IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

HODES & NAUSER, M.D.'s, P.A. HERBERT C. HODES, M.D., and TRACI LYNN NAUSER, 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 for Johnson County; JEROME GORMAN, in his official capacity as District Attorney for Wyandotte County; and DEREK SCHMIDT, in his official capacity as Attorney General for the State of Kansas, Defendants.	) Civil Action) No. 11-2365-CM-KMH) PLACE OF TRIAL) REQUESTED:) KANSAS CITY, KANSAS

SUGGESTIONS IN SUPPORT OF MOTION TO INTERVENE FOR RECONSIDERATION OF THE PRELIMINARY INJUNCTION AND TO APPEAL BY THE AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS (AAPLOG)

Intervenor-Defendant American Association of Pro-Life Obstetricians and Gynecologists ("AAPLOG") moves to intervene pursuant to FED. R. CIV. P. 24, in order to seek reconsideration of the preliminary injunction issued by this Court on July 1, 2011, and to file a timely, protective Notice of Appeal.

The Tenth Circuit has adopted "a somewhat liberal line in allowing intervention." *WildEarth Guardians v. United States Forest Serv.*, 573 F.3d 992, 995 (10th Cir. 2009)

(quoting *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1249 (10th Cir. 2001), internal quotation marks omitted). There the Tenth Circuit reversed a denial of intervention after emphasizing that the intervenor's "burden is minimal." *WildEarth Guardians*, 573 F.3d at 995 (internal quotation marks omitted).

Because Kansas SB 36 ("SB 36" or "the Act") strengthens health protections of women in connection with abortion, no injunction should have issued against it or its implementing regulations, and because SB 36 contains a strong severability clause, any provision of the Act or its implementing regulations that was in doubt should have been severed from the plainly constitutional aspects of that law. The controlling U.S. Supreme Court precedent of *Ayotte* requires vacating the preliminary injunction, see *infra* Point V, and SB 36 survives the "rational basis" test that applies to this type of economic legislation, see *infra* Point VI.

Federal courts have specifically allowed intervention by medical organizations and a pregnancy center in abortion-related litigation. *See Planned Parenthood Minn., N.D., S.D. v. Alpha Ctr.*, 213 Fed. Appx. 508, 509-10 (8th Cir. 2007) (intervention by pregnancy center); *Council for Life Coalition v. Reno*, 856 F. Supp. 1422, 1425 (S.D. Cal. 1994) (allowing intervention by The California Medical Association and The San Diego County Medical Society).

I. BACKGROUND

A. SB 36 and the Temporary Regulations

Kansas SB 36 ("SB 36" or "the Act") requires abortion providers to bear more of the costs associated with their procedure, both by meeting minimal regulatory standards for their facilities and by making follow-up care available to their patients. The

economic effect of SB 36 is to limit the shifting of costs of complications from abortion onto others, including AAPLOG members, by requiring abortion providers to be available for follow-up care, by mandating that they be more proactive in post-operation checkups, and by prohibiting the use of facilities that do not meet minimal standards for patient care. As such, SB 36 is economic legislation that limits the ability of abortion providers to externalize the costs of their business onto others, including AAPLOG members.

The Act requires abortion facilities to comply with "reasonabl[e]" new regulations as established by the State of Kansas. Specifically, SB 36 Section 2(b) requires:

> Any facility seeking licensure for the performance of abortions shall submit an application for such license to the department on forms and in the manner required by the secretary. Such application shall contain such information as the secretary may reasonably require, including affirmative evidence of the ability of the applicant to comply with such reasonable standards ….

The license shall be effective for one year and shall cost only $500. Section 2(e)-(f).

SB 36 includes protections for post-abortive women with respect to follow-up care – protections that plainly enhance women's health. For example, SB 36 Section 9(h)(1)&(2) mandates that:

> (1) A postabortion medical visit is offered and scheduled within four weeks after the abortion, if accepted by the patient, including a medical examination and a review of the results of all laboratory tests;
>
> (2) a urine pregnancy test is obtained at the time of the follow-up visit to rule out continuing pregnancy. If a continuing pregnancy is suspected, the patient shall be evaluated and a physician who performs or induces abortions shall be consulted

Similarly, Section 8(b) establishes that:

> It shall be unlawful for a person to perform or induce an abortion in a facility unless such person is a physician, with clinical privileges at a hospital located within 30 miles of the facility, with no requirement of culpable mental state.

This provision is almost identical to a Missouri statute, § 188.080 R.S.Mo. (2005), which has been upheld in court and remains in force. *See Women's Health Ctr. v. Webster*, 681 F. Supp. 1385 (E.D. Mo. 1988), *aff'd*, 871 F.2d 1377 (8th Cir. 1989).

> SB 36 has a strong severability clause in its Section 12:
>
> The provisions of sections 1 through 12, and amendments thereto, are declared to be severable, and if any provision, or the application thereof, to any person shall be held invalid, such invalidity shall not affect the validity of the remaining provisions of sections 1 through 12, and amendments thereto.

This severability clause not only requires severing any section that may be unconstitutional in order to save the remainder of the Act, but also requires severing any subsection (provision thereof) or application in order to preserve the remainder of the each section.

Defendants issued temporary regulations under the Act, effective July 1, 2011. Complaint Exh. B [Doc. 1]. Some provisions of the regulations simply repeat what is in the statute, and thus is already law; other regulatory provisions mandate standards that would be required regardless of the Act. For example, K.A.R. 28-34-132 sets forth minimal staffing requirements for abortion facilities: "Each applicant and each licensee shall endure that each physician assistant, each nursing, and each ancillary staff member employed by or contracted with the facility are licensed, if required by state law, are qualified, and provide services to patients consistent with the scope of practice of the individual's training and experience." K.A.R. 28-34-132(d) (Complaint Exh. B. at p. 11).

The regulations specify minimum amounts of space for procedure and recovery rooms, such as requiring that "a recovery area consist[] of at least 80 square feet per patient in the area." K.A.R. 28-34-133(b)(8) (Complaint Exh. B. at p. 12). Such regulations by a State have been commonplace and can hardly be questioned for their

constitutionality. For example, Kansas requires of youth facilities that "[t]he inside program and activity areas, excluding the sleeping rooms, day room, and classrooms, shall provide floor space equivalent to a minimum of 100 square feet per youth." K.A.R. § 28-4-343. As to regulatory authority of the State of Kansas to inspect businesses, such authority has long existed and is clearly constitutional. *See, e.g.*, K.S.A. § 44-5,104(b) (authorizing random inspection of businesses for accident avoidance).

B. Procedural History

Plaintiffs sought a preliminary injunction blocking enforcement of the Act and the temporary regulations issued under the Act. [Doc. 4] Plaintiffs demanded "that this Court issue a preliminary injunction prohibiting the defendants, and their agents and successors in office, from … enforcing the licensing requirements of the Act (Act, at sec. 2, 8) against Plaintiffs." [Doc. 4 at p. 3]. Plaintiffs' request concerned the entire Act, because Section 2 incorporates the entire SB 36, and even future amendments to it: "A facility shall be licensed in accordance with sections 1 through 12, and amendments thereto."

Without issuing a written opinion, this Court "granted [Doc. 4] plaintiffs' Motion for Preliminary Injunction." Minute Entry for July 1, 2011 [Doc. 30]. Accordingly, the preliminary injunction ostensibly prevents enforcement of any of the provisions of SB 36, despite its strong severability clause that requires preservation of all sections and subsections that are constitutional.

Defendants have failed to move for a narrowing of the preliminary injunction so that enforcement of the plainly constitutional provisions may proceed. Defendants indicated that they would not file a timely appeal of this preliminary injunction, with the

result that constitutional provisions of SB 36 continue to be enjoined for the foreseeable future.

C. Factual Background on the Intervenor AAPLOG

AAPLOG is a nonprofit membership organization based in Michigan. Declaration of Joseph DeCook, M.D. ("DeCook Decl.") ¶ 1 (attached as Exhibit A to the Motion to Intervene). Founded in 1973, AAPLOG's members consist of obstetricians and gynecologists and other health practitioners nationwide, including practitioners in Kansas who compete with abortion providers in serving the needs of pregnant women. *Id.* ¶¶ 2, 6. The membership of AAPLOG in Kansas include practitioners who, in the course of their duties, provide uncompensated or undercompensated care to post-abortive women suffering from complications due to abortion. *Id.* ¶ 7.

In the absence of SB 36, AAPLOG members continue to bear some of the costs externalized by Kansas abortion providers. *Id.* ¶ 8. The lack of follow-up care by some abortion providers – including their lack of hospital privileges to handle hospitalizations resulting from abortions – results in a shifting of the costs of follow-up care to AAPLOG members and others. *Id.* ¶ 9. SB 36 prevents abortion providers from externalizing and shifting those costs of follow-up care to AAPLOG members in Kansas, and others. Moreover, by requiring minimal facility standards for patients, SB 36 helps prevent those complications from occurring in the first place.

AAPLOG seeks to intervene here to protect its members' interests and the healthcare of women, which are adversely affected by the broad preliminary injunction against SB 36. *Id.* ¶ 11. AAPLOG members have a significant interest in reducing the cost-shifting resulting from the lack of follow-up care by abortion providers, which SB 36 reduces. *Id.* ¶¶ 12-13. SB 36 levels the playing field by requiring abortion providers

to bear more of the costs of complications that result from their own businesses, and to require abortion providers to take steps that will reduce the likelihood of complications from occurring. *Id.* ¶¶ 14, 16. The preliminary injunction blocking SB 36 has the economic effect of subsidizing abortion clinics, to the competitive disadvantage of AAPLOG members. *Id.* ¶¶ 12-13. AAPLOG has a right to intervene to protect its members' interests against impairment by this challenge to SB 36, *id.* ¶ 16, and the existing parties do not adequately represent these interests of AAPLOG members.

II. INTERVENTION AS OF RIGHT

AAPLOG satisfies all the requirements for intervention as of right:

> (1) the [motion] is timely, (2) [AAPLOG] claims an interest relating to the property or transaction which is the subject of the action, (3) [AAPLOG's] interest may be impaired or impeded, and (4) [AAPLOG's] interest is not adequately represented by existing parties.

Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co., 407 F.3d 1091, 1103 (10th Cir. 2005).

A. <u>This Motion is Timely</u>

Intervention is sought here within five weeks of the filing of the initial complaint [Doc. 1], and less than a month after the filing of an intervenor's amended complaint [Doc. 33]. This prompt intervention is thereby timely, and no party is prejudiced by it. *See Poynor v. Chesapeake Energy Ltd. P'ship* (*In re Lease Oil Antitrust Litig.),* 570 F.3d 244, 250 (5th Cir. 2009) (finding an abuse of discretion in a lower court denial of a motion to intervene as untimely, even though the intervenor waited "two years after it became aware of its interest in the suit and should have acted sooner"). Moreover, AAPLOG intervened within days of learning that Defendants would fail to adequately represent its interests by not appealing. *See Stallworth v. Monsanto Co.*, 558 F.2d 257,

264 (5th Cir. 1977) (promptness in intervention is best gauged by when it became apparent that the intervenor's interests may not be protected by the original parties).

B. AAPLOG Has Interests in the Subject Matter of this Litigation

AAPLOG members have an interest in how SB 36 compels abortion providers to minimize and follow up on the complications caused by their own procedures, so that AAPLOG members themselves (and patients) are not burdened. SB 36 helps reduce the externalities imposed on AAPLOG members and others by the costs of complications caused by abortion providers. This economic effect of externalities – reduced by SB 36 – easily satisfies the trifle required to establish legal standing for AAPLOG. *United States v. SCRAP*, 412 U.S. 669, 690 (1973) ("an identifiable trifle is enough for standing").

The economic interests of AAPLOG members in providing childbirth services also establish standing, because abortion clinics reduce the childbirths available for AAPLOG members to provide. DeCook Decl. ¶¶ 12-13. AAPLOG members serve the same patients as Plaintiffs: women who have pregnancies. Economically, this is a "zero-sum" situation that establishes standing. *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 807 (5th Cir. 2011) (a "zero-sum competitive relationship" establishes standing).

AAPLOG members are analogous to crisis pregnancy centers, which have been held to have standing to defend abortion laws. *See Planned Parenthood Minnesota, North Dakota, South Dakota v. Alpha Center*, 213 Fed. Appx. 508, 509-10 (8th Cir. 2007) (establishing standing for a pregnancy clinic to defend a law regulating abortion); *see also Warth v. Seldin*, 422 U.S. 490, 514 (1975).[1]

[1] In a case ***not*** focusing on an economic regulation of abortion clinics, a parent and pediatrician – who did not serve pregnant women or handle complications from abortion

C. This Action May Impair AAPLOG's Interests

This litigation "may, as a practical manner" impair the interests of AAPLOG members by putting them at an economic disadvantage if abortion providers are allowed to continue to shift and externalize the costs of complications and follow-up care to others. Moreover, the *stare decisis* effect of allowing abortion providers to continue to externalize their costs of aftercare and complications would place AAPLOG and its members at a permanent competitive disadvantage, which justifies intervention. *Heaton v. Monogram Credit Card Bank*, 297 F.3d 416, 424 (5th Cir. 2002) ("The *stare decisis* effect of an adverse judgment constitutes a sufficient impairment to compel intervention.") (quotation marks omitted). *See also Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152-58 (1970) (establishing competitor standing to challenge an agency's decision about what a law permits); *U.S. v. Union Elec. Co.*, 64 F.3d 1152, 1161 (8th Cir. 1995). AAPLOG members would likely suffer from the burden of caring for abortion complications, and lose childbirth-related business, due to a broad injunction against the Act. In addition, any judgment against the State Defendants here could bind its citizens, including AAPLOG members, which further justifies intervention. *See City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958).

D. Defendants Do Not Adequately Represent these Interests

An intervenor "need only show that representation '***may be***' inadequate," which is ***a "'minimal'" requirement***. *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994) (reversing a denial of intervention) (quoting *Trbovich v. United Mine Workers*, 404 U.S.

– was not allowed to defend an abortion law by himself on appeal as an intervenor. *Diamond v. Charles*, 476 U.S. 54 (1986). But that decision turned on parental rights and there was no issue of cost-shifting by abortion providers or competitor standing.

528, 538 n.10 (1972), emphasis added). Demonstration of "nonfeasance on the part of the existing party" suffices. *Edwards v. City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996) (reversing a denial of intervention). Defendants have failed to appeal the broad preliminary injunction against the Act, and have not moved to narrow the injunction as provided by the strong severability clause. Moreover, Defendants have failed to assert all of the arguments asserted here, and Defendants (as State entities) are obligated to represent broad additional interests that may be in conflict with AAPLOG's. The "minimal burden as to inadequate representation" has been easily met here. *Heaton*, 297 F.3d at 425.

III. PERMISSIVE INTERVENTION

Even if a right to intervene were somehow lacking,[2] AAPLOG qualifies for permissive intervention pursuant to FED. R. CIV. P. 24(b) because they (1) timely filed for intervention, *NAACP v. New York*, 413 U.S. 345, 365 (1973), and (2) have a claim or defense that has "a common question of law or fact." *See, e.g.*, *Miss. State Conf. of the NAACP v. Barbour*, 2011 U.S. Dist. LEXIS 41379, *8 - *11 (S.D. Miss. Apr. 1, 2011) (granting permissive intervention). The first criterion (timeliness) is easily satisfied, and the second criterion is also met because AAPLOG seeks to intervene as defendants on the same law and facts raised by Plaintiffs' complaint.

Intervention by new parties on the side of Plaintiffs in this action has already been allowed; this intervention on the side of Defendants should likewise be allowed.

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[2] A party that fails to qualify for intervention as of right can nonetheless meet the test for permissive intervention. *See, e.g., Ionian Shipping Co. v. British Law Ins. Co.*, 426 F.2d 186, 191-92 (2d Cir. 1970) (denial of intervention as of right does not preordain denial of permissive intervention).

IV. ASSOCIATIONAL STANDING

Just as the trade associations had standing to intervene in *Sierra Club v. Espy*, 18 F.3d at 1203, AAPLOG likewise has associational standing to intervene here because:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

AAPS v. Texas Medical Board, 627 F.3d 547, 550 (5th Cir. 2010) (upholding the standing of a medical organization to sue the Texas Medical Board). AAPLOG members who are obstetricians in Kansas are competitors of Plaintiffs, thereby giving them – and AAPLOG – competitor standing; AAPLOG members who care for complications of abortion have standing – thereby giving AAPLOG standing – because SB 36 reduces cost-shifting from abortion to those members.

As to the other two prongs of associational standing, AAPLOG's motion is plainly germane to its purpose and no participation by its individual members is needed. As to purpose, AAPLOG is pro-life as its name indicates, and it thereby favors removing the ability of abortion providers to externalize their costs and oversell their services by shifting the care of complications onto others. And no participation by AAPLOG members is necessary to defend against this lawsuit, because AAPLOG merely opposes a facial challenge to the constitutionality of the Act.

V. THE PRELIMINARY INJUNCTION SHOULD BE VACATED BECAUSE SB 36 HAS A STRONG SEVERABILITY CLAUSE.

The broad preliminary injunction issued in this action is contrary to the unanimous holding by the U.S. Supreme Court requiring federal courts to abide by

severability clauses in abortion statutes. *Ayotte v. Planned Parenthood*, 546 U.S. 320 (2006). The Court held, without dissent, that:

> In the case that is before us, however, we agree with New Hampshire that the lower courts need not have invalidated the law wholesale. … Only a few applications of New Hampshire's parental notification statute would present a constitutional problem. So long as they are faithful to legislative intent, then, in this case the lower courts can issue a declaratory judgment and an injunction prohibiting the statute's unconstitutional application.

Id. at 331.

SB 36 is clear that any unconstitutional provisions must be severed in order to preserve the remainder of the statute. Section 12 expressly states, "if any provision, or the application thereof, to any person shall be held invalid, such invalidity shall not affect the validity of the remaining provisions." This unambiguous expression of legislative intent requires a narrowing the preliminary injunction to only the specific provisions that might be unconstitutional, leaving everything else in full force and effect. Invalidating the entire law and implementing regulations based on a mere facial challenge is particularly disfavored by the U.S. Supreme Court. *See Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) ("As-applied challenges are the basic building blocks of constitutional adjudication.") (quoting Richard Fallon, "As-Applied and Facial Challenges and Third-Party Standing," 113 HARV. L. REV. 1321, 1328 (2000)).

Neither SB 36 nor its implementing regulations should remain enjoined in their entirety. SB 36 Section 8(b), for example, is plainly constitutional in prohibiting abortion unless the provider has "clinical privileges at a hospital located within 30 miles of the facility." *See* Point VI *infra.* One of the Plaintiff-Intervenors, Ronald Yeoman, M.D., essentially admitted that, as of June 29, 2011, he does not have hospital admitting privileges as required by SB 36, and there may be other abortion providers who do not

satisfy that requirement. (Doc. 14 Exh. A, at ¶ 5). In light of the strong severability provision, no injunction should block enforcement of that requirement and other constitutional provisions in SB 36 and its implementing regulations.

VI. THE PRELIMINARY INJUNCTION SHOULD BE VACATED BECAUSE SB 36 IS ECONOMIC LEGISLATION MERITING "RATIONAL BASIS" REVIEW FOR ITSELF AND ITS IMPLEMENTING REGULATIONS; BOTH ARE CONSTITUTIONAL UNDER *CASEY*.

Economic legislation receives the highly deferential "rational basis" level of judicial scrutiny. SB 36 is economic legislation, and both it and its implementing regulations are entitled to this highly deferential standard of review. SB 36 reduces cost-shifting by the abortion industry with respect to complications caused by their procedures, and it authorizes regulations that will help reduce complications. One study of second-trimester abortions found that complications occurred in a shocking 29% of women who had a medical abortion, and in 4% of women who had a dilation and evacuation (D&E) procedure. *See* Autry et al., "A comparison of medical induction and D&E for second-trimester abortion," 187(2) *American Journal of Obstetrics & Gynecology* 393-97 (2002).[3] While the abortion industry typically insists that complications are rare, the complications from abortion are very costly when they do occur, and the rates of complications are higher than for many other invasive procedures. *See, e.g.*, Levin, Zhao, Conell *et al.*, "Complications of Colonoscopy in an Integrated Health Care Delivery System," 145 ANN. INTERN. MED. 880-86 (2006) (the complication rate for colonoscopies is only about 0.5%).[4] Moreover, a single hospitalization can, of

[3] https://www.guttmacher.org/pubs/journals/3505003a.html (viewed 7/30/11).

[4] http://www.medscape.com/viewarticle/550252 (viewed 7/30/11).

course, cost tens of thousands of dollars, and prior to SB 36 abortionists were not even required to have nearby hospital privileges to handle such complications.

SB 36 is a set of safety-related provisions that help reduce complications and their severity, by mandating better facilities and follow-up care. SB 36 thereby reduces the shifting of those costs by abortion providers onto other caregivers. Such economic legislation is constitutional under the "rational basis" test. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 981 (1992) (Scalia, J., joined by Rehnquist, CJ, and White and Thomas, JJ., dissenting). If the State of Kansas were to mandate follow-up care for colonoscopies, then there would be little doubt of its constitutionality.

One of the central provisions of SB 36 – prohibiting abortion unless the abortionist has privileges at a hospital within 30 miles in order to handle complications -- has already been upheld in federal court, as noted above. Such a requirement "has 'no significant impact' on a woman's right to an abortion and is justified by an 'important state health objective.' It does not violate a woman's right to privacy within the meaning of Roe." *Women's Health Ctr. v. Webster*, 681 F. Supp. 1385, 1392 (E.D. Mo. 1988), *aff'd*, 871 F.2d 1377 (8th Cir. 1989).

"[T]he State has a significant role to play in regulating the medical profession." *Gonzales v. Carhart*, 550 U.S. at 127. SB 36 protects women in connection with abortion, just as informed consent laws do, and thus is fully constitutional. *See, e.g.*, *Casey*, 505 U.S. at 887 ("Because the informed consent requirement facilitates the wise exercise of that right, it cannot be classified as an interference with the right *Roe* protects."). The broad preliminary injunction against SB 36 should be vacated.

VII. CONCLUSION

For the foregoing reasons, the motion to intervene by AAPLOG should be granted, and the preliminary injunction should be vacated.

Dated: August 1, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2011, I electronically filed the foregoing Suggestions in Support of Motion to Intervene with the Clerk of the Court using the Electronic Case Filing system, which I understand to have caused service of all the parties in this case.

/s/ Thomas M. Dawson