2015

Sean Kendall, Plaintiff/Appellant, v Brett Olsen, Lt. Brian Purvis, Joseph Allen Everett, Tom Edmundson, George S. Pregman and Salt Lake City Corporation, Defendants/Appellees

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

SEAN KENDALL, *Plaintiff/Appellant,* v. BRETT OLSEN, LT. BRIAN PURVIS, JOSEPH ALLEN EVERETT, TOM EDMUNDSON, GEORGE S. PREGMAN and SALT LAKE CITY CORPORATION, *Defendants/Appellees.*	Case No. 20150927-CA

BRIEF OF APPELLANT SEAN KENDALL

Appeal From the Third Judicial District Court, Salt Lake County, Before the Honorable Heather Brereton and William Barrett

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JURISDICTIONAL STATEMENT

The Utah Supreme Court had jurisdiction in this matter pursuant to Utah Code Ann. § 78A-3-102(3)(j). The Supreme Court transferred this appeal to the Utah Court of Appeals pursuant to Rule 42(a), Utah Rules of Appellate Procedure. (R.607–08; 617.) Hence, the Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78A-4-103(2)(j).

STATEMENT OF ISSUE, STANDARD OF REVIEW, AND PRESERVATION OF ISSUES IN THE TRIAL COURT

ISSUE 1: Do the discriminatory and excessively burdensome attorneys' fee and costs bond requirement of Utah Code Ann. § 78B-3-104 ("the Bond Statute") and the discriminatory costs undertaking requirement of Utah Code Ann. § 63G-7-601 ("the Undertaking Statute") violate the equal protection, freedom to petition, and due process guarantees of the Utah and United States Constitutions, and the Open Courts Clause of the Utah Constitution, both facially and as applied to Appellant Sean Kendall ("Kendall")?

STANDARD OF REVIEW: A determination regarding the constitutionality of a statute is a question of law to be reviewed for correctness, giving no deference to the trial court. *State v. Drej*, 2010 UT 35, ¶ 9, 233 P.3d 476; *State v. Ainsworth*, 2016 UT App 2, ¶ 5, 365 P.3d 1227.

PRESERVATION OF ISSUE ON APPEAL: The issue of the constitutionality—facially and as applied to Kendall—of the two discriminatory, court-access-obstructing bond and undertaking requirements, which call for arbitrary and capricious determinations, without any statutory guidelines or procedures, was at the core of, and raised throughout,

the proceedings in the trial court. (*See, e.g.*, R. 1–2; 5–19; 42–60; 185–86; 188–201; 310; 323–339; 371; 374–379; 386; 426–27; 543–47; 549–51; 621; 639–652; 777–786.)

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES WHOSE INTERPRETATION IS DETERMINATIVE OF THE APPEAL OR OF CENTRAL IMPORTANCE

United States Constitution, First Amendment:

Congress shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances.

United States Constitution, Fifth Amendment:

No person shall . . . be deprived of life, liberty, or property, without due process of law….

United States Constitution, Fourteenth Amendment, Section 1:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Utah Constitution, Article 1, Section 1:

All men have the inherent and inalienable right to enjoy and defend their lives and liberties; . . . to . . . protest against wrongs, and petition for redress of grievances ….

Utah Constitution, Article 1, Section 7:

No person shall be deprived of life, liberty or property, without due process of law.

Utah Constitution, Article 1, Section 11:

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 Constitution, Article 1, Section 24:

All laws of a general nature shall have uniform operation.

Utah Code Ann. § 63G-7-601:

Actions governed by Utah Rules of Civil Procedure—Undertaking required.
(1) An action brought under this chapter shall be governed by the Utah Rules of Civil Procedure to the extent that they are consistent with this chapter.
(2) At the time the action is filed, the plaintiff shall file an undertaking in a sum fixed by the court that is:

(a) not less than $300; and

(b) conditioned upon payment by the plaintiff of taxable costs incurred by the governmental entity in the action if the plaintiff fails to prosecute the action or fails to recover judgment.

Utah Code Ann. § 78B-3-104:

Actions against officers—Bond required—Costs and Attorney fees.
(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.

STATEMENT OF THE CASE

NATURE OF THE CASE, THE COURSE OF PROCEEDINGS, AND ITS DISPOSITION IN THE TRIAL COURT

CONTEXT OF THIS CASE IN UNITED STATES SOCIETY GENERALLY, AND IN THE CIVIL JUSTICE SYSTEM SPECIFICALLY

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]

If there is to be a semblance of justice that is not subverted by economic status, it must come from the Judicial Branch, because it is seldom to be found in the Legislative and Executive Branches.[2] However, more and more, like the Legislative and Executive

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[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 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. *See also THE FEDERALIST NO. 57*, where James Madison argued that in the absence of equal application of the law, "every government degenerates into tyranny." (Quoted in Greenwald, at 8.)

[2]

> Public officials . . . are much more responsive to the privileged than to average citizens and the least affluent. . . .
>
> **Advantage begets additional advantage.** . . .
>
> [G]overnment officials disproportionately respond to business, the wealthy, and the organized and vocal when they design America's domestic and foreign policies.
>
> The bias in government responsiveness toward the affluent is evident not only in Congress but also in national government policy more generally.

Branches in state and federal government, the courts have been complicit in bringing about a two-tiered system of justice—where, for instance, Wall Street fraudsters can escape prison or any other legal accountability for their crimes, while Weldon Angelos, a Utah native convicted for selling small amounts of marijuana three times when he owned, but did not use or threaten anyone with, guns, remains in a penitentiary under a 55-year sentence.

A two-tiered system of justice has developed, where the rich and powerful inside and outside of government can escape accountability for their Republic-destroying contempt for and violation of the U.S. Constitution and domestic laws passed by Congress,[3] while the law is often applied with a vengeance against those without wealth and without power.[4]

"American Democracy in an Age of Rising Inequality," Task Force on Inequality and American Democracy, American Political Science Association (2004), http://www.apsanet.org/portals/54/Files/Task%20Force%20Reports/taskforcereport.pdf (last visited March 31, 2016), at 1, 10, 14 (emphasis added).

[3] For instance, there has been no accountability for the powerful people who authorized or ordered torture of people in foreign nations, in violation of numerous international treaties (which are among the "supreme law of the land" under Article VI, Paragraph 2 of the Constitution) and federal criminal law, 18 U.S.C. 2340A, *see, e.g., El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), and illegal warrantless mass surveillance, in violation of the Fourth Amendment to the Constitution and the Foreign Intelligence Surveillance Act, 50 U.S.C. ch. 36. *See, e.g., Clapper v. Amnesty International*, 133 S.Ct. 1138 (2013).

[4] The United States, with the world's highest incarceration rate, has only 5 percent of the world's population, yet almost 25 percent of all prisoners in the world. Greenwald at 223. "Class inequalities in incarceration are reflected in the very low educational level of those in prison and jail. . . . State Prisoners average just a tenth grade education and about 70 percent have no high school diploma." Bruce Western & Becky Pettit, "Incarceration & social inequality," American Academy of Arts & Sciences (Dædalus, Summer 2010),

The overarching question, societally as well as in this particular case, is whether wealth and power will be permitted to determine one's access to fundamental justice, including access to the courts for the vindication of crucial state constitutional and other legal protections, or will the astounding inequities based on wealth and power be permitted to pervert any sense of equal justice for all?

NATURE OF THE CASE

This appeal challenges the blatant unconstitutionality of Utah Code Ann. §§ 63G-7-601 and 78B-3-104, which place discriminatory, arbitrary, and unreasonable—in some 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.

This case arises out of the tragic, unconscionable killing of Kendall's best friend, his Weimaraner dog Geist, by a Salt Lake City Police officer who was unconstitutionally trespassing during an illegal warrantless search in Kendall's backyard.

THE COURSE OF PROCEEDINGS

Kendall seeks accountability, under the guarantees of the Utah Constitution and other state legal protections—as well as under federal law—for the illegal trespass and killing of Geist. In doing so, Kendall has encountered the arbitrary and discriminatory burdens imposed by Utah Code Ann. § 63G-7-601 (the "Undertaking Statute") and § 78B-

https://www.amacad.org/content/publications/pubContent.aspx?d=808 (last visited March 31, 2016).

3-104 (the "Bond Statute"), which prohibit a prospective plaintiff from accessing the courts without first paying a bond and providing an undertaking in amounts arbitrarily set by the court, without any statutory guidelines or procedures for setting the amounts and without any showing by the Defendants/Appellants ("City and Police Officers") that the case fell within the category of cases—"frivolous" cases—the Bond Statute was purportedly intended to discourage.

The Undertaking Statute and Bond Statute, which caused a nine-month delay in filing the Complaint under state law for the unconstitutional and otherwise unlawful actions by the City and Police Officers, deprived Kendall of his constitutional rights to due process, equal protection, the right of access to justice through the courts, and the right to petition the government. These are all deprivations that would not be obstacles to (1) plaintiffs suing people other than peace officers and (2) plaintiffs (perhaps only multi-millionaires) for whom a significant bond requirement, to cover all potential fees and costs for all defendant law enforcement officers, would not be a deterrent against pursuing justice under state legal guarantees. The challenged statutes also allow inequitable protections for the narrow classes of "peace officers" (under the Bond Statute) and governmental entities and employees (under the Undertaking Statute) that are not afforded other people or entities.

Kendall appealed from the District Court's Memorandum Decision (R.543–52) and Order (R. 580–82), which held that the Bond and Undertaking Statutes are constitutional, to the Utah Supreme Court. (R.585-602.) Appellees filed a Motion for Summary Disposition on November 17, 2015. On December 9, 2015, the Supreme Court determined it would not retain this appeal. (R.617.) On December 10, 2015, this Court issued an order

denying Appellees' Motion for Summary Disposition, noting "[t]he issues framed by the motion and response present policy and law issues that are not appropriate for summary disposition."

DISPOSITION IN THE TRIAL COURT

The trial court determined that: (1) the Bond Statute and the Undertaking Statute are constitutional; (R. 549–51.); (2) Kendall met the criteria for impecuniosity in Utah Code Ann. § 78A-2-302 and was therefore not required to file a bond pursuant to the Bond Statute (R. 548–49); and (3) Kendall was required to file an undertaking in the amount of $300, which amount was arbitrarily selected, without any explanation by the Court, and imposed without any guidance from the Undertaking Statute, other than a statement as to the *minimum* amount for an undertaking (R. 548–49).

STATEMENT OF FACTS

A. THE TRAGIC AND ILLEGAL KILLING OF GEIST.

On June 18, 2014, a three year-old child was reported missing from his home located in Salt Lake City, Utah (the "Child's Home"). (R.43.) Joseph Allen Everett, Tom Edmundson and George Pregman, all officers of the Salt Lake City Police Department, were sent to search the Child's Home. (R.43.) The child was, in fact, asleep in the basement of the home, but the officers did not find him. (R.44.) As a result of their failure to locate the child during their searches (if, in fact, they did conduct searches), additional Salt Lake City Police officers were called to conduct a door-to-door search of the area. (R.43.) Brett Olsen ("Olsen") was among the officers who participated in the search. (R.43.)

Sean Kendall lived approximately 1/8 mile from the Child's Home. (R.44.) During the search for the supposedly missing child, Olsen approached Kendall's home. (R.44.) Despite the facts that no one was at home, no consent for a search was provided, Olsen did not have a warrant to search Kendall's home or yard, and there was no reasonable cause to believe there was any nexus whatsoever between Kendall's property and the missing child, Olsen opened the gate leading to Kendall's backyard adjacent to his home ("the curtilage"), entered the curtilage, and proceeded to conduct an invasive search of the backyard and a shed located there. (R.44; 66–67.) Upon entering the yard, Olsen was approached by Kendall's beloved 2 1/3 year-old Weimaraner dog Geist, who, doing what dogs do, ran toward Olsen and barked. (R.44; 67.) Olsen outrageously and unnecessarily drew his gun and fired two rounds, killing Geist. (R.44; 67.)

B. KENDALL FILED THIS DECLARATORY JUDGMENT ACTION BECAUSE OF THE ARBITRARINESS OF THE PROCESS INVOLVED IN SETTING THE AMOUNT OF THE UNDERTAKING AND BOND, THE UNCONSTITUTIONAL TAKING REQUIRED BY THE BOND AND UNDERTAKING STATUTES, THE DISCRIMINATORY IMPACT ON KENDALL AND OTHERS SEEKING JUSTICE IN THE COURTS AGAINST LAW ENFORCEMENT OFFICERS FOR THEIR WRONG-DOING, AND BECAUSE OF THE PROSPECT THAT ACCESS TO THE COURTS WOULD BE UNJUSTLY DELAYED, IMPERMISSIBLY BURDENED, AND PERHAPS DENIED BECAUSE OF THE INEQUITABLE UNDERTAKING AND BOND STATUTES.

Kendall served an Amended Notice of Claim on Salt Lake City Corporation and the individual defendants pursuant to another special-interest, discriminatory statute, § 63G-7-401, on January 26, 2015. (R. 21-34.) That same day, Kendall filed a complaint in the Third District Court seeking a declaratory judgment that, inter alia, the Bond and

Undertaking Statutes violate Kendall's and other plaintiffs' constitutional rights to due process, equal protection, access to the courts, and right to petition the government.[5] (R.1–19.)

Kendall filed a Motion for Summary Judgment seeking a declaration that the Bond and Undertaking Statutes are unconstitutional on their face and as applied to Kendall. (R.185-201.) Kendall submitted affidavits and live testimony from two attorneys experienced in civil rights lawsuits, Randall K. Edwards and Robert Sykes, showing that the amount of attorney fees and costs defendants could incur in this action is far more than Kendall could pay and that any attempt to predict the amount of future fees and costs would require "pure conjecture and speculation." (R.226-33; 720–28; 734–39.) He also presented evidence, by means of affidavits and live testimony, from two insurance agents, as well as personal testimony, that he would be unable to secure a bond for that amount based on his income and assets. (R.235–45; 660–85; 711–20.)

The trial court held an evidentiary hearing on the Motion for Summary Judgment and a motion to strike the affidavit of legal counsel for the City and Police Officers on September 15, 2015. (R.621-815.)

C. THE TRIAL COURT ISSUED AN ERRONEOUS RULING UPHOLDING THE CONSTITUTIONALITY OF THE BOND AND UNDERTAKING STATUTES.

[5] Subsequent to the ruling in this Declaratory Judgment action, in November 2015 Kendall filed a second action alleging that defendants violated his constitutional rights by conducting a warrantless search of his backyard and killing Geist, and also alleging a variety of tort claims, including trespass, conversion, negligence and intentional infliction of emotional distress. Third Dist. Ct. Civ. No. 150907410 (Blanch, J.). That action was subsequently removed to the United States District Court for the District of Utah, where it currently is pending. (Case No. 2:15-cv-00862).

The trial court ruled on the Motion for Summary Judgment on September 21, 2015. (R.592-600.) The trial court never provided any explanation as to how it set the amount of the undertaking but held that Kendall had sufficient funds to cover an undertaking of $300, which the court ordered. (R.598.)

Curiously, the trial court failed to determine the amount of "estimated costs and attorney fees the officer[s] may be expected to incur in defending the action," as required by Utah Code § 78B-3-104, yet found Kendall to be "impecunious." (R. 598.) The trial court failed to explain what it meant by "impecunious" in the context of what amount would otherwise be required to be posted as a bond. Determining the amount of estimated fees and costs is a necessary precondition to finding that a plaintiff cannot afford to pay that amount under Utah Code Ann. § 78A-2-302(2).

The court erroneously upheld the constitutionality of the Bond and Undertaking Statutes, although the statutes had delayed Kendall nine months in pursuing his substantive claims against the City and Police Officers and put him through extensive, time-consuming, costly, and anxiety-laden litigation (R. 681–685) in a patently discriminatory and oppressive manner.

SUMMARY OF ARGUMENTS

Before a person claiming injury because of the unlawful conduct of a law enforcement officer can gain access to the courts for the vindication of rights and protections under the Utah Constitution and other state laws, the potential plaintiff must first file a bond in the amount a court estimates to be the costs and attorney fees the officer

"may be expected" to incur in the action. Utah Code Ann. § 78B-3-104. Another statute requires that all those seeking recovery in a civil action against a governmental entity or employee must file "an undertaking" "conditioned upon payment by the plaintiff of taxable costs incurred by the governmental entity . . . if the plaintiff fails to prosecute the action or fails to recover judgment." Utah Code Ann. § 63G-7-601.

The bond requirement is imposed on only those seeking justice under state law for injuries caused by police misconduct. Plaintiffs suing any other persons or entities, or those who invoke the protections of only federal law, are not required to post such a bond. Likewise, only law enforcement officers enjoy the unjust protections afforded them from the discriminatory burdens imposed on those who seek to file civil claims against them.

These egregiously discriminatory statutes provide no due process standard for the ascertainment of the bond and undertaking amounts, 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 in passing the statutes; (2) the reasonableness of the amount of the bond and/or undertaking; or (3) the extent and nature of the burden imposed on the prospective plaintiff by the bond or undertaking requirements.

The City and Police Officers claim that the bond requirement is justified by a legislative desire to deter frivolous lawsuits. However, they have provided 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 violates equal protection and due process guarantees, as well as the guarantees of access to the courts, under the Utah and United States Constitutions, insofar as they impermissibly burden or

completely prevent *meritorious* lawsuits by those who cannot afford, or who are otherwise deterred, by the bond and attorney fee 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.

Both of the statutes require an unconstitutional taking because the price of admission to the courts is the posting of a bond and undertaking in amounts arbitrarily fixed by a court—which could be hundreds of thousands of dollars in the case of the Bond Statute—in a manner not required of plaintiffs who do not sue governmental entities or employees, 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.

ARGUMENT

The Bond and Undertaking Statutes violate 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 and the Petition Clauses of the U.S. and Utah Constitutions.

I. ON THEIR FACE AND AS APPLIED TO KENDALL, THE DICRIMINATORY AND BURDENSOME BOND STATUTE AND UNDERTAKING STATUTE VIOLATE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF EQUAL PROTECTION UNDER THE LAW.

As applied in this matter, Utah Const. art. I, § 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. "Despite their dissimilar language, these 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." *Gallivan v. Walker*, 2002 UT 89, ¶ 31, 54 P.3d 1069 (*quoting Malan v. Lewis*, 693 P.2d 661, 669 (Utah 1984)). "Both constitutional provisions incorporate the '[b]asic principles of equal protection of the law [that] are inherent in the very concept of justice and are a necessary attribute of a just society.'" *Id.* at ¶ 32 (quoting *Malan*, 693 P.2d at 670). "That equal protection is 'essential to a free society' is 'explicitly stated . . . in Article I, § 2 of the Utah Constitution: "[A]ll free governments are founded on their authority for [the people's] equal protection and benefit...."'" *Id.* (quoting *Malan* 693 P.2d at 670) (alterations in original).

The Utah Supreme Court "generally incorporates principles from the federal equal protection regime," *State v. Canton*, 2013 UT 44 at ¶ 36, n. 9, while reserving "the right to depart from those standards." *Id.* Under Utah law, the equal protection analysis is at least as rigorous as under the federal Constitution and, in some instances, can be even more strict. *See Mountain Fuel Supply Co. v. Salt Lake City Corp.*, 752 P.2d 884, 889 (Utah 1988) ("[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.")

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).

The last inquiry "incorporates varying standards of scrutiny." *Id.* at ¶ 50, (quoting *State v. Canton*, 2013 UT 44, at ¶ 36). The third step "recognize[s] that most classifications are presumptively permissible, and thus subject only to 'rational basis review.'" *Id.* However, heightened scrutiny must be applied in cases involving "discrimination on the basis of a 'fundamental right.'" *Id. See also Tindley v. Salt Lake City School Dist.*, 2005 UT 30, ¶ 30, 116 P.3d 295, 301 ("we review statutory classifications that implicate rights protected by the open courts clause under 'heightened scrutiny'"); *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 v. Drezga*, 2004 UT 91, ¶ 19, 103 P.3d 135. (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, and the additional requirement for an undertaking in an amount a judge, in his or her unfettered, arbitrary discretion, determines to impose under the Undertaking Statute, clearly "implicate" the Open Courts Clause of the Utah Constitution. The Bond

and Undertaking Statutes may very well preclude a person like Kendall 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 it might put at risk a large portion, if not all, of their financial resources. Of course, only the most reckless, intrepid, or extremely wealthy would be willing 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 to hold law enforcement officers accountable for their violations of legal protections under Utah law.

"In order for a law to be constitutional under the uniform operation of laws provision, 'it is not enough that it be uniform on its face. What 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). In other words, the effects of the law in the real world are to be considered when determining if a statute has an unconstitutionally discriminatory impact. Here, the effect of the Bond Statute is the slamming of the court doors, or the imposition of unjust and discriminatory burdens, on people of almost all economic classes with meritorious claims against law enforcement officers who have caused harm by their unconstitutional or otherwise unlawful conduct.

> Robert Sykes: [V]ery few, I think I could count on the fingers of one hand, how many clients I've had that could afford to pay, say $5000, you know. They're mostly poor, frequently people of color. They don't have the money to fund the litigation and if you were to tell them, hey, you're at risk, my friend, for, you know, tens of thousands of dollars, even $12,000, they wouldn't do it, they'd walk away from their rights.

(R. 739.)

> Question [Mr. Anderson]: And have you ever filed an action on behalf of a plaintiff where the plaintiff had to file a bond for future attorney's fees and costs under 78B-3-104?
> Answer [Robert Sykes]: Never.
> Q: Would you—do you know of any clients that you have right now that would even be able to do that or that would be willing to do that or undertake the threat of attorney's fees?
> A: No. Able—probably none of them willing—if they had the money, probably none of them have the money to do it. **That is an absolute bar in essence to any constitutional action for most people**, for most people, okay?

(R. 744.) (Emphasis added.)

> Question [Mr. Anderson]: So have you had any experience with clients who were of limited financial means that have not pursued state law claims after you disclosed to them that they would have to put up a bond in an amount found by the court to cover future attorney's fees and costs?
> Answer [Randall Edwards]: Yes, most of the clients that I have who have confrontations with the police in which they believe that there has been some violation of their rights, are people who do not have the financial resources to pursue it if they had to pay for the other side's attorney's fees or for that matter if they had to pay me by the hour.
> Q: And what's been the impact on them in terms of their decision as to whether to seek justice in our courts?
> A: **They finally just shake their heads and say there is no justice and they just walk away.**

(R. 727-28.) (Emphasis added.)

Under either the rational basis test or the heightened scrutiny test, the Bond Statute and the Undertaking Statute fail to meet the test under the Equal Protection Clauses of the U.S. and Utah Constitutions and the uniform operation of laws provision in article I, section 24 of the Utah Constitution.

A. The Bond Statute and Undertaking Statute Fail to Pass Muster Under the Rational Basis Test.

As noted above, the following must be asked concerning a statute analyzed under the rational basis standard:

1. What classifications are created by the statute?

2. Are different classes treated disparately?

3. Is the disparity among any classifications warranted by any reasonable objective the legislature may have had?

See DIRECTV v. Utah State Tax Comm'n, 2015 UT 93, ¶ 49, 364 P.3d 1036.

1. Among the numerous classifications created by the statute are the following:

(1) Between (a) people who have legal claims against police officers and (b) those who have claims against anyone other than police officers;

(2) Between (a) plaintiffs or prospective plaintiffs who cannot afford to post, 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 prior to the filing of a complaint, without any statutory provision for a due process hearing and without any statutory guidelines for making the determination as to the bond amount and (b) those who are not deterred, because of their unusual wealth or temerity, 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.

(3) Between (a) plaintiffs or prospective plaintiffs who have meritorious claims, yet are still required to post a bond under the Bond Statute and (b) those who seek to file frivolous claims against peace officers (examples of which the City and Police Officers have wholly failed to provide throughout the proceedings in the court below).

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

(5) Between (a) defendants or prospective defendants who are peace officers and beneficiaries of the special, discriminatory treatment under the Bond Statute and (b) any other persons who may be named as defendants in lawsuits, meritorious *or* frivolous, who do not benefit from the discriminatory Bond Statute.

(6) Between (a) defendants other than governmental entities or employees who can be sued without the plaintiffs having to post an undertaking under the Undertaking Statute and (b) defendants who are governmental entities or employees who cannot be sued unless the plaintiffs post an undertaking arbitrarily set by the court, without any standards or procedures provided by the Undertaking Statute.

2. Obviously, the different classes are treated disparately:

(1) Plaintiffs or prospective plaintiffs seeking access to the courts to hold police officers accountable face enormous, often impossible, hurdles not faced by any other plaintiffs or prospective plaintiffs.

(2) Those injured by police officers violating the Utah Constitution or other Utah laws, even if they can technically afford to pay for a bond, are exposed to tremendous burdens that are not faced by victims injured by people or entities other than police officers.

(3) Plaintiffs or prospective plaintiffs seeking to sue police officers suffer a taking without due process of law in the form of either (a) the temporary loss of use of money posted as a bond or (b) the permanent loss of money that must be paid as a premium, and the collateral that must be provided, to obtain a bond—all without any determination at a due process hearing of whether their claims fall within the category of cases (*i.e,*. frivolous cases) purportedly sought to be deterred by the Bond Statute, the reasonableness of the bond, and the ability of the plaintiff to pay the bond.

(4) Police officers enjoy the protections, including the prohibitive effects, of the Bond Statute, while no one else enjoys such protections against those they have unlawfully injured.

(5) Governmental entities and employees enjoy the protections, including the prohibitive effects, of the Undertaking Statute, while no one else enjoys such protections against those they have injured.

3. The enormous disparities between classifications are not warranted by any reasonable legislative objectives. The City and Police Officers, citing *Zamora v. Draper*, 635 P.2d 78 (Utah 1981), have characterized the objective behind a statutory requirement for a bond to cover future costs and attorneys' fees as "discouraging frivolous lawsuits and to ensure . . . that if a lawsuit is brought that has no merit[6] and the City prevails . . . then

[6] Contrary to the characterization by legal counsel for the City and Police Officers, there is *nothing* in either the bond statute addressed in *Zamora* or the current Bond Statute that limits recovery of attorneys' fees to cases involving "frivolous" claims. Under those bond statutes, attorneys' fees are recoverable to the prevailing party regardless of whether the plaintiffs' claims are meritorious. *See* Utah Code Ann. § 78B-3-104(3) ("The prevailing party shall recover from the losing party all costs and attorney fees allowed by the court.")

there's an ability to put up the attorney's fees which are awarded to both sides." (R. 648.) But *Zamora*, which did not engage in any equal protection analysis, expressly noted that the concern regarding "frivolous and/or vexatious lawsuits" is not unique to lawsuits against police 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 v. Draper, 635 P.2d at 81.

The City and Police Officers have repeatedly argued that the bond statute considered in *Zamora* is "virtually identical" to the Bond Statute at issue here. (R. 326-27; 646-47; 786-87.) Also, the trial court misread the current Bond Statute as allowing the same flexibility that the Court in *Zamora* found existing in the bond statute under consideration in that case. (R. 546.) However, 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.[7]

[7] 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 v. Draper*, 635 P.2d at 81. The plain language of the current Bond Statute at issue in this case is completely different. In language far different than the bond statute at issue in *Zamora*, the current Bond Statute provides in mandatory, non-discretionary terms that "[t]he bond **shall** cover all estimated

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, the Louisiana Supreme Court noted as follows:

> The statute now before us would . . . [make] it extremely costly, if not prohibitive, for minority groups or individuals to bring suit against any public official (school board member, police officer, police juror) for the redress of grievances suffered

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costs and attorney fees the officer may be expected to incur in defending the action, in the event the officer prevails." Utah Code Ann. § 78B-3-104 (emphasis added).

The sponsor of the current Bond Statute, then an employee of 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-at-the-sheriffs-office.html?pg=all), represented to other legislators that the current Bond Statute was simply part of a recodification—a renumbering—of pre-existing statutes:

> Rep. Jackie Biskupski (at 34:02): "What this bill does is we're recodifying and doing some technical cleanup from legislation that we passed last year. . . . So it's a renumbering that's occurring in the bill, and then there is [sic] technical changes."
>
> Rep. Ray (at 39:20): "Does this have any statutory changes or are we just recodifying and putting them in different areas of the code?"
>
> Rep. Biskupski (at 39:24): "That's correct, no statutory changes, only recodifications. Revisions, technical revisions as well."

House Day 1 Statements of Members of Utah House of Representatives (January 21, 2008) http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=17195&meta_id=509623.

But that was not true. H.B. 78 (2008), entitled Title 78 Recodification and Revision, reflects mostly amendments and renumbering of many sections of the Utah Code. However, it expressly "repeals" Utah Code Ann. § 78-11-10, the statute construed in *Zamora*. It also expressly "enacts" entirely new legislation, the current Bond Statute, which, according to its plain language, removes any of the discretion the Court in *Zamora* found 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 Utah Code Ann. § 78-11-10) and 895 (enactment of new Bond Statute, Utah Code Ann. § 78B-3-104).

> because of race. The statute classifies litigants as either public officials or those not public officials. Public officials can recover attorney's fees if the plaintiff is unsuccessful, and obtain a bond for attorney's fees before trial. Defendants who are not public officials can recover attorney's fees only in certain kinds of cases as provided by statute.

Detraz v. Fontana, 416 So.2d 1291, 1293-94 (La. 1982).

The Louisiana Supreme Court, addressing the identical issue posed here, noted the equal protection violations under the state and federal constitutions arising from the different classes of tortfeasors and different classes of victims created by the discriminatory bond and attorneys' fee statute applied only to lawsuits against public officials, 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. . . ." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed.2d 989, 990-991 (1920). [Other 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.

Id. at 1295–1296 (emphasis added).

Similar to the situation in *Detraz*, the City and Police Officers have not presented any evidence supporting a claim that law enforcement officers are subjected to more frivolous claims than anyone else[8]—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.

[8] "There's been nothing offered, nothing factual, no studies showing that there is any kind of unfairness or more frivolous cases brought against police officers than anybody else." (Argument of Kendall's counsel at evidentiary hearing, R. 78-82, which was not rebutted by counsel for the City and Police Officers.)

B. The Bond Statute and Undertaking Statute Fail to Pass Equal Protection Muster Under the Heightened Scrutiny Test

Under the applicable heightened scrutiny test, the Bond Statute and the Undertaking Statute must be shown to (1) be "reasonable," (2) have "more than a speculative tendency to further the legislative objective and, in fact, actually and substantially further[] 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 that same test, 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 and Undertaking Statute in this case are 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, in this case, it cannot be

assumed that Kendall or other plaintiffs resorting to the courts after suffering abuses by police officers, as compared with plaintiffs in matters not involving police officers, will be particularly uncooperative in paying cost and attorney fee awards (if such awards eventually occur)—or that their claims, as compared with the claims of plaintiffs in cases not involving police officers, will more often 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, as concerns this case, people seeking to hold law enforcement officers accountable under the law have not been shown to be more apt to file frivolous claims than any other plaintiffs. 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 v. Normet*, 405 U.S. at 76). Just as the bond and undertaking requirements impose discriminatory and significant burdens on people who seek access to the courts to hold police 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 v. Normet*, 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.

Lindsey v. Normet, 405 U.S. 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. at 78 (emphasis added).

Precisely the same is true in the instant case. The Bond and Undertaking Statutes bar or unduly burden 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 and Undertaking Statutes.

Statutes like the Bond and Undertaking Statutes, which (1) deny access to courts for people with meritorious claims who cannot afford the bond or are prohibitively deterred or unduly burdened by the discriminatory bond requirement, but (2) allow access to the courts by wealthy people with frivolous claims who are 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. 1981) (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.")

II. BECAUSE THEY UNREASONABLY BURDEN ACCESS TO THE COURTS BY IMPOSING AN ARBITRARY AND UNREASONABLE PRICE OF ADMISSION TO THE COURTS, THE BOND AND UNDERTAKING STATUTES VIOLATE THE PETITION CLAUSES OF THE UTAH CONSTITUTION AND THE UNITED STATES CONSTITUTION AND THE OPEN COURTS CLAUSE OF THE UTAH CONSTITUTION.

The Open Courts Clause of the Utah Constitution, Art. I, section 11, and the Petition Clauses of the United States Constitution (First Amendment) and the Utah Constitution (Art. I, section 1) all guarantee 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 19, ¶ 28, 5 P.3d 616, 625 ("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."); *Borough of Duryea, Pa.. v. Guarnieri*, 131 S. Ct. 2488, 2494 (2011) (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896-97 (1984)) ("[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government."). The right of access is a fundamental First Amendment right, requiring strict scrutiny of any restriction. *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461

U.S. 731, 741 (1983) ("the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances."); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) ("'only 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)). To meet that standard, the infringement of a First Amendment right must be "actually necessary" to achieve a solution to an "actual problem." *Brown v. Ent. Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011).

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).

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.

A discriminatory bond requirement, the amount of which is to be determined in an astoundingly arbitrary manner, and which operates on the very wealthy in a manner differently than on nearly everyone else, 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 Ann. § 78B-5-825. *See 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 THEIR FACE AND AS APPLIED TO KENDALL, THE BOND STATUTE AND THE UNDERTAKING STATUTE VIOLATE SUBSTANTIVE AND PROCEDURAL DUE PROCESS.

The Bond Statute and the Undertaking Statute violate substantive and procedural due process (1) by denying access to the courts, or at least making access so 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; (2) by discriminating between plaintiffs on the basis of their economic status; (3) by discriminating between defendants on the basis of whether they are peace officers or

anyone else who are claimed to have harmed others through their violations of Utah law; (4) because the statutes do not provide any guidance as to how, and according to what procedures, the amounts of the undertaking and 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 (5) by allowing 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 and Undertaking Statutes are 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 how much in attorneys' fees and costs will be incurred in the future. Further, the Bond Statute violates substantive and procedural due process 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 And The Undertaking Statute Deny or Unduly Burden The Right To Access Justice Through The Courts, In Violation of Due Process.

Utah courts apply a rational basis standard of review to claims alleging due process violations. "[I]f a statute has 'a reasonable 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). The Bond and Undertaking Statutes fail this test on both counts, as they are not reasonably related to a proper legislative purpose and are arbitrary and discriminatory, facially and as applied to Kendall.

1. The Bond and Undertaking Statutes Are Not Reasonably Related to a Proper Legislative Purpose.

In *Zamora v. Draper*, the Utah Supreme Court upheld a version of the 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. As noted above, the *Zamora* court was considering a materially different bond statute than is at issue here. The former statute read:

> Before any action may be filed against any sheriff, constable, peace officer, state road officer, or any other person charged with the duty of enforcement of the criminal laws of this state, or service of civil process, when such action arises out of, or in the course of the performance of his duty, or in any action upon the bond of any such officer, the proposed plaintiff, as a condition precedent thereto, shall prepare and file with, and at the time of filing the complaint in any such action, a written undertaking with at least two sufficient sureties *in an amount to be fixed by the court*, conditioned upon the diligent prosecution of such action, and, in the event judgment in the said cause shall be against the plaintiff, 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. In any such action, the prevailing party therein shall, in addition to an award of costs as otherwise provided, recover from the losing party therein such sum as counsel fees as shall be allowed by the court. The official bond of any such officer shall be liable for any such costs and attorney fees.

Utah Code Ann. § 78-11-10 (emphasis added). 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 Ann. § 78B-3-104 (emphasis added).

The trial court in this matter dismissed the distinction, stating, erroneously, that "the Utah Supreme Court has already held the bond statute is constitutional." (R.550.) The *Zamora* court, however, 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 the trial court's reliance on that opinion is misplaced.

Further, the Defendants and the trial court relied heavily on the argument that the Bond Statute eliminates frivolous claims, which argument 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.

> 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 and undertaking statutes that 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 three federal court cases, 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); *Mglej v. Garfield Co.*, 2014 WL 2967605, at *2 (D. Utah July 1, 2014); *Webb v. Scott*, 2015 WL 1257513, at *14 (D. Utah Mar. 18, 2015) *reconsideration denied*, 2015 WL 2183124 (D. Utah May 8, 2015).

In order to obtain a determination by the trial court of his constitutional claims regarding the Bond Statute and the Undertaking Statute, and to obtain a resolution that permitted him to proceed with his substantive state claims against the City and Police

Officers, Kendall spent significant funds and was subjected to a delay of nine months. (R. 670-72; R. 19 (Complaint dated January 26, 2015); R. 551 (Memorandum Decision dated September 21, 2015).) Accordingly, while the Bond and Undertaking Statutes do not bar *all* lawsuits against government entities and officials, they clearly have the real effect of denying, or significantly burdening and unreasonably delaying, access to the courts for a determination of people's claims, particularly against law enforcement officers, on the merits.

2. The Bond and Undertaking Statutes Call For an Impossible and Arbitrary Determination by the Courts of What Future Attorneys' Fees and Costs Will Be.

The Bond and Undertaking Statutes violate a prospective plaintiff's due process rights because they require 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. 485, 552 (1965)).

As in *Beaudreau*, neither statute at issue here promulgates standards or guidelines for setting the amount a litigant must pay in order to bring his or her claim. The Bond and Undertaking Statutes allow the courts nearly unlimited discretion in setting the amounts of the undertaking and bond. The statutes are silent as to how the court should determine the amount of the bond, the factors a court must or should consider in setting the bond, or the procedure a court should follow in determining the amount of bond. Thus, before the filing of a complaint, a court is left to determine, without any guidance from the statutes or the benefit of an inquiry into the merits of the claim, the entire amount of attorney fees and costs that could possibly be incurred in the future in defending the action, plus an additional, seemingly random and duplicative costs undertaking. As was made clear in this case during the evidentiary hearing before the trial court,[9] making a determination about

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[9] Question [Mr. Anderson]: And have you read through the Amended Notice of Claim in this case?
Answer [Randall Edwards]: I have.
Q: Exhibit 2. And you're familiar with the basic claims that Mr. Kendall seeks to pursue?
A: I am.
Q: And if called upon to, given your vast experience in this area, would you have any basis whatsoever before a complaint is filed or even soon thereafter in determining what the likely fees and costs are going to be for any of the parties?
A: Oh heavens no. But can I give a little context to that?
Q: Please.
A: As we look at the statute which I have looked at, the statute actually makes no sense and so in order for us to look at someone to say here's how they could be compliant with the statute and pay and in determining how much you would have to come up with, there's no way that that could be done.

* * * *

Q: And are you ever able to tell in advance with any precision whatsoever what kind of time or fees are going to be involved?
A: No.

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.[10]

R. 722-23.

> Question [Mr. Anderson]: Okay. And you stated in the affidavit you submitted in this case an estimate of what you think the attorney's fees might be in the future and the range that you gave was from $100,000 to $750,000 or more.
> Answer [Robert Sykes]: Could easily be.
> Q: And why such a range:
> A: It's impossible when you sit down to begin the case to estimate. You don't know how hard they're going to fight. . . . But you can't estimate that. Up front you don't know how hard the other side is going to fight and that's the problem. . . . You can make a general estimate but that's why I gave you that range, that big range because you don't know how hard they're going to fight. It's one of the problems with it.
> Q: Would it, would any kind of estimate be based on conjecture, speculation?
> A: Oh, it would be very speculative. It would be very speculative.
> Q: Alright, and do you know, you looked at the Bond Statute, (inaudible) 3-104?
> A: Yes.
> Q: Do you know of any procedure that's provided for under that statute for ascertaining the amount of bond?
> A: There's no procedure.
> Q: Is there any standard?
> A: There's no standard and I think there's no case law. When I checked I couldn't find a case on it. So, you know, it's just wide open.
> Q: And how does one get into a court for a court's determination before you even file the complaint?
> A: I don't know how that would be done except maybe the way you're doing it right now.
> Q: Nine months later since we filed —
> A: Yeah, nine months later.
> A: —the complaint.
> Q: Yeah.

R. 737–39.

[10] The testimony of two experienced civil rights attorneys estimated the range of the amount of attorneys' fees and costs to be incurred on behalf of the individual Police Officer Defendants at between $30,000 to more than $500,000 (R. 266) and between $100,000 to $750,000 or more. (R. 270.) One of them, Randall Edwards, noted that "even a reasonable

B. The Bond and Undertaking Statutes Constitute an Unconstitutional Taking Without Due Process.

estimate is impossible to predict before the conclusion of the case without engaging in gross speculation," that "[c]ertainly 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." (R. 266.)

The City and Police Officers demonstrated how prospective defendants 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 ("the 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 somewhat ameliorate the due process and equal protection concerns.

In egregious violation of the prohibition against a lawyer also acting as a witness on contested matters, and following strenuous objections by Kendall's counsel (R. 626–31; 755; 768–773), the trial court permitted legal counsel for the City and Police Officers to present by means of affidavit and live testimony the only evidence on behalf of his clients regarding an estimate of future attorneys' fees and costs—an absurd, self-serving figure of $12,000. (R. 352; 756.) Lawyers are prohibited from also being witnesses on contested matters. *Watkiss & Campbell v. Foa &* Son, 808 P.2d 1061, 1065 (Utah 1991) ("[I]t was improper for [a party's lawyer] to submit his affidavit and remain as counsel for [his client]. . . .[W]e deem it to be generally inadvisable for members of the bar to testify in litigation where they personally represent a party. The need for the testimony of counsel must be compelling and must be necessary to preserve the cause of action . . ."); *State v. Leonard*, 707 P.2d 650, 653 (Utah 1985) ("Experience teaches that the roles of advocate and witness should be separated."). *See also United States v. Morris*, 714 F.2d 669, 671 (7th Cir. 1983) ("That counsel should avoid appearing both as advocate and witness except under special circumstances is beyond question."); *Reed v. Ford Motor Co.*, 679 F.Supp. 873, 875 (S.D. Ind. 1988) ("attorneys of parties to litigation generally are not proper witnesses, including at the summary judgment stage"); *Haberer v. First Bank of South Dakota*, 429 N.W.2d 62, 65–66 (S.D. 1988) ("[A]ttorneys must be cautioned when using affidavits in support of a motion for summary judgment, or any affidavits with respect to litigation. Clearly, the affidavits must not deal with contested matter or facts, or otherwise give evidence regarding matters that would be questions of fact."); *Aghili v. Banks*, 63 S.W.3d 812, 818 (Tex. Ct. App. 2001) ("the appearance of a testifying advocate tends to cast doubt on the ethics and propriety of our judicial system. . . .'The practice of attorneys furnishing from their own lips and on their own oaths the controlling testimony for their client is one not to be condoned by judicial silence. . . .Nothing short of actual corruption can more surely discredit the profession.'" (citation omitted)).

A person cannot be deprived of life, liberty, or property without notice and an opportunity to be heard. The requirement of the Undertaking Statute to post a costs bond in an amount set by the court when one seeks to hold a governmental entity or employee legally accountable in the courts and 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 an undertaking constitutes a taking of property since a nonrefundable premium is required to secure an undertaking

or bond and, in addition, collateral may be required.[11] *See, e.g., Brooks v. Small Claims Court*, 504 P.2d 1249,1253 (Cal. 1973).[12] Hence, before a costs or attorneys' fees bond or undertaking 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

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[11] Q [Mr. Anderson]: Did you check with Platt River Insurance Company regarding the availability of a bond?

A [Michael Brown]: Through a brokerage company that has a contract with Platt River, yes.

Q: And what were the terms of that bond going to be if Sean [Kendall] would have qualified?

A: The indication was three percent of the bond requirement would be the premium and 100 percent collateral.

. . . .

Q: You say collateral. Besides paying the premium, you have to put up collateral?

A: Correct.

Q: And in what form?

A: Cash or cash equivalent, CD, Bank line of credit or a bank guarantee letter in the name of the insurance company.

Q: And would that be in the full amount of the bond?

A: Yes.

R. 713–14.

[12] "[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.

> 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 and Undertaking Statutes do 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 police officer in Utah must post the bond or prove his or her impecuniosity and every person seeking to sue a governmental entity or employee must post an undertaking, in the arbitrary (and, in part, duplicative) amounts 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 Ann. § 78B-3-104. Accordingly, the Bond and Undertaking Statutes violate due process under the United States and Utah Constitutions.

CONCLUSION

The Bond Statute and Undertaking Statute are 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 order of the trial court should be reversed and the Bond Statute and Undertaking Statute must finally 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.

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CERTIFICATE OF COMPLIANCE

This reply brief, submitted under Utah rule of Appellate Procedure 24(f)(l), complies with the type-volume limitation. The word processing system used to prepare this brief states that it contains 13,460 words and 1,182 lines in Times New Roman type, which is a proportionally spaced font.

CERTIFICATE OF SERVCE

The undersigned hereby certifies that on this 7th day of April, 2016, an original and 7 copies of the foregoing **BRIEF OF APPELLANT** were filed with the Clerk of the Utah Court of Appeals, and two copies served upon the following by U.S. Mail.

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Appellant's Brief Addendum