IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

HODES & NAUSER, MDs, P.A.; HERBERT C. HODES, M.D.; and TRACI LYNN NAUSER, M.D., Plaintiffs, and CENTRAL FAMILY MEDICAL, LLC dba AID FOR WOMEN, and RONALD N. YEOMANS, M.D. Plaintiffs/Intervenors, 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.	Case No. 2:11-CV-02365-CM-KMH

PLAINTIFFS'[1] OPPOSITION TO MOTION TO INTERVENE BY THE AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS

This is a Section 1983 suit brought by board-certified obstetrician-gynecologists who provide abortions as part of their comprehensive reproductive health care services, and by their office-based medical practices. Plaintiffs challenge newly-enacted Kansas laws that would force

[1] The term "Plaintiffs" as used in this filing refers collectively to the Plaintiffs and the Plaintiffs-Interveners.

them to cease providing abortion services in their outpatient practices and rebuild their facilities from the ground up before they would qualify to provide abortions again. Pls.' Compl. ¶ 1-3.[2] On June 28, 2011, Plaintiffs filed a motion for a temporary restraining order and/or preliminary injunction to prevent enforcement of the Temporary Regulations and Licensing Process during the pendency of the lawsuit. This Court granted Defendants time to file a response to the motion, and the Court subsequently conducted a hearing on the motion. On July 1, 2011, this Court granted Plaintiffs' motion for preliminary injunction. Defendants did not appeal.

On August 1, 2011, the date that the time for Defendants to appeal expired, the American Association of Pro-Life Obstetricians and Gynecologists ("AAPLOG"), a Michigan-based organization that is not a party to this action, filed a notice of appeal in this Court, and thereafter filed a Motion to Intervene and an Answer to Plaintiffs' Complaint. AAPLOG does not meet the criteria for either permissive intervention or intervention as of right, and its Motion to Intervene should therefore be denied.

I. AAPLOG Cannot Meet The Criteria For Intervention As Of Right

Timely intervention as of right is permitted under Federal Rule of Civil Procedure 24(a)(2) when an applicant: "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). Courts in this Circuit typically have applied a

[2] Specifically Plaintiffs 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") to govern facilities that perform abortions, and (2) the licensing provisions of the 2011 legislation authorizing specific regulations for abortion facilities, Kansas Senate Bill No. 36 (2011) ("Act"), 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 or comment just days before licensing was required (the "Licensing Process").

four-part test for intervention: "(1) the application is timely; (2) the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) the applicant's interest may as a practical matter be impaired or impeded; and (4) the applicant's interest is [not] adequately represented by existing parties." *United States v. Albert Inv. Co., Inc.*, 585 F.3d 1386, 1391 (10th Cir. 2009). The Tenth Circuit tends to evaluate factors (2) and (3) (alleged interest and potential injury) together, and it has emphasized the practical nature of the intervention analysis, and the need for the court to assess whether the strength of the asserted interest and the potential risk of injury to that interest justify intervention. *San Juan County v. United States*, 503 F.3d 1163, 1199 (10th Cir. 2007) (en banc). AAPLOG fails to meet these standards for three reasons: (1) AAPLOG has not demonstrated "an interest that could be adversely affected by the litigation," and that is not "wholly remote and speculative," *San Juan* County, 503 F.3d at 1199; (2) the strength of the interest asserted by AAPLOG and potential risk of injury to that interest do not justify intervention, *id.* at 1199; and (3) the interest asserted by AAPLOG is adequately represented by Defendants, *id.* at 1204.

A. AAPLOG Has Failed To Demonstrate That Its Members Have A Cognizable Interest That Could Be Adversely Affected by This Litigation.

An applicant for intervention must have "an interest that could be adversely affected by the litigation" *San Juan County*, 503 F.3d at 1199, and that is not overly speculative or remote, *id.* at 1203. Courts in this circuit will deny intervention where the asserted interest is "too attenuated," *City of Stilwell v. Ozarks Rural Elec. Coop. Corp.*, 79 F.3d 1038, 1042 (10th Cir. 1996), or where the interest is "too contingent, too indirect, and hardly substantial," *San Juan County*, 503 F.3d at 1202. Likewise, the Court will deny intervention where the claimed injury is "too speculative," or consists of only "minimal impact." *Id. See, e.g., City of Stilwell*, 79 F.3d at

1042 (holding that would-be intervening electrical cooperative's concern about harm to defendant cooperative's business, where defendant cooperative represented 4% of would-be intervenor's total sales, or 8% of its state revenue, were too contingent to support intervention under Rule 24(a)). AAPLOG's alleged interest in this lawsuit fails these standards for two reasons: (1) AAPLOG's assertion that it has members with *any* interest in this suit is speculative and wholly unsupported by credible evidence, and (2) the interests and threatened harms argued by AAPLOG on behalf of its purported members are speculative, contingent, and insubstantial.

1) AAPLOG Has Failed to Submit Credible Evidence That It Has Any Member With Any Interest That May Be Affected By his Litigation.

Fist, AAPLOG has submitted no credible evidence that it has any member whose interests would be affected in any way by this case or the preliminary injunction. AAPLOG seeks to represent the interests of its members, who it alleges are "obstetricians and gynecologists and other health practitioners nationwide, including practitioners in Kansas, who compete with abortion providers in serving the needs of pregnant women." Suggestions in Supp. of Mot. to Intervene (hereinafter "Ints.' Br.") at 6. But AAPLOG has not identified a single such Kansas member; nor has it submitted a declaration from any person in the state. Rather, AAPLOG bases its motion solely on a declaration from its Michigan-based executive director, who is not a physician in Kansas and makes no claim of any individual interest in this lawsuit. *See generally* DeCook Decl. That declaration makes conclusory statements – without supporting facts or any indication of personal knowledge on the part of the declarant – about how unidentified and unknown individuals in Kansas may be affected by the challenged laws. *See* DeCook Decl. ¶ 6. Thus AAPLOG's claims that it has members with any interest whatsoever in this lawsuit are entirely speculative and insufficient to warrant intervention. *See San Juan*

County, 503 F.3d at 119 (intervention will be denied where it is sought on the basis of wholly speculative claims). *Cf. Summers v. Earth Island Inst.*, 129 S.Ct. 1142, 1151, 1153 (2009) (to establish Article III associational standing, a group must demonstrate with specific attestations either that (1) all of its members would have individual standing, or (2) at least one individual identified member has standing); *The Coal. for Mercury-Free Drugs v. Sebelius*, 725 F.Supp.2d 1, 9 n.7 (D.D.C. 2010) ("standing [cannot] be based on the argument that an unnamed member of [an] organization is likely to be harmed.").[3]

2) The Interests AAPLOG Asserts On Behalf Of Its Purported Members Are Too Speculative And Remote To Justify Intervention.

Second, even if AAPLOG had submitted credible evidence that it has Kansas members who have an interest in the litigation, the interests and potential injuries it asserts on behalf of those purported members are not cognizable because they are speculative, attenuated, contingent, and insubstantial. AAPLOG claims that its putative Kansas members have an economic interest in the outcome of this lawsuit for two reasons: (1) because they provide "uncompensated or undercompensated care" to women who have complications after an abortion procedure, Ints.' Br. at 6, and (2) because they have an interest in competing with abortion providers for patients, and if fewer women can have abortions there will be more deliveries, which would be

[3] *Earth Island Institute* and *The Coalition for Mercury-Free Drugs* are cases addressing the requirements for Article III associational standing, in which an organization attempts to represent the interests of its members. *See Earth Island Inst.*, 129 S.Ct. at 1151; *The Coal. for Mercury-Free Drugs*, 725 F.Supp.2d at 9 n.7. Although the standards for intervention standing may not be as rigorous as the standards for Article III constitutional standing, at least one federal district court in the Tenth Circuit has nevertheless recognized that "the standing cases give some guidance about the interests at issue" in intervention analysis. *See Amer. Ass'n of People with Disabilities v. Herrera*, 257 F.R.D. 236, 249 (D. N.M. 2008). *See also Providence Baptist Church v. Hillendale Comm., Ltd.*, 425 F.3d 309, 318 (6th Cir. 2005) (noting that overlap between standing to intervene and Article III standing is not "perfect" and that Article III standing may be more "rigid in certain of its requirements"). Thus, the case law on Article III associational standing, which requires the identification of at least one individual member with standing (or that *all* members of an organization have Article III standing), informs the analysis here of whether AAPLOG's claimed interests are overly speculative.

economically beneficial to AAPLOG's unidentified members who might be retained by those women and paid for their delivery services, *id.* at 8.[4]

As to the first asserted interest (alleged provision of "uncompensated or under compensated care"), AAPLOG has provided absolutely no credible evidence supporting its claims. As discussed *supra* in Section I(A)(1), AAPLOG has not identified any of its Kansas members, nor even how many such members the group claims to have[5], let alone identified which or how many of those purported members provide such "uncompensated or undercompensated care." It has similarly failed to identify the context in which such alleged care takes place, how often it takes place, why it is uncompensated or undercompensated, or how much of an economic impact such care has on these unnamed and unidentified members. Given that less than 0.3% of abortion patients require hospitalization for a complication[6], it is hard to imagine that the economic impact on AAPLOG's members is even measurable, much less that it rises to a cognizable interest. *Cf. City of Stilwell*, 79 F.3d at 1042; *see also Rosebud Coal Sales*

[4] AAPLOG also asserts that it "seeks to intervene here to protect . . . the healthcare of women." Ints.' Br. at 6. AAPLOG provides no additional information about this interest, failing to explain the nature of its members' interest in women's healthcare, why AAPLOG would have any standing to represent such an interest, or whether AAPLOG claims to represent the interests of women directly. Such a conclusorily asserted and vague interest cannot possibly provide the basis for intervention.

[5] AAPLOG lists just eight "pro-life" Kansas practitioners in its physician directory. *See* http://www.aaplog.org/aaplog-physician-directory/?state=KS (last visited Aug. 13, 2011).

[6] Guttmacher Institute, "Facts on Induced Abortion in the United States," at "Safety of Abortion" (May 2011), *available at* http://www.guttmacher.org/pubs/fb_induced_abortion.html#10 (last visited Aug. 12, 2011) (citing Henshaw SK, Unintended pregnancy and abortion: a public health perspective, in: Paul M et al., eds., *A Clinician's Guide to Medical and Surgical Abortion*, New York: Churchill Livingstone, 1999, pp. 11–22.).

In alleging that abortion has a high complication rate that produces the need for the allegedly uncompensated/undercompensated care provided but its putative members, AAPLOG misleadingly provides a complication rate for induction abortions. Ints.' Br. at 13 ("29% of women who had a medical abortion" in the second-trimester experienced complications). Inductions are rarely-performed second trimester procedures generally undertaken in hospital settings. Maureen Paul et al., *Management of Unintended and Abnormal Pregnancy* 179 (2009) (in 2005 only 2% of second-trimester abortions were medical abortions). The procedure's complication rate is significantly higher than for abortions overall, or even for all abortions performed in the second trimester. *See* Autry et al., "A comparison of medical induction and D&E for second-trimester abortion," 187(2) *Amer. J. of Obs. & Gynec.* 393-97 (2002).

Co. v. Andrus, 644 F.2d 849, 850 (10th Cir. 1981) (holding that company that had leased its land to coal corporation and pegged its royalty payments on that land to the rate negotiated between the coal corporation and the government under a separate federal coal lease did not have a sufficiently direct economic interest to intervene in suit concerning said federal royalty rate).

As to the second alleged basis, the competitive economic interest, AAPLOG again relies solely on conjecture, and provides no credible evidence for its claims. The Tenth Circuit has clearly held that intervention will be denied where the alleged impact is "too speculative." *San Juan County*, 503 F.3d at 1202. In a substantively and procedurally similar case concerning Article III standing[7], the Supreme Court rejected an almost identical argument. In *Diamond v. Charles*, 476 U.S. 54 (1986), a pro-life pediatrician attempted to intervene in a challenge to the constitutionality of an Illinois abortion regulation on the grounds that, *inter alia*, "if the Abortion Law were enforced, he would gain patients; fewer abortions would be performed. . . . [and by] implication, therefore, the pool of potential fee-paying patients would be enlarged." *Id.* at 67. The Supreme Court rejected this argument, holding that the "possibilities that such fetuses would survive and then find their way as patients to Diamond are speculative." *Id.* Likewise, AAPLOG's conclusory allegations rest on the assumptions that (1) if the Temporary Regulations and Licensing Process were being enforced some women in Kansas would not be able to obtain abortions, in Kansas or elsewhere (2) such women would seek pregnancy-related services from AAPLOG's alleged, unidentified members, and (3) such business would have more than an

[7] The Court in *Diamond* applied the requirements of Article III standing because the intervenor was the only party remaining on appeal after the State of Illinois had declined to pursue the case. 476 U.S. at 65-66. As discussed *supra*, n. 2, the requirements of an Article III standing analysis may inform intervention analysis. *See also Diamond*, 476 U.S. at 66 (evaluating whether asserted interest was too remote and speculative to support standing). Further, as discussed *infra* at Section I(B)(2), to the extent that a court considering intervention should focus on the practical implications of the motion, AAPLOG has explicitly stated it desires to intervene in order to appeal this court's ruling on the preliminary injunction, and *Diamond* establishes that AAPLOG does not have standing to bring such an appeal.

incidental effect on such members' incomes. Needless to say, evidence supporting this chain of reasoning is completely absent from AAPLOG's filings. Thus, these claims are simply "speculative," *Diamond*, 476 U.S. at 66, and the alleged economic impact is "*too* contingent, *too* indirect, and hardly substantial," *San Juan County*, 503 F.3d at 1202 (emphasis original).[8]

B. The Weakness Of AAPLOG's Asserted Interests And The Remote And Speculative Impact Of This Lawsuit Upon Them Do Not Justify Intervention.

Even where an applicant is found to have a non-speculative, non-remote interest that could be adversely affected by the litigation, the Court must still determine whether the strength of the interest and the potential risk of injury to that interest justify intervention. *San Juan County*, 503 F.3d at 1199. As the Tenth Circuit has explained, "practical judgment must be applied in determining whether the strength of the interest and potential risk of injury to that interest justify intervention." *Id.* The "interest test is primarily a practical guide" to facilitate including interested parties in lawsuits as long as doing so is "compatible with efficiency and due process." *San Juan County*, 503 F.3d at 1195 (internal citation and quotation marks omitted). In this case, as established above, AAPLOG has not demonstrated any cognizable interest in this lawsuit or any impairment to such interest. Even if it had, allowing AAPLOG to intervene would cause inefficiency and delay for no productive purpose. AAPLOG seeks to intervene to (a) move for reconsideration of this court's grant of a preliminary injunction, and (b) appeal the grant of

[8] AAPLOG cites *Planned Parenthood of Minnesota v. Alpha Center*, 213 F. App'x 508 (8th Cir.), an unpublished per curiam decision, for the proposition that because a "crisis pregnancy center" was allowed to intervene in a case concerning abortion regulations on the basis of potential financial and reputational harm, AAPLOG should be allowed to intervene as well. First, of course, being an unpublished decision the holding is not even precedential in the Eighth Circuit, much less in the Tenth. But more importantly, the intervenors in *Alpha Center* were two identified organizations and an identified doctor and social worker who were employed by the organizations. The analysis of any alleged reputational and financial harm was therefore informed by the kind of specific identifying information that is utterly lacking from AAPLOG's briefing in this case. Further, the procedural posture was different: in that case the intervenors had been allowed to intervene and had participated fully in litigation and been adjudged to have standing on appeal in other aspects of the case, which was a primary consideration for the court. *See Alpha Ctr.*, 213 F. App'x at 510.

preliminary injunction to the Tenth Circuit. Ints.' Br. at 1. Its efforts to do so will be fruitless in both cases.

1) AAPLOG's Arguments For Reconsideration Of The Preliminary Injunction Are Meritless.

First, AAPLOG indicates it intends to ask this Court to reconsider its July 1, 2011, order granting a preliminary injunction.[9] This Court's order was careful and thorough, addressing each of the required factors governing the motion. This Court undertook the necessary balancing of interests and found that Plaintiffs had made a showing of likelihood of success on the merits with respect to their claims that the Temporary Regulations and Licensing Process violated their rights to substantive and procedural due process. Defendants did not appeal this ruling.

AAPLOG seeks to request reconsideration of the preliminary injunction based on two arguments: (1) that this Court allegedly enjoined the entire Act, and (2) that this Court should have applied rational basis review. Both arguments are meritless. With respect to the first argument, AAPLOG argues that because the licensing provisions of the Act refer to other sections of the Act, they "incorporate" the rest of the Act, and therefore the Court's injunction against the licensing provisions (sections 2 and 8 of the Act) applies to the entire Act. Ints.' Br. at 5, 12. This interpretation is simply not credible. Plaintiffs brought only an as-applied challenge to the Act, and they brought that challenge against only the two discrete provisions of the Act governing licensing. *See e.g.* Compl. at 21-22 ("Request for Relief"). The preliminary injunction they sought and obtained is correspondingly limited. Mot. for TRO/PI at 1-2. AAPLOG's claim

[9] Plaintiffs read AAPLOG's brief in support of its motion to intervene as only supporting the motion to intervene itself, and assume that if intervention were granted AAPLOG would then submit a motion for reconsideration of the preliminary injunction. Should the Court grant intervention and interpret AAPLOG's current briefing to also be a motion for reconsideration of the preliminary injunction, Plaintiffs request leave to respond separately to that motion.

that the Court has somehow silently enjoined the entire Act through some kind of incorporation by reference is a creation entirely of its own imagination.

With respect to its second argument, AAPLOG claims that this Court should have applied rational basis review because the Act is economic legislation. Ints.' Br. at 13. AAPLOG seems to imply that this Court applied some other unidentified standard of review, and did so incorrectly. In fact, as this Court well knows, it granted the preliminary injunction on procedural and substantive due process grounds, and applied rational basis review to the latter claim. Tr. of Prelim. Inj. Hr'g at 42. AAPLOG complains that the undue burden standard should not have been applied – and, in fact, it was not, because the Court never reached the privacy claims Plaintiffs asserted on behalf of their patients. Thus, the motion for reconsideration AAPLOG seeks to pursue will be meritless.

2) AAPLOG Does Not Have Standing to Appeal the Preliminary Injunction.

AAPLOG's other goal in intervening is to appeal this Court's grant of preliminary injunction. It lacks any standing to do so. While a party seeking intervention in the district court may not have to demonstrate Article III standing, a party seeking to "defend on appeal in place of the original defendant" must always do so. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). *See also Diamond*, 476 U.S. at 69 ("To continue this suit in the absence of Illinois [the original state defendant], Diamond himself must satisfy the requirements of Art. III"); *San Juan County*, 503 F.3d at 1174 ("an intervenor who lacks [Article III] standing cannot pursue an appeal if the original parties choose not to"); *Assoc. Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir. 1994) ("as any other party, an intervenor seeking to appeal must have standing under Article III of the Constitution entitling it to have the court decide the merits of the dispute"). For the reasons stated *supra* in Section I(A), AAPLOG has not even identified

interests sufficient to entitle intervention – and the standards for Article III standing are more rigorous. *See Arizonans for Official English*, 520 U.S. at 65 (Article III standing requires "an invasion of a legally protected interest that is concrete and particularized and actual or imminent") (internal quotation marks and citation omitted).

In order to demonstrate Article III standing to appeal the preliminary injunction where Defendants have not chosen to do so, AAPLOG would have to meet the requirements for Article III associational standing, since it claims to represent the alleged interests of its members. Such standing requires that either *all* members of an organization have individual standing, or that the organization identify at least one individual member who has individual standing. *See e.g.*, *Earth Island Inst.*, 129 S.Ct. 1142, 1151, 1153. As discussed *supra* in Section I(A)(1), AAPLOG has failed to do so. In addition, the interests AAPLOG asserts on behalf of its purported members are too speculative and attenuated and the impact it alleges too insubstantial and contingent to constitute grounds for Article III standing, even if such alleged interests and impact were found sufficient for intervention. *See, e.g.*, *Diamond*, 476 U.S. at 66 (rejecting attempt by pro-life pediatrician who successfully intervened at district court level to appeal decision in State of Illinois' place on grounds that his assertion of economic interest in future pediatric patients born due to lower abortion rates was too speculative to confer standing); *Perry*, 16 F.3d at 691 (holding that intervenor did not have standing to appeal judgment in State of Michigan's place because its desire for "enforcement of the new law to negate the competitive advantage of . . . plaintiffs" was not sufficient to convey Article III standing).

Since AAPLOG's motion for reconsideration and its appeal are both utterly meritless, there is no practical benefit to allowing its intervention. To the contrary, intervention in this case would be inefficient and create pointless complication and confusion for the true parties-in-

interest and this Court, as well as require Plaintiffs to respond to a meritless appeal which AAPLOG does not have standing to bring even though Defendants have chosen not to pursue such recourse.

C. The State Will Adequately Represent AAPLOG's Interests.

Even if AAPLOG had demonstrated a cognizable interest and sufficient likelihood of impairment, and the weight of that interest and impairment justified intervention, it would still have to demonstrate that the State would not adequately represent its interests in order to qualify for intervention as of right. AAPLOG has made no such showing. There is a general presumption that "representation is adequate when the objective of the applicant for intervention is identical to that of one of the parties." *San Juan County,* 503 F.3d at 1204 (internal citations and quotation marks omitted). The Tenth Circuit has held that "[t]his presumption should apply when the government is a party pursuing a single objective." *Id.* Here, the State's objective is to enforce the Act and Temporary Regulations, and AAPLOG shares the same objective.

AAPLOG's only argument to the contrary is that Defendants are not appealing the preliminary injunction. The fact that Defendants chose not to appeal or move for reconsideration is not evidence of a lack of zealousness in pursuing their objective of enforcing the challenged laws. The injunction applies only to the Temporary Regulations – which will expire upon passage of permanent regulations – and the Licensing Process based on the Temporary Regulations. In the meantime, Defendants are moving ahead on promulgating permanent regulations. They have proposed a set of permanent regulations identical to the Temporary Regulations, and they are quickly moving ahead with the notice and comment period, which will end in just a few weeks. Kan. Reg. Vol. 30:26, at 908 (June 30, 2011). As discussed *supra* in Section I(B)(1), AAPLOG's theory that the injunction implicitly enjoined the entire Act is

implausible, and its assertion that this Court applied an incorrect legal standard can only have been based on a failure to read the transcript of the Court's decision before attempting to challenge it. Defendants' failure to seek reconsideration or take an appeal based on these meritless arguments was a sound strategic decision, and as such it does not constitute inadequate representation. *See San Juan County,* 503 F.3d at 1206 (citing with approval *State v. Director, U.S. Fish & Wildlife Svc*., 262 F.3d 13, 18-20 (1st Cir. 2001) and its "denial of intervention even though prospective intervenors would present an argument that the government was highly unlikely to make").

II. The Court Should Deny AAPLOG Permissive Intervention

A party who is not entitled to intervention as of right may nevertheless qualify for permissive intervention under Federal Rule of Civil Procedure 24(b). The rule allows intervention in the court's discretion to anyone who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Rule 24(b)(3) notes that "in exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). *See also Kane County v. United States*, 597 F.3d 1129, 1135 (10th Cir. 2010).

AAPLOG does not even brief its motion for permissive intervention, merely asserting that it "seeks to intervene as defendants on the same law and facts raised by Plaintiffs' complaint." Ints.' Br. at 10. But the question in permissive intervention is whether the party seeking to intervene has a *claim or defense* that shares common questions of law or fact. AAPLOG has not identified a claim or a defense that it has in this case, and it is hard to imagine what such a claim or defense would be, since the only interest it has alleged is economic and it certainly cannot use its members' (speculative) economic interest as a defense that the

challenged law, regulations, and licensing process satisfy substantive and procedural due process. Further, allowing AAPLOG to intervene would unduly delay these proceedings and prejudice the parties, since, at the very least, it would require Plaintiffs to respond to a meritless appeal for which AAPLOG does not have standing even though Defendants have chosen not to appeal. For these reasons this Court should deny the motion for permissive intervention as well.

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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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