

**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**

**INTERVENOR COMPLAINT OF  
DODGE CITY FAMILY PLANNING CLINIC**

Plaintiff-Intervenor Dodge City Family Planning Clinic, Inc. (“DCFP”), by and through its undersigned counsel, brings this Intervenor Complaint against the above-named Defendants, their employees, agents, and successors in office (“Defendants”). DCFP files this Complaint simultaneously with its motion to intervene and its motion for temporary restraining order and preliminary injunction. For its claims against Defendants, Plaintiff-Intervenor states the following:

**I. Nature of the Action**

1. DCFP files this civil action pursuant to 42 U.S.C. § 1983, and under the Supremacy Clause of the United States Constitution, to vindicate rights secured by the Supremacy Clause. Throughout its 35 years, DCFP has used its Title X federal family

planning dollars to play a critical role in providing family planning care to the women and families of Ford County and surrounding counties, and particularly their low-income and Hispanic populations. DCFP has never provided abortion services, but as “collateral damage” under a law designed to defund entities that do provide them, DCFP has lost over 60% of its revenues, including the 40% of its budget that the Title X funds represented. It now faces imminent shut-down.

2. On May 28, 2011, Governor Sam Brownback signed into law a state appropriations bill that includes an impermissible provision. H.B. 2014, 84th Leg. (Kan. 2011). Section 107(l) of the bill sets forth a funding restriction for the distribution of Title X monies, which precludes DCFP from receiving these funds because it is neither a public entity such as a county health department nor a hospital or federally qualified health center (“FQHC”) that provides comprehensive primary care.

3. DCFP seeks declaratory and injunctive relief because Section 107(l) violates the Supremacy Clause of the United States Constitution by imposing restrictions on eligibility for Title X funds that are in excess of and inconsistent with restrictions and requirements established by the federal government for these funds.

4. Section 107(l) took effect July 1, 2011, the start of the 2012 fiscal year. It is causing significant and irreparable harm to DCFP, its employees, and its patients in dire need of family planning and other Title X services. It will imminently suffer the irrevocable harm of being forced to shut.

## **II. Jurisdiction and Venue**

5. Jurisdiction is conferred on this Court by 28 U.S.C. § 1331.

6. Plaintiff's claim for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202 and by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by the general legal and equitable powers of this Court.

7. Venue is proper under 28 U.S.C. § 1391(b) because Defendants reside in this District.

## **III. The Parties**

8. DCFP is a 501(c)(3) non-profit Kansas corporation, with its sole office and facility in Dodge City. DCFP provides care including 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 its services. In the fiscal year that ended June 30, 2011, it provided approximately 700 contraception visits; 450 pap tests; and 250 tests for sexually transmitted infections. From 1976 through June 30, 2011, DCFP received federal Title X subgrants from the Kansas Department of Health and Environment ("KDHE"). During the many years in which DCFP has provided these services with Title X funds, there has never been any allegation that it failed to fulfill its obligations as a Title X subgrantee.

9. Defendant Sam Brownback is the Governor of Kansas. He is a government official responsible for the acts complained of in this litigation. *See* Kan. Const. art. 1, § 3. He is sued in his official capacity.

10. Defendant Robert Moser, M.D., is the Secretary of KDHE. He is a government official responsible for the acts complained of in this litigation. He is sued in his official capacity.

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

11. The Title X Family Planning Program is the federal program to subsidize family planning services for low-income individuals. 42 U.S.C. § 300, *et seq.* Congress enacted it in 1970 as part of the Public Health Service Act, and designed it to ensure that low-income and/or uninsured families and individuals, including those not eligible for Medicaid, have access to reproductive health care including family planning services, cancer screenings; pregnancy testing and related services; and screenings and treatment for sexually transmitted infections. The United States Department of Health and Human Services (“HHS”) grants Title X funds to state agencies or private entities (“grantees”). Those grantees may provide services themselves or, as is the case in Kansas, enter into agreements with other entities (“subgrantees”) to provide Title X services.

12. Title X does not exclude from receipt of Title X monies either non-public entities or entities that provide predominantly family planning care. Indeed, Title X regulations state that “Any public or nonprofit private entity” is eligible to apply for the funds, *see* 42 C.F.R. § 59.3 (2011), *et seq.*, and impose no additional service requirements, including that recipients be hospitals or federally qualified health centers (“FQHC’s”), or that they provide any services other than those that Title X funds. Title X’s rules and requirements apply not only to the Title X funds, but to all the funds allocated to the project that Title X subsidizes. *See* 42 C.F.R. § 59.1, *et seq.*

13. When Congress passed Title X in 1970, its clear intent was to fund low-cost family planning services provided by organizations such as DCFP that specialize in family planning services.

**V. KDHE'S Family Planning Program and its Current Title X Grant**

14. KDHE is the Title X grantee for the state of Kansas, and its Family Planning Services Program is funded in large part by federal Title X grant monies.

15. On February 22, 2010, KDHE submitted to HHS its competing continuation grant application for federal Title X funds for the Kansas Family Planning Services Program. The grant application requested funds for the first year of a five-year project period, beginning June 30, 2010, and ending June 29, 2015. In its application, KDHE explained, as it had in prior years, how it intended to perform its proposed project and distribute its grant monies, and the number of patients that grant monies would cover. Its application included DCFP as the single subgrantee in Ford County.

16. According to KDHE's competing continuation grant, Ford County is one of the top 10 counties in need of Title X services and is in a cluster of high-need counties in southwest Kansas. KDHE's competing continuation grant prioritized increasing support to the top 10 counties with unmet needs, including Ford County, and addressing the high-need southwest cluster. Two of the counties that adjoin Ford, Hodgeman and Clark, have no Title X subgrantee. For the 5-year period 2010-2015, KDHE's competing continuation grant requested supplemental expansion funds to increase DCFP's contraception patients, particularly low-income patients.

17. On information and belief, the federal government accepted KDHE's 2010 grant application for the 2010 – 2015 grant period.

18. KDHE enters into contracts with DCFP and other family planning providers on an annual basis, for contract periods that run from July 1 through June 30, to provide the clinical health services described in KDHE's Title X grant. For the 2011 fiscal year, KDHE awarded DCFP \$39,288 in Title X funds, including \$8,360 to expand the availability of family planning care to greater numbers of patients, particularly low-income patients, for a total of at least 590 Title X family planning patients. DCFP met that goal. DCFP's last contract with KDHE expired June 30, 2011.

#### **VI. The Kansas State Budget Process and its Defunding of DCFP**

19. The Kansas annual budget for the current fiscal year, which runs from July 1, 2011, to June 30, 2012, includes KDHE's federal Title X grant monies.

20. For the fiscal year beginning July 1, 2011, all of the federal Title X funds are be appropriated in Section 107(l) of the appropriations bill, H.B. 2014, which states:

(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.

21. Under Kan. Stat. Ann. § 65-1669(e), an FQHC is a primary health care center that both meets the requirements for federal funding under 42 U.S.C. § 1396d(l) of the Public Health Service Act ("Section 1396d(l)"), and has been designated as an FQHC by the federal government. Section 1396d(l) is part of Title XIX, the Medicaid program.

Under 42 U.S.C. § 1396d(l), to qualify as an FQHC, an entity must receive a grant (or contract with a grantee) and meet the requirements to receive a grant under Section 254b of the Public Health Service Act, which provides Medicaid funds for primary health care services for underserved populations. 42 U.S.C. § 1396d(l). Section 254b grant recipients are “health centers” that must provide a range of “required primary health services,” including but not limited to general preventative dental care, vision screenings, and “pediatric eye, ear, and dental screenings to determine the need for vision and hearing correction and dental care.” 42 U.S.C. §§ 254b(b)(1)(A)(i)-(v). In addition, for a center to be an official FQHC, one of two things must be true: either the Secretary of HHS has determined that it meets the federal requirements for a section 254b grant, or the Secretary treated it as a fully federally funded health center as of January 1, 1990. *Id.* §§ 1396d(l)(2)(B)(iii)-(iv).

22. DCFP is not a hospital or an FQHC under 42 U.S.C. § 1396d(l): it specializes in family planning and related services; it does not provide all the primary health care services required to be an FQHC.

23. Under the newly-enacted Section 107(l), only public entities and “non-public entities which are hospitals or federally qualified health centers that provide comprehensive primary and preventative care in addition to family planning services” are eligible for federal Title X funds. Section 107(l) thereby prohibits KDHE from distributing federal Title X Family Planning Program funds to any organization that specializes in family planning and related services – as does DCFP – unless it also provides comprehensive primary and preventative care. By requiring DCFP to have been designated as an FQHC by the federal government, Section 107(l) imposes an unrelated

federal administrative requirement on the receipt of Title X monies. These Section 107(l) requirements are inconsistent with the intent of Title X and impose restrictions on eligibility for these funds that are in excess of and inconsistent with the restrictions and requirements established by the federal government for Title X funds.

24. On May 28, 2011, Governor Brownback signed the appropriations bill, H.B. 2014, into law.

25. By phone call on June 9, 2011, and by letter dated June 14, 2011, KDHE informed DCFP that under the budget bill the Governor had signed May 28, 2011, DCFP would not receive Title X funds for the 2012 fiscal year and that KDHE was cancelling its Universal Contract. The June 14 letter is on KDHE letterhead, reflecting the names of Defendants Governor Brownback and Secretary Moser and signed by Defendant Secretary Moser.

## **VII. The Impact of Section 107(l) on DCFP and its Patients**

26. Section 107(l) effectively strips more \$39,000 in historical annual funding from DCFP – 40% of its budget. DCFP runs on an extremely thin margin. On its sliding scale, one third of its patients qualify for a 50% discount and one third pay nothing at all.

27. The loss of Title X funds would have forced DCFP to close in July if its two employees – the Executive Director/Nurse Practitioner and the Receptionist – had not started working without pay. Patient numbers are down, as some patients (particularly those who qualify for no discount, and who thus have greater means to go elsewhere), are not making appointments because they fear DCFP will close without its Title X funds; already, at least one other funder has ended its contributions to DCFP, likewise out of fear that it will close without its Title X funds; already DCFP has lost



access to the “340B” discounted drug pricing available to Title X providers; and already, DCFP has had to switch to less expansive contraceptive options, which some of its patients dislike, with the result that that those patients now face increased risk of unintended pregnancy.

28. DCFP’s employees cannot continue working for no pay; they are already suffering financially and emotionally. One has had trouble paying for needed medical care; the other has had trouble making mortgage payments, and has had to tell her children in college to take out additional loans because she is unable to support them as she had previously committed to doing. Under continued enforcement of newly enacted Section 107(1), DCFP will close in a very few weeks or even in a matter of days.

29. The closure of DCFP would cause irreparable harm not only to DCFP and its employees, but to DCFP’s patients as well. There is no other organization with the capacity, facilities, staffing or willingness to provide Title X services to the population DCFP serves. No entity in Ford County – not the Ford County Health Department and not the FQHC in Garden City – is willing to become a Title X provider. Neither has applied for the Title X monies denied to DCFP. The health department does not provide family planning services and cannot write prescriptions. The FQHC has a very small contraceptive formulary, with, for example, only one oral contraceptive; offers only a male provider, which is a disincentive to a large part of DCFP’s client base; and has a 2-3 month wait for appointments, whereas patients can get an appointment at DCFP within a week.

30. If DCFP closed, many of its patients would altogether lose access to critical medical services. Many of its patients simply cannot pay more for services or

transportation. Those who did manage to access care would be forced to travel further, pay more, wait longer for appointments, delay testing and other procedures, or otherwise receive care that is not of the same quality that DCFP provides.

31. The loss of Title X funds also causes DCFP to lose its eligibility to participate in the 340B drug pricing program, which enables Title X providers to purchase outpatient drugs at a discount. This loss reduces funds that DCFP would otherwise put directly toward helping it provide free or half-price family planning services to low-income Kansans.

32. Without Title X funds and the accompanying benefits, DCFP will close within a very few weeks, if not days.

33. DCFP has no adequate remedy at law.

### **CLAIMS FOR RELIEF**

#### **COUNT I - SUPREMACY CLAUSE**

34. DCFP hereby reaffirms and realleges each and every allegation made in ¶¶ 1-33 above as if set forth fully herein.

35. Section 107(l) violates the Supremacy Clause of the United States Constitution by placing impermissible eligibility conditions on federal funds that are in excess of and inconsistent with those established by the federal government.

WHEREFORE, Plaintiff-Intervenor DCFP requests that this Court:

1. Issue a declaratory judgment that Section 107(l) of Senate Substitute for House Bill 2014 violates the Supremacy Clause of the United States Constitution and is therefore void and of no effect;

2. Issue preliminary and permanent injunctive relief, without bond, restraining the enforcement, operation, and execution of Section 107(l) of Senate Substitute for House Bill 2014 by enjoining Defendants, their agents, employees, appointees, or successors from enforcing, threatening to enforce, or otherwise applying the provisions of Section 107(l) and directing Defendants to refrain from any reliance on Section 107(l) in their administration of KDHE's Title X funds;

3. Grant Plaintiff-Intervenor attorneys' fees, costs and expenses pursuant to 42 U.S.C. § 1988; and

4. Grant such further relief as this Court deems just and proper.

**PLACE OF TRIAL**

Pursuant to D. Kan. Rule 40.2, Plaintiff designates Kansas City as the place for trial.

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, 18<sup>th</sup> 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 Intervenor Complaint 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