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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**

PLAINTIFFS' REPLY 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

"Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Request for Preliminary Injunction" ("Defendants' Opposition") utterly fails to address the indisputable critical facts and core legal points which establish Plaintiffs' right to enjoin the unauthorized regulation by the State of California, Department of Industrial Relations and its affiliated agencies and divisions (together, "CDIR" or "California") of federally-certified apprentices' opportunities and rights to work on public works projects involving a "Federal purpose".

Defendants' Opposition takes pains to avoid discussion of the legal significance and effect of the U.S. Department of Labor's conclusive adjudications that California's regulation of apprenticeship fails to meet the minimum national standards required by the National Apprenticeship Act (29 U.S.C. § 50), commonly known as the "Fitzgerald Act" or "NAA," and its implementing regulations (29 C.F.R. § 29.1, *et seq.*) because California discriminatorily restricts apprenticeship employment opportunity rather serving the overriding federal goals of promoting and expanding apprenticeship rights, welfare and opportunity (29 U.S.C. § 50). California's failure to address the central issues of the case is particularly disturbing in light of the fact that California is the only state to be derecognized in the long history of the Fitzgerald Act and the consequences of such decertification create a question of first impression.

Instead of examining the controlling law of the Fitzgerald Act and its companion regulations and analyzing the significance of California's official "derecognition" pursuant to federal regulations, Defendants choose to conduct a five-century fly-over of the evolution of apprenticeship. Instead of focusing on the pertinent history from the 1937 enactment of the Fitzgerald Act, through the California DIR's derecognition in 2007, to its presently unauthorized regulation of federally certified apprentices on public works jobs involving a "Federal purpose," Defendants attempt to divert the court's attention to the "traditional" role of the state in policing apprenticeship in an era pre-dating the Fitzgerald Act's establishment of minimum *national* standards for the regulation of apprenticeship. Instead of explaining how CDIR could be permitted to continue to attempt to regulate apprenticeship by purporting to determine (a) whether federally

certified apprentices must be afforded the opportunity to work on public works projects within California at apprentice prevailing wage rates and (b) which projects in California involve "Federal purpose" as defined by 29 C.F.R. § 29.2(k), when California has been officially stripped of the authority to make such determinations pursuant to the derecognition provisions of 29 C.F.R. §§29.12(a)(1) and 29.13, Defendants simply insist that derecognition should not affect their assumed authority to regulate all aspects of apprenticeship on all public projects other than those for which the federal government is either the contracting party or the sole source of funding.

In short, despite having no authority to do so, CDIR continues to regulate the apprenticeship status and opportunity of apprentices in federally approved programs, by determining which apprentices within California may be paid apprentice rates in compliance with prevailing wage laws and which public works projects are ones deemed by CDIR to be projects involving "Federal purpose."

Such unauthorized regulation of apprentices and apprenticeship opportunities, in direct conflict with the national system established by the Fitzgerald Act's mandate to the U.S. Department of Labor ("D.O.L") "to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices" (29 U.S.C. § 50), is unlawful and should be enjoined to prevent further harm to plaintiffs and all other similarly situated apprentices, employers of apprentices, and the federally certified programs which bring such apprentices and employers together.

Further, the grounds for denial of the motion that defendants do assert are without merit. Plaintiffs need not demonstrate a private right of action under the Fitzgerald Act. They seek a declaration that defendants' conduct is unlawful and seek to enjoin the unlawful conduct. Their right to do so is well established, even fundamental. *See*, for example *Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635 (2002).

Defendants fail to demonstrate that federal standards and state law regarding apprenticeship are not in conflict. The unacceptability of California's apprenticeship standards has already been conclusively adjudicated. RFJN, Exh. A and B. Defendants also admit to use of

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a guide for determining when federal apprentice standards apply that is far narrower than the controlling federal standard.

Defendants' attacks on the Commerce Clause and Equal Protection claims disregard their own implicit admission that apprentices in both state and federally approved apprenticeship programs receive substantially the same training. The distinctions they draw between the programs are not rational.

Defendants' procedural argument that the *Younger* abstention bars plaintiffs' claims ignores the fact that the administrative proceeding to which they point to support the notion that abstention is appropriate involves only *one* of the three plaintiffs. Equally important, *Younger* abstention should not be applied in a case where the underlying state proceeding is based on state regulations that are nullified by federal law.

Defendants offer no evidence that plaintiffs are not irreparably harmed by defendants' unlawful conduct. A balancing of the harms here requires that the court refuse to abstain and grant the plaintiffs motion for injunctive relief.

II. ARGUMENT

A. The Basis For Plaintiffs' Entitlement To A Declaration And Injunction Prohibiting DIR's Unauthorized Regulation Of Apprenticeship Is Entirely Unrebutted By Defendants' Opposition.

Defendants' Opposition ignores or concedes the following four fundamental points at the core of plaintiffs' entitlement to the requested relief:

1. The Fitzgerald Act Requires the Establishment and Maintenance of Basic, National Standards for Apprenticeship Training, Opportunity and Welfare Which May Not be Impaired, Frustrated or Altered by Conflicting State Law.

The Fitzgerald Act itself states that its objective is to provide a system of national standards to "safeguard the welfare of apprentices" and to promote opportunities for apprentices throughout the country. 29 U.S.C. § 50. That objective is achieved through regulations promulgated pursuant to the Fitzgerald Act's mandate by the U.S. Department of Labor at Title 29, Code of Federal Regulations §§ 29.1 et seq. These regulations provide for registration and monitoring of apprenticeship programs for various "Federal purposes" by the D.O.L.'s Office of Apprenticeship Training, Employment and Labor Services ("OATELS") pursuant to uniform

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national standards. 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(k), emphasis added.

Both federal and state courts have regularly recognized that one of the primary purposes of the Fitzgerald Act is to establish and maintain a set of national standards for promoting and protecting the welfare of apprentices. Indeed, California's own Supreme Court has stated:

> [A]lthough one of the purposes of the Fitzgerald Act was unquestionably to provide "a cloak of protection to put around boys and girls and encourage them to go back into the skilled trades" [citation omitted], the standards to protect the apprentices were to be *national standards* formulated by the Secretary [*Southern California Chapter of Associated Builders and Contractors, Inc., Joint Apprenticeship Committee v. California Apprenticeship Council, etc. et al*., 4 Cal. 4th 422 (1992), 452; 841 P.2d 1011; 114 Cal.Rptr.2d 491; emphasis in original.]

As a result, inconsistent or conflicting state standards are not permitted to frustrate the goals of the Fitzgerald Act and therefore must yield to the controlling federal law (*Southern California Chapter of Associated Builders and Contractors, Inc., Joint Apprenticeship Committee v. California Apprenticeship Council, etc. et al*., supra, at 452-453) as codified in the implementing regulations themselves (29 C.F.R. § 29.12(a)(1) and § 29.13)[1] and as ensured by the Constitution's supremacy clause which "secures federal rights by according them priority whenever, they come into conflict with state law." *Golden State Transit Corporation v. City of Los Angeles*, 493 U.S. 103, 107, 107 L.Ed.2d 420, 110 S.Ct. 444 (1989).

Defendants acknowledge that the Fitzgerald Act and its implementing regulations "propose to, inter alia, 'safeguard the welfare of apprentices …' " through a national system directed by the Secretary of Labor by which the federal government "could delegate" its power to regulate apprenticeship to certified [recognized] state agencies. Defendants' Opposition, p.2 ftn., 1 and p.

[1] The D.O.L.'s OATELS is empowered to derecognize a state agency's authority to regulate apprenticeship for failure of the state "to operate in conformity with the requirements of this part" (§ 29.13) including the failure to operate under "an acceptable State apprenticeship law … and regulations adopted pursuant thereto" § 29.12(a)(1).

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3, lns. 11-16; emphasis added.

Nonetheless, Defendants seem to argue that, despite regulatory authority dependent on delegation by the D.O.L., California should somehow be allowed to regulate apprenticeship outside the scope of the delegated authority by enacting and enforcing state laws which the D.O.L. has determined to be in conflict with the Fitzgerald Act's overarching mandate and the D.O.L.'s own regulations governing the exercise of the delegated authority.

Not surprisingly, the defendants can cite no factual support or legal basis for the nonsensical proposition that California (or any other state) may disregard and work at complete cross-purposes to the regulations promulgated by the very governing entity from which the state's authority to operate in the realm of national apprenticeship standards is derived.

2. Defendants Cannot Deny That California's Former Power to Regulate Apprenticeship for Any "Federal Purpose" Was Derived from the Fitzgerald Act and Its Implementing Regulations But Has Been Revoked Due to California's Failure to Meet the Minimum National Standards for Apprenticeship Regulation.

As noted, California/CDIR's authority to regulate apprenticeship as to any "Federal purpose" was formerly derived from the Fitzgerald Act's implementing regulations pursuant to 29 C.F.R. § 29.12.

Defendants acknowledge that CDIR was delegated such authority in 1978 through certification by OATELS' forerunner, the federal Bureau of Apprenticeship Training ("BAT").

However, nowhere in the "Introduction and Summary of Argument," the "Background" or the "Summary of Facts" sections of Defendants' Opposition is there *any* mention, much less a challenge, of the fact that the Department of Labor, the federal agency to whose jurisdiction apprenticeship welfare across the nation has been entrusted, has conclusively determined, after a five-year adjudicative process including multiple hearings and exhaustive briefing by the parties and *amici*, that: (a) California has failed to meet the minimum standards for apprenticeship regulation by enacting and seeking to enforce an anti-competitive law which restricts rather than promotes apprenticeship opportunity; and (b) such failure to comport with the minimum national standards governing apprenticeship welfare and opportunity warranted revocation of the state's

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authority to regulate it.

Thus, defendants are forced to concede that California has been derecognized and is barred from litigating *de novo* the merits of such derecognition in this court. Put another way, in determining plaintiffs' entitlement to injunctive relief, the court's deliberations need not include any question of the propriety of CDIR's derecognition. Those questions have been fully litigated and determined on the merits. Thus, the derecognition and the basis for it are now conclusively established facts and no longer issues requiring resolution through examination of evidence or application of law by this Court.

3. Because Its Former Power to Regulate Apprenticeship for Any "Federal Purpose" Has Been Revoked by CDIR's Final Derecognition in 2007, California Has No Current Legal Authority to Regulate Apprenticeship Through State Determinations as to (A) Whether Federally Certified Apprentices Qualify for Employment at Apprentice Prevailing Wage Rates and (B) Whether Any Particular Public Works Project Is One Involving a "Federal Purpose."

Although there is a single-sentence reference to the occurrence of the CDIR's derecognition buried in page thirteen of the sixteen pages of Defendants' Opposition, Defendants utterly fail to address either the findings and reasons supporting the D.O.L's derecognition order or the legal significance of the fact that CDIR's authority to regulate apprenticeship standards for Federal purposes has been completely revoked by the federal government because California has failed "to operate in conformity with the requirements of this part [29 C.F.R. §§ 29.1, *et seq.*]" and failed to operate under "acceptable State apprenticeship law … and regulations adopted pursuant thereto" § 29.12(a)(1). *See,* RFJN, Exh. A, Document 6-3, Pages 8 and 9 of 42 and Pages 40 and 41 of 42 and Exh. B, Document 6-4, Pages 32 and 33 of 42.

California's refusal to discuss the import of the Review Board's ruling and basis is perhaps understandable but certainly revealing. The State's deafening silence regarding the reasoning underlying CDIR's derecognition exposes and emphasizes the analytical keystone in this case: California has no evidence or legal support countering the plaintiffs' logic that CDIR has no present authority to determine (1) whether federally certified apprentices must be afforded the opportunity work on public works projects within California at apprentice prevailing wage rates or

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(2) whether any particular project involves a "Federal purpose." From point (2) the conclusion is compelled that California has no authority, standing or basis to challenge the plain meaning of the language of D.O.L.'s regulation that a Federal Purpose regarding apprenticeship is involved wherever and whenever "*any* Federal contract, grant, agreement or arrangement dealing with apprenticeship" or "*any* Federal financial or *other* assistance, benefit, privilege, contribution, allowance, exemption, preference or right pertaining to apprenticeship" (29 C.F.R. §29.12; emphasis added) is implicated.

Because CDIR and its subagencies no longer have any authority to make the determinations of the apprenticeship status of individuals for a "Federal purpose," the approval of training programs certifying apprentices for "Federal purpose" projects and/or what constitutes a "Federal purpose," those crucial determinations are now solely within the jurisdiction of the D.O.L which has steadfastly reasoned and ruled that "Federal Purpose" is far broader than the narrow segment of apprenticeship concerns as to which CDIR states it is willing to "defer" to federal authority, namely, "'federally funded projects controlled by, carried out by, and awarded by the federal government … '" Defendants' Opposition, p. 11, lns. 17-21. As noted, the key regulation promulgated by D.O.L. lists, in addition to federally awarded contracts and federally financed construction projects, "*any* … *other* assistance, benefit, privilege, contribution, allowance, exemption, preference or right pertaining to apprenticeship." 29 C.F.R. §29.12; emphasis added.

Even in the realm of contracting and financing, the State of California's view of what constitutes a "Federal purpose" is far too narrow. The D.O.L. has determined and explained to California that a "Federal purpose" includes, but is not limited to, "all public works projects funded in whole *or in part* with Federal funds,"[2] and that all states 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*

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

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provided."[3]

4. Defendants Can Present Neither Evidence Nor Law Contradicting the Principle That Public Works Projects Involving Any Degree of Federal Funding or Subsidization Constitute "Federal Purpose" Projects.

Defendants offer no countervailing evidence or law to the crucial point that *any* amount of federal financial involvement in a public works project constitutes a "Federal purpose" which places regulation of apprenticeship standards and opportunity for such project squarely within the purview of the Fitzgerald Act and its companion regulations and, thus, within the jurisdiction of the D.O.L as opposed to the California's derecognized state agencies.

Plaintiffs have offered the evidence contained within the declaration of Michael Genest (Compendium Exh. 5) that projects financed through either tax-exempt municipal bonds or so-called "Build America Bonds," like the Marysville High School Project, the Chicago Park Project and the Stockton Joint Use Gym Project are all funded, in part, with federal funds. Genest Decl. ¶¶ 4 and 10, Compendium Exh. 5. That federal subsidies of any form are involved in such projects places them firmly within a "Federal purpose" according to the regulation and D.O.L.'s application of the regulation.

In contrast to the plaintiffs' showing, the Defendants' Opposition is absolutely devoid of any evidence or law suggesting that the projects in question were not funded "in part" with federal financial assistance. Defendants' brief does not even mention the point and no documentary or testimonial evidence referring to the projects or their financing has been submitted by the defendants. The court should draw the inference that no evidence exists which conflicts with the evidence that each of the projects benefited from subsidies provided by the federal government.

Therefore, California must be enjoined from regulating apprenticeship status and opportunities with respect to the three specific public works projects at issue in plaintiffs' lawsuit, the Chicago Park Project, the Marysville High School Project, and the Stockton Joint Use Gym Project because defendants cannot even meet the burden of producing a scintilla of evidence that

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

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no federal money, subsidy or *other* "Federal purpose" is involved.

As a result of the lack of dispute concerning the presence of federal financial involvement on the named projects, defendants must be enjoined from failing to acknowledge federally certified apprentices as qualifying for apprentice wages on those three projects as well as any and all other public projects which indisputably involve federal subsidies and/or employment opportunities for federally certified apprentices.

B. Defendants' Opposition Is Without Merit.

To the extent defendants offer arguments against some of the plaintiffs' points, the arguments fail for the reasons summarized below:

1. In Seeking a Declaration and an Injunction of Defendants' Unlawful Conduct, Plaintiffs Need Not Demonstrate a Private Right of Action Under the Fitzgerald Act .[4]

Among other things, plaintiffs seek a declaration that defendants' regulation of apprenticeship for federal purposes (1) is nullified by federal law and (2) offends the commerce, due process and equal protection provisions of the Constitution. "The question of who may enforce a statutory right is fundamentally different from the question of who may enforce a right that is protected by the Constitution." *Davis v. Passman*, 442 U.S. 228, 241 (1979). Challenges to state action based on constitutional grounds, including challenges grounded on the supremacy clause, preemption or similar grounds, do not obligate a plaintiff to articulate a private right of action under the federal scheme alleged to be preeminent. *See,* for example, *Siuslaw Concrete v. State of Washington* 784 F. 2d 952 (1986) (cited by defendants); *Associated Builders and Contractors v Curry*, 797 F. Supp. 1528 (1992).

As a result, courts regularly distinguish between a private cause of action under a statute and a declaratory or injunctive relief claim which challenges the lawfulness of an action, statute or

[4] Although the basis for plaintiffs' claims obviates the need for a detailed discussion of the existence of a private right of action under the Fitzgerald Act, plaintiffs do not concede that a private right does not exist under that statute. Indeed, of the three cases defendants cite for that proposition, all involve claims asserted by contractors or apprenticeship programs. The one case that explains its analysis of the question, *Joint Apprenticeship and Training Council of Local 363 v. New York State Department of Labor*, 829 F. Supp. 101 (1993), bases its finding that there is no right of action for an apprenticeship program on its interpretation of Congress' intent in passing the Act: to protect apprentices. (*Id*. at 105) Plaintiffs have found no case holding that an aggrieved apprentice, such as is present here, lacks a private right of action under the Fitzgerald Act.

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regulation. *See, New York Airlines, Inc. v. Dukes County, Martha's Vineyard Airport Commission* 623 F. Supp. 1435 (1985); *Verizon Maryland Inc. v. Pub. Serv. Comm'n, infra*, 535 U.S. 635.

Federal courts permit claims for injunctive and declaratory relief to determine whether state law conflicts with federal law under the Supremacy clause of the Constitution. *Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635 (2002). In *Verizon*, after the Maryland state utility commission ruled against Verizon in a dispute over whether Verizon was obligated to pay reciprocal compensation to Worldcom for certain ISP traffic under the Telecommunications Act of 1996 ("Telecom Act"), a federal agency (the FCC) issued an order that conflicted with Maryland's interpretation of the Telecommunications Act. Verizon filed suit seeking a declaratory judgment that the commission's order was unlawful, and an injunction prohibiting its enforcement. The commission contended that there was no private right of action in the Act and therefore the Court lacked jurisdiction to entertain the suit. The Supreme Court disagreed with that argument, stating, "As we have said, 'the district court has jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.'" *Verizon, supra*, at 643. That same principle applies here. Plaintiffs have sued state officials seeking a declaration that the defendants' conduct violates federal law and seeking an injunction prohibiting that conduct.[5]

Thus, in challenging CDIR's action on the grounds it offends federal law, or on other constitutional grounds, plaintiffs need not establish a private right of action under the federal law they claim is supreme. *See, New York Airlines, Inc. v. Dukes County, Martha's Vineyard Airport Commission, supra*, 623 F. Supp. 1442-1444 ; *Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635 (2002); *Davis v. Passman*, 442 U.S., *supra*, 241-44.

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[5] The Supreme Court has consistently interpreted the Constitution as permitting claims that lawmakers have exceeded their authority. See, for example, *Bond v. U.S.*, 2011 U.S. LEXIS 4558 (June 16, 2011).

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2. Defendants Ignore the Supremacy of Fitzgerald Act Standards and Thus Defendants' Unauthorized Regulation of Apprenticeship Contrary to the Fitzgerald Act Is Improper.

Although Defendants cite cases holding that the Fitzgerald Act does not preempt states from enacting separate 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)), defendants ignore that those cases were decided in an entirely different context than confronts this court: the cited cases were decided before and in the absence of the derecognition order. These pre-derecognition cases are grounded on a reading of the Fitzgerald Act that permits states to engage in "supplemental" (as opposed to conflicting) regulation of the "basic" standards established by the D.O.L. *Curry, supra* at 1538.[6]

Here, plaintiffs ask the court to interpret the Fitzgerald Act (and the regulations promulgated under it) in light of the fact that California has adopted apprenticeship standards that violate the basic national apprenticeship standards which Congress empowered the D.O.L. to establish. Moreover, the violation of those national standards has already been determined by D.O.L. adjudication.

The Supremacy Clause (U.S. Const., art. VI, cl. 2) invalidates state laws that interfere with or are contrary to federal law. *Gibbons v. Ogden*, 22 U.S. 1, 9 (1824). "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 regulations is a physical impossibility" (*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963)) or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Hillsborough County Florida v. Automated Medical Laboratories, Inc.* 471 U.S. 707, 713(1985), citing generally *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698-699 (1984).

[6] It is clear that the Fitzgerald Act requires the Department of Labor to formulate and adopt uniform national standards for apprenticeship. *So.Cal. Chapter of Associated Builders and Contractors Joint Apprenticeship Committee v. California Apprenticeship Council, supra*, 4 Cal. 4th at 452.

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The Supreme Court has repeatedly held that state laws can be pre-empted by federal regulations as well as by federal statutes. *Hillsborough, supra,* 471 U.S. 713. Citing generally, *Capital Cities Cable, Inc. v. Crisp, supra,* at 699; *Fidelity Federal Savings & Loan Assn. v. De la Cuesta,* 458 U.S. 141, 153-154 (1982); *United States v. Shimer,* 367 U.S. 374, 381-383 (1961).

Thus, CDIR's exclusion of federally certified apprentices from the opportunity to work at prevailing apprenticeship wages because they are not also state certified under a state statute which conflicts with the controlling federal law regarding minimum national standards for apprenticeship training and opportunity, is unlawful and should be enjoined.

3. Defendants' Claimed Deference to Federal Standards on Federally Awarded Projects is Insufficient Because Defendants Lack the Authority to Define "Federal purpose."

Defendants cite *Southern California Labor Management Operating Engineers Contract Compliance Committee v. Aubry,* 54 Cal.App.4th 873 (1997) ("*Aubry*") in arguing that "California law does not conflict with federal law. " Defendants' Opposition, p. 11, lns. 19-27. *Aubry* offers no support for defendants' position. Rather, the *Aubry* court's explication of California prevailing wage law highlights the very conflict defendants seek to deny. In *Aubry*, plaintiffs sought a writ of mandate requiring the director of the CDIR to set aside his determination that a particular construction project was a public works project subject to Federal prevailing wage law and substituting it with a determination that the project was subject to California prevailing wage law. The *Aubry* Court upheld the trial court's denial of the writ, finding that California's prevailing wage law did not apply to "federally funded projects controlled by, carried out by, and awarded by the federal government." *Id.* at 883.

The standard imposed by Fitzgerald Act regulations is much broader than this narrow "control/award" concept. The Act's standard requires federally approved apprentices to be allowed to work on projects serving any "Federal purpose." As previously noted, section 29.2(k) of the Code of Federal Regulations 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." Notwithstanding defendants' refusal to acknowledge it, the two scopes are not co-extensive; the "control/award" concept is merely a subset of the full scope of the regulation's definition.

The Fitzgerald Act standard requires that federal apprentices be recognized on projects involving a Federal purpose (essentially, whenever *any* federal benefit, monies, subsidy or contribution is involved or wherever an exemption, preference or right pertaining to apprenticeship is implicated) while the scope articulated by *Aubry* applies only when the Federal Government awards or controls a project.

When defendants were derecognized as co-equal players and DOL agents under the Fitzgerald Act system, they lost any ability to interpret, construe, alter or apply the operative national apprenticeship standards as they relate to a "Federal purpose." By insisting that they need only defer to federal apprentice prevailing wage standards when the federal government awards or controls a project, CDIR acts unlawfully because it is required to adhere to the broader standard applied by D.O.L. to projects involving any "Federal purpose."

Here, defendants offer no evidence to contest that the projects cited by plaintiffs each involve a Federal purpose. Instead, they repeatedly assert that they are entitled to apply "higher" standards than the bedrock standard established by the Fitzgerald Act. That repeated assertion misses the point. While the State of California is free to regulate apprenticeship for solely state purposes (i.e., where there is *no* Federal purpose by the D.O.L regulatory definition), the State is bound to adhere to federal apprenticeship standards in any project which involves *any* "Federal purpose" as defined by 29 C.F.R. 29.2(k) and interpreted by D.O.L.

The evidence is undisputed. Defendants failed and refused to apply federal apprenticeship standards (including permitting the use of apprentices enrolled in a federally approved apprenticeship program on projects involving a Federal purpose and payment of apprentice prevailing wages to those apprentices). Indeed, there is every reason to understand that defendants make no effort to determine if a federal purpose is implicated in a particular public works project and instead rely on the identity of the awarding agency as an unauthorized and illegal "litmus test"

to determine if federal or state standards apply. This conduct must be enjoined.

4. Defendants Unauthorized Regulation of Apprenticeship for Federal purposes Improperly 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, 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 D.O.L in the other forty-nine states from pursuing public work employment opportunities within California.

5. Defendants Conduct Denies Plaintiffs Equal Protection Under The Law.

California Labor Code §3075(b) has been adjudicated 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.

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Defendants admit that both state and federal apprenticeship registration serves the purpose of maintaining standards. ("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." Defendants' Opposition, p. 9. Even so, Defendants justifications for treating state and federal programs differently are not rational. Thus, the claim that the distinction can be supported on the grounds that state support to apprenticeship programs must adhere to budget limits is also irrational. Since it costs the state nothing for federal apprenticeship training, the budget limits are meaningless. Indeed, because defendants do not offer anything to challenge plaintiffs' evidence that the apprenticeship training and opportunities provided by federally-approved programs are at least equal if not superior to that provided by state approved programs, how can defendants justify any distinction between apprentices based on the identity of the approving agency? Once again, the distinction is artificial and therefore irrational. Defendants' claim that the "needs test" insures that there will be jobs for apprentices who graduate also cannot survive no scrutiny. Defendants' Opposition, p.13. The argument disregards the adjudicated finding that the "needs test" reduces, rather than increases opportunities for apprentices.

6. A Balancing of the Harms Favors Granting the Motion. Defendants Will Not Be Harmed by the Granting of the Motion While Plaintiffs Are Suffering Irreparable Injury.

The declaration of Glen Forman states: "Neither DLSE nor DAS have recognized workers enrolled in federal training or apprenticeship programs as registered for state purposes during the time I have been with DAS and I can say with particularity that there has been no change since 2006."

This assertion does not controvert or even address the substantial evidence offered by plaintiffs that, for years following CDIR's derecognition, defendants (1) had notice that apprentices enrolled in federally approved apprenticeship programs were working on projects defendants now consider to be "state" projects and were receiving apprentices wages and (2) pursued no enforcement or penalty actions against the contractors employing the apprentices from

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these federally approved programs. 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.

Thus, deference to the Fitzgerald Act's control over public works projects with a "Federal purpose" will cause no hardship to 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.

Defendants will not be prejudiced by an order that reestablishes a status quo that Defendants themselves fostered and abided by for years following the DOL's derecognition of the CDIR's and CAC's authority to regulate apprenticeship programs and standards involving a "Federal purpose." Further, no harm will be visited upon apprentices participating in state-approved programs because, contrary to defendants' misrepresentation that "[p]laintiffs seek to enjoin the California law that requires contractors to employ apprentices on public work in at least the ratio of one hour of apprentice work for every five of journey level work," plaintiffs only seek an injunction requiring CDIR to recognize federally certified apprentices as qualifying as "apprentices" under the statute for the purposes of calculating apprentice to journeyman hours ratios and paying apprentice prevailing wage rates.

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 California because the financial incentives to hire an apprentice from a federally approved program are entirely eliminated. 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 apprentices on public works projects at apprentice rather than journeyman wages because defendants refuse to acknowledge OATELS' approval, and contractors will therefore not hire ITAP apprentices. *Inland Empire Chapter of Associated Gen. Contractors of Am. v. Dear*, 77 F.3d 296, 299 (9th Cir.

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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, ¶ 4-5, Compendium Exh. 8. Defendants' conduct also works irreparable injury on apprentices: the number of apprenticeship programs in the state are reduced and therefore competition as to the quality and price of apprenticeship training is reduced. This adverse effect on apprentices was basis upon which the D.O.L's de-recognition of the CDIR and CAC was upheld. RFJN, Exh A, B. More immediately, the transition from the I-TAP program to a program approved by the CDIR, has caused apprentices to terminate employment, suffer pay cuts and sacrifice training already received from I-TAP. Moyer Decl. ¶5-9; Clark Decl. ¶5.

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.

7. Abstention under *Younger* is Improper.

Defendants argue that this court should deny Plaintiffs' motion because it should abstain from hearing the case under the rule established in *Younger v. Harris* 401 U.S. 37 (1971). Defendants acknowledge that, for *Younger* abstention to apply, defendants must establish: (1) ongoing state judicial proceedings; (2) an important state interest; and (3) the state proceedings provide an adequate forum to raise the constitutional issue.[7] *Middlesex County Ethics Comm. v. Garden State Bar Ass'n.*, 457 U.S. 423, 432 (1982). All three elements must be present. (*Id.*)

Here, *Younger* abstention does not apply for four reasons.

[7] As to this last element, it is worth noting that defendants have repeatedly been presented with plaintiff's central contention that the derecognition of the CDIR and the CAC left those entities without authority to regulate apprenticeship on projects involving a Federal purpose. *See* Baker Decl. ¶4-7, Exhibit 1 to Compendium; JNutter Decl. ¶7-10. The CDIR ignored or rejected that contention.

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First, there is no ongoing state court action as defendants have stayed their pending administrative action pending the decision of this court. *See* JNutter Decl. ¶14, Exh. 9, Compendium of Evidence.

Second, no significant state interest is served where it is readily apparent that state law is superseded by federal law. *Gartrell Construction Inc. v. Aubry,* 940 F.2d 437, 441 (1991): "In such a case, the state tribunal is acting beyond its authority and *Younger* abstention is not required."

Here, the central question before this court is the invalidity of state actions, laws and regulations that purport to regulate apprenticeship in projects involving a Federal purpose. It is readily apparent that the state's attempt to so regulate violates federal law. The Department of Labor has already conclusively adjudicated that the California's apprenticeship administration scheme fell below the basic national standard established under the Fitzgerald Act. The D.O.L. derecognized defendants as a direct consequence of California's failure to meet federal apprenticeship standards. RFJN Exh. A, p.4. The administrative proceeding upon which Defendants ground their *Younger* argument, is itself based on Defendants continued unauthorized regulation of apprenticeship activity in projects serving a "Federal purpose." No significant state interest is served where California continues to advance an apprenticeship scheme that violates the basic national standard established under the Fitzgerald Act. As a result, *Younger* preemption is improper here.

Third, the forum is inadequate to air constitutional issues as CDIR's enforcement division hearing officers have steadfastly maintained that they are only empowered, and therefore constrained, to enforce state law.

Fourth, the CDIR enforcement action involves only <u>one</u> of the plaintiffs and the defendants' claim that the interests of all of the plaintiffs are thoroughly "intertwined" with plaintiff Nutter Electric is wholly unsupported by evidence. Defendants' Opposition, p. 15, lns. 3-11.

Defendants cite *Green v. City of Tuscon,* 255 F.3d 1086 (2001) with the grudging

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acknowledgment that where parties to an state administrative proceeding are not identical to the plaintiffs in a federal action, *Younger* abstention is inappropriate in "some circumstances." Defendants' Opposition, p.15, lns. 3-5. In fact, the *Green* Court was considerably less timid than defendants would have it; *Green* reversed a trial court grant of such abstention, finding that *Younger* abstention does not apply to nonparties to an ongoing state proceeding. Notwithstanding that finding, defendants argue that the interests of all plaintiffs are sufficiently intertwined to support application of *Younger* abstention against all of them. (Defendants' Opposition, p. 15, lns 7-10. Defendants cite no evidence and offer no rationale for this conclusion as none exists.

The undisputed evidence is that Plaintiff Brandin Moyer was an I-TAP apprentice employed by Gray Electric when Gray Electric, in the face of DIR objections to its use of I-TAP apprentices, elected to discontinue its affiliation with I-TAP. Moyer Decl. ¶ 6-9, Exhibit 2 to Compendium. Although I-TAP provides apprentices to Nutter Electric, it provided apprentices to several other contractors who have discontinued their affiliation with I-TAP as a result of CDIR actions. CNutter Decl. ¶7-10, Exhibit 4 to Compendium; PSmith Decl. ¶3-5, Exhibit 8 to Compendium. The undisputed evidence rules out Defendants' claim that Moyer and ITAP's interests are intertwined with Nutter Electric's.

Defendants also cite *Hicks v. Miranda,* 422 U.S. 332 (1975) as supporting their argument. In *Hicks,* the Supreme Court applied *Younger* abstention against theatre owners on the basis of a State court proceeding against two employees of the theatre. While it is well established that employees can be agents of their employers, no similar doctrine attaches the interests of Plaintiffs Moyer and I-TAP to the interests of Plaintiff Nutter Electric. Thus, defendants' assertion that all the plaintiffs' interests are intertwined is without legal or factual support.

8. The Injunction Sought is Neither Vague Nor Impermissibly Overbroad.

The typical relief in a preemption case is an order invalidating the state law or regulation and enjoining its enforcement. *Crosby v. National Foreign Trade Council,* 530 U.S. 363, 371 (2000); *Shaw v. Delta Airlines Inc.,* 463 U.S. 85, 96, n.14 (1983). If plaintiffs do not wish to completely eliminate the state law, it can be invalidated "insofar as it violates the federal statute."

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See, e.g., Dalton v. Little Rock Family Planning Servs., 516 U.S. 474, 478 (1996) (remanding case "for entry of an order enjoining the enforcement of Amendment 68 [of the Arkansas Constitution] only to the extent that the amendment imposes obligations inconsistent with federal law"); *Engelman v. Amos*, 404 U.S. 23 (1971). In this way, invalidating the law, regulation, or administrative order gives the plaintiffs the affirmative relief they seek. For example, when the Supreme Court invalidates a state utility commission rate order, the utility is not left without rates. Rather, the case is remanded and the state agency will reform its order consistent with federal law. *Compare Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986) [invalidating state commission rate-making order that misallocated costs and remanding case] with *In re Nantahala Power & Light Co.*, 87 P.U.R.4th 217, 1987 WL 257989 (N.C. Util. Comm'n Nov. 13, 1987) [recalculating utility rates in light of Supreme Court decision].

Here, plaintiffs are likely to prevail in their request for a declaration that defendants' continued regulation of apprenticeship involving a Federal purpose is unlawful. Tailoring of injunctive relief consistent with that declaration should not be difficult for this Court.

III. CONCLUSION

For all the foregoing reasons Plaintiffs' motion for Preliminary Injunction should be granted.

Respectfully submitted.

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