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.	**REPLY BRIEF IN SUPPORT OF APPELLEES DELTA AIR LINES, INC. AND SKYWEST AIRLINES, INC.'S SUPPLEMENTAL BRIEF** 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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Appellees Delta Air Lines, Inc. and SkyWest Airlines, Inc. (the "Airlines") submit this reply brief in response to the Counties' supplemental brief.

INTRODUCTION

The Counties do not directly address the Court's questions posed in the June 6, 2019 Supplemental Briefing Order ("Order"). Instead, the Counties rephrase the Court's questions and use the rephrased questions as a platform to argue their view of the underlying merits, which neither party nor the district court confronted below. And based on these arguments, it appears that the Counties and Airlines ultimately agree on much about which the Court has inquired.

For example, both parties seem to agree the Counties' Complaint does not properly allege as-applied challenges. Both parties also agree the Complaint is not based on an actual tax assessment. As a result, the Counties' claims are not connected to a concrete set of facts. Finally, by failing to respond to the Court's fourth question, the Counties imply that they agree with the Airlines' view that the Counties' claims do not arise from facts that form the basis for other challenges to the 2017 tax assessment currently pending in the district court and the Commission.

But the parties do not agree on all issues. The Airlines disagree with the Counties' suggestion that the Court can address their facial challenges without a concrete set of facts. The Airlines also dispute the claim that the Complaint sufficiently alleges that the Counties were harmed. As shown below, the Counties' positions fail.

ARGUMENT

I. *BANGERTER* PRECLUDES JUDICIAL REVIEW OF THE COUNTIES' FACIAL CHALLENGES ABSENT CONCRETE FACTS.

The parties agree that the Complaint does not allege as-applied challenges. (*See* Cty. Supp. Br., p. 7; State's Supp. Br., pp. 4-5; Airlines' Supp. Br., pp. 3-4). In fact, the Counties admit their claims are only "facial" or "quasi facial" challenges. (Cty. Supp. Br., p. 7). Ultimately, the Counties argue that the manner in which the claims are classified is irrelevant. For this, they cite federal cases involving first amendment challenges, not the challenges at issue here. (Cty. Supp. Br., pp. 8-9). They advance these unrelated cases to suggest that their challenges to the tax provisions are ripe even without being "tied to a particular assessment." (Cty. Supp. Br., pp. 8-9).

But the Counties' argument ignores *Bangerter*, which is on point and outlines the requirements for challenging the constitutionality of a tax provision. *Salt Lake City v. Bangerter*, 928 P.2d 384, 385 (Utah 1996). *Bangerter* holds that a "declaratory judgment action . . . does not remove the controversy requirement." *Id.* As such, *Bangerter* requires the Counties to "produce a tax assessment that has been challenged and reduced under [the challenged provision] with a resulting loss of revenue to the relevant county" in order to challenge the constitutionality of a tax statute. *Bangerter*, 928 P.2d at 385. This, the Counties have not done. Thus the Court could not find the Counties' claims are ripe without departing from *Bangerter* despite the Counties' claim that they do not "call on this Court to depart from settled law." (Cty. Supp. Br., p. 11).

Perhaps recognizing *Bangerter*'s bar to a ripeness finding here, the Counties attempt to distinguish *Bangerter*. The Counties cite *Moon Lake Elec. Ass'n, Inc. v. Utah State Tax Comm'n*, 345 P.2d 612 (Utah 1959), and argue that the Court could decide constitutional challenges to tax provisions without a challenge to a specific tax assessment. (Cty. Supp. Br., pp. 11, 14). But *Moon Lake* is clearly inapposite to this case.

There, the Legislature had enacted a statute that placed a cap on the value of electric and telephone companies for purposes of ad valorem taxation. 345 P.2d at 613. The statute was a direct and blatant violation of the Utah Constitution provision that expressly provides that "[a]ll tangible property in the state, not exempted under the laws of the United States, or under this constitution, shall be . . . taxed *in proportion to its fair market value, to be ascertained as provided by law*." UTAH CONST. art. XIII, § 2(1)(a) (Emphasis added). Because a cap on value would not result in the property being taxed in proportion to its fair market value, the *Moon Lake* Court held the statute was unconstitutional, even without an actual assessment. 345 P.2d at 614. In the statutes at issue in *Moon Lake*, "[t]he conflict with the constitution is clear." *Id.*

This case is different. The Challenged Laws do not cap the taxable value of the Airlines' property to prevent a fair market valuation, and do not otherwise blatantly violate the State's Constitution. Here, the Legislature has exercised its constitutional authority and provided a flexible valuation procedure to assess airline property, a

directive squarely within the Legislature's authority to provide the appropriate law for that process. *See* UTAH CONST. art. XIII, § 2(1)(a) (directing that property shall be "assessed at a uniform and equal rate in proportion to its fair market value *to be ascertained as provided by law*.") (Emphasis added). And once airline property is assessed, the Counties impose a tax on that assessed value. *Id.*

In sum, this case is similar to *Bangerter* and distinct from *Moon Lake*. And *Moon Lake* provides no basis here to depart from *Bangerter*'s requirements.[1] Interestingly, the *Bangerter* Court did not find *Moon Lake* to be controlling precedent, as that Court did not cite to or discuss *Moon Lake* in its decision. The Counties are not exempt from connecting their constitutional challenges to an actual assessment. For this reason, the Court should affirm the district court's ruling.

II. THE COMPLAINT AND ALLEGATIONS ON APPEAL DO NOT ESTABLISH THE COUNTIES' HARM.

Though the Counties concede that their claims are not based on an actual tax assessment, they cite their Complaint and claim to have been harmed by the Challenged Laws. (Cty. Supp. Br., pp. 12-14, 16). But even overlooking the vague, conclusory, and speculative nature of the referenced allegations, the Counties' Complaint cannot serve to establish the required harm now. This is so because, on appeal, the Counties distanced themselves from any set of facts and announced that they are not appealing any as-

[1] Even the Counties acknowledge that "under most circumstances challenges to a tax statute require factual findings arising from a completed assessment." (Cty. Supp. Br., p. 16).

applied challenges. (Gray, pp. 3, 11). Now, they argue that their claims "give rise to purely legal questions." (Blue, p. 14). Accordingly, the hypothetical application of conclusory facts from the Complaint cannot demonstrate the Counties' claims are ripe for review. *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).

III. THE COUNTIES DO NOT ADDRESS WHETHER THEIR CLAIMS ARISE FROM FACTS UNDERLYING TAX ASSESSMENT CHALLENGES RAISED IN OTHER CASES.

The Counties do not respond to the Court's fourth question. This may be viewed as a concession that the Complaint's allegations arise from tax assessments currently challenged in other cases. The Counties recognize they have raised their constitutional challenges in other matters currently pending before the district court and the Commission. (*See* Airlines' Supp. Br., pp. 7-8). This alone allows the Court to affirm the district court's dismissal of the Complaint. *See McRae & DeLand v. Feltch*, 669 P.2d 404, 405 (Utah 1983) ("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.")

(citations omitted); *see also Hercules, Inc. v. Utah State Tax Comm'n*, 1999 UT 12, ¶¶ 7-9, 974 P.2d 286 (same).

The Counties cannot avoid this fatal flaw in their declaratory judgment action by rephrasing the Court's question to ask "whether the Court may reach the Counties' claims in the absence of [a] challenged tax assessment." (Cty. Supp. Br., p. 2 n.1). While the Counties' rephrasing does not appear to be consistent with the intent behind the Court's fourth question, the answer to the Counties' question is clearly, no. (*See* Part I, *infra*). But even if the Court could reach the Counties' claims in the absence of a challenged assessment, it does not excuse the rule articulated in *McRae* and *Hercules*. Therefore, because litigation involving the same parties and similar issues is pending in the district court and the Commission, this Court should affirm the dismissal of this related declaratory judgment action.

CONCLUSION

For the above reasons, and the reasons set forth in the Airlines' prior briefs, the Airlines respectfully request that the Court affirm the district court's ruling.

DATED THIS 8th day of August, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 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 ten (10) 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 8th day of August, 2019.

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