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

APPELLEESô RESPONSE IN OPPOSITION TO APPELLANTôS EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION

In this contracts dispute between Appellant Planned Parenthood Association of Utah (ñPlanned Parenthoodò or ñAppellantò) and the State of Utah, the District Court has already carefully consideredð and rejectedð each argument Planned Parenthood urges this Court to adopt on just four daysô notice. Indeed, the order denying Appellantôs 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 Parenthoodôs emergency motion provides a basis for this Court to findð in four daysð that the District Courtôs 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 8ôs 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 Appellantôs emergency motion thus would provide all the relief Appellant could obtain after full briefing and argument. Planned Parenthoodôs 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 Appellantôs Emergency Mot.) (ñOrder Denying P.I.ò). 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 ñstate agencies to cease acting as an intermediary for pass-through federal funds to Planned Parenthood.ò 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 Appellantôs 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 daysô written notice under the contractôs 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 Parenthoodôs Complaint accurately alleges his reasons for terminating the four contracts. *See id.* at 2 n.1. He issued his directive ñin response toò the Center for Medical Progressôs videos. Compl. ¶ 13. A few days after the directive, he said that he and the people of Utah were ñoutragedò at the alleged ñcoloring outside the linesò by Appellantôs national counterpart. *Id.* ¶ 14. And a few days after that, he spoke at a pep rally in the Utah State Capitol decrying the ñappalling . . . casualness, the callousness . . . the lack of respectò 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 Stateôs decision to terminate the four contracts violates Planned Parenthoodôs equal protection rights or the unconstitutional conditions doctrine.

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

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

On October 15, 2015, the District Court heard oral argument on Planned Parenthoodôs fully briefed motion for preliminary injunction. After methodically and carefully analyzingð for 68 daysð both partiesô arguments, the District Court entered an order on December 22, 2015, vacating the TRO and denying Planned Parenthoodôs motion for preliminary injunction. *See* Order Denying P.I. at 16.

The District Court rejected Planned Parenthoodôs arguments on each of the four preliminary injunction factors. It first found that Planned Parenthoodôs claims were unlikely to succeed on the merits. It reasoned that Planned Parenthoodôs 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 Parenthoodôs unconstitutional conditions claims were likely to fail because ñthe Governorôs 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 againstò Planned Parenthood based on any constitutionally protected conduct. *Id.* at 13.

The District Court concluded that the second factorð irreparable harmð ñweighs in favor of the defendants.ò *Id.* Planned Parenthood ñlikely will not be able to show it suffered a constitutional harmò; any financial harm from terminating the contracts ñcan be redressedò; and the groundswell of support for Planned Parenthood after the contracts were terminated demonstrated an absence of ñirreparable reputational harm.ò *Id.*

On the third factor, the District Court concluded that ñthe injuries to defendantsò from issuing an injunction ñoutweigh the injuries toò Planned Parenthood. *Id.* at 15. The directive does not preclude Appellant from receiving Medicaid reimbursement or ñfrom advocating for or performing abortions.ò *Id.* at 14. Rather, Appellantôs ñinjury is related only to the loss of four contracts.ò *Id.* ñIn contrast,ò an injunction preventing Utah from terminating the contracts would ñcurtail[]ò the Stateôs ñauthority to manage [its] affairs.ò *Id.* An injunction also would ñdeprive the defendants of their contractual right to terminate the contracts at willò and could ñreasonablyò lead ñthe citizenry of Utahò to perceive that the State approves of the conduct depicted in the videos. *Id.* And ñ[r]equiring the defendants to continue the contracts will remove the defendantsô discretionary decisionmaking. There is no monetary remedy for such injuries.ò *Id.* at 15.

Finally, on the fourth factor, the District Court ñconclude[d] it is not in the public interest to enjoin the defendants from terminating the contracts at issue.ò *Id.* The Court suggested that ñsome members of the public may be harmed if the contracts terminate,ò finding it to be ñnot clearò whether other service providers could step into Planned Parenthoodôs shoes and provide the four contracted services. *Id.* But the District Court also considered another public interestð ñthe right of the elected Governor of this State to make decisions about what is in the best interest of the State.ò *Id.* ñThese contracts relate to discretionary programs.ò *Id.* ñIt is contrary to the publicôs interest to remove from the Governor the very discretion his position entails.ò *Id.* ñIndeed, these are the types of decisions that should be left to elected officials and not managed by the courts.ò *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 Appellantôs emergency motion before 3:00 PM MST on December 29, 2015.

ARGUMENT

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

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

It appears that Planned Parenthoodôs 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 factorsð 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 Parenthoodôs claims arise from its contracts with the State of Utahð *not* from any generally applicable action the State took as a sovereign. That undisputed fact is dispositive to a proper analysis of Planned Parenthoodôs likelihood of success.

For more than 50 years, the Supreme Court has ñrecognized óa 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.ôò *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 Stateôs powers to manage its discretionary operationsð for example, when it acts as employer or contractorð are ñófar broaderôò than its powers ñóas sovereign.ôò *Id.* (quoting *Engquist*, 553 U.S. at 598). Accordingly, and in light of ñthe ócommon-sense realization that government offices could not function if everyôò discretionary operational decision ñbecame a constitutional matter,ò ñconstitutional review of government [operational] decisions must rest on different principles than review of . . . restraints imposed by the government as sovereign,ò *Engquist*, 553 U.S. at 599 (quotations omitted).

Planned Parenthoodôs motion fails to properly account for that line of cases. The District Courtôs 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 Parenthoodôs 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 ñbeen intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.ò *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 Courtôs holding in *Engquist* that ña óclass-of-oneô theory of equal protection has no place in the public employment context.ò *Id.* at 594. *Engquist* explained that ñsome forms of state action . . . by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments.ò *Id.* at 603. ñThis principle,ò the Court explained, ñapplies 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.ò *Id.* at 604.

Given the ñobviousò similarities between government employees and government contractors, *Bd. of Cnty. Commr's v. Umbehr*, 518 U.S. 668, 674 (1996), the Eleventh Circuit had ñlittle trouble applying the reasoning in *Engquist*ò to hold ñthat *Engquist* controlsò cases brought by government contractors ñand makes clear thatò contractors cannot ñassert a cognizable right to [class-of-one] equal protection,ò *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 ð who

dissented in *Engquist*ð reasoned that ñ[a]lthough *Engquist*ôs 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.ò *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. Appôx 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 ñit is arguably just a small step fromò *Engquist* ñto the conclusion the [class-of-one equal protection] doctrine shouldnôt apply when the government interacts with independent contractorsð in both circumstances, the government acts in a more proprietorial and less regulatory capacity.ò 666 F.3d at 690. The contrary conclusionð that a government contractor *can* state a cognizable class-of-one equal protection claim based on a Stateôs terminating an at-will contractð 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 Courtôs 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 ñ[t]here is no óclear standardô against whichò the Court could assess the Stateôs 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 ñneither case discussed *Engquist*.ò *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 Parenthoodôs class-of-one claim is unlikely to succeed for the separate, independent reason that Planned Parenthood failed to carry its ñósubstantial burdenôò to ñdemonstrate others ósimilarly situated in all material respectsô were treated differently and that there is no objectively reasonable basis for the defendantôs action.ò *Kansas Penn Gaming*, 656 F.3d at 1217 (quotations omitted). This Courtôs precedents ñemphasize [its] strict reading of this element because it addresses the main concern with the class-of-one theoryð that it will create a flood of claims in that area of government action where discretion is high and variation is common.ò *Id.* Thus, ñwhere the government actor enjoys a broader range of discretionòð as it does when managing its contractsð the ñplaintiff must account for a wide range of characteristics in identifying similarly situated individuals.ò *Id.*

The District Court correctly rejected Appellantôs assertion that ñothers ósimilarly situatedô should be defined as óother reproductive health care providers,ôò reasoning that this Courtôs cases ñrequire[] similarity in every material respectò and ñPlaintiffôs comparators do not adhere strictly to that element.ò Order Denying P.I. at 10. Appellant instead should have shownð but did not showð that ñit was treated differently from a specifically identified comparator, namely, another reproductive health care provider that associates with an entity allegedly engaged in illegal conduct.ò *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 plaintiffôs argument that the proper comparators were ñother elk hunting ranches,ò 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 Parenthoodôs complaint that the District Courtôs reasoning is ñcircularò and ñallow[s] the Stateôs purported reason for differential treatment to eliminate the existence of any comparators.ò Emergency Mot. at 8 n.4. Just as the Stateôs reason for treating the plaintiff elk hunting ranch differentlyð the plaintiffôs

provision of other outdoor activitiesö was a characteristic missing from the plaintiffôs proffered comparator ranches in *Jicarilla Apache Nation*, so too is Utahôs reason for terminating these four contractsö Appellantôs affiliation with an entity allegedly engaged in illegal activityö a characteristic missing from Appellantôs proffered comparator health care providers. The District Courtôs conclusion on this issue thus accords with this Courtôs 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 Courtôs conclusion that Planned Parenthoodôs unconstitutional claims are likely to fail is not an abuse of discretion. *See* Order Denying P.I. at 11-13. ñUnder the ómodern 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.ôò *Planned Parenthood of Kan. & Mid-Mo. v. Moser*, 747 F.3d 814, 838 (10th Cir. 2014) (quoting *Umbehr*, 518 U.S. at 674). This ñdoctrine has been applied when the condition acts retrospectively in a *discretionary* executive action that terminates a government-provided benefit,ò such as ña government contract,ò ñin retaliation for prior protected speech or association.ò *Id.* at 839. These types of claims ñnecessarily examine the officialôs motive for taking the action; the challenge will be rejected unless retaliation *against the protected conduct* was óa

substantial or motivating factorô for taking the action.ôò *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 ñprotected conduct was a ósubstantial or motivating factorôò for the Governorôs decision to terminate the four disputed contracts. *Id.* As it did below, Planned Parenthood contends that the Governorôs directive amounts to retaliation for its advocating ñfor reproductive choice, including by associating with others that similarly advocate pro-choice activities,ò and for providing ñabortion services.ò Emergency Mot. at 16. But under Planned Parenthoodôs own allegationsð which the Governor has admitted for purposes of the proceedings belowð neither abortion itself, nor speaking about it, nor associating with others to advocate for it had anything to do with the Governorôs decision. Instead, it was instead his ñoutrage[]ò at the ñvideo where theyôre selling fetus body parts for money,ò Compl. ¶ 14, and ñthe casualness, the callousnessò such actions evinced, *id.* ¶ 15.

Planned Parenthoodôs remaining allegations confirm the Governorôs motivation. It alleges a ñsuccessful partner[ship]ò with Utah ñfor over two decades.ò 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 timeð including during Governor Herbertôs prior six

years in office, when Utah entered and renewed its contracts with Planned Parenthood. *See* Order Denying P.I. at 12-13. ñIt was not until the videos were released that the Governor acted to terminate the contracts.ò *Id.* at 13. Thus, ñ[b]oth the Governorôs 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.ò *Id.*[2]

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

Planned Parenthoodôs principal contentionð that the Governorôs directive violates its constitutional rights, *ipso facto* establishing irreparable harmð 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 harmsð monies owed under a contract, or a dip in private fundraisingð amount to ñsimple economic loss,ò which ñusually 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 ñspecifically to penalize Planned Parenthood for its separate abortion-related activitiesò); *see* Emergency Mot. at 16 (citing other similar cases).

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

More important, the evidence in the record shows that Planned Parenthoodôs reputation remains in good stead. In the District Courtôs words, ñ[w]hile protestors against Planned Parenthood have rallied, so have supporters of Planned Parenthoodò; they sent thousands of postcards to the Governorôs office on Planned Parenthoodôs behalf and made donations to the organization in the Governorôs name. Order Denying P.I. at 13. This evidence supports the District Courtôs finding that this factor ñweighs in favor of the defendants.ò *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 ñirreparable harmò that justifies an injunction, the alleged ñinjury must be certain, great, actual and not theoretical.ò *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 Parenthoodôs 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 Governorôs 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 ñcurtail[]ò the Stateôs ñauthority to manage [its] affairsò and ñdeprive defendants of their contractual right to terminate the contracts at will.ò *Id.* An injunction also would deprive defendants of their ñdiscretion under the contracts to consider whether continuation of them would send a message that wrongful conduct is acceptable.ò *Id.* at 15. The District Court correctly reasoned that ñ[t]here is no monetary remedyò available to the State for injuries arising from an order ñremov[ing] the defendantsô discretionary decisionmaking.ò *Id.*

That reasoning accords with orders from members of the Supreme Court, acting as Circuit Justices, repeatedly acknowledging that ñany time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.ò *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 ñis not in the public interest.ò Order Denying P.I. at 15.

The Courtôs conclusion that ñsome members of the public may be harmed if the contracts terminateò because ñit is not clearò whether the Utah Department of Health can ñredirect the funding to other qualified providers,ò *id.*, does not account for repeated public statements by Planned Parenthoodôs Executive Director that the Governorôs directive will not stop Appellant from providing the services: ñPlanned 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. Weôre not going to stop any of this. Itôs too important.ò 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 Parenthoodôs 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.ð around three percent

of Planned Parenthoodôs 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 ñthe right of the elected Governor of this State to make decisions about what is in the best interest of the State.ò Order Denying P.I. at 15. As the District Court correctly recognized, ñ[i]t is contrary to the publicôs 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.ò *Id.* Planned Parenthoodôs 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 Courtôs 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 Utahôs favor. Accordingly, it has failed to show it is entitled to an injunction pending appeal under 10th Cir. Rule 8ð 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.

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ECF CERTIFICATIONS

Pursuant to Section II(I) of the Courtôs CM/ECF Userôs 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 clerkôs 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 AppelleesôResponse in Opposition to Appellantôs Emergency Motion for Injunction Pending Appeal was filed with the Court and served on the counsel of record listed below via the Courtôs ECF system:

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