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' REPLY BRIEF

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I. INTRODUCTION

On public-works projects imbued with a "Federal purpose," California agencies impose steep financial penalties on contractors who hire apprentices enrolled in federally approved apprenticeship programs. In so doing, California agencies reject the definition of "Federal purpose" adopted by the expert federal administrative agency charged with establishing and maintaining national standards for apprenticeships. Defendants/Appellees California Department of Industrial Relations, et al. (the "Agencies") do not dispute this. Instead they argue that they have a right to interpret federal regulations defining "Federal purpose" that is superior to that of the federal administrative agency that drafted the regulation. Of course, the Agencies downplay the fact that the interpretive right they assert serves a regulatory scheme that has been adjudicated to be and inconsistent with national apprenticeship standards.

The Agencies' improper regulatory activity has real-life consequences for individuals such as Appellants in this action. Apprentices enrolled in federally certified programs cannot work as apprentices on public-works projects in California that have a "Federal purpose." Federally certified apprenticeship programs are excluded from the benefits of their federal certification. Contractors that have used apprentices from a federally certified apprenticeship program on

public-works projects with a "Federal purpose" are penalized with severe financial sanctions.

The program offered by Plaintiff/Appellant I-TAP and the apprentices it trains (collectively, "Appellants") meets all of the federal requirements for apprenticeship training. The only meaningful difference between the California certification standard and the federal certification standard is that California restricts the number of apprentices that can be trained in a particular region. This bears emphasis – the Agencies penalize federally certified apprenticeship programs and apprentices enrolled in those programs solely because federal certification defeats the Agencies' desire to limit apprenticeship opportunities.[1]

The U.S. Department of Labor ("DOL"), which is responsible for administration of the federal apprenticeship law, already has determined that the California's decision to restrict apprenticeships violates the federal law. The DOL concluded that California falls short in this regard because it discriminatorily restricts apprenticeship employment opportunity rather serving the overriding federal goals of promoting and expanding apprenticeship rights, welfare and opportunity as intended in the Fitzgerald Act, 29 U.S.C. § 50, and its implementing

[1] Opponents of the California standard have always asserted that the practical upshot of this limitation is that existing apprenticeship programs, many of which are union affiliated, are favored over new programs (whether union affiliated or not). This "locks in" a preference for union affiliation in a way that does not reflect current labor affiliation statistics. (*See*, *e.g.,* ER 387.)

regulations, 29 C.F.R. §§ 29.1, et seq. *See* 72 Fed. Reg. 9590; *see also* ER at 000103-105, 000181-184. California's deviation from the Fitzgerald Act and the Agencies' attempt to continue regulating federally certified apprenticeships after the state was derecognized by the DOL is, in a word, irrational.

In their Answering Brief ("Ans. Brf."), the Agencies fail to address or adequately challenge the undisputed facts and core legal points that establish the right to enjoin unauthorized regulatory activity that constricts apprentice opportunities on public-works projects involving a "Federal purpose." Instead, the Agencies avoid discussion of the legal significance and effect of the conclusive adjudications of the DOL. The Agencies' failure to address the central issues of the case is particularly disturbing in light of the fact that California is the only state to be derecognized in the long history of the Fitzgerald Act and the consequences of such decertification create a question of first impression.

Rather than examine the controlling law of the Fitzgerald Act and its companion regulations and the significance of California's official "derecognition," the Agencies choose to conduct a five-century fly-over of the evolution of apprenticeship. In so doing, the Agencies refrain from tracing the pertinent history of the 1937 enactment of the Fitzgerald Act, through the California's derecognition in 2007, to its presently unauthorized regulation of federally certified apprentices on public-works jobs involving a "Federal purpose."

The Agencies argue that states have a "traditional" role in policing apprenticeships. Ans. Brf. at 1. Yet the state cannot rationally dispute that Congress is empowered to establish a national standard for apprenticeships that serve a "Federal purpose." The State's "traditional" regulating of apprenticeships must yield to conflicting federal standards in instances where the project in question involves a "Federal purpose." To find otherwise would be to render the Fitzgerald Act meaningless.

When California was stripped of its authority to license federal apprenticeship programs, the Agencies also lost whatever authority they may have had to decide what a "Federal purpose" is, and whether apprentices in federally certified programs could be employed, free of financial penalty, on public-works projects with a "Federal purpose." The Agencies cannot dispute this, yet insist that derecognition should not affect their assumed authority to regulate all aspects of apprenticeship on all public-works projects (except those for which the federal government is either the contracting party or the sole source of funding).

In short, despite having no authority to do so, the Agencies continue to regulate the apprenticeship in federally certified programs by determining which apprentices within California may be paid apprentice rates in compliance with prevailing-wage laws and which public-works projects are ones deemed to involve a "Federal purpose." Such unauthorized regulation of apprenticeship opportunities on projects with a "Federal purpose" is in direct conflict with the national system

established by the Fitzgerald Act's mandate to the DOL. That mandate instructs the DOL "to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices." 29 U.S.C. § 50. Thus, this Court should enjoin the efforts of the Agencies that frustrate these federal goals and harm Appellants and similarly situated apprentices, employers of apprentices, and the federally certified programs which bring such apprentices and employers together.

There is no merit to the arguments asserted by the Agencies in their quest to have affirmed the judgment in question. Appellants need not demonstrate a private right of action under the Fitzgerald Act because they do not seek a private right of action under that statute; rather, they seek to enjoin the Agencies from imposing financial penalties that improperly diminish apprenticeship opportunities on projects imbued with a "Federal purpose." Specifically, they seek a declaration that the Agencies' conduct is unlawful and they seek to enjoin the unlawful conduct. Their right to do so is well established. *E.g.*, *Verizon Md. Inc. v. Public Serv. Comm'n*, 535 U.S. 635, 642-43; 122 S.Ct. 1753; 152 L.Ed.2d 871 (2002).

There can be no denying that the federal standards and state law regarding apprenticeship are in conflict; indeed, the unacceptability of California's apprenticeship standards as they apply to the Fitzgerald Act already has been adjudicated conclusively. *See* ER 107-178. As such, the Agencies claim that the expert federal agency charged by Congress with enforcement of the federal

standards is incorrect in its interpretation of its own regulations. The Agencies admit to use of a guide for determining when federal apprentice standards apply that is far narrower than the controlling federal standard, and claim they should not be bound by controlling federal regulations. *See* Ans. Brf. at 16-22.

Likewise, the Agencies' attacks on the Commerce Clause and Equal Protection claims disregard the fact that apprentices in both state and federally approved apprenticeship programs receive substantially the same training. The distinctions the Agencies draw between the programs (and the Agencies' refusal to follow controlling federal regulations and confine their regulatory activity to conform with their derecognition) are not rational. Indeed, the only distinction is that the federal program is contrary to the Agencies' efforts to restrict apprenticeship opportunities – something the DOL already has determined to be improper and, therefore, irrational. *See* 72 Fed. Reg. 9590.

Finally, the Agencies retreat to the notion that Appellants' claims are not ripe, a faulty conclusion that is premised upon an unduly narrow interpretation of what is a "Federal purpose." Appellants' claims are ripe because this improperly narrow construction of what constitutes a "Federal purpose" and the Agencies impermissible efforts to regulate apprenticeship opportunities on projects that involve a "Federal purpose" have impaired Appellants' apprenticeship opportunities on three public-works projects. *See* ER 191-92, 215-16, 221, 264-66.

Ultimately, the relief Appellants seek is neither vague nor overbroad, but needed to stop the Agencies' unlawful and improperly expansive regulatory activities.

II. LEGAL DISCUSSION

A. The Basis for Appellants' Entitlement to a Declaration and Injunction Remains Entirely Unrebutted.

The Agencies as much as concede that they cannot add requirements on projects that involve a "Federal purpose," but then assume that they (rather than the DOL) are in control of deciding whether a project truly involves a "Federal purpose." *See*, *e.g.*, Ans. Brf. at 5, 14, and 21-22. In so doing, the Agencies' Answering Brief convolutes, ignores, or concedes the following five fundamental points at the core of Appellants' entitlement to the requested relief:

1. The DOL's Definition of "Federal Purpose" is Controlling.

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. However, the District Court did not give proper deference to the DOL's determinations. Because the term "Federal purpose" as defined in 29 C.F.R. § 29.2 is subject to differing interpretation and, thus, is ambiguous, the DOL's interpretation of its own regulations must be followed since it is neither "plainly erroneous" nor inconsistent with the regulation. *Bassiri v. Xerox Corp.* 463 F.3d 927, 931 (9th Cir. 2006).

Neither the Fitzgerald Act itself nor 29 C.F.R. § 29.2 restrict the reach of the Fitzgerald Act to projects directly paid for with federal dollars. 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, 29 C.F.R. § 29.2 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."

The DOL has interpreted the term "Federal purpose" in its own regulations to require California "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 . . . even if the project is funded in part by the state or local government." ER 275 (official letter from OATELS to interim director of one of the Agencies). Such a construction is not plainly erroneous or inconsistent with the regulation. Thus, the District Court was bound by it. *See Bassari*, 463 F.3d at 931. While the Agencies seek to avoid deference to the DOL on this score, their arguments and authorities are misplaced (as discussed in greater detail in Section B.3. of this brief).

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

The Fitzgerald Act's express objective is to provide a system of national standards to "safeguard the welfare of apprentices" and to promote apprenticeship opportunities throughout the country. 29 U.S.C. § 50. That objective is achieved through regulations promulgated by the DOL pursuant to the Fitzgerald Act's mandate. *See* 29 C.F.R. §§ 29.1 et seq. The regulations provide for registration and monitoring of apprenticeship programs involving "Federal purposes" through uniform national standards set by the DOL's Office of Apprenticeship Training, Employment and Labor Services ("OATELS"). 29 C.F.R. § 29.1.

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

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

Secretary." *Southern Cal. Chapter of Assoc. Builders and Contractors, Inc., Joint Apprenticeship Comm. v. Cal. Apprenticeship Council,* 4 Cal. 4th 422, 452; 841 P.2d 1011; 114 Cal.Rptr.2d 491 (1992) (emphasis in original, internal quotation marks and citation omitted).

As a result, inconsistent or conflicting state standards are not permitted to frustrate the goals of the Fitzgerald Act and, therefore, must yield to the controlling federal regulations. *Id*. at 452-53.[2] The ultimate safeguard against such practices is found in the U.S. Constitution's Supremacy Clause, which "secures federal rights by according them priority whenever, they come into conflict with state law." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107; 110 S.Ct. 444; 107 L.Ed.2d 420 (1989).

The Agencies acknowledge that the Fitzgerald Act and its implementing regulations "propose to, *inter alia*, 'safeguard the welfare of apprentices'" through a national system directed by the DOL by which the federal government "could ***delegate*** its power [to regulate apprenticeship] to states with their own apprenticeship laws by 'recognizing' a 'State Apprenticeship Agency or Council.'" Ans. Brf. at 5 (emphasis added, internal ellipses and citation omitted).

[2] The DOL's OATELS is empowered to derecognize a state agency's authority to regulate apprenticeship for failure of the state "to operate in conformity with the requirements of this part," 29 C.F.R. § 29.13, including the failure to operate under "an acceptable State apprenticeship law … and regulations adopted pursuant thereto." 29 C.F.R. § 29.12(a)(1).

Nonetheless, the Agencies seem to argue that, despite regulatory authority dependent upon delegation by the DOL, California should somehow be allowed to regulate apprenticeship outside the scope of the delegated authority by enacting and enforcing state laws which the DOL has determined to be in conflict with the Fitzgerald Act's overarching mandate and the DOL's own regulations governing the exercise of the delegated authority. Not surprisingly, the Agencies can cite no factual support or legal basis for the proposition that California (or any other state) may disregard (and work at cross-purposes to) the regulations promulgated by the very governing entity from which the state's authority to operate in the realm of national apprenticeship standards is derived.

3. Any Authority the Agencies May Have Had to Regulate Apprenticeships on Projects with a "Federal Purpose" was Revoked When the DOL Derecognized California.

As the Agencies' concede, their former authority to regulate apprenticeship as to any "Federal purpose" was derived from the Fitzgerald Act's implementing regulations. *See* Ans. Brf. at 5. The Agencies acknowledge that they were delegated such authority in 1978 through certification by OATELS' forerunner, the federal Bureau of Apprenticeship Training ("BAT"). *Id*. However, the Agencies fail to explain away the fact that the DOL (the federal agency to whose jurisdiction apprenticeship welfare across the nation has been entrusted) determined conclusively, after a five-year adjudicative process including multiple hearings and exhaustive briefing by the parties and *amici*, that: (a) California has failed to meet

the minimum standards for apprenticeship regulation by enacting and seeking to enforce an anti-competitive law which ***restricts rather than promotes*** apprenticeship opportunity; and (b) such failure to comport with the minimum national standards governing apprenticeship welfare and opportunity warranted revocation of the state's authority to regulate apprenticeships with respect to public-works projects that involve a "Federal purpose." *See* 72 Fed. Reg. 9590.

The Agencies cannot escape the fact that California has been derecognized and is barred from litigating *de novo* the merits of such derecognition in this Court. Put another way, in determining Appellants' entitlement to injunctive relief, the Court's deliberations need not include any question of the propriety of California's derecognition. Those questions have been fully litigated and determined on the merits. The derecognition and the basis for it are now conclusively established facts. They are not issues that require or permit resolution through examination of evidence or application of law by this Court.

Regardless of the five years that have transpired since the derecognition, the Agencies imply that the time to challenge the DOL's determination has not yet expired. They do so by arguing that 28 U.S.C. § 2344 does not apply to DOL derecognition proceedings. Ans. Brf. at 9. However, they cite no authority to suggest that they may attack that DOL determination so many years after it was rendered. Accordingly, the fact that 28 U.S.C. § 2344 does not apply to DOL

derecognition proceedings only proves that the Agencies are unable to mount a judicial challenge to the DOL's decision. In any event, the Agencies do not appear to challenge the validity of their derecognition here.

4. The Agencies Have No Current Legal Authority to Regulate Apprenticeship on Projects that Involve a "Federal Purpose."

Perhaps because it is too late for the Agencies to do so, they fail to explain either the findings and reasons supporting the DOL's derecognition order or the legal significance of the fact that their authority to regulate apprenticeship standards for Federal purposes has been revoked by the federal government. It bears repeating that the Agencies' authority was revoked because California failed "to operate in conformity with the requirements of this part [29 C.F.R. §§ 29.1, *et seq.*]" and failed to operate under "acceptable State apprenticeship law … and regulations adopted pursuant thereto." *See* ER 110-11, 142-43, and 176-77.

The Agencies' failure to discuss the import of the Review Board's ruling and the basis for it is revealing. It exposes and emphasizes the analytical keystone in this case: What is the meaning of the derecognition? Appellants contend the derecognition strips the Agencies of the authority to determine (1) whether federally certified apprentices must be afforded the opportunity work on public-works projects serving a Federal purpose within California at apprentice prevailing-wage rates, or (2) whether any particular project involves a "Federal purpose." Apparently Respondents don't want to talk about the meaning of the

derecognition. It is the elephant in the room. Derecognition means the Agencies have no authority, standing, or basis to challenge the plain meaning of the DOL regulation mandating that a "Federal purpose" is involved wherever and whenever "***any*** Federal contract, grant, agreement or arrangement dealing with apprenticeship" or "***any*** Federal financial ***or other*** assistance, benefit, privilege, contribution, allowance, exemption, preference or right pertaining to apprenticeship" is implicated. 29 C.F.R. §29.12 (emphasis added).

Because the Agencies no longer have authority to make the determinations of the apprenticeship status of individuals for a "Federal purpose," the approval of training programs certifying apprentices for "Federal purpose" projects, and/or what constitutes a "Federal purpose," those crucial determinations are now solely within the jurisdiction of the DOL. The DOL has steadfastly reasoned and ruled that "Federal purpose" is far broader than the narrow segment of apprenticeship concerns as to which the Agencies say they are willing to "defer" to federal authority; namely, "'federally funded projects controlled by, carried out by, and awarded by the federal government.'" Ans. Brf. at 21. As noted, the key regulation promulgated by DOL lists, in addition to federally awarded contracts and federally financed construction projects, "***any*** … ***other*** assistance, benefit, privilege, contribution, allowance, exemption, preference or right pertaining to apprenticeship." 29 C.F.R. §29.12 (emphasis added).

Even in the realm of contracting and financing, the Agencies' view of what constitutes a "Federal purpose" is far too narrow. The DOL has determined and explained to California that a "Federal purpose" includes, but is not limited to, "all public works projects funded in whole ***or in part*** with Federal funds," ER 277 (emphasis added), and that all states are required 'to accept programs and apprentices registered by OATELS, for Federal purposes, on ***all*** federally funded ***or supported*** public works projects, ***regardless of how much Federal funding or support is provided*** . . . even if the project is funded in part by the state or local government."" ER 275 (emphasis added).

5. The Agencies Cannot Deny that Public-Works Projects Involving Any Degree of Federal Funding or Subsidization Constitute "Federal Purpose" Projects.

The Agencies offer no evidence or controlling law to counter the crucial point that ***any*** amount of federal financial involvement in a public works project constitutes a "Federal purpose," a circumstance that places regulation of apprenticeship standards squarely within the purview of the Fitzgerald Act and its companion regulations. In other words, such a project is within the jurisdiction of the DOL and not California's derecognized state agencies.

Appellants have offered unrefuted evidence that projects financed through either tax-exempt municipal bonds or so-called "Build America Bonds" (like the Marysville High School Project, the Chicago Park Project, and the Stockton Gym Project) are all funded, in part, with federal funds. ER 232 and 234 (¶¶ 4 and 10).

That federal subsidies of any form are involved in such projects places them firmly within a "Federal purpose" according to the regulation and DOL's application of the regulation. Because the District Court misconstrued the term "Federal purpose," it never considered this evidence.

In contrast to the Appellants' showing, the Agencies offer no evidence or law suggesting that the projects in question were not funded "in part" with federal financial assistance. Instead, the Agencies insist that a "Federal purpose" exists only where there is a "federal construction contract" or some other type of "federal contract for the projects" in question. Beyond that, the Agencies offer nothing except poor analogies to prop up unfounded "the sky is falling" warnings about the consequences of properly deferring to the DOL's determination concerning what constitutes a "Federal purpose." Ans. Brf. at 14-15.[3] The Court should draw the inference that no evidence exists which conflicts with the evidence that each of the projects in question (i.e., the Marysville High School Project, the Chicago Park Project, and the Stockton Gym Project) benefited from subsidies provided by the federal government.

Therefore, the Agencies must be enjoined from regulating apprenticeship status and opportunities with respect to these three specific public works projects at issue in Appellants' lawsuit. The Agencies failed to meet the burden of producing

[3] Those unpersuasive arguments are addressed herein at Section B.2.

even a scintilla of evidence to show that *no* federal money, subsidy or *other* "Federal purpose" is involved.

In fact, the Agencies admit that they do not (except in projects awarded by the federal government) distinguish between state and federal funding. ER 78. Appellants' evidence was undisputed. As a result of the lack of dispute concerning the presence of federal financial involvement on the named projects, the Agencies must be enjoined from failing to acknowledge federally certified apprentices as qualifying for apprentice wages on those three projects as well as any and all other public-works projects which indisputably involve federal subsidies and/or employment opportunities for federally certified apprentices.

B. Defendants' Opposition Is Without Merit.

To the extent the Agencies offer arguments against some of Appellants' points, the arguments fail for the reasons summarized below.

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1. The Right to Seek to Enjoin Conduct Violative of Federal Law is Well Established. No Private Right of Action is Needed.[4]

The Agencies position regarding the need to prove the existence and viability of a private right of action is untenable. *See Verizon Md. Inc.*, 535 U.S. at 642 (finding that injunctive relief can be awarded even where it can be said that the statute that was violated "does not create a private cause of action"). At various points, the Agencies so much as acknowledge that they cannot make apprentice determinations or take punitive measures against Appellants with respect to public-works projects that involve a "Federal purpose." *See* Ans. Brf. at 5, 14, and 21-22. Despite that concession, the Agencies proclaim that Appellants have no private right of action to stop the Agencies from doing what they concede they cannot do. *Id*. at 10-12.

Accordingly, "the general rule . . . that 'for every wrong there is a remedy'" applies here. *Jacobellis v. State Farm Fire & Cas. Co.*, 120 F.3d 171, 174 (9th Cir. 1997) (internal quotation marks and citation omitted); *see also Shaw v. Delta Air*

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

Lines, Inc., 463 U.S. 85, 96 n.14, 103 S.Ct. 2890; 77 L.Ed. 2d 490 (1983) (allowing "companies subject to ERISA regulation" to "seek injunctions against enforcement of state laws they claim are pre-empted by ERISA, as well as declarations that those laws are pre-empted").

Among other things, Appellants seek a declaration that the Agencies' regulation of apprenticeship for federal purposes (1) is nullified by federal law and (2) offends the commerce, due process and equal protection provisions of the Constitution. "The question of who may enforce a statutory right is fundamentally different from the question of who may enforce a right that is protected by the Constitution." *Davis v. Passman*, 442 U.S. 228, 241; 99 S.Ct. 2264; 60 L.Ed.2d 846 (1979). Challenges to state action based on constitutional grounds (including challenges based upon the Supremacy Clause, preemption, or similar foundations) do not obligate a plaintiff to articulate a private right of action under the federal scheme alleged to be preeminent. *See, e.g.*, *Siuslaw Concrete v. State of Washington*, 784 F.2d 952, 957-58 (9th Cir. 1986) (analyzing a private party's Fitzgerald Act claims on the merits without suggesting that a private right of action does not exist); *Associated Builders and Contractors v Curry*, 797 F.Supp. 1528, 1530 (N.D. Cal. 1992) (same), *vacated on different grounds*, 68 F.3d 342 (9th Cir. 1995).

Courts regularly distinguish between a private cause of action under a statute and a declaratory or injunctive relief claim which challenges the lawfulness of an action, statute, or regulation. *See Verizon Md. Inc.*, 535 U.S. at 642 (finding that injunctive relief can be awarded even where it can be said that the statute that was violated "does not create a private cause of action"); *New York Airlines, Inc. v. Dukes County, Martha's Vineyard Airport Commission*, 623 F. Supp. 1435, 1443 (1985) ("Where state regulation does impose excessively on 'aspects of trade [which] must remain free from interference by the States,' the clause of its own force may serve to invalidate the state regulatory activity.").

Federal courts permit claims for injunctive and declaratory relief to determine whether state law conflicts with federal law under the Supremacy Clause of the U.S. Constitution. For example, in *Verizon Md. Inc.,* a state utility commission ruled against Verizon (a private corporate entity) in a dispute over whether Verizon was obligated to pay reciprocal compensation to another corporation under the Telecommunications Act of 1996 ("Telecom Act"). Subsequently, a federal agency (the FCC) issued an order that conflicted with the state utility commission's interpretation of the Telecom Act. Verizon filed suit seeking a declaratory judgment that the state utility commission's order was unlawful, and seeking an injunction prohibiting the order's enforcement. *Verizon Md. Inc.*, 535 U.S. at 638-40.

The state utility commission contended that there was no private right of action in the Telecom Act and the federal court therefore lacked jurisdiction to entertain the suit. *Verizon Md. Inc.*, 535 U.S. at 642. The U.S. Supreme Court disagreed with that argument, stating, "As we have said, 'the district court has jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.'" *Id*. at 643. That same principle applies here. Appellants have sued state officials seeking a declaration that the Agencies' conduct violates federal law, and Appellants seek an injunction prohibiting that conduct.[5]

Thus, in challenging the Agencies' actions on the basis that they offend federal law, or on other constitutional grounds, Appellants need not establish a private right of action under the federal law they claim is supreme. *See Verizon Md. Inc.*, 535 U.S. at 642; *Davis*, 442 U.S. at 241-44; *New York Airlines, Inc.*, 623 F. Supp. at 1443.

2. The Agencies Violated the Fitzgerald Act and its Regulations.

The Agencies' contention that there was no violation of the Fitzgerald Act or its implementing regulations lacks merit. Indeed, the Agencies' violation of the

[5] The U.S. Supreme Court consistently has interpreted the U.S. Constitution as permitting claims that lawmakers have exceeded their authority. *See*, *e.g.*, *Bond v. United States*, ___ U.S. ___, ___, 131 S. Ct. 2355, 2360; 180 L.Ed.2d 269, (2011).

national standards set forth in the Fitzgerald Act's implementing regulations already has been determined conclusively by DOL adjudication. *See* 72 Fed. Reg. 9590. The Agencies' improper and continuing usurpation of the authority to determine which projects involve a "Federal purpose" after California's derecognition is yet another violation of the Fitzgerald Act and its regulations.

Undaunted by those inconvenient facts, the Agencies argue that that 1) "[t]he Fitzgerald Act does not require states to recognize federal apprentices" and 2) "[p]rograms are not required to use federal apprentices." Ans. Brf. at 13. While that may be so in terms of purely state projects that do not involve a "Federal purpose," such reasoning does not apply in the context of projects that do involve a "Federal purpose." *See* 72 Fed. Reg. 9590 (ruling that "apprenticeship programs registered in California must register with DOL's Office of Apprenticeship (OA), if they wish to pay apprentice wages at the rates authorized under the regulations implementing the Davis-Bacon and related acts"). More to the point, there is no basis to believe that the Fitzgerald Act permits the Agencies (or any derecognized state) to interfere with the DOL's determination of what projects involve a "Federal purpose" or to negate federal certification of apprentices on such projects.

The Agencies also contend that "[c]ontractors on federally managed projects are not required to use federal apprentices." Ans. Brf. at 13. The point here is not whether contractors on such projects are required to use apprentices, but whether it

is proper for the Agencies to prevent them from using federally certified apprentices. Clearly, the Agencies' conduct is unlawful regardless of whether contractors are required or merely allowed to use federally certified apprentices.

The Agencies also retreat to their untenable position that a "Federal purpose" does not exist except where there is some "federal construction contract." Ans. Brf. at 14. Since California's authority to determine what is and what is not a "Federal purpose" has been derecognized by the DOL, the Agencies' arguments ring especially hollow.

Lastly, the Agencies offer a number of inapplicable analogies to prop up their unfounded caution against properly deferring to the DOL's determination concerning what constitutes a "Federal purpose." Ans. Brf. at 14-15. A contractor paying Social Security tax for apprentices working on a project is a far cry from a "federally funded or supported public works project[]." ER 277. Social Security funds or supports workers after they retire and not the public-works project where they are or were once employed. Likewise, the tax deduction for home mortgage interest spurs private home purchasing, and the tuition paid by parents to fund renovations at a daycare center have nothing to do with a "federally funded or supported public works project[]." ER 277. Just because the Agencies can conceive of preposterous interpretations that would lead to ridiculous results, that does not mean that the far more narrow and reasonable construction adopted by the

DOL and cited by Appellants is invalid.

The Agencies are correct that "Congress has not left us to stumble in the dark." Ans. Brf. at 15. To prevent such stumbling, Congress assigned to the DOL the task of establishing labor standards necessary to achieve the purposes of the Fitzgerald Act. *See* 29 U.S.C. § 50. And while Congress may have identified some benefits that pertain to apprenticeship in 20 U.S.C. § 7245, or 29 U.S.C. § 2503, or 38 U.S.C. § 3452, or 42 U.S.C. § 16411, or in the Davis-Bacon Act of the Service Contract Act, *see* Ans. Brf. at 15-16, that does not mean those are the exclusive benefits that pertain to apprenticeship. The DOL also has identified other examples of where such a "Federal purpose" exists. *See* ER 277.

In sum, Appellants ask the Court to interpret the Fitzgerald Act (and the regulations promulgated under it) in light of the fact that California has adopted apprenticeship standards that violate the basic national apprenticeship standards which Congress empowered the DOL to establish. Since the violation of those national standards has already been determined by the DOL, it is unlawful for the Agencies to exclude federally certified apprentices from the opportunity to work at prevailing apprenticeship wages on projects that involve a "Federal purpose."

3. The Agencies Improperly Discount the DOL Evidence.

The Agencies assert six arguments in their attempt to undercut the application of and deference that should be accorded to the DOL's interpretation of

"Federal purpose" as confirmed in its official letters in 2004. Ans. Brf. at 16-18. From there, the Agencies offer the fallacious conclusion that "the construction given the regulation by [Appellants] requires that the phrases 'pertaining to apprenticeship' and 'dealing with apprenticeship' be taken out of the regulation." *Id*. at 18. All of these arguments are unavailing.

First, the Agencies dispute Appellants' observation that *Elec. Joint Apprenticeship Comm. v. MacDonald*, 949 F.2d 270 (9th Cir. 1991), confirmed "the scope of federal purposes in 29 C.F.R. § 29." Ans. Brf. at 16 n.7. That decision expressly states: "29 C.F.R. § 29.3 provides for a dual system of approval and recognition so that either the BAT or the State Apprenticeship Council can approve an apprenticeship program for federal purposes. However, either agency is constrained in its approval to apply the requirements and standards of the federal regulations." 949 F.2d at 273. It goes on to confirm that "Federal purposes include federal public works and public works deriving federal financial assistance." *Id*. at 274.

Second, the Agencies contend that the letters should be ignored because they were issued before the DOL derecognized California. Ans. Brf. at 17. The letters from the DOL were written to "explain the status of apprenticeship programs registered by the [DOL] in California," ER 275, and to "clarify the status of apprenticeship programs registered by [the DOL], for Federal purposes, in states,

such as California." ER 277. The letters and the action to derecognize are completely consistent. They reveal the same interpretation of the statute and the regulations. There is no basis to conclude that the one invalidates or reverses the other. They are consistent with other another. The key question is not whether California is still a SAC state (there is no dispute that it has been derecognized); instead, the dispositive question is what constitutes a "Federal purpose" under the controlling law and regulations. The answer to that question is found in the DOL letters.

Third, the Agencies insist that none of the three projects in question involve "federal funds." Ans. Brf. at 17. Here again, the Agencies ignore the vital point. The question is not whether any "of the three projects in dispute involve 'federal funds' used to fund a public works project." *Id*. No, the key is whether any of those projects were "federally funded ***or supported*** public works projects, ***regardless of how much Federal funding or support is provided*** . . . even if the project is funded in part by the state or local government." ER 275 (emphasis added). It is beyond dispute that the three projects were federally supported public-works projects. ER 231-35.

Fourth, the Agencies characterization of the DOL's interpretation of its own regulations as "a litigant's interpretation of an agency interpretation of a regulation" is simply incorrect. Ans. Brf. at 17. Appellants here did not offer their

"interpretation of [the DOL] interpretation of a regulation." *Id*. The letters plainly reveal the DOL's interpretation of the regulations - not the litigants. It is fanciful to think that deference to the DOL does not apply in instances where a litigant parrots to a court the DOL's interpretations of its own regulations. Moreover, the absence of any evidence demonstrating that the DOL's interpretation is something other than that revealed in the letters shows that this argument is merely wishful thinking on the part of the Agencies.

Fifth, the Agencies proclaim that the DOL letters are "informal" and, therefore, not entitled to deference. Ans. Brf. at 17. Assuming (without conceding) that the DOL letters written on official letterhead to state agencies (involved in this case) explaining the DOL's interpretation of its regulations are somehow "informal," nothing in the Agencies' authorities indicate that deference is unwarranted. On their face, the letters constitute published interpretations of the DOLs regulations.

In this respect, the Agencies claim to draw a rule of formal publication as a prerequisite to deference from *SEC v. Phan*, 500 F.3d 898, 904 (9th Cir. 2007). Ans. Brf. at 17. But that is not what that case says at all. It only notes that the interpretation at issue in that case was published. Any such rule would be contrary to the holding of *Auer v. Robbins*, 519 U.S. 452, 462-63; 117 S.Ct. 905, 912; 137 L.Ed.2d 79, 91 (1997), which involved an amicus brief, not a formal publication.

Sixth, the Agencies insist that a DOL "regulation must be ambiguous in order for the [C]ourt to give any deference to [DOL's] interpretation." Ans. Brf. at 17. Insofar as the Agencies maintain that their construction of the regulations is a reasonable one, there is no doubt that the regulations are ambiguous.[6] "The language used in a statute or, as in this case, an agency order, is ambiguous if it is 'capable of being understood in two or more possible senses or ways.'" *Southern Utah Wilderness Alliance v. Office of Surface Mining Reclamation and Enforcement*, 620 F.3d 1227, 1238 (10th Cir. 2010) (quoting from *Chickasaw Nation v. United States*, 534 U.S. 84, 90, 122 S.Ct. 528, 151 L.Ed.2d 474 (2001)).

The Agencies' conclusion – that "the construction given the regulation by [Appellants] requires that the phrases 'pertaining to apprenticeship' and 'dealing with apprenticeship' be taken out of the regulation," Ans. Brf. at 18 – does not follow from any of the preceding five arguments. Moreover, the Agencies offer no other authority or explanation to support this conclusion. Thus, their conclusion merely parrots the erroneous conclusion reached by the District Court without any effort to reinforce it. *See* ER at 000029, Order at 12:5-9. Appellants already have explained the flaws in the District Court's hyper-literalist interpretation. See Appellants' Opening Brief at 35-38

[6] This ambiguity is demonstrated by the fact the DOL, the Agencies, and the District Court all read the regulations differently.

Under the conclusion advanced by the Agencies and the District Court, 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, "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.

If that conclusion were accurate, it would defeat the purpose of the Fitzgerald Act (and its implementing regulations) by denying its application even in wholly federally funded projects. Because that conclusion 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)). In sum, the Agencies offer nothing to detract from the definitions of "pertaining to" and "dealing with" provided by Appellants in their opening brief.

4. The Agencies Ignore the Supremacy of Fitzgerald Act Standards.

The Agencies cite cases holding that the Fitzgerald Act does not preempt states from enacting separate apprenticeship schemes; i.e., *Siuslaw*, 784 F.2d at

956-958; *Associated Builders and Contractors*, 797 F.Supp at 1538. The Agencies ignore the fact that those cases were decided in an entirely different context - before and in the absence of the DOL order that derecognized California. Those pre-derecognition cases hold merely that states may engage in "supplemental" (as opposed to conflicting) regulation of the "basic" standards established by the DOL. *Associated Builders and Contractors*, 797 F.Supp at 1538.[7]

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

The Supremacy Clause invalidates state laws that interfere with or are contrary to federal law. *Gibbons v. Ogden*, 22 U.S. 1, 9; 6 L.Ed. 23 (1824).

> Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Hillsborough County v. Automated Med. Labs., Inc. 471 U.S. 707, 713; 105 S.Ct. 2371; 85 L.Ed.2d 714 (1985) (internal quotation marks and citation omitted).

[7] It is clear that the Fitzgerald Act requires the DOL to formulate and adopt uniform national standards for apprenticeship. *Southern Cal. Chapter of Assoc. Builders and Contractors, Inc., Joint Apprenticeship Comm.*, 4 Cal.4th at 452.

The U.S. Supreme Court has repeatedly held that state laws can be pre-empted by federal regulations as well as by federal statutes. *Hillsborough County*, 471 U.S. at 713; *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153-54; 102 S.Ct. 3014; 73 L.Ed.2d 664 (1982); *United States v. Shimer*, 367 U.S. 374, 381-83, 81 S.Ct. 1554; 6 L.Ed.2d 908 (1961). Thus, the Agencies' exclusion of federally certified apprentices from the opportunity to work at prevailing apprenticeship wages because they are not also state certified under a state statute which conflicts with the controlling federal law is unlawful and should be enjoined.

5. The Agencies' Interpretation and the DOL's Interpretation Conflict.

The Agencies cite *Southern California Labor Management Operating Engineers Contract Compliance Committee v. Aubry,* 54 Cal.App.4th 873 (1997) ("*Aubry*"), in arguing that "California law does not conflict with federal law." Ans. Brf. at 21. However, *Aubry* offers no support for the Agencies' position. Rather, the *Aubry* court's explication of California's prevailing-wage law highlights the very conflict the Agencies seek to deny. The plaintiffs in *Aubry* sought a writ of mandate requiring the director of one of the Agencies to set aside his determination that a particular construction project was a public-works project subject to federal prevailing-wage law. The plaintiffs also sought to substitute that decision by the director of one of the Agencies with a determination that the

project in question was subject to California's prevailing-wage law. The *Aubry* court upheld the trial court's denial of the writ, finding that California's prevailing-wage law did not apply to "federally funded projects controlled by, carried out by, and awarded by the federal government." *Aubry*, 54 Cal.App.4th at 883.

The standard imposed by Fitzgerald Act regulations is much broader than the Agencies' narrow "control/award" concept. The Fitzgerald Act's standard requires federally approved apprentices to be allowed to work on projects serving any "Federal purpose." As previously noted, 29 C.F.R. § 29.2(k) defines "Federal purpose" as "any Federal contract, grant, agreement or arrangement dealing with apprenticeship; and any Federal financial or other assistance, benefit, privilege contribution, allowance, exemption preference or right pertaining to apprenticeship." Notwithstanding the Agencies' refusal to acknowledge it, the two scopes are not co-extensive; the "control/award" concept is merely a subset of the full scope of the regulation's definition.

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

When California was derecognized as a co-equal player with DOL agents under the Fitzgerald Act system, the Agencies lost any ability to supplement, interpret, construe, alter, or apply the operative national apprenticeship standards as they relate to projects involving a "Federal purpose." By insisting that they need only defer to federal apprentice prevailing-wage standards when the federal government awards or controls a project, the Agencies act unlawfully because they are required to adhere to the broader standard applied by DOL to projects involving any "Federal purpose."

The Agencies offer no evidence to contest that the projects cited by plaintiffs each involve a "Federal purpose";[8] namely, the Marysville High School Project, the Chicago Park Project, and the Stockton Gym Project. Instead, they repeatedly assert that they are entitled to apply "higher" standards than the bedrock standard established by the Fitzgerald Act. That repeated assertion misses the point. While California is free to regulate apprenticeship for solely state purposes (i.e., where there is *no* "Federal purpose" by the DOL regulatory definition), the State is bound to adhere to federal apprenticeship standards in any project which involves *any* "Federal purpose" as defined by 29 C.F.R. 29.2(k) and interpreted by DOL.

[8] Indeed, they admit they do not distinguish between federal and state money in public-works projects unless the project is awarded by the Federal government. ER 78.

The evidence is undisputed. The Agencies failed and refused to apply federal apprenticeship standards (including permitting the use of apprentices enrolled in a federally approved apprenticeship program on projects involving a "Federal purpose" and payment of apprentice prevailing wages to those apprentices). Indeed, the Agencies make no effort to determine if such a federal purpose is implicated in a particular public-works project and instead rely on the identity of the awarding agency as an unauthorized and illegal "litmus test" to determine if federal or state standards apply. This conduct must be enjoined.

6. The Agencies' Unauthorized Regulation Improperly Burdens Interstate Commerce.

The DOL proceedings conclusively determined that California Labor Code § 3075(b) fails to conform with the Fitzgerald Act. It does so by discriminating against new apprenticeship programs, subordinating the interests of apprentices to the interests of existing apprenticeship programs, and improperly restricting, rather than promoting, apprenticeship opportunities for workers. ER 175-77.

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

The Agencies' unauthorized and unlawful application of California Labor Code § 3075(b), in combination with California Labor Code § 1775.5, effectively bars apprentices (such as Appellant Brandin Moyer) from participating in federally certified apprenticeship programs (such as that operated by Appellant I-TAP), and from employment on public-works projects in California involving a "Federal purpose." As a result, the Agencies' conduct amount to an unjustifiable interference with interstate commerce in violation of the U.S. Constitution's Commerce Clause, art. I, § 8, cl. 3, because it prevents thoroughly qualified apprentices from programs approved by the DOL in the other forty-nine states from pursuing public work employment opportunities within California.

7. The Agencies' Conduct Denies Appellants Equal Protection.

California Labor Code § 3075(b) has been adjudicated to "discriminate against new [apprenticeship] programs" and their enrollees. ER 175-77. Yet the Agencies cite this statute as the ultimate authority and thereby deny individuals seeking the opportunity to work as apprentices and federally 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.

The Agencies admit that both state and federal apprenticeship registration serves the purpose of maintaining standards. *See* Ans. Brf. at 20 ("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 state and federal programs differently are not rational. Thus, the claim that the distinction can be supported on the grounds that state support to apprenticeship programs must adhere to budget limits is also irrational. Since it costs the state nothing for federal apprenticeship training, the budget limits are meaningless.

Indeed, because the Agencies do not offer anything 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), how can Appellants justify any distinction between apprentices based on the identity of the approving agency? Once again, the distinction is artificial and therefore irrational. The Agencies' claim that the "needs test" insures that there will be jobs for apprentices who graduate also cannot survive scrutiny. Ans. Brf. at 24-25. The argument disregards the adjudicated finding that the "needs test" reduces, rather than increases opportunities for apprentices.

8. The Matter is Ripe.

Taking a page from the District Court's decision, the Agencies insist that the ruling in question should not be disturbed "because . . . none of the three projects

[at issue] involve actual federal funding." Ans. Brf. at 27. This rationale completely disregards the DOL's binding determination as to what constitutes a "Federal purpose" and improperly substitutes the Agencies' unauthorized judgment on that question.

The Agencies go on to purport that the purported lack of "actual federal funding" takes the three projects at issue (i.e., the Marysville High School Project, the Chicago Park Project, and the Stockton Gym Project) "beyond the scope of even the DOL letters on which [Appellants] rely." Ans. Brf. at 27. However, the Agencies offer no explanation, evidence, or authority to support this unfounded and erroneous proposition. Indeed, and as already discussed herein, there is actual federal funding involved in the three projects at issue. Even if the Agencies mean there is no direct federal grant, such a circumstance is of no import.

In reality, a "Federal purpose" is not confined only to situations where there is, as the Agencies refer to it, "actual federal funding." On the contrary, a "Federal purpose" is found wherever there is "***any*** Federal . . . ***assistance, benefit, privilege, contribution, allowance, exemption, preference or right*** pertaining to apprenticeship." 29 C.F.R. § 29.2(k) (emphasis added). In other words, a "Federal purpose" exists "on all federally funded ***or supported*** public works projects, ***regardless of how much federal funding or support is provided*** . . . even if the project is funded in part by the state or local government." ER 275 and 277

(emphasis added).

The Agencies also argue that the matter is unripe because "I-TAP has never been denied state approval . . . [and] has never even asked for state approval." Ans. Brf. at 27. This position is specious. Granted, if Appellants sought to enjoin the Agencies from withholding approval on purely state projects with no "Federal purpose," it may be proper to require Appellants to apply for such approval before allowing them to sue to get it. However, that is not the situation here.

Instead, this case concerns the Agencies actively precluding Appellants from the benefit of federally certified apprentice opportunities on projects that involve a "Federal purpose." It would be ludicrous to require Appellants to ask the Agencies for the very thing that they are unauthorized to give before allowing Appellants to move to enjoin the Agencies from continuing to require such improper steps. Appellants are not claiming that the Agencies should certify federal apprentices on projects that involve a "Federal purpose." Rather, Appellants are attempting to stop the derecognized Agencies from continuing to assert the now negated authority to make apprentice decisions where a "Federal purpose" is in play.

Given these circumstances, it is no surprise that the Agencies offer no authority to support their position that the matter is not ripe. In light of the foregoing evidence and authorities provided by Appellants, it is clear that the matter is quite ripe for adjudication.

9. The Injunction Sought is Neither Vague Nor Overbroad.

The Agencies argue that "the scope of federal purposes proposed by [Appellants]" renders "the injunctive relief they seek . . . [as] excessively broad." Ans. Brf. at 28. Not so. The scope of federal purposes that Appellants propose is no broader than that already delineated by the DOL. It is completely specious to think that adhering to such parameters would create a "Federal purpose" in "putting up street signs identifying a federal courthouse paid for with state tax dollars only." Ans. Brf. at 29.

The typical relief in a preemption case is an order invalidating the state law or regulation and enjoining its enforcement. *Crosby v. National Foreign Trade Council,* 530 U.S. 363, 371; 120 S.Ct. 2288;147 L.Ed.2d 352 (2000); *Shaw v. Delta Airlines Inc.,* 463 U.S. 85, 96, n.14; 103 S.Ct. 2890; 77 L.Ed.2d 490 (1983). If for some reason the state law is not eliminated completely, it can be invalidated "insofar as it violates the federal statute." *Engelman v. Amos*, 404 U.S. 23, 24; 92 S.Ct. 181; 30 L.Ed.2d 143 (1971); *accord Dalton v. Little Rock Family Planning Servs*., 516 U.S. 474, 478; 116 S.Ct. 1063; 134 L.Ed.2d 115 (1996) (remanding case "for entry of an order enjoining the enforcement of Amendment 68 [of the Arkansas Constitution] only to the extent that the amendment imposes obligations inconsistent with federal law").

In this way, invalidating the law, regulation, or administrative order (or the offending part of a law, regulation, or order) gives the Appellants the affirmative relief they seek. For example, when the U.S. Supreme Court invalidates a state utility commission rate order, the utility is not left without rates. Rather, the case is remanded and the state agency will reform its order consistent with federal law. *Compare Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 973; 106 S.Ct. 2349; 90 L.Ed.2d 943 (1986) (invalidating state commission rate-making order that misallocated costs and remanding case), *and In re Nantahala Power & Light Co.,* 87 P.U.R.4th 217, 1987 WL 257989 (N.C. Util. Comm'n Nov. 13, 1987) (recalculating utility rates in light of federal court rulings).

Here, Appellants were/are likely to prevail in their request for a declaration that the Agencies' continued regulation of apprenticeship on public-works projects involving a "Federal purpose" is unlawful. Tailoring of injunctive relief consistent with that declaration should not be difficult for any federal court. And while the Agencies insist they did not waive argument on the other factors that courts weigh in determining whether to issue an injunction, they offer no argument to indicate that those factors disfavor an injunction here. *See* Ans. Brf. at 27 and 30.

III. 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) (holding that "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: August 3, 2012

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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 reply brief is

   ☑ Proportionately spaced, has a typeface of 14 points or more and contains 8,956 words.

Dated: August 3, 2012

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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' REPLY 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 August 3, 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:

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