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Utah Supreme Court

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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 Reply 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

The parties' supplemental briefing confirms that all of the Counties' claims against the Challenged Laws are unripe. In their supplemental brief, the Counties concede they have alleged only facial challenges. And, at the same time, the Counties emphasize they are not relying on "lost revenue from undervalued airline assessments . . . as the basis for either past or imminent injury to the County." (Appellants' Supp. Br. at 13). Thus, the Counties are not relying on the very thing they must rely on to demonstrate their facial challenges are ripe.[1] Accordingly, the Court should affirm the district court's dismissal of the Counties' challenges on ripeness grounds.

ARGUMENT

I. The Counties did not properly allege as-applied challenges.

In the first question in its Supplemental Briefing Order, the Court asks whether the Counties properly alleged any as-applied challenges. (Supp. Order at 3). Based on the parties' responses, it is undisputed the Counties did not. The Counties dispel any remaining doubts by expressly providing a "reluctant concession to a 'facial' or a 'quasi facial' classification of their claims" and then reiterating the "Counties bring facial challenges" only. (Appellants' Supp. Br. at 7).

Having made this concession, the Counties do not attempt to show there is a factual basis for any as-applied challenges. To the contrary, the Counties contend their facial challenges "*are* pure questions of law that need no express application to be rendered void." (*Id.* at 11). Thus,

[1] *Salt Lake Cty. v. Bangerter*, 928 P.2d 384, 385 (Utah 1996) (holding a 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.").

the Court should characterize the Counties' claims "only as facial challenges, not as-applied challenges based on a particular aspect of the 2017 tax assessment." (Supp. Order at 2).

The Counties' "reluctan[ce]" to concede they have alleged only facial challenges apparently arises from their concerns over the burden associated with such challenges: in the same paragraph as their concession, and the two paragraphs that follow, the Counties argue (for the first time on appeal) they do not have the burden to show there are no set of circumstances under which the Challenged Laws would be valid. (Appellants' Supp. Br. at 7-9).

But the Counties' arguments about the applicable burden for their facial challenges are irrelevant to the issue of ripeness.[2] That is, before the Court determines and applies the appropriate burden for a constitutional challenge to a statute, the plaintiff must first demonstrate the challenge is ripe. And demonstrating the challenge is ripe depends on whether the plaintiff suffered an injury, not on the particular burden the challenger must satisfy. *Cf. Gillmor v. Summit Cty.*, 2010 UT 69, ¶¶ 27-28, 246 P.3d 102 (noting that although as applied and facial challenges involve different tests, both types of challenges accrue and ripen on the "the date upon which the plaintiff's injury occurred.").

Thus, to determine whether the Counties' facial challenges are ripe, the Court need not address their argument that the "no set of circumstances" standard does not apply to the challenges.

II. The Counties fail to allege facts sufficient to demonstrate harm and ripeness.

The Court's second question asks whether facts alleged about the 2017 tax assessment establish the Counties have been harmed by the Challenged Laws and, if not, whether the

[2] Besides, the Court did not ask for briefing on the burden in the Supplemental Briefing Order.

complaint contains another factual basis to support a ripeness determination. (Supp. Order at 3-4). The answer to both parts of this question is "no."

The Counties make clear they are not relying on the 2017 assessment to establish harm or ripeness. Although the Counties observe that they alleged that airline property valuations were reduced "an average of 39%" with a "total loss in airline tax revenues of roughly $5 million" in 2017, they emphasize that "it is not lost revenue from undervalued airline assessments that serves as the basis for either past or imminent injury to the County." (Appellants' Supp. Br. at 13).

Thus, for purposes of demonstrating ripeness, the Counties emphatically deny they are relying on a tax assessment that has been reduced under the Challenged Laws with a resulting loss of revenue to the Counties. But, as this Court observed, that is exactly what they must rely on to demonstrate their challenges are ripe for adjudication. (Supp. Order at 1 (citing *Bangerter*, 928 P.2d at 385).

Instead, the Counties contend the "injury or unconstitutional impact caused by the Challenged Laws is the fact the laws prevent the accurate fair market assessment of airline property to its full value in every case." (Appellants' Supp. Br. at 14). But the Court has already rejected this very type of alleged "injury" as too abstract and hypothetical to demonstrate ripeness. *Bangerter*, 928 P.2d at 385 (dismissing as unripe Counties' abstract claim that the Equalization Act violated constitutional provision requiring that "property be assessed at its fair market value" and would "diminish tax revenues and impact county budgets" because the Counties "failed to set forth specific facts of any case that has arisen."). "If the Counties wish to attack the [Challenged Laws] in the abstract without a specific controversy which is ripe for adjudication, they must approach the legislature, not this [C]ourt." *Id.* at 386.

Thus, the Counties have not demonstrated any of their challenges are ripe.

III. The Court should not decide the Counties' purely legal questions because they are not connected to a concrete set of facts.

The Court's third question asks if it would be proper for the Court to decide the Counties' "pure[] legal questions" in the event it finds that the Counties' claims are not connected to a concrete set of facts. (Supp. Order at 4). The Counties assert it would proper to do so. (Appellants' Supp. Br. at 11 ("The Counties raise facial challenges to the statutes' constitutionality, which when viewed in light of the compulsory nature of the Challenged Statutes *are* pure questions of law that need no express application to be rendered void.")). The Counties are mistaken.

Attempting to support their position, the Counties assert the Court "assumes too much" by interpreting *Bangerter* to require, in all cases involving constitutional challenges to tax laws, the County produce a reduced tax assessment in order to provide a concrete set of facts necessary to demonstrate ripeness. (Appellants' Supp. Br. at 10-11 (citing Supp. Order at 1-3)). According to the Counties, in interpreting *Bangerter*, the Court makes the "obvious assumption" that "administrative factual findings arising from a 'reduced assessment' reflecting revenue loss are always material or relevant to the constitutional determination of a statute's validity measured against controlling constitutional provisions." (Appellants' Supp. Br. at 11). This assumption, they say, is incorrect. (*Id*).

But the Court did not make this assumption in either *Bangerter* or the Supplemental Briefing Order. As stated in *Bangerter* and reiterated in the Supplemental Briefing Order, a County challenging the constitutionality of a tax law must produce a specific reduced assessment to demonstrate it suffered a concrete injury sufficient to make its challenge ripe, 928 P.2d at 385, not because the Court assumed the reduced assessment would be relevant to determining whether

the challenged law is facially constitutional. In other words, a claim's justiciability is different from the statute's constitutionality.

The Counties also target another non-existent assumption. That is, the Counties argue the "Court's apparent preference for an administratively adjudicated assessment that evidences revenue loss *assumes* the Counties are always afforded an opportunity to challenge the reduced airline assessment in the first instance." (Appellants' Supp. Br. at 12 (emphasis added)). The Counties then argue this assumption is incorrect with respect to the Threshold Law because it denies taxing entities the ability to appeal certain valuations. (*Id.*)

These arguments are inaccurate and inapposite. For purposes of determining the ripeness of facial constitutional challenges, the Court has not indicated it prefers an administratively adjudicated assessment or that it assumes there is an opportunity to administratively challenge an assessment. And, consistent with *Bangerter*, the district court correctly determined the Counties' challenge to the Threshold Law is unripe because their complaint does not contain allegations showing it was applied to an assessment or prevented the Counties from appealing an assessment. (R. 912).

In a further attempt to avoid the ripeness principles in *Bangerter*, the Counties rely on an earlier case from 1959 where, according to the Counties, "this Court accepted original jurisdiction to review the statutes' facial conformity with the Utah Constitution without the production of a specific tax assessment." (Appellants' Supp. Br. at 11) (citing *Moon Lake Electric Ass'n, Inc. v. Utah State Tax Comm'n*, 345 P.2d 612 (Utah 1959)). But, unlike *Bangerter*, this Court did not address the issue of ripeness in *Moon Lake*. And it did not hold that a court could adjudicate a constitutional challenge to a tax law without a specific tax assessment. Thus, *Moon Lake* is inapposite and *Bangerter* is controlling.

Finally, the Counties erroneously apply the pleading requirements for standing to ripeness. This error begins with the Counties seizing upon a statement in the Supplemental Briefing Order where the Court states a party must generally "allege sufficient facts in their complaint to show that the challenged statutes have been applied to them, or will soon be applied to them, before they have ***standing*** to bring either a facial or an as-applied challenge to the statute. *Jenkins v. Swan*, 675 P.2d 1145, 1149 (Utah 1983)." (Appellants' Supp. Brief at 15 (quoting Supp. Order at 4) (emphasis added)). But the Court's statement expressly refers to "standing," not ripeness. And, in *Bangerter*, the Court distinguished standing from ripeness. *Bangerter*, 928 P.2d at 386 (citing *Kennecott Corp. v. Salt Lake County*, 702 P.2d 451 (Utah 1985), and *Utah Association of Counties v. Tax Commission*, 895 P.2d 819 (Utah 1995)) (stating that cases illustrating "standing in tax-assessment-based actions" are "inapposite, first, because the issue in the instant case is not standing but ripeness, second, because [these cases] involved actual challenges to specific property value assessments").

Overlooking the distinction between standing and ripeness, the Counties then improperly apply the Court's statement about standing to the question of ripeness. First, the Counties incorrectly assert there is "no dispute the Challenged Laws apply to and have been applied by the Commission to the assessment of airline property."[3] (Appellants' Supp. Brief at 15-16) (citing Complaint, ¶¶ 4, 6, 10, 11, 36-41, 58, 59, 74, 77-92, 94-100, 112-114, 120-122, 125). And then

[3] This assertion is incorrect. The district court correctly found the "Complaint does not contain any allegations regarding the application of the Review Threshold Law." (R. 912). The Complaint also does not contain any allegations about the application of the Allocation Law to an assessment. (State Supp. Br. at 8-9). And, although the Complaint does include allegations about how the Valuation Law affected them collectively, these allegations do not satisfy *Bangerter*'s ripeness standard, (*id.* at 9), and, besides, the Counties have made clear they are not attempting to demonstrate past or imminent injury based on a loss of revenue caused by applying the Valuation Law and other Challenged Laws to an assessment. (Appellants' Supp. Br. at 13).

the Counties abruptly conclude "[n]othing more need be alleged." (Appellants' Supp. Brief at 16).

But *Bangerter* requires more to demonstrate ripeness. Specifically, *Bangerter* requires that "concrete facts be pleaded indicating a[] specific injury" (loss of revenue) caused by the application of the challenged law to a particular assessment. 928 P.2d at 385 (stating that plaintiff must plead concrete facts showing the plaintiff suffered an injury to "render the constitutionality of [a tax law] ripe for adjudication."). And the Counties have failed to do so.

IV. The Counties do not address the Court's fourth question.

The Court's fourth question asks whether "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." (Supp. Order at 4). The Counties did not answer this question. But the State and Airlines did answer this question and generally agree that the pendency of challenges to the Challenged Laws in other cases further justifies dismissing this lawsuit.

CONCLUSION

Thus, the Counties' complaint should be dismissed in its entirety on ripeness grounds.

Respectfully submitted this 8th day of August,

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CERTIFICATE OF COMPLIANCE

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

   - this brief does not exceed 10 pages, excluding the parts of the brief exempted by Rule 24(g)(2)

2. This brief complies with Rule 21(g), governing public and private records, because:

   - this brief contains only public information and records.

*/s/ Andrew Dymek*__________

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of August 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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