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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

CALVIN DONALD OSTLER, individually and as personal representative of the Estate of Lisa Marie Ostler, Plaintiff, v. HOLLY PATRICE HARRIS, ZACHARY PAUL FREDERICKSON, TODD ALLAN BOOTH, RONALD PAUL SEEWER, JR., BRENT LEE TUCKER, JOHN DOE, whose true name is unknown, and SALT LAKE COUNTY, a political subdivision of the State of Utah, Defendants.	**DEFENDANTS' OPPOSITION TO PLAINTIFFS' PARTIAL MOTION FOR SUMMARY JUDGMENT** Case No. 2:18-cv-00254-001 Judge: Bruce S. Jenkins

Defendants Salt Lake County, Holly Patrice Harris, Zachary Paul Frederickson, Todd Allan Booth, Brent Lee Tucker, and Ronald Paul Seewer, Jr., through counsel and under Rule 56 of the Federal Rules Civil Procedure and DUCivR 56-1, oppose Plaintiffs' partial motion for summary judgment.

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INTRODUCTION

Plaintiffs claim Utah Code § 78B-3-104 (the bond statute), which calls on them to post a bond when bringing a state law claim against law enforcement is unconstitutional – facially and as applied. Whether based on a lack of standing or the doctrine of ripeness, Plaintiffs, however, have failed to properly invoke this Court's jurisdiction to hear that claim. At the outset of this case, Plaintiffs posted the required – and pursuant to DUCivR 67-1, de minimis – fixed fee of $300 and have nowhere shown they cannot afford that fee, nor that its payment poses undue hardship to them. It is undisputed that Defendants have not asked this Court to fix the bond at a higher amount; and Defendants have no intention, later, of doing so. But Plaintiffs purported anxiety over the unrealized, and as yet potential, dismissal of their state law claims or the speculative need to incur the expense of posting a cost bond should one be required, is wholly immaterial to this Court's consideration of the motion now before it. Further, when reviewing a predecessor statute, the Utah Supreme Court previously upheld the bond statute as constitutional, and found that if a plaintiff were impecunious – which, again, Plaintiffs have not alleged they are – courts are possessed under the statute with the means to conduct a preliminary proceeding to determine the financial status of any plaintiff who may make such a claim. This Court is bound by that authority and must interpret Utah Code § 78B-3-104 in the manner that Utah's highest court would.[1] Consequently, there being no basis upon which to grant Plaintiffs' partial motion for summary judgment, it should be denied.

[1] The Utah Supreme Court has already addressed and upheld the prior bond statute – with language substantially similar to the statute at issue here – on Utah open courts and federal equal protection grounds. *See Zamora v. Draper*, 635 P.2d 78, 80-82 (Utah 1981) (open courts and equal protection) (citing *Boddie v. Conn.*, 401 U.S. 371 (1971) and *Kras v. United States*, 409 U.S. 434 (1973)); *Snyder v. Cook*, 688 P.2d 496, 498 (Utah 1984) (equal protection).

RESPONSE TO STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Defendants Harris, Frederickson, Booth, Winder, and Lofgreen[2] were, at all material times, law enforcement officers.

Response. Undisputed.

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

Response. Undisputed.

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

Response. Undisputed.

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.

Response. Undisputed.

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.

Response. Undisputed, speculative, and immaterial. Defendants have not asked nor has the Court required Plaintiffs to post a greater bond or otherwise acted to review, fix or adjust the required sum of $300 upon threat of dismissal without prejudice.

[2] On April 25, 2019, this Court granted, in part, Defendants' partial motion to dismiss Plaintiffs' First Amended Complaint, and dismissed defendants Winder and Lofgreen.

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.

Response. Undisputed, speculative and immaterial. Defendants have not asked nor has the Court required Plaintiffs to post a greater bond or otherwise acted to review, fix or adjust the required sum of $300 upon threat of dismissal without prejudice.

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

Response. Undisputed, speculative, self-serving and immaterial. Defendants have not asked nor has the Court required Plaintiffs to post a greater bond or otherwise acted to review, fix or adjust the required sum of $300 upon threat of dismissal without prejudice.

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ARGUMENT

I. PLAINTIFFS FAIL TO RAISE A JUSTICIABLE CLAIM.

Plaintiffs challenge Utah Code § 78B-3-104, claiming the statute is unconstitutional on its face and as applied.[3] Plaintiffs, however, possess neither standing nor a ripe case or controversy that warrants this Court's exercise of jurisdiction. Nowhere have Plaintiffs alleged, or by their statement of undisputed facts shown, that the bond statute will or has unduly burdened them. Plaintiffs also do not contend, nor have they shown, they are impecunious or aver they lack sufficient financial resources to post a bond or comply with the bond statute should this Court ever require it.[4] Instead, Plaintiffs assert that the bond statute places an undue and oppressive burden, *generally*, on persons injured by the actions of law enforcement and deprives those persons with limited financial resources access to the courts. Of consequence, however, here, Plaintiffs have not also shown whether or how *they* have been oppressed or unduly burdened by the bond statute, nor established in any material way they lack financial resources to bear the meager payment of $300 they long ago posted – without fanfare or protest – with the Clerk of Court. Instead, as the sole support for this partial motion for summary

[3] In their response to Defendants' motion to dismiss, Plaintiffs contended they were challenging the bond statute only on its face. Here, Plaintiffs challenge the statute facially and as applied. While Plaintiffs should be judicially estopped from switching course, it would be of no moment. But Plaintiffs' summary judgment motion fails under either analysis.

[4] Instead, both in their motion and through the Declaration of Calvin Ostler submitted as "evidence" in support, Plaintiffs maintain that although Plaintiffs have not been required to pay more than the de minimis sum of $300 in satisfaction of the bond statute, should the Court later call on them to post a higher amount, Plaintiffs assert they "may not be able or willing" to do so. *See* ECF No. 126, MSJ at 7; Ex. 5 to ECF No. 126-1, Ostler Decl. ¶ 5. Such a statement makes any harm caused to Plaintiffs both speculative and by Plaintiffs' own account, within their own willingness and control.

judgment Plaintiffs allege nonspecific stress and anxiety respecting action that has not taken place, and that is dubious will ever take place. Instead, and viewing the facts in the light most favorable to Defendants, *see* Fed. R. Civ. P. 56(c); *Kingsford v. Salt Lake City Sch. Dist.*, 247 F.3d 1123, 1127-28 (10th Cir. 2001), no justiciable controversy exists to invoke this Court's jurisdiction, consequently, this Court should deny Plaintiffs' motion for summary judgment and grant Defendants' previously filed motion asking this Court to dismiss, in its entirety and with prejudice, Plaintiffs' Third Cause of Action instead.

A. The Concern Over Justiciability.

As an Article III court, this Court's jurisdiction is limited to hearing "cases or controversies." *See Allen v. Wright*, 468 U.S. 737, 750 (1984). Interpreted by the Supreme Court and the Tenth Circuit Court of Appeals, this constitutional limitation "founded in the concern about the proper – and properly limited – role of the courts" requires courts to always determine whether a justiciable dispute actually exists. *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *accord People for the Ethical Treatment of Animals v. Rasmussen*, 298 F.3d 1198, 1202 (10th Cir. 2002). And because the question of justiciability implicates a court's jurisdiction, when, as here, a court is called on to grant summary judgment, the moving party bears the burden, but here has failed, to establish that no genuine issue of material facts exists as to justiciability. *Z.J. Gifts D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220, 1226 (10th Cir. 2002). But the undisputed record reveals the opposite. Plaintiffs have failed in their complaint and by their motion for summary judgment to show they possess either standing to maintain their claim, or a ripe controversy that warrants this Court's review. Instead, because the undisputed facts reveal that Plaintiffs have yet to sustain any injury as result of the bond statute, and that it is

skeptical they ever will, the twin justiciability doctrines of standing and ripeness necessarily bar the door.

B. Plaintiffs Lack Standing to Challenge the Constitutionality of the Bond Statute.

Foremost among the elements of a justiciable controversy is a plaintiff's standing to maintain suit. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Z.J. Gifts D-4*, 311 F.3d at 1226. To satisfy Article III, a plaintiff must show an injury in fact that is fairly traceable to the defendant's conduct and that an order from the court may redress. *Lujan*, 504 U.S. at 560. To show an "injury in fact" a plaintiff must establish the "invasion of a protected interest that is (a) concrete and particularized and (b) actual or imminent, i.e., not conjectural or hypothetical." *Essence, Inc. v. City of Fed. Heights*, 285 F.3d 1272, 1280 (10th Cir. 2002). Stated differently, to demonstrate here that Plaintiffs possess standing to challenge the bond statute, Plaintiffs must demonstrate harm that is traceable to the Defendants and must show that Plaintiffs have or will suffer a present and imminent injury; not the mere possibility of future harm. *Id.; see also Rector v. City & County of Denver*, 348 F.3d 935, 942-43 (10th Cir. 2003). They have not done so.

A party whose rights are not diminished in the face of a state statute lacks standing to proceed. And curiously, though Plaintiffs devote dozens of pages of argument to the proposition the bond statute violates myriad state and federal constitutional principles, Plaintiffs devote little space to establishing whether or how Plaintiffs have sustained an injury as result of those constitutional deprivations. Indeed, Plaintiffs at most and without analysis, only mention a speculative harm on pages 4-7 of Plaintiffs' motion. *See* ECF No. 126, MSJ, pp. 4-7 & generally. That lack is Plaintiffs' doom.

Constitutional harms of the type Plaintiffs have alleged here are far from self-evident. Instead, the undisputed record reveals that by their amended complaint Plaintiffs have challenged the constitutionality of Utah's bond statute by alleging, generally, the statute places an unreasonable and oppressive burden on persons injured by the wrongful acts of law enforcement by depriving persons with limited financial resources access to the courts. Amend. Compl. ¶ 80. And even when seeking now to convert those facially insufficient allegations into a cognizable claim, Plaintiffs have still not shown they lack sufficient resources to comply with the bond statute, nor that Defendants have called on Plaintiffs to post a higher amount than they payment of $300 as required by DUCivR 67-1. Even now on summary judgment, any harm Plaintiffs maintain they will suffer is speculative at best. Supported only by the sparse Declaration of Calvin Ostler, Plaintiffs' now aver they suffer generalized concern over what might occur should, later, this Court change course and fix the bond at a higher amount or should Defendants later ask the court to do so. Unspecified fear about a speculative future event is insufficient to satisfy Plaintiffs' burden as a matter of law.

The traditional rule of constitutional standing posits that one to whom a statute may be applied constitutionally lacks standing to challenge the statute on the basis it may conceivably harm another in a situation not then before the court. *See New York v. Ferber*, 458 U.S. 747, 768 (1982). Such a ruling, the United States Supreme Court has held, reflects the "'personal nature of constitutional rights'" and the "'precedential considerations of constitutional adjudication.'" *Id.* (quoting *McGowan v. Maryland*, 366 U.S. 420, 429 (1961) (internal citation omitted). Plaintiffs motion is at odds with that showing, or with any showing they have been deprived of a

constitutional right. Surely, Plaintiffs have expressed a veritable parade of constitutional horribles. In reality, however, Plaintiffs have shown none.

Further, and as a matter of Utah law, a constitutional question cannot exist in a vacuum; rather a valid question exists only when the person who raises it has standing to do so:

> A constitutional question does not arise merely because it is raised and a decision is sought thereon; rather, the constitutionality of a statute is to be considered in [] light of the standing of the one who seeks raise [it]. An attack on the validity of a statute cannot be made by parties whose interests have not been, and are not about to be, prejudiced by operation of the statute.

Hoyle v. Monson, 606 P.2d 240, 242-43 (Utah 1980) (declining to consider the constitutionality of a filing fee statute where plaintiffs were not impecunious and could not show how the statue denied them any rights). Despite now moving for summary judgment, in their statement of undisputed facts Plaintiffs have not even begun to make such a showing. At the outset of this matter – now more than one year ago - Plaintiffs paid into the Court the sum of $300 as required under the bond statute and directed by DUCivR 67-1(c).[5] Plaintiffs did not then claim or in either complaint contend nor in support of their motion for summary judgement now aver, that paying this sum has harmed them financially. Instead, Plaintiffs allege only a nonspecific concern of an unspecified future event. Because "it is not sufficient that, at some future time, an application of the [bond] statute might infringe upon the constitutional rights of differently situated persons," Plaintiffs have failed to carry their burden to establish they possess standing.

[5] That rule provides: "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." DUCivR. 67-1(c).

Id; see also Ferber, 458 U.S. at 758. Plaintiffs are therefore not entitled to summary judgment, rather their third cause of action must instead be dismissed for lack of a justiciable challenge.

C. Plaintiffs Have Not Alleged an Injury That Is Ripe for the Court's Review.

Contrasted with standing, "[r]ipeness is a justiciability doctrine designed to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract legal disagreements." *Nat'l Park Hospitality Ass'n v. Dept of Interior,* 588 U.S. 803, 807 (2003) (internal quotation marks omitted). But like standing, ripeness asks whether a challenged harm has been realized. Ripeness, therefore, focuses not on whether a plaintiff has, in fact, been harmed, but "whether the harm asserted has matured sufficiently to warrant judicial intervention." *Warth*, 422 U.S. at 499, n.10. Determining whether an issue is ripe requires the Court "to evaluate both the fitness of the issue[ ] . . . and the hardship to [Plaintiffs] of withholding consideration." *Abbott Labs v. Gardner*, 387 U.S. 136, 129 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977). Application of this standard, like standing, requires the Court to inquire "whether the case involves certain or contingent future events that may not occur as anticipated, or indeed may not occur at all." *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995). Ascertaining hardship, in turn, requires the Court to ask, "whether the challenged action creates a direct and immediate dilemma for the parties." *Id.* Clearly, here, the answer to is each inquiry is, "No."

Consistently, Plaintiffs have couched their third cause of action and motion for summary judgment in monetary terms, alleging that "access to money alone determines whether Plaintiffs in this action, and similarly situated plaintiffs in other actions, get into court at all." Amend. Compl. ¶¶ 84, 80. Plaintiffs, however, have not in turn alleged or shown an undue financial

burden, nor shown that Defendants or this Court have made any effort to trigger the review upon which Mr. Ostler's speculative future fear is based. *See* ECF No. 126-1, Exhibit 5, Ostler Decl., generally.

Absent any showing by Plaintiffs that Defendants or this Court may now, later, or ever seek to have the amount of the $300 bond increased as permitted by the bond statute, the Court may not speculate about a future controversy that may bring Plaintiffs' third cause of action into focus. Instead, taking any action in the face of a patently undeveloped controversy is the very event the doctrine of ripeness exists to forestall. Because Plaintiffs' alleged constitutional harms rest on the happening of contingent future events, action by this Court would be premature, and any decision would be solely advisory. *See Morgan v. McCotter*, 365 F.3d 882, 891 (10th Cir. 2004). The better course is for the Court to deny Plaintiff's motion for summary judgment as unsupported as a matter of law, and to grant Defendants' motion to dismiss Plaintiffs' bond statute claim, with prejudice.

II. THE BOND STATUTE IS CONSTITUTIONAL.

A. Introduction and Background.

Setting aside Plaintiffs' lack of standing and that they have not alleged any injury that is ripe for this Court's review, Plaintiffs' constitutional challenge nonetheless fails. A facial statutory challenge contends legislation is always unconstitutional, and void in all its applications. Facial challenges carry great consequences and are disfavored. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450-451 (2008) (stating reasons facial challenges must be disfavored).

But it is precisely due to the speculative, premature and anti-democratic nature of facial challenges, that the United States Supreme Court has placed a high burden on those wishing to bring one: To succeed in a facial attack, a plaintiff must establish "that no set of circumstances exists under which [the statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745; *see also Washington v. Glucksberg*, 521 U.S. 702, 739-40 (facial challenge must fail where statute has "plainly legitimate sweep.") Frustrating Plaintiffs' attempt to state a facial claim, the Utah Supreme Court in *Zamora v. Draper*, 635 P.2d 78 (Utah 1981), previously upheld the bond statute scheme under grounds similar to those raised by Plaintiffs here. Further vexing to Plaintiffs, when a federal court is called on to interpret state law, the court must endeavor to analyze the question as a state court would. *See United States v. DeGasso*, 369 F.3d 1139, 1145 (10th Cir. 2004). For this reason, among others, the Court should deny Plaintiffs' motion.

B. The Bond Statute Does Not Violate the Utah Open Courts Clause.

i. The bond statute is valid on its face.

Ruling directly on Open Courts grounds, and citing cases steeped in federal due process and equal protection, the Utah Supreme Court previously considered and affirmed the constitutionality of the prior bond statute, Utah Code § 78-11-10, which contained language that is substantially similar to the language at issue here. In *Zamora*, the Court first considered the statute's purpose – protecting law enforcement who serve an important public function from frivolous suits – then looked to the statute's face, and determined it withstood constitutional scrutiny. The Utah Court noted the bond statute armed courts with the means to conduct a preliminary inquiry to determine a) whether, as a matter of law, an action is connected to the defendant's duties as a police officer, and b) if so, whether the plaintiff is unable to furnish the

bond. *Zamora*, 635 P.2d at 81. As to the latter, the Court found it "significant that the statute itself allows some flexibility wherein it provides that the bond shall be 'in an amount fixed by the court . . .'" thus permitting a 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." *Id.*

By harmonizing the statute in this fashion, the Court found it constitutionally "affords all persons": (1) "equal justice under the law" (i.e., promotes equal protection)[6], (2) "access to the courts to serve that purpose" (i.e., secures open courts), and (3) a means to determine a "plaintiff's ability to furnish the bond" (i.e., provides due process). *Id.* at 82. Succinctly, the *Zamora* opinion's breadth blunts Plaintiffs' facial claim and defeats any reason for this Court to venture further there.

Plaintiffs acknowledge *Zamora* but they attempt to distinguish the case by alleging the bond statute at issue here is disparately different. A comparison of the plain language of each disproves that claim. A copy of Utah Code §§ 78-11-10 and 78B-3-104 are attached hereto as Exhibit A. Both statutes award attorney's fees to the prevailing party and require the posting of a bond to cover fees and costs in the event a peace officer prevails on the state law claims. *Compare* Utah Code § 78-11-10 (requiring a bond to cover "all costs and expenses that may be awarded against such plaintiff, including a reasonable attorney's fee to be fixed by the court") *with* Utah Code § 78B-3- 104(1)-(2) (requiring a bond to cover "all estimated costs and attorney fees the officer may be expected to incur in defending the action."). And both statutes require the

[6] The Utah Supreme Court reaffirmed *Zamora's* holding squarely on equal protection grounds three years later in *Snyder v. Cook*, 688 P.2d 496, 498 (Utah 1984).

court to set the amount of the bond; language the court in *Zamora* found gave courts the flexibility required by the constitution. *Compare* Utah Code § 78-11-10 (requiring "a written undertaking with at least two sufficient sureties in an amount to be fixed by the court") *with* Utah Code § 78B-3-104(1) (requiring "a bond [posted] in an amount determined by the court.") In the presence of these similarities, the Utah Supreme Court's decisions in *Zamora* – and later *Snyder* – are equally applicable to the statute at issue here. But whether the version in use when the Utah Court decided *Zamora,* or the version of the statute at issue here, the bond statute vests the trial courts with necessary flexibility to determine the amount of the bond to suit the needs of a particular plaintiff. *See Zamora,* 635 P.2d at 80-82. In doing so, the statute satisfies constitutional minima. It acts with equal force; it provides for, not forecloses access to justice; and it gives courts and litigants, alike, an opportunity for financial review.

ii. The bond statute does not abrogate any rights.

Even despite *Zamora's* dispositive holding, it is abundant the bond statute does not violate the open courts provision of the Utah Constitution because it does not abrogate any claim. "[T]he plain meaning of the [open courts clause]' is that it 'imposes some substantive limitation on the legislature's ability to abolish judicial remedies in a capricious fashion." *See Tindley v. Salt Lake City School Dist.*, 2005 UT 30, 13, 116 P.3d 295 (internal quotation and citation omitted). "Although the open courts clause protects both substantive and procedural rights, the clause is not an absolute guarantee of all substantive rights." *Id*., ¶ 17. "Rather, it applies only to legislation which abrogates a cause of action existing at the time of its enactment." *Id*. (internal quotation and citation omitted). Thus, only when a statute abrogates a claim that existed at the time it was enacted, must a court apply the analysis handed down by the Utah Supreme Court in

Berry by & through Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985); *see, e.g., Judd v. Drezga*, 2004 UT 91, ¶¶ 10-18, 103 P.3d 135, 139-141.

Absent abrogation of an existing law, "[t]he legislature thus remains free to abrogate or limit claims that could not have been brought under then-existing law." *Tindley*, 2005 UT 30, ¶¶ 17. The open courts clause applies only when legislation abrogates a cause of action that existed at the time of its enactment." *Id.* at ¶18. "Claims barred by the doctrine of governmental immunity are an example of this principle." *Id. See also DeBry v. Noble*, 889 P.2d 428, 435 (Utah 1995) ("the scope of the protections afforded by article I, section 11 [have] to be viewed in light of the immunities that were recognized when the Utah Constitution was adopted," including "governmental immunity."). To determine whether a statute abrogates a claim courts look to the law at the time of statehood. *See, e.g., Tindley*, 2005 UT 30, ¶¶ 9-26. At the time of Utah's statehood, public officials were shielded by immunity for acts involving the exercise of discretion. *Ross v. Schackel*, 920 P.2d 1159, 1162-66 (Utah 1996). Thus, when the bond statute was first passed in 1951, a plaintiff would not have had a claim against a police officer for the actions at issue here. There being no abrogation of a prior right of action, the bond statute satisfies *Berry* and the open courts clause. It should be upheld.

But even despite the fact the bond statute satisfies the first prong of *Berry* that examines whether a legal right has been abolished, the statute also satisfies the second part of the *Berry* test that holds a statute that abrogates a claim is acceptable if it (1) provides an injured person an effective and reasonable alternative remedy, or (2) seeks to eliminate a clear social or economic evil. *Berry*, 717 P.2d at 680. Here, Plaintiffs possess valid, adequate and alternative remedies by

way of the federal constitutional claims they filed without the need to post a bond whatsoever. Accordingly, even under *Berry* analysis, the bond statute satisfies the Utah Constitution.[7]

C. The Bond Statute Does Not Violate Due Process.

Plaintiffs also claim the bond statute violates substantive due process because it is not reasonably related to a proper legislative purpose but is arbitrary and capricious. When undertaking a substantive due process analysis under either Article I, Section 7 of the Utah Constitution or under the Fourteenth Amendment to the United States Constitution, courts apply a rational basis test unless the governmental action implicates a fundamental right or interest. *State v. Candedo*, 2010 UT 32, ¶ 16, 232 P.3d 1008, 1013-14. The right to bring a state law claim is not a fundamental,[8] thus a rational basis test applies. *Tindley*, 2005 UT 30, ¶ 29. Under a rational basis test a statute must be upheld if it is reasonably related to a proper legislative purpose and neither arbitrary nor discriminatory. *Id*.

i. The bond statute is reasonably related to a proper legislative purpose.

The bond statute is reasonably related to a proper legislative purpose. What is more, it is not the province of the courts to "rule on the wisdom of [a statute] or to determine whether the

[7] Seeking to avoid this outcome, Plaintiffs rely not on Utah law, but a decision from the Florida Supreme Court in *Psychiatric Assocs. v. Siegel*, 610 So. 2d 419 (Fla. 1992). Doing so, they ignore the teaching of *United States v. DeGasso*, 369 F.3d at 1145, that when a federal court is called on to interpret state law, the court must endeavor to analyze the question as a state court would. Further, Utah's own case law counsels that Utah court's "should rely on our own state history and precedent to determine the purpose and meaning of article I, section 11's protection." *Tindley*, 2005 UT 30, ¶ 16 ("the meaning of our open courts clause is not dependent upon another state's interpretation of a similar provision.")

[8] Pertinent here, Plaintiffs contend the bond statute intrudes upon their access to the court, which under federal law is a fundamental right. *See* ECF No. 126 pp. 27-30. But as set out above, Plaintiff's have nowhere shown how their access to justice or to any remedy afforded by filing their present suit has been – or will be – curtailed. Too, because this Court is bound to follow the teachings of *Zamora v. Draper*, this claim rings hollow.

[statute is] the optimal method for achieving the desired result." *Tindley*, 2005 UT 30, ¶ 32. "Rather, [a court's] inquiry is limited to the Act's constitutionality." *Id*. Further, Utah law directs that when reviewing the legitimacy of a legislative purpose, courts are not limited to considering only "those purposes that can be plainly shown to have been held by some or all legislators." *Ryan v. Gold Cross Servs., Inc*., 903 P.2d 423, 427 (Utah 1995) (internal quotation and citation omitted). "Rather, the court will sustain legislative action if it can reasonably conceive of facts which would justify the classifications made by the legislation." *Id.* ("we do not require exact proof of the legislative purposes; it is enough if a legitimate purpose can be reasonably imputed to the legislative body."). Relevant here, the Utah Supreme Court expressly recognized the purpose of the bond statute in *Zamora*:

> [P]eace officers are in an especially hazardous calling rendering a service essential to public safety and welfare. While it is the privilege of most of us to steer clear of situations where there is violence and danger, it is the sworn duty of peace officers to go into such situations. Without extenuating thereon, this exposes them to the possibility of becoming involved therein and of incurring animosities of those engaged in such troubles, with the consequent risks of lawsuits which may emanate therefrom.
>
> [W]e see nothing inherently unreasonable in the legislature viewing it as within the police power of the sovereign, in the interest of maintaining the peace and good order of society, to provide this measure of protection to that class of officers who are willing to undertake that hazardous responsibility.

Zamora, 635 P.2d at 80. The bond statute is an attorney's fees provision that awards fees to a prevailing party. To ensure the opportunity for law enforcement to recover fees if they prevail, and to discourage the pursuit of harassing or frivolous claims, the statute calls for the posting of a bond. That purpose being rationally related to a proper legislative purpose, the bond statute should be upheld and Plaintiffs' motion for summary judgment dismissed.

ii. The bond statute is not arbitrary or discriminatory.

Just as the bond statute is reasonably related to and furthers a proper legislative purpose, the statute is also not arbitrary or discriminatory, and Plaintiffs have not shown the contrary. Instead, Plaintiffs attempt to meet their burden by relying on readily distinguishable caselaw that concerns a bond statute, that, unlike Utah's, does not include a provision that allows the court to set the amount of the bond commensurate with the party's ability to pay. *See, e.g., Psychiatric Assocs*., 610 So. 2d at 424 (finding Florida statute that contained no provision permitting court the ability to weigh plaintiff's ability to post bond violated due process). But applicalbe instead, are decisions from courts in jurisdictions that have considered bond statutes similar to Utah's and that have found those similar statutes rationally related to a proper legislative purpose. *See Urrizaga v. Twin Falls County*, 106 Fed. Appx. 546, 549 (9th Cir. 2004) (upholding Idaho's bond statute that requires plaintiff to post bond when bringing state law claims against law enforcement officer); *see also Rhodes v. Superior Court*, 90 Cal. App. 3d 484, 489 (Cal. Ct. App. 1979) (finding constitutional statute permitting court to hold hearing to determine non-frivolous nature of suit and to set amount of the undertaking).

Dodging this accepted rationale, Plaintiffs claim the bond statute results in gross injustices because courts have dismissed - without hearing constitutional claims on the merits – cases in which a plaintiff has failed to post the required bond. (ECF No. 126, MSJ at 33). Plaintiffs' contention proves too much. But when a claim is dismissed for a plaintiff's failure to post a necessary bond, it is dismissed without prejudice. *See, e.g., Rippstein v. City of Provo*, 929 F.2d 576, 578 (10th Cir. 1991) ("the appropriate remedy for failure to make a timely filing of an undertaking under section 63–30–1916 is dismissal without prejudice"); *Mglej v. Garfield*

County, No. 2:13-CV-713, 2014 WL 2967605, at *2 (D. Utah July 1, 2014) ("Utah case law is clear that undertakings and bonds must be filed contemporaneously with the filing of the complaint" and that "failure to post an undertaking and bond necessitates dismissal without prejudice."). Indeed, even were Plaintiffs here faced with the possibility of dismissal – which they are not – Plaintiffs would possess leave to re-file their state law claims with the necessary bond.

Plaintiffs' claim that the bond statute vests the court with ability to engage in speculative and arbitrary guesswork is also unfounded. But under DUCiv R. 67-1(c), this Court set and has not subsequently altered, the amount of Plaintiffs' bond at $300. "If [an] act operates equally and affords freedom from arbitrary action it satisfies the requirements of substantive due process." *Mineer v. Bd. of Review of Indus. Comm'n*, 572 P.2d 1364, 1366 (Utah 1977).[9]

D. The Bond Statute Does Not Violate Equal Protection.

Finally, Plaintiffs claim the bond statute violates the equal protection clauses of the Utah and United States Constitutions by discriminating against people who sue law enforcement. In Utah, when a party challenges a statute on the grounds it creates improper classification, the party must show the statute creates classifications that are discriminatory. *DIRECTV v. Utah State Tax Comm'n*, 2015 UT 93, ¶ 49, 364 P.3d 1036, 1050 ("Under our governing standard, we ask (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.") (internal quotation and citation omitted). If a

[9] In this respect, Plaintiffs' gratuitous attack on DUCivR 67-1(c) is particularly confounding. What is more, Rule 67-1(c)'s facially regularity and predictability satisfies the needs of procedural due process and is thus also not an unconstitutional taking.

discriminatory classification can be shown, the plaintiff then bears the burden to show the legislature had no reasonable objective that warrants the discriminatory classification. *Id*. The level of scrutiny, in turn, is determined by the classification at issue. *Id.* at ¶ 50.

Here, Plaintiffs cannot satisfy this burden because the bond statute creates no discriminatory classification. But any classifications created by the statute satisfies both rational basis level review and a heightened level of scrutiny.

i. The bond statute does not create discriminatory classifications.

The bond statute creates no discriminatory classifications. Presented with a constitutional challenged under the Utah Constitution's uniform operation of laws provision, a court must first determine what classification is made by the statutory provision. *Gallivan v. Walker*, 2002 UT 89, ¶¶ 43-44, 54 P.3d 1069, 1086. The classification created by a statute "is, the class of persons to which the statutory provision applies." *Id*. Here, the bond statute applies to individuals that bring state law claims against law enforcement. A statute is not unconstitutional merely because it creates a classification of people subject to the statute. *Id*. at ¶ 38 (recognizing the legislature has "discretion in the creation of classes to which legislation applies"). The relevant constitutional inquiry, therefore, looks to whether the classification created by the statute "operate[s] equally on all persons similarly situated." *Id*. Here, that objective is satisfied, and the bond operates equally to all persons similarly situated. Namely, all persons that bring state law claims against law enforcement must post a bond if they have funds sufficient to do so. *See, e.g.*, Utah Code § 78B-3-104.

In disregard of those principles, Plaintiffs claim the bond statute contains a discriminatory classification because other plaintiffs are not subject to the same requirement.

That contention falls under the scrutiny of Utah law. But in Utah, individuals that bring state law claims against parties other than law enforcement are simply not similarly situated to persons who sue law enforcement, instead. *See, e.g., Ross*, 920 P.2d at 1166-68 (statute that precluded claims against prison doctors did not violate uniform operation of laws because prisoner medical patients are not similarly situated to other patients); *Bradshaw v. Wilkinson Water Co.*, 2004 UT 38, ¶¶ 15-19, 94 P.3d 242, 246 (developer is not similarly situated to individual consumer for purpose of equal protection challenge to water connections fees); *State v. Honie*, 2002 UT 4, ¶ 21, 39 57 P.3d 977, 984-85 (persons charged with felony murder are not similarly situated to persons charged with aggravated murder because the elements of the crimes were different); *Roberts*, 2015 UT 24, ¶¶ 41-43 (individuals that view, possess, or distribute child pornography are not similarly situated to law enforcement officers and employees of certain organizations that view, possess or distribute child pornography within the scope of their employment). Classifications of the type here afforded to law enforcement, are neither novel nor new. But the Governmental Immunity Act and Utah's common law afford law enforcement defenses to state law claims that are not available to other defendants. The bond statute is in keeping with that tradition. It is constitutional and should be upheld.

ii. Any classification created by the bond statute satisfies rational basis review.

To the extent the bond statute creates a discriminatory classification it is subject only to rationale basis review. But "[m]ost classifications are presumptively permissible and thus subject to rational basis review." *In re Adoption of J.S.*, 2014 UT 51, ¶ 68, 358 P.3d 1009, 1026. Only suspect classifications or classifications that implicate fundamental rights or rights protected by the open courts clause are reviewed under "heightened scrutiny." *Tindley*, 2005 UT 30, ¶ 28.

Persons seeking to sue law enforcement are not a suspect class.[10] Likewise, there exists no fundamental right to sue law enforcement. *Tindley*, 2005 UT 30, ¶ 29 ("[t]he right to sue in tort a governmental entity engaging in a governmental function does not qualify as such a fundamental right."). Further, because – as set out in Point II.B., above - enactment of the bond statute neither abrogated a vested right, nor was protected or permitted at common law, the Utah open courts provision is not implicated. Consequently, when it is established that a statute does not violate the open courts provision, "heightened scrutiny" does not apply. *See, e.g.*, *Tindley*, 2005 UT 30, ¶¶ 27-30; *Ross*, 920 P.2d at 1162-68. Thus, to the extent this Court even reaches it, Plaintiff's contentions are subject only to rational basis review.

In Utah "a statute is constitutional if its classification is 'a reasonable one and bears a reasonable relationship to the achievement of a legitimate legislative purpose.'" *Tindley*, 2005 UT 30, ¶ 33. In *Zamora*, the Utah Supreme Court recognized the prior bond statute was reasonably related to the legitimate legislative purpose of reducing frivolous and harassing claims against law enforcement. *Zamora*, 635 P.2d at 80 (finding that due to the nature of police work, officers are at greater risk of being subject to litigation and holding there is nothing inherently unreasonable in the legislature affording officers extra protection from frivolous or vexatious suits); *Snyder*, 688 P.2d at 498 ("In *Zamora* this Court held that the statute requiring an undertaking was constitutional and served the public interest").

Attempting to distance themselves from the Utah Supreme Court's decision in *Zamora*, Plaintiffs contend that court did not engage in an equal protection analysis. That contention,

[10] And to extent Plaintiffs' equal protection claim remains grounded in the Amended Complaints focus on the bond statute's impact on person without financial means, the United States Supreme Court has held that poverty is not a suspect class.

however, falls flat. But in *Zamora* the Utah court specifically found it was reasonable for the legislature to provide an extra measure of protection to "that class of officers who are willing to undertake" the "hazardous responsibility" of enforcement of the laws. *Zamora*, 635 P.2d at 80. And later, in *Snyder*, the Utah Supreme Court directly rejected a claim the bond statute violated equal protection of the laws. *Snyder*, 688 P.2d at 498 ("[P]laintiffs' argument that they were denied equal protection is without merit."). Finally, to the extent Plaintiffs' equal protection claim is grounded in Utah law, this Court must view that claim as the Utah Supreme Court would. And to that end, Plaintiffs' lengthy resort from decisions by other state courts is unavailing and should be ignored. The Utah Supreme Court has affirmed the prior bond statute on equal protection grounds, so too should this Court.

iii. Any classification created by the bond statute satisfies heightened scrutiny.

Any classifications created by the bond statute also satisfies a heightened level of scrutiny. A discriminatory classification is constitutionally permissible under a heightened level of scrutiny where it "(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 (internal quotation and citation omitted). In *Judd*, the Utah Supreme Court found legislation that capped the damages that a plaintiff may recover in a medical malpractice action was constitutional. *Id*., ¶¶ 10-40. The court concluded the legislature's policy choice to cap damages in medical malpractice cases in order to reduce medical malpractice premiums and drive down health care costs was legitimate, that the measures chosen were a reasonably necessary means of achieving that purpose, and that it actually and substantially furthered that purpose. *Id*., ¶¶ 19-29.

In reaching that conclusion the court noted "we do not proceed in our analysis under article I, section 24 as if we were called upon to answer these questions in the first instance. . . . Instead, we carry out our role as the state's court of last resort, called upon to identify the boundaries of the constitution, giving appropriate deference to the policy choices of the citizens' elected representatives." *Id*. at ¶ 22.

Deterring frivolous suits against law enforcement – a class of governmental employees tasked with both dangerous work and with "incurring animosities" by decisions that some may see as unpopular decisions – by requiring the posting of a bond satisfies the rigors of Utah law. It is reasonable, has more than a speculative tendency to further a legislative objective, and is reasonably necessary to further a legitimate legislative goal. By requiring individuals with sufficient resources to pay a bond to cover attorney's fees that law enforcement may later be entitled to receive if he or she prevails on state law claims serves a reasonable state goal, and also provides a necessary means of ensuring law enforcement actually recover at least some of the attorney's fees he or she is entitled receive.

Finally, though each may be stated differently, both the Utah and U.S. Constitutions "incorporate the [b]asic principles of equal protection." *Gallivan*, 2002 UT 89, ¶ 32. And while each share fundamental principles, the Utah Supreme Court has remarked that Utah's uniform of operation of the laws clause may, at times, be more rigorous than its federal counterpart. *Id.* Thus, to the extent it satisfies Utah law, the bond statute necessarily passes muster under the federal Equal Protection Clause. Plaintiffs have not overcome this showing and their motion for summary judgement should be denied.

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CONCLUSION

For the reasons and arguments set forth above, Defendants respectfully request this Court find Plaintiffs' motion fails for its wholesale lack of a justiciable controversy. Because Plaintiffs possess neither standing nor a ripe claim to press, this Court similarly possess no jurisdiction to proceed. Plaintiffs' motion should be denied out of hand. Even should this Court find a means to move on, Plaintiffs' claims in this Court must fail for the same reason they would fail in state court. Being foreclosed by the Utah Supreme Court's decision in *Zamora v. Draper*, Plaintiffs should take nothing by this motion, but the Court should dismiss their Third Cause of Action as moved for by Defendants' partial motion to dismiss instead.

Respectfully submitted this 7th day of May, 2019.

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CERTIFICATE OF SERVICE

I certify that on May 7, 2019, a true and correct copy of the foregoing **DEFENDANTS' OPPOSITION TO PLAINTIFFS' PARTIAL MOTION FOR SUMMARY JUDGMENT** was electronically filed with the Clerk of the Court, utilizing the Court's CM/ECF electronic filing system.

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