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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

INDEPENDENT TRAINING AND APPRENTICESHIP PROGRAM, a California corporation, BRANDIN MOYER, and HAROLD E. NUTTER, INC., a California Corporation,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California, by and through CHRISTINE BAKER, in her official capacity as Acting Director of the CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF APPRENTICESHIP STANDARDS, by and through GLEN FORMAN, in his official capacity as Acting Chief, DIVISION OF LABOR STANDARDS ENFORCEMENT, by and through JULIE SU, in her official capacity as Labor Commissioner,

Defendants.

Case No.: **2:11−CV−01047−GEB −DAD**

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Date: July 11, 2011
Time: 9:00 a.m.
Courtroom: 10
Judge: Hon. Garland E. Burrell, Jr.

Complaint Filed - April 18, 2011

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I. INTRODUCTION

The Fitzgerald Act (29 U.S.C. §50, *et seq.*) establishes a national system of apprenticeship standards intended to foster apprenticeship opportunities in the skilled trades. The act authorizes the Secretary of Labor to delegate to the states regulatory power within the federal system, subject to the continuing supervision of the Secretary. Until 2007, California regulators had authority — granted by the Department of Labor under the Fitzgerald Act — to regulate the use of apprentices on public works involving a "Federal purpose." In 2007, because California had earlier adopted a discriminatory scheme that harmed apprentices, California lost the ability to regulate apprenticeship: their agencies were "derecognized" and thus stripped of authority to "register and oversee apprenticeship programs for federal purposes." (Request For Judicial Notice ("RFJN"), Exhibit C.) California's de-recognition left the DOL as the sole regulatory authority for determining the standards, conditions and circumstances under which federally-registered apprentices are required to work on public works projects in California with a "Federal purpose."

Notwithstanding the conclusive de-recognition of the state's authority, California's labor and apprenticeship agencies have recently begun to penalize contractors who use apprentices participating in federally approved apprenticeship programs, depriving those programs and their apprentices of the very opportunities the Fitzgerald Act is designed to ensure. These agencies have no authority to continue to regulate in this arena in defiance and violation of the controlling federal regulations which define which projects have a Federal purpose and those which do not. This improper regulation must be enjoined[1] to prevent further irreparable harm to registered apprentices, to the federally-certified organizations which train them, and to the contractors who employ them.

II. STATEMENT OF FACTS

A. The System of Federal Apprenticeship Standards.

In 1937, Congress enacted the National Apprenticeship Act (the "NAA or Fitzgerald Act") authorizing the Secretary of Labor to promote, extend, and encourage apprenticeships with the

[1] Federal Courts have jurisdiction over suits to enjoin State officials from interfering with federal rights. (*Shaw v. Delta Airlines, Inc.* 463 U.S. 94, n.14; *Inland Pacific v. Dear*, 1993 U.S. Dist. Lexis, 16324, *69.)

cooperation of state agencies. Specifically, the Fitzgerald Act assigns to the Secretary of Labor the task of establishing labor standards necessary to achieve the purposes of the NAA. (29 U.S.C. §50.)

Apprenticeship programs generally are designed to combine supervised on-the-job training with related classroom instruction in a particular trade for the purposes of producing skilled workers qualified to contribute to the nation's labor force, all at a cost favorable to the sponsoring program, apprentices, and potential employers. Specifically, "registered" apprentices — i.e., those participating in "approved" apprenticeship programs — are paid substantially less than a skilled worker's wage, which allows a sponsoring contractor to make competitive bids on public works projects. Thus, everyone involved receives financial incentives by conforming to the federal standards.

Upon completion of apprenticeship training, an apprentice becomes a skilled, certified journey level worker and receives a portable nationally recognized certificate. (RFJN, Exh.B, p. 4.) Thus, those who have completed a federally approved program are highly marketable post-apprenticeship as they offer certified skill and knowhow for employers within the trade.

The Fitzgerald Act authorizes the United States Department of Labor ("U.S. DOL") to certify apprenticeship training programs and contains a wide grant of authority to develop and promote standards of training for apprentices, and to give such standards the broadest possible application and effect in order to "safeguard the welfare of apprentices." (29 U.S.C. §50.) The purpose of these programs is to provide for the training of new workers in skilled crafts by providing work experience on public works projects.

The U.S. Department of Labor's Office of Apprenticeship Training, Employment and Labor Services ("OATELS") administers the Fitzgerald Act on behalf of the Secretary of Labor.[2] The Fitzgerald Act provides:

> The Secretary of Labor is hereby authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in

[2] OATELS has replaced the former Bureau of Apprenticeship and Training ("BAT") as the agency that administers the Fitzgerald Act although the companion regulations continue to refer to BAT. (29 C.F.R. § 29.2 (c).)

> contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship. [29 U.S.C.A. § 50].

The Fitzgerald Act is implemented through Title 29, Code of Federal Regulations §§ 29.1 et seq. These regulations provide for registration or approval of apprenticeship programs for various "Federal purposes" by OATELS. (29 C.F.R. § 29.1.)

"Federal purposes" are defined in the implementing regulations as "*any* Federal contract, grant, agreement or arrangement dealing with apprenticeship; and *any* Federal financial or *other* assistance, benefit, privilege, contribution, allowance, exemption, preference or right pertaining to apprenticeship" (29 C.F.R. § 29.2, emphasis added).

The creation of apprenticeship opportunities and the regulation of those opportunities under the Fitzgerald Act (either directly by the Department of Labor or by a state agency or Council recognized pursuant to the Fitzgerald Act as complying with the Fitzgerald Act's objectives and standards) is itself an "agreement or arrangement dealing with apprenticeship" and a "benefit, privilege ... preference or right pertaining to apprenticeship" constituting a Federal purpose under 29 C.F.R. § 29.2.

B. The Role of the States in the Federal Apprenticeship System.

Under the authority of the Fitzgerald Act, OATELS either operates as the exclusive registrar of apprenticeship programs or it recognizes and approves State Apprenticeship Councils ("SACS") to approve apprenticeship programs. (RFJN, Exh. B, p.5) as, pursuant to 29 C.F.R. § 29.12, OATELS may delegate its power to approve apprenticeship programs for "Federal purposes" to a state agency by "recognizing" a "State Agency or Council." However, once a state has been "recognized" OATELS continues to monitor the State to ensure that the SAC continuously conforms to federal standards. (*Id.*)

In 1978, OATELS authorized the California Department of Industrial Relations ("CDIR") to act as a SAC because OATELS had determined that California's laws regulating apprentices and apprenticeship programs conformed to the federal standards and requirements[3]. (RFJN, Exh.

[3] Many of the details of the operation of the Fitzgerald Act are also expressed in case law, including the U.S. Supreme

B, p. 9.)

C. California Enacts Discriminatory Apprenticeship Laws.

In 1999, California amended section 3075 of the California Labor Code to, among other things, require that a "needs test" be satisfied by apprenticeship programs in order for their participants to be treated as "apprentices" under California law. (Cal. Labor Code 3075(b); RFJN, Exh. B, p. 6.) OATELS determined that the amendment operated to "discriminate against new [apprenticeship] programs," to "subordinate the interests of apprentices to the interests of existing apprenticeship programs," and to "improperly restrict, rather than promote, apprenticeship opportunities for workers contrary to the letter and spirit of the NAA [Fitzgerald Act]." (RFJN, Exh. D.) OATELS notified CDIR of OATLES' findings and initiated proceedings to revoke California's authority to regulate apprentices and apprenticeship programs on public works projects through an "Initiation of Derecognition Proceedings" from U.S. Department of Labor to CDIR dated May 10, 2002 ("Derecognition Notice"). (RFJN, Exh. D.) Further, the discriminatory "needs" requirements of California Labor Code §3075(b) were deemed by OATELS to be unnecessary to achieve California's "ostensible purpose" of protecting apprentices from "transient or exploitative programs."[4] (*Id.*)

California failed or refused to delete the provisions of the California Labor Code which did not conform to federal law governing apprentices and apprenticeship programs on public works projects serving Federal purposes and appealed OATELS' revocation through a series of administrative hearings. (*Id.*)

D. The U.S. D.O.L. Derecognizes California's Authority Under the Fitzgerald Act.

On January 31, 2007, the Administrative Review Board of the U.S. Department of Labor issued a "Final Decision and Order" upholding both (a) OATEL's determination of "the amended California apprenticeship statue as not conforming to federal apprenticeship standards" and (b)

Court's decision in *California Division of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316, 320 (1997) and the California Supreme Court's discussion in *So. Cal. ABC, Inc. v. California Apprenticeship Counsel*, 4 Cal.4th 422, 433 (1992). These cases predate derecognition of defendants by the U.S. DOL.

[4] OATELS derecognition position is also detailed in the Administrative Law Judge's recommended decision affirming the derecognition. (RFJN, Exh. B, pp. 7-10; 27-28.)

OATELS' action fully and finally revoking Defendants' authority to regulate apprentices and apprenticeship programs on public works projects in California with a Federal purpose. (RFJN, Exh. A, B.)

On March 2, 2007, the U.S. Department of Labor gave public notice, as required by 29 C.F.R. 29.13(d), that OATELS had withdrawn recognition from both CDIR and CAC, stating: "The CDIR and the CAC no longer have authority to register or oversee apprenticeship programs for 'Federal purposes'" (72 F.R. 9590.) No court has overturned or stayed the U.S. DOL's determination and the limitations period for seeking such judicial intervention has long since expired.

Thus, Defendants are no longer authorized to determine eligibility of apprenticeship program participants to work on public works projects with any "Federal purpose" and are barred from contending otherwise.

E. Defendants Complied with U.S. DOL Decisions for Years Following the Derecognition.

The Administrative Law Judge's recommended decision confirming the U.S. DOL's de-recognition of the CDIR and CAC is dated April 22, 2005. (RFJN Exh. B.) The final Decision and Order from the Administrative Review Board confirming that recommended decision is dated January 31, 2007[5]. (RFJN, Exh. A.) I-TAP's apprentices were employed on public works projects in California from April 2005 through the fall of 2010. (Declaration of Carolyn Nutter ("C. Nutter Decl") ¶ 3-4, Compendium of Evidence ("Compendium"), Exhibit 4; Declaration of Paul Smith ("P. Smith Decl.") ¶ 5, Compendium Exh. ¶8; Declaration of Travis Baker ("Baker Decl.") ¶10, Compendium Exh1; Declaration of Norman Nutter ("N. Nutter Decl.") ¶ 8, Compendium Exh. 3; Declaration of Juli Nutter ("J. Nutter Decl.") ¶ 4-5, Compendium, Exh. 9.)

Between the date of the Administrative Law Judge's recommended decision and the fall of 2010, state prevailing wage enforcement agencies were aware of contractors' use of I-TAP

[5] OATELS initiated the derecognition proceedings in 2002. (RFJN Exh. D.)

apprentices on public works projects in California.[6] (C. Nutter Decl. ¶11-12, Compendium Exh. 4; P.Smith Decl. ¶ 5-6, Compendium Exh. ¶8; Baker Decl. ¶10, Compendium Exh1; N. Nutter Decl. ¶ 8, Compendium Exh.3.) Although these agencies often raised initial objections to the use of apprentices who were not affiliated with a State approved apprenticeship program, after ITAP or contractors using I-TAP apprentices responded by asserting that use of federally approved apprentices was proper given that the projects at issue involved a Federal purpose, neither ITAP nor contractors using I-TAP apprentices faced any enforcement actions during this period. (*Id.*) That situation prevailed until the spring of 2010 when contractors using I-TAP apprentices suddenly were notified that they faced enforcement proceedings for their use of I-TAP apprentices on public works projects. (Baker Decl. ¶3-7, Compendium Exh. 1; C. Nutter Decl. ¶5,7-8; Compendium Exh. 4; J. Nutter Decl. ¶ 6-12, Compendium Exh. 9.)

F. Defendants' Recent Defiance of DOL's Definition and Determination of Federal Purpose.

Gray Electric Company ("Gray Electric") is a California electrical contracting company that provides repairs, construction, and sales of electrical products to both residential and commercial customers. In the fall of 2010, Gray Electric hired a number of I-TAP apprentices to work for two different projects on which it was a subcontractor: (1) the construction of a multi-purpose/gymnasium expansion and four new classroom buildings at Chicago Park Elementary School in Nevada County, California (the "Chicago Park Project"); and (2) the construction of an alternative education center at Marysville High School in Yuba County, California (the "Marysville High School Project"). (T, Baker Decl. ¶ 3,8, Compendium Exh. 1)

On September 29, 2010 CDIR alleged that Gray Electric's use of I-TAP apprentices on the Chicago Park Project was improper. Gray Electric's General Manager, Travis Baker, subsequently spoke to Gustavo Alvaro, Deputy Labor Commissioner at the CDIR regarding the allegations, and informed Alvaro that Gray Electric's use of ITAP apprentices was proper because I-TAP was a

[6] California's system of prevailing wage enforcement is expressed in both statute and regulations and includes enforcement activities by the Division of Apprenticeship Standards (Labor Code section 1777.7), the Labor Commissioner (Labor Code section 1777.1) as well as Labor Compliance Program (which are approved by the California Labor Commissioner) (Labor Code section 1775.1; 8 CCR §§16421-16439).

federally-certified apprenticeship training program. A series of letters and emails between Gray Electric and the CDIR followed. In that correspondence, Gray Electric noted I-TAP is a federally-certified program and that federal law requires all apprentices from federally-certified apprenticeship training programs be accepted on public works projects involving any amount of federal funds and/or benefits while the CDIR took the position that there was no federal money involved in either the Chicago Park Project or the Marysville High School Project, that all apprentices must be registered with the DAS regardless of whether they are federally certified, and that the CDIR intended to issue a Civil Wage and Penalty Assessment ("CWPA") against Gray Electric if it continued to use I-TAP apprentices. (T. Baker Decl. ¶ 4-8, Compendium Exh. 1.) As a result, Gray Electric notified I-TAP that it could not afford to use I-TAP apprentices in light of the CWPA fines being assessed against it. (*Id.* at ¶ 9; N. Nutter Decl. ¶ 11, Compendium Exh. 3, C. Nutter Decl. ¶ 8, Compendium Exh. 4.)

Plaintiff Harold E. Nutter, Inc. ("Nutter Electric") was the electrical contractor on the Joint-Use Gymnasium at Williams Brotherhood Park/Merlos Institute in the City of Stockton, California ("Stockton Joint-Use Gym Project") for which McFadden Construction, Inc. ("McFadden") was the primary contractor. Harold E Nutter, Inc., employed eight workers from the I-TAP apprenticeship training program on the Stockton Joint-Use Gym Project. (J. Nutter Decl. ¶ 6, Compendium Exh. 9.)

In May of 2010, Nutter Electric learned that the Northern California Electrical Construction Industry Labor Management Trust ("NCECILM") had complained to Division of Apprentice Standards within the CDIR alleging that Nutter Electric's use of I-TAP apprentices was improper and that I-TAP apprentices were not properly certified and indentured under California law. (J. Nutter Decl. ¶ 7, Compendium, Exh. 9.) Nutter Electric responded to the NCECILM and the CDIR by separate letters.. Among other things, the letters stated that Nutter Electric's use of I-TAP apprentices was proper because I-TAP is a federally approved apprenticeship program and the Stockton Joint-Use Gym Project involved a Federal purpose. (*Id.* at ¶8.) Over the next several months, Nutter Electric exchanged letters and communications with

McFadden, the CDIR and NCECILM concerning its use of I-TAP apprentices. Among those communications was Nutter Electric's request that the CDIR identify the sources of funding for the Stockton Joint-Use Gym Project to establish that no federal funding, subsidy or benefit was present in the project. Nutter Electric has received no reply to that request. (*Id.* at ¶ 9.)

However, Nutter Electric's did receive a Civil Wage and Penalty Assessment ("CWPA") from the CDIR's Division of Labor Standards Enforcement ("DLSE") in the amount of $20,059.25 (Case Number 40-26553/254). The CWPA cites Nutter Electric's use of I-TAP apprentices on the Stockton Joint-Use Project as the basis for the assessment. (*Id*. at ¶ 10.)

Because of the CDIR's actions, McFadden, as prime contractor on the Stockton Joint –Use Project initially withheld from Harold E Nutter, Inc. the sum $103,520.56 of which it later (on February 3, 2011) released $43,342.81, reducing the withheld amount to $60,177.75. (*Id*. at 11.)

Nutter Electric filed a timely Request for Review of the CDIR's assessment pursuant to California Labor Code § 1742 and posted a cash deposit with the CDIR pursuant to California Labor Code § 1742.1(b). The Request for Review was based on California's lack of authority to disallow the payment of the apprentice wages (the purported basis for the CWPA) due to the U.S. Department of Labor having revoked such authority[7]. (*Id*. at 12.)

G. The Chicago Park, Marysville High School and Stockton Joint Use Projects All Benefit from Federal Subsidies.

Michael Genest, former Director of Finance for the State of California, researched the sources and nature of funding for the Chicago Park, Marysville High School, and the Stockton Joint –Use projects. (Declaration of Michael Genest ("Genest Decl.") ¶ 3, Compendium, Exh. 5.) He determined that each of the projects received and benefitted from federal subsidies. He discovered that the Chicago Park and Stockton Joint-Use Projects were funded by Build America Bonds ("BABs"), a new form of municipal bond created by the U.S. Treasury in response to financial crisis that began in 2008-9. These bonds are taxable, but the U.S. Treasury pays a direct subsidy to the municipal lender to induce sales of the bonds. (Genest Decl. ¶ 8, 10, Compendium,

[7] The CDIR has stayed the enforcement action against Nutter Electric pending the outcome of this action. (J. Nutter Decl. ¶ 14.)

Exh. 5.) The funding authorized for the Marysville High School Project is a tax exempt municipal bonds. These bonds are subsidized by the U.S. Government through their tax exempt status. *(Id.* at ¶ 7, 10.)

H. Defendants' Recent Improper Regulation of Apprenticeship Injures Apprentices.

Plaintiff, Brandin Moyer is a former I-TAP enrolled apprentice, who, as a result of Defendants' conduct has suffered substantial economic and other injury. Mr. Moyer has been employed by Gray Electric for several years as an apprentice level wireman. Initially, he was enrolled in a state-certified program known as A.B.C, in which he participated in classroom instruction and accumulated approximately 8,000 hours of work experience credit toward journeyman status. (B. Moyer Decl. ¶ 3, 4; Compendium, Exh. 2.)

To improve the quality of the instruction, Gray Electric, withdrew its apprentice level employees from the A.B.C. program and enrolled them in programs conducted by I-TAP. Mr. Moyer participated in I-TAP's program for approximately a year and a half and learned "more in the first two weeks in the I-TAP program than in the years of participation in the A.B.C program." (*Id.* at ¶ 5.) While sponsored at I-TAP, Mr. Moyer accumulated another 1,500 or so of work experience in addition to the classroom instruction. (*Id.* at ¶ 5.)

As noted, in October of 2010, Gray Electric was economically compelled to pull all Gray apprentices out of I-TAP's federally certified apprenticeship program because of DSLE's insistence that it was entitled to issue CWPA actions against Gray for using such apprentices on public works projects ion California without paying journeyman's wages. (Baker Decl. ¶9, Compendium Exh.1, C. Nutter Decl. ¶8, Compendium, Exh. 4.) As a consequence, Mr. Moyer was recently re-enrolled with A.B.C. but was required by A.B.C. to start from the beginning with both classroom instruction and on-the-job experience credits. The reduced experience rating forced Gray to reduce Mr. Moyer' wage rate substantially resulting in an overall reduction of Mr. Moyer's take-home income of slightly over $1,000 a month, a crucial reduction for Mr. Moyer and his young family which was forced to sacrifice their home in a "short sale." (Moyer Decl., ¶ 6-9; Compendium Exh. 2.)

Jacob Clark, another I-TAP apprentice, formerly employed by Gray Electric had a similar experience. Gray Electric's decision to discontinue use of I-TAP apprentices led Mr. Clark to resign his employment with Gray Electric. (Clark Dec., ¶ 4-5; Compendium, Exh. 6.)

I. Defendants' Recent Improper Regulation of Apprenticeship Injures I-TAP.

Since Defendants began enforcement activity against contractors using I-TAP apprentices, I-TAP has lost relationships with several contractors that formerly used I-TAP apprentices. It provides training to far fewer California apprentices than it did prior to CDIR's enforcement actions. (C. Nutter Decl. ¶ 6-10; N. Nutter Decl. ¶11-12, 16-17.) I-TAP continues to lose opportunities to provide apprentices as a result of Defendants' actions. (Decl. of Roy Smith ("Smith Decl. II") ¶ 3-5; Compendium Exh. 8) and these actions threaten ITAP's very existence. (N. Nutter Decl. ¶ 10-18; Compendium Exh. 3.)

III. STANDARD FOR INJUNCTIVE RELIEF

A party seeking a preliminary injunction bears the burden of meeting one of two tests. Under the "traditional" standard, a court may issue preliminary relief if it finds that (1) the moving party will suffer irreparable injury if the relief is denied; (2) the moving party will probably prevail on the merits; (3) the balance of potential harm favors the moving party; and (4) the public interest favors granting relief. (*Cassim v. Bowen*, 824 F.2d 791, 795 (9th Cir. 1987).) Under the "alternative" standard, the moving party may satisfy its burden by demonstrating either (1) a combination of probable success or the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in its favor. (*Id.*)

Though two tests are recognized, they are not mutually exclusive or wholly distinct. The critical element is the relative hardship to the parties. (*Wilson v. Watt*, 703 F.2d 395, 399 (9th Cir. 1983).) If the balance of hardships tips decidedly toward the plaintiff, a less substantial showing of a likelihood of success on the merits will suffice. (*Id.*) In every case, however, a plaintiff must establish at least some probability of success. "The irreducible minimum has been described by one court as a fair chance of success on the merits, while another court has said that the question must be serious enough to require litigation. The difference between the two formulations is

insignificant. Therefore, we accept either as satisfactory." (*Benda v. Grand Lodge of Intern. Ass'n. of Machinists and Aerospace Workers*, 584 F.2d 308, 315 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937 (1979).)

IV. LEGAL ANALYSIS IN SUPPORT OF INJUNCTION

A. ITAP is Likely to Succeed on the Merits of Its Claims.

1. OATELS is the Only Agency Authorized to Approve Apprenticeship Training Programs For Projects in California With a Federal purpose Due to California's Derecognition.

As already noted, the National Apprenticeship Act of 1937, known as the "Fitzgerald Act" (29 U.S.C.A. § 50, *et seq.)* was enacted to encourage the establishment of modern apprenticeship programs to be administered by the United States Department of Labor. The Fitzgerald Act provides in pertinent part:

> The Secretary of Labor is hereby authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship. [29 U.S.C.A. § 50.]

As a result, the Fitzgerald Act grants broad authority to the Secretary of Labor to develop and promote standards of training for apprentices, and to give such standards the widest possible application in order to fulfill the primary objective of the law: to "safeguard the welfare of apprentices." (*Id.*)

The Fitzgerald Act is implemented through Title 29, Code of Federal Regulations §§ 29.1 et seq. These regulations provide for registration or approval of apprenticeship programs for various "federal purposes" by OATELS.[8] (29 C.F.R. § 29.1.) OATELS may choose to delegate its approval power to states that have enacted their own apprenticeship laws by recognizing a State Apprenticeship Council (SAC) or Agency ("SAA"). (29 C.F.R. § 29.2.)[9] Through this

[8] This office was previously known as the Department of Labor, Bureau of Apprenticeship Training (hereinafter "BAT"). Pursuant to, BAT is authorized to administer the regulation and approval of apprenticeship programs.

[9] In 2008, the Department of Labor promulgated amendments to 29 C.F.R. 29.13 effectively such that the OATELS no

recognition, the Secretary of Labor "gives the SAC the authority to determine whether an apprenticeship program conforms with the secretary's published standards and the program is, therefore, eligible for those Federal purposes which require such a determination by the secretary." (29 C.F.R. § 29.12(a).) Thus, once approved by OATELS, a SAC or a SAA may recognize apprenticeship programs for projects with a Federal purpose.[10]

Under the dual system of approval and recognition, either OATELS or the SAC or SAA authorized by OATELS, acting as OATEL's agent and following OATELS's guidelines, can approve an apprenticeship program. (29 C.F.R. § 29.3.) The state agency *must* apply OATELS standards. The SAC or SAA's authority remains in effect as long as it is in good standing. In the event a SAC or SAA fails to comply with OATELS standards or refuses to comply with OATELS requirements, OATELS is authorized to "derecognize" the SAA for "reasonable cause" and strip the SAA of its authority to register or oversee apprenticeship programs. (29 C.F.R. § 29.13.) Where there is no state SAC or SAA authorized to recognize apprenticeship programs on public works projects with a federal purpose, OATELS is the sole agency authorized to do so.[11] (29 C.F.R. § 29.3.)

The CDIR was recognized as a SAA in 1978. However, in 1999, the California legislature adopted a statute that established "needs-based criteria" for approving apprenticeship programs. Section 3075(b) of the California Labor Code dictated that a program could be approved only if there was no existing apprenticeship program serving the same craft or trade in the geographic area, or if the existing program did not have the ability to dispatch a sufficient number of apprentices to qualified employers at a public works site).

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longer recognizes State Apprenticeship Councils, only State Apprenticeship Agencies. (73 FR 64418.)

[10] In order to register an apprenticeship program with a SAC, a "sponsor," i.e., a person or entity operating an apprenticeship training program (see 29 CFR. § 29.2(g)), must designate an "apprenticeship committee" to administer the program. (See *Id.* § 29.2(i).) The committee may be "joint"--in which case it is comprised of an equal number of company and union representatives--or it may be "unilateral"--in which case union representatives do not participate in its operation. (See id. and RFJN, Exh. B, p4, fn 7.) When a sponsor seeks to register an apprenticeship program, it must meet certain eligibility requirements. (See *Id.* § 29.3.) Once approved, the program must conform to certain regulatory standards. (See *Id.* § 29.5).

[11] Twenty-five states plus the District of Columbia and Puerto Rico have recognized state apprenticeship operations.

As a result, in May of 2002, OATELS instituted derecognition proceedings against the CDIR on the grounds that California Labor Code 3075(b) did not conform to OATELS' regulations at 29 C.F.R. Part 29 because the State law's "needs test" limited, rather than promoted, apprenticeship opportunity.[12] CDIR appealed and the matter was assigned to an Administrative Law Judge ("ALJ") for preliminary findings and the preparation of a recommended decision. On April 22 2005, the ALJ upheld OATELS' determination that the "needs test" did not conform to 29 C.F.R. Part 29, and recommended derecognition on that ground. (RFJN, Exh. B.) The U.S. DOL's Administrative Review Board ("ARB") reviewed the ALJ's recommended findings and decision.

On January 31, 2007, the ARB issued a Final Decision and Order that adopted the ALJ's findings, thereby completing the California's derecognition. (RFJN, Exh. A.) On March 2, 2007, the USDOL gave public notice, as required by 29 C.F.R. 29.13(d), that OATELS had withdrawn recognition from both CDIR and CAC, stating: "The CDIR and the CAC no longer have authority to register or oversee apprenticeship programs for 'Federal purposes.'" (72 F.R. 9590.) (RFJN, Exh. C.) Because the CDIR and CAC have been derecognized, OATELS is the *sole* agency authorized to recognize apprenticeship programs for Federal purposes in California.

2. Defendants' Post De-Recognition Application of Labor Code 3075(b) Constitutes Impermissible Regulation of Matters Reserved for Federal Regulation.

I-TAP is a merit based (non-union) apprenticeship program that has been approved and certified federally as an apprenticeship training program by OATELS to work on all projects with a "Federal purpose." Enrollees in I-TAP's programs have been effectively barred from working on public improvement projects in California at apprentice wage rates, effectively depriving such apprentices from employment opportunities entirely.

Under California Labor Code Section 1777.5, only apprenticeship program enrollees approved by Defendants can work on public works projects in California.[13] However, since the

[12] May 10, 2002 letter from Anthony Swoope, Administrator of OATELS, to Stephen Smith at CDIR. (Exh. B to J. Nutter Decl., Compendium Exh. 9.)

[13] California Labor Code Section 1777.5(c) provides, "Only apprentices, as defined in Section 3077, who are in

amendment of Labor Code section 3075 in 1999, Defendants have eliminated any possibility of state approval of merit based apprenticeship programs by refusing to certify nonunion apprenticeship programs where there is an existing union program on the claim that there is no "need" for a competing program. In this way, Defendants have restricted competition by refusing to allow non-union shops to enter the marketplace.[14] Thus, the "needs test" violates the very purpose of the Fitzgerald Act, the legislative history of which indicates that the Act was intended to bring together employers and labor unions for the benefit of *apprentices* not unions:

> [T]here is a mutual interest between the employer and the workers in proper standards for apprenticeship. Distrust and suspicion often develop when either one or the other undertakes the training program alone. It was pointed out to the committee by employers and employees that industry and labor are being brought together . . . in a most effective manner to work out and administer apprentice programs and that young people are being assisted thereby to secure training which fits them for profitable employment and responsible citizenship. The experience of this close cooperation between management and labor on questions of apprenticeship may be expected to influence beneficially other negotiations between management and labor, with consequent benefits to the whole Nation.[15]

The Fitzgerald Act is intended to provide a system of national standards to "safeguard the welfare of apprentices (29 U.S.C. § 50) and to promote opportunities for apprentices through the country. Under the regulations promulgated under the Fitzgerald Act, the U.S. Department of Labor defines Federal purpose as "*any* Federal contract, grant, agreement or arrangement dealing with apprenticeship; and *any* Federal financial or *other* assistance, benefit, privilege, contribution, allowance, exemption, preference or right pertaining to apprenticeship." (29 C.F.R. 29.2(k) (emphasis added)). This definition of "Federal purpose" was affirmed on October 29, 2008, when

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training under apprenticeship standards that have been approved by the Chief of the Division of Apprenticeship Standards and who are parties to written apprentice agreements under Chapter 4 (commencing with Section 3070) of Division 3 are eligible to be employed at the apprentice wage rate on public works." California has its own apprenticeship program standards. (8 C.C.R. § 212.)

[14] This restriction is against both California and federal public policy. *See* Executive Order, Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects (February 17, 2001). *See also Healthcare Association of New York State v. Pataki*, 471 F. 3d 87 (2nd Cir. 2006) (Finding that a state or local agency can only act as a proprietor of its own funds – it does not have any "proprietary" protection when it is using any federal money).

[15] H.R. 945, 75th Cong., 1st Sess., at 3.

the Department of Labor issued final rules updating 29 C.F.R. Part 29, in which the definition of "Federal purpose" was not changed.[16] (73 F.R. 64402.) Although letters from OATELS staff indicate that OATELS has interpreted the phrase "Federal purpose" to *include* "all public works projects funded in whole or in part with Federal funds,"[17] and that all SACs are required 'to accept programs and apprentices registered by OATELS, for Federal purposes, on all federally funded or supported public works projects, regardless of how much Federal funding or support is provided,"[18] that position does not limit "Federal purpose" to federal financial involvement. The Fitzgerald Act itself and 29 C.F.R. 29.2 contain no such restriction. Instead, both the Fitzgerald Act and the regulation focus on the welfare of apprentices through increased opportunity for on-the-job training and employment. Reflecting the many purposes of the Fitzgerald Act and its implementing regulations, section 29.2 of the regulations references federal funding as *one* "Federal purpose" and lists as others "any Federal financial or other assistance, benefit, privilege, contribution, allowance or exemption" (emphasis added) in addition to any "preference or right pertaining to apprenticeship."

California's regulations violate this national standard. California and its Labor Code do not distinguish between the use of federal or state money on a public works project and do not require a determination of whether any other Federal purpose is involved in a public works project. (See, 8 C.C.R. § 16000 (defining "Public Funds" to include "state, local and/or federal monies.") Further, there is no factual indication that Defendants seek to determine if a Federal purpose is implicated in a particular project public works project before rejecting payment of apprentice wages to apprentices in federally approved programs who are employed on that project even though a public works project is broadly defined in California to include "construction,

[16] On December 13, 2007, the U.S. DOL issued a Notice of Proposed Rulemaking ("NPRM") outlining proposed updates to labor standards, policies and procedures for the registration, cancellation, and deregistration of apprenticeship programs and administration of the National Apprenticeship System. (72 F.R. 71020.)

[17] Letter from Anthony Swoope, Administrator of OATELS, to John M. Rea, Acting Director of the CDIR, October 4, 2004. (Exh. B to J. Nutter Decl., Compendium Exh. 9.)

[18] Letter from Emily Stover DeRocco at OATELS, to John M. Rea, Acting Director of the CDIR, July 16, 2004. (Exh. B to Baker Decl., Compendium Exh. 1.)

alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds" (including projects paid for with federal funds).[19]

The evidence gathered to date demonstrates that the only inquiry into whether a Federal purpose is served by the projects at issue in this case has been undertaken by Plaintiffs. (See J. Nutter Decl. ¶ 8 and Exh. 8 thereto, Compendium Exh. 9.) Yet there is every reason to understand that it is Defendants' burden to establish that no Federal purpose is served on a project where they choose to discriminate against federally approved apprentices.

Historically, when a state uses federal money, it is required to implement fiscal controls to trace how the money is spent, and support its findings with "[s]ource documentation to support accounting records." (*Edmonds v. Chao,* 449 F. 3d 51, 58 (1st Cir. 2006), citing 20 C.F.R. § 627.425(b)(1)(iv) [Court requiring the State of Massachusetts to repay the Department of Labor federal funds for which "it cannot prove were spent in compliance with the substantive regulations" and concluding that "the statute itself and the regulations implementing it evince a strong concern for proper recordkeeping and financial accountability."].) Further, when a state takes the position that an institution or project receiving public money is using state funds to do so, and therefore the project must comply with state law and guidelines, it is the state's burden to show this is how the money is, in fact, being spent. (*Planned Parenthood of Central and Northern Arizona v. State of Arizona,* 789 F. 2d 1348, 1351 (9th Cir. 1986).) There are always limitations placed on a state agency when the federal government provides financial assistance or benefits to the state and certainly the first of these limitations is that the state comply with federal law.

Here, OATELS determined that the State of California was violating federal law by not allowing federally certified apprentices to work on projects that involved federal benefits and/or monies when it acted to derecognize the State of California, and that determination was upheld by two different administrative review boards. Thus, at a bare minimum, California must bear the burden of showing that the State is either not using federal money (s*ee, e.g.* 20 C.F.R. 627.802(e) (in hearings before Department of Labor Administrative Law Judges on employee benefits under

[19] Cal. Lab. Code § 1720.

the Job Training Partnership Act, rules of procedure require that once the federal officer granting the money decides that federal money is being misspent, the burden of persuasion then shifts to the party seeking to overturn the officer's decision) or that no other Federal purpose is being served.

Wherever the burden lies, Defendants should be enjoined from assuming, (especially without any factual inquiry or determination) that no Federal purpose is served on public works projects awarded by California agencies. *A fortiori* Defendants must be enjoined from failing to acknowledge federally certified apprentices as qualifying for apprentice wages on public projects which indisputably involve federal subsidies and/or employment opportunities such as the Chicago Park Project, the Marysville High School Project, and the Stockton Joint Use Gym Project.

Under Defendants' current application of state law, in order for an apprentice to be accepted on a public works project in California and paid at the apprenticeship rate (substantially less than the wage rate of journeymen in the same trade), the apprentice must be certified by the Chief of the Division of Apprenticeship Standards ("DAS"), a branch of the CDIR.[20] Apprentices working on a public works project who are not certified by the CDIR must be paid at the higher journeyman rate of pay, regardless of whether the project is funded with federal money.[21] Thus, if an apprenticeship program is registered by OATELS, but not DAS, under California law its apprentices are not accepted on public works projects even if the project is partially financed with federal money. This end-run of the Department of Labor's recognition/de-recognition authority directly conflicts with and ignores OATELS which maintains that: OATELS' registered apprentices must be recognized as registered apprentices for the purposes of all public works

[20] (8 C.C.R. § 208(b).) California Labor Code Section 1777.5(c) provides, "Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards that have been approved by the Chief of the Division of Apprenticeship Standards and who are parties to written apprentice agreements under Chapter 4 (commencing with Section 3070) of Division 3 are eligible to be employed at the apprentice wage rate on public works." California has its own apprenticeship program standards. (8 C.C.R. § 212.)

[21] (8 C.C.R. § 208(c).)

projects funded in whole or in part with Federal funds.[22] Perhaps more importantly, CDIR and DLSE's view assaults the very purpose of the Fitzgerald Act: the creation of national standards for apprenticeship to create a national market for apprentices and journeymen trained through that national system. By acting to adopt standards that deprive apprentices in federally approved programs the opportunity to work in California (unless they submit to the California imposed-standard of restricted programs), California interferes with the fundamental "preference or right" created by the Fitzgerald Act; the right to participate in a national apprenticeship system. Instead of recognizing OATELS' registered apprentices on public works projects in California, the CDIR maintains that, in order for the lower apprenticeship wage to apply to a public works project, the public works project must be *controlled* by, carried out by, and/or awarded by the federal government. (*See Southern California Labor Management Operating Engineers Contract Compliance Committee v. Aubry*, 54 Cal. App. 4th 873 (1997) [California Court of Appeal found a dam project was not subject to California's prevailing wage law because it was controlled and carried out by a federal agency].).

3. In Enforcing the Discriminatory Regulations Defendants are Acting As Regulators and not as a Market Participant.

In grounding their approval or disapproval of apprenticeship programs on Labor Code Section 3075, Defendants are acting as regulators rather than purchasers of goods or services in the marketplace. The "market participant doctrine" permits state actors who are purchasers or sellers in the marketplace to avoid some constitutional and federal statutory limits on their actions[23]. (*e.g., Building and Construction Trades Council v. Associated Builders and Contractors* 113 S. Ct. 1190 [market participant rule avoids obligations imposed by National

[22] See CFR § 29.12; Oct. 4, 2004 Letter from Anthony Swoope to CDIR. (Exh. B to J. Nutter Decl., Compendium Exh. 1.)

[23] In determining if a State acts as a regulator or market participant courts look to determine whether, among other things, the challenged restrictions are imposed as a result of the state's participation in the marketplace or whether the state seeks to leverage a regulatory result in a marketplace where it is not a participant. (*Tri-M Group, supra* at 7-8.) Courts also look at whether the conditions are imposed by contract or by an administrative system that includes the ability to impose penalties, which suggest the conditions arise from the state's police power rather than its power to contract. (*Id*.)

Labor Relations Act]; *Tri-M Group, LLC v. Thomas B. Sharp,* 2011 U.S. App. LEXIS 5660 (March 21, 2011, Third Cir.).)

However, the "market participant" exception to regulatory activity does not apply here where, among other things, the statutory scheme applies to any project, even those where the state is not a market actor. (*Wyoming v. Oklahoma*, 502 U.S. 437, 456 (1992).)

4. As the Sole Agency Authorized to Approve Apprenticeship Programs on Projects in California Involving a Federal Purpose, OATELS' Authority and Determinations Control.

OATELS determines "Federal purpose" in 29 C.F.R. 29.2(k) as requiring any public works project that involves apprentices and receives a federal benefit to accept apprentices from programs registered with OATELS. California, applying a different standard, requires apprentices to be certified by DAS in order to receive the apprenticeship wage rate on public works projects in California, including public works projects receiving federal money and/or involving other apprenticeship rights and benefits.[24] The facts in this case and published authority demonstrate that California will only permit a public works project to be subject to federal wage requirements if the federally funded project is controlled by, carried out by, and awarded by the federal government.[25]

Because OATELS is the only agency authorized to certify apprenticeship programs on public works projects with a Federal purpose, it is the agency charged with enforcing the statute. When a statute is silent or unclear with respect to a particular issue, the Courts must defer to the reasonable interpretation of the agency responsible for administering the statute. (*Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).) In such a case, the Court may not substitute its judgment for that of the agency as long as the agency has adopted a reasonable construction of the statute. (*Id.* 467 U.S. at 845; *INS v. Jong Ha Wang*, 450 U.S. 139, 144 (1981).)

[24] (8 C.C.R. § 16001(a) and (b).)

[25] *Lili Valley Water System Improvement Project, City of West Point*, PW 2008-030 (CDIR, Nov. 3, 2008) (project funded by federal grant and controlled by federal government is not subject to state prevailing wage law); *Casmalia Resources Hazardous Waste Management Facility*, PW 2001-046 (CDIR, Mar. 30, 2005) (California prevailing wage law not applicable where federal government maintains complete and exclusive control over CERCLA remediation project.)

The Court should defer to the agency's interpretation even if the agency could also have reached another reasonable interpretation, or "even if we [the Court] would have reached a different result had we construed the statute initially." (*Columbia Basin Land Protection Association v. Schlesinger*, 643 F.2d 585, 600 (9th Cir.1981).)

The agency's interpretation is especially weighty where statutory construction involves "reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation (depends) upon more than ordinary knowledge respecting the matters subjected to agency regulations." (*Chevron, U.S.A., supra*, 467 U.S. 845, *quoting United States v. Shimer*, 367 U.S. 374, 382 (1961). *See also*, *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), finding a federal administrative agency's interpretation [of a federal statute] warrants deference even when expressed less formally than a regulation, as long as that agency has a delegated authority to administer the statute and the views are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come before a judge.)

Since OATELS is the agency charged with enforcing 29 C.F.R. Part 29, its interpretation of what a "federal purpose" is controls. To the extent the state's regulations conflict with federal regulations, the state's regulations are nullified.[26] State law is nullified to the extent that it actually conflicts with federal law. (*Hillsborough County v. Automated Medical Labs.*, 471 U.S. 707, 713 (1985) (Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility.").) Federal courts owe no deference to state agency's interpretation of federal law that the state agency is not charged with enforcing. (*Cf. Perry v. Dowling*, 95 F.3d 231, 236 (2d Cir.1996), stating that when a state agency interprets a federal statute deference is not appropriate.)

Federal regulations make clear that, at a minimum, Federal purpose means the use of *any* federal money or *any* federal benefit on a project that involves apprentices. To the extent California law conflicts with the supervising federal agency's interpretation, the federal agency's

[26] U.S. Const., art. VI.

application of law controls. *A fortiori*, when the agency's interpretation and administrative action based on such interpretation has not been timely and successfully challenged, much less overturned in court, it becomes governing federal law. (See *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel*, 567 U.S. 837, 1844-45 (1984).)

5. The Chicago Park, Marysville High School, and Stockton Joint use Gym Projects All Have a "Federal Purpose" Because They Were Funded By Build America Bonds and Municipal Bonds, Which Provide Direct and Indirect Federal Subsidies to those Projects.

a. The Chicago Park and Stockton Joint-Use Projects Benefit From a Direct Federal Subsidy.

According to Michael Genest, former Director of the California Department of Finance, the Chicago Park and Stockton Joint Use Projects were funded, in part, with federal funds.[27] (Genest Decl. ¶ 4, 10, Compendium Exh. 5.) Specifically, the Treasurer of the State of California sold Build America Bonds, a portion of the proceeds of which were used to pay for the Chicago Park and the Stockton Joint-Use Projects. Build America Bonds ("BABs") are a new type of municipal bond created by the U.S. treasury in an effort to bring more capital into the municipal bond market during the financial crisis of 2008-2009. (*Id.* at ¶ 8.) BABs are taxable bonds, but the U.S. Treasury pays a direct subsidy to the municipal lender to cover the differential interest costs associated with the taxable nature of the bond. This allows more investors to purchase municipal bonds, since there are substantial segments of the bond market that traditionally do not participate in the tax exempt market. The United States Treasury describes the BABs subsidy as follows:

> "BABs provide a deeper federal subsidy to state and local governments (equal to 35 percent of the taxable borrowing cost) than traditional tax-exempt bonds which leads to lower net borrowing costs for state and local governments. This feature also makes Build America Bonds attractive to a broader group of investors than typically invest in more traditional state and local tax-exempt bonds. The capital projects these bonds fund include work on public buildings, courthouses, schools, transportation infrastructure, government hospitals, public safety facilities and

[27] *See also* http://www.sos.ca.gov/elections/vig_06/general_06/pdf/proposition_1d/entire_prop1d.pdf, last visited on January 24, 2011.

> equipment, water and sewer projects, environmental projects, energy projects, government housing projects and public utilities."[28]

(Genest Decl. ¶ 9, Compendium, Exh. 5.) Therefore, since both the Chicago Park Project and Stockton Joint-Use Gym Project were funded by the proceeds of BAB bond sales and BAB bonds provide a direct subsidy to the State of California, these projects had a financial "Federal purpose" in addition to the purposes surrounding apprenticeship welfare and opportunity.

b. The Marysville High School Project Benefits From a Federal Subsidy.

The authorized source of funding for the Marysville High School Project are municipal bonds sold by the Treasurer of the State of California. (Genest Decl. ¶ 4, Compendium Exh. 5.) These municipal bonds benefit from a substantial federal subsidy. Eric Solomon, United States Treasury Department Assistant Secretary for Tax Policy, described the federal subsidy provided by municipal bonds in his testimony to the United States House of Representatives Oversight Subcommittee on Domestic Policy on Tax Exempt Bond Financing, as follows: "[t]he Federal government provides an important Federal subsidy for tax-exempt bond financing through the Federal income tax exemption for interest paid on State or local bonds under Section 103 of the Internal Revenue Code (the "Code"),[29] which enables State and local governments to finance public infrastructure projects and other public-purpose activities at lower costs."[30] (*Id.* at ¶6.)

According to Mr. Genest, from a public policy and financial perspective, tax-free municipal bonds provide an imputed subsidy to state and local governments. The magnitude of this subsidy is equal to the difference in the interest rates that must be offered to buyers of the two types of bonds. For a bond buyer with income tax obligations to both the federal government and the State of California, a tax exempt bond provides a benefit equal to the amount of federal and state income tax that he would have had to pay over the life of the bond if the bond were taxable. This results in tax exempt bonds commanding lower interest rates than taxable bonds.[31] Selling

[28] See also http://www.treasury.gov/initiatives/recovery/Pages/babs.aspx (last visited on February 4, 2011).

[29] (26 U.S.C. § 103.)

[30] *See* http://www.treasury.gov/press-center/press-releases/Pages/HP601.aspx (last visited on January 24, 2011).

[31] Market rates for bonds are affected by a variety of factors unrelated to tax policy such as the maturity of the bond (bond buyers generally demand higher rates when they have to wait longer to receive their principal back), the amount

bonds at a lower interest rate means that the State of California pays less for financing a given project. This savings constitutes the federal subsidy inherent in the federal government permitting California to sell tax exempt bonds.

Because the authorized source of funding for the Marysville High School Project is the sale of a municipal bond which provides an imputed subsidy to the State, the Marysville High School Project involves a "Federal purpose." Therefore, because I-TAP is an OATELS-recognized apprenticeship program, I-TAP's apprentices must be acknowledged by California as apprentices entitled to work at the apprentice wage rates on the Chicago Park Project, the Marysville High School Project, the Stockton Joint use Gym Project and all projects in the State of California funded directly or indirectly with federal money, assistance or benefit. (29 C.F.R. 29.2.)

6. The Chicago Park, Marysville High School, and Stockton Joint-Use Gym Projects All Have a "Federal Purpose" Because They Involve "Arrangements" "Preferences and Rights" "Pertaining" to and "Dealing with" Apprenticeship.

California adopted its apprenticeship scheme pursuant to the Fitzgerald Act and was duly recognized by the D.O.L. pursuant to its provisions. (RFJN, Exh. B, p.5.) At the time of that recognition California's apprenticeship standards were "substantively similar" to the standards adopted by the D.O.L. (*California Division of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316, 320 (1997).) Once a state has been recognized the D.O.L. continues to ensure that it conforms to the federal standard. (RFJN, Exh. B, p.5.) A state that departs from that standard is subject to derecognition pursuant to 29 C.F.R. 29.14. (*Inland Pacific v. Dear*, *supra*.) Such derecognition occurred here.

California was derecognized because the California program did not comply with the national standards established under the Fitzgerald Act. Indeed, the derecognition was based on the determination that the "needs test" "*limits apprenticeship opportunity rather than safeguards*

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of risk of non-payment perceived to exist with regard to a given issue (generally reflected in the bond's rating) and various market conditions. However, with all of these factors held constant, a tax exempt bond will always sell for a lower rate of return than a taxable bond.

the welfare of apprentices[32]. (RFJN, Exh. B, p.32.) The Fitzgerald Act and regulations promulgated under it were adopted to create a national standard for the training and employment of apprentices. (29 U.S.C. § 50; RFJN, Exh.B, p.19.) Those standards create a "right" and a "preference" to be provided to apprentices – a right and preference that apprentices in California are now denied. The Fitzgerald Act cannot be read as encouraging (or even tolerating) states and the federal government to create fifty one separate standards for the training and employment of apprentices. Rather, the stated goal of the Act is to create a single, fundamental national standard, which states are permitted to supplement but not depart from or contradict. The maintenance of that basic standard for apprenticeship training is the chief "Federal purpose" underlying enactment of the Fitzgerald Act.[33] This overriding Federal purpose is fully frustrated by California's enforcement (in the Chicago Park, Marysville High School and Stockton Joint use Gym Projects) of the very apprenticeship standards that resulted in Defendants' de-recognition.

7. California Is Prohibited From Enacting Statutes in Conflict with the Fitzgerald Act, Its Regulations and Objectives.

Although several cases hold that the Fitzgerald Act does not preempt States from enacting separate but complementary apprenticeship schemes, (*Siuslaw Concrete Constr. Co. v. Washington Dep't of Transportation*, 784 F.2d 952, 956-958 (9th Cir. 1986); *Associated Builders and Contractors v. James Curry*, 797 F.Supp. 1528, 1538 (Cal. N.D. 1992).) all of those cases were decided before the U.S. DOL acted to derecognize California CDIR and CAC. These pre-derecognition cases are grounded on a reading of the Fitzgerald Act that permits states to engage in "supplemental" regulation of the "basic" standards established by the U.S. DOL. *Curry, supra*

[32] The stated purpose of the Fitzgerald Act is to 'safeguard the welfare of apprentices." (29 U.S.C. §50; 29 C.F.R. §29.1(b), emphasis added.) The Fitzgerald Act further was intended to bring employers and labor unions together for the benefit of apprentices and the public. (*Gregory Electric, Inc. v. U.S. Department of Labor*, 268 F.Supp. 987, 993 (1967) ("The wording of the National Apprenticeship Act mandating the Secretary to `safeguard the welfare of apprentices' leads to the conclusion that this type of statutory and regulatory scheme was intended to promote the interest of laborers and not contractors.").) (RFJN, Exh. B, p.28, citing HR Report 75-945 at 2-3 (June 7, 1973).)

[33] RFJN, Exh.B, p.19, citing Sen. Rpt. 75-1078 at 3 (July 22 1937) ["The thorough training of skilled workmen is of paramount importance to the employer, to labor, to apprentices, and to the public. To assure that type of training, the Federal committee has, with the advice of employers, labor and educators, evolved certain minimum standards for apprenticeship."]

at 1538. Apparently, no court has yet to consider a case where, as here, a state has adopted apprenticeship standards that violate a basic national apprenticeship standard congress intended to establish, and that violation has been identified and adjudicated by the U.S. DOL as the responsible enforcement agency. (RFJN, Exh. A, B.)

Both *Siulsaw* and *Curry* stand only for the proposition that the Fitzgerald Act does not completely occupy the field and that states may be authorized to enact apprenticeship standards that supplement the "basic" federal standard. That sort of independent, supplemental regulation "falls within the scope of a state's traditional police powers." (*Curry, supra* at 1538, citing *Siuslaw, supra* at 958.) Nothing in case law suggests that a state has authority to adopt apprenticeship standards that are even arguably inconsistent with the US. DOL standards and the fundamental objective of the Fitzgerald Act to promote apprenticeship opportunities and safeguard the welfare of apprentices, much less apply apprenticeship standards which have been determined to violate the letter and spirit of the Fitzgerald Act.[34] Indeed, the *Siuslaw* case itself recognized:

> Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulation is a physical impossibility … or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of congress." [*Siuslaw, supra* at 153 quoting *Hillsborough County Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 105 S. Ct. 2371, 2375 (1985).]

Here, the determination that California's "needs test" is an obstacle to the accomplishment of federal objectives, has already been made, appealed and is both well-reasoned and well-seasoned.[35]

8. Defendants' Conduct Should Be Enjoined Because It Impermissibly Burdens Interstate Commerce and Offends Basic Constitutional Protections.

[34] OATELS' power and obligation to ensure that state laws comply with the basic standards created under the Fitzgerald Act is well recognized. See *Southern California Chapter of Associated Builders and Contractors, Inc. Joint Apprenticeship Committee v. California Apprenticeship Counsel*, 4 Cal.4th 422, 433 (1992) [the California Supreme Court discussed the requirements of §29.12(a) and stated "... the Secretary, at regular intervals, reviews a SAC state's statutes and regulations for conformity to the Fitzgerald Act and its implementing regulations."].)

[35] Plaintiffs can find no indication that either the CDIR or the CAC acted to challenge the 2007 confirmation of the 2005 decision (affirming the D.O.L. derecognition) by timely court action. It cannot do so now. (28 U.S.C. §2344.)

a. Defendants Conduct Burdens Interstate Commerce.

The U.S. D.O.L proceedings conclusively determined that California Labor Code §3075(b) fails to conform with Fitzgerald Act because it operates to discriminate against new apprenticeship programs, to subordinate the interests of apprentices to the interests of existing apprenticeship programs, and to improperly restrict, rather than promote, apprenticeship opportunities for workers contrary to the letter and spirit of the Fitzgerald Act without serving its ostensible purpose of protecting apprentices in California. (RFJN, Exh. B, p.31-32.)

Thus, in enforcing California Labor Code §3075(b) in combination with California's prevailing wage law, California Labor Code §1775.5, Defendants' actions constitute unlawful regulation rather than "market participation" by the State of California. (*Dillingham Const. N.A., Inc. v. County of Sonoma*, 190 F.3d 1034, 1038 (9th Cir. 1999).)

Defendants' unauthorized and unlawful application of California Labor Code §3075(b), in combination with California Labor Code §1775.5, effectively bars apprentices, such as plaintiff Brandin Moyer from participating in federally certified apprenticeship programs such as that operated by Plaintiff I-TAP, and from employment on public works projects in California serving a Federal purpose. As a result, Defendants' conduct constitutes an unjustifiable interference with interstate commerce in violation of the Constitution's Commerce Clause (art. I, § 8, cl. 3) because it prevents thoroughly qualified apprentices from programs approved by the U.S. DOL in the other forty-nine states from pursuing public work employment opportunities within California. (See, *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 98, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994) and *Tri-M Group, L.L.C. v. Thomas B. Sharp, Secretary, Delaware Department of Labor* 2011 U.S.App. LEXIS 5560 (3rd.Cir., opinion filed March 21, 2011).)

b. Defendants' Unjustifiable Discrimination Denies Plaintiffs' Due Process and Equal Protection of the Law.

California Labor Code §3075(b) operates to "discriminate against new [apprenticeship] programs" and their enrollees (RFJN, Exhibit B, p.31-2) Yet Defendants cite this section as the ultimate authority and thereby deny individuals seeking the opportunity to work as apprentices and OATELS-certified apprenticeship programs from participating in public works contracting in

California. Defendants' actions violate plaintiffs' rights to equal protection and due process of law as follows:

i. California's prevailing wage law – allowing differential pay only for apprentices enrolled in a California certified program, together with the requirement to employ a specified number of apprentices on each project and the award of contracts through the competitive bidding process requires contractors to use only California-certified apprentices.

ii. Defendants' refusal to approve apprentices enrolled in federally certified apprenticeship programs for public works projects, even though a federally certified program is of equal standard and quality as a state certified program, precludes federally certified apprenticeship programs and their enrollees from participating in public works projects in California.

iii. I-TAP and all other federally certified programs have been certified by OATELS as complying with the federal standards for apprenticeship training. (Nutter Decl. ¶ 3-5, Compendium Exh. 3; C. Nutter Decl. ¶3, Compendium Exh. 4.) I-TAP's apprenticeship program is equal or superior to state-certified apprenticeship programs as I-TAP is certified by California to provide classroom education to trainees and journeymen in the electrical trades and provides exactly the same classroom education to apprentices enrolled in I-TAP's program as it does to trainees and journeymen. (N. Nutter Decl. ¶ 5-8, Compendium Exh. 3; Moyer Decl. ¶5, Compendium, Exh. 2).)

California Labor Code §3075(b) and Defendants' application and enforcement of it in combination with California's prevailing wage law, California Labor Code §1775.5, has no rational connection to public health, safety, or welfare, or any other legitimate governmental interest and, on that basis, deprives plaintiffs of liberty – the right to pursue a lawful occupation (and the right to travel across state lines to do so) – without due process of law and in denial of equal protection of the law and rights secured by the 14th Amendment to the Constitution.

Defendants are enforcing a classification, established in Labor Code Section 3075, that has no rational basis. Defendants favor apprenticeship programs already certified under state law before the "need" requirement was put into California Labor Code Section 3075. In contrast,

programs certified under federal law that provide the same or superior training to apprentices are economically disfavored and burdened with rules so restrictive that they effectively prevent individuals and businesses from participating in California's economy through apprenticeship programs operating in the state.

Defendants' classification and punitive treatment of the disfavored class serves no rational governmental purpose. The classification and resulting disfavored treatment deprives plaintiffs of their rights to equal protection of the laws under the Equal Protection Clause of Fourteenth Amendment of the United States Constitution. This action deprives plaintiffs of their federal rights under color of state law in violation of 42 U.S.C. § 1983.

Defendants' past and continuing deprivation of Plaintiffs' rights, privileges and immunities secured by the Constitution and other federal law under color of state law violates Plaintiffs' civil rights and entitling Plaintiffs to injunctive redress pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1988.

B. Plaintiffs Will Suffer Irreparable Injury if Relief is Denied.

Defendants have refused give effect to the approval and registration of I-TAP by OATELS by insisting that only apprentices certified by the DAS may be used on the three projects at issue because they are "public works" projects under California law. The CDIR's refusal to allow I-TAP apprentices on public works projects with a Federal purpose effectively precludes all I-TAP apprentices from working on any public works project in the State of California because the financial incentives to hire an apprentice from a federally approved program are entirely eliminated.

After all, approved apprentices employed on a public works job in California can be paid at a rate substantially less than the wage rate of an accomplished journeyman craftsman in the same trade. If the apprentice on a public works job is not enrolled in a California- approved program, that apprentice must be paid the higher journeyman rate of pay as set forth in state law.[36] There is

[36] California Labor Code Section 1777.5 provides, "Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards that have been approved by the Chief of the Division of Apprenticeship Standards and who are parties to written apprenticeship agreements under Chapter 4 of Division 3 are eligible to be employed at the apprentice wage rate on public works."

no incentive to hire an apprentice enrolled in the I-TAP program when the employer can get a fully trained journeyman craftsman for the same salary.

Moreover, the employer of an apprentice can contribute fringe training contributions to an approved apprenticeship training program through deductions from the worker's hourly pay, which is considered a part of the worker's compensation. However, under California law, if contributions are made to an apprenticeship training program that has not been approved by DAS, any contribution must come from the employer's pocket, over and above the workmen's statutory hourly pay.[37] Therefore, there is no incentive for employers to contribute fringe training contributions to I-TAP since the State of California refuses to acknowledge its OATELS' approval.

The irreparable injury that Plaintiffs suffer, and will continue to suffer, if Defendants' conduct is not enjoined is that the state will not allow I-TAP to put their apprentices on public works projects at apprentice rather than journeyman wages because Defendants refuse to acknowledge OATELS' approval, and contractors will therefore not use ITAP's apprentices. (*Inland Empire Chapter of Associated Gen. Contractors of Am. v. Dear*, 77 F.3d 296, 299 (9th Cir. 1996); *See also ABC Nat'l Line Erection Apprenticeship Training Trust v. Aubry*, 68 F.3d 343, 346 (9th Cir. 1995).) As a result I-TAP will be forced out of business because no one will use it as an apprenticeship program and/or employ its apprentices. (N. Nutter Decl. ¶ 10-18, Compendium Exh. 3; C. Nutter Decl. ¶ 6-10, Compendium Exh.4; Smith Decl. II, P4-5, Compendium Exh. 8.) Defendants conduct works similar irreparable injury on apprentices: the number of apprenticeship programs in the state are reduced. This adverse effect on apprentices was basis upon which the U.S. DOL's de-recognition of the CDIR and CAC was upheld. (RFJN, Exh A, B.) More immediately, the transition from the ITAP program to a program approved by the CDIR, has caused apprentices to terminate employment and sacrifice training already received from ITAP. (Moyer Decl. ¶5-9; Clark Decl. ¶5.)

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[37] California Labor Code Section 1777.5 requires every public works contractor and subcontractor to make training fund contributions in the amount published by the CDIR for every apprenticeable craft reported on the certified payroll.

Nutter Electric is also faced with continuing injury. In order to compete for public works jobs with required quotas of apprentices from California approved apprenticeship programs, Nutter Electric will be forced either to hire apprentices from programs which provide classroom instruction and training which Nutter Electric considers inferior to that of I-TAP or to pay I-TAP's federally certified apprentices at economically unfeasible journeyman rates.

C. A Balancing Of The Hardships Favors Plaintiffs.

For years following the derecognition of the CDIR and CAC, Defendants abided by the supremacy of the Fitzgerald Act and applicable regulations that Plaintiffs rely upon. (C. Nutter Decl. ¶11-12, Compendium Exh. 4; P. Smith Decl. ¶ 5-6, Compendium Exh. ¶8; Baker Decl. ¶10, Compendium Exh1; N. Nutter Decl. ¶ 8, Compendium Exh.3.) Continuing to defer to the Fitzgerald Act's control over public works projects with a Federal purpose will have no adverse impact whatsoever on the State of California. There is no adverse financial consequence to California in obeying the controlling federal law and there is no risk of poorly trained-apprentices working on public works projects within the state as all apprentices will have been trained in accordance with the national standards promulgated and enforced by OATELS as contemplated by congress when the Fitzgerald Act became the law of the land.

Thus, Defendants will not be prejudiced one iota by an order that reestablishes a status quo that Defendants themselves fostered and abided by for many years following the DOL's derecognition of the CDIR's and CAC's authority to regulate apprenticeship programs and standards.

V. CONCLUSION

Based on the foregoing facts and authorities, Plaintiffs request a preliminary injunction and a permanent injunction enjoining and prohibiting Defendants, and each of them, and their respective officers, directors, agents, attorneys, servants and employees, and all persons acting under, in concert with, or for them as follows:

(a) From refusing to recognize and comply with the United State Department of Labor Administrative Review Board's "Final Decision and Order" of January 31, 2007 and the U.S.

Department of Labor's March 2, 2007 public notice, pursuant to 29 C.F.R. 29.13(d), that "[T]he CDIR and the CAC no longer have authority to register or oversee apprenticeship programs for 'Federal purposes' " (72 F.R. 9590).

(b) From enforcing California Code of Regulations Section 16001 with respect to projects involving "any Federal financial or other assistance, benefit, privilege, contribution, allowance, exemption, preference or right pertaining to apprenticeship;"

(c) From enforcing California Labor Code Section 1777.5 with respect to apprentices from federally approved apprenticeship training programs working on public works projects with a Federal purpose;

(d) From refusing to enforce 29 C.F.R. Part 29 with respect to what constitutes a "Federal purpose;"

(e) From refusing to acknowledge that Plaintiff I-TAP is an approved apprenticeship program for all public works projects with a "Federal purpose" in California;

(f) From refusing to allow contractors to pay Plaintiff I-TAP's apprentices at apprentice prevailing wage rates rather than journeyman prevailing wage rates on public works projects in California with any Federal purpose;

(g) From refusing to allow Plaintiff I-TAP to receive fringe training contributions as an approved program on such projects;

(h) Directing Defendants to recognize Brandin Moyer and all other similarly situated electrical tradesmen enrolled in federally certified apprenticeship programs as "apprentices" entitled to all of the "assistance, benefits, privileges, contributions, allowances, exemptions, preferences and/or rights pertaining to apprenticeship" (29 C.F.R. § 29.2) on public works project in California that are accorded to "apprentices" in apprenticeship programs certified by DAS pursuant to the provisions of the California Labor Code;

(i) Directing Defendants to rescind the Civil Wage and Penalty Assessment issued in Case No. 40-26553/254 as against Plaintiff Harold E. Nutter, Inc.; and

(j) Directing Defendants to refrain from purporting to enforce any penalties,

assessments or sanctions against Plaintiff Harold E. Nutter, Inc. or any other contractor on the grounds that apprentices participating in I-TAP's apprenticeship training program, or any other federally certified program, do not qualify for payment of apprentice prevailing wage rates pursuant to California Labor Code §1777.5.

Respectfully submitted.

Dated: May 19, 2011

weintraub genshlea chediak
a law corporation

By: /s/ - Zachary Smith
Zachary Smith
Attorney for Plaintiffs