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

APPELLEES' BRIEF

Katherine Zalewski, Chief Counsel, CSB No. 124891
Steven McGinty, Asst. Chief Counsel, CSB No. 170606
Fred D. Lonsdale, Counsel, CSB No. 071724
Email: flonsdale@dir.ca.gov
Gary O'Mara, Counsel, CSB No. 104761
Email: go'mara@dir.ca.gov
State of California
Department of Industrial Relations
Office of Director – Legal Unit
1515 Clay Street, Suite 701
Oakland, CA 94612
Telephone No.: (510) 286-3800
Facsimile No.: (510) 286-1220

Counsel for Defendants-Appellees,
California Department of Industrial Relations, et al.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Independent Training and Apprenticeship Progam, Brandin Moyer and Harold E. Nutter, Inc. (hereinafter "I-TAP and Nutter") attempt to preempt clear state law and make claims that are based on unreasonable readings of federal regulations concerning apprentices. As a long-standing area of state concern, regulation of apprentice minimum wages does not improperly interfere with the National Apprenticeship Act, 29 U.S.C. § 50 (1994) ("the Fitzgerald Act"). The United States Supreme Court has already considered and rejected the argument that state regulation of apprentice wages on public works for apprentices in programs that voluntarily seek state approval has an improper connection with ERISA plans. The Court found that state apprentice wage laws are not preempted under ERISA's express preemption provision. There is even less indication that Congress intended the Fitzgerald Act to displace traditional state regulation of apprenticeship.

Moreover, there is no indication that Congress intended that private parties enforce the Fitzgerald Act. I-TAP and Nutter are asking this Court to do something Congress never intended: to turn Federal Department of Labor ("DOL") approval of an apprenticeship program into approval for state purposes and not just for federal purposes. I-TAP and Nutter's claims of violation of equal protection and due process must fail because the state has a legitimate and rational basis for distinguishing on state public works between programs that have state approval, and those that do not. Finally, California law does not distinguish between programs based in California and those outside the state.

I-TAP and Nutter stretch the language of the Fitzgerald Act and regulations beyond the breaking point. It is undisputed that federal approval of an apprenticeship program means that the program is entitled to those federal benefits that pertain to or deal with apprenticeship. The federal regulations provide that federal approval is good for all federal purposes and defines "federal purposes."

The applicable regulation states: "Federal purposes includes any Federal contract, grant, agreement or arrangement **dealing with apprenticeship**; and any Federal financial or other assistance, benefit, privilege, contribution, allowance, exemption, preference or right **pertaining to apprenticeship**." 29 C.F.R. § 29.2. (Emphasis added.) I-TAP and Nutter, however, turn this language inside out, claiming that a project pertains to apprenticeship or deals with apprenticeship whenever the project has any federal purpose, or where there is any financing that has a federal purpose, even if the project itself does not have a federal purpose. While the regulation on its face would apply, for example, where a federal grant to fund apprentice training is limited to programs with federal approval, I-TAP and Nutter's argument would mean that an apprenticeship program with federal approval would be eligible for any grant with a federal purpose, not just those grants pertaining to or dealing with apprenticeship.

II. QUESTIONS PRESENTED

(1) Did the District Court correctly find that the challenged California law, which requires payment of the lower prevailing apprentice wage only to apprentices in state-approved apprenticeship programs employed on state public works projects, did not conflict with federal law because the projects at issue did not involve a "federal purpose" pertaining to or dealing with apprenticeship?

(2) Did the District Court correctly find that I-TAP and Nutter lacked standing and that the issues raised were not ripe for adjudication because I-TAP and Nutter's concerns were conjectural?

(3) Did the District Court correctly find that I-TAP and Nutter failed to show a likelihood of success on the merits of any claim, and thus acted appropriately in not addressing the remaining injunction factors?

III. STANDARD OF REVIEW

All parties stipulated to the entry of a final judgment based on the District Court's order denying the preliminary injunction. Pursuant to Federal Rule of Civil Procedure 65(a)(2), the District Court consolidated its preliminary injunction ruling with its decision on the merits. Thus, the standard in these instances is to review the District Court's 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).

IV. BACKGROUND

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

State-approved apprenticeship derives from a unique, historical relationship between a master, or employer, and apprentice. The apprentice agrees to work for the master often for little or no wages in return for the promise of training. This has long been an area where the government has acted to protect the apprentice. The English Statute of Artificers (1563) addressed the length of an apprenticeship, setting it at seven years. *W.J. Rorabaugh, The Craft Apprentice: From Franklin To The Machine Age In America 4* (1986). In California, regulation began as a form of child protection. 1858 Cal. Stat., ch. 182, pp. 134-37, *codified in* Cal. Civ. Code §§ 264-274 (*subsequently repealed and superseded by* 1937 Cal. Stat., ch. 90). Over time, the regulation of apprenticeship evolved and took the form of establishing "standards" to fix the scope of promised training and set out the parties' obligations.

In 1937, Congress first enacted legislation, known formally as the National Apprenticeship Act ("the Fitzgerald Act"), 29 U.S.C § 50 (1994), to encourage the establishment of modern apprenticeship.[1] California adopted the Shelley-Maloney

[1] The Fitzgerald Act provides: "The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard

Apprentice Labor Standards Act in 1939 (Labor Code section 3070 et seq.).[2] Modern apprenticeship combines on-the-job training with related and supplemental classroom instruction. The Fitzgerald Act directs the Secretary of Labor to cooperate with (not dictate to) state agencies and to encourage (not require) the parties to an apprentice agreement to include labor standards in the contract of apprenticeship. 29 U.S.C § 50 (1994).

A state-approved apprenticeship program is operated by an apprentice committee, which may be either joint or unilateral. § 3075, and Cal. Code of Regs tit. 8, § 205(g). A joint program has union participation, while a unilateral program, such as the program operated by the Independent Training and Apprenticeship Program, does not. The program itself determines the nature and scope of the on-the-job training. Cal. Code Regs. tit. 8, § 212(a)(1). In California, there are approximately 29,000 apprentices in 325 joint programs in the building trades, and 3500 apprentices in 53 unilateral programs. Declaration of Glen Forman ("Dec. Forman"), p. 2, ¶9. Appellants' Excerpts of Records ("ER") at 000076.

An apprentice who enters a state-approved apprentice program signs an apprentice agreement, which adopts the program's apprentice standards. §§ 3077, 3078. The standards are the written document setting out the terms and conditions of the apprenticeship, including selection of apprentices, training, working conditions and so on. In addition, on public works projects, contractors who do not

---

the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship...." 29 U.S.C. § 50 (1994).

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

participate in apprenticeship programs are required to request apprentices and where possible employ apprentices on public works. Cal.Code Regs. tit. 8, § 230.1, § 1777.5.

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

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

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

state requirements does forfeit the benefits afforded under the state apprenticeship scheme. *See, e.g.*, Cal. Educ. Code, § 8152.

Since 1939, the Legislature has entrusted the welfare and promotion of apprenticeship to the Division of Apprenticeship Standards ("DAS"), and, within that, to the California Apprenticeship Council ("CAC") that has expressly been authorized to: "establish standards for minimum wages, maximum hours, and working conditions for apprentice agreements …." § 3071. California has long had minimum labor standards for approved apprenticeship programs.

California establishes on a trade-by-trade basis for various geographic areas the minimum wages that must be paid to workers on public works projects funded or carried out by the state. *O.G. Sansone Co. v. Dept. of Transportation*, 55 Cal.App.3d 434, 458 n.4 (1976). The California prevailing wage law allows a wage for registered apprentices in approved apprenticeship programs that is lower than that applicable to fully-qualified journey-level workers. This wage varies with the apprentices' levels of progress through the multi-year apprenticeship program. § 1777.5. Currently, the Director of Industrial Relations publishes an apprentice wage schedule. Dec. Forman, p. 1 ¶1. ER000075. This schedule lists the wages determined to be prevailing by trade and geographic area, as is done with the journey level rates. *Id.*

2. The Regulation Of Apprentices On Public Work.

At the time California's Shelly-Maloney Act was adopted in 1939, California spelled out apprentice wages on public works in the statute: The apprentice was to be paid not less than 25% of the journey level wage, with 15% increases every six months.[4] Stats. 1939, ch. 971. California also requires

[4] The Legislature no longer spells out the apprentice wage in statute; rather, the wage is set in regulations of the CAC and on public works is set by the Director of Industrial Relations. § 1770, Cal. Code Regs. tit. 8, § 208. For a discussion of the purpose of the prevailing wage law see generally *Lusardi Construction Co. v.*

contractors on state public works projects to pay a training fund contribution to the CAC to support apprenticeship. § 1777.5(m). Contractors may take a credit against this obligation to pay a training contribution to the CAC for payments they make to state-approved apprenticeship programs. They may not take a credit for payments to programs that have federal approval only. *Id*. Contractors may take credit for employer payments for training, whether approved apprenticeship or some other type of training, so long as those employer payments meet the criteria set out in § 1773.1. Contributions irrevocably made by an employer to a trustee or third person pursuant to a plan, fund or program are included as employer payments under § 1773.1.

V. STATEMENT OF THE CASE

I-TAP and Nutter's complaint alleges that in 2010 contractors were advised that on three state public works projects, I-TAP apprentices could not be paid the state apprentice wage because they lacked registration in a state-approved program. I-TAP and Nutter also allege that contractors were advised that contributions to I-TAP could not be credited against the obligation to pay training funds to the CAC under § 1777.5.

The three projects in question were awarded by state awarding bodies. They were not federally funded or managed. I-TAP and Nutter's Declaration of Michael Genest, p. 4, ¶ 10. ER000234. All three projects were carried out by state awarding bodies. I-TAP and Nutter allege only that two of the projects, Chicago Park and Stockton Joint Use, were funded in part with Build America Bonds and that the federal government paid a subsidy to the municipal lender to cover the differential interest associated with the taxable nature of the bond. Plaintiffs'

Aubry, 1 Cal. 4th 976, 4 Cal. Rptr. 2d 837 (1992) (to protect and benefit employees on public works projects).

Points and Authorities ("P&A"), p. 21, ln. 10-26 ER000329. A third project, Marysville High School, is alleged to benefit from a federal subsidy because it was financed with bonds that are tax exempt under federal tax law.

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

Rather than present its argument concerning federal apprentices to the DIR hearing officer, I-TAP and Nutter filed this lawsuit against the Director of Industrial Relations, Christine Baker, the Chief of the Division of Apprenticeship Standards, Glen Forman, and the Labor Commissioner, Julie Su, in their official capacities (hereinafter "DIR") seeking to enjoin California from limiting the apprentice wage to those apprentices in programs approved by the DAS, and also seeking to require California to allow payment of below the prevailing wage to apprentices that are in federal programs lacking state approval. In addition, I-TAP and Nutter sought to require California to allow contributions to an apprenticeship program with federal but not state approval to satisfy the contractor's obligation to contribute to the CAC under § 1777.5(m). I-TAP and Nutter point to the fact that in 2007, the DOL "derecognized" California as a SAC state, so that California approval of an apprenticeship program no longer counted as federal approval as well. The derecognition action was based on the California legislature having adopted a modification to its program approval statute in 1999 which the DOL felt unreasonably limited the number of apprenticeship programs.

I-TAP and Nutter incorrectly suggest that the 1999 legislation was the first

time California had based program approval on a need for the training. The DOL had previously approved the California statute that allowed the Chief DAS to approve new programs when "training needs" justified the establishment of a new program. Exhibit A to I-TAP and Nutter's Request for Judicial Notice p. 5, 9, ER000116, 000120. In 1999, the California Legislature spelled out certain criteria in the building trades for finding training needs. The DOL derecognition decision notes that the federal regulations on apprenticeship do not expressly address whether training needs should be a factor in approving a new program. *Id.* at ER000138. "In support of their respective interpretations, the parties here have offered two conflicting, yet reasonable, policy-based arguments." *Id*. The DOL decision does not invalidate the California law. The federal regulations provide a single consequence when a state is found to have an apprenticeship law that is not "an acceptable State apprenticeship law" and that is derecognition. 29 C.F.R. § 29.13. The DOL decision found that the Office of Apprenticeship Training, Employer and Labor Services' ("OATELS") view that there should be no limitations on program approval based on the anticipated need for trained workers was a reasonable view, and so California was no longer deputized to approve programs for "federal purposes." However, the DOL decision did not remove California's authority to approve programs for its own state purposes. Neither DIR nor the CAC has yet taken action to challenge the DOL decision.[5]

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

VI. ARGUMENT

A. THE DISTRICT COURT CORRECTLY FOUND THAT I-TAP AND NUTTER DID NOT HAVE A LIKELIHOOD OF SUCCESS, OR RAISE A SERIOUS QUESTION ON THE MERITS IN THIS MATTER

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

I-TAP and Nutter's claim for relief is an attempt to turn the Fitzgerald Act -- a statutory scheme that directs the Secretary of Labor to work cooperatively with the states to promote labor standards and to safeguard the welfare of apprentices -- into a vehicle for preventing the states from enforcing state laws protecting apprentices and promoting state-approved apprenticeship. As will be shown below, Congress did not intend that private parties play a role in carrying out the Fitzgerald Act.

a. No Express Right Of Action.

The Fitzgerald Act directs the Secretary of Labor to formulate and promote labor standards for apprentices, to encourage the inclusion of such standards in contracts of apprenticeship, and to "cooperate" with state agencies to formulate and promote labor standards needed to protect the welfare of apprentices. 29 U.S.C. § 50 (1994). There is no express right of action given to private parties to enforce the Act. Indeed, the statute does not even mandate specific federal labor standards for apprentices but rather directs the Secretary of Labor to extend the application of higher labor standards agreed to by the parties to apprentice agreements by encouragement and cooperation.

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

In determining whether to imply a private right of action, a court looks to the four-part test established in *Cort v. Ash*, 422 U.S. 66 (1975). That test looks to the

following: 1) whether plaintiff was part of the class for whose special benefit that statute was enacted; 2) whether there is an indication of legislative intent to create or deny a private right of action; 3) whether an implied remedy is consistent with the underlying purpose; and, 4) whether the cause of action is in an area of traditional state concern where it would not be appropriate to infer a cause of action based solely on federal law. *Id*. In this case, the statute was enacted to protect apprentices, not contractors or apprentice programs, *Gregory Elec. Co. v. United States Dept. of Labor*, 268 F.Supp. 987 (D.S.C. 1967); there is no indication that Congress intended to create a private right of action; allowing private parties to bring actions under the Fitzgerald Act to block state law is inconsistent with the goal of the act to promote cooperation between the states and the federal government; finally, the preemption of a traditional area of state law would be inappropriate based on such an attenuated reading of a regulation and not found in the statute itself.

The Fitzgerald Act specifically tells the Secretary of Labor to cooperate with those state agencies "engaged in the formulation and promotion of standards of apprenticeship… [,]" not to displace their activity. 29 U.S.C. § 50 (1994). There is nothing in the Act to suggest that Congress contemplated that the states would not be active in regulating apprenticeship.

c. No Implied Right of Action In The Regulations.

The Fitzgerald Act regulations provide for a single sanction if the Secretary finds that a state law is not operating in conformity with federal regulations, and that sanction is derecognition. 29 C.F.R. § 29.13. The effect of derecognition is that state approval of a program is no longer effective as recognition for federal purposes. *Id*. State-approved programs must be given the opportunity to request

federal approval, but are not required to do so.[6] This regulation makes it clear that the programs continue to operate and have state approval, whether or not they opt for federal approval as well.

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

In *Baltimore Metropolitan Chapter v. O'Connor*, 75 F.Supp.2d 440 (D.Md. 1999), a contractors' association sued several Maryland officials claiming that the refusal to register the contractors' program violated the contractors' rights. The court found that there was no private right of action to enforce the Fitzgerald Act. *Id.* at 444.

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

In *Gregory Elec. Co.*, 268 F.Supp. 987, a contractor sued when the DOL did not approve a new program because the existing program had agreed to allow the contractor to participate. The court found that contractors, like Nutter Electric, did not have standing to obtain judicial review of the DOL's decision not to register a proposed program. *Id.* at 993.

2. There Was No Violation Of the Fitzgerald Act Or Its Implementing Regulations.

Even if there were a private right of action, the complaint did not allege conduct that amounts to a violation of the Fitzgerald Act or DOL regulations

[6] The federal regulation provides: (e) In the event that a State Apprenticeship Agency is not recognized by the Office of Apprenticeship for Federal purposes or that such recognition has been withdrawn, or if no State Apprenticeship Agency exists, apprenticeship program sponsors may request registration with the Office of Apprenticeship in accordance with the following: . . . *Id.*

implementing the Act. The Fitzgerald Act does not require states to recognize federal apprentices, or establish a mandatory national apprenticeship system. Contractors on federally managed projects are not required to use federal apprentices. Programs are not required to follow a federally mandated curriculum. Instead, the Fitzgerald Act encourages the DOL to work with the states to expand labor standards for apprentices.

I-TAP and Nutter allege that California unlawfully refuses to allow credit against the prevailing wage for contributions to a federally approved program such as I-TAP. Appellants' Brief at 54. California law does in fact allow as a credit against the benefit portion of the prevailing wage employer payments to a training program. Under California's prevailing wage law an employer may pay a portion of the wages as benefits. Under § 1773.1(a) any bona fide employer payment, including payments for apprenticeship, may qualify for a credit to the benefit portion of the prevailing wage. *WSB Elec., Inc. v. Curry*, 88 F.3d 788, 793 (9th Cir. 1996) ("The scheme does not force employers to provide any particular employee benefits or plans or to alter their existing plans, or even to provide ERISA plans or employee benefits at all.") While I-TAP and Nutter assert that contributions to the I-TAP program must come from the employer's pocket above the worker's hourly pay, Appellants' Brief at 54, they cite no authority for this proposition. None exists because, as discussed above, the law allows a credit for a bona fide employer payments for training.

California law also requires a contractor to pay contributions to the CAC for training above the prevailing wage paid to the worker in cash and benefits. § 1777.5(m). Under § 1777.5(m) only payments to a state approved program are allowed as a credit for these required contributions to the CAC. Thus, a contractor like Nutter would be required to pay for state-approved training under § 1777.5(m), but that contractor could continue to make bona fide employer

payments to an apprenticeship plan, whether state approved or not, and those payments could be a credit against the prevailing wage. I-TAP and Nutter thus cannot show any violation of the Fitzgerald Act or regulations by California's limiting credit for payments to the CAC to payments to a state-approved program.

I-TAP and Nutter also allege that failure to allow federal apprentices to work at the state apprentice wage on a state-funded projects is a violation of the Fitzgerald Act regulations. Those regulations recognize that approval of an apprenticeship program by the Department of Labor is for federal purposes. I-TAP and Nutter find a violation only by stretching the meaning of the phrase "federal purposes pertaining to apprenticeship" beyond any reasonable interpretation. Federal approval of an apprenticeship program brings with it approval for "federal purposes." That phrase is defined in the current DOL regulations as follows: "Federal purposes includes any Federal contract, grant, agreement or arrangement dealing with apprenticeship; and any Federal financial or other assistance, benefit, privilege, contribution, allowance, exemption, preference or right pertaining to apprenticeship." 29 C.F.R § 29.2.

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

I-TAP and Nutter reach too far. Taken to the extreme, one could argue that because social security is a federal benefit with a federal purpose, if a contractor pays social security taxes on apprentices working on a project, then those apprentices would be working on a project with a federal purpose. Indeed, under I-TAP and Nutter's reasoning concerning tax exempt bonds, the tax deduction for

home mortgage interest would make all home construction and remodeling a form of work with a "federal purpose" pertaining to or dealing with apprenticeship. This is an absurd result. Likewise, by I-TAP and Nutter's logic, renovations of a private day care center would be a project with a federal purpose because it is funded by the tuition from parents who receive a federal benefit through the child and dependent care tax credit. 26 U.S.C. § 21. This is much like the problem the U.S Supreme Court addressed in *New York State Conference of Blue Cross and Blue Shields Plans v. Travelers Ins. Co.,* 514 U.S. 645, concerning the scope of ERISA's preemptive reach: "If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for '[r]eally, universally, relations stop nowhere,' H. James, Roderick Hudson xli (New York ed., World's Classics 1980) at p. 655." Not every federal purpose is a federal purpose pertaining to apprenticeship. *Contra,* "I am he as you are he and you are me and we are altogether," *I Am The Walrus* (Lennon-McCartney, 1967.)

Congress has not left us to stumble in the dark. Congress specifically identified some benefits that pertain to apprenticeship. For example, a veteran who is in training in an apprenticeship program is eligible for benefits pertaining to that apprenticeship if the program is approved for federal purposes. 38 U.S.C. § 3452. Another example of a benefit linked to federal approval would be certain grants to promote employment of apprentices that are limited to programs with federal approval. *See* 29 U.S.C. § 2503; *see also* http://www.dol.gov/wb/federalregister3-30-2010.htm (grants to promote women in apprenticeship (WANTO grants) (last viewed June 19, 2012). *See also*, 42 U.S.C. § 16411 (workforce trends and training grants in energy technology), and 20 U.S.C. § 7425 (education grants). There is no reason to assume that the phrases "pertaining to apprenticeship" and "dealing with apprenticeship" were intended to expand federal purposes beyond

those specific federal financial or other benefits that are expressly linked to apprenticeship.

If one looks at the legislative history of the regulations in question one finds that the DOL specifically pointed to these sort of express links to apprenticeship in response to comments about the breadth of the regulations. The DOL noted that while the rule was broad, "Those Federal purposes which this part affects are described in 29.3(a) which reads as follows: "Eligibility for various Federal purposes is conditioned on a program's conformity with apprenticeship program standards published by the Secretary of Labor in this part….Examples of such Federal purposes are the Davis-Bacon Act and the Service Contract Act." Promulgation of Final Rule, 42 Fed.Reg. No. 34 10138 (1977). While the DOL may have intended the term "Federal purposes" to have a broad reach as to those programs and benefits dealing with apprenticeship, the regulations were intended to be limited to those Federal purposes pertaining to apprenticeship and not to all Federal purposes generally.

3. DOL Letters Do Not Apply.

I-TAP and Nutter argue that the DOL has construed the term federal purposes to include "all public works projects funded in whole or part with federal funds."[7] This construction is taken from a letter of October 4, 2004. Appellants'

[7] In *Elec. Joint Apprenticeship Comm. v. MacDonald*, 949 F.2d 270, 273 (9th Cir.1991) the Ninth Circuit did not, as I-TAP and Nutter suggest in Appellants' Brief at 38, decide the scope of federal purposes in 29 C.F.R. § 29. Rather, the issue was ERISA preemption of the state law that did not exempt federally approved apprenticeship program for state public works from prevailing wage requirements on the ground that the program did not comply with state standards apart from those set forth in nonpreempted Fitzgerald Act regulations and the court's holding has been undercut by *Dilllingham*, and *Oregon Columbia Brick Masons Joint Apprenticeship Training v. Gardner*, 448 F.3d. 1082, 1086 (9th Cir. 2006).

Brief at 30. They further quote another earlier DOL letter dated July 16, 2004, that says in part that all State Apprenticeship Councils ("SACs") recognized for federal purposes "are 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." Again I-TAP and Nutter stretch this language too far. California's apprenticeship council is no longer recognized as a SAC for federal purposes and thus the July 16, 2004, letter, and the related October 4, 2004, letter which concern state apprenticeship councils with Federal recognition has no application to California which is not a federally recognized SAC state at this time. ER 000180-000182. Moreover, even if California were still a SAC state, none of the three projects in dispute involve "federal funds" used to fund a public works project. In one case the purported federal connection involves the tax advantage to investors for municipal bonds, and in the others, a subsidy to lenders. ER 000233-000234 Dec. of Genest ¶¶ 7, 8, 10 .

While it is true that an agency's interpretation of its own regulation is entitled to deference, *Auer v. Robbins*, 519 U.S. 452 (1997), that deference does not apply to a litigant's interpretation of an agency interpretation of a regulation. I-TAP and Nutter are asking this court to give deference to their interpretation of a letter purporting to interpret a regulation. Moreover, *Auer* deference does not even require uncritical acceptance of all pronouncements by an agency about its regulations. *See Associated Builders and Contractors, Inc. v. Herman*, 166 F.3d 1248, 1255, 1256 (D.C. Cir 1999). The degree of deference may depend on whether the interpretation is contained in a published interpretation of its regulation or, as here, in a more informal letter. *S.E.C. v. Phan* 500 F.3d 898, 904 (9th Cir. 2007). Most important, an agency regulation must be ambiguous in order for the court to give any deference to agency interpretation of that regulation.

Christensen v. Harris County, 529 U.S. 576 (2000). To hold otherwise would allow an agency to rewrite regulations without going through the regulation adoption process. Id. at 588. In this case, the construction given the regulation by I-TAP and Nutter requires that the phrases "pertaining to apprenticeship" and "dealing with apprenticeship" be taken out of the regulation. This would, as the District Court noted, amount to treating those phrases as surplusage, which would be impermissible since they clearly and unambiguously define the term "federal purposes" with those limiting conditions.

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

I-TAP and Nutter ask this court to bar state enforcement of its prevailing wage and apprenticeship law. As the U.S. Supreme Court noted in *New York State Conference of Blue Cross and Blue Shields Plans v. Travelers Ins. Co.*, 514 U.S. 645:

> As is always the case in our pre-emption jurisprudence, where "federal law is said to bar state action in fields of traditional state regulation, we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* at 655 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

There is no basis for concluding that Congress intended to displace state regulation in this area. The state's traditional interest in apprenticeship is shown by the longevity of the statute, which has addressed apprentice standards of payment outside of public works spanning two centuries. *See* Historical Note, West Annotated California Labor Code, Vol. 44 (1989), p. 671 at Chapter 4, "Apprenticeship." Congress did not provide for express preemption of state apprenticeship laws, and California's law does not conflict with the purpose of the Fitzgerald Act. Indeed, California defers to federal law on projects carried out by

federal awarding bodies using federal funds. *Southern California Labor Management Operating Engineers Contract Compliance Committee v. Aubry*, 54 Cal.App.4th 873, 883, 63 Cal.Rptr.2d 106, 111-112 (1997) ("*Southern California Labor Management Committee*.")

There is nothing in the Fitzgerald Act that requires that apprentices on state public works projects be paid a lower wage than state law requires. State law allows all apprentices to work on state funded projects, whether they are state approved apprentices, federally approved apprentices, or apprentices in programs with no approval at all. California does, however, allow a lower wage for apprentices in state-approved programs. I-TAP and Nutter are asking the court to step in and invalidate California law. The Fitzgerald Act itself, however, says nothing about preempting state law. To the contrary, as argued above, the Act anticipates independent state action fostering labor standards for apprentices. Preemption of state laws is not done lightly, especially where the law concerns an area of traditional state regulation. *California DLSE v. Dillingham Const.*, 519 U.S. 316, 325 (1997). California has been regulating apprenticeship for more than 130 years. Its laws clearly and unambiguously restrict the lower apprentice wage on state public works projects to apprentices registered with DAS. §1777.5.

The Fitzgerald Act regulations likewise were not intended to preempt state law. In *Suislaw Concrete Construction Co. v. State of Washington*, 784 F.2d. 952, 957 (9th Cir. 1986), the court held that the Fitzgerald Act regulations were not intended to occupy the field, nor exclude state regulation of apprenticeship programs. The court also found that those regulations did not show any intention that the federal regulations be exclusive, and noted that the court will not infer an intent to preempt when the regulation does not expressly address the issue. *Id.*

I-TAP and Nutter acknowledge that *Suislaw* rejected the proposition that the Fitzgerald Act was intended to occupy the field, but argue that it did not address a

state law that conflicted with the Fitzgerald Act. Appellants' Brief p. 24-26. To the extent the objectives of the Fitzgerald Act are to safeguard the welfare of apprentices, California's law is consistent with that goal. By limiting the lower apprentice wage to apprentices in approved programs, the law encourages contractors to participate in programs that meet minimum standards, which is also a goal of the Fitzgerald Act.

I-TAP and Nutter cite *Hillsborough County Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985), for the proposition that state regulation is nullified if it conflicts with federal regulations. Appellants' Brief, p. 26. In *Hillsborough,* the Court was considering the argument that state regulation of blood plasma was preempted by federal regulations. The Court found no preemption and rejected the argument that the comprehensive scope of the federal regulation required preemption. *Hillsborough,* 471 U.S. at 715. The Court emphasized the presumption against preemption of state laws in areas traditionally occupied by the states. *Id.* Here, the Fitzgerald Act regulations set minimum standards, and in no way suggest that DOL intended to preempt the field and displace traditional state law. The Court pointed out that, as here, the federal regulations actually called for a cooperative policy. *Id.* at 719. The Court also found that the fact that the *Hillsborough* ordinances were more stringent than federal policy did not require preemption based on conflict with the federal policy. In this case, state approval of an apprenticeship program for state purposes does not interfere with federal approval for federal purposes.

I-TAP and Nutter see a national system of apprenticeship with national standards where none exists. I-TAP and Nutter ignore the fact that apprenticeship at the federal level is a voluntary program. Under federal law: no one must become an apprentice to practice a trade; no contactor is required to participate in an apprenticeship program; no contractor is required to employ apprentices, on

either public or private work. Federally approved programs are not required to have a uniform curriculum for a trade or a required level of on-the-job training in specific work processes. Rather, the program must have some organized, related and supplemental instruction in technical subjects related to the trade and a "minimum of 144 hours is recommended." 29 C.F.R. § 29.5(b)(4). The exact curriculum is chosen by the parties, not set by the federal regulation. The federal regulations provide that an apprenticeship program's standards must include an "outline of the work processes in which the apprentice will receive supervised work experience and training on the job and the allocation of the approximate time to be spent in each major process." 29 C.F.R.§ 29.5(b)(3). Federal regulations do not specify specific number of hours of training in specific work processes that a contractor must offer in a particular trade. In contrast, programs in California are required to meet some substantive minimum standards for education and training when they have been adopted on an industry wide basis. *See* Cal. Code Regs. tit. 8, § 212.1.

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

California law does not conflict with federal law. Under both state statutes and state regulations, "federally funded projects controlled by, carried out by, and awarded by the federal government are not subject to [California prevailing wage law]…." *Southern California Labor Management Committee*, 54 Cal.App.4th 873. In reaching this conclusion, the court in *Southern Cal. Labor Management* specifically cited Cal. Code Regs. tit. 8, § 16001(b): "Federally Funded or Assisted Projects. The application of state prevailing wage rates when higher is required whenever federally funded or assisted projects are controlled or carried out by California awarding bodies of any sort."

Thus, when the federal government controls the project the regulation was interpreted to mean that Davis-Bacon Act projects awarded, controlled, and carried out by the federal government fall outside the purview of the requirement to pay state prevailing wages; therefore, contractors pay the federal prevailing wage rate. The Davis-Bacon Act establishes a minimum wage on covered projects based on the prevailing wage for construction work. On those federally controlled projects, the use of apprentices registered by the DOL would be governed by federal law.

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

> [I]t was not enacted to benefit contractors but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects….Indeed, its requirement that the contractor pay 'not less' than the specified minimum presupposes the possibility that the contractor may have to pay higher rates.

Id. at 177-178, 98 L.Ed. 594, 74 S.Ct. at 441-442.

6. There Is No Commerce Clause Violation.

California's law does not burden interstate commerce. In *Tri-M Group, L.L.C. v Sharp*, 638 F.3d 406 (3d Cir. 2011), the court found that Delaware required an apprenticeship program to be located in Delaware, and thus the court concluded that the law discriminated against out-of-state businesses. Likewise in

Oregon Waste Sys., Inc. v Dept. of Envtl. Quality of Oregon, 511 U.S. 93 (1994), the Court found invalid a state law that levied a surcharge on in-state disposal of waste generated in other states because it treated in-state and out-of-state businesses differently. California law does neither of those two things.

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

7. There Is No Equal Protection Violation.

I-TAP and Nutter must meet a very high burden to show that California's law is a denial of equal protection in that they must prove that there is no rational basis for California limiting benefits pertaining to apprenticeship to apprentices in state-approved apprenticeship programs. *See Exxon Corp v. Eagerton*, 462 U.S. 176, 177 (1983) ("the standard of rationality applie[s] in considering equal protection challenges to statutes regulating economic and commercial matters.")

Even the DOL decision derecognizing California found that the California law was based on serious policy considerations, albeit ones different from those favored by the DOL for approval for federal purposes. Exhibit A to I-TAP and Nutter's Request for Judicial Notice, at p. 27. ER 000138. The Chief Administrative Law Judge, John M. Vittone, noted, "In support of their respective interpretations, the parties here have offered two conflicting, yet reasonable, policy based arguments." *Id*. This is hardly a finding that there was no rational basis for the California law. The California law was described as requiring a showing of

"training needs" to establish a new program in order to make sure that apprentices were being trained for jobs that would exist after completion. Judge Vittone also acknowledged that the legislative history included concern about providing apprenticeships where there were no training needs. He noted "While the legislative history demonstrates that there was some call to balance the number of apprentices with the need for their skills [footnote citation omitted], any statutory or regulatory means of achieving that balance was left out of the NAA and Part 29." *Id* at 28. That the Fitzgerald Act and regulations do not contain express provisions to attempt to adjust the supply of skilled workers to the demands of industry does not make that an irrational policy choice. This is especially true where the statute itself speaks of a cooperative relation between the federal and state government allowing states to promote apprenticeship in various ways. In the end Judge Vittone found that the Fitzgerald Act legislative history and the case law about the Fitzgerald Act showed an intention to safeguard the welfare of apprentices by promoting the creation and expansion of the number of programs. California's interest in preventing the approval of programs where there are not training needs does not prevent the federal DOL from approving as many programs as apply for federal purposes.

The rationale of basing program approval in part on whether there are actual training needs being served (as opposed to serving contractors' desire to pay workers below the prevailing wage) is not unique to California. Oregon also imposes a prerequisite for recognition of a new apprenticeship program that it be "necessary to serve the needs of the various apprenticeable occupations," *Oregon Columbia Brick Masons Joint Apprenticeship Training v. Gardner*, 448 F.3d. 1082 (9th Cir. 2006) (rejecting an ERISA challenge to Oregon "needs" standard).

In addition, California provides financial support for apprenticeship programs and thus has a rational interest in supporting existing programs to ensure

that that financial support does not go to waste, but instead produces successful graduates. California Education Code section 8152 provides for the reimbursement of some of the costs of the apprentices related and supplemental instruction carried out by California public schools and community colleges. California has a rational basis for providing incentives for increased work opportunities for apprentices in state-approved programs to foster successful completion of those programs. In adopting the current language concerning program approval the California Legislature has described apprenticeship as a "vital" part of the California educational system.[8]

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

---

[8] Section 1 of Stats.1999, c. 903 (A.B.921), provides: "The Legislature finds and declares that apprenticeship programs are a vital part of the educational system in California. It is the purpose and goal of this legislation to strengthen the regulation of apprenticeship programs in California, to ensure that all apprenticeship programs approved under Chapter 4 (commencing with Section 3070) of Division 3 of the Labor Code meet the high standards necessary to prepare apprentices for the workplaces of the future and to prevent the exploitation of apprentices by employers or apprenticeship programs. It is further the intent of the Legislature that apprenticeship programs should make active efforts to recruit qualified men, women, and minorities and train them in the skills needed for the workplace."

I-TAP and Nutter suggest that because there is no financial cost to the state for allowing federal apprentices to be paid the lower apprentice wage on public works there is no rational basis for the state law. This ignores state interests that are not financial such as the need to balance the number of apprentices to the available on-the-job training opportunities discussed above. This also completely ignores the fact that if a contractor employs federal apprentices instead of state apprentices then those state-approved apprentices will be denied on-the-job training. The fact that the state financially supports state-approved apprentices gives the state an added interest in ensuring that those apprentices do have the on-the-job training opportunities needed to complement the related and supplemental instruction provided through state educational institutions.

B. THERE IS NO BASIS FOR THIS COURT ORDERING AN INJUNCTION.

I-TAP and Nutter ask this Court to reverse the District Court judgment and remand with instructions to issue an injunction. As discussed above, the District Court was correct on the merits. I-TAP and Nutter have failed to show any entitlement to relief. However, even if this Court were to accept any or all of I-TAP and Nutter's claims it would still not be appropriate to remand with instructions to issue an injunction.

A plaintiff seeking a preliminary injunction must establish four things. A plaintiff must show that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. *Winter v. National Resources Defense. Council, Inc*., 555 U.S. 7, 20 (2008).

An injunction however does not automatically follow from success on the merits. *Weinberger v. Romero-Barcelo* 456 U.S. 313 (1982). As the Supreme Court made clear in *Winter*, 555 U.S. 7, an injunction even after a finding of

success on the merits is still "a matter of equitable discretion; it does not follow from success on the merits as a matter of course. *Romero-Barcelo,* 456 U.S., at 313 ("[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law").

The factors examined above—the balance of equities and consideration of the public interest—are pertinent in assessing the propriety of any injunctive relief, preliminary or permanent. *See Amoco Production Co. v. Village of Gambell AK.* 480 U.S. 531 at 546, n. 12 (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"). *Winter*, 555 U.S. at 32.

It would be inappropriate to pre judge the District Court's consideration of the other *Winter* factors that must be evaluated before granting injunctive relief on this record without allowing the District Court to weigh those issues. *Natural Res.Def. Council v. U.S. Forest Serv.*, 421 F.3d 797 at 816, n. 29 (9th Cir. 2005).

1. This Matter is Not Ripe.

An order directing the District Court to issue an injunction would be inappropriate under the circumstances of this case because as discussed above, none of the three projects involve actual federal funding, thus taking them beyond the scope of even the DOL letters on which I-TAP and Nutter rely. As the District Court noted, Order p. 9, ER 000026, it is a conjectural concern, not an actual controversy, regarding whether California would enforce its laws in conflict with an actual federal purpose pertaining to or dealing with apprenticeship.

In addition, I-TAP has never been denied state approval. It has never even asked for state approval. Dec. Forman, p. 2, ¶9. ER000076. I-TAP speculates that it would not be given approval for its program. I-TAP and Nutter's Dec. Nutter, p.

2 ¶4. *Id*. The "needs" standard in § 3075(b) does not bar all new programs. It specifically finds there *is* a need for a new program if there is no existing program. Where there is an existing program, there are other tests, including whether the existing program lacks the capacity to supply sufficient apprentices to public works projects. *Id.* Since 1999, DAS has approved 14 new programs, so approval is hardly an impossibility. Dec. Forman, p. 2, ¶10. *Id.* Again, I-TAP is asking for an answer to a conjectural concern.

2. The Injunctive Relief I-TAP and Nutter Seek Is Vague And Overbroad.

I-TAP and Nutter minimize the impact of the injunctive relief they seek. I-TAP and Nutter state in their brief that they are only asking for an injunction requiring California to recognize federally certified apprentices for the purpose of the prevailing wage law and for the purpose of satisfying the requirement that contactors employ state apprentices on public works. Appellants' Brief at 56. However, because of the unlimited scope of federal purposes proposed by I-TAP and Nutter, the injunctive relief they seek is also excessively broad. The I-TAP and Nutter complaint asked for a preliminary injunction with 10 subparts. Many of the subparts fail to specifically describe what conduct would violate an injunction. For example subpart (b) purports to direct DIR to stop enforcing Cal. Code Regs. tit. 8, § 16001 with respect to "[p]rojects involving 'any Federal financial or other assistance, benefit, privilege, contribution allowance, exemption, preference or right pertaining to apprenticeship.'" That state regulation provides in part: "Federally Funded or Assisted Projects. The application of state prevailing wage rates when higher is required whenever federally funded or assisted projects are controlled or carried out by California awarding bodies of any sort." The injunction I-TAP and Nutter seek would thus bar the enforcement of the journey

level wage for journeymen on projects that involve federal assistance pertaining to apprenticeship.

Moreover, there is nothing specifying what it means for a project to involve any of I-TAP and Nutter's long list of emoluments "pertaining to apprenticeship." In subpart (e), I-TAP and Nutter expand the scope of the injunction they seek beyond projects involving funds pertaining to apprenticeship to encompass all projects with a federal purpose. This would include projects with no federal financial participation at all if the project had some relation to a federal purpose, whatever that turned out to mean. Street construction that included putting up street signs identifying a federal courthouse paid for with state tax dollars only could become a project with a federal purpose.

I-TAP and Nutter also seek to enjoin California law that does not directly affect federal apprentices, but would have serious negative impact on state-approved apprentices. I-TAP and Nutter seek to enjoin that part of California law that requires contactors to employ state-approved apprentices on public works in at least the ratio of one hour of apprentice work for every five of journey level work. § 1777.5(d). Even if I-TAP and Nutter were successful in getting federal apprentices recognized for the purpose of the prevailing wage, there is no reason to prevent the state from also requiring at least this minimal participation of state-approved apprentices. Likewise I-TAP and Nutter seek to enjoin the requirement that contractors on state public work pay contributions to the CAC to support state-approved apprenticeship training. § 1777.5(m). This requirement has no effect on the federal programs like I-TAP because contractors can still take credit for bona fide employer payments as discussed above.

This Court should be mindful of the negative effects on those state apprentices who would be adversely affected but who are not before the court. Here, I-TAP and Nutter are asking DIR to stop enforcing the prevailing wage law

and stop assessing penalties. Those workers who would be entitled to those wages and penalties and those awarding bodies that would be affected should be considered.

As noted above, before any injunction, preliminary or permanent, may issue, the court must weigh the four *Winter* factors, including the public interest. I-TAP and Nutter seem to argue that the public interest is presumed where there is "improper" regulatory activity causing "irreparable harm." Appellants' Brief at 57. They suggest that because DIR did not argue otherwise to the District Court it may not argue to this Court. The District Court's decision will be upheld if any argument supports it. *Atel Fin'l Corp v Quaker Coal Co.*, 321 F3d 924, 926 (9th Cir 2003). In any case, the District Court did not reach the issue of the public interest, or indeed any of the factors except the merits. DIR did however point out the negative effects of an injunction on other contractors and on apprentices in state-approved programs. This is a further reason why there is no basis for this Court to order that an injunction issue.

VII. CONCLUSION

For all the reasons discussed above, the court should affirm the District Court's decision that denied I-TAP and Nutter's request for a preliminary injunction. DIR has demonstrated that I-TAP and Nutter have failed to state any kind of claim on which relief of any kind could be granted.

Dated: June 22, 2012

CALIFORNIA DEPARTMENT OF
INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR, LEGAL UNIT

BY: *__/s/ FRED LONSDALE__*
FRED LONSDALE
Attorney for Defendants-Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

STATE STATUTES

STATE REGULATIONS

OTHER AUTHORITIES