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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

CALVIN DONALD OSTLER, individually and as personal representative of the Estate of Lisa Marie Ostler, KIM OSTLER, and the three minor children of Lisa Marie Ostler, C.K., E.L.K., and L.M.O., through their adoptive parents and next friends, CALVIN DONALD OSTLER and KIM OSTLER,

Plaintiffs,

v.

HOLLY PATRICE HARRIS, ZACHARY PAUL FREDERICKSON, TODD ALLAN BOOTH, TODD RANDALL WILCOX, M.D., RONALD PAUL SEEWER, JR., BRENT LEE TUCKER, JAMES M. WINDER, PAM LOFGREEN, RICHARD BELL, JOHN DOE, whose true name is unknown, and SALT LAKE COUNTY, a political subdivision of the State of Utah,

Defendants.

MOTION FOR PARTIAL SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM

Case No. 2:18-cv-00254-001

Judge Bruce S. Jenkins

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INTRODUCTION AND RELIEF SOUGHT

Plaintiffs hereby move the Court for summary judgment on Plaintiffs' Third Claim for Relief granting (1) an order requiring the refund to Plaintiffs of $300, which was deposited by Plaintiffs with the clerk of the Court pursuant to Utah Code § 78B-3-104 (the "Bond Statute") and DUCivR 67-1(c), and (2) a declaratory judgment adjudicating that the Bond Statute, facially and as applied to Plaintiffs, violates the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution; the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; the Due Process Clause of article I, section 7 of the Utah Constitution; the Uniform Operation of Laws Clause of article I, section 24 of the Utah Constitution; and the Open Courts Clause of article I, section 11 of the Utah Constitution.

SUPPORTING MEMORANDUM

If it operates with the scales of justice evenly balanced, the judicial system is the best, and probably the only, hope in our nation for fair and equal treatment of people, regardless of economic status, under the law.[1] This Motion asserts the blatant

[1] The Founders strongly believed that equal application of the law is a prerequisite for a free republic. *See, e.g.,* Thomas Jefferson's assertion that "the poorest laborer stood on equal ground with the wealthiest millionaire, and generally on a more

unconstitutionality of the Bond Statute,[2] which places discriminatory, arbitrary, and unreasonable—in most instances, insurmountable—burdens on people, with or without substantial financial resources, who seek access to the courts to vindicate their rights under Utah law to hold law enforcement officers accountable for their misconduct.

One class of tort victims faces a discriminatory and unjust reality: A victim seeking justice under state law, including the Utah Constitution, for an injury caused by a law enforcement officer learns that, unlike any other people who have suffered

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favored one whenever their rights seem to jar." Thomas Jefferson, *Answers to Monsieur de Meusnier's Questions* (1786) (quoted in Glen Greenwald, *With Liberty and Justice for Some—How the Law Is Used to Destroy Equality and Protect the Powerful* ("Greenwald") (2011), at 8.

[2] Utah Code § 78B-3-104 provides as follows:

> (1) A person may not file an action against a law enforcement officer acting within the scope of the officer's official duties unless the person has posted a bond in an amount determined by the court.
>
> (2) The bond shall cover all estimated costs and attorney fees the officer may be expected to incur in defending the action, in the event the officer prevails.
>
> (3) The prevailing party shall recover from the losing party all costs and attorney fees allowed by the court.
>
> (4) In the event the plaintiff prevails, the official bond of the officer shall be liable for the plaintiff's costs and attorney fees.

injuries at the hands of people *other* than law enforcement officers, he or she must (1) *before* filing a complaint, obtain a determination by a judge (with no legal procedure as to how that is to be accomplished) of the amount of attorneys' fees and costs that will be incurred by a law enforcement officer sued by the victim and (2) post a bond, before filing a complaint, in the amount "found" by the court to be the fees and costs that will be incurred in the future by the law enforcement officer.

The egregiously discriminatory Bond Statute provides no due process standard for the ascertainment of the bond amount, and no procedure for determining (1) if the particular case or prospective plaintiff falls within the category of cases or plaintiffs of reasonable concern to the legislature that passed the statute; (2) the reasonableness of the amount of the bond; or (3) the extent and nature of the burden imposed on the prospective plaintiff by the bond requirements.

The bond requirement in a prior Utah bond statute was purportedly justified by a legislative desire to deter frivolous lawsuits.[3] However, there is no evidence that there is any greater problem relating to frivolous claims facing law enforcement officers than others against whom claims may be made. Further, the bond statute

[3] *Zamora v. Draper*, 635 P.2d 78, 81 (Utah 1981) (stating the purpose of a prior bond statute was "affording protection to peace officers against frivolous and/or vexatious lawsuits").

violates equal protection and due process guarantees, as well as the guarantee of access to the courts, insofar as it impermissibly burdens *meritorious* lawsuits by those who cannot afford to post the bond or who are otherwise deterred from pursuing their claims because of the provisions of the Bond Statute. At the same time, the Bond Statute permits *frivolous* lawsuits by those with sufficient resources or temerity to post the bond and pursue the claims.

The Bond Statute requires an unconstitutional taking because the price of admission to the courts is the posting of a bond in an amount arbitrarily fixed by a court—which could be hundreds of thousands of dollars—in a manner not required of plaintiffs who do not sue law enforcement officers, without any due process, and in an arbitrary, capricious, and oppressive manner that prevents or unjustly burdens the fundamental right of access to the courts.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Defendants Harris, Frederickson, Booth, Winder, and Lofgreen were, at all material times, law enforcement officers (collectively, the "Law Enforcement Defendants").[4]

[4] Declaration of Ross C. Anderson ("Anderson Decl."), Exhibit "1", at ¶¶ 3–6. *See also George v. Beaver Cty.*, No. 2:16-cv-1076, 2017 WL 782287, *6 (D. Utah Feb. 28, 2017) (unpublished) ("[T]his court has required a bond where defendants

2. Plaintiffs have brought state and federal claims against the Law Enforcement Defendants related to the death of Lisa Marie Ostler ("Lisa").[5]

3. Pursuant to the Bond Statute and DUCivR 67-1(c),[6] Plaintiffs tendered $300 to the clerk of the Court prior to filing the Complaint in this action.[7]

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included a county, a sheriff's office, a county jail, and an individual officer." (citation omitted)).

[5] *See* Pls.' First Amended Complaint [ECF 59].

[6] DUCivR 67-1(c) provides as follows:

> In any case involving a civil action against the State of Utah, its officers, or its governmental entities, for which the filing of a written undertaking or cost bond is required by state law as a condition of proceeding with such an action, the clerk of court may accept an undertaking or bond at the time the complaint is filed in an amount not less than $300.00. The court may review, fix, and adjust the amount of the required undertaking or bond as provided by law. The court may dismiss without prejudice any applicable case in which the required undertaking or bond is not timely filed.

There is no corresponding rule in Utah State Courts. In cases filed in state courts, the amount of estimated costs and fees must somehow be determined by a court prior to the filing of a complaint, and the plaintiff must post a bond in that amount.

[7] Notice of Bond [ECF 3]; Anderson Decl., at ¶ 1.

4. The Court has not determined an estimated amount of costs and attorneys' fees each of the Law Enforcement Defendants is expected to incur in defending against claims brought in this action.[8]

5. Experienced civil rights attorneys estimate the costs and attorneys' fees incurred by the Law Enforcement Defendants in defending this action could range from $100,000 or $200,000 to $750,000, $1,000,000, or more.[9]

6. In order to obtain a court bond, Plaintiffs would be required to pay a non-refundable fee, which could be approximately 1% of the amount of the bond, and Plaintiffs would likely be required to provide collateral in the full amount of the bond.[10]

7. Plaintiffs have experienced anxiety, stress, and worry (a) that their valuable state constitutional claims may be subject to dismissal for

[8] Anderson Decl., at ¶ 2.

[9] Declaration of Robert Sykes ("Sykes Declaration"), Exhibit "2", at ¶ 6; Declaration of Randall K. Edwards ("Edwards Declaration"), Exhibit "3", at ¶ 9.

[10] Sykes Declaration, at ¶ 7; Declaration of Charles James Cayias, Exhibit "4", at ¶¶ 6–8.

failure to comply with the Bond Statute[11] and (b) that, if subjected to a requirement to post a bond in the amount estimated to be the costs and attorneys' fees the Law Enforcement Defendants may incur, which may be hundreds of thousands of dollars,[12] Plaintiffs may not be able or willing to pay a non-refundable fee and provide collateral to secure the bond and will be vulnerable to losing the opportunity to pursue their state constitutional claims.[13]

ARGUMENT

The Bond Statute violates federal and state constitutional provisions guaranteeing equal protection under the law, due process, and access to the courts under the Open Courts Clause of the Utah Constitution.

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[11] Plaintiffs, who have complied with DUCivR 67-1(c), are still subject to having their state constitutional claims dismissed pursuant to the Bond Statute—absent a finding that the Bond Statute is unconstitutional—because the local rule, DUCivR 67-1(c), is entirely at odds with the Bond Statute, which states a "person may not file an action against a law enforcement officer . . . unless the person has posted a bond in an amount *determined by the court*. . . The bond *shall* cover all estimated costs and attorney fees . . . . " Utah Code § 78B-3-104 (emphasis added). Also, Plaintiffs are vulnerable to the possibility that the Court will adjust the amount of the bond.

[12] Sykes Declaration, at ¶¶ 5–6; Edwards Declaration, at ¶¶ 8–10.

[13] Declaration of Calvin Donald Ostler ("Ostler Declaration"), Exhibit "5", ¶¶ 3–5.

I. ON ITS FACE AND AS APPLIED TO PLAINTIFFS, THE DISCRIMINATORY AND BURDENSOME BOND STATUTE VIOLATES STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF EQUAL PROTECTION UNDER THE LAW.

Analysis of claims of equal protection violations under the Fourteenth Amendment generally proceed in two steps: "First, we ask whether the challenged state action intentionally discriminates between groups of persons. . . . Second . . . courts ask whether the state's intentional decision to discriminate can be justified by reference to some upright government purpose." *SECSYS, LLC v. Vigil*, 666 F.3d 678, 685–686 (10th Cir. 2012). "Laws selectively burdening fundamental rights are . . . 'carefully scrutinized.' " *Id.* at 687 (citation omitted). Laws that do not selectively burden fundamental rights and do not discriminate between "historically ostracized groups" are reviewed "to see if the distinctions they draw between persons are at least rational." *Id.*

As applied in this matter, Utah Const. article I, section 24 ("All laws of a general nature shall have uniform operation.") should initially be treated as "a state-law counterpart to the federal Equal Protection Clause." *See State v. Canton,* 2013 UT 44, ¶¶ 34–35, 308 P.3d 517. *See also Gallivan v. Walker*, 2002 UT 89, ¶¶ 31, 32, 54 P.3d 1069 ("[T]hese two constitutional provisions 'embody the same general principle: persons similarly situated should be treated similarly, and persons in

different circumstances should not be treated as if their circumstances were the same.'" (citation omitted)).

"[T]o pass state constitutional muster, a legislative measure must often meet a higher de facto standard of reasonableness than would be imposed by the federal courts." *Mountain Fuel Supply Co. v. Salt Lake City Corp.,* 752 P.2d 884, 889 (Utah 1988). The initial governing standard is to inquire "(a) 'what classifications the statute creates,' (b) 'whether different classes . . . are treated disparately,' and then (c) 'whether the legislature had any reasonable objective that warrants the disparity' among any classifications." *DIRECTV v. Utah State Tax Comm'n*, 2015 UT 93, ¶ 49, 364 P.3d 1036 (citing *State v. Canton*, 2013 UT 44, ¶ 35, 308 P.3d 517).

A. The Bond Statute Intentionally Discriminates Between Different Classes of Plaintiffs and Defendants, and the Operation of the Bond Statute on Different Plaintiffs and Different Defendants Is Vastly Dissimilar.

The Bond Statute, *on its face*, discriminates between classes of potential defendants (law enforcement officers versus all other classes of defendants) and between classes of potential plaintiffs (those aggrieved by law enforcement officers versus those aggrieved by anyone else). *See* Utah Code § 78B-3-104. "When a distinction between groups of persons appears on the face of a state law . . . , an intent to discriminate is presumed and no further examination of legislative purpose is required." *SECSYS, LLC,* 666 F.3d at 685.

In determining whether a law is constitutional under the uniform operation of laws provision of the Utah Constitution, "'[w]hat is critical is that the *operation* of the law be uniform.'" *Gallivan v. Walker*, 2002 Utah 89 at ¶ 37 (quoting *Lee v. Gaufin*, 867 P.2d 572, 577 (Utah 1993)) (emphasis added). The dissimilar operation of § 78B-3-104 clearly results in numerous discriminatory classifications, in addition to those discussed in the prior paragraph, including the following:

(1) Between (a) plaintiffs or prospective plaintiffs who cannot afford to post a bond, or the vast majority of people who would be substantially burdened and likely deterred from pursuing justice in the courts by the prospect of being required to post a bond in an amount estimated by a court to be the future fees and costs to be incurred by any law enforcement defendants, and (b) those who are not deterred, because of their unusual wealth or audacity, from paying a premium for a bond and posting collateral in an amount that might equal hundreds of thousands of dollars in estimated attorneys' fees and costs that will be incurred in the future.

(2) Between (a) plaintiffs or prospective plaintiffs who have meritorious claims, yet are burdened and perhaps deterred from pursuing their claims because of the requirement that they post a bond under the Bond Statute and (b) those who seek to file frivolous claims against law enforcement officers, but can move forward with their lawsuit because they are able and willing to post the required bond.

(3) Between (a) plaintiffs who suffer a taking without due process (*i.e.*, (i) being deprived of the amount that must be paid as a premium for a bond and (ii) the collateral that must be provided for a bond) under the Bond Statute and (b) plaintiffs who suffer no taking as a pre-condition to filing a lawsuit.

(4) Between (a) defendants or prospective defendants who are law enforcement officers and are *de facto* immune from suit because those who desire to pursue state legal claims against them are foreclosed from pursuing them because of the extreme burdens imposed upon them by the Bond Statute and (b) defendants or prospective defendants who are subject to lawsuits because (i) if the defendants or prospective defendants are law enforcement officers, the plaintiffs are willing and able to post a bond or (ii) if the defendants are not law enforcement officers, the plaintiffs are not required to post a bond.

Because the Bond Statute intentionally discriminates against different classes of plaintiffs and defendants, and because of the vastly disparate operation of the Bond Statute on distinct classes of plaintiffs and defendants, the next step in the analysis, under either the Equal Protection Clause of the U.S. Constitution or the uniform operation of laws provision in article I, section 24 of the Utah Constitution, is whether that intentional discrimination meets the appropriate level of scrutiny.

B. The Discriminatory Classifications of the Bond Statute Are Subject to Heightened Scrutiny.

Under article I, section 24 of the Utah Constitution, heightened scrutiny must be applied in cases involving "discrimination on the basis of a 'fundamental right.'" *DIRECTV v. Utah State Tax Comm'n*, 2015 UT 93, ¶ 50, 364 P.3d 1036 (citation omitted). *See also Tindley v. Salt Lake City School Dist.*, 2005 UT 30, ¶ 30, 116 P.3d 295, 301 ("[W]e review statutory classifications that implicate rights protected by the open courts clause under 'heightened scrutiny.'" (citation omitted)); *Gallivan v. Walker*, 2002 UT 89 at ¶ 40. Hence, heightened scrutiny must be employed under article I, section 24 "when reviewing legislation that 'implicates' rights under article I, section 11." *Judd v. Drezga*, 2004 UT 91, ¶ 19, 103 P.3d 135 (citing *Lee v. Gaufin*, 867 P.2d 572, 581 (Utah 1993)). "Sustaining legislation against an article I, section 24 challenge alleging that one's rights under the Open Courts Clause are constitutionally discriminated against requires the court to find that the challenged legislation '(1) is reasonable, (2) has more than a speculative tendency to further the legislative objective and, in fact, actually and substantially furthers a valid legislative purpose, and (3) is reasonably necessary to further a legitimate legislative goal.'" *Judd*, 2004 UT 91, ¶ 19 (quoting *Lee v. Gaufin*, 867 P.2d at 583).

The requirement of the Bond Statute to post a bond in the amount a judge speculates may be the estimated costs and attorney fees to be incurred by a law

enforcement officer in the future clearly implicates the Open Courts Clause of the Utah Constitution. The Bond Statute may very well preclude a person from gaining access to the courts or, as a practical matter, will deter many, if not most, people from seeking to vindicate their rights under Utah law because only the most reckless, intrepid, or extremely wealthy would be able (1) to comply with the cart-before-the-horse provision of the Bond Statute that the prospective plaintiff must obtain a determination by the court of the estimated amount of costs and fees to be incurred by the defendant *prior* to filing the complaint and (2) to risk perhaps hundreds of thousands of dollars in fees and costs, and pay a premium and post collateral for a bond in that amount, as the price of admission to the courts.

For equal protection claims brought under the Fourteenth Amendment, statutory classifications that impinge on a fundamental right "ordinarily require [the courts] to apply strict scrutiny." *Riddle v. Hickenlooper*, 742 F.3d 922, 927 (10th Cir. 2014). The right of access to the courts is a fundamental right, requiring strict scrutiny of any restriction. *Nordgren v. Milliken*, 762 F.2d 851, 853 (10th Cir. 1985) ("The right of access to the courts . . . is one of the fundamental rights protected by the Constitution." (quoting *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983))). *See also Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 387 (2011) ("[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment

right to petition the government." (quoting *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 896–97 (1984))); *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 741 (1983); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (" '[O]nly a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.' " (quoting *NAACP v. Button*, 371 U.S. 415 at 438 (1963)).

C. The Bond Statute Fails to Pass Equal Protection Muster Under Heightened Scrutiny.

Under the Equal Protection Clause of the Fourteenth Amendment, the Bond Statute must be found unconstitutional unless the State's interest is "compelling" and the "means chosen are narrowly tailored to advance that interest." *Riddle v. Hickenlooper*, 742 F.3d 922, 928 (10th Cir. 2014).

Under article I, section 24 of the Utah Constitution, the Bond Statute must be found unconstitutional unless it is shown to (1) be "reasonable," (2) have "more than a speculative tendency to further the legislative objective and, in fact, actually and substantially furthers a valid legislative purpose," and (3) be "reasonably necessary to further a legitimate legislative goal." *Judd v. Drezga*, 2004 UT 91 at ¶ 19.

Utilizing what appears to be the same test as that applied under article I, section 24 of the Utah Constitution, the Alaska Supreme Court held a bond requirement for out-of-state plaintiffs suing in-state residents in Alaska to be a

violation of equal protection. In *Patrick v. Lynden Transport, Inc.*, 765 P.2d 1375 (Alaska 1988), the Court began with the proposition that "an unlitigated claim is considered a property interest," and that "the claim cannot be taken away from the plaintiff by government action without due process of law." *Id*. at 1378. Construing the right to court access under the Alaska Constitution to be an "important right," the Court held that "[s]tatutory infringement upon that right is deserving of close scrutiny." *Id.* at 1379. The Court then held the statute to be "both overinclusive and underinclusive"—in the same ways in which the Bond Statute in this case is both overinclusive and underinclusive.

In *Patrick*, the bond imposed on only out-of-state plaintiffs was "overinclusive because it requires that a bond be posted by all nonresident plaintiffs." *Id.* As the Court noted, it cannot be "assumed that all nonresident plaintiffs will be uncooperative in paying cost and attorney fee awards entered against them." *Id.* Likewise, it cannot be assumed that the claims of Plaintiffs, or the claims of all other plaintiffs resorting to the courts after suffering abuses by law enforcement officers, as compared with the claims of plaintiffs in matters not involving law enforcement officers, will be frivolous.

The Court in *Patrick* continued: "[T]he statute is underinclusive because it assumes that only nonresident plaintiffs will be difficult debtors. The statute ignores

the fact that resident plaintiffs also may be uncooperative in paying cost and attorney fee awards and that defendants may have a more difficult time collecting from illiquid resident plaintiffs than from liquid foreign plaintiffs." *Id.* Likewise, the Bond Statute is underinclusive because it assumes that only people seeking to hold law enforcement officers accountable under the law file frivolous claims. The conclusion of the Court in *Patrick* applies with full force to the situation presented here:

> We conclude that a statute which restricts access to Alaska courts by means of a bond requirement for only nonresident plaintiffs is not sufficiently related to the purpose of providing security for cost and attorney fee awards to defendants to withstand a challenge under the Alaska Constitution's guarantee of equal protection under the law.

Id. at 1380.

The United States Supreme Court was faced with a similar equal protection issue where an Oregon statute required appellants in an eviction case to post bond on appeal, with two sureties, in twice the amount of rent expected to accrue pending an appellate decision, the bond to be forfeited if the decision in favor of eviction was affirmed. *Lindsey v. Normet*, 405 U.S. 56 (1972). The purported purpose of the bond statute, as explained by the Oregon Supreme Court, "was to guarantee that the rent pending an appeal would be paid," and the double-bond "was, no doubt, intended to prevent frivolous appeals for the purpose of delay." *Scales v. Spencer*, 424 P.2d 242, 243 (Or. 1967) (quoted in *Lindsey*, 405 U.S. at 76). Just as the requirements of the

Bond Statute impose discriminatory and significant burdens on people who seek access to the courts to hold law enforcement officers accountable for their misconduct, the double-bond requirement in *Lindsey* was held by the United States Supreme Court to "heavily burden[] the statutory right of an FED defendant to appeal." *Lindsey*, 405 U.S. at 77.

The Court, holding that the bond requirement violated equal protection, stated as follows:

> The claim that the double-bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond.

Id. at 78.

Not only the poor are impacted by such facially discriminatory legislation. Those who are not indigent are also unconstitutionally burdened in ways that other parties to litigation are not:

> The discrimination against the poor, who could pay their rent pending an appeal but cannot post the double bond, is particularly obvious. For them, as a practical matter, appeal is foreclosed, no matter how meritorious their case may be. The *nonindigent* FED appellant also is confronted by a substantial barrier to appeal faced by no other civil litigant in Oregon. The discrimination against the class of FED appellants is arbitrary and irrational, and the double-bond requirement of [the statute] violates the Equal Protection Clause.

Id. (emphasis added).

Precisely the same is true in the instant case. The Bond Statute bars or unduly and significantly burdens meritorious claims by those who cannot, or will not, put at risk substantial sums of money to obtain justice for violations of state law by law enforcement officers, while allowing frivolous claims by those who are wealthy and tenacious enough to remain undeterred by the arbitrary and discriminatory Bond Statute.

Statutes like the Bond Statute, which (1) deny access to courts for people with meritorious claims who cannot afford the bond or are deterred or unduly burdened by the discriminatory bond requirement, but (2) allow access to the courts by people with frivolous claims who are, because of their wealth or any other reason, not deterred by the bond requirement, are blatantly unconstitutional under state and federal equal protection guarantees.

Obviously, the purported goal of preventing frivolous claims has no relation to the financial status of litigants.

> The cost bond statutes in *Eastin* [*v. Broomfield,* 570 P.2d 744 (Ariz. 1977)] and *New* [*v. Arizona Board of Regents*, 618 P.2d 238 (Ariz. Ct. App. 1980)] did not have a rational basis. The purpose of the statutes was to deter frivolous litigation. The frivolity vel non of litigation is not related to the financial status of the litigants. By denying access to the courts to indigents with meritorious claims and granting it to the wealthy with frivolous claims, the bond provisions of the statutes were grossly overinclusive and underinclusive. The defects were so great that it cannot be said they rationally furthered a legitimate legislative purpose.

Tahtinen v. Superior Court, 637 P.2d 723, 725 (Ariz. 1981) (in banc).

Whether one is indigent or not, the bond and undertaking requirements are unconstitutional.

> As to the indigent, the statute [requiring a claimant in a medical malpractice case to post a bond] violates the Arizona constitutional privileges and immunities clause, Art. II, s 13, by denying access to the courts. As to the non-indigent, it places a heavier burden upon his access to the court and therefore violates the same clause of the Arizona Constitution.

Eastin v. Broomfield, 570 P.2d 744, 754 (Ariz. 1977) (in banc). *See also New v. Arizona Bd. of Regents*, 618 P.2d 238, 239–40 (Ariz. Ct. App. 1980). ("The bond requirement . . . is a monetary blockade to access to the courts and is therefore violative of constitutional rights.").

D. The Bond Statute Fails to Pass Muster Under Even the Rational Basis Test Because the Enormous Disparities Between Classifications Are Not Warranted by any Reasonable Legislative Objectives.

Under the rational basis test, the Bond Statute's discriminatory classifications are unconstitutional because they are not rationally related to a legitimate state interest. *See Heller v. Doe*, 509 U.S. 312, 319 (1993) (describing rational basis test for equal protection claims); *DIRECTV v. Utah State Tax Comm'n*, 2015 UT 93, ¶ 51, 364 P.3d 1036 (describing rational basis test under uniform operation of laws clause).

Defendants have misleadingly argued "the Utah Supreme Court in *Zamora v. Draper*, 635 P.2d 78 (Utah 1981), previously upheld the challenged statutory scheme under grounds similar to those raised by Plaintiffs here."[14]

First, the repealed statute at issue in *Zamora* and the current Bond Statute are vastly different in terms of whether a trial court has discretion in setting the amount of the bond. In *Zamora*, the Utah Supreme Court found "that the statute itself allows some flexibility wherein it provides that the bond shall be 'in an amount fixed by the court . . . .' This would permit the court to fix the bond in accordance with the plaintiff's circumstances, however impoverished he may be, and yet allow him access to the court to seek justice, as assured by Sec. 11 of Article I of our State Constitution . . . ." *Zamora*, 635 P.2d at 81. The plain language of the current Bond Statute at issue in this case is completely different. The current Bond Statute provides in mandatory, non-discretionary terms that "[t]he bond **shall** cover all estimated costs and attorney fees the officer may be expected to incur in defending the action, in the event the officer prevails." Utah Code § 78B-3-104 (emphasis added).

Second, *Zamora* did not engage in any equal protection analysis. In fact, the Court's limited statements that are relevant to an equal protection analysis are

[14] Defendants' Reply in Support of Defendants' Partial Motion to Dismiss [ECF 108], at 10.

contrary to any finding that the discriminatory classifications of either bond statute have a rational basis. While stating that the purpose of the bond statute under consideration in *Zamora* was to protect against "frivolous and/or vexatious lawsuits," the Utah Supreme Court expressly noted that the concern regarding "frivolous and/or vexatious lawsuits" is not unique to lawsuits against law enforcement officers:

> It is suggested that indiscriminate allowance of the filing of such suits is contrary to the express wording of the statute and defeats its purpose of affording protection to peace officers against frivolous and/or vexatious lawsuits by compelling them to come forward and defend. A pertinent rejoinder to this is that *the danger of filing meritless actions also exists as to other kinds of lawsuits*. It is the responsibility of the courts not only to see that the purpose of the statute in protecting police officers is served, but also to safeguard the rights of persons who claim they have suffered injury.

Zamora, 635 P.2d at 81 (emphasis added).

In stark contrast to the failure in *Zamora* to conduct any equal protection analysis, the Louisiana Supreme Court, considering the discriminatory imposition of an attorneys' fee bond (and the prospect of having to pay the defendant's attorneys' fees if the plaintiff is not successful at trial, even in a meritorious case) when public officials were sued, noted as follows:

> This statutory scheme creates a classification which substantially burdens the right of some persons to be compensated for injuries

suffered by them while not placing such a burden on other individuals. Such classifications are permissible only if they are:

> "reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." [Citations omitted.]

It is argued that the bond requirement is a justifiable means to deter frivolous suits instituted against public officials for harassment. *No support for the suggestion that suits are brought against public officials for harassment with greater frequency than suits against other defendants has been presented in brief or in argument.*

A similar statute was invalidated in *Sheffield v. State*, 92 Wash.2d 807, 601 P.2d 163 (1979), on an equal protection ground. In that case, the court summarily struck down a provision which entailed the filing of a surety bond contemporaneously with institution of suit against the state, relying on *Hunter v. North Mason High School*, 85 Wash.2d 810, 539 P.2d 845 (1975). *Hunter* dealt with a "nonclaim" statute which required notice of claims against governmental entities to be given within 120 days from the date the claim arose. The court held that, *even under minimal scrutiny*, the statute bore no reasonable relation to its asserted purposes—it unjustifiably discriminated against persons with claims against the government in violation of the equal protection clause of the Fourteenth Amendment.

> " . . . This prerequisite to tort recovery has no counterpart in actions between private parties. The statutes thus create two classes of tortfeasors, governmental and nongovernmental, and grant the one a procedural advantage not available to the other. Concomitantly they produce two classes of tort victims and place a substantial burden on the right to bring an action of one of them." *Hunter v. North Mason High School*, supra, 539 P.2d at 847.

> In the case before us, the instant statute also divides tortfeasors into two classes; governmental tortfeasors and private tortfeasors. Simultaneously two classes of victims are created: victims of governmental tortfeasors and victims of private tortfeasors. Only the first class of victims must suffer the additional burden of a bond for attorney's fees. No reasonable justification for this disparate treatment has been supplied. The statute violates the equal protection clauses of the state and federal constitutions.

Detraz v. Fontana, 416 So. 2d 1291, 1295–1296 (La. 1982) (emphasis added).

Just as in *Detraz*, no evidence has been presented here supporting a claim that law enforcement officers are subjected to more frivolous claims than anyone else—or that whatever dangers are encountered by law enforcement officers are so great, or the interactions by law enforcement officers with people during the course of their duties are such that they are exposed to so many frivolous claims, to justify blocking, or significantly burdening, access to the courts for those who have meritorious claims regarding harm suffered as a result of misconduct by law enforcement officers.

II. BECAUSE IT UNREASONABLY BURDENS ACCESS TO THE COURTS BY IMPOSING AN ARBITRARY AND UNREASONABLE PRICE OF ADMISSION TO THE COURTS, THE BOND STATUTE VIOLATES THE OPEN COURTS CLAUSE OF THE UTAH CONSTITUTION.

The Open Courts Clause of the Utah Constitution, article I, section 11, guarantees fair and equal access to the courts. *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 675 (Utah 1985) ("The clear language of the [open courts] section

guarantees access to the courts and a judicial procedure that is based on fairness and equality."); *Lyon v. Burton*, 2000 UT 55, ¶ 28, 5 P.3d 616 ("The right of access to the courts and to a civil remedy to redress injuries, which article I, section 11 protects, is fundamental in Anglo-American law."). *See also Day v. State ex rel. Utah Dep't of Pub. Safety*, 1999 UT 46, ¶ 37, 980 P.2d 1171 (The Open Courts Clause "imposes a substantive limitation on the legislature's ability to eliminate *or unduly restrict* causes of action seeking relief for injury to 'person, property, or reputation.' " (emphasis added) (quoting *Berry*, 717 P.2d at 676))); *Jeffs v. Stubbs*, 970 P.2d 1234, 1250 (Utah 1998) ("While this clause may not guarantee any specific remedy, it certainly guarantees access to the courts."); *Jensen v. State Tax Comm'n*, 835 P.2d 965, 969 (Utah 1992) (stating if a statute "precludes *reasonable access* to judicial review, it violates the open courts provision and is unconstitutional as applied." (emphasis added)); *Burgandy v. State, Dep't of Human Servs.*, 1999 UT App 208, ¶ 18, 983 P.2d 586 (finding no violation of Open Courts Clause where statute "does not *deny, restrict, chill, burden* or *impose conditions upon* appellant's right and ability to access the courts" (emphasis added)).

Declaring unconstitutional a bond requirement, intended to cover defendants' attorneys' fees and costs, imposed on those who sue medical review board participants, the Florida Supreme Court stated as follows:

> We find that the bond requirement does not totally abrogate a plaintiff's right of access to the courts; however, the statutes do create an impermissible restriction on access to the courts. The constitutional right of access to the courts sharply restricts the imposition of financial barriers to asserting claims or defenses in court. Although courts have upheld reasonable measures, such as filing fees, financial preconditions that constitute a substantial burden on a litigant's right to have his or her case heard are disfavored. . . . The right to go to court to resolve our disputes is one of our fundamental rights. . . . Although courts generally oppose any burden being placed on the right of a person to seek redress of injuries from the courts, the legislature may abrogate or restrict a person's access to the courts if it provides: 1) a reasonable alternative remedy or commensurate benefit, or 2) a showing of an overpowering public necessity for the abolishment of the right, *and* finds that there is no alternative method of meeting such public necessity.

Psychiatric Associates v. Siegel, 610 So. 2d 419, 423–24 (Fla. 1992) (emphasis in original) (citations omitted). After finding that the bond requirement does not provide a plaintiff with an alternative remedy or a commensurate benefit, the Florida Supreme Court held the fees and costs bond violative of the open courts provision because the "record in the case does not show that the bond requirement is the only method of furthering" the purpose of the bond statute, "meeting the medical malpractice crisis and encouraging peer review." *Id*. at 424–25.

The discriminatory bond requirement under Utah's Bond Statute, the amount of which is to be determined in an astoundingly arbitrary and bizarre manner, cannot constitutionally be applied to determine if, and under what circumstances, a person

will have access to the courts for the vindication of state rights under the Utah Constitution or other state laws.

To address the concern about potentially frivolous lawsuits, a Utah statute of general application provides that fees and costs can be assessed against those who assert claims or defenses without merit. Utah Code § 78B-5-825. *See also Boddie v. Connecticut,* 401 U.S. 371, 381–82 (1971) ("[O]ther alternatives exist to fees and cost requirements as a means for conserving the time of courts and protecting parties from frivolous litigation, such as penalties for false pleadings or affidavits, and actions for malicious prosecution or abuse of process, to mention only a few.").

III. ON ITS FACE AND AS APPLIED TO PLAINTIFFS, THE BOND STATUTE VIOLATES SUBSTANTIVE AND PROCEDURAL DUE PROCESS.

The Bond Statute violates substantive and procedural due process:

(1) by allowing or requiring an unconstitutional taking of property (*i.e.*, the lost use of money posted as a bond or the payment of a premium for a bond and providing collateral) and perhaps the loss of one's meritorious claim, without a due process hearing to determine (a) whether the case is of the category the Bond Statute is intended to discourage *(i.e.*, frivolous cases) and (b) what bond amount, if any, would be appropriate under the circumstances, taking into account the nature and extent of any burden of the bond on a person seeking access to the court and the

impossible, arbitrary ascertainment of the amount of attorneys' fees and costs that may be incurred in the future.

(2) by denying access to the courts, or at least making access so burdensome and expensive (or potentially expensive) as to effectively prohibit or unreasonably burden plaintiffs—no matter their economic status—seeking to bring state claims against law enforcement officers;

(3) because the statute does not provide any guidance as to how, and according to what procedures, the amounts of the bond are to be set, inviting unconstitutionally arbitrary enforcement by requiring the trial court to impossibly intuit how much costs and fees will be incurred in the future; and

(4) because the purported rationale of the statute is to deter frivolous claims, when that supposed interest is not advanced by the statute because the statute deters meritorious claims and permits those with substantial resources to pursue frivolous claims.

A. The Bond Statute Is Subject to Heightened Scrutiny Under Plaintiffs' Due Process Claims Because It Impinges on the Fundamental Right of Access to the Courts.

Under federal law, access to the courts is a fundamental right. *See, e.g., Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1422, 1427–28 (8th Cir. 1986); *Nordgren v. Milliken*, 762 F.2d 851, 853 (10th Cir. 1985) ("The right of

access to the courts is basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution." (quoting *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983))).

"[T]he fundamental right of access to the courts . . . . can be infringed only if state action survives heightened judicial scrutiny." *Guttman v. Khalsa*, 669 F.3d 1101, 1118 (10th Cir. 2012) (citation omitted). *See also Tennessee v. Lane*, 541 U.S. 509, 523 (2004) ("The Due Process Clause also requires the States to afford certain civil litigants a 'meaningful opportunity to be heard' by removing obstacles to their full participation in judicial proceedings." (citations omitted)).

Similarly, a statute that impinges on fundamental rights triggers strict scrutiny in substantive due process challenges brought under article I, section 7 of the Utah Constitution. *Jones v. Jones*, 2015 UT 84, ¶¶ 26–27, 359 P.3d 603, 609. "As a majority of the Utah Supreme Court noted, 'this court has consistently rejected the presumption of constitutionality of statutes challenged under the remedies clause of article I, section 11.'" *Wood v. Univ. of Utah Med. Ctr.*, 2002 UT 134, ¶ 46, 67 P.3d 436 (Durham, C.J., dissenting) (writing for a majority of the court). *Contra Judd v. Drezga,* 2004 UT 91, ¶ 30, 103 P.3d 135. To the extent *Judd* holds that the rational basis test should be used in a substantive due process case implicating article I, section 11 because the rights implicated there were not "fundamental," that

conclusion is at odds with federal constitutional analysis and provides far less protection for the right of access to the courts under the Utah Constitution. It is also at odds with the earlier statement in the same case that "[w]e employ heightened scrutiny under article I, section 24 when reviewing legislation that 'implicates' rights under article I, section 11." *Id.* at ¶ 19.

B. The Bond Statute Violates Due Process Under Either a Heightened Scrutiny or Rational Basis Test.

The Bond Statute fails to survive heightened scrutiny because there is no compelling state interest furthered by the statute and the means adopted by the statute are not even related, let alone narrowly tailored, to achieving the statute's purpose.[15]

The Bond Statute fails to pass even the wholly inapplicable rational basis test because the statute is not reasonably related to a proper legislative purpose and is arbitrary and discriminatory, facially and as applied to Plaintiffs. [16]

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[15] *See Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, ¶ 72, 250 P.3d 465, 484 (analyzing claim under article I, section 7 of the Utah Constitution and stating "[a] statute that infringes upon [a] 'fundamental' right is subject to heightened scrutiny and is unconstitutional unless it (1) furthers a compelling state interest and (2) 'the means adopted are narrowly tailored to achieve the basic statutory purpose.' " (citation omitted)); *Kitchen v. Herbert*, 755 F.3d 1193, 1218 (10th Cir. 2014) ("The Due Process Clause 'forbids the government to infringe certain fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.' " (citation omitted)).

[16] Utah courts apply a rational basis standard of review to claims alleging due process violations that do not impinge on fundamental rights. "[I]f a statute has 'a reasonable

1. The Bond Statute Denies or Unduly Burdens the Right to Access Justice Through the Courts, in Violation of Due Process.

a. The Bond Statute Does Not Further a Compelling State Interest Nor Is It Reasonably Related to a Proper Legislative Purpose.

In *Zamora v. Draper*, the Utah Supreme Court upheld a prior bond statute on the grounds that it prevented frivolous lawsuits and "provide[d] a measure of protection to that class of officers who are willing to undertake th[e] hazardous responsibility [of maintaining the peace and good order of society]." *Zamora*, 635 P.2d at 80. The *Zamora* court was considering a materially different bond statute than is at issue here. The former statute read, in relevant part, as follows:

> Before any action may be filed against any sheriff, constable, peace officer . . . the proposed plaintiff, as a condition precedent thereto, shall prepare and file . . . a written undertaking with at least two sufficient sureties *in an amount to be fixed by the court* . . . for the payment to the defendant of all costs and expenses that may be awarded against such plaintiff, including a reasonable attorney's fee to be fixed by the court.

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relation to a proper legislative purpose, and [is] neither arbitrary or discriminatory, it is constitutionally permissible.' " *State v. Candedo*, 232 P.3d 1008, 1013 (Utah 2010) (citations omitted). *See also Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1181 (10th Cir. 2009) (If a legislative enactment burdens a lesser than fundamental right "the infringement is merely required to bear a rational relation to a legitimate government interest." (citations omitted)).

Utah Code § 78-11-10 (emphasis added).[17] The language of that previous bond statute was clearly more flexible than the current Bond Statute, which requires that a bond "*shall* cover *all* estimated attorney fees and costs." Utah Code § 78B-3-104 (emphasis added).

The *Zamora* court found that the "flexibility" allowed under the previous version of the statute was critical to its constitutionality because it permitted the court to conduct a preliminary inquiry as to the plaintiff's ability to furnish a bond and to set the amount of the bond accordingly. 635 P.2d 78, 81–82. There is no such flexibility in the language of the current Bond Statute; accordingly, the reasoning of *Zamora* does not apply and any reliance on that opinion is misplaced.

Further, the argument that a bond requirement eliminates frivolous claims has been examined and rejected. In *Psychiatric Assoc. v. Siegel*, the Florida Supreme Court considered the effect of a similar bond statute on a plaintiff's due process rights. 610 So. 2d 419, 425 (Fla. 1992). The Court in *Siegel* found the bond statute unconstitutional, in part because it "infringe[d] on the plaintiff's due process rights by not being reasonably related to the legislative goal of preventing frivolous lawsuits." *Id.* at 421.

[17] The full text of that statute is set out at http://law.justia.com/codes/utah/2006/title78/78_0f011.html.

> Under the bond requirement statutes, all plaintiffs, regardless of the merits of their claims, must post a bond before proceeding with their action. This requirement will not necessarily discourage frivolous lawsuits of the rich, but only those lawsuits where the plaintiff is too poor to post the bond. Thus, the effect of the bond requirement is to discourage lawsuits based on the plaintiff's financial ability rather [than] the merits of the claim. Further, under the bond requirement, a plaintiff with a complex meritorious case would have to post a larger bond than a plaintiff with a simple but frivolous case. Thus, . . . "*[t]his kind of provision may net some sharks, but only at the price of also netting a substantial number of innocent fish*." . . . We find that this result is not reasonably related to the permissible legislative goal of preventing frivolous lawsuits filed for intimidation or leverage.

Psychiatric Associates v. Siegel, 610 So. 2d at 425 (citation omitted) (emphasis added).

Other courts have similarly determined that bond statutes which limit or prohibit access to courts on the basis that frivolous lawsuits might be deterred are unconstitutional. *See Lindsey v. Normet*, 405 U.S. at 78 (statute requiring that appellant obtain two sureties was not likely to prevent frivolous lawsuits "for it not only bar[red] nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond."); *Detraz v. Fontana*, 416 So. 2d at 1295 (rejecting the argument that a bond requirement deterred frivolous lawsuits where there was "[n]o support for the suggestion that suits are brought against public officials for harassment with greater frequency than suits against other defendants.").

The Bond Statute has resulted in gross injustices in at least five federal court cases in Utah, which have been dismissed because of the plaintiffs' failure to post the required bond, without any consideration of the crucial constitutional issues, and without any determination that the claims of the plaintiffs were frivolous. *See Rippstein v. City of Provo*, 929 F.2d 576, 578 (10th Cir. 1991) (affirming dismissal for failure to comply with prior bond statute, with materially different language than the Bond Statute at issue here); *Robbins v. Merrell*, No. 2:15-cv-156, 2017 WL 1628879, at *11 (D. Utah May 1, 2017) (unpublished); *George v. Beaver Cty.*, No. 2:16-cv-1076, 2017 WL 782287, *6 (D. Utah Feb. 28, 2017) (unpublished); *Webb v. Scott*, No. 1:11-cv-128, 2015 WL 1257513, at *14 (D. Utah Mar. 18, 2015) (unpublished) *reconsideration denied*, 2015 WL 2183124 (D. Utah May 8, 2015) (unpublished); *Mglej v. Garfield Cty.*, No. 2:13-cv-713, 2014 WL 2967605, at *2 (D. Utah July 1, 2014) (unpublished).

b. <u>The Bond Statute Calls for an Impossible and Arbitrary Determination by the Courts of What Future Attorneys' Fees and Costs Will Be.</u>

The Bond Statute violates a prospective plaintiff's due process rights because it requires the courts to engage in an impossible, speculative, arbitrary guess about what fees will be incurred in the future.

> [T]he bond requirement statutes are distinguishable from statutes that award a prevailing party reasonable attorney's fees at the conclusion of

> a case. Under these latter statutes, the court can accurately measure the reasonableness of the fees; whereas the bond requirement statutes compel the court to intuit the appropriate attorney's fees and costs in advance of any action.

Psychiatric Associates v. Siegel, 610 So. 2d at 425. *See also Beaudreau v. Superior Court,* 535 P.2d 713, 721 (Cal. 1975) (in banc) (invalidating a costs undertaking statute in part because the "legislation specifie[d] no standards for determining the reasonable amount of such undertaking" and without such standards, any hearing would "not be a 'meaningful' hearing, 'appropriate to the nature of the case' and as such would not meet due process standards." (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965))).

As in *Beaudreau*, the Bond Statute at issue here does not promulgate standards or guidelines for setting the amount a litigant must pay in order to bring his or her claim. The Bond Statute allows the courts nearly unlimited discretion in setting the amounts of the undertaking and bond. The statutes are silent as to how a court should determine the amount of the bond, the factors a court must or should consider in setting the bond, or the procedure a plaintiff is to follow to obtain a court's determination of the amount of the bond. Thus, before the filing of a complaint, a plaintiff is to somehow obtain a court's determination, without any guidance from the statutes or the benefit of an inquiry into the merits of the claim, of the entire estimated amount of attorney fees and costs that will be incurred in the future by a

law enforcement officer defendant. Making a determination about future costs and fees is an impossible task and one that cannot result in anything other than an arbitrary number chosen by the court, based on conjecture and speculation.

The Bond Statute's unworkability and circularity, which rival the images of M.C. Escher, are not resolved by DUCivR 67-1(c). The Bond Statute unambiguously provides, first, that an action against a law enforcement officer cannot be filed unless the person *has posted* a bond and, second, that the amount of the bond *shall cover all estimated costs and attorney fees* the officer may be expected to incur, *as determined by the court*. The United States District Court for the District of Utah, through DUCivR 67-1(c), purported to allow the Court to set the bond amount at $300 for all cases and change the amount of the bond *after* the complaint has been filed. By doing so, DUCivR 67-1(c) completely disregards the mandatory language of the Bond Statute requiring that the posting of the bond *precede* the filing of the complaint and that the amount of the bond "shall cover all estimated costs and attorney fees." The local rules of practice do not have the authority to unilaterally change the requirements of the Bond Statute. Accordingly, Plaintiffs here, and other plaintiffs who have posted a bond pursuant to the Bond Statute and DUCivR 67-1(c), are subject, absent the invalidation of the Bond Statute, to dismissal of their state constitutional claims for failure to comply with the Bond Statute.

As reflected in their declarations, two experienced civil rights attorneys have estimated the amount of attorneys' fees and costs to be incurred on behalf of the Law Enforcement Defendants to be at least $100,000 or $200,000 and could be as high as $750,000, $1,000,000, or more.[18] One of them, Randall Edwards, noted that "[t]he exact amount, or even a reasonable estimate, is impossible to predict before the conclusion of the case without engaging in gross speculation," that "there is no possible way to estimate the amount of attorneys' fees and costs that will be incurred prior to the commencement of a lawsuit," and that arriving at such an estimate "would not only be administratively impossible, but would in any case require gross speculation."[19]

A prospective defendant can manipulate the process by (1) driving the number up so it will be out of reach of the prospective plaintiffs, *see Psychiatric Associates v. Siegel*, 610 So. 2d at 425 ("[T]he bond requirement may have the unwanted effect of encouraging defendants to estimate costly defenses for all claims in order to obtain a prohibitively high bond."), or (2) driving it down in an effort to, superficially, somewhat ameliorate the due process and equal protection concerns.

[18] Sykes Declaration, at ¶¶ 5–6; Edwards Declaration, at ¶¶ 8–9.

[19] Edwards Declaration, at ¶¶ 9–10.

2. The Bond Statute Constitutes an Unconstitutional Taking Without Due Process.

A person cannot be deprived of life, liberty, or property without notice and an opportunity to be heard. The requirement under the Bond Statute for posting a bond in the amount of future attorneys' fees and costs to be incurred by a law enforcement officer constitute an unconstitutional taking, in violation of due process under the Utah and United States Constitutions.

It is not enough to say that the Legislature was seeking to deter frivolous cases by imposing the bond and undertaking requirements. It must be shown, during a due process hearing, that each particular case in which a bond or undertaking is required is of the category of cases sought to be deterred. That is, it must be shown at a hearing that the case is not meritorious if a bond is to be required.

A "claim against a public entity or public employee—assuming that it is bona fide and potentially meritorious—is a 'property interest' within the meaning of the due process clause." *Beaudreau v. Superior Court*, 535 P.2d at 718. *See also Miller v. USAA Cas. Ins. Co.*, 2002 UT 6, ¶ 40, 44 P.3d 663 ("Causes of action or claims that have accrued under existing law are vested property rights just as tangible things are property"); *Payne v. Myers*, 743 P.2d 186, 190 (Utah 1987) ("[A] vested right of action is a property right protected by the due process clause."). Also, the

requirement of a bond constitutes a taking of property since a nonrefundable premium is required to secure a bond and, in addition, collateral may be required.

> [W]e are convinced that [costs undertaking statutes] involve a two-fold taking of property. To put it another way, a plaintiff is deprived of his property whether he complies with the statute and files the demanded undertaking or refuses to comply and incurs dismissal of his action. If he takes the former course and secures his undertaking from a corporate surety . . . he will at least be deprived of his nonrefundable premium; if he deposits money in court in lieu of an undertaking, he will be deprived of its use during the pendency of the action.
>
> If the plaintiff takes the latter course and incurs dismissal of his action, he will also have suffered a 'taking' of his property, since his claim against a public entity or public employee . . . is a 'property interest' within the meaning of the due process clause.

Beaudreau v. Superior Court, 535 P.2d at 717–18 (citations and footnotes omitted). *See also Brooks v. Small Claims Court*, 504 P.2d 1249, 1253 (Cal. 1973).

Hence, before a costs or attorneys' fees bond can be required as a condition to filing a lawsuit, due process requires a hearing to inquire into the merits of the case, the appropriateness of the bond, and the ability of the plaintiff to pay the bond.

> Under the fundamental notions of due process . . . , the taking to which a plaintiff is subjected under the above [cost undertaking] statutes must be preceded by a hearing in the particular case in order to determine whether the statutory purpose is promoted by the imposition of the undertaking requirement. As these statutes are purportedly designed to protect public entities and public employees against the cost of defending frivolous lawsuits, a due process hearing would necessarily inquire into the merit of the plaintiff's action as well as into the reasonableness of the amount of the undertaking in the light of the defendant's probable expenses.

Beaudreau v. Superior Court, 535 P.2d at 720. *See also Gonzales v. Fox*, 68 Cal. App. 3d Supp. 16, 18–19 (Cal. App. 1977) (statute requiring nonresident plaintiffs to file a bond in a suit against the county for personal injuries violated due process because it did not "provide a meaningful pretaking hearing" that would inquire into merits of claim, reasonableness of bond, and the ability of plaintiffs to pay bond).

In *Beaudreau*, the California Supreme Court invalidated statutes requiring plaintiffs suing a school district and public employees to post an undertaking. 535 P.2d at 720–21. The Court held that the California statutes at issue effectuated a taking inasmuch as "a plaintiff may be required to relinquish property either by filing an undertaking or by suffering dismissal of his action." *Id.* at 718. Since the undertaking statutes amounted to a taking, therefore, the Court found that plaintiffs were constitutionally entitled to a pretaking hearing "in order to determine whether the statutory purpose is promoted by the imposition of the undertaking requirement." *Id.* at 720.

Here, as in *Beaudreau*, the Bond Statute does not require or permit a pretaking hearing, let alone any inquiry into the merits of a plaintiff's claims, the reasonableness of the bond, or the litigant's ability to pay a bond. Every person seeking to bring a lawsuit against a law enforcement officer in Utah must post the bond, in the arbitrary amount set by the court, or forego his or her claims. Further,

the Bond Statute does not allow the court discretion in fixing the bond according to a particular plaintiff's circumstances; rather, the statute requires that the amount of the bond "shall" cover "*all* estimated costs and attorney fees." Utah Code § 78B-3-104. Accordingly, the Bond Statute violates due process under the United States and Utah Constitutions.

CONCLUSION

The Bond Statute is symptomatic of the trend throughout government, and in the judicial system specifically, of the growing inequities between the rich and powerful (including governmental entities and employees) and everyone else. The scales of justice are indeed severely tilted against ordinary men and women, with insurmountable, or at least unconscionably burdensome, obstacles for just about everyone seeking justice for injuries inflicted through misconduct by governmental entities and employees, generally, and law enforcement officers, specifically. If equal protection, due process, and the constitutional guarantees of equal access to the courts have any practical meaning, the Bond Statute must be deemed unconstitutional, consistent with the compellingly reasoned case law throughout the nation that has recognized the abuses of such statutes—and consistent with the principle at the core of our constitutional republic that no one is above the law and

all must be treated equally, without regard to their economic, political, or social status.

DATED this 9th day of April 2019.

LAW OFFICES OF ROCKY ANDERSON

/s/ Ross C. Anderson
Ross C. Anderson
Attorney for Plaintiffs

CERTIFICATE OF COMPLIANCE WITH WORD-COUNT LIMIT

In compliance with the word-count limit of DUCivR 56-1(g)(1), I certify that the foregoing MOTION FOR PARTIAL SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM contains 9,913 words, excluding the items that are exempted from the word count under DUCivR 56-1(g)(1).

DATED this 9th day of April 2019.

LAW OFFICES OF ROCKY ANDERSON

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