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	)	**CIVIL ACTION** **Case No.: 11-2357 JTM/DJW**
vs.	)	
SAM BROWNBACK, Governor of Kansas, and ROBERT MOSER, M.D., Secretary, Kansas Department of Health and Environment,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR INTERVENTION AND FOR EXPEDITED CONSIDERATION OF PLAINTIFF-INTERVENOR DODGE CITY FAMILY PLANNING CLINIC

The Court is familiar with the facts of the above-captioned case, a federal constitutional challenge to Section 107(1) of H.B. 2014, 84th Leg. (Kan. 2011) ("Section 107(1)" or "the defunding provision"), which limits eligibility to participate in the Title X program to public entities, hospitals, and Federally Qualified Health Centers ("FQHCs"). There is ample evidence that the specific purpose of Section 107(1) was to deny funding to any entity that provides abortions. *See Planned Parenthood of Kansas & Mid-Missouri v. Brownback*, --- F. Supp. 2d ----, 2011 WL 3250720, *15 (D. Kan. Aug. 1, 2011) (holding that Plaintiff Planned Parenthood of Kansas and Mid-Missouri ("PPKM") showed a "strong likelihood of success" on that claim). However, even though Plaintiff-Intervenor Dodge City Family Planning Clinic ("DCFP") does not provide abortions, it

has become the collateral damage of that dispute: It is the only other Title X provider to be defunded under Section 107(1). As a result, DCFP is already suffering irreparable harm and will be forced to close its doors in a very few weeks or even a matter of days; this would leave hundreds of high-need, low-income patients with no access to critical family planning services.

Thus, while DCFP and PPKM share one common constitutional claim against the defunding provision (a preemption claim), their objectives and interests are not completely aligned: PPKM is also pursuing claims relative to its status as an abortion provider, and those claims do not protect DCFP's interests. Moreover, recent experience demonstrates that Defendants are obstructing the relief this Court has ordered: they continue to enforce the defunding provision against DCFP. Hence, unless DCFP intervenes in this case, it will continue to suffer irreparable harm under the defunding provision, and will close imminently, at the expense of its patients' health and public health in Ford County and the surrounding area.

ARGUMENT

I. DCFP Is Entitled To Intervention As of Right.

DCFP seeks to intervene pursuant to Fed. R. Civ. P. 24(a)(2), which entitles a movant to intervene as of right if: (1) the motion is timely; (2) the movant claims an interest relating to the property or transaction that is the subject of the action; (3) the disposition of the litigation may, as a practical matter, impair or impede the movant's interest; and (4) the existing parties do not adequately represent the movant's interest. *See also WildEarth Guardians v. Nat'l Park Service*, 604 F.3d 1192, 1198 (10th Cir. 2010) ("*WildEarth Guardians II*"). The central concern in deciding whether intervention

is appropriate is the practical effect of the litigation on the movant. *WildEarth Guardians v. U.S. Forest Service*, 573 F.3d 992, 995 (10th Cir. 2009) ("*WildEarth Guardians I*"). DCFP meets this standard.

As an initial matter, this motion is timely. The case is still in its early stages; this Court has not yet issued any scheduling orders; and allowing intervention at this point would neither prejudice the adjudication of any parties' rights nor delay any proceedings on the merits. Moreover, it was not until after this Court's August 30, 2011, order denying Defendants' motion to clarify the August 1, 2011, preliminarily injunction that DCFP could have known its interests were not being adequately represented in the case.[1] Given these circumstances, DCFP's motion to intervene is timely filed. *See Elliott Indus. Ltd. Partnership v. BP Am. Prod. Co.*, 407 F.3d 1091, 1103 (10th Cir. 2005).

Furthermore, DCFP has shown an interest in this litigation that has already been impeded by Defendants: because it is not a public entity, hospital, or FQHC, it has lost its Title X funding under Section 107(1). By phone call of June 9, 2011, and by letter dated June 14, 2011, Defendants informed DCFP that they were cancelling DCFP's Title X contract "[d]ue to recent legislative action." Letter from Robert Moser, Secretary, KDHE, to Karla Demuth, Exec. Dir., DCFP (June 14, 2011) (attached as Exhibit 2 to Demuth Decl); *see also* Demuth Decl. ¶ 11. But for the volunteer services of DCFP's employees, Section 107(1) would have shut DCFP down as of July 1, 2011; DFCP now faces imminent shut down. Demuth Decl. ¶¶ 3-4, 21-22. It is already suffering severe loss of

[1] *See generally* Demuth Decl. ¶ 11, Sept. 29, 2011 (attached to this memorandum of law). It was only after this Court's August 30, 2011, order that Defendants finally complied with the preliminary injunction, to the extent that it enjoined enforcement of Section 107(1) against Plaintiff PPKM. However, notwithstanding DCFP's subsequent request that Defendants stop enforcing the defunding provision against DCFP, Defendants continue to do so. *Id.* ¶¶ 15-16.

revenue, even above and beyond the Title X funds, because other funders and paying patients alike fear it will close. *Id.* ¶¶ 3, 18-20. "The threat of economic injury from the outcome of litigation undoubtedly gives a petitioner the requisite interest." *WildEarth Guardians I*, 573 F.3d at 996 (quoting *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 295 F.3d 1111, 1115 (10th Cir. 2002)).

Finally, PPKM could obtain relief on any one of multiple grounds, only one of which applies to DCFP. That is, PPKM could obtain the relief it seeks based on a claim that DCFP does not have, which would leave DCFP with no relief. Therefore, no current party in the case can adequately represent DCFP's interest. *Natural Res. Def. Council, Inc., v. U.S. Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345-46 (10th Cir. 1978) (holding inadequate representation where possibility that existing party situated "somewhat differently" could obtain relief that would not protect movant); *see also WildEarth Guardians II*, 604 F.3d at 1198-99 (citing *Utah Ass'n of Cnty. v. Clinton*, 255 F.3d 1246, 1254 (10th Cir. 2001). Indeed, as explained above, Defendants have already attempted to evade the preliminary relief granted by this Court in a manner directly harmful to DCFP's interests: they continue to enforce Section 107(1) against DCFP. Thus, unless DCFP intervenes as a plaintiff in this challenge, it will be unable to ensure that Defendants comply with this Court's orders in a way that protects its interests, particularly where those interests may diverge from PPKM's. Under the law of this circuit, these factors together justify DCFP's intervention as of right. *See WildEarth Guardians II*, 604 F.3d 1198-99 (citing *Clinton*, 255 F.3d at 1254).

II. Alternatively, the Court Should Grant DCFP Permissive Intervention.

In the alternative, DCFP meets all the prerequisites for permissive intervention under Fed. Rule Civ. P. 24(b), which provides:

> On timely motion, the court may permit anyone to intervene who: . . . has a claim or defense that shares with the main action a common question of law or fact. . . . In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

DCFP raises only one claim in this case—that Section 107(1) violates the Supremacy Clause—which is identical to one of PPKM's claims. Moreover, as described above, allowing DCFP to intervene in this case will not unduly delay or prejudice the adjudication of any parties' rights, or result in delay of the proceedings on the merits. Thus, it is within this Court's broad discretion to grant DCFP permissive intervention in this case.

CONCLUSION

For the reasons stated above, DCFP respectfully requests that the Court grant its motion to intervene as of right, pursuant to Fed. R. Civ. P. 24(a), or, in the alternative, grant it permissive intervention pursuant to Fed. R. Civ. P. 24(b).

Respectfully submitted,

___s/Stephen Douglas Bonney_____
Stephen Douglas Bonney, KS Bar No. 12322
ACLU Foundation of Kansas & Western Missouri
3601 Main Street
Kansas City, MO 64111
Tel. (816) 994-3311
Fax: (816) 756-0136
dbonney@aclukswmo.org

Talcott Camp*
Alexa Kolbi-Molinas*
ACLU Foundation

Reproductive Freedom Project
125 Broad Street, 18th Floor
New York, NY 10004
212-549-2633
tcamp@aclu.org
akolbi-molinas@aclu.org
* *Pro hac vice* to be filed

Attorneys for Plaintiff-Intervenor

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