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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

**PLANNED PARENTHOOD ASSOCIATION
OF UTAH, a Utah non-profit
corporation,**

Plaintiff,

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
government of THE STATE OF UTAH,**

Defendants.

**MOTION FOR A TEMPORARY
RESTRAINING ORDER AND A
PRELIMINARY INJUNCTION**

Case No. 2:15-CV-00693-CW

Honorable Clark Waddoups

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Plaintiff Planned Parenthood Association of Utah (“Plaintiff” or “PPAU”), through its counsel of record, hereby submits this Motion for a Temporary Restraining Order and a Preliminary Injunction, and states as follows:

INTRODUCTION

On August 14, 2015, without warning and having never previously expressed concerns about Plaintiff, Defendant Gary R. Herbert (“Governor Herbert”) directed the agencies of the State of Utah to cease acting as an intermediary for federal grant money going to Plaintiff for non-abortion related services (the “Directive”), based solely on unproven allegations by an anti-abortion group of misconduct in other states by affiliates of the national organization of Planned Parenthood Federation of America (the “National Organization”) (collectively, with its affiliates, “Planned Parenthood”) related to the donation of fetal tissue for medical research. Pursuant to Governor Herbert’s Directive, the Utah Department of Health (“UDOH”) (collectively, with Governor Herbert, the “State” or “Defendants”) has stated that it will refuse to renew a contract with Plaintiff that expires on September 30, 2015, and has sent notices to Plaintiff that two of its contracts will be terminated on October 8, 2015 (collectively, with the Directive, the “State Action”).

This case arises in a current political climate that is very hostile to Planned Parenthood. At the time of the filing of this complaint, threats of a complete shut-down of the federal government loom as certain opponents of Planned Parenthood in Congress are conditioning the approval of the government’s operating budget on the complete revocation of all federal funds to Planned Parenthood, unless the organization

certifies that it will not provide abortions. The State has therefore singled out Plaintiff for this unfavorable treatment, not based on any actual, threatened, or even alleged, misconduct by Plaintiff itself, but because of its association with the National Organization and its affiliates, and Governor Herbert's personal, political animus toward Plaintiff's constitutionally protected, privately funded activities --- specifically, that Plaintiff provides, associates with, and/or advocates for access to abortions, even though Plaintiff conducts all such activities outside of any state or federal program and does not utilize any government funding for such activities.

The State's Action violates Plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution, and threatens imminent and irreparable harm to Plaintiff and the thousands of women, men, and teens of Utah who rely on Plaintiff for critical reproductive health care and education, including to prevent unwanted pregnancies and to prevent the contraction and transmission of life-threatening infections and diseases.

Accordingly, through the instant motion, Plaintiff seeks a preliminary injunction pursuant to Federal Rule of Civil Procedure 65, without bond, enjoining Defendants from taking any further action to implement the Directive, and from refusing to act as an intermediary for federal funds which Plaintiff is otherwise qualified to receive, based solely on Plaintiff's association with providers of abortion services, including the National Organization and its affiliates; Plaintiff's advocacy for access to abortion services; and/or Plaintiff's provision of and/or association with abortion services.

Furthermore, because time is of the essence, including because the status quo will be altered on September 30 and October 8, 2015, causing irreparable harm to Plaintiff and its patients before Defendants may be heard by the Court, Plaintiff requests that the Court set a hearing on its motion on an expedited basis and asks the Court for a temporary restraining order (“TRO”) in the interim.¹ Specifically, Plaintiff requests that the Court enter a TRO enjoining Defendants, and their agents, servants, officers, employees, entities, and those acting in concert with them, and/or those acting under their direction or control, from taking any further action in furtherance of the Directive, including without limitation by: (1) treating the contract between the State of Utah and Plaintiff for the Utah Abstinence Education Program as being in full force and effect, including after October 7, 2015; (2) treating the contract between the State of Utah and Plaintiff for the STD Surveillance Network Program as being in full force and effect,

¹ The specific facts showing that “immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition,” Fed. R. Civ. P. 65(b)(1)(A), are set forth in the Declaration of Karrie Galloway (“Galloway Decl.”), which is attached hereto as Exhibit A, and discussed in detail in this memorandum. Under the local rules of this Court, Defendants will have until October 12, 2015, to file their opposition to Plaintiff’s motion. See DUCivR 7-1(b)(3)(B). However, certain events altering the status quo and giving rise to the irreparable injury to Plaintiff and its patients will occur prior to this time, on September 30 and October 8, 2015. See Galloway Decl., ¶¶ 34, 47 & 72. Because Defendants will not suffer any harm from the entry of a TRO preserving the status quo, for the same reasons discussed in Section III of the Argument, *infra*, notice to Defendants should not be required for interim injunctive relief. Notwithstanding, the undersigned certifies that Plaintiff’s counsel will be hand-delivering the instant motion to Defendants at the same time that it serves the summons and complaint on Defendants, which it intends to do immediately after filing on the morning of September 28, 2015. Accordingly, Plaintiff will be providing notice of its request for a TRO to Defendants on the date this motion is filed.

including after October 7, 2015; (3) treating the contract between the State of Utah and Plaintiff for the Personal Responsibility Education Program as being in full force and effect, including after September 30, 2015; (4) continuing to reimburse Plaintiff for specimens sent to the Utah Public Health Laboratory for STD testing, and providing related medications, under the Targeted STD Testing Program; and continuing to reimburse Plaintiff for pregnancy and STD testing for victims of rape or sexual assault through the Utah Office for Victims of Crime.

STATEMENT OF FACTS

Governor Herbert's Directive

1. On August 14, 2015, Governor Herbert issued a statement regarding PPAU (the "Directive"), wherein Governor Herbert "instructed state agencies to cease acting as an intermediary for pass-through federal funds to Planned Parenthood [of Utah]." Galloway Decl., Ex. 1.

2. In a press conference on August 17, 2015, Governor Herbert stated, "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, Planned Parenthood [of Utah] forfeits some of their benefits." *Id.*, Ex. 2.

3. Accordingly, Governor Herbert's Directive was issued in response to recent (false) accusations made in the media by an anti-abortion organization that purport to relate to fetal tissue donation programs conducted by other affiliates of the National Organization in other states, due to misleading videos recently released by an

organization made up anti-abortion extremists opposed to Planned Parenthood called the Center for Medical Progress (the “CMP Videos”). See *id.*, ¶¶ 13 & 81 and Ex. 2.

4. While PPAU is an “affiliate” of the National Organization, PPAU is a legally separate non-profit corporation organized under the laws of the State of Utah. *Id.*, ¶ 4.

5. Moreover, none of PPAU’s employees has appeared in any of the CMP Videos. *Id.*, ¶ 81.

6. In sum, the accusations made in the media against the other affiliates of Planned Parenthood do not include any alleged conduct by PPAU, as Governor Herbert himself acknowledged in his August 17, 2015, press conference when he stated that none of the alleged conduct occurred in Utah. See *id.*, Ex. 2.

7. Thus, Governor Herbert knew, and continues to know, that there is no evidence, or even accusation, that PPAU has “colored outside” of any lines, including because PPAU does not participate in any program that provides fetal tissue for scientific research. *Id.*; see also Galloway Decl., ¶ 13.

8. Moreover, as Governor Herbert himself acknowledged in his Directive, no federal funding to PPAU, whether directly from the federal government or through state agencies such as UDOH, is used to provide abortions. See *id.*, Ex. 1.

9. Instead, the funds affected by Governor Herbert’s Directive, which primarily include funding through contracts between PPAU and UDOH, are shown in a list available through a hyperlink included in the Governor’s statement:

a. Funding to support the “Utah Abstinence Education Program,” the purpose of which is to provide abstinence education as a means of promoting

abstinence from sexual activity among Utah youth. This program is an afterschool program requiring parental permission to enroll.

b. Funding to support the “Personal Responsibility Education Program,” the purpose of which is to educate adolescents on both abstinence and contraception to prevent pregnancy and STDs, while also providing education into adulthood preparation topics such as positive self-esteem and health relationship dynamics, educational and career success, and life skills such as goal-setting, decision making, communication skills, and stress management. This program is also an afterschool program requiring parental permission to enroll.

c. Funding to support a program in collaboration with the Communicable Disease Prevention Program for STD Testing in the State of Utah, wherein federal funds are used to pay the Utah Public Health Laboratory for specimens to be tested for STDs such as chlamydia and gonorrhea (the “Targeted STD Testing Funds”).

d. Funding to support a program to improve timeliness, accuracy, and completeness of STD reporting and surveillance data, sometimes referred to as the “STD Surveillance Network.”

Id., ¶¶ 30, 42, 54 & 69 and Ex. 1.

10. The Directive also purports to affect reimbursements made to PPAU for pregnancy and STD testing for victims of rape or sexual assault through the Utah Office for Victims of Crime. *Id.*, ¶ 76.

11. Thus, the funds affected by Governor Herbert's Directive are unrelated to abortion and/or to the donation of fetal tissue for scientific research (except that the programs funded are intended to, and have the effect of, decreasing abortions). *Id.*, ¶ 29.

12. Instead, Governor Herbert's Directive was issued solely in retaliation for PPAU's prior protected and privately funded activities --- specifically, that PPAU provides, associates with, and/or advocates for access to abortion, even though PPAU conducts all such activities outside of any state or federal program. *See id.*, ¶ 12.

13. On August 19, 2015, Governor Herbert joined Mia Love, one of Utah's congressional representatives, and approximately three-hundred other attendees at a protest held in the rotunda of the Utah State Capitol, to ask lawmakers to defund Planned Parenthood. At the protest, Governor Herbert stated, "I'm here today to add my voice to yours and speak out on the sanctity of life" He further stated, "The thing I find most appalling is the casualness, the callousness . . . the lack of respect, the lack of sensitivity to the unborn" Galloway Decl., Ex. 3.

Implementation of Governor Herbert's Directive by UDOH

14. On September 8, 2015, and pursuant to Governor Herbert's Directive, UDOH provided PPAU with a thirty-day written notice of termination of its contract for the Utah Abstinence Education Program, which was not set to expire until September 30, 2016, and would be renewable for additional years at the time of expiration. Galloway Decl., ¶ 34. Accordingly, this contract will terminate on October 8, 2015. *Id.*

15. On September 8, 2015, the UDOH also provided PPAU with a notice that UDOH would cease accepting funds from the Centers for Disease Control and Prevention (the “CDC”) for the STD Surveillance Network contract after September 29, 2015, when such funds would otherwise be available through September 29, 2018. *Id.*, ¶ 72. This contract will terminate on October 8, 2015. *Id.*

16. The contract between UDOH and PPAU for the Personal Responsibility Education Program (“PREP”) is set to expire on September 30, 2015, and UDOH has made public statements that it will allow this contract to expire without renewal, per the Governor’s Directive. *Id.*, ¶ 47.

17. PPAU has also been informed by UDOH that reimbursement for specimens sent to the Utah Public Health Laboratory for STD testing will only continue to December 31, 2015, due to Governor Herbert’s Directive. *Id.*, ¶ 57.

18. All of the programs above are funded by the federal government, and grant recipients are selected based upon criteria established by the federal government. By contract, the State of Utah has agreed to administer these programs on behalf of the federal government. These programs are not funded by Utah taxpayer dollars.

19. Given PPAU’s longstanding relationship with UDOH, and the quality and quantity of services PPAU has provided to the Utah community for nearly 50 years, the State’s Action is without any legitimate justification.

PPAU’s Long History of Service to the Utah Community

20. For nearly 50 years, PPAU has provided reproductive health services to women, men, and teens of Utah, including providing education, health care, and testing

to prevent unwanted pregnancies, to prevent the spread of sexually transmitted diseases (“STDs”), and to promote safe and healthy relationships. Galloway Decl., ¶ 5. Last year alone, PPAU provided health care and education to over 50,000 people statewide. *Id.*

21. While PPAU’s services are available to all in the State of Utah, PPAU focuses on serving the needs of groups that are at higher risk for contracting and spreading disease, and having unplanned pregnancies, by providing them with accurate information concerning the emotional and physical aspects of human sexual behavior and reproduction, in addition to providing statewide, affordable, high quality reproductive health care, particular to those that are uninsured or underinsured. *Id.*, ¶ 6.

22. PPAU provides comprehensive health care services through its network of nine (9) urban and rural clinics, and it contracts with another eleven (11) rural and frontier providers that provide health care services on PPAU’s behalf throughout Utah. *Id.*, ¶ 7. Currently, PPAU is the only statewide organization that provides reproductive health services to all who request them. This is true regardless of a patient’s health insurance status, or any other circumstance related to a patient’s economic, ethnic, cultural, or demographic position in the state. *Id.*

23. PPAU healthcare centers are staffed with experienced physicians, nurse practitioners, physician assistants, and other professionals, who provide exemplary medical care. PPAU’s patient surveys consistently reflect public satisfaction with the quality of care provided. *Id.*, ¶ 8.

24. In the fiscal year that ended 2015, PPAU provided family planning and reproductive health care wholly unrelated to abortion to almost 45,000 patients, which included family planning services such as birth control, vasectomy, and pregnancy testing, STD screenings, cancer screenings, and cancer prevention. Galloway Decl., ¶ 9. These services include examinations for conditions that, if left untreated, could result in serious consequences to the health of PPAU's patients. *Id.* PPAU also tests for and provides care related to diabetes, anemia, and cholesterol. *Id.*

25. In addition, in the past fiscal year, PPAU provided 38,470 tests for sexually transmitted infections and, for those who tested positive and requested, PPAU provided treatment, referrals, and related medical care. *Id.*, ¶ 10.

26. In the 2015 fiscal year, 86% of PPAU's patients reported being uninsured. PPAU's ability to continue to provide services at affordable rates to these uninsured individuals is critical. *Id.*, ¶ 11.

27. All federal money received by PPAU, whether directly or through programs administered by the State of Utah, is tied to a particular program or a particular medical service. *Id.*, ¶ 12. PPAU does not receive *any* funds from either the federal or state government for abortion services, and scrupulously ensures that no federal or state money is used to fund abortions, except for the limited abortions paid for by Medicaid pursuant to federal law (which PPAU has never received for even a single abortion-related service). Galloway Decl., ¶ 12 & n.1.

28. In 2011, PPAU started offering abortion services as part of its commitment to continued accessibility of comprehensive reproductive health care in Utah. *Id.*, ¶ 13.

PPAU does not participate in any programs that allow its patients to donate fetal tissue after an abortion, and never has. *Id.* PPAU complies with all federal and state laws, including those regarding disposal of fetal tissue. *Id.* Furthermore, none of PPAU's employees has appeared in any of the misleading CMP Videos. *Id.*

29. In addition to medical services, PPAU provides education services through its in-school maturation and sex education programs, after school programs, youth in custody programs, seminars and classes at colleges and universities, and for community groups across the state. *Id.*, ¶ 14. These education and service programs help prevent unintended pregnancy and empower young people to form healthy and safe relationships. *Id.*

PPAU's Longstanding, Successful Relationship with UDOH

30. PPAU has received federal funding to support its reproductive health services and education since 1973, and has received federal funds through programs administered by the State of Utah since 1993. Galloway Decl., ¶ 15.

31. PPAU has a record of being an exemplary partner in providing public health services throughout the state, and has had an excellent working relationship with UDOH for over two decades. *Id.*, ¶ 16.

32. As just one example, in July of 2009, UDOH wrote PPAU "to express [its] sincere appreciation for [PPAU's] support and collaboration in [the] mutual efforts to reach out to [the] community's minority population." *Id.*, ¶ 17. UDOH thanked PPAU for participating in programs that "were extremely successful due to [PPAU's] participation." *Id.* UDOH stated that it was "looking forward to more in the future," and that "[t]he Utah

Department of Health . . . is excited to continue to collaborate with [PPAU] [] in these and other projects.” *Id.* The letter concludes that *UDOH* “**fully support[s] Planned Parenthood Association of Utah’s project and look[s] forward to continued collaboration.**” *Id.* (emphasis added).

33. In a more recent example from May 2013, UDOH issued a letter of support, stating that it “strongly supports the activities and services Planned Parenthood Association of Utah (PPAU) provides in HIV/AIDS.” Galloway Decl., ¶ 18. UDOH states that “PPAU has a long standing working relationship with both the Utah Department of Health and the Salt Lake County Health Department to ensure the newly identified HIV+ and partners receive appropriate services and linkage to care and treatment.” *Id.* The letter concludes: “PPAU has always been on the cutting edge with the latest and most effective interventions. **We strongly support all of the programming at PPAU.**” *Id.* (emphasis added).

34. Just earlier this year, UDOH wrote several letters of support regarding PPAU’s efforts to provide education programs to teens in Utah that “will decrease teen pregnancy in [the] community by empowering 9-10th grade youth that the Utah Department of Health serves to make healthy sexual decisions, support families to build connectedness, and develop open communications about sexual health;” and will “decrease teen pregnancy and STD rates among LGBTQ identified youth by empowering the 15-19 year old youth that the Utah Department of Health serves to make healthy sexual decisions, access health care more frequently, and develop an open communication about sexual health with health care providers.” *Id.*, ¶ 19. UDOH

stated that it **“is excited . . . to continue [its] collaboration with the Planned Parenthood Association of Utah.”** *Id.* (emphasis added).

35. At no time has PPAU been accused of misusing funds, either by using those funds to perform abortions, or engaging in any other kind of impropriety. *Id.*, ¶ 20.

36. At no time has UDOH complained about the services provided by PPAU, or otherwise claimed that PPAU was not qualified to provide services. Galloway Decl., ¶ 21. To the contrary, and as shown in the examples above, UDOH has been very pleased with PPAU’s services and consistently indicated its intent to continue to support PPAU’s programs and collaborate with PPAU. *Id.*

37. In the more than two decades that the State of Utah has administered funds for federal programs to PPAU, PPAU has been accepted by UDOH for most, if not all, of the federal grants for which PPAU was qualified and met all of the application requirements. *Id.*, ¶ 22.

38. In the more than two decades that the State of Utah has administered funds for federal programs to PPAU, grants having additional funds available after the expiration of the original contract with PPAU have been routinely renewed as a matter of course by UDOH without any controversy or negotiation. *Id.*, ¶ 23.

39. In the two decades that the State of Utah has administered funds for federal programs to PPAU, PPAU has never received a notice of termination of an existing contract with UDOH, until the recent notices of September 8, 2015. *Id.*, ¶ 24.

40. In the two decades that the State of Utah has administered funds for federal programs to PPAU, UDOH has never refused to renew a contract with PPAU,

until the recent threat that UDOH will not renew an existing contract with PPAU that expires on September 30, 2015. Galloway Decl., ¶ 25.

41. Since 1993, PPAU has received over \$1.5 million in federal funds through programs administered by the State of Utah. This funding is a vital part of the continued success of PPAU's organization. *Id.*, ¶ 26.

42. Based on the long-standing history of collaboration between UDOH and PPAU, UDOH would not have terminated or threatened not to renew its existing contracts with PPAU, but for Governor Herbert's Directive. *Id.*, ¶ 27.

43. Based on PPAU's outstanding service to the community and its successful partnership with UDOH since 1993, PPAU would have continued to be approved for, and receive, federal funds administered by the State of Utah, for programs for which PPAU is qualified, but for Governor Herbert's Directive. *Id.*, ¶ 28.

THE "UTAH ABSTINENCE EDUCATION PROGRAM"

44. Governor Herbert's Directive affects funding to support the "Utah Abstinence Education Program," the purpose of which is to provide abstinence education as a means of promoting abstinence from sexual activity among Utah youth. Galloway Decl., ¶ 30. This program is offered after school and requires parental permission to enroll. *Id.*

45. PPAU has been receiving funding from UDOH to provide abstinence education during the last 15 years. *Id.*, ¶ 31. With respect to this particular grant, PPAU has been receiving funding from UDOH since April 2011, when PPAU was awarded five years of funding. *Id.*

46. For this particular federal grant, at the start of each new funding cycle (based on the federal fiscal year), PPAU would sign a new contract for the period October 1 through September 30. *Id.*, ¶ 32. There was no negotiation, but rather, the grant was “amended” as a matter of course each year for the next service period --- that is, until Governor Herbert’s Directive. *Id.*

47. PPAU has never received any complaint from UDOH or anyone else regarding the quality of the services it has been providing under the Utah Abstinence Education Program grant. Galloway Decl., ¶ 33.

48. While Utah has always been a bright spot when reporting national statistics of teen pregnancy, within its borders there are continued areas of concern which PPAU is positioned to address. *Id.*, ¶ 35. Despite nearly two decades of declining teenage birth rates in Utah, for example, significant disparities exist among racial and ethnic populations, including Utah’s growing number of African refugees. *Id.* Further, there are geographic disparities with small areas in Utah marked with higher rates of teen pregnancy, with the highest teenage pregnancy rates reported in Glendale, South Salt Lake, and Rose Park. *Id.* These same discrepancies are also present with respect to Utah Chlamydia infection rates which, unlike teen birth rates, are on the rise. Both teen pregnancy and Chlamydia infection rates are markers of risky sexual behavior among adolescents. *Id.*

49. PPAU’s goal with the Utah Abstinence Education Program is to reduce pregnancy and risky sexual behavior among teens, while increasing school performance within identified high risk communities, through three afterschool “clubs”

for youth in grades 6-10 (and their parents) at Midvale CBC, Glendale Junior High, and Northwest Junior High, using the abstinence based Wyman Teen Outreach Program™ (“TOP™”) curriculum. *Id.*, ¶ 36.

50. Last year PPAU had 98 teens sign up for the Utah Abstinence Education Program, with 44 teens graduating from the program. Galloway Decl., ¶ 37.

51. The school year has just started, but PPAU anticipates having 52 teens participate this year. *Id.*, ¶ 38.

52. Even if new clubs could be created in time by other organizations to serve these teens (which is doubtful), it would not be the same program that is offered by PPAU, as PPAU is the only organization certified to replicate or teach the Wyman TOP™ curriculum in Utah. *Id.*, ¶ 39 Nationwide, this program has been shown to lower the risk of school suspension by 52%, the risk of course failure by 60%, the risk of teen pregnancy by 53%, and the risk of dropping out of school by 60%. *Id.* In other words, it is a very desirable program because of its demonstrated success. *Id.* And PPAU is the only organization in Utah certified to offer or replicate this highly successful program. *Id.*

53. Additionally, as the leading family planning and reproductive health care provider in the state, PPAU is uniquely qualified to offer this education to Utah teens. Galloway Decl., ¶ 40.

54. Accordingly, the State’s Action threatens to irreparably harm PPAU’s ability to serve these high-risk teens and their parents, its ability to prevent unwanted teen pregnancies, and its ability to prevent these teens from acquiring potentially-life

threatening STDs. *Id.*, ¶ 41. These are harms that are not compensable by money.

Id.

THE “PERSONAL RESPONSIBILITY EDUCATION PROGRAM”

55. Governor Herbert’s Directive also affects funding to support the “Personal Responsibility Education Program,” the purpose of which is to educate adolescents on both abstinence and contraception to prevent pregnancy and STDs, while also providing education into adulthood preparation topics such as positive self-esteem and health relationship dynamics, educational and career success, and life skills such as goal-setting, decision making, communication skills, and stress management. Galloway Decl., ¶ 42. This program is offered after school and requires parental permission to enroll. *Id.*

56. The Personal Responsibility Education Program (“PREP”) grant in essence expands on PPAU’s prior Utah Abstinence Education Program grant. *Id.*, ¶ 43. The intention of the grant is to create the Utah Teen Health Coalition and a long-term partnership with local community groups to replicate the evidence-based Wyman TOPtm in communities historically at risk for teen pregnancy in Salt Lake County. *Id.*

57. The Utah Teen Health Coalition has included a number of community organizations since its inception two years ago. *Id.*, ¶ 44. For program year 2015-2016, the coalition includes the Sudanese Youth in Action (“SYA”), Transitions for Refugee Youth (“TRY”), Salt Lake Center for Science Education (“SLCSE”), and West High Community Education. *Id.* Each partner has an afterschool program where they are teaching the Wyman TOPtm curriculum under the guidance of PPAU. Galloway Decl., ¶

44. Again, PPAU is the only certified replication partner in Utah for this curriculum. *Id.* PREP grant funding is used to not only pay PPAU's certified Wyman TOPtm staff to train facilitators from partner agencies, but also subcontract with the partner organization and pass on financial support for their clubs. *Id.*

58. The UDOH grant committee awarded the first PREP grant contract in 2013 through a competitive process in which PPAU responded to a Request for Proposal from UDOH. *Id.*, ¶ 45. This grant is a 3-year commitment through 2016, and subsequent years have been merely a matter of signing a new contract for the fiscal year. *Id.* Historically UDOH would send over the new contract, and PPAU would then sign and send it back. *Id.*

59. PPAU has never received any complaint from UDOH or anyone else as to the quality of the services it has been providing under the PREP grant. Galloway Decl., ¶ 46.

60. Given PPAU's long-standing relationship with UDOH, PPAU's past performance in providing excellent reproductive services and education, and PPAU's unique qualifications for the PREP grant, UDOH would have renewed the contract for PREP for additional years, but for Governor Herbert's directive. *Id.*, ¶ 48. For example, on December 18, 2014, UDOH promised that whatever funds remained of the \$76,846.05 for the year ending September 30, 2015, could be rolled over into the following year. *Id.* In addition, UDOH promised that for the year beginning on October 1, 2015, PPAU would be provided an additional \$63,865, the remainder of which could be rolled over into 2017. *Id.*

61. The PREP afterschool programs had 132 students enrolled last year. *Id.*, ¶ 49. PPAU estimates that 100 students will sign up to be a member of the TOP clubs (they are still enrolling) this school year. *Id.*

62. By cutting off the grant, the third party payments to the partner organizations from PPAU will end, and may very well end the clubs at TRY, SYA, and SLCSE. Galloway Decl., ¶ 50. Moreover, to remain a Wyman TOPtm program, PPAU must oversee the clubs as the certified replication partner, because PPAU is the only Utah organization certified to do so. *Id.*

63. Other groups currently receiving PREP funding in Utah are not in the areas targeted by PPAU, and will therefore not be able to pick up the clubs formerly serviced by PPAU. *Id.*, ¶ 51. Moreover, these groups are not certified to offer the desirable Wyman TOPtm program. *Id.*

64. With no further PREP funding for the program, PPAU may be forced to terminate these afterschool programs, leaving 100+ teens and their parents without any after school club to address these critical issues. *Id.*, ¶ 52.

65. Accordingly, the State's Action threatens to irreparably harm PPAU's ability to serve these high-risk teens and their parents, its ability to prevent unwanted teen pregnancies, and its ability to prevent these teens from acquiring potentially-life threatening STDs. *Id.*, ¶ 53. These are harms that are not compensable by money. *Id.*

TARGETED STD TESTING FUNDS

66. Governor Herbert's Directive also affects funding to support a program in collaboration with the Communicable Disease Prevention Program for STD Testing in the State of Utah, wherein federal funds are used to pay the Utah Public Health Laboratory for specimens to be tested for STDs such as chlamydia and gonorrhea. Galloway Decl., ¶ 54. This program targets groups for testing who have been identified as high risk: females between the ages of 15-24 (and their partners), and men who have sex with other men. *Id.* As part of this program, UDOH has also provided PPAU with the prescription medications needed to treat Chlamydia and Gonorrhea at no charge, which has allowed PPAU to treat all patients who test positive (not just those identified as targeted populations in the program) – and their partners – at no cost to the patient. *Id.*

67. PPAU has a long history of providing STD testing and treatment to low-income and at risk populations in Utah, and has been instrumental in assisting UDOH in this critical health care area. *Id.*, ¶ 55. For example, PPAU has received federal Title X funding from the U.S. Department of Health and Human Services since the early 1970s. *Id.* PPAU first received federal Title X funding as one of three direct recipients in Utah, which also included UDOH and Park City Community Health in Utah. *Id.* In 1983, when UDOH could no longer qualify for Title X funding (due to a new state law), PPAU stepped in to become the main Title X recipient in Utah of these critical federal funds. Galloway Decl., ¶ 55.

68. This particular program, referred to as the “Targeted STD Testing” program, has existed in one form or another since the early 1990s. *Id.*, ¶ 56. 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. *Id.* As the primary provider of reproductive health care in Utah and the Title X family planning provider, PPAU has never had to compete for this funding, which has always been automatically renewed. *Id.*

69. PPAU has been informed that reimbursements will continue through December 31, 2015, but that UDOH will not provide funds for this targeted STD testing and medication in subsequent years, because of the Governor’s Directive. *Id.*, ¶ 57.

70. Given PPAU’s long-standing relationship with UDOH and PPAU’s past performance in providing excellent STD testing services and treatment, UDOH would also have provided PPAU with additional years of federal funding to pay the Utah Public Health Laboratory for specimens to be tested for the Communicable Disease Prevention Program for STD Testing in the State of Utah, and related medications for treatment, but for Governor Herbert’s Directive. *Id.*, ¶ 58.

71. In the past fiscal year, PPAU provided health care to 46,082 patients (86% reported being uninsured). Galloway Decl., ¶ 59. Of those patients, 17,449 asked to be tested for Chlamydia and/or Gonorrhea or were identified as at risk for having contracted the disease (many do not have symptoms). *Id.* Of the 17,449 tested, 12,512 (or 72%) did not have insurance. *Id.*

72. PPAU provided this testing throughout the entire state: Logan (691), Metro (748), Ogden (1,634), Salt Lake (3,982), South Jordan (2,248), St. George (1,203), Utah Valley (1,514), Wasatch (136), West Valley (5,233), and Rural Clinics (60). *Id.*, ¶ 60.

73. In the absence of these critical funds, PPAU's continued ability to provide STD testing and treatment statewide to all who request it is put in imminent danger. *Id.*, ¶ 61.

74. Moreover, local health departments have neither the capacity nor the expertise to provide Chlamydia and Gonorrhea testing and treatment on the scale that PPAU does (statewide to all who request it, including low income households and those without insurance). *Id.*, ¶ 62. Moreover, PPAU offers extended hours, with testing available Monday through Friday on a walk-in basis, with some offices open on Saturday. Galloway Decl., ¶ 62.

75. During a press conference on August 23, 2015, Governor Herbert stated that patients can simply go to the other 26 "health agencies" at 49 different locations around the state for their care. *Id.*, ¶ 63.

76. PPAU called the closest health department in each health district that hosts one of its health centers and documented the health department's hours, costs, and services. *Id.*, ¶ 64. Of the eight (8) health departments called, only five (5) offered testing. *Id.* Only the Salt Lake County HD offered testing 5 days a week, and the other four (4) departments offering testing a few days or one day a week. *Id.* None of the health centers offered services on Saturday. *Id.* And none offered testing at no cost. *Id.*

77. In sum, PPAU is far more accessible than any local health department. Galloway Decl., ¶ 65. In addition, for the target groups, there was no contest in terms of cost, given that PPAU is the only provider to offer no-cost testing. *Id.*

78. The groups targeted by this program have been identified as being higher risk of having unprotected sex and passing on/contracting Chlamydia and Gonorrhea. *Id.*, ¶ 66. If the at-risk groups are now forced to pay for their testing, or to make another (separate) trip to the health department, many won't get tested and Chlamydia and Gonorrhea rates will increase. *Id.* In addition, many of PPAU's patients choose to come to PPAU for their health care because they know PPAU creates a safe space and atmosphere to talk about reproductive health and STD exposure and prevention, and they may be afraid to visit the health department for testing and treatment. *Id.*

79. In sum, although some PPAU patients might seek services at other local service providers, including county health departments, PPAU's experience serving this patient population indicates that the lack of prompt care, the lack of cost-free care, and the lack of evening and weekend hours will cause patients who would otherwise utilize the services of PPAU to forego services altogether. *Id.*, ¶ 67. Women who have to wait or travel for family planning services or who forego service entirely will undoubtedly experience increased risk of unintended pregnancy, sexually-transmitted infection, and undetected cancer. *Id.* Plus, untreated Chlamydia can cause Pelvic Inflammatory Infections which can lead to infertility in women. Galloway Decl., ¶ 67. And obviously, the spread of communicable diseases is an important public health issue, beyond the harms to affected individuals. *Id.*

80. Accordingly, the State's Action threatens to irreparably harm PPAU's ability to serve the community by preventing the spread of STDs and related injuries such as infertility --- harms that are not compensable by money. *Id.*, ¶ 68.

THE "STD SURVEILLANCE NETWORK"

81. Governor Herbert's Directive affects funding to support a program to improve timeliness, accuracy, and completeness of STD reporting and surveillance data, referred to as the "STD Surveillance Network." Galloway Decl., ¶ 69.

82. Because of PPAU's long-standing relationship with UDOH and the high quality of PPAU's services, PPAU was asked by UDOH to partner with them in this 5-year project, to update the surveillance systems at the UDOH to improve data gathering and disease prevention outcomes across the state. *Id.*, ¶ 70. From the outset, because the project was a multi-year project, and based on PPAU's communications with UDOH, PPAU had the reasonable expectation that the grant would be amended or renewed without a formal renewal process, and that PPAU would merely sign a new contract each year. *Id.*

83. PPAU has never received any complaint from UDOH or anyone else as to the quality of the services it has been providing under the STD Surveillance Network grant. *Id.*, ¶ 71.

84. PPAU and UDOH are 2 years into the 5-year project and have just implemented the electronic transmission of data. *Id.*, ¶ 73. By ending what was intended to be a demonstration project that would potentially be replicated throughout the state, UDOH will have wasted the federal taxpayer dollars it requested and

accepted for years. *Id.* Because of Governor Herbert's Directive, the efforts of the last 2 years to build an infrastructure for disease prevention for the entire state through a partnership between PPAU and UDOH will be for nothing. *Id.*

85. In UDOH's own grant proposal to the federal government, UDOH states that "**PPAU is the ideal candidate** for a project of this magnitude within Utah due to their robust system and their consistent collection of the data from the target populations of interest." Galloway Decl., ¶ 74 (emphasis added). Accordingly, by UDOH's own statements, it cannot replace PPAU. *Id.* However, even if UDOH could find a new partner, it will essentially have to start over, or at best, UDOH will have to re-do much of the work it had already accomplished with PPAU over the last 2 years. *Id.*

86. Accordingly, the State's Action threatens to irreparably harm PPAU's ability to serve the community by helping UDOH build the data communication infrastructure to prevent the spread of STDs, which can be life threatening --- harms that are not compensable by money. *Id.*, ¶ 75.

TESTING FOR VICTIMS OF RAPE AND SEXUAL ASSAULT

87. Governor Herbert's Directive purports to affect reimbursements made to PPAU for pregnancy and STD testing for victims of rape or sexual assault through the Utah Office for Victims of Crime. Galloway Decl., ¶ 76.

88. In a recent article in the Salt Lake Tribune that was published on August 17, 2015, Holly Mullen, the executive director of the Rape Recovery Center was quoted as saying that every year the center refers 400 victims of sexual assault to PPAU or the county health department for STD testing and pregnancy tests after assaults. *Id.*, ¶ 77.

In the article Ms. Mullen further states that the clients the center serves generally prefer PPAU because it is more specialized and they “were treated with respect without judgment.” *Id.* Ms. Mullen concludes, “There are probably going to be fewer clients who will report for that important follow-up testing because Planned Parenthood really does have a reputation of understanding women’s health care and being really professional at that aspect of what they do, and it’s an easier place for rape victims to go for follow-up testing.” *Id.*

89. Accordingly, the State’s Action threatens to irreparably harm PPAU’s ability to serve the victims of rape and sexual assault, and to prevent these patients from being tested and receiving care for STDs, which could be life threatening --- harm that is not compensable by money. *Id.*, ¶ 78.

WITHOUT AN INJUNCTION, THE STATE’S ACTION WILL RESULT IN HARM TO PPAU’S REPUTATION, WHICH THREATENS ITS VERY EXISTENCE AND ITS ABILITY TO CONTINUE TO SERVE THE UTAH COMMUNITY

90. PPAU’s reputation and its ability to partner with local health organizations are critical to its success and continued ability to fulfill its mission. Galloway Decl., ¶ 79. PPAU continuously invests in established and developing relationships with state and local health, and community-based organizations statewide. *Id.* PPAU is a founding member of the local Primary Care Association, Association for Utah Community Health (“AUCH”) that represents over 40 not-for-profit community clinics that provide quality health care services particularly for low-to-moderate income, uninsured, or underinsured Utahns who might otherwise not have access to health care. *Id.* Moreover, as explained in detail above, PPAU’s long-standing history of collaboration with UDOH has

been instrumental in its ability to provide the education and health care services state-wide to all who request those services. *Id.*

91. Historically PPAU staff have been invited by UDOH to work on public health projects, to speak at symposiums and conferences, and to sit on tasks forces and coalitions. *Id.*, ¶ 80. PPAU has the reputation of being the reproductive health care experts in the state, and this reputation has been critical to its success. *Id.*

92. Even though PPAU has nothing to do with the misleading CMP videos, and even though PPAU does not participate in any program for fetal tissue donation, Governor Herbert has made false public statements that suggest that PPAU has engaged in illegal activities related to fetal tissue donation, and he has instructed state agencies to terminate state-administered federal funds to PPAU because of this alleged wrongdoing. Galloway Decl., ¶ 81. These false statements, and the State Action attendant these statements, threatens to destroy PPAU's reputation in the community that it has worked so hard to build over almost 50 years in Utah. *Id.* Without its reputation intact, PPAU will no longer be able to function and serve the community as it has in the past. *Id.*

93. For example, state employees will be reticent to talk with PPAU staff. PPAU is concerned that the Governor's Directive has created a hostile environment for PPAU to participate in public health coalitions. *Id.*, ¶ 82. The State's Action could very well result in potential partners questioning whether PPAU will be able to follow through on its promises and ability to provide services as it has done in the past, and whether

PPAU is a reliable partner, given the fact that the Governor himself has accused PPAU of criminal behavior. *Id.*

94. In addition to the ability to successfully collaborate with other health care organizations, PPAU's reputation is also critical to its continued ability to raise funds through private donors, which is necessary for PPAU to keep its costs low, and to meet its mission of providing statewide services to all who request those services regardless of their ability to pay. Galloway Decl., ¶ 83. Donors will be less likely to provide money to PPAU if they believe, as the Governor has stated, that PPAU has "colored outside the lines." *Id.* If PPAU cannot maintain the trust of its donors, PPAU will lose its ability to serve patients without insurance. *Id.* When these vulnerable groups are forced to pay out of pocket, they will either forego or significantly delay seeking critical healthcare 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.*

95. Finally, for PPAU to successfully meet its mission, it must continue to have the reputation with patients in the community that it is an organization that can be trusted. Galloway Decl., ¶ 84. Many patients choose PPAU over other health care centers because they trust that PPAU will offer nonjudgmental, compassionate, and comprehensive care, and that PPAU will provide them with information needed to plan their families and protect their health in a safe environment. *Id.* If patients believe that PPAU has engaged in criminal behavior, or acted improperly, they are less likely to

believe PPAU is a safe environment in which to receive the sensitive education and care related to their reproductive health. *Id.*

ARGUMENT

Plaintiff is entitled to a temporary restraining order (“TRO”) and preliminary injunction under the facts of this case. To prevail on its motion for preliminary injunctive relief, Plaintiff “must establish the following elements: (1) a substantial likelihood of success on the merits; (2) irreparable injury will result if the injunction does not issue; (3) the threatened injury to the movant outweighs any damage the injunction may cause the opposing party; and (4) issuance of the injunction would not be adverse to the public interest.” *N. Natural Gas Co. v. L.D. Drilling, Inc.*, 697 F.3d 1259, 1266 (10th Cir. 2012) (internal quotation marks and citation omitted). Moreover, where, as is the case here, “the three latter harm factors weigh in favor of the movant,” the probability of success factor is “relaxed.” *Flood v. ClearOne Communications, Inc.*, 618 F.3d 1110, 1117 n.1 (10th Cir. 2010). Further, because the injunction Plaintiff seeks does not seek to alter, but to preserve, the status quo, it is not the type of injunction that is “disfavored.” *Id.* Finally, for the likelihood of success factor to be met under the facts of this case, it is sufficient that Plaintiff has raised “questions going to the merits [] so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation.” *Fed. Lands Legal Consortium v. U.S.*, 195 F.3d 1190-1194-95 (10th Cir. 1999).

Plaintiff has established each of the required elements for injunctive relief in this case. Accordingly, the Court should enjoin the State, during the pendency of this action, from refusing to act as an intermediary for federal funds that Plaintiff is otherwise qualified to and would receive, but for the State’s Action, including terminating and/or

refusing to renew the contracts at issue because of Plaintiff's constitutionally protected activities.

I. PLAINTIFF IS LIKELY TO PREVAIL ON ITS CLAIMS

The State can offer no legitimate reason for its Action. The State has singled out Plaintiff from all other federal grant recipients for reproductive health services, in order to punish Plaintiff for its association with Planned Parenthood, and its advocacy for and provision of abortion services. The State's conduct therefore violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the First Amendment, making it not just likely, but almost certain that Plaintiff will prevail on its claims.

A. The State's Action Is a Violation of Equal Protection

Plaintiffs are substantially likely to prevail on the merits of their Equal Protection claim. The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Moreover, Equal Protection applies not only to legislation, but also to executive action, like the circumstances presented by this case. *See Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350, 352 (1918) ("The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."). As the Supreme Court has explained, "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least

mean that a bare [] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

Here, the Governor has singled out PPAU and is treating it differently than all other federal grant recipients for reproductive health services. PPAU is similarly situated to the other federal grant recipients for providing non-abortion reproductive health services. This disparate treatment of PPAU is a violation of PPAU’s constitutional rights under the Equal Protection Clause of the Fourteenth Amendment.

The Governor has stated that he is excluding Plaintiff from all state-administered grant programs because of Plaintiff’s association with other Planned Parenthood providers who participate in lawful programs that allow abortion patients to donate fetal tissue for scientific research. See Statement of Facts (“Facts”), *supra*, ¶¶ 1-13. This association is protected by the First Amendment. 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) (quoting *Roberts*, 468 U.S. at 618).

Where, as here, the State interferes with a plaintiff's exercise of fundamental constitutional rights, courts apply strict scrutiny in assessing the validity of the government action. *Petrella v. Brownback*, 787 F.3d 1242, 1261 (10th Cir. 2015); see also *Planned Parenthood of Greater Memphis Region v. Dreyzehner*, 853 F. Supp.2d 724, 737 (M.D. Tenn. 2012) (citing *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 & n.3 (1976) (First Amendment rights and the right to an abortion are "fundamental rights" and that classifications burdening those rights are reviewed under strict scrutiny)). Strict scrutiny requires "the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest." *Kitchen v. Herbert*, 755 F.3d 1193, 1218 (10th Cir. 2014) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)); see also *Planned Parenthood of Mid-Mo. & E. Kan., Inc. v. Dempsey*, 167 F.3d 458, 461 (8th Cir.1999) ("[F]unding classifications that interfere with the exercise of constitutional rights must be necessary to promote a *compelling* governmental interest.") (internal quotation marks and citations omitted; emphasis in original). Moreover, even if Defendants' actions were subject to only rational basis review (which they should not be), Plaintiffs would still be likely to prevail.

The State lacks any compelling, or even legitimate, governmental interest for distinguishing between Plaintiff and other federal grant recipients providing reproductive health services and education who have and will be approved for receiving federal funds administered by the State, and whose existing contracts were not terminated or

rejected for renewal. The State has offered no rationale for its decision to cut off Plaintiff (and only Plaintiff), and to categorically deny Plaintiff access to all state-administered federal funds, other than the Governor's personal outrage at unproven accusations leveled against other organizations in other states that are not PPAU.

Animus toward Planned Parenthood, abortion, and/or fetal tissue donation is not a justifiable reason under any standard of review for prohibiting Plaintiff, who has been successfully providing reproductive health services with state-administered federal grants for many years, without incident and with glowing reviews, from continuing to provide non-abortion services under these federal programs. It is undisputed that only Plaintiff has been categorically excluded by the State for participation in state-administered federal grant programs, irrespective of the nature and requirements of those programs. It is also undisputed that Plaintiff is an entity that would be otherwise eligible for participation in those grant programs (and that there are indeed funds that have already been earmarked for Plaintiff's use), but for the State's impermissible Action.

Plaintiff has a long history of obtaining approval for and providing reproductive health services in Utah through state-administered federal grant programs. See Facts, ¶¶ 30-43. These funds have been consistently disbursed and the contracts routinely and virtually automatically renewed by the State without incident or negotiation, and without any complaint by the State as to the quality or nature of the services provided. See *id.* Plaintiff has consistently received positive evaluations. See, e.g., *id.*, ¶¶ 32-34. The State's recent terminations and refusals to renew and/or disburse awards already

granted to Plaintiff is contrary to the State's historical practices and course of dealing with Plaintiff, and is without compelling or legitimate justification.

Furthermore, when a state's action is directed only toward one party, as is the case here, it is extremely underinclusive, and "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown v. Entm't Merchs. Ass'n*, 313 S. Ct. 2729, 2740 (2011). The evidence in this case is that the Governor has in fact acted with the "bare [] desire to harm a politically unpopular group," due to political motivations and the current movement by the Governor's colleagues to defund the National Organization and its affiliates, including Plaintiff in Utah, by cutting off all access to federal funds. *Moreno*, 413 U.S. at 534. But the Governor's political motivations and/or personal feelings against PPAU, the National Organization, and/or the Planned Parenthood affiliates in other states, however strong and impassioned, do not constitute a compelling or legitimate governmental interest.

To the extent that the State claims its objective is not to penalize Plaintiff, but to further an objective favoring childbirth over abortion (which is contrary to the only stated rational), the categorical denial of PPAU from access to all state-administered federal funds for reproductive health care and education unrelated to abortion is still unconstitutional. "[E]ven in the ordinary equal protection case calling for the most deferential of standards, [courts] insist on knowing the relation between the classification adopted and the object to be attained." *Romer v. Evans*, 517 U.S. 620, 632–33 (1996). As the Supreme Court has explained, "[t]he State may not rely on a

classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.” *City of Cleburne*, 473 U.S. at 446–47 (internal quotation marks and citations omitted). The State Action is not precisely tailored, or rationally related, to achieving such a claimed state interest. At best, it is “so attenuated as to render the distinction [between PPAU and all other federal grant recipients for reproductive health services and education] arbitrary or irrational” and therefore a violation of the Equal Protection Clause. *Id.* at 447. Here, not only do the accusations cited by the Governor have to do with entities other than PPAU, but also the subject matter of the accusations has absolutely no bearing on or relation to the valuable health care and education services actually provided by PPAU.

It is undisputed that the funding at issue in this case, present and future, would not be used to fund abortion-related services or advocacy, as both federal and Utah legislation already exist to bar the use of government funds for abortion-related services or advocacy, and the State does not allege that Plaintiff would use, or has ever used, government funds for abortion-related services or advocacy. See Facts, ¶ 8. Moreover, **the programs that Plaintiff has been excluded from participating in include education programs** promoting abstinence and responsible behavior with respect to reproductive choices, which are **intended to prevent unwanted pregnancies**, and therefore eliminate the circumstances wherein a woman might consider the choice of having an abortion. See *id.*, ¶¶ 9-11 & 44-86. Accordingly, this Court should also conclude, as other courts have in similar circumstances, that the State’s Action categorically excluding Plaintiff’s access to all federal funding administered by the State

not only impedes Plaintiff's constitutional rights, as discussed below with respect to Plaintiff's First Amendment and Due Process claims, but does so without being necessary to serve any governmental interest, let alone a compelling one. See *Dempsey*, 167 F.3d at 461 (“[F]unding classifications that interfere with the exercise of constitutional rights must be necessary to promote a *compelling* governmental interest.”) (internal quotation marks and citations omitted; emphasis in original).

The State's broad and categorical denial of PPAU's access to *all* state-administered programs, local and federal, is neither “narrow enough in scope [nor] grounded in a sufficient factual context for [the court] to ascertain some relation between the classification and the purpose it serve[s].” *Romer*, 517 U.S. at 632–33. The “sheer breadth [of the State's Action] is so discontinuous with the reasons offered for it that [] [it] seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.” *Id.* at 632. Other courts have reached the same conclusion in circumstances similar to those presented in this case. See, e.g., *Planned Parenthood of Minn. v. Minnesota*, 612 F.2d 359, 361 (8th Cir.1980) (“Planned Parenthood's unpopularity in and of itself and without reference to some independent considerations in the public interest” could not justify a statute forbidding the state health commissioner from issuing grants to nonprofit corporations that perform abortions); *Planned Parenthood of Cent. N.C. v. Cansler*, 804 F.Supp.2d 482, 498 (M.D.N.C. 2011) (finding that plaintiff Planned Parenthood showed a likelihood of success on equal protection claim because there was no rational basis for statute barring funding to Planned Parenthood other than “penalizing Planned Parenthood and

its affiliates”); *Planned Parenthood of Greater Memphis Region v. Dreyzehner*, 853 F. Supp.2d 724, 736 (M.D. Tenn. 2012) (finding likelihood of success on the merits of Planned Parenthood’s claim that the revocation by Tennessee of Planned Parenthood’s successful bids for federal grants violated Equal Protection); *Planned Parenthood of Kan. v. City of Wichita*, 729 F.Supp. 1282, 1289–91 (D.Kan.1990) (law banning contract with Planned Parenthood violates equal protection where it was “deprived of the benefit of continued access to Title X funding simply because of the reputation and unpopularity of Planned Parenthood”).

In conclusion, the State’s Action improperly singles out Plaintiff for unfavorable treatment solely because of its status as a highly visible, pro-choice organization. The categorical exclusion of Plaintiff from all government programs administered by the State is not rationally related to any legitimate governmental interest, let alone precisely tailored to achieve a compelling governmental interest as necessary to pass the strict scrutiny required to justify infringement on Plaintiff’s fundamental, constitutional right to equal protection under the law. The only thing advanced by the State’s Action is the Governor’s personal and political interests, at the expense of a Utah organization that has done nothing wrong, and that provides critical reproductive health care services to the community, including to the most vulnerable, marginalized, and economically disadvantaged citizens of the State. Because the State’s Action violates the Equal Protection Clause of the Fourteenth Amendment, Plaintiff is substantially likely to succeed on the merits of its claim, and the Court should grant the requested injunction.

B. The State's Action Imposes an Impermissible Penalty on Plaintiff's Constitutionally Protected Conduct

The State's Action also violates Plaintiff's constitutional rights because it impermissibly targets Plaintiff for unfavorable treatment based solely on the exercise of its rights to associate with entities that provide, to provide, and to advocate for access to abortion services. However, the First Amendment protects Plaintiff's right to advocate for reproductive choice, including by associating with others that similarly advocate pro-choice activities, including the National Organization. See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 196 (1991) (recognizing a constitutional right "to engage in abortion advocacy and counseling"). While not a direct restraint on speech, the State's categorical exclusion of Plaintiff from all state-administered federal grant programs, and related contracts, interferes with Plaintiff's First Amendment rights by punishing Plaintiff for exercising those rights. See, e.g., *Planned Parenthood of Central N.C. v. Cansler*, 877 F. Supp. 2d 310, 321 (M.D.N.C. 2012) (finding that North Carolina legislation prohibiting state agency from providing state or federal funds to Planned Parenthood violated its constitutional rights under the First Amendment); *Planned Parenthood of Greater Memphis Region v. Dreyzehner*, 853 F. Supp.2d 724, 736 (M.D. Tenn. 2012) (finding that the revocation by Tennessee of Planned Parenthood's successful bids for federal grants violated its First Amendment rights); *Planned Parenthood of Kan., Inc. v. City of Wichita*, 729 F. Supp. 1282, 1289 (D. Kan. 1990) (finding that city resolution to defund Planned Parenthood violated the First Amendment rights of Planned Parenthood and its patients). In addition, Plaintiff's abortion services are also constitutionally protected, for they are essential to ensure that a woman may exercise her right, secured by the Due

Process Clause of the Fourteenth Amendment, to terminate her pregnancy. *See Roe v. Wade*, 410 U.S. 113, 164 (1973); *see also Cansler*, 877 F. Supp. 2d at 321 (finding that North Carolina legislation prohibiting state agency from providing state or federal funds to Planned Parenthood violated the Due Process Clause of the Fourteenth Amendment). Because these activities are constitutionally protected, the State's Action to impose a penalty on Plaintiff for engaging in these activities is not permitted under the law, and Plaintiff is likely to prevail on the merits of these claims.

More specifically, “[u]nder 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 is the case here, the government cancels a pre-existing commercial relationship with an independent contractor as punishment for the contractor's exercise of 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”). The rationale is that “if the

government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited . . . allow[ing] the government to ‘produce a result which (it) could not command directly.’” *Perry*, 408 U.S. at 597 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). The Supreme Court has clearly stated that “[s]uch interference with constitutional rights is impermissible.” *Id.*

Moreover, 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 at 319 (emphasis in original). “In doing so, the Supreme Court noted that government action would violate the unconstitutional conditions doctrine where it ‘placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.’” *Id.* (quoting *Rust*, 500 U.S. at 197). 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, “[c]ircuit and district 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)).

“Therefore, as it relates to the present case, although the State may choose not to fund abortions or abortion-related services, the State may not condition participation in a government program or receipt of a government benefit, [such as [UDOH]-administered contracts and grants], upon an applicant's exercise of protected rights, such as the right to advocate for and provide abortion-related services,” and to associate with others exercising those same rights, such as the National Organization. *Cansler*, 877 F. Supp. 2d 310, 319-20 (internal quotation marks and citation omitted).

Furthermore, the Tenth Circuit has expressly recognized that “the unconstitutional-conditions doctrine has been applied 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* 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).

Here, as discussed above regarding Plaintiff’s Equal Protection claim, no permissible reason can possibly account for the State’s abrupt, last-minute decision to deny grant funds to Plaintiff and only to Plaintiff, when Plaintiff has been successfully providing reproductive health services with state-administered federal grants for many years, without incident and with glowing reviews. As discussed above, the State’s recent terminations and refusals to renew and/or disburse awards already granted to Plaintiff is contrary to the State’s historical practices and course of dealing with Plaintiff, is without justification, and is based solely upon Plaintiff’s constitutionally-protected activities.

The Governor’s conduct is a blatant attempt to jump on the bandwagon of his political party, whose members have vowed to “defund” the National Organization and its affiliates, which includes Plaintiff in Utah. However, the State cannot categorically exclude Plaintiff from all state-administered federal grant programs (particularly those already awarded and/or earmarked for Plaintiff) as a penalty for its exercise of constitutionally-protected right of affiliation with, and/or advocacy for, access to abortion services. This Court should conclude, as have other courts in similar circumstances, that Plaintiff is likely to succeed on its Fourteenth and First Amendment claims because “the State engaged in an exercise of ‘raw’ political power to penalize Plaintiff[] for [its]

activities and advocacy unrelated to these federal grants and programs.” *Dreyzehner*, 853 F. Supp. 2d at 735 (citing *O’ Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 719 (1996)).

II. PLAINTIFF AND ITS PATIENTS WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF AN INJUNCTION

“[W]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.” *Awad v. Zirax*, 670 G.3d 1111, 1131 (10th Cir. 2012) (quoting *Kikamura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2011) (quoting 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1 (2d ed.1995))). Similarly, courts have held that a plaintiff satisfies the irreparable harm analysis by showing violations of both First and Fourteenth Amendment rights. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1975) (“[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”); *Planned Parenthood of Kansas, Inc. v. City of Wichita*, 729 F.Supp. 1282, 1291 (D.Kan.1990) (irreparable injury due to threat to important constitutional rights of plaintiffs and their clients). Accordingly, this Court can and should find Plaintiff is experiencing irreparable harm as a matter of law. *See, e.g., Roe v. Patton*, No. 2:15-cv-00253-DB, 2015 WL 4476734, at *3 (D. Utah July 22, 2015) (finding irreparable harm “as a matter of law” where violations of the Equal Protection Clause of the Fourteenth Amendment were claimed).

While the constitutional nature of Plaintiff’s injuries alone warrants granting preliminary injunctive relief, Plaintiff has also shown that Plaintiff and the population it serves will imminently suffer other irreparable injuries without the Court’s intervention.

As discussed in great detail above, the State's Action threatens to irreparably harm Plaintiff's ability to serve the high-risk men, women, and teens and their parents, all of whom are the subjects and recipients of the programs that the Governor's Directive directly affects, including by the State's failure to renew a contract set to expire just days from now, on September 30, 2015, and by the State's notice of termination of other contracts on October 8, 2015. Without the critical funds for these programs, the State's Action threatens to increase unwanted pregnancies among these groups, as well as increasing the risk that these patients will contract and/or transmit potentially-life threatening STDs. These are serious harms that are not compensable by money, and also affect the public health, even beyond the irreparable injury to Plaintiff and its patients. Finally, the State's Action threatens to irreparably harm Plaintiff by destroying its reputation that it has built over the almost 50 years Plaintiff has been providing reproductive health care and education in Utah. This reputation is necessary for Plaintiff to continue to serve the community as it has successfully served it in the past, including because Plaintiff's ability to successfully collaborate with UDOH and other local health organizations, and Plaintiff's ability to successfully raise money through local donors, is essential to its ability to continue to provide exceptional, low cost health care statewide to all who request it, including the uninsured. Plaintiff's reputation is also critical to maintaining the trust of its patients.

In sum, all of these injuries are irreparable. Accordingly, this Court should grant the instant motion and enjoin Defendants without further delay.

III. THE THREATENED INJURY TO PLAINTIFF FAR OUTWEIGHS ANY INJURY TO THE STATE

While Plaintiff, its patients, the Utah community, and Plaintiff's reputation will suffer serious harm in the absence of an injunction, the State will suffer no injury at all. It has never been suggested that Plaintiff is unqualified to provide the services that it has been contracted to provide, has failed to fulfill its contractual obligations, has misused funds, or otherwise engaged in any wrongdoing. An injunction would therefore 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, the State cannot argue that the preservation of the status quo will result in its injury, let alone any injury that would outweigh the threatened harm to Plaintiff

IV. THE INJUNCTION WILL PROMOTE THE PUBLIC INTEREST

A preliminary injunction should be granted because of the strong public interest in ensuring continued public access to crucial health services, especially for the underserved and low-income patients Plaintiff serves. Not only does the public have a strong interest in protecting access to reproductive health and educational services, that interest is particularly acute with respect to the neediest of its members who depend on publicly funded programs, like the programs at issue in this case.

V. THE INJUNCTION SHOULD ISSUE WITHOUT BOND

This Court has the discretion to issue a preliminary injunction without requiring Plaintiff to post bond. See *Cont'l Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780, 782 (10th

Cir. 1964). Exercise of that discretion is particularly appropriate where, as here, issues of public concern and important federal rights are involved. See *id.*

Defendants will suffer no monetary injury if a preliminary injunction is issued. In the absence of such injuries, no bond should be required.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff's motion for a TRO, followed by a preliminary injunction.

DATED this 28th day of September, 2015.

MAGLEBY & GREENWOOD, P.C.

A handwritten signature in blue ink, appearing to be 'Peggy A. Tomsic', is written over a horizontal line.

Peggy A. Tomsic
Christine T. Greenwood
Jennifer Fraser Parrish

Attorneys for Plaintiff Planned Parenthood
Association of Utah

CERTIFICATE OF SERVICE

I hereby certify that I am employed by the law firm of MAGLEBY & GREENWOOD, P.C., 170 South Main Street, Suite 1100, Salt Lake City, Utah 84101, and that pursuant to Rule 5(b), Federal Rules of Civil Procedure, a true and correct copy of the foregoing

MOTION FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY

INJUNCTION was hand-delivered to the following this 28th day of September, 2015:

Gary R. Herbert
Governor of the State of Utah
350 North State Street, Suite 200
Salt Lake City, Utah 84111

Joseph K. Miner
Executive Director, Utah Department of Health
288 North 1460 West
Salt Lake City, Utah 84116


