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**Issue Date: 22 April 2005**

**Case Nos.: 2002-CCP-00001, 2003-CCP-00001**

*In the Matters of*

**U.S. DEPARTMENT OF LABOR, OFFICE OF  
APPRENTICESHIP TRAINING, EMPLOYMENT  
AND LABOR SERVICES,**  
*Prosecuting Party,*

v.

**CALIFORNIA DEPARTMENT OF INDUSTRIAL  
RELATIONS,**  
*Respondent,*

*and*

**CALIFORNIA APPRENTICESHIP COUNCIL,**  
*Respondent.*

**RECOMMENDED DECISION AND ORDER  
ON CROSS MOTIONS FOR SUMMARY JUDGMENT**

This proceeding arises out of the Office of Apprenticeship Training, Employment and Labor Services' (hereinafter "OATELS") authority to administer the provisions of the National Apprenticeship Act of 1937, 29 U.S.C. § 50 *et seq.* (2005), (hereinafter "NAA" or "the Act")<sup>1</sup> and its implementing regulations, 29 C.F.R. Part 29 (2004).<sup>2</sup> OATELS is a division of the United States Department of Labor (hereinafter "DOL"). The NAA was enacted to provide the DOL with the authorization and means to formulate and promote labor standards necessary to safeguard the welfare of apprentices, to extend the application of standards related to

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<sup>1</sup> The NAA is also commonly known as the "Fitzgerald Act."

<sup>2</sup> OATELS has compiled and provided a comprehensive Administrative File and a Supplemental Administrative File (hereinafter, respectively "AF" and "SAF") upon which both parties rely for purposes of this proceeding.

apprenticeship programs, and to cooperate with State agencies engaged in the establishment of apprenticeship standards. *See* 29 U.S.C. § 50.

The regulation at 29 C.F.R. § 29.12 provides OATELS with the authority to “recognize” an individual state as an official agent, or State Apprenticeship Council (hereinafter “SAC”),<sup>3</sup> of the DOL. Such recognition empowers the SAC to “approve” individual apprenticeship programs within that state for “Federal purposes.” A SAC will be “recognized” so long as its governing rules, policies, and regulations conform to the federal standards set forth in 29 C.F.R. Part 29.<sup>4</sup> Ultimately, approval of an apprenticeship program for “Federal purposes”—whether by the SAC on behalf of the DOL or by OATELS directly—affords that apprenticeship program the benefit of certain financial incentives.<sup>5</sup>

In California, apprenticeship training is governed by the Shelley-Maloney Apprentice Labor Standards Act of 1939, California Labor Code §§3070-3099.5, and is administered by the Chief of the Division of Apprenticeship Standards (hereinafter “DAS”). The DAS is a subpart of Respondent California Department of Industrial Relations (hereinafter “CDIR”). The DAS Chief acts as secretary of Respondent California Apprenticeship Council (hereinafter “CAC”), which is the California state body responsible for reviewing CDIR’s apprenticeship registration decisions and is empowered to issue rules, regulations, and policies governing California’s apprenticeship laws. *See* Cal. Lab. Code § 3071. CDIR was first “recognized” as a SAC by OATELS’ predecessor, the Bureau of Apprenticeship Training (hereinafter “BAT”), in 1978. In doing so, BAT determined that the California Labor Code was in conformity with the federal standards for apprenticeship programs found at 29 C.F.R. Part 29. Under California law, apprenticeship programs can voluntarily seek CDIR’s approval for state and Federal purposes by virtue of CDIR’s recognition by OATELS as a SAC. In other words, once a SAC is recognized, any apprenticeship program approved or registered by that SAC for state purposes is automatically approved for “Federal purposes.”

### STATEMENT OF THE CASE

In October of 1999, the California Legislature amended the California Labor Code provisions governing apprenticeships in California. *See* Cal. Lab. Code § 3075(b); SAF Tab 5; AF Tab 4D. In January 2001, OATELS received a copy of the amendment, along with an explanation of the changes from CDIR. Shortly thereafter, OATELS initiated conciliation talks

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<sup>3</sup> Recognized SACs are defined as organizations “approved by the Bureau as an agency or council which has been properly constituted under an acceptable law or Executive order, and has been approved by the Bureau as the appropriate body for State registration and/or approval of local apprenticeship programs...for Federal purposes.” 29 C.F.R. § 29.2(o). The “Bureau” is a subdivision of OATELS specifically responsible for registering programs and overseeing SACs.

<sup>4</sup> Neither OATELS nor its recognized SACs provide apprenticeship training. Instead, those organizations set and apply standards for registering apprenticeship programs.

<sup>5</sup> While neither federal nor state “approval” is required to operate an apprenticeship program, such approval is required to receive significant financial incentives. 29 C.F.R. § 29.2(k). “‘Federal purposes’ includes any Federal contract, grant, agreement or arrangement dealing with apprenticeship; and any Federal financial or other assistance, benefit, privilege, contribution, allowance, exemption, preference or right pertaining to apprenticeship.” 29 C.F.R. § 29.2(k).

with CDIR in an attempt to persuade it to repeal the amendment, which OATELS found to be inconsistent with the federal standards set forth in 29 C.F.R. Part 29. The conciliation talks failed, and OATELS—for the first time ever—decided to “derecognize” a state as its official agent, or SAC, under the NAA.

On May 10, 2002, OATELS initiated derecognition proceedings against CDIR, contending that the newly-amended apprenticeship standards set forth in the California Labor Code § 3075 do not conform with the federal standards administered by the DOL. *See* 29 C.F.R. § 29.13; AF 6-8. Pursuant to 29 C.F.R. § 29.13(c), Respondent CDIR challenged OATELS’ findings and requested a hearing before the Office of Administrative Law Judges on June 7, 2002. On April 8, 2003, OATELS initiated derecognition proceedings against Respondent CAC as well. Like CDIR, CAC requested a formal hearing before the Office of Administrative Law Judges on April 25, 2003. The cases were assigned to me, and I consolidated CDIR’s and CAC’s (collectively, hereinafter “Respondents”) request for a hearing to challenge OATELS’ determination.

By Motion dated August 4, 2004, the parties jointly requested that the scheduled hearing be continued so that this matter could be heard and decided based solely on cross motions for summary judgment. By Order Canceling Hearing and Setting Briefing Schedule dated August 12, 2004, the undersigned granted the parties’ request.

On September 23, 2004, Prosecuting Party OATELS filed its Motion for Summary Decision pursuant to the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges at 29 C.F.R. § 18.40. In filing this motion, OATELS requests this Court to conclude as a matter of law that each Respondent should be “derecognized” as a state apprenticeship council or state agency under the National Apprenticeship Act and the implementing regulations found at 29 C.F.R. Part 29. Similarly, Respondents filed their respective cross Motions for Summary Judgment pursuant to 29 C.F.R. § 18.40 in September of 2004 asking this Court to find that as a matter of law there is no basis for derecognition. On October 7, 2004, OATELS filed its Reply Brief in Support of Prosecuting Party’s Motion for Summary Decision. CDIR and CAC then each filed reply briefs.

Expressing great interest in the outcome of this case of first impression, a number of *amici* filed briefs on behalf of both parties. By letter dated September 20, 2004, Western Electrical Contractors Association, Inc. (hereinafter “WECA”) filed an *Amicus Curiae* Brief in Support of OATELS. On September 22, 2004, The San Diego Associated Builders and Contractors, Golden Gate Associated Builders and Contractors, Southern California Associated Builders and Contractors, and Los Angeles-Ventura Associated Builders and Contractors (collectively, hereinafter “California ABC”) filed an *Amicus Brief* in Support of OATELS’ Motion for Summary Judgment. Shortly thereafter, on September 28, 2004, Associated Builders and Contractors, Inc. (hereinafter “National ABC”) filed its Motion for Leave to File *Amicus* Brief in Support of OATELS, along with its brief in support thereof.

Then on October 5, 2004, the California Apprenticeship Coordinators Association (hereinafter “California ACA”) and the State Building and Construction Trades Council of California, AFL-CIO (hereinafter “SBCTC”) filed their joint Motion for Leave to File Brief of

*Amicus Curiae* in Support of Respondent’s Motion for Summary Judgment pursuant to 29 C.F.R. § 18.12, along with a brief in support thereof.

Finally, on October 14, 2004, OATELS filed its Prosecuting Party’s Response to Joint Programs’ Motion for Leave to File an *Amicus Curiae* Brief and Declaration in Support of Respondent’s Motion for Summary Judgment. I have considered each of these briefs in making my determination in this matter.

### STATEMENT OF UNCONTESTED FACTS

On September 10, 2004, the parties submitted their Joint Stipulation of Facts. In addition, both parties have relied upon the materials submitted in the “Administrative File” and the “Supplemental Administrative File” in support of their respective positions.

In 1937, Congress enacted the National Apprenticeship Act authorizing the Secretary of Labor to promote, extend, and encourage apprenticeships with the cooperation of State agencies. Specifically, the Secretary of Labor is assigned the task of establishing labor standards necessary to achieve the purposes of the NAA. Those standards appear in the Code of Federal Regulations at 29 C.F.R. Part 29.

Apprenticeship programs generally are designed to combine supervised on-the-job training with related classroom instruction in a particular trade for the purpose of producing skilled workers qualified to contribute to the nation’s labor force; all at a cost favorable to the sponsoring program, the apprentices, and potential employers. Specifically, “registered” apprentices—i.e., those participating in “approved” apprenticeship programs—are paid substantially less than a skilled worker’s wage, which allows a sponsoring program to make more competitive bids on public work projects under the Davis-Bacon Act.<sup>6</sup> Thus, a registered apprenticeship program receives financial incentives by conforming to the federal standards. Moreover, those who have completed an apprenticeship program offer immediate skill and know-how for employers within that trade, which in turn means highly marketable credentials for an apprentice seeking post-apprenticeship employment. After successful completion of apprenticeship training, an apprentice becomes a skilled, certified, journey-level worker, and receives a portable, nationally recognized certificate. According to the parties, apprenticeship programs provide a worker who has successfully completed a program with \$40,000 to \$150,000 in increased lifetime earnings.

In 2003, California was home to more than 69,000 registered apprentices participating in more than 1,400 approved apprenticeship programs. Of those 69,000, 70% were trained as construction workers; and of that 70%, an overwhelming majority were enrolled in approved joint programs, as opposed to approved unilateral programs.<sup>7</sup> As of March 2003, the registered

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<sup>6</sup> See 40 U.S.C. §§ 276a-276a-7.

<sup>7</sup> According to the parties, “joint programs” are collaborative ventures between unions and employers; “unilateral programs” are run by employers without union involvement. See also Cal. Lab. Code § 3075; Cal. Code Regs., tit. 8, §§ 205(g), 206(a)-(b).

programs in California consisted of 210 joint programs, 37 unilateral programs, and 29 plant and school-to-career programs.

Throughout the country, OATELS is the exclusive registrar of apprenticeship programs in 23 states, meaning the other 27 states, along with the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands, maintain recognized SACs authorized to approve programs on behalf of the DOL. Moreover, OATELS concurrently registers apprenticeship programs along side its recognized SACs in 24 of those 27 states, including California.

The Code of Federal Regulations “cover[s] the registration, cancellation and deregistration or [sic] apprenticeship programs and of apprenticeship agreements; the recognition of a State agency as the appropriate agency for registering local apprenticeship programs for certain federal purposes; and matters relating thereto.” 29 C.F.R. § 29.1(b).

Once a State has been “recognized,” OATELS continues to monitor the State’s status as an authorized SAC to ensure the recognized SAC continuously conforms to the federal standards. Therefore, accompanying the Secretary’s authority to “recognize” a State Apprenticeship Council under section 29.12 is its power to “derecognize” a SAC “for the failure to fulfill, or operate in conformity with, the requirements of [Part 29].” 29 C.F.R. § 29.13. The applicable regulations provide a process by which OATELS may “derecognize” a SAC for “reasonable cause.” *Id.* To determine whether recognized SACs are still in conformity with federal requirements, OATELS reviews any changes a recognized SAC may make to its apprenticeship requirements. Over the past fifteen years, OATELS has rejected proposed changes to apprenticeship laws by Washington, Oregon and North Carolina; it has approved proposed changes from Arizona, New York, New Mexico, and Florida. As noted above, prior to the instant proceeding, OATEL has never initiated derecognition proceedings against a SAC.

In 1976, the State of California enacted section 3075 of the California Labor Code. AF 1059. The original version of section 3075—which was approved by the DOL upon its recognition of California as a SAC—read as follows:

Local or state joint apprenticeship committees may be selected by the employer and the employee organizations, in any trade in the state or in a city or trade area, whenever the apprenticeship training needs of such trade justifies [sic] such establishment. Such joint apprenticeship committees shall be composed of an equal number of employer and employee representatives. All selection and disciplinary proceedings for apprentices or prospective apprentices shall be duly noticed to such individuals. The Division of Apprenticeship Standards shall audit all such proceedings.

Cal. Lab.Code § 3075 (1976).<sup>8</sup>

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<sup>8</sup> The parties note in their Joint Stipulation of Facts that although section 3075 originally referred to the selection of “joint” apprenticeship committees, the California Attorney General’s Office construed that language “as permissive and concluded that it did not preclude the establishment of unilateral committees.” Parties’ Joint Stipulation of

In October of 1999, California amended section 3075 of the California Labor Code to read as follows:

**§ 3075.** Apprenticeship programs; administration; necessary conditions

(a) An apprenticeship program may be administered by a joint apprenticeship committee, unilateral management or labor apprenticeship committee, or an individual employer. Programs may be approved by the chief in any trade in the state or in a city or trade area, whenever the apprentice training needs justify the establishment. Where a collective bargaining agreement exists, a program shall be jointly sponsored unless either party to the agreement waives its right to representation in writing. Joint apprenticeship committees shall be composed of an equal number of employer and employee representatives.

(b) For purposes of this section, the apprentice training needs in the building and construction trades shall be deemed to justify the approval of a new apprenticeship program only if any of the following conditions are met:

- (1) There is no existing apprenticeship program approved under this chapter serving the same craft or trade and geographic area.
- (2) Existing apprenticeship programs approved under this chapter that serve the same craft or trade and geographic area do not have the capacity, or neglect or refuse, to dispatch sufficient apprentices to qualified employers at a public works site who are willing to abide by the applicable apprenticeship standards.
- (3) Existing apprenticeship programs approved under this chapter that serve the same trade and geographic area have been identified by the California Apprenticeship Council as deficient in meeting their obligations under this chapter.

(c) Notwithstanding subdivision (b), the California Apprenticeship Council may approve a new apprenticeship program if special circumstances, as established by regulation, justify the establishment of the program.

Cal. Lab. Code § 3075(b) (1999) (amended by Stats.1999, c.903 (A.B. 921), §7); AF Tab 4D, at 859.

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Facts, at 6 (Sept. 7, 2004) citing Letter from Asher Rubin, California Deputy Attorney General to H. Edward White, then Director of CDIR, at 2 (Apr. 23, 1973); AF 1068.

Subsection (b) of section 3075 is referred to by the parties as the “needs test.” OATELS’ examination of the “needs test” prompted the instant derecognition proceedings against the Respondents, and is at the heart of the present inquiry. According to the parties’ stipulations, neither CDIR nor CAC requested or received prior approval from OATELS before enacting or administering the “needs test.”

Since the “needs test” was enacted, CDIR has identified only four new or expanded unilateral programs that have been approved in the construction trade. Since the initial approval of the four new or expanded unilateral programs, two have been reversed by CAC. OATELS’ Reply Br. to *Amici Curiae*, at 9 (December 9, 2004). Since August 2003, OATELS has directly registered 17 new or expanded unilateral construction apprenticeship programs and 2 new joint programs.

OATELS initiated the instant derecognition proceedings based upon two mutually exclusive grounds. The parties’ respective motions for summary judgment address each ground separately. First, OATELS alleges that California Labor Code § 3075(b) does not conform to the federal standards for apprenticeship training under the NAA and its implementing regulations. Second, OATELS argues that even if section 3075(b) does conform to the federal standards, Respondents may be derecognized as a federal agent for failure to obtain OATELS’ prior approval for the codification and implementation of section 3075(b).

## **ISSUES**

1. Whether the National Apprenticeship Act and its implementing regulations provide OATELS with the authority to derecognize Respondents solely for failure to gain OATELS’ prior approval of the enactment and administration of section 3075(b) of the California Labor Code governing apprenticeship training.
2. Whether section 3075(b) of the California Labor Code—commonly referred to as the “needs test”—conforms to the federal standards for apprenticeship training set forth in the National Apprenticeship Act and its implementing regulations.

## **OATELS’ POSITION**

OATELS’ position is that it properly derecognized Respondents under the NAA, and it is therefore entitled to summary judgment under 29 C.F.R. § 18.40.

Initially, OATELS maintains that “the California needs test, on its face, limits, rather than promotes, apprenticeship opportunities by severely restricting registration of new and expanded apprenticeship programs in the California construction trades.” Prosecuting Party’s Motion for Summary Decision, at 26 (Sept. 20, 2004). According to OATELS, the needs test gives the apprenticeship standards in California “an exceptionally narrow application in the construction trade,” because it limits apprenticeship registration to essentially “one existing approved program for each craft or trade in a geographic area.” *Id.* In short, the needs test severely limits

apprenticeship opportunities, thereby frustrating the purpose of the NAA to encourage and promote people to enter the skilled trades and contribute to the supply of American skilled workers.<sup>9</sup> *See id.*

OATELS further argues that by limiting the number of available apprenticeship programs in a given geographic area, individual apprentices are deprived of any option to join a program of their choice, or one that meets their specific needs. As the argument goes, while one geographic area may already contain a joint or union program, an individual seeking a unilateral or non-union apprenticeship program in the same area is simply out of luck. Moreover, apprentices may be searching for programs with different schedules, methods of class-room instruction, or locales in relation to the work sites. It is those restrictions which OATELS argues frustrates the purpose of the NAA.

In addition, OATELS contends that limiting the number of programs within a geographic area upsets the purpose of the NAA in a way that directly affects the quality of the programs themselves: competition among apprenticeship programs within a geographic area creates positive by-products of lower course fees, better instruction, and better training, which improves the overall experience of apprenticeships. OATELS insists that competition among programs will do nothing but benefit the apprentices registered to participate. OATELS further explains that the needs test “ensures that joint programs will have a near monopoly on registered programs to the detriment of apprentices and contrary to the NAA.” *Id.* at 28. Because the majority of registered construction apprenticeship programs in California are joint programs, the needs test in effect favors the use of such programs and thereby discourages formation or expansion of unilateral programs. The NAA, according to OATELS, is “neither pro-management nor pro-union but pro-apprentice,” and is thus designed to protect apprentices and increase opportunities for apprenticeship—“not to protect existing registered programs from competition from new and expanded programs.” *Id.* The needs test may in fact force non-union contractors to become unionized or affiliated with unions, thereby favoring the formation of union programs against the regulations’ clear intent to treat all programs equally regardless of its type. *Id.* at 30 *citing* 29 C.F.R. §§ 29.2(i), 29.12(b)(10).<sup>10</sup>

Next, OATELS argues that the needs test further harms the public interest and frustrates the general purpose behind federal procurement law. Pros. Party’s Motion for Summary Decision, at 30. According to OATELS, by limiting open competition among apprenticeship programs bidding on federal contracts—i.e., limiting the number of registered programs for Federal purposes—the needs test unavoidably drives the lowest bid price upward. Like federal procurement law, California’s laws typically encourage competition for public contracts by awarding them to the lowest bidder. OATELS is concerned that the needs test will restrict the number of construction contractors who qualify to pay lower apprentice wages and offer better services, thereby reducing the number of programs that can make competitive bids for public

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<sup>9</sup> OATELS relies generally on *Daugherty v. United States*, 1974 WL 215, at \*3, 86 L.R.R.M. (BNA) 3075, 8 Empl. Prac. Dec. P 9585, 74 Lab. Cas. P 33,100 (S.D. Tex. July 22, 1974) for its position. *See* AF 724, 726.

<sup>10</sup> OATELS notes here that of the four programs approved by CDIR since the needs test became effective, zero unilateral programs were approved before OATELS initiated derecognition proceedings. *See* Pros. Party’s Motion for Summary Decision, at 28.



works contracts. Thus, the needs test upsets Congress' intent to promote apprenticeships for the benefit of the public and not the programs themselves.

Finally, OATELS notes that neither the NAA nor its implementing regulations address the needs test as it appears in the California Labor Code. Nonetheless, according to OATELS, it has the authority to review SAC state requirements that go beyond the scope of federal requirements, and thus even if the California needs test does not violate any specific provision of the NAA and its implementing regulations, OATELS' decision to derecognize CDIR and CAC is reasonable. In other words, any additional requirements a SAC might adopt for registration purposes—such as the “needs test”—are subject to the approval of OATELS. The criteria for acceptable state provisions enumerated in section 29.12(b) are not exhaustive, OATELS argues, thereby providing OATELS (as the administrator of the federal statutes) with “broad discretion” to determine whether state provisions are acceptable or consistent with the federal regulations.

In addition to its argument that the California needs test is inconsistent with the NAA and its implementing regulations, OATELS has proposed a second basis for why it properly derecognized CDIR and CAC.

OATELS first notes that it recognized Respondents as its California agent under the NAA in February 1978. At the time, section 3075 of the California Labor Code “permitted establishment of a new apprenticeship committee whenever justified by the apprenticeship training needs of the trade in question.” According to OATELS, the old section 3075, unlike the amended version at issue here, did not bar approval of new apprenticeship programs where existing approved programs served the same craft or trade and geographic area. As a result, the original version of section 3075 allowed new local programs “‘in any trade in the state or in a city or trade area’ whenever justified by the apprenticeship training needs.” In short, the new section 3075 contains restrictive conditions that did not exist when the BAT officially recognized the Respondents under the NAA back in 1978.

Respondents did not inform OATELS of the amendment to section 3075 until almost ten months after it was enacted, and did not request or receive approval for the “needs test” before its enactment. Thus, according to OATELS, Respondents violated 29 C.F.R. § 29.12(a) and BAT Circulars 88-5, 88-9, and 88-12. *See* AF Tab 4C, Tab 5B. OATELS maintains that 29 C.F.R. § 29.12(a) “requires a SAC to submit [] and obtain DOL’s approval of” any policy or procedure that departs from or adds requirements to those already prescribed in Part 29 of the implementing regulations. Simply stated, the approval requirement ensures conformity with Part 29, and allows OATELS to perform its obligations of reviewing potentially restrictive or nonconforming laws in order to protect current and prospective programs.

OATELS further argues that the BAT Circulars explain that section 29.12(a) obliges recognized SACs to continuously submit any changes (e.g., new and revised state apprenticeship requirements, as well as any change that might go beyond federal requirements) to already approved state requirements so that OATELS is able to determine whether or not they conform to the NAA and its implementing regulations. Moreover, because the needs test is in violation of the NAA and the regulations, according to OATELS, Respondents’ failure to obtain prior approval becomes “even more serious here.” Pros. Party’s Motion for Summary Decision, at 36.

Had Respondents sought to obtain prior approval, “OATELS could have informed the state that the law was unacceptable before it was adopted.” *Id.* (emphasis in original). OATELS would thereby have been given a chance to consult with Respondents before program opportunities were limited. In contrast, OATELS argues that submission or approval of state changes after they have been made exposes apprentices to “potentially harmful nonconforming or otherwise unacceptable requirements during the long consultative period that may be necessary to persuade the SAC to drop its adopted nonconforming requirement.” *Id.* at 37. In short, compliance with the prior approval requirement ensures continuous federal conformity and uninterrupted protection of the nation’s apprentices.

## RESPONDENTS’ POSITION<sup>11</sup>

Respondents, CDIR and CAC, filed their motions for summary judgment pursuant to 29 C.F.R. § 18.40 seeking judgment as a matter of law that OATELS improperly revoked their recognition under the regulations. “[T]he asserted bases for derecognition fail,” according to Respondents, because there is no legal authority for either the “prior approval” requirement or for the conclusion that section 3075(b) of the California Labor Code fails to conform with the NAA and its implementing regulations. Resp.’s Motion for Summary Judgment, at 2 (Sept. 21, 2004). Instead, Respondents argue that section 3075(b) is wholly consistent with both the language and intent of the NAA.

Initially, Respondents argue that while OATELS has “the authority to pass on changes to SAC state apprenticeship law and regulation, there is no requirement that the state secure ‘prior approval.’” Resp.’s Brief, at 5 (Sept. 21, 2004). Respondents have offered three reasons in support of its argument. First, the idea of a state having to obtain prior approval before enacting its own legislation is a “misstatement of the federal-state partnership introduced in federal apprenticeship law.” Resp.’s Motion for Summary Judgment, at 5. In addition, Respondents believe OATELS’ notion of “prior approval” is not a part of the statutory scheme governing apprenticeships and is “not based on any law or regulation.” *Id.*

According to Respondents, the NAA was not enacted with the purpose of creating a national or federal standard at the expense of state autonomy, but rather to create cooperation between states and the federal government. Respondents argue that the relationship is wholly voluntary. *Id.* at 6, n. 5, *citing Calif. Div. of Labor Standards v. Dillingham*, 519 U.S. 319, 325 (1997). Moreover, Respondents’ research has found no provision in the Act or its legislative history directing a state to enact legislation regarding apprenticeships. Resp.’s Motion for Summary Judgment, at 6. The only requirement under the NAA, according to Respondents, is that a SAC operates “consistent with federal *minimum* standards.” *Id.* at 7 (emphasis in original).

OATELS’ “prior approval” requirement, Respondents argue, would produce a “monumental transformation” in the state-federal relationship by providing OATELS with a

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<sup>11</sup> Respondent CDIR filed its Motion for Summary Judgment, along with its arguments in support thereof. Respondent CAC also filed a Motion for Summary Judgment, in which it expressly relies “on the grounds set forth in the motion for summary judgment of respondent California Department of Industrial Relations (“CDIR”).” CAC’s Motion for Summary Judgment, at 1 (Sept. 29, 2004). Thus, CAC did not file an initial brief in support of its motion. CAC later filed a reply brief.

“veto right” over California law despite the voluntary nature of the Act.<sup>12</sup> *Id.* In addition, OATELS, while claiming a right to prior approval, has not established a process for conferring prior approval of changes in the state law applicable to apprenticeships. According to Respondents, veto powers without a designed process or timetable will only “invit[e] chaos.”<sup>13</sup> Similarly, Respondents are concerned that because there is no established appeals process, should OATELS mistakenly withhold approval, a SAC is left with no remedy. *Id.* at 9.

Second, Respondents contend that the BAT Circulars, upon which OATELS relies, do “not forbid a SAC state from making changes to state apprenticeship law absent ‘prior approval.’” Resp.’s Motion for Summary Judgment, at 5. Rather BAT Circular 88-5, *see* AF Vol. 2, Tab 4C, at 858, simply “clarifies for BAT internal staff that changes in SAC policies and procedures should be reviewed by BAT for consistency with 29 C.F.R. Part 29, and should be submitted by the SAC to BAT for that purpose.” *Id.* at 10. According to Respondents, Circular 88-5 does nothing more than set forth BAT policy that recognized SACs should continue to comply with 29 C.F.R. Part 29; it does not provide OATELS with control over SACs to which the Secretary has assigned recognition. To be sure, Respondents contend that the subsequent Circular 88-9 clarifies that SACs are required to “inform BAT of changes...for BAT’s review of their continued status as a SAC,” not that BAT has the authority to require prior approval of those changes.<sup>14</sup> *See id.* at 11.

Lastly, Respondents argue that the BAT Circulars are not binding authority and do not have the force of law. Resp.’s Motion for Summary Judgment, at 5. Relying on a long list of U.S. Circuit Court cases, including *U.S. v. Carveiro*, 907 F.2d 260, 264 (1st Cir. 1990) and *Associated Builders & Contractors, Inc. v. Reich*, 922 F. Supp. 676 (D.C. Cir. 1996), Respondents note that internal guidelines of a federal agency do not confer substantive rights on any party. Here, Respondents contend Circular 88-5 is not subject to the Administrative Procedure Act, is not published in the Code of Federal Regulations, and is not disseminated to the public in any way as to have the force of law; it is thus not binding authority. The Circulars are instead internal guidelines on BAT policy.

Respondents also disagree with OATELS’ assertion on the merits that the amended California Labor Code § 3075(b) is inconsistent with the NAA and its implementing regulations. Specifically, Respondents stress that section 3075(b) does not violate 29 C.F.R. §29.1, which provides only general descriptions of the purpose of the regulations, “impos[ing] obligations *not* on the States, but on the Secretary of Labor.” Resp.’s Motion for Summary Judgment, at 17

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<sup>12</sup> In response, OATELS explains that while it may derecognize a SAC state, it has no authority to nullify the offending state requirements, leaving California free to register programs for its own State purposes. *See* Pros. Party’s Reply Brief, at 5 (Oct. 4, 2004).

<sup>13</sup> In addition, Respondent is concerned that giving OATELS the ability to grant or withhold its “prior approval” places a SAC in an “untenable position” by tempting the DOL to take sides (or even the appearance of such) in a future labor dispute by creating even an unintentional delay in the operation of a SAC. Resp.’s Motion for Summary Judgment, at 16.

<sup>14</sup> Respondents note that since the enactment of the 1939 Shelley-Maloney Apprentice Labor Standards Act, California has made multiple changes to that Act and its apprenticeship regulations without any complaint from OATELS that California failed to receive prior approval.

(emphasis original). Indeed, Respondents interpret section 29.1 as a directive to the Secretary to merely formulate and promote labor standards necessary to safeguard the welfare of apprentices and to cooperate with state agencies engaged in such activity—not as a directive aimed at the states to “expand the number of apprenticeship programs” or “promote apprenticeship by ignoring the ability of a program to actually provide opportunities.” *Id.*

As a result, Respondents characterize the issue here to be “whether approval of programs that are being proposed for reasons other than training needs will ‘safeguard the welfare of apprentices,’” *id.*, not whether the state law restricts program approval. Thus, Respondents are sure, contrary to OATELS’ suggestion, that under section 3075(b), approval of a program intended to fulfill a training need does more to promote the welfare of apprentices than a program simply designed to provide cheap labor on public works projects. *Id.* In other words, the goal of the NAA can only be achieved through standards and training, not “multiplication of exploitative and contentless programs.” *Id.* at 18. Furthermore, Respondents urge this Court to accept its interpretation of the NAA and its implementing regulations—that they establish minimum standards for apprenticeship programs to be approved for Federal purposes—while leaving SACs free to incorporate higher standards in order to raise the quality of apprenticeships. *Id.* at 18-19.

Next, Respondents challenge OATELS’ interpretations with its own policy concerns. Respondents contend that the purposes of the NAA can be achieved only if “meaningful” jobs exist for the apprentices. *Id.* at 19. Thus, according to Respondents, the “needs test” promotes quality and real apprenticeship programs by focusing on the needs of the employers, which in turn means jobs will actually be available in a given trade or area for the newly-trained, skilled workers. In other words, “approving programs where there is no ‘training need’ does not promote apprenticeship opportunity.” *Id.* Instead, by promoting more apprenticeship opportunity only, OATELS’ position operates to exploit apprentices where no jobs exist for the sole purpose of avoiding higher wages under the Davis-Bacon Act. *See id.* Even assuming employers have nothing but the best intentions, the “needs test,” according to Respondents, operates to ensure the existence of apprenticeships by registering programs only where the need arises, or where there is an actual labor market.<sup>15</sup> To be sure, Respondents insist that the legislative history of the NAA is filled with concerns regarding the labor market for apprentices.

To Respondents, the meaning of “training needs” under section 3075(b) is very different from OATELS’ understanding. Respondents contend a training need exists when: “1) there is no existing program, 2) when existing programs have been found deficient, 3) when existing programs fail or refuse to dispatch apprentices to a contractor making a request for public works purposes.” *Id.* at 22. According to Respondents, none of the provisions in section 3075(b) restrict the approval of new programs, as OATELS suggests. As reassurance, Respondents

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<sup>15</sup> More specifically, Respondents cite to 29 C.F.R. § 29.5(b)(7), which provides that a program is conforming so long as it includes, *inter alia*, provisions concerning the following: “the numeric ratio of apprentices to journeymen consistent with proper supervision, training, safety and continuity of employment, and applicable provisions in collective bargaining agreements, except where such ratios are expressly prohibited by the collective bargaining agreements.” This provision applies directly to the requirements a program must meet in order to be approved under the applicable regulations.

maintain that new programs will be approved so long as they comply with the Labor Code and regulations, and insist that California will protect the welfare of apprentices.

## AMICUS CURIAE

### California ACA and SBCTC

California ACA and SBCTC (collectively, hereinafter, “Joint Amici”) filed a joint brief in support of the Respondents’ Motion for Summary Judgment. Members of these organizations sponsor and administer joint apprenticeship training programs in the construction industry of California. In addition, SBCTC, which is a federation of labor organizations composed of unions and district councils, represents the interests of more than 375,000 unionized construction workers in California. The Joint Amici’s interest in the outcome of this case stems from its self-described purpose of supporting “comprehensive apprenticeship laws and regulations adopted by the Legislature and the CAC for the betterment of registered apprentices throughout California.” Joint Amici Motion for Leave to File Brief, at 2 (Oct. 5, 2004). More importantly, according to Joint Amici, its member organizations recruit, train, dispatch, and monitor apprentices working on public works projects in California. *Id.* at 3. The State Building and Construction Trades Council was one of many organizations listed as an original sponsor and “source” of section 3075(b). SAF 789.

In support of Respondents’ Motion for Summary Judgment, and after a brief explanation of the Babylonian origin of apprenticeships, the Joint Amici proposed several arguments in addition to those presented by Respondents. First, Joint Amici insist that the legislative history of section 3075(b) of the California Labor Code at issue here is based on a model statute developed by the Department of Labor. More specifically, the “training needs” language, according to Joint Amici, was a feature of the original version of section 3075 in 1978 when BAT first recognized CDIR as a SAC, and was originally based on a “Model State Law” proposed by the DOL’s Federal Committee on Apprenticeship back in 1939 that used similar “training needs” language. Thus, as the argument goes, “it strains credulity to suggest...that California’s ‘needs test’ is, all of a sudden, inconsistent with the Fitzgerald Act.” Joint Amici brief, at 23. Instead, according to Joint Amici, the newly enacted “needs test” in section 3075(b) “more specifically define[s] the otherwise well-established statutory ‘needs test’ in the aftermath of a series of ERISA preemption decisions” addressing California’s apprenticeship regulations. In short, the amended version of the “needs test” at issue here is actually no more restrictive than the original version, and is merely describing “the three most likely sets of circumstances in which CDIR and/or CAC may reasonably conclude that ‘apprentice training needs justify the establishment’ of a new apprenticeship program.” *Id.* at 25.

Second, Joint Amici contends that OATELS’ concern that the needs test limits apprenticeship opportunities—specifically those among unilateral programs—is completely speculative and without any basis in law or in fact. *Id.* at 6, 26. Joint Amici thus point out that OATELS has failed to demonstrate that any unilateral program has actually been denied approval based on the needs test for more than a decade, or that the needs test actually limits

apprenticeship opportunities in any way.<sup>16</sup> Rather, according to Joint Amici, OATELS' arguments are based on hyperbole and "hypothetical doomsday scenarios," none of which have materialized in the 5 years since the amendment was enacted. *Id.* at 26. Consequently, Joint Amici argues OATELS has not made out a prima facie case for derecognition. *Id.* at 26-28.

Third, Joint Amici maintains that the needs test safeguards the welfare of apprenticeships by ensuring that those apprentices obtain necessary skills in a timely fashion through "reasonably continuous employment." *Id.* at 29. Citing to California Labor Code §§ 3077-78 and the California Code of Regulations at Title 8, §212, Joint Amici follow the lead of Respondents to argue that OATELS' position risks "overcrowding" of apprentices in a particular craft and geographic area. And as a result, California's promise to provide "reasonably continuous employment," Cal. Code Regs., tit. 8, § 212(14), cannot be fulfilled if there are no jobs available due to the overcrowding. *Id.* at 29-30. Joint Amici believe that when an apprentice commits to acquiring certain skills necessary to obtain journeyman status over a number of years at reduced wages via an approved program, the State "is at least impliedly representing that employment opportunities in that craft will be available upon the apprentice's graduation." *Id.* at 30.

Fourth, Joint Amici—suggesting OATELS' legal grounds for derecognition are borderline frivolous—contend OATELS has exceeded its authority by attempting to force California to lower its own standards for apprenticeships. *Id.* at 31. By substituting philosophical considerations for legal grounds in its attempt to derecognize, OATELS, according to Joint Amici, is trying to "placate special interest groups, i.e., non-union contractors...who have philosophical aversion to dealing with Unions and don't want to have to hire well-qualified apprentices from [joint] programs." *Id.* Moreover, the principles of federalism, Joint Amici argue, do not provide OATELS with the means or authority under the NAA "to dictate to California the standards under which apprenticeship programs may be approved," and correcting the alleged "restrictiveness" of section 3075(b) is not a matter of federal concern. *Id.*

Lastly, Joint Amici believe that a successful prosecution by OATELS here will "have dire consequences" for the California apprenticeship system and the apprentices therein by requiring new and existing programs to plow through duplicative bureaucratic red tape, including reapplication with OATELS directly, months of delay, and notifying previously registered apprentices of the change. *Id.* at 6, 32-33.

### California ABC

California ABC is represented by four separate chapters of Associated Builders and Contractors who sponsor registered apprenticeship programs. Almost 80% of all construction workers in California are employed by "merit shop," or "unilateral," companies. California ABC chapters represent hundreds of contractors and over one thousand apprentices by overseeing non-union apprenticeship training programs that are registered and approved by the State of California. California ABC filed its brief in support of OATELS' motion for summary decision arguing that the "union controlled CAC" realizes economic incentives by limiting the number of competitive non-union programs to be registered, thereby creating a "virtual monopoly" within

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<sup>16</sup> Specifically, Joint Amici note that the reversal of WECA's approval "had *nothing whatsoever* to do with the 'needs test'." Joint Amici brief, at 27 (emphasis original).

California's apprenticeship community. California ABC Amicus Brief in Support of OATELS' Motion for Summary Judgment, at 4 (Sept. 22, 2004).

In addition to restating OATELS' argument that the Respondents should be derecognized for failure to obtain prior approval before promulgating and implementing section 3075(b), California ABC's argument focuses on the alleged discriminatory effect the "needs test" has on non-union apprenticeship programs seeking approval. Initially, California ABC notes that the NAA "specifically provides for equal treatment of union and nonunion programs." *Id.* at 6 citing *Associated Builders and Contractors, Inc. v. Reich*, 963 F. Supp. 35, 38 (D.D.C. 1997) and 29 C.F.R. §29.3(i). However, California ABC believes the "needs test," which was enacted during former California Governor Gray Davis' administration, is administered by "union affiliated" individuals in the CAC using "discriminatory delay tactics" allegedly designed to prevent non-union programs from being approved. California ABC Brief, at 9.

According to California ABC, its San Diego chapter experienced a long 12 month delay during its attempt to obtain approval for a low voltage EST apprenticeship program, while a "local IBEW Program received prompt approval for virtually an identical program." *Id.* The San Diego chapter's program was then approved "only after derecognition proceedings had been filed by OATELS." *Id.*

In addition, relying on *Southern California Chapter of Associated Builders and Contractors, Inc. v. California Apprenticeship Council*, 4 Cal. 4<sup>th</sup> 422, 841 P.2d 1011, 14 Cal. Rptr. 2d 491 (1992), in which the California Supreme Court held, *inter alia*, that ERISA preempts a California regulation because it would otherwise modify, impair, or hinder the NAA, California ABC contends the NAA does not authorize a "needs test." California ABC brief, at 7. California ABC argues that the State of California's conduct over the last several years, nevertheless, indicates a concerted agenda favoring prospective union programs over non-union programs.

### National ABC

National ABC is an association of more than 23,000 construction contractors and related firms, including both union and non-union employers in 80 chapters throughout the country. According to its Motion for Leave to File Amicus Brief, National ABC is recognized as the leading representative of merit shop construction programs. National ABC operates to expand and promote opportunities for those who are excluded from unionized apprenticeship programs. National ABC Motion for Leave to File Amicus Brief in Support of OATELS' Motion for Summary Judgment, at 2 (Sept. 28, 2004). It filed its *amicus curiae* brief to urge this Court to focus on the "national impact of this case;" specifically, to "explain why California's departure from federal apprenticeship standards, if left unremedied, threatens the entire fabric of the [NAA]." *Id.* at 3.

Like California ABC, National ABC contends that existing union-sponsored apprenticeship programs, along with their "political allies in certain states," have been able to successfully resist the approval or expansion of non-union apprenticeship programs. National ABC Brief, at 4. By restricting non-union access to apprenticeship training, unions "preserve

union enclaves in the construction industry, particularly on public projects where prevailing wage rates are tied to the number of registered apprentices employed.” *Id.* at 4. National ABC notes that although California was first recognized as a SAC in 1978, it did not approve its first unilateral program until 1988. *Id.* at 5. Thereafter, the CAC refused to approve new ABC programs alleging no “need” for such programs, and unilateral programs would adversely impact existing union programs. National ABC also argues that after the California Supreme Court struck down those CAC decisions in *Southern California*, 4 Cal.4<sup>th</sup> 422, 841 P.2d 1011, 14 Cal.Rptr.2d 491, Governor Davis “signed into law the most restrictive and anticompetitive ‘needs’ test in the country.” National ABC Brief, at 5.

Since then, according to National ABC, similar attempts in other states to restrict approval of unilateral programs have been thwarted by the DOL and litigation in federal court. Nevertheless, California’s “apparent discrimination against non-union programs” remains “unmatched.” *Id.* at 6. National ABC is concerned that the “inherently discriminatory” restriction placed on non-union programs under the “needs test” comes at a time when “there is a critical shortage of skilled workers in the construction industry.”<sup>17</sup> *Id.* at 8.

Finally, National ABC argues that 29 C.F.R. § 29.13—authorizing derecognition—is available to the DOL “to address exactly the present eventuality.” *Id.*, at 9. According to National ABC, the DOL—not the states—is authorized to formulate labor standards under the NAA, which was originally intended to set national standards for apprenticeship training. *Id.*

### WECA

Western Electrical Contractors Association Incorporated filed its Amicus Curiae Brief in Support of OATELS. WECA is a California non-profit trade organization which represents hundreds of non-union electrical contractors and thousands of their workers. In addition, WECA represents three non-union apprenticeship programs, including a commercial electrician program, a residential electrician program, and a sound and communication system installer program.

WECA claims to have experienced “first hand the detrimental impact Labor Code section 3075 has had on apprenticeship opportunities in the State of California.” WECA brief, at 2 (Sept. 21, 2004). Specifically, according to WECA, the CAC has revoked the approval of WECA’s statewide commercial electrician apprenticeship standards under section 3075(b). *Id.* at 6. Originally approved by DAS in 1992, WECA’s commercial electrician apprenticeship program operated in 11 counties in the Sacramento metropolitan area. WECA’s statewide expansion was also approved by DAS in the late 1990’s. Then in December, 2001 a competing union program filed a complaint with DAS challenging WECA’s approval on grounds that the DAS did not comply with the “notice and comment” requirement set forth in California Code of Regulations, Title 8, § 212.2, mandating that revised standards be served upon existing programs, and having failed to establish any need under section 3075.

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<sup>17</sup> Citing to Berman, Industry Output and Employment Projections to 2010, Monthly Labor Review, 39-56, Nov. 2001, and U.S. Bureau of Labor Statistics, 2000-2010 Employment projections, Dec. 3, 2001, National ABC notes that in order to maintain the present levels of employment, “the industry needs to train more than 850,000 [apprentices] during the current decade” on a national level. National ABC Brief, at 8.



Similarly, WECA faced challenges by existing programs pursuant to section 3075(b) in its attempts to obtain approval for a new statewide program for sound and communication system installers in April, 2003. *Id.* at 10. The challenging union programs claim they have the capacity to expand in order to meet any future demand for apprentices in the trade. Like the electrician program litigation, WECA awaits resolution to the lengthy litigation regarding the sound installer program.

The result of the litigation delays, which WECA attributes directly to the instant proceedings, has left WECA unable “to sustain or increase the number of apprentices enrolled in its commercial electrician program[,] and it has been unable to enroll new apprentices in its sound and communication system installer program, despite a significant demand for such apprentices by merit shop contractors.” *Id.* at 2. Following OATELS’ lead, WECA generally maintains that section 3075(b) violates federal standards on its face and in effect by rendering virtually impossible any unilateral program’s ability to develop or expand into any geographic area in which a joint program already exists. Furthermore, WECA argues that although the express language of section 3075(b) does not provide for such blatant discrimination, the original purpose and the legislative history of the amendment clearly does. *Id.* at 5.<sup>18</sup>

## DISCUSSION

### **Summary Judgment Standard**

The Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges, found at Title 29 C.F.R. Part 18, provide that an administrative law judge may enter summary judgment for either party if the pleadings, depositions, affidavits, material obtained by discovery, or other materials show that there is no genuine issue of material fact. 29 C.F.R. § 18.40.<sup>19</sup> The standard is virtually identical to that found in Rule 56(c) of the Federal Rules of Civil Procedure. Summary judgment is appropriate when the record “show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a

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<sup>18</sup> Relying on the language of an early draft of the section 3075 amendment, WECA argues that the amendment was specifically designed with the intent to prevent the approval and expansion of unilateral programs:

It is the public policy of this state to favor the training of apprentices in jointly sponsored programs. Where an approved jointly sponsored program exists for the trade and geographic area, and has the capacity to meet the apprenticeship training needs, the chief shall not approve a new unilateral program unless special circumstances justify the establishment of the program.

*See* WECA Brief, at 5 quoting Legislative Counsel’s Digest amendments to Section 3075 of the Labor Code, relating to apprenticeship programs as introduced by Assembly Member Keeley (Feb. 25, 1999).

<sup>19</sup> Title 29 C.F.R. Part 18 provides that the Federal Rules of Civil Procedure apply to situations not controlled by Part 18 or rules of special application, and that an administrative law judge may take any appropriate action authorized by the Rules of Civil Procedure for the District Courts.

judgment as a matter of law.”<sup>20</sup> Fed.R.Civ.P. 56(c). No genuine issue of material fact exists when the “record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The party moving for summary judgment has the burden of establishing the “absence of evidence to support the non-moving party’s case.” *Celotex Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Thus, in reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242 (1986). In the case at bar, I agree with the representations of the parties, and it is clear from the record that there are no material facts concerning the derecognition proceedings in dispute, and the only matter at issue is one of law.

### **Standards of Construction and Interpretation of the NAA and Implementing Regulations**

As made clear by the many briefs submitted in this matter, the quintessence of the two issues here lies within the construction and interpretation of the NAA and its implementing regulations.

Enacted in 1937, the National Apprenticeship Act states in part as follows:

The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Secretary of Education in accordance with section 17 of Title 20. For the purposes of this chapter the term “State” shall include the District of Columbia.

29 U.S.C. § 50.<sup>21</sup> Using broad language, Congress authorized the Secretary to issue regulations setting forth a detailed scheme defining apprenticeship programs and their requirements, including processes for review, approval, and registration of proposed programs. In doing so, the Secretary’s mission is to promote the welfare of apprentices and apprenticeship programs by

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<sup>20</sup> It is important to note here that typically when faced with cross-motions for summary judgment, a court must rule on each party’s motion on an individual and separate basis, determining in each case whether a judgment may be entered for the moving party. *See Held v. American Airlines, Inc.*, 13 F.Supp.2d 20, 23 (D.D.C. 1998). Such a separate analysis is not necessary here because the parties’ cross-motions address the exact same issues and the exact same set of facts. In fact, the parties have stipulated to many of the material factual circumstances that affect the outcome of the instant determination. Thus, I have consolidated the analysis for both motions into one for the sake of convenience and simplicity.

<sup>21</sup> Section 17 of Title 20, referred to in the text, was repealed by Pub.L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 643.

setting Federal standards<sup>22</sup> for apprenticeship programs and to regulate those states afforded the authority to approve apprenticeship programs.

Acting under the statute, the Secretary, by regulation, defines the requirements for a State to be recognized as a SAC capable of approving apprenticeship programs for Federal purposes. 29 C.F.R. § 29.12. The Secretary, by regulation, also sets forth the means by which a SAC's recognition may be revoked. 29 C.F.R. § 29.13. Thus, the first issue here presents itself: do the Secretary's regulations found at 29 C.F.R. §§ 29.12, 29.13 permit OATELS to derecognize a SAC *solely* because the SAC amended its State apprenticeship laws without obtaining prior approval from OATELS.

The Supreme Court has had occasion to address the task of evaluating an agency's construction and interpretation of federal statutes and the accompanying regulations issued by that federal agency. In *Chevron v. Natural Resources Defense Council, Inc., et al*, 467 U.S. 837, 842-43 (1984), the Court described an adjudicating court's role in making such a determination as follows:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

(footnotes omitted). The Court then went on to explain in more detail the agency's role in administering a federally mandated program via regulations, and a court's examination of those regulations:

The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given

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<sup>22</sup> See Sen. Rpt. 75-1078, at 3 (July 22, 1937); AF Tab 4A, at 731 ("The thorough training of skilled workmen is of paramount importance to the employer, to labor, to apprentices, and to the public. To assure that type of training, the Federal committee has, with the advice of employers, labor, and educators, evolved certain minimum standards for apprenticeship.").

controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

*Id.* at 843-44 (citations and quotations omitted).

In the instant case, Congress drafted the NAA with very broad language, and expressly delegated to the Department of Labor the authority to fill the large gaps left by the Act. Indeed, a plain reading of the statute reveals that Congress intended to leave the creation of the specific rules, standards, and policies—i.e., the guidelines necessary to the everyday administration of the NAA—solely in the hands of the Secretary. Thus, under *Chevron*, the NAA’s implementing regulations issued by the Secretary found at 29 C.F.R. Part 29 are to be given “controlling weight” in construing the meaning of the statute. But, when, as here, the regulatory language does not explicitly address the issue to be resolved, and the agency administering the statute and opposing party present conflicting interpretations of the regulation provisions, further analysis is required.

When construing the meaning of regulatory provisions, an agency’s interpretation of its own regulations is entitled to “substantial deference,” with some limitation. *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994); *see also Auer v. Robbins*, 519 U.S. 452 (1997) and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). In other words, “the agency’s interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *Shalala*, 512 U.S. at 512 (citations and internal quotations omitted). Such deference is “warranted,” according to the Court, where the regulations at issue concern “a complex and highly technical regulatory program, in which the identification and classification of relevant criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.” *Id.* at 512-13 (internal quotations and citations omitted). Nonetheless, as the Supreme Court noted in *Shalala* and *Chevron*, the agency’s discretion is not unfettered. *See also United States v. American National Can Co.*, 126 F.Supp.2d 521 (2000) (“Substantial deference, however, does not mean acquiescence.”) *citing Green v. Shalala*, 51 F.3d 96, 100 (7th Cir. 1995).<sup>23</sup>

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<sup>23</sup> In *Dept. of the Army*, ARB Nos., 98-120, 98-121 and 98-122 (ARB Dec. 22, 1999), a prevailing wage dispute arising under the McNamara-O’Hara Service Contract Act, 41 U.S.C. §351 *et seq.*, the Administrative Review Board described a deferential standard of review of the Wage and Hour Administrator’s interpretations of the Act and its implementing regulations. The Board observed that neither the Davis-Bacon Act nor the Service Contract Act prescribe a specific methodology to be used by the Secretary or her designee, the Administrator, when determining prevailing wages, thereby leaving the Administrator with broad discretion to devise program guidelines. *Dept. of the Army*, ARB No. 98-120, USDOL/OALJ Reporter at 24-25 [PDF]. The Board held that the Administrator’s legal interpretations are therefore accorded broad deference “so long as the Administrator’s policies and determinations are legally sound and otherwise reasonable.” *Id.* at 33. The Board further held that its “inquiry on review is focused simply on whether the Administrator’s decision reflects a *reasonable* interpretation of the statute and regulations, not whether we believe it to be the best policy choice.” *Id.* at 34 (emphasis original). *See also El Rio Grande*, 1998-INA-133 (BALCA Feb. 4, 2000) (en banc) (adoption of this same standard of review when reviewing SCA wage determinations in permanent labor certification appeals). Similarly, Congress delegated broad administrative discretion to the Department of Labor to administer Federal certification of apprenticeship

## **“Prior Approval” Requirement**

Relying on section 29.12(a), OATELS initially claims that the regulations implicitly require a recognized SAC to obtain prior approval for any modification or change a State may make to its apprenticeship laws that departs from or adds to the requirements prescribed in Part 29, or risk derecognition. Although it admits that neither the regulations nor the NAA contain express language establishing a “prior approval” requirement for already-recognized SACs, OATELS believes that prior approval is implied in order to ensure continuous compliance with the federal standards and to protect—“uninterrupted”—apprentices. For the following reasons, I find that OATELS’ interpretation of the regulations is erroneous and not supported by the plain language of the regulations or with the purpose of the NAA.

Title 29, Part 29.12 of the Code of Federal Regulations provides in pertinent part:

### **§ 29.12 Recognition of State agencies.**

(a) The Secretary’s recognition of a State Apprenticeship Agency or Council (SAC) gives the SAC the authority to determine whether an apprenticeship program conforms with the Secretary’s published standards and the program is, therefore, eligible for those Federal purposes which require such a determination by the Secretary. Such recognition of a SAC shall be accorded by the Secretary upon submission and approval of the following:

- (1) An acceptable State apprenticeship law (or Executive order), and regulations adopted pursuant thereto;
- (2) Acceptable composition of the State Apprenticeship Council (SAC);
- (3) An acceptable State Plan for Equal Employment Opportunity in Apprenticeship;
- (4) A description of the basic standards, criteria, and requirements for program registration and/or approval; and
- (5) A description of policies and operating procedures which depart from or impose requirements in addition to those prescribed in this part.

29 C.F.R. § 29.12(a). This provision plainly governs whether a State Apprenticeship Council *initially* deserves “recognition” by OATELS as its agent, capable of approving apprenticeship

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programs. An administrative law judge, therefore, must afford OATELS broad deference in its interpretation of the NAA and its implementing regulations as long as its policies and determinations are legally sound or otherwise reasonable, even if other reasonable interpretations may exist.

programs for Federal purposes, by requiring the submission of particular materials demonstrating conformity with the Federal standards. In other words, to be recognized as a SAC, first a State must submit and have approved by OATELS those materials listed in section 29.12(a).<sup>24</sup> Clearly absent from the language of section 29.12(a) is any mandate, or obligation on the part of a SAC—once it becomes recognized—to continuously submit its apprenticeship laws and changes thereto for prior approval. Also noticeably absent from section 29.12 are detailed procedures governing OATELS’ so-called “prior approval” requirement. Therefore, such a requirement is not implicit in the regulatory scheme.

Had the drafters of the regulations intended to include a “prior approval” requirement, as OATELS contends, it is reasonable to conclude that 29 C.F.R. Part 29 would contain a detailed section governing such “prior approval” for already-recognized SACs. In other words, because *every other aspect* related to the administration of the NAA is comprehensively spelled out in the regulations, OATELS is unable to explain why there is a “prior approval” requirement yet no comprehensive plan or procedure governing it within Part 29. Indeed, there is no schedule or time period within the regulations governing when a recognized SAC must submit new materials or changes to its apprenticeship laws for “prior approval.”<sup>25</sup> There is no procedure in place describing the review of such materials. Moreover, there is no regulatory deadline stating when OATELS must then approve or disapprove a SAC’s materials once they have been submitted for “prior approval.” Given the otherwise comprehensive and intricate composition of the NAA’s implementing regulations, it is difficult to assume that the drafters intended to include a “prior approval” requirement into the regulatory scheme without any guidance as to its administration.

Furthermore, it has been documented—in this case and in others—that OATELS regularly monitors and reviews a SAC’s state statutes and regulations for conformity to the federal standards. *See Parties’ Joint Stipulation of Facts*, at 5; AF Tab 5B, at 869 (BAT Circular 95-02, Nov. 17, 1994) (“All BAT State Directors in SAC States will continually monitor apprenticeship activities of their SACs...for conformance with Title 29 C.F.R. Part 29...and shall conduct, no less than annually...a comprehensive review of such activities.”); and *Southern California Chapter of Associated Builders and Contractors Inc., Joint Apprenticeship Committee v. California Apprenticeship Council*, 4 Cal.4th 422, 433, 841 P.2d 1011, 1016 (1992) (in which the Supreme Court of California, while discussing the requirements of 29 C.F.R. § 29.12(a), stated, “According to the record in this case, the Secretary, at regular intervals, reviews a SAC state’s statutes and regulations for conformity to the Fitzgerald Act and its implementing regulations.”). This suggests that “ensuring continuous federal conformity”—the concern upon which OATELS’ argument is based—is, in large part, a task willingly shouldered by OATELS, and not one required by already-recognized SACs via a “prior approval” requirement. Thus, by

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<sup>24</sup> In 1978, Respondents obtained recognition by meeting the requirements of § 29.12(a).

<sup>25</sup> It is reasonable to conclude that if a SAC were required to continuously submit materials for review in order to maintain its “recognized” status, or risk derecognition, the regulations—which are in every other respect highly detailed and particular—would at least provide a schedule setting forth when such materials are due. Moreover, it is reasonable to conclude that if a SAC were required to submit additions or changes to its already approved apprenticeship rules and standards, the regulations would at least provide some explanation regarding when a State could go ahead and enact or administer a change to its laws after submission for prior approval. The regulations contain neither.

regularly monitoring SACs, OATELS already ensures continuous federal conformity. The fact that a “prior approval” requirement might save time, or may otherwise be a good idea from OATELS’ perspective, is not reason enough to read such a requirement into the comprehensive language of section 29.12(a).

In any event, section 29.12 does not even govern OATELS’ authority to derecognize a SAC. The NAA’s implementing regulations contain a provision *directly* addressing OATELS’ ability to derecognize an already-recognized SAC. Section 29.13, which is entitled “Derecognition of State agencies,” provides OATELS with the authority to revoke a SAC’s recognition “for the failure to fulfill, or operate in conformity with, the requirements of this part.”<sup>26</sup> 29 C.F.R. §29.13. Subparts (a) and (b) then describe how “derecognition proceedings for reasonable cause shall be instituted.” 29 C.F.R. § 29.13. The phrase “reasonable cause” is not defined expressly in the Act or the implementing regulations. Nevertheless, absent from section 29.13 is any express reference to a SAC’s failure to obtain “prior approval” or any other endorsement from OATELS before amending or adding to its apprenticeship laws.

OATELS maintains that section 29.12(a), which requires a State seeking recognition to submit a number of specific documents, was violated here when the California “needs test” was enacted. And, as the argument goes, Respondent’s failure to obtain prior approval before enacting that departure or addition amounts to a “failure to fulfill...the requirements of this part,” or “reasonable cause” to derecognize under section 29.13. Therefore, the issue of whether reasonable ground exists to invoke section 29.13 must be examined in light of the requirements set forth in section 29.12(a).

When sections 29.12(a) and 29.13 are read together, however, “failure to fulfill...the requirements of this part” can include—by express language—nothing more than the failure to meet the “basic requirements” listed in section 29.12(a). If the phrases, “for the failure to fulfill, or operate in conformity with, the requirements of this part,” and “reasonable cause” are meant to include “failure to obtain prior approval” as a basis for derecognition, then section 29.12 would naturally include an obligation to present new materials for prior approval as a “basic requirement.” However, as noted above, section 29.12 does not include any reference to the continuous submission of those materials or any requirement of “prior approval” once recognition has been accorded. In short, a plain reading of the regulations leads to the conclusion that a SAC cannot be deemed to have failed to fulfill a requirement “of this part” under section 29.13, unless that requirement is actually included *somewhere* in the Part.

In further support of its argument, OATELS contends that BAT Circulars 88-5, 88-9, and 88-12, *see* AF Tab 4C, at 857, 858; Tab 5B, at 880, state and fully explain that recognized SACs are obligated to continuously submit changes to approved state requirements so that OATELS is able to determine conformity with the Federal standards, which may very well be true. However, although the BAT Circulars state a policy of “prior approval,” as OATELS presents here, such internal guidelines, or “interpretive rules,” are not controlling in the determination to be made in the instant case<sup>27</sup>—that is, whether OATELS’ interpretation of the provisions governing its

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<sup>26</sup> This phrase is not defined further in the regulations.

<sup>27</sup> *See generally Reno v. Koray*, 515 U.S. 50, 61 (1995).

ability to derecognize Respondent's as a state agency under the Act is plainly erroneous or inconsistent with the regulations.<sup>28</sup>

As noted above, an agency's interpretation of its own regulations is entitled to deference; but, it has also been held that "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference," *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), and internal guidelines of a federal agency do not confer substantive rights upon *any* party—including the federal agency, *see generally U.S. v. Carveiro*, 907 F.2d 260 (1st Cir. 1990). Thus, inasmuch as the BAT Circulars amount to nothing more than OATELS' position presented in the case at bar—that is, an interpretation of the regulatory scheme at issue<sup>29</sup>—and are not official regulations published in the Federal Register, they are not entitled to any more weight than permitted under the principles described in *Chevron* and *Shalala*.

Had Congress wanted to give OATELS the authority to derecognize SACs solely for failure to obtain "prior approval," it could have so stated in the language of the NAA; and had the Secretary meant to issue the Act's implementing regulations with a "prior approval" requirement, he or she easily could have. Neither did, however. Instead, the NAA is silent on the issue, and the regulations provide only the requirements for initial recognition, and then how that recognition may be revoked. As explained above, "derecognition for failure to obtain prior approval" is noticeably absent from the statutory and regulatory scheme.

Thus, based on a plain reading of the NAA and relevant regulatory provisions, and given that OATELS has provided no legal precedent, no statutory precedent, or no regulatory precedent for its contention that the NAA's regulations implicitly allow it to derecognize a SAC solely for the failure to obtain "prior approval" for an amendment to its State apprenticeship laws, I agree with Respondents that OATELS' interpretation of the regulations at issue here is plainly erroneous and inconsistent with the regulatory scheme governing the administration of the NAA. As described below, OATELS' interpretation is also inconsistent with the purpose of the Act.

OATELS' interpretation of the regulations is not reasonable in light of the purpose of the NAA; nor does it ensure continuous conformity with the Federal standards. Initially, I note here that ensuring continuous conformity with the Federal standards may be a legitimate goal. But, allowing OATELS to derecognize a SAC solely for failure to obtain prior approval of a statutory amendment may not always achieve that goal, or safeguard the welfare of apprentices and apprenticeship programs. Under the regulatory scheme envisioned by OATELS—that is, by

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<sup>28</sup> Like the implementing regulations found at 29 C.F.R. Part 29, the BAT Circulars do not provide any procedure or protocol for administering a "prior approval" requirement—i.e., there is no timetable, no deadlines, and no standard of review spelled out. In fact, the BAT Circulars do not state that OATELS may "derecognize" a SAC for failure to obtain "prior approval."

<sup>29</sup> In its Reply Brief (at p. 15), OATELS states, "BAT Circulars do not create [the prior approval requirement] but simply interpret an ambiguous existing requirement in the NAA's implementing regulations at 29 C.F.R. § 29.12(a)."



reading a “prior approval” requirement into the regulations—a State could conceivably amend its already-approved apprenticeship laws in a way that departs from or imposes requirements in addition to those prescribed in the federal regulations, but nevertheless operates in furtherance of the purpose of the Act more completely than any other state law, rule, procedure, regulation, or policy ever has or will, yet risk derecognition merely because it failed to obtain prior approval for it. Given that the purpose of the NAA is, according to OATELS, to promote the welfare of apprentices and apprenticeship programs, it is difficult to conclude that the NAA and its implementing regulations call for derecognition in such a circumstance.

Similarly, OATELS has not adequately explained how a “prior approval” requirement ensures continuous federal conformity. In support of its contention here, OATELS argues that “because the California needs test’s restrictions do violate the NAA and its implementing regulations and have harmful consequences . . . the state’s violation of the ‘prior approval’ requirement is even more serious here.” OATELS’ Br., at 36. However, I find OATELS’ argument does not withstand scrutiny. OATELS urges this Court, on the one hand, to read a rigid rule into the regulations—one that allows it to derecognize a SAC *solely* because of its failure to obtain “prior approval” for an amendment to its apprenticeship laws—but then argues that an analysis to determine the extent to which the State’s amendment conforms with the Federal standards is relevant to whether a “prior approval” rule exists. OATELS’ argument here suggests that if it were to find California’s “needs test” to be in conformity with the Federal standards, it would have ignored the fact that Respondents did not obtain prior approval, thereby undermining the credibility of the purported need for a “prior approval” requirement. Thus, by its own admission, OATELS’ “prior approval” rule alone does not serve the proposed purpose of ensuring continuous conformity. Indeed, absent any “prior approval” requirement, the regulations already provide OATELS with the authority to examine whether the “needs test” violates the NAA because it does not conform to the Federal standards.

In addition, OATELS has yet to explain why a “prior approval” requirement for recognized SACs is *implied* here, while such a requirement is *explicit* for approved apprenticeship programs. If the Secretary intended to ensure “continuous federal conformity” among “recognized” SACs by way of a “prior approval” mandate, he or she could have done so in a manner similar to the way in which “approved” apprenticeship programs are required to maintain continuous conformity with the Federal standards. Under 29 C.F.R. § 29.3, which governs “*Eligibility and procedure for Bureau registration of a program,*” “Any modification(s) or change(s) to registered or certified programs shall be promptly submitted to the registration office and, if approved, shall be recorded and acknowledged as an amendment to such program.” 29 C.F.R. § 29.3(g). Notably, section 29.3 contains language similar in all other respects to section 29.12—that is, section 29.3 spells out requirements a program must satisfy before being approved by the DOL, just as section 29.12 does for purposes of recognizing SACs. *See also* 29 C.F.R. § 29.7(b) (governing the cancellation of an approved program, similar to the derecognition process in section 29.13). That the Secretary drafted a “prior approval” requirement in section 29.3 but not in section 29.12 is significant, and confirms that such a requirement in section 29.13 is not reasonably implied.

Finally, I cannot accept as reasonable OATELS’ determination to act as a check and balance over the California legislature. Congress delegated authority to the DOL to issue

regulations governing the NAA, along with the authority to determine whether State laws conform to the Federal standards. To be sure, the regulations clearly provide the DOL the opportunity to examine State apprenticeship laws, and derecognize a State SAC if those laws do not conform. *See* 29 C.F.R. § 29.13. However, by allowing OATELS to make that determination—that is, to derecognize a State SAC—without first examining whether or not the state law actually conforms to the Federal standards (as the regulations require) is tantamount to granting OATELS a veto power over state legislatures.

Based on the foregoing, I find that OATELS’ interpretation of the regulatory provisions relevant to the issue of whether it has the authority to derecognize a SAC solely for its failure to obtain “prior approval” for an amendment to its apprenticeship laws is erroneous, unreasonable, and inconsistent with the NAA and its implementing regulations. Instead, the regulations are clear that once recognition is afforded under section 29.12, such recognition may be revoked only for failure to fulfill the requirements set forth in the regulations; “prior approval” for an amendment to a State’s apprenticeship law is simply not one of those requirements. Thus, I find that as a matter of law, the regulations found at 29 C.F.R. Part 29 do not permit OATELS to derecognize Respondents for failure to obtain “prior approval” from the DOL for California’s “needs test.”

### **The “Needs Test”**

The second issue here likewise requires me to examine the parties’ interpretations of the regulations issued by the Secretary of Labor pursuant to express delegation by Congress under the NAA. For the following reasons, I find that Prosecuting Party OATELS is entitled to judgment as a matter of law.

As the discussion above indicates, the language of the NAA provides little guidance for resolving the specific issue here—that is, whether the California “needs test” conforms to the federal standards set forth in 29 C.F.R. Part 29. I again note that Congress drafted the NAA in very broad terms, giving the Secretary wide discretion to formulate and administer regulations governing apprenticeship programs. *See generally Gregory Electric Co., Inc. v. United States Department of Labor*, 268 F.Supp. 987, 991 (D.S.C. 1967) (District Court held that Congress granted the Secretary wide authority to set regulatory standards and to give those standards “the widest possible application.”). Acting under the statute, the Secretary, by regulation defines what it means and takes to be recognized as a SAC capable of approving apprenticeship programs for Federal purposes. The Secretary, by regulation also authorizes OATELS to derecognize a SAC “for the failure to fulfill, or operate in conformity with, the requirements of this part.” 29 C.F.R. § 29.13. However, neither the NAA nor the implementing regulations explain explicitly what it means to “conform to the federal standards.” Thus, the parties have yet again offered conflicting interpretations of the regulatory scheme at issue. Under prevailing law, “[my] task is not to decide which among several competing interpretations best serves the regulatory purpose,” but “[r]ather, the agency’s interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *Shalala*, 512 U.S. at 512.<sup>30</sup>

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<sup>30</sup> *See* footnote 23, *supra*.

I note here that there is no dispute that OATELS has the authority to derecognize a SAC for “failure to fulfill, or operate in conformity with, the requirements of this part,” and for “reasonable cause.” 29 C.F.R. § 29.13. There is also no dispute in the instant case that OATELS has the authority, then, to derecognize a SAC for failure to operate under “an acceptable State apprenticeship law (or Executive Order), and regulations adopted pursuant thereto,” 29 C.F.R. §29.12(a)(1), or for a SAC’s failure to operate in conformity with any other provision within Part 29.<sup>31</sup> And, because the statute and regulations at hand are ambiguous as to the meaning of “reasonable cause,” “conformity with” the Federal standards, and “acceptable” State law, OATELS’ interpretation of the meaning of its own regulations is once again afforded “substantial deference,” with some limitation. *Shalala*, 512 U.S. at 512; *see Auer*, 519 U.S. 452; *Bowles*, 325 U.S. 410. Thus, I must determine specifically whether OATELS’ interpretation that the “needs test” is not an “acceptable State apprenticeship law,” and its enactment thereby constitutes “failure to...operate in conformity with” the Federal standards, is plainly erroneous or inconsistent with the regulation. *Shalala*, 512 U.S. at 512. For the following reasons, I find that OATELS’ interpretation is wholly reasonable and consistent with the regulatory scheme and purpose of the NAA.<sup>32</sup>

Upon its review of California’s apprenticeship laws and regulations, and relying on the purpose of the Act and implementing regulations, along with its authority to determine what amounts to “an acceptable State apprenticeship law and regulations,” *see* 29 C.F.R. § 29.12(a)(1), OATELS has determined that section 3075(b) of the California Labor Code—the “needs test”—fails to conform to the Federal standards for apprenticeships, and is inapposite to the “NAA’s directive to promote apprenticeship opportunities.” OATELS’ Br., at 25. In contrast, Respondents maintain that the California “needs test” does in fact operate to further the purpose of the Act.

In support of their respective interpretations, the parties here have offered two conflicting, yet reasonable, policy-based arguments. On the one hand, OATELS believes that more apprenticeship programs and increased competition among those programs will benefit apprentices—the intended beneficiaries of the NAA—by providing more opportunities for apprentices and improving the quality of the training services via free-market competition. According to OATELS, the “needs test,” like any other restriction on competition, operates contrary to the purpose of the Act and acts as a disservice to apprentices by limiting training opportunity. Respondents, on the other hand, maintain that the “needs test” benefits apprentices by ensuring that those apprentices who have successfully completed a program will be able to find gainful employment based on the needs of the employers within the labor market. Without the “needs test,” according to Respondents, there is likely to be too many skilled workers within a given trade and geographic area and not enough employment opportunities to accommodate them. As the discussion below explains, I find OATELS’ interpretation to be reasonable and

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<sup>31</sup> I further note that the phrase “the requirements of this part,” 29 C.F.R. § 29.13, clearly encompasses all of Title 29, Part 29 of the Code of Federal Regulations, including section 29.1, which sets forth the purpose and scope of the regulations, and contains virtually identical language to that of the NAA.

<sup>32</sup> Because there is no formula or standard set forth within the statute, regulations, or any relevant case law for determining precisely whether a state’s laws “conform” to the Federal standards, the analysis of the parties’ interpretations here must naturally entail consideration of the plain language of the federal statute and state law at issue, their respective legislative histories, and any guidance provided in the relevant case law.

consistent with the regulations and purpose of the Act because the “needs test” limits apprenticeship opportunity.

It is significant that the stated purpose of the NAA is to “safeguard the welfare of apprentices.” 29 U.S.C. §50; 29 C.F.R. § 29.1(b) (emphasis added). Indeed, the legislative history of the NAA and the relevant case law overwhelmingly establish that the NAA operates to promote the interests of those individuals seeking to enter the skilled trades; not the contractors hiring them, and not those running the apprenticeship programs. *See Associated Builders & Contractors, Inc. v. Reich*, 963 F.Supp. 35, 38 (D.D.C. 1997) (“*ABC 1*”) (“The [NAA] is neither pro-industry nor pro-labor union. It is pro-apprentice.”); *Associated Builders & Contractors, Inc. v. Reich*, 978 F.Supp. 338, 340 (D.D.C. 1997) (“*ABC 2*”) (“The NAA further was intended to bring employers and labor unions together for the benefit of apprentices and the public.”); *Gregory Electric*, 268 F.Supp. at 993 (“The wording of the National Apprenticeship Act, mandating the Secretary ‘to safeguard the welfare of apprentices’, leads also to the conclusion that this type of statutory and regulatory scheme was intended to promote the interest of laborers and not contractors.”); H.R. Rpt. 75-945, at 2-3 (June 7, 1937) (“It is surprising...that definite national steps had not been taken long ago to assure an adequate supply of skilled work[ers] and at the same time provide young people much-needed employment in the trades.”); *id.* at 5 (“With funds for apprenticeship promotion on a national basis, the Department of Labor will be carrying out the purpose for which it was created, to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment.”) (internal quotation marks omitted). Both parties even agree that at its most basic level, the NAA is designed to serve the interests of the individual apprentices; the difference here exists in the parties’ interpretations as to how to reach that end.

The “needs test” may arguably improve a graduating apprentice’s chances of obtaining post-graduation employment in a specific trade and within a particular geographic area, because it—in theory—is designed to match the number of apprentices being trained to the needs of the employers willing to hire skilled laborers. However, as the discussion above reveals, the NAA was designed to safeguard the welfare of *all* those seeking apprenticeship training, without consideration of how many other individuals desire training at the time and without any mention of the needs of the employers. While the legislative history demonstrates that there was some call to balance the number of apprentices with the need for their skills,<sup>33</sup> any statutory or regulatory means of achieving that balance was left out of the NAA and Part 29. Had the Secretary, in setting the standards and policies for administering the NAA, intended to restrict apprenticeship program expansion in the name of “safeguard[ing] the welfare of apprentices” with a geographically- and categorically-based “needs test,” the Secretary could have established specific guidelines within the regulations. Instead, as the legislative history and case law demonstrates, Congress and the Secretary intended to “safeguard the welfare of apprentices” by promoting the creation and expansion of as many apprenticeship programs as the needs of those seeking the skilled training demand, all the while leaving free market forces to regulate the quality of and need for new or expanded programs.

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<sup>33</sup> *See* Sen. Rpt. 75-1078, at 2 (July 22, 1937) (“There is constant need for some Federal agency to bring employers and employees together in the formulation of national programs of apprenticeship and to attempt to adjust the supply of skilled workers to the demands of the industry.”).

The “needs test”—as OATELS reasonably concludes—does not further the purpose of the Act in a manner expressed by Congress. On its face, the “needs test” limits the expansion of apprenticeship opportunities in a given trade and geographic area, and thus is inapposite to the purpose of the Act to serve the interests of apprentices. Despite Respondents’ contention that “none of [the provisions set forth in sections 3075(b)(1)-(3)] restrict the approval of new programs,” CDIR’s Br., at 22, the plain language of section 3075(b) is undoubtedly restrictive. By limiting the definition of “training needs” to include only a finite geographic area, the language of subsection (b) does not adequately account for the wide variety of needs of the individuals seeking apprenticeship training. Moreover, subsection (b) allows more than one program within a geographic area only under very limited circumstances, which are dictated by the actions or inaction of employers and/or contractors. Consequently, the language of section 3075(b)—instead of focusing on the needs of the apprentices seeking training—focuses on the needs of the employers and contractors in violation of the purpose of the Act. Simply stated, absent such a strict definition of “training needs,” California law would, on its face, permit more apprenticeship opportunities for more individuals seeking training. Protecting the already-existing programs within a geographic area from competition is not a goal of the Act or implementing regulations, and is in fact contrary to the purpose of the Act and regulations because it restricts apprenticeship training opportunities.

Prior to the promulgation of the restrictive definition of “training needs” presented in section 3075(b), the California apprenticeship “training needs” were not defined per se, and were simply regulated by the free market. However, with the newly enacted “needs test” the training needs are automatically restricting new programs geographically and categorically before the market has a chance to work.<sup>34</sup> Meanwhile, Respondents have offered no argument that California needed to enact section 3075(b), or that the free market was inadequately regulating the training needs of the State. Other than spelling out very specific circumstances under which new programs will be approved, were subsections (b)(1)-(3) of section 3075(b) enacted to cure any problem balancing the supply of apprentices with the demands of the market in California? Were they enacted specifically to help apprentices land “meaningful employment?” Respondents have not argued that such problems actually existed prior to 1999 in the State of California, or that section 3075(b) was designed to specifically address such concerns. As a result, it appears as though the definition of “training needs” was promulgated arbitrarily to ensure existing programs would not face unnecessary competition, and allow for new programs only under very limited circumstances.

Plainly, subsection (b)(1) sets the stage by erecting a new program’s first hurdle to gaining approval and introduces California’s clear intent to limit competition among programs within a geographic area. Thus, without any consideration of the “training needs” of individuals seeking apprenticeship training in a geographic area, invoking subsection (b)(1) requires nothing more than determining whether one or no programs exists in that geographic area. As long as there are none—i.e., there is no competing program—a new program is ripe for approval.

Yet, if a program exists in the geographic area, other circumstances must be present before a new program is approved. The problem here is that subsection (b)(2) does not

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<sup>34</sup> Admittedly, section 3075(b) allows for more than one program in a geographic area, but “only”—as the “needs test” states—under very specific circumstances.

contemplate California's future training needs. As OATELS has pointed out, subsection (b)(2) of the "needs test," which allows for a new program if an existing program does not have the capacity to dispatch sufficient apprentices to qualified employers at a public works site, addresses only an immediate concern without consideration of the existing programs' capacity to supply sufficient apprentices beyond what is needed at a public works site at that time. But, the NAA and its implementing regulations were not drafted to address immediate labor shortages; rather the purpose of the NAA was to create a national program designed to deal with a real inadequacy within the skilled trades threatening the future of American skilled labor. *See* H.R. Rpt. 75-945, at 2 (June 7, 1937); *see also* H.R. Subcomm. of the Comm. on Lab., *To Safeguard the Welfare of Apprentices: Hearings on H.R. 6205*, 75th Cong. 6 (Apr. 22 1937) (statement of C.R. Dooley) (acknowledging a significant shortage of skilled labor throughout the United States). And, as the parties agree, there is a substantial and constant need for trained apprentices throughout the country and throughout the State of California that must be considered. In addition, subsection (b)(2) requires failure or inaction on the part of existing programs before a new program can be approved. Thus, not only does subsection (b)(2) restrict the approval of new programs unless there is an immediate need without regard to the future landscape of apprenticeships in California, it—like subsection (b)(1)—does not adequately consider the needs of the individuals seeking training programs.

Finally, subsection (b)(3) similarly focuses solely on the action or inaction of existing programs without any examination of the needs of the apprentices. In addition, subsection (b)(3) requires the CAC—rather than marketplace forces—to determine whether a program is "deficient," setting the stage for potential miscalculation, apathy, and abuse. For example, the parties have argued over a concern raised by OATELS and its *amici*: that section 3075(b) operates to maintain a monopoly for union-based programs in California. According to OATELS and its *amici*, section 3075(b) facilitates the monopoly because it provides those in a position to grant approval with the means to maintain the status quo.

I recognize the concerns and arguments raised by the various parties regarding the statistical discrepancy between the number of unilateral programs versus the number of joint programs approved in California. The stipulated facts submitted by the parties suggest that joint programs may enjoy a numerical "monopoly"—as OATELS and its *amici* put it—in California. However, the record, as presently developed, does not provide an adequate basis upon which to determine whether the "needs test" contributes to, establishes, causes, or maintains such a "monopoly." In any event, resolution of the question of the existence or absence of an apprenticeship monopoly, or whether the "needs test" maintains the status quo, is unnecessary to render a decision on the precise issue at hand—that is, whether section 3075(b) conforms to the Federal standards. Even assuming the "needs test" does not operate to create a joint program monopoly in California, the language of section 3075(b) is not consistent with the purpose of the NAA and the regulatory scheme at issue because it restricts apprenticeship opportunity regardless of whether new programs are union-affiliated or not. Thus, the extent to which the "needs test" causes a joint program monopoly is not a material factual dispute, and does not preclude rendering a decision on the parties' cross motions for summary judgment. Accordingly, in making my determination in this matter, and given the procedural posture of these

proceedings, I have not considered whether the “needs test” operates to create a joint program monopoly at the expense of unilateral programs in California.<sup>35</sup>

The relevant case law suggests that OATELS’ design to interject more new and expanded programs into the competitive marketplace without statutory or regulatory limitation best facilitates the purpose of the Act and the intentions of Congress to create apprenticeship opportunity and quality training in the best interests of apprentices. First, competition among the most possible programs best serves apprentices’ interests by requiring programs to provide quality training or risk being forced out of the market. The California Supreme Court, which has had the opportunity to examine the NAA on a number of occasions, has determined that the purpose of the NAA is best served through free market competition among existing and new apprenticeship programs. *Southern California Chapter of Associated Builders and Contractors, Inc. v. California Apprenticeship Council*, 4 Cal. 4th 422, 452, 841 P.2d 1011, 1029, 14 Cal. Rptr. 2d 491, 509 (1992) (“The legislative history of the Fitzgerald Act and the regulations promulgated thereunder...do not demonstrate a Congressional intent to restrict competition in this area or to prefer existing training programs over new programs.”). Second, the most apprentices are served by providing the most opportunity to participate in an apprenticeship program. The United States District Court for the Southern District of Texas has held that providing more opportunities to join apprenticeship programs serves the purpose of the Act. *Daugherty v. United States*, 1974 WL 215, \*4, 86 L.R.R.M. (BNA) 3075, 8 Empl. Prac. Dec. P 9585, 74 Lab. Cas. P 33,100 (S.D.Tex. 1974)<sup>36</sup> (upon examining a number of BAT Circulars and the NAA, the District Court stated, “An increase in the number of registered programs in a given area will provide more opportunities for people to be apprentices, to learn and practice the skills of the trade which they desire to enter in apprenticeship programs that they can be confident meet certain minimum standards because they have been registered and are continually monitored by BAT.”). The “needs test” does not promote competition among programs, does not consider the needs of individuals seeking apprenticeship training, and limits training opportunities for apprentices.<sup>37</sup>

Based on the foregoing, and under the guidance of *Chevron* and *Shalala*, I find that OATELS’ interpretation of the regulatory scheme that the California “needs test” is an

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<sup>35</sup> I also note that subsection (c) of section 3075 does not save the “needs test” from its otherwise restrictive language and effect. As OATELS correctly points out, section 3075(c) has never been implemented, and “by its own terms, cannot take effect until a regulation establishing the special circumstances waiving the needs test for approval of a program is adopted.” OATELS’ Reply Br. to Joint Programs, at 6. No such regulation has been adopted.

<sup>36</sup> *Daugherty v. United States*, 1974 WL 215 (S.D.Tex. 1974), discussed briefly by both parties, and a copy of which is part of the record in this proceeding, is not published in the Federal Supplement. It is published in a number of other reporters, as indicated in the lengthy citation. Nevertheless, given that the instant case is one of first impression and there is a significant lack of precedential authority related generally to the NAA, *Daugherty* is considered persuasive authority in the instant proceeding.

<sup>37</sup> By arguing that the “needs test”—which limits the approval of new or expanding programs geographically—ensures employment opportunities for graduating apprentices, and thus acts in the best interest of apprentices, Respondents appear to assume that graduating apprentices will stay in that same geographic area upon graduation despite their pronouncement that California apprentices graduate with a portable and transferable certificate of apprenticeship.

unacceptable state law that limits apprenticeship opportunity rather than safeguards the welfare of apprentices, and is therefore not in conformity with the requirements of Part 29, is reasonable and consistent with the purpose of the Act and the regulatory scheme. While Respondents' articulated goal to provide "meaningful employment" for those individuals training in apprenticeship programs is also sound policy in light of the purpose of the Act, the "needs test" does not adequately account for the needs of all individuals seeking apprenticeship training and clearly limits their opportunities in California. Consequently, OATELS' decision to derecognize Respondents as SACs under 29 C.F.R. §29.13 is reasonable, and OATELS is entitled to judgment as a matter of law.

### **CONCLUSION OF LAW**

In sum, and after close examination of the entire record, I find that as a matter of law the NAA and its implementing regulations do not provide OATELS with the authority to derecognize Respondents as a SAC under 29 C.F.R. § 29.13 solely for Respondents' failure to obtain prior approval from OATELS before enacting and implementing section 3075(b) of the California Labor Code. I further find that as a matter of law OATELS may reasonably derecognize Respondents as a SAC under 29 C.F.R. § 29.13 based on OATELS' interpretation that the California "needs test" does not conform to the Federal standards governing apprenticeships under the NAA and its implementing regulations. Therefore, Prosecuting Party OATELS is entitled to judgment as a matter of law.

**SO ORDERED.**

**A**

**JOHN M. VITTON**  
Chief Administrative Law Judge

Notice of Review: This Recommended Decision and Order and the Administrative File in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Ave., NW, Washington, DC 20210. 29 C.F.R. § 29.9(b);