No. 11-17763

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

---

**INDEPENDENT TRAINING AND APPRENTICESHIP PROGRAM, a California corporation, et al.**
***Plaintiffs-Appellants,***

**v.**

**CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California, et al.,**
***Defendants-Appellees.***

---

**On Appeal from the United States District Court for the Eastern District of California, Hon. Garland E. Burrell, Jr.**
**Case No. 2:11-CV-01047-GEB-DAD**

---

# APPELLANTS' OPENING BRIEF

---

Zachary Smith, #78241
Charles L. Post, #160443
Brendan J. Begley, #202563
**WEINTRAUB GENSHLEA CHEDIAK TOBIN & TOBIN**
400 Capitol Mall, Suite 1100
Sacramento, CA 95814
Telephone: (916) 558-6000
Facsimile: (916) 446-1611

Counsel for Plaintiffs/Appellants,
Independent Training and Apprenticeship Program, et al.

# CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 16.1, the undersigned counsel for Plaintiffs/Appellants Independent Training and Apprenticeship Program ("I-TAP"), et al. states that Appellant I-TAP is a California corporation, with no parent or subsidiary, and that no publicly held company owns ten percent or more of Appellant's stock.

Dated: April 23, 2012

**weintraub** genshlea chediak
**tobin** & tobin
a law corporation

By: /s/ Charles L. Post
Charles L. Post
Brendan J. Begley

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases

**Federal Statutes**

**State Statutes**



**Constitutional Provisions**



**Other Authorities**

# 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 U.S Secretary of Labor ("Secretary") 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 ("DOL") 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: the DOL "derecognized" California's agencies and stripped them of authority to "register and oversee apprenticeship programs for federal purposes." *See* Appellants' Excerpts of Record ("ER") at 000180-182. 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, Defendants California Department of Industrial Relations, et al. (the "Agencies") began 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 was designed to ensure.[1] Plaintiffs and Appellants complained that the Agencies had no authority to regulate in this arena in defiance and in violation of the controlling federal regulations which define projects that have a Federal purpose and those that do not. Following the filing of their complaint, Appellants moved to enjoin this improper regulation[2] to prevent further irreparable harm to registered apprentices, to the federally-certified organizations which train them, and to the contractors who employ them.

The U.S. District Court for the Eastern District of California ("District Court") denied the injunction, applying, sua sponte, an improperly narrow interpretation of "federal purpose," as that term is used for purposes of regulating the standards for apprenticeships. In so doing, the District Court improperly substituted its interpretation of the controlling regulations for that of drafting agency. The DOL's interpretation is neither plainly erroneous nor inconsistent with the regulation and the District Court should have recognized the DOL's interpretation as controlling.

---

[1] After the question as to whether the District Court erred by rejecting the DOL's interpretation of its own regulation, Appellants' claim raises this question: Can State Agencies, no longer approved to regulate apprenticeship in matters with a "federal purpose," properly reject the DOL's definition of "federal purpose" and refuse to recognize apprentices in federally approved training programs?

[2] Federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 94, 96 n.14; 103 S. Ct. 2890; 77 L. Ed. 2d 490 (1983); *Inland Pacific v. Dear*, No. 92-C-6479, 1993 U.S. Dist. Lexis 16324 at *69 (Nov. 17, 1993).

## II. JURISDICTIONAL STATEMENT

The underlying civil action in this matter seeks redress of deprivation of rights, privileges and immunities secured by the U.S. Constitution and federal law by persons purportedly acting under color of state law. *See* ER at 000361-364. Accordingly, the District Court had subject jurisdiction over this matter pursuant to 28 U.S.C. § 1331 (federal-question jurisdiction), 28 U.S.C. § 1343(a)(3) (jurisdiction to hear claims brought pursuant to 42 U.S.C. §1983), 28 U.S.C. §§ 2201 and 2202 (declaratory relief), and 28 U.S.C. § 2202 (injunctive relief). *See also* ER at 000348:18-24.

This Court has jurisdiction to hear the appeal because it follows a final judgment that disposed of the claims of all parties. *See* ER at 000003-12; Fed. R. Civ. P. 54 and 65(a)(2). The appeal is timely because the District Court entered the judgment on October 31, 2011, and Appellants Independent Training and Apprenticeship Program ("I-TAP"), Brandin Moyer, and Harold E. Nutter, Inc. (collectively, "Appellants") filed their notice of appeal on November 16, 2011. *See* ER at 000001-2; Fed. R. App. P. 4(a)(1)(A).

## III. ISSUES PRESENTED FOR REVIEW

The various issues presented for review in this matter generally turn on the first and primary issue concerning the District Court's legal conclusion as to the

scope of the term "federal purpose" under 29 C.F.R. § 29.2. The issues presented are:

A) Under controlling federal law, did the District Court fail to give proper deference to a federal administrative agency's interpretation of the term "federal purpose" as used in the agency's own regulation and, thereby, impose an unduly narrow construction when even state agencies do not read the term so narrowly?

B) Under controlling federal law, did the District Court err in finding unripe Appellants' claim that the Agencies cannot enforce California's apprenticeship and prevailing wage laws on work projects that have a "federal purpose," as that term is used in 29 C.F.R. § 29.2 and construed by the DOL, when the Agencies already enforced these laws on three projects that have a "federal purpose"?

C) Under controlling federal law, did the District Court reach an erroneous legal conclusion by ruling that Appellants "failed to show a likelihood of success, or raise a serious question, on the merits of any claim". ER at 000034, Order at 17:22-24.

## IV. STATEMENT OF THE CASE

Appellants filed their complaint alleging violations of federal law and seeking declaratory and injunctive relief on April 18, 2011, and their motion for a

preliminary injunction on May 19, 2011. ER at 000344-368, 000341-343. On June 27, 2011, the Agencies filed their opposition to Appellants' motion, and Appellants filed their reply papers on July 1, 2011. ER at 000972-100; 000044-71. The Agencies subsequently filed their answer to the complaint on July 14, 2011. ER at 000036-43.

On August 15, 2011, the District Court entered its order denying Appellants' motion for a preliminary injunction. ER at 000018-35. Appellants timely filed an initial notice of appeal from this decision on September 13, 2011. ER at 000013-17; *see also* Fed. R. App. R. 4(a)(1)(A) (setting a 30-day deadline for filing such notices of appeal). The parties filed a stipulation to consolidate the trial of the action on the merits with Appellants' application for a preliminary injunction pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, which the District Court granted on October 31, 2011. ER at 000003-12.[3] That same day, the District Court entered its judgment in this matter. ER at 00003-12.

Appellants timely filed a notice of appeal from that judgment on November 16, 2011. ER at 000001-2; *see also* Fed. R. App. R. 4(a)(1)(A). That same day, Appellants requested the dismissal of their original appeal in Ninth

[3] Citing a desire to preserve scarce resources and expedite appellate review of District Court's decision, the parties stipulated to entry of judgment pursuant to *Assoc. Builders & Contractors of S. Cal. v. Nunn*, 356 F.3d 979, 984 (9th Cir. 2004).

Circuit Case No. 11-17191, so that the parties and this Court could address all issues in need of review in the instant appeal.

## V. STANDARD OF REVIEW

"By entering a final judgment pursuant to Fed. R. Civ. P. 65(a)(2), the [District Court] consolidated its preliminary injunction ruling with its decision on the merits. In such cases, [this Court] review[s] the factual findings for clear error and its conclusions of law de novo." *Assoc. Builders & Contractors of S. Cal. v. Nunn*, 356 F.3d 979, 984 (9th Cir. 2004) (hereafter, "*ABC v. Nunn*"). Insofar as Appellants do not contend that the District Court made any incorrect factual findings, but instead reached erroneous conclusions of law in terms of what constitutes a "federal purpose" and whether Appellants are entitled to injunctive relief, the standard here should be de novo. *See id.*

## VI. STATEMENT OF FACTS

In 1937, Congress enacted the National Apprenticeship Act (also known as the "Fitzgerald Act"), 29 U.S.C. § 50, authorizing the Secretary to promote, extend, and encourage apprenticeships with the cooperation of state agencies. Specifically, the Fitzgerald Act assigns to the Secretary the task of establishing labor standards necessary to achieve the purposes of the Fitzgerald Act. *See* 29 U.S.C. § 50.

In so doing, the Fitzgerald Act establishes a national system of apprenticeship standards intended to foster apprenticeship opportunities in the skilled trades. It authorizes the Secretary to delegate to the states regulatory power within the federal system, subject to the continuing supervision of the Secretary. *See* 29 U.S.C. § 50. The Office of Apprenticeship Training, Employment and Labor Services ("OATELS"), an agency within the DOL, administers the Fitzgerald Act on behalf of the Secretary.[4]

The Fitzgerald Act is implemented through 29 C.F.R. §§ 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 by 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.

Until 2007, California regulators had authority — granted by the DOL under the Fitzgerald Act — to regulate the use of apprentices on public works involving a "federal purpose." 29 C.F.R. § 29.1. In 2007, because California had earlier adopted a discriminatory scheme that harmed apprentices by improperly limiting

[4] From time to time the office with the DOL responsible for apprenticeship changes its name. For most of the time relevant to this matter, the office was designated as OATELS. Recently the office was designated the "Office of Apprenticeship" or OA. *See* 29 C.F.R. § 29.2.

opportunities for apprenticeship, California lost the ability to regulate apprenticeship. The DOL "derecognized" the Agencies and thereby stripped them of authority to "register and oversee apprenticeship programs for federal purposes." ER at 000180-182, Request For Judicial Notice ("RFJN"), Exhibit C. The Agencies' 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 revocation of their authority, the Agencies recently began to penalize contractors who use apprentices participating in federally approved apprenticeship programs. ER at 000190-93, 000263-66.[5] Such actions deprived those programs and their apprentices of the very opportunities the Fitzgerald Act is designed to ensure. The 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 to prevent further irreparable harm

[5] Although apparently acknowledging that they would be obligated to recognize as apprentices in federally approved programs working on projects on federal land or those that were wholly federally funded, the Agencies refuse to recognize federally approved apprentices on projects partially funded or supported by federal funds. ER at 000095:7-000096:13.

to registered apprentices, to the federally-certified organizations which train them, and to the contractors who employ them.

**A. The System of Federal Apprenticeship Standards.**

Apprenticeship programs generally are designed to combine supervised on-the-job training with related classroom instruction in a particular trade. The purpose of such programs is to produce 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. This 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. ER at 000103-105, 000149, RFJN, Exh. B, p. 4. 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 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 creation of apprenticeship opportunities and the regulation of those opportunities under the Fitzgerald Act (either directly by the DOL or by a state agency or council recognized as complying with the Fitzgerald Act's objectives and standards) is itself an "agreement or arrangement dealing with apprenticeship" and confers 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 State 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 to approve apprenticeship programs. ER at 000103-105, 000150, RFJN, Exh. B, p. 5. 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 Apprentice Council" ("SAC"). However, once a state has been "recognized," OATELS continues to monitor the state to ensure that the SAC continuously conforms to federal standards. 29 C.F.R. § 29.12. In 1978, OATELS authorized the Agencies 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. ER 000103-105, 000154, RFJN, Exh. B, p. 9.

**C. California Enacts Discriminatory Apprenticeship Laws.**

In 1999, California amended section 3075 of the California Labor Code[6] 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. Labor Code § 3075(b); ER at 000103-105, 000151, 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 [Fitzgerald Act]." ER at 000103-105, 000181-184, RFJN, Exh. D.

OATELS notified the Agencies of such findings and initiated proceedings to revoke their authority to regulate apprentices and apprenticeship programs on public-works projects through an Initiation of Derecognition Proceedings ("Derecognition Notice") on May 10, 2002. ER at 000103-105, 000181-184, RFJN, Exh. D. Further, the discriminatory "needs" requirements of Labor Code § 3075(b) were deemed by OATELS to be unnecessary to achieve California's "ostensible purpose" of protecting apprentices from "transient or exploitative

[6] All further references to the Labor Code are to the California Labor Code.

programs." *Id.* Instead of deleting the provisions of the Labor Code that ran afoul of federal law governing apprentices and apprenticeship programs on public-works projects serving federal purposes, the Agencies appealed OATELS' revocation through a series of administrative hearings. *Id.*

**D. The DOL Derecognizes The Agencies' Authority.**

On January 31, 2007, the DOL's Administrative Review Board issued a "Final Decision and Order" upholding both (1) OATELs' determination of "the amended California apprenticeship statue as not conforming to federal apprenticeship standards" and (2) OATELS' action fully and finally revoking the Agencies' authority to regulate apprentices and apprenticeship programs on public works projects in California with a federal purpose. ER at 000103-178, RFJN, Exhs. A, B.

On March 2, 2007, the DOL gave public notice, as required by 29 C.F.R. § 29.13(d), that OATELS had withdrawn recognition from the Agencies, explaining: "The CDIR and the CAC no longer have authority to register or oversee apprenticeship programs for 'Federal purposes.'" 72 Fed. Reg. 9590. No court has overturned or stayed the DOL's determination, and the limitations period for seeking such judicial intervention has long since expired. Thus, the Agencies no longer are 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. The Agencies' Actions after Derecognition.**

The Administrative Law Judge's recommended decision confirming the DOL's de-recognition of California is dated April 22, 2005. ER at 000103-105, 000146-178, RFJN Exh. B. The final Decision and Order from the Administrative Review Board confirming that recommended decision is dated January 31, 2007. ER 103-144, RFJN, Exh. A. Appellant I-TAP's apprentices were employed on public-works projects in California from April 2005 through the fall of 2010. ER at 000220, Declaration of Carolyn Nutter ("C. Nutter Decl") ¶¶ 3-4, Compendium of Evidence ("Compendium"), Exhibit 4; ER at 000247, Declaration of Paul Smith ("P. Smith Decl.") ¶ 5, Compendium Exh. 8; ER at 000192-193, Declaration of Travis Baker ("Baker Decl.") ¶ 10, Compendium Exh. 1; ER at 000215, Declaration of Norman Nutter ("N. Nutter Decl.") ¶ 8, Compendium Exh. 3; ER at 000264, 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, California agencies responsible for enforcing prevailing-wage laws were aware of contractors' use of I-TAP apprentices on public-works projects in California. ER at 000222, C. Nutter Decl. ¶11-12, Compendium Exh. 4; ER at 000267-268, P. Smith Decl. ¶¶ 5-6, Compendium Exh. 8; ER at 000192-193, T.

Baker Decl. ¶ 10, Compendium Exh. 1; ER at 000215, N. Nutter Decl. ¶ 8, Compendium Exh. 3. These agencies often raised initial objections to the use of apprentices who were not affiliated with a state-approved apprenticeship program. *Id*.

However, 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 I-TAP nor contractors using I-TAP apprentices faced any enforcement actions during this period. *Id.* That ended in 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. ER at 000191-192, T. Baker Decl. ¶3-7, Compendium Exh. 1; ER at 000220, C. Nutter Decl. ¶¶ 5 and 7-8; Compendium Exh. 4; ER at 000264-266, J. Nutter Decl. ¶¶ 6-12, Compendium Exh. 9.

**F. The Agencies' Defiance of DOL Guidelines.**

Gray Electric Company ("Gray Electric") is a California electrical contractor 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 on two different projects on which Gray Electric 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"). ER at 000191-192, T. Baker Decl. ¶¶ 3 and 8, Compendium Exh. 1.

On September 29, 2010, the Agencies 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, California's Deputy Labor Commissioner, regarding the allegations. Baker informed Alvaro that Gray Electric's use of I-TAP apprentices was proper because I-TAP was a federally-certified apprenticeship training program. ER at 000191-192, T. Baker Decl. ¶ 4-8, Compendium Exh. 1.

A series of letters and emails between Gray Electric and the Agencies followed. In one correspondence, Gray Electric explained that 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. The Agencies 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 California's program regardless of whether they are federally certified, and that the Agencies intended to issue a Civil Wage and Penalty

Assessment ("Penalty Assessment") against Gray Electric if it continued to use I-TAP apprentices. ER at 000191-192, 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 imposition of a Penalty Assessment against it. *Id.* at ¶ 9; ER at 000215-216, N. Nutter Decl. ¶ 11, Compendium Exh. 3, ER at 000221, C. Nutter Decl. ¶ 8, Compendium Exh. 4.

Appellant 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 Gym Project"). McFadden Construction, Inc. ("McFadden") was the primary contractor on that project. Nutter Electric employed eight workers from the I-TAP apprenticeship training program on the Stockton Gym Project. ER at 000264, J. Nutter Decl. ¶ 6, Compendium Exh. 9.

In May 2010, Nutter Electric learned that the Northern California Electrical Construction Industry Labor Management Trust ("Labor Management Trust") had alleged to the Agencies 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. ER at 000264-265, J. Nutter Decl. ¶ 7, Compendium, Exh. 9. Nutter Electric responded to the Labor Management Trust and the Agencies 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 Gym Project involved a federal purpose. *Id.* at ¶8.

Over the next several months, Nutter Electric exchanged letters and communications with McFadden, the Labor Management Trust, and the Agencies concerning its use of I-TAP apprentices. Among those communications was Nutter Electric's request that the Agencies identify the sources of funding for the Stockton Gym Project to establish that no federal funding, subsidy, or benefit was present in the project. Nutter Electric received no reply to that request. *Id.* at ¶ 9.

However, Nutter Electric did receive a Penalty Assessment from the Agencies in the amount of $20,059.25 (Case Number 40-26553/254). The Penalty Assessment cites Nutter Electric's use of I-TAP apprentices on the Stockton Gym Project as the violation. *Id.* at ¶ 10. Because of the Agencies' actions, McFadden (as prime contractor on the Stockton Gym Project) initially withheld from Nutter Electric 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 Agencies' assessment pursuant to Labor Code section 1742 and posted a cash deposit with the Agencies pursuant to Labor Code section 1742.1(b). The Request for Review was based on the Agencies' lack of authority to disallow the payment of the apprentice

wages (the purported basis for the Penalty Assessment) due to the DOL having revoked such authority. ER at 000265-266, J. Nutter Decl., at ¶12.

**G. All the Projects at Issue 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 Stockton Gym Projects. ER at 000232, 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 Gym Projects were funded by Build America Bonds ("BABs"), a new form of municipal bond created by the U.S. Treasury in response to the financial crisis that began in 2008-09. These bonds are taxable, but the U.S. Treasury pays a direct subsidy to the municipal lender to induce sales of the bonds. ER at 000233-234, Genest Decl. ¶¶ 8 and 10, Compendium, Exh. 5. The funding authorized for the Marysville High School Project is through tax-exempt municipal bonds. These bonds are subsidized by the U.S. Government through their tax exempt status. *Id.* at ¶¶ 7 and 10.

**H. The Agencies' Improper Regulation Injures Apprentices.**

Appellant Brandin Moyer is a former I-TAP enrolled apprentice who, as a result of the Agencies' improper regulatory activities, 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. ER at 000210, 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 roughly another 1,500 hours of work experience in addition to the classroom instruction. *Id.* at ¶ 5.

As noted, in October of 2010, Gray Electric was economically compelled by the Agencies to pull all Gray apprentices out of I-TAP's federally certified apprenticeship program. ER at 000192, T. Baker Decl. ¶9, Compendium Exh. 1, ER at 000221, C. Nutter Decl. ¶8, Compendium, Exh. 4. As a consequence, Mr. Moyer 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 Electric to reduce Mr. Moyer's compensation drastically, a crucial reduction for Mr. Moyer and his young family

that forced them to sacrifice their home in a "short sale." ER at 000210-211, 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. ER at 000244, Clark Dec., ¶¶ 4-5; Compendium, Exh. 6.

## I. The Agencies' Improper Regulation Injures I-TAP.

Since the Agencies began enforcement activity against contractors using I-TAP apprentices, I-TAP has lost relationships with several contractors that formerly used I-TAP apprentices. I-TAP provides training to far fewer California apprentices than it did prior to the Agencies' enforcement actions. ER at 000219-229, C. Nutter Decl. ¶¶ 6-10; ER at 000220-221, N. Nutter Decl. ¶¶ 11-12 and 16-17. I-TAP continues to lose opportunities to provide apprentices as a result of the Agencies' improper and biased regulatory actions. ER at 000260-261, Decl. of Roy Smith ("Smith Decl. II") ¶¶ 3-5; Compendium Exh. 8. The Agencies' unlawful actions threaten I-TAP's very existence. ER at 000215-216, N. Nutter Decl. ¶¶ 10-18; Compendium Exh. 3.

## J. Plaintiff's Evidence Is Almost Completely Uncontested.

The Agencies' Opposition to Plaintiff's Application for Preliminary Injunction is supported by a single declaration. In it, Glen Forman, acting chief of

the Division of Apprenticeship Standards for the California Division of Industrial Relations, states that the Agencies have had no change in policy regarding actions against contractors on public works projects within the state that use apprentices enrolled in apprenticeship programs not approved by the Agencies; however, he offers no evidence contesting the specific testimony of several declarants that such uses were not the subject of enforcement actions. ER at 000074-78, Forman Decl. For the most part, Mr. Forman's declaration states that the Agencies operate in a way consistent with California law. The declaration does not contest or reference the derecognition of the Agencies by the DOL or the DOL's interpretation of "federal purposes." Nor does Mr. Forman's declaration, or anything else offered by the Agencies, contest the facts attested in the declarations filed by Appellants (i.e., those of Mike Genest, Roy Smith, Travis Baker, or Norm and Carolyn Nutter).

## VII. SUMMARY OF THE ARGUMENT

Appellants do not contend that the Fitzgerald Act preempts state laws regulating apprenticeship programs that are unconnected to any federal purpose. That said, it is clear that the Fitzgerald Act sets a national floor below which state protections for apprentices working on projects with a "federal purpose" may not sink. *See Associated Builders and Contractors v. Curry*, 797 F.Supp. 1528, 1538 (N.D. Cal. 1992), *vacated on a different ground*, 68 F.3d 342 (9th Cir. 1995) ("*Curry*"); *see also California Div. of Labor Stds. Enforcement v. Dillingham*

*Constr., N.A.*, 519 U.S. 316, 328 (1997) ("*Dillingham*") (noting that apprenticeship programs "meeting the substantive standards set forth in the Fitzgerald Act regulations can be approved" by states recognized by the Secretary). In passing the Fitzgerald Act, "Congress . . . recognized pre-existing state efforts in regulating apprenticeship programs and apparently expected that those efforts would continue." *Dillingham*, 519 U.S. at 330. Nonetheless, the fact "[t]hat the States traditionally regulated these areas would not alone immunize their efforts." *Id*.[7]

The DOL properly defined "federal purpose" under the Fitzgerald Act. The DOL also appropriately determined that the Agencies' regulation of apprentices on projects connected to a "federal purpose" violated the minimum federal standard.[8] However, the District Court did not give proper deference to the DOL's

[7] The U.S. Supreme Court noted that the Fitzgerald Act's likely aim was to prevent "multistate apprenticeship programs" from being "saddled with the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government." *Dillingham*, 519 U.S. at 332 n.10 (internal quotation marks and citation omitted). In dicta in that decision, which predates the DOL's de-recognition of California, the high court also pondered, without deciding, the interrelationship of state and federal apprenticeship regulation. *Id*.

[8] Among other things, in derecognizing the Agencies' authority to regulate apprenticeship under the Fitzgerald Act, the DOL concluded that California's regulations violated the Fitzgerald Act's core requirement to foster and expand apprenticeship, concluding that the denial of job opportunities is an artificial barrier to the key educational underpinning of apprenticeship. ER at 000180. On-the-job training is where most apprenticeship learning occurs. The classroom experience is considered related and supplemental to the jobsite education. 29 CFR 29.4.

determinations. Even assuming the term "federal purpose" as defined in 29 CFR 29.2 is ambiguous, the DOL's interpretation of its own regulations is neither "plainly erroneous" not inconsistent with the regulation. *Bassiri v. Xerox Corp.* 463 F.3d 927, 931 (9th Cir. 2006).

The District Court also advanced a jurisdictional theory to deny Appellants' claims and considered the ripeness of Plaintiff's claims. The District Court ultimately based its decision upon its interpretation of "federal purpose." The court refused to defer to the DOL's interpretation of its own regulations. On the basis of that flawed legal conclusion, the District Court found no merit to any of Appellants' claims and refused to grant Appellants the injunctive relief they requested. To conserve resources and advance the case to appellate review, the parties stipulated to an entry of judgment pursuant to *Assoc. Builders & Contractors of S. Cal. v. Nunn*, 356 F.3d 979, 984 (9th Cir. 2004). ER at 000003-12.

## VIII. LEGAL DISCUSSION

By setting a national floor for apprenticeship standards, without preempting state laws in that area, the Fitzgerald Act is analogous to the federal Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219. *See Pacific Merch. Shipping Assoc. v. Aubry*, 918 F.2d 1409, 1425 (9th Cir. 1990) ("There is no indication that Congress, in enacting the FLSA[] . . . intended to preempt states from according

more generous protection to . . . employees . . . . Further, the purpose behind the FLSA is to establish a national floor under which wage protections cannot drop, not to establish absolute uniformity in minimum wage and overtime standards nationwide at levels established in the FLSA."). As explained below, it was in the DOL's province to define and enforce those standards, and the Agencies lost their authority to regulate federal apprentices when it was derecognized.

Indeed, several cases hold that the Fitzgerald Act does not preempt states from enacting separate but complementary apprenticeship schemes. *E.g., Siuslaw Concrete Constr. Co. v. Washington Dep't of Transportation*, 784 F.2d 952, 956-958 (9th Cir. 1986) ("*Siuslaw*"); *Curry*, 797 F.Supp. at 1538; *but see Dillingham*, 519 U.S. at 332 n.10 (contemplating the aim of the Fitzgerald Act as being to prevent "multistate apprenticeship programs" from being "saddled with the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government"). Each of those cases was decided before the DOL derecognized California.

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 DOL. *Curry*, 797 F.Supp. at 1538; *see also Dillingham*, 519 U.S. at 330 (confirming the fact "[t]hat the States traditionally regulated these areas would not alone immunize their efforts"). Apparently, no

court has yet to consider a case where, as here, a state has adopted apprenticeship standards that violate the basic national apprenticeship standard Congress intended to establish. As explained herein, the Agencies' violation of that standard has been identified and adjudicated by the DOL as the responsible enforcement agency. ER at 000103-178, 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. *Curry*, 797 F.Supp. at 1538 (citing *Siuslaw*, 784 F.2d at 958); *see also Dillingham*, 519 U.S. at 320 (noting that "California has adopted its own apprenticeship standards . . . that are 'substantively similar' to the federal standards"). That sort of independent, supplemental regulation "falls within the scope of a state's traditional police powers." *Curry*, 797 F.Supp. at 1538 (citing *Siuslaw*, 784 F.2d at 958); *see also Dillingham*, 519 U.S. at 325.

Nothing in applicable case law suggests that the Agencies have the authority to adopt apprenticeship standards that are inconsistent with the DOL standards or the fundamental objective of the Fitzgerald Act (to promote apprenticeship opportunities and safeguard the welfare of apprentices). *Cf. Dillingham*, 519 U.S. at 332 n.10 (pre-derecognition decision confirming that the Fitzgerald Act's likely aim was to prevent "the . . . burden of complying with conflicting

directives . . . between States and the Federal Government," but assuming in confusing dicta "that the federal and state apprenticeship standards are not mandatory") (internal quotation marks and citation omitted).

Likewise, there is no decision indicating that the Agencies may apply apprenticeship standards which have been determined to violate the letter and spirit of the Fitzgerald Act. 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*, 784 F.2d at 153 (quoting from *Hillsborough County Florida v. Automated Med. Labs., Inc.*, 471 U.S. 707, 105 S. Ct. 2371, 2375 (1985)).

Here, the Agencies' improper regulatory activities are an obstacle to the accomplishment of federal objectives,[9] a fact that has been determined by the DOL. Ultimately, the District Court failed to give proper deference to the DOL's interpretation of its own regulation and construed that controlling regulation in an unduly restrictive manner. The District Court's construction of the regulation, if affirmed, would lead to absurd results.

[9] The Fitzgerald Act states that one of its core purposes is to "promote" apprenticeship. 29 U.S.C. §50.

## A. The District Court Misconstrued "Federal Purpose."

The District Court denied Appellants' request for a preliminary injunction and entered judgment in favor of the Agencies based upon the mistaken impression that part of Appellants' claim was not ripe and that Appellants had "failed to show a likelihood of success, or raise a serious question, on the merits of any claim." ER at 000034, Order at 17:22-24. These erroneous legal conclusions stem from the District Court's misinterpretation of what constitutes a "federal purpose." As the District Court commented at oral argument:

> Your preemption argument really centers on whether there is a federal purpose and how you define federal purpose. And if federal purpose is not defined as your clients argue, and if I find that your clients' arguments are frivolous, then that claim would be dismissed because it would be wholly unsubstantial and frivolous, and Supreme Court authority states that a federal judge should dismiss such a claim. And that's where you are.

Reporter's Transcript ("RT") at 23:23-24:5.[10]

### 1. The Fitzgerald Act's Broad Federal Purpose.

Appreciating the proper breadth of "federal purpose" requires some background information, all of which was provided to the District Court. As already noted, the Fitzgerald Act was enacted to encourage the establishment of

[10] The District Court was hostile to Appellants' claim. For instance, the District Court repeatedly refused to allow Appellants to articulate their position in response to questions at oral argument. *See* RT at 6:12-11:23, 13:1-17:22, 18:9-21:22, 22:10-26:19, 28:12-29:12.

modern apprenticeship programs to be administered by the DOL. The Fitzgerald Act provides in pertinent part:

> The Secretary . . . 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 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." 29 U.S.C.A. § 50. The Fitzgerald Act is implemented through 29 C.F.R. §§ 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. These regulations explicitly fill a gap in the statutory scheme that Congress intended the DOL to fill.

Congress intended the DOL to "elucidate" the statute by regulation. "Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Tualatin Valley Builders Supply, Inc. v. United States*, 522 F.3d 937, 941 (9th Cir. 2008) (citing *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-44 (1984)). In such cases, "'a court may

not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.'" *Id*.

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' guidelines, can approve an apprenticeship program. 29 C.F.R. § 29.3. The Agencies must apply OATELS' standards. The SAC or SAA's authority remains in effect as long as the Agencies are in good standing. In the event SAC or SAA fails to comply with OATELS' standards or refuses to comply with OATELS' requirements, OATELS is authorized to "derecognize" SAC or SAA for "reasonable cause" and strip SAC or 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. 29 C.F.R. § 29.3.

The Fitzgerald Act is intended to provide a system of national standards to "safeguard the welfare of apprentices and to promote opportunities for apprentices through the country." 29 U.S.C. § 50. Under the regulations promulgated pursuant to the Fitzgerald Act, the DOL 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).

This definition of "federal purpose" was affirmed on October 29, 2008, when the DOL issued final rules updating 29 C.F.R. Part 29, in which the definition of "federal purpose" was not changed. 73 Fed. Reg. 64402.

Letters from OATELS staff indicate that the DOL has interpreted the phrase "federal purpose" in its own regulations to include "all public works projects funded in whole or in part with federal funds." Additionally, these letters confirm that the DOL has interpreted its own regulations to require all SACs "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." Accordingly, the DOL has determined that "federal purpose" includes, but is not limited to, projects where there is federal financial involvement. The District Court was bound to give this interpretation controlling deference. Such a construction is not plainly erroneous or inconsistent with the regulation. Thus, the District Court was bound by it. *Bassari v. Xerox Corp.*, 463 F.3d 927, 931 (9th Cir. 2011).

Neither the Fitzgerald Act itself nor 29 C.F.R. § 29.2 restrict the reach of the Fitzgerald Act to projects where there is federal funding. 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" in addition to any "preference or right pertaining to apprenticeship."

**2. The District Court Erred by not Deferring to the DOL.**

The DOL's interpretation is not "plainly erroneous" and is controlling. The DOL's interpretation of "federal purpose," through OATELS, is consistent with Appellants' position. Nonetheless, the District Court declined to adopt the DOL's interpretation of its own regulation, finding that construction "unpersuasive" and not "entitled to respect." ER at 000030, Order at 13:24-28. In this regard, not only did the District Court construe the term "federal purpose" too narrowly, it also applied the wrong standard concerning deference to administrative agencies.

The District Court relied upon *Chirstiansen v. Harris Cty.*, 529 U.S. 576, 587 (2000), to support its erroneous determination that "Chevron-style deference" does not apply to the letters expressing OATELS' position on this issue. ER at 000030, Order at 13:13-17. However, OATELS was not interpreting a statute but a DOL regulation. The proper measure for the degree of deference that must be given to an agency's interpretation of its own regulation is found in *Bowles v. Seminole Rock & Sand*, 325 U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997). Those binding authorities confirm that the District Court was required to

give "controlling" deference to OATELS' interpretation. *Auer*, 519 U.S. at 461; *Bowles*, 325 U.S. at 414.

When a question arises as to the meaning of an agency's regulations, federal courts will apply traditional rules of construction and, where required, administrative deference. *Western Radio Servs. Co. v. Qwest Corp.*, 2012 U.S. App. LEXIS 5434 (9th Cir. 2012). However, "Auer deference" applies to an agency's own interpretation of an ambiguous regulation.

In order to determine whether Auer deference applies, the Ninth Circuit applies a two-part test as provided in *Christensen*, 529 U.S. 576 at 588. "[T]he court must first determine whether the regulation was ambiguous." *Id.* In other words, if the meaning of regulatory language is not "free from doubt," it is ambiguous. *Bassiri v. Xerox Corp.*, 463 F.3d 927, 931 (9th Cir. 2006). Second, if the regulatory term is ambiguous, the agency's interpretation is controlling under Auer unless it is "plainly erroneous or inconsistent with the regulation." *Id*. "Under this standard, (the court will) defer to the agency's interpretation of its regulation unless an 'alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation." *Id.* Even if the Court concludes that "federal purpose" is ambiguous, the DOL interpretation of the term is not plainly erroneous or inconsistent with the regulation. Indeed, the DOL's interpretation is

consistent with the goal of establishing a national minimum standard of apprenticeship. Under the principles of *Auer* and its Ninth Circuit progeny, a District Court may not substitute its interpretation for that of the regulatory agency unless the "plainly erroneous" standard has been met.

**a. Appellants' Interpretation is Consistent with OATELS'.**

When OATELS' interpretation of its own regulations is given the controlling deference that it deserves, it becomes clear that the three projects that have been impacted by the Agencies' enforcement of the laws in question all involved a "federal purpose." Consequently, the Agencies' enforcement of those laws violates the Supremacy Clause by conflicting with the national standard set by the Fitzgerald Act and its implementing regulations.

OATELS determined that that 29 C.F.R. § 29.2(k) requires any public-works project that involves apprentices and receives a federal benefit to accept apprentices from programs registered with OATELS. Applying a different standard, the Agencies require apprentices to be certified by them in order to receive the apprenticeship wage-rate on public-works projects in California – including public-works projects that receive federal money and/or involve other apprenticeship rights and benefits. The Agencies will only permit a public-works project to be subject to federal wage requirements if the project is controlled by,

carried out by, and awarded by the federal government. ER at 000095-96, Opp. 11:17-12:13.

Because the DOL (through 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, federal courts must defer to the reasonable interpretation of the agency responsible for administering the statute. *See Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). In such a case, a federal 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.* at 845; *see also INS v. Jong Ha Wang*, 450 U.S. 139, 144 (1981).

A federal 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 [the court] construed the statute initially." *Columbia Basin Land Protection Association v. Schlesinger*, 643 F.2d 585, 600 (9th Cir.1981).

The DOL'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*, 467

U.S. at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961)); *see also Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944) (explaining that 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). Since OATELS is the agency charged with enforcing 29 C.F.R. Part 29, its interpretation of "federal purpose" controls.

**3. The District Court's Narrow Interpretation is Erroneous.**

In misconstruing "federal purpose," the District Court disregarded this background and the import of the authorities cited by Appellants. In so doing, the District Court correctly acknowledged that 29 C.F.R. § 29.2 defines "federal purposes" as including "'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*.'" ER at 000028-29, Order at 11:27-12:3 (emphasis in original). However, the District Court adopted an interpretation of the phrases "dealing with apprenticeship" and "pertaining to apprenticeship" that 1) is not supported by the plain meaning of that language and 2) effectively strips the Fitzgerald Act and the implementing regulations of their purposes.

The District Court was right to heed the rule of statutory construction that prohibits rendering as surplusage any words in a regulation. *See* ER at 000029, Order at 12:5-13. Nonetheless, Appellants' interpretation of 29 C.F.R. § 29.2 does not "read[] . . . into thin air" the phrases "dealing with apprenticeship" and "pertaining to apprenticeship." ER at 000029, Order at 12:5-9.

On the contrary, Appellants' reading of the regulation is that a federal purpose exists where "any federal contract, grant, agreement, or arrangement deal[s] with apprenticeship" if it covers a public-works project where apprentice labor is to be used. By the same token, a federal purpose exists where "any federal financial or other assistance, benefit, privilege, contribution, allowance, [or] exemption" is provided to a public-works project that "pertain[s] to apprenticeship" by virtue of the presence of apprenticeship opportunities.

By contrast, under the District Court's interpretation, a "federal contract, grant, agreement, or arrangement" does not have a "federal purpose" under 29 C.F.R. § 29.2 unless it is entered for the primary purpose of creating apprenticeship opportunities. Likewise, according to the District Court's construction, "any federal financial or other assistance, benefit, privilege, contribution, allowance, [or] exemption" does not have a "federal purpose" under 29 C.F.R. § 29.2 unless the major aim of the financial assistance, contribution, etc., is to create apprenticeship jobs.

Consequently, under the District Court's analysis, the following would be true: If the federal government were to enter a contract with a carpenter to erect a new federal courthouse in California, the building of which was funded exclusively with federal monies, that endeavor would have no "federal purpose" under 29 C.F.R. § 29.2 unless creating work for apprentices was the central goal of erecting that structure, entering the contract, and providing the financial assistance. This interpretation defeats the purpose of the Fitzgerald Act and its implementing regulations, denying its application even in wholly federally funded projects. Because the District Court's interpretation would lead to such absurd results, it cannot be sustained. *See Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 681 (9th Cir. 2005) ("'It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute.'") (quoting from *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983)).

It is apparent that the District Court read "dealing with" and "pertaining to" as requiring that apprenticeship be the "subject of" a federal contract grant, payment, or subsidy. But fairly read, that is not what "pertaining to" or "dealing with" means. Chiefly, "pertain" means, "to have reference to or to relate to

something."[11] One thesaurus says "pertain means" "relevant to."[12] Several sources use the term "deal with" in the same fashion, as in "relating or pertaining to." These meanings are inconsistent with the District Court's interpretation. As usually defined, the phrases "pertaining to" and "dealing with" apprenticeship must mean "relating to" or "affecting" apprenticeship. This construction is consistent with the DOL's interpretation of the regulation.

The District Court's interpretation also must be rejected because it is contrary to Ninth Circuit jurisprudence. *See Elec. Joint Apprenticeship Comm. v. MacDonald*, 949 F.2d 270, 274 (9th Cir. 1991) (confirming that "federal purposes include federal public works and public works deriving federal financial assistance," without limitation to those instances when the design of public works is to create apprenticeship jobs). Not only does the District Court's hyper-literalist construction disregard Ninth Circuit authority, it also fails to give proper deference to the DOL's interpretation of its own regulation.

**4. The Agencies Failed to Carry their Burden RE Federal Purpose.**

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

[11] The American Heritage® Dictionary of the English Language, Fourth Edition copyright ©2000 by Houghton Mifflin Company.

[12] www.thesaurus.com

F.3d 51, 58 (1st Cir. 2006) (citing 20 C.F.R. § 627.425(b)(1)(iv) and requiring the State of Massachusetts to repay the DOL federal funds for which the state could not "prove were spent in compliance with the substantive regulations").

Further, when the Agencies take 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 Agencies' 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 the state when the federal government provides financial assistance or benefits to the state – and certainly the first of these limitations is that the state must comply with federal law.

Here, OATELS determined that the Agencies were 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 California. Thus, at a bare minimum, the Agencies must bear the burden of showing that it is either not using federal money or that no other federal purpose is being served. *See, e.g.*, 20 C.F.R. § 627.802(e) (mandating 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).

**a. The Agencies' Position is not Entitled to Deference.**

Like the District Court, the Agencies' position fails to take proper account of the DOL's derecognition of California's authority to determine what does or does not constitute a federal purpose. Indeed, because the Agencies' interpretation of "federal purpose" actually conflicts with the DOL's interpretation, the Agencies' position must be disregarded. *See Hillsborough*, 471 U.S. at 713 (noting that such a conflict arises when "compliance with both federal and state regulations is a physical impossibility"). Federal courts owe no deference to a state agency's interpretation of federal law that the state agency is not charged with enforcing. *See Perry v. Dowling*, 95 F.3d 231, 236 (2d Cir.1996).

**b. The Three Projects Involved a Federal Purpose.**

Arguing that there is no "federal purpose" at play in this case, the Agencies correctly pointed out to the District Court that "there is no alleged federal contract" involved in the Chicago Park Project, the Marysville High School Project, or the Stockton Gym Project. ER at 000094, Opp. at 10:23-24. The Agencies also asserted that "there is no federal or financial or other assistance" involved in those projects. ER at 000094, Opp at 10:24-25. Putting aside the questionable validity of that second argument, the undisputed evidence confirms that the federal government did provide, under 29 C.F.R. § 29.2, a "benefit, privilege, contribution, allowance, [or] exemption" to those projects by way of the aforementioned BABs

and tax-exempt municipal bonds. See ER at 000233-234, Genest Decl. ¶¶ 7-8 and 10, Compendium, Exh. 5.

By declining to address such funding, the Agencies failed to carry their burden of showing that the three projects at issue did not involve a "federal purpose." Moreover, by acting to adopt standards that deprive apprentices in federally approved programs the opportunity to work in California (unless they submit to the state imposed-standard of restricted programs), the Agencies interfere with the fundamental "preference or right" created by the Fitzgerald Act; specifically, the right to participate in a national apprenticeship system.

***i. The Chicago Park and Stockton Gym Projects.***

The Chicago Park and Stockton Gym Projects were funded, in part, with federal funds. ER at 000233-234, 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 Gym 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 U.S. 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 equipment, water and sewer projects, environmental projects, energy projects, government housing projects and public utilities."

ER at 000234, Genest Decl. ¶ 9, Compendium, Exh. 5.

Therefore, since both the Chicago Park Project and Stockton Gym Project were funded by the proceeds of BAB bond sales and BABs provide a direct subsidy to California, these projects had a financial "federal purpose" in addition to the purposes surrounding apprenticeship welfare and opportunity.

### *ii. The Marysville High School Project.*

The authorized source of funding for the Marysville High School Project was municipal bonds sold by the Treasurer of the State of California. ER at 000232, Genest Decl. ¶ 4, Compendium Exh. 5. These municipal bonds benefit from a substantial federal subsidy. Eric Solomon, U.S. Treasury Department Assistant Secretary for Tax Policy, described the federal subsidy provided by

municipal bonds in his testimony to the U.S. House of Representatives Oversight Subcommittee on Domestic Policy on Tax Exempt Bond Financing, as follows:

> The 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"), which enables State and local governments to finance public infrastructure projects and other public-purpose activities at lower costs.

ER at 000233, Genest Decl. ¶ 6, Compendium Exh. 5.

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. Selling 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 California, the Marysville High School Project involves a "Federal purpose."

***iii. The Right to Participate as an Apprentice.***

The DOL derecognized California because the state's 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 the welfare of apprentices. ER at 000103-105, 000177, 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; ER at 000103-105, 000164, RFJN, Exh. B, p.19. Those standards create a "right" and a "preference" to be provided to apprentices – a right and preference that federal apprentices in California are now denied due to the Agencies' improper regulatory activities.

The Fitzgerald Act cannot be read as encouraging (or even tolerating) states and the federal government to create 51 separate standards for the training and employment of apprentices. Rather, the express goal of the Fitzgerald Act is to promote the welfare of apprentices. That goal is accomplished by, among other things, the adoption of basic standards for apprentice welfare and training. *See Dillingham*, 519 U.S. at 332 n.10 (explaining that the Fitzgerald Act's likely aim

was to prevent "the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government") (internal quotation marks and citation omitted). The maintenance of that basic standard for apprenticeship training is the chief "federal purpose" underlying enactment of the Fitzgerald Act. This overriding federal purpose is fully frustrated by the Agencies' enforcement (in the Chicago Park, Marysville High School and Stockton Gym Projects) of the very apprenticeship standards that resulted in California's derecognition.

**B. The Matter Was Ripe for Adjudication.**

The undisputed evidence in the record leaves no doubt that the Agencies enforced California's apprenticeship and prevailing wage laws in the aforementioned three public-works projects. *Compare* ER at 000190-93 and 000263-66 (Appellants' evidence), with ER at 000072-78 (the Agencies' evidentiary objections and evidence in opposition to the requested relief in finding Appellants' concern not yet ripe, the District Court construed the term "federal purpose" far too narrowly. When that term is given a proper construction, it becomes evident that all three of the projects regulated by the Agencies in the challenged fashion implicate a "federal purpose."

///

///

### C. Each of Appellants' Claims Supports Injunctive Relief.

A party seeking a preliminary injunction bears the burden of showing that (1) the moving party probably will prevail on the merits; (2) the moving party will suffer irreparable injury if the relief is denied; (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). In addition to those elements, a party seeking a permanent injunction must show "that remedies available at law, such as monetary damages, are inadequate to compensate for that injury" *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1184 (9th Cir. 2011); *cf. Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 546 n.12, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.").

Because the ruling on Appellants' motion for a preliminary injunction was consolidated with the trial on the merits in this action under Rule 65(a)(2) of the Federal Rules of Civil Procedure, ER at 000003-12, there is reason to believe that "considerations of irreparable harm are out the window and the only question is whether the [Appellants are] entitled to an injunction, period." *Cronin v. United States Dep't of Agriculture*, 919 F.2d 439, 445 (7th Cir. 1990). In any event, Appellants easily can establish each of the elements for either type of injunction

through the undisputed evidence in this case and the controlling authorities that pertain to each of Appellants' claims.

**1. Success on the Merits of the Supremacy Clause Claim.**

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." *Hillsborough*, 471 U.S. at 713. "Such a conflict arises when compliance with both federal and state regulations 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." *Id.* (internal quotation marks and citation omitted).

The Supreme Court has repeatedly held that state laws can be pre-empted by federal regulations as well as by federal statutes. *Hillsborough*, 471 U.S. at 713; *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). The Agencies' exclusion of federally certified apprentices from the opportunity to work at prevailing apprenticeship wages is based upon a state statute that conflicts with the controlling federal law; therefore, the Agencies' activity in this regard should be enjoined. Because the District Court's legal conclusion on this claim was couched

in a misinterpretation of "federal purpose," *see* ER at 000028-31, the judgment against Appellants should be reversed.

**2. Success on the Merits of the Commerce Clause Claim.**

The DOL proceedings conclusively determined that Labor Code section 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 without serving the ostensible purpose of protecting apprentices in California. ER at 000103-105, 000176-177, RFJN, Exh. B, p. 31-32. Thus, by enforcing Labor Code section 3075(b) in combination with California's prevailing wage law, Labor Code section 1775.5, the Agencies' actions constitute unlawful regulation rather than "market participation" by the state. *Dillingham Const. N.A., Inc. v. County of Sonoma*, 190 F.3d 1034, 1038 (9th Cir. 1999).

The Agencies' unlawful regulatory activity improperly interferes with interstate commerce in violation of the U.S. Constitution's Commerce Clause, art. I, § 8, cl. 3. The Agencies' conduct in this respect effectively bars apprentices, such as Appellant Brandin Moyer, from participating in federally certified apprenticeship programs. As a result, the Agencies prevent thoroughly qualified apprentices in programs approved by the DOL in the other 49 states from pursuing

public-works employment opportunities within California. *See Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Oregon*, 511 U.S. 93, 98 (1994); *Tri-M Group, L.L.C. v. Sharp*, No. 10-10235, 2011 U.S.App. LEXIS 5560 (3d. Cir. March 21, 2011). The District Court erred by failing to appreciate such circumstances. *See* ER at 000031-32.

**3. Success on the Due Process & Equal Protection Claim.**

The DOL has determined that Labor Code section 3075(b) "discriminate[s] against new [apprenticeship] programs" and their enrollees. ER at 000103-105, 000176-177, RFJN, Exhibit B, p. 31-32. Yet, the Agencies cite this section as the ultimate authority to deny individuals seeking the opportunity to work as apprentices and OATELS-certified apprenticeship programs from participating in public-works contracting in California. The Agencies' actions violate Appellants' 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 state-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. The Agencies' 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. ER 000214, N. Nutter Decl. ¶ 3-5, Compendium Exh. 3; ER at 000220, C. Nutter Decl. ¶3, Compendium Exh. 4. I-TAP's apprenticeship program is equal or superior to state-certified apprenticeship programs. ER at 000214-215, N. Nutter Decl. ¶ 5-8, Compendium Exh. 3; ER at 000210, Moyer Decl. ¶5, Compendium, Exh. 2.

Labor Code section 3075(b) and the Agencies' application and enforcement of it in combination with California's prevailing wage law, Labor Code section 1775.5, has no rational connection to public health, safety, or welfare, or any other legitimate governmental interest and, on that basis, deprives Appellants 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 Fourteenth Amendment to the U.S. Constitution.

The Agencies are enforcing a classification, established in Labor Code section 3075, that has no rational basis. The Agencies favor apprenticeship programs already certified under California law before the "need" requirement was

put into 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 therein.

The Agencies admit that both California's apprenticeship statutes and the federal apprenticeship registration serve the purpose of maintaining standards. *See* ER at 000093, Defendants' Opp, p. 9:14-16 ("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."). Even so, the Agencies' justifications for treating 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 Agencies nothing for federal apprenticeship training, the budget limits are meaningless. Indeed, because the Agencies offered nothing to challenge Appellants' 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, the Agencies cannot justify any distinction between apprentices based on the identity of the approving agency.

Once again, the distinction is artificial and therefore irrational. *See Merrifield v. Lockyer*, 547 F. 3d 978, 990-92 (9th Cir. 2008).

The Agencies' claim - that the "needs test" insures that there will be jobs for apprentices who graduate - also cannot survive scrutiny. ER at 000097. The argument disregards the DOL's finding that the "needs test" reduces, rather than increases opportunities for apprentices.

Labor Code section 3075(b)(2) states that the existence of a "need" may be demonstrated when "[e]xisting apprenticeship programs approved under this chapter that serve the same craft or trade and geographic area do not have the capacity . . . to dispatch sufficient apprentices to qualified employers." Meanwhile, California Code of Regulations title 8, section 212.2(h), provides that, when the operator of an existing apprenticeship program files an objection, the Agencies enjoy unlimited "discretion" to hold a hearing to determine whether the application complies with applicable law, and that if such a hearing is held, it shall be "informal[] without the application of formal rules of evidence and procedure."

Thus, neither Labor Code section 3075 nor its implementing regulations provide any boundaries to the Agencies' discretion to determine whether "apprentice training needs justify the establishment" of a new, or expanded, apprenticeship program. Such unfettered discretion to interpret what does or does not constitute "apprentice training needs" and to grant or withhold permission to

operate an apprenticeship program at will violates both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

**4. The Remaining Factors Support an Injunction.**

**a. Appellants will be irreparably injured.**

The Agencies have refused give effect to the approval and registration of I-TAP by OATELS by insisting that only state-certified apprentices may be used on the three projects at issue because they are "public works" projects under California law. The Agencies' 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.

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 state-approved program, that apprentice must be paid the higher journeyman rate of pay as set forth in state law. There is 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 the Agencies, any contribution must come from the employer's pocket, over and above the workmen's statutory hourly pay. Therefore, there is no incentive for employers to contribute fringe training contributions to I-TAP since the Agencies refuse to acknowledge its OATELS' approval.

The irreparable injury that Appellants suffer, and will continue to suffer, if the Agencies' conduct is not enjoined is that the Agencies will not allow I-TAP to put its apprentices on public-works projects at apprentice wages, and contractors therefore will not use ITAP's apprentices. *See Inland Empire Chapter of Associated Gen. Contractors of Am. v. Dear*, 77 F.3d 296, 299 (9th Cir. 1996); *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. ER at 000215-216, N. Nutter Decl. ¶¶ 10-18, Compendium Exh. 3; ER at 000220-221, C. Nutter Decl. ¶ 6-10, Compendium Exh.4; ER at 000260-261, R. Smith Decl. ¶¶ 4-5, Compendium Exh. 8.

The Agencies' conduct works similar irreparable injury on apprentices, because it reduces the number of apprenticeship programs in California. This

adverse effect on apprentices was the basis upon which the DOL's de-recognition of California was upheld. ER at 000103-178, RFJN, Exhs. A, B. More immediately, the transition from the I-TAP program to a program approved by the Agencies has caused apprentices to terminate employment and sacrifice training already received from I-TAP. ER at 000210-211, Moyer Decl. ¶5-9; ER at 244, Clark Decl. ¶5.

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

**b. The balance favors Appellants, who have no legal remedy.**

The Agencies contend that they have not "recognized workers enrolled in federal training or apprenticeship programs as registered for [S]tate purposes . . . since 2006." ER at 000074-78, Decl. of Forman. This assertion does not controvert or even address the substantial evidence offered by Appellants that, for years following the California's derecognition, the Agencies (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 these federally approved programs. ER at 000222, C. Nutter Decl. ¶11-12, Compendium Exh. 4; ER at 000247-248, P. Smith Decl. ¶ 5-6, Compendium Exh. ¶8; ER at 000192, Baker Decl. ¶10, Compendium Exh1; ER at 000215, 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 the Agencies. There is no adverse financial consequence to the Agencies in obeying the controlling federal law, and there is no risk of poorly trained apprentices working on public-works projects within California. On the contrary, 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.

The Agencies will not be prejudiced by an order that reestablishes a status quo that the Agencies themselves fostered and abided by for years following the DOL's de-recognition of the California'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. Indeed, Appellants only seek an injunction requiring the Agencies 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.

**c. An injunction is in the public interest.**

As explained herein, the Agencies' improper regulatory activity violates the Supremacy Clause, the Commerce Clause, and Equal Protection and Due Process while causing irreparable harm to Appellants. Thus, granting the injunctive relief sought by Appellants is in the public interest. *See Winter v. NRDC, Inc*., 555 U.S. 7, 9 (2008). Because the Agencies did not argue otherwise to the District Court, they should not be permitted to do so here. *See Cold Mountain v. Garber*, 375 F.3d 884, 891 (9th Cir. 2004) (declining to reach "the hitherto unaired" issue because the party seeking to assert that issue did not present it squarely to the district court).

## IX. CONCLUSION

In light of the foregoing points and authorities, Appellants respectfully request that this Court reverse the judgment of the District Court and remand the case with instructions to enter an appropriate injunction to enjoin and prohibit the Agencies from further improper regulator activities described herein. *See Patton v. Dole*, 806 F.2d 24, 31 (2d Cir. 1986) ("Although reversal of an order denying an application for a preliminary injunction is customarily accompanied by a directive that the district court conduct a new hearing on remand, an appellate court, on a

finding of merit in plaintiff's case, can in the alternative direct the district court to issue the injunction.").

Respectfully submitted,

Dated: April 20, 2012

**weintraub** genshlea chediak
**tobin** & tobin
a law corporation

By: //s/ Charles L. Post
Charles L. Post
Brendan J. Begley

Attorneys for Plaintiffs/Appellants

## STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Plaintiffs/Appellants Independent Training and Apprenticeship Program, et al. state that there are no known Ninth Circuit cases related to this action.

Dated: April 23, 2012

**weintraub** genshlea chediak
**tobin** & tobin
a law corporation

By: /s/ Charles L. Post
Charles L. Post
Brendan J. Begley

**Certificate of Compliance Pursuant to**
**Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1**

I certify that:

1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

   ☑ Proportionately spaced, has a typeface of 14 points or more and contains 12,430 words.

Dated: April 20, 2012

**weintraub** genshlea chediak
**tobin** & tobin
a law corporation

By: //s/ Charles L. Post
Charles L. Post
Brendan J. Begley

**CERTIFICATE OF SERVICE**
**When Not All Case Participants are Registered for the Appellate CM/ECF System**

**U.S. Court of Appeals Docket Number(s): 11-17763**

I hereby certify that I electronically filed the foregoing **APPELLANTS' OPENING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 20, 2012.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

| | |
|---|---|
| Gary O'Mara<br>California Department of Industrial Relations<br>Division of Workers' Compensation<br>455 Golden Gate Avenue, Suite 9516<br>P.O. Box 420603<br>San Francisco, CA 94142-0603 | *Attorneys for Defendants* |

/s/ - Ramona R. Carrillo
RAMONA R. CARRILLO