IN THE UTAH SUPREME COURT

SALT LAKE COUNTY, DUCHESNE COUNTY, UINTAH COUNTY, WASHINGTON COUNTY, and WEBER COUNTY, all political subdivisions of the State of Utah, Plaintiffs/Appellants, vs. STATE OF UTAH, DELTA AIR LINES, INC., AND SKYWEST AIRLINES, INC., Defendants/Appellees.	**SUPPLEMENTAL BRIEF OF APPELLEES DELTA AIR LINES, INC. AND SKYWEST AIRLINES, INC.** Appellate Case No. 20180586-SC

ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, HONORABLE KARA PETTIT, DISTRICT JUDGE

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INTRODUCTION

Appellees Delta Air Lines, Inc. and SkyWest Airlines, Inc. (the "Airlines") respectfully submit this Supplemental Brief pursuant to the Court's June 6, 2019 Supplemental Briefing Order ("Order").

The Order's Questions:

The Order requested supplemental briefing on four questions. Below, each question is restated and answered in turn. A detailed analysis of each answer follows.

Question No. 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?"

Airlines' Summary Response to Question No. 1: The Counties' Complaint did not properly allege as-applied challenges. The Complaint is not based on an actual assessment. And the Counties fail to identify how an assessment harmed them or how the Challenged Laws are "uniquely unconstitutional" when applied to them. *Gilmor v. Summit Cty.*, 2010 UT 69, ¶ 27, 246 P.3d 102. Further, the Counties did not appeal any alleged as-applied claims and, thus, waived those issues.

Question No. 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?"

Airlines' Summary Response to Question No. 2: The facts alleged in the Complaint relating to the 2017 assessment are not sufficient to establish that the Challenged Laws harmed the Counties. The Counties' claims are not based on a specific assessment and the alleged harm is merely hypothetical. The Complaint does not contain another factual basis to support a ripeness determination. Thus, because the Counties do not factually show they have been injured by the Challenged Laws, their constitutional challenges are premature.

Question No. 3: "Would it be proper for the [C]ourt to decide the Counties' 'pure[] legal questions,' in the event [the Court] find[s] the Counties' claims are not connected to a concrete set of facts?"

Airlines' Summary Response to Question No. 3: It would be improper for the Court to decide the Counties' "pure[] legal questions" that are not based on a concrete set of facts because "courts are not a forum for hearing academic contentions or rendering advisory opinions." *Utah Transit Auth. v. Local 382 of Amalgamated Transit Union*, 2012 UT 75, ¶ 19, 289 P.3d 582 (citations omitted). The Court would be required to speculate and entertain hypothetical facts because the Counties' Complaint does not allege an actual tax assessment. Consequently, the Counties are unable to identify a justiciable case and controversy. Moreover, the merits of the Counties' claims were not briefed before the district court or this Court, and it would be improper for the Court to decide these issues if it determines that the Counties' claims are ripe.

Question No. 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?"

Airlines' Summary Response to Question No. 4: All the Counties' claims arise from a tax assessment that is currently being challenged in another case. The Counties' claims are similar to claims now in litigation either before the district court or the Commission.

A detailed explanation of the Airlines' responses follows.

ARGUMENT

I. THE COUNTIES' COMPLAINT DOES NOT PROPERLY ALLEGE AS-APPLIED CHALLENGES.

Though the Complaint offers sweeping allegations of "fact" and ostensible as-applied challenges, the Complaint does not properly allege as-applied challenges.[1] Rather, the Complaint describes hypothetical circumstances and makes conclusory statements regarding the 2017 assessment. (R. 1-30). But the Complaint fails to identify a specific airline that was assessed or how the Counties were harmed by the assessment. "In an as-applied challenge, a party concedes that the challenged statue may be facially constitutional, but argues that under the particular facts of the party's case, the statute was applied in an unconstitutional manner." (Order, p. 2 (citing *Gilmor*, 2010 UT 69, ¶ 27)).

[1] Beyond their ripeness challenge, the Airlines also contended that the Complaint purported to assert as-applied challenges which would have required the Counties to exhaust their administrative remedies. (Airlines' Red, pp. 16-20).

That concession was not made here. The Counties do not contend the Challenged Laws are "uniquely unconstitutional" as applied to them. *Gilmor*, 2010 UT 69, ¶ 27. Instead, the Counties say the Challenged Laws are unconstitutional under any set of facts. (Blue, p. 19; Gray, pp. 1-2, 11). This is also shown by the Complaint's prayer for relief. (R. 28).

The Counties also admit that they do not challenge a specific assessment, but only included "facts" regarding the 2017 assessment as "background" and "to provide context and basis for standing." (Gray, p. 11). Such conclusory statements regarding the 2017 assessment do not constitute proper as-applied challenges.

More importantly, even if the Complaint properly alleged as-applied challenges, the Counties subsequently waived the challenges. The Counties "have not appealed any 'as-applied' claims." (Gray, p. 3). And when a party fails to raise and argue an issue on appeal, the issue is waived and will typically not be addressed by the appellate court. *Allen v. Friel*, 2008 UT 56, ¶¶ 7–8, 194 P.3d 903 (appellants failing to raise an issue, or raising an issue for the first time in their reply brief, have waived the issue on appeal).

And by not appealing any as-applied issues, the Counties undermine the factual significance of those claims. In fact, the Counties now contend that record evidence relating to as-applied claims (presumably including evidence concerning the 2017 assessment) is irrelevant. (*See* Gray, p. 3) (Counties arguing that "whether the record developed in the Commission may be of use as to those claims is simply not germane").

Accordingly, the Court should conclude that the Counties' case on appeal does not include any as-applied challenge.

II. ALLEGATIONS REGARDING THE 2017 TAX ASSESSMENT DO NOT CREATE A JUSTICIABLE CASE AND CONTROVERSY.

This Court has "repeatedly recognized" that "a justiciable controversy is the keystone of our judicial framework." *Carlton v. Brown*, 2014 UT 6, ¶ 29, 323 P.3d 571. In this tax matter, "[t]o 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 [challenged act] with a resulting loss of revenue to the relevant county." *Salt Lake Cty. v. Bangerter*, 928 P.2d 384, 385 (Utah 1996) (citations omitted) (emphasis added). But the Counties have failed to do this. And "[i]n the absence of such a reduced assessment, [the Court's] hands are tied because a justiciable controversy necessarily involves an accrued state of facts as opposed to a hypothetical state of facts." *Id.* (citations omitted).

In *Bangerter*, the Court found the counties' claims unripe because the "allegations concerning the unconstitutionality of the [provision] were all pleaded in the abstract [and] [t]here were no concrete facts pleaded indicating any specific injury sustained or threatened to [the counties] personally." *Bangerter*, 928 P.2d at 385. This is true here. The Counties admit on appeal that their Complaint is not based on the 2017 assessment, and argued that the Complaint's conclusory facts relating to the 2017 assessment were ostensibly for "background" and "to provide context and basis for standing." (Gray, p. 11). But, the Counties' hypothetical application of abstract and conclusory facts are not

sufficient to create a justiciable case and controversy. *See Clegg v. Wasatch Cty.*, 2010 UT 5, ¶ 26, 227 P.3d 1243 ("Where a controversy has not yet sharpened into an actual or imminent clash of legal rights and obligations between the parties, or where there exists no more than a difference of opinion regarding the hypothetical application of a piece of legislation to a situation in which the parties might, at some future time, find themselves, the question is unripe for adjudication.") (citations and internal punctuation omitted).

To create a justiciable case and controversy, the Counties were required to challenge a particular assessment, with specific facts. *See Bangerter*, 928 P.2d at 385. The Counties had the option early on simply to amend their Complaint and challenge a specific assessment. (State's Red, pp. 12, 20). They declined. As they are, the Counties' claims are not ripe. And for the same reasons, no alternative factual basis have been presented to show that the Counties' claims are otherwise ripe for review.

III. IT IS IMPROPER TO DECIDE THE COUNTIES' LEGAL QUESTIONS NOW.

These grounds (provided in Part II), also confirm that it would be improper to decide the Counties' "legal claims" without any connection to concrete facts. The Court does not "speculate as to what the facts may be" or apply "hypothetical facts." *Boyd v. Nat'l Union Fire Ins. Co.*, 866 P.2d 595, 598 (Utah Ct. App. 1993); *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."). To conclude that a case is ripe when the pleadings are not based on concrete facts, would foster a precarious precedent and cut against the Court's longstanding policy. *See Local 382*, 2012 UT 75, ¶ 19 ("[C]ourts are not a forum for hearing academic contentions or rendering advisory opinions.") (citations omitted). Thus, the Counties' "pure[] legal questions," are not ripe for review.

Beyond this, the parties have never briefed the merits of these issues in the district court or on appeal. Thus, it would be improper for the Court to attempt to decide the Counties' "legal claims" even if the Counties' underlying claims were ripe.

IV. CLAIMS REGARDING THE CHALLENGED LAWS ARE ALSO BEFORE THE DISTRICT COURT OR THE TAX COMMISSION.

At this moment, some Counties are litigating similar claims in either the district court or the Commission where certain counties have appealed the actual 2017 assessments of eight airlines. Appellant Salt Lake County appealed from the Commission to the district court, asserting a constitutional challenge to the Threshold Law. *See Salt Lake Cty. v. Utah State Tax Comm'n, et al.*, Case No. 180902758; *Salt Lake Cty.* v. *Utah State Tax Comm'n, et al.*, Case No. 180902754; *Salt Lake Cty. v. Utah State Tax Comm'n, et al.*, Case No. 180902757; *Salt Lake Cty. v. Utah State Tax Comm'n, et al.*, Case No. 180902759. Other Counties are appealing the application of

the Valuation and Allocation Laws to the Commission.[2] *See* Appeal No. 17-977, filed June 19, 2017 (*SkyWest, Airlines Inc. v. Prop. Tax. Div.*; *Iron Cty. v. Prop. Tax Div. ex rel. SkyWest Airlines Inc.*; *Washington Cty. v. Prop. Tax Div. ex rel. SkyWest Airlines, Inc.*; *Salt Lake Cty. v. Prop. Tax Div. ex rel. SkyWest Airlines, Inc.*); Appeal No. 17-979, filed June 22, 2017 (*Delta Air Lines, Inc. v. Prop. Tax Div.; Salt Lake Cty. v. Prop. Tax Div. ex rel. Delta Air Lines, Inc.*); Appeal No. 17-1163, filed June 22, 2017 (*Salt Lake Cty. v. Prop. Tax Div. ex rel. Frontier Airlines, Inc.*); Appeal No. 17-1160, filed June 22, 2017 (*Salt Lake Cty. v. Prop. Tax Div. ex rel. JetBlue Airways Corp.*). (R. 287, 294, 817).

"Generally jurisdiction of a declaratory judgment action will not be entertained if there is pending at the time of commencement of the declaratory action another action or proceeding to which the same persons are parties, in which are involved and may be adjudicated the identical issues that are involved in the declaratory action." *See McRae & DeLand v. Feltch*, 669 P.2d 404, 405 (Utah 1983) (citations omitted). The cases pending before the district court and the Commission were filed on or about June 19, 2017 and June 22, 2017. The Complaint in the instant case was filed July 17, 2017.

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[2] Although the Commission cannot declare the constitutionality of statutes, *see TDM, Inc. v. Tax Comm'n*, 2004 UT App 433, ¶ 4, 103 P.3d 190, the Counties may appeal for *de novo* review by a tax judge in the district court or by this Court on the administrative record where the constitutional challenges may be resolved. *See* Utah Code §§ 59-1-602(1)(a), 59-1-601(1), 59-1-610(1); *see also* Utah Code § 78A-3-102(3)(e)(ii).

Accordingly, it is unnecessary and inappropriate to have the Counties' challenges decided here.

CONCLUSION

For the above reasons, and for the reasons set forth in the Airlines' principal brief and at oral argument, the Airlines respectfully request that the Court affirm the district court's ruling.

DATED THIS 18th day of July, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2019, two true and correct copies of the foregoing were served via U.S. Mail and electronic mail to the following:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of the Court's June 6, 2019 Supplemental Briefing Order because it is less than twenty (20) pages. I further certify that this brief complies with the typeface requirements of Utah R. App. 27(b) and with the requirements of Utah R. App. P. 21.

DATED THIS 18th day of July, 2019.

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