IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

HODES & NAUSER, MDs, P.A.; HERBERT C. HODES, M.D.; and TRACI LYNN NAUSER, M.D., Plaintiffs-Appellees, and CENTRAL FAMILY MEDICAL, LLC dba AID FOR WOMEN, and RONALD N. YEOMANS, M.D. Plaintiffs-Interveners-Appellees, v. ROBERT MOSER, M.D., in his official capacity as Secretary of the Kansas Department of Health and Environment; STEPHEN HOWE, in his official capacity as District Attorney of Johnson County; DEREK SCHMIDT, in his official capacity as Attorney General for the State of Kansas; and JEROME GORMAN, in his official capacity as District Attorney for Wyandotte County, Defendants-Not Parties to Appeal and AMERICAN ASSOCIATION of PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS Proposed Defendants-Intervenors-Appellants	)	Case No. 11-3229

PLAINTIFFS-APPELLEES' MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION, WITH SUPPORTING MEMORANDUM

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure, and Rule 27.2 of the Tenth Circuit Rules, Plaintiffs-Appellees[1] move the Court to dismiss this appeal filed by non-party American Association of Pro-Life Obstetricians and Gynecologists ("AAPLOG") for lack of jurisdiction. In support of their motion, Plaintiffs-Appellees state the following:

I. Procedural Background

This Section 1983 action is brought by board-certified obstetrician-gynecologists and their office-based medical practices, in which they include abortion services among the health care services they provide. *See, e.g.,* Compl. ¶¶ 1-3 (a copy of Plaintiffs' complaint is located at Tab 1 of the accompanying appendix ("Appendix")). Plaintiffs-Appellees challenge newly-enacted Kansas laws that would force them to cease providing abortion services in their outpatient practices, and to rebuild their facilities from the ground up in order to provide abortions in the future. *See* Compl. ¶¶ 33-64. Defendants are Kansas government officials with authority to enforce the challenged laws. Compl. ¶¶ 17-19.

Specifically, Plaintiffs-Appellees challenge the constitutionality of (1) a set of recently-enacted temporary regulations (the "Temporary Regulations") promulgated by Defendant Secretary of the Kansas Department of Health and Environment ("KDHE")[2] to govern facilities in which abortions are performed, and (2) the licensing provisions of the 2011 legislation that authorized specific regulations for abortion facilities, Kansas Senate Bill No. 36 (2011) ("Act"),[3] Act, at sec. 2, 8, as those provisions have been applied by KDHE to condition abortion facility licensing upon compliance with the Temporary Regulations, which were issued without notice or opportunity for comment just days before licensing was required (the "Licensing Process").

[1] The term "Plaintiffs-Appelless" as used in this filing to refers collectively to the Plaintiffs and the Plaintiffs-Interveners in the District Court.
[2] A true and correct copy of the regulations, which are to be codified at Kan. Admin. Regs. § 28-34-126 - 44 (2011), is attached to Plaintiffs-Appellees' Complaint as Exhibit B.
[3] A true and correct copy of the Act is attached as Exhibit A to Plaintiffs-Appellees' Complaint.

Compl. ¶ 1. The Temporary Regulations and Licensing Process impose burdensome and medically unnecessary requirements that would shutter the practice of health care providers who have provided medical services to the community for decades. Compl. ¶¶ 1-3. Plaintiffs allege that the Temporary Regulations and Licensing Process violate their rights to substantive and procedural due process, impose an undue burden on their patients, subject them to vague standards, and deny them and their patients equal protection of the laws. Compl. ¶¶ 76-85.

On June 28, 2011, Plaintiffs filed a motion for temporary restraining order and/or preliminary injunction to prevent enforcement of the Temporary Regulations and Licensing Process during the pendency of the lawsuit. The Court provided Defendants time to file a response to the motion, and then conducted a hearing on the motion on July 1, 2011, the effective date of the Act. After considering the parties' filings and arguments, the District Court issued a ruling from the bench, granting Plaintiffs' motion for preliminary injunction. Tr. of July 1, 2011 Hr'g on Ps.' Mot. for TRO and/or PI ("Tr.") at 47 (the cited portions of the transcript are located in the Appendix at Tab 2). The ruling methodically addressed each of the factors governing motions for preliminary injunction, and undertook the necessary balancing of interests to assess whether a grant of preliminary injunctive relief was warranted. With respect to the necessary showing of likelihood of success on the merits, the District Court held that Plaintiffs had made such a showing with respect to their claims that the Temporary Regulations and Licensing Process violated their rights to substantive and procedural due process. Tr. at 40-43.

Defendants did not appeal the grant of preliminary injunction, and Defendants' time to file a notice of appeal expired on August 1, 2001. On August 1, 2001, AAPLOG, a non-party to this action, filed a notice of appeal in the District Court. (AAPLOG's notice of appeal is located in the Appendix at Tab 3). Thereafter, AAPLOG filed a motion to intervene. (AAPLOG's

motion for intervention "AAPLOG Mot." and suggestions in support of the motion ("AAPLOG Suggestions") are located in the Appendix at Tab 5). The motion to intervene has not yet been decided by the district court.

II. AAPLOG Cannot Appeal the District Court's Grant of Preliminary Injunction Because AAPLOG Is Not a Named Party to This Lawsuit.

At the time of filing its notice of appeal, AAPLOG was neither a named party to this action nor an intervener, nor even a proposed intervener. As such, AAPLOG lacks any basis for invoking this Court's appellate jurisdiction. As this Court has explained, "[g]enerally speaking, only named parties to a lawsuit in the district court may appeal an adverse final judgment." *Raley v. Hyundai Motor Co., Ltd.*, 642 F.3d 1271, 1274 (10th Cir. 2011) (dismissing appeal for lack of jurisdiction where a notice of appeal was filed only by a non-party).

While narrow exceptions to this general rule exist – such as for non-named class members who object to approval of a settlement, *see Devlin v. Scardelletti*, 536 U.S. 1, 14 (2002) – no such exception applies here. AAPLOG is a national organization seeking to intervene on the basis of generalized allegations about harms that unidentified "pro-life" obstetrician-gynecologist members will incur if the laws challenged in this case are preliminarily enjoined. *See, e.g.*, AAPLOG Mot. ¶¶ 1, 4-5. These allegations fall well outside the narrow circumstances in which a non-party has sufficient standing to pursue an appeal.[4]

[4] Such appeals have been permitted where the non-party possessed both Article III and prudential standing, and where the individuals seeking to appeal: "(1) personally appeared in the district court; (2) suffered a real and concrete injury as a result of a district court ruling that is entitled to preclusive effect; and (3) possess interests that would not, on appeal, be adequately represented by the named parties to the district court lawsuit." *Raley*, 642 F.3d at 1275. It is facially apparent that at least some of these factors are absent here. For example, no individual alleging real and concrete injury as a result of the district court ruling appeared in district court, and the order below was preliminary in nature, Tr. at 39, and thus without preclusive effect. *See, e.g., Abbott Labs. v. Andrx Pharmas., Inc.* 473 F.3d 1196, 1206 (7th Cir, 2007) (noting that a ruling on preliminary injunction does not have a preclusive effect unless it "clearly intended to firmly and finally resolve the issue"). Moreover, as explained below, AAPLOG lacks Article III standing.

The fact that AAPLOG 's motion for intervention is currently pending before the District Court does not affect its status as a non-party for purposes of the notice of appeal it has already filed. *See S. Utah Wilderness Alliance*, 525 F.3d 966, 968 (10th Cir. 2008) ("Movants, non-parties in the district court, suggest their first appeal from the district court's judgment is viable even though the district court had yet to rule on their motion to intervene at the time they filed their notice of appeal. We think not.").

III. AAPLOG Cannot Independently Appeal the District Court's Grant of Preliminary Injunction Because It Lacks Article III Standing.

Even if AAPLOG had been granted leave to intervene in this suit and had filed its notice of appeal once it was an intervenor, it would still lack standing to pursue this appeal. Because no defendant has appealed the grant of preliminary injunction, AAPLOG must establish its own Article III standing in order to invoke this Court's jurisdiction to review that ruling:

> The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance. . . . An intervener cannot step into the shoes of the original party unless the intervener independently fulfills the requirements of Article III.

Arizonans for Official English v. Arizona, 520 U.S. 43, 64-65 (1997) (internal citations and quotation marks omitted). Article III standing requires the following:

> To qualify as a party with standing to litigate, a person must show, first and foremost, an invasion of a legally protected interest that is concrete and particularized and actual or imminent. An interest shared generally with the public at large in the proper application of the Constitution and laws will not do. Standing to defend on appeal in the place of an original defendant, no less than standing to sue, demands that the litigant possess a direct stake in the outcome.

Id. at 64 (internal citations and quotation marks omitted). As explained below, AAPLOG cannot meet these criteria.

AAPLOG alleges that is has "associational standing" to participate in this case. AAPLOG is a nonprofit membership organization based in Michigan that claims to have among its members "practitioners in Kansas who compete with abortion providers in serving the needs of pregnant women" and whose interests are impaired by the preliminary injunction, which allegedly "has the economic effect of subsidizing abortion clinics, to the economic disadvantage of AAPLOG members." AAPLOG Suggestions at 6-7. Even if AAPLOG's allegations are assumed to be true[5], they are wholly inadequate to establish associational standing.

The Supreme Court has stated that a party seeking to establish organizational standing based on its members' interests, as AAPLOG does here, "must make specific allegations establishing that at least one identified member had suffered or would suffer harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 129 S. Ct. 1142, 1151 (2009).[6] AAPLOG has not identified *any* of its members, let alone any Kansas member, who has suffered or would suffer harm as a result of the preliminary injunction ruling below. In the absence of such allegations, AAPLOG is simply a "concerned bystander" who lacks any basis for invoking this Court's jurisdiction: "The decision to seek review is not to be placed in the hands of 'concerned bystanders,' persons who would seize it as a vehicle for the vindication of value interests." *Arizonans for Official English*, 520 U.S. at 64-65 (internal citation omitted).

[5] These allegations are unsupported by any credible evidence; the only "evidence" submitted by AAPLOG is the conclusory declaration of its executive director. AAPLOG Mot. at DeCook Aff.

[6] "This requirement of naming the affected members has never been dispensed with in light of statistical probabilities, but only where *all* the members of the organization are affected by the challenged activity." *Earth Island Inst.*, 129 S. Ct. at 1152 (emphasis in original). AAPLOG has not, and cannot, make any such claim. It is a national organization that lists just eight "pro-life" Kansas practitioners in its physician directory. *See* "AAPLOG Physician Directory", *available at* http://www.aaplog.org/aaplog-physician-directory/?state=KS (last visited Aug. 12, 2011).

IV. Conclusion

For the foregoing reasons, Plaintiffs-Appellees respectfully move this Court to dismiss this appeal and remand the case to the District Court for further proceedings.

Dated: August 15, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above and foregoing was electronically filed with the Clerk of the Court using the CM/ECF filing system on August 15, 2011, which system sent notification of such filing electronically to the following counsel of record:

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