Case No. 11-3310

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Dodge City Family Planning Clinic, Inc.,
Plaintiff/Intervenor-Appellee,

v.

Robert Moser, M.D., Secretary,
Kansas Department of Health and Environment,
Defendant-Appellant.

On Appeal from the United States District Court for the District of Kansas
Honorable J. Thomas Marten, United States District Court Judge
Case No. 11-2357-JTM-DJW

BRIEF OF PLAINTIFF/INTERVENOR-APPELLEE

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ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Dodge City Family Planning Clinic, Inc., states that it has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

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STATEMENT OF RELATED CASES

Pursuant to 10th Cir. R. 28.2(C)(1), there is one related appeal, *Planned Parenthood of Kansas and Mid-Missouri v. Moser,* Appeal No. 11-3235, arising out of the same underlying lawsuit, *Planned Parenthood of Kansas and Mid-Missouri, et al. v. Moser*, District of Kansas Case No. 11-2357-JTM/DJW. The district court granted Dodge City Family Planning Clinic, Inc.'s ("DCFP") Motion to Intervene in this lawsuit and Motion for Preliminary Injunction. Defendant-Appellant filed this appeal. Pursuant to the Order entered by this Court on December 9, 2011, this appeal has been consolidated with Appeal No. 11-3235.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is proper pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1) Whether the district court abused its discretion in granting a preliminary injunction upon finding that DCFP made a "strong showing" as to all four elements for preliminary injunctive relief.
2) Whether the district court clearly erred in finding that Section 107(l) was enacted for the improper purpose of penalizing Plaintiff-Appellee Planned

Parenthood of Kansas and Mid-Missouri ("PPKM") for its association with abortion.

3) Whether the district court abused its discretion in finding that Section 107(l) violates the Supremacy Clause because it imposes eligibility conditions on federal Title X funds that are in excess of, and in conflict with, those in Title X.

4) Whether the district court abused its discretion in finding that DCFP would likely suffer irreparable harm without preliminary injunctive relief, that the injury to DCFP outweighs any harm to Defendant, and that a preliminary injunction furthers the public interest.

STATEMENT OF THE CASE

This case involves an unlawful provision, Section 107(l) (or "defunding provision"), contained in Kansas's annual appropriations bill, H.B. 2014, 84th Leg. (Kan. 2011), reproduced as the Addendum, p. 32, *infra*. The purpose of Section 107(l) was to disqualify any abortion provider from receiving Title X funds for non-abortion services. DCFP has never provided abortions, but it and its patients suffered as "collateral damage": Defendant cancelled DCFP's Title X Universal Contract because Section 107(l) rendered DCFP categorically ineligible for funds

that it had used for 35 years to serve the low-income residents of an extremely high-need region of Kansas.

Section 107(l) limits the distribution of federal Title X funds in Kansas to only "two priorities": (1) "First priority to public entities;" and (2) "if any moneys remain, then, Second priority to . . . hospitals or federally qualified health centers ["FQHCs"] that provide comprehensive primary and preventative care in addition to family planning services." Because these two categories exclude DCFP, the provision caused the cancellation of DCFP's Title X contract – 40% of its budget – and a further, precipitous decrease in other revenue sources as well.

Giving two weeks notice, the Kansas Department of Health and Environment ("KDHE") informed PPKM and DCFP that, effective July 1, 2011, it was cancelling their Title X contracts pursuant to the newly enacted Section 107(l): "Due to recent legislative action funding is no longer available for your organization. As a result, please accept this letter as notice to you of cancellation of the Universal Contract between your organization and the" KDHE. Letter from Defendant to Karla Demuth, Exec. Dir., DCFP (June 14, 2011), Aplt. App. at 906; *see also* Letter from Defendant to Peter Brownlie, Exec. Dir., PPKM (June 14, 2011), Aplt. App. at 205 (identical letter to PPKM). PPKM challenged the provision, seeking preliminary injunctive relief. PPKM Compl. 1-14, Aplt. App. at 10-23; Pl. Mot. Prelim. Inj. 1-3, Aplt. App. at 24-26. On August 1, 2011, the

district court preliminarily enjoined Defendant "from any further enforcement or reliance on Section 107(l)" and ordered him "to allocate all Title X funding for State Fiscal Year 2012 without reference to Section 107(l)." PPKM Mem. & Order (Dkt. No. 39) ("PPKM M&O") at 36, Aplt. App. at 485. Instead of complying with the court's order, Defendant continued to enforce Section 107(l) against DCFP, and delayed complying even as to PPKM: Defendant requested a stay of the order, which the court denied, and then filed a motion for clarification, which the court also denied, while simultaneously ordering Defendant to comply "immediately." Aplt. App. at 608-10, 658-61, 687-90, 782-84. Defendant finally complied, over a month after the court issued the preliminary injunction.

Despite the August 1 preliminary injunction and subsequent rulings, Defendant continued to enforce Section 107(l) against DCFP, withholding Title X funds for no reason other than the existence of Section 107(l). On September 30, 2011, DCFP moved to intervene in PPKM's lawsuit; on October 11, the district court granted DCFP's motion to intervene; and on that same day, DCFP filed its Intervenor Complaint and a Motion for Temporary Restraining Order and Preliminary Injunction. Aplt. App. at 801-30, 864-906. DCFP claimed that Section 107(l) violates the Supremacy Clause because it imposes additional conditions on eligibility for a federal program that are in excess of, and in conflict with, federal law. DCFP specifically requested that the district court declare

Section 107(l) preempted by Title X, and grant "preliminary and permanent injunctive relief, without bond, restraining the enforcement, operation, and execution of Section 107(l). . . by enjoining Defendant[] . . . from enforcing, threatening to enforce, or otherwise applying the provisions of Section 107(l) and directing Defendant[] to refrain from any reliance on Section 107(l) in the[] administration of KDHE's Title X funds." Intervenor Compl., Relief, ¶ 2, Aplt. App. at 878. DCFP also presented evidence that it had remained open only because its employees had worked without pay – for over three months, since the de-funding provision had taken effect July 1, 2011 – and that without the requested relief, DCFP would close within a few weeks or even days. Demuth Decl. ¶¶ 4, 23, Aplt. App. at 896, 903.

On October 18, 2011, the district court granted the injunction, specifying that Defendant had one week to comply. DCFP Mem. & Order (Dkt. No. 80) ("DCFP M&O") at 8, Aplt. App. at 959. The court ruled that, like PPKM, DCFP "presented a strong showing of likely success on the merits," because Section 107(l) adopts Title X "eligibility requirements directly in conflict with those adopted by Congress." *Id.* at 4, 8, Aplt. App. at 955, 959. In doing so, the court adopted and incorporated "its findings and rulings previously rendered" in the August 1 Order granting PPKM's request for a preliminary injunction. *Id.* at 1,

Aplt. App. at 952. The October 18 DCFP Order thus incorporated several findings relevant to DCFP's claim, including:

- The clear purpose of the defunding provision was "to single out, punish, and exclude Planned Parenthood, the only historical Kansas subgrantee which provides or associates with a provider of abortion services, from receiving any further Title X subgrants." PPKM M&O at 32, Aplt. App. at 481.
- Defendant provided no evidence to rebut the impermissible legislative purpose of this provision, *id.* at 24, Aplt. App. at 473, or to support its claim that the provision was a prioritization scheme, *id.* at 22-23, Aplt. App. at 471-72.
- Section 107(l) is in "direct conflict with federal law"; thus, Plaintiff showed a "strong likelihood of success on the merits of its Supremacy Clause claim." *Id.* at 28, Aplt. App. at 477.
- Defendant's argument that PPKM could apply directly to the federal government for Title X funds was "irrelevant" but, even if not, Defendant's "argument that Title X's broad 'all entities' eligibility standard only applies to direct grantees" was contrary to the plain language of Title X. *Id.* at 25, Aplt. App. at 474.

- Although the heightened standard for a preliminary injunction did not apply, PPKM would meet that heightened standard. *Id.* at 13, 17, 33, Aplt. App. at 462, 466, 482.
- The preliminary injunction was a "proper application of *Ex parte Young* to correct prospectively an ongoing violation of federal law." *Id.* at 18-19, Aplt. App. at 467-68.

The court also made factual findings based on DCFP's claims:

- "The application of Section 107(l) has created irreparable injury to" DCFP, "both by direct loss of [Title X] funding and the loss of additional resources as a direct result of that legislation. It has . . . remained open only because its employees are working without pay." DCFP M&O at 7, Aplt. App. at 958.
- "The facts show that an irreparable injury is occurring to . . . DCFP, that any damage to the defendant is substantially less, and that the public interest strongly supports the issuance of an injunction." *Id.* at 8, Aplt. App. at 959.
- "Despite the State's argument that patients may obtain family planning services from other providers in Ford County, the evidence shows that these entities are not interested in providing the type or level of services provided by DCFP," which is "the only entity in Ford

County able to provide family planning services commensurate with the local need." *Id*.

- "[T]he effect" of Section 107(l) "is the complete failure" by KDHE "to provide any federally-fund[ed] family planning services in an area where such services are in need." *Id.* at 7, Aplt. App. at 958.
- "[T]he evidence shows that" travelling further "is not a realistic alternative for the low-income patients served by DCFP. . . . KDHE recently increased DCFP's Title X funding, precisely because of the growing local need for family planning services" and "a lack of nearby alternative providers." *Id.* at 5, 8, Aplt. App. at 956, 959.
- "[T]he State has always expressed satisfaction" with DCFP and made "no showing that any funds extended to DCFP would not be properly used for necessary and valuable family planning services." *Id.* at 8, Aplt. App. at 959.

The court noted that Defendant presented only one new argument that it had not advanced in opposing PPKM's motion: a one-paragraph argument that issuing an injunction would allow DCFP to impose its view of Title X on the state of Kansas. The court dismissed this usurpation claim as "without merit." *Id.* at 3, Aplt. App. at 954.

The district court granted a preliminary injunction against the enforcement of Section 107(l) without bond. The court did not order KDHE to reimburse DCFP for the Title X services it had continued providing without any Title X funds throughout the first quarter of the 2012 fiscal year, from July 1 – September 30, 2011. However, the court ordered KDHE to "provide, on or before October 25, 2011, Title X funding to DCFP for the Second Quarter." *Id.* at 8-9, Aplt. App. at 959-60. In other words, on day 18 of the second quarter, the court ordered KDHE to cease enforcement of Section 107(l) with regard to DCFP's Title X funding on or before day 25 of the second quarter. The court also ordered KDHE to "provide, no later than 30 days from the conclusion of the Second Quarter," i.e., by day 30 of the third quarter, "funding for the Third Quarter, subject to any intervening court order directing otherwise." *Id.* On October 21, 2011, Defendant timely filed his notice of appeal.

STATEMENT OF FACTS

Pursuant to Fed. R. App. P. 28(i), DCFP adopts and incorporates the Statement of Facts, The Title X Family Planning Program, section of PPKM's Brief in Case No. 11-3235. In addition, DCFP offers the following facts that are relevant to DCFP's claim.

KDHE is the sole Title X grantee for the state of Kansas. KDHE does not provide the clinical services itself, but uses the funds to make subgrants to providers of family planning services, such as DCFP. "Under the Title X regulatory scheme," subgrantees are pre-paid for providing Title X services: they receive half of what they are due for a quarter on day one of that quarter, and the other half on day 45, i.e., the mid-point, of that quarter. Def. Br. at 7-8.

DCFP has been the sole Title X provider for Ford County for 35 years. Demuth Decl. ¶ 8, Aplt. App. at 898. 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, Aplt. App. at 896-98, 902-03. The care DCFP provides includes pap tests and other cancer screenings; contraception; pregnancy testing and related services; screenings for HIV/AIDS; screenings and treatment for other sexually transmitted infections; and counseling related to all those services. In 2010, DCFP provided approximately 700 contraception visits; 450 pap tests; and 250 tests for sexually transmitted infections. *Id*. ¶ 7, Aplt. App. at 897. Sixty percent of DCFP's patients are Hispanic; two-thirds are poor or near-poor. *Id*. ¶ 6, Aplt. App. at 897.

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, Aplt. App. at 898; Letter from Kevin Shaughnessy, KDHE, to Karla Demuth, Exec. Dir., DCFP (Dec. 6, 2010), Aplt. App. at 904-05. DCFP met that goal. That contract, which expired June 30, 2011, was DCFP's last contract with KDHE, Demuth Decl. ¶¶ 8, 11, Aplt. App. at 898-99, but it was only the first of five annual contracts that KDHE had projected in its application for Title X funds.

On February 22, 2010, KDHE had submitted to Health and Human Services ("HHS") its competing continuation grant application for Title X funding for the Kansas Family Planning Services Program, requesting federal funds for the first year of a five-year project period from June 30, 2010, through June 29, 2015. *See* KDHE Grant Application, Aplt. App. at 64-195. Having received a Title X contract from KDHE for 35 years, and having been explicitly included by KDHE in its application to HHS for the five-year grant from 2010 through 2015, DCFP had no reason to apply, and did not apply, directly to HHS in 2010; under the current Title X regime, DCFP cannot apply directly to HHS for Title X funds until the competitive cycle ends in 2015. *See id.*; *see also, e.g.*, 42 C.F.R. § 59.8(a).

As in prior years, KDHE included in its competitive grant 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. KDHE Grant Application, Aplt. App. at 172-79. 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 94, and is in "a cluster of 'high need' counties in southwest Kansas," *id.* at 96. 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 96. 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 105-06. Two of the counties that adjoin Ford – Hodgeman and Clark – have no Title X provider. *Id.* at 114. For the period 2010-2015, KDHE requested from HHS "Supplemental Expansion funds . . . to support" an increase in patients, particularly low-income patients, specifically at DCFP, which had already considerably increased its low-income family planning patients from 2007-2009. *Id.* at 157-58 & Table 1; Demuth Decl. ¶ 19, Aplt. App. at 901.

In the 35 years DCFP has been a Title X subgrantee, there has never been any allegation of any kind that it misused funds or failed in any way to fulfill its agreements with KDHE or its obligations under Title X. Demuth Decl. ¶ 8, Aplt.

App. at 898; *see also* DCFP M&O at 8, Aplt. App. at 959 (KDHE has "always expressed satisfaction" with DCFP's Title X services).

Under Section 107(l), whose eligibility criteria exclude DCFP, KDHE cancelled DCFP's Universal Contract effective July 1, 2011. Letter from Defendant to Karla Demuth, Exec. Dir., DCFP (June 14, 2011), Aplt. App. at 906. From that day until KDHE complied with the district court's Preliminary Injunction, there was no provider of Title X family planning and related services in Ford County.

With the cancellation of its Title X contract, DCFP lost 40% of its revenue; had another funding source respond by discontinuing its grant; and lost eligibility for other financial benefits available to Title X providers. DCFP M&O at 6, Aplt. App. at 957; Demuth Decl. ¶¶ 2-3, 10, 18, Aplt. App. at 896, 898, 901. DCFP would have closed but for the willingness of its two employees to work, and continue providing the services that Title X funds, without pay. DCFP M&O at 7, Aplt. App. at 958; Demuth Decl. ¶¶ 2-4, Aplt. App. at 896. Because DCFP is the only Title X provider in Ford County and there is no Title X provider in two of the adjacent counties, low-income individuals in need of family planning services would suffer absent an injunction. *See* DCFP M&O at 5-8, Aplt. App. at 956-59.

Defendant submitted no evidence of any injury it would suffer under an injunction. The funds have already been appropriated for family planning

purposes and there is no indication that DCFP would not satisfactorily fulfill its obligations as it has for 35 years – and every indication to the contrary.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in granting the preliminary injunction. The court reasonably found that: (1) DCFP is likely to succeed on the merits; (2) DCFP and its patients would suffer irreparable harm without the injunction; (3) the injury to DCFP outweighed any injury to Defendant; (4) the injunction furthers the public interest; and (5) a heightened standard did not apply, but even if it did, DCFP would satisfy it.

Defendant's litigation-inspired claim that Section 107(l) was enacted to serve the health of low-income Kansans is counter-factual, to say the least. Far from doing so, Section 107(l) would, if left unchallenged, leave literally hundreds of very poor and near-poor, largely Hispanic women and families with no affordable source of family planning and related services in Ford County. The notion that this politically motivated and shockingly reckless provision was enacted with an eye to public health is not credible. As the experience with Section 107(l) in Ford County demonstrates, Congress and HHS are wise neither to impose, nor to allow, such additional eligibility criteria on the receipt of Title X grants and sub-grants. That is because excluding exemplary providers of family

planning services such as DCFP manifestly harms the mission of Title X and the health of the low-income women and families it is designed to serve.

Because Title X does not so limit eligibility, the district court properly concluded that Section 107(l) is likely preempted by Title X's eligibility requirements. While Section 107(l) restricts Title X funding to public entities and, if funds remain, to hospitals or FQHCs, Title X allows non-profit family planning providers, including those that are not hospitals or FQHCs, to receive grants and subgrants. The district court thus properly concluded that DCFP "presented a strong likelihood of success on the merits" because Section 107(l) "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." PPKM M&O at 28, Aplt. App. at 477; *see also* DCFP M&O at 8, Aplt. App. at 959 (same).

DCFP submitted substantial evidence of the irreparable injury Section 107(l) imposed on it and its patients absent an injunction. Defendant neither rebutted that evidence nor offered any evidence of injury it would suffer from a preliminary injunction maintaining the status quo. Thus, the district court properly concluded that "any damage to the defendant is substantially less." DCFP M&O at 8, Aplt. App. at 959. Finally, the district court correctly found the injunction to be in the public interest, as it "allow[s] family planning services to be provided in a manner

consistent with uniform local history, avoiding disruptions in the provision of such services." PPKM M&O at 35-36, Aplt. App. at 603-04; *see* DCFP M&O at 1, Aplt. App. at 952 (adopting holdings in PPKM M&O).

Because the preliminary injunction merely preserved the pre-dispute status quo, the district court properly found that no heightened standard applied, but the court also properly found that even if a heightened standard did apply, DCFP would meet it, having made a "strong showing" that injunctive relief was appropriate. DCFP M&O at 1, 8, Aplt. App. at 952, 959.

ARGUMENT

I. Standard of Review

Pursuant to Fed. R. App. P. 28(i), DCFP adopts and incorporates Section I of the argument in PPKM's Brief in Case No. 11-3235.

II. The District Court Did Not Clearly Err in Finding that Section 107(l) Was Enacted to Punish PPKM for its Association with Abortion.

Pursuant to Fed. R. App. P. 28(i), DCFP adopts and incorporates Section II of the argument in PPKM's Brief in Case No. 11-3235.

Unlike PPKM, DCFP has no association with abortion; DCFP therefore makes no argument either that Section 107(l) imposes an unconstitutional condition on the receipt of Title X funds, nor that it is pre-empted because Title X

clearly contemplates that abortion providers participate in Title X. However, DCFP adopts and incorporates this section of PPKM's Brief – amply demonstrating that the district court's finding of improper purpose was not clearly erroneous – for another reason: Defendant's opposition to *DCFP*'s preemption claim rests entirely on its assertion that the purpose of Section 107(l) – the post-hoc rationale of purportedly better serving low-income Kansans – is consistent with the purpose of Title X. *See, e.g.*, Def. Br. at 12 ("Section 107(l) Promotes Congressional And HHS' Focus On Comprehensive Medical Care."); *id.* at 16-17 ("Section 107(l) promotes . . . . this aspect of Title X."); *id.* at 19 (Section 107(l) allows KDHE to "select[] the medical providers it believes will best be able to meet the Title X project goals.").

But the district court's finding – that the purpose of Section 107(l) had nothing to do with Title X or low-income patients and everything to do with penalizing PPKM for its association with abortion – precludes all Defendant's arguments based on the assertion that Section of 107(l) fulfills the purpose of Title X. This brief proceeds to argue that Title X would preempt Section 107(l) even if it had been enacted for the reasons Defendant now asserts in this litigation, *see* Section III, *infra*; however, the district court's finding of the defunding provision's true purpose makes it unnecessary for the Court even to entertain Defendant's arguments.

III. The District Court Did Not Abuse its Discretion in Finding that DCFP Demonstrated a Strong Likelihood of Success on the Merits.

The district court's finding that DCFP demonstrated a strong likelihood of success on the merits of its Supremacy Clause claim is well supported by the record and not an abuse of discretion: Section 107(l) is preempted because it imposes restrictions on eligibility that are in excess of, and in conflict with, those in Title X. DCFP M&O at 4, 8, Aplt. App. at 955, 959; PPKM M&O at 22, 24-28, Aplt. App. at 471, 473-77.

Pursuant to Fed. R. App. P. 28(i), DCFP adopts and incorporates Sections III.B and V.A of the argument in PPKM's Brief in Case No. 11-3235. Because Defendant's argument on the merits in this appeal merely expands on his argument on this claim in the PPKM appeal, DCFP relies almost entirely on the relevant sections of PPKM's brief, but also offers the following rejoinder to four of Defendant's expanded points.

First, Defendant goes to great lengths – using fully 25% of his argument on the merits – to try to demonstrate that Title X "Focus[es] On Comprehensive Medical Care." Def. Br. at 12-17. On the contrary, Title X is entitled, "Population Research and Voluntary *Family Planning* Programs." Public Health Service Act, 42 U.S.C. Ch. 6A, Subch. VIII (emphasis added). Under the first section of Title

X, entitled, "Project grants and contracts for *family planning* services") (emphasis added):

> The Secretary [of HHS] is authorized to make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary *family planning* projects which shall offer a broad range of acceptable and effective *family planning* methods and services (including natural *family planning* methods, infertility services, and services for adolescents).

42 U.S.C. § 300 (emphases added).[1] Hence,

- the purpose of Title X is to subsidize family planning services;
- the purpose of Section 107(l) is to penalize PPKM for its association with abortion; and
- "the effect" of Section 107(l) "is the complete failure to provide any federally-fund[ed] family planning services in an area where such services are in need." DCFP M&O at 7, Aplt. App. at 958.

Second, Defendant claims – extravagantly – that HHS "afford[s] grantees unfettered discretion" and "unbridled flexibility to determine which (if any)

[1] *See also* Congressional Declaration of Purpose, Pub. L. 91-572, sec. 2, *amended by* Pub. L. 96-88, Title V, § 509(b), 93 Stat. 695 (1979) (clearly stating intent to provide comprehensive family planning services, with no mention of unrelated comprehensive primary or preventative care); 42 C.F.R. § 59.1 (Title X "assist[s] in the establishment and operation of voluntary *family planning projects*" that "consist of the educational, comprehensive medical, and social services *necessary to aid individuals to determine freely the number and spacing of their children*.") (emphases added). Pointing to its own Grant Award from HHS, *see* Def. Br. at 14, Defendant attempts to obscure the fact that the "preventative health services" HHS included are those that are "related" to family planning. Notice of Grant Award, ¶ 4, Aplt. App. at 1035-36.

delegate agencies it [sic] believes will best be able to" deliver the Title X services. Def. Br. at 19, 21. Were that so, this Court might expect Defendant to cite numerous judicial decisions upholding additional Title X eligibility criteria such as Section 107(l). But Defendant cites not one case upholding such a limitation, for the simple reason that every court to address the issue has held that additional eligibility criteria such as Section 107(l) are preempted by federal law. *See* PPKM Br. in Case No. 11-3235 at 41-42, 44-45; PPKM M&O at 19, Aplt. App. at 468.[2]

Indeed, far from having unbridled discretion to impose restrictions that conflict with Title X and thwart its purpose, KDHE "offer[ed] . . . assurances to . . . HHS," Def. Br. at 20, the most basic of which was to carry out the project described in the application that HHS approved. That application clearly

[2] The cases Defendant cites for this point are, accordingly, inapposite, for several reasons. For example, each one involves a cooperative federalism program, where "'the case for federal preemption is less persuasive.'" Def. Br. at 16-17 (quoting *N.M. Dep't of Human Servs. v. Dep't of Health and Human Servs. Heath Care Fin. Admin.*, 4 F.3d 882, 887 (10th Cir. 1993) (Medicaid)); *see also* Def. Br. at 17-19, 23 (citing *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003) (Medicaid); *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 421 (1973) (Social Security Act's Federal Work Incentive Program); *Keith v. Rizutto*, 212 F.3d 1190 (10th Cir. 2000) (Medicaid)). Title X, unlike Medicaid, is not such a cooperative federalism program: as Defendant notes, Defendant's Response to DCFP's Motion for a Temporary Restraining Order at 21, Aplt. App. at 927; Def. Opening Br. in Case No. 11-3235 at 58, Title X grantees (unlike Medicaid administrators), may be local or state public entities, or private entities; they need not be state health departments. *See* 42 C.F.R. § 59.3 ("Any public or nonprofit private entity in a State may apply for a grant under this subpart."). In contrast, *only* states may administer Medicaid Programs. Social Security Act, 42 U.S.C. § 1396a.

established the urgency of delivering – and DCFP's ability to deliver – Title X services in Ford County. Section 107(l) having completely eliminated Title X services in Ford County, Defendant is hard-pressed to dispute that the new law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Keith*, 212 F.3d at 1190, 1193.[3]

Third, because Section 107(l) was "the *only* reason for KDHE's discontinuation of Title X funding to DCFP," the district court properly granted "DCFP's motion for the prevention of enforcement of Section 107(l)." DCFP M&O at 8, Aplt. App. at 959 (emphasis added). Doing so neither "Upend[ed] The Federal Regulatory System" nor "usurped" the role of HHS. Def. Br. at 22. Nothing in the district court's order prevents appropriate oversight.

Moreover, while Defendant complains that DCFP is "without . . . duties" under the preliminary injunction, *id.*, he does not – because he cannot – claim that DCFP has ever failed to produce a single Title X reporting document, including for the first quarter of the 2012 fiscal year (when DCFP continued to report to KDHE as if its Title X contract had been in effect, even though it never received any Title X funding for that quarter), and for the period since then, when it has received Title X funding under the district court's order. *Cf.* DCFP M&O at 8, Aplt. App. at 959

[3] That is the basis of Plaintiffs' preemption claim, not any assertion of "physical impossibility." Hence, Defendant's reliance on *Keith* in misplaced, and does not change the result. *See* Def. Br. at 23-24.

("There has been no showing that any funds extended to DCFP would not be properly used for necessary and valuable family planning services."). Indeed, were Defendant remotely concerned that DCFP was not using the funds to provide Pap tests, breast exams, birth control pills and the other family planning and related services that Title X funds, he could and would have sought relief from the district court in the form of an "intervening court order directing otherwise." *Id.* at 9, Aplt. App. at 960. Having taken not one step to ensure that desperately poor women and families in and around Ford County had access to these critical services after June 30, 2011, Defendant is ill situated to claim that DCFP lacks binding "duties." It was the willingness of DCFP's two employees to work for free – it was their sense of duty, *alone* – that ensured that those women and families did not suffer undetected cervical and breast cancers, did not go without family planning care, were not left out in the cold to serve political ends.

***Fourth*,** were Defendant correct that PPKM and DCFP lack standing to claim that Title X preempts Section 107(l), *see* Def. Br. at 25-27, then they would also lack standing to claim that it preempts a state law limiting Title X subgrantees to agencies affiliated with a particular religion – a clearly absurd result. None of the cases Defendant cites are to the contrary. As the district court properly recognized, for example, the "unique circumstances" of *Astra UNA, Inc., v. Santa Clara County*, 131 S. Ct. 1342, 1347 (2011), involved the question of whether an

(entirely different) federal statute gave rise to a third-party claim. DCFP M&O at 3, Aplt. App. at 954. *Astra* thus has no bearing on DCFP's ability to raise a Supremacy Clause claim on its own behalf. The same is true of *Wilderness Society v. Kane County*, 632 F.3d 1162, 1165 (10th Cir. 2011) (*en banc*), in which conservationists sought "to vindicate the property rights of the federal government" where a local law was applied to federal land; here, DCFP challenges the application of Section 107(l) to it, and claims a direct, concrete injury. Finally, to raise this claim, DCFP need not prove that it has a "right" to receive Title X funds. *See Wilderness Soc'y*, 632 F.3d at 1168; *St. Thomas-St. John Hotel & Tourism Ass'n, Inc. v. Gov't of U.S. Virgin Islands*, 218 F.3d 232, 241 (3rd Cir. 2000) ("[A] state . . . law can be . . . preempted by federal law even when the federal law secures no individual substantive rights for the party arguing preemption."). Rather, DCFP need prove only that Section 107(l) excludes it from receiving a Title X subgrant in a manner that is preempted by Title X, which DCFP has done.

IV. The District Court Reasonably Found that DCFP and Its Patients Would Suffer Irreparable Harm Absent an Injunction.

DCFP provided substantial evidence of irreparable harm to itself and its patients resulting from Section 107(l), which Defendant does not contest. *See* Statement of the Case and Statement of Facts, *supra*. Instead, Defendant argues

that because DCFP was not guaranteed a Title X contract, its sudden and improper exclusion from the application process after 35 years of satisfactory performance cannot, as a legal matter, constitute irreparable harm. Defendant thus argues that because KDHE had discretion to cancel DCFP's contract for *permissible* reasons, DCFP could not suffer a legal harm when KDHE did so for *impermissible* reasons. Defendant misapprehends the nature of the injury. DCFP's burden is to show "that it will suffer irreparable harm unless the preliminary injunction is issued," *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001), which DCFP has done.

DCFP provided uncontested evidence of the severe economic hardship it and its employees suffered when KDHE, enforcing Section 107(l), cancelled DCFP's Universal Contract. DCFP thereby lost 40% of its funding, Demuth Decl. ¶ 2, Aplt. App. at 896, and, in addition, "the United Way discontinu[ed] a grant based upon the loss of Title X funding," DCFP M&O at 6, Aplt. App. at 957; Demuth Decl. ¶ 18, Aplt. App. at 901 (same). When KDHE cancelled DCFP's contract, DCFP narrowly avoided shutting down "only because its two employees" continued "working without pay," DCFP M&O at 7, Aplt. App. at 958; absent the injunction, it would have shut its doors in very short order, Demuth Decl. ¶¶ 4, 18, 22-23, Aplt. App. at 896, 901-03. The closure of DCFP would constitute irreparable harm. *See, e.g., Planned Parenthood of Minn. v. Citizens for Cmty.*

Action, 558 F.2d 861, 866-67 (8th Cir. 1977) (concluding that clinic demonstrated irreparable injury due to "[t]he adverse effect on [its] business, coupled with the incalculable loss of revenue"); *Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 794 F. Supp. 2d 892, 912-13 (S.D. Ind. 2011) (finding irreparable harm where plaintiff would have to close health centers and eliminate jobs). KDHE's insistence that DCFP could mitigate these injuries by applying directly to HHS for Title X funds is irrelevant, and false. PPKM M&O at 25, Aplt App. at 474; KDHE Grant Application, Aplt. App. at 64-195; *see also e.g.*, 42 C.F.R. § 59.8(a).

DCFP also amply demonstrated the harm its patients would suffer if it closed, as it would do absent an injunction: simply, the patients would lose access to services that KDHE has itself described as desperately needed. *See* Statement of Facts, *supra.*; DCFP M&O at 8, Aplt. App. at 959; KDHE Grant Application, Aplt. App. at 94-96, 105-06, 114.

Defendant has utterly failed to rebut this evidence: it claims that another, unnamed facility applied to become a Title X provider in Ford County, but asserts that it, too, was rejected. DCFP M&O at 4, Aplt. App. at 955. That rejection would make sense, as the district court found that there are no other qualified providers interested in delivering Title X services in Ford County, *id.* at 8, Aplt.

App. at 959[4]; moreover, that unnamed applicant may be ineligible for Title X funds for the additional reason that it, too, falls outside Section 107(l)'s narrow eligibility criteria. In any event, the fact that KDHE awarded no Title X contract in Ford County after July 1 speaks for itself.

Based on the overwhelming evidence, the district court did not abuse its discretion in finding that DCFP and its patients would suffer irreparable harm absent preliminary injunctive relief.

V. The District Court Did Not Abuse Its Discretion in Finding that the Remaining Two Factors Supported the Preliminary Injunction.

Defendant cannot establish that the district court abused its discretion in evaluating the evidentiary record and finding that both of the remaining two factors supported preliminary injunctive relief. *See* DCFP M&O at 8, Aplt. App. at 959.

[4] *See also id.* at 6, Aplt. App. at 957 (quoting Demuth Decl. ¶ 13, Aplt. App. at 899) ("'The Ford County Health Department provides no family planning care whatsoever; does not do pap tests; and does not have anyone on staff who can write a prescription. The [United Methodist Mexican-American Ministries] 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. Patients can get an appointment at DCFP within a week.'") (alteration in original). Knowing full well that Section 107(l) would leave Ford County without services, KDHE asked these two facilities to apply for the Title X subgrant, which would necessitate greatly expanding the care they offer; they declined to apply. Demuth Decl. ¶ 14, Aplt. App. at 900.

A. The Injury to DCFP Outweighs Any Harm to Defendant.

Pursuant to Fed. R. App. P. 28(i), DCFP adopts and incorporates Section V.A of the argument in PPKM's Brief in Case No. 11-3235.

Additionally, the district court did not abuse its discretion in finding that "any damage to the defendant is substantially less" than the injury that would occur to DCFP in the absence of an injunction. DCFP M&O at 8, Aplt. App. at 959. By applying for Title X funding, Defendant agreed to be bound by the program's requirements. *See King v. Smith*, 392 U.S. 309, 333 n.34 (1968); *Planned Parenthood Ass'n of Utah v. Dandoy*, 810 F.2d 984, 988 (10th Cir. 1987) ("[The state] may participate in the program and thereby accept the conditions attached by the federal acts which may be contrary to state law or unwanted or instead choose not to participate and to use its own funds as it wishes."). Therefore, enjoining Section 107(l), which conflicts with Title X, neither infringes on state sovereignty nor implicates the state treasury.

Furthermore, the district court properly held that Defendant's "usurpation argument is without merit." DCFP M&O at 3, Aplt. App. at 954. Neither DCFP nor the district court imposed its views on Kansas or HHS. Instead, in this Supremacy Clause case, "the court is preventing the State from adopting eligibility requirements directly in conflict with those adopted by Congress." *Id.* at 3-4, Aplt. App. at 954-55.

B. The Preliminary Injunction Furthers the Public Interest.

Pursuant to Fed. R. App. P. 28(i), DCFP adopts and incorporates Section V.B of the argument in PPKM's Brief in Case No. 11-3235.

The district court properly found that the preliminary injunction advances the public interest. DCFP M&O at 8, Aplt. App. at 959. Without injunctive relief, individuals seeking family planning and related services in Ford County will suffer significant irreparable harm from the closure of DCFP. DCFP is the sole Title X provider in Ford County; there are no alternative providers of these same services in the area; and travelling further is simply not an option for many of DCFP's patients. *Id.* at 5, 8, Aplt. App. at 956, 959. Defendant's claim that "low-income patients in Kansas . . . would have had greater access to a wider array of health care services" in the absence of the injunction, Def. Opening Br. in Case No. 11-3235 at 59, is unsupported and unsupportable. Indeed, KDHE's failure to award any Title X contract in Ford County after Section 107(l) took effect is merely additional proof of the harm patients would suffer absent an injunction.

VI. The District Court Reasonably Found that Heightened Review Did Not Apply, but that DCFP Would Satisfy it in Any Event.

Pursuant to Fed. R. App. P. 28(i), DCFP adopts and incorporates Section VI of the argument in PPKM's Brief in Case No. 11-3235.

Additionally, the district court properly found that heightened review was inappropriate. Prior to the enactment of Section 107(l) – that is, during the last uncontested circumstances – KDHE awarded DCFP Title X subgrants for 35 years; KDHE's grant application to HHS asserted its plan for DCFP to be the Title X provider for Ford County through 2015. KDHE Grant Application, Aplt. App. at 172-79. "DCFP lost its Title X funding, not due to any problem with the quality of its service, but solely due to" Section 107(l). DCFP M&O at 6, Aplt. App. at 957. Thus, the preliminary injunction does not require Defendant to change course and take affirmative action; rather, it "restore[s] the status quo by requiring the State to provide Title X funding" without reference to Section 107(l), as it has for 35 years. *Id.* at 8, Aplt. App. at 959. The district court did not abuse its discretion in reaching this conclusion.

CONCLUSION

For all the foregoing reasons, this Court should affirm the Order of the district court granting the Motion for Preliminary Injunction.

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Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 10th Cir. R. 28.2(C)(4), Appellee respectfully requests oral argument. This case involves important constitutional claims, and DCFP believes that oral argument would assist the Court in ruling on the issues raised in this appeal regarding the preliminary injunction granted by the district court.

ADDENDUM: REPRODUCTION OF SECTION 107(l)

> (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.

Section 107(l), H.B. 2014, 84th Leg. (Kan. 2011).

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,397 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(b)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2012, I electronically filed the foregoing with the Clerk of the Tenth Circuit Court of Appeals by using the CM/ECF system, which will send a notice of electronic filing to:

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