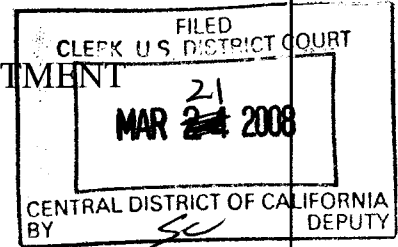


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5 Attorneys for Union Intervenor CALIFORNIA TEACHERS ASSOCIATION;  
6 and CAPISTRANO UNIFIED EDUCATION ASSOCIATION

7  
8 UNITED STATES DISTRICT COURT

9 FOR THE CENTRAL DISTRICT OF CALIFORNIA - SANTA ANA DIVISION

10  
11 CHIAO FARNAN, a minor, by and  
12 through his BILL FARNAN and  
13 TERESA FARNAN,  
BY

Case No. : SACV-07-1434 JVS (ANx)

BEFORE THE HONORABLE  
JAMES V. SELNA – COURTROOM 10C

14 Plaintiff,

15 v.

16  
17 CAPISTRANO UNIFIED SCHOOL  
18 DISTRICT; DR. JAMES CORBETT,  
et al.,

19 Defendants.

20  
21 **UNION INTERVENORS' NOTICE  
22 OF MOTION AND MOTION TO  
23 INTERVENE; AND  
24 MEMORANDUM OF POINTS AND  
25 AUTHORITIES IN SUPPORT  
26 THEREOF**

27 **MOTION**

28  
29 CALIFORNIA TEACHERS  
30 ASSOCIATION/NEA; and  
31 CAPISTRANO UNIFIED  
32 EDUCATION ASSOCIATION,

Union Intervenor/Defendants.

DATE: April 28, 2008  
TIME: 1:30 p.m.  
COURTROOM: 10C/Judge Selna

1 **TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2  
3 **PLEASE TAKE NOTICE** that on April 28, 2008, at 1:30 p.m. or as soon  
4 thereafter as the matter may be heard in Courtroom 10C of the above-entitled  
5 Court, located in the Ronald Reagan Federal Building, 411 West Fourth Street,  
6 Santa Ana, California 92701, the California Teachers Association ("CTA") and  
7 Capistrano Unified Education Association ("CUEA"), together "Union  
8 Intervenors," will and do move the Court for an order permitting them to intervene  
9 as defendants in this action as a matter of right under Rule 24(a) of the Federal  
10 Rules of Civil Procedure ("FRCP") or, in the alternative, intervention permissively  
11 under Rule 24(b) of the FRCP.


12  
13 **DEFENSES TO BE ASSERTED**

14 By intervening in this action, CTA and CUEA seek to assert defenses set  
15 out in the attached proposed Union Intervenors' Answer to First Amended  
16 Complaint.

17 This motion is based upon this notice of motion, the memorandum of points  
18 and authorities in support thereof, the Declaration of Michael D. Hersh with  
19 attached exhibits, and upon such other oral and documentary matters as may be  
20 presented to the Court at or before the hearing on this motion.

21  
22 DATED: March 19, 2008

CALIFORNIA TEACHERS ASSOCIATION. .

23  
24 By:   
Michael D. Hersh

25  
26 Attorney for Union Intervenors CTA  
27 and CUEA  
mhersh@cta.org  
562.478.1410

28 ///

**MEMORANDUM OF POINTS AND AUTHORITIES**  
**IN SUPPORT OF MOTION TO INTERVENE**

**THE UNION INTERVENORS**

CTA represents more than 340,000 public school teachers, librarians, and other certificated and classified educational professionals. CTA provides legal assistance, labor relations expertise, and other professional assistance to its members and affiliate chapters. CUEA is an affiliate of CTA. CTA's official policies are democratically determined by representatives of its affiliates at CTA's State Council that meets four times each year. Policies relevant to this motion are described below and in the supporting declaration of Michael D. Hersh. CTA is an "employee organization" as defined in section 3540.1(d) of the California Educational Employment Relations Act (Gov. Code, § 3540 et seq., hereafter "EERA.>").

CUEA is a "recognized employee organization" pursuant to section 3540.1(1) of EERA, and is the "exclusive representative" of approximately 2300 non-exempt certificated employees of the Defendant Capistrano Unified School District ("District"). CUEA is a party to a collective bargaining agreement with the District, effective July 1, 2006 through June 30, 2008 ("CBA"). Article 18.1 of the CBA requires that teachers maintain high professional standards, protect the welfare of students, and adhere to the California Education Code, District policies and the CBA. CUEA enforces the CBA and represents its members who are accused of violations of Article 18.1 professional standards. CTA provides CUEA members, as a benefit of membership, with legal representation when the District takes adverse action against CUEA members for failure to comply with professional standards, District policies, Education Code and CBA.

Defendant Dr. James Corbett is a member of CTA and CUEA.

**I. GROUNDS FOR INTERVENTION AS A MATTER OF RIGHT**

An applicant seeking to intervene in a pending lawsuit “as of right” must demonstrate that: “(1) it has a significant protectable interest relating to the property or transaction that is the subject matter of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest.” (United States v. City of Los Angeles, 288 F.3d 391, 397 (9th Cir. 2002); FRCP 24(a)(2).)

**A. CTA and CUEA Have Protectable Contractual, Legal and First Amendment Interests Related to this Case.**

An “interest” must be protectable under some law and be related to the claims at issue. (Arakaki v. Cayetano, 324 F.3d 1078, 1084 (9th Cir.2003)) “[A] party has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interest as a result of the pending litigation. (California ex rel. Lockyer v United States, 450 F. 3d 436, 441 (9<sup>th</sup> cir. 2006)) The requirement of an interest relating to the property or transaction is construed expansively. (Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 132-36, 87 S.Ct. 932, 17 L.Ed.2d 814 (1967)) The interests of CTA and CUEA in this case are contractual, legal and Constitutional.

**1. CTA and CUEA Have Protectable Contractual Interests**

A labor organization’s contractual rights are a protectable interest sufficient for intervention. (Little Rock Sch. Dist. v. Pulaski County Special School District, 738 F.2d 82, 84 (8th Cir.1984)) As set forth above, the CBA obligates teachers in the District to conform to particular professional, statutory and contractual standards. CUEA and CTA provide representation to teachers whom the District accuses of standards violations, and of course, through negotiations with the District have helped shape those standards.

## 2. CTA and CUEA Have Protectable Legal Interests

A labor organization's state-law rights to negotiate terms and conditions of employment for its members is also a sufficient protectable interest for intervention. (*City of Los Angeles, supra*, 288 F.3d 391, 399 - 400 [protectable interest where the complaint seeks injunctive relief against its members and raises factual allegations that its member committed unconstitutional acts in the line of duty]) CUEA and CTA have rights pursuant to EERA to negotiate terms and conditions of employment for District employees and represent those employees in labor relations matters and the causes for discipline of employees. (Gov. Code, § 3543.2(a) & (b).)

## 3. CTA and CUEA Have Protectable First Amendment Rights

"[O]ne of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means." (*Lyng v. International Union, United Auto., Aerospace and Agr. Implement Workers of America, UAW* 485 U.S. 360, 366, 108 S.Ct. 1184, 1189, 99 L.Ed.2d 380 (U.S.Dist.Col.,1988) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933, 102 S.Ct. 3409, 3436, 73 L.Ed.2d 1215 (1982).) "This right encompasses the combination of individual workers together in order better to assert their lawful rights." (*Id.*)

Educational employees join CTA and CUEA, not only to negotiate wages, but also to 1) pursue broad professional, political and social policy objectives to strengthen public education and teacher rights and 2) defend the First Amendment rights of individual teachers in the performance of their professional work.

### **a) CTA and CUEA Promote Academic Freedom and Defend Educators Against Abridgements of that Freedom**

CTA's official policy on Academic Freedom states that, "Teachers must be free to teach and students free to learn. Both must have access to and be free to

1 explore and discuss issues and divergent points of view. Both must be free to  
 2 form, hold, and express judgments and opinions, responsibly identifying them as  
 3 such. The profession must defend itself and its members from any abridgment of  
 4 academic freedom.” CUEA supports this policy and seeks to further it in its  
 5 efforts on behalf of certificated employees of the Defendant District, including  
 6 Defendant Corbett.

7                                   **b) CTA and CUEA Promote Educators’ Professional**  
 8                                   **Role in Selecting Instructional Materials and**  
 9                                   **Methods to Meet Curricular Goals and in Defend**  
 10                                   **Against Undue Interference with that Professional**  
 11                                   **Expertise**

12 CTA’s official policy states that, “Teachers must have the responsibility for  
 13 developing curriculum and selecting instructional materials and methods to meet  
 14 the goals of that curriculum. Local associations and governing boards must  
 15 adopt/negotiate procedures to be followed when there are criticisms/objections to  
 16 methods or materials. The content of instruction must be judged and controlled by  
 17 skilled professionals without undue interference by any individual or group. Any  
 18 individual or group which seeks to inhibit academic freedom must not have  
 19 influence over the hiring, firing, promotion or due process rights of bargaining  
 20 unit members.” CTA recognizes that, “Bargaining unit members must be  
 21 employed, promoted or retained without discrimination or harassment regarding  
 22 their personal opinions or their scholarly, literary or artistic endeavors” and that,  
 23 “The presence in the classroom of any individual or organization whose intent it is  
 24 to decide or determine what is accurate or inaccurate inhibits academic freedom.”

25 CUEA supports this policy and seeks to defend all represented educators of  
 26 the District against the influence of individuals and organizations who would  
 27 abridge the exercise the professional discretion and deprive students of the full  
 28 and creative talents of their teachers.



1           4. The Interests of CTA and CUEA are Related to the Claims at Issue

2           The FAC asserts federal claims under the First and Fourteenth Amendments  
3 based largely on the alleged conduct of defendant Corbett. As remedy, plaintiff  
4 seeks, in relevant part, to “permanently enjoin Defendants, their agents, servants,  
5 employees, officials, or any other person acting in concert with them or on their  
6 behalf, from continuing to make statements in the classroom that are hostile  
7 towards religion and favor irreligion over religion”; declare that defendants’  
8 policy and practice violates the First Amendment; and require the District to  
9 institute a training and mentoring program. (FAC at pp. 11-12)

10          The allegations in the FAC and the relief sought by plaintiffs, are directly  
11 related to the protectable interests of CTA and CUEA. Plaintiffs would use this  
12 Court to set professional standards and bases for teacher discipline that implicate  
13 the CBA between the District and CUEA, and the representational services  
14 provided by CTA and CUEA in enforcement of those contractual rights. The FAC  
15 seeks relief that would dictate terms and conditions of employment and bases for  
16 teacher discipline that CTA and CUEA have a legal right to negotiate on behalf of  
17 the District’s employees. The FAC asserts claims under the Establishment Clause  
18 which would severely impact the Free Exercise and Free Association Rights of  
19 CUEA, CTA and their members and which would weaken public education in  
20 California by making educators fearful of discussing controversial issues.

21           **B. The Disposition of this Action May Impair or Impede the**  
22           **Proposed Intervenor’s Ability to Protect Their Interests.**

23          As explained above, the disposition of this case may impair or impede the  
24 interests of CUEA and CTA, because it involves the formulation of District  
25 policies that the CUEA and CTA have contractual and legal rights to help  
26 determine and whose violation will lead to CUEA and CTA representation of  
27 disciplined teachers, and because the remedies sought by plaintiff would constrain  
28 the First Amendment rights of CUEA and CTA members, and violate fundamental

1 policies of CTA to support of Academic Freedom and professional discretion for  
2 all educators, and protect teachers, such as defendant Corbett, when attacked for  
3 the exercise of their rights.

4 **C. The Existing Parties Do Not Adequately Represent the Unions'**  
5 **Interests.**

6 There are three factors to consider when determining whether existing  
7 parties adequately represent an applicant's interest: "(1) whether the interest of a  
8 present party is such that it will undoubtedly make all the intervenor's arguments;  
9 (2) whether the present party is capable and willing to make such arguments; and  
10 (3) whether the would-be intervenor would offer any necessary elements to the  
11 proceedings that other parties would neglect." (*City of Los Angeles, supra*, 288  
12 F.3d at 398 [citations omitted]) The requirement "is satisfied if the applicant  
13 shows that representation of his interest 'may be' inadequate." (*Trbovich v.*  
14 *United Mine Workers*, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 30 L.Ed.2d 686  
15 (1972). The burden of making this showing is minimal. *Id.*

16 CUEA and CTA are likely to raise arguments here that emphasize the role  
17 of teachers and teacher unions in public education that the existing parties are  
18 unlikely to make, and stress the impact upon other employees of the Defendant  
19 District. CUEA and CTA's are concerned about the chilling impact that law suits  
20 such as this have on the Defendant District's teachers and the teaching profession  
21 generally, and about how the balance of Establishment Clause concerns are to be  
22 balanced with the First Amendment Rights of educators and the contractual and  
23 legal rights of teacher unions to formulate the specific terms of employment that  
24 CUEA members must live with and CUEA and CTA must enforce.

25 The existing Defendants have constraints, such as political and emotional  
26 pressure from parents, students and taxpayers, that make it more difficult for them  
27 to aggressively pursue the issues of central importance to CUEA and CTA, even  
28 when we share a common purpose. But in addition, CUEA and CTA offer



1 elements of concerning contractual, legal and First Amendment Interests which are  
2 unique to them, as set forth above.

3  
4 **II. GROUND FOR PERMISSIVE INTERVENTION**

5 Should the Court decline to grant the motion of CTA and CUEA to  
6 intervene as a right, CTA and CUEA should be allowed permissive intervention in  
7 the action. “[A] court may grant permissive intervention where the applicant for  
8 intervention shows (1) independent grounds for jurisdiction; (2) the motion is  
9 timely; and (3) the applicant's claim or defense, and the main action, have a  
10 question of law or a question of fact in common.” (City of Los Angeles, supra,  
11 288 F.3d 391, 403 -404; FRCP 24(b))

12 **A. CUEA and CTA Have Independent Grounds for Jurisdiction**

13 The answer which CUEA and CTA propose to file asserts independent  
14 grounds for this Court’s jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C.  
15 § 1343 in so far as the plaintiff’s claim and most of the affirmative defenses pled  
16 are based on the First and Fourteenth Amendment rights of the parties.

17 **B. This Motion is Timely**

18 Union Intervenors understand that though the FAC was filed in December  
19 2007, the answer of Defendants has only recently been filed. Therefore, there  
20 should be no substantial delay caused to the parties as a result of this intervention.  
21 The defenses and affirmative defenses raised by Union Intervenors would not  
22 likely involve the factual disputes beyond those already at issue, and would have  
23 minimal impact on discovery. Union Intervenors wish to participate in  
24 depositions, and pursue limited discovery concerning those facts already in issue,  
25 but will accept any limitations on discovery deemed appropriate by the Court to  
26 facilitate judicial economy and so as not to prejudice the other parties.

27 ///

28 ///

**C. CTA and CUEA's Defenses and the Main Action Have Common Questions of Law and Fact**

The Proposed Answer of Union Intervenors concerns those facts that have been alleged in the Complaint, and those necessary to place those facts in context. Union Intervenors are familiar with the Court's ruling on the Defendant's Motion to Dismiss, and, do not believe their intervention will make the balancing of Constitutional rights required here of the Court any more difficult than it already is.

**III. CONCLUSION**

The claims and defenses raised by the existing parties in this case have raised difficult issues concerning the methods by which Defendants may perform their official duties and tasks without violating the Establishment Clause of the First Amendment. The Court has recognized the difficult balancing of rights that are involved in such a dispute. Based on their argument here, Union Intervenors believe their unique interests provide a basis for intervention that will help ensure that balancing will result in a just outcome of these proceedings and one that will not encourage every student to seek adjudication of teacher's comments that the student deems offensive. Respectfully, Union Intervenors request an order to grant them status as parties in this case, as a matter of right, or, in the alternative, permissively.

DATED: March 19, 2008

CALIFORNIA TEACHERS ASSOCIATION

By: 

Michael D. Hersh

Attorney for Union Intervenors CTA  
and CUEA  
[mhersh@cta.org](mailto:mhersh@cta.org)  
562.478.1410

**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 11745 East Telegraph Road, Santa Fe Springs, California 90670.

On **March 20, 2008**, I served the foregoing document described as **UNION INTERVENORS' NOTICE OF MOTION AND MOTION TO INTERVENE; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**, on the interested parties in this action by placing

☐

the original

☒

a true copy thereof

enclosed in a sealed envelope addressed as follows:

**Attorney for Plaintiff****Robert Tyler, Esq.****Jennifer Monk, Esq.****Advocates for Faith & Freedom****24910 Las Brisas Road -- Suite 110****Murrieta, California 92562****Attorney for Defendants****Daniel Spradlin, Esq.****Woodruff, Spradlin & Smart, A PLC****555 Anton Boulevard -- Suite 1200****Costa Mesa, California 92626**☒ X

(By Mail) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Santa Fe Springs, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐

(By Fax) I transmitted said document(s) to the fax telephone number(s) listed on the attached service list.

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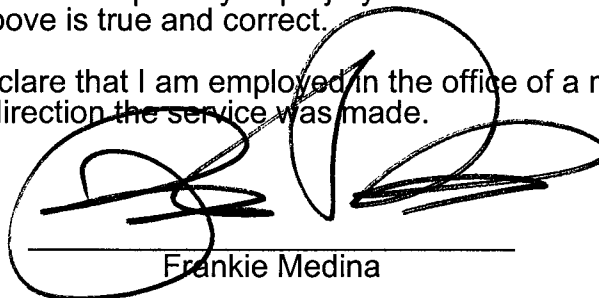
(By Personal Service) I caused such envelope to be delivered by hand to the offices of the addressee.

☐

(State Court) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ X

(Federal Court) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.



Frankie Medina