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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

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, THE HON. HEATHER BRERETON AND WILLIAM BARRETT

REPLY BRIEF OF THE APPELLANT

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I. KENDALL HAS STANDING TO CHALLENGE THE STATUTES BASED ON TRADITIONAL STANDING AND BASED ON ALTERNATIVE STANDING.

Under Utah law, a plaintiff can establish standing to challenge a statute under two main tests. The traditional standing test requires the plaintiff to show a distinct and palpable injury. *See Utah Chapter of Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, ¶ 19, 148 P.3d 960. The alternative standing test requires the plaintiff to show the issue is of sufficient public importance and the plaintiff is an appropriate party to bring suit. *See BV Lending, LLC v. Jordanelle Special Serv. Dist.*, 2013 UT App 9, ¶ 12, 294 P.3d 656. Kendall has standing under both tests.

A. Because Kendall suffers and has suffered a distinct and palpable injury, he has standing to challenge the constitutionality of the statutes.

The Appellees, Brett Olsen, Brian Purvis, Joseph Allen Everett, Tom Edmundson, George S. Pregman, and Salt Lake City Corporation (collectively the "City Defendants"), and the State are incorrect in their assertions that Kendall does not have standing in this case because they refuse to acknowledge the distinct and palpable injuries that Kendall has suffered and is suffering. *See* City Defendants' Brief 14; State's Brief, 5. To have traditional standing, a party must show it has suffered or will suffer a "distinct and palpable injury" that gives the

party a "personal stake in the outcome of the legal dispute." *Utah Chapter of Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, ¶ 19, 148 P.3d 960.

To determine whether a party has suffered or is suffering a distinct and palpable injury, the Utah Supreme Court has applied a three-part test that requires a party to show:

> (1) that [the party] has been or will be adversely affected by the [challenged] actions, (2) that a causal relationship [exists] between the injury to the party, the [challenged] actions and the relief requested, and (3) that the relief requested is substantially likely to redress the injury claimed.

State v. Roberts, 2015 UT 24, ¶ 46, 345 P.3d 1226 (citation and internal quotation marks omitted). This three-part test is undisputedly the correct analysis, but cases decided much earlier did not apply it or anything substantially similar to it. For example, in *Hoyle v. Monson*, 606 P.2d 240 (Utah 1980), cited at length by the City Defendants, the Utah Supreme Court used a wholly different analysis to determine that appellants who claimed a filing fee statute violated article I, section 4 of the Utah Constitution did not have standing. *Id*. at 242. The appellants in *Hoyle* had argued that the Utah Constitution prohibited "the requirement of a property qualification" for holding office. *Id*. While the analysis in *Hoyle* is not readily apparent, it appears the Court determined the appellants could afford the filing fee and therefore were not in the class of people who were barred from office by the filing-fee requirement. *Id*. *Hoyle*, however, was decided more than twenty-five years before *Sierra Club* and about thirty-five years before *Roberts*. The *Hoyle* court did not apply the three-part test articulated in *Sierra Club* and

Roberts, which was based on a test first articulated in *Jenkins v. Swan*, 675 P.2d 1145, 1150 (Utah 1983). In fact, *Hoyle* was decided three years before *Jenkins*. The conclusion in *Hoyle* that a plaintiff lacks standing when challenging a fee if the plaintiff has the ability to pay the fee likely would have been different if the Court had the benefit of the current three-part "traditional test" in *Roberts*. If, as the City Defendants seek, *Hoyle* is read to stand for a rule that a plaintiff will always lack standing to challenge a fee if the plaintiff has the ability to pay the fee, then it has clearly been overruled by *Jenkins* and its progeny. Any analysis of standing, therefore, must begin with the three-part test.

The trial court in this case failed to perform the three-part test and both the City Defendants and the State failed to apply the three-part test on appeal. *See* R. 549; City Defendants' Brief, 16; State's Brief, 7. Applying the correct test to the facts of this case, it is clear Kendall has standing.

First, Kendall has been adversely affected by both Utah Code section 78B-3-104 (the "Bond Statute") and Utah Code section 63G-7-601 (the "Undertaking Statute").[1] Under the Bond Statute, the City Defendants attempted to force Kendall to put up a bond in the amount found by the trial court to be the fees and costs that will be incurred in the future by the police officer defendants or abandon his claims against them. Facing these intimidating, arbitrary, and unconstitutional actions, Kendall was forced to contest the bond or forfeit his state law claims

[1] The Bond Statute and the Undertaking Statute together are referred to herein as the "Statutes."

against the defendants. This resulted in thousands of dollars in attorney fees and a nine-month delay in his case. *See* R. 1–34; 592–600; 759. This delay is highly problematic because memories fade over time and key witnesses can find it difficult to recall important details so long after the events occurred. *See Myers v. McDonald*, 635 P.2d 84, 86 (Utah 1981).

The time, expense, and procedural disadvantages are concrete adverse effects that Kendall suffered, and is suffering, as a direct result of the Bond Statute. The Undertaking Statute adversely affected Kendall in a similar way. Because the bond can be set at any amount, Kendall was required to spend time and money contesting it along with the Bond Statute. Even paying the statutory minimum undertaking is an adverse effect. A "temporary, nonfinal deprivation of property is nonetheless a 'deprivation.'" *See Beaudreau v. Superior Court*, 535 P.2d 713, 719 (Cal. 1975) (citation and internal quotation marks omitted).

Now that the case has been removed to federal court, Kendall is still in danger of being forced to file a bond and an increased undertaking. As the City Defendants point out, Rule DUCivR 67-1(c) now applies. City Defendants' Brief, 34. That rule clearly states that the federal court "may review, fix, and adjust the amount of the required undertaking or bond as provided by law." DUCivR 67-1(c). The Statutes continue to adversely affect Kendall, hanging over his head during the pendency of the litigation. At any point in time, the bond and undertaking may be adjusted, and if Kendall does not have the money on hand or

cannot afford or is unwilling to put that money at risk, he faces forfeiting his vital claims.

The City Defendants inadvertently admit the Statutes have adversely affected Kendall by asserting Kendall's case is "a classic example" of the kind of litigation "the bond and undertaking statutes were intended to discourage." City Defendants' Brief, 30 n.14. They admit, therefore, that the Statutes are designed to discourage litigation through the adverse effects they impose on plaintiffs. If there were no adverse effects, then there would be no power to "discourage." Therefore, as the City Defendants admit, the Statutes have adversely affected Kendall.

Second, there is a causal relationship between the injury, the challenged Statutes, and the relief sought. But for the Statutes, Kendall's claim would not have been delayed for nine months and he would not have had to spend thousands of dollars in attorney fees and costs. *See* R. 1–34; 592–600; 759. The City Defendants and the State wish to look back with hindsight and argue that Kendall did not need to expend time and money to challenge the Statutes because, eventually, they resulted only in a $300 undertaking. However, this result, which is admittedly better than a bond and an undertaking possibly totaling several hundred thousand dollars, was only achieved after Kendall vigorously contested the bond and the undertaking. *See* R. 737. A plaintiff who faces a requirement to post an undertaking for costs in an amount to be determined by the court cannot disregard the Undertaking Statute in the same casual way the State does when it claims the undertaking requirement "seldom, if ever" results in "an amount greater

than $300." *See* State's Brief, 16. The nature of the Statutes effectively requires a plaintiff, like Kendall, to vigorously contest the bond and undertaking because any half measures could result in a costly bond and undertaking that would effectively bar the plaintiff from access to the courts or impose a substantial and unequal barrier to access on a narrow class of plaintiffs not imposed on other plaintiffs. Therefore, under the Statutes, it is necessary for a plaintiff to expend time and money contesting the bond and undertaking or risk either forfeiting the plaintiff's claims or enduring a substantial, unequal barrier to access to the courts. There is obviously a direct causal link between the application of the unconstitutional Statutes and the past and continuing adverse effects.

The relief sought is also causally linked to the injury sustained as a result of the challenged Statutes. Kendall sought declaratory relief so that he could pursue claims without the immense burden of the bond and the undertaking blocking or significantly impairing his access to the courts and hanging over his head during the litigation. This relief is still required and is directly related to the validity of the Statutes. If the Statutes are deemed to be invalid, Kendall will not continue to face the prospect of having to post a bond or have an increased undertaking imposed. Also, if the Statutes are deemed to be invalid, Kendall will no longer be deprived the $300 previously posted as an undertaking.

Third, the relief requested is substantially likely to redress the injury. Kendall's $300 undertaking would be returned to him, and he would no longer face the possibility the bond might be increased at a later date. The trial court,

instead of granting the relief sought, found that Kendall was impecunious and waived the bond on that basis. The trial court, however, in upholding the constitutionality of the Statutes, ignored the nine months and great expense that Kendall sustained to contest the Statutes. Kendall continues to be injured by the facts that he is still deprived of the amount he was required to pay for the undertaking and that the federal court could, at any time, particularly if Kendall is no longer "impecunious," adjust the amount required. Therefore, the relief requested is necessary to protect Kendall's rights.

The Statutes adversely affect Kendall and there is a causal link between the Statutes and the injury. The relief sought is substantially likely to redress the injury and ensure no further harm occurs. Therefore, Kendall has traditional standing to challenge the Statutes. The trial court erred when it failed to apply the correct analysis. The City Defendants and the State err in relying on *Hoyle* for a bright-line rule when *Jenkins* and its progeny require the application of the three-part test.

B. Kendall also has alternative standing because he is an appropriate plaintiff and the issue has significant importance to the public.

The City Defendants are incorrect when they claim Kendall does not qualify for alternative standing. *See* City Defendants' Brief, 17. Alternative standing requires that the plaintiff show the issue is of sufficient public importance and the plaintiff is an appropriate party to bring suit. *See BV Lending, LLC v. Jordanelle Special Serv. Dist.*, 2013 UT App 9, ¶ 12, 294 P.3d 656.

An appropriate plaintiff is one that has a personal interest in the outcome of the litigation such that it can "effectively assist the court in developing and reviewing all relevant and legal factual questions." *Utah Chapter of Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, ¶ 42, 148 P.3d 960 (citation and internal quotation marks omitted). An issue of public importance is usually an issue that affects the public as whole and not just individual future plaintiffs. *See BV Lending,* 2013 UT App 9, ¶ 14. This Court has collected and summarized cases on public importance as follows:

> [I]n *City Defendants of Grantsville v. Redevelopment Agency of Tooele City,* 2010 UT 38, 233 P.3d 461, the party seeking alternative standing alleged that Tooele City and its redevelopment agency had breached an agreement relating to the redevelopment of a decommissioned military base by selling the property and using the proceeds for the benefit of Tooele City rather than the members of the broader Tooele County community that were affected by the base's closing. *Id.* ¶ 6. The supreme court determined that Grantsville City had alternative standing to bring its claims because the entire community had an interest in having the issue litigated due to its having a stake in the sale or development of the military base. *Id.* ¶ 19. Similarly, in *Utah Chapter of the Sierra Club v. Utah Air Quality Board,* 2006 UT 74, 148 P.3d 960, the issue raised by the party seeking alternative standing was whether the Executive Secretary of the Utah Division of Air Quality had complied with state and federal law in approving the construction of a power plant. *Id.* ¶ 3. The supreme court considered this to be an issue of public importance because the alleged violations would directly affect the entire community due to the power plant's proximity to homes and Capitol Reef National Park. *Id.* ¶ 44. . . .

Id. ¶ 15.

In this case, the City Defendants badly err when they assert Kendall lacks an "interest in the injury he seeks to redress." City Defendants' Brief, 19. As

previously discussed, the application of the Statutes has injured and continues to injure Kendall in significant ways. His claims were delayed for nine months. *See* R. 1–34; 592–600. He spent thousands of dollars in attorney fees and costs. *See* R. 759. And he continues to be deprived of the undertaking he was required to post and faces the ongoing threat of being required to post a bond and pay an increased undertaking. Therefore, Kendall has a paramount interest in the constitutionality of the Statutes. This interest has motivated Kendall to provide this Court with a thorough analysis of all relevant legal and factual issues. In response to the Appellant's brief, the City Defendants and the State have also fully briefed the legal and factual issues to aid this Court in reaching a conclusion. Therefore, Kendall is an appropriate plaintiff, and this Court has all the necessary information to rule on this issue.

The constitutionality of the Statutes is an issue of great importance to the public as a whole, and not just to future individual plaintiffs. The general public has three overarching interests in the outcome of this appeal. First, the public has an interest in curbing police misconduct through appropriate and accessible deterrents. As the Utah Supreme Court has noted, denying citizens meaningful access to the courts to hold law enforcement officers accountable for their wrongful acts "could open the way to any kind of oppressive treatment however cruel or diabolical, without the perpetrator being brought to account." *See Zamora v. Draper*, 635 P.2d 78, 81 (Utah 1981).

Second, the citizens of Salt Lake City have an interest in the conduct of the police force that represents, protects, and serves them. As the United States Supreme Court has observed, "[I]t is the public at large which enjoys the benefits of the government's activities, and it is the public at large which is ultimately responsible for its administration." *Owen v. City of Indep., Mo.*, 445 U.S. 622, 655 (1980). Therefore, the issue of whether these Statutes unconstitutionally block and deter lawsuits, like Kendall's, that form the principle deterrents against police misconduct, is of enormous importance to the public.

Third, the public has a vital interest in the administration of its justice system to ensure everyone has access to the courts, equal protection of the laws, and due process under those laws. *See id*. The United States Supreme Court has long held that the public has a responsibility in a "democracy for the wise conduct of the government." *See First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 788 (1978); *see also* Carole Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right,* 60 OHIO ST. L.J. 557 (1999) ("This nation has long viewed a person's ability to gain access to court as a fundamental element of our democracy."); Jethro K. Liberman, THE LITIGIOUS SOCIETY 31 (1981) ("It is . . . fundamental to any humane society that a person may seek recompense from those who injure."). These Statutes unduly burden access to the courts and create a two-tiered justice system wherein the extremely wealthy can seek justice, but the poor and those who cannot afford to risk their

assets are denied. The public has a responsibility to ensure that its public institutions function in a just and equitable manner.

As additional proof of the public interest in whether a certain class of claimants should face the significant barriers imposed by the Statutes, several local and national news outlets found this issue of sufficient public importance to publish stories about the barriers Kendall faces in accessing the courts. *See, e.g.*, Christopher Smart, *Utah man faces financial hurdle to sue the officer who shot his dog, Geist*, THE SALT LAKE TRIBUNE, (June 24, 2015), http://www.sltrib.com/home/2660648-155/man-faces-financial-hurdle-to-sue; *Utah man must pay for permission to sue officer who killed his dog*, THE WEEK, (June 25, 2015), http://theweek.com/speedreads/562732/utah-man-must-pay-permission-sue-officer-who-killed-dog.

Kendall is an appropriate plaintiff and the issues he raises are vital to the public. Therefore, even if he did not have traditional standing, he has alternative standing.

II. THE APPEAL IS NOT MOOT AND KENDALL STILL REQUIRES THE RELIEF HE SOUGHT IN THE TRIAL COURT.

The City Defendants contend that this appeal is moot because a determination of the constitutionality of the Bond Statute and the Undertaking Statute will not affect Kendall's rights. City Defendants' Brief, 14. Again, the City Defendants refuse to acknowledge the harm the Statutes have caused, and continue to cause, Kendall. Because Kendall's rights have been impinged upon and because

they are still in jeopardy, the issues he raises are not moot. "A case is deemed moot when the requested judicial relief *cannot* affect the rights of the litigants." *Burkett v. Schwendiman*, 773 P.2d 42, 44 (Utah 1989) (emphasis added).

In this case, judicial relief is still necessary to protect Kendall's rights. The City Defendants' position that there can be no "actual relief" is particularly suspect because in the very same paragraph they admit that Kendall has already been forced to post a $300 undertaking. City Defendants' Brief, 13. A ruling from this Court that the Undertaking Statute is unconstitutional would result in an immediate refund of that $300. Perhaps the City Defendants find $300 to be an insignificant amount, and therefore not worthy of any "actual relief." But $300 is a significant amount to many Americans who live paycheck to paycheck. *See* Kelley Holland, *62% of Americans can't cover unexpected expenses*, CNBC.COM, (Jan. 7, 2015), http://www.cnbc.com/2015/01/07/60-percent-of-americans-cant-cover-unexpected-expenses.html. The City Defendants cite neither case law nor statute to support the proposition that matters involving $300 are somehow moot.[2]

Kendall's issue with the Bond Statute is also not moot because, as the City Defendants concede, DUCivR 67-1(c) allows a federal court to "review, fix, and adjust the amount of the required undertaking or bond as provided by law." DUCivR 67-1(c). To succeed on its claim of mootness, the City Defendants must

[2] While the State does not join the City Defendants in their mootness claim, it does suffer from the same disturbing insouciance regarding the $300 undertaking. Despite the fact most Americans today would have to go into debt to pay a $300 undertaking, the State describes this as "no more than a speed bump." State's Brief, 4.

show that "judicial relief *cannot* affect the rights of the litigants." *Burkett*, 773 P.2d at 44 (emphasis added). Instead, they have shown the opposite by emphasizing that, according to DUCivR 67-1(c), Kendall is still subject to the imposition of a bond and greater undertaking under the unconstitutional Statutes. City Defendants' Brief, 34.

Finally, and most importantly, the City Defendants refuse to acknowledge the extreme hardships the Statutes have already caused Kendall. To protect his constitutional rights, he was forced to use extensive, costly, and time consuming efforts to oppose the imposition of the bond and undertaking requirements, which could have totaled more than hundreds of thousands of dollars. R. 228, 232, 737. This delayed his litigation for nine months and cost him thousands of dollars in attorney fees and costs. *See* R. 1–34; 592–600; 759.

The crucial issues presented in this matter are not moot. Kendall is entitled to a ruling on the merits.

III. AN EXCEPTION TO THE MOOTNESS DOCTRINE APPLIES IN THIS CASE BECAUSE KENDALL RAISES ISSUES OF PUBLIC IMPORTANCE THAT ARE LIKELY TO RECUR BUT EVADE REVIEW.

Even if, for some reason, Kendall's issues were technically moot, the public interest exception would still apply. "The public interest exception to the mootness doctrine arises when the case [1] presents an issue that affects the public interest, [2] is likely to recur, and [3] because of the brief time that any one litigant is affected, is capable of evading review." *Guardian ad Litem v. State ex rel. C.D.*,

2010 UT 66, ¶ 13, 245 P.3d 724 (citation and internal quotation marks omitted); *see also Utah Transit Auth. v. Local 382 of Amalgamated Transit Union*, 2012 UT 75, ¶ 31, 289 P.3d 582 (refusing to recognize a per se "public interest exception" and requiring the appropriate three-part test).

First, as previously discussed, this case is a matter of great public importance. *See supra* Part I. B. It affects the efficacy of deterrents for police misconduct and the training and conduct of the Salt Lake City Police Department in particular. It also affects the manner in which our society ensures our justice system is accessible and treats all people fairly regardless of their financial resources. Equal protection and due process are not just esoteric constitutional concepts devoid of meaning in the public sphere. They are ideals that citizens in our democracy have a responsibility to protect and promote. These issues are of vital public importance.

Second, this problem is highly likely to recur. The Statutes are designed to discourage litigation and are applied to every case that is brought against a police officer in Utah. The City Defendants even assert there were "[s]eventy-four new matters asserted against Salt Lake City alone last year." City Defendants' Brief, 45. It is inevitable, therefore, that other plaintiffs will face the same barriers to justice that Kendall faces with these Statutes that unfairly and disproportionately punish poorer plaintiffs and impose a tremendous burden on even those who can afford to post a bond and file an undertaking. This is a constantly recurring problem.

Third, the Statutes are capable of evading review. The City Defendants' own mootness argument belies their contention that the public interest exception does not apply. If the City Defendants' position on mootness is adopted, then courts would not be able to review any cases in which a plaintiff successfully contested the bond and undertaking requirements even though that plaintiff had to expend a significant amount of time and money in reaching that result. The City Defendants also contend that a smaller undertaking is not worthy of review or judicial relief. Furthermore, the City Defendants fail to appreciate the fact that many potential plaintiffs with legitimate claims are intimidated and discouraged from even starting a case. *See* Appellant's Brief, 16–17. In all of these scenarios, the validity of the Statutes is capable of evading review. Indeed, if the City Defendants have their way, none of these scenarios would ever warrant review. Instead the City Defendants argue that this Court should wait until a plaintiff comes along who does not have the means and ability to challenge the constitutionality of the Statutes and is therefore completely barred from Utah courts, but then suddenly has the means and ability to appeal to a higher court. Such a scenario is extremely unlikely.[3] Therefore, this issue is highly capable of evading review.

[3] For instance, in at least three cases in the United States District Court for the District of Utah, claims have been dismissed because of plaintiffs' failure to comply with the Bond Statute or with the Undertaking Statute, without any argument by the parties or consideration by the courts of the constitutionality of the Statutes. *See* Appellant's Brief, 35.

Therefore, Kendall's case is not moot. The relief he seeks remains necessary to protect and vindicate his constitutional rights. But even if the case were technically moot, it remains the best possible scenario in which this Court could review the Statutes. On matters of such important public interest, this Court should embrace the opportunity to address the merits of Kendall's appeal.

IV. THE STATE DOES NOT CONTEST THE UNCONSTITUTIONALITY OF THE BOND STATUTE.

The State has made it clear throughout the proceedings before the trial court and on appeal that it does not defend the validity of the Bond Statute. *See* R. 436–46; State's Brief. In fact, the State goes to great lengths to distinguish cases that invalidated statutes that required bonds for attorney fees, like the Bond Statute, from cases dealing only with undertakings for costs, like the Undertaking Statute. *See* State's Brief, 10–11. From a practical perspective, this approach is deeply flawed since a plaintiff in Utah who seeks to sue a law enforcement officer does not have the luxury of only being subject to one statute and not the other. In any event, one must understand this as a concession that the Bond Statue is indefensible.

V. HEIGHTENED SCRUTINY APPLIES TO THE EQUAL PROTECTION CLAUSE AND UNIFORM OPERATION OF LAWS ISSUES BECAUSE THE STATUTES IMPINGE UPON A FUNDAMENTAL RIGHT.

Both the State and the City Defendants argue that this Court should apply only rational basis scrutiny to determine whether the Statutes are valid under the

United States Constitution's Equal Protection Clause and under the Utah Constitution's Uniform Operation of Laws Clause. City Defendants' Brief, 40; State's Brief, 8. Although heightened scrutiny applies, Kendall has established that, even under a rational basis analysis, the challenged Statutes are unconstitutional. *See* Appellant's Brief, 17–24.

The challenged Statutes must be subjected to heightened scrutiny because the Statutes impinge upon or implicate a fundamental right. *See Plyler v. Doe*, 457 U.S. 202, 217 (1982); *Lee v. Gaufin*, 867 P.2d 572, 583 (Utah 1993). In *Plyler*, the United States Supreme Court ruled that statutes that create classifications impinging upon fundamental rights are "presumptively invidious" and invalid. *See Plyler*, 457 U.S. at 217. Under these circumstances, the party defending the law must "demonstrate that its classification has been precisely tailored to serve a compelling governmental interest." *Id*. The United States Supreme Court has recognized that "meaningful access to the courts is a fundamental right within the protection of the First Amendment." *See United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 585 (1971).

Under these circumstances, heightened scrutiny should be applied under the Utah Constitution as well. In *Lee*, the Utah Supreme Court considered whether a statute of limitations violated the Uniform Operation of Laws Clause because it treated "minors who have medical malpractice causes of action differently from minors who have causes of action for other kinds of personal injury." *Id*. at 577. The Court determined that the statute of limitations implicated the constitutional

rights contained in Article I, section 11 of the Utah Constitution. *Id*. at 583. The *Lee* court applied heightened scrutiny because the statutory scheme "implicated" the right of access to the courts. *Id*. at 584.

In this case, the Statutes implicate the fundamental right of meaningful access to Utah courts. The undisputed intent of the Statutes is to create deterrents and barriers that plaintiffs must overcome before they may have meaningful access to the courts. The City Defendants err in their analysis in this regard by assuming Utah's Open Courts Clause can only be implicated to limit the Legislature's ability to abrogate a remedy. As the Utah Supreme Court has ruled, "While this clause may not guarantee any specific remedy, it certainly guarantees access to the courts." *Jeffs v. Stubbs*, 970 P.2d 1234, 1250 (Utah 1998). Kendall has consistently argued that the Statutes unconstitutionally burdened his *access* to courts, and he has not argued that the Legislature has abrogated a "remedy" that was previously available at common law. *See* Appellant's Brief, 29–30. Therefore, the City Defendants err greatly when they attempt to argue that none of the rights contained in Article I, section 11 of the Utah Constitution are implicated in any way by the Statutes simply because they "do not abrogate a claim." *See* City Defendants' Brief, 41. This misses the point. The Statutes clearly implicate access to the courts; therefore, heightened scrutiny must apply both under the federal and the state constitutions.

The State also misses the point when it attempts to argue that heightened scrutiny does not apply because the Undertaking Statute does not "seriously

impede access to the courts." State's Brief, 9. Kendall disputes this conclusion as a factual matter, but even if it were taken at face value, it articulates an incorrect standard. The standard is whether the Undertaking Statute "implicates" or "impinges" on the fundamental right of access to the courts. The standard is not whether the statute "seriously impedes" that right.

Heightened scrutiny applies to both the federal Equal Protection analysis and the state Uniform Operation of Laws analysis, which is at least as rigorous as its federal counterpart. *See Mountain Fuel Supply Co. v. Salt Lake City Corp.*, 752 P.2d 884, 889 (Utah 1988). The State has conspicuously refrained from arguing that the Undertaking Statute could survive heightened scrutiny. State's Brief, 9–13. The City Defendants merely make speculative statements that the Statutes are working as intended, but they offer no evidence anywhere in the record that the Statutes have anything "more than a speculative tendency to further the legislative objective and, in fact, actually and substantially further[] a valid legislative purpose." *See Lee v. Gaufin*, 867 P.2d 572, 583 (Utah 1993). In fact, the City Defendants admit they failed to provide "empirical evidence to show that police officers are subject to a greater number of harassing and frivolous lawsuits than other individuals." *See* City Defendants' Brief, 43. Instead, they attempt for the first time on appeal to present evidence that they have many pending lawsuits and that they have prevailed on "more than half of those matters." *See* State's Brief, 45. Even if this evidence were part of the record, it fails to demonstrate that the Statutes substantially further a valid legislative objective in any way. These

assertions of fact give no indication about whether frivolous lawsuits were actually deterred or whether a deterrent is even needed.

More importantly, the facts asserted by the City Defendants give no indication about how many meritorious lawsuits were barred simply because the plaintiffs lacked the funds to overcome the barriers the Statutes imposed. In contrast, Kendall provided evidence that plaintiffs with meritorious claims are often deterred or barred from bringing their claims solely because of the Statutes. *See* R. 727–28, 744, 739. Under heightened scrutiny, the proponent of the challenged statute bears the burden of showing the law is appropriately tailored to fit its need. *See Lee*, 867 P.2d at 591. But neither the City Defendants nor the State have explained how the Statutes are "reasonably necessary" to achieve a legitimate goal, *see id.* at 583, or "precisely tailored" to a compelling governmental interest, *see Plyler*, 457 U.S. at 217. Based on Kendall's evidence, it is clear the statutes are overbroad and overinclusive. They are discouraging meritorious lawsuits and disproportionately punishing poorer plaintiffs. As a result, the Statutes cannot survive heightened scrutiny.

VI. UTAH COURTS HAVE NOT ADDRESSED WHETHER UTAH'S CURRENT BOND STATUTE IS CONSTITUTIONAL; *ZAMORA V. DRAPER* DEALT WITH A SUBSTANTIVELY DIFFERENT STATUTE.

The City Defendants have argued that the Utah Supreme Court in *Zamora v. Draper*, 635 P.2d 78, 79 (Utah 1981), "squarely addressed" whether the Bond Statute violates the Open Courts Clause of the Utah Constitution and found it to be

"constitutional on its face." *See* City Defendants' Brief, 20. The State makes a similar argument about the Undertaking Statute. *See* State's Brief, 17–18. Neither the City Defendants nor the State examine the significant textual differences between the statute addressed by the *Zamora* Court and the current Statutes at issue in this case. The differences are illuminating.

The statute in *Zamora* read:

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

Zamora, 635 P.2d at 79 (emphasis added).

The Bond Statute in this case reads:

> (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.

UTAH CODE ANN. § 78B-3-104(1)–(2) (emphasis added).

While both statutes allow a court to set the bond, the current Bond Statute takes away the court's discretion in setting that amount by *requiring* that the amount of the bond "*shall* cover all estimated costs and attorney fees." *Id*. (emphasis added). The Court in *Zamora* tepidly determined that the older statute was "not necessarily unconstitutional," *see Zamora*, 635 P.2d at 80, but this was premised on the observation that the "statute itself allows some flexibility," *see id*.

at 81. The plain language of the Bond Statute at issue in this case removes that flexibility and *requires* a court to cover "all estimated costs and attorney fees." The Undertaking Statute also lacks flexibility. It requires the bond be "not less than $300." UTAH CODE ANN. § 63G-7-601(2)(a).

Both the City Defendants and the State argue that the federal courts have, by way of a rule, inserted some flexibility into the Statutes. This, however, is an unsatisfactory answer for many reasons. First, Kendall faced the burden of these Statutes in a Utah state court where there is no rule like Rule DUCivR 67-1(c) to provide sufficient flexibility to satisfy Due Process.

Second, the very fact the federal courts found it necessary to create a rule with greater flexibility indicates the federal courts found the Statutes to be infirm on some level. The City Defendants argue that DUCivR 67-1(c) provides procedural protections for plaintiffs that are unavailable in Utah courts—including a hearing before setting a bond above the minimum $300. *See* City Defendants' Brief 34, 33. The City Defendants even go so far as to chastise Kendall for bringing his claims in state court. City Defendants' Brief, 33. This seems to admit that the Statutes, by themselves, are unconstitutionally inflexible and that the procedural protections in Utah courts are lacking. Kendall agrees.

Third, the flexibility in DUCivR 67-1(c), when applied according to the plain text of the Bond Statute, is still insufficient to protect a plaintiff's fundamental rights. As has previously been discussed, DUCivR 67-1(c) means a federal court could at any time *increase* the amount of the bond "as provided by

law." *See* DUCivR 67-1(c). Therefore, DUCivR 67-1(c) creates some flexibility in the timing of setting the bond and undertaking, which is inconsistent with the language of the Bond Statute, but it still does not remedy the Statutes' rigidity regarding the *amounts* of the bond and undertaking.

As a result, it is highly inaccurate to argue that *Zamora* has already determined the Statutes in this case do not violate Due Process. If anything, *Zamora* illustrates a contrast between what is "not necessarily unconstitutional" and what is, in fact, glaringly unconstitutional.

VII. HEIGHTENED SCRUTINY APPLIES TO KENDALL'S DUE PROCESS CLAIMS BECAUSE THEY DEAL WITH FUNDAMENTAL RIGHTS.

Heightened scrutiny applies to the Due Process claims in this case because the Statutes burden the fundamental right of access to the courts.[4]

In *In re Boyer*, 636 P.2d 1085, 1087 (Utah 1981), the Utah Supreme Court addressed what level of scrutiny applied to a Due Process challenge to a statute when the appellant argued that the statute was void for vagueness. *Id*. The Utah Supreme Court found that "[w]hen state action impinges on fundamental rights, due process requires" a heightened standard. *See id*. Following *Boyer*, a long line of cases recognized a heightened level of scrutiny for all challenges arising under Article I, section 11 of the Utah Constitution. *See, e.g.*, *Hipwell v. Sharp,* 858 P.2d 987, 988 n.4 (Utah 1993); *Condemarin v. Univ. Hosp.,* 775 P.2d 348, 368 (Utah

[4] Although heightened scrutiny applies, the Statutes are also unconstitutional under a rational basis analysis. *See* Appellant's Brief, 33–40.

1989) (Zimmerman, J., concurring); *Currier v. Holden,* 862 P.2d 1357, 1362–63 (Utah App. 1993).

In *Wood v. Univ. of Utah Med. Ctr.*, 2002 UT 134, ¶ 8, 67 P.3d 436, the Utah Supreme Court rejected a blanket application of heightened scrutiny to every challenge under Article I, section 11. *Id*. In *Wood*, the appellant argued that a statute had abrogated a legal remedy. *Id*. ¶ 10. Because the Utah Supreme Court determined that the appellant's claimed legal remedy was not available at common law and had never been recognized in Utah, there was no reason to apply heightened scrutiny. *See id*. ¶ 14. This makes sense because that statute did not impinge upon a fundamental right.

In this case, however, Kendall has not argued that a remedy has been abrogated. Instead, he has argued that the Statutes "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." Appellant's Brief, 36. As previously discussed in this Reply Brief, *see supra* Part III, and as discussed in great detail in the Appellant's Brief, *see* Appellant's Brief, 29–30, the Statutes impinge on the fundamental right of access to the courts. Therefore, a heightened level of scrutiny must apply to the Statutes under a Due Process analysis.

VIII. THE STATUTES WERE UNCONSTITUTIONALLY APPLIED TO KENDALL BECAUSE THEY REQUIRED HIM TO DELAY HIS LITIGATION AND INCUR EXPENSES TO AVOID POSTING A BOND AND AN UNDERTAKING.

The City Defendants erroneously state, without sufficient analysis, that the Statutes were not unconstitutional as applied to Kendall "because the district court found Kendall impecunious and not required to furnish a bond." City Defendants' Brief, 47. The City Defendants also argue "the undertaking statute was not unconstitutionally applied to Kendall because Kendall was only required to pay a $300 undertaking that he stated he could afford." *Id*.

Once again, the City Defendants ignore the fact Kendall was injured by the efforts it took to achieve this result. In other words, the unconstitutional injury had already occurred before the trial court made its ruling. The Statutes were unconstitutional as applied to Kendall when he was forced to contest them or abandon his claims. These efforts cost Kendall thousands of dollars in attorney fees and delayed his litigation by nine months. *See* R. 1–34; 592–600; 759. In the end, he was still required to pay $300 that plaintiffs filing suit against non-governmental defendants were not required to pay. Neither the City Defendants nor the State have even attempted to explain how charging one group of plaintiffs more for access to the courts serves any legitimate purpose. Instead they shrug off Kendall's injuries as unimportant from their perspective. *See, e.g.*, State's Brief, 4. Fortunately, this is not the standard required by the Utah Constitution or the United States Constitution. The City Defendants and the State have merely

attempted to avoid Kendall's as-applied challenges to the Statutes, and therefore have not addressed them at all. For the reasons stated above, this Court should find that the Statutes are unconstitutional as applied to Kendall.

CONCLUSION

For the foregoing reasons, Kendall respectfully requests this Court to reverse the trial court's decision and declare the Bond Statute and the Undertaking Statute unconstitutional, both facially and as applied to Kendall.

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CERTIFICATE OF COMPLIANCE

I, Marshall Thompson, certify that the Appellant's Reply Brief complies fully with the requirements of rule 24(f) of the Utah Rules of Appellate Procedure. It contains 6,489 words and 570 lines of text.

CERTIFICATE OF SERVICE

I, Marshall Thompson, certify that on June 27, 2016, an original of this Reply Brief was e-filed with the Utah Court of Appeals; seven bound copies were filed with the Clerk of the Utah Court of Appeals; and two copies were served upon the following by U.S. Mail:

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