IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

PLANNED PARENTHOOD OF KANSAS AND MID-MISSOURI d/b/a COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD OF KANSAS AND MID-MISSOURI, Plaintiff, v. PETER LYSKOWSKI, Acting Director of the Missouri Department of Health and Senior Services, in his official capacity, Defendant.	CASE NO. 15-cv-04273-NKL

PLAINTIFF'S SUGGESTIONS IN SUPPORT OF FINAL JUDGMENT ON THE MERITS

Douglas N. Ghertner, Mo. Bar No. 22086
Slagle, Bernard and Gorman
600 Plaza West Building
4600 Madison Avenue
Kansas City, MO 64112-3031
(816) 410-4664
(816) 561-4498 (telefacsimile)
dghertner@sbg-law.com

Arthur A. Benson II, Mo. Bar No. 70134
Arthur Benson & Associates
4006 Central Avenue
Kansas City, Missouri 64111
(816) 531-6565
(816) 531-6688 (telefacsimile)
abenson@bensonlaw.com

Carrie Y. Flaxman
Planned Parenthood Federation of America, Inc.
1110 Vermont Ave., NW, Suite 300
Washington, DC 20005
(202) 973-4830
carrie.flaxman@ppfa.org

Melissa A. Cohen
Diana O. Salgado
Planned Parenthood Federation of America, Inc.
123 William Street
New York, New York 10038
(212) 541-7800
(212) 247-6811 (telefacsimile)
melissa.cohen@ppfa.org
diana.salgado@ppfa.org

Attorneys for Plaintiff

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I. INTRODUCTION

The record shows that Defendant Missouri Department of Health and Senior Services ("DHSS" or "the Department"), in seeking to revoke Planned Parenthood of Kansas and Mid-Missouri d/b/a Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri's ("PPKM") Abortion Facility License, "treated PPKM more harshly than other similarly situated institutions and thereby violated the Equal Protection Clause." Order at 1, ECF 49 ("PI Order"). As the Court found in entering the preliminary injunction, revocation of an ambulatory surgical center's ("ASC") license[1] "is an extremely rare event," and DHSS has only done so once before, "after a DHSS inspection of the Surgical Center of Creve Coeur ("SCCC") revealed a host of immediate public health and safety threats at the facility." PI Order at 2. Despite these threats, DHSS followed the statutorily prescribed plan of correction process and worked with SCCC to attempt to cure its deficiencies. *Id.*

In stark contrast, when DHSS learned in September 2015 that PPKM would no longer have a physician with hospital privileges as of December 1, 2015, it immediately informed PPKM that its license would be revoked on that date, even though DHSS has admitted that PPKM's deficiency would present no health and safety concerns. *Id.* DHSS solicited no plan of correction from PPKM and refused to let it have any period of deficiency before revoking its license. *Id.*

DHSS has admitted that the Department was under enormous pressure from the Senate Interim Committee on the Sanctity of Life ("Committee") as well as anti-abortion individuals and groups to take action against PPKM, and that DHSS feared retaliation from Senator Kurt Schaefer (R-Columbia) ("Sen. Schaefer"), the head of the Committee, who is also a member of the Senate Appropriations Committee. *Id.* at 24. This political pressure cannot justify "DHSS's

[1] An abortion facility is a type of ASC under Missouri law. Mo. Ann. Stat. § 197.200(1).

disparate treatment of PPKM." *Id.* at 3. These facts make abundantly clear that the Court should enter judgment in Plaintiff's favor and a permanent injunction to prevent the revocation of Plaintiff's license.

II. FACTUAL BACKGROUND

A. Events Leading Up to DHSS's Revocation of PPKM's License

Missouri law requires that abortion facilities be licensed as ASCs. Mo. Ann. Stat. § 197.200(1). Accordingly, PPKM holds a current license to operate an abortion facility in Columbia, Missouri. Decl. of Laura McQuade in Supp. of Pl.'s Mot. for TRO and Prelim. Inj. ¶ 4, ECF 6-1 ("McQuade Decl."). This facility is one of only two licensed abortion facilities in the state; the other is located in St. Louis. *Id.*

The regulations implementing the licensing statutes further require that "[p]hysicians performing abortions . . . have staff privileges at a hospital within fifteen (15) minutes' travel time from the facility or the facility shall show proof there is a working arrangement between the facility and the hospital within fifteen (15) minutes' travel time from the facility granting the admittance of patients for emergency treatment whenever necessary." Mo. Code Regs. Ann. tit. 19, § 30-30.060(1)(C)4.[2] PPKM's physician who, until the end of November 2015, provided abortions at the Columbia health center, is a board-certified obstetrician/gynecologist who held

[2] There is also a statutory licensing requirement for abortion facilities that requires physicians who perform surgical abortions to be privileged to perform those procedures in a hospital in the community in which the abortion facility is located, or there must be a working agreement with a hospital in the community guaranteeing the transfer and admittance of patients for emergency treatment. Mo. Ann. Stat. § 197.215 (1)(2); *see also* Mo. Code Regs. Ann. tit. 19, § 30-30.020(1)(B)(4) (requiring the same). While both these hospital privilege provisions permit a facility to have a working agreement with a hospital in lieu of its physician having hospital privileges, this alternative is not practically feasible, since Missouri law criminalizes the provision of abortion without hospital admitting privileges. Mo. Ann. Stat. § 188.080 ("Any physician performing or inducing an abortion who does not have clinical privileges at a hospital which offers obstetrical or gynecological care located within thirty miles of the location at which the abortion is performed or induced shall be guilty of a class A misdemeanor.").

"refer and follow" hospital privileges at Missouri University Health Care ("MU Health Care") that allowed her under the licensing regulations to perform medication abortions, but not surgical abortions, at the Columbia health center. McQuade Decl. ¶ 3.

In July 2015, a group of anti-abortion extremists calling themselves the Center for Medical Progress ("CMP") released heavily edited and misleading videotapes regarding the abortion practices of other Planned Parenthood affiliates in other states. *Id.* ¶ 5. No one from PPKM appears in any of the released CMP videos. Nor does PPKM have a fetal tissue donation program, which is the subject of most of the claims made in the videos. *Id*. Despite these facts, following the release of the CMP videos, Missouri Senate Pro Tem Tom Dempsey formed the Committee, chaired by Sen. Schaefer, a Republican from Columbia. Although the Committee was ostensibly formed to investigate the false allegations made in the CMP videos, the Committee's investigations prior to the events at issue in this case focused almost exclusively on the licensing of PPKM's Columbia health center and its relationship with MU Health Care, including its physician's privileges. *Id.* ¶ 6; *see* PI Order at 3.

The evidence shows that both MU Health Care and DHSS became part of the political attack against PPKM and its provision of abortion services. On August 17, 2015, Senator Schaefer specifically requested that MU Health Care provide him with documents regarding PPKM's physician's privileges. *See* PI Order at 4; Letter from Sen. Schaefer to Chancellor R. Bowen Lofton [sic], Chancellor, Univ. of Mo. (Aug. 17, 2015), ECF 6-2; Mike Lear, *Missouri Senate Committee Questions License for Abortion Resumption in Columbia, University of Missouri Hospital Involvement*, MissouriNet (Aug. 25, 2015), http://www.missourinet.com/2015/08/25/missouri-senate-committee-questions-license-for-abortion-resumption-in-columbia-university-of-missouri-hospital-involvement/. On August 25,

the Committee called R. Bowen Loftin, the then-Chancellor of the University of Missouri, to testify about PPKM's physician's privileges.

On September 24, 2015, MU Health Care responded by announcing that effective December 1, 2015, it would eliminate entirely "refer and follow" privileges which would impact only two physicians—one of them being PPKM's physician. *See* PI Order at 4. That day, MU Health Care issued multiple versions of its press releases, but at least one admits that its actions were the result of the Committee's focus on PPKM's physician's provision of abortion:

> The review of MU Health Care policies and privileges was prompted by inquiries from the Missouri Senate Interim Committee on the Sanctity of Life and from various members of the public to MU's chancellor. Chancellor Loftin then asked the medical staff, many of whom are also faculty, to review these policies and make recommendations.

Press Release, MU Health Care, MU Health Care Ends "Refer and Follow" Privileges; Reviewing Other Proposed Changes to Credentials Procedure Manual (Sept. 24, 2015), ECF 6-4; *see also* Email from Steven Alan Ramsey, Dir., DHSS Office of Governmental Policy & Legislation ("Ramsey") to Gail Vasterling, then-Dir., DHSS ("Vasterling") (Sept. 25, 2015), ECF 33-2 at 001917 (sharing link to article announcing elimination of "Refer and Follow" privileges).

Meanwhile, throughout the summer of 2015, DHSS received a barrage of requests from members of the Committee, other members of the legislature, and members of anti-abortion organizations, demanding information about PPKM's license, the scope of services provided at the Columbia health center, and whether PPKM was properly licensed. *See* Suggestions in Further Supp. of Pl.'s Mot. for a Prelim. Inj. 2–3, ECF 33 ("Pl.'s Dec. 12 Suggestions in Supp. PI"), ECF 33 at 2–3. In addition to responding to inquiries from the Committee about PPKM's license, DHSS representatives were called to testify at committee hearings held "for the purpose

of investigating Planned Parenthood activity in Missouri. Among the issues before the Committee was the Department's decision to issue a license to the Columbia Planned Parenthood facility for abortion services." Letter from Sen. Schaefer to Vasterling 1 (July 29, 2015), ECF 33-2 at 006799 ("July 29 Letter from Schaefer to Vasterling"). The Committee questioned DHSS aggressively about its decision to provide the license to PPKM, Pl.'s Dec. 12 Suggestions in Supp. PI at 4, demanding that DHSS justify the decision and turn over additional documentation supporting it, including information regarding the hospital at which PPKM's physician had privileges. *See* July 29 Letter from Schaefer to Vasterling 2, ECF 33-2 at 006800 (calling for DHSS to suspend PPKM's license during the investigation); Letter from Sen. Schaefer to Vasterling 1, 3 (Aug. 14, 2015), ECF 33-2 at 006801–006802 (challenging justification for PPKM's license and demanding additional documents be provided to the Committee by August 21); Letter from Vasterling to Sen. Schaefer 1–2 (Aug. 21, 2015), ECF 33-2 at 000639–000640 (responding to additional inquiries); Emails between Ramsey and Paula Medlin, Leg. Assistant, Office of Mo. State Rep. Sue Allen (R) (Aug. 17, 2015), ECF 33-2 at 000581–000582 (arranging drop off of additional documents); Dep. of John Langston, Adm'r, DHSS Bureau of Ambulatory Care ("Langston") as Individual at 21:5–7, ECF 33.3 and ECF 35.1 ("Langston Indiv. Dep."); Email from Vasterling to Mo. State Reps. Diane Franklin (R) ("Rep. Franklin") and Andrew Koenig (R) (Aug. 26, 2015), ECF 33-2 at 001489 (responding to inquiries regarding PPKM's license); Email from Jeanne Serra, Dir., DHSS Div. of Regulation & Licensure ("Serra"), to Terri Russler, Admin. Sec'y, DHSS Div. of Regulation & Licensure (Sept. 14, 2015), ECF 33-2 at 001852 (forwarding notice of Sept. 17 House hearing sponsored by Rep. Franklin to "continue the investigation into Planned Parenthood clinics in Missouri"); Email from Rep. Franklin to Vasterling (Sept. 17, 2015), ECF 33-2 at 001873–001875 (requesting DHSS's records on

abortions performed at Planned Parenthood facilities in Missouri since Jan. 1, 2014); Email from Ramsey to Vasterling and other DHSS staff (Sept. 28, 2015), ECF 33-2 at 001951 (forwarding notice of another hearing); Email from Molly Boeckman, Chief, DHSS Bureau of Budget Servs. & Analysis, to Bret Fischer, Dir., DHSS Admin. Div. and other DHSS staff members (Sept. 28, 2015), ECF 33-2 at 001955 (same); Email from Serra to DHSS staff members (Nov. 6, 2015), ECF 33-2 at 006806–006808 (regarding answering additional questions from October hearing on Planned Parenthood).

Given the pressure the Committee was placing on DHSS, DHSS officials expressed concern that Sen. Schaefer, in his role on the Senate appropriations committee, would retaliate against DHSS by cutting its legislative appropriations. *See* PI Order at 2–3, 24; Langston Indiv. Dep., ECF 33-3 at 29:10–25, ECF 35-1 at 33:1–23.

B. DHSS's Decision to Revoke PPKM's License

On September 25, 2015, the day after MU Health Care announced the termination of PPKM's physician's privileges, DHSS notified PPKM that its Abortion Facility License would be revoked on December 1, 2015, the day the privileges would terminate, unless PPKM could otherwise satisfy the statutory privileging requirement by that date.[3] PI Order at 4–5; Letter from Langston to Laura McQuade, President & CEO, PPKM ("McQuade") (Sept. 25, 2015), ECF 6-1 at 13. Although DHSS was aware that PPKM and its physician were actively pursuing a solution, including seeking to obtain privileges elsewhere, and knew that the process to obtain privileges can be lengthy, PI Order at 20 n. 9; Dep. of William Koebel, Deputy Adm'r, DHSS Section for Health Standards & Licensure ("Koebel") under Fed. R. Civ. P. 30(b)(6) at 10:9–19, 12:4–11,

[3] Since MU Health Care announced that it was terminating PPKM's provider's privileges, PPKM has been working diligently to assist its physician in seeking new hospital privileges and/or to locate a new physician with hospital privileges to provide abortions at its Columbia facility. While those efforts are ongoing, they have not yet been successful.

ECF 33-1 ("Koebel 30(b)(6) Dep."), DHSS nonetheless sent a second letter on November 25, confirming its intent to revoke the license effective at close of business on November 30. Letter from Langston to McQuade (Nov. 25, 2015), ECF 6-1 at 15. DHSS undertook this immediate revocation despite its knowledge that there was no health and safety threat to the public because PPKM had suspended its provision of abortions. Dep. of Langston under Fed. R. Civ. P. 30(b)(6) at 17:5–11, 18:10–17, ECF 33-4 ("Langston 30(b)(6) Dep.").

The record shows that the external pressures outlined above resulted in DHSS handling PPKM's license in a highly unusual manner. PI Order at 2–3, 24–25. DHSS has admitted that it treated PPKM differently from other license-holders because of the sensitive nature of abortion and the public scrutiny thereof. Koebel 30(b)(6) Dep. 61:22–62:15.

1. Standard Process for Addressing ASC Compliance Deficiencies

As Defendant has admitted, DHSS generally follows the Mo. Ann. Stat. § 197.293 plan of correction process in addressing ASC deficiencies. Letter from Emily Dodge, Assistant Att'y Gen., to Pl.'s Counsel 2 (Dec. 1, 2015), ECF 15-1 ("Dec. 1 Discovery Response"). Pursuant to this process, upon learning of deficiencies, DHSS is required to notify an ASC of the deficiencies and request that the ASC submit a plan of correction. Such a plan "includes, but is not limited to, the specific type of corrective action to be taken and an estimated time to complete such action." Mo. Ann. Stat. § 197.293 (1)(1). An ASC may have multiple opportunities to submit plans of correction and to correct ongoing deficiencies before its license is suspended or revoked. *Id.* § 197.293 (1)(2). Furthermore, "if a deficiency in meeting licensure standards presents an immediate and serious threat to the patients' health and safety, the department *may*, based on the scope and severity of the deficiency, restrict access to the service or services affected by the deficiency until the hospital or ambulatory surgical center has

developed and implemented an approved plan of correction." *Id.* (emphasis added). DHSS maintains the discretion whether to suspend, revoke, or maintain an ASC license in active status while a provider goes through the plan of correction process. Mo. Ann. Stat. § 197.220 ("[DHSS] *may* deny, suspend or revoke a license in any case in which the department finds that there has been a substantial failure to comply with the requirements of sections 197.200 to 197.240.") (emphasis added).

Thus, it is undisputed that the department has significant flexibility to give providers multiple opportunities to correct any licensing deficiencies, and to restrict the services a provider offers, if necessary, to protect public health and safety while the plan of correction process occurs. *See* PI Order at 15–17. In other words, even where "an immediate and serious threat to the patients' health and safety" exists, the statute contemplates that a plan or plans of correction will be implemented before the Department revokes a license. Mo. Ann. Stat. § 197.293 (2).

The process outlined in Mo. Ann. Stat. § 197.293, through which licensed ASCs are given numerous opportunities to correct licensing deficiencies before taking the rare step of revoking a license, is borne out by Defendant's historical practice. The Department admitted that when an ASC has deficiencies, its "protocol is to generate a statement of deficiencies," which initiates the statutory plan of correction process. Langston 30(b)(6) Dep. 11:20–25. The Department further admitted that, typically, a notice of deficiencies informs a license-holder of the steps or procedures that could be undertaken to prepare a plan of correction. *Id.* 17:25–18:3.[4]

[4] Notices of Deficiencies are generally issued on a standardized form, Langston Indiv. Dep. 35:9–12, and are provided to an ASC along with a "packet" of material that includes "guidelines on how to respond to the statement of deficiencies [and] a cover letter." *Id.* 35:19–36:4. The standard Notice of Deficiencies form enumerates each deficiency identified by DHSS and includes a space for the ASC to draft a plan of correction for each deficiency. *See, e.g.*, Not. of Deficiency and Plan of Correction Form for Surgical Center of Creve Coeur (Nov. 10, 2010), ECF 33-2 at 006296–006342.

Following receipt of a Notice of Deficiencies, ASCs submit plans of correction to DHSS for approval. *Id.* 12:1–25.

Once the plan of correction process has been initiated, DHSS has discretion as to how much time to give a license-holder to correct deficiencies, with an outer time limit of the expiration of a license, and DHSS considers the complexity of the required corrections in determining how much time to give a license-holder. Langston 30(b)(6) Dep. 22:17–24:18. Indeed, consistent with statute, DHSS has admitted that serial plans of correction may be implemented, if necessary, and the plan of correction process can extend over an indefinite period of time, as necessary. Koebel 30(b)(6) Dep. 39:11–16. DHSS also admitted that it has the discretion to suspend a license, if necessary, while an ASC is implementing a plan or plans of correction. *Id.* 39:17–20.

According to DHSS, decisions regarding plans of correction and what actions to take regarding ASC licenses are generally made at the "bureau level," or by the DHSS employees who conduct ASC surveys. Langston 30(b)(6) Dep. 29:16–30:12. DHSS admits that the Director does not generally weigh in on licensing decisions, Koebel 30(b)(6) Dep. 60:15–25, and consultation with the Office of the Governor regarding licensing decisions is not the norm. *Id.* 59:10–60:5.

Indeed, "[o]ther than the PPKM revocation that is the subject of this litigation, there is no instance in DHSS records involving an ASC license revocation without a plan of correction being put in place first." PI Order at 16; Langston 30(b)(6) Dep. 41:17–23. Defendant recalls only one instance in which it has revoked an ASC license, for the Surgical Center of Creve Coeur, Dec. 1 Discovery Response at 2, and that revocation followed multiple opportunities for the ASC to correct deficiencies through the statutory plan of correction process. Def.'s Resp. to

Pl.'s First Set of Disc. Reqs. at 2, ECF 33-5 ("Def.'s Dec. 7 Discovery Response") ("Before revoking [SCCC's] license, DHSS informed SCCC of deficiencies and reviewed plans of correction submitted by SCCC."); Langston 30(b)(6) Dep. 24:19–25:3; *see, e.g.*, Letter from Langston to Harry Eggleston, SCCC (June 12, 2012), ECF 44-1 at 006779 (approving a plan of correction submitted by SCCC). In that case, as the Court found, "DHSS made a substantial effort with SCCC to remedy the deficiencies, involving numerous back and forth communications with SCCC." PI Order at 17; Langston 30(b)(6) Dep. 28:13–29:1. Furthermore, some of the deficiencies on which the revocation of that ASC's license was based, including that it "failed to ensure that the drugs used at the center were maintained securely, allowed nurses to provide patients conscious sedation without training, failed to follow acceptable infection control standards, and failed to ensure that its nursing staff was aware of the location of emergency resuscitative equipment [,] . . . constitute egregious threats to patient welfare." PI Order at 22.

Moreover, there were significant periods of time when SCCC's sole physician was not providing surgical procedures, and yet the Department did *not* "summarily revoke[]" SCCC's license—instead, it continued to permit SCCC to work toward compliance, only revoking its license when those efforts failed.[5] *See* PI Order at 14; Emails between Karen Maine, Health Facilities Nursing Consultant, DHSS ("Maine"), and Langston, (Feb. 9–14, 2011), ECF 40-1 at 005530; Email re: SCCC (sender and recipient redacted) (Feb. 22, 2012), ECF 40-1 at 005975; Emails between Maine and Langston (May 31, 2012), ECF 40-1 at 006769. Indeed, despite all this, DHSS ultimately agreed to SCCC's request to *suspend* the license on the condition that the

[5] In addition, a similar situation arose in 2013 involving PPKM, and its license was not summarily revoked, but instead DHSS took no action on the license before the license expired. PI Order at 14; Def.'s Suggestions in Opp. to Pl.'s Mot. for PI, ECF 36 at 6 (explaining that, when PPKM lacked a physician with privileges in 2013 and was therefore not performing abortions, DHSS took no action until PPKM's license expired and the license was not renewed for the following year).

sole physician who provided surgeries at SCCC would cease doing so. *See* Emails between Koebel, and Dean Linneman, Deputy Div. Dir., Div. of Regulation & Licensure, and Langston (July 31–Aug. 1, 2012), ECF 40-1 at 006712–006713; Email from Gregory White, Att'y, to Langston (Aug. 8, 2012), ECF 40-1 at 006721; Email (redacted), ECF 40-1 at 006722. These facts make it clear that DHSS normally follows the statutory plan of correction process, even where an ASC's deficiencies present a threat to the public, and does not normally treat an ASC's inability to provide procedures as a deficiency meriting immediate revocation of a license.

2. DHSS's Highly Unusual Treatment of PPKM

In contrast, by its own admission, DHSS did not follow the plan of correction protocol outlined above when handling PPKM's licensing deficiency, even though that process typically applies to abortion facilities. *See* Email from Langston to Julie Creach and Koebel (Nov. 8, 2015), ECF 33-2 at 006806–006808 (containing draft responses to Committee questions and stating that when an abortion facility has a licensing deficiency it is "given a written statement of deficiencies, and given an opportunity to respond in writing with a plan of correction, and a reasonable period to come into compliance or face additional licensure actions such as suspension or revocation of the license."); Letter from Jennifer Stilabower, then-Chief, DHSS Office of Gen. Counsel, to Joe Ortwerth, Exec. Dir., Mo. Family Policy Council (Feb. 2, 2012), ECF 33-2 at 004998–004999 (explaining that, when abortion facilities have licensing deficiencies, they are provided with a statement of deficiencies and an opportunity to correct those deficiencies via a plan of correction); Langston 30(b)(6) Dep. 10:16–11:6 (the deficiency process is the same regardless of whether a licensed facility performs abortion).[6]

[6] DHSS has further admitted that it had the statutory authority to follow the plan of correction process for PPKM, Koebel 30(b)(6) Dep. 39:4–7, and that it could have put in place a plan of correction that outlined the steps that PPKM would have taken to obtain hospital privileges. *Id.* 40:17–21. Moreover, DHSS admitted that if it had concerns about maintaining the license in

"In stark contrast with DHSS's general procedure. . . [DHSS] decided prior to engaging in any communication with PPKM that the license would be revoked if the deficiency was not corrected by the exact day the deficiency arose." PI Order at 21. "After sending the September 25 letter, DHSS had no further formal communication with PPKM until DHSS sent a second letter on November 25," *Id.* at 19–20; Langston Indiv. Dep. 36:8–14, and "[n]o draft or plan of correction was ever solicited from PPKM." PI Order at 20; Langston Indiv. Dep. 36:15–21. Indeed, none of the information contained in the standard notice of deficiency packet was provided to PPKM, *See* PI Order at 19; Langston Indiv. Dep. 35:19–36:7, and "[t]here was nothing in DHSS's communications that suggested it was invoking a statutory plan of correction process." PI Order at 20 n. 9. In addition, DHSS has admitted that, "[u]nlike is customary at DHSS, the September 25 notice of deficiencies letter was drafted at levels high above Mr. Langston, who has responsibility over ASCs at DHSS and whose staff would normally be in charge of generating notices of deficiencies and overseeing plans of correction submitted by ASCs." PI Order at 23–24; Koebel 30(b)(6) Dep. 54:1–7, 56:2–11, 58:1–13.

This differential treatment of PPKM occurred despite the fact that its single deficiency posed no immediate threat to patient safety. PI Order at 2. As the Court found, "There is no question that SCCC's safety deficiencies made the center less deserving of DHSS leeway in developing and implementing a plan of correction than does PPKM's single deficiency. . . . Yet the record reveals that SCCC was given significantly more opportunities to communicate with DHSS and attempt to correct the deficiencies than was PPKM." *Id.* at 23.

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active status while PPKM implemented this plan of correction, it could have suspended the license during this time. *Id.* 40:22–41:1.

C. The Effect of Defendant's Action on PPKM and Its Patients

Should Defendant be permitted to revoke the Columbia Center's license, PPKM would be immediately deprived of its property right in the license. PI Order at 6–7. Furthermore, the process for applying for a new license once PPKM has a physician with hospital privileges would be expensive and time consuming. PPKM most recently applied for a license in March of 2015, and it took four months, until July 2015, for the license to be granted. *See* Langston 30(b)(6) Dep. 37:15–7 (stating it would take at least two months to issue a new license to a facility that had its license revoked, because DHSS would have to review new documents and the facility would have to obtain additional third-party inspections). Following submission of the license application in March 2015, the process involved significant staff time spent gathering documentation related to numerous licensing requirements to submit to DHSS, including credentialing information for the physician and staff, policy and procedure information, training documents, proof of various facility inspections, proof that the staff had been checked against the Missouri Family Care Safety Registry, and proof of registration with federal and state drug enforcement authorities, among other items. McQuade Decl. ¶ 15. A full-day inspection of the facility by DHSS also took place as part of the application process. *Id.*

In addition to the significant time involved in the application, there are significant financial costs as well. During the application process in 2015, in addition to the license application fee that was paid to DHSS, PPKM also incurred legal fees associated with the application process and fees paid to vendors to conduct required tests of the HVAC system and air quality in the facility. *Id.* ¶ 16. In addition to these expenses, the months-long delay associated with the licensure process resulted in lost revenue for services that could have been provided during that time. *Id.*

Without an injunction preventing Defendant from revoking PPKM's Abortion Facility License, PPKM will suffer significant injury due to the time and expense involved in applying for a new Abortion Facility License once it has a physician with hospital privileges. It will also suffer financial losses due to the inability to provide abortions during the several-month process involved in applying for and obtaining a new license. PI Order at 8.

These harms will also cause harm to PPKM's patients. First, the time and resources spent by PPKM obtaining a new license could instead be spent on patient care. *Id.* ¶ 18. Moreover, the longer it takes for PPKM to be able to provide abortions again in Columbia, the harder it will be for women in the state to access safe and legal abortion, as women from all corners of the state will have to travel to St. Louis to obtain in-state abortions. *Id.*

III. THE COURT SHOULD ENTER A PERMANENT INJUNCTION

Defendant's revocation of Plaintiff's ASC license violates Plaintiff's rights to equal protection and procedural due process, and the Court should enter judgment and a permanent injunction for Plaintiff. To determine whether permanent injunctive relief is warranted, in addition to examining whether a plaintiff has succeeded on the merits of its claims, courts in the Eighth Circuit balance three factors: (1) the threat of irreparable harm to the moving party; (2) the balance of harm between this harm and the harm suffered by the nonmoving party if the injunction is granted; and (3) the public interest. *See Bank One v. Guttau,* 190 F.3d 844, 847 (8th Cir. 1999). "The standard for granting a permanent injunction is essentially the same as for a preliminary injunction, except that to obtain a permanent injunction the movant must attain success on the merits." *Id.*

A. Plaintiff Has Succeeded on the Merits of Its Claim That Defendant Singled It Out for Disparate Treatment in Violation of the Equal Protection Clause

In entering the preliminary injunction in this case, the Court concluded that "it is likely that DHSS treated PPKM more harshly than other similarly situated institutions and thereby violated the Equal Protection Clause." PI Order at 1. The record is unchanged since the Court's entry of the preliminary injunction. Defendant singled out PPKM from other licensed ASCs for disparate treatment based on animus to PPKM, rather than any legitimate governmental interest, and Defendant's action violates the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." *Stevenson v. Blytheville Sch. Dist. #5*, 800 F.3d 955, 970 (8th Cir. 2015) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)) (internal quotation marks omitted). "Generally, a law will survive . . . scrutiny if the distinction it makes rationally furthers a legitimate state purpose." *Zobel v. Williams*, 457 U.S. 55, 60 (1982). However, "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446*; see also Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564–65 (2000) (per curiam) (plaintiff's claim that government's action was irrational and wholly arbitrary was valid equal protection claim). "Some particularly invidious distinctions are subject to more rigorous scrutiny." *Zobel*, 457 U.S. at 60.

Even if rational basis review applies to Plaintiff's claim,[7] Defendant's actions plainly violate the Equal Protection Clause since bare animus is not a constitutionally sufficient

[7] Because the Court found, in entering the preliminary injunction, that "DHSS's actions cannot withstand even rational basis review," it did not address whether Plaintiff's claim is entitled to heightened scrutiny. PI Order at 9. Heightened scrutiny is warranted here. Defendant's action to single PPKM out was motivated by PPKM's involvement with a constitutionally protected health care service and its association with abortion providers who participate in lawful fetal tissue

justification for DHSS's differential treatment of PPKM.[8] PI Order at 9 (citing *Vill. of Willowbrook*, 528 U.S. at 564 ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges she has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment.")). As this Court explained in entering the preliminary injunction,

> [t]o establish liability for a class-of-one violation, Plaintiff must allege that: (1) it was part of a class of individuals or groups that were similarly situated; (2) it was intentionally treated differently from its peers in a context where there were clear and defined standards governing the state's actions; (3) it suffered harm as a result of the state's actions; and (4) the difference in treatment was not rationally related to a legitimate state interest.

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donation programs. *See supra* Part II.A. This association is plainly protected by the First Amendment. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (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."). Where government action interferes with the exercise of a fundamental right, equal protection analysis requires strict scrutiny. *See Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 & n. 3 (1976) (noting that First Amendment rights are "fundamental right[s]" and that classifications burdening those rights are reviewed under strict scrutiny).

[8] Accordingly, numerous courts, including the Eighth Circuit, have enjoined government action targeting Planned Parenthood organizations. *See Planned Parenthood of Minn. v. State of Minn.*, 612 F.2d 359, 361 (8th Cir. 1980) (applying *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) and holding that "Planned Parenthood's unpopularity [based on its stance on abortion] played a large role" in passage of statute denying certain family planning grants to abortion providers, and "Planned Parenthood's unpopularity in and of itself and without reference to some independent considerations in the public interest cannot justify" the statute), *aff'd sub nom. Minn. v. Planned Parenthood of Minn.*, 448 U.S. 901; *Planned Parenthood Greater Memphis Region v. Dreyzehner*, 853 F. Supp. 2d 724, 737 (M.D. Tenn. 2012) (finding likelihood of success on equal protection claim when "the Defendant acted with political motivation to defund Planned Parenthood from a federal grant program funded by the federal government"); *Planned Parenthood of Cent. N.C. v. Cansler*, 877 F. Supp. 2d 310, 327 (M.D.N.C. 2012) (finding equal protection violation because the "State's interest in favoring childbirth over abortions" cannot provide a rational basis for barring Planned Parenthood "from receiving funding for non-abortion-related services for which [it] would otherwise be eligible"); *Planned Parenthood of Kan., Inc. v. City of Wichita*, 729 F. Supp. 1282, 1290–91 (D. Kan. 1990) (law banning contract with Planned Parenthood violates equal protection where it was "deprived of the benefit of continued access to Title X funding simply because of the reputation and unpopularity of Planned Parenthood").

PI Order at 10 (quoting *Intralot, Inc. v. McCaffrey*, No. 1:11-cv-08046, 2012 WL 4361451, at *3 (N.D. Ill. Sept. 21, 2012)) (internal quotation marks omitted); *Vill. of Willowbrook*, 528 U.S. at 564. As the Court found in entering the preliminary injunction, Plaintiff meets all four of these factors.

First, as the Court has found, Plaintiff is both legally and factually similarly situated to other ASCs. Abortion facilities are one of three types of ASCs defined in Missouri regulations, all of which are governed by the same licensing statutes, including the same statutes regarding denial, suspension, or revocation of a license, and the plan of correction process that is prescribed to address licensing deficiencies. PI Order at 11–14 (citing Mo. Ann. Stat. § 197.220, §197.293). Therefore, Plaintiff is legally similarly situated to other ASCs. Plaintiff is also factually similarly situated to other ASCs. The record shows that PPKM is not unique in having a licensing deficiency and is not unique in the particular deficiency at issue here – lacking a physician who is able to perform procedures. DHSS identifies deficiencies at most ASCs when it inspects them, and subsequently resolves those deficiencies through the plan of correction process. PI Order at 21 (citing Dec. 1 Discovery Response at 6). The record further shows that in 2011, SCCC did not have a physician capable of performing procedures, and yet that facility's license was not summarily revoked; instead, SCCC was given the opportunity to participate in the statutory plan of correction process.[9] PI Order at 14. Therefore, Plaintiff has shown that it is both legally and factually similarly situated to other ASCs.

Second, Plaintiff has shown that it was ". . . intentionally treated differently from others similarly situated. . ." *Vill. of Willowbrook*, 528 U.S. at 564. As the Court has found, DHSS's treatment of PPKM was in stark contrast to its usual treatment of other ASCs in two key ways.

[9] In addition, a similar situation arose in 2013 involving PPKM, and its license was not summarily revoked. PI Order at 14.

First, the timing of the September 25 and November 25 revocation notices sent by DHSS to PPKM show that "DHSS in this case decided prior to engaging in any communication with PPKM that the license would be revoked if the deficiency was not corrected by the exact day the deficiency arose." PI Order at 21. In other words, PPKM had no deficiency when the revocation notices were sent, a situation that is "unique to PPKM in the record." *Id.*

The second key difference in how PPKM was treated is that DHSS revoked PPKM's license without soliciting a plan of correction and permitting PPKM to implement that plan. DHSS has further admitted that a revocation without a plan of correction was unprecedented. In fact, as is discussed in detail above, this case and the SCCC case are the only instances in which DHSS has sought to revoke ASC licenses, and DHSS approached SCCC's licensing deficiencies in an "incremental fashion" and provided SCCC the opportunity to implement a plan of correction, even though its deficiencies presented an "egregious" threat to patient safety. *Id.* at 22. Here, DHSS has admitted that no such threats exist. *Id.* at 2.

As the Court found in entering the preliminary injunction, the fact that DHSS treated SCCC, a bad actor, worse than PPKM, which presents no threat to patient safety, is evidence that PPKM was treated unequally. PI Order at 15 (quoting *Bell v. Duperrault*, 367 F.3d 703, 707 (7th Cir. 2004) (a plaintiff may demonstrate that he has suffered irrational and arbitrary discrimination by showing that "he was treated worse than less deserving individuals for no rational reason."); *see also Esmail v. Macrane*, 53 F.3d 176, 179 (7th Cir. 1995)(". . . equal protection does not just mean treating identically situated persons identically. If a bad person is treated better than a good person, this is just as much an example of unequal treatment."). This is "irrational disparate treatment [] prohibited by the Equal Protection Clause." PI Order at 23.

Plaintiff has also shown that it will suffer harm as a result of the state's actions. The Court has found that PPKM's license is a "valuable property right" and that loss of that property right is "irreparable harm that PPKM is certain to suffer if the license is taken away." PI Order at 7. DHSS acknowledged during oral argument on Plaintiff's motion for a preliminary injunction that, should PPKM's license be revoked, it would not automatically be reinstated as soon as it has a physician with the required privileges. *Id.* The Court has further found that, given the disparate treatment of PPKM by DHSS thus far, any claim by DHSS that the license would be reinstated without substantial costs and delay is "not . . . credible," and any such delay "would constitute a significant irreparable injury." PI Order at 7.

Finally, the evidence clearly demonstrates that the disparate treatment PPKM has suffered was not rationally related to a legitimate state interest. *See Vill. of Willowbrook*, 528 U.S. at 564. The Court found in entering the preliminary injunction that "PPKM was treated disparately as a result of animus toward PPKM," since DHSS feared retaliation from Senator Schaefer if it did not act in accordance with the Senator's goals. PI Order at 23–24. As the Supreme Court has explained, "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *see also Cleburne*, 473 U.S. at 448 ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.") (citations and internal quotations omitted); *Palmer v. Thompson*, 403 U.S. 217, 226, (1971) ("Citizens may not be compelled to forgo their constitutional rights because officials fear public hostility . . . ."); *Little Rock Sch. Dist. v. Pulaski Cty. Special Sch. Dist. No. 1*, 839 F.2d 1296, 1303 (8th Cir. 1988) ("Constitutional rights are at stake here, and those rights exist (or not, as the

case may be) independently of public opinion . . . .'" (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943))).

In this case, no plausible policy reason exists for Defendant's decision to summarily revoke PPKM's license since PPKM has currently suspended abortion services while it lacks a physician with hospital privileges. Thus, any attempt by Defendant to argue that its actions were in the interest of public health are belied by this fact. Notably, the only other license revocation ever undertaken by DHSS involved serious health and safety issues, and, even in that situation, DHSS provided an opportunity for the license-holder to resolve deficiencies before revoking the license, during which time the ASC continued to operate. PI Order at 22–23. This fact further belies any contention by DHSS that it had a legitimate basis to summarily revoke PPKM's license due to urgent health and safety concerns. Therefore, Plaintiff has clearly proven that it was singled out for disparate treatment, with no rational basis, in violation of the Equal Protection Clause.

B. Plaintiff Has Succeeded on the Merits of Its Claim that Defendant Failed to Provide Adequate Procedural Due Process Prior to Revoking PPKM's License

The record shows Defendant also failed to provide PPKM adequate due process prior to summarily revoking its license.[10] To assess a procedural due process claim, the Eighth Circuit has stated: "[A] plaintiff must first demonstrate that he has a protected liberty or property interest at stake. Secondly, a plaintiff must prove that he was deprived of such an interest without due process of law." *Marler v. Mo. State Bd. of Optometry*, 102 F.3d 1453, 1456 (8th Cir. 1996) (citations omitted). Property interests are not created by the Constitution but rather stem from an

[10] Because the Court concluded that a preliminary injunction was appropriate based upon Plaintiff's equal protection claim, it did not address Plaintiff's procedural due process claim in its Preliminary Injunction Order. PI Order at 9.

independent source such as state law. *Stauch v. City of Columbia Heights*, 212 F.3d 425, 429 (8th Cir. 2000).

1. Plaintiff Has a Property Interest in Its Abortion Facility License and Was Not Afforded Adequate Process Prior to the License Revocation

As the current holder of a valid abortion facility license, which Defendant has sought to revoke, Plaintiff readily meets the requirement that it have a recognized property interest at stake, and Defendant has not contended otherwise. It is well-established under Missouri law that a license-holder "has a property right in a license that requires sufficient procedural due process before the license can be 'impaired, suspended, or revoked.'" *Stone v. Mo. Dep't of Health & Senior Servs.*, 350 S.W.3d 14, 27 (Mo. 2011) (quoting *Mo. Real Estate Comm'n v. Rayford*, 307 S.W.3d 686, 692 (Mo. App. 2010)); PI Order at 7 ("a license is a valuable property right").

Moreover, Plaintiff has been deprived of its property right without adequate procedural due process. The seminal case establishing the balancing test by which courts determine what and how much process is due in a given situation, *Mathews v. Eldridge*, 424 U.S. 319 (1976), requires the following factors be weighed:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335 (citing *Goldberg v. Kelly*, 397 U.S. 254, 263–71 (1970)).

"Applying [*Mathews*], the [Supreme] Court usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property." *Zinermon v. Burch*, 494 U.S. 113, 127–28 (1990) (emphasis in original) (citation omitted); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (The "'root requirement' of

the Due Process Clause [is] 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.'" (quoting *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971) (emphasis in original)). Indeed, courts have recognized only two situations in which post-deprivation process is constitutionally sufficient: first, "where there is a need for 'quick action by the State when there is a compelling or overriding state interest in a summary adjudication,'" and, second, where the deprivation resulted from unauthorized government action that could not have been predicted such that it would have been impossible to provide a pre-deprivation process. *Keating v. Neb. Pub. Power Dist.*, 562 F.3d 923, 928 (8th Cir. 2009) (quoting *Moore v. Warwick Pub. Sch. Dist. No. 29*, 794 F.2d 322, 327 (8th Cir. 1986)).

Neither exception applies here. First, as Defendant has admitted and the Court has recognized, there is no threat to public health or safety because Plaintiff ceased providing abortions when it no longer had a physician with privileges. Langston 30(b)(6) Dep. 17:5–11, 18:10–17; PI Order at 2. And, second, DHSS's revocation of PPKM's license was a deliberate, calculated government action that came from the highest chain of command at DHHS, in consultation with the Office of the Governor; therefore, no legitimate excuse can be given for why PPKM was denied the same process to cure a licensing deficiency that is provided to other ASCs, as outlined in Mo. Ann. Stat. § 197.293.

Applying the *Mathews* factors confirms that PPKM was not provided the required due process prior to having its license revoked. First, as established above, PPKM's private interest at stake—its property interest in its license—is substantial. Should Plaintiff be deprived of this right, it would suffer significant harms associated with the need to apply for a new license, including time and financial expense, and would suffer financial loss due to the inability to

restart abortion services during the application process. *See* McQuade Decl. ¶ 16, Dkt. 6-1; PI Order at 8.

As to the second *Mathews* factor, the record in this case makes clear that a formal pre-deprivation process is of significant value to preventing the very type of arbitrary and illegitimate decision that DHSS has made to single PPKM out for disparate treatment because of political pressure. Had PPKM been given a meaningful opportunity to be heard, it would have presented DHSS with information regarding the steps its physician was taking to attempt to obtain new hospital privileges, its efforts to locate a new physician who already had privileges or would apply for privileges, and the time necessary for these processes to play out. As a result, the risk of an arbitrary or erroneous deprivation would have been significantly decreased since DHSS would have come to a final decision regarding PPKM's license with full information before it (and, indeed, may have chosen to suspend, rather than revoke PPKM's license). *See Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) ("It has long been recognized that fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . .") (internal quotations omitted). Thus, the second *Mathews* factor plainly weighs in PPKM's favor.

The final *Mathews* factor—the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail—also weighs heavily in favor of Plaintiff. Any claim that the action was necessary for the public health is belied by Defendant's own admission that there was no concern that Plaintiff would provide abortions while it lacked a physician with hospital privileges.[11] Nor can Defendant argue that providing Plaintiff with a formal pre-deprivation process would have been

[11] Even in situations where patient safety is compromised, Missouri law does not require the revocation of an ASC license, but rather provides for DHSS to "restrict access to the service or services affected" while a plan of correction is developed and implemented. Mo. Ann. Stat. § 197.293 (2).

a fiscal or administrative burden. By Defendant's own admission, DHSS typically follows a pre-deprivation plan of correction. *See supra* Part II.B.1. Therefore, Defendant's failure to provide PPKM the pre-deprivation process it provides to other ASCs—the opportunity to correct deficiencies through a plan of correction—clearly violates PPKM's procedural due process rights.

2. Defendant Failed to Afford PPKM a Reasonable Opportunity to Comply with Hospital Privileging Requirements

"Due process . . . is a flexible concept that varies with the particular situation." *Zinermon*, 494 U.S. at 127. Where a "statute regulates private conduct," due process requires "affording those within the statute's reach a reasonable opportunity . . . to comply with those requirements." *United States v. Locke*, 471 U.S. 84, 108 (1985); *see also Atkins v. Parker*, 472 U.S. 115, 130 (1985) (sufficient "grace period" required); *Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982) (legislature must "afford the citizenry a reasonable opportunity . . . to comply"); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to . . . conform their conduct accordingly.").

Therefore, courts have found procedural due process violations where, as here, abortion restrictions, including a hospital privileges requirement, did not afford providers sufficient time to comply with the law. For example, in analyzing this issue, the Fifth Circuit explained:

> [I]t is unreasonable to expect that all abortion providers will be able to comply with the admitting-privileges provision within [the time provided by the statute] where receiving a response from a hospital processing an application for admitting privileges can take [nearly twice that time]. Accordingly, we conclude that . . . the admitting-privileges requirement may not be enforced against abortion providers who applied for admitting privileges . . . but are awaiting a response from a hospital.

Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 600 (5th Cir. 2014), *reh'g en banc denied*, 769 F.3d 330; *see also Women's Med. Prof'l Corp. v. Baird*,

438 F.3d 595, 613–14 (6th Cir. 2006) (finding procedural due process violation where State issued cease and desist order, preventing abortion clinic from operating, without providing pre-deprivation process and opportunity for compliance with ASC requirements, noting that "in situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so." (quoting *Zinermon*, 494 U.S. at 132)).

As with the admitting privileges requirement in *Abbott*, DHSS's action violates PPKM's procedural due process rights because it was impossible for PPKM to comply with the hospital privileges requirement by December 1 and thereby maintain its license. *See* McQuade Decl. ¶¶ 11–12. Its provider did not have enough time to obtain new privileges, and, in the alternative, PPKM did not have the time necessary to locate a new physician who was willing and able to provide abortion services in Missouri. *Id.* As such, the failure to provide PPKM with time to comply also violates PPKM's right to procedural due process.

C. The Remaining Factors Weigh in Favor of Granting Permanent Injunctive Relief

As the Court found in entering the preliminary injunction, Plaintiff satisfies the remaining factors for permanent injunctive relief. Should Plaintiff's Abortion Facility License be revoked, PPKM would suffer immediate, irreparable injury from the loss of its property right in its license. PI Order at 7. The process of applying for a new license involves significant staff time and financial costs and would also result in a several-month delay before Plaintiff is able to re-start abortion services, resulting in financial loss due to the inability to provide during that time period. *See* Langston 30(b)(6) Dep. 37:15–38:18 (stating it would take at least two months to issue a new license to a facility that had its license revoked, because DHSS would have to review

new documents and the facility would have to obtain additional third-party inspections).[12] These financial losses would be irreparable, as the Eleventh Amendment bars PPKM from recovering damages from the state. *See, e.g.*, *Kan. Health Care Ass'n v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994) (economic injury was irreparable harm because Eleventh Amendment barred damages); *see also* Mo. Ann. Stat. § 537.600 (Missouri sovereign immunity statute). Defendant, on the other hand, will not be harmed by the issuance of a permanent injunction, as DHSS admits that there is no patient health or safety concern in this case. *See* Langston 30(b)(6) Dep. 17:5–11, 18:10–17.

Finally, the public interest will be served, rather than harmed, by permanent injunctive relief. It is axiomatic that the public interest is served by upholding the Constitution and preventing the enforcement of unconstitutional laws. *See, e.g.*, *Phelps–Roper v. Nixon,* 545 F.3d 685, 690 (8th Cir. 2008) ("it is always in the public interest to protect constitutional rights."); *Traditionalist Am. Knights of the Ku Klux Klan v. City of Desloge, Mo.*, 914 F. Supp. 2d 1041, 1051 (E.D. Mo. 2012); *Saint v. Neb. Sch. Activities Ass'n*, 684 F. Supp. 626, 630 (D. Neb. 1988); *see also Kirkeby v. Furness*, 52 F.3d 772, 775 (8th Cir. 1995) (public interest favored injunction against unconstitutional ordinance). Sparing PPKM from having to reapply for its license once it cures the licensing deficiency will also allow it to spend its limited resources on patient care so that Missouri women will again have an additional provider of abortions outside of St. Louis.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter judgment in Plaintiff's favor and a permanent injunction preventing DHSS from revoking PPKM's Abortion Facility License.

[12] By contrast, DHSS admitted that if it had suspended the license instead, PPKM would have been able to restore abortion services with far less delay and expense once it could comply with the law. Koebel 30(b)(6) Dep. 40:6–12.

Respectfully submitted this 4th day of April, 2016,

/s/ Douglas N. Ghertner

Douglas N. Ghertner, Mo. Bar No. 22086
Slagle, Bernard and Gorman
600 Plaza West Building
4600 Madison Avenue
Kansas City, MO 64112-3031
(816) 410-4664
(816) 561-4498 (telefacsimile)
dghertner@sbg-law.com

Arthur A. Benson II, Mo. Bar No. 70134
Arthur Benson & Associates
4006 Central Avenue
Kansas City, Missouri 64111
(816) 531-6565
(816) 531-6688 (telefacsimile)
abenson@bensonlaw.com

Carrie Y. Flaxman (*admitted pro hac vice*)
Planned Parenthood Federation of America, Inc.
1110 Vermont Ave., NW, Suite 300
Washington, DC 20005
(202) 973-4830
carrie.flaxman@ppfa.org

Melissa A. Cohen (*admitted pro hac vice*)
Diana O. Salgado (*admitted pro hac vice*)
Planned Parenthood Federation of America, Inc.
Public Policy Litigation & Law
123 William St., 9th Floor
New York, New York 10038
(212) 541-7800
(212) 247-6811 (telefacsimile)
melissa.cohen@ppfa.org
diana.salgado@ppfa.org

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2016 a copy of the foregoing has been served upon all counsel of record in this action by electronic service through the Court's CM/ECF system.

s/ Melissa A. Cohen
Melissa A. Cohen