

27 Before REAVLEY, SMITH, and EMILIO M. GARZA, Circuit Judges.

28 PER CURIAM:

29 We withdraw our opinion issued March 29, 1993, and reported at
30 986 F.2d 953 (5th Cir. 1993), and substitute in its place the
31 following opinion. The mandate shall issue forthwith.

32 JERRY E. SMITH, Circuit Judge:

33 I.

34 Jane Doe was twelve years old when her family moved to
35 Duncanville, Texas, and she started the seventh grade at Reed
36 Junior High School, in the Duncanville Independent School District
37 ("DISD"). Doe tried out for and made the girls' basketball team at
38 her new school and shortly thereafter learned that Coach Smith, the
39 girls' basketball coach, regularly began or ended practice with a
40 team recitation of the Lord's Prayer. Even though she was
41 uncomfortable with these prayers and opposed to the practice, Doe
42 participated out of a desire not to create dissension.

43 At Doe's first basketball game, the Lord's Prayer was recited
44 in the center of the court at the end of the game, the girls on
45 their hands and knees with the coach standing over them, heads
46 bowed. Over the following weeks, prayers were said prior to
47 leaving the school for away games as well as before exiting the bus
48 upon the team's return. These prayers usually were started either
49 by the coaches' signal or at their verbal request. Prayers
50 apparently have been conducted in physical education classes at

51 DISD for the past seventeen years.

52 After attending a game and seeing his daughter participate in
53 the prayer, John Doe, Jane's father, asked her how she felt about
54 participating. When told that she preferred not to, John Doe told
55 his daughter that she did not have to join in the prayers,
56 whereupon she resolved to cease her participation.

57 Following this incident, John Doe contacted Ed Parker, at that
58 time the assistant superintendent of schools. Parker was somewhat
59 less than sympathetic to John Doe's complaint.¹

60 Mr. Doe later contacted Marvin Utecht, who had replaced
61 Mr. Parker, regarding prayer at school-time pep rallies and
62 following basketball games. Utecht took action to halt the prayers
63 at pep rallies but insisted there was nothing he could do regarding
64 the post-game prayers. Mr. Doe then appeared before the DISD Board
65 of Trustees (the "school board") to present his case, at which
66 appearance, according to Mr. Doe, the school board showed no
67 inclination to alter the school's practices.

68 Jane and John Doe subsequently filed a complaint seeking
69 declaratory and injunctive relief against DISD, its superintendent,
70 and the current and future members of the school board, alleging a
71 number of objectionable religious acts, practices, and customs that
72 they contend occurred at DISD schools and sponsored events.²

¹ Parker stated that "unless [Doe] had grandparents buried in the Duncanville Cemetery he had no right to tell [Parker] how to run his schools."

² Among these acts and customs were the following:

1. Girls basketball teams from the seventh through twelfth grades (with
(continued...))

73 Upon deciding not to participate in the team prayer, Doe was
74 required by Coach Smith, on one occasion, to stand outside the
75 prayer circle. Moreover, at away games, at which the girls are not
76 permitted to return to the locker room except as a group, Doe
77 regularly had to stand apart while the coaches and students prayed.

78 The Does contend that the DISD thus fosters a climate in which

²(...continued)

the exception of the seventh and eighth grade at one school) recited the Lord's Prayer before (in the locker room) and after (at center court) each game (but not, apparently, during games, although there may be an exception for last-second, buzzer-beater shots). They also routinely formed a circle and recite the Prayer before practices. The recital of a prayer at basketball games was a tradition at DISD for over 20 years.

2. The Lord's Prayer was recited during regularly scheduled physical education classes for members of the teams.

3. Prayers were said at pep rallies.

4. While traveling from away games, the teams recited the Lord's Prayer prior to leaving the school bus.

5. At awards ceremonies honoring the teams, prayers were recited, and pamphlets containing religious songs were prepared and distributed by the coaches and/or other school personnel.

6. A prayer was spoken prior to all football games conducted at fields owned and operated by DISD.

7. At other sporting events, ceremonies, and major events conducted under the direction and/or supervision of the DISD and its personnel, prayers routinely were included in the program and recited as an integral part of the event.

8. Prayers began all regular school board meetings, with the exception of special school board meetings. Prayers were said prior to each football game, graduation ceremony, baccalaureate, employee banquet, new teacher orientation, the end of the year banquet, and PTA meetings.

9. Each school in the district usually staged a Christmas program during its December PTA meeting. During these meetings, traditional Christmas hymns were sung, and the meetings began with a prayer.

10. Gideon Bibles were made available to the intermediate school students, and announcements were made that the Bibles could be picked up in the front foyer of the schools.

11. Doe's history teacher taught the Biblical version of Creation; in choir class, Christian songs routinely were sung, and the theme song for the choir)) required to be sung at all performances)) was a religious song.

DISD admitted the above acts and practices, and that they were conducted on DISD property as an integral part of DISD's curricular or extra-curricular programs while students were under the active supervision and surveillance of DISD personnel.

79 Jane Doe is singled out and subjected to criticism on the basis of
80 her religious beliefs. The record shows that her fellow students
81 asked, "Aren't you a Christian?" and that one spectator stood up
82 after a game and yelled, "Well, why isn't she praying? Isn't she
83 a Christian?" Additionally, Doe's history teacher called her "a
84 little atheist" during one class lecture.

85 According to the DISD, administration members met with several
86 of the coaches subsequent to the filing of this suit and told the
87 coaches that they should permit student-initiated prayer, but that
88 prayers were not to be allowed during classroom time and that
89 faculty should neither initiate nor participate in prayer. By the
90 time of the preliminary injunction hearing, all class-time prayers
91 had stopped. Doe had no complaints during her ninth-grade year at
92 the DISD.

93 II.

94 On August 15, 1991, the Does filed an application for a
95 temporary restraining order ("TRO") and preliminary injunction.
96 The district court, on August 20, 1991, denied the TRO but
97 scheduled a preliminary injunction hearing for September 16, 1991.
98 Following a two-day trial, the court on November 18, 1991, entered
99 a preliminary injunction. DISD filed a notice of appeal as
100 No. 91-7347.

101 In the now-consolidated FED. R. CIV. P. 24 proceeding, the
102 Rutherford Institute of Texas Foundation, amicus curiae before this
103 court on the appeal of the preliminary injunction, proposes to

104 intervene on behalf of a class of DISD schoolchildren (collec-
105 tively, "Rutherford") who claim their constitutional rights to the
106 free exercise of religion stand directly and adversely to be
107 affected by the outcome of this lawsuit.

108 On September 12, 1991, and (according to Rutherford) two days
109 after they first learned that the Does had filed an application for
110 a TRO, the putative intervenors moved to intervene and filed a
111 third-party complaint. The court denied the motion to intervene
112 the next day on the ground that the suit did not affect
113 Rutherford's rights and the motion to intervene was untimely.
114 Rutherford filed a motion to reconsider on September 27, 1991,
115 which the court denied on October 7. Rutherford appeals, as
116 No. 91-1988, the September 13 and October 7 orders denying leave to
117 intervene.

118 III.

119 To obtain a preliminary injunction, a movant has the burden of
120 proving four elements: a substantial likelihood of success on the
121 merits; a substantial threat that he will suffer irreparable injury
122 if the injunction is not issued; that the threatened injury to him
123 outweighs any damage the injunction might cause to the non-movant;
124 and that the injunction will not disserve the public interest.
125 Apple Barrel Prods. v. Beard, 730 F.2d 384, 386 (5th Cir. 1984).
126 We will reverse the district court's weighing of these factors only
127 upon a showing of an abuse of discretion. Doran v. Salem Inn, 422
128 U.S. 922, 931-32 (1975); White v. Carlucci, 862 F.2d 1209, 1211

129 (5th Cir. 1989) (quoting Apple Barrel, 730 F.2d at 386).

130

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IV.

132

The Does claim a violation of the First Amendment's
133 Establishment Clause. Such claims are guided by the three-part
134 test enunciated in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971):
135 "First, the statute [or practice] must have a secular legislative
136 purpose; second, its principal or primary effect must be one that
137 neither advances nor inhibits religion; finally, the statute must
138 not foster `an excessive government entanglement with religion.'"
139 (Citations omitted.) Absent any one of these factors, the
140 challenged statute or practice must be stricken as violative of the
141 Establishment Clause.

142

The district court found that DISD's practices violated all
143 three prongs)) thus presenting a substantial likelihood of the
144 Does' succeeding on the merits)) and accordingly entered its
145 injunctive order:

146

It is therefore ORDERED that Plaintiffs' motion for
147 preliminary injunction is granted.

148

It is FURTHER ORDERED that Defendants are enjoined
149 from permitting employees of [DISD] to lead, encourage,
150 promote, or participate in prayer with or among students
151 during curricular or extracurricular activities,
152 including before, during or after school related sporting
153 events.

154

It is FURTHER ORDERED that, due to the pervasive
155 nature of past school prayer, Defendants are to advise
156 students of [DISD], in writing, that under the First
157 Amendment of the United States Constitution, prayer and
158 religious activities initiated and promoted by school
159 officials are unconstitutional, and that students have a

160 constitutional right not to participate in such
161 activities.

162 V.

163 Applicable Supreme Court precedent compels our conclusion that
164 the district court did not abuse its discretion in determining that
165 the Does demonstrated a substantial likelihood of success on the
166 constitutional merits of their claim. The parties point us to two
167 different lines of precedent: a restrictive one of considerable
168 parentage that prohibits prayer in the school classroom or
169 environs, the most recent statement of which is the Court's opinion
170 in Lee v. Weisman, 112 S. Ct. 2649 (1992); and a recently-carved-
171 out exception, permitting equal access to school facilities to
172 student-run religious groups and student-initiated prayer, see
173 Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226,
174 243-53 (1990); Widmar v. Vincent, 454 U.S. 263, 271-75 (1981).

175 In Mergens, the Court interpreted the Equal Access Act (the
176 "Act"), 20 U.S.C. §§ 4071-4074, and held that under its non-
177 discrimination provisions, Congress constitutionally could require
178 a school receiving federal funds, which had established a "limited
179 open forum," to permit a student-initiated prayer group to be
180 formed and accorded official recognition and access to facilities
181 on an equal basis with other "noncurriculum related student groups"
182 (e.g., Peer Advocates, Subsurfers, and the Chess Club). 496 U.S.
183 at 247-53. The access accompanying official recognition included
184 use of the school newspaper, bulletin boards, and the public
185 address system to announce meeting times and promote turnout to the
186 school's annual Club Fair. Mergens, id. at 246-47.

187 Although teachers or other school personnel can be present at

188 religious meetings, the Equal Access Act permits meetings to be
189 held only during "non-instructional" time and school personnel to
190 be present solely in a "custodial" capacity)) "merely to ensure
191 order and good behavior." Id. at 252-53. While the Act does not
192 apply to the instant case, Mergens nonetheless informs as to the
193 parameters of the Establishment Clause.

194 The DISD understandably points to Mergens to support its
195 contention that by allowing students and teachers to engage in
196 spontaneous prayer, it merely is accommodating religion in a
197 constitutionally permissible manner. For a number of reasons,
198 however, Mergens is not implicated by the facts before us. First,
199 Mergens involved noncurriculum-related activities; the crucial
200 activity here, playing on a school-sponsored basketball team, is
201 extracurricular.³ Second, even if participation on the school
202 basketball team were non-curricular, the prayer here hardly could
203 be considered student-initiated. Coach Smith chose the prayer and
204 where and when it was to be said and led the team in reciting it.
205 This is not the minimal, "custodial" oversight allowed by Mergens.

206 Lastly, DISD has not established a "limited open forum."⁴
207 Mergens does not reveal whether this constitutes merely a

³ The Mergens Court's test for noncurriculum activities includes consideration of whether participation results in academic credit. 496 U.S. at 239-40. At one point in its opinion, moreover, the Court seems to suggest that swimming, as part of the physical education requirement, would be curriculum-related. Id. at 245. We conclude that basketball almost certainly would not be categorized as noncurricular under Mergens.

⁴ According to the Act, "[a] public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b) (1990).

208 jurisdictional requirement for the application of the Act or
209 instead, whether it partakes of a constitutional character. But
210 the Act, according to the Court, "extended the reasoning of Widmar
211 to public secondary schools," Mergens, id. at 235, and Widmar
212 undeniably premised its constitutional conclusions on the existence
213 of a limited public forum. See Widmar, 454 U.S. at 267 ("Through
214 its policy of accommodating their meetings, the University has
215 created a forum generally open for use by student groups. Having
216 done so, the University has assumed an obligation to justify its
217 discriminations and exclusions under applicable constitutional
218 norms." (Footnote omitted.)).

219 Absent the existence of a limited public forum, therefore, the
220 neutrality considerations underlying Widmar and Mergens's anti-
221 discrimination approach are not implicated. Cf. Lamb's Chapel v.
222 Center Moriches Union Free Sch. Dist., 61 U.S.L.W. 4549, 4552 (U.S.
223 June 7, 1993). The DISD's arguments)) that no evidence was
224 presented that students actually perceived district endorsement of
225 religion, that students are mature enough to distinguish
226 accommodation from impermissible endorsement, and that a proper
227 mission of the school is to teach religious tolerance)) were
228 rejected in Lee. Nor are DISD's attempts to distinguish the
229 graduation setting at issue in Lee at all persuasive. Coach Smith,
230 a DISD employee, just as surely chose and "composed" the prayer
231 here as did the school officials in Lee. Given the "subtle
232 coercive pressures" deemed dispositive by the Court there, Coach
233 Smith's involvement, too, no doubt "will be perceived by the

234 students as inducing a participation they might otherwise reject."
235 Lee, 112 S. Ct. at 2657. Just as at the Rhode Island graduation in
236 Lee, "[o]ne may fairly say . . . that the government brought prayer
237 into the ceremony" Id. at 2678 (Souter, J., concurring).⁵
238 Lee is merely the most recent in a long line of cases carving
239 out of the Establishment Clause what essentially amounts to a per
240 se rule prohibiting public-school-related or -initiated religious
241 expression or indoctrination.⁶ Nothing the DISD has presented
242 persuades us that the instant case materially differs from this
243 long-established line of cases. The DISD's assertion of its
244 employees' First Amendment rights of speech, association, and free
245 exercise, and its attempt to portray its refusal to interfere with
246 their spontaneous religious expression as a necessary accommodation
247 of religion, while understandable, cannot withstand analysis.
248 Acceptance of DISD's argument would produce an unwieldy result
249 foreclosed by precedent; in Lee, the Court affirmed that "[t]he
250 principle that government may accommodate the free exercise of
251 religion does not supersede the fundamental limitations imposed by

⁵ The DISD objects to the district court's citation to Lubbock Civil Liberties Union v. Lubbock ISD, 669 F.2d 1038 (5th Cir. 1982), cert. denied, 459 U.S. 1155 (1983), and Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981). Although the enactment of the Act abrogated the holding of these two cases, see Mergens, 496 U.S. at 239, a close reading of the district court's opinion reveals that the reference to these two cases primarily was for rhetorical purposes. We are persuaded that the district court's application of Lemon was not infected by any undue reliance upon the abrogated cases.

⁶ See, e.g., Edwards v. Aguillard, 482 U.S. 578, 583-84 (1987) (striking down act requiring equal time for "creation-science"); Wallace v. Jaffree, 472 U.S. 38, 60, n.51 (1985) (act requiring one minute period for meditation); Stone v. Graham, 449 U.S. 39, 42 (1980) (act requiring posting of copy of Ten Commandments on classroom wall); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 252-53 (1963) (Brennan, J., concurring) (act requiring daily Bible readings at start of school day); Engel v. Vitale, 370 U.S. 421, 430 (1962) (act requiring state-composed prayer to be recited at beginning of every school day).

252 the Establishment Clause." 112 S. Ct. at 2655.

253 Logically extended, the DISD's reasoning implies that the
254 Court would have decided Lee differently had a teacher, rather than
255 a Rabbi, delivered the prayer. We cannot agree. While the DISD
256 correctly cites Tinker v. Des Moines ISD, 393 U.S. 503, 506 (1969),
257 and its circuit court progeny as support for the scope of its
258 employees' free exercise and free speech rights, even the most
259 cursory reading of the Court's school prayer cases belies any
260 notion that these may trump schoolchildren's Establishment Clause
261 rights. A teacher has no free exercise rights to lead
262 schoolchildren in prayer in the classroom, for example, or to hang
263 the Ten Commandments on the classroom wall, or even to invite a
264 Rabbi to deliver an invocation and benediction to open graduation
265 ceremonies. See, e.g., Karen B. v. Treen, 653 F.2d 897 (5th Cir.
266 Unit A Aug. 1981), aff'd, 455 U.S. 913 (1982) (striking down
267 statute authorizing voluntary student or teacher-initiated prayer
268 at start of school day).

269 We have no choice but to follow the Supreme Court's dictates
270 in this regard. The district court did not abuse its discretion in
271 determining that the Does had demonstrated a substantial likelihood
272 of success on the merits of their Establishment Clause claim.⁷

⁷ We have eschewed the tripartite Lemon analysis in favor of a more case-bound approach because we believe that a fact-sensitive application of existing precedents is more manageable and rewarding than an attempt to reconcile the Supreme Court's confusing and confused Establishment Clause jurisprudence. See, e.g., Committee for Pub. Educ. & Religious Liberty v. Reagan, 444 U.S. 646, 662 (1979) (Establishment Clause cases "sacrifice[] clarity and predictability for flexibility"); Edwards v. Aguillard, 482 U.S. at 639 (Scalia, J., dissenting) (criticizing the Court's "embarrassing Establishment Clause jurisprudence"). While ordinarily "it is neither our object nor our place to opine whether the Court's Establishment Clause

(continued...)

273 Our decision on the remaining injunction factors)) whether
274 there is a substantial threat that the movant will suffer
275 irreparable injury, whether the threatened injury to the movant
276 outweighs any damage the injunction might cause to the non-movant,
277 and whether the injunction will serve the public interest))
278 follows from the initial determination that the Does likely will
279 succeed at trial. Assuming that the Does' Establishment Clause
280 rights have been infringed, the threat of irreparable injury to the
281 Does and to the public interest that the clause purports to serve
282 are adequately demonstrated. The district court so found, and we
283 see no abuse of discretion in its determinations.

284 The DISD's voluntary cessation of its allegedly violative
285 religious practices does not preclude a finding of irreparable
286 injury. The district court, which was closer to the facts of this
287 case, stated that "[t]he evidence leads the court to believe that
288 there is a substantial likelihood that the alleged conduct would be
289 reinstated if the court refused to grant the relief requested."
290 The district court's findings bring the instant case within our
291 prior precedents, in which we have stated that

292 mere voluntary cessation of misconduct when a suit is
293 filed does not necessarily render a case moot or remove
294 the necessary justiciability. The crucial test, in an

⁷(...continued)
jurisprudence is good, fair, or useful," Jones v. Clear Creek ISD, 977 F.2d
963, 966 (5th Cir. 1992), cert. denied, 61 U.S.L.W. 3819 (U.S. June 7, 1993),
we note that recent indications suggest that the Court agrees with our
assessment of Lemon, essentially ignoring it in Lee in favor of the school
prayer cases. See Lee, 112 S. Ct. at 2655, 2658; id. at 2685 (Scalia, J.,
dissenting) ("The Court today demonstrates the irrelevance of Lemon by
essentially ignoring it, and the interment of that case may be the one happy
byproduct of the Court's otherwise lamentable decision." (Citations
omitted.)). In Lamb's Chapel, however, the Court most recently has declared
that Lemon "has not been overruled." 61 U.S.L.W. at 4552 n.7.

295 action involving a request for injunctive or declaratory
296 relief, where defendant has voluntarily ceased his
297 allegedly illegal conduct, is whether it can be said with
298 assurance that there is no reasonable expectation that
299 the wrong will be repeated.

300 Meltzer v. Board of Pub. Instruction, 548 F.2d 559, 566 n.10 (5th
301 Cir. 1977) (citations omitted), cert. denied, 439 U.S. 1089 (1979).

302 Lastly, the DISD charges that the district court's injunction
303 order is too broad, inasmuch as it purportedly allows student-
304 initiated prayer only "provided such prayer is not done with school
305 participation, supervision, or under circumstances suggesting
306 school participation or supervision." Were we to accept this as
307 the import of the district court's order, it might well fall afoul
308 of Mergens, wherein the Court permitted school employees and
309 administrators to supervise student-initiated prayer in a custodial
310 capacity. See Mergens, 496 U.S. at 252-53.

311 The allegedly offending passage in the court's order appears
312 prior to the text of the injunction. We do not rest our decision
313 not to disturb the order on this ground, however, as we do not
314 believe that the order, when read as a whole, reflects an intent to
315 infringe upon the custodial supervision of genuinely student-
316 initiated, noncurriculum-related religious groups)) a fact
317 situation very different from that which the district court's order
318 was designed to address. Accordingly, we construe the order as
319 permitting Mergens-like, custodial supervision; the court's
320 introductory language regarding "supervision," given the context of
321 this case, more appropriately is read as prohibiting any school
322 sponsorship of prayer or other religious activities.

323

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VI.

325

We next address whether the district court correctly denied
326 intervention under FED. R. CIV. P. 24 to Rutherford as the
327 representative of the proposed intervenor class of DISD
328 schoolchildren. Rule 24 provides for both permissive intervention,
329 see rule 24(b), and intervention as a matter of right, see rule
330 24(a). Of the latter category, it is only the non-statutory
331 variety of intervention of right, set out in rule 24(a)(2), that
332 presents itself here.⁸ We review the district court's rule
333 24(a)(2) determinations under a de novo standard. Ceres Gulf v.
334 Cooper, 957 F.2d 1199, 1202 (5th Cir. 1992).

335

Intervention under Rule 24(a)(2) is to be accorded only upon
336 proof of four factors:

337

(1) the application must be timely;

338

(2) the applicant must have an interest in the property
339 or transaction that is the subject of the action;

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(3) disposition of the matter must impair or impede the
341 applicant's ability to protect that interest; and

342

(4) the applicant's interest must not be adequately
343 represented by the parties to the suit.

344

Association of Professional Flight Attendants v. Gibbs, 804 F.2d
345 318, 320 (5th Cir. 1986). Rutherford first claims that its motion

⁸ Rule 24(a)(2) provides,

(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.

346 was timely. Doe disagrees, and the district court alternatively
347 denied intervention on this ground, citing the fact that Rutherford
348 moved to intervene just two days before the hearing on the
349 preliminary injunction, although it had had almost four months to
350 seek leave to intervene.

351 Alone among the four Gibbs factors, we review the district
352 court's determination of the timeliness of the petition for abuse
353 of discretion. Kneeland v. National Collegiate Athletic Ass'n,
354 806 F.2d 1285, 1289 (5th Cir.), cert. denied, 484 U.S. 817 (1987).
355 In Stallworth v. Monsanto Co., 558 F.2d 257, 264-66 (5th Cir.
356 1977), we distilled from prior precedent four factors to be
357 considered before passing on the timeliness of a petition for leave
358 to intervene:

359 (1) The length of time during which the would-be
360 intervenor actually knew or reasonably should have known
361 of his interest in the case before he petitioned for
362 leave to intervene [. . . ;]

363 (2) The extent of the prejudice that the existing
364 parties to the litigation may suffer as a result of the
365 would-be intervenor's failure to apply for intervention
366 as soon as he actually knew or reasonably should have
367 known of his interest in the case [. . . ;]

368 (3) The extent of the prejudice that the would-be
369 intervenor may suffer if his petition for leave to
370 intervene is denied [. . . ; and]

371 (4) The existence of unusual circumstances militating
372 either for or against a determination that the
373 application is timely.

374 See also Kneeland, 806 F.2d at 1289.

375 It is not altogether evident, on the record available to us,
376 just how languid Rutherford was in pursuit of intervention. While
377 its first petition was filed nearly four months after the Does

378 filed their original complaint and only two days before the
379 preliminary injunction hearing, thus threatening prejudice to the
380 Does from the almost certain delay that its entry would have
381 occasioned, these considerations are not dispositive under
382 Stallworth.

383 Of the remaining two factors, there appear to be no "unusual
384 circumstances," and thus the only remaining factor is that of
385 prejudice to the intervenors should their petition be denied.
386 Here, the equities favor the Does. In adopting the Fourth
387 Circuit's standard for adequacy of representation, we previously
388 have stated that "[w]hen the party seeking intervention has the
389 same ultimate objective as a party to the suit, a presumption
390 arises that its interests are adequately represented, against which
391 the petitioner must demonstrate adversity of interest, collusion,
392 or nonfeasance." International Tank Terminals v. M/V Acadia
393 Forest, 579 F.2d 964 (5th Cir. 1978) (quoting Virginia v.
394 Westinghouse Elec. Corp., 542 F.2d 214, 216 (4th Cir. 1976)). See
395 also United States v. League of United Latin Am. Citizens, 793 F.2d
396 636, 644 (5th Cir. 1986); Bush v. Viterna, 740 F.2d 350, 355-58
397 (5th Cir. 1984).

398 In the record developed to date, Rutherford has made no
399 substantial showing that the DISD will not adequately represent its
400 interests in the litigation.⁹ By all indications, the DISD and

⁹ Of course, the fact that the DISD voluntarily halted prayers at its schools prior to the issuance of the preliminary injunction does not compel the conclusion that Rutherford's interests are incompatible with those of the DISD. It is the mutuality of interests in the litigation that is the proper
(continued...)

401 Rutherford are seeking the same outcome)) a declaration that the
402 religious practices that the students wish to engage in, and that
403 the DISD wishes to sustain, are constitutionally permissible.

404 Because Gibbs requires all four of its factors to be present
405 before a party may be entitled to intervention as of right, our
406 conclusion that Rutherford has failed to overcome the presumed
407 mutuality of the DISD's and its interests not only bolsters the
408 district court's finding that the motion was untimely under
409 Stallworth, but also suffices to deny intervention of right
410 altogether. Accordingly, we conclude that the district court did
411 not err in denying intervention at the preliminary injunction stage
412 of the proceedings. Because it is foreseeable, however, that the
413 interests of the schoolchildren and the DISD yet may diverge (for
414 example, at the permanent injunction phase of the case), the denial
415 of intervention is hereby modified to be without prejudice to
416 Rutherford's ability to seek to intervene at some future date.¹⁰

417 In summary, the order granting the preliminary injunction is
418 AFFIRMED. The order denying intervention is AFFIRMED as modified.
419 In affirming, we emphasize that the issues before us arise in the
420 context of a preliminary, not a permanent injunction. The trial of

⁹(...continued)
inquiry, not their divergent views regarding pre-trial strategy or their
respective legal obligations during the pendency of the litigation.

¹⁰ We decline to address Rutherford's request for permissive
intervention under FED. R. CIV. P. 24(b)(2). Ordinarily, "[r]eversing a denial
of permissive intervention requires a clear abuse of discretion." Kneeland,
806 F.2d at 1289. Indeed, "[t]his circuit has never reversed a denial of
permissive intervention. Such a decision by any federal appellate court `is
so unusual as to be almost unique.'" Id. at 1289-90 (citation omitted). We
note only that as we are proceeding under this exceedingly deferential
standard, it is plain that the requisite abuse is not presented by the facts
of this case.

421 these issues has yet to occur. Accordingly, this opinion should
422 not be read to pretermitt their final resolution.