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Utah Supreme Court

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Recommended Citation

Brief of Appellee, *Salt Lake County v. Utah*, No. 20180586 (Utah Supreme Court, 2018).
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In the Supreme Court of the State of Utah

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 AIR LINES, INC. and SKYWEST AIRLINES, INC.,

Defendants-Appellees.

No. 20180586-SC

Supplemental Brief of Appellee State of Utah

On appeal from the Third Judicial District Court
Judge Kara Pettit, District Court No. 170904525

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INTRODUCTION

Salt Lake County, Duchesne County, Uintah County, and Washington County (the "Counties") challenge the constitutionality of the following three tax laws (the "Challenged Laws"): Utah Code sections 59-2-201(4) ("Valuation Law"), 59-2-804 ("Allocation Law"), and 59-2-1007(2)(b) ("Threshold Law"). Although the district court dismissed the challenge to the Threshold Law on ripeness grounds, it determined the challenges to the Valuation Law and Allocation Law were ripe based on the Counties' references to the 2017 tax assessment in their complaint.

But in its Supplemental Briefing Order, the Court notes the "language of [the Counties'] complaint, and their arguments on appeal, suggest that the present case may not be sufficiently connected to the 2017 tax assessment to render" any of the Counties' claims ripe for adjudication. Supp. Order at 1-2. The Court therefore has asked the parties to provide supplemental briefing on the following four questions:

1. Did the Counties properly allege as-applied challenges in addition to their facial challenges? If so, what was the factual basis for the as-applied challenges?

2. Are the alleged facts related to the 2017 tax assessment in the Counties' complaint sufficient to establish that the Counties have been harmed by the Challenged Laws? If not, does the complaint contain another factual basis to support a ripeness determination?

3. Would it be proper for the court to decide the Counties' "pure[] legal questions," in the event we find that the Counties' claims are not connected to a concrete set of facts?

4. Do any of the Counties' claims in this case arise from facts stemming from a tax assessment that is not being challenged, or has not already been challenged, in another case?

Id. at pp. 3-4

The answers to these questions demonstrate that none of the Counties' claims are ripe.

First, the Counties allege only facial challenges. In their complaint and arguments on appeal, the Counties do not take the position that the Challenged Laws could be constitutionally applied in certain circumstances. To the contrary, the Counties seek orders declaring the Challenged Laws unconstitutional and enjoining their enforcement without qualification.

Second, the facts alleged in the complaint related to the 2017 tax assessment are not sufficient to establish that the Counties have been harmed by the Challenged Laws. As shown in the State's opening brief, the district court correctly determined the Counties did not allege facts showing the Threshold Law was applied to the 2017 tax assessment or any other assessment. As shown in this supplemental brief, the same is true regarding the Allocation Law. By failing to allege the Threshold Law and Allocation

Law have been applied, the Counties have necessarily failed to demonstrate they have been harmed by either law.

As for the Valuation Law, the Counties have not demonstrated harm in accordance with the standard established in the *Bangerter* case. That is, the Counties have not identified a specific tax assessment that has been reduced under the Valuation Law with a resulting loss of revenue to a particular county. Rather, the Counties vaguely allege collective harm resulting from the application of the Valuation Law to tax assessments in 2017. Even if these allegations might sufficiently demonstrate harm, the Counties on appeal have made it clear that their facial challenges give rise to purely legal questions that do not depend on any specific factual scenario. By doing so, the Counties divorced their challenges to the Valuation Law (and other Challenged Laws) from any allegations of harm, which precludes the Counties from demonstrating their challenges are ripe.

Third, it would not be proper for the Court to decide the Counties' "pure[] legal questions" in the event the Court finds the Counties' claims are not connected to a concrete set of facts. Without a concrete set of facts showing the Counties were injured by the Challenged Laws, their claims are not ripe for adjudication.

Fourth, based on the allegations in the complaint, it appears that none of the Counties' claims in this case arise from facts stemming from a tax

assessment that is not being challenged, or has not already been challenged, in another case. The complaint refers only to 2017 tax assessments. And the record on appeal shows that 2017 tax assessments are being challenged in other cases. The pendency of these other cases further supports dismissal of this case.

ARGUMENT

I. The Counties Do Not Properly Allege As-Applied Challenges.

The Counties do not properly allege as-applied challenges in their complaint. Although the Counties allege they are challenging the Challenged Laws both "facially" and "as applied to the 2017 tax assessments," (R. 35-36, ¶¶ 86, 92 93, 104, 106, 107, 114, 115, 118, 119),[1] this Court is not bound by how the Counties characterize their challenges. *Gillmor v. Summit Cty.*, 2010 UT 69, ¶ 30, 246 P.3d 102 (explaining that a party's "as-applied" challenges were more properly classified as "facial challenges" because "nothing in [the party's] petition alleges that there was something uniquely unconstitutional about the way in which the ordinances were applied to her particular [circumstances]."); *State v. Herrera,* 1999 UT 64, ¶ 22, 993 P.2d 854 (discussing a defendant's as-applied claim, which challenged a criminal statute's application to the defendant based on the defendant's mental illness). Rather, the Court will reject a plaintiff's characterization if it does

[1] Of note, the Counties state they are appealing only their facial challenges, but not their alleged "as-applied" challenges. (Appellants' Reply Br. at 1-3).

not conform to the substance of the challenge. *Gilmor*, 2010 UT 69, ¶ 30. The Court should reject the Counties' allegations that characterize their challenges as as-applied challenges.

This Court has distinguished facial from as-applied challenges. "A facial challenge . . . requires the challenger to 'establish that no set of circumstances exists under which the [statute] would be valid.'" *Herrera*, 1999 UT 64, ¶ 4 n.2 (second alteration in original) (quoting *United States v. Salerno,* 481 U.S. 739, 745 (1987)); *see also Am. Fed'n of State, Cty. & Mun. Emps. Council 79 v. Scott*, 717 F.3d 851, 863 (11th Cir. 2013) ("A facial challenge, as distinguished from an as-applied challenge, seeks to invalidate a statute or regulation itself."). Thus, in a facial challenge, "the specific facts related to the challenging party are irrelevant." *People v. Thompson*, 2015 IL 118151, ¶ 36, 43 N.E.3d 984. In contrast, "[i]n an as-applied challenge, a party concedes that the challenged statute may be facially constitutional, but argues that under the particular facts of the party's case, 'the statute was applied . . . in an unconstitutional manner.'" *Gillmor*, 2010 UT 69, ¶ 27 (quoting *State v. Gallegos*, 2009 UT 42, ¶ 14, 220 P.3d 136.).

Based on this framework, the Counties' claims raise only facial challenges, not as-applied challenges. The Counties do not concede the Challenged Laws may be facially constitutional or that any scenario exists under which they are constitutional. The Counties do just the opposite.

Under the heading "Nature of the Action," (R. 6, ¶¶ 11-12), and in their prayer for relief, (R. 28), the Counties request orders broadly declaring the Challenged Laws unconstitutional and enjoining the State Tax Commission from applying the Challenged Laws without limitation as to the circumstances. (*Id.* at 20). Similarly, the Complaint is devoid of allegations asserting that the Challenged Laws are unconstitutional based on a particular quality or status, or the particular circumstances, of one or more of the Counties.

II. The Allegations in the Complaint Do Not Establish that the Counties Have Been Harmed by the Challenged Laws.

The facts alleged in the Complaint, including the facts related to the 2017 tax year, fail to establish the Counties have been harmed by any of the Challenged Laws.

A. Threshold Law

As shown in the State's opening brief (and determined by the district court), the Counties did not allege facts showing they have been harmed by the Threshold Law. (State Br. at 14-18). More specifically, the Counties do not allege the Threshold Law was applied to any tax assessment in 2017. In fact, the district court concluded the Counties' "Complaint does not contain any allegations regarding the application of the Review Threshold Law." (*Id.* at 912-13). The Counties do not dispute this conclusion.

As this Court stated in its Supplemental Briefing Order, "in order for a county to challenge the constitutionality of a particular provision in the tax code, the county 'must produce a tax assessment that has been challenged and reduced under [the challenged provision] with a resulting loss of revenue to the relevant county.'" Supp. Order at 1 (quoting *Salt Lake Cty. v. Bangerter,* 928 P.2d 384, 385 (Utah 1996)). Thus, because the Counties have not alleged facts showing the Threshold Law was applied to a 2017 tax assessment or another tax assessment to the Counties' detriment, the Counties' challenges to the Threshold Law are not ripe.

B. Allocation Law

For the same reasons, the Court should conclude the Counties have not alleged facts related to a 2017 tax assessment or another assessment sufficient to establish the Counties have been harmed by the Allocation Law.

With respect to the Allocation Law and Valuation Law, the district court correctly observed that the "Complaint does not set forth the specifics of a particular assessment . . . ." (R. 912). But, without citing any specific paragraphs or pages of the complaint, the district court concluded the Counties' challenges to these laws are ripe because their complaint "alleges that the Commission used the Valuation and Allocation Laws to determine airline assessments in 2017, which resulted in reduced tax revenue from airlines." (R. 912).

But, on close inspection, the Counties' complaint does not allege that the Commission used the Allocation Law (SB 237) in 2017 to determine airline assessments and cause a reduction of tax revenue to the Counties. The Counties' allegations about the 2017 tax year concern only the Valuation Law (SB 157):

> [T]he Division in 2017 was required by the methodology set forth by the Legislature in **SB157** to value airlines at an average of 39% less than what their values would have been using 2016 methods—for a total loss in airline tax revenues of roughly $5 million. (R. 5-6, ¶ 7 (emphasis added)).
>
> The assessments issued by the State Tax Commission for the January 1, 2017, lien date for the seven major passenger airlines utilized the **SB157**-required valuation method, rather than the preferred valuation methods used by the State Tax Commission for the 2016 assessments. This significantly affected the assessed value of Airline Property. For example, application of Utah Code section 59-2-201(4), as amended, reduced the 2017 assessed system value of one airline from $26.2 billion to less than $14.7 billion (a roughly 44% decrease). (R. 15, ¶ 58 (emphasis added)).
>
> By applying the **SB157** methodology rather than applying the methodologies used the previous year, the 2017 Utah taxable values for the seven major passenger airlines decreased by roughly 39% overall. (R. 15, ¶ 59 (emphasis added)).
>
> Had the State Tax Commission used the preferred valuation methods it used in 2016 instead of the **SB157** methodology, the 2017 Utah taxable values for the seven major airlines would be on average 43% higher. (R. 15, ¶ 60 (emphasis added)).

Thus, as is the case with the Threshold Law, the Counties have not alleged facts showing the Allocation Law was applied to a 2017 tax assessment or another tax assessment to their detriment. Accordingly, the Counties' challenges to Allocation Law are also not ripe.

C. Valuation Law

Despite the references to 2017 tax assessments in the complaint, the Court should conclude that the Counties' challenge to the Valuation Law is not ripe.

First, the Counties' allegations do not satisfy the standard for demonstrating harm and ripeness announced in *Bangerter*. Under *Bangerter*, to "render the constitutionality of [a tax law] ripe for adjudication, the Counties must produce a tax assessment that has been challenged and reduced under the [tax law] with a resulting loss of revenue to the relevant county. 938 P.2d at 385; *id.* at 386 (stating that "actual challenges to specific property value assessments" is "precisely what is missing here."). Contrary to this standard, the Counties do not identify a specific assessment that has been reduced with a resulting loss of revenue to a relevant county. Rather, the Counties allege only how the Valuation Law affected them collectively.

And the Counties do not identify which provision of the Valuation Law was applied in 2017. This oversight is important because the Counties are

challenging two provisions of the Valuation Law, i.e., the "clear and convincing evidence" threshold and the "fleet adjustment." (State Br. at 3-4). The Counties must show each of these challenges are ripe. *See, e.g.*, *Tribble v. Chuff,* 642 F. Supp. 2d 737, 753 (E.D. Mich. 2009) ("The plaintiff must establish that each claim brought is ripe for judicial resolution."). But due to the vagueness of their allegations, the Counties have not demonstrated that either challenge is ripe.

Further, as the Court correctly observes, although the district court determined the references to 2017 tax assessments were enough to render the challenges to the Valuation Law ripe, the Counties on appeal "appear to distance themselves from any specific factual scenario, and never couch their claims in context of the 2017 assessment." Supp. Order at 2. Instead, the Counties "argue that their claims 'give rise to purely legal questions,' and that the tax commission 'is precluded by law from making factual determinations related to the statutes' legality or constitutionality' because 'all the claims appealed present purely constitutional challenges.'" Supp. Order at 2-3 (citations omitted).

Thus, the Counties have distanced themselves from the references to 2017 tax assessments in their complaint for the apparent strategic purpose of undermining the (i) district court's rationale for dismissing the Valuation and

Allocation Laws on exhaustion grounds and (ii) Airlines' arguments on appeal supporting dismissal on those grounds.

As part of this strategy, the Counties state they are appealing only their facial challenges, but not their so-called "as-applied" challenges. (Appellants' Reply Br. at 1-3). In defense of this strategy, the Counties argue that they are not forced to litigate claims they have chosen not to pursue on appeal and the "non-appealed [as-applied] claims are not predicative of the facial question." (*Id*. at 1-2).

According to the Counties, by not appealing their "as-applied" challenges, the remaining facial "claims on appeal posit that merely on their face the Challenged Laws violate the constitutional requirement for uniformity – those law[s] are unconstitutional at the outset such that dismissed claims require no administrative exhaustion." (*Id*. at 2). By relying on the theory that the remaining facial claims on appeal are "unconstitutional at the outset," the Counties distanced and divorced their claims from the allegations about the 2017 tax assessments.

But, under this theory, the Counties' claims are not ripe. This Court has recognized only one situation where facial challenges are ripe at the outset: facial challenges to regulatory takings. *Gillmor*, 2010 UT 69, ¶ 31 (stating the rule that a "facial challenge to a land use regulation becomes ripe upon the enactment of the regulation itself" is a limited rule that is meant to

apply only to "facial challenges to regulatory takings where injury to the plaintiff is said to occur at the moment the ordinance is enacted and the plaintiff's property value is 'taken.'"). In other situations, like the situation here, a facial challenge is not ripe "at the outset"; it ripens only when the Challenged Law causes injury to a particular plaintiff. *Id.* ¶ 33.

By distancing their claims from the 2017 tax assessments, the Counties cannot demonstrate their claims are ripe.[2] Thus, their challenge to the Valuation Law should be dismissed on ripeness grounds.

III. The Court Should Not Decide the Counties' Purely Legal Questions if it Finds They Are Not Connected to a Concrete Set of Facts.

The Court should not decide the purely legal questions presented by Counties' claims if they are not connected to a concrete set of facts. Without a connection to a concrete set of facts, the Counties' claims and the pure legal questions they present are not ripe and present only abstract questions over which this Court has no power to adjudicate. *Bangerter*, 928 P.2d at 385 (stating that although the "law itself is at issue" in a declaratory judgment action, plaintiff must still plead concrete facts showing the plaintiff suffered an injury to "render the constitutionality of [a tax law] ripe for adjudication."); *Jenkins v. Swan*, 675 P.2d 1145, 1149 (Utah 1983) (explaining that courts have the constitutional obligation of applying legal

[2] This same reasoning applies to the Threshold and Allocation Laws.

principles "to a particular dispute"); *Utah Transit Auth. v. Local 382 of Amalgamated Transit Union*, 2012 UT 75, ¶ 19, 289 P.3d 582 (stating "[e]ven courts of general jurisdiction *have no power* to decide abstract questions or to render declaratory judgments, in the absence of an actual controversy directly involving rights") (alteration and emphasis in original); *see also Int'l Longshoremen's & Warehousemen's Union, Local 37 v. Boyd*, 347 U.S. 222, 224 (1954) ("Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.").

While it may be that "pure legal questions that require little factual development are more likely to be ripe," a party bringing a challenge raising a pure legal question must still present a "concrete factual situation" demonstrating the party has suffered an injury. *State v. Am. Civil Liberties Union of Alaska*, 204 P.3d 364, 368 (Alaska 2009); *see Utah Transit Auth.*, 2012 UT 75, ¶ 19; *Philadelphia Fed'n of Teachers, Am. Fed'n of Teachers, Local 3, AFL-CIO v. Ridge*, 150 F.3d 319, 325 (3d Cir. 1998) (stating that even "the presence of 'a purely legal question' is not enough, of itself, to render a case ripe for judicial review, not even as to that issue" and "plaintiffs must still demonstrate that they face a real and immediate threat of injury.").

Thus, although a facial challenge to a statute may present a purely legal question, *State v. Houston*, 2015 UT 40, ¶ 27, 353 P.3d 55, the party asserting the challenge must still demonstrate the statute injured the party. *Gillmor*, 2010 UT 69, ¶ 33 (stating "a law may be facially attacked whenever it causes injury to a particular plaintiff"). For this reason, in the context of a facial challenge to a tax law, this Court concluded the challenge was not ripe because there "were no concrete facts pleaded indicating any specific injury sustained or threatened to plaintiff personally." *Bangerter*, 928 P.2d at 385. The same result is required here.

IV. The Counties' Claims Do Not Arise from a Tax Assessment that is Not Being Challenged or Has Not Already Been Challenged in Another Case.

The Counties' claims do not arise from facts stemming from a tax assessment that is not being challenged or has not already been challenged in another case. If cases involving the same parties and issues were pending at the time this declaratory judgment action commenced, it is subject to dismissal on that basis. *Hercules, Inc. v. Utah State Tax Comm'n*, 1999 UT 12, ¶¶ 7-9, 974 P.2d 286 (stating Utah law precludes a declaratory judgment action when the same parties are already involved in a separate administrative action or proceeding involving identical issues). At present, Salt Lake County is raising constitutional challenges to the Threshold Law in four pending tax court cases, (Airlines' Br. at 1 n.1), which are appeals from

Tax Commission cases filed on or about June 22, 2017. (R. 673-74, 680-81, 688-89, 698-98, 794, 817 n.1.). And, in cases filed in the Tax Commission on or before June 22, 2017, Salt Lake County and Washington County are challenging tax assessments to which the Valuation Law and Allocation Law were applied. (Airlines' Br. at 1 n.1). These two counties could raise their constitutional challenges to the Valuation and Allocation Laws on appeal to the tax court.

This declaratory judgment action was filed on July 17, 2017. (R. 28). Thus, under the rule in *Hercules*, the Court may limit or preclude this declaratory judgment action.

CONCLUSION

For the foregoing reasons, and those stated in the State's opening brief, the district court's ruling dismissing the Counties' complaint should be affirmed on ripeness grounds.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)

1. This brief complies with the type-volume limitations of the Court's supplemental briefing order because:

- this brief does not exceed 20 pages.

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because:

- this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 13-point Century Schoolbook.

s/ Andrew Dymek

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of July 2019, a true, correct and complete copy of the foregoing Supplemental Brief of the State of Utah was filed with the Court and served via electronic mail as follows:

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