No. 15-4189

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PLANNED PARENTHOOD ASSOCIATION OF UTAH,

Plaintiff-Appellant,

v.

GARY R. HERBERT, in his official capacity as Governor of the State of Utah, and JOSEPH K. MINER, in his official capacity as Executive Director of the Department of Health,

Defendants-Appellees.

On Appeal From the United States District Court for the District of Utah
Honorable Clark Waddoups, No. 2:13-CV-00217

BRIEF OF PLAINTIFF-APPELLANT PLANNED PARENTHOOD ASSOCIATION OF UTAH

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ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant Planned Parenthood Association of Utah ("PPAU" or "Appellant") is a Utah non-profit corporation and does not have a parent corporation. No publicly-held corporation owns ten percent or more of PPAU's stock.

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No prior or related appeals have been filed.

JURISDICTIONAL STATEMENT

Because this case involves PPAU's rights under the United States Constitution, the district court had jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction of the appeal under 28 U.S.C. § 1292(a)(1).

The district court issued its Memorandum Decision and Order Denying Preliminary Injunction (the "Order on Appeal") on December 22, 2015. App.483-498. The notice of appeal was timely filed on December 27, 2015. *See* Fed. R. App. P. 4(a)(1)(A); App.499-501.

ISSUES ON APPEAL

Whether the district court committed legal error in concluding that PPAU did not show a likelihood of success on the merits of its constitutional claims in denying PPAU'S preliminary injunction motion.

Whether the district court abused its discretion in denying PPAU's preliminary injunction motion.

STATEMENT OF CASE

I. FACTS

A. PPAU's History of Collaboration with the Utah Department of Health ("UDOH") to Serve Utah's Citizens

For nearly 50 years, PPAU has provided reproductive healthcare and education services to thousands of Utah women, men, and teens. App.27. While PPAU focuses on serving groups at higher risk of contracting and spreading sexually-transmitted diseases ("STDs") and having unplanned pregnancies, its services are made available to all. *Id.* PPAU is the only statewide organization that provides reproductive healthcare services to all who request them, regardless of their health insurance status or their economic, ethnic, cultural, or demographic position in the state. *Id.* In the last year alone, PPAU provided services to over 50,000 people statewide (including 38,470 tests for STDs), 86% of whom reported being uninsured, through its network of nine urban and rural clinics, and contracts with another eleven rural and frontier providers. App.27-28. PPAU's ability to continue to provide services to the uninsured or underinsured is critical. *Id.*

For over two decades, PPAU has partnered with UDOH to provide Utah citizens with reproductive healthcare and education services through state-administered federal funds. App.30. PPAU receives these pass-through funds through written contracts and other agreements between UDOH and PPAU, which agreements are entered into and managed by UDOH employees. App.147; *see*

also, e.g., App.64-93, 149-308 & 336-389. These funds and PPAU's long-standing history of collaboration with UDOH are vital to PPAU's continued success. App.45-46.

UDOH has consistently praised PPAU for the quality of its services and represented it will continue to support PPAU's programs into the foreseeable future, including by providing federal pass-through funding to PPAU. App.30-31. At no time has PPAU been accused, including by Defendant-Appellee Gary R. Herbert, Governor of the State of Utah ("Governor Herbert") or UDOH,[1] of misusing funds or engaging in any other impropriety. App.31. Neither Governor Herbert nor UDOH has ever complained about the services provided by PPAU or claimed PPAU was unqualified to provide services. *Id*.

In the more than two decades that UDOH has provided federal funds to PPAU, UDOH has accepted PPAU for most or all of the federal programs for which PPAU was qualified. App.32. UDOH has routinely renewed contracts with funds remaining after the expiration of the original contract, without any controversy or negotiation. *Id.* Until the facts giving rise to this appeal, UDOH never provided PPAU with a notice of termination or refused to renew a contract with PPAU. *Id.*

[1] Joseph K. Miner, M.D., is the other Defendant-Appellee in his official capacity as Director of UDOH. Defendants-Appellees are referred to collectively as the "State."

By law, no federal funding, including federal funding UDOH provides to PPAU, is used for abortion-related services or advocacy. App.28-29. Instead, the PPAU programs at issue are: (1) a program for testing specimens from individuals in high-risk target groups for Chlamydia and Gonorrhea (the "Targeted STD Testing Program"); (2) a program aimed at improving the timeliness, accuracy, and completeness of STD reporting and surveillance data (the "STD Surveillance Network Program" or "SSuN"); and (3) after-school education programs for adolescents regarding abstinence and/or contraception to prevent pregnancy and STDs and regarding other life skills (the "Utah Abstinence Program" and the "Personal Responsibility Education Program" or "PREP"). App.33-44. Federal pass-through funds are also used to reimburse PPAU for pregnancy and STD testing for rape and sexual assault victims. App.44-45.

B. Governor Herbert's Reliance Upon Unfounded Allegations as a Pretext for Defunding PPAU

Efforts to "defund" Planned Parenthood Federation of America (the "National Organization") and its affiliates were in full swing in both Congress and the states during the summer of 2015, which included threats to shut down the entire federal government if Congress did not cease all funding to these entities. App.399. Amidst this political environment, on August 14, 2015, Governor Herbert abruptly and without warning directed all state agencies to cease providing

pass-through funding to PPAU (the "Directive"), falsely implying that PPAU had been accused of misconduct:

> The allegations against Planned Parenthood are deeply troubling. Current Utah state law prohibits the use of state funds to provide abortions by Planned Parenthood or any other organization. The federal government has provided grants to Planned Parenthood, distributed through the Utah Department of Health. These funds are also prohibited from being used to perform abortions. In light of ongoing concerns about the organization, I have instructed state agencies to cease acting as an intermediary for pass-through federal funds to Planned Parenthood.

App.51.

At a subsequent press conference, Governor Herbert falsely accused PPAU of "coloring outside the lines," citing misleading videos (the "CMP Videos") released by an inaptly named organization, the Center for Medical Progress, made up of anti-abortion activists. The CMP Videos allegedly depict wrongdoing by affiliates of the National Organization related to the legal donation of fetal tissue for medical research. App.26, 29 & 55-56. Governor Herbert declared, "We now have video where they're selling fetus body parts for money and it's an outrage and the people of Utah are outraged. I'm outraged. So for coloring outside the lines, [PPAU] forfeits some of [its] benefits." App.56.

PPAU has never "colored outside the lines." PPAU does not and has never participated in any fetal donation program, nor do any of PPAU's agents or employees appear in the CMP Videos. App.29. Although PPAU is an affiliate of

the National Organization, PPAU is an independent, not-for-profit Utah corporation. App.27. Moreover, every governmental agency that had investigated the CMP Videos at or about the time Governor Herbert issued his Directive concluded that no Planned Parenthood affiliate had engaged in any wrongful or illegal conduct, including investigations completed by the U.S. Department of Health and Human Services and officials in several states. App.387-388 (e-mail between UDOH employees sharing news article entitled, "HHS and State Investigations Find No Violations Of Fetal Tissue Laws After Witch Hunt Sparked by Deceptively-Edited Videos"); App.398-401 ("Planned Parenthood Probes Find No Wrongdoing, But The Damage Has Been Done"); App.403-404 ("GOP Probe Into Planned Parenthood Funding Comes Up Empty").

Governor Herbert underscored his true motivations for the Directive at a political rally held just days after the Directive was issued. App.59-60. The "theme" of Governor Herbert's remarks was "Standing up for the right to life," and the "objective" of his remarks was to

> Emphasize [his] support for life and the law, which prohibits using taxpayer money to pay for abortions. The decision for the state not to act as a pass-through for federal funds to Planned Parenthood was based on those considerations. Reaffirm [his] commitment to fight for the "Right to Life."

App.391. Describing Planned Parenthood as a group that does not have "that same respect for human life," Governor Herbert's memorandum for the rally states that his

> action sends a strong message to Planned Parenthood and the rest of the nation that the state of Utah values the sacred nature of human life.
>
> Utah should not, and must not, be in the business of supporting an organization that does not share that same basic respect.
>
> As your governor, I will continue to do everything in my power to protect this right to life.

App.391-392.

UDOH was strongly opposed to cutting off PPAU's funding. Prior to issuing his Directive, UDOH employees advised Governor Herbert that defunding PPAU would result in "[un]acceptable" harm to the citizens of Utah." App.359. UDOH employees are the state employees actually charged with entering into contracts to provide and managing the state's administration of the federal pass-through funds at issue. App.147; *see also, e.g.*, App.64-93, 149-308 & 336-389. Notwithstanding UDOH's pleas, despite Governor Herbert's lack of involvement in awarding or managing the contracts with PPAU, despite the harm to the public, and despite the truth or falsity of the allegations leveled against Planned Parenthood by its political enemies, Governor Herbert pushed forward with his personal and political agenda.

Pursuant to the Directive, on September 8, 2015, UDOH provided PPAU with a thirty-day termination notice of its contract for the Utah Abstinence Education Program, which would not otherwise have expired until September 30, 2016, and which would have been renewable for additional years at the time of expiration. App.34. On that same day, UDOH provided notice to PPAU that it would cease accepting funds from the Centers for Disease Control and Prevention ("CDC") for the SSuN contract after September 29, 2015. App.43. Absent the Directive, those funds would have continued to be available through September 29, 2018. *Id*. UDOH also publicly announced that it would not renew the contract for PREP, which was set to expire on September 30, 2015, and which UDOH had previously promised PPAU it would fund in 2016 and 2017. App.36-37. Additionally, UDOH informed PPAU that reimbursement for testing under the Targeted STD Testing Program, which UDOH had previously renewed every year as a matter of course, would cease on December 31, 2015. App.40.

C. UDOH Employees Repeatedly Advised Governor Herbert That Cutting Funds to PPAU Was Not in the State's Best Interest

A week prior to the issuance of the Directive, Governor Herbert's office informed UDOH Deputy Director Robert Rolfs, "There is a real risk that [UDOH] will be directed to cancel all funding to planned parenthood." App.336. In response, Dr. Rolfs requested that UDOH employees provide Governor Herbert with "reasons why [the State] shouldn't do that" and "why [the State] can't give

the money to somebody else." *Id*. UDOH employees provided bullet points to Dr. Rolfs, listing some of the negative impacts that would result "without the partnership" between UDOH and PPAU: (1) 4,400 patients would not receive STD testing, leading to "long-term health consequences such as pelvic inflammatory disease (PID) and infertility;" (2) 3,725 individuals diagnosed with chlamydia/gonorrhea would not receive treatment, "resulting in [] long-term health consequences;" (3) valuable patient data related to pregnancy and treatment for STDs "will be less accurate and less timely, in turn increasing the workload of local health department disease intervention staff;" and (4) "Utah will not be able to participate in a CDC deemed 'project of inherent national significance,' which would hurt [the State's] chances of future funding." App.339.

Four days after Governor Herbert's Directive was issued, Dr. Rolfs e-mailed Governor Herbert's staff, stating "there are areas of service where we can't avoid taking services away from women who would have been helped" by PPAU. App.342. That same day, UDOH e-mailed a letter to Governor Herbert from Dr. Rolfs, "summariz[ing] the complexities and concerns that [UDOH employees] have with terminating funding" to PPAU. App.345-346. UDOH employees had prepared another memorandum identifying effects of Governor Herbert's Directive, including that (1) the State could not identify a provider to continue the targeted STD testing formerly provided by PPAU in St. George, Utah; (2) ending

the partnership with PPAU for targeted STD testing would cause the Utah Public Health Laboratory to lose about $240,000 annually; and (3) ending the Abstinence Education and PREP Programs would result in a "need to return the funds" to the federal government, because "PPAU is the only provider in Utah certified to provide the particular curriculum [] use[d]" and because "PPAU had established access with difficult to reach, high risk populations and our program staff believe it is unlikely that within the remaining year of funding another provider could establish relationships and access similar to that of PPAU." App.352-353. With respect to the SSuN Project, UDOH employee Jon Reid stated that cancelling the program with PPAU would cause the State to lose "an additional year of testing." App.355.

A few days later, UDOH employee Cristie Chesler e-mailed Dr. Rolfs, explaining that rerouting STD treatment from PPAU to local health departments would result in patients being charged a $35 fee, "[s]o free treatment would no longer be free." App.357. Ms. Chesler further discussed that no one in the St. George area could cover the STD testing provided by PPAU. *Id*.

The next day, Dr. Rolfs e-mailed Governor Herbert's staff again, stating he had "ongoing concerns" about the Directive, including that he did not "believe that [UDOH] [could] arbitrarily restrict PP from being considered in an open procurement" without potentially risking the State's ability to receive grants from

the federal government for services like the Utah Abstinence Education Program and PREP. App.359. He bluntly stated that defunding PPAU could also cause problems related to other grants, including those for STD, HIV, and hepatitis education, that UDOH "really [doesn't] have good alternatives for some of the services PP is providing," and that "abruptly terminating [PPAU's funds] will harm people of Utah." *Id*. This situation, he stated, "isn't acceptable to me." *Id*.

D. But for Governor Herbert's Directive, UDOH Would Have Continued to Provide Pass-Through Funds to PPAU

When UDOH employees learned that Governor Herbert might cut PPAU's funding, they began actively looking for ways to work around the Directive. *See, e.g.*, App.336 (Dr. Rolfs e-mailed UDOH employees on August 7, 2015: "[W]ould [it] be possible for Feds to fund them directly[?] … [W]e should be exploring [].").

A few days after the Directive issued, UDOH employee Amanda Whipple e-mailed Penny Davies at PPAU, stating she "wasn't officially made aware of the situation [regarding Governor Herbert's Directive] until recently," and that UDOH valued working with PPAU and would "continue to explore options on how to do that." App.361. Ms. Whipple also sent an e-mail to Elizabeth Torrone at the CDC, stating that Governor Herbert had still not communicated with UDOH regarding

his Directive, but indicating she wanted to explore ways the State could work around the Directive to get funds to PPAU. App.365.[2]

UDOH employees' efforts to work around the impact of the Directive are consistent with the positive history and course of dealing between UDOH and PPAU. The state employees actually charged with managing the federal funds and contracts at issue would not have terminated and/or refused to renew UDOH's contracts with PPAU but for Governor Herbert's edict.

UDOH only sent the termination letters to PPAU because Governor Herbert instructed it to do so. On August 21, 2015, Dr. Rolfs told Governor Herbert's staff that he did not intend to send the termination letters to PPAU until he heard further from Governor Herbert. App.343. On August 31, 2015, UDOH employees exchanged e-mails stating the termination letters to PPAU were ready, but they were waiting to hear from Governor Herbert's office whether they must be sent. App.367; App.370 ("As an agency, we have been instructed [by Governor Herbert] to terminate these contracts."). In other words, the decision to terminate and/or not renew contracts with PPAU was made by Governor Herbert and Governor Herbert only.

[2] State-produced documents indicate no work-around solution has been found.

E. Irreparable Harm Will Result Because Other Providers Cannot Provide the Services PPAU Is Providing

1. The Targeted STD Testing Program

The Directive cuts off funding to support the Targeted SDT Testing Program, a program conducted in collaboration with the Communicable Disease Prevention Program for STD testing in Utah, wherein federal funds are used to pay the Utah Public Health Laboratory for testing STD specimens. App.39. The program targets groups for testing who have been identified as high risk: females between the ages of 15-24 and men who have sex with other men. *Id.* As part of this program, UDOH has also provided PPAU with prescription medications needed to treat Chlamydia and Gonorrhea at no charge, allowing PPAU to treat all patients who test positive, and their partners, at no cost. *Id.*

The Targeted STD Testing Program has existed since the early 1990s. *Id.* PPAU has been part of this program, either as a direct recipient of funds or as a partner with a direct recipient of funds, since the program's inception. App.39-40. As the primary provider of reproductive healthcare in Utah, PPAU has never had to compete for this funding. App.40. Until the Directive, PPAU's funding was always automatically renewed. *Id*.

In the past fiscal year, 17,499 patients statewide were tested for Chlamydia and/or Gonorrhea, and 72% of those patients had no insurance. *Id.* Absent these

critical funds, PPAU's ability to provide STD testing and treatment statewide to all who request it is put in imminent danger. *Id.*

Local health departments have neither the capacity nor the expertise to provide STD testing and treatment on the same scale as PPAU; *i.e.*, statewide to all who request it, including for low income households and those without insurance. App.41. PPAU also offers extended hours, with testing available Monday through Friday on a walk-in basis, with some offices open on Saturday. *Id.*

While Governor Herbert has stated that patients can simply obtain services from other "health agencies" around the state, they are inadequate substitutes for PPAU. *Id.* Of the eight health department offices located within the same districts as PPAU centers, only five offered testing; the other three did not. *Id.* Of those five, only the Salt Lake County office offered testing five days a week; the other four departments offered testing only one day a week or a few days a week. *Id.* None of the health centers offered services on Saturday, and none offered free testing to patients. *Id.*

Many patients choose PPAU for STD testing because PPAU provides a safe space for discussion about reproductive health and STD exposure and prevention, whereas they may be afraid to seek the same services at the state health department. App.41-42. If individuals in the target groups cannot access the prompt, cost-free care offered by PPAU, during extended hours, evenings and

weekends, many will forego testing altogether. *Id.* This will cause increases in the rates of Chlamydia and Gonorrhea, infertility related to Chlamydia, unintended pregnancies, and reproductive-health related cancers. *Id.*

UDOH employees advised Governor Herbert of these harms, as described, *supra*, in their pleas that Governor Herbert not implement the Directive.

2. The Utah Abstinence Education Program and PREP

Governor Herbert's Directive cuts off funding for the Utah Abstinence Education Program, an after-school program that provides abstinence education. App.33. The Directive also cuts off funding for PREP, which expands on the Utah Abstinence Education Program by creating the Utah Teen Health Coalition and long-term partnerships with local community groups to provide education on both abstinence and contraception to prevent pregnancy and STDs and adulthood preparation topics such as positive self-esteem, healthy relationship dynamics, educational and career success, and other life skills. App.36. Both programs require parental permission for enrollment. App.33 & 36. PPAU has received funding from UDOH for abstinence education during the last fifteen years, and for PREP since 2013. *Id.* Until the Directive issued, these contracts were routinely "amended" or renewed for each subsequent funding cycle. App.33 & 37.

While Utah has been a bright spot with respect to its lower teen pregnancy rates, Utah experiences continued areas of concern. App.34. PPAU is uniquely

positioned to address these issues. *Id.* Despite nearly two decades of declining teenage birth rates, for example, significant disparities exist among racial and ethnic populations, including among Utah's growing population of African refugees. *Id.* Geographic disparities also persist, such that smaller areas in Utah are marked with higher rates of teen pregnancy. *Id.* These same discrepancies also exist with respect to Utah Chlamydia infection rates which, unlike teen birth rates, are on the rise in Utah. *Id.*

PPAU's goal with the Utah Abstinence Program and PREP is to reduce pregnancy and risky sexual behavior among teens, while increasing school performance in identified high risk communities, through after-school "clubs" for youth in grades 6-10, using the abstinence-based Wyman Teen Outreach Program™ (TOP™) curriculum. App.35-36. Nationwide, this curriculum has been shown to lower the risk of (1) school suspension by 52%, (2) course failure by 60%, (3) teen pregnancy by 52%, and (4) school drop out by 60%. App.35. In other words, the curriculum is very desirable because of its proven success. *Id.*

PPAU is the only organization in Utah certified to offer or replicate the Wyman TOP™ curriculum. *Id.* Even if other organizations could create new clubs in time to serve these teens and their parents (which is doubtful), it would not be the same successful program PPAU offers. *Id.*

UDOH employees advised Governor Herbert of these issues created by his Directive, as set forth, *supra*, in their efforts to keep Governor Herbert from implementing it. In addition, UDOH employees confirmed that the funding for these programs for upcoming years will no longer be available to Utah if they do not go to PPAU, and that the State will have to reapply for these grants, "mak[ing] a new RFP completely unfeasible." App.369-370.

3. The SSuN Program

Governor Herbert's Directive cuts off funding to support the SSuN Program. App.42. Because of PPAU's long-standing relationship with UDOH and the high quality of PPAU's services, UDOH asked PPAU to participate in this five-year project to update the STD-surveillance systems at UDOH and improve data gathering and disease prevention outcomes across Utah. App.43. When the Directive was issued, UDOH and PPAU were two years into the project and had just implemented the electronic data transmission phase. *Id.*

UDOH's grant proposal to the federal government stated that "PPAU is the ideal candidate for a project of this magnitude within Utah due to [its] robust system and [its] consistent collection of data from the target populations of interest." App.44. UDOH said PPAU is the "ideal partner," and therefore PPAU cannot be replaced for this program. *Id.* Even if UDOH could find a new partner,

it would have to start over or, at best, re-do much of the work it had already accomplished with PPAU. *Id.*

UDOH advised Governor Herbert that cutting PPAU from this project would cause Utah to lose "an additional year of testing," and that valuable patient data related to pregnancy and STD treatment would "be less accurate and less timely, in turn increasing the workload of local health department disease intervention staff." App.339 & 355. UDOH also advised that, if PPAU was cut from this project, "Utah will not be able to participate in a CDC deemed 'project of inherent national significance,' which would hurt [the State's] chances of future funding." App.339.

4. Testing for Victims of Rape and Sexual Assault

Governor Herbert's Directive cuts off reimbursement made to PPAU for pregnancy and STD testing for rape and sexual assault victims. App.44 & 53. The Rape Recovery Center in Utah refers 400 victims of sexual assault to PPAU or the county health department each year for STD testing and pregnancy tests. *Id.* The Center's executive director has stated that victims generally prefer PPAU because it is more specialized and the victims are "treated with respect without judgment," and that, without the ability to seek testing at PPAU, many victims will forego this important testing. App.45.

F. Governor Herbert's Directive Has Harmed and Will Irreparably Harm PPAU's Reputation

PPAU's ability to partner with UDOH and other local health organizations is essential to its success and ability to fulfill its mission of providing reproductive health services and education to all Utah citizens who request them, regardless of their ability to pay. App.45-46. PPAU has continuously invested in developing relationships with state and local health and community-based organizations to provide healthcare and education. *Id.* PPAU is a founding member of the local Primary Care Association, Association for Utah Community Heath, which represents over 40 not-for-profit community clinics that provide quality healthcare services, particularly for low-to-moderate income, uninsured, and underinsured Utahans who might otherwise not have access to healthcare. *Id.*

Historically, UDOH has invited PPAU staff to work on public health projects, to speak at symposiums and conferences, and to sit on task forces and coalitions. App.46. PPAU has earned the reputation of being the reproductive healthcare expert in Utah, which has been critical to the success of the organization. *Id.*

Governor Herbert has made false public statements implicating PPAU in illegal activities related to fetal tissue donation, and he has instructed state agencies to terminate PPAU's federal pass-through funding because of this alleged wrongdoing. *Id.* These false statements and the attendant Directive will

irreparably harm PPAU's reputation in the community and its ability to successfully collaborate with other health organizations. App.45.

Governor Herbert's Directive has created a hostile environment for PPAU to participate in public health coalitions. App.46. The State's action ensures that potential partners will question whether PPAU is reliable and whether it can provide services as it has done in the past. App.46-47. Governor Herbert's false statements and Directive create a real risk that state employees will be reticent even to speak with PPAU staff about collaborative efforts. *Id.*

PPAU's reputation is also critical to its continued ability to raise funds through private donors. App.47. Donors will be less likely to provide money to PPAU if they believe, as Governor Herbert has stated, that PPAU has "colored outside the lines." *Id.* If PPAU cannot maintain the trust of its donors, it will lose the ability to provide low-cost health and education services and to serve patients without insurance. *Id.* When these vulnerable groups are forced to pay for services, they will either forego or delay seeking such services. *Id.* Delays in family planning services can lead to devastating consequences, including undetected diseases and unintended pregnancies, some of which may end in abortion. *Id.*

Finally, for PPAU to successfully fulfill its mission, its reputation with patients as an organization that can be trusted must be maintained. App.47. Many

patients choose PPAU over other healthcare providers because PPAU offers nonjudgmental, compassionate, and comprehensive care in a safe environment. *Id.* If patients believe PPAU has engaged in criminal behavior, or otherwise acted improperly, they are less likely to trust PPAU to provide those services. *Id.*

II. PROCEDURAL HISTORY

PPAU filed its complaint and motion for a temporary restraining order and preliminary injunction on September 28, 2015. App.2. The district court held a hearing on the motion on September 29, 2015, and on that same day, issued a temporary restraining order (the "TRO") in favor of PPAU. App.94-96. The TRO enjoined the State from "defunding or denying funding to [PPAU] on impermissible constitutional grounds, including PPAU's affiliation with the national Planned Parenthood organization." App.95-96. The TRO further provided:

> The injunction does not require the defendants to continue contracts, renew contracts, or issue new contracts. If the defendants defund, decline to renew, or do not issue a contract to PPAU, however, they are required to state in writing a legitimate basis for doing so prior to the time their decision takes effect. Such basis cannot include unproven allegations against the national Planned Parenthood organization.

App.96.

Following the parties' additional briefing, the court held a hearing to determine whether to enter a preliminary injunction. App.4. During the hearing,

the State agreed the TRO could remain in effect pending the district court's decision, and the court so ruled.[3] App.479-481.

On December 22, 2015, the district court issued the Order on Appeal, denying PPAU's motion for preliminary injunction and vacating the TRO. App.484.

On December 30, 2015, this Court granted PPAU's motion for injunction pending appeal, enjoining the State from terminating funding to PPAU for the duration of the appeal. *See* Dec. 30, 2015, Order, Doc. 0109547129.

III. DECISION ON APPEAL

In the Order on Appeal, The district court denied PPAU's motion for preliminary injunction. App.484. The court held that PPAU was unlikely to prevail on its equal protection and unconstitutional conditions claims. The court found that the equal protection claim is barred by *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591 (2008). The district court also held that, even if *Engquist* was inapplicable, the claim would fail because there was no independent constitutional violation and PPAU did not sufficiently identify a similarly-situated comparator group who received disparate treatment. App.491-93.

[3] Subsequently, the State voluntarily extended PPAU's funding under the contracts through December 31, 2015. App.479-480.

On PPAU's unconstitutional conditions claims, the district court held that the evidence did not establish that retaliation for the exercise of protected conduct was the substantial or motivating factor for the Directive. App.493-495.

The district court also concluded that PPAU would not irreparably harmed absent an injunction and that PPAU's lack of a likelihood of success on the merits of its constitutional claims precluded a finding of constitutional harm. App. 495. The court also ruled that PPAU would not be harmed because "many people have spoken out in favor of Planned Parenthood following [the Directive]." *Id.*

The district court further determined that the potential harm to the State outweighed the harm to PPAU, stating that PPAU's only injury was "related to the loss of four contracts," whereas an injunction would impact the State's ability to manage its affairs and its "contractual right to terminate the contracts." App. 496. The court also determined that an injunction would harm the State's "interest in avoiding the appearance of corruption." *Id.*

Last, the district court found that the public interest did not favor an injunction. Although harm would result to the public if PPAU's services cease, the court found that interfering with the public's interest in allowing an elected official to determine what is in the State's best interest was of greater significance. App.497.

SUMMARY OF THE ARGUMENT

Governor Herbert's Directive cut off all federal pass-through funding to PPAU based on unfounded accusations of illegal conduct against different affiliates of the National Organization made by a political enemy of Planned Parenthood. The Directive violates PPAU's Equal Protection rights under the Fourteenth Amendment and constitutes an unconstitutional condition in violation of PPAU's First Amendment rights free speech and association rights and its Fourteenth Amendment right to facilitate women's constitutional right to legal abortions. PPAU is entitled to a preliminary injunction because it established a substantial likelihood of success on the merits of its constitutional claims, that the failure to issue the injunction will irreparably harm PPAU and the public, and that the State will suffer no real harm if the injunction issues.

The district court's denial of PPAU's motion for a preliminary injunction was erroneous as a matter of fact and law, and an abuse of discretion. With respect to PPAU's likelihood of success on the merits, the district court erroneously analyzed the law applicable to PPAU's class-of-one equal protection claim and its unconstitutional conditions claims, and it incorrectly applied the law to the facts of this case. Compounding these errors, the district court completely disregarded significant record evidence, including regarding the impacts of and motivations for Governor Herbert's actions.

First, the district court erred in concluding that PPAU's class-of-one claim is barred by the Supreme Court's ruling in *Engquist*. The district court also erred because PPAU is substantially likely to satisfy the elements of its equal protection claim. Without any rational basis, let alone any compelling state interest, and without narrowly tailoring the Directive to serve any such interest, Governor Herbert, with no rational or compelling state interest singled out PPAU for differential treatment from similarly-situated recipients of federal pass-through funding, abruptly terminating the funding that PPAU had received through UDOH for decades without incident.

Second, the district court erred in concluding that the evidence supporting PPAU's unconstitutional conditions claims was insufficient to establish that a substantial or motivating factor for the Directive was retaliation against PPAU for its association with the National Organization and its affiliates, and/or its advocacy for and provision of abortion services. PPAU provided both direct and circumstantial evidence that Governor Herbert's animus to abortion was his real motivation.

The district court also incorrectly concluded PPAU would not suffer irreparable harm, that the harm to the State outweighed the harm to PPAU, and that the public interest would not be served by the issuance of an injunction. PPAU, its reputation, and the citizens of Utah will all suffer irreparable harm if no injunction

is entered, including the ongoing constitutional harm resulting from the Directive. The irreparable harm to PPAU far outweighs any potential harm to the State, and the district court ignored substantial evidence on this issue.

Finally, the court improperly found that an injunction would not serve the public interest because the Governor has an interest in deciding "what is best for the State." App. 497. However, the public has no interest in allowing the Governor to violate citizens' constitutional rights, and the evidence shows that the public's interest in receiving the critical reproductive health and education services at issue, in the absence of which dire health consequences and unwanted pregnancies will result, substantially overrides any interest the Governor might have in unconstitutionally terminating PPAU's federal pass-through funding.

Because the district court committed legal and factual error in assessing PPAU's substantial likelihood of success on the merits and abused its discretion in denying PPAU's motion for preliminary injunction, the Order on Appeal should be reversed, and a preliminary injunction should be entered to preserve the status quo pending the resolution of the case below.

ARGUMENT

I. STANDARD OF REVIEW

This Court "review[s] the denial of a preliminary injunction for abuse of discretion." *Hobby Lobby Stores, Inc. v. Sibelius*, 723 F.3d 1114, 1128 (10th Cir. 2015), *aff'd sub nom Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). When a district court denies a preliminary injunction based on a legal error "or where there is no rational basis in the evidence for its ruling," the district court necessarily abuses its discretion. *See Aid for Women v. Foulston*, 441 F.3d 1101, 1115 (10th Cir 2006).

This case involves the denial of a preliminary injunction based on asserted constitutional violations under the First and Fourteenth Amendments. Accordingly this Court reviews *de novo* the district court's determination of PPAU's likelihood of success on the merits. *See Derma Pen, LLC v. 4EverYoung Ltd.*, 773 F.3d 1117, 1119-1120 (10th Cir. 2014) ("[T]he district relied largely on likelihood of success. Because this element involves [legal matters], we conduct de novo review of the district court's conclusions on likelihood of success.").

A plaintiff seeking a preliminary injunction must establish that it is likely to succeed on the merits, that it is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in its favor, and that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S.

7, 20 (2008). The court applies a relaxed standard to the likelihood of success factor if the movant establishes that the factors "tip decidedly in its favor." *Nova Health Sys. v. Edmondson*, 460 F.3d 1295, 1298 n.6 (10th Cir. 2006). In such cases, the movant need only show "questions going to the merits so serious, substantial, difficult, and doubtful, as to make them a fair ground for litigation." *Id.*

Here, PPAU met its burden under either standard. The district court's determination that PPAU did not show a likelihood of success on the merits was erroneous, and denial of the requested preliminary injunction was an abuse of discretion.

II. THE DISTRICT COURT ERRONEOUSLY DETERMINED THAT PPAU WAS NOT SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS OF ITS EQUAL PROTECTION CLAIM

The district court's conclusion that PPAU was not substantially likely to prevail on its equal protection claim was legal error. The district court first erred in concluding that PPAU's class-of-one equal protection claim is barred by the Supreme Court's ruling in *Engquist*. The district court also erred because PPAU is substantially likely to satisfy the elements of its equal protection claim. Without any rational basis, let alone any compelling state interest, and without narrowly tailoring the Directive to serve any such interest, Governor Herbert improperly singled out PPAU for differential treatment from similarly-situated recipients of

federal pass-through funding, abruptly terminating the funding that PPAU had received through UDOH for many years without incident.

A. *Engquist* Does Not Bar PPAU's Equal Protection Claim

1. *Engquist* and Its Progeny Are Inapposite to the Facts of This Case

Following the United States Supreme Court's recognition of class-of-of one equal protection claims in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), the Supreme Court in *Engquist* held that "the class-of-one theory of equal protection has no application in the public employment context." 553 U.S. at 607. The basis for this ruling was that the government must have the power "to manage [its] internal operation[]s.'" *Id.* at 598. Because "'[g]overnment agencies are charged by law with doing particular tasks,'" when acting as employers, those agencies "hire employees to help do those tasks as effectively and efficiently as possible." *Id.* (quoting *Waters v. Churchill*, 511 U.S. 661, 671 (1994)).

In denying PPAU's motion for preliminary injunction, the district court first noted that, whether *Engquist* applies outside the government employee context, including in government contractor cases, remains an open question in this Circuit. App.490. Although the court acknowledged that *Engquist* might not apply in certain cases, the court nevertheless hung its hat on the *Engquist* Court's concern that, in government employee cases, there are no "clear standard[s] against which departures, even for a single plaintiff, could be readily assessed," *Engquist*, 553

U.S. at 602, holding that in this case "[t]here is no 'clear standard against which a departure could be measured." App.491. Accordingly, PPAU's class-of-one equal protection claim was barred by *Engquist* and could survive only if PPAU could establish a violation of an independent constitutional right. *Id.* Because the court found that PPAU failed to do so, it concluded PPAU was unlikely to succeed on the merits of its class-of-one equal protection claim. The district court's ruling includes a number of significant legal errors and should be reversed.

First, as the district court acknowledged, the Tenth Circuit has declined to extend *Engquist* beyond the public employee context. *See SECSYS, LLC v. Vigil*, 666 F.3d 678, 690 (10th Cir. 2012) (declining to address scope of *Engquist* where case could be resolved under existing standard); *Kansas Penn Gaming, LLC, v. Collins*, 656 F.3d 1210, 1217 n.1 (10th Cir. 2011) (same) *Glover v. Mabrey*, 384 Fed. App'x 763, 778 (10th Cir. 2010) (same). Doing so in this instance would therefore blaze a new trail.

Second, in this case there is a "clear standard" against which departure can be measured. In *Engquist*, the plaintiff had a checkered employment history, including repeated disputes with other employees. *See Engquist*, 553 U.S. at 594. Plaintiff alleged she had been singled out for unfavorable treatment by her employer for no reason other than animosity. *Id.* at 596. According to the Court, the employer's decisions leading to her termination were based on numerous,

individualized considerations, and the officials at issue required discretion to deal with those quotidian issues. *See id.*

By contrast in this case, PPAU's allegation is that, despite its stellar performance for decades, despite UDOH's consistent praise of PPAU's services, and despite UDOH's strong recommendation to continue funding to PPAU, Governor Herbert irrationally and arbitrarily singled out PPAU, terminating its federal pass-through funding. As in Olech, where there was a single, readily assessable factor – the imposition of a requirement on the plaintiff that she provide a larger easement than the other property owners – differentiating the plaintiff from the other property owners, here Governor Herbert simply imposed a consequence on a single pass-through funding recipient without imposing that consequence on any other recipient. *See Olech*, 538 U.S. at 565.

This case is far more similar to *Analytical Diagnostic Labs, Inc. v. Kusel*, 626 F.3d 135 (2d Cir. 2010) and *Hanes v. Zurick*, 578 F.3d 491 (7th Cir. 2009), in which both courts held that *Engquist* did not bar the plaintiffs' claims, than it is to *Engquist*. As explained by the *Kusel* court, in those cases there was a single, readily identifiable way to measure the differences between the plaintiffs and those similarly situated to them:

> As aptly noted by the *Hanes* court, "the officer who repeatedly arrests someone solely because of malice does have a way to distinguish between the citizen repeatedly arrested and the citizen left alone: the

> officer hates the arrestee." Similarly, here plaintiffs have a way to distinguish themselves and other labs who are allegedly subject to less scrutiny by DOH: defendants maliciously targeted ADL for increased oversight. Especially where the state is exercising its regulatory and licensing power, we are loath to read *Engquist* as broadly as defendants urge.

Kusel, 626 F.3d at 142-43 (citation omitted) (emphases added).[4]

Third, unlike in *Engquist* where the state action at issue was made by the government in its role as an employer managing its internal affairs, *Engquist*, 553 U.S. at 598, here Governor Herbert acted in his capacity as sovereign. *See id.* at 599 (contrasting situations in which the "government acts as employer as opposed to sovereign"); *see also Kusel*, 626 F.3d at 142 (emphasizing *Engquist's* focus on differences between governmental actions as sovereigns and as proprietors); *Hanes*, 578 F.3d at 495 (same). This Court in *Kansas Penn* emphasized that "low level government decision-making" involves far more discretion than government activity at higher levels. 656 F.3d at 1216. Government officials who perhaps should be afforded such latitude include "police officers, IRS agents, university administrators, zoning officials, and other, similar governmental actors," *id.*, but do not include governors acting as state executives. In the words of the Seventh Circuit, "context matters." *Hanes*, 578 F.3d at 495.

[4] The reasoning in circuit court cases extending *Engquist's* holding to cases involving government contractors are inapposite, particularly given that in this case no such individualized factors were even recited, let alone evidenced. *See Caesars Mass. Mgmt. Co. v. Crosby*, 778 F.3d 327, 336 (1st Cir. 2015); *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269, 1274 (11th Cir. 2008).

Fourth, even if there were some discretionary aspect to the Directive, which there is not, the *Engquist* line of cases is distinguishable for another reason. In the *Engquist* cases, disparate treatment based upon the exercise of a fundamental right was not at issue, but instead allegations that a government employee or contractor was treated differently for some other reason. In *Engquist*, for example, the plaintiff alleged she was treated differently from her peers for "arbitrary, vindictive, or malicious reasons," but not for exercising her fundamental rights. *Id.* at 595. Here, PPAU alleges both that Governor Herbert treated it differently from similarly-situated providers for arbitrary and vindictive reasons, but also targeted it because of constitutionally protected activity, *i.e.*, its speech in support of abortion rights, its provision of abortion services, and its affiliation with like-minded organizations. This type of claim cannot and should not be barred by *Engquist*, and no case has extended *Engquist* to such cases.

The district court's conclusion that PPAU failed to make out any independent constitutional claim was legal error. PPAU has alleged and is substantially likely to establish that, by terminating PPAU's pass-through funding, the State punished PPAU for associating with the National Organization and its affiliates and advocating for and providing abortion services. In contrast, the district court erroneously asserts that, because PPAU can continue to engage in

these activities despite the termination of funding, no violation has occurred. That, however, is not the standard.

When a government actor singles out an individual based upon her exercise of such fundamental rights, and when the government actor treats that individual differently from her similarly-situated peers without any compelling interest for doing so, a violation of the Equal Protection Clause occurs. *See, e.g., Bower v. Vill. of Mount Sterling*, 44 Fed. App'x 670, 676 (6th Cir. 2002) ("The general deference to government action … yields to a heightened judicial scrutiny when a … governmental act interferes with a person's fundamental rights."). These fundamental rights are also violated when a state actor, for example, retaliates against an individual for speaking out on a matter of public concern, *see, e.g., Glover*, 384 Fed. App'x at 769, or for associating with a politically unpopular group, *See Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1171, 1175, 1178 & n.7 (10th Cir. 2005) (same analysis applies to free speech and free association claims). Whether or not the Directive *de facto* prevented PPAU from engaging in the constitutionally-protective activities at issue, there is no question that the Directive impermissibly penalized PPAU for engaging in those activities. Accordingly, PPAU has made out claims for independent constitutional violations.

B. PPAU Is Substantially Likely to Succeed on the Elements of Its Equal Protection Claim

The Equal Protection Clause of the Fourteenth Amendment mandates that "No state shall … deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV § 1. This provision "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). "The purpose of the equal protection clause … is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination." *Olech*, 528 U.S. at 564 (citation omitted).

"In typical equal protection cases, plaintiffs 'generally allege that they have been arbitrarily classified as members of an 'identifiable group.'" *Davis v. Prison Health Servs.*, 679 F.3d 433, 441 (6th Cir. 2012) (quoting *Engquist*, 553 U.S. at 601). In cases involving class-of-one claims, however, the plaintiff does not allege that the defendants discriminate against a *group* with whom she shares characteristics, but rather that the defendants simply harbor animus against her *in particular* and therefore treated her arbitrarily." *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 592 (9th Cir. 2008) (emphases in original). As explained in *Lauth v. McCollum*, 424 F.3d 631, 633 (7th Cir. 2005):

> The paradigmatic "class of one" case … is one in which a public official, with no conceivable basis for his action other than spite or some other improper motive (improper because unrelated to his public

> duties), comes down hard on a hapless private citizen. Perhaps he is the holder of a license from the state to operate a bar or restaurant or some other business, and the official deprives him of a valuable property right that identically situated citizens towards whom the official bears no ill will are permitted the unfettered enjoyment of.

Id.

Generally, to prevail on a class-of-one claim, the plaintiff must show "that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.'" *Olech*, 528 U.S. at 564); *see also Penrod v. Zavaras*, 94 F.3d 1399, 1406 (10th Cir. 1996) ("[A]n equal protection violation occurs when the government treats someone differently than another who is similarly situated."). However, when the disparate treatment in a class-of-one case is alleged to impinge a fundamental right, the governmental action must satisfy strict scrutiny. *See, e.g.*, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966) ("[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."); *Petrella v. Brownback*, 787 F.3d 1242, 1261 (10th Cir. 2015) ("When a plaintiff demonstrates that a challenged law burdens a fundamental right, courts apply strict scrutiny in assessing the validity of the law."), cert. denied, 136 S. Ct. 588 (2015); *Planned Parenthood of Greater Memphis Region v. Dreyzehner*, 853 F. Supp. 2d 724, 737 (M.D. Tenn. 2012) ("Where, as here, the State interferes with a person's exercise of

fundamental constitutional rights, the Equal Protection Clause applies the strict scrutiny standard."). Moreover, "it is the mere impingement upon, not impermissible interference with, the exercise of a fundamental right that triggers strict scrutiny." *Special Programs, Inc. v. Courter*, 923 F. Supp. 851, 854 (E.D. Va. 1996) (citation omitted)).

1. Governor Herbert Intentionally Treated PPAU Differently from Similarly-Situated Providers of Reproductive Healthcare and Education Services Who Receive Federal Pass-Through Funding

The district court erroneously determined that PPAU could not show it was "treated differently than others who were 'similarly situated in every material respect[]' and [that] the 'difference in treatment' was 'wholly unrelated to any legitimate state activity.'" App.492.

First, there is no question Governor Herbert has treated PPAU differently from any other reproduction and healthcare providers who receive pass-through funding. Governor Herbert intentionally did not terminate funding for any other provider of similar services in Utah, instead aiming the Directive solely at PPAU. Governor Herbert did so "to send a message to Planned Parenthood … that the state of Utah values the sacred nature of human life," to reaffirm his commitment to the "Right to Life," and to emphasize that "Utah should not … be in the business of supporting an organization that does not share that same basic respect [for life]." App.391-392. Governor Herbert was motivated by animus toward PPAU and its

activities, and he acted to further his personal and political beliefs and agenda. The evidence in the record, including Governor Herbert's statements regarding PPAU and the timing and purpose of his attendance at an anti-abortion rally just days after he issued the Directive, App.59, is more than sufficient to demonstrate PPAU's substantial likelihood of success on this issue. *See, e.g.*, *Dreyzehner*, 853 F. Supp. 2d at 737 ("The proof is clear and convincing that "the Defendant acted with political motivation to defund Planned Parenthood from a federal grant program … [because] [t]he desire to harm a politically unpopular group does not constitute a legitimate governmental interest." (citation omitted)).

Second, contrary to the district court's ruling, App.42-43, PPAU readily met its burden to identify a materially similar comparator group. The group who received differential treatment need not be identical in every respect, but instead need only be "similarly situated in every material respect." *Jicarilla Apache Nation v. Rio Arriba County*, 440 F. 3d 1202, 1210 (10th Cir. 2006) (emphasis added) (property owners not similarly situated where distinctions involved contextual and individualized judgments regarding value and other material variations). As this Court recognized in *Kansas Penn*, the reason why the similarly-situated requirement is heightened in class-of-one cases is to prevent "a flood of claims in that area of government action where discretion is high and variation is common." *Kansas Penn*, 656 F.3d at 1218 (emphasis in original)

(plaintiff failed to adequately plead existence of similarly-situated individuals in case involving "the inherently subjective and individualized enforcement of health and safety regulations."). *Id*. at 1220. "In cases not involving judgments that are 'subjective and individualized,' the plaintiff will meet this burden easily." *Id.* at 1218 (emphasis added).

PPAU easily satisfies the stricter standard applicable to class-of-one claims because this is "not a case involving judgments that are subjective and individualized," *id.*, and the district court's conclusion on this point should be reversed. The *Kansas Penn* court explained the difference between the facts in that case and those in *Olech*, where a class-of-one claim was successfully asserted, as follows:

> The complaint [in *Kansas Penn*] addresses the inherently subjective and individualized enforcement of health and safety regulations. Unlike *Olech,* this is not a case where the regulatory decision is a simple, one-dimensional inquiry, resolved with a tape measure. Rather, Kansas Penn challenges an act of regulatory enforcement that implicates a "multiplicity of relevant (nondiscriminatory) variables, … making it "correspondingly more difficult to bring an equal protection claim." *Jennings*, 383 F.3d at 1214–15.

Kansas Penn, 656 F.3d at 1220.

Here, Governor Herbert did not issue the Directive on the basis of a variety of factors or any contextual, subjective, or individualized judgments. Instead, as in *Olech*, the Directive was based upon "a simple, one-dimensional inquiry" ─ his

animus for and opposition to PPAU, including its purported lack of "basic respect" for "the sacred nature of human life." App.392.

The district court too narrowly defined the appropriate comparator group in this case as other "reproductive health care provider[s] that associate[] with an entity allegedly engaged in illegal conduct." App.493. A state actor should not be permitted to rely upon the challenged action itself as the factor that precludes a plaintiff from identifying a comparator group. If that were the law, no plaintiff could ever identify a comparator group because the disparate treatment would be the reason for the difference between the plaintiff and the comparator group.

Defining the comparator group in the manner posited by the district court would also preclude claims such as the successful claim in *Olech*, because an owner of property with the exact same characteristics as the owners of other properties, but who is required to provide a larger easement to the government than the other property owners, could never assert a class-of-one claim. The other property owners would not be an appropriate comparator group because of the municipality's imposition of the arbitrary requirement of a larger easement on the plaintiff. Likewise here, PPAU would be precluded from identifying providers of the exact same services at issue in this case, who also receive pass-through funding, on the sole ground that Governor Herbert arbitrarily terminated PPAU's funding. This cannot be the law.

2. There Is No Legitimate Rationale or Compelling Interest to Support the Directive, Nor Is the Directive Tailored to Address Any Such Rationale or Interest

As to the element of whether Governor Herbert's Directive complies with strict scrutiny, the answer is clearly "no."[5]

Under the strict scrutiny analysis, a government action "will be struck down unless the classification drawn … is 'suitably tailored to serve a compelling state interest.'" *Warden v. Nickels*, 697 F. Supp. 2d 1221, 1226 (W.D. Wash. 2010) (quoting *City of Cleburne*, 473 U.S. at 440). To satisfy strict scrutiny, "[t]he state must specifically identify an 'actual problem' in need of solving." *Brown v. Entm't Merch. Assoc.*, 131 S. Ct. 2729, 2738 (2011) (citation omitted).

In *Brown*, the state law at issue banned the sale of "'violent video games' to minors[] and require[d] their packaging to be labeled 18.'" *Id.* at 2732. The state attempted to justify the regulation based on evidence of the harmful effects of exposure to violent video games. The cited studies, however, did not "prove that violent video games *cause* minors to *act* aggressively." *Id.* at 2740 (emphases in original). Moreover, in cases involving strict scrutiny, the State "bears the risk of uncertainty" and "ambiguous proof will not suffice." *Id.* at 2739.

[5] While strict scrutiny applies here, PPAU has met its burden under the rational basis standard, for the same reasons discussed herein.

Similarly here, the state has not identified and cannot identify an "actual problem" in need of solving and, to the extent there is such a problem, it cannot "show a direct causal link," between the pass-through funded services provided by PPAU and the interest purportedly served by the Directive. *See Brown*, 131 S. Ct. at 2738. Although the State asserted it has an interest in avoiding "the appearance of corruption," Defs.' Opp'n at 15, Dkt. 19, the district court did not even address strict scrutiny, nor did it analyze the Directive according to rational basis review. In fact, the district court mentioned the "appearance of corruption" only in connection with its discussion of the balance-of-harms factor, noting that the State's alleged interest in avoiding the appearance of corruption was a reason why the injury to the State would outweigh the potential injury to PPAU. App.496.

There is also no evidence that any affiliate of PPAU actually engaged in any illegal conduct, as the district court acknowledges. App.493; *see also* App.387-388, 398-401, 403-404. As such, the assertion that an appearance of corruption could arise from the State's provision of funding to PPAU, which indisputably has not engaged in any illegal activity, and which is affiliated with other entities that are only *alleged* to have been involved in illegal activities, is speculative at best, and the State has offered no evidence to support it. Thus, the State has improperly presumed guilt where none exists.

Of equal importance is that, even if the State had a legitimate interest in avoiding an appearance of corruption, the Directive bears no rational relationship and certainly is not narrowly tailored to address that purported interest. As noted, the relationship between defunding PPAU and preventing an appearance of corruption is wholly unsupported. Moreover, terminating funding for PPAU's indisputably legal and well-managed programs will simply lead the public to inaccurately assume PPAU has engaged in some misconduct, which it has not. And, even if the State were to allege that it has an interest in demonstrating its pro-life stance, the State has failed to show how cutting off funding for non-abortion services is narrowly tailored to further, or even rationally related to, that interest. *See Planned Parenthood of Cent. Tex. v. Sanchez*, 280 F. Supp. 2d 590, 609 (W.D. Tex. 2003) (state action at issue did not further desire to demonstrate lack of support for abortion).

As in *Brown*, the State offers no evidence to show the connection between cutting off funding that is not related to fetal tissue research and an appearance of corruption. *See also, e.g., Dreyzehner*, 853 F. Supp. 2d at 737 ("Tennessee's concerted effort to defund Plaintiffs is neither 'narrow enough in scope [nor] grounded in sufficient factual context … to ascertain some relation between the classification and the purposes it serve[s].'") (citation omitted). Rather than

avoiding an appearance of corruption with respect to the State, the Directive imposes an appearance of corruption on PPAU.

In summary, as the court in a similar case recently stated, "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare [legislative] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Planned Parenthood of Kan. & Mid-Mo., Inc. v. Lykowski*, No. 2:15-CV-04273-NKL, 2015 WL 9463198, at *1 (W.D. Mo. Dec. 28, 2015) (citation omitted) (granting preliminary injunction in class-of-one claim).

III. THE DISTRICT COURT ERRONEOUSLY DETERMINED THAT PPAU WAS NOT SUBSTANTIALLY LIKELY TO SUCCEED ON ITS UNCONSTITUTIONAL CONDITIONS CLAIMS

Giving short shrift to PPAU's unconstitutional conditions claims, the district court concluded in two paragraphs that PPAU was unlikely to establish that PPAU's exercise of its constitutional rights was the "substantial or motivating factor for terminating [PPAU's] contracts." App. 494. According to the court, Governor Herbert's prior acquiescence in PPAU's receipt of pass-through funding, the Directive's specific reference to the CMP videos, and the "temporal proximity between the release of the videos and the [D]irective," all showed that Governor Herbert "did not retaliate against [PPAU] based upon its right of association nor its

right to advocate for and perform abortions." App. 494-95. This conclusion was erroneous as a matter of fact and law.

PPAU asserts unconstitutional conditions claims under the First and Fourteenth Amendments. Contrary to the district court's conclusion, these claims are substantially likely to succeed on the merits or, at the very least, they present questions going to the merits so serious, substantial, difficult, and doubtful as to make the issues ripe for litigation.

The unconstitutional conditions "doctrine forbids the government from denying or terminating a benefit because the beneficiary has engaged in constitutionally protected activity." *Petrella*, 787 F.3d at 1265. The State's action is unconstitutional under that doctrine because it impermissibly penalizes PPAU for exercising its First and Fourteenth Amendment rights to advocate for and provide access to abortion services, and to associate with entities that exercise those same rights. In other words, the Directive forces PPAU into an unconstitutional choice: forego all state-administered federal funding or stop associating with the National Organization and its affiliates, and advocating for and providing abortions.

"Under the modern unconstitutional conditions doctrine … the government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom [] [] even if he has no entitlement to that benefit." *Planned*

Parenthood of Kan. & Mid-Mo. v. Moser, 747 F.3d 814, 838 (10th Cir. 2014) (quoting *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996)) (internal quotation marks omitted); *see also Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("even though a person has no 'right' to a valuable governmental benefit … [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."). This principle holds true where, as in this case, the government cancels a pre-existing commercial relationship with an independent contractor as punishment for the contractor's exercise of its constitutional rights. *See Umbehr*, 518 U.S. at 680 ("The First Amendment permits neither the firing of janitors nor the discriminatory pricing of state lottery tickets based on the government's disagreement with certain political expression. Independent contractors appear to us to lie somewhere between ….").

In the context of reproductive rights, the Supreme Court has recognized "the distinction between conditions placed on federally-funded programs and those placed on the recipients of federal funds." *Cansler*, 877 F. Supp. 2d 310, 319 (M.D.N.C. 2010) (emphasis in original). Where state action places a condition on the recipient rather than the program or service, "effectively prohibiting the recipient from engaging in the protected conduct," the action violates the unconstitutional conditions doctrine. *Id.* (quoting *Rust*, 500 U.S. at 197). In *Rust*,

the Supreme Court held "that although the government can elect not to subsidize the abortion or advocacy for access to abortion as a form of government speech, the government cannot disqualify an otherwise eligible recipient of public funds based on that recipient's conduct outside of the government program." *Dreyzehner*, 853 F. Supp. 2d at 734 (citing *Rust*, 500 U.S. at 198). Accordingly, "courts have held in the context of abortion advocacy groups, that the First Amendment rights of expression, association and advocacy are violated where States target abortion groups for disqualification from public funding." *Id.* (citing *Planned Parenthood of Mid–Mo. & E. Kan., Inc. v. Dempsey*, 167 F.3d 458, 462 (8th Cir.1999) ("Legislation that simply dictates the proper scope of government-funded programs is constitutional, while legislation that restricts protected grantee activities outside government programs is unconstitutional"); and *Planned Parenthood of Cent. N.C. v. Cansler*, 804 F. Supp. 2d 482 (M.D.N.C. 2011)).

The First Amendment protects PPAU's right to advocate for and associate with others who advocate for reproductive choice, and who allow patients to participate in lawful programs to donate fetal tissue for scientific research. Indeed, the Supreme Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

This right to expressive association does not amount to "a generic right to mix and mingle," *URI Student Senate v. Town Of Narragansett*, 631 F.3d 1, 13 (1st Cir. 2011), but is instead "an instrumental [right]: expressive association is protected 'as an indispensable means of preserving other individual liberties'" guaranteed by the First Amendment. *Hsu By and Through Hsu v. Roslyn Union Free School Dist. No. 3*, 85 F.3d 839, 858 (2d Cir. 1996) (citation omitted). Further, the Fourteenth Amendment protects PPAU's right to perform services essential to ensuring that women may exercise their right to a legal abortion. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992); *Singleton v. Wulff*, 428 U.S. 106, 117 (1976).

The State's categorical exclusion of PPAU from all state-administered federal funding interferes with PPAU's First and Fourteenth Amendment rights by punishing PPAU for exercising those rights, which are unrelated to the programs and funding at issue. *See, e.g.*, *Cansler*, 877 F. Supp. 2d at 321 (legislation prohibiting state agency from providing state or federal funds to Planned Parenthood violated First Amendment rights); *Dreyzehner*, 853 F. Supp. 2d at 736 (state's revocation of Planned Parenthood's successful bids for federal grants violated First Amendment rights); *City of Wichita*, 729 F. Supp. at 1289 (D. Kan. 1990) (city resolution to defund Planned Parenthood violated First Amendment rights).

Here, it is uncontroverted that PPAU has committed no wrong, that PPAU has successfully provided reproductive healthcare services and education through federal pass-through funds for over two decades, and that this funding would have continued into the foreseeable future, but for the Directive. On this record, no legitimate reason can possibly account for Governor Herbert's decision to deny PPAU all state-administered federal funding. Therefore, this Court should conclude that PPAU is likely to succeed on its unconstitutional conditions claims, because "the State engaged in an exercise of 'raw' political power to penalize [PPAU] for [its] activities and advocacy unrelated to these federal grants and programs." *Dreyzehner*, 853 F. Supp. 2d at 735 (citation omitted).

A. The District Court Erred in Concluding that PPAU Did Not Show A Retaliatory Motive

This Court has recognized that the unconstitutional conditions doctrine applies in cases like this one, "when the condition acts retrospectively in a *discretionary* executive action that terminates a government-provided benefit—typically public employment, a government contract, or eligibility for either—in retaliation for prior protected speech or association." *Moser*, 747 F.3d at 839 (citing *Umbehr*, 518 U.S. at 671 & *Perry*, 408 U.S. at 597) (emphasis in original). "In these cases, the government official's action has not been compelled by a statute or regulation; rather, the challenged action is one that would be within the

official's discretion if it were not taken in retaliation for the exercise of a constitutional right." *Id.* "Thus, these cases necessarily examine the official's motive for taking the action; the challenge will be rejected unless retaliation against the protected conduct was 'a substantial or motivating factor' for taking the action and the official would not 'have taken the same action … in the absence of the protected conduct.'" *Id.* (citing *Umbehr*, 518 U.S. at 675). This Court's jurisprudence allows retaliatory motive to be established under either the "mixed-motive" or "pretext" theory of retaliation, and a plaintiff may allege both. *See Fye v. Okla. Corp. Comm'n*, 516 F.3d 1217, 1224-1227 (10th Cir. 2008). The evidence in this case is sufficient under either theory.

Under the "mixed-motive' theory, the plaintiff may directly show that retaliatory animus played a 'motivating part' in the [] decision … through…[either] direct or circumstantial evidence." *Id.* at 1226. As suggested by the name, to satisfy the mixed-motive test, a plaintiff "need not demonstrate that the sole or primary reason for the termination was the protected activity." *Darby v. Gordon Food Servs., Inc.*, No. 3:11-cv-00646-DJH, 2015 WL 3622529, at *3 (W.D. Ky. June 9, 2015) (citation omitted). Instead, the plaintiff need only show that engaging in the activity was "a substantial or motivating factor" for the action. *Moser*, 747 F.3d at 839 (citing *Umbehr*, 518 U.S. at 675). "Once the plaintiff proves that retaliatory animus was a motivating factor, the

burden of persuasion shifts to the defendant to prove that it would have taken the same action absent the retaliatory motive." *Fye*, 516 F.3d at 1225.

The district court erroneously concluded that the evidence did not establish that a substantial or motivating factor for the Directive was to retaliate against PPAU for its association with the National Organization and its affiliates, and/or its advocacy for and provision of abortion services. Both direct and circumstantial evidence show that Governor Herbert's animus to abortion was his real motivation.

Most notably, the memorandum issued by Governor Herbert's office mere days after the Directive states in no uncertain terms that the Directive "was based on" Governor Herbert's support of the anti-abortion political movement, referred to in the memorandum as the "Right to Life." App.391. The memorandum further describes Planned Parenthood as a group that does not have "that same respect for human life." *Id.* Finally, the memorandum declares that the Directive was issued to "send[] a strong message to Planned Parenthood and the rest of the nation that the state of Utah values the sacred nature of human life." App.392. The memorandum is direct evidence of Governor Herbert's retaliatory motive, and the district court could and should have relied on this evidence to find that PPAU had met its burden.

In addition to the direct evidence, copious amounts of circumstantial evidence establish Governor Herbert's retaliatory motive.

For example, the Directive was issued at the time politicians were attempting to "defund" Planned Parenthood nationwide, including by threatening to shut down the entire government if all federal funding to the organization was not terminated. App.399. Battles to cut funding were also underway in approximately a dozen states. *Id.* Almost immediately after the Directive was issued, Governor Herbert participated in an anti-abortion protest with four other Republican politicians, "add[ing] [his] voice" to those speaking out against abortion, and touting the Directive as evidence of his support for the "Right to Life." App.59 & 391-392. The temporal proximity of the Directive to the defunding efforts also show that Governor Herbert waited until the political moment was ripe to retaliate against PPAU.

The uncontroverted evidence demonstrates that every governmental agency that has investigated the CMP Videos has concluded no Planned Parenthood entity has engaged in any wrongful or illegal conduct. App.387 & 398-404. This is true with respect to the numerous investigations completed at or about the time of the Directive. App.387 (sharing link to August 17, 2015, article reporting that investigations by the U.S. Department of Health and Human Services and state officials in Georgia, Indiana, Massachusetts, and South Dakota had turned up no violations).

Governor Herbert knew that PPAU had not committed or even been accused of any wrongdoing. App.56 (quoting Governor Herbert at a press conference about the Directive, acknowledging that none of the conduct alleged in the CMP Videos occurred in Utah). The uncontroverted record also shows that Governor Herbert knew, even before his Directive issued, that his action would cause significant harm to Utah citizens and cause a loss of income and federal funding to the State. App.336-359.

The circumstantial evidence shows that Governor Herbert would not have issued the Directive in the absence of a retaliatory motive. It defies common sense that Governor Herbert would issue the Directive with the knowledge it would certainly harm Utah citizens, and in direct opposition to the recommendations of UDOH, just to "send a message" to out-of-state entities accused of misconduct, particularly where those allegations have been found by all government investigations to be baseless, and where the source of those allegations is a known enemy of Planned Parenthood. A retaliatory motive is the only reasonable inference under these facts.

The district court erroneously concluded that PPAU had not met its burden to establish a prima facie case, which it did. After PPAU met that burden, the burden shifted to the State to show that the Directive would have issued even in the

absence of Governor Herbert's retaliatory motive. *Fye*, 516 F.3d at 1225. The district court erroneously failed to even assess whether the State met that burden.

The findings on which the district court relied to show a lack of retaliatory motive were Governor Herbert's own conclusory statements that he was motivated by the CMP Videos and the fact that Governor Herbert already been in office for six years before retaliating against PPAU. Those findings do not overcome the substantial evidence showing that the CMP Videos were nothing more than a pretext for the retaliatory Directive. To show pretext, PPAU "must produce evidence of such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the [State's] proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the [State] did not act for the asserted non-discriminatory reasons." *Fye*, 516 F.3d at 1228. PPAU also met that burden. In the Order on Appeal, the district court legally erred by completely disregarding the pretext argument.

The circumstantial evidence relating to the mixed-motive test also demonstrates the implausibility of the Directive. While the State baldly asserts that Governor Herbert was acting in the best interests of the State, it has provided no evidence to substantiate its claims or show the Directive provided any benefit to Utah citizens. Instead, the record is replete with evidence showing the harm on Utah's citizens from the Directive. App.35-36, 38, 42, 44-45 & 336-359.

Governor Herbert's inconsistent and contradictory statements also show that his reference to the CMP Videos was mere pretext. Governor Herbert's claim that he was motivated solely by the allegations in the CMP Videos is belied by his memorandum, which expressly states that the Directive was motivated by Governor Herbert's support for the "Right to Life" movement. App.391. The Directive itself, which had no reason even to mention abortion, also stated repeatedly that the funding at issue had nothing to do with abortion. App.51.

Governor Herbert's conduct after issuing the Directive is also inconsistent with any claim that the CMP Video allegations were the sole reason for his action. At the time the Directive was issued, all government investigations into the allegations had shown them to be false. App.387. Moreover, as the underlying litigation progressed, more and more investigations concluded with no finding of misconduct. App.398-404. Notwithstanding these circumstances, and despite continuing harm to Utah citizens, Governor Herbert has publicly stated he will not change his position. *See, e.g.*, App.394 ("Gov. Herbert stands by his actions to cease acting as a pass-through for federal funds to Planned Parenthood. . . . "); App.396 ("The governor stands by his actions …. [The TRO] does not deter Governor Herbert's resolve to carry out his directive.").

If the alleged wrongdoing were the real reason for Governor Herbert's action, Governor Herbert would not continue to withhold funds from PPAU now

that those allegations have been shown to be false. But this is not what has transpired. Even though the allegations were shown, time and time again, to be unsupported, Governor Herbert still refuses to reconsider his edict, which on its face has no end and punishes PPAU for having done nothing wrong.

IV. THE DISTRICT COURT'S CONCLUSION THAT PPAU WOULD NOT SUFFER IRREPARABLE HARM WAS AN ABUSE OF DISCRETION

Based on its ruling that PPAU was unlikely to succeed on the merits of its claims, the district court summarily determined that PPAU would suffer no constitutional harm. The district court also found, based upon evidence purportedly showing recent support for PPAU, that PPAU would not suffer reputational harm. Not only are these findings contrary to the evidence, but the district court completely ignored critical record evidence and argument regarding irreparable harm. As such, the district court abused its discretion.

When a plaintiff has shown it is likely to succeed on the merits of a constitutional claim, as in this case, irreparable injury is shown as a matter of law. *Elrod v. Burns*, 427 U.S. 347, 373 (1975). Because PPAU has shown a likelihood of success on the merits of its constitutional claims, PPAU is threatened with irreparable harm as a matter of law.

While the constitutional nature of PPAU's injuries alone is sufficient to demonstrate irreparable harm, PPAU has also shown that it and the population it

serves will imminently suffer other irreparable injuries absent a preliminary injunction. The district court wholly disregarded this evidence, which is painstakingly detailed in the record and was not controverted by the State.

In the absence of an injunction, PPAU's ability to provide continued services to vulnerable populations will be irreparably harmed. This harm includes preventing PPAU's patients from obtaining testing to determine whether they have contracted and will spread potentially-life threatening STDs and eliminating critical educational services directed at avoiding STDs and unwanted pregnancies, including teen and indigent pregnancies. App.35-36, 38, 42, 44-45 & 336-359. While PPAU's patients are most directly affected by these harms, PPAU also suffers irreparable harm because the Directive precludes PPAU from fulfilling its mission and purpose as a provider of healthcare and education services. These are serious harms that are not compensable by money and affect the public health.

The district court also improperly determined that PPAU was not likely to suffer reputational harm. The district court's reliance solely upon the 1,800 postcards and 3 thank you notes sent to Governor Herbert's office from PPAU supporters does not support his conclusion. Given that there are over two million Utah citizens, of whom PPAU serves approximately 50,000 each year, the small showing of support provided to Governor Herbert is a drop in the bucket. Moreover, the harm that will result to PPAU's reputation will result from the

Directive itself. If Governor Herbert insists that funding to PPAU must be cut off, the message to the public is that PPAU's services are inadequate and that PPAU is untrustworthy. As a result of these messages, patients who otherwise would seek out PPAU's services and organizations that would otherwise collaborate with PPAU will now be disinclined to do so. PPAU has worked for roughly 50 years to build its reputation in Utah as a dependable, safe, and high quality provider of reproductive healthcare and education to all, including the uninsured. App.45-47. Undercutting PPAU's outstanding reputation is harm that cannot be repaired with money and thus meets the irreparable harm standard. *See Aria Diagnostics, Inc. v. Sequenom, Inc.*, 726 F.3d 1296, 304 (Fed. Cir. 2013) (damage to reputation is valid ground for finding irreparable harm.").

Finally, PPAU's loss of funding is also irreparable harm. The district court inaccurately stated that "[a]ny financial harm Plaintiff has suffered from the contracts' termination can be redressed." App.495. But the Eleventh Amendment bars PPAU from recovering these funds after the fact. *See Kan. Health Care Ass'n v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994) (economic injury irreparable harm because Eleventh Amendment barred damages).

V. THE DISTRICT COURT'S FINDING THAT THE INJURY TO THE STATE OUTWEIGHED THE INJURY TO PPAU WAS AN ABUSE OF DISCRETION

Addressing the injury facing PPAU versus the harm to the State, the district court cursorily asserted that PPAU would not be harmed because it had or could obtain funding from other sources, whereas the State's interest in managing its affairs and avoiding the appearance of corruption would be irreparably injured. App.496-97. The district court abused its discretion on this issue.

First, reciting that PPAU's injury "is related only to the loss of four contracts," App.496, the district court wholly ignored the constitutional violations at issue and the irreparable constitutional injury to PPAU. This type of harm outweighs any potential harm to the State resulting from an injunction. *See, e.g.*, *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237-37 (10th Cir. 2005) (constitutional harm to plaintiff outweighed potential monetary and other harm to defendant city).

Second, the district court's assertion that PPAU can simply obtain funding from other sources is both unsupported and controverted by record evidence, which shows that "[a]ll federal money received by PPAU, whether directly or through programs administered by the State, is tied to a particular program or a particular medical service." App.28. These particular programs are federally-funded, but administered by the State, and therefore, PPAU cannot participate in

these programs except through UDOH. Indeed, in attempting to relieve the harm resulting from the Directive, UDOH unsuccessfully attempted to find a work-around by which PPAU could obtain funding for the programs at issue directly from the federal government. App.336.

Third, the district court's statements regarding the purported harm to the State are equally problematic. While PPAU, its patients, and the Utah community will suffer irreparable harm in the absence of an injunction, the State will suffer no real injury at all. The funding at issue is federal money already intended for PPAU, some of which the State will lose entirely if it does not go to PPAU. *See, e.g.*, App.369. An injunction therefore would simply require the State "to maintain the funding [it] ha[s] provided to Plaintiff[ ] for years and which [it] ha[s] authorized year after year in the past." *Marlo M. ex rel. Parris v. Cansler*, 679 F. Supp. 2d 635, 638 (E.D.N.C. 2010). Accordingly, preservation of the status quo will not result in harm the state, let alone any injury that would outweigh the harm to PPAU.

Fourth, the court's finding that requiring defendants to continue the contracts will harm the State's ability to "manage its affairs" and terminate contracts at will misperceives the action to be enjoined. An injunction would prevent the State from implementing the Directive based on personal and political reasons that violate PPAU's constitutional rights, which reasons are directly contrary to the

discretionary decisions and recommendations of UDOH. Moreover, as the district court indicated in its TRO, an injunction would not inhibit the State's ability to terminate the contracts; instead, it would prohibit the contracts' termination only for illegitimate bases, including "unproven allegations against the national Planned Parenthood organization," App. 96, and violations of PPAU's constitutional rights.

Finally, the district court's finding that the State's interest in avoiding the appearance of corruption outweighs the undisputed harm to PPAU and the public is contrary to the record, which shows only that, while allegations of wrongful conduct have been made against the National Organization and its affiliates, no wrongful conduct has been found. App.387 & 398-404. It is undisputed that PPAU has never been involved in the alleged misconduct or any other improper conduct. In the face of a record that shows only unfounded accusations and none against PPAU, the district court's abused its discretion in concluding that maintaining the status quo between the parties "may reasonably be perceived by the citizenry of Utah as approbation of the wrongful conduct." App.496. Indeed, terminating the contracts would punish PPAU for conduct in which it did not engage and cause the public to distrust PPAU without cause.

VI. CONTRARY TO THE DISTRICT COURT'S FINDING, THE PUBLIC INTEREST WILL BE SERVED BY ISSUANCE OF AN INJUNCTION

In its brief discussion of the impact of an injunction on the public interest, the district court acknowledged that "some members of the public may be harmed," App. 497, but went on to find this harm was outweighed by "right of the elected Governor of this State to make decisions about what is in the best interests of the State." *Id.* The district court abused its discretion in connection with its findings on this factor.

The district court improperly deemphasized the potential harm to the public in the absence of an injunction. The public has a strong interest in ensuring continued public access to crucial health services, especially for underserved and low-income patients, which interest will be furthered by issuance of the requested injunction. The undisputed evidence – including UDOH's own documents – shows that PPAU is uniquely situated to provide the services at issue, and the State will be unable to find comparable replacement services. *See* Statement of Facts, I.D., *supra*. UDOH employees repeatedly advised Governor Herbert that his Directive would harm the public. *See id*. For example, UDOH unequivocally advised Governor Herbert that his Directive "will harm people of Utah," in a way that "isn't acceptable." App.359. The district court's finding that "some members of the public may be harmed" if an injunction does not issue disregards entirely the

evidence demonstrating the severity and extent of that harm. Harming any members of the public is public harm with no countervailing benefit to the public.

The district court's conclusion that Governor Herbert's ability to make decisions about what he believes is in the best interest of the state outweighs the harm to the public is wrong. It is never in the public's best interest to allow a public official to make unbridled decisions that violate a citizen's constitutional rights. It certainly is not in the public's best interest to let a governor make political and personal decisions that override the discretionary decisions of the agency – here UDOH – actually charged with determining to whom the State should award contracts.

CONCLUSION

For the foregoing reasons, PPAU requests that the Court reverse the Order on Appeal.

Dated: January 26, 2016

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

PPAU respectfully requests oral argument, given the significance of the issues in this appeal to PPAU and the thousands of men, women, and teens in Utah served by PPAU who are adversely affected by the Directive.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 13,982 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I relied on my word processor, Microsoft Office Word 2013, to obtain said count.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in 14 point Times New Roman.

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ECF CERTIFICATION

Pursuant to Section II(I) of the Court's CM/ECF User's Manual, the undersigned certifies:

1. All required privacy redactions have been made.

2. Hard copies of the foregoing brief required to be submitted to the clerk's office are exact copies of the brief as filed via ECF.

3. The brief filed via ECF was scanned for viruses using Webroot SecureAnywhere Version 9.7.44 and according to that software is free of viruses.

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CERTIFICATE OF SERVICE

I, Peggy A. Tomsic, hereby certify that on January 26, 2014, I filed a true, correct, and complete copy of the foregoing Brief of Plaintiff-Appellant Planned Parenthood Association of Utah with the Court and served it on the following via the Court's ECF System:

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