IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

STATE OF TEXAS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 7:16-cv-54-O
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' OPPOSITION TO MOTION TO INTERVENE

Three pro se federal inmates move to intervene in this case. *See* Mot. to Intervene, ECF No. 101. The putative intervenors seek to challenge the presence of transgender female inmates in Federal Medical Center (FMC) Carswell, an administrative security federal medical center in Fort Worth, Texas. This Court should deny the motion to intervene because the putative intervenors cannot meet the standard for intervention as of right or the standard for permissive intervention.

In essence, the putative intervenors seek to merge two fundamentally different lawsuits. As the Court is well aware, the plaintiff states challenge guidance documents that reflect the interpretation of the defendant agencies that Title VII and Title IX and its implementing regulations prohibit discrimination because an individual's gender identity is different than their birth-assigned sex (i.e., because a person is transgender). Plaintiffs challenge in particular the agencies' view that transgender students should be permitted to use restrooms and other similar facilities that correspond to their gender identity. Putative intervenors' suit, by contrast, appears to involve an individual challenge to the Prison Rape Elimination Act (PREA), 42 U.S.C. §§ 15601, *et seq.*, and its implementing regulations, and particularly those provisions related to

the assignment of transgender inmates to male or female facilities. Consistent with the rules governing intervention, the Court should not allow the putative intervenors to insert this new and entirely unrelated matter into this case.

In order to intervene as of right under Federal Rule of Civil Procedure 24(a), all of the following elements must be satisfied:

> (1) the application for intervention must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; (4) the applicant's interest must be inadequately represented by the existing parties to the suit.

Texas v. United States, 805 F.3d 653, 657 (5th Cir. 2015) (citing *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir.1984)). Even if the standard for intervention as of right is not satisfied, the Court may, in its discretion, permit intervention under Rule 24(b) where the potential intervenor timely files a motion, has a claim or defense that shares a common question of law or fact with the main action, and his or her intervention will not unduly delay or prejudice the adjudication of the original parties' rights. *See League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 884 F.2d 185, 189 n.2 (5th Cir. 1989); *see also New Orleans Pub. Serv., Inc.*, 732 F.2d at 470-71 (permissive intervention "is wholly discretionary with the [district] court").

As an initial matter, putative intervenors have not satisfied the requirement that a motion to intervene "be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). Putative intervenors have not filed a proposed complaint in intervention along with their motion, and thus their motion should be denied for that reason alone. *See In re SBMC Healthcare, LLC*, 519 B.R. 172, 185 (S.D. Tex. 2014) ("Rule 24(c), as interpreted by the Fifth Circuit, requires a motion to intervene to include a well-pleaded

complaint. Here, the Motion to Intervene failed to attach a proposed complaint. Indeed, the Motion itself does not even allege any causes of action against the Defendants. The Motion is therefore woefully inadequate."); *see also Pin v. Texaco, Inc.*, 793 F.2d 1448, 1450 (5th Cir. 1986); *Ihms v. Deutsche Bank Nat'l Tr. Co.*, No. 3:15-cv-1078, 2016 WL 4536578, at *4 n.1 (N.D. Tex. Aug. 9, 2016) (Stickney, M.J.).

Even had putative intervenors complied with Rule 24(c), they cannot satisfy the standard for intervention as of right or permissive intervention because their claims—to the extent that they are discernible—raise factual and legal issues that are entirely distinct from those in the case at hand. As the Court knows, this case involves guidance documents that reflect the defendant agencies' interpretation of Title VII and Title IX and its implementing regulations, and, in particular, access to restrooms and similar facilities by transgender individuals in public educational institutions. The issue raised by putative intervenors—the assignment of transgender inmates incarcerated at FMC Carswell, a *federal* facility—has nothing to do with Title VII or Title IX. Instead, putative intervenors appear to challenge aspects of PREA and its implementing regulations. *See* 42 U.S.C. § 15607(a) (requiring the Attorney General to "publish a final rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape"); *id.* § 15607(b) (applying the national standards adopted by the Attorney General to federal facilities); 28 C.F.R. § 115.42 (PREA implementing regulations addressing the assignment of, *inter alia*, transgender inmates). In short, PREA's implementing regulations require the Federal Bureau of Prisons (BOP) to make case-by-case determinations when deciding whether to assign a transgender inmate to a male or female facility. *See* 28 C.F.R. § 115.42(c) ("In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency shall consider

on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems."); *id.* § 115.42(d) ("Placement and programming assignments for each transgender or intersex inmate shall be reassessed at least twice each year to review any threats to safety experienced by the inmate."); *id.* § 115.42(e) ("A transgender or intersex inmate's own views with respect to his or her own safety shall be given serious consideration."). Not only do the putative intervenors' claims arise in a completely different legal setting, but they also involve distinct factual issues related to the prison context, as well as an agency (BOP) that is not a party to this case.[1]

As a result, putative intervenors do not have "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); nor do they have an "interest relating to the property or transaction which is the subject of the action," and the "the disposition of [this] action" . . . will not "impair or impede [their] ability to protect" any interest that they might have, *id.* 24(a)(2). Putative intervenors can seek to pursue their claim that BOP's actions are inconsistent with PREA in a *separate* action, if they so choose, regardless of the outcome of this case.[2]

Finally, putative intervenors cannot satisfy the requirement that intervention be "timely," *id.*, or will not be prejudicial to all parties, *see id.* 24(b)(3). This case was initiated nearly eight

[1] Although plaintiffs mention PREA in a single paragraph of their Amended Complaint, *see* Am. Compl. ¶ 97, ECF No. 6, they do not challenge PREA or its implementing regulations.

[2] The government does not believe that any such claim would have merit, but does not address the merits here. Putative intervenors have filed a Motion for Preliminary Injunctive Relief, ECF No. 102, to which the government will respond if and when the Court allows putative intervenors to intervene, which, for the reasons explained herein, it should not.

months ago, and has been the subject of substantial litigation. The interjection of wholly new issues at this date would unduly prejudice the parties.[3]

CONCLUSION

For the reasons stated above, the Court should deny putative intervenors' motion to intervene in this case.

Dated: January 19, 2017

Respectfully submitted,

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[3] Defendants also note that that allowing intervention may lead to additional frivolous filings and delays. Putative intervenor Rhonda Fleming, who signed the certificate of service, has been involved in a large number of unsuccessful cases and appeals over the years, and has even been barred from proceeding *in forma pauperis* in the Fifth Circuit. *See Fleming v. Williams*, 235 F.3d 1341 (5th Cir. 2000) (unpublished).

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2017, a copy of the foregoing Opposition to Motion to Intervene was filed electronically via the Court's ECF system, which effects service upon counsel of record for the parties. A copy was also served by mail to: Rhonda Fleming, Federal Medical Center, Carswell, P.O. Box 27137, Ft. Worth, TX 76172.

/s/ Benjamin L. Berwick
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