

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

PLANNED PARENTHOOD OF *
CENTRAL NORTH CAROLINA, *
 *
Plaintiff, *
 * Case No. 1:11CV531
vs. *
 *
LANIER CANSLER, in his * Winston-Salem, North Carolina
official capacity as the * August 10, 2011
Secretary of the North * 10 a.m.
Carolina Department of *
Health and Human Services, *
 *
Defendant. *

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE JAMES A. BEATY, JR.,
UNITED STATES CHIEF DISTRICT JUDGE.

APPEARANCES:

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P R O C E E D I N G S

THE COURT: The matter now being called for hearing is entitled Planned Parenthood of Central North Carolina versus Lanier Cansler.

If the parties will identify yourselves for the record.

MR. WOLFSON: Good morning, Your Honor. Thank you. My name is Paul Wolfson, appearing for the Plaintiff in this matter; and with me at counsel table are Mr. Jack Nichols and Mr. Joshua Salzman.

THE COURT: Yes.

MS. BULLOCK: Your Honor, my name is Mabel Bullock. I'm with the public health section of the Attorney General's office and I'm representing Defendant Cansler.

THE COURT: All right. It's the Plaintiff's motion for preliminary injunction. I'll hear from you.

MR. WOLFSON: Thank you, Your Honor.

This case involves one of several statutes that have recently been enacted across the nation in which state legislatures have barred funding for Planned Parenthood because of that organization's prominence as a pro-choice advocate and for its provision of abortion services. Two District Courts have already enjoined such legislation.

And this law in some ways is the worst of all because in this case the North Carolina Legislature has abandoned any pretense of following any neutral principle at all and

1 has simply singled out Planned Parenthood by name and has
2 directed the State health department to deny all funds, all
3 contracts, and grants to Planned Parenthood. This kind of
4 categorical disqualification is a foreigner to our legal
5 system and it violates both the Constitution and Title X.

6 Until the day that Section 10.19 was enacted, Planned
7 Parenthood of Central North Carolina was a valued partner
8 with the State health department in providing much needed,
9 vital health services to vulnerable sectors in the community
10 in North Carolina. The State had funded several projects
11 run by Planned Parenthood and had showed every intention of
12 renewing contracts with Planned Parenthood in this fiscal
13 year.

14 What I -- and I'd like to focus on -- there are three
15 projects at issue in this case; and for the moment, I'd like
16 to focus on one of those projects to show the Court why
17 there would be irreparable harm in the absence of a
18 preliminary injunction.

19 One of the grants at issue in this case was a \$125,000
20 grant made available from federal funds provided through the
21 Title X program that the State health department
22 administers. That fund -- those funds were to go to a
23 Latino outreach and services project operated out of Planned
24 Parenthood's Durham clinic. The State had all -- the --
25 Planned Parenthood had run this project in previous years.

1 The State had already told Planned Parenthood that the
2 contract would be renewed for the coming year. Indeed, it
3 had tendered to Planned Parenthood a contract, which my
4 client had signed and returned to the State health
5 department.

6 Before Section 10.19 was enacted, there was every
7 indication that the State was going to renew its contract
8 for that grant and, indeed, for the two other grants that
9 are at issue in this case. The only reason that that
10 contract was not renewed was because Section 10.19 was
11 enacted and singled out Planned Parenthood by name as being
12 ineligible for any grants or contracts run by the department
13 of health services.

14 Now, I think it's important to understand that those
15 were -- these are competitive contracts. So Planned
16 Parenthood had applied for these grants and had come out
17 first in the process -- in the competitive contracting
18 process.

19 THE COURT: Were these solely Title X funds?

20 MR. WOLFSON: No for both also. There are three
21 pools of money we're talking about. So there's the Title X
22 funds, which are the Latino project from the Durham clinic.
23 That's \$125,000.

24 Then there is a second pool of money which is used in
25 Cumberland County which -- in a teen pregnancy prevention

1 education initiative and then -- so that's -- that's not
2 Title X funds. Those are State funds. So there's no
3 question of Planned Parenthood going to the federal
4 government and asking for that money separately. And
5 then -- so that's \$75,000.

6 And then there is a third grant, which is a grant for
7 providing long-acting contraceptives to lower income women.
8 That's also a separate pool of money. That's just State
9 money, not Title X funds.

10 So essentially all of those -- all of those programs
11 will have to be shut down by Planned Parenthood. The --
12 the -- Planned Parenthood has already shut down the program
13 for providing -- the women's health grant for providing
14 long-acting contraceptives, and if the funding -- if the law
15 is not enjoined and the funding is not restored -- for the
16 past month and a half Planned Parenthood has been dipping
17 into its reserves to make sure these programs can keep
18 going, but that has to come to an end very soon. And so
19 these programs will be shut down within a few weeks and
20 inevitably that will mean, you know, laying off staff,
21 terminating -- curtailing services; and probably Planned
22 Parenthood will be forced to close its Durham clinic
23 entirely because that --

24 THE COURT: Are services available through other
25 entities?

1 MR. WOLFSON: Well, the -- the State has not
2 indicated that the services are available through other
3 entities. There are -- the county health department does
4 offer various kinds of services to people in Durham County;
5 but as we pointed out in our affidavit, one of the things
6 that Planned Parenthood can offer people is -- first of all,
7 it has -- all of its clinicians at the Durham clinic are
8 bilingual. So it can -- given that this is a -- it's
9 a heavily Latino community in the area -- and indeed, of
10 course, one of the grants is directed for Latinos -- that's
11 obviously a very important thing. The county health
12 department does not have that -- does not have a fully
13 bilingual staff, so interpreters may be needed. That's, I
14 think, very important.

15 We are able to offer services on a -- virtually on a
16 walk-in basis. At the county health department, there are
17 sometimes wait times of weeks and indeed months for various
18 kinds of services. Of course, when you're talking about
19 women's health, these can be matters that are -- really need
20 to be addressed on an urgent, real-time basis. We are able
21 to offer weekend hours and some weekday hours late, you
22 know, into the evening. So these are all things that the
23 county health department cannot offer.

24 And then if we -- if we really did have to close the
25 Durham clinic entirely, which seems likely, we're talking

1 about -- that clinic sees about 3,000 patients a year --
2 3,000 unique patients a year. That's running up to about
3 7,000 visits from 3,000 unique patients; and, you know, the
4 State has not suggested that the county health department
5 will be able to absorb all of those patients, certainly not
6 in a way where they could be seen on a timely basis.

7 So not only is there irreparable harm to Planned
8 Parenthood from having to curtail its operations and having
9 to shut down the clinic, but I think there's a very serious
10 public interest issue here, which is, of course, the fourth
11 prong of the preliminary injunction standard, which is will
12 the public interest be served by essentially freezing the
13 status quo before, which was that we were going to get the
14 contracts and the funding.

15 Now, the State has suggested that we can go to the
16 federal government for funding. First of all, that's not
17 the case for two of the programs that I spoke about.

18 THE COURT: And you're speaking of making a direct
19 grant -- seeking a direct grant from the federal government.

20 MR. WOLFSON: Correct.

21 First of all, that's just not true about two of the
22 programs, the teen pregnancy program and the long-acting
23 contraceptive program. And for the other program, one of
24 the crucial problems with that argument is that these funds
25 are -- you know, you have to apply for these funds well in

1 advance of the fiscal year. So the grants are made
2 available on a fiscal-year cycle. So for the current fiscal
3 year, which began July 1, the grant applications for that
4 were due, you know, well -- I think in the late winter or
5 early spring at some point. So time has passed for that.
6 So we're not -- if we could -- if we even could apply to the
7 federal government -- of course, there is no assurance the
8 federal government would give us the money. If we could
9 apply to the federal government, we couldn't even get that
10 money until July of 2012.

11 In the meantime, we would have to shut down. Our
12 patients would not have our services. We don't know where
13 they would go. And even, theoretically, if we could ramp up
14 later having gotten the money -- you know, in healthcare
15 there's a very serious issue with continuity of care. I
16 mean, we lose the -- you know, part of our objective here is
17 reaching out to the community and letting them know that
18 these services are available. If that disappears, you know,
19 I don't know that we'll be able to kind of re -- it will be
20 difficult to reinvent all of that later on having lost our
21 contacts with all the various people who refer and the
22 entities and the community groups that refer patients to our
23 clinic. And indeed the State has not suggested that other
24 entities will actually have -- really do have the capacity
25 to be able to step into the breach and replicate the

1 services that we have provided for, you know, several years
2 up until now.

3 The -- I've spoken to the -- I've spoken to the -- the
4 inability to reach out for the federal funds, to our having
5 to curtail services imminently, to having to close the
6 Durham clinic with a loss of services and a loss of --
7 obviously, having to lay off our staff. We don't know that
8 we would be able to get back our staff even if we would be
9 able to get the funding later and ramp up the program again,
10 though that -- that is, I think, the key point on the
11 irreparable harm that would befall Planned Parenthood in the
12 absence of an injunction.

13 Turning to the likelihood of success on the merits, the
14 State has provided no legitimate justification for its
15 decision to disqualify Planned Parenthood and only Planned
16 Parenthood from state and federal funding. Indeed, I think
17 what's most notable by the State's brief is what it does not
18 say. It does not argue that there has been any complaint
19 about the quality of our services. It does not argue that
20 there is any evidence that we have engaged in any financial
21 irresponsibility or any program integrity problems. Indeed,
22 as I've spoken, the State was all prepared to renew its
23 contracts with us. It does not argue that Section 10.19 is
24 a budgetary or a cost-saving measure and indeed it's not.

25 The -- the legislature's intent, presumably, was that

1 the money go to other programs and, of course, for -- this
2 is money -- the Title X funds are the money that the State
3 gets from the federal government. So it has to spend that
4 money. It can't just pocket it. And most notably, the
5 State, I think to its credit, has not even -- could not even
6 bring itself to defend what was said in the legislative
7 history, especially in the House of Representatives, about
8 the justification for Section 10.19. As the Court is aware,
9 the -- the interest that was offered in the House of
10 Representatives, both in the committee and on the floor, for
11 Section 10.19 was that Planned Parenthood was an unsavory
12 organization because of the past history of its founder,
13 Margaret Sanger, with the eugenics movement.

14 You know, there are so many problems with it that I
15 can't even -- you know, it's hard to know where to begin
16 other than the fact that, you know, that -- the comments
17 that were made were 80 years ago when this organization in
18 North Carolina wasn't even in existence. It has never been
19 involved in the eugenics movement, et cetera, but I think --
20 I think to its credit the State has not even taken up that
21 and accepted that that would be a justification because that
22 is just a -- that is just a straight-out punishment of this
23 organization for something that somebody affiliated with an
24 affiliate of it did 80 years ago.

25 This is also not -- what's also not at issue here, this

1 is not a case where the State has decided, "We're going to
2 fund certain activities and not other activities." So
3 there's no question -- we have no dispute with the principle
4 that the State has discretion in deciding in its budgetary
5 priorities that it's going to fund certain activities and
6 not others.

7 THE COURT: So in each instance here where you've
8 talked about the funding being involved, these are programs
9 that the State would otherwise or is otherwise making funds
10 available for, whether it's the Latino family planning
11 program or the teen pregnancy program or the other
12 contraceptive program you mentioned.

13 MR. WOLFSON: That is correct. These are
14 activities that the State desires to fund and desires
15 somebody to implement. So this is not -- this is not a
16 question that the State -- this doesn't bring at all into
17 question the principle that the State can decide where its
18 budgetary priorities go. It also doesn't bring into
19 question the principle that the State has averted to in its
20 brief that the State can favor childbirth over abortion in
21 deciding how to use its funds. The Supreme Court has --

22 THE COURT: In terms of putting any funds toward
23 the issue.

24 MR. WOLFSON: Correct, correct.

25 The Supreme Court has said so. But what this is about,

1 this is about something else altogether. This is about the
2 State saying, "We are not going to give you money, not
3 because it would be -- that money would be used for
4 abortions but because you have engaged in abortion-related
5 activities and speech elsewhere with your own money, on your
6 own time, in other programs not funded by the State; that
7 because we don't -- we don't like that and we want to
8 penalize that for -- you for doing that we're just going to
9 deny you funding here for a completely unrelated and indeed
10 worthy activity," which is family planning, teen pregnancy.

11 THE COURT: What would be the objective? "If you
12 don't do that" -- "if you don't abandon your activities,
13 then we're not going to give you funding at all on programs
14 that we will fund"?

15 MR. WOLFSON: Well, I don't know what the
16 objective would be. I mean, of course, this is just a
17 categorical ban. It says, "You may not have funding." I
18 mean, they haven't given us the option of saying, "If you
19 give up your abortions, you can get the money." But I don't
20 think that that's -- you know, it's not a *quid pro quo* that
21 the State has engaged in here. They've just basically said,
22 "You" -- and one assumes it's because of "you," Planned
23 Parenthood, and one has to assume it's because of what
24 you've done previously -- "you may not get our money and
25 federal money."

1 And indeed, Senator Daniel on the floor of the Senate
2 said, you know, "I think this is a very legitimate bill that
3 we have here because I would just like to point out the
4 pregnant women who come to Planned Parenthood overwhelmingly
5 choose to have abortions rather than, for example, to seek
6 referral -- rather than, for example, to have referral for
7 adoption."

8 Now, obviously, one can have the debate about abortion
9 versus adoption and the moral issues, but that's not the
10 issue here. The issue here is that providing abortion
11 services is a constitutionally-protected activity and has
12 been so recognized by the U.S. Supreme Court many times, and
13 the North Carolina Legislature is not authorized within the
14 confines of the First and Fourteenth Amendments to say to
15 Planned Parenthood, "Because you engage in those
16 constitutionally-protected activities we are deciding to put
17 a mark on you and say that you are not entitled to our
18 money." Even if it has nothing to do -- even if the money
19 and the activity have nothing to do with abortion, even if
20 the money is going to activities that we think are
21 desirable, are important to the public health for
22 communities in North Carolina, which I think -- indeed, the
23 legislative history -- the defenders of the bill have said,
24 "We're not taking" -- "We're not defunding this. We want to
25 fund family planning. This is something we want to do.

1 We're not reducing the funding. So this is not a program
2 we're not reducing funding for. We just don't want you to
3 be involved in it."

4 The -- this sort of concept that you can't penalize a
5 person or an organization for engaging in
6 constitutionally-protected activities, I think this goes
7 back to the classic cases from the Supreme Court of the
8 1950s where the Court said that someone couldn't be denied a
9 government job because they wouldn't take a loyalty oath or
10 because they wouldn't disavow their sympathy for membership
11 in certain organizations or certain movements which were
12 disfavored at the time, maybe even disfavored today; but the
13 Courts -- the Court understood that denying somebody a job,
14 money, a benefit because they have engaged in
15 constitutionally-protected activity has a powerful coercive
16 effect, not just on that person but also on other people who
17 are watching. It has a powerful coercive effect and the
18 inevitable result is to abridge those constitutional
19 freedoms just as forcefully as if you had a direct restraint
20 on the constitutional protected act -- on the protected
21 activity.

22 THE COURT: So speak to me about which portions of
23 the constitution you think -- you say are at issue here.

24 MR. WOLFSON: Correct.

25 THE COURT: What's being violated?

1 MR. WOLFSON: So there are -- we rely on four
2 provisions of the Constitution and I think it's useful to
3 kind of separate them into two groups of two because I think
4 they're -- although they're doctrinally different, they
5 are -- the two and two can be thought of sort of raising
6 similar issues.

7 What I have been speaking of mostly up until now has
8 been the First Amendment, of course, and the Due Process
9 Clause of the Fourteenth Amendment, in particular the aspect
10 of the Due Process Clause that has been held to guarantee
11 the right of a woman to terminate her pregnancy. So one can
12 talk of that as substantive due process but part of the
13 liberty that is protected by the Due Process Clause of the
14 Fourteenth Amendment. So those are two separate kinds of
15 constitutionally-protected activity, providing services to
16 women who want to terminate their pregnancy and also
17 speaking out in favor of reproductive choice that Planned
18 Parenthood, of course, has long engaged in and is a very
19 visible participant in, perhaps the most visible.

20 And I think the Court is aware that we provided the
21 Court with the two other cases in Kansas and in Indiana
22 where the legislatures have acted similarly. Of course,
23 there was a big debate in the United States Congress earlier
24 this year where very similar legislation was actually passed
25 by the House of Representatives that would have just

1 completely defunded Planned Parenthood from federal funds.
2 That did not survive the Senate, but I think we can see that
3 these are all part of a movement that is afoot in
4 legislatures and to penalize a particularly visible
5 organization for having engaged in
6 constitutionally-protected activity. Again, this is not an
7 issue of the legislature choosing which activities it wants
8 to fund out of its budget because the legislature has made
9 clear that these activities, family planning and teen
10 pregnancy prevention, are highly important, desirable
11 activities that it's funding in full, just not by Planned
12 Parenthood. So that's one set.

13 The second set of constitutional challenges that I
14 haven't yet spoken to quite as much arise -- are the Bill of
15 Attainder and the violation of the Equal Protection Clause
16 of the Fourteenth Amendment. And these are -- they are
17 doctrinally distinct, but they are, I think -- they share
18 similar concerns because they -- the concern there is that
19 of all the entities in the world the legislature has just
20 picked out one or one set of affiliated entities in Planned
21 Parenthood and said, "You may not get federal funds." Or,
22 sorry, state or federal funds.

23 The -- the Equal Protection Clause, there are
24 several -- I think there are several aspects to our equal
25 protection challenge here. The first is, as the Supreme

1 Court pointed out or held in the case of *Romer versus Evans*,
2 when a legislature singles out a group of -- a specifically
3 identifiable group or entities, group of entities for
4 disfavored treatment and where that singling out is not
5 supported by a legitimate regulatory objective but appears
6 designed -- appears motivated out of animus, out of a bear
7 desire to disfavor, that violates the Equal Protection
8 Clause even at its lowest level of scrutiny, which is
9 rational basis, because the bear desire to -- the bear
10 desire to inflict disapproval on a group without any other
11 regulatory objective is not -- it's just not even a
12 legitimate governmental objective under the Fourteenth
13 Amendment.

14 So another strand of our equal protection challenge is
15 what is known as the "class of one" type of challenge, which
16 is I think related, which is just you can't just single out
17 one person or one entity without any rational basis for
18 doing so. The State hasn't suggested that there is one.

19 And then, second, I think this case does implicate what
20 is sometimes called the fundamental rights strand of equal
21 protection, which is you can't discriminate against a group
22 of people because they have engaged in fundamental rights.
23 And as I've spoken, obviously Planned Parenthood has
24 frequently and vocally engaged in fundamental rights. This
25 is a strand of equal protection that goes back to the

1 Supreme Court's cases where they decided that you couldn't
2 discriminate against people with giving them public
3 assistance because they recently moved into the state
4 because they had engaged in their constitutional right to
5 interstate travel. That's a constitutional right and you
6 couldn't draw distinction based on that.

7 Here I think it's sort of the same problem. The
8 distinction is being drawn -- the line is being drawn, the
9 circle is being drawn around Planned Parenthood and the
10 target painted on it because it has engaged in
11 constitutionally-protected activity and it's just motivated
12 by a desire to penalize Planned Parenthood.

13 Turning to the Bill of Attainder, I think essentially
14 this is -- for sort of similar reasons this is -- I mean,
15 there are very few Bill of Attainder cases in the courts,
16 reported cases; and I think the reason why is that this kind
17 of action is just so fundamentally at odds with our legal
18 system and principles that legislatures don't do it very
19 often because they know that they -- that this is wrong. It
20 is -- it is really unusual for --

21 THE COURT: It appears from a legislative history
22 that this was brought to the attention of some of the
23 sponsors of the 10.19.

24 MR. WOLFSON: Correct. That was -- the Bill of
25 Attainder issue was raised on the floor, as it was -- as it

1 has been in other similar -- other of these other similar
2 laws and bills that I've pointed out; but it, obviously, did
3 not prevail in the legislature.

4 But this is -- I mean, it's one thing for the
5 legislature to say, "We're not going to give funds to a
6 particular class of people because, you know, maybe you're
7 not suitable for this kind of particular program." But for
8 the legislature to actually kind of identify an organization
9 by name and say, "Not you, "You can't get any government
10 funds," "You can't participate in government contracts,"
11 "You're not eligible to help us carry out valuable services
12 for the community," that is -- that is really extraordinary
13 and happens -- fortunately, happens very rarely in our
14 country.

15 I think the framers of the Constitution understood that
16 from time to time in a democracy -- and we have all the
17 benefits of our democracy, which I'm very happy for. But
18 from time to time in a democracy, the public does get roused
19 by passions against particular people, groups,
20 organizations. Fortunately, in our democracy, the passions
21 usually subside, but sometimes they don't subside without
22 leaving some devastation in their wake.

23 And this, I think, is an example because the -- the --
24 the Section 10.19 bears all the hallmarks of a legislature
25 being roused to punish a particular organization for what it

1 has done in the past. Obviously, I've spoken to the
2 comments made in the committee and on the floor about this
3 being an appalling organization because the women get
4 abortions instead of adoption referrals because of the
5 supposed participation in the eugenics movement, which is a
6 terrible blot on the North Carolina history but not
7 something in which my organization had anything -- my client
8 had anything to do with. But the singling out for --
9 essentially for vilification of a particular organization
10 makes this -- really bears this the hallmarks of punishment.
11 The -- and that, unfortunately, is what has happened in
12 Section 10.19.

13 What is not present in Section 10.19 is the presence of
14 a legitimate regulatory objective. So there are cases where
15 the Courts have said, "Okay. You know, we're troubled by
16 the fact that the legislature has identified a particular
17 person or group or entity by name, but let's think about
18 whether or let's examine whether maybe there might have been
19 a legitimate nonpunitive reason for them to do so. For
20 example, was this an organization that in the past had shown
21 signs of fiscal impropriety? Was it an organization that in
22 the past had failed to carry out the terms of the program in
23 an effective way that the State intended? Were there
24 concerns about that organization being committed to the
25 program?"

1 THE COURT: If these were the reasons, they would
2 not necessarily be for punishment purposes, but they're
3 legitimate reasons.

4 MR. WOLFSON: Correct. Those would be legitimate
5 purposes. Of course, none of them appear in the legislative
6 history and the State has not advanced any of them here.
7 The only -- the only interests that the State has advanced
8 are "We can choose childbirth over abortion," which is --
9 is -- it's true as a general matter, but -- and in terms of
10 where the State directs its funds, but that has nothing to
11 do with this program. And the State has said, "Well, we're
12 entitled to favor organizations that are pro-life rather
13 than pro-choice in our funding decisions." But in this
14 context, that is not a legitimate regulatory objective. I
15 mean, this has -- there's no match between that objective
16 and the programs that are being funded here that Planned
17 Parenthood was being asked to carry out.

18 So those -- those are the -- those are the set of
19 concerns that are raised by the Equal Protection Clause and
20 the Bill of Attainder by the singling out of Planned
21 Parenthood.

22 Finally, I want to touch on the Supremacy Clause and
23 Title X. I've left that for last because normally, of
24 course, the Courts look to the nonconstitutional ground
25 before they look to the constitutional ground in the hopes

1 of avoiding a constitutional problem. That, unfortunately,
2 I think is not available to the Court here because only one
3 of our claims involves Title X and Supremacy Clause, only
4 the Title X funds, too, and not the others. So our
5 constitutional claims go to all three and are only -- and
6 are the only claims we have for two of the pools of -- two
7 of the three pools of money that we spoke to. So that is
8 why I started with the Constitution.

9 But -- let me say a few things. First of all, as the
10 Fifth Circuit has most noticeably held in the *Planned*
11 *Parenthood versus Sanchez* and as the recent cases in Kansas
12 and Indiana have pointed out, Title X reflects Congress's
13 judgment that funds be made available on the broadest
14 possible array to every reach of the state, every community;
15 and that is why Congress has said that any -- any nonprofit
16 entity is eligible to apply for funds. And the State, by
17 saying just there's a group of people we won't even let
18 apply, the State has arti -- has -- that -- to use the
19 language of implied preemption, that stands as an obstacle
20 to Congress's objectives because it is narrowing the class
21 of people and entities that would be --

22 THE COURT: Is that creating some additional
23 criteria that Congress did not have?

24 MR. WOLFSON: Correct. Exactly.

25 Now, the State hasn't really denied that. I mean,

1 their responses have been, "Well, you can go to the federal
2 government for money yourself," which I have spoken to. The
3 other things they have said is, "Well this, can't be raised
4 under Section 1983 because this isn't a right." We disagree
5 with that, but I think the more important point is the Court
6 does not have to decide that because the Court has authority
7 just to entertain a Supremacy Clause challenge as sort of a
8 direct cause of action for equitable -- we're talking about
9 equitable relief, of course, not money damages.

10 But the -- we point to cases in our reply brief and the
11 cases are legion going back to the 1820s where the federal
12 courts have just heard -- before Section 1983 was even
13 enacted, of course, which was after the Civil War -- where
14 the courts have just -- the federal courts have just granted
15 injunctions against state statutes that just conflict with a
16 federal statute, and that sort of equitable authority arises
17 under this Court's subject matter jurisdiction under 1331
18 and is properly before the Court without regard to whether
19 Section 1983 also would provide the Court with the vehicle.
20 1983 might be important later on down the road or attorney's
21 fees under 1988 or something like that, but there's no need
22 for the Court to address that here.

23 And then, of course, finally, the State has addressed
24 the Eleventh Amendment; and I think the Court will
25 understand that this -- the Eleventh Amendment just is not

1 applicable here. This is a direct -- this is a classic case
2 under *Ex Parte Young* where we are suing a state officer for
3 -- essentially for acting ultra vires, for acting in a way
4 that is illegal under federal statutory and constitutional
5 law. We're not seeking retrospective money damages. We are
6 asking for the Court to enjoin the enforcement of Section
7 10.19 here today. That is what we have asked for in our
8 motion. It is our belief --

9 THE COURT: The Defendant makes the point that
10 with respect to the contracts that you're asking for -- that
11 your contract, if it existed at all, may have expired and
12 you're asking for the injunction for ongoing contracts that
13 are not even in existence, as they would argue.

14 MR. WOLFSON: Right. So it is our
15 understanding -- I mean, Ms. Bullock may be able to speak to
16 this, but from the record as we -- the factual record as we
17 understand it, the -- the State was all -- was ready, able,
18 and willing to enter into the contracts with us. Indeed, of
19 course, as I said, they had tendered contracts to us, which
20 we had signed and returned to them; and they had indicated
21 to us that we had won the competitive grant process; and
22 therefore, we were to get the contract and to get the money.

23 So the only reason that we have been -- we have been
24 tendered for why that did not happen was the enactment of
25 Section 10.19. So if that law is enjoined, it would seem to

1 me the natural course of events would be that the State
2 would do what it had said it already would do, which is
3 sign the contracts. It is -- we haven't -- we do not have
4 any information that would indicate to us that those
5 contracts -- that any other contracts have been let to
6 anybody else or that the money has been obligated elsewhere.
7 If that is the case, you know, we might ask the Court --

8 THE COURT: It's not in the record at this point.

9 MR. WOLFSON: It's not in the record at this
10 point. I would say that, contrary to what happened in
11 Kansas where the State said that had happened, the State has
12 not said that has happened here. So they have not told the
13 Court that "We've given that money to somebody else." So it
14 would -- it would appear to us that the status quo, as far
15 as we can tell, is that the -- if 10.19 is enjoined, the
16 State should be ready to move forward with what it said it
17 would do already.

18 THE COURT: There's some issue with respect to
19 what's the status quo. The Defendant argues status quo
20 is now that 10.19 has been enacted, so that's status quo.
21 What's your response to that?

22 MR. WOLFSON: I think the status quo is the
23 last -- what is the term -- uncontested situation between
24 the parties; and the day before Section 10.19 was enacted
25 the State had tendered -- had informed us that the contracts

1 would be renewed, had tendered the contracts to us. We had
2 signed them and returned them to the State. So it would
3 appear that -- and as I pointed out, again, this is a
4 competitive grant process, so we won. So it would appear
5 that there would be nothing left for the State to do but to
6 finalize the contract and enter into their contractual
7 relationship that it was previously prepared to do.

8 Unless the Court has any questions --

9 THE COURT: I'm sure the State is going to argue
10 with respect to whether or not there's -- how the Court is
11 to take into account balance of the equities -- you haven't
12 talked about that very much -- as to how the State might be
13 harmed as opposed -- or not harmed, as you may argue, as
14 opposed to the Plaintiff.

15 MR. WOLFSON: Well, I don't -- I don't see how
16 the State is harmed because the State was -- the status quo
17 was the State was prepared to do exactly what we would like
18 it to do, which is enter into a contractual relationship
19 with us and give us -- and give us the grants.

20 I mean, as I said before, we -- we are a
21 long-and-valued partner with the State department of health
22 for close to a decade for carrying out these kinds of
23 programs. I mean, the State -- I mean, to its credit, the
24 State in its briefs has never said, "We" -- you know, "We
25 did this because, you know, we, the health department, by

1 the way, we're dissatisfied with your performance." So, I
2 mean, the State -- this is not a situation where the State
3 would say, you know, "We didn't -- we didn't really like the
4 way you were carrying out this program and we actually just
5 think it would be better for somebody else to have -- have a
6 shot at it." That would be something that would, obviously,
7 be important to the State if that were true, but no
8 suggestion has been offered that it is.

9 And, again, this is not -- we don't -- this is not a
10 case here where the State health department said, totally
11 independent of 10.19, "We're just not going to give you the
12 contract this year. We're going to give it to somebody
13 else." I mean, there we would have a different situation I
14 think because the state might have an argument -- obviously,
15 one would have to know more about the facts, but the State
16 might have an argument that it would be harmed because
17 somebody else would provide it with superior results.

18 But here, because we were the winners of the
19 competitive contracting process and because the State had
20 already indicated it was ready, willing, and able to
21 contract with us, it's hard to see how the State is harmed.
22 And, again, there's no budgetary impact. We're not asking
23 the State to spend money that it wouldn't otherwise spend.

24 THE COURT: Thank you, sir.

25 MR. WOLFSON: Thank you, Your Honor.

1 THE COURT: Ms. Bullock.

2 MS. BULLOCK: Your Honor, the various claims that
3 the Plaintiff have brought in its complaint have already
4 been brought up: Supremacy Clause, First Amendment, Due
5 Process Clause, Equal Protection, Bill of Attainder.

6 I'll start off by saying there is no conflict between
7 the federal law and 10.19 -- and Section 10.19. Does 10.19
8 as written prevent Planned Parenthood from receiving any
9 funds administered by the North Carolina Department of
10 Health and Human Services? Yes, it does. Does it prevent
11 Planned Parenthood from applying directly to the federal
12 government for Title X family planning funding? No, it does
13 not. Is the State the only place that Planned Parenthood
14 can go to apply for Title X funding? No. Unlike Medicaid,
15 the State is not the only source of Title X funding for the
16 Plaintiff for family planning funding.

17 In their brief --

18 THE COURT: Are you speaking of prospectively or
19 are you talking about the contracts that may have already
20 been in existence in terms of the fiscal years?

21 MS. BULLOCK: Your Honor, what I'm saying is that
22 Planned Parenthood has always had the ability to directly
23 apply. They have chosen on their own, in their discretion
24 to rely on being a delegate of the North Carolina Department
25 of Health and Human Services.

1 THE COURT: Well, North Carolina in making the
2 application included Planned Parenthood as one of the
3 service providers, didn't it?

4 MS. BULLOCK: What it indicated in its application
5 was a past history of what the previous year -- their record
6 was. It did not say that their application was based on a
7 promise of providing funds to Planned Parenthood. It was
8 basically a history of what had gone on the previous year
9 for --

10 THE COURT: And that was that Planned Parenthood
11 had provided these services that were subject to Title X
12 funding or could receive Title X funding.

13 MS. BULLOCK: I'm not sure that I understand.

14 THE COURT: In terms of including a reference to
15 Planned Parenthood in the grant you were seeking from the
16 federal government for Title X funds --

17 MS. BULLOCK: Yes, sir.

18 THE COURT: -- they were mentioned to the extent
19 they had been receiving Title X funds without any reason not
20 to give them those funds.

21 MS. BULLOCK: It did not indicate any bad dealings
22 with Planned Parenthood. It did not indicate any problems
23 with them, but it did not indicate any promise that they
24 would be part of the package deal if the federal government
25 decided to give them the Title X funding because, again, the

1 State has to apply for the funding. It's no guarantee to
2 the State that they'll get the funds as a grantee, just as
3 there's no guarantee that a delegate is going to get the
4 funds.

5 THE COURT: But for the affected years, they did
6 get the funding.

7 MS. BULLOCK: They have previously gotten the
8 Title X funding from the State, yes, Your Honor.

9 THE COURT: In terms of fiscal years, I believe
10 the Plaintiff was speaking of for the 2011-2012 period the
11 funding was already in place, \$125,000 for the Title X
12 money, and there was some contract, perhaps, for the other
13 services in Cumberland County or the contraceptive program.

14 MS. BULLOCK: A contract for this fiscal year had
15 been discussed with Planned Parenthood. Contracts had been
16 signed, but there was no execution of that contract. There
17 is no contract in effect at this time.

18 THE COURT: And why not?

19 MS. BULLOCK: Because there was, as the Plaintiff
20 has stated, 10.19; but because of that there was no new
21 contract that was entered into. The budget bill passed in
22 June to be effective July 1st. This lawsuit --

23 THE COURT: But you're saying but for 10.19, with
24 the contracts already having been let, more than likely they
25 would have received the funding?

1 MS. BULLOCK: Your Honor, what I'm saying is, is
2 that the contract that was in existence prior to June 30th
3 has expired. It expired June 30th. This law took effect
4 July 1st. The budget bill was passed June 15th. This
5 lawsuit was not filed until July 7th. The status quo at
6 that time was 10.19, no contract. And as far as what the
7 Plaintiffs are asking this Court to do --

8 THE COURT: Just for -- point of clarification.
9 If you say June 30th is when the contracts expired, are you
10 saying that the money in the contract that expired June 30th
11 would have been for the previous year or was that for the
12 upcoming fiscal period starting July 1, 2011?

13 MS. BULLOCK: No, I'm saying the contract fiscal
14 year July 1, 2010, to June 30th, 2011, expired June 30th.

15 THE COURT: Is that what they're seeking to get at
16 this point as a part of an injunction?

17 MS. BULLOCK: No, Your Honor. They're seeking to
18 obtain funding for the fiscal year July 1, 2011, through
19 July -- June 30th of 2012.

20 THE COURT: So is it correct they had a contract
21 for that that Plaintiff had signed and returned to the
22 State?

23 MS. BULLOCK: Your Honor, our position is there is
24 no contract unless it has been executed.

25 THE COURT: My question is: Is it correct that

1 they had a contract that they had returned to the State
2 covering the period from July 1, 2011, to June --

3 MS. BULLOCK: Yes, Your Honor. They had signed a
4 proposed contract, but it has not been executed. There is
5 no contract.

6 THE COURT: By the State.

7 MS. BULLOCK: Correct.

8 THE COURT: Thank you.

9 MS. BULLOCK: As far as the Plaintiff stating in
10 their brief that Planned Parenthood cannot obtain funds
11 directly from the government at least until next year is an
12 admission that it can apply for funding directly from the
13 federal government. They have made the choice, in their
14 discretion, not to do that; but because they haven't chose
15 to go directly to the federal government for the funding
16 does not make the action of 10.19 unconstitutional.

17 THE COURT: Again, though, you're talking about a
18 funding period that the application process, if they were
19 going for the 2012 to 2013 period, yes, as a part of this
20 year, 2011, they could have put in an application; but they
21 can't put any application in for monies for 2011-2012
22 because the period for that has run.

23 MS. BULLOCK: Yes, Your Honor.

24 THE COURT: Thank you.

25 MS. BULLOCK: But as far as other Planned

1 Parenthood organizations in the United States, there are
2 many that go directly to the federal government to get Title
3 X funding for whatever reason. May it be that it's easier
4 to have the funds administered through DHHS, this Planned
5 Parenthood organization has chosen to go through the State
6 and not go directly to the feds. That's their discretionary
7 decision and that's what they chose to do. The funds are
8 not guaranteed to any delegate application to the State of
9 North Carolina.

10 As far as the First Amendment and Due Process claims
11 that the Plaintiffs make, 10.19 does not impose a penalty on
12 any constitutionally-protected right of the Plaintiff.
13 Therefore, there's no violation of the First or Fourteenth
14 Amendments. Defendant Cansler maintains that the preference
15 of the majority of the North Carolina General Assembly to
16 prefer childbirth over abortion and not to provide funding
17 for organizations that are pro-choice is a preference that
18 the General Assembly is allowed to make. There is no
19 constitutional right to the funds for family planning and
20 the General Assembly can choose to fund such programs that
21 it supports. Planned Parenthood --

22 THE COURT: But you're funding other organizations
23 or would fund other organizations for the programs that are
24 involved here. We're not talking about abortion here.

25 MS. BULLOCK: Title X funding does go to many

1 other entities, but none of those other entities provide
2 abortions.

3 THE COURT: So because they're using other funds
4 other than Title X or other State funds through this
5 program -- because they otherwise use other funds for
6 abortion, you're saying they can be prohibited by 10.19 in
7 this case from getting these funds and not related to
8 abortion activities?

9 MS. BULLOCK: What I'm saying is 10.19 does
10 nothing to affect their freedom of speech, does nothing to
11 affect their ability to give abortions, provide abortions.
12 It makes no restriction on that whatsoever. They are still
13 able to do that on their own accord.

14 THE COURT: But because they do they cannot
15 receive funding that's otherwise available to anybody that
16 wants to apply?

17 MS. BULLOCK: They are not able to have funds that
18 are administered by DHHS with the Title X funding or other
19 funds, but they can apply directly to the federal
20 government.

21 THE COURT: What makes them not eligible for those
22 department of health services funds from the State?

23 MS. BULLOCK: That is a policy decision that the
24 General Assembly made.

25 THE COURT: What is the reason? Tell me again.

1 MS. BULLOCK: Because they favor childbirth over
2 abortion, which is a position that the General Assembly can
3 favor and support. Family planning funds, that's not a
4 constitutional right. Nobody has a right --

5 THE COURT: Is there any portion of the funds from
6 your argument that are related to the childbirth or abortion
7 issue that are involved here as a part of the funding in
8 this case?

9 MS. BULLOCK: Excuse me?

10 THE COURT: Are there any funds being used toward
11 that decision or choice that you make reference to,
12 pro-choice or abortion or life or abortions, any of the
13 funds that are a part of these programs being used for that?

14 MS. BULLOCK: Title X funds cannot be used for
15 abortion, but the General Assembly's position that it does
16 not want to provide support to the entity that does provide
17 abortions would be a policy that they can favor.

18 Again, the Plaintiff argues that 10.19 targets
19 protected speech and protected conduct, and Defendant
20 Cansler would argue that this is not accurate because there
21 is nothing that -- as far as freedom of speech or any type
22 of conduct that 10.19 would prohibit. Plaintiff does not
23 have a constitutional right to provide abortions and 10.19
24 does --

25 THE COURT: So you would suggest there is no

1 discriminatory aspect of 10.19?

2 MS. BULLOCK: I am stating that the position that
3 the General Assembly took does have a legitimate rational
4 basis because they can favor childbirth over abortion.

5 THE COURT: So you're saying it does not have any
6 discriminatory purpose?

7 MS. BULLOCK: There is no penalty intended, no,
8 Your Honor. What is intended is that they want to support
9 programs that favor childbirth and not abortion, and the
10 defunding of Planned Parenthood does not --

11 THE COURT: So if Planned Parenthood was seeking
12 funds from the General Assembly for abortions, then the
13 General Assembly certainly could prohibit that?

14 MS. BULLOCK: Yes, Your Honor.

15 THE COURT: Is that what they're seeking as a part
16 of what's involved in this case?

17 MS. BULLOCK: I'm sorry?

18 THE COURT: Are they seeking to get the monies in
19 this case from the Title X funding or the funds for the
20 statement at issue here, are they seeking to use those for
21 abortion purposes?

22 MS. BULLOCK: Is that what Planned Parenthood is
23 doing?

24 THE COURT: Yes.

25 MS. BULLOCK: Again, by federal and state law,

1 they're not allowed to use those funds for abortion.

2 THE COURT: But are they doing that? Is there any
3 suggestion they're doing that?

4 MS. BULLOCK: There has been no allegations that
5 there has been misuse of funds by Planned Parenthood.

6 THE COURT: Okay.

7 MS. BULLOCK: But in defunding Planned Parenthood,
8 there is no restriction on a woman's means of access to
9 vital medical information and it does not represent an
10 impermissible limitation upon free speech. It simply does
11 not fund it. There has been no restriction on the actions
12 or the speech, and the patients still have the ability to
13 obtain access to medical information and free speech as
14 existed prior to the funding through the State administered
15 Title X funds. The State did not create the condition of
16 indigence that many patients have. It is not funding
17 Planned Parenthood. There is no government --

18 THE COURT: It appears you're reading from your
19 brief that I may have already read before. What distinction
20 do you make between this case and the facts that may have
21 existed leading to results in the Kansas or the Indiana
22 case?

23 MS. BULLOCK: In the Kansas and in the -- in
24 *Sanchez* and in Indiana, there were various distinctions that
25 can be made. In this particular case, there was no

1 termination of an existing contract. They were the existing
2 facts in several of the other cases because there were
3 existing contracts that they were either -- in *Sanchez*, they
4 were required to sign an affidavit saying they were going to
5 give up the ability to do abortions in order to get the
6 funds and there was an existing contract. There is no
7 existing contract here.

8 And in the Indiana case, I believe one of the main pots
9 of money or whatever that were involved there was Medicaid
10 and with Medicaid you can only get that through the State,
11 but here you can get Title X directly from the federal
12 government.

13 So there are distinctions between those cases. I mean,
14 they're very similar. I'm not going to deny that. But as
15 far as the distinctions, there are many; and as far as the
16 General Assembly's right here to take a position favoring
17 childbirth over abortion, there are cases that allow them to
18 do that. Again, they're not denying any kind of benefit to
19 a patient seeking medical care because there are other
20 entities, mostly public health departments, that provide
21 these same --

22 THE COURT: The Plaintiff made note of Durham
23 County in particular for women health services where there
24 are some reasons why the services provided by Planned
25 Parenthood are more beneficial than those that could be

1 provided by the county to the extent that their -- the hours
2 are different, they work on the weekend, they have bilingual
3 staff that's not available within the county, based upon
4 what the representation is made to the Court. Is that a
5 reason why the -- certainly Planned Parenthood said it's
6 being harmed in that way; but to the extent that the
7 patients who are being denied those opportunities, are they
8 being harmed as well to the extent the county does not
9 provide those similar services?

10 MS. BULLOCK: Your Honor, I would state they are
11 not being denied medical services. It may be more difficult
12 for them to obtain them, but they are not being denied
13 physical services.

14 As far as the claim that Plaintiff has as being
15 entitled to the Title X funding, it is entitled to apply.
16 They can apply. They can apply directly.

17 As far as the case of *Planned Parenthood versus Wichita*
18 and in the Kansas -- most recent Kansas plaintiff -- Planned
19 Parenthood lawsuit, again, it dealt with an existing
20 contract that Planned Parenthood had terminated. That's not
21 the case here.

22 So it is not a situation where North Carolina -- where
23 the preliminary injunction that they're requesting would
24 merely force them to abide by contractual obligations.
25 There is no contract. What this Court would be doing if you

1 issued a preliminary injunction at this point -- because
2 they're asking more than stopping the enforcement of 10.19.
3 They're asking you to make the State enter into a contract
4 that they are not in now and to provide funding for them,
5 which they're not required to do.

6 They have no entitlement to the funding at all. They
7 do have an entitlement to apply for the funding, which they
8 can do directly. And the status quo, as Your Honor
9 indicated, is viewed differently here because, again, the
10 budget bill passed in mid-June. The effective date was July
11 1st. The contract expired July 30th and their action was
12 filed July the 7th. So the status quo was no contract,
13 10.19 is in effect.

14 THE COURT: What would the State do if the -- do
15 with the funds if the Court did not enjoin it in this case?

16 MS. BULLOCK: My understanding is that those next
17 in line that were part of the competitive bidding process
18 would be allotted those funds.

19 THE COURT: So the funds are still available at
20 this point?

21 MS. BULLOCK: As far as I know, Your Honor. There
22 is a budget crisis as far as certain funds are involved, so
23 I don't know the specifics on those.

24 Simply with the Bill of Attainder, there has been no
25 punishment here, as far as the General Assembly is

1 concerned. This was a statute that was passed because the
2 majority of the General Assembly favors childbirth over
3 abortion.

4 And as far as the Equal Protection Clause, the
5 Defendant Cansler maintains that their argument is
6 justified; that they can support -- the General Assembly can
7 support this position, childbirth over abortion; that 10.19
8 was not designed to harm Planned Parenthood but to protect
9 and favor of childbirth over abortion.

10 Again, Planned Parenthood has no fundamental right to
11 Title X funding from the State and Planned Parenthood can
12 apply directly. It may be that the application deadline has
13 passed, as Your Honor indicated, but the ability to apply
14 directly has always been there. They chose not to do that.

15 And as far as the level of or the standard --

16 THE COURT: How long have they been receiving it
17 from the State? Is there some pattern that's developed that
18 they were cooperating with the State and the State --

19 MS. BULLOCK: They have to apply every year. They
20 are not guaranteed this money on a year-to-year basis. They
21 have to apply every year.

22 THE COURT: How many years have they applied
23 before this time?

24 MS. BULLOCK: I know more than five.

25 THE COURT: And were they always successful in

1 receiving the grant?

2 MS. BULLOCK: My understanding is that they have
3 applied once in conjunction with the health department and
4 they were not granted. So they have not always, 100
5 percent, but that's the only case.

6 As far as Planned Parenthood not being a member of the
7 suspect class, the rational basis test applies; and as far
8 as the rational basis test is concerned, an Equal Protection
9 challenge to a government classification must be denied if
10 there's any reasonable, conceivable stated facts that
11 provide a rational basis for classification. So even if
12 there may be differences of opinion on the wisdom,
13 fairness, logic or legislative decision, if there is any
14 basis -- which here the basis would be that the
15 legislature -- majority of the legislature favors childbirth
16 over abortion -- then that would be a rational basis that
17 could be the basis of the statute.

18 And, again, Planned Parenthood has no constitutional
19 right to provide abortion services. Whatever rights it may
20 have in connection with that are directly derived from a
21 woman's right to abortion and nothing in 10.19 would prevent
22 a woman from having an abortion. There is no undue burden
23 that's been placed on the woman to obtain the abortion and
24 there is no restriction on Planned Parenthood --

25 THE COURT: Is that directly before the Court,

1 though? You're talking a lot about the abortion issue, but
2 is that directly before the Court?

3 MS. BULLOCK: Planned Parenthood is using that, in
4 my understanding, to say that they have a constitutional
5 right to these funds; and it would be the position of the
6 Defendant that they do not have -- there is no fundamental
7 right at issue here because they're not suspect class and
8 they are not entitled. It's not a benefit that they're
9 entitled to.

10 THE COURT: They're saying they have the right to
11 express support for abortions through using other funds than
12 the funds here. Is that what their First Amendment right
13 is?

14 MS. BULLOCK: There's no restriction in 10.19 that
15 would prevent them from doing that.

16 THE COURT: But back to the question or statement
17 I made earlier. Is there any suggestion if you stop doing
18 abortions you can get funding?

19 MS. BULLOCK: They are the ones that are claiming
20 that because of the loss of 10.19 funds they're going to be
21 having to lay off people and they're going to be --

22 THE COURT: You're not answering my question. Is
23 there any suggestion here that you can get funding if you
24 stop supporting abortions by the implication of 10.19 or
25 what the legislative history may be?

1 MS. BULLOCK: 10.19 does not make that statement,
2 no, Your Honor.

3 THE COURT: Do you want to address the legislative
4 history?

5 MS. BULLOCK: The legislative history that's been
6 presented by the Plaintiffs, again, as I stated in my brief,
7 it -- it is interesting, but it is an argument that --

8 THE COURT: Well, what does it say? What does
9 Representative Stam or Senator Daniel say?

10 MS. BULLOCK: I'm not trying to deny any of the
11 statements that the Plaintiff has made as far as statements
12 of the legislators that were involved on the floor
13 discussion, but what I'm saying is that their purpose in
14 passing 10.19 not to fund Planned Parenthood is based on
15 their position of favoring childbirth over abortion.

16 THE COURT: Anything further?

17 MS. BULLOCK: I would just state that as far as
18 Eleventh Amendment immunity is concerned the real party at
19 interest here is the State. And, again, what they're asking
20 is more than stopping the effectiveness of 10.19. They're
21 asking this Court to make the government -- the State enter
22 into a contract and provide funding to them when there is no
23 contract in effect, and it would be the Defendant's position
24 that that would obviously violate the State's sovereign
25 immunity.

1 And as far as the balancing for the preliminary
2 injunction test, the irreparable harm arguments that
3 Plaintiff has made, I'm not going to deny, as nobody would,
4 that the economy is bad and it was stated in the affidavit
5 that Planned Parenthood has operated at a significant loss
6 during the last fiscal year. People are being laid off
7 everywhere, be that private industry or state government.
8 Title X funding does not guarantee there will be no layoffs
9 and Title X funds are not guaranteed to the Plaintiff.

10 As far as likelihood of harm to the Defendant if the
11 relief is granted, the harm to the State, the real party in
12 interest, the citizens of North Carolina, is that the
13 preliminary injunction would force North Carolina to enter a
14 contract to provide funding in opposition to properly
15 adopted legislation; and the public interest favors -- as
16 far as whether or not the public interest favors granting
17 the preliminary injunction, the citizens of North Carolina
18 have elected the legislators that are now in the General
19 Assembly and those citizens --

20 THE COURT: What would happen if the Court granted
21 the Plaintiff's motion for injunction? You're saying what
22 the legislature has done. What would they do and what would
23 be the course of action if the Court grants the injunction?

24 MS. BULLOCK: Honestly, Your Honor, it -- I guess
25 it would depend on how you phrased your preliminary

1 injunction -- your order granting the preliminary
2 injunction. If you stopped the enforcement of 10.19 and
3 said nothing further, then it would be up to DHHS as to
4 whether or not they presented those remaining funds to the
5 other delegates that had applied; but there would be a
6 decision on the State making that decision, not a decision
7 by this Court ordering them to enter into a contract that is
8 not in existence at this time. And as far as the other
9 entities that do have Title X funding, they do provide
10 family planning services that Planned Parenthood has
11 provided in the past.

12 And because of the arguments that I've given to the
13 Court, we believe that Planned Parenthood is not likely to
14 succeed on the merits of this case and Defendant Cansler
15 would respectfully request that this Court not issue the
16 preliminary injunction.

17 THE COURT: Thank you, ma'am.

18 Does Plaintiff wish to respond?

19 MR. WOLFSON: Thank you, Your Honor.

20 THE COURT: And address first, if you will, the
21 notion of the Court requiring the State upon an injunction,
22 if it were to issue, to enter into a contract it has not
23 entered into.

24 MR. WOLFSON: Right. So, Your Honor, as I said
25 before and as I believe Ms. Bullock confirmed, the State was

1 prepared to -- was ready, willing, and able to enter into a
2 contract with us. They tendered us the contract. We signed
3 it. I think actually it may be under North Carolina law
4 that I think they didn't have to countersign it, but I
5 won't -- I don't think the Court needs to get into that.
6 There is -- we won the competitive bidding process. The
7 only reason that the contracts were not finalized and
8 executed is because of 10.19. So, I mean, no other -- we
9 have no other reason proffered today as to why --

10 THE COURT: So if that's the status quo, would the
11 Court have to order health services to give you the money?

12 MR. WOLFSON: I don't think the Court would have
13 to order that at this point, Your Honor. I think the
14 Court -- if the Court enjoined the enforcement of 10.19, our
15 expectation would be that the State would finalize the
16 contracts with us because we already -- we already won the
17 competitive -- the competitive bidding process.

18 So -- I mean, if they didn't -- you know, if the Court
19 entered into an injunction and then there was some -- I'll
20 use the term funny business -- I'll use that term
21 colloquially -- where the State didn't do what it said it
22 would do, we might want to come back to the Court. But our
23 expectation if 10.19 were enjoined, the State would carry
24 out its duties completely otherwise consistently with
25 federal and state law and all contracting procedures

1 officers and whatnot; and we have no reason to doubt that
2 the already executed contracts from our side would be
3 finalized and put into place.

4 THE COURT: You understand, though, that would
5 involve only the contract supposedly already in place -- and
6 we're talking about the 2011-2012 period -- but it would not
7 cover anything beyond that.

8 MR. WOLFSON: It would not cover '12 to '13, but
9 if the State -- again, if 10.19 were enjoined, then
10 presumably in the spring we would be free to apply again and
11 the State would view our application in a completely neutral
12 way, which is -- which they've always done in the past, and
13 we have no reason to doubt that they wouldn't next year if
14 10.19 -- if the cloud of 10.19 is lifted. So all that we
15 are really asking is the State treat us the way it has
16 treated us all along, which is fairly; and it's only because
17 10.19 has come into the picture that they have not done so
18 for -- have not done so now. I'm going to just -- so that I
19 think is our key point on the state of the injunction.

20 On the -- on the issue of the merits, I just want to
21 address one very significant point, which is this question
22 of does Planned Parenthood have a constitutional right to
23 funds. Of course there is no constitutional right to funds.
24 There is a constitutional right not to have the government
25 follow discriminatory or unconstitutional criteria in

1 determining who receives funds.

2 So the -- I would refer the Court to the key Supreme
3 Court case of *Perry versus Sindermann*, which is much
4 discussed in the briefs, where someone who was a faculty
5 member of a state college was seeking -- he was up for
6 tenure and he spoke out against the Board of Regents of the
7 university to the state legislature, perhaps not the wisest
8 career move. The Board of Regents -- the state college
9 swiftly retaliated against him by denying him tenure.

10 The argument was made, which is just directly analogous
11 to the argument made here, the argument was made you have no
12 constitutional right to tenure, you have no constitutional
13 right to a government job, you have no constitutional -- you
14 know, you didn't have tenure before. Because you didn't
15 have tenure you have no legally protected right to have it
16 renewed ad infinitum, just like we don't have a legally
17 protected right to have our contract renewed ad infinitum.

18 But the Supreme Court said, "That's not the argument
19 that has been made in this case. The argument that is being
20 made in this case is that the government cannot use its
21 power to award jobs or contracts, cannot exercise that in a
22 way -- in a discriminatory or unconstitutional way." And
23 the Supreme Court I believe unanimously so held and that
24 essentially is the principle that controls this case.

25 THE COURT: What the Defendant argued, as I

1 understood it, is where is the right in this case or the
2 First Amendment right? Who has it? Planned Parenthood or
3 the women who have the right to make a choice?

4 MR. WOLFSON: So there are two -- there's the
5 First Amendment and then there is a Due Process Clause --
6 the constitutional right to terminate a pregnancy under the
7 Due Process Clause. Planned Parenthood has a First
8 Amendment right to speak of its own. In terms of the Due
9 Process Clause, it is the woman's right to seek to terminate
10 her pregnancy within the bounds that the Supreme Court has
11 established. Of course, that right has to -- that service
12 has to be provided to her by a medical provider, by a
13 healthcare provider.

14 But many are the cases where the -- a challenge to
15 abortion restrictions have been raised by the provider
16 rather than by women potentially seeking to terminate their
17 pregnancy and many of those cases have involved Planned
18 Parenthood. And uniformly the Supreme Court has said, of
19 course, Planned Parenthood has standing to raise the --
20 raise the constitutional rights of the women. It is
21 directly harmed by the legislation because it is being --
22 its activities are being curtailed and it is the proper
23 person to bring the case before the Court.

24 Yes, it is true, as Ms. Bullock pointed out, this
25 statute does not directly say to Planned Parenthood, "You

1 may not offer an abortion under such circumstances. You may
2 not speak out in favor of choice." But also what -- that
3 was also true in all of those cases where the Supreme Court
4 has held that what is -- what the legislature is enacting is
5 essentially a penalty for having done that in the past and
6 an attempt to coerce you not to do it in the future.

7 THE COURT: Any suggestion that you have not kept
8 your funds separate from the nonabortion services and
9 whatever abortion services you may provide?

10 MR. WOLFSON: There is no such suggestion of which
11 we are aware, Your Honor. The -- the State conducts an
12 on-site review of our programs every year; and, of course,
13 we are well aware of the requirement in Title X and under
14 North Carolina law that we not use government funds for
15 abortion; and those -- we adhere to those scrupulously; and
16 no suggestion has been made that we have failed to do so.

17 Thank you.

18 THE COURT: Anything further you wish to add?

19 MR. WOLFSON: No. Thank you, Your Honor.

20 THE COURT: Anything further?

21 MS. BULLOCK: Nothing, Your Honor.

22 THE COURT: The Court will take into account your
23 arguments you've made, will notify you shortly of its ruling
24 in this case.

25 Anything further? Thank you very much. We'll be in

1 recess until further notice.

2 (Proceedings concluded at 11:20 a.m.)

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C E R T I F I C A T E

I, LORI RUSSELL, RMR, CRR, United States District Court Reporter for the Middle District of North Carolina, DO HEREBY CERTIFY:

That the foregoing is a true and correct transcript of the proceedings had in the within-entitled action; that I reported the same in stenotype to the best of my ability and thereafter reduced same to typewriting through the use of Computer-Aided Transcription.



Lori Russell, RMR, CRR
Official Court Reporter

Date 8-31-11