No. 15-4189

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PLANNED PARENTHOOD ASSOCATION 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

BRIEF OF APPELLEES

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SCHEDULED FOR ORAL ARGUMENT ON MARCH 8, 2016

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There are no prior or related appeals.

JURISDICTIONAL STATEMENT

Plaintiff-Appellant Planned Parenthood Association of Utah filed this lawsuit in the U.S. District Court for the District of Utah, alleging class-of-one equal protection and unconstitutional conditions claims under 42 U.S.C. § 1983. The District Court has jurisdiction over those claims based on 28 U.S.C. § 1331. On December 22, 2015, the District Court entered an order denying Planned Parenthood's motion for preliminary injunction. Planned Parenthood filed its notice of appeal from that order on December 27, 2015. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) to review the order denying Planned Parenthood's motion for injunctive relief.

STATEMENT OF THE ISSUES

1. Can a plaintiff's showing on any of the four injunction elements—singularly or in combination—lower the plaintiff's required showing with respect to the remaining elements before a court may enter a preliminary injunction?

State Defendants raised this issue below and the District Court ruled on it. Appendix volume 2, page 488 n.2 (hereinafter App. 2:488).

2. Did the District Court abuse its discretion in denying Planned Parenthood's motion for preliminary injunction upon finding that it had failed to carry its burden on every one of the four preliminary injunction elements?

State Defendants raised these issues below and the District Court ruled on them. *See generally* App. 2:488-98.

STATEMENT OF THE CASE

This appeal presents separation-of-powers and federalism issues that transcend the parties. It concerns the ability of a State's chief executive, its duly elected governor, to exercise his executive discretion to cancel a State's at-will contracts with a government contractor—and when a federal court of appeals may void such an exercise of executive discretion after a district court has concluded that a plaintiff's constitutional challenge to it is likely to fail.

In this particular case, Defendant-Appellee Gary R. Herbert, Governor of Utah, directed the Utah Department of Health ("UDOH") to cancel or not renew four at-will contracts between the State and Plaintiff-Appellant Planned Parenthood Association of Utah ("Planned Parenthood"). Planned Parenthood contends that Governor Herbert canceled the contracts in retaliation for exercising its rights to advocate for and perform abortions, thereby violating its constitutional rights. But the *undisputed allegations in Planned Parenthood's own Complaint* disclose Governor Herbert's reason for cancelling the contracts: The release of

videos purporting to show officials of Planned Parenthood Federation of America negotiating the sale of aborted human fetal tissue—transactions that would constitute a federal crime. Governor Herbert decided it is in Utah's interest to cancel its contracts with Planned Parenthood because of its admitted affiliation with another entity purportedly engaged in such criminal activity.

The U.S. District Court for the District of Utah (Waddoups, J.) carefully analyzed—for 10 weeks—Planned Parenthood's largely undisputed factual allegations and its best legal arguments regarding why Governor Herbert's decision to cancel the four contracts warrants injunctive relief. The District Court ultimately rejected *all* of Planned Parenthood's arguments and denied its motion for preliminary injunction. In so doing, the District Court not only vacated its prior temporary restraining order—which had initially accepted Planned Parenthood's arguments at face value—but also recognized that Governor Herbert's exercises of executive discretion at issue "are the types of decisions that should be left to elected officials and not managed by the courts." App. 2:497.

As explained *infra*, the District Court drew reasonable inferences from the evidence and correctly applied governing legal principles to Planned Parenthood's own allegations in denying injunctive relief. In doing so, the District Court properly avoided ruling based on policy disputes with Governor Herbert's decision to cancel the four discretionary contracts—recognizing that the remedy for any

such policy disagreements belongs to Utah voters in the ballot box, not to the federal judiciary.

Planned Parenthood's brief in this Court fails to show that the District Court's rulings lack a rational basis in the record evidence or rest on legal errors. Indeed, it fails to make either showing on even one injunction element—let alone on all four of them. Planned Parenthood thus fails to carry its burden on appeal to show that the order denying injunctive relief was an abuse of discretion. This Court should immediately vacate its stay of that order and enter an opinion affirming it, as the District Court properly found Planned Parenthood has not met its burden for a preliminary injunction.

I. FACTUAL BACKGROUND

This contracts dispute arose in the summer of 2015, after the Center for Medical Progress published an online series of videos purporting to show executives, employees, and vendors of Planned Parenthood Federation of America, Inc. and its affiliates discussing the sale of tissue from aborted human fetuses—and altering how abortions are performed to obtain more intact fetal tissue and organs. *See* The Center for Medical Progress, Documentary Web Series, *at* http://www.centerformedicalprogress.org/human-capital/documentary-web-series/ (last visited Feb. 15, 2016); *see also* App. 1:11, 2:484. Such allegations, if verified, would constitute a federal crime. *See* 42 U.S.C. § 289g-2(a) ("It shall be

unlawful for any person to knowingly acquire, receive, or otherwise transfer any human fetal tissue for valuable consideration if the transfer affects interstate commerce."); *id.* § 289g-2(d)(1) ("Any person who violates subsection (a) . . . of this section shall be fined in accordance with Title 18, subject to paragraph (2), or imprisoned for not more than 10 years, or both.").

Planned Parenthood Federation of America denied the allegations and accused the Center for Medical Progress of selectively and suggestively editing the videos. But public reaction to the videos, including by lawmakers, was swift. Some members of Congress introduced bills to cut federal funding for the national Planned Parenthood and its affiliates. *See* App. 1:11. And three House of Representatives committees launched investigations that continue today. The House Energy and Commerce Committee even voted last October to create a still-extant select panel "for the purpose of investigating abortion practices and the handling of and policies regarding fetal tissue, its cost, and how it is obtained."[1]

The videos also caught the attention of State lawmakers. Last summer, the governors of Alabama, Arkansas, and Louisiana cut off State funding for the Planned Parenthood affiliates in those States.[2] As the cited news reports describe,

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[1] *House Creates Select Panel to Investigate Handling of Infant Lives* (Oct. 7, 2015), http://energycommerce.house.gov/press-release/house-creates-select-panel-investigate-handling-infant-lives.

[2] *See* Kim Chandler, *Alabama Gov. Defunds Planned Parenthood*, Assoc. Press (Aug. 7, 2015, 7:56 AM),

the governors of those States attempted to make their local Planned Parenthood affiliates ineligible for Medicaid reimbursements. More recently, the governor of Kansas announced that he too would direct health department officials in his state to cut Medicaid funding for the Kansas Planned Parenthood affiliate.[3]

Utah Governor Gary R. Herbert also became aware of the videos last summer. He conceded (only for the purpose of opposing Planned Parenthood's motion for preliminary injunction) the factual allegations in paragraphs 12 through 22 of Planned Parenthood's Complaint describing his response to the videos: On August 14, 2015, he issued a statement directing "state agencies to cease acting as an intermediary for pass-through federal funds to Planned Parenthood." App. 1:11. He did so "in response to" the Center for Medical Progress's videos. *Id.* A few days later, he said that he and the people of Utah were "outraged" by the alleged "coloring outside the lines." *Id.* And a few days after that he spoke at a rally in the Utah State Capitol decrying the "appalling . . . casualness, the callousness . . .

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http://www.usnews.com/news/articles/2015/08/07/robert-j-bentley-governor-of-alabama-says-he-is-cutting-off-medicaid-payment-to-planned-parenthood; Stephanie Armour, *Arkansas Gov. Hutchinson Moves to End Planned Parenthood Funding*, Wall St. J. (Aug. 16, 2015, 8:54 AM), http://www.wsj.com/articles/arkansas-gov-hutchinson-moves-to-end-planned-parenthood-funding-1439592285; Laurel Brubaker Calkins, *Louisiana Will Cut Planned Parenthood Medicaid Funds Monday*, Bloomberg (Sept. 11, 2015, 7:59 PM), http://www.bloomberg.com/politics/articles/2015-09-12/louisiana-will-cut-planned-parenthood-medicaid-funds-monday-iegfdfqt.

[3] *See* David Bailey, *Kansas Governor Orders Planned Parenthood Funding Cut*, Reuters (Jan. 13, 2016, 7:33 PM), http://www.reuters.com/article/us-kansas-plannedparenthood-idUSKCN0US02K20160114.

the lack of respect" in the Center for Medical Progress's videos. *Id.* News reports of that rally also quote the Governor as stating that he was "here today to add my voice to yours and speak out on the sanctity of life." *Id.*

But unlike the other States listed above, Utah did not try to make Planned Parenthood ineligible for Medicaid reimbursement. Neither did the State try to stop Planned Parenthood from receiving other funding directly from the federal government. Rather, Governor Herbert directed UDOH to stop acting as the intermediary for just four discrete federal funding streams: two contracts for after-school abstinence education programs, one contract for a computer program to track the reporting of sexually transmitted diseases, and one letter of understanding in which Utah agreed to subsidize a certain number of STD tests Planned Parenthood submitted to the Utah Public Health Laboratory. *See id.* at 1:12-13. These four contracts are the only federal funding streams Utah cut—and thus the only four funding streams at issue here. The Governor further assured the public that the State will redirect these federal funds to other qualified providers. *Id.* at 1:55.

Utah relied on its explicit contract rights to terminate the four contracts in dispute. One of the two after-school education program contracts was set to expire on September 30, 2015, so Governor Herbert directed UDOH not to renew it. *See id.* at 1:15. The two other contracts—for another after-school program and the

STD computer monitoring network—each contained a provision giving Utah unbridled discretion to terminate the contract at will upon 30 days' notice. Utah invoked its plain contract rights and by letters dated September 8, 2015, notified Planned Parenthood of its intent to cease funding those two contracts after 30 days. *See id.* at 1:14-15, 72, 76. Finally, Utah notified Planned Parenthood that it would cease subsidizing its STD tests at the Utah Public Health Laboratory after December 31, 2015. *See id.* at 1:15, 2:485-86.

II. PROCEDURAL HISTORY

On September 28, 2015, Planned Parenthood filed an official capacity suit against Governor Herbert and Joseph K. Miner, M.D., Executive Director of UDOH. It alleges three causes of action: one class-of-one equal protection claim and two unconstitutional conditions claims. App. 1:6-23. Planned Parenthood simultaneously filed a motion for a temporary restraining order and a preliminary injunction and sought an emergency hearing.

The next day—before the State had a chance to brief the legal issues—the District Court held a hearing and granted Planned Parenthood's motion for a temporary restraining order. *See id*. at 1:94-96. The TRO effectively kept the contracts in place until the District Court resolved Planned Parenthood's motion for preliminary injunction.

On October 15, 2015, the District Court heard oral argument on Planned Parenthood's fully briefed motion for preliminary injunction. After methodically and carefully analyzing—for 68 days—both parties' arguments, the District Court entered an order on December 22, 2015, vacating the TRO and denying Planned Parenthood's motion for preliminary injunction. *See id*. at 2:483-98.

The District Court rejected Planned Parenthood's arguments on every one of the four injunction elements. It first found that Planned Parenthood's claims were unlikely to succeed on the merits. It reasoned that Planned Parenthood's class-of-one equal protection claim was likely to fail for two separate reasons: (1) a government contractor (like Planned Parenthood) could not state such a claim in light of the rule announced in *Engquist v. Oregon Department 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* App. 2:488-93. The District Court also reasoned upon an explicit finding of fact that Planned Parenthood's unconstitutional conditions claims were likely to fail because "the Governor's words and the temporal proximity between the release of the videos and his directive to terminate the contracts support [the conclusion that] he did not retaliate against" Planned Parenthood based on any constitutionally protected conduct. *Id.* at 2:495.

The District Court concluded that the second injunction element—irreparable harm—"weighs in favor of the defendants." *Id.* Planned Parenthood "likely will not be able to show it suffered a constitutional harm"; any financial harm from terminating the contracts "can be redressed"; and upon another explicit finding of fact, noted the groundswell of support for Planned Parenthood after the contracts were terminated established an absence of "irreparable reputational harm." *Id.*

On the third injunction element, the District Court concluded that "the injuries to defendants" from issuing an injunction "outweigh the injuries to" Planned Parenthood without one. *Id.* at 2:497. The directive does not make Planned Parenthood ineligible for Medicaid reimbursements or preclude it "from advocating for or performing abortions." *Id.* at 2:496. Rather, Planned Parenthood's "injury is related only to the loss of four contracts." *Id.* "In contrast," an injunction preventing Utah from terminating the contracts would "curtail[]" the State's "authority to manage [its] affairs." *Id.* An injunction also would "deprive the defendants of their contractual right to terminate the contracts at will" and could "reasonably" lead "the citizenry of Utah" to perceive that the State approves of the conduct depicted in the videos. *Id.* And "[r]equiring the defendants to continue the contracts will remove the defendants' discretionary decisionmaking. There is no monetary remedy for such injuries." *Id.* at 2:497.

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

On Sunday, December 27, 2015, Planned Parenthood filed simultaneously its notice of appeal and an emergency motion for injunction pending appeal. The next day, this Court ordered State Defendants to respond to Planned Parenthood's emergency motion before 3:00 PM MST on December 29, 2015. State Defendants complied with that order. This Court granted Planned Parenthood's emergency motion on December 30, 2015. The Court subsequently entered an expedited briefing schedule and set oral argument for March 8, 2016.

SUMMARY OF THE ARGUMENT

Because the District Court rejected Planned Parenthood's arguments on all four preliminary injunction elements, Planned Parenthood cannot prevail on appeal without proving abuses of discretion on at least a half-dozen issues—some legal questions, but others involving factual inferences expressly supported by factual findings from a largely undisputed record.

Planned Parenthood tries to lighten that significant burden by inviting this Court to apply its cases discussing a "relaxed" injunction standard. Under that precedent, plaintiffs who show that the latter three injunction elements weigh strongly in their favor may obtain injunctive relief upon showing merely that they have raised "serious" or "substantial" questions on the merits.

This Court should decline that invitation. The relaxed standard is no longer good law in light of *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), which made clear that courts may not reduce a plaintiff's burden on any element based on its showing with respect to any other element.

But regardless of which standard this Court applies, Planned Parenthood fails to carry its burden of showing the District Court abused its discretion on *every* element. That's because Planned Parenthood does not properly account for a premise that even it acknowledges is dispositive in reviewing the District Court's

factual findings and conclusions: "'context matters.'" Aplt. Br. 44 (quoting *Hanes v. Zurick*, 578 F.3d 491, 495 (7th Cir. 2009)).

Context matters because Planned Parenthood seeks a federal judicial order overriding a State governor's exercise of executive discretion on a state contracting decision. Supreme Court precedent requires federal courts to exercise appropriate restraint when considering such extraordinary requests; they implicate federalism concerns extant since our Country's founding and risk turning federal judges into politically unaccountable overseers of a state government's day-to-day discretionary operations.

Context also matters in light of Supreme Court precedent confirming the States' broad powers under the Constitution to manage their discretionary operations—and the resulting distinctions in the frameworks that govern a plaintiff's challenge to discretionary state action versus a challenge to a state's conduct as sovereign. That difference in framework is necessary to prevent lawsuits and judicial oversight from grinding state government to a halt.

The District Court's conclusions properly acknowledge that context matters. With respect to the first injunction element, Planned Parenthood's class-of-one equal protection claim arises in the context of government contracting, meaning this claim is not cognizable in light of *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591 (2008). No objective standard exists by which a court can measure a

state's discretionary contracting decisions. The District Court likewise correctly reasoned that in this context—where Planned Parenthood is admittedly affiliated with an entity accused of illegal activity—such an affiliation is a material characteristic of any appropriate comparator. Planned Parenthood's failure to identify one such comparator, let alone one that Governor Herbert treated differently, separately bars its class-of-one claim. This context also provides an objectively reasonable justification for cancelling the contracts; and deference is due to the District Court's conclusion that continuing the contracts might lead Utah's citizens to believe that its government approves of the alleged conduct. Finally, because Governor Herbert's own contemporaneous explanation linked his decision to the release of the videos, the District Court did not abuse its discretion by agreeing that his stated reasons for the cancelations—his outrage at the newly released videos—were his actual reasons, not pretext for impermissible retaliation against Planned Parenthood for its exercise of constitutional rights. This factual inference finds ample support in the record.

The District Court's conclusions that Planned Parenthood would not be irreparably harmed without an injunction, that the balance of harms favors Utah, and that an injunction would not favor the public interest all likewise account for the context in which this suit arises. Each conclusion finds evidentiary support in the record and correctly applies governing legal principles—appropriately

accounting for Governor Herbert's broad executive discretion to manage Utah's operational affairs, and for the separation-of-powers and federalism concerns inherent in Planned Parenthood's request.

To be sure, the State has no discretion to violate constitutional rights. But absent such a violation, federal court injunctions of discretionary state executive action are rarely appropriate. The District Court's constitutional calculus (like the rest of its analysis) properly applies the rules relevant *in this context* to determine that injunctive relief is not appropriate here. This Court should affirm, and immediately vacate its stay of, the District Court's order denying injunctive relief.

ARGUMENT

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). "Even in an action between private individuals, it has long been held that an injunction is 'to be used sparingly, and only in a clear and plain case.'" *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (quoting *Irwin v. Dixion*, 9 How. 10, 33 (1850)). The propriety of injunctive relief becomes more suspect when a plaintiff asks a federal court "to enjoin the activity of a [federal] government agency" because he "must contend with 'the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs.'" *Rizzo*, 423 U.S. at 378-79 (quoting *Sampson v. Murray*, 415 U.S. 61, 83 (1974)) (other quotation

marks omitted). But a request to a federal court to enjoin one of the "50 state judicial, legislative, and executive branches" demands still higher and closer scrutiny; because such a request triggers a potential conflict between two Sovereigns, federal courts must give "appropriate consideration" to "principles of federalism in determining the availability and scope of equitable relief." *Rizzo*, 423 U.S. at 379.

A plaintiff is entitled to such extraordinary relief only upon showing that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20 (citing cases). The plaintiff must not only show that each element weighs in its favor, *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1188-89 (10th Cir. 2003), but also that its right to extraordinary relief is clear and unequivocal, *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001).

Appellate review of an order denying injunctive relief has a "narrow scope." *Heideman*, 348 F.3d at 1185 (citing *Hawkins v. City & County of Denver*, 170 F.3d 1281, 1292 (10th Cir. 1999)). This Court reviews such decisions "only for an abuse of discretion," which "occurs only when the trial court bases its decision on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling." *Hawkins*, 170 F.3d at 1292 (quotation marks omitted). "The abuse

of discretion standard commands that" this Court "give due deference to the district court's evaluation of the salience and credibility of testimony, affidavits, and other evidence." *Heideman*, 348 F.3d at 1188 (citation omitted). This Court "will not challenge that evaluation unless it finds no support in the record, deviates from the appropriate legal standard, or follows from a plainly implausible, irrational, or erroneous reading of the record." *Id.* (citation omitted).

The District Court did not abuse its discretion on any of the injunction elements—let alone on all four of them, as Planned Parenthood must show before this Court can reverse the order denying injunctive relief.

I. SUPREME COURT PRECEDENT CONFIRMS THAT PLANNED PARENTHOOD IS NOT ENTITLED TO A PRELIMINARY INJUNCTION UNLESS ALL FOUR INJUNCTION ELEMENTS WEIGH CLEARLY IN ITS FAVOR.

Planned Parenthood suggests that in reviewing the District Court's order denying injunctive relief, this Court should apply "a relaxed standard to the likelihood of success factor" because the other three factors "tip decidedly in its favor." Aplt. Br. 40 (quoting *Nova Health Sys. v. Edmondson*, 460 F.3d 1295, 1298 n.6 (10th Cir. 2006)). But the "relaxed" standard is no longer good law. The Supreme Court's decision in *Winter* impliedly overruled it, as the State Defendants argued below in preserving this issue for appeal. *See* App. 2:488 n.2.

Winter reversed a preliminary injunction that limited the U.S. Navy's sonar-training program off the coast of southern California because the plaintiff claimed

the sonar would harm marine mammals. *See* 555 U.S. at 12-20. In affirming the injunction, the Ninth Circuit had "held that when a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based only on a 'possibility' of irreparable harm." *Id.* at 21.

The Supreme Court agreed with the Navy and rejected the Ninth Circuit's lower "possibility" standard as "too lenient" in light of the Supreme Court's "frequently reiterated standard requir[ing] plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Id.* "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.*

The logical end of *Winter*'s reasoning is that courts may not lower a plaintiff's required showing for any preliminary injunction element based on the plaintiff's showing with respect to any of the other elements, singularly or in combination. The Ninth Circuit has adopted that reading of *Winter*. *See Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) ("The [Supreme] Court succinctly stated the rule to be as follows: 'A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary

relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.' To the extent that our cases have suggested a lesser standard, they are no longer controlling, or even viable.") (citation omitted). So has the Fourth Circuit, which abandoned its prior precedent authorizing injunctions when plaintiff met a lower burden on some elements. *See Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir. 2013) ("Before the Supreme Court issued its ruling in *Winter*, this Court used a 'balance-of-hardship test' that allowed it to disregard some of the preliminary injunction factors if it found that the facts satisfied other factors. However, in light of *Winter*, this Court recalibrated that test, requiring that each preliminary injunction factor be satisfied as articulated.") (citations and quotation marks omitted).

This Court has acknowledged in an unpublished opinion the question whether *Winter* alters the "relaxed" standard. *See Vill. of Logan v. U.S. Dep't of Interior*, 577 F. App'x 760, 769 n.2 (10th Cir. 2014). But that case presented no opportunity to resolve the question because the plaintiff had "shown neither that the other three factors tip strongly in its favor nor that it is likely, let alone substantially likely, to succeed on the merits." *Id.*

Because the District Court did not abuse its discretion on any of the four elements here, this case also should not present a chance to decide whether this Circuit's relaxed-standard jurisprudence survives *Winter*. But if this Court

disagrees, and finds an abuse of discretion on the last three elements, the issue of whether this Court's "relaxed" standard survived *Winter* would be squarely in play.

In such circumstances, the Court should hold that *Winter* overruled the "relaxed" standard line of precedent. And applying *Winter*'s standard, it should affirm the judgment under review since (as discussed below) Planned Parenthood has failed to establish that its claims are likely to succeed on the merits.[4]

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

Planned Parenthood's claims arise from its contracts with the State of Utah—*not* from any generally applicable action the State took as a sovereign. That undisputed fact is dispositive to a proper review of the District Court's order rejecting Planned Parenthood's arguments on all four injunction elements.

For more than 50 years, the Supreme Court has "held the view that there is a crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as a lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" *Engquist*, 553 U.S. at 598) (quoting *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 896 (1961)). This half-century-old line of precedent confirms that a State's powers to

[4] Even if the "relaxed" standard survived *Winter*, affirming the District Court's order still would be the proper result. Planned Parenthood has not raised serious or substantial questions going to the merits; however viewed, its claims are likely to fail.

manage its discretionary operations—for example, when it acts as employer or contractor—are "far broader" than its powers "as sovereign." *Id.* (quotations omitted); *see also O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 724-25 (1996) ("Cities and other governmental entities make a wide range of decisions in the course of contracting for goods and services. The Constitution accords government officials a large measure of freedom as they exercise the discretion inherent in making these decisions.").

Accordingly, and in light of "the 'common-sense realization that government offices could not function if every'" discretionary operational decision "'became a constitutional matter,'" *Engquist*, 553 U.S. at 599 (quoting *Connick v. Myers*, 461 U.S. 138, 143 (1983)), "'constitutional review of government [operational] decisions must rest on different principles than review of . . . restraints imposed by the government as sovereign,'" *id.* (quoting *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality op.)).

The District Court's analysis properly accounts for that context; Planned Parenthood does not. That difference explains why the District Court's order was not an abuse of discretion.

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

Planned Parenthood alleges an equal protection claim and two unconstitutional conditions claims. The District Court correctly held that none of

those claims is likely to succeed. *See* App. 2:488-95.

1. The District Court properly held that class-of-one equal protection claims by government contractors are not cognizable.

Planned Parenthood admits that it brings a "class-of-one equal protection claim." Aplt. Br. 40. It thus does "not allege[] class-based discrimination, but instead claims that [it] has been irrationally singled out." *Engquist*, 553 U.S. at 601 (citing *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000) (*per curiam*)). In contexts where a class-of-one equal protection claim is cognizable, a plaintiff may state a claim by alleging that it has "'been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.'" *Id.* (quoting *Olech*, 528 U.S. at 564).

But not all class-of-one claims are constitutionally cognizable. The Supreme Court has held that "a 'class-of-one' theory of equal protection has no place in the public employment context." *Id.* at 594. As the District Court correctly held, *Engquist* is dispositive here because its reasoning—discussed below—applies readily in the parallel context of government contracts. Thus, *Engquist*'s holding also bars class-of-one claims by government contractors—a conclusion reached by every other Court of Appeals that has squarely decided this issue.

Engquist explained that "some forms of state action . . . by their nature involve discretionary decisionmaking based on a vast array of subjective,

individualized assessments." *Id.* at 603. "In such cases the rule that people should be 'treated alike, under like circumstances and conditions' is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted." *Id.* "In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise." *Id.*

"This principle," the Court explained, "applies most clearly in the employment context, for employment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify." *Id.* at 604. "To treat employees differently is not to classify them in a way that raises equal protection concerns. Rather, it is simply to exercise the broad discretion that typically characterizes the employer-employee relationship." *Id.* at 605. Thus, holding that class-of-one claims by public employees are not cognizable under the Equal Protection Clause was necessary to give effect to the "basic principle of at-will employment"—"that an employee may be terminated for a good reason, a bad reason, or no reason at all." *Id.* at 606.

Engquist emphasized that its holding bars class-of-one claims by government employees even when courts disagree with the wisdom or veracity of the government's basis for the challenged personnel action. Such considerations

are irrelevant because the Court has "never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information." *Id.* at 606 (internal quotation marks omitted). It also has "never found the Equal Protection Clause implicated in the specific circumstances where, as here, government employers are alleged to have made an individualized, subjective personnel decision in a seemingly arbitrary or irrational manner." *Id.* Thus, "recognition of a class-of-one theory of equal protection in the public employment context—that is, a claim that the State treated an employee differently from others for a bad reason, or for no reason at all—is simply contrary to the concept of at-will employment." *Id.*

Engquist's reasoning necessarily extends to parallel contexts where governmental entities enjoy broad discretion. One such context is, "as in this case," the government's "pre-existing commercial relationship[s] with its independent contractor[s]." Aplt. Br. 58. The factual similarities between the government's relationships with its employees and its independent contractors are "obvious." *Bd. of Cnty. Commr's v. Umbehr*, 518 U.S. 668, 674 (1996). "The government needs to be free to terminate both employees and contractors for poor performance, to improve the efficiency, efficacy, and responsiveness of service to the public, and to prevent the *appearance* of corruption." *Id.* (emphasis added).

"And, absent contractual, statutory, or constitutional restriction, the government is entitled to terminate them for no reason at all." *Id.*

Because of those obvious similarities, the Eleventh Circuit had "little trouble applying the reasoning in *Engquist*" to hold "that *Engquist* controls" cases brought by government contractors "and makes clear that" contractors cannot "assert a cognizable right to [class-of-one] equal protection." *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269, 1274 (11th Cir. 2008); *see id.* ("Just as in the employee context, and in the absence of a restricting contract or statute, decisions involving government contractors require broad discretion that may rest on a wide array of factors that are difficult to articulate and quantify.") (citation omitted). And the First Circuit, in an opinion by retired Justice Souter—who dissented in *Engquist*—reasoned that "[a]lthough *Engquist*'s specific subject was public employment, its reasoning extends beyond its particular facts, and we agree with those federal courts that have found the case applicable beyond government staffing." *Caesars Mass. Mgmt. Co. v. Crosby*, 778 F.3d 327, 336 (1st Cir. 2015) (citing with approval *Douglas Asphalt*). "[P]ure legal discretion in government" operations, "absent contractual restrictions," is "not itself unreasonable, making judicial

review both inappropriate and potentially destructive of a systematically justifiable way of doing public business." *Id.* (citations omitted).[5]

This Court has twice acknowledged the question whether government contractors can state a cognizable class-of-one equal protection claim in light of *Engquist*. *See SECSYS, LLC v. Vigil*, 666 F.3d 678, 690 (10th Cir. 2012); *Glover v. Mabrey*, 384 F. App'x 763, 778 (10th Cir. 2010). But it did not answer the question in either case because it resolved those appeals on other grounds. Even so, in *SECSYS* this Court reasoned in *dicta* that "it is arguably just a small step from" *Engquist* "to the conclusion the [class-of-one equal protection] doctrine shouldn't apply when the government interacts with independent contractors—in both circumstances, the government acts in a more proprietorial and less regulatory capacity." 666 F.3d at 690.

[5] The Second Circuit has concluded "that *Engquist* does not bar all class-of-one claims involving any discretionary state action." *Analytical Diagnostic Labs, Inc. v. Kusel*, 626 F.3d 135, 142 (2d Cir. 2010). And the Seventh Circuit held in *Hanes v. Zurick*, 578 F.3d 491, 495-96 (7th Cir. 2009), that some class-of-one claims against police officers can be cognizable. But *Kusel* and *Hanes* do not conflict with *Douglas Asphalt* or *Crosby*, or support the conclusion that the District Court abused its discretion. Neither *Kusel* nor *Hanes* involved a class-of-one claim by an independent contractor, like Planned Parenthood, whose contract gave the State unfettered discretion to terminate the contract. Rather, *Kusel* involved a claim by a state licensee complaining of the defendants' exercise of "the state's regulatory power," which was constrained by statute. 626 F.3d at 142. And the plaintiff in *Hanes* challenged his allegedly unjustified and malicious arrests—"exercise[s of] the government's sovereign power." 578 F.3d at 495.

Despite the lack of binding Tenth Circuit precedent, the District Court correctly looked to this Court's clear suggestion in *SECSYS*—and to the overwhelming weight of non-binding authority *specific to government contractors*—to apply *Engquist* and hold that Planned Parenthood is unlikely to succeed on its class-of-one claim. App. 2:490-91. It correctly reasoned that "[t]here is no 'clear standard' against which" the Court could assess the State's discretionary decisions in managing its contracts. *Id.* at 2:491.

In the proceedings below, Planned Parenthood cited only two district court decisions to rebut that conclusion. The District Court found them to be unpersuasive because "neither case discussed *Engquist*." *Id.*

Planned Parenthood's efforts in this Court to distinguish *Engquist* are similarly unpersuasive. It first contends that this Court "has declined to extend *Engquist* beyond the public employee context" and that "doing so here would therefore blaze a new trail." Aplt. Br. 42. But this Court has never held that *Engquist* does *not* extend beyond public employment—it simply has never definitively answered the question either way, because it resolved the prior cases presenting the question on other grounds. Here, in contrast, the issue is squarely presented, and Planned Parenthood cannot prevail on its class-of-one claim unless the Court reverses the District Court's conclusion. And a holding that a government contractor *can*—despite *Engquist*—state a cognizable class-of-one

equal protection claim based on a State's terminating an at-will contract would be the first such holding by any federal court. Such a holding also would create a square split with the First and Eleventh Circuits on "the same important matter." S. Ct. R. 10(a).

Second, Planned Parenthood likens Governor Herbert's contracting decision to *Olech* and contends that there is a "clear standard" against which it can be measured because it turns on "a single, readily assessable factor." Aplt. Br. 42-43. This misunderstands *Engquist*'s reasoning, which looks at whether the *type* of decision involves the *discretion* to consider a number of factors—not to the number of factors the government actually considered in any *particular* exercise of discretion. *Engquist* bars a class-of-one claim for a government employer's firing an employee even if that decision turned solely on the employee's repeatedly being late for work. So too here—the number of factors *actually* considered in a given contracting decision does not limit the State's discretion to consider a multitude of factors in later contracting decisions.

Third, Planned Parenthood contends that "Governor Herbert acted in his capacity as sovereign" when cancelling the contracts. Aplt. Br. 44. But sovereign acts are exercises of "the power to regulate or license, as a lawmaker." *Engquist*, 553 U.S. at 598 (internal quotation marks omitted). The distinction between such state actions and exercises of the government's non-sovereign power to "act[] as

proprietor, to manage its internal operation," is indispensable to *Engquist*'s holding. *Id.* (internal quotation marks and brackets omitted). A state's decisions with respect to its contractors fall in the latter category. *See id.*; *Umbehr*, 518 U.S. at 674.

Fourth, Planned Parenthood contends that *Engquist* does not bar class-of-one claims when the government "target[s]" the plaintiff "*because* of constitutionally protected activity." Aplt. Br. 45. But such facts do not give rise to equal protection claims—those are unconstitutional conditions claims.

Planned Parenthood's argument thus parallels the limited respect in which the District Court's legal analysis missed the mark. To be sure, the government may not "independently violate the Constitution" in its dealings with contractors. App. 2:489 (alteration omitted). But liability for a class-of-one equal protection claim does not arise based on a violation of *another* constitutional provision. Rather, an independent constitutional violation gives rise to a separate cause of action under § 1983 *for that violation*—it does not give rise to a class-of-one equal protection claim. Put differently, if a State violates a contractor's First Amendment rights, the contractor may sue under § 1983 alleging a First Amendment violation; it may not sue under § 1983 alleging a class-of-one equal protection claim *seeking to vindicate* that First Amendment violation. States face class-of-one liability only for "irrationally singl[ing] out" a plaintiff, *Engquist*, 553

U.S. at 601—not for, *e.g.*, improperly abridging its speech rights. Accordingly, the District Court (and Planned Parenthood) misread *Engquist* by suggesting Planned Parenthood could state a class-of-one claim if it could "show violation of an independent constitutional right." App. 2:491. But, the District Court's recognition that class-of-one claims are not cognizable because "[t]here is no 'clear standard' against which" courts can measure the State's discretionary contracting decisions is clearly correct. *Id.*. So too is its separate conclusion that Planned Parenthood has *not* shown independent constitutional violations. *See id.* at 2:491-92.

Applying *Engquist* to bar class-of-one claims by government contractors is not to deprive contractors of constitutional protections. To the contrary, government contractors retain their traditional equal protection rights under *Engquist*: the Supreme Court's "cases make clear that the Equal Protection Clause is implicated when the government makes class-based decisions in the employment [and contracting] context[s], treating distinct groups of individuals categorically differently." 553 U.S. at 605 (citing cases). Government contractors similarly retain other constitutional protections, for the State "cannot . . . take [contracting] actions that would independently violate the Constitution." *Id.* at 606. So if the government engages in class-based discrimination against a government contractor, or violates a contractor's other constitutional rights, the contractor may

seek relief under 42 U.S.C. § 1983 by alleging a violation of the Equal Protection Clause or other identified constitutional provision.

In short, whether Utah's reasons for terminating Planned Parenthood's contracts were "arbitrary, vindictive or malicious," *id.* at 596, or "irrational," *id.* at 605, or "based on substantively incorrect information," *id.* at 606, or even "bad reason[s]," *id.* at 606, ultimately "is beside the point," *id.* at 608. "The Equal Protection Clause does not require this displacement of managerial discretion by judicial supervision." *Id.* at 608-09 (internal quotation marks and brackets omitted). Planned Parenthood's class-of-one equal protection claim thus is not cognizable as a matter of law. The District Court did not abuse its discretion by holding that this claim cannot support injunctive relief.

2. The District Court correctly held that Planned Parenthood's class-of-one equal protection claim fails for the additional reason that it did not identify a proper comparator.

The District Court properly denied injunctive relief on the class-of-one claim for the separate, independent reason that Planned Parenthood failed to carry its "'substantial burden'" to "demonstrate others 'similarly situated in all material respects' were treated differently and that there is no objectively reasonable basis for the defendant's action." *Kansas Penn Gaming*, 656 F.3d at 1217 (quotations omitted); *see also Jicarilla Apache Nation v. Morales*, 440 F.3d 1202, 1213 (10th Cir. 2006) (holding that a class-of-one plaintiff "cannot prevail if there is *any*

material difference between it and allegedly similarly situated parties that relates to a governmental interest").[6]

This Court's precedents "emphasize [its] strict reading of this element because it addresses the main concern with the class-of-one theory—that it will create a flood of claims in that area of government action where discretion is high and variation is common." *Kansas Penn Gaming*, 656 F.3d at 1218. "This is because the requirement that comparators be 'similarly situated in *all material respects*' is inevitably more demanding where a difference in treatment could legitimately be based on a number of different factors." *Id.* Thus, "where the government actor enjoys a broader range of discretion"—as it does when managing its at-will contracts—"it is more likely that there are material distinctions between allegedly similarly situated parties, leading to a ready supply of rational and not wholly arbitrary reasons for differential treatment." *Id.* (quotation marks omitted). In such cases, "the plaintiff must account for a wide range of characteristics in identifying similarly situated individuals." *Id.*

[6] Requiring such a high showing "is consistent with the practice of other circuits." *Kansas Penn Gaming*, 656 F.3d at 1218; *see id.* (quoting *Analytical Diagnostic Labs*, 626 F.3d at 143 ("[P]laintiff [must] show that no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy.")); *id.* (quoting *Cordi-Allen v. Conlon*, 494 F.3d 245, 251 (1st Cir. 2007) ("This requirement demands more than lip service. It is meant to be a very significant burden.")); *id.* (quoting *Purze v. Village of Winthrop Harbor*, 286 F.3d 452, 455 (7th Cir. 2002) (requiring a class-of-one plaintiff to demonstrate that the comparable properties were "*prima facie* identical in all relevant respects")).

The District Court correctly rejected Planned Parenthood's attempt to define "others 'similarly situated'" in this case merely "as 'other reproductive health care providers.'" App. 2:492. Such proffered "comparators do not adhere strictly" to this Court's precedents requiring "similarity in every material respect." *Id.* Rather, to carry its "very significant burden," *Kansas Penn Gaming*, 656 F.3d at 1218 (quotations omitted), Planned Parenthood should have shown that "it was treated differently from a specifically identified comparator, namely, another reproductive health care provider that associates with an entity allegedly engaged in illegal conduct," App. 2:493.

Planned Parenthood's association with such an entity is unquestionably a material point of comparison. Indeed, Planned Parenthood admits that it "is an affiliate of" the National Planned Parenthood organization. Aplt. Br. 18. And it is beyond dispute that this affiliation is material to both Planned Parenthood's theory of this case and the state action it challenges. Accordingly, under this Court's precedents, comparators are proper—similarly situated in *every material respect*—only if, like Planned Parenthood, they are reproductive health care providers admittedly affiliated with an entity accused of illegal conduct.

That such an affiliation is an indispensable characteristic of a proper "similarly situated" comparator here is the lesson of six published cases from this

Court addressing a class-of-one equal protection claim—all the published Tenth Circuit precedent the State Defendants could find on this issue.

First, *Kansas Penn Gaming* addressed a class-of-one claim alleging that a county health department arbitrarily and maliciously singled out the plaintiff for regulatory enforcement. According to the plaintiff, the county improperly sent a notice of a nuisance violation contending that the plaintiff's property "appeared abandoned" and contained "six structures in various stages of deterioration; the remains of a concrete house foundation; solid debris and waste, including tires, barrels, appliances, concrete, and other items; and evidence that an indeterminate amount of waste material had been disposed of by burning." 656 F.3d at 1213 (alterations omitted). This Court affirmed an order dismissing that claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure because the plaintiff's factual allegations were "inadequate to show that other properties with ramshackle buildings and visible debris have somehow gotten a pass from [county health] officials." *Id.* at 1220. The plaintiff thus failed to carry its burden of alleging "specific facts plausibly suggesting the conditions on [its proffered comparator] properties and the properties themselves are similar in all material respects." *Id.*

Second, in *Jicarilla Apache Nation*, this Court affirmed the dismissal on summary judgment of a class-of-one claim arising from an allegedly discriminatory tax assessment of an elk hunting ranch. It specifically disagreed

with the plaintiff's argument that the proper comparators were "other elk hunting ranches," finding instead the proper comparators to be other elk hunting ranches that were similarly situated in all material respects: those, like plaintiff, that offered its customers a wide variety of other sporting activities, such as "hiking, fishing, cross-country skiing, skeet shooting, and other pursuits." 440 F.3d at 1213. "Nothing in the record suggests that the other ranches offer the same breadth of activities," which were "rational reasons to believe that [plaintiff's ranch] generates more income, and is thus more valuable, than the land on the allegedly similarly situated properties." *Id.*

Third, in *Jennings*, this Court addressed a class-of-one claim for reverse-selective enforcement—a claim that the defendant police officers devoted "too few resources" to investigate the plaintiff's rape allegations against certain members of the Oklahoma State University football team. *See* 383 F.3d at 1215. It affirmed an order granting summary judgment for the defendants because the plaintiff "failed to make an adequate showing that similarly situated persons were treated differently." *Id.* at 1213. "Nowhere in the over 550 pages of evidence submitted by the Plaintiff to the district court [did] she supply *any* information regarding the allegedly similarly situated rape victims" whose rape allegations she contended the police officers had properly investigated. *Id.* at 1215.

Fourth, in *Bruner v. Baker*, 506 F.3d 1021 (10th Cir. 2007), the plaintiff was both the CFO for, and a consultant to, one company; he received one paycheck for both streams of work. The district attorney's office followed a recommendation from state tax commission investigators, who had reviewed plaintiff's income and tax records, and filed criminal tax evasion charges against plaintiff; but it later dismissed them when it discovered other evidence that undermined the likelihood of a tax-evasion conviction. *See id.* at 1023-24.

The District Court granted summary judgment to defendants on the plaintiff's class-of-one selective investigation and prosecution claim. This Court affirmed, noting the plaintiff "provided no evidence of similarly situated individuals being treated differently." *Id.* at 1029. The plaintiff was "in a unique situation, defying easy comparison with other employees, on account of his position as CFO" and his other business relationships with the firm. *Id.* Because the plaintiff had "failed to point to any similarly situated individuals, let alone similarly situated individuals treated differently, his class-of-one equal protection claim must fail." *Id.*

Fifth, in *Grubbs v. Bailes*, 445 F.3d 1275, 1280 (10th Cir. 2006), this Court addressed a plaintiff's class-of-one claim for law enforcement's alleged failure to properly enforce trespass laws. He contended that when he complained of bicyclists and ATV riders trespassing on his private, lakeside land, the sheriff's

office responded by improperly arresting him for allegedly pointing a gun at the trespassers (and having him charged with a crime) instead of charging the bicyclists with trespassing. *See id.* at 1277-78. In affirming an order granting summary judgment to the defendants, this Court cited the "glaring absence of evidence showing that defendants enforced trespassing laws in any different fashion with respect to other, similarly situated residents of the county." *Id.* at 1282.

And sixth, the plaintiffs in *MIMICS, Inc. v. Village of Angel Fire*, 394 F.3d 836 (10th Cir. 2005), owned a computer software business they operated from their condominium. After the manager of their condominium complex became a town councilor, a rift developed pitting the manager and the business owners against two other town councilors and the town's building inspector. According to the plaintiffs, that rift led the building inspector to arbitrarily and maliciously single them out, culminating in his improperly entering their condominium for building inspections and improperly sending letters falsely accusing them of building code violations. *See id.* at 839-41.

This Court concluded that plaintiffs had "established an equal protection violation sufficient to preclude summary judgment" for the building inspector "based on qualified immunity." *Id.* at 849. They "provided extensive testimony demonstrating that they were treated differently than others who were similarly

situated." *Id.* In particular, they relied on the Chairperson (and later Director of the Planning and Zoning Commission) who "stated that she 'had knowledge of businesses similarly situated to MIMICS that were treated differently'"—even going so far as to provide "a chart detailing the treatment of various businesses which demonstrates the differential treatment of MIMICS." *Id.*

In each of these six cases, this Court defined appropriate comparators—others similarly situated in *all material respects*—by looking to the reasons the government took (or did not take) the action that allegedly violated the plaintiff's equal protection rights. *See Kansas Penn Gaming*, 656 F.3d at 1220 (holding that plaintiff did not identify appropriate comparators because it did not identify "other properties with ramshackle buildings and visible debris" that had "somehow gotten a pass from [county health] officials"); *Jicarilla Apache Nation*, 440 F.3d at 1213 (holding that elk hunting ranch failed to identify appropriate comparator ranches because it did not identify other ranches that *also* offered additional sporting activities but were taxed at a lower rate); *Jennings*, 383 F.3d at 1215 (rejecting class-of-one reverse-selective enforcement claim failed because plaintiff failed to "supply *any* information regarding the allegedly similarly situated rape victims" whose rape allegations she contended the police officers had properly investigated); *Bruner*, 506 F.3d at 1029 (holding that CFO failed to identify appropriate comparators because he was "in a unique situation, defying easy

comparison with other employees, on account of his position as CFO" and his other business relationships with the firm); *Grubbs*, 445 F.3d at 1282 (rejecting landowner's class-of-one failure-to-prosecute claim due to the "glaring absence of evidence showing that defendants enforced trespassing laws in any different fashion with respect to other, similarly situated residents of the county"); *MIMICS*, 394 F.3d at 849 (affirming that plaintiff business owners had identified appropriate comparators for class-of-one claim against town building inspector because they "provided extensive testimony"—including a chart prepared by the Director of Planning and Zoning—detailing the inspector's differential treatment of other "'businesses similarly situated'").

The District Court's order requiring Planned Parenthood to identify as a comparator another "reproductive health care provider that associates with an entity allegedly engaged in illegal conduct" does no more than faithfully adhere to this Court's published cases. App. 2:493. It merely acknowledges that Utah's reason for terminating the four contracts—Planned Parenthood's admitted affiliation with an entity allegedly engaged in illegal activity—is a material characteristic missing from Planned Parenthood's proffered comparator health care providers. Accordingly, not only was the order not an abuse of discretion, it was clearly correct.

These six cases also answer Planned Parenthood's complaint that the District Court's reasoning is incorrect because "[a] state actor should not be permitted to rely upon the challenged action itself as the factor that precludes a plaintiff from identifying a comparator group." Aplt. Br. 52. If that complaint were accurate, each of these six cases was wrongly decided. But these cases are correct, so Planned Parenthood's reasoning is not.

These six cases further confirm that this Court accurately described the class-of-one plaintiff's burden of identifying comparators "similarly situated in all material respects" to be a "substantial" and "very significant" burden. *Kansas Penn Gaming*, 656 F.3d at 1217-18 (quotations omitted). Just one of the six cases concluded that the plaintiff carried its burden. In the other five, the plaintiff failed. Accordingly, failing to carry this substantial burden is not the exception—it's the norm. There is nothing unusual about the District Court's numbering Planned Parenthood among the mine-run of plaintiffs who fail on this score.

In sum, this record supports the District Court's conclusion that Planned Parenthood more closely resembles the unsuccessful class-of-one plaintiffs in *Kansas Penn Gaming*, *Jicarilla Apache Nation*, *Jennings*, *Bruner*, and *Grubbs* than the class-of-one plaintiff in *MIMICS*. Indeed, there is no dispute that Planned Parenthood failed to identify a single comparator similarly situated in every

material respect. Planned Parenthood did not even *try*. The District Court's holding acknowledging that failure was not an abuse of discretion.

3. The District Court did not abuse its discretion by holding that a cognizable class-of-one claim identifying appropriate comparators would fail on the merits in any event.

Even if Planned Parenthood's class-of-one claim cleared the *Engquist* and appropriate-comparator hurdles it still would fail on the merits.

After establishing "that others, similarly situated in every material respect," were treated differently, a class-of-one "plaintiff must then show this difference in treatment was without rational basis, that is, the government action was irrational and abusive, and wholly unrelated to any legitimate state activity."[7] *Kansas Penn Gaming*, 656 F.3d at 1216 (internal quotation marks and citations omitted). "This standard is objective—if there is a reasonable justification for the challenged action, we do not inquire into the government actor's actual motivations." *Id.* And because this class-of-one claim arises from Utah's "exercis[ing] contractual power," it implicates Utah's "interests as a public service provider, including its

[7] Planned Parenthood argues that its class-of-one claim involves fundamental rights and therefore demands that the State's contract terminations satisfy strict scrutiny. Aplt. Br. 48, 53-56. But this is wrong for several reasons. First, it misstates this Court's precedent regarding the analytical framework for class-of-one cases. Second, as already discussed, it conflates the class-of-one claims with the unconstitutional conditions claims. Third, also as discussed in this brief and determined by the District Court, the terminations of at-will contracts do not violate any of Planned Parenthood's independent constitutional or fundamental rights. App. 2:491-92.

interest in being free from intensive judicial supervision of its daily management functions." *Umbehr*, 518 U.S. at 678. "Deference is therefore due to [Utah's] reasonable assessments of its interests *as a contractor*." *Id.*

As noted, Governor Herbert admitted for purposes of opposing Planned Parenthood's request for injunction that he directed UDOH to cease funding the four contracts because of Planned Parenthood's (undisputed) affiliation with its national counterpart, after video evidence emerged suggesting that the national Planned Parenthood was "coloring outside the lines" by "selling fetal body parts for money." App. 1:11. Utah "needs to be free to terminate both employees and contractors . . . to prevent the appearance of corruption." *Umbehr*, 518 U.S. at 674. A contactor's undisputed affiliation with a group alleged to be engaged in such illegal activity is "a reasonable justification" for terminating the contract, *Kansas Penn Gaming*, 656 F.3d at 1216, to prevent the very "appearance of corruption" Utah is entitled to avoid, *Umbehr*, 518 U.S. at 674.

There is nothing objectively unreasonable about Utah's ceasing a contractual relationship with a local affiliate of a national entity alleged to be engaged in such illegal activity. At a minimum, "[d]eference is . . . due" to Utah's "reasonable assessment" that terminating the four disputed contracts furthers "its interests *as a contractor*," *id.* at 678, in avoiding the appearance of such corruption.

The District Court's order correctly grants such deference. As it recognizes, "governmental entities have an interest in avoiding the appearance of corruption." App. 2:496. To be sure, Utah's Planned Parenthood affiliate is not itself implicated in the videos, but "it is currently affiliated with other Planned Parenthood entities that have allegedly engaged in illegal conduct." *Id.* "Under such circumstances, continuing to allow [Planned Parenthood] to provide services under the auspices of the contracts may reasonably be perceived by the citizenry of Utah as approbation of the wrongful conduct." *Id.* Because there is a "rational basis in the evidence" for this ruling, *Hawkins*, 170 F.3d at 1292, the "abuse of discretion standard commands that" this Court "give due deference" to it, *Heideman*, 348 F.3d at 1188.

This objectively reasonable justification for Governor Herbert's decision eliminates any basis for this Court to "inquire into the government actor's actual motivations." *Kansas Penn Gaming*, 656 F.3d at 1216. It also eliminates any basis for holding that the District Court abused its discretion by concluding that any cognizable class-of-one claim is likely to fail on the merits.

4. The District Court did not abuse its discretion by holding that Planned Parenthood's unconstitutional conditions claims are likely to fail on the merits.

Planned Parenthood's two unconstitutional conditions claims contend that by terminating the four contracts in dispute, Governor Herbert has imposed an

impermissible penalty in retaliation for Planned Parenthood's exercising its First Amendment right to advocate for and associate with others in furtherance of abortion, or a Fourteenth Amendment right to perform abortions. *See* App. 1:20-21; Aplt. Br. 57, 59-60. The District Court correctly rejected these arguments in denying Planned Parenthood's motion for injunctive relief. And unlike the District Court's rulings on the class-of-one claim, which turn at least in part on legal conclusions, the District Court's conclusion on these claims turns only on a rational inference it drew from record evidence, including Planned Parenthood's own allegations. The abuse-of-discretion standard of review means that this Court does "not challenge" these factual conclusions and inferences. *Heideman*, 348 F.3d at 1188.

"Under the 'modern unconstitutional conditions doctrine . . . the government may not deny a benefit to a person on the basis that infringes his constitutionally protected [rights] even if he has no entitlement to that benefit.'" *Planned Parenthood of Kan. & Mid-Mo. v. Moser*, 747 F.3d 814, 838 (10th Cir. 2014) (quoting *Umbehr*, 518 U.S. at 674). This "doctrine has been applied when the condition acts retrospectively in a *discretionary* executive action that terminates a government-provided benefit," such as "a government contract," "in retaliation for prior protected speech or association." *Id.* at 839 (rejecting First Amendment association challenge to facially neutral health-services funding statute). "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.* (emphasis added). These types of claims "necessarily examine the official's motive for taking the action; the challenge will be rejected unless retaliation *against the protected conduct* was 'a substantial or motivating factor' for taking the action." *Id.* (quoting *Umbehr*, 518 U.S. at 675) (emphasis added).

As the emphasized language makes clear, a necessary ingredient of an unconstitutional conditions claim is the plaintiff's showing that the State retaliated against it for engaging in constitutionally protected activity. *See Umbehr*, 518 U.S. at 675 ("To prevail, an employee [or contractor] must prove that the conduct at issue was constitutionally protected . . . ."); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) ("the burden was properly placed upon [the contractor] to show that his conduct was constitutionally protected"). Hence the long line of government-employee-speech cases outlining when the government may constitutionally proscribe its employees' speech. *See, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 417-23 (2006); *Connick*, 461 U.S. at 146-47; *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968). Those cases make clear that although the First Amendment protects "speech," it does not protect *all* speech by government employees, and thus not *all* government

infringements of its employees' speech are constitutional violations. Courts in those cases must first scrutinize "the speech in question" to determine whether in fact it "is protected." *Andersen v. McCotter*, 100 F.3d 723, 728 (10th Cir. 1996). Only after confirming that a plaintiff has carried that burden do courts move to the second step—determining whether the employee has carried the additional burden to "show that the speech was a substantial or motivating factor in the decision to deny the benefit." *Id.*

Planned Parenthood fails this first requirement. It cannot prove that the conduct at issue is constitutionally protected. State Defendants do not dispute that the Supreme Court held in *Roe v. Wade*, 410 U.S. 113 (1973), that abortion is a woman's fundamental right. Nor do they dispute that 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. Jaycees*, 468 U.S. 609, 622 (1984).

But just as government employees cannot invoke "speech" rights as a talisman to ward off careful judicial inquiry into whether their *specific* speech is *actually* protected, Planned Parenthood cannot merely invoke "abortion" or the right to "speak and associate with respect to abortion" to meet its burden of showing that the *specific* conduct at issue is constitutionally protected. A closer

look—like the District Court took when it found the facts supporting its holding on this issue—is required.

A closer examination reveals no constitutionally protected activity here. State Defendants are not aware of any case extending *Roe* to hold that a fundamental right to abortion encompasses the right to sell fetal tissue. Planned Parenthood does not appear to dispute that premise, and it cites no case law undermining it. Thus, whatever might be said about the act of selling fetal tissue for money, that act—which federal law prohibits, *see* 42 U.S.C. § 289g-2(a)—is not constitutionally protected.

And the First Amendment right of association has never been held to be a right to associate for *any* purpose. Rather, the "right to associate with others" is an adjunct to, or a right "corresponding" to, the "right to engage in activities *protected by the First Amendment*." *Roberts*, 468 U.S. at 622 (emphasis added). Defendants are not aware of any case extending the First Amendment right of association to encompass the right to associate in furtherance of illegal acts, such as selling fetal tissue. Planned Parenthood has not cited any case extending the association right to such circumstances, either in the District Court or its brief here. Accordingly, Planned Parenthood's unconstitutional conditions claims fail to clear even their first hurdle: Utah's termination of the four disputed contracts does not implicate any constitutionally protected activity.

The District Court also correctly concluded that these claims do not clear their second hurdle—Planned Parenthood is not likely to show that constitutionally "protected conduct was a 'substantial or motivating factor'" for the Governor's decision to terminate the four disputed contracts. *Moser*, 747 F.3d at 838.

As it did below, Planned Parenthood contends that the Governor's directive amounts to retaliation for its "exercising its First and Fourteenth Amendment rights to advocate for and provide access to abortion services." Aplt. Br. 57. But under *Planned Parenthood's own allegations*—which the Governor admitted for purposes of the proceedings below—neither abortion itself, nor speaking about it, nor associating with others to advocate for it had anything to do with the Governor's decision. Instead, it was his "outrage[]" at the "video where they're selling fetus body parts for money," App. 1:11, and "the casualness, the callousness" such actions evinced, *id.*

Planned Parenthood's remaining allegations only confirm the Governor's motivation. It describes its "long-standing history of collaboration with UDOH" for "over two decades" on a number of initiatives. Aplt. Br. 14-15. It is undisputed that Planned Parenthood provided, advocated for, and associated with others in favor of abortions during that time—including, as the District Court recognized, during Governor Herbert's prior six years in office, when Utah entered and renewed its contracts with Planned Parenthood. *See* App. 2:494-95. "It was

not until the videos were released that the Governor acted to terminate the contracts." *Id.* at 2:495. Even Planned Parenthood acknowledges that "[u]ntil the facts giving rise to this appeal, UDOH never provided" it "with a notice of termination or refused to renew a contract." Aplt. Br. 15. Thus, "[b]oth the Governor's words and the temporal proximity between the release of the videos and his directive to terminate the contracts support [the conclusion that] he did not retaliate against Plaintiff based upon its right of association nor its right to advocate for and perform abortions." App. 2:495.[8] Because there is a "rational basis in the evidence for [this] ruling," *Hawkins*, 170 F.3d at 1292, this Court must "give due deference to" it and "not challenge that evaluation," *Heideman*, 348 F.3d at 1188.

In an attempt to show pretext or mixed motive, Planned Parenthood relies heavily on an alleged "memorandum issued by Governor Herbert's office mere days after the Directive." Aplt. Br. 63; *see also id.* at 18-19, 49 (quoting from or discussing the alleged "memo"). But the "memo" isn't a memo at all—it's nothing more than an internal draft of talking points independently prepared by a staff speechwriter for short remarks the Governor was scheduled to give at a pro-life

[8] That fact alone distinguishes this case from other abortion-related unconstitutional conditions cases upon which Planned Parenthood relies. *See, e.g.*, *Planned Parenthood of Central N.C. v. Cansler*, 804 F. Supp. 2d 482, 496 (M.D.N.C. 2011) (finding that governmental entity took action against a Planned Parenthood affiliate "specifically to penalize Planned Parenthood for its separate abortion-related activities"); *see also* Aplt. Br. 60 (citing other similar cases).

rally. App. 2:391-92. Nothing in the actual reported accounts of those remarks—which were widely covered by the press—prove that the Governor in fact said, or otherwise endorsed, the words in the draft talking points upon which Planned Parenthood relies to attribute the retaliatory motives to him. *See, e.g.*, *id.* at 1:59-60; 2:487. The District Court itself recognized that this document was merely a draft of talking points and "that the Governor may well have rejected all of these ideas and said my real reason has nothing to do with the theme that's set forth in the talking points, my reason is what I said, you were coloring outside the lines." App. 2:472 (Preliminary Injunction Hearing Transcript). The District Court thus carefully considered the document upon which Planned Parenthood so heavily relies and, after careful consideration—including comparing it with the press reports of the same rally at which the Governor was supposed to speak from these remarks—concluded that this document is nowhere near as probative as Planned Parenthood now posits it to be. The abuse-of-discretion standard requires deference to this factual conclusion. *Heideman*, 348 F.3d at 1188. And the Governor's Office certainly never issued the draft notes as a "memorandum" of some sort "mere days after the Directive" or at any other time. Aplt. Br. 63. Planned Parenthood's own evidence makes clear that it obtained the draft notes only during discovery weeks after the Governor's directive. App. 2:332.

These serious flaws with Planned Parenthood's "direct evidence" (Aplt. Br. 63) of pretext and mixed motive simply underscore the District Court's conclusion that Planned Parenthood will not prevail on its unconstitutional conditions claim. Planned Parenthood's "circumstantial evidence"—essentially that Governor Herbert opposes abortion—fares no better. Aplt. Br. 64-65. As the District Court stated, "[t]hese facts fall short of proving" an improper "substantial or motivating factor for terminating the contracts." App. 2:494. That view of the evidence should not only be affirmed as within the District Court's sound discretion, but it should also be upheld as a matter of sound law. Otherwise, if Planned Parenthood's mixed-motive or pretext arguments are correct, it will essentially be awarded four contracts-for-life with the State. Anytime a pro-life Governor attempts to terminate any contract, Planned Parenthood could simply point to the "circumstantial evidence" of the Governor's opposition to abortion as proof of pretext to impose an unconstitutional condition. That is not and should not be the law. Planned Parenthood has not met its evidentiary burden. The District Court should be affirmed.

B. The District Court's Holding That Planned Parenthood Would Not Be Irreparably Harmed Without An Injunction Is Not An Abuse Of Discretion.

The District Court properly rejected Planned Parenthood's attempt to establish that it would be irreparably harmed without an injunction.

"To constitute irreparable harm, an injury must be certain, great, actual and not theoretical." *Heideman*, 348 F.3d at 1189 (quotation marks omitted). "Irreparable harm is not harm that is merely serious or substantial. The party seeking injunctive relief must show that the injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Id.* (quotation marks and citations omitted).

Planned Parenthood's principal contention is that the Governor's directive necessarily results in irreparable harm because the directive violates its constitutional rights. *See* Aplt. Br. 68. Because the District Court correctly held that Planned Parenthood's constitutional claims fail, it did not abuse its discretion by refusing to find irreparable harm on that basis. *See* App. 2:495.

The District Court also correctly rejected Planned Parenthood's effort to show irreparable financial or reputational harm absent an injunction. *See id.* Financial harms—such as breach-of-contract damages or a dip in private fundraising—amount to "simple economic loss," which "usually does not, in and of itself, constitute irreparable harm; such losses are compensable by monetary damages." *Heideman*, 348 F.3d at 1189. And Planned Parenthood errs (Aplt. Br. 70) by suggesting that the Eleventh Amendment entirely precludes breach-of-contract damages. Because that Amendment concerns only "[t]he judicial power *of the United States*," U.S. Const. amend. XI (emphasis added), it prevents States

from being "sued *in federal court* unless they consent to it in unequivocal terms," *Green v. Mansour*, 474 U.S. 64, 68 (1985) (emphasis added). The Eleventh Amendment does not preclude Planned Parenthood from filing a breach-of-contract claim in *state* court, for which Utah has waived its sovereign immunity. *See* Utah Code Ann. § 63G-7-301(1).

More important, the record shows that Planned Parenthood's arguments contravene the facts—its reputation remains in good stead. In the District Court's words, "[w]hile protestors against Planned Parenthood have rallied, so too have supporters of Planned Parenthood," who sent thousands of postcards to the Governor's office on Planned Parenthood's behalf and made donations to the organization in the Governor's name. App. 2:310-20, 495. This evidence amply supports the District Court's factual finding that this element "weighs in favor of the defendants." *Id.* at 2:495.

Finally, Planned Parenthood contends that denying an injunction would harm the public health. Aplt. Br. 68-70. But far from establishing "certain, great, [and] actual" harms—*irreparable* harms—that justify an injunction, those allegations constitute examples of quintessential "theoretical" and speculative harms that cannot support equitable relief. *Heideman*, 348 F.3d at 1189 (quotations omitted). The alleged public health harms are speculative and theoretical because they hinge on the contingent behavior of third parties—

strangers to this lawsuit about whom no evidence exists in this record. Accordingly, it is just as likely that these third parties will obtain services from the other providers that will receive the redirected funds as it is that they will go without services—unless, of course, the third-parties decide they no longer want the services from *any* provider. Planned Parenthood's invoking theoretical, speculative harms to nonparties thus provides no basis for concluding the District Court abused its discretion by finding a lack of irreparable harm *to Planned Parenthood*.

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.

Because a preliminary injunction is such extraordinary relief, "courts must balance the competing claims of injury and consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24. The balance of harms must weigh in the movant's favor to warrant a preliminary injunction. *Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1224 (10th Cir. 2009); *Heideman*, 348 F.3d at 1188-89.

The District Court did not abuse its discretion by finding that the balance of harms favors Utah. As discussed above, the Governor's directive does not violate Planned Parenthood's constitutional rights, does not cause reputational harm, and does not lead to financial harm (which is reparable harm in any event). Planned

Parenthood remains eligible for Medicaid reimbursement and may continue to advocate for and perform abortions—as it did during Governor Herbert's six prior years in office, when he did not stop UDOH from entering discretionary contracts with Planned Parenthood. Any harm to Planned Parenthood from the directive thus relates only to the loss of four discretionary contracts. *See* App. 2:496.

In contrast, an injunction requiring Utah to continue funding the contracts would deprive State Defendants of their "discretion under the contracts to consider whether continuation of them would send a message that wrongful conduct is acceptable." *Id.* at 2:497. Injunctive relief also would "curtail[]" the State's "authority to manage [its] affairs" and "deprive defendants of their contractual right to terminate the contracts at will." *Id.* at 2:496.

In fact, these proceedings have already twice resulted in that harm to Utah—the District Court's (now vacated) TRO, and this Court's order granting a stay pending appeal, twice led to Utah's renewing discretionary contracts its duly elected Governor had decided it was in the State's interest to cancel or let expire. Thus, continuing to subject State Defendants to an injunction unquestionably infringes Utah's well-recognized "interest in being free from intensive judicial supervision of its daily management functions." *Umbehr*, 518 U.S. at 678.

Any continuing injunctive relief also implicates serious federalism concerns. When "the exercise of authority by state officials is attacked, federal courts must

be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'" *Rizzo*, 423 U.S. at 378 (quoting *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951)). A plaintiff seeking to enjoin government action "must contend with 'the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs.'" *Id.* at 378-79 (quoting *Sampson*, 415 U.S. at 83) (other quotation marks omitted). Equally clear is the requirement that when a plaintiff asks a federal court to enjoin state action, "appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief." *Id.* at 379.

Thus, even in "an action brought under § 1983, . . . the underlying notions of federalism which Congress has recognized in dealing with the relationships between federal and state courts still have weight." *Id.* In particular, "the principles of equity . . . militate heavily against the grant of an injunction except in the most extraordinary circumstances." *Id.* The Supreme Court has left no doubt that these "principles of federalism," which "play such an important part in governing the relationship between federal courts and state governments," clearly apply when a plaintiff seeks injunctive relief "against those in charge of an executive branch of an agency of state." *Id.* at 380.

The District Court's order appropriately accounts for these principles. It gives due weight to the federalism concerns inherent in a federal judicial order requiring a State's chief executive to enter or renew a discretionary contract, since such equitable relief would "remove the defendants' discretionary decisionmaking." App. 2:497. Depriving a State's governor of such discretion constitutes irreparable harm because "[t]here is no monetary remedy for such injuries." *Id.* The District Court's conclusion on this element was not an abuse of discretion.[9]

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

Finally, the District Court correctly concluded that enjoining the State from terminating the contracts "is not in the public interest." App. 2:497.

The District Court's conclusion that "some members of the public may be harmed if the contracts terminate" because "it is not clear" whether UDOH can "redirect the funding to other qualified providers," *id.*, does not account for

[9] These federalism principles also animate orders from members of the Supreme Court, acting as Circuit Justices, repeatedly acknowledging that "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *accord Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 506 (2013) (Scalia, J., concurring in denial of application to vacate stay). This analogous precedent further supports the District Court's conclusion that an injunction would necessarily harm the State by requiring it to reenter discretionary contracts it would otherwise cancel.

repeated public statements by Planned Parenthood's Executive Director. She promised that Governor Herbert's directive will not stop Planned Parenthood from providing the services: "Planned Parenthood does not break its commitment to the communities that we serve. . . . We will not stop any of these services. The education programs are for middle-schoolers and high-schoolers in vulnerable communities. We're not going to stop any of this. It's too important." *Id.* at 1:56. Planned Parenthood has the financial means to continue these services without the pass-through funding dispersed by the State. Its 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 id.* at 1:52-53,—around three percent of Planned Parenthood's total budget. In short, if Planned Parenthood stops providing these services, it would not appear to be for lack of pass-through funding.

But as the District Court correctly reasoned, the availability of services under the four contracts is not the only public interest an injunction would implicate. The public also has an interest in "the right of the elected Governor of this State to make decisions about what is in the best interest of the State." *Id.* at 2:497. The District Court correctly recognized that "[i]t is contrary to the public's interest to remove from the Governor the very discretion his position entails. Indeed, these are the types of decisions that should be left to elected officials and not managed by the courts." *Id.*

Longstanding Supreme Court precedent supports the District Court's conclusion. Chief Justice John Marshall concluded 213 years ago that when "the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable." *Marbury v. Madison*, 1 Cranch 137, 166 (1803); *see also id.* at 170-71 ("Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation."). Although mandamus was the specific equitable relief at issue in *Marbury*, later decisions make clear that the executive-discretion constraint applies to all forms of equitable relief, including injunctions. *See, e.g.*, *U.S. ex rel. Riverside Oil Co. v. Hitchcock*, 190 U.S. 316, 324 (1903) ("Neither an injunction nor mandamus will lie against an officer of the [executive branch] to control him in discharging an official duty which requires the exercise of his judgment and discretion.").

Planned Parenthood's brief is bereft of any precedent undermining that conclusion.

CONCLUSION

The District Court did not abuse its discretion in denying Planned Parenthood's motion for injunctive relief. This Court should vacate its stay of, and affirm, that order.

DATED: February 16, 2016

Respectfully submitted.

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I hereby certify that on the 16th day of February, 2016, a true, correct and complete copy of the foregoing Brief of Appellees was filed with the Court and served on the counsel of record listed below via the Court's ECF system:

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