

No. 11-998

IN THE SUPREME COURT OF THE UNITED STATES

MOUNT SOLEDAD MEMORIAL ASSOCIATION,

Petitioner,

v.

STEVE TRUNK, *et al.*,

Respondents.

**OPPOSITION TO PACIFIC JUSTICE INSTITUTE’S MOTION TO
INTERVENE AND FILE RESPONSE IN SUPPORT FOR PETITION FOR
WRIT OF CERTIORARI**

Respondents Jewish War Veterans of the United States of America, Inc., Richard Smith, Mina Sagheb, Judith Copeland, and Steve Trunk (collectively “Plaintiffs-Respondents”) oppose the Motion to Intervene and File Response in Support of Petition for Writ of Certiorari filed by the Pacific Justice Institute (“PJI”). This is PJI’s fourth motion to intervene in this case. It should be rejected just as the first three were.

This case arises from two litigations consolidated in the United States District Court for the Southern District of California regarding the government’s display of a 43-foot-tall Latin cross on Mount Soledad in San Diego. In 2006, PJI

moved to intervene in one of those cases, *Trunk v. City of San Diego*. All parties, including the government defendants, opposed PJI's intervention. On September 26, 2006, the District Court denied PJI's motion, but permitted it to participate as amicus curiae supporting the government. App. A, at 5. PJI did not appeal that order.

On July 29, 2008, the District Court granted summary judgment for the defendants, and Plaintiffs-Respondents appealed to the United States Court of Appeals for the Ninth Circuit. On September 8, 2008, PJI moved to intervene in the appeal, or in the alternative for leave to file an amicus curiae brief. The government defendants and Plaintiffs-Respondents again opposed intervention, but did not oppose PJI's participation as amicus curiae. On December 3, 2008, the Ninth Circuit denied PJI's motion to intervene but allowed it to file an amicus brief. App. B, at 1. PJI filed an amicus brief on February 10, 2009. PJI did not petition this Court for review of the Ninth Circuit's denial of its request for intervention.

On April 7, 2009, shortly after the parties had completed merits briefing, PJI filed yet another motion to intervene in the Ninth Circuit. Alternatively, PJI asked the Ninth Circuit to certify certain Article III standing questions to this Court or to stay the appeal until this Court decided *Salazar v. Buono*, No. 08-472. On June 30,

2009, the Ninth Circuit denied PJI's motion in its entirety. App. C, at 1. Again, PJI did not ask this Court to review the Ninth Circuit's denial of its motion.

PJI's motion should be denied for three reasons: (1) as a non-party below, PJI has no standing to request that this Court review the merits of the lower court's decision; (2) PJI has only a generalized, ideological interest in the outcome of this case; and (3) to the extent PJI wants to express its views on issues pertinent to this case, it can do so as *amicus curiae*.

1. PJI was not a party to the proceeding below. It moved to intervene once in the District Court and twice in the Ninth Circuit, and all its motions were denied. PJI did not ask this Court to review any of those denials and does not do so in its current motion. Rather, it now seeks to intervene in order to request the Court's review of other aspects of the judgment—namely, Article III standing and the validity of the *Lemon* test. Motion, at i-ii. Having declined to seek review of the lower courts' denial of its motions to intervene, PJI may not seek review of any other aspect of the judgment below. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 28-34 (1993) (per curiam) (where petitioning company had been denied leave to intervene in the Court of Appeals and did not seek review of that decision, Court dismissed writ as improvidently granted); *see also* Gressman, et al., *Supreme Court Practice* 426 (9th ed. 2007) ("The refusal of the court below to permit one to intervene as a party entitles that person to seek

Supreme Court review of the denial of the motion to intervene, but such a putative intervenor cannot petition for review of any other aspect of the judgment below.”).

The same situation applies here: PJI, a non-party below, has not asked this Court to review the lower courts’ denials of its motions to intervene. Rather, PJI seeks review only of the Court of Appeals’ ultimate decision on the merits. Like the company in *Izumi*, PJI has no standing to do so.

2. Moreover, even if PJI’s request were cognizable, it would be meritless. As the District Court ruled in denying PJI’s first motion to intervene, PJI does not have any greater interest in this case than “other religious organizations, public interest groups, and private citizens who feel strongly about the issues in this case.” App. A, at 3. PJI offers no reason why the district court’s reasoning is not equally applicable now.

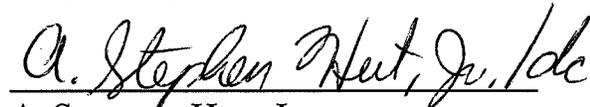
Nor, contrary to PJI’s claim, does PJI’s apparent interest in the Article III standing issue create “an ideal situation where intervention would be appropriate.” Motion, at 11. PJI was able to raise, and did raise, that same issue in front of the District Court and the Court of Appeals as amicus. *See id.* at 6 n.2. Indeed, PJI’s motion highlights its amicus filings in other cases in this Court, without explaining why it cannot offer its views in the same way here. *Id.* at 12-13.

Plaintiffs-Respondents have no objection to PJI's submission of a timely amicus brief pursuant to this Court's Rule 37, which would give PJI a full opportunity to present its arguments.

CONCLUSION

PJI's Motion to Intervene and File Response in Support of Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Adam Raviv, a member of the bar of this Court, hereby certify that on March 1, 2012, all parties required to be served have been served copies of Plaintiffs-Respondents' Opposition to Pacific Justice Institute's Motion to Intervene and File Response in Support for Petition for Writ of Certiorari in this matter via first-class mail at the addresses listed below:

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APPENDIX A

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

STEVE TRUNK and PHILIP K.
PAULSON,

Plaintiffs,

vs.

CITY OF SAN DIEGO, UNITED STATES
OF AMERICA, DONALD H. RUMSFELD,
Secretary of Defense and DOES 1
through 100, Inclusive,

Defendants.

MOUNT SOLEDAD MEMORIAL
ASSOCIATION, Real parties in interest.

JEWISH WAR VETERANS OF THE
UNITED STATES OF AMERICA, INC.,
RICHARD A. SMITH, MINA SAGHEB,
and JUDITH M. COPELAND,

Plaintiffs,

vs.

DONALD H. RUMSFELD, Secretary of
Defense, in his official capacity,

Defendant.

CASE NO. 06cv1597 BTM(WMc)
(consolidated with 06cv1728)

**ORDER DENYING PACIFIC
JUSTICE INSTITUTE'S MOTION TO
INTERVENE**

Pacific Justice Institute ("PJI") has filed a motion to intervene pursuant to Fed. R. Civ. P. 24(a) and (b). On September 21, 2006, the Court held a hearing on the motion. For the

1 reasons discussed below, PJI's motion to intervene is **DENIED**.

2
3 **DISCUSSION**

4 PJI seeks to intervene as a matter of right under Fed. R. Civ. P. 24(a). In the
5 alternative, PJI seeks permissive intervention under Fed. R. Civ. P. 24(b). PJI's motion is
6 opposed by Plaintiffs and Defendants in both Trunk v. City of San Diego, Case No. 06cv1597
7 and Jewish War Veterans v. Rumsfeld, Case No. 06cv1728. The Court finds that PJI does
8 not satisfy the requirements for intervention under Rule 24(a) or 24(b).

9
10 **A. Intervention as a Matter of Right**

11 Rule 24(a) provides that upon timely application, anyone shall be permitted to
12 intervene in an action "when the applicant claims an interest relating to the property or
13 transaction which is the subject of the action and the applicant is so situated that the
14 disposition of the action may as a practical matter impair or impede the applicant's ability to
15 protect that interest, unless the applicant's interest is adequately represented by existing
16 parties."

17 The Ninth Circuit applies a four-part test under Rule 24(a): (1) the application for
18 intervention must be timely; (2) the applicant must have a "significantly protectable" interest
19 relating to the property or transaction that is the subject of the action; (3) the applicant must
20 be so situated that the disposition of the action may, as a practical matter, impair or impede
21 the applicant's ability to protect that interest; and (4) the applicant's interest must not be
22 adequately represented by the existing parties in the lawsuit. Northwest Forest Resource
23 Council v. Glickman, 82 F.3d 825, 836 (9th Cir. 1996).

24 PJI describes itself as a non-profit legal organization dedicated to the preservation of
25 religious and civil liberties. PJI believes it is its "solemn duty to defend our nation's religious
26 heritage against overly-restrictive interpretations of the Establishment Clause." PJI has been
27 involved (as amicus) in litigation concerning the constitutionality of the Pledge of Allegiance
28 and displays of the Ten Commandments. PJI is an intervenor and defendant in the National

1 Motto Case, Newdow v. The Congress of the United States of America, which is currently
2 pending before the Ninth Circuit.

3 With respect to the instant case, PJI takes the position that the religious icons included
4 in the Mt. Soledad War Memorial are “invaluable and unique expressions of our nation’s
5 history and heritage” and that the removal of these religious icons from these types of public
6 war memorials would “have a serious, detrimental effect on Americans’ awareness and
7 appreciation of our nation’s religious heritage.” PJI fears that its mission to defend
8 “expressions of religious heritage against misuse of the Establishment Clause” would be
9 severely hindered if the Court found in favor of Plaintiffs.

10 Although PJI’s interest in the case is undoubtedly genuine, it falls short of a
11 “significantly protectable” interest. PJI does not have any property interest in the Memorial.
12 PJI’s ideological interest is no greater than that of other religious organizations, public
13 interest groups, and private citizens who feel strongly about the issues in this case.

14 PJI compares its stake in the case to that of environmental groups permitted to
15 intervene in cases such as Idaho Farm Bureau Federation v. Babbitt, 58 F.3d 1392 (9th Cir.
16 1995) and Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983). However, in
17 these cases, the environmental groups not only had an interest in preserving wildlife and
18 their habitat, but also had participated in administrative processes leading up to the litigation.
19 See Northwest Forest Resource Council v. Glickman, 82 F.3d 825, 837 (9th Cir. 1996)
20 (“[T]he cases in which we have allowed public interest groups to intervene generally share
21 a common thread . . . these groups were directly involved in the enactment of the law or in
22 the administrative proceedings out of which the litigation arose.”)

23 Moreover, PJI has not shown that its interest in the case would not be adequately
24 represented by the existing defendants. There is a presumption of adequate representation
25 when the representative is a government acting on behalf of its constituency. United States
26 v. City of Los Angeles, 288 F.3d 391, 401 (9th Cir. 2002). Furthermore, a presumption of
27 adequacy arises where an existing party and the applicant for intervention have the same
28 “ultimate objective.” Northwest Forest, 82 F.3d at 838.

1 Here, PJI, the City, and the United States have the same ultimate objective – to
2 establish that (1) the transfer of the Memorial to the federal government did not violate the
3 United States Constitution or the California Constitution; and (2) the presence of the cross
4 on federal property does not violate the Establishment Clause. The fact that the government
5 defendants are not religious organizations and might make different arguments than PJI does
6 not mean that they cannot adequately represent PJI's interest. See League of United Latin
7 American Citizens v. Wilson, 131 F.3d 1297, 1306 (9th Cir. 1997) (“When a proposed
8 intervenor has not alleged any substantive disagreement between it and the existing parties
9 to the suit, and instead has vested its claim for intervention entirely upon a disagreement
10 over litigation strategy or legal tactics, courts have been hesitant to accord the applicant full-
11 party status.”).

12 PJI is particularly concerned that Defendants will not challenge Plaintiffs' standing
13 under Article III of the Constitution. However, whether or not Defendants raise the issue of
14 standing in a motion to dismiss, the issue will be confronted and resolved before this case
15 concludes.

16 There is nothing in the history of this case that indicates that either the City or the
17 United States will not vigorously defend this suit. To the contrary, the City has fought to
18 preserve the Memorial over almost two decades of litigation. The federal government is a
19 new party in this dispute. However, in light of the fact that the federal government took active
20 steps to acquire ownership of the Memorial and the land under it, the Court has no reason
21 to believe that the federal government would not mount a full defense against Plaintiffs'
22 constitutional challenge.

23 PJI has not satisfied the requirements for intervention as a matter of right. Therefore,
24 its motion to intervene under Fed. R. Civ. P. 24(a) is denied.

25
26 **B. Permissive Intervention**

27 Under Fed. R. Civ. P. 24(b)(2), upon timely application, anyone may be permitted to
28 intervene in an action “when an applicant's claim or defense and the main action have a

1 question of law or fact in common.” In exercising its discretion under Rule 24(b), the court
2 “shall consider whether the intervention will unduly delay or prejudice the adjudication of the
3 rights of the original parties.”

4 Here, PJI does not have a separate defense or claim but, rather, seeks to weigh in on
5 the issues presented by the case. As discussed above, PJI’s ideological interest in the case
6 does not justify inclusion of PJI as a party to the case. If the Court were to allow PJI to
7 intervene, the Court would receive numerous motions to intervene from other organizations
8 and individuals who want to have their voices heard. The addition of extraneous parties
9 would complicate the proceedings before the Court and could very well cause delay and
10 prejudice to the existing parties. Therefore, the Court, in its discretion, denies PJI’s motion
11 for permissive intervention.

12 However, the Court will allow PJI to appear as amicus. As amicus, PJI will have
13 ample opportunity to present its views on the pertinent legal issues.

14
15 **CONCLUSION**

16 For the reasons discussed above, PJI’s motion to intervene is **DENIED**. However, the
17 Court grants PJI leave to appear as amicus.

18
19 **IT IS SO ORDERED.**

20 DATED: September 26, 2006

21 

22 Hon. Barry Ted Moskowitz
23 United States District Judge

APPENDIX B

FILED

UNITED STATES COURT OF APPEALS

DEC 03 2008

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JEWISH WAR VETERANS; STEVE
TRUNK; et al.,

Plaintiffs - Appellants,

v.

CITY OF SAN DIEGO; et al.,

Defendants - Appellees.

Nos. 08-56415, 08-56436

D.C. Nos. 3:06-cv-01597-LAB

3:06-cv-01728-LAB

Southern District of California,
San Diego

ORDER

Before: GOODWIN and CLIFTON, Circuit Judges.

The motion to consolidate these appeals is granted. Appeal Nos. 08-56415 and 08-56436 are consolidated.

Pacific Justice Institutes' ("PJI") motion for leave to intervene on behalf of appellees in these consolidated appeals is denied.

PJI's unopposed motion for leave to file an amicus curiae brief in these consolidated appeals is granted.

PJI's motion for leave to participate in oral argument is denied.

Appellants' consolidated opening brief is due January 5, 2009; appellees' consolidated answering brief and PJI's amicus brief are due February 4, 2009; and

the optional reply brief is due 14 days after service of the answering and amicus briefs.

All parties on a side are encouraged to join in a single brief to the greatest extent practicable. *See* 9th Cir. R. 28-4.

APPENDIX C

FILED

UNITED STATES COURT OF APPEALS

JUN 30 2009

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

STEVE TRUNK; et al.,

Plaintiffs-Appellants,

and

JEWISH WAR VETERANS OF THE
UNITED STATES OF AMERICA, INC.;
et al.,

Plaintiffs - Appellants,

v.

CITY OF SAN DIEGO; et al.,

Defendants - Appellees.

Nos. 08-56415, 08-56436

D.C. Nos. 3:06-cv-01597-LAB,
3:06-cv-01728-LAB
Southern District of California,
San Diego

ORDER

Before: PAEZ and TALLMAN, Circuit Judges.

Pacific Justice Institute's ("PJI") motion for leave to intervene on behalf of appellees in these consolidated appeals is construed as a motion to reconsider the December 3, 2008 denial of PJI's motion for leave to intervene. So construed, the motion is denied as untimely. *See* 9th Cir. R. 27-10.

Based on our review of PJI's motion to certify a question of law to the United States Supreme Court, the responses and the parties' briefs, we find no

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circumstance that would form a basis for granting certification. *See* 28 U.S.C. 1254(2); *see also Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam) (The circumstances do not provide an “occasion for invoking so exceptional a jurisdiction of the [Supreme] Court as that on certification.”). Therefore, the motion is denied.

PJI’s motion to stay appellate proceedings pending the United States Supreme Court’s ruling in *Salazar v. Buono* (No. 08-472) is also denied.

Appellants’ opposed motion to strike the letter and attached brief filed by appellees on June 3, 2009 is granted.

These consolidated cases are ready for calendaring.