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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.

Civil Case No. 2:11-CV-01047-GEB-DAD

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' REQUEST FOR PRELIMINARY INJUNCTION

Date: July 11, 2011
Time: 9:00 A.M.
Judge: Hon. Garland E. Burrell, Jr.

(Complaint Filed: April 18, 2011)

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DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' REQUEST FOR PRELIMINARY INJUNCTION

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should deny the request for a preliminary injunction because Plaintiffs have no likelihood of success on the merits and there is no showing of irreparable injury. Defendants California Department of Industrial Relations, Christine Baker, Glen Forman, and Julie Su ("DIR") have not violated the Fitzgerald Act (29 U.S.C. § 50) or its regulations, and there is no private right of action to enforce them. Likewise, Defendants have not violated the commerce or equal protection clauses of the United States Constitution.

This case concerns Plaintiffs Independent Training and Apprenticeship Program ("I-TAP"), Brandin Moyer and Harold E. Nutter, Inc.'s ("Nutter Electric") effort to void California law: they seek to require California to allow payment of wages below the prevailing wage to apprentices that have federal but not state approval. Plaintiffs' claims are based on unreasonable readings of federal regulations concerning apprentices and an attempt to preempt clear state law. Contrary to Plaintiffs' assertions, it is properly registered California apprentices who will be denied employment and the contractors who hire them who will not be able to bid competitively if they comply with California law and others do not. Plaintiff Nutter Electric is able to use California apprentices just as other electrical contractors do and is not harmed by the state law.

As a long-standing area of state regulation, regulation of apprentice minimum wages does not improperly interfere with the National Apprenticeship Act 29 U.S.C. § 50 ("the Fitzgerald Act"). The United States Supreme Court has already considered and rejected the argument that state regulation of apprentice wages on pubic works for apprentices in programs that voluntarily seek state approval has an improper connection with ERISA plans and are preempted under ERISA's express preemption provision. There is even less indication that the Congress intended the Fitzgerald Act to displace traditional state regulation of apprenticeship. Moreover, there is no indication that Congress intended that private parties enforce the Fitzgerald Act. Plaintiffs are trying to do something Congress never intended by asking this court to turn Federal Department of Labor ("DOL") approval of an apprenticeship program into approval

for state purposes and not just for federal purposes. Plaintiffs' claims of violation of equal protection and due process must fail because the state has a legitimate and rational basis for distinguishing between programs that have state approval and those that do not on state public works. Finally, California law does not distinguish between programs based in California and those outside.

II. BACKGROUND

1. Apprenticeship In the Regulatory Scheme Enacted By the Legislature and Congress

State-approved apprenticeship derives from a unique, historical relationship between a master, or employer, and apprentice. The apprentice agrees to work for the master often for little or no wages in return for the promise of training. This has long been an area where the government has acted to protect the apprentice. The English Statute of Artificers (1563) addressed the length of an apprenticeship, setting it at seven years. W.J. Rorabaugh, The Craft Apprentice: From Franklin To The Machine Age In America 4 (1986). In California, regulation began as a form of child protection. (See California Civil Code sections 264-276, Master and Apprentice**,** enacted in 1872, amended by Code Am. 1880, c. 41, p. 5. subsequently repealed and superseded by Stats. 1937, ch. 90). Over time, the regulation of apprenticeship evolved and took the form of establishing "standards" to fix the scope of promised training and set out the parties' obligations.

In 1937, Congress first enacted legislation, known formally as the National Apprenticeship Act ("the Fitzgerald Act"), 29 U.S.C § 50 (1994), to encourage the establishment of modern apprenticeship.[1] California adopted the Shelley-Maloney Apprentice Labor Standards Act in 1939 (Labor Code section 3070 et seq.[2]). Modern Apprenticeship combines on-the-job training with related and supplemental classroom instruction.

A state approved Apprenticeship program is operated by an apprentice committee, which may be

[1] The Fitzgerald Act provides: "The Secretary of Labor is 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. § 50.

[2] All subsequent statutory references are to the California Labor Code unless noted otherwise.

either joint or unilateral. Section 3075, and California Code of Regulations ("C.C.R."), title 8, § 205(g). A joint program has union participation, while a unilateral program, such as the program operated by I-TAP, does not. In California, there are approximately 29,000 apprentices in 325 joint programs in the building trades, and 3500 apprentices in 53 unilateral programs. Declaration of Glen Forman ("Dec. Forman"), p. 2, ¶9. An apprentice who enters a program signs an apprentice agreement, which adopts the program's apprentice standards. Sections 3077, 3078. The standards are the written document setting out the terms and conditions of the apprenticeship, including selection of apprentices, training, working conditions and so on. In addition, on public works projects, contractors who do not participate in apprenticeship programs are required to request apprentices and where possible employ apprentices on public works. 8 C.C.R. § 230.1, Section 1777.5.

The implementing regulations for the Fitzgerald Act were not adopted until 1977 and they propose to, inter alia, "safeguard the welfare of apprentices…." 29 C.F.R. § 29.1 et seq. An example of cooperative federalism, the regulations provided that the federal Bureau of Apprenticeship Training ("BAT"), as it was known at the time, could delegate its approval power to states with their own apprenticeship laws by "recognizing" a "State Apprenticeship Agency or Council" ("SAC"). California was certified by the BAT as a SAC state in 1978.

An employer who wishes to have an apprenticeship program in California is not required to have a state license.[3] A program may voluntarily request state approval. State approval brings the state-imprimatur on the graduates, and benefits to the committee sponsoring the training and contractors employing the apprentices. It is permissible to operate an apprenticeship program that is not state-approved, or to work under an apprentice agreement that is not registered with the State. However,

[3] The Court noted in *Calif. Div. of Labor Stds. Enf. v. Dillingham*, 519 U.S. 316 at 332, 117 S.Ct. 832 at 841 (1997)("Dillingham"): "No apprenticeship program is required by California law to meet California's standards. See *Southern Cal. ABC v. CAC*, 4 Cal.4th 422, at 428, 14 Cal.Rptr.2d, at 493, 841 P.2d, at 1013 (1992). If a contractor chooses to hire apprentices for a public works project, it need not hire them from approved programs (although if it does not, it must pay these apprentices journeyman wages). So, apprenticeship programs that have not gained CAC approval may still supply public works contractors with apprentices. Unapproved apprenticeship programs also may supply apprentices to private contractors [footnote omitted]. The effect of § 1777.5 on ERISA apprenticeship programs; therefore, is merely to provide some measure of economic incentive to comport with the State's requirements, at least to the extent that those programs seek to provide apprentices who can work on public works projects at a lower wage."

noncompliance with state requirements does forfeit the benefits afforded under the state apprenticeship scheme. See e.g. California Education Code § 8152.

Since 1939, the Legislature has entrusted the welfare and promotion of apprenticeship to the Division of Apprenticeship Standards ("DAS"), and, within that, to the California Apprenticeship Council ("CAC") that has expressly been authorized to: "establish standards for minimum wages, maximum hours, and working conditions for apprentice agreements …" California has long had minimum labor standards for approved apprenticeship programs.

California establishes on a trade-by-trade basis for various geographic areas the minimum wages that must be paid to workers on public works projects funded or carried out by the state. *O.G. Sansone Co. v. Dept. of Transportation*, 55 Cal.App.3d 434, 458 n.4 and accompanying text, 127 Cal.Rptr. 799 (1976). The California prevailing wage law allows a wage for registered apprentices in approved apprenticeship programs different from that applicable to fully-qualified journey-level workers. This wage is set at less than the wage for fully trained workers in the trade and varies with the apprentices' levels of progress through the multi-year apprenticeship program. Labor Code section 1777.5. Currently, the Director of Industrial Relations publishes an apprentice wage schedule. Dec. Forman, p. 1 ¶1. This schedule lists the wages determined to be prevailing by trade and geographic area, as is done with the journey level rates. *Id.*

2. The Regulation Of Apprentices On Public Work

At the time California's Shelly-Maloney Act was adopted in 1939, California spelled out apprentice wages on public works in the statute: The apprentice was to be paid not less than 25% of the Journey level wage, with 15% increases every six months. Stats. 1939, ch. 971. The Legislature no longer spells out the apprentice wage in statute; rather, the wage is set in regulations of the CAC and on public works is set by the Director of Industrial Relations. Labor Code § 1770, 8 C.C.R. § 208. For a discussion of the purpose of the prevailing wage law see generally *Lusardi Construction Co. v. Aubry*, 1 Cal. 4th 976, 4 Cal. Rptr. 2d 837 (1992)(to protect and benefit employees on public works projects).

California also requires contractors on state public works projects to pay a training fund contribution to the California Apprenticeship Council to support apprenticeship. Labor Code section 1777.5(m). Contractors may take a credit against this obligation for payments to state approved

apprenticeship programs but not programs that have federal approval only. *Id.* Contractors may take credit for employer payments for training, whether approved apprenticeship or some other type of training, so long as those employer payments met the criteria set out in Labor Code section 1773.1. Contributions irrevocably made by an employer to a trustee or third person pursuant to a plan, fund or program are included as employer payments under section 1773.1.

III. SUMMARY OF FACTS

Plaintiffs' complaint alleges that in 2010 contractors were advised that on three state public works projects I-TAP apprentices could not be paid the state apprentice wage because they lacked registration in a state approved program. Plaintiffs also allege that contractors were advised that contributions to I-TAP could not be credited against the obligation to pay training funds to the California Apprenticeship Council under Labor Code section 1777.5.

The three projects in question were awarded by **state** awarding bodies. They were not federally funded or managed. See Plaintiffs' Declaration of the Michael Genest, p. 4, ¶ 10. All three projects were carried out by state awarding bodies. Plaintiffs allege only that two of the projects, Chicago Park and Stockton Joint Use, were funded in part with Build America Bonds and that the federal government paid a subsidy to the municipal lender to cover the differential interest associated with the taxable nature of the bond. (Plaintiff's Points and Authorities ("P&A"), p. 21, ln. 10-26). A third project, Marysville High School, is alleged to benefit from a federal subsidy because it was financed with bonds that are tax exempt under federal tax law.

On one of these projects, Nutter Electric was issued a Civil Wage and Penalty Assessment ("CWPA") by the California Division of Labor Standards Enforcement ("DLSE") for failing to pay the prevailing wage to some of its employees. The workers in question were not state approved apprentices but were in the federally approved I-TAP program. Nutter Electric filed a request for review and that matter is pending before a hearing officer on behalf of the Director of Industrial Relations under Labor Code section 1742.

Rather than present its argument concerning federal apprentices to the DIR hearing officer, Nutter Electric and the other Plaintiffs filed this lawsuit seeking to enjoin California from limiting the apprentice

wage to those apprentices in programs approved by the DAS, and also seeking to require California to allow payment of below the prevailing wage to apprentices that have federal but not state approval. In addition, Plaintiffs seek to require California to allow contributions to an apprenticeship program with federal but not state approval to satisfy the contractor's obligation to contribute to the California Apprenticeship Council under Labor Code § 1777.5(m). Plaintiffs point to the fact that in 2007 the Federal Department of Labor "derecognized" California as a state apprenticeship council state, so that California approval of an apprenticeship program no longer counted as federal approval as well. The derecognition was based on the California legislature having adopted a modification to its program approval statute.

The DOL had previously approved the California statute that allowed the Chief DAS to approve new programs when "training needs" justified the establishment of a new program. In 1999, the Legislature spelled out certain criteria in the building trades for finding training needs. The DOL derecognition decision notes that the federal regulations on apprenticeship do not expressly address whether training needs should be a factor in approving a new program. Plaintiffs' Request for Judicial Notice, p. 27. "In support of their respective interpretations, the parties here have offered two conflicting, yet reasonable, policy-based arguments." *Id.* The DOL decision does not invalidate the California law. The regulations provide a single sanction when a state is found to have an apprenticeship law that is not "an acceptable State apprenticeship law" and that is derecognition. 29 C.F.R. § 29.13. The DOL decision found that OATELS's view that there should be no limitations on program approval based on the anticipated need for trained workers was a reasonable view, and so California was no longer deputized to approve programs for "federal purposes." However, the DOL decision did not remove California's authority to approve programs for its own state purposes. Neither DIR nor the CAC has yet taken action to challenge the DOL decision.[4]

[4] Plaintiffs contend that the decision can no longer be challenged based on 28 U.S.C. § 2344, However, that section applies only to certain enumerated agencies not DOL derecognition proceedings.

IV. ARGUMENT

The state's traditional interest in apprenticeship is shown by the longevity of the statute, which has addressed apprentice standards of payment outside of public works spanning two centuries. See Historical Note, West Annotated California Labor Code, Vol. 44 (1989), p. 671 at Chapter 4, "Apprenticeship". Plaintiffs ask this court to bar state enforcement of its prevailing wage and apprenticeship law. As the U.S. Supreme Court noted in *New York State Conference of Blue Cross and Blue Shields Plans v. Travelers Ins. Co.*, 514 U.S. 645:

> As is always the case in our pre-emption jurisprudence, where "federal law is said to bar state action in fields of traditional state regulation, we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Id.*, at 655 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230).

There is no basis for concluding that Congress intended to displace state regulation in this area.

1. There Is No Private Right Of Action To Enforce the Fitzgerald Act or Regulations.

a. No Express Right Of Action

The Fitzgerald Act directs the Secretary of Labor to formulate and promote labor standards for apprentices, to encourage the inclusion of such standards in contacts of apprenticeship, and to "cooperate" with State agencies to formulate and promote labor standards needed to protect the welfare of apprentices. There is no express right of action given to private parties to enforce the act. Indeed, the statute does not mandate specific labor standards for apprentices but rather directs to Secretary of Labor to extend the application of higher labor standards by encouragement and cooperation.

b. No Implied Right Of Action: There Is Nothing To Enforce In The Act

In determining whether to imply a private right of action, the court looks to the four part test established in *Cort v. Ash*, 422 U.S. 66 (1975). That test looks to 1) whether plaintiff was one of the class for whose special benefit that statute was enacted, 2) whether there is an indication of legislative intent to create or deny a private right of action, 3) whether an implied remedy is consistent with the underlying purpose, and 4) whether the cause of action is in an area of traditional state concern where it would not be appropriate to infer a cause of action based solely on federal law. *Id.*

The Fitzgerald Act specifically tells the Secretary of Labor to cooperate with those state agencies

"engaged in the formulation and promotion of standards of apprenticeship…." not displace their activity. There is nothing in the act to suggest that Congress contemplated that the states would not be active in regulating apprenticeship.

c. No Implied Right In The Regulations

The Fitzgerald Act regulations provide for a sanction if the Secretary finds that a state law is not operating in conformity with federal regulations, but that is limited to derecognition. 29 C.F.R. §29.13. The effect of derecognition is that state approval of a program is no longer effective as recognition for federal purposes. *Id*. However, the regulations make clear that the programs continue to operate and have state approval. State approved programs must be given the opportunity to request federal approval, but are not required to do so. *Id.*

d. Courts Have Held There Is No Private Right Of Action

In *Baltimore Metropolitan Chapter v. O'Connor*, 75 F.Supp.2d 440 (D.C. Md. 1999), a contractors' association sued several Maryland officials claiming that the refusal to register the contractors' program violated the contractors' rights. The court found that there was no private right of action to enforce the Fitzgerald Act.

In *Joint Apprenticeship and Training Council of Local 363, Teamsters v. New York State Department of Labor*, 829 F.Supp. 101 (S.D.N.Y. 1993), the court denied an apprenticeship program's request to enjoin New York from deactivating their program. The court found that there was no basis to find a private right of action by a program. *Id*. at p. 105.

In *Gregory Elec. Co. v. United States Dept. of Labor*, 268 F.Supp. 987 (D.S.C. 1967), a contractor sued when the Department of Labor did not approve a new program because the existing program had agreed to allow the contractor to participate. The court found that contractors, like Nutter Electric, did not have standing to obtain judicial review of the Department of Labor's decision not to register a proposed program.

2. There Is No Basis For Preempting California's Law

The Fitzgerald Act itself says nothing about preempting state law. To the contrary as argued above, the Act anticipates independent state action fostering labor standards for apprentices. Preemption of state laws is not done lightly, especially where the law concerns an area of traditional state regulation.

California DLSE v. Dillingham Const., 519 U.S. 316 (1997). California has been regulating apprenticeship for more than 130 years. Its laws clearly and unambiguously restrict the lower apprentice wage on state public works projects to apprentices registered with the Division of Apprenticeship Standards. Labor Code section 1777.5.

The Fitzgerald Act regulations likewise were not intended to preempt state law. In *Suislaw Concrete Construction Co. v. State of Washington,* 784 F.2d. 952 (9th Cir. 1986), the court held that the Fitzgerald Act regulations were not intended to occupy the field, and exclude state regulation of apprenticeship programs. *Id*. at p. 957. The court also found that those regulations did not show any intention that the federal regulations be exclusive, and noted that the court will not infer an intent to preempt when the regulation does not expressly address the issue. *Id.*

Plaintiffs acknowledge that *Suislaw* rejected the proposition that the Fitzgerald Act was intended to occupy the field, but argue that it did not address a state law that conflicted with the Fitzgerald Act. P&A, p. 25, ln. 5-20. To the extent the objectives of the Fitzgerald Act are to safeguard the welfare of apprentices, California's law is consistent with that goal. By limiting the lower apprentice wage to apprentices in approved programs the law encourages contractors to participate in programs that meet minimum standards, which is also a goal of the Fitzgerald Act.

Plaintiffs cite *Hillsborough County Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985), for the proposition that state regulation is nullified if it conflicts with federal regulations. P&A, p. 20. Plaintiffs further suggest that even regulations that are "arguably inconsistent" should be preempted. P&A, p. 25, ln 9-10. The holding of *Hillsborough* does not support such a broad statement. In *Hillsborough*, the Court was considering the argument that state regulation of blood plasma was preempted by federal regulations. The Court found no preemption and rejected the argument that the comprehensive scope of the federal regulation required preemption. *Id*, at p. 715. The Court emphasized the presumption against preemption of state laws in areas traditionally occupied by the states. *Id.* Here, the Fitzgerald Act regulations set minimum standards, and in no way suggest an intent to preempt the field and displace traditional state law. The Court pointed out that, as here, the federal policy actually called for a cooperative policy. *Id*., at p. 719. The Court also found that the fact that the *Hillsborough* ordinances were more stringent than federal policy did not require preemption based on conflict with the

federal policy. In this case, state approval of an apprenticeship program for state purposes does not interfere with federal approval for federal purposes.

3. There Is No Violation Of the Fitzgerald Act Or Its Implementing Regulations

Even if there were a private right of action, the complaint does not allege conduct that amounts to a violation of the Fitzgerald Act. The Fitzgerald Act does not require states to recognize federal apprentices, or establish a mandatory national apprenticeship system. Rather it encourages the Department of Labor to work with the states to expand labor standards.

In addition, I-TAP has never been denied state approval. It has never even asked for state approval. Dec. Forman, p. 2, ¶9. I-TAP merely speculates that it would not be given approval for its program. Plaintiffs' Dec. Nutter, p. 2 ¶4. The "needs" standard in section 3075(b) does not bar all new programs. It specifically finds there *is* a need for a new program if there is no existing program. Where there is an existing program there are other tests, including whether the existing program lacks the capacity to supply apprentices to public works projects. *Id.* Since 1999 DAS has approved 14 new programs, so approval is hardly an impossibility. Dec. Forman, p. 2, ¶10.

The plaintiffs allege a violation of the Fitzgerald Act regulations which recognize that approval of an apprenticeship program by the Department of Labor is for federal purposes by stretching the meaning of the phrase "federal purposes pertaining to apprenticeship" beyond any reasonable interpretation. Federal approval of an apprenticeship program brings with it approval for "federal purposes." That phrase is defined in the 29 C.F.R § 29.2 of current DOL regulations as follows: "Federal purposes includes 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."

In this case there is no alleged federal contract, let alone one dealing with apprenticeship. Rather we have a state contract for public construction. Likewise, there is no federal financial or other assistance pertaining to apprenticeship. Instead, there is alleged a federal tax exemption pertaining to municipal bonds that pertains to investors, not apprentices.

Plaintiffs reach too far. Taken to the extreme, one could argue that because social security is a federal benefit, if a contractor pays social security taxes on apprentices working on a project then those

apprentices would be working on a project with a federal purpose. This is much like the problem the U.S Supreme Court addressed in *New York State Conference of Blue Cross and Blue Shields Plans v. Travelers Ins. Co.*, 514 U.S. 645, concerning the scope of ERISA's preemptive reach. "If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for '[r]eally, universally, relations stop nowhere,' H. James, Roderick Hudson xli (New York ed., World's Classics 1980) at p. 655."

Congress has specifically identified some benefits that pertain to apprenticeship. For example, a veteran who is in training in an apprenticeship program is eligible for benefits pertaining to that apprenticeship if the program is approved for federal purposes. 38 U.S.C.A. § 3452. Another example of a benefit linked to federal approval would be certain grants to promote employment of apprentices that are limited to programs with federal approval. 29 U.S.C.A. § 2503 (http://www.dol.gov/wb/federalregister3-30-2010.htm.(WANTO) (grants to promote women in apprenticeship (last viewed June 24, 2011)). See also, 42 U.S.C.A. § 16411 (Workforce trends and training grants in energy technology), and 20 U.S.C.A. § 7425 (education grants). There is no reason to assume that the phrase "pertaining to apprenticeship" was intended to expand federal purposes beyond those specific federal financial or other benefits that are expressly linked to apprenticeship.

4. California Appropriately Defers On Projects That Are Actually Federally Funded and Carried Out

California law does not conflict with federal law. Under both state statutes and state regulations, "federally funded projects controlled by, carried out by, and awarded by the federal government are not subject to [California prevailing wage law]…." *Southern California Labor Management Operating Engineers Contract Compliance Committee v. Aubry*, 54 Cal.App.4th 873, 883, 63 Cal.Rptr.2d 106, 111-112 (1997). In reaching this conclusion, the court in *Southern Cal. Labor Management* specifically cited 8 C.C.R. § 16001(b): "Federally Funded or Assisted Projects. The application of state prevailing wage rates when higher is required whenever federally funded or assisted projects are controlled or carried out by California awarding bodies of any sort."

The regulation was interpreted to mean that Davis-Bacon Act projects awarded, controlled, and carried out by the federal government fall outside the purview of the requirement to pay state prevailing

wages; therefore, contractors pay the federal prevailing wage rate. On those projects, the use of apprentices registered by the Department of Labor would be governed by federal law.

Moreover, the Davis-Bacon Act, "is a minimum wage law designed for the benefit of construction workers." The Davis-Bacon Act is not violated by paying apprentices who have federal approval the higher wage required under California's prevailing wage law for apprentices who are not in state approved programs. *United States v. Binghamton Construction Company, Inc.*, 347 U.S. 171, 178, 74 S.Ct. 438, 442, 98 L.Ed. 594 *reh'g denied*, 347 U.S. 940, 98 L.Ed. 1089, 74 S.Ct. 625 (1954). It "requires that the wages of workmen on a [federal] Government construction project shall be 'not less' than the 'minimum wages' specified in a schedule furnished by the Secretary of Labor." *Id.*, 347 U.S. at 172, 98 L.Ed. 594, 74 S.Ct. at 439. Furthermore:

> [I]t was not enacted to benefit contractors but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects….Indeed, its requirement that the contractor pay 'not less' than the specified minimum presupposes the possibility that the contractor may have to pay higher rates. *Id*, 347 U.S. at 177-178, 98 L.Ed. 594, 74 S.Ct. at 441-442.

5. There Is No Commerce Clause Violation

California's law does not burden interstate commerce. In *Tri-M Group, L.L.C. v Sharp,* 638 F.3d 406 (3d Cir. 2011) the court found that Delaware required an apprenticeship program to be located in Delaware, and thus the court could conclude that the law discriminated against out of state businesses. Likewise in *Oregon Waste Sys., Inc. v Dept. of Envtl. Quality of Oregon,* 511 U.S. 93 (1994) the state law treated in-state and out of state businesses differently. California law does neither of those two things.

In this case, I-TAP suggests only that California's law prevents apprentices from other states from working in California on public works unless they are registered in a California approved program. Program approval standards under Labor Code § 3075 are the same for in-state and out of state based programs. The law does not make a distinction between programs like I-TAP that is based in California and a program based in another state. Likewise apprentices are treated the same. Both in-state and out of state apprentices must be registered in approved programs.

6. There Is No Equal Protection Violation

Plaintiffs must meet a very high burden to show that California's law is a denial of equal

protection in that they must prove that there is no rational basis for California limiting the apprentice was to apprentices in registered apprenticeship programs. Even the Department of Labor decision derecognizing California found that the California law was based on serious policy considerations, albeit ones different from those favored by the Department of Labor for approval for federal purposes. Plaintiffs' Request for Judicial Notice, Exh. B, at p. 27. The California law was described as requiring a showing of "training needs" to establish a new program in order to make sure that apprentices were being trained for jobs that would exist after completion. In addition, California provides support for apprenticeship programs and thus has an interest in supporting existing programs, but with budget limits. California Education Code section 8152 provides for the reimbursement of some of the costs of the apprentices related and supplemental instruction carried out by California public schools and community colleges.

In *Johnson v. Rancho Santiago Community College*, 623 F.3d. 1011 (9th Cir. 2010), the Ninth Circuit rejected a claim that a project labor agreement that distinguished between programs that had state approval violated equal protection. The court noted that the burden on the one attacking a legislative arrangement is to "negative every conceivable basis which might support it." (Quoting *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1280 (9th Cir. 2004)). *Id*. at 1031. At the very least, it is obvious that restricting the apprentice wage on state public works to apprentices in state approved programs that get state financial support, is a reasonable policy choice that supports those programs and apprentices in which the state is investing.

7. There Is No Showing Of Irreparable Injury

Nutter Electric is currently a party in a state administrative proceeding concerning an alleged underpayment of the prevailing wage. It alleges that it has had funds withheld in connection with this administrative proceeding. Complaint at ¶¶17-18. I-TAP asserts that contractors will not use its apprentices. Plaintiff Moyer is no longer an I-TAP apprentice and is enrolled in a state approved program.

None of these allegations rise to the level of irreparable injury. A preliminary injunction is a drastic and extraordinary remedy. *Intel Corp. v. ULI Systems Technology*, 995 F.2d 1566 (Fed. Cir. 1993). Its function is to preserve the status quo and to prevent irreparable loss of rights prior to

judgment. *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415 (9th Cir. 1984).

Nutter Electric is in the process of contesting the administrative proceeding and that process will continue. In that action Nutter Electric will be able to raise its claim that federal apprentices can be paid the apprentice wage. I-TAP's assertion that other contractors are reluctant to use I-TAP apprentices is really based on allegations that these contractors are unwilling to risk enforcement actions themselves and it is unlikely that a preliminary injunction would remove the legal cloud that I-TAP fears may cause contractors to use apprentices from other programs.

8. This Court Should Also Consider the Harm To Properly Registered State Apprentices If It Enjoins State Law As Requested

Plaintiffs also seek to enjoin the California law that requires contactors to employ apprentices on public work in at least the ratio of one hour of apprentice work for every five of journey level work. Labor Code sec. 1777.5(d). Even if Plaintiffs were successful in getting federal apprentices recognized for the purpose of the prevailing wage, there is no reason for this court to prevent the state from also requiring at least this minimal participation of state approved apprentices. This court should be mindful of the negative effects on those state apprentices who would be adversely affected but who are not before the court.

9. Court Should Abstain Under *Younger* Because There Is A Pending Enforcement Action Where This Can Be Litigated Subject Of Judicial Review Where The Federal Issue Can Be Presented

The complaint in this case alleges that there is a pending administrative enforcement action brought against Nutter Electric for failing to pay the prevailing wage to workers who were registered in I-TAP's federally approved program. See Complaint, Paragraph 56. DIR asks this court to abstain from deciding whether DIR is violating the Fitzgerald Act because that issue is squarely presented in the state administrative proceeding and Nutter Electric will be able to fully present its claims concerning the payment of wages.

In *Younger v. Harris*, 401 U.S. 37 (1971), the Supreme Court articulated a strong federal policy against federal court interference with pending state judicial proceeds. Abstention is required where the state proceedings are ongoing, implicate important state interests and the state proceeding provides an adequate opportunity to raise federal questions, and the federal court action would interfere with the state

court proceeding. *Gilbertson v. Albright*, 381 F. 965 (9th Cir. 2004)(en banc), *Hirsh v. Justices of the Supreme Court of California*, 67 F.3d. 708 (9th Cir. 1995).

In this case the parties to the administrative proceeding are not identical to the plaintiffs herein, and this has been found to make abstention inappropriate in some circumstances. *Green v. City of Tucson*, 255 F.3d. 1086 (9th Cir. 2001). Neither I-TAP nor Brandin Moyer are parties to the prevailing wage proceeding involving Nutter Electric. Nevertheless, when the wage proceeding concerns Nutter Electric's use of I-TAP apprentices like Mr. Moyer, the interests of Nutter Electric, and the I-TAP program and apprentices are so intertwined that *Younger* would still apply. In *Hicks v. Miranda*, 422 U.S. 332 (1975), *Younger* was found to apply to a federal action by owners of an adult movie theater brought after the state brought an action against two of their employees for violating the state obscenity statute. Here, the interests of Nutter Electric and the program and apprentices are similarly interlinked.

10. The Injunctive Relief Plaintiffs Seek Is Vague And Overbroad

Plaintiffs ask for a preliminary injunction with 10 subparts. Many of the subparts fail to specifically describe what conduct would violate an injunction. For example subpart (b) purports to direct DIR to stop enforcing 8 C.C.R. § 16001 with respect to "Projects involving 'any Federal financial or other assistance, benefit, privilege, contribution allowance, exemption, preference or right pertaining to apprenticeship.' " That regulation provides in part: "Federally Funded or Assisted Projects. The application of state prevailing wage rates when higher is required whenever federally funded or assisted projects are controlled or carried out by California awarding bodies of any sort."

The injunction Plaintiffs seek would bar the enforcement of the journey level wage for journeymen on projects that involve federal assistance pertaining to apprenticeship. Moreover, there is nothing specifying what it means for a project to involve any of this long list of emoluments "pertaining to apprenticeship."

In subpart (e) Plaintiffs expand the scope of the injunction beyond projects involving funds pertaining to apprenticeship to encompass all projects with a federal purpose. This presumably would include projects with no federal financial participation at all if the project had some relation to a federal purpose whatever that turned out to mean. Would putting up street signs identifying the federal courthouse paid for with state tax dollars only be a project with a federal purpose? In (h) Plaintiff Moyer

is to be recognized as an "apprentice" but he is no longer in the I-TAP program. Plaintiffs' Dec. of Moyer, p. 2, at line 4-5. Is DIR to recognize all "former" apprentices as apprentices? Furthermore, this subpart seems to request that those "similarly situated" be accorded all benefits and right of state apprenticeship including benefits that have nothing to do with the lower apprentice wage. For example, apprentices in state programs enjoy the benefit of being able to file complaints with DAS. 8 C.C.R. §201.

In sum, the relief requested does not give specifics as to what conduct would violate the injunction. *Davis v. City and County of San Francisco*, 890 F.2d. 1438, 1450 (9th Cir. 1989), *Louise W. Epstein Family Partnership v. KMART*, 13 F.3d. 762, 771 (3d Cir. 1994) (Broad language that merely enjoins a party to obey the law does not give the restrained party fair notice of what conduct will risk contempt).

Finally, there is no provision for a bond. Here, Plaintiffs are asking DIR to stop enforcing the prevailing wage law and stop assessing penalties. Those workers who would be entitled to those wages and penalties and those awarding bodies that would be affected should be adequately protected.

V. CONCLUSION

For all the reasons discussed above, the Court should deny Plaintiffs' request for a preliminary injunction. DIR have demonstrated that Plaintiffs have failed to state any kind of claim on which relief of any kind could be granted.

Respectfully submitted,

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CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF DIRECTOR-LEGAL

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