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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

INDEPENDENT TRAINING AND)	
APPRENTICESHIP PROGRAM, a)	2:11-cv-01047-GEB-DAD
California corporation, BRANDIN)	
MOYER, and HAROLD E. NUTTER,)	
INC., a California Corporation,)	<u>ORDER DENYING MOTION FOR</u>
)	<u>PRELIMINARY INJUNCTION</u>
Plaintiffs,)	
)	
v.)	
)	
CALIFORNIA DEPARTMENT OF)	
INDUSTRIAL RELATIONS, an agency)	
of the State of California, by)	
and through CHRISTINE BAKER, in)	
her official capacity as Acting)	
Director of the CALIFORNIA)	
DEPARTMENT OF INDUSTRIAL)	
RELATIONS, DIVISION OF)	
APPRENTICESHIP STANDARDS, by and)	
through GLEN FORMAN, in his)	
official capacity as Acting)	
Chief, DIVISION OF LABOR)	
STANDARDS ENFORCEMENT, by and)	
through JULIE SU, in her)	
official capacity as Labor)	
Commissioner,)	
)	
Defendants.)	
_____)	

Plaintiffs seek a preliminary injunction enjoining Defendants from, *inter alia*, enforcing California’s prevailing wage and apprenticeship laws on three California public works projects.¹ The laws at issue are prescribed in California Labor Code sections 1771, *et seq.*

¹ The authority on which Plaintiffs’ injunctive relief is based is discussed *infra*.

1 and section 3070, *et seq.* Plaintiffs argue enforcement of these laws on
2 the referenced projects violates the Supremacy Clause, Commerce Clause,
3 Equal Protection Clause, Due Process Clause and Privileges and
4 Immunities Clause in the United States Constitution. Defendants oppose
5 the motion. Argument on the motion was heard on July 18, 2011.

6 I. LEGAL STANDARD

7 A preliminary injunction is "an extraordinary remedy that may
8 only be awarded upon a clear showing that the plaintiff is entitled to
9 such relief." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22
10 (2008). Plaintiffs seeking a preliminary injunction must establish that
11 "(1) they are likely to succeed on the merits; (2) they are likely to
12 suffer irreparable harm in the absence of preliminary relief; (3) the
13 balance of equities tips in their favor; and (4) a preliminary
14 injunction is in the public interest." Sierra Forest Legacy v. Rey, 577
15 F.3d 1015, 1021 (9th Cir. 2009)(citing Winter, 555 U.S. at 19).

16 Further, the Ninth Circuit's "'serious questions' approach
17 survives Winter when applied as part of the four-element Winter test."
18 Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir.
19 2011). In other words, "'serious questions going to the merits' and a
20 balance of hardships that tips sharply towards the plaintiff can support
21 issuance of a preliminary injunction, so long as the plaintiff also
22 shows that there is a likelihood of irreparable injury and that the
23 injunction is in the public interest." Id.

24 II. BACKGROUND

25 A. The Fitzgerald Act, the Shelley-Maloney Act, and the De- 26 recognition of California's State Apprenticeship Council for Federal Purposes

27 Plaintiffs' injunctive relief request concerns the following
28 congressional enactment act and California laws. "Congress enacted the

1 Fitzgerald Act [, 29 U.S.C. § 50,] in 1937 for the purposes of
2 protecting apprentices through the establishment of minimum labor
3 standards, promoting apprenticeship as a system of training skilled
4 workers and encouraging the federal government to cooperate with state
5 agencies in formulating apprentice standards." Joint Apprenticeship &
6 Training Council of Local 363, Int'l Bhd. of Teamsters, AFL-CIO v. New
7 York State Dep't of Labor, 984 F.2d 589, 591 (2d. Cir. 1993). The
8 Fitzgerald Act provides in relevant part:

9 The Secretary of Labor is authorized and
10 directed to formulate and promote the furtherance
11 of labor standards necessary to safeguard the
12 welfare of apprentices, to extend the application
13 of such standards by encouraging the inclusion
14 thereof in contracts of apprenticeship, to bring
15 together employers and labor for the formulation of
16 programs of apprenticeship, to cooperate with State
17 agencies engaged in the formulation and promotion
18 of standards of apprenticeship....

19 29 U.S.C. § 50. In 1977, the Department of Labor promulgated
20 regulations, 29 C.F.R. part 29, under the Fitzgerald Act "to establish,
21 for certain Federal purposes, labor standards, policies and procedures
22 for the registration, cancellation and deregistration of apprenticeship
23 programs, and apprenticeship agreements." Apprenticeship Programs, Labor
24 Standards for Regulation, Amendment of Regulations, 72 Fed. Reg. 71020
25 (Dec. 13, 2007)(summary).

26 The[se] regulations establish the [Office of
27 Apprenticeship Training, Employment and Labor
28 Services ("OATELS")], for the purpose of
29 administering the registration and approval of
30 apprenticeship programs and other provisions of the
31 regulations. [OATELS] is authorized to certify
32 apprenticeship standards and to register and
33 approve local apprenticeship programs and
34 apprenticeship agreements for federal purposes. The
35 regulations also authorize [OATELS] to approve
36 appropriate state bodies for registration and/or
37 approval of local apprenticeship programs and
38 agreements for federal purposes.

1 | Elec. Joint Apprenticeship Comm. v. MacDonald, 949 F.2d 270, 273 (9th
2 | Cir. 1991)(internal quotation marks and citations omitted). Thus, 29
3 | C.F.R. part 29 "provides for a dual system of approval and recognition
4 | so that either [OATELS] or the State Apprenticeship Council can approve
5 | an apprenticeship program for federal purposes[; h]owever, either agency
6 | is constrained in its approval to apply the requirements and standards
7 | of the federal regulations." Id.

8 | "To be approved as a [State Apprenticeship Council ("SAC")],
9 | a state must submit proof of[, *inter alia*,] acceptable apprenticeship
10 | laws and regulations; . . . a description of the standards, criteria,
11 | and requirements for program registration and/or approval; and a
12 | description of the policies and operating procedures which depart from
13 | or impose requirements in addition to those in the federal regulations."
14 | S. Cal. Chapter of Assoc. Builders & Contractors, Inc., Joint
15 | Apprenticeship Comm. v. Cal. Apprenticeship Council, 4 Cal. 4th 422, 433
16 | (1992)(internal citations omitted). "If a state does not continue to
17 | meet the federal requirements, it may be 'derecognized.'" Id. (citing 29
18 | C.F.R. § 29.13 (1992).)

19 | "In California, apprenticeship training is governed by the
20 | Shelley-Maloney Apprenticeship Labor Standards Act of 1939
21 | [("Shelley-Maloney Act")], which is codified as California Labor Code
22 | section 3070 *et seq.*" S. Cal. Chapter of Assoc. Builders & Contractors,
23 | Inc., Joint Apprenticeship Comm., 4 Cal. 4th at 433. "Pursuant to the
24 | Shelley-Maloney Act, apprenticeship training is administered by the
25 | Division [of Apprenticeship Standards ("DAS")], which is under the
26 | auspices of the Department of Industrial Relations [("DIR")](hereafter
27 | Department)." Id. (citation omitted). "The Chief of the [DAS] . . .
28 | administers the apprenticeship law . . . and is empowered to investigate

1 and either approve or disapprove written standards for apprenticeship
2 programs." Id. (citations omitted).

3 California was "authorized under 29 C.F.R. § 29.12 to approve
4 apprenticeship programs for federal purposes as a SAC state [in] 1978."
5 Cal. Div. Of Labor Standards Enforcement v. Dillingham Constr., N.A.,
6 Inc., 519 U.S. 316, 320 (1997). However, after California amended its
7 apprenticeship law - California Labor Code § 3075 - in 1999, OATELS
8 "began proceedings to derecognize" California as a SAC state "contending
9 that the amended apprenticeship statute did not conform to federal
10 standards." Cal. Dept. of Indus. Relations, Adm. Rev. Bd. Case No. 05-
11 093, 2007 WL 352459 (Dep't of Labor Jan. 31, 2007) (final decision and
12 order). The United States Department of Labor's Administrative Review
13 Board ultimately withdrew California's recognition as a SAC state on
14 January 31, 2007. Cal. Dept. of Indus. Relations, 72 Fed. Reg. 9590-01
15 (Dep't of Labor Mar. 2, 2007) (notice). Therefore, California "no longer
16 has the authority to register or oversee apprenticeship programs for
17 'Federal purposes.'" Id.

18 **B. The Three Public Works Projects at Issue**

19 Plaintiffs' motion concerns the enforcement of California
20 apprenticeship and prevailing wage laws on the following three public
21 works projects (referenced collectively as "state projects"): (1) the
22 Chicago Park Elementary School Multi-purpose/Gymnasium Expansion & Four
23 New Relocatable Classroom Buildings Project in Nevada County, ("Chicago
24 Park Project"); (2) the Marysville High School Alternative Education
25 Center Project in Yuba County, ("Marysville High Project"); and (3)
26 Williams-Brotherhood Joint Use Gym in Stockton, California ("Stockton
27 Project"). The "Chicago Park Project" is a multi-purpose gymnasium and
28 classroom expansion project. (Pls.' Compendium of Evidence in Supp. of

1 Mot. for Prelim. Inj., Decl. of Michael Genest ¶ 3, ECF No. 6-2 ("Genest
2 Decl.").

3 The Treasurer of the State of California used a portion of the
4 proceeds from the sale of "Build America Bonds," which occurred in April
5 2009 and May 2010, to fund a portion of the Stockton Project and the
6 Chicago Park Project. (Genest Decl. ¶¶ 10a, 10c.) "Build America Bonds"
7 are a new form of municipal bond which are subject to federal taxes. Id.
8 ¶ 8. However, the U.S. Treasury pays a subsidy to the municipal lender
9 to cover the differential costs associated with the taxable nature of
10 the bond. Id. The Treasurer of the State of California funded the
11 Marysville High Project with funds received from the sell of municipal
12 bonds, which are usually exempt from federal taxation. Id. ¶¶ 5, 10b.
13 Plaintiffs argue that the referenced financing for the state projects
14 causes the projects to be projects for a "federal purpose" under the
15 Fitzgerald Act and its implementing regulations, because of the
16 referenced federal tax incentives involved with funding the projects.
17 (Pls. Mot. for Prelim. Inj. at 21-24.)

18 III. DISCUSSION

19 A. Standing / Ripeness of Specific Injunctive Relief Sought

20 Plaintiffs request the following specific relief in their
21 preliminary injunction motion:

22 [An order] enjoining and prohibiting Defendants
23 . . . :

24 (a) From refusing to recognize and comply
25 with the United State Department of Labor
26 Administrative Review Board's "Final Decision and
27 Order" of January 31, 2007 and the U.S. Department
28 of Labor's March 2, 2007 public notice, pursuant to
29 C.F.R. 29.13(d), that "the CDIR and the CAC no
longer have authority to register or oversee
apprenticeship programs for 'Federal purposes' "
(72 F.R. 9590).

1 (b) From enforcing California Code of
2 Regulations Section 16001 with respect to projects
3 involving "any Federal financial or other
4 assistance, benefit, privilege, contribution,
5 allowance, exemption, preference or right
6 pertaining to apprenticeship;"

7 (c) From enforcing California Labor Code
8 Section 1777.5 with respect to apprentices from
9 federally approved apprenticeship training programs
10 working on public works projects with a Federal
11 purpose;

12 (d) From refusing to enforce 29 C.F.R. Part
13 29 with respect to what constitutes a "Federal
14 purpose;"

15 (e) From refusing to acknowledge that
16 Plaintiff I-TAP is an approved apprenticeship
17 program for all public works projects with a
18 "Federal purpose" in California;

19 (f) From refusing to allow contractors to pay
20 Plaintiff I-TAP's apprentices at apprentice
21 prevailing wage rates rather than journeyman
22 prevailing wage rates on public works projects in
23 California with any Federal purpose;

24 (g) From refusing to allow Plaintiff I-TAP to
25 receive fringe training contributions as an
26 approved program on such projects;

27 (h) Directing Defendants to recognize Brandin
28 Moyer and all other similarly situated electrical
tradesmen enrolled in federally certified
apprenticeship programs as "apprentices" entitled
to all of the "assistance, benefits, privileges,
contributions, allowances, exemptions, preferences
and/or rights pertaining to apprenticeship" (29
C.F.R. § 29.2) on public works project in
California that are accorded to "apprentices" in
apprenticeship programs certified by DAS pursuant
to the provisions of the California Labor Code;

(i) Directing Defendants to rescind the Civil
Wage and Penalty Assessment issued in Case No.
40-26553/254 as against Plaintiff Harold E. Nutter,
Inc.; and

(j) Directing Defendants to refrain from
purporting to enforce any penalties, assessments or
sanctions against Plaintiff Harold E. Nutter, Inc.
or any other contractor on the grounds that
apprentices participating in I-TAP's apprenticeship
training program, or any other federally certified
program, do not qualify for payment of apprentice

1 prevailing wage rates pursuant to California Labor
2 Code §1777.5.

3 (Pls.' Mem. of P.&A. in Supp. of Mot. for Prelim. Inj. ("Mot.") 30:22-
4 32:4.) However, Plaintiffs have not shown that they have standing to
5 request much of the specific injunctive relief sought and/or that it is
6 ripe for judicial decision.

7 Article III of the Constitution "restricts federal court[]
8 [jurisdiction] to the resolution of cases and controversies." Davis v.
9 Fed. Election Comm'n, 554 U.S. 724, 732 (2008). "Two components of the
10 Article III case or controversy requirement are [the closely related
11 concepts of] standing and ripeness." Bova v. City of Medford, 564 F.3d
12 1093, 1095-96 (2009). "To allege a justiciable [request for injunctive
13 relief], [Plaintiffs] must plead facts that are sufficient to confer
14 standing and demonstrate that the [request] is ripe for determination."
15 Dermer v. Miami-Dade Cnty., 599 F.3d 1217, 1220 (11th Cir. 2010).
16 Further, "[P]laintiff[s] must demonstrate standing separately for each
17 form of relief sought." Friends of the Earth, Inc. v. Laidlaw Env'tl.
18 Servs., Inc., 528 U.S., 167, 185 (2000)(citations omitted). "[S]tanding
19 is not dispensed in gross." Lewis v. Casey, 518 U.S. 343, 358 n.6
20 (1996).

21 Specifically, Plaintiffs "must demonstrate three elements
22 which constitute the 'irreducible constitutional minimum' of Article III
23 standing." San Diego Cnty. Gun Rights Comm. v. Reno, 98 F.3d 1121, 1126
24 (9th Cir. 1996)(quoting Lujan, 504 U.S. at 560).

25 First, [they] must have suffered an
26 "injury-in-fact" to a legally protected interest
27 that is both "concrete and particularized" and
28 "actual or imminent," as opposed to "'conjectural'
or 'hypothetical.'" Second, there must be a causal
connection between [their] injury and the conduct
complained of. Third, it must be "likely" - not

1 merely "speculative" - that [their] injury will be
2 "redressed by a favorable decision."

3 Id. (quoting Lujan, at 560-61).

4 In comparison, "[r]ipeness is peculiarly a question of
5 timing." Thomas v. Union Carbide Agr. Prods. Co., 473 U.S. 568, 580
6 (1985). "For a suit to be ripe within the meaning of Article III, it
7 must present concrete legal issues, presented in actual cases, not
8 abstractions." Colwell v. Dep't of Health & Human Servs., 558 F.3d 1112,
9 1123 (9th Cir. 2009). "A claim is not ripe for adjudication if it rests
10 upon contingent future events that may not occur as anticipated, or
11 indeed may not occur at all." Texas v. U.S., 523 U.S. 296, 300
12 (1998)(internal quotation marks and citation omitted).

13 In many cases, "the constitutional component of the ripeness
14 inquiry" "coincides squarely with standing's injury in fact prong."
15 Sacks v. Office of Foreign Assets Control, 466 F.3d 764, 773 (9th Cir.
16 2006).

17 For example, a claim is not ripe for
18 adjudication if it rests upon contingent future
19 events That is so because, if the
20 contingent events do not occur, the plaintiff
likely will not have suffered an injury that is
concrete and particularized enough to establish the
first element of standing. In this way, ripeness
and standing are intertwined.

21 Id.

22 Part of the injunctive relief Plaintiffs seek essentially asks
23 the Court to address their conjectural concern that Defendants could
24 enforce California's apprenticeship and prevailing wage laws on any
25 public works project that has a "federal purpose." However, this
26 concern "is contingent upon events [that may not occur,]" and has not
27 been shown to be "concrete and particularized enough to survive the
28 standing/ripeness inquiry." Bova, 564 F.3d at 1096-97. Therefore, this

1 concern has not been shown ripe for adjudication, and the issue is
2 whether Plaintiffs have a basis for enjoining the state projects. See
3 generally, Lewis, 518 U.S. at 343 n.6 (stating “[i]f the right to
4 complain of one administrative deficiency automatically conferred the
5 right to complain of all administrative deficiencies, any citizen
6 aggrieved in one respect could bring the whole structure of state
7 administration before the courts for review. That is of course not the
8 law”).

9 **B. Likelihood of Success on the Merits**

10 **1. Supremacy Clause Claim**

11 Plaintiffs argue Defendants’ enforcement of California’s
12 apprenticeship and prevailing wage laws on the state projects violates
13 the Supremacy Clause of the United States Constitution because the
14 subject California law “violate[s] [the] national standard” created by
15 the Fitzgerald Act and its implementing regulations. (Mot. 15:15, 17:20-
16 18:1, 20:15-18, 24:13-25:20.) This argument concerns the issue whether
17 Congress intended the Fitzgerald Act to preempt the subject California
18 law.

19 “[T]he Supremacy Clause, U.S. Const., Art. VI, cl. 2,
20 invalidates state laws that interfere with, or are contrary to federal
21 law.” Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc., 471 U.S.
22 707, 712 (1985)(internal quotation marks and citations omitted).

23 Congressional intent to preempt state law can
24 either be expressed in statutory language or
25 implied from the scheme of federal regulation.
26 Implied pre-emption comes in two forms: field and
27 conflict preemption. Field preemption occurs when
28 the federal regulation is sufficiently
comprehensive to leave no room for supplementary
state regulation. Conflict preemption, in turn,
arises when: (1) compliance with both federal and
state regulations is a physical impossibility, or
(2) state law stands as an obstacle to the

1 accomplishment and execution of the full purposes
2 and objectives of Congress.

3 Gaeta v. Perrigo Pharm. Co., 630 F.3d 1225, 1230-31 (9th Cir.
4 2011)(internal quotation marks and citations omitted). However,
5 Plaintiffs concede in their Reply that Defendants “[are] free to
6 regulate apprenticeship for solely state purposes (i.e., where there is
7 no Federal purpose by the D.O.L regulatory definition)[.]” (Reply 13:18-
8 21.) Therefore, Plaintiffs’ Supremacy Clause claim is based on the
9 contention that the state projects have a “federal purpose” prescribed
10 in 29 C.F.R. § 29.2, since the projects are funded, at least in part, by
11 municipal bonds that receive a benefit from a “Federal income tax
12 exemption for interest paid” on the bonds, or a Federal “subsidy to the
13 municipal lender [that] cover[s] the differential interest costs
14 associated with the . . . bonds.” (Mot. 21:12-18, 22:7-16.)

15 Defendants counter that enforcement of the subject California
16 apprenticeship and prevailing wage laws on these projects is not
17 preempted by the Fitzgerald Act because the referenced public works
18 projects involve “state contract[s] for public construction[,]” which
19 are not within the “federal purpose” definition in 29 C.F.R. § 29.2.
20 (Opp’n 10:4-7, 10:23-26.) Defendants also argue that Plaintiffs’
21 Supremacy Clause claim “reach[es] too far,” “by stretching the meaning
22 of the phrase ‘federal purposes pertaining to apprenticeship’ beyond any
23 reasonable interpretation.” Id. at 10:15-18, 27. Defendants further
24 argue that the projects do not involve “federal financial or other
25 assistance pertaining to apprenticeship[; i]nstead, there is federal tax
26 exemption . . . that pertains to investors, not apprentices.” Id. 10:24-
27 26.

28 29 C.F.R. § 29.2 prescribes “federal purposes” to include:
“any Federal contract, grant, agreement or arrangement *dealing with*

1 *apprenticeship*; and any Federal financial or other assistance, benefit,
2 privilege, contribution, allowance, exemption, preference or right
3 *pertaining to apprenticeship.*" (emphasis added). Plaintiffs have not
4 shown that what they characterize as federal tax benefits constitute a
5 "federal purpose" prescribed in § 29.2. Plaintiffs' construction of
6 "federal purpose" in § 29.2 "reads the words ['Federal' and 'pertaining
7 to apprenticeship'] into thin air[,] " contrary to the court's duty in
8 interpreting a regulation "to give effect, if possible, to every clause
9 and word" of the regulation. Ramadan v. Keisler, 504 F.3d 973, 976 (9th
10 Cir. 2007) (citation omitted). "It is a fundamental cannon of statutory
11 construction that a statute should not be construed so as to render any
12 of its provisions mere surplusage." United States v. Wenner, 351 F.3d
13 969, 975 (2003).

14 Plaintiffs rely upon two opinion letters written by the
15 Administrator of OATELS as support for their argument that § 29.2's
16 definition of "federal purpose" encompasses what they characterize as
17 federal benefits which are sufficient to make the "state projects"
18 projects that are with § 29.2's definition of "federal purpose." (Mot.
19 15:2-7; Reply 7:20-8:1.) The referenced opinion letters were written in
20 response to inquiries concerning the status of apprenticeship programs
21 registered by OATELS in California and predate OATELS' de-recognition of
22 the California Department of Industrial Relations and the California
23 Apprenticeship Council as an SAC for federal purposes under the
24 Fitzgerald Act. The first opinion letter is dated July 16, 2004, and
25 states in pertinent part:

26 DOL's position is that all SAC's, including
27 California's, are to accept programs and
28 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.

1 Accordingly, the Department expects the SACs to
2 accept OATELS registration for an entire public
3 works project, even if the project is funded in
4 part by the state or local government.

5 (Pls.' Compendium of Evidence in Supp. of Mot. for Prelim. Inj., Decl.
6 of Juli Nutter, Ex. B, ECF No. 6-2, at 89.) The second opinion letter,
7 dated October 4, 2004, states in relevant part: "OATELS' registered
8 apprentices must be recognized as registered apprentices for the
9 purposes of all public works projects funded in whole or part with
10 Federal funds." Id., at 91.

11 Assuming arguendo that these opinion letters support
12 Plaintiffs' argument that "federal purpose" is defined broadly enough to
13 include a federal financial benefit as tangential as a tax exemption or
14 tax subsidy provided to a municipal lender, this interpretation would
15 not be entitled to deference. "Interpretations . . . in opinion
16 letters-like interpretations contained in policy statements, agency
17 manuals, and enforcement guidelines, all of which lack the force of
18 law-do not warrant Chevron-style deference." Christensen v. Harris Cty.,
19 529 U.S. 576, 587 (2000) (citations omitted). "Instead, interpretations
20 contained in formats such as opinion letters are 'entitled to respect'
21 under [the Supreme Court's] decision in Skidmore v. Swift & Co., 323
22 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944), but only to the extent
23 that those interpretations have the 'power to persuade[.]'" Id.
24 (citation omitted). Like Plaintiffs' construction of "federal purpose,"
25 these two opinion letters render the terms "Federal" and "pertaining to
26 apprenticeship" in § 29.2 mere surplusage. Therefore, even assuming
27 arguendo that the opinion letters could be interpreted as broadly as
28 Plaintiffs argue, that interpretation would be unpersuasive and would
29 not be "entitled to respect."

1 For the stated reasons, Plaintiffs have not shown that the
2 challenged California law and projects conflict with federal law.
3 Therefore, they have not shown a likelihood of success, nor raised
4 serious questions, on the merits of their Supremacy Clause claim.

5 2. Commerce Clause Claim

6 Plaintiffs also argue Defendants' enforcement of California's
7 apprenticeship and prevailing wage laws on the three referenced public
8 works projects "constitutes an unjustifiable interference with
9 interstate commerce in violation of the [Commerce Clause of the United
10 States Constitution,] because it prevents thoroughly qualified
11 apprentices from programs approved by the U.S. DOL in the other forty-
12 nine states from pursuing public work employment opportunities within
13 California." (Mot. 26:12-19.)

14 The Commerce Clause of the United States Constitution provides
15 "[t]he Congress shall have Power . . . [t]o regulate Commerce . . .
16 among the several States." Art. I, § 8, cl. 2. "[T]he Clause has long
17 been understood to have a 'negative' [or dormant] aspect that denies the
18 States the power unjustifiably to discriminate against or burden the
19 interstate flow of articles of commerce." Or. Waste Sys., Inc. v. Dep't
20 of Environmental Quality, 511 U.S. 93, 99 (1994); see also Brown v.
21 Hovatter, 561 F.3d 357, 364 (4th Cir. 2009) (stating "[t]he dormant
22 Commerce Clause is implicated by burdens placed *on the flow of*
23 *interstate commerce commerce*-the flow of goods, materials, and other
24 articles of commerce across state lines" (emphasis in original)).

25 Plaintiffs make no showing that California's regulation of
26 its apprenticeship programs through its prevailing wage and
27 apprenticeship laws has any relationship to the flow of articles of
28 inter-state commerce.

1 Therefore, Plaintiffs have not shown a likelihood of success,
2 nor raised serious questions, on the merits of their Commerce Clause
3 claim.

4 **3. Equal Protection Clause Claim**

5 Plaintiffs also argue that Defendants are enforcing a
6 classification in violation their Equal Protection rights that favors
7 apprenticeship programs already certified under state law while programs
8 certified under federal law are "economically disfavored and burdened
9 with rules so restrictive they effectively prevent individuals and
10 businesses from participating in California's economy through
11 apprenticeship programs operating in the state." (Mot. 27:25-28:4.)

12 "The first step in equal protection analysis is to identify
13 the state's classification of groups." Country Classic Dairies v.
14 Montana, Dep't of Commerce Milk Control Bureau, 847 F.2d 593, 596 (9th
15 Cir. 1988). "Once the plaintiff establishes governmental classification,
16 it is necessary to identify a 'similarly situated' class against which
17 the plaintiff's class can be compared." Freeman v. City of Santa Ana, 68
18 F.3d 1180, 1187 (9th Cir. 1995) (citation omitted). "The Equal
19 Protection Clause 'is essentially a direction that all persons similarly
20 situated should be treated alike.'" Christian Legal Soc'y Chapter of
21 Univ. Of Cal. v. Wu, 626 F.3d 483, 487 (9th Cir. 2010) (citing City of
22 Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985)). An equal
23 protection claim will not lie by conflating all persons not injured into
24 a preferred class receiving better treatment than the plaintiff.
25 Thornton v. City of St. Helens, 425 F.3d 1158, 1167 (9th Cir. 2005).

26 Plaintiffs have not shown that federal apprenticeship programs
27 and California apprenticeship program are "similarly situated" for
28 purposes of an Equal Protection claim. Further, Plaintiffs' purported

1 class has not been shown to be similarly situated to any individual
2 approved to participate in California's apprenticeship program.

3 Therefore, Plaintiffs have not shown a likelihood of success,
4 nor raised serious questions, on the merits of their Equal Protection
5 claim.

6 4. Due Process Clause claims

7 Plaintiffs also argue that Defendants actions, which
8 "require[] contractors to use only California-certified apprentices" and
9 "preclude[] federally certified apprenticeship programs and their
10 enrollees from participating in public works projects in California",
11 "deprive [P]laintiffs of liberty - the right to pursue a lawful
12 occupation" in violation of their substantive due process rights. (Mot.
13 26:25-28:13.)

14 "Substantive due process forbids the government from depriving
15 a person of life, liberty, or property in such a way that shocks the
16 conscience or interferes with the rights implicit in the concept of
17 ordered liberty." Corales v. Bennett, 567 F.3d 554, 568 (9th Cir. 2009).
18 "To establish a violation of substantive due process, a plaintiff must
19 first show a deprivation of some fundamental right or liberty interest
20 that is deeply rooted in this Nation's history and tradition."
21 Tutor-Saliba Corp. v. City of Hailey, 452 F.3d 1055, 1061 (9th Cir.
22 2006) (internal quotation and citation omitted). "The protections of
23 substantive due process have for the most part been accorded to matters
24 relating to marriage, family, procreation, and the right to bodily
25 integrity[,] and "the [Supreme] Court has always been reluctant to
26 expand the concept of substantive due process because the guideposts for
27 responsible decisionmaking in this uncharted area are scarce and
28 open-ended." Albright v. Oliver, 510 U.S. 266, 271-72 (1994).

1 Plaintiffs have not shown that any fundamental right or liberty
2 interest is implicated in this case.

3 At the hearing on their motion Plaintiffs also indicated they
4 have also allege a procedural due process claim but made only a
5 conclusory unpersuasive oral argument in support of this claim.

6 For the stated reasons, Plaintiffs have not shown that they
7 have not shown a likelihood of success, nor raised serious questions, on
8 the merits of their Due Process claims.

9 **5. Privileges & Immunities Clause Claim**

10 Lastly, when the court was sua sponte considering whether
11 subject matter jurisdiction exist in this action, it became aware that
12 Plaintiffs also allege that the California subject laws violate the
13 Privileges and Immunities Clause of the United States Constitution. (See
14 Compl. ¶ 9.)

15 "Discrimination on the basis of out-of-state residency is a
16 necessary element for a claim under the Privileges and Immunities
17 Clause." Russell v. Hug, 275 F.3d 812, 821 (9th Cir. 2002). However,
18 Plaintiffs' allegations are woefully insufficient to allege a claim
19 under the Privileges and Immunities Clause a claim under the Privileges
20 and Immunities Clause.


21 **B. Irreparable Harm / Balance of the Equities / Public Interest**

22 Since Plaintiffs have failed to show a likelihood of success,
23 or raise a serious question, on the merits of any claim, the three
24 remaining injunction factors need not be addressed. See Doe v. Reed, 586
25 F.3d 671, 681 n.14 (9th Cir. 2009)(stating: "Because we conclude that
26 Plaintiffs have failed to satisfy the first Winter factor-likelihood of
27 success on the merits-we need not examine the three remaining Winter
28 factors . . . ").

1 **IV. CONCLUSION**

2 For the stated reasons, Plaintiffs' motion for a preliminary
3 injunction is DENIED.

4 Dated: August 15, 2011

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8 GARLAND E. BURRELL, JR.
9 United States District Judge
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