Ross C. Anderson (#0109)
Walter M. Mason (#16891)
LAW OFFICES OF ROCKY ANDERSON
The Judge Building
Eight East Broadway, Suite 450
Salt Lake City, Utah 84111
Telephone: (801) 349-1690
Fax: (801) 349-1682
rocky@andersonlawoffices.org
walter@andersonlawoffices.org

Attorneys for Plaintiffs

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, 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.

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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

Judge Bruce S. Jenkins

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutional Provisions

Rules

Other Authorities

INTRODUCTION

Utah Code § 78B-3-104(1) and (2) (the "Bond Statute") requires one unfortunate, differentiated class of plaintiffs—those suing law enforcement officers—to post a bond before filing a complaint in "an amount determined by the court" that "*shall* cover *all* estimated costs and attorney fees the officer may be expected to incur in defending the action . . . ." (Emphasis added.) On its face, that discriminatory treatment of a narrow class of plaintiffs is blatantly arbitrary, failing to survive any level of scrutiny, because (1) the discriminatory bond requirement bears no rational relationship to deterring frivolous lawsuits because it is "both overinclusive and underinclusive;" (2) there is no procedure for obtaining a court's determination of the estimated costs and fees, particularly *before* a complaint is filed; (3) any estimate of the costs and fees would be grossly speculative; (4) the Bond Statute does not allow for a due process hearing to assess, among other things, the merits or frivolousness of the claims; and (5) a statute of general application, Utah Code § 78B-5-825, provides a non-discriminatory sanction for the filing of *all* frivolous lawsuits.

Revealing the State of Utah's view regarding the unconstitutionality of the Bond Statute, the Office of the Utah Attorney General offers, and previously offered, no defense of that statute's constitutionality.[1]

Defendants assert that Plaintiffs lack standing and their claims are not ripe, while ignoring and obfuscating the facts that (i) Plaintiffs are threatened with dismissal of state law claims for failure to comply with the Bond Statute and because the Court has not determined the amount of "all estimated costs and attorney fees the [defendant law enforcement] officer[s] may be expected to incur in defending the action," (ii) Plaintiffs faced, and continue to face, discriminatory procedural hurdles, burdens, conditions, and chilling restrictions not faced by *any* other class of plaintiffs, and (iii) Plaintiffs have been subject to the concrete, discriminatory burden of posting a bond in the amount of $300 in order to commence this action.[2]

[1] In response to a separate challenge to the Bond Statute and Utah Code § 63G-7-601 (the "Undertaking Statute"), the Office of the Utah Attorney General defended the Undertaking Statute but not the Bond Statute. *See* State of Utah's Brief on Constitutionality of Utah Code Section 63G-7-601, June 8, 2016, *Kendall v. Olsen*, Utah Court of Appeals No. 20150927.

[2] The $300 bond is provided for by DUCivR 67-1(c), which ignores and violates the requirement of the Bond Statute that the Court is to determine the amount of the bond and that the amount "shall cover all estimated costs and attorney fees the officer may be expected to incur . . . ." The local rule, which has likely been applied only to the Undertaking Statute until the commencement of this case, may be in compliance with the Undertaking Statute, but clearly is *not* in compliance with the Bond Statute.

Defendants also, without authority, erroneously argue Plaintiffs are estopped from asserting an as-applied challenge.[3]

In arguing that the Bond Statute is constitutional, Defendants rely on *Zamora v. Draper*, 635 P.2d 78 (Utah 1981), even though (i) that case is entitled to no deference regarding claims that the Bond Statute violates the U.S. Constitution, and (ii) *Zamora* addressed a materially *different* statute than the Bond Statute.

Consistently throughout their argument, Defendants ignore the constitutionally problematic language of the Bond Statute. The Court cannot ignore or rewrite the text of the statute at issue here, as Defendants apparently ask it to do. The Bond Statute's requirements are unambiguous, discriminatory, and arbitrary. Therefore, the Court should grant Plaintiffs' Motion for Partial Summary Judgment [ECF 126].

[3] Defendants' Opposition [ECF 150], at 9 n.3. The applicability of the doctrine of equitable estoppel depends on a party taking "clearly inconsistent" positions, which Plaintiffs have not done. *Liberty Mut. Fire Ins. Co. v. Woolman*, 913 F.3d 977, 990 (10th Cir. 2019) (citations omitted).

ARGUMENT

I. Plaintiffs Have Standing to Challenge the Constitutionality of the Bond Statute Because (1) Plaintiffs Are Subject to the Bond Statute's Requirements, Which Have Not Been Met, and (2) Plaintiffs Have Suffered the Concrete Deprivation of $300 as a Result of the Bond Statute.

Defendants ignore the Bond Statute's mandatory language: The court must determine the amount of the bond in each case and "[t]he bond *shall* cover all estimated costs and attorney fees the officer may be expected to incur in defending the action . . . ." Utah Code § 78B-3-104(1) and (2) (emphasis added). *Nothing* is left for anyone's discretion, nor can this Court's local rule, DUCivR 67-1(c), alter the mandate of the Bond Statute by setting a general requirement of a $300 bond, without a determination by the Court in each instance of the estimated costs and fees to be incurred by each law enforcement officer defendant. A plaintiff *must* post the bond in the amount *determined by the court* in each particular case to "cover all estimated costs and attorney fees the officer may be expected to incur in defending the action;" otherwise, (s)he "may not file an action against a law enforcement officer." § 78B-3-104(1).

Here, there has not been, and there could not be, a "determination" by a court that a bond in the amount of $300 "cover[s] all estimated costs and attorney fees" the law enforcement officer Defendants may be expected to incur. In fact, there has

not been *any* determination by any court of estimated costs or attorney fees, in direct contravention of the oppressive and discriminatory terms of § 78B-3-104(2). Because the bond filed by Plaintiffs does not comport with the Bond Statute, and because the Court has not made any determination regarding the estimated costs and attorney fees the defendant law enforcement officers may be expected to incur in defending this action, Plaintiffs' state constitutional claims are—and, from the outset, have been—subject to dismissal.

Defendants falsely assert that the Bond Statute's mandate applies only if the Court or Defendants "seek to have the amount of the $300 bond increased as *permitted* by the bond statute, . . ." Defendants' Opposition [ECF 150], at 15 (emphasis added). Defendants are describing a very different statute than the Bond Statute challenged here. Instead, Defendants appear to be imagining a statute like that at issue in *Rhodes v. Superior Court*, 90 Cal. App. 3d 484, 487 (1979), upon which Defendants rely. In *Rhodes*, the court addressed a statute providing that "*On motion of any party*, a court shall require a private plaintiff to post a bond in a *reasonable* amount at any stage of the litigation to guarantee payment of costs." *Id.* (citation omitted) (emphasis added). The very different requirements of the Utah Bond Statute, however, (1) are not triggered by motion, but instead *must* be met by plaintiffs regardless of what defendants do or do not do and (2) do not allow the

Court to set a *reasonable* amount, but instead mandate that "[t]he bond *shall* cover *all estimated costs and attorney fees* . . . ." Utah Code § 78B-3-104(2) (emphasis added).

Defendants are not allowed to dodge the obvious facial constitutional defects of the Bond Statute by choosing to refrain from insisting that the Court comply with the requirement of the statute that the Court make a determination of "all estimated costs and attorney fees" defendant law enforcement officers "may be expected to incur in defending the action."

The doctrine of standing does not require the danger faced by plaintiffs to actually occur, particularly when the defendants manipulate the situation in an effort to elude a determination that a statute is unconstitutional. Otherwise, school officials could avoid a determination as to the constitutionality of a statute mandating racial segregation by simply saying they have no intention of seeking compliance with it.

Plaintiffs have standing because their state law claims are subject to dismissal for failure to comply with the Bond Statute's requirements, regardless of what the defendants might do or refrain from doing. Plaintiffs need not "await the consummation of threatened injury to obtain preventive relief." *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 143 (1974) (citations omitted); *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 759 (10th Cir. 2010). "It is sufficient

for standing purposes that the plaintiff intends to engage in 'a course of conduct arguably affected with a constitutional interest' and that there is a credible threat that the challenged provision will be invoked against the plaintiff." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1154–55 (9th Cir. 2000) (quoting *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979)). That discriminatory threat has hung over Plaintiffs since before they commenced this action. Defendants cannot self-servingly undermine Plaintiffs' standing by stating they "have no intention"[4] of insisting upon compliance with the Bond Statute, which, by its clear language, mandates compliance by *plaintiffs* at the time, or before, they filed their complaint and is not conditioned upon "enforcement" or a "motion" by Defendants.

Defendants have incorrectly asserted that Plaintiffs posted a $300 bond payment "without fanfare or protest." Defendants' Opposition [ECF 150], at 9. To the contrary, Plaintiffs stated as follows in their Complaints:

> Under protest, and vigorously asserting the inapplicability or the unconstitutionality of the Bond and Undertaking Requirements . . . Plaintiffs have deposited with the Clerk of the Court . . . $300 for the Bond . . . .

Complaint [ECF 2], at 5 ¶ 17; Plaintiffs' First Amended Complaint [ECF 59], at 6 ¶ 18. Defendants have wholly ignored the fact that Plaintiffs, to be able to pursue this

[4] Defendants' Opposition [ECF 150], at 6.

action, have *already* been, and continue to be, deprived of $300 during the pendency of this lawsuit. That alone is sufficient for Plaintiffs to have standing to challenge the Bond Statute and creates a ripe controversy.[5] "It is immaterial that a [party] can afford to be deprived of his property . . . ." *Brooks v. Small Claims Court*, 504 P.2d 1249, 1255 (Cal. 1973) (in bank). A "temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment, and . . . must be preceded by a fair hearing." *Beaudreau v. Superior Court*, 535 P.2d 713, 719 (Cal. 1975) (citation and internal quotation marks omitted).

II. Plaintiffs' Challenge to the Constitutionality of the Bond Statute Is Ripe Because All Factual Issues Are Developed, Only Legal Issues Remain, and Plaintiffs Were Required to Comply with the Bond Statute Before They Filed Their Complaint.

"In determining whether a claim is ripe, a court must look at '[1] the *fitness* of the issue for judicial resolution and [2] the *hardship* to the parties of withholding judicial consideration.' " *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1237 (10th Cir. 2004) (emphasis and alterations in original) (quoting *United States v. Wilson*, 244 F.3d 1208, 1213 (10th Cir. 2001)).

[5] *Hoyle v. Monson*, 606 P.2d 240 (Utah 1980), relied upon by Defendants, is irrelevant, as explained in Plaintiffs' Memorandum in Opposition to Defendants' Partial Motion to Dismiss [ECF 104 at 31], at 25.

A. The Factual Issues Underpinning Plaintiffs' Facial and As-Applied Challenges Are Fully Developed, Thus the Claims Are Fit for Judicial Resolution.

> Under the first prong of the ripeness inquiry—fitness for judicial resolution—the court must determine whether the matter involves uncertain events which may not happen at all, and *whether the issues involved are based on legal questions* or factual ones. If there are factual issues that need further development, the matter may not be fit for resolution. Fitness for judicial resolution may depend upon whether it is "purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final."

Id. at 1237 (emphasis added) (citations omitted).

Here, there are no factual issues that need further development. First, as to Plaintiffs' as-applied challenge, it is undisputed that the Bond Statute's requirements apply to Plaintiffs.[6] It is also undisputed that Plaintiffs were subjected to the procedural and financial burden of being deprived of $300 for the pendency of this action.[7] All that remain are *legal questions* about the application and constitutionality of the Bond Statute.

[6] Defendants' Opposition [ECF 150], at 7 (undisputed that several of the Defendants are law enforcement officers).

[7] *Id.* (undisputed that Plaintiffs tendered $300 to the clerk of the Court pursuant to the Bond Statute).

Second, as to Plaintiffs' *facial* challenge, there are no factual issues that need to be developed. "[A] purely legal claim in the context of a facial challenge . . . is 'presumptively reviewable.' " *National Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1282 (D.C. Cir. 2005) (citation omitted); *see also Stern v. U.S. Dist. Court for Dist. of Mass.*, 214 F.3d 4, 10 (1st Cir. 2000) (concluding that question whether the federal court has the power to incorporate a state bar ethical rule into the court's local rules was ripe for review and stating "[t]he issue presented can be finally resolved by declaratory judgment, its contours are sharply defined, and additional facts will not affect its resolution."); *U.S. v. Supreme Court of New Mexico*, 980 F. Supp. 2d 1334, 1340–41 (D.N.M. 2013).

B. The Parties Face a Direct and Immediate Dilemma Regarding the Application, Effect, and Constitutionality of the Bond Statute.

"Under the second prong of the ripeness inquiry—the potential hardship of withholding judicial resolution—we examine 'whether the challenged action creates a direct and immediate dilemma for the parties.' " *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d at 1237.

In this case, the dispositive facts relating to Plaintiffs' as-applied challenge are presently occurring or have already occurred: Plaintiffs (1) were subjected to the burdens of filing a bond; (2) have been subjected to the ongoing deprivation of the

use of $300; and (3) face, and have faced, the possibility of dismissal because the bond posted does not comply with the Bond Statute and the Court did not make the statutorily required determination of the estimated fees and costs to be incurred. With respect to Plaintiffs' facial challenge, Plaintiffs were—in the past—required to comply, as of the time of filing their Complaint, with the terms of the Bond Statute and the Court was required to determine the amount of the bond.

III. The Bond Statute's Requirements Violate Procedural Due Process.

Defendants entirely ignore, and thus concede, Plaintiffs' argument regarding procedural due process. *See* Plaintiffs' Motion [ECF 126], at 44–47.

IV. The Bond Statute's Requirement That the Bond "Shall Cover All Costs and Attorney Fees" Violates Substantive Due Process Because It Denies Courts the Constitutionally Necessary Flexibility in Setting the Bond Amount.

A. *Zamora* Is Inapposite Because the Bond Statute Is Materially Different Than the Statute Analyzed in *Zamora*.

Defendants misrepresent the Bond Statute and the predecessor statute, Utah Code § 78-11-10 (repealed),[8] which was analyzed in *Zamora*, 635 P.2d at 80–82. The predecessor statute did not contain *any* requirement about the *amount* of the bond. Instead, the courts were to determine the amount, with the discretion to take

[8] The full text of Utah Code § 78-11-10, which was analyzed in *Zamora* and subsequently repealed, is available at https://law.justia.com/codes/utah/2006/title78/78_0f011.html.

into account the parties' circumstances. In repealing the predecessor statute and enacting the Bond Statute, the Utah Legislature stripped the courts of that discretion and added a new, inflexible mandate: "The bond *shall* cover *all estimated costs and attorney fees* the officer may be expected to incur . . . ." Utah Code § 78B-3-104(2) (emphasis added).[9] Defendants ignore the requirement of the Bond Statute and, at odds with its text, contend that the Bond Statute is satisfied by the posting of a bond in the amount of $300. Defendants' Opposition [ECF 150], at 13 ("Plaintiffs paid into the Court the sum of $300 as required under the bond statute . . . .").

Defendants also deliberately add their own question-begging words to misrepresent Utah Code § 78-11-10 (repealed) by describing it as "***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.'" Defendants' Opposition [ECF

[9] H.B. 78 (2008) expressly "repeal[ed]" Utah Code § 78-11-10, the statute construed in *Zamora*. It also expressly "enact[ed]" entirely new legislation, the current Bond Statute, which removes any of the discretion found in *Zamora* to rescue the earlier statute from unconstitutionality. H.B. 78 Enrolled, "Title 78 Recodification and Revision" (2008 General Session, State of Utah), http://le.utah.gov/~2008/bills/hbillenr/ HB0078.pdf, at 1412 (repeal of § 78-11-10) and 895 (enactment of § 78B-3-104).

The sponsor of the current Bond Statute, Jackie Biskupski, was employed by the Salt Lake County Sheriff's Office (Leigh Dethman, "Biskupski takes job at the sheriff's office," *Deseret News*, June 5, 2007, http://deseretnews.com/article/660226823/ Biskupski-takes-job-atthe-sheriffs-office.html?pg=all).

150], at 17. That statute contains *no such requirement*. Rather, Utah Code § 78-11-10 (repealed) stated, with respect to the amount of the bond, only that the amount is "to be fixed by the court . . . ."

Defendants' misrepresentations of Utah Code § 78-11-10 (repealed) and the Bond Statute, to make it appear as if those statutes have the same meaning, despite their manifestly different terms, defies all applicable principles of statutory construction. "There is a general presumption that 'when [the Legislature] alters the words of a statute, it must intend to change the statute's meaning.' " *Judkins v. Jenkins*, 996 F. Supp. 2d 1155, 1163–64 (D. Utah 2014) (alteration in original) (quoting *United States v. Wilson*, 503 U.S. 329, 336 (1992)). In the case of the Bond Statute, the Utah Legislature unequivocally said: "The bond *shall* cover all estimated costs and attorney fees the officer may be expected to incur . . . ." Utah Code § 78B-3-104(2) (emphasis added).

Defendants falsely contend "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." Defendants' Opposition [ECF 150], at 18. No such flexibility is provided by the current Bond Statute. If the Court fixes the bond in an amount that *does not* "cover all estimated costs and attorney fees," then the Court is not complying with the statute. Similarly, a bond set at $300 pursuant to DUCivR 67-

1(c), without a determination by the Court that $300 is the estimate of all costs and attorney fees the defendant officer is likely to incur, does not comport with the unequivocal mandate of the Bond Statute. Accordingly, even under *Zamora*, the Bond Statute lacks the flexibility necessary to avoid violating plaintiffs' constitutional rights. *Zamora*, 635 P.2d at 81 ("[I]t is significant 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 . . . .").

Further, Defendants misrepresent the weight of *Zamora*, stating "[t]his Court is bound by that authority . . . ." Defendants' Opposition [ECF 150], at 6, 20 n.8 (" . . . this Court is bound to follow the teachings of *Zamora v. Draper* . . ."). To the contrary, *Zamora* is *not* binding on this Court because (1) *Zamora* addressed a materially different statute and (2) this Court is to give no deference to the Utah Supreme Court on interpretations of the United States Constitution. *See, e.g., United States v. Madden*, 682 F.3d 920, 927 (10th Cir. 2012); *First Am. Title Co. v. Devaugh*, 480 F.3d 438, 455 (6th Cir. 2007) ("A state court's opinion on an issue of federal law . . . is entitled to no deference whatsoever.").

B. The Bond Statute Cannot Survive Even Minimal Scrutiny Because the Bond Requirement Bears No Rational Relationship to Deterring Frivolous Suits.

Defendants do not contest that access to the courts is a fundamental right under federal law. *See* Defendants' Opposition [ECF 150], at 20 n.8. Instead, they claim that right is not at issue because Plaintiffs overcame the barriers facing them and are now before the Court. *Id.* Defendants are incorrect because heightened scrutiny applies, as here, when a fundamental right is *burdened*, not only where a right is abrogated. "If a legislative enactment *burdens* a fundamental right, the infringement must be narrowly tailored to serve a compelling government interest." *Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1181 (10th Cir. 2009) (citation omitted) (emphasis added).

Under any level of scrutiny, however, the Bond Statute fails. To argue that the Bond Statute is not arbitrary, Defendants rely on two cases they say "considered bond statutes similar to Utah's" and "found those similar statutes rationally related to a proper legislative purpose." Defendants' Opposition [ECF 150], at 22.

First, they cite *Urrizaga v. Twin Falls County*, 106 Fed. App'x 546, 549 (9th Cir. 2004) (unpublished). That case, "analyzing" the constitutional issues in three sentences, relied on irrelevant authorities addressing non-discriminatory fees of *general application* challenged on constitutional grounds because they did not allow

an exception for impecunious parties. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 123 (1996); *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973). Further, the statute at issue in *Urrizaga* was not like the Bond Statute, but rather was nearly identical to the statute at issue in *Zamora*. *See* Idaho Code § 6-610.

Second, Defendants cite *Rhodes v. Superior Court*, 90 Cal. App. 3d 484, 489 (Cal Ct. App. 1979), which addressed a statute that read as follows: "On motion of any party, a court shall require a private plaintiff to post a bond in a *reasonable amount* at any stage of the litigation to guarantee payment of costs." *Id.* at 487 (emphasis added). The court in *Rhodes* found "a reasonable construction of [the statute] is that it provides for a hearing at which the trial court may make a determination, upon suitable presentation by the parties, of the probable merit of the lawsuit, and will set the amount of the undertaking to take into account both the reasonable costs to the defendant of the lawsuit and the probability that the lawsuit will be successful." *Id.* at 489. That statute has no resemblance to the Bond Statute.

Cases containing any substantial analysis reflect that a bond requirement is not rationally related to deterring frivolous suits. *See, e.g., Lindsey v. Normet*, 405 U.S. 56, 78 (1972) (statute requiring that appellant obtain two sureties was not likely to prevent frivolous lawsuits "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."); *Patrick v. Lynden Transp., Inc.*, 765 P.2d 1375, 1380 (Alaska 1988) (invalidating bond statute on equal protection grounds because "bond requirement for only nonresident plaintiffs is not sufficiently related to the purpose of providing security for cost and attorney fee awards to defendants"); *Eastin v. Broomfield*, 570 P.2d 744 (Ariz. 1977) (finding bond violated state constitutional privileges and immunities clause); *New v. Arizona Board of Regents*, 618 P.2d 238 (Ariz. Ct. App. 1980) (same); *Psychiatric Associates v. Siegel*, 610 So. 2d 419, 425 (Fla. 1992) (" '[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." (citations omitted)); *Detraz v. Fontana*, 416 So. 2d 1291, 1296–97 (La. 1982); *Sheffield v. State*, 92 Wash. 2d 807, 601 P.2d 163 (1979).

V. The Bond Statute's Facial Discrimination Violates Equal Protection.

"[H]eightened scrutiny" is to be applied to challenges under article I, section 24 "when reviewing legislation that '*implicates*' rights under article I, section 11." *Judd v. Drezga*, 2004 UT 91, ¶ 30, 103 P.3d 135 (citations omitted) (emphasis added). Therefore, Defendants are incorrect in asserting that "when it is established

that a statute *does not violate* the open courts provision, 'heightened scrutiny' does not apply." Defendants' Opposition [ECF 150], at 26 (emphasis added).

The Bond Statute fails heightened scrutiny because it is neither narrowly tailored to advance a compelling state interest nor reasonably necessary to further a legitimate legislative goal. *See Riddle v. Hickenlooper*, 742 F.3d 922, 928 (10th Cir. 2014); *Judd*, 2004 UT 91, ¶ 19. Defendants have provided no evidence that law enforcement defendants are subject to more frivolous litigation than other defendants, or that the Bond Statute deters frivolous suits. *See Detraz v. Fontana*, 416 So. 2d 1291, 1296–97 (La. 1982) (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.").

Indeed, a statute of general application, Utah Code § 78B-5-825, protects *all* defendants against the filing of frivolous lawsuits. The Bond Statute is "both overinclusive and underinclusive" in that it (1) burdens access to courts for people with meritorious claims who cannot put at risk substantial sums of money to obtain justice and (2) allows frivolous claims to be brought by the wealthy. *See Patrick v. Lynden Transport, Inc.*, 765 P.2d 1375, 1379 (Alaska 1988); Plaintiffs' Motion [ECF 126], at 14–19.

The Bond Statute fails to pass even the inapplicable rational basis test. Defendants' assertion that the Bond Statute "operates equally to all persons similarly situated" because "all persons that bring state law claims against law enforcement must post a bond if they have funds sufficient to do so"[10] reflects question-begging reasoning that would allow, for example, discrimination against any particular race because all members of that race were treated equally. Under the Bond Statute, all tortfeasors are *not* treated equally. Neither are all victims of tortfeasors. The Bond Statute's arbitrary and discriminatory classification between parties in lawsuits involving claims of wrongdoing against law enforcement officers and all other parties in all other lawsuits does not survive minimal scrutiny.

> [T]he 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, 1296 (La. 1982). *See also* Plaintiffs' Motion [ECF 126], at 14–19.

[10] Defendants' Opposition [ECF 150], at 24.

VI. The Bond Statute Unconstitutionally Burdens Access to the Courts with Both Its Impossible Procedural Requirements and the Oppressive Amount Required for a Bond.

Defendants have applied an entirely inapplicable doctrine to Plaintiffs' claim under the Open Courts Clause, stating "[t]here being no abrogation of a prior right of action, the bond statute satisfies *Berry* [*v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985)] and the open courts clause." Defendants' Opposition [ECF 150], at 19. The *Berry* analysis is inapplicable here because Plaintiffs have argued that their right of access to the courts has been unconstitutionally burdened, restricted, and chilled.

The Open Courts Clause states, in its entirety, as follows:

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Utah Const., Article I, section 11. *See also Jensen v. State Tax Comm'n*, 835 P.2d 965, 969 (Utah 1992) (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, Dept. 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)). *See also Psychiatric Associates v. Siegel*, 610

So. 2d 419, 423 (Fla. 1992) ("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.").

Under the Bond Statute, Plaintiffs face discriminatory and unconstitutional (1) limitations on the "open[ness]" of the courts, (2) threats of "denial" and "unnecessary delay" to the administration of their remedies by due course of law, and (3) "bar[s]," "restrictions," "burdens," and discriminatory "conditions" to prosecuting civil causes to which they are a party. No other class of plaintiffs is subject to the burdensome hurdles, if not total restrictions, to justice imposed by the Bond Statute's requirements that one particular class of plaintiffs must (1) seek a speculative determination from the courts, without any statutory guidelines, of the amount of costs and fees defendants are likely to incur; (2) post a bond in such an amount, which could be for hundreds of thousands of dollars, and thus be deprived of the cost of the bond during the pendency of the litigation; and (3) post such a bond *before* filing the complaint.

CONCLUSION

The Bond Statute discriminatorily imposes a highly burdensome, if not impossible, price of admission for access to the courts to seek vindication for rights violated by law enforcement officers. Those requirements, facially and as applied to Plaintiffs, violate the constitutional guarantees of due process, equal protection, and access to the courts.

DATED this 4th day of June 2019.

LAW OFFICES OF ROCKY ANDERSON

/s/ Walter M. Mason
Walter M. Mason
Attorney for Plaintiffs

CERTIFICATE OF COMPLIANCE WITH WORD-COUNT LIMIT

In compliance with the word-count limit of DUCivR 56(g)(1), I certify that the foregoing *Plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion For Partial Summary Judgment* contains 4,946 words, exclusive of face sheet, table of contents, table of authorities, signature block, and certificate of service.

DATED this 4th day of June 2019.

LAW OFFICES OF ROCKY ANDERSON

/s/ Walter M. Mason
Walter M. Mason
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2019, a true and correct copy of the foregoing *Plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment*, filed with the Court on June 4, 2019, was served upon the following:

Via U.S. Mail, postage prepaid:

Office of the Utah Attorney General
Attn: Utah Solicitor General
320 Utah State Capitol
P.O. Box 142320
Salt Lake City, Utah 84114-2320

Via email:

notices@agutah.gov

DATED this 4th day of June 2019.

LAW OFFICES OF ROCKY ANDERSON

/s/ Walter M. Mason
Walter M. Mason
Attorney for Plaintiffs