IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

JOHN DOE and JANE DOE, as the Natural Parents and Next Friends of Their Minor Child, JAMES DOE, Plaintiffs, vs. THE WILSON COUNTY SCHOOL SYSTEM; DR. JIM DUNCAN, Individually and as Director of Wilson County Schools; WENDELL MARLOWE, Principal of the Lakeview Elementary School; YVONNE SMITH, Assistant Principal of Lakeview Elementary School; and JANET ADAMSON, Teacher at Lakeview Elementary School, Defendants, DOUG GOLD, CHRISTY GOLD, JAMES WALKER and JENNIFER WALKER, Intervenor-Defendants	CIVIL ACTION NO. 3:06-cv-00924 DISTRICT JUDDGE ROBERT ECHOLS MAGITRATE JUDGE JOHN S. BRYANT

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

COME NOW Doug Gold, Christy Gold, James Walker, and Jennifer Walker, and hereby submit this Memorandum in Support of their Motion to Intervene in this cause.

INTRODUCTION

Doug Gold, Christy Gold, James Walker, and Jennifer Walker (hereinafter referred to collectively as "applicants") seek to intervene in this action to protect their First Amendment rights. On September 27, 2006, plaintiffs brought instant lawsuit against various school officials affiliated with Lakeview Elementary School (hereinafter "Lakeview") for purported Establishment Clause violations. Plaintiffs seek declaratory and injunctive relief aimed at

eliminating religious content on school premises and prohibiting parents and students from praying or otherwise expressing their faith on school grounds. In particular, plaintiffs seek to "[e]njoin[ ] the Defendants and their successors, employees and agents from permitting … the delivering of: 1) the "See You at the Pole" event; 2) Praying Parents activities; 3) the "National Day of Prayer" event; 4) the Christian themes and songs at the Christmas program; and [Thanksgiving] prayers." (Complaint "Request for Relief").

If granted, plaintiffs' requested relief will effectively silence constitutionally-protected religious expression of applicants and their children. Thus, applicants seek access to this Court to protect their paramount interests that hang in the balance.

BACKGROUND

According to plaintiffs, school officials violated the Establishment Clause by conducting a Christmas program and by permitting prayer and religious discussion on school property. Specifically, plaintiffs object to five activities: 1) Prayer at the flagpole 2) the National Day of Prayer 3) "Praying Parents" 4) references to religion regarding Thanksgiving, and 5) religious content in the Christmas Program. Pursuant to 42 U.S.C. §1983, plaintiffs ask for declaratory relief to denounce the school board for permitting these events, injunctive relief to prohibit these events, as well as damages. (Complaint "Request For Relief.").

James and Jennifer Walker have two children that currently attend Lakeview. (Walker Aff., ¶ 2.). Mrs. Walker was specifically named in the Complaint. (Complaint, ¶¶ 43-44). Their family has personally participated in the "See You at the Pole" and "National Day of Prayer" events to which plaintiffs object. (Walker Aff., ¶¶ 7, 14.). Mrs. Walker has served to organize these events in the past. (*Id*.). Also, Mrs. Walker presently leads the Praying Parents' get-

together at the school. (Walker Aff., ¶ 18). The Walkers desire to participate in and organize these activities in the future. (Walker Aff., ¶¶ 13, 17, 23.).

Doug and Christy Gold have one child who currently attends Lakeview and one child who will begin kindergarten at Lakeview next year. (Gold Aff., ¶ 4.). Mrs. Gold participates in "Praying Parents," and Mr. and Mrs. Gold and their children all attended the "See You at the Pole" event and the "National Day of Prayer" event at Lakeview. (Gold Aff., ¶¶ 9, 13, 17). Mrs. Gold led the "National Day of Prayer" event this past year, in 2006, that is specified in the Complaint. (Gold Aff., ¶ 13; Complaint, ¶¶ 53-64). Mr. and Mrs. Gold desire to continue such participation. (Gold Aff., ¶¶ 12, 16, 18.). Mr. and Mrs. Gold are also concerned about upcoming school programs at Lakeview for their child who will attend kindergarten next year. Particularly, they fear that this litigation could result in Lakeview school officials being hostile toward their religion. (Gold Aff., ¶¶ 19-22).

Prayer at Flagpole

"See You at the Pole" is a national event where students across the country gather around school flagpoles and pray for their classmates and teachers. To coincide with this national event, Mrs. Walker organized the 2006 "See You at the Pole" event at Lakeview. (Walker Aff., ¶ 7). The event occurred before school, beginning at 6:40 a.m. and ending at 7:00 a.m., around the school flagpole on school grounds. (Walker Aff., ¶ 10; Gold Aff., ¶ 9). During this event, students and parents prayed and read bible verses. (Walker Aff., ¶ 12). Some school officials attended but did not formally lead or speak at the event. (*Id*.). Applicants and their children participated in this event. (Walker Aff., ¶ 7; Gold Aff., ¶ 9).

National Day of Prayer

"The National Day of Prayer" is a day dedicated by United States Congress to encourage prayer. (Gold Aff., ¶ 14). To coincide with this national event, Mrs. Gold organized a time for students and parents to pray before school in the school cafeteria from 6:40-7:00 a.m., on May 4, 2006. (Gold Aff., ¶¶ 13, 15). Some school officials attended this gathering, but no one affiliated with the school led the event. (Gold Aff., ¶15.). Mrs. Walker also placed flyers in the school mailboxes of teachers so that teachers would distribute these flyers to the students about the event. (Walker Aff., ¶16.). Mrs. Walker placed information in the school newsletter regarding this event. (*Id*.). Other groups place similar information about their events in the school newsletter. (*Id.*).

Praying Parents

"Praying Parents" is a small informal grouping of parents who meet at Lakeview to pray for students and teachers. (Walker Aff., ¶ 18; Gold Aff., ¶ 17). Mrs. Walker organizes and attends these meetings. (Walker Aff., ¶18.). The group typically meets the first Friday of each month from 7:15 to 8:15 a.m. in a partitioned off area of the school cafeteria when no children are present. (Walker Aff., ¶ 19). "Praying Parents" puts flyers about their activities in teachers' boxes to distribute. (Walker Aff., ¶19.). Mrs. Walker has also obtained permission to post information about this group on the school website. (Walker Aff., ¶21). Other groups can also obtain website access. (*Id*.). As a general rule, group members do not enter into classes or speak to students. (Walker Aff., ¶ 22).

References to Religion in Teaching of Thanksgiving

In 2005, a kindergarten teacher conducted a mock thanksgiving dinner at Lakeview. (Complaint ¶¶ 80-81; Answer ¶¶ 80-81.). For this occasion, and teaching moment, students

dressed like Native Americans and discussed things for which they were thankful. (*Id*.). The Gold family celebrates Thanksgiving. As Christians, they would be highly offended if Lakeview stripped this holiday of its religious history or its meaning of giving thanks. (Gold Aff., ¶¶ 19-20).

Christmas References in Christmas Program

Lakeview Elementary School typically hosts a Christmas program in December for the kindergarten class. (Complaint ¶¶ 65-67.). In the program, students sing various songs and act out events. At this program in the past, students recreated the story *T'was the Night Before Christmas* and also recreated a Nativity Scene. (Walker Aff., ¶ 23.). Students also sang various Christmas Carols including "Deck the Halls," "Silent Night," "Rudolph, The Red Nose Reindeer" and "We Wish You a Merry Christmas." (*Id*.). Golds would objects to any Christmas program that purposely eliminates Christian aspects of this holiday. (Gold Aff., ¶ 21).

ARGUMENT

Applicants seek participation in the instant litigation via intervention. They are entitled to intervene as a matter of right. In any event, applicants demonstrate sufficient basis for permissive intervention.

I. INTERVENTION IS APPROPRIATE AS A MATTER OF RIGHT

Fed. R. Civ. P. 24 sets out the standard to assess an intervention motion:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action…(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

This circuit analyzes four factors in judging a motion to intervene: (1) timeliness of the application to intervene, (2) the applicant's substantial legal interest in the case, (3) impairment of the applicant's ability to protect that interest in the absence of intervention, and (4) inadequate

representation of that interest by parties already before the court. *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 315 (6th Cir. 2005). In this matter, the aforementioned requirements are fully satisfied.

A. Petition is Timely

In analyzing timeliness, a district court is to evaluate intervention "in the context of all relevant circumstances." *Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir.1990). Five factors guide this analysis: (a) the point to which the suit has progressed; (b) the purpose for which intervention is sought; (c) the length of time preceding the application during which the applicant knew or reasonably should have known of its interest in the case; (d) prejudice to the original parties due to the failure of the applicant to apply promptly for intervention upon acquiring the knowledge of its interest; and (e) any unusual circumstances of the case. *Linton by Arnold v. Commissioner of Health and Env't.*, 973 F.2d 1311, 1317 (6th Cir. 1992).

1. Progression of case

Courts measure progression not so much by the absolute time between the complaint and intervention but by the steps through which a case has progressed. *Stupak-Thrall v. Glickman*, 226 F.3d 467, 475 (6th Cir. 2000). Therefore, intervention is deemed improper during the later stages of a case. *See, e.g., United States v. Tennessee*, 260 F.3d 587, 592-93 (6th Cir. 2001) (denying intervention because judge had already approved settlement). Since this case is in its infancy, it is suitable for intervention.

2. Purpose of intervention

Applicants seek to intervene to ensure the continuation of their constitutionally-protected conduct. In fact, applicants engage in the very activity to which plaintiffs object in this cause, thus, applicants do not merely seek to defend abstract theories, but actual behavior. Therefore,

applicants will have a strong desire to appeal any negative outcome. An amicus brief cannot facilitate an appeal and such an inability justifies intervention. *See Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). Moreover, applicants' and defendants' goals differ, which is fleshed out in how the parties approach settlement, strategy for trial, and the very arguments for litigation. Only intervention can confer these unique benefits to applicants.

3. Proceedings before application

This factor assesses "the length of time preceding the appellants' motion to intervene, during which they knew, or should have known, of their interest in the case." *Stupak-Thrall*, 226 F.3d at 477. Parties cannot adopt a "wait-and-see" approach but should intervene when they become aware of a suit. *Stotts v. Memphis Fire Dep't*, 679 F.2d 579, 584 n. 3 (6th Cir.1982). Applicants have not taken a wait-and-see approach here but have acted decisively to protect their interests. As parents who have no connection to the original parties, applicants would not immediately learn of the suit. But, after learning of the suit, applicants obtained legal representation, and shortly thereafter, filed this motion, all less than three months after the filing of the complaint.

4. Prejudice to parties

As a general rule, intervention should not cause undue prejudice to the original parities by complicating the case or prolonging discovery. *Cf. United States v. Michigan*, 424 F.3d 438, 445 (6th Cir. 2005) (denying intervention because it would complicate case by "requiring the adjudication of fact intensive issues."). No such complication or delay will occur here due to the sheer infancy of the case. Defendants have yet to file a motion to dismiss or motion for summary judgment. Discovery will not be completed because applicants and defendants will most likely seek the same information. Intervention will not unduly complicate the case or alter

the expectations of the original parties. In fact, inclusion of applicants would add clarity to the rights at stake.

5. Unusual circumstances

Under this factor, courts assess any special circumstances that affect intervention. The present circumstances highly favor granting intervention because a ruling in favor of plaintiffs would provide a chilling effect on speech. Absent the intervenors, this Court can only consider the Establishment Clause concerns, without contemplation of the Free Speech and Free Exercise rights at play. Because of the vital importance of these constitutional issues, intervenors play a vital role in this litigation.

B. Applicants have Significant Legal Interest in the Matter

As a second factor for intervention, applicants must allege "an interest relating to the property . . . which is the subject of the action." Fed. R. Civ. P. 24(a). In this regard, the Sixth Circuit has adopted "a rather expansive notion of the interest sufficient to invoke intervention of right." *Providence Baptist Church*, 425 F.3d at 315 (citations omitted). S*ee also Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) ("[T]his court has acknowledged that 'interest' is to be construed liberally.").[1] Therefore, "close cases should be resolved in favor of recognizing an interest under Rule 24(a)…" *Miller*, 103 F.3d at 1247. And the inquiry is "necessarily fact-specific." *Id*.

This case concerns the propriety of private religious speech on public property and the propriety of religious references in recognition of religious holidays on school grounds. As the actual source of the speech, and celebrants of the challenged holidays, applicants have a legal

[1] For this reason, an intervenor does not need the same standing necessary to initiate a lawsuit. *See Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991).

interest in protecting their opportunity and their right to speak, as well as preventing governmental hostility toward their speech, and their religion.

1. Action threatens right to private religious speech

A primary issue of this case is whether school officials violated the Establishment Clause in permitting parents and students to pray and speak about religion on school grounds. For the most part, plaintiffs are not concerned with school officials directly engaging in religious speech. According to plaintiffs, the problem is that school officials have endorsed and supposedly perpetuated religion by merely allowing others to speak. (Complaint ¶ 99.). For this reason, plaintiffs request an injunction to stop officials from even "permitting" the religious speech of private individuals. *Id*. at ¶¶ 111-12.

On plaintiffs' theory, constitutional violation will end when officials prevent parents and students from speaking in a religious manner. Thus the legal challenge involves two related yet distinct issues: the ability of private individuals to speak at Lakeview and the school's relationship to that speech. In order to prove that school officials must stop and preclude the speech in question, plaintiffs must establish that the speakers have no right to speak or that some interest trumps that right to speak.

a. Applicants have an interest in preserving their opportunity to speak

If this Court accepts plaintiffs' arguments, then the school would have to silence the applicants. This relief necessarily eliminates applicants' opportunity to speak. Applicants have a significant interest in avoiding this grave result, and in preserving their opportunity to speak freely.

The potential loss of an opportunity can justify intervention. For example, in *Grutter v. Bollinger*, the Sixth Circuit permitted applicants to the University of Michigan to intervene to defend the school's affirmative action policy. 188 F.3d 394 (6th Cir. 1999). These intervenors

had a significant legal interest to intervene because the case may have vitiated their opportunity to receive an education:

> [Intervenors'] interest in maintaining the use of race as a factor in the University's admissions program is a sufficient substantial legal interest to support intervention as of right. Specifically, they argue that they have a substantial legal interest in educational opportunity, which requires preserving access to the University for African-American and Latino/a students and preventing a decline in the enrollment of African-American and Latino/a students.

Id. at 398. The Constitution did not require Michigan to adopt an affirmative action policy. Nevertheless, the Sixth Circuit emphasized that applicants need not establish a right to receive right to intervene. Rather, the lost opportunity can create a legal interest sufficient for intervention:

> The *Gratz* district court's opinion relies heavily on the premise that the proposed intervenors do not have a significant legal interest unless they have a "legally enforceable right to have the existing admissions policy construed." We conclude that this interpretation results from a misreading of this circuit's approach to the issue. As noted earlier, we have repeatedly "cited with approval decisions of other courts 'reject[ing] the notion that Rule 24(a)(2) requires a specific legal or equitable interest.'"

Id. at 398-99 (citation omitted). *Grutter* stands for the simple principle that a lost opportunity creates a legal interest to justify intervention.

This scenario is no different from *Grutter*. The opportunity to speak is no different from the opportunity to receive an education. Indeed, many courts have permitted intervention to defend the opportunity to speak about religion in schools. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 212 (1997) (noting that district court permitted parents to intervene to defend ability of public school teachers to teach in parochial school against Establishment Clause challenge); *Committee for Public Ed. and Religious Liberty v. Nyquist*, 350 F.Supp. 655, 657 n.1 (N.D.N.Y. 1972) (overturned on other grounds) (permitting parents to intervene to defend government aid to nonpublic schools against Establishment Clause); *Harris v. Joint School Dist. No. 241*, 821

F.Supp. 638 (D. Idaho 1993) (overturned on other grounds) (permitting intervenors to defend constitutionality of school prayer against Establishment Clause challenge); *Chandler v. James*, 985 F.Supp. 1068, 1077 n.17 (M.D. Ala. 1997) (commenting that intervention to defend prayer at public school against Establishment Clause challenge would have been permitted if timely).

This case is similar to cases where parents and students intervened to defend prayer at school graduations or funding of parochial schools. In all of these situations, the government permitted some form of religious expression. The intervenors had a direct interest to defeat the Establishment Clause challenges because these cases determined whether the intervenors could seize an opportunity to speak. So too, this case will determine whether applicants can utilize their opportunity to speak at Lakeview. Faced with the loss of an opportunity to speak, applicants have a clear interest in this case and should be allowed to intervene.

b. Applicants have an interest in preserving their right to speak

Not only do applicants face the loss of their *opportunity* to speak, but applicants also face the loss of their *right* to speak. A court should permit intervention if litigation threatens a party's constitutional rights. This principle is most clearly seen in school desegregation cases where courts have permitted parents to intervene in light of the important constitutional rights at stake. *See, e.g.*, *Jones v. Caddo Parish Sch. Bd.*, 499 F.2d 914 (5th Cir. 1974) ("When parents move to intervene in school desegregation cases, the important constitutional rights at stake demand a scrupulous regard for due process considerations."); *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969) ("[T]here is no apparent reason why an economic interest should always be necessary to justify intervention…[Intervention's goals] may in certain circumstances be met by allowing parents whose only interest is the education of their children to intervene.") (quotations omitted). There is no reason to distinguish between equal protection and other constitutional rights. *See*

Drummond v. Fulton County Dept. of Family and Children's Services, 547 F.2d 835 (5th Cir. 1977) (finding that child had Due Process right that justified his intervention in litigation over termination of parental status of his parents). By this reasoning, a threat to First Amendment rights also justifies intervention.

In this case, applicants face the violation of their First Amendment rights in two respects: plaintiffs' requested relief would require 1) viewpoint discrimination, and 2) content discrimination in a designated public forum. By attacking the government's ability to permit religious speech, plaintiffs simultaneously attack applicants' right to speak. Therefore, applicants have a clear interest to see that plaintiffs do not obtain their requested relief.

Applicants have a clear right to speak because a ban on their speech would constitute viewpoint discrimination. When the government excludes speech on an otherwise includible subject because of its perspective, it engages in viewpoint discrimination. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). Absent compelling justification, viewpoint discrimination is always unconstitutional, regardless of the context or environment in which it takes place. *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 828 (1995); *Kincaid v. Gibson*, 236 F.3d 342, 355 (6th Cir. 2001). Excluding a religious perspective on an otherwise permissible subject is an obvious form of viewpoint discrimination. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

This analysis does not change for religious speech in an elementary school context. Courts have forbidden elementary schools from silencing religious speech and have even forbidden schools from silencing the same type of activities conducted by applicants here. For example, in *Child Evangelism Fellowship of New Jersey Inc. v. Stafford Tp. Sch. Dist.*, a

religious group attempted to distribute literature to students, post information in school hallways, and meet in classrooms in three elementary schools. 386 F.3d 514, 519-521 (3rd Cir. 2004). The schools denied the religious group but allowed other groups to conduct such activity. *Id.* In a unanimous decision, the appellate court found the elementary schools guilty of viewpoint discrimination:

> What Stafford [school district] appears to mean when it says that it excludes groups that proselytize is that it rejects religiously affiliated groups that attempt to recruit new members and persuade them to adopt the group's views. *This is viewpoint discrimination.*

Id. at 528 (emphasis added). *See also Child Evangelism Fellowship of MD., Inc. v. Montgomery County Pub. Schs.*, 373 F.3d 589 (4th Cir. 2004) (finding viewpoint discrimination when elementary schools prohibited religious group from dispensing flyers to students).

This case is no different from *Stafford.* Applicants seek to express their religious views in the same places that other groups express their non-religious views. Specifically, applicants seek to speak before school at the school flagpole and to gather inside school facilities and pray for students. (Walker Aff., ¶¶ 6-9, 17, 18). Other groups may also access these facilities and use them for their purposes. (Walker Aff., ¶11). Applicants do not ask for special treatment and do not want the school to "endorse" their message but ask only for neutrality. Any other course of conduct would force the school to discriminate because of viewpoint. If the First Amendment prohibits anything, it prohibits government from silencing one viewpoint in the marketplace of ideas. *See Rosenberger v. Rector & Vistors of Univ. of Virginia,* 515 U.S. 819, 829 (1995). ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from

regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

Nor can the plaintiffs hide behind the Establishment Clause to justify viewpoint discrimination. Applicants merely seek the same opportunities and access given to secular groups. Such neutrality does not constitute endorsement, whether speech is in an elementary school or not. *See, e.g., Rusk v. Crestview Local Sch. Dist.*, 379 F.3d 418 (6th Cir. 2004); *Wigg v. Sioux Falls School Dist. 49-5*, 382 F.3d 807 (8th Cir. 2004); *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044 (9th Cir. 2003); *Sherman v. Cmty. Consol. Sch. Dist. 21*, 8 F.3d 1160 (7th Cir. 1993).

Indeed, courts have consistently upheld the same activities challenged by plaintiffs here. *See, e.g., Stafford Tp. School Dist.*, 386 F.3d at 530-35 (ruling that elementary school could allow religious groups to distribute flyers and permission slips and post material on school walls); *Westfield High School L.I.F.E. Club v. City of Westfield*, 249 F.Supp.2d 98 (D. Mass. 2003) (ruling that high school could permit students to pray at flagpole); *Daugherty v. Vanguard Charter Sch. Academy*, 116 F.Supp.2d 897 (W.D. Mich. 2000) (permitting elementary school to allow parents to pray in empty classroom during school hours, to allow teachers to attend prayer at flagpole before school hours, and to allow community groups to distribute religious material to students). The First Amendment empowers applicants to speak at Lakeview. Therefore, applicants have a clear interest to protect their rights against plaintiffs' attacks.

Applicants also have a right to speak because Lakeview retains a designated public forum.[2] A designated public forum "consists of public property that the State has opened for

[2] Different circuit courts define limited public forum and designated public forum differently. *See Bowman v. White*, 444 F.3d 967, 975-76 (8th Cir. 2006). For purposes of this discussion, the terms can be treated as synonyms.

expressive activity by part or all of the public." *Jobe v. City of Catlettsburg*, 409 F.3d 261, 266 (6th Cir. 2005) (citation omitted). If a speaker falls within the permitted class, then the area is the equivalent of a traditional public forum for that speaker and any content based restrictions must survive strict scrutiny. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). To determine the existence of designated public forum, courts analyze the school's practices and policies, the nature of the property at issue, its compatibility with expressive activity, and the context of the forum. *Kincaid*, 236 F.3d at 349.

These factors support the existence of a designated public forum at Lakeview. The school has consistently opened its facilities to various groups. (Walker Aff., ¶ 11). Various groups may post information on the school website, in the school newsletters, and within the school itself. (Walker Aff., ¶¶ 9, 16, 21). Groups may also give information to teachers to give to students. (Walker Aff., ¶ 9). These groups do not seek access to classrooms or offices at Lakeview. Rather, applicants only seek access to forums that are compatible with speech. Because of its location outside and ability to dissipate loud noises, the school flagpole can easily accommodate discussion and public prayers. Venues like partitioned area of school cafeteria – when no children are present - can likewise accommodate innocuous expression. (Walker Aff. ¶ 20). Applicants do not wish to create disturbances but to communicate information in ways consistent with the characteristics of the forums at Lakeview.

Courts typically agree that elementary schools are compatible with various forms of expression and can contain public forums. The Supreme Court has commented on the "considerable force" of the argument that public schools can create designated public forums. *Lamb's Chapel*, 508 U.S. at 391. The Third Circuit has squarely found a limited forum when an elementary school allowed groups to distribute materials and post materials in school hallways:

> [I]t is evident that Stafford [school district] created limited public fora when it opened up the three fora at issue for speech by a broad array of community groups on matters related to the students and the schools. Stafford had no constitutional obligation to distribute or post any community group materials or to allow any such groups to staff tables at Back-to-School nights. But when it decided to open up these fora to a specified category of groups (i.e., non-profit, non-partisan community groups) for speech on particular topics (i.e., speech related to the students and the schools), it established a limited public fora.

Stafford Tp. School Dist., 386 F.3d at 526. The Fourth Circuit echoes this conclusion. *See Child Evangelism Fellowship of MD, Inc. v. Montgomery County Pub. Schs.*, 457 F.3d 376, 383 (4th Cir. 2006) ("Thus, the take-home flyer forum would seem to be a limited public forum…").

Having created a forum open to other groups, Lakeview may not forbid religious groups. *See Stafford Tp. School Dist.*, 386 F.3d at 526. Such conduct would constitute blatant content discrimination. *See, e.g., Widmar v. Vincent,* 454 U.S. 263, 269-70 (1981). Nor could the school justify its behavior as an effort to comply with the Establishment Clause. The Establishment Clause simply does not require schools to silence private, religious speakers. *See Montgomery County*, 373 F.3d at 594-95; *Hedges v. Wauconda Cmty. Sch. Dist.*, 9 F.3d 1295, 1298 (7th Cir. 1993).

2. Action threatens governmental hostility toward religion

Applicants also have a right to avoid school hostility toward their religion. Depending on the context, the government could communicate a message of hostility toward religion and violate the Establishment Clause by eliminating religious materials and references. The Establishment Clause not only forbids government endorsement of religion but, importantly, also forbids government hostility toward religion. *Lynch v. Donnelly,* 465 U.S. 668, 673 (1984). Indeed, government may not foster "a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Rosenberger*, 515 U.S. at 846. Nor may the State "establish a religion of secularism in the sense of affirmatively opposing or

showing hostility to religion, thus preferring those who believe in no religion over those who do believe." *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963) (citation and quotation omitted).

The elimination of religious references in contexts where religious mention would be expected communicates a message of hostility, which violates the Establishment Clause. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general") (citations omitted)[3]; *Lee v. Weisman*, 505 U.S. 577, 598 (1992) ("A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution."); *Murray v. City of Austin*, 947 F.2d 147, 158 (5th Cir. 1991) ("requiring the City to remove all displays of the [religious] insignia, arguably evinces not neutrality, but instead hostility, to religion").

Obviously, this principle does not require the government to permit religious speech in all circumstances. If the government removes religious content in certain contexts, though, that context may communicate a message of hostility. For example, some musical programs inherently encompass religious content. Because religious content was very important in the historical development of some music, the removal of religious references from this context would send a blatant message of hostility. While the government need not set aside space for religious content from the outset of a musical program, removal of religious content from a pre-existing program would create a message of hostility. In this sense, deletion of expected religious content carries a different message than the refusal to add religious content:

[3] As *Lukumi* demonstrates, the Free Exercise Clause also forbids the government hostility toward religion. *Id*. at 533.

> Under normal circumstances the absence of religious displays is neutral and without First Amendment significance. However, in the context of the Christmas-Chanukah holidays, this absence might be less than neutral. As our nation becomes overwhelmed with the tangible evidences of the year-end holiday spirit, the studied absence or even limitation of consistent celebrations within the school might well be interpreted by a student as governmental hostility to the celebrating religions.

Clever v. Cherry Hill Township Bd. of Educ., 838 F. Supp 929, 940 (D.N.J. 1993). In the balance, context determines an Establishment Clause violation. *See County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 636 (1989) (O'Connor, J., concurring) ("[Establishment Clause analysis] depends on sensitivity to the context and circumstances presented by each case.").

For this reason, courts have consistently permitted the performance of religious songs in public schools. *See, e.g.*, *Florey v. Sioux Falls School Dist. 49-5*, 619 F.2d 1311, 1317 n.5 (8th Cir. 1980) (noting that schools could perform Christmas carols such as Adeste Fideles, Hark the Herald Angels Sing, Joy to the World, and Silent Night). Moreover, courts have noted that removing religious songs can communicate a message of hostility:

> Given the dominance of religious music in this field, DISD [the school district] can hardly be presumed to be advancing or endorsing religion by allowing its choirs to sing a religious theme song.… Within the world of choral music, such a restriction would require hostility, not neutrality, toward religion. A position of neutrality towards religion must allow choir directors to recognize the fact that most choral music is religious. Limiting the number of times a religious piece of music can be sung is tantamount to censorship and does not send students a message of neutrality. Where, as here, singing the theme song is not a religious exercise, we will not find an endorsement of religion exists merely because a religious song with widely recognized musical value is sung more often than other songs. Such animosity towards religion is not required or condoned by the Constitution.

Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 407-08 (5th Cir. 1995).

These precedents apply forcefully to the current situation. Plaintiffs ask this Court to remove various forms of religious reference and expression at Lakeview. (Complaint ¶ 99.).

Yet, with certain fields of study pertaining to nationally celebrated holidays, like Thanksgiving and Christmas, religious content provides indispensable background to understand the historical record. Therefore, the school would send a clear anti-religion message by prohibiting religious mention in these fields. This hostility becomes most apparent in the attack on Lakeview's Christmas program and the mock Thanksgiving dinner. As indicated by its name, Christmas has historical roots in Christianity, and thus many Christmas songs use religious themes. Thanksgiving also began with a strong emphasis on the importance of faith, particularly, its very purpose of giving thanks to God. For this very reason, the pilgrims prayed and gave thanks.

Despite this historical reality, plaintiffs wish to expunge all references to religion with those holidays. This principle has no limit. Plaintiffs might as well delete all references to religion in the Declaration of Independence or ignore the religious motivations that drove the pilgrims to America. Such censorship serves only to impose a secularist meta-narrative upon elementary students by manipulating and rewriting the historical record. Indeed, such "editing" of the historical record evokes Orwellian visions, not the values of the Constitution. The Establishment Clause does not require such censorship. Far from it, the Establishment Clause strictly forbids such anti-religious censorship, and applicants have a clear interest to avoid such hostility.[4]

C. Litigation Impairs Ability to Protect Interest

For this requirement, "a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied. This burden is minimal." *Miller*,

[4] To assess whether the government has engaged in hostility toward religion, this court would analyze the conduct under the three prong Lemon test: 1) does the conduct have a secular purpose, 2) is the primary effect of the conduct either to advance or inhibit religion, and 3) does the conduct foster an excessive entanglement with religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

103 F.3d at 1247 (citation omitted). In other words, an applicant "need not show that substantial impairment of their interest will result" nor "that impairment will inevitably ensue from an unfavorable disposition." *Purnell*, 925 F.2d at 948. Rather, applicants "need only show that the disposition '*may* ⋯ impair or impede [their] ability to protect [their] interest.'" *Id*. (quoting Fed. R. Civ. P. 24(a)(2).). Applicants easily satisfy this burden because an unfavorable decision would nullify their ability to protect their First Amendment rights.

Applicants do not simply wish to defend an interpretation of the First Amendment or guard against some hypothetical threat. Quite the contrary, applicants have a direct interest in this litigation because applicants have actually engaged in and intend, in the future, to engage in the activities to which plaintiffs challenge. The Walkers and the Golds participated in the "Praying Parents" group, the "See you at the Pole" event, and the National Day of Prayer event. (Walker Aff., ¶¶ 7, 14, 19; Gold Aff., ¶¶ 9, 13, 17). Also, a child of the Golds, who will attend kindergarten next year, will be subjected to religious hostility if plaintiffs prevail. Put simply, *applicants' speech and religion* are the subject of this case.

In this case, plaintiffs request relief to prevent school officials from, among other things, even "permitting" events with religious content. (Complaint ¶ 110.). As participants in these events, applicants come under the barrel of plaintiffs' attacks. Without intervention, this Court may grant relief to the plaintiffs with the effect that the intervenors will be silenced. Alternatively, plaintiffs and defendants may settle in such a way to imperil intervenors' rights to speak. Either of these scenarios significantly impairs applicants' rights. Fairness dictates that a court should not so impair a party's rights without hearing from that party.

Nor could applicants vindicate their rights by filing a suit after this case was resolved. This scenario would create significant delay and expense. In this situation, time is important

because applicants have children who will attend Lakeview before their rights can be vindicated. Time sensitive situations heighten the need for intervention. For example, in *Americans United for Separation of Church and State v. City of Grand Rapids*, parties intervened to defend the presence of a crèche on government property. 922 F.2d 303 (6th Cir.1990). Though intervenors could have filed suit later, the Sixth Circuit heard their arguments immediately to protect their ability to display the crèche during the upcoming Christmas season. *Id*. at 306. *See also Miller*, 103 F.3d at 1247. Like the intervenors in *Americans United*, applicants must present their arguments immediately or face the loss of their rights.

Immediate intervention is also appropriate because poor precedent would undermine applicants' ability to obtain relief. As demonstrated by *Michigan State AFL-CIO v. Miller*, a negative precedent can undermine the ability to obtain relief and justify intervention:

> The Chamber asserts that the precedential effect of an adverse ruling in the district court could hinder its own efforts to litigate the validity of Michigan's system for regulating campaign finance both in currently ongoing cases and in future challenges. This court has already acknowledged that potential stare decisis effects can be a sufficient basis for finding an impairment of interest.

103 F.3d at 1247. *See also Linton*, 973 F.2d at 1319.

In this matter, a negative precedent would radically undermine applicants' ability to gain relief. Indeed, a court will not vindicate applicants' rights when a prior court prohibited such conduct under the Establishment Clause. That result would pit the Establishment Clause against the Free Speech Clause. A later court would not accept this interpretation but would defer to the prior court's ruling. In fact, *res judicata* may even require this result.[5] Because of this potential impairment, applicants' arguments deserve the present attention of this Court.

[5] For this reason, applicants may also qualify as "necessary parties" under Fed. R. Civ. Proc. 19.

D. Current Representation is Inadequate

A party cannot intervene if "the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a). While applicants retain the burden to prove inadequacy, this burden "is minimal" because the movant need only prove that "representation *may* be inadequate," but movant need not prove that representation "*will in fact be* inadequate." *Miller*, 103 F.3d at 1247 (emphasis added). *See also Grutter*, 188 F.3d at 400 ("The proposed intervenors need show only that there is a potential for inadequate representation."). Therefore, "it may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments." *Miller*, 103 F.3d at 1247. This low burden applies even if a party intervenes on the side of the government. *See Grutter*, 188 F.3d at 400 ("However, this circuit has declined to endorse a higher standard for inadequacy when a governmental entity in involved."). This low burden is met here because defendants have not raised the same arguments as applicants and, in fact, will not use the same arguments as applicants due to a conflict in interest. As a result, defendants will not adequately represent applicants' interests in this case.

As demonstrated at the outset of this case, defendants and applicants present different arguments. For example, defendants merely defend their actions as being compliant with the Establishment Clause and object to plaintiffs' insufficient claims. (Wilson County Board of Education (WCBE) Answer ¶¶ 119-120.). In contrast, applicants argue that the Free Speech, Free Exercise, and Establishment Clauses guarantee their *individual* right to speak at Lakeview and right to avoid governmental hostility. (Answer ¶¶ 117-120.). Specifically, applicants raise concerns over viewpoint discrimination and discrimination within a limited public forum. *See supra*. Moreover, applicants argue that the Establishment Clause not only *permits* Lakeview to

allow religious speech but actually *requires* Lakeview to allow religious speech. *See supra*. As demonstrated by their absence in the defendants' affirmative defenses in this regard, these arguments do not appeal to and will not be utilized by Lakeview. In light of this glaring absence, Lakeview simply will not represent the interests of applicants. *See Miller*, 103 F.3d at 1247.

Defendants' omission of these arguments is no mere coincidence. Rather, a conflict of interest between defendants and applicants ensures that these parties will employ different arguments and adopt different strategies. While defendants have an obligation to defend the constitutionality of their behavior, the interests of applicants and defendants differ beyond this point. Defendants will not attempt to bind themselves beyond the point necessary to avoid liability. As a result, defendants have not and will not raise arguments that empower applicants but simultaneously minimize the school's authority. (WCBE Answer ¶¶ 119-120.).

On the other hand, applicants desire solely to exercise their rights. Therefore, applicants will levy any argument to justify those rights, even if such arguments limit the school's discretion. (*See* Answer ¶¶ 118-126.). Defendants lack any motivation to pursue these arguments to their conclusion and retain great incentives to avoid these arguments entirely. This conflict of interest ensures that applicants and defendants will continue to present different arguments and adopt different strategies. *See Northeast Ohio Coalition for Homeless and Service Employees Intern. Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1008 (6th Cir. 2006) (permitting intervention because defendant's "primary interest" differed from intervenors' "independent interest."). Applicants must intervene to represent their unique interests in this case.

Because defendants have different goals and have used different arguments than applicants, this case is very similar to *Grutter v. Bollinger*, *supra*. In *Grutter*, different interests

motivated the defendant and the intervenor. Because of various pressures, defendant would not assert the same arguments with the same passion as the intervenor:

> The proposed intervenors insist that there is indeed a possibility that the University will inadequately represent their interests, because the University is subject to internal and external institutional pressures that may prevent it from articulating some of the defenses of affirmative action that the proposed intervenors intend to present. They also argue that the University is at less risk of harm than the applicants if it loses this case and, thus, that the University may not defend the case as vigorously as will the proposed intervenors.

Id. at 400. This case is no different. In both situations, the institutional defendant retains a smaller stake in the case than the individual intervenor. Therefore, the intervenor will more vigorously press its arguments. In both cases, the defendant furthers their interests by avoiding intervenors' arguments. As a result of this divergence in goals, the Sixth Circuit permitted intervention in *Grutter*:

> The proposed intervenors in these two cases have presented legitimate and reasonable concerns about whether the University will present particular defenses of the contested race-conscious admissions policies. We find persuasive their argument that the University is unlikely to present evidence of past discrimination by the University itself or of the disparate impact of some current admissions criteria, and that these may be important and relevant factors in determining the legality of a race-conscious admissions policy. We must therefore conclude that the proposed intervenors have articulated specific relevant defenses that the University may not present and, as a consequence, have established the possibility of inadequate representation.

Id. While Lakeview may vigorously defend the constitutionality of its behavior, only applicants can adequately defend their individual rights. Indeed, defendants have already declined to raise important defenses that protect applicants' rights. In light of the conflict of interest and defendant's refusal to raise certain defenses, applicants have demonstrated the possibility of inadequate representation.

II. IN THE ALTERNATIVE, PERMISSIVE INTERVENTION SHOULD BE ALLOWED

Though applicants satisfy the requirements for mandatory intervention, applicants also deserve permissive intervention. A court grants permissive intervention if "the applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b). In the Sixth Circuit, an application must also be timely, and a court must balance the risk of undue delay, prejudice to the original parties, and any other relevant factors so as not to abuse its discretion. *See Miller*, 103 F.3d at 1248.

Trial courts possess broad discretion to grant or deny permissive intervention. *See Meyer Goldberg, Inc. of Lorain v. Goldberg*, 717 F.2d 290, 294 (6th Cir. 1983). The foregoing analy is demonstrates that permissive intervention is appropriate here. The resolution of this case may greatly affect applicants' interests. Moreover, applicants have acted timely so as not to prejudice the original parties. This Court should use its broad discretionary authority to give applicants their day in court while they still have opportunity to protect their interests.

CONCLUSION

For the foregoing reasons, applicants respectfully request this Court to enter an order granting leave for intervention under Rule 24(a) or, in the alternative, under Rule 24(b).

Respectfully submitted,

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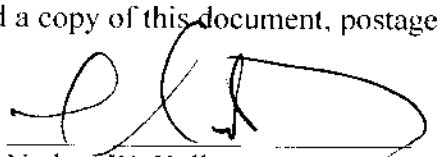
CERTIFICATE OF SERVICE

On the 19th day of December, 2006, I mailed a copy of this document, postage prepaid, to all counsel of record in this case.



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