

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**PLANNED PARENTHOOD OF** )  
**KANSAS AND MID-MISSOURI,** )  
**Plaintiff,** )  
) )  
**and** )  
) )  
**Dodge City Family Planning Clinic, Inc.,** )  
**Plaintiff-Intervenor** )  
) )  
**vs.** )  
) )  
**SAM BROWNBACK, Governor of** )  
**Kansas, and ROBERT MOSER, M.D.,** )  
**Secretary, Kansas Department of** )  
**Health and Environment,** )  
) )  
**Defendants.** )  
\_\_\_\_\_ )

**CIVIL ACTION  
Case No.: 11-2357 JTM/DJW**

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR  
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION  
OF PLAINTIFF-INTERVENOR DODGE CITY FAMILY PLANNING CLINIC**

On May 28, 2011, Defendant Governor Sam Brownback signed into law an appropriations bill, H.B. 2014, 84th Leg. (Kan. 2011), with an unlawful “defunding provision,” Section 107(l). That provision deprives Plaintiff-Intervenor Dodge City Family Planning Clinic, Inc. (“DCFP”) of federal family planning funds it has received for 35 years. As of July 1, 2011, all federal funds for the Title X Family Planning program in Kansas were distributed according to two “priorities” that exclude DCFP: first, to public entities; second, to hospitals or federally qualified health centers (“FQHCs”) that provide comprehensive primary care. Section 107(l) thus violates the Supremacy Clause because it imposes additional conditions on eligibility for a federal

program not required by – and inconsistent with – federal law: the Title X Family Planning program laws do not contemplate or allow restricting the type of providers who may receive Title X monies. The purpose of Section 107(l) was to defund entities that provide abortion services; although DCFP has never provided abortion services, the effect of the provision on DCFP has been to cut off its Title X funds – 40% of its budget – and to cause a further, precipitous decrease in other revenue sources as well. But for the generosity of its employees, who donated their time without pay, DCFP would have closed July 1. Because of Section 107(1), DCFP will shut down in a very few weeks, if not in a matter of days.

Pursuant to Federal Rule of Civil Procedure 65, DCFP now moves the Court to issue a temporary restraining order and preliminary injunction clarifying that Defendants must “act with respect to Title X funding without reference to or reliance on . . . Section 107(1)” in its dealings with DCFP – and not only in its dealings with Plaintiff Planned Parenthood of Kansas and Mid-Missouri (“PPKM”). *See PPKM v. Brownback*, --- F. Supp. 2d ----, 2011 WL 3250720, at \*7 (D. Kan. Aug. 1, 2011) (granting preliminary injunction in this case on motion of Plaintiff PPKM). As explained below, DCFP is already suffering irreparable harm. Absent the immediate relief DCFP now seeks, the defunding provision will have additional devastating and irreparable consequences for DCFP, its employees, and its predominantly low-income and Hispanic patients. In the face of higher costs, longer and more expensive travel, and decreased access, many of DCFP’s hundreds of patients would simply go without these critical medical services when DCFP closes.

## FACTS

### **I. The Title X Family Planning Program**

The Title X Family Planning Program, 42 U.S.C. §§ 300 *et seq.*, is the federal program that funds low-cost family planning services at organizations such as DCFP. Congress enacted it in 1970 as part of the Public Health Service Act with the specific intent of providing access to family planning services for low-income and/or uninsured women and families, including those ineligible for Medicaid.<sup>1</sup> The United States Department of Health and Human Services (“HHS”) grants Title X funds to “public or nonprofit entities” (“grantees”). 42 U.S.C. § 300(a). The Kansas Department of Health and Environment (“KDHE”) is the Title X grantee for the state of Kansas; it uses federal Title X funds for its Family Planning Services Program. Rather than provide the clinical services itself, KDHE subgrants the funds to providers of family planning services, such as DCFP. *See* KDHE Competing Continuation Grant Application for Federal Title X Funds (Feb. 22, 2010) at 11 (attached as Exhibit C to PPKM’s Mem. Law in Supp. Mot. for Prelim. Inj., filed June 29, 2011 ) (“KDHE Grant Application, PPKM Mem. Ex. C”).

“Any public or nonprofit private entity” is eligible to apply for Title X funds, 42 C.F.R. § 59.3, as part of a project to provide “services necessary to aid individuals to determine freely the number and spacing of their children.” 42 C.F.R. § 59.1. Neither the Title X statute nor any federal regulation imposes any additional service requirements on entities that receive Title X funds; no federal law mandates what type of provider they must be, or what if any services they must provide other than those that Title X funds.

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<sup>1</sup> *See generally* Office of Population Affairs Title X Family Planning Program Fact Sheet (Jan. 2008), <http://www.hhs.gov/opa/pdfs/title-x-family-planning-fact-sheet.pdf>. Patients at Title X providers receive care on a sliding fee scale, and thus incur charges for their services based on their ability to pay. *See* 42 C.F.R. § 59.5 (2011).

Certainly no part of the “Title X Family Planning program” law envisions disqualification of “independent family planning clinics,” such as the Dodge City Family Planning Clinic. *See* Office of Population Affairs Title X Family Planning Program Fact Sheet (Jan. 2008), <http://www.hhs.gov/opa/pdfs/title-x-family-planning-fact-sheet.pdf>.

## **II. KDHE’s Family Planning Program and DCFP’s Historical Participation**

DCFP has been the Title X provider for Ford County for 35 years. Demuth Decl. ¶ 8, Sept. 29, 2011 (attached to DCFP’s Mem. Law in Supp. Mot. for Intervention). DCFP and its two employees are exceedingly committed to ensuring access to affordable, high quality, comprehensive family planning and related services for the low-income, high-need population of Ford County and the surrounding area. *Id.* ¶¶ 3, 6-7, 9, 21-23. Sixty percent of DCFP’s patients are Hispanic; two-thirds are poor or near-poor. *Id.* ¶ 6. For the 2011 fiscal year, which ended June 30, 2011, KDHE awarded DCFP \$39,288 in Title X funds, including \$8,360 to expand the availability of family planning care to greater numbers of low-income patients, for a total of at least 590 Title X family planning patients. *Id.* ¶ 9. DCFP met that goal. That contract, which expired June 30, 2011, was DCFP’s last contract with KDHE, *id.* ¶ 11, but it was only the first of five annual contracts KDHE projected in its application for Title X funds.

On February 22, 2010, KDHE submitted to HHS its application for funding for the Kansas Family Planning Services Program, requesting Title X funds for the first year of a five-year project period to run from June 30, 2010 through June 29, 2015. *See* KDHE Grant Application, PPKM Mem. Ex. C. As in prior years, KDHE included in its application an explanation of how it intended to perform its proposed project and distribute its grant monies, and the number of patients the grant would serve. KDHE’s Grant Application included DCFP, by name, as the only Title X subgrantee in Ford County. *Id.* at 109-16. According to

KDHE’s own assessment, reflected in its Grant Application, among Kansas’s 105 counties, Ford is one of the “top ten counties in need of [subsidized family planning] services,” *id.* at 31, and is in “a cluster of ‘high need’ counties in southwest Kansas,” *id.* at 33. Ford County ranks “high” on the indicators for “15-17 year old teen pregnancy,” “18-19 year old teen pregnancy,” “Repeat Teen Pregnancy,” and “Mothers with low Educational Attainment.” *Id.* at 33. KDHE identified as a “priority . . . [t]he need to shift emphasis and possible resources to provide additional support to the top 10 counties” with unmet needs for family planning, including Ford County, and the “need to address the SW cluster.” *Id.* at 42-43. Two of the counties that adjoin Ford – Hodgeman and Clark – have no Title X provider. *Id.* at 51. For the period 2010-2015, KDHE requested “Supplemental Expansion funds . . . to support” an increase in patients, particularly low-income patients, at DCFP, which had already considerably increased its family planning patients and low-income patients from 2007-2009. *Id.* at 94-95 & Table 1; Demuth Decl. ¶ 19.

### **III. Section 107(l) and the Defunding of DCFP**

On May 28, 2011, Governor Brownback signed into law H.B. 2014, which took effect July 1, 2011. Under Section 107(l) of that budget bill,

(l) During the fiscal year ending June 30, 2012, subject to any applicable requirements of federal statutes, rules, regulations or guidelines, any expenditures or grants of money by the department of health and environment—division of health for family planning services financed in whole or in part from federal title X moneys shall be made subject to the following two priorities: First priority to public entities (state, county, local health departments and health clinics) and, if any moneys remain, then, Second priority to non-public entities which are hospitals or federally qualified health centers that provide comprehensive primary and preventative care in addition to family planning services: Provided, That, as used in this subsection “hospitals” shall have the same meaning as defined in K.S.A. 65-425, and amendments thereto, and “federally qualified health center” shall have the same meaning as defined in K.S.A. 65-1669, and amendments thereto.

Because DCFP is not a public entity, hospital, or FQHC, the defunding provision excludes it from eligibility to continue receiving Title X subgrants.

As explained more fully below, Section 107(1) is currently causing – and imminently threatens further – actual and irreparable consequences. In mid-June 2011, KDHE informed DCFP that, under the new provision, DCFP would lose its Title X funds as of July 1, 2011. Since July 1, DCFP has remained open to serve high-need, low-income patients only because its two employees started working without pay; since July 1, 2011, Ford County has had no Title X provider. As currently configured, the county health department and the local FQHC are completely unable to fill the need (one provides *no* family planning), and each has stated its unwillingness to apply for the Title X funds and thus to start providing these desperately needed services. The ability of DCFP’s employees to volunteer their time is ending imminently. Absent the relief requested here, DCFP will close; its patients will lose access to affordable, comprehensive family planning care; and their health, family health, and public health in the region will suffer. *See* Demuth Decl. ¶¶ 17-23.

### **ARGUMENT**

To prevail on a motion for temporary or preliminary injunctive relief, DCFP must demonstrate: (1) a substantial likelihood that it will prevail on the merits; (2) that it will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to the moving party outweighs whatever damage the proposed injunction will cause the opposing party; and (4) that the injunction would not be adverse to the public interest. *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001);

*Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980); *Bey v. Douglas Cnty. Corr. Facility*, 540 F. Supp. 2d 1194, 1196 (D. Kan. 2008). DCFP easily meets this test.<sup>2</sup>

**I. DCFP Is Extremely Likely To Prevail on the Merits of its Supremacy Clause Claim.**

Through continued reliance on the defunding provision that this Court preliminarily enjoined, Defendants have disqualified DCFP from participating as a subgrantee in the Title X program solely because it is not a public entity, hospital, or FQHC. *See* § 107(1); Demuth Decl. ¶ 11. As this Court held, because Section 107(1) “create[s] an additional condition for a successful subgrant application, completely excluding a class of entities who are otherwise qualified under federal law for Title X participation,” it is invalid under the Supremacy Clause. *PPKM*, 2011 WL 3250720, at \*13. DCFP is thus extremely likely to succeed on the merits of its claim: it is virtually indistinguishable from the Supremacy Clause claim that Plaintiff PPKM raised against

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<sup>2</sup> DCFP does not believe that the heightened *O Centro* standard for injunctive relief applies here. *See O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973 (10th Cir. 2004) (*en banc*) (*per curiam*). However, DCFP has made such a strong showing with respect to each of the required factors that it would more than meet its burden, even under that heightened standard. As explained further below, DCFP is extremely likely to succeed on the merits – its claim is identical to the Supremacy Clause claim that Plaintiff PPKM raised in this case, which this Court held “demonstrated a strong likelihood of success on the merits,” *PPKM*, 2011 WL 3250720, at \*13, under either the heightened or regular standard, *id.* at \*15; *see also O Centro Espirita*, 389 F.3d at 976 (requiring party seeking injunction to “make a strong showing . . . with regard to the likelihood of success on the merits”). Further, DCFP “has demonstrated convincingly the existence of an injury which may be effectively addressed only by granting the injunction sought.” *PPKM*, 2011 WL 3250720, at \*16. These injuries are more than just imminent, they are “certain, great, actual and not theoretical.” *Id.* at \*6. Finally, DCFP has shown “the balance of interests between the parties strongly supports an injunction” and also that an injunction would advance the public interest. *Id.* at \*16-17. DCFP is thus entitled to the relief it seeks under either standard. *See id.*

Section 107(1), which this Court held had “a strong likelihood of success on the merits.”

*Id.*

It is also virtually indistinguishable from the “consistent conclusions of other courts that state legislation which effectively narrows the eligibility requirements for Title X recipients is invalid under the Supremacy Clause.” *Id.* at 12.<sup>3</sup> Indeed, less than three weeks after this Court issued the preliminary injunction, still another court invalidated a state law that similarly imposed additional eligibility requirements on Title X subgrantees. *See Planned Parenthood of Cent. North Carolina v. Cansler*, 2011 WL 3658902 (M.D. N.C. Aug. 19, 2011) (enjoining state law precluding state Title X grantee from subcontracting with Planned Parenthood or its affiliates). The court held, as has every other court to consider the question, that “the overwhelming weight of authority supports the conclusion” that a state may not impose additional eligibility requirements on grantees or subgrantees above and beyond what the Title X statute requires. *Id.* at \*7. Defendants can cite no case that holds otherwise. *PPKM*, 2011 WL 3250720, at \*13; *Cansler*, 2011 WL 3658902, at \*8. Thus, in view of this Court’s very recent precedent, and the long-standing and consistent precedent of other courts, DCFP has made a strong showing of a likelihood of success on the merits of its Supremacy Clause claim.

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<sup>3</sup> *See e.g., Planned Parenthood of Houston and Southeast Tex. v. Sanchez*, 403 F.3d 324, 336-37 (5<sup>th</sup> Cir. 2005) (“state eligibility standard that altogether excludes entities that might otherwise be eligible for federal funds is invalid under Supremacy Clause”); *Planned Parenthood Fed. of Am. v. Heckler*, 712 F.2d 650, 663 (D.C. Cir.1983) (“Title X does not provide, or suggest, that states are permitted to determine eligibility criteria for participants in Title X programs”); *Planned Parenthood of Billings v. Montana*, 648 F. Supp. 47 (D. Mont. 1986) (same); *see also Hern v. Beye*, 57 F.3d 906, 913 (10th Cir.1995) (reaching similar conclusion as to Title XIX funding); *Planned Parenthood Ass’n of Utah v. Dandoy*, 810 F.2d 984 (10th Cir. 1987) (same); *Planned Parenthood of Indiana v. Comm’r of the Indiana State Dept. of Health*, ---- F. Supp. 2d ----, 2011 WL 2532921, at \*17 (S.D. Ind. June 24, 2011) (appeal to be argued No. 11-2464 7th Cir. Oct. 20, 2011).



**II. Absent Temporary and Preliminary Injunctive Relief, DCFP, Its Employees, and Its Patients Will Suffer Certain, Great, and Actual Irreparable Harm.**

Absent an injunction by this Court, Defendants will continue to enforce Section 107(1) against DCFP, in direct contravention of this Court's August 1, 2011, decision and the clear dictates of the Supremacy Clause, thereby forcing DCFP to shut its doors and eliminating the *sole* provider of affordable family planning services for the high-need population DCFP serves. These injuries are not merely imminent: they are current, "certain, great, actual, and not theoretical." *PPKM*, 2011 WL 3250720, at \* 6 (citing *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003)).

If and when DCFP closes, hundreds of high-need, low-income individuals will be left with no source of affordable, comprehensive family planning and related services.<sup>4</sup> The Ford County Department of Health does not provide family planning care; does not do pap tests; and does not have anyone on staff who can write a prescription – i.e., it cannot provide access to birth control pills. The FQHC has a very small contraceptive formulary (for example, it offers only one kind of birth control pill) and has a 2-3 month wait for an appointment, whereas patients can get an appointment at DCFP within a week. In addition, because the medical professional at the FQHC is a man, many of DCFP's patients would hesitate to seek contraceptive and other reproductive health care from the FQHC with its current staffing. Demuth Decl. ¶ 13. Neither entity is willing to apply for the Title X contract and to start providing the services that Title X funds; neither has done so. *Id.* ¶ 14. As KDHE's own Title X Grant Application reflects, these are critical services: DCFP's closure would irreparably harm its patients, causing damage to their health

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<sup>4</sup> Already, because of the loss of Title X funds, DCFP has had to cut back on contraceptive options, to the detriment of patient satisfaction, patient health, and the Title X mission. Demuth Decl. ¶ 17.

and to public health in the region. *See id.* ¶¶ 12, 17, 21; *see also PPKM*, 2011 WL 3250720, at \*16 (loss of access to Title X services constitutes irreparable harm); *Cansler*, 2011 WL 3658902, at \*14 (same).

DCFP and its employees are already suffering irreparable harm. Its employees are suffering real financial hardship, affecting their ability to pay for medical care, housing, and children's college costs. Demuth Decl. ¶ 22. Already, DCFP has seen a significant decline in patient numbers due to the public threat of closure that Section 107(1) presents, and these patients are disproportionately among those who qualify for no discount in services, and who therefore help DCFP remain solvent. DCFP may never get these patients back. *Id.* ¶ 19. "The adverse effect on [DCFP's] business, coupled with the incalculable loss of revenue," *Planned Parenthood of Minnesota, Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 866-67 (8<sup>th</sup> Cir. 1977), and the inevitable elimination of jobs is irreparable harm, *Planned Parenthood of Indiana*, 2011 WL 2532921, at \*17 (preliminarily enjoining enforcement of funding restriction).

Absent relief from this Court, DCFP will imminently suffer the ultimate irreparable harm of closure, and its employees will suffer permanent loss of their jobs. *See PPKM*, 2011 WL 3250720, at \*16. Even were later compensation for present injuries possible – which it is not – DCFP would not survive the pendency of this litigation to be compensated at a later stage. *See, e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (Evidence that the plaintiffs "would suffer a substantial loss of business and perhaps even bankruptcy. . . . meets the standards for granting interim relief, for otherwise a favorable final judgment might well be useless."). As the Tenth Circuit has held, a mere "threat to trade or business viability may constitute irreparable harm," *Tri-*

*State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 805 F.2d 351, 356 (10th Cir. 1986), and the certainty that DCFP will close goes far beyond a mere threat.<sup>5</sup>

**III. The Current and Threatened Injuries Greatly Outweigh Any Damage the Injunction Might Cause, and Granting the Requested Relief Will Serve the Public Interest.**

Defendants cannot seriously contend that granting DCFP preliminary relief would cause either KDHE or the public interest any harm. As this Court has already held, an injunction “will simply require the defendants to refrain from relying upon the illegal ‘prioritization’ scheme of Section 107(1) and provide funding to” DCFP. *PPKM*, 2011 WL 3250720, at \*16. Inasmuch as it does not harm Defendants to refrain from enforcing an illegal scheme against PPKM, it will not harm them to refrain from enforcing it against DCFP. As such, the serious harms that DCFP and its clients are already suffering, and are certain to suffer imminently, greatly outweigh any cost to Defendants from complying with the Title X statute. *See id.*

For much the same reasons, the requested relief would be in the public interest: “The public interest is advanced by the use of Title X funding consistent with the intent of Congress” and “by allowing family planning services to be provided” in Ford County and the surrounding high-need area without disruption “in a manner consistent with uniform local history.” *Id.* at \*17; *see also Planned Parenthood of Cent. Texas v.*

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<sup>5</sup> In addition, DCFP also suffers the irreparable harm of being subject to an unconstitutional law. *See Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001). This principle applies to Supremacy Clause violations as well as other constitutional violations. *See, e.g. Dominguez v. Schwarzenegger*, 596 F.3d 1087 (9th Cir. 2010); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992); *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858, 878 (N.D. Tex. 2008) (“A party may be irreparably injured in the face of the threatened enforcement of a preempted law.”).

*Sanchez*, 280 F. Supp. 2d 590, 612 (W.D. Tex. 2003) (injunction in public interest where plaintiff clinics were “instrumental to ensuring . . . women receive the family planning services Congress intended to fund” and no “substitute providers of these important services, particularly in rural areas” are available). Without an injunction, by contrast, hundreds of high-need, low-income Kansans will lose access to critical family planning and related services. Demuth Decl. ¶¶ 6, 23. Thus, both the balance of harms and the public interest weigh strongly in favor of granting the preliminary relief sought here.

### **CONCLUSION**

For the reasons stated above, DCFP respectfully requests that the Court grant its motion for temporary restraining order and preliminary injunction.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 30, 2011, I caused a copy of Plaintiff-Intervenor's Memorandum of Law to be served through the Court's electronic filing system, which will serve all the parties in this action.

Dated: September 30, 2011

s/Stephen Douglas Bonney