

No. 15-4189

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PLANNED PARENTHOOD OF UTAH, a Utah non-profit corporation,
Plaintiff-Appellant,

v.

GARY R. HERBERT, in his official capacity as Governor of THE STATE OF UTAH; and JOSEPH K. MINER, M.D., in his official capacity as the Executive Director of THE UTAH DEPARTMENT OF HEALTH, a department of THE STATE OF UTAH,
Defendants-Appellees.

On appeal from the United States District Court for the District of Utah
Honorable Clark Waddoups
Civil No. 2:15-cv-00693-CW

APPELLEES'S RESPONSE IN OPPOSITION TO APPELLANT'S EMERGENCY
MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION

In this contract's dispute between Appellant Planned Parenthood Association of Utah (Planned Parenthood or Appellant) and the State of Utah, the District Court has already carefully considered and rejected each argument Planned Parenthood urges this Court to adopt on just four days' notice. Indeed, the order denying Appellant's motion for preliminary injunction properly concludes that Appellant has failed to carry its burden on *every one* of the four injunction factors.

Nothing in Planned Parenthood's emergency motion provides a basis for this Court to find in four days that the District Court's conclusions on all four factors, reached after 10 weeks of careful study, constitute abuses of discretion. Planned Parenthood thus is not entitled to an injunction pending appeal because it fails to carry its burden of establishing that its appeal is likely to succeed *and* that Rule 8's harm factors support its request. *See* 10th Cir. R. 8.1(B)-(E).

And because this appeal arises from an order denying a preliminary injunction, this Court has jurisdiction only under 28 U.S.C. § 1292(a)(1). The only issue before the Court is whether the District Court properly denied a preliminary injunction. An order granting Appellant's emergency motion thus would provide all the relief Appellant could obtain after full briefing and argument. Planned Parenthood's motion cites nothing that justifies effectively expediting and

compressing this entire appellate proceeding into just four days. This Court should therefore deny the emergency motion for an injunction pending appeal.

FACTUAL BACKGROUND

This contracts dispute arose in the summer of 2015 after the Center for Medical Progress distributed secretly recorded videos purporting to show officials of Planned Parenthood Federation of America, Inc. discussing the sale of tissue from aborted human fetuses. *See* Mem. Decision & Order Denying Prelim. Inj. dated 12/22/15, docket no. 30, at 2 (attached as Ex. A to Appellant's Emergency Mot.) (Order Denying P.I.). Such allegations, if verified, would constitute a federal crime. *See* 42 U.S.C. § 289g-2(a); *id.* § 289g-2(d)(1).

After becoming aware of the videos, Utah Governor Gary R. Herbert directed state agencies to cease acting as an intermediary for pass-through federal funds to Planned Parenthood. Compl. ¶ 12. He ultimately directed the Utah Department of Health to terminate four contracts between Planned Parenthood and the State.¹ Two of those four contracts provide funding for after-school abstinence education programs. One contract provides funding for a computer network that tracks the incidence of sexually transmitted diseases. The fourth contract is a letter of understanding in which Utah agreed to subsidize a certain number of STD tests that Planned Parenthood submits to the Utah Public Health Laboratory. The State

¹ Contrary to Appellant's suggestion, *see* Emergency Mot. at 6, the State has not cut funding for pregnancy or STD testing for victims of rape or sexual assault.

terminated each contract either by providing 30 days' written notice under the contract's express at-will termination provision, or by telling Appellant that it would not renew expiring contracts. *See* Order Denying P.I. at 3-4.

Governor Herbert admitted (only for purposes of the proceedings below) that Planned Parenthood's Complaint accurately alleges his reasons for terminating the four contracts. *See id.* at 2 n.1. He issued his directive in response to the Center for Medical Progress's videos. Compl. ¶ 13. A few days after the directive, he said that he and the people of Utah were "outraged" at the alleged "coloring outside the lines" by Appellant's national counterpart. *Id.* ¶ 14. And a few days after that, he spoke at a pep rally in the Utah State Capitol decrying the "appalling . . . casualness, the callousness . . . the lack of respect" shown in the videos. *Id.* ¶ 15; *see* Order Denying P.I. at 4-5.

Planned Parenthood filed an official capacity suit against Governor Herbert and Joseph K. Miner, M.D., Executive Director of the Utah Department of Health. It alleges that the State's decision to terminate the four contracts violates Planned Parenthood's equal protection rights or the unconstitutional conditions doctrine.

On September 29, 2015— one day after Planned Parenthood filed its Complaint, and before the State had a chance to brief the legal issues— the U.S. District Court for the District of Utah (Waddoups, J.) granted Planned Parenthood's motion for a temporary restraining order. *See* Ex. B to Appellant's

Emergency Mot. The TRO effectively kept the contracts in place until the District Court resolved Planned Parenthood's motion for preliminary injunction.

On October 15, 2015, the District Court heard oral argument on Planned Parenthood's fully briefed motion for preliminary injunction. After methodically and carefully analyzing both parties' arguments, the District Court entered an order on December 22, 2015, vacating the TRO and denying Planned Parenthood's motion for preliminary injunction. *See* Order Denying P.I. at 16.

The District Court rejected Planned Parenthood's arguments on each of the four preliminary injunction factors. It first found that Planned Parenthood's claims were unlikely to succeed on the merits. It reasoned that Planned Parenthood's class-of-one equal protection claim was likely to fail for two separate reasons: (1) a government contractor (like Planned Parenthood) could not state such a claim under the rule announced in *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591 (2008); and (2) even if such a claim were cognizable, Planned Parenthood had failed to identify an appropriate comparator as required by *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210 (10th Cir. 2011). *See* Order Denying P.I. at 6-11.

The District Court also reasoned that Planned Parenthood's unconstitutional conditions claims were likely to fail because of the Governor's words and the temporal proximity between the release of the videos and his directive to terminate

the contracts support [the conclusion that] he did not retaliate against Planned Parenthood based on any constitutionally protected conduct. *Id.* at 13.

The District Court concluded that the second factor—irreparable harm—weighs in favor of the defendants. *Id.* Planned Parenthood likely will not be able to show it suffered a constitutional harm; any financial harm from terminating the contracts can be redressed; and the groundswell of support for Planned Parenthood after the contracts were terminated demonstrated an absence of irreparable reputational harm. *Id.*

On the third factor, the District Court concluded that the injuries to defendants from issuing an injunction outweigh the injuries to Planned Parenthood. *Id.* at 15. The directive does not preclude Appellant from receiving Medicaid reimbursement or from advocating for or performing abortions. *Id.* at 14. Rather, Appellant's injury is related only to the loss of four contracts. *Id.* In contrast, an injunction preventing Utah from terminating the contracts would curtail[] the State's authority to manage [its] affairs. *Id.* An injunction also would deprive the defendants of their contractual right to terminate the contracts at will and could reasonably lead the citizenry of Utah to perceive that the State approves of the conduct depicted in the videos. *Id.* And requiring the defendants to continue the contracts will remove the defendants' discretionary decisionmaking. There is no monetary remedy for such injuries. *Id.* at 15.

Finally, on the fourth factor, the District Court “conclude[d] it is not in the public interest to enjoin the defendants from terminating the contracts at issue.” *Id.* The Court suggested that “some members of the public may be harmed if the contracts terminate,” finding it to be “not clear” whether other service providers could step into Planned Parenthood’s shoes and provide the four contracted services. *Id.* But the District Court also considered another public interest— “the right of the elected Governor of this State to make decisions about what is in the best interest of the State.” *Id.* “These contracts relate to discretionary programs.” *Id.* “It is contrary to the public’s interest to remove from the Governor the very discretion his position entails.” *Id.* “Indeed, these are the types of decisions that should be left to elected officials and not managed by the courts.” *Id.*

On Sunday, December 27, 2015, Appellant simultaneously filed its notice of appeal and the instant emergency motion for injunction pending appeal. On December 28, 2015, this Court ordered Appellees to respond to Appellant’s emergency motion before 3:00 PM MST on December 29, 2015.

ARGUMENT

“A preliminary injunction,” like an injunction pending appeal, “is an extraordinary remedy never awarded as of right.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). In resolving a request for an injunction pending appeal, this Court “makes the same inquiry as it would when reviewing a

district court's order on a preliminary injunction. *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001). It considers, based on a preliminary record, whether the district court abused its discretion in denying injunctive relief and whether the movant has demonstrated a clear and unequivocal right to relief. *Id.*

It appears that Planned Parenthood's motion does not cite the applicable abuse-of-discretion standard of review. Such an omission is telling. The District Court did not abuse its discretion on any of the injunction factors, let alone on all four of them, as Planned Parenthood must show to be eligible for its requested relief. This Court should deny the emergency motion.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLANNED PARENTHOOD'S MOTION FOR PRELIMINARY INJUNCTION.

Planned Parenthood's claims arise from its contracts with the State of Utah, not from any generally applicable action the State took as a sovereign. That undisputed fact is dispositive to a proper analysis of Planned Parenthood's likelihood of success.

For more than 50 years, the Supreme Court has recognized a crucial difference, with respect to constitutional analysis, between the government exercising the power to regulate or license, as a lawmaker, and the government acting as a proprietor, to manage [its] internal operation. *Pignanelli v. Pueblo*

Sch. Dist. No. 60, 540 F.3d 1213, 1220 (10th Cir. 2008) (quoting *Engquist*, 553 U.S. at 598) (other quotations omitted). This half-century-old line of precedent confirms that a State's powers to manage its discretionary operations—for example, when it acts as employer or contractor—are "far broader" than its powers "as sovereign." *Id.* (quoting *Engquist*, 553 U.S. at 598). Accordingly, and in light of "the common-sense realization that government offices could not function if every discretionary operational decision became a constitutional matter," "constitutional review of government [operational] decisions must rest on different principles than review of . . . restraints imposed by the government as sovereign," *Engquist*, 553 U.S. at 599 (quotations omitted).

Planned Parenthood's motion fails to properly account for that line of cases. The District Court's analysis, in contrast, properly gives effect to them, confirming that it did not abuse its discretion by denying a preliminary injunction.

A. The District Court Correctly Held That Planned Parenthood's Claims Are Likely To Fail On The Merits.

Planned Parenthood alleges a class-of-one equal protection claim and two unconstitutional conditions claims. The District Court correctly held that none of those claims is likely to succeed. *See* Order Denying P.I. at 9-13.

Equal Protection. The District Court properly rejected Planned Parenthood's class-of-one equal protection claim for two independent reasons.

First, a cognizable class-of-one equal protection claim can exist when a plaintiff alleges that it has “been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” *Engquist*, 553 U.S. at 601 (quotations omitted). But the Supreme Court has imposed critical limits on such claims. One such limit dispositive here is the Court’s holding in *Engquist* that “a ‘class-of-one’ theory of equal protection has no place in the public employment context.” *Id.* at 594. *Engquist* explained that “some forms of state action . . . by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments.” *Id.* at 603. “This principle,” the Court explained, “applies most clearly in the employment context, for employment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify.” *Id.* at 604.

Given the “obvious” similarities between government employees and government contractors, *Bd. of Cnty. Commr’s v. Umbehr*, 518 U.S. 668, 674 (1996), the Eleventh Circuit had “little trouble applying the reasoning in *Engquist*” to hold “that *Engquist* controls” cases brought by government contractors “and makes clear that” contractors cannot “assert a cognizable right to [class-of-one] equal protection,” *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269, 1274 (11th Cir. 2008). And the First Circuit, in an opinion by retired Justice Souter “who

dissented in *Engquist* reasoned that “[a]lthough *Engquist*’s specific subject was public employment, its reasoning extends beyond its particular facts, and we agree with those federal courts that have found the case applicable beyond government staffing.” *Caesars Mass. Mgmt. Co. v. Crosby*, 778 F.3d 327, 336 (1st Cir. 2015) (Souter, J.) (citing with approval *Douglas Asphalt*).

This Court has not yet squarely answered the question whether government contractors can state a cognizable a class-of-one equal protection claim. It has acknowledged the question twice, *see SECSYS, LLC v. Vigil*, 666 F.3d 678, 690 (10th Cir. 2012); *Glover v. Mabrey*, 384 F. App’x 763, 778 (10th Cir. 2010), but did not answer it in either case, choosing instead to resolve the appeals on other grounds. Even so, in *SECSYS* this Court reasoned in *dicta* that “it is arguably just a small step from *Engquist* to the conclusion the [class-of-one equal protection] doctrine should not apply when the government interacts with independent contractors” in both circumstances, the government acts in a more proprietorial and less regulatory capacity.” 666 F.3d at 690. The contrary conclusion “that a government contractor *can* state a cognizable class-of-one equal protection claim based on a State’s terminating an at-will contract” would be the first such holding in the Nation and create a square circuit split with the First and Eleventh Circuits.

In light of the overwhelming weight of authority, and this Court’s clear suggestion in *SECSYS*, the District Court correctly held that *Engquist* applies and

makes Planned Parenthood unlikely to succeed on its class-of-one claim because “[t]here is no ‘clear standard’ against which” the Court could assess the State’s discretionary decisions in managing its contracts. Order Denying P.I. at 9. Indeed, Appellant cited only two district court decisions to rebut that conclusion, but the District Court found them to be unpersuasive because “neither case discussed *Engquist*.” *Id.* Planned Parenthood relies upon those same district court cases here, *see* Emergency Mot. at 12; this Court should reject them for the same reason.

Second, the District Court correctly held that Planned Parenthood’s class-of-one claim is unlikely to succeed for the separate, independent reason that Planned Parenthood failed to carry its “substantial burden” to “demonstrate others ‘similarly situated in all material respects’ were treated differently and that there is no objectively reasonable basis for the defendant’s action.” *Kansas Penn Gaming*, 656 F.3d at 1217 (quotations omitted). This Court’s precedents “emphasize [its] strict reading of this element because it addresses the main concern with the class-of-one theory” that it will create a flood of claims in that area of government action where discretion is high and variation is common.” *Id.* Thus, “where the government actor enjoys a broader range of discretion” as it does when managing its contracts “the ‘plaintiff must account for a wide range of characteristics in identifying similarly situated individuals.’” *Id.*

The District Court correctly rejected Appellant's assertion that "others similarly situated" should be defined as "other reproductive health care providers," reasoning that this Court's cases "require[] similarity in every material respect" and "Plaintiff's comparators do not adhere strictly to that element." Order Denying P.I. at 10. Appellant instead should have shown "but did not show" that "it was treated differently from a specifically identified comparator, namely, another reproductive health care provider that associates with an entity allegedly engaged in illegal conduct." *Id.* at 11.

That a plaintiff must identify comparators at that level of detail is the inescapable lesson of *Jicarilla Apache Nation v. Morales*, 440 F.3d 1202 (10th Cir. 2006). There, this Court rejected a class-of-one claim arising from an allegedly discriminatory tax assessment of an elk hunting ranch. It specifically disagreed with the plaintiff's argument that the proper comparators were "other elk hunting ranches," finding instead the proper comparators to be other elk hunting ranches that were similarly situated in all material respects: those, like plaintiff, that offer a wide variety of other outdoor and sporting activities. *See id.* at 1213. That case alone defeats Planned Parenthood's complaint that the District Court's reasoning is "circular" and "allow[s] the State's purported reason for differential treatment to eliminate the existence of any comparators." Emergency Mot. at 8 n.4. Just as the State's reason for treating the plaintiff elk hunting ranch differently "the plaintiff's

provision of other outdoor activities” was a characteristic missing from the plaintiff’s proffered comparator ranches in *Jicarilla Apache Nation*, so too is Utah’s reason for terminating these four contracts” Appellant’s affiliation with an entity allegedly engaged in illegal activity” a characteristic missing from Appellant’s proffered comparator health care providers. The District Court’s conclusion on this issue thus accords with this Court’s cases and creates a second bar to a finding that Appellant is likely to succeed on its class-of-one claim.

Unconstitutional Conditions. The District Court’s conclusion that Planned Parenthood’s unconstitutional claims are likely to fail is not an abuse of discretion. *See* Order Denying P.I. at 11-13. “Under the “modern unconstitutional conditions doctrine . . . the government may not deny a benefit to a person on the basis that infringes his constitutionally protected [rights] 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 *Umbehr*, 518 U.S. at 674). This “doctrine has been applied when the condition acts retrospectively in a *discretionary* executive action that terminates a government-provided benefit,” such as “a government contract,” “in retaliation for prior protected speech or association.” *Id.* at 839. These types of claims “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. *Id.* (quoting *Umbehr*, 518 U.S. at 675) (emphasis added).

The District Court correctly concluded that Planned Parenthood is not likely to show that constitutionally protected conduct was a “substantial or motivating factor” for the Governor’s decision to terminate the four disputed contracts. *Id.* As it did below, Planned Parenthood contends that the Governor’s directive amounts to retaliation for its advocating “for reproductive choice, including by associating with others that similarly advocate pro-choice activities,” and for providing “abortion services.” Emergency Mot. at 16. But under Planned Parenthood’s own allegations— which the Governor has admitted for purposes of the proceedings below— neither abortion itself, nor speaking about it, nor associating with others to advocate for it had anything to do with the Governor’s decision. Instead, it was instead his “outrage[]” at the “video where they’re selling fetus body parts for money,” Compl. ¶ 14, and “the casualness, the callousness” such actions evinced, *id.* ¶ 15.

Planned Parenthood’s remaining allegations confirm the Governor’s motivation. It alleges a “successful partner[ship]” with Utah “for over two decades.” Emergency Mot. at 2. As the District Court recognized, it is undisputed that Planned Parenthood provided, advocated for, and associated with others in favor of abortion during that time— including during Governor Herbert’s prior six

years in office, when Utah entered and renewed its contracts with Planned Parenthood. *See* Order Denying P.I. at 12-13. “It was not until the videos were released that the Governor acted to terminate the contracts.” *Id.* at 13. Thus, “[b]oth the Governor’s words and the temporal proximity between the release of the videos and his directive to terminate the contracts support [the conclusion that] he did not retaliate against Plaintiff based upon its right of association nor its right to advocate for and perform abortions.” *Id.*²

B. The District Court Correctly Concluded That Planned Parenthood Would Not Be Irreparably Harmed Without An Injunction.

Planned Parenthood’s principal contention—that the Governor’s directive violates its constitutional rights, *ipso facto* establishing irreparable harm—fails for the reasons discussed above. The District Court thus correctly rejected this contention as a basis for finding irreparable harm. *See* Order Denying P.I. at 13.

Neither did the District Court abuse its discretion by holding that Planned Parenthood failed to establish irreparable financial or reputational harm. *See id.* Financial harms—monies owed under a contract, or a dip in private fundraising—amount to “simple economic loss,” which “usually does not, in and of itself,

² That fact alone distinguishes this case from other abortion-related unconstitutional conditions cases upon which Planned Parenthood relies. *See, e.g., Planned Parenthood of Central N.C. v. Cansler*, 804 F. Supp.2d 482, 496 (M.D.N.C. 2011) (finding that governmental entity took action against a Planned Parenthood affiliate “specifically to penalize Planned Parenthood for its separate abortion-related activities”); *see* Emergency Mot. at 16 (citing other similar cases).

constitute irreparable harm; such losses are compensable by monetary damages.ö
Heideman v. South Salt Lake City, 348 F.3d 1182, 1189 (10th Cir. 2003).

More important, the evidence in the record shows that Planned Parenthood's reputation remains in good stead. In the District Court's words, "[w]hile protestors against Planned Parenthood have rallied, so have supporters of Planned Parenthood; they sent thousands of postcards to the Governor's office on Planned Parenthood's behalf and made donations to the organization in the Governor's name. Order Denying P.I. at 13. This evidence supports the District Court's finding that this factor "weighs in favor of the defendants.ö *Id.*

Finally, Planned Parenthood contends that an injunction is necessary to prevent public health harms that might arise if Utah terminates the four contracts in dispute. But those alleged harms cannot support an injunction. To constitute the type of "irreparable harm" that justifies an injunction, the alleged "injury must be certain, great, actual and not theoretical.ö *Heideman*, 348 F.3d at 1189 (quotations omitted). The public health harms Planned Parenthood alleges are speculative; they hinge on services that other entities also provide. Thus, Planned Parenthood's attempt to establish irreparable harm by invoking theoretical harms to nonparties necessarily fails.

C. The District Court Correctly Found That The Harms An Injunction Would Cause The State Outweigh The Alleged Injuries to Planned Parenthood Without An Injunction.

The District Court did not abuse its discretion by finding that the balance of harms favors Utah. Under the Governor's directive Appellant remains eligible for Medicaid reimbursement, and may continue to advocate for and perform abortions. Any harm from the directive thus relates only to the loss of four contracts. *See* Order Denying P.I. at 14. But an injunction requiring Utah to continue funding the contracts would "curtail[] the State's authority to manage [its] affairs" and "deprive defendants of their contractual right to terminate the contracts at will." *Id.* An injunction also would deprive defendants of their "discretion under the contracts to consider whether continuation of them would send a message that wrongful conduct is acceptable." *Id.* at 15. The District Court correctly reasoned that "[t]here is no monetary remedy" available to the State for injuries arising from an order "remov[ing] the defendants' discretionary decisionmaking." *Id.*

That reasoning accords with orders from members of the Supreme Court, acting as Circuit Justices, repeatedly acknowledging that "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *accord Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers); *Planned*

Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 134 S. Ct. 506, 506 (2013) (Scalia, J., concurring in denial of application to vacate stay). Under this analogous precedent, it was not an abuse of discretion for the District Court to conclude that an injunction would necessarily harm the State.

D. The District Court Correctly Held That The Public Interest Does Not Weigh In Favor Of An Injunction.

Finally, the District Court correctly concluded that enjoining the State from terminating the contracts "is not in the public interest." Order Denying P.I. at 15.

The Court's conclusion that "some members of the public may be harmed if the contracts terminate" because "it is not clear" whether the Utah Department of Health can "redirect the funding to other qualified providers," *id.*, does not account for repeated public statements by Planned Parenthood's Executive Director that the Governor's directive will not stop Appellant from providing the services:

"Planned Parenthood does not break its commitment to the communities that we serve. . . . We will not stop any of these services. The education programs are for middle-schoolers and high-schoolers in vulnerable communities. We are not going to stop any of this. It's too important." Ex. 2 to K. Galloway Decl. Planned Parenthood has the financial means to continue these services without the federal funds dispersed by the State. Planned Parenthood's annual budget is more than \$8 million, and terminating the four contracts in dispute here would result in a loss of about \$230,000 of that total, *see* Ex. 1 to K. Galloway Decl. around three percent

of Planned Parenthood's total budget. In short, if Planned Parenthood stops providing these services, it would not be for lack of pass-through funding.

But as the District Court correctly reasoned, the availability of services under the four contracts is not the only public interest an injunction would implicate. The public also has an interest in "the right of the elected Governor of this State to make decisions about what is in the best interest of the State." Order Denying P.I. at 15. As the District Court correctly recognized, "[i]t is contrary to the public's interest to remove from the Governor the very discretion his position entails. Indeed, these are the types of decisions that should be left to elected officials and not managed by the courts." *Id.* Planned Parenthood's emergency motion is bereft of any precedent even purporting to undermine that conclusion.

CONCLUSION

The District Court carefully considered for nearly 10 weeks the same arguments Planned Parenthood presses here. After that thorough vetting, it rejected those arguments. In so doing, it reversed course and vacated prior equitable relief it had entered for Planned Parenthood. The State respectfully submits that Planned Parenthood has not given this Court any grounds to undo in four days the District Court's measured conclusions and reinstate equitable relief that the District Court has since decided was not warranted. Specifically, Planned Parenthood has failed to carry its burden of establishing that the District Court

abused its discretion when it found that each of the four preliminary injunction factors weighs in Utah's favor. Accordingly, it has failed to show it is entitled to an injunction pending appeal under 10th Cir. Rule 8's relief that, if granted, would give Planned Parenthood in just four days everything to which it would be entitled should it prevail on the merits. This Court should deny the emergency motion.

DATED: December 29, 2015.

OFFICE OF THE UTAH ATTORNEY
GENERAL

/s/Tyler R. Green

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ECF CERTIFICATIONS

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

1. all required privacy redactions have been made;
2. hard copies of the foregoing response required to be submitted to the clerk's office are exact copies of the brief as filed via ECF; and
3. the response filed via ECF was scanned for viruses with the most recent version of Microsoft Security Essentials v. 2.1.111.6.0, and according to the program is free of viruses.

/s/Tyler R. Green

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of December, 2015, a true, correct and complete copy of the foregoing Appellee's Response in Opposition to Appellant's Emergency Motion for Injunction Pending Appeal was filed with the Court and served on the counsel of record listed below via the Court's ECF system:

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