IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

ASOCIACIÓN DE TRABAJADORES FRONTERIZOS, JOSE DE LA CRUZ, SANDRA MORA, RODRIGO MORIN, SOLEDAD RENTERIA, AND MARISELA RODRIGUEZ, Plaintiffs;	§	Civil Action No.
	§	EP-04-CA-400-FM
v.	§	
U.S. DEPARTMENT OF LABOR, Defendant.	§	

REPLY MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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In reply to the Department of Labor's Response to Plaintiffs' Motion for Summary Judgment (DOL Response), Plaintiffs would respectfully show the Court:

I. Introduction

This case is not about matters committed to agency discretion under *Chevron's* second step as DOL argues; it is about three specific matters that Congress itself directly decided, and is properly resolved under *Chevron's* first step without deference to DOL's interpretation of the law.[1] Plaintiffs are entitled to summary judgment on all three issues.

First, DOL concedes that the law prohibits the approval of incomplete training such as stand-alone ESL and GED classes for workers who need vocational training, and DOL admits that it allows incomplete training to be approved under what it claims are limited circumstances. DOL argues only that its violation of the law is not "systemic," but DOL's policy creating an exception to the law is itself a systemic violation regardless of how many workers are affected, and in any event there is no genuine issue but that DOL's exception is not applied in a limited fashion.

Second, DOL concedes that 80% wage replacement is the goal of Trade Act training, and that Congress ordered DOL to issue all regulations necessary to implement the statute. DOL has no regulations that implement Congress's 80% wage replacement goal, and instead allows state agencies to reject the standard. Rather than respond to Plaintiffs' claim, DOL makes up a new 80% wage-replacement issue that is not before this Court, and then smites its own straw man.

Third, the Act requires that training be provided on-the-job whenever possible, and Congress expressed that requirement by repeatedly using mandatory terms. DOL responded with a regulation that allows on-the-job training (OJT) to be entirely ignored. DOL defends

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[1] If Congress directly decided an issue, an agency's contrary interpretation of the law gets no deference. *Chevron U.S.A., Inc. v Natural Resources Def Council*, 467 U.S. 837, 842-43 & n.9 (1984); *FDA v. Brown & Williamson Tobacco Corp* , 529 U.S. 120, 132-33 (2000) (courts must look to each statute's text, structure, history, and purpose to decide whether Congress directly decided an issue under *Chevron*); DOL Resp. at 4, 14.

the regulation by citing congressional language that it claims softened Congress's directive, but that language does no such thing.

Throughout DOL's Response, the agency claims to draw on its expertise in applying the training statute in ways that enable limited English proficient (LEP) workers to enhance their skills as much as possible in light of the educational barriers they face.[2] But the facts in this case are not seriously challenged by DOL, and they paint an entirely different picture.[3] They show that DOL has consistently taken the low road when it comes to training LEP workers. DOL consistently applies the Trade Act in ways that increase the use of cheaper ESL and GED courses as substitutes for the bilingual vocational training that DOL knows these workers need.

As discussed below, Facts 71, 81, and 96 should be the only facts necessary to conclusively establish that DOL violates the Trade Act in the three respects claimed by Plaintiffs, and Facts 40 through 62 show that DOL compliance with the law would improve training outcomes for some if

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[2] The parties agree that the Trade Act must be liberally construed to help workers return to "suitable employment" as this term is defined in 19 U.S.C. § 2296(e). DOL Resp. at 15, 19; 20 C.F.R. §§ 617.2 & 617.52(a); *UAW v Brock*, 568 F. Supp. 1047, 1053 (D.D.C. 1983), *aff'd in part*, 816 F.2d 761 (D.C. Cir. 1987). Unfortunately, DOL may not always be counted upon to apply the Trade Act in ways that help workers. *See e.g Employees of Chevron v. DOL*, 298 F.Supp. 2d 1338, 1348-50 (Ct. Int'l Trade 2003) (This "case stands as a monument to the flaws and dysfunctions in the Labor Department's administration of the nation's trade adjustment assistance laws—for, while it may be an extreme case, it is regrettably not an isolated one. ... [A] growing line of precedent involving court-ordered certifications [evidences] the bench's mounting frustration with the Labor Department's handling of these cases. ... Whether the result of overwork, incompetence, or indifference (or some combination of the three), the Labor Department deprived workers of the job training and other benefits to which they are entitled.").

[3] To facilitate ready access to all of the parties' arguments as to each fact, the attached Reply Statement of Facts collects in one place all of the facts that Plaintiffs claim are undisputed, DOL's response to each fact, and Plaintiffs' reply to each response. Examination of this document shows that there is no genuine issue of material fact requiring a trial in this case. Nor is there apparently a dispute over the relevant evidence, for DOL's fact appendix largely consists of copies of the same documents submitted by Plaintiffs, which Plaintiffs deliberately selected to show that proof of the facts may be made largely through DOL's own statements and documents.

Under Rule 56, "a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1985). Here, DOL either concedes the critical facts or rests upon conclusory denials lacking the factual basis required by Rule 56(e). With no evidence to contest Plaintiffs' thoroughly supported statements of fact, DOL substitutes baseless objections and argumentation, none of which is sufficient under the rules to show that a genuine issue remains to be tried as to any of the stated facts. *See Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd*, 731 F.2d 831, 836 (Fed. Cir. 1984).

not all LEP trade-dislocated workers. The injunction that Plaintiffs seek is not only necessary to secure DOL's compliance with Congress's decisions, but it is a modest means of achieving that compliance. In essence, the injunction would send DOL back to the regulatory drawing board to plan how it will fully comply with the law in cases where LEP workers qualify for the training Congress prescribed.

II. DOL Admits to Creating What is a Systemic Exception to the Training Completeness Requirement.

As to the applicable legal standard on training completeness, DOL concedes that the parties have no "dispute as to the Department's policy regarding this issue: the Department requires state agencies to approve training that renders an individual job ready." DOL Resp. at 17-18.[4] DOL bases its entire defense upon whether a systemic violation of this standard exists that requires a remedy from this Court. Yet DOL fully admits that it allows state agencies to approve training that is not expected to render a worker fully job-ready under what it claims are limited circumstances. DOL Resp. at 18-19 ("there may be isolated instances in which, because of the time and monetary constraints of the Trade Act, incomplete training may be approved"); DOL

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[4] As an aside, DOL suggests that the training completeness requirement is more a creature of DOL's regulation than of Congress's direct choice. DOL Resp. at 16. But because the parties agree on what the legal standard established by the regulation is, the source of the training completeness requirement need not be decided in this case. When there is no question of interpretation of an agency's regulation, federal courts enforce regulations against agencies under 5 U.S.C. § 706 just as they do statutes. *United States v Caceres*, 440 U.S. 741, 754 & n.18 (1979) ("Agency violations of their own regulations, whether or not also in violation of the Constitution, may well be inconsistent with the standards of agency action which the APA directs the courts to enforce.").

Moreover, the statute's text—"reasonable expectation of employment following completion"—shows that Congress decided the training completeness issue. 19 U.S.C. § 2296(a)(1)(C). DOL offers only its conclusory assertion that Plaintiffs read this statutory text "out of context." DOL Resp. at 16 n.13. It does not attempt to explain how an agency could determine that a worker has a "reasonable expectation of employment following completion of such training" when the training under consideration for approval does not provide all of the skills that the worker needs to be job ready. *See also* Fact 67 (DOL admits that the criteria of 19 U.S.C. § 2296(a)(1) are themselves the source of the requirement that no training may be approved unless it will render a worker "job ready."); Fact 75 (remedial education was approved as Mr. Trejo's Trade Act training, and in the blank requiring an explanation of the source of the "reasonable expectation of employment" requirement having been met, "after vocational training" is written). The history of the statute as reflected in DOL's contemporaneous regulation, 20 C.F.R. § 617.22(a)(2), confirms that the decision was *Congress's*. Pl. Mem. at 9 & n.7.

Admission Nos. 19, 20, and 22 (PA-24, cited in Fact 71).[5] It is this very policy of allowing an exception to the law that Plaintiffs claim is a systemic violation of the applicable legal standard, and that Plaintiffs seek to correct by the proposed injunction. *See Hampe v. DOL*, 364 F.3d 90, 92 n.3, 95 (3d Cir. 2004) (summary judgment granting injunctive relief against DOL is ordered where DOL "knew of and condoned" a state agency's illegal policy under the Trade Act, "and even encouraged the policy").

DOL argues that its exception to the training completeness requirement is limited and necessary to protect workers. DOL Resp. at 19. But DOL's exception is neither limited nor necessary. Strict adherence to the training completeness requirement as written would not diminish any worker's access to training, and would improve training outcomes for many workers.

DOL's exception to the training completeness requirement is not limited, primarily because it does not appear in any formal DOL regulation or other policy statement. The exception is a wink and nod from DOL when state agencies approve incomplete training for LEP workers. *E.g.* Fact 70. Consequently, state agencies have no formal guidance on how to apply the exception, *i.e.* how to determine when a worker's pre-training skills "may be insufficient," or how to determine which of the available training programs provides "as many skills as possible." *See* Fact 71.

Historically, DOL has been well aware that the Texas Workforce Commission (TWC) has driven a truck through DOL's "limited" exception:

> TAA training is limited to 104 weeks by law and the worker must complete the proposed program and be job ready within this period. Many of the affected workers in El Paso required long-term training well beyond the 104 week period; thus necessitating a coordinated effort by all programs to provide the resources needed for a lengthy training. The training infrastructure was not in place to handle

[5] In light of the language of these three admissions and the requirement of Fed. R. Civ. P. 36(a) that a party "shall specify so much of [each requested admission] as is true and qualify or deny the remainder," DOL's suggestion that it really "*denied*" the policy at issue in this case is laughable. *See* DOL Resp. at 19 n.19.

> the volume or the needs of this special group of workers. Most workers required some ESL/GED plus skill training.

DOL Texas Trade Act Review (1/14/2000) at 10 (PA-39); Facts 68-70. Yet DOL has not complained to TWC about this, demanded specific corrective action, nor formalized its exception in a more coherent policy that would limit how broadly the exception is applied. Facts 70-74; Hearing Transcript (10/20/2003) at 28:2-9 (PA-19) (DOL's counsel admitted in response to this Court's pointed question that he is unaware of *any* changes that DOL has made in its policies for Trade Act administration).

DOL repeatedly urges the Court to ignore DOL's history of disregarding the training completeness requirement in El Paso,[6] and to focus on the present. But the Court need look no further than DOL's Response to see that DOL not only expects to continue applying the policy exception articulated in Fact 71, but that the exception is "especially likely" to affect the LEP workers that comprise ATF's membership. DOL Resp. at 19 & n.20; Fact 3. By attempting to justify its illegal exception on prudential grounds, DOL admits that the exception will continue to operate in Texas. Of course, DOL must admit that it allows less than complete training to be approved for some workers, because TWC conceded that it practices DOL's exception to the training completeness requirement. Fact 73. To understand how widely DOL's training completeness exception is being applied in El Paso, well past the 1997-2000 time period that DOL wishes to forget, the August 14, 2003 testimony of five-year veteran El Paso Trade Act case manager Gloria Candelaria is particularly relevant:

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[6] The evidence that TWC routinely approved incomplete Trade Act training for thousands of LEP workers in the 1997 to 2000 period, and did so with DOL's blessing, is thorough and conclusive, and includes DOL's admission at the October 20, 2003 hearing. Facts 68-76. For DOL to "assume *arguendo*" that this evidence is conclusive is utterly disingenuous. *See* DOL Resp. at 18 n.17.

> Q. Okay. Do you understand you – your testimony to be that, when you saw participants who needed vocational training, but also needed a lot of ESL and GED training, that you would recommend approval of a training contract, that ex— that consisted exclusively of ESL and GED courses, and wait until later to decide what vocational training would be approved for that worker?
> A. Yes, sir. Uh-huh.
> ...
> Q. What is your estimate of the percentage of people, who came to you requesting Trade Act training, who were enrolled in ESL and GED training?
> A. Roughly my estimate would be, about 90 percent.
> ...
> Q. Am I correct that there have been no changes that you're aware of, in the procedures that lead all the way up to your decision to recommend Trade Act training approval?
> A. Okay. The only changes that have taken place, is that we don't have the quality check people reviewing what we have submitted....
> Q. But the policies that we've discussed today, as far as how you decide what training to recommend for approval, those have not changed?
> A. They haven't changed.

Candelaria Depo. at 21:7-15, 23:1-5, 74:13-25 (PA-4), Fact 74. Thus, there is no genuine issue but that DOL's exception to the training completeness requirement is not applied in a limited way in El Paso, at present or in the past. Facts 68-76.

DOL claims that approval of Mr. Trejo's training complied with the Trade Act because a complete training program was ultimately provided to him. DOL Resp. at 20. But DOL does not dispute that TWC approved remedial education as Mr. Trejo's only Trade Act training even when the training approval form itself acknowledged that Mr. Trejo would have a reasonable expectation of employment only "after vocational training." Approval of remedial education for Mr. Trejo violated the training completeness requirement regardless of whether Mr. Trejo's tenacity ultimately enabled him to get the complete training that he needed. Fact 75.

Next, DOL suggests that "ESL/GED" was named as the occupation for which Mr. Gilbert was trained in March 2003 simply because ESL/GED may have been the only skill that Mr. Gilbert needed to become job ready. DOL Resp. at 20 & n.23 (approving of TWC's practice of naming

ESL/GED as the occupation in these cases). Unfortunately, DOL's representation to this Court is directly at odds with its own regulations, which require that an *occupation* be named as the object of Trade Act training for every worker. 20 C.F.R. §§ 617.22(f)(3) ("a training program may consist of a single course or group of courses which is designed and approved by the State agency for an individual to meet a specific occupational goal"); 617.23(d)(3) ("In determining suitable training the State agency shall exclude certain occupations, where ... the occupation provides no reasonable expectation of permanent employment."). Because TWC declined to name a target occupation for Mr. Gilbert's Trade Act training, no "reasonable expectation of employment" determination could have been made, and his training was by definition incomplete. *See also supra* at 6-7 (Ms. Candelaria described what happened to Mr. Gilbert as standard practice). That in December 2004, DOL would defend TWC's treatment of Messrs. Trejo and Gilbert as consistent with the law only confirms the continuing need for injunctive relief in this case.

DOL's exception to the training completeness requirement is no more necessary than it is limited. DOL invites this Court to accept that some workers' education is so deficient that they cannot be trained for any occupation whatsoever in the two and one-half years allowed by the statute, even though every one of those workers held a steady job before entering training. *See* 19 U.S.C. § 2291(a)(2) (requiring 6 months' employment before layoff). DOL offers nothing but its own speculation in support of its argument, and fails entirely to state, let alone support, how many workers would fall into this "untrainable" category, nor what basis could accurately be used to make a determination of "untrainability." There is no reason in logic or evidence to suggest that if

DOL enforces the training completeness requirement as written, this would result in fewer workers being approved for Trade Act training.[7]

The Court has undisputed evidence before it, however, to establish that strict adherence to the training completeness requirement would improve training outcomes for at least some LEP workers. DOL itself claims that adequate bilingual training opportunities are available to LEP workers in El Paso, and it told this Court that it is "horrified" that more workers are not in these programs. Facts 51-52. Thus, the parties agree that more workers in bilingual training programs as opposed to serial stand-alone ESL/GED training programs will result in better training outcomes for workers. *See also* Facts 49, 62 (serial training has been criticized as a waste of millions of federal taxpayer dollars). Nor is there any genuine issue of fact but that bilingual training renders workers job-ready faster than serial training. Fact 54. There is no genuine issue of fact but that strict adherence to the training completeness requirement would result in more workers enrolling in bilingual training, and that bilingual training is more effective in rendering workers job ready in higher paying occupations than is serial training. Facts 48 to 55; Pl. Mem. at 13-14.[8] In sum, the record firmly establishes that requiring absolute training completeness will

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[7] Moreover, DOL's own Office of Inspector General (OIG) conducted a detailed audit of Trade Act administration and squarely blamed the *absence of training approval standards* for hurting workers. DOL OIG 1993 Audit at 13-17 (PA-61); Fact 87. DOL's argument that *diminishing* the existing written standards for training approval by applying an unwritten exception would help workers is thus inconsistent with the conclusion of its own OIG.

[8] DOL's attempted response to these facts appears at DOL Resp. 20 n.22. All arguments in DOL's footnote 22 are irrelevant or wrong. That "remedial training is contemplated as approvable training under the Act" has nothing to do with which method of training produces better results for LEP workers, *see* Fact 67. DOL's training creation argument is not only irrelevant to which type of training is better for workers, it is wrong, because 20 C.F.R. § 617.23(a) shows that DOL not only has an "obligation to create training programs," but that it has delegated that obligation to state agencies, and Fact 51 proves that DOL does not consider the creation of bilingual programs to be the obstacle in El Paso. Plaintiffs debunk DOL's training "choice" argument at Pl. Mem at 12-13; Fact 40. DOL's argument that the "efficacy of each individual training decision is a factual contention" is irrelevant because what is at issue in this case is whether approving incomplete serial training is better for workers than approving bilingual training that renders them fully job-ready. The fact that workers may appeal decisions to State courts has nothing to do with which training method is better. DOL concludes note 22 with a conclusory whopper: "This matter is not ripe for summary judgment if a decision hinges on the factual issue regarding bilingual vs. serial training." DOL presents nothing to indicate that

increase the benefits that workers derive from bilingual training over the discredited serial training methods that are allowed under DOL's illegal policy as stated in Fact 71.

III. 80% Wage Replacement Is Congress's Goal for Training, and DOL Has Failed to Regulate as Congress Requires to Ensure That This Goal is Pursued in the Training Approval Process.

Contrary to DOL's assertions, Plaintiffs have never claimed that the Trade Act requires that post-training employment guarantee an 80% replacement wage, nor have Plaintiffs claimed that DOL violates the Trade Act by failing to issue regulations that require a specific post-training wage rate. Indeed, Plaintiffs agree that there is no statutory requirement that post-training employment must result in 80% wage replacement.

Because DOL fundamentally misstates Plaintiffs' claim, it devotes ten pages of its response to proving a point not at issue, and DOL largely fails to address Plaintiffs' actual claim—that DOL has failed to regulate the training approval process in pursuit of the Trade Act's *goal* of returning dislocated workers to employment paying at least 80% of their prior wages.[9] DOL agrees that 80% wage replacement is the goal of Trade Act training, but DOL never explains its failure to promulgate regulations requiring state agencies to pursue that goal when making training approval decisions. It is DOL's failure to comply with the statutory mandate to regulate, rather than a failure to require a particular outcome, that is at issue in this case.

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such a "factual issue" exists when it is DOL's duty to do so under Rule 56(e). *See* Facts 45-62; note 2, *supra*

[9] While the 80% wage-replacement argument is DOL's most voluminous red herring, it by no means swims alone. For example, at page 16, DOL emphasizes that "there may be instances in which remedial education or ESL is all the training that an individual needs to become 'job ready,'" even though Plaintiffs' training completeness argument is explicitly and exclusively directed at the overwhelming majority of LEP workers who need *both* ESL and vocational training to become job ready. Facts 68-76. Next, at pages 21 and 22, DOL suggests that Plaintiffs' claims really belong in state court, when DOL previously conceded that this Court has jurisdiction to issue declaratory and injunctive relief if it concludes that DOL's policies violate the Trade Act. DOL Brief at 5, Civil Action No. EP-02-CA-131, Docket No. 75. And, at page 25, DOL explains that the "Department, as the agency entrusted to administer the Trade Act, has determined that the statute does not require that OJT be available in every instance," even though Plaintiffs have not argued that the Trade Act contains such a requirement. *See also* note 8, *supra*.

A. Congress Established 80% Wage Replacement as the Goal of Trade Act Training

> DOL admits that 80% wage replacement is the goal of Trade Act training:
>
> While this program provides trade-impacted dislocated workers with job search assistance and, if necessary, retraining, income support services, job relocation, and out-of-area job search assistance, its ultimate goal is to place participants in employment that pays at least 80% of their pre-dislocation wage.

DOL Monitoring Letter to TWC (3/8/2001) at 4 (PA-45); Fact 79; DOL Resp. at 11. In seeking discretion under *Chevron's* step two, however, DOL claims that this goal is a creature of DOL, not of Congress. *Id.*; Fact 77. Not true. The same Congress that enacted 19 U.S.C. § 2296(e), which defines "suitable employment" in terms of 80% wage replacement, stated:

> If the Secretary of Labor determines that there is no suitable employment available and suitable employment would be available if the adversely affected worker received the appropriate training, the Secretary may approve such training.

S. REP. NO. 97-139, 534 (1981), *reprinted in* 1981 U.S.C.C.A.N. 396, 710, 800 (emphasis added). After Congress set the 80% wage replacement standard for suitable employment, DOL officially acknowledged: "The Act created a program of trade adjustment assistance (hereinafter referred to as TAA) to assist individuals, who became unemployed as a result of increased imports, return to suitable employment." 20 C.F.R. § 617.2 (emphasis added). DOL further admits that it has never promulgated a definition for "suitable employment" in 20 C.F.R. § 617.2 that differs from the 80% wage replacement standard of 19 U.S.C. § 2296(e). DOL Admission No. 26; Fact 77. DOL's designated Trade Act policy spokesperson testified that he understands this goal to be "Congress' intent." Kooser Depo. at 106:1 to 107:3; Fact 77. Any one of these facts conclusively establishes that Congress is the source of the 80% wage replacement goal for Trade Act training.

In support of its claim that DOL alone established the 80% wage replacement goal, DOL says that suitable employment was absent from the express purposes that Congress stated for Trade

Act training in the original 1974 Trade Act. DOL Resp. at 6 n.3. This argument only demonstrates a careless reading of the 1974 statute, for its text explicitly names "suitable employment" as the goal of Trade Act training. Fact 33. When Congress defined "suitable employment" in terms of 80% wage replacement in 1981, DOL's regulation incorporated Congress's definition of "suitable employment" into its statement of the sole purpose of Trade Act training. Facts 36-38.

B. Congress Requires DOL to Regulate as Necessary to Pursue 80% Wage Replacement

Congress ordered DOL to regulate Trade Act training as necessary to ensure that Congress's 80% wage replacement goal is pursued. 19 U.S.C. §§ 2296(a)(9) and 2320; 20 C.F.R. § 617.52(a). When interpreting an agency's enabling act under *Chevron*, the "inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented." *Brown & Williamson*, 529 U.S. at 159-60. The more an issue touches a statute's "core objective," the more courts search for a statutory construction that is consistent with Congress's expressed intent. *Id.* "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration." *Id.*

C. DOL Does Not Regulate Trade Act Training Approval to Pursue 80% Wage Replacement

DOL has not issued any regulation stating what actions state agencies must take in the training approval process to pursue Congress's 80% wage replacement goal. Fact 81.[10] Although DOL has implemented Congress's "suitable employment" goal for other Trade Act benefits in

[10] DOL cites 20 C.F.R. § 617.22 in arguing that "the Department has promulgated regulations that set forth the criteria to be used as a basis for making training determinations under 19 U.S.C. § 2296(a)(1)." DOL Resp. at 4 n.2. But nothing in this regulation states what actions state agencies must take in the training approval process to pursue or consider Congress's 80% wage replacement goal. Fact 81.

other regulations, *see, e.g.*, 20 C.F.R. § 617.32(a)(4) (job search eligibility) and 20 C.F.R. § 617.42(a)(6) (relocation allowance eligibility), DOL admits that it "has carefully limited its use of suitable employment in the regulations" to avoid mentioning any wage replacement goal in its training regulations. DOL Resp. at 11 n.9. It is this absence of regulation for the Trade Act *training* benefit that Plaintiffs challenge in this case and that DOL, choosing instead to brief a non-issue, has failed to address.

Not only has DOL refused to issue a regulation implementing Congress's wage replacement goal for Trade Act training, it has explicitly informed state agencies that this goal is non-binding upon them! Fact 78 ("No objection."). This is why TWC feels free explicitly to reject Congress's 80% wage replacement goal in its official Trade Act administration policies, which DOL approved. Facts 89-94.

D. The Wage Replacement Injunction that Plaintiffs Seek Will Help Workers

Clearly, DOL could issue regulations requiring *consideration* of the 80% wage replacement goal in the context of training approval decisions, and it is undisputed that DOL has failed to do so. Only DOL's mischaracterization of Plaintiffs' claim leads it to conclude that Plaintiffs seek regulations prohibiting the approval of any training not *guaranteed* to lead to employment at 80% of prior wages. DOL Resp. at 15 and n.11. Nothing could be further from the truth. Plaintiffs seek to enjoin DOL to issue regulations that require state agencies at least to *pursue* Congress's wage replacement goal in their training approval decisions. These regulations do not demand a particular result as a condition of training, but would improve the training outcomes for LEP workers through the increased provision of bilingual vocational training instead of remedial education classes that carry no expectation of increased earning capacity after training. *See* Pl. Mem. at 22-23 (describing four specific options available to DOL).

IV. Congress Mandated that DOL *Provide* Trade Act Training On-The-Job Insofar as Possible, But DOL's Regulation "Makes OJT a *Priority*, Insofar as Possible."

DOL succinctly states why Plaintiffs seek summary judgment: "The Act only requires that OJT be provided insofar as possible. The Department makes OJT a ***priority***, insofar as possible." DOL Resp. at 24-25 (emphasis in original). DOL never defines what its "priority" means in terms of how state agencies must choose between on-the-job training and classroom training when both are available to a worker and both meet the requirements of the Trade Act. *Id.* at 25 n.26. DOL provides no guidance to state agencies as to how they are to choose among training options when both OJT and classroom training are available and meet all statutory requirements for a worker. Fact 96. Under this regulatory scheme, state agencies are free to disregard on-the-job training as a Trade Act training option. That is what TWC did for years on end. Facts 97-100. DOL knew this and allowed it. Fact 101. Plaintiffs seek summary judgment that DOL's regulatory scheme illegally diminishes the training options available to dislocated workers.

A. Congress Mandated that On-the-Job Training Be Provided Over Classroom Training

Congress unambiguously decided that "insofar as possible, the Secretary shall provide or assure the provision of [Trade Act] training on the job," and Congress reiterated that its statutory text "directs the maximum feasible use of training on the job." 19 U.S.C. § 2296(a)(1); S. REP. No. 93-1298 at 93, *reprinted in* 1974 U.S.C.C.A.N. at 7279 (emphasis added). The words "shall," "assure," and "directs" all carry mandatory force, and do not confer discretion, thus keeping this case under *Chevron's* first step. *International Union, United Auto. Workers v. Dole*, 919 F.2d 753, 756 (D.C. Cir. 1990) ("Considering the frequency with which it uses the two words, Congress can be expected to distinguish between 'may' and 'shall.'"). What these words require of DOL is explicitly superlative, *i.e.* do everything that is "possible" or "feasible" to assure that training is

provided on the job.[11] Thus, Plaintiffs submit that the plain meaning of the words chosen by Congress is that Trade Act training must be provided on the job when it is available to a worker and meets all requirements of the Trade Act.

DOL argues the contrary, claiming that this same statutory text vests it with discretion to approve classroom training over on-the-job training when both are available. DOL does not offer any explanation of how "shall," "assure," or "directs" can be consistent with DOL's interpretation of the statutory text in § 2296(a)(1). Instead, DOL points to three congressional statements that it claims support its position, none of which do.

First, DOL cites the phrase "the training programs that may be approved under paragraph (1) include but are not limited to" those listed in 19 U.S.C. § 2296(a)(5), and argues that this text confers discretion in choice of training methods. But the list of training options in § 2296(a)(5) is in no way inconsistent with the specific directive to the Secretary contained in § 2296(a)(1), and § 2296(a)(5) contains no words that indicate any modification of Congress's on-the-job training directive in § 2296(a)(1). *See United States v. Perry*, 360 F.3d 519, 535 (6th Cir. 2004) ("One of the most basic canons of statutory interpretations is that a more specific provision takes precedence over a more general one."); *Int'l Trading Co. v. United States*, 306 F.Supp. 2d 1265, 1269 (Ct. Int'l Trade 2004) ("A canon of statutory construction is that a statute should be read to avoid internal inconsistencies."). Also, DOL admits that § 2296(a)(5) does not override the training completeness requirement in § 2296(a)(1), so there is no reason why § 2296(a)(5) should override the on-the-job training requirement of § 2296(a)(1) either. *See* Fact 67.

Next, DOL cites the following passage from the legislative history:

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[11] Congress has directed agency action "as practicable" at least 557 times, and it has directed agency action "as possible" at least 259 times. WESTLAW search of U.S.C.A. Database (search of TE((agency commis! department secretary) /p "as practicable").

> While the bill does not bar the Secretary from providing any type of training which he may find appropriate, it clearly requires that the highest priority be given to developing and placing displaced workers in training on-the-job. The ultimate objective of training programs is the placement of a worker in actual employment. On-the-job training is, therefore, the most desirable type of training since it accomplishes this objective at the beginning rather than at the end of the process. The bill accordingly directs the maximum feasible use of training on the job.

DOL Resp. at 23-24. DOL points to the phrase "While the bill does not bar the Secretary from providing any type of training which he may find appropriate," and claims that this confers discretion upon DOL to approve classroom training over on-the-job training. But DOL's reading is inconsistent with the remainder of the same sentence upon which DOL relies, it is inconsistent with the last sentence in the same paragraph, and it is inconsistent with the plain meaning of § 2296(a)(1). *See* DOL Resp. at 9 n.6 ("A permissive statement in a Senate report cannot change the statute Congress enacted."). In fact, the phrase on which DOL relies has a more limited meaning that raises no inconsistency. It only observes the fact that the statute does not include *language prohibiting* the Secretary from approving training that the Secretary finds to be appropriate, so that the sentence is accurately paraphrased as: "Congress did not express its preference for on-the-job training in prohibitory terms, *i.e.,* 'the Secretary may not ...,' but rather did so in positive terms, *i.e.*, 'the Secretary shall assure training on the job insofar as possible.'" This reading of the sentence at issue gives meaning to all terms and renders none of them inconsistent, a result that must be sought whenever possible in construing contemporaneous language. *Brown & Williamson*, 529 U.S. at 133.

Finally, DOL points to language from the Trade Act's 1981 legislative history, stating that "Under section 236(a) of existing law, the Secretary of Labor may, but is not required to, approve training (on-the-job insofar as possible) for an adversely affected certified worker ...." DOL Brief at 24. But the law is settled that a later Congress may not modify the statute enacted by a prior

Congress using legislative history alone. *Adkinson v. Inter-American Development Bank*, 156 F.3d 1335, 1342 (D.C. Cir. 1998) ("If the enacted intent of a later Congress cannot change the meaning of an earlier statute, it should go without saying that the later unenacted intent cannot possibly do so."). In this case, the 1981 Congress did not even *attempt* to change the meaning of the 1974 Congress's statutory text. DOL invites this Court to read the phrase "is not required to" as modifying "on-the-job insofar as possible" but this is not how the sentence is structured. The phrase "is not required to" modifies "training," which accurately describes "existing law" before 1981, when Trade Act training was not an entitlement as it is today. Facts 33-35. This passage merely observes that no type of training was an entitlement before 1981, and has nothing to do with Congress's preference for on-the-job training when training is approved. The fact that the passage appears within Congress's report of existing law, not within its subsequent report of what Congress intends the law to be, shows that the passage cannot effect the change in the statute that DOL seeks.

In sum, DOL has identified no language that dilutes Congress's requirement that DOL "shall provide" Trade Act training on the job "insofar as possible."

B. On its Face, DOL's Regulation Fails to "Assure" That OJT Is Provided "Insofar as Possible"

There is no genuine dispute that DOL fails to assure that Trade Act training is provided on the job insofar as possible. While DOL argues that its regulation is consistent with the statute, the evidence of record contains DOL's admission that its regulation is weaker than the statutory standard. Fact 102.[12] Even entirely apart from Fact 102, DOL admits that even when OJT is

[12] DOL objects that Fact 102 "is meant to lead one to the conclusion that the Department admits that its regulations related to on-the-job training violate the statute." But the evidence itself, not Plaintiffs' statement of the evidence, is what must "lead one to the conclusion that the Department admits that its regulations related to on-the-job training violate the statute." DOL designated Mr. Kooser under Rule 30(b)(6) to speak on its behalf regarding DOL's Trade Act policies, Fact 14(c), and he testified:

available to a trade-affected worker and meets all requirements of the Trade Act, and is thus indisputably "possible," DOL does not require state agencies to approve it. Fact 96. DOL's Response itself repeatedly confirms DOL's intent to step back from the statute's absolute requirement. DOL Resp. at 24-25 ("***priority***, insofar as possible") (emphasis in original); *id.* at 23 (OJT "should be considered first among [the list of] possible training options"); *id.* at 26 ("the Department's policy is that OJT be presented to individuals as a first option"); *but see* DOL Response to Fact 96 ("Mr. Kooser testified that the Department requires states to do all that is possible to provide training on-the-job in the context of that state.").[13]

C. The Proposed OJT Injunction Would Expand Training Options for Workers

DOL attempts to justify its reading of the statute by explaining that "balancing an individual's skill level and desires with the available training provides the best results in placing workers into employment." DOL Resp. at 25. Plaintiffs entirely agree that this balance is essential, but without training options there is no balance to be struck. Plaintiffs have sued DOL

> Q. When you provide training to either your regional offices or to state Trade Act administrators, what do you tell them about on-the-job training?
> A. I tell them exactly what's in the regulations, that insofar as possible they are to put emphasis on on-the-job training, because that's what it says. That's what the requirement is.
> Q. Do you agree that there is a difference between insofar as possible putting emphasis on on-the-job training on the one hand and on the other [hand] insofar as possible provide training? The first says insofar as possible put an emphasis on it and the other one says insofar as possible do it. Do you agree that there's a difference there?
> A. Yes, insofar as possible they should do it, insofar as possible.
> Q. But you agree that the two options that I described, insofar as possible put an emphasis on it and insofar as possible do it, those are two different things, right?
> A. Somewhat, yes.
> Q And the insofar as possible do it is stronger than the insofar as possible put an emphasis on it.
> A. That's correct. That's what I meant to say.

Kooser Depo. at 163:4 to 164:10 (PA-13). The word "emphasis" was unmistakably chosen by Mr. Kooser as his synonym for the word "priority" in 20 C.F.R. § 617.23(c)(1), and the fact that he chose a synonym does nothing to diminish the devastating impact of his testimony upon DOL. See DOL Resp. at 26 n.26 (defining "priority" in terms of its synonyms "precedence," "importance," and "urgency").

[13] DOL actually claims that TWC satisfies the "first option" standard simply by including a statement about OJT in a video that workers watch as a group before they ever see a case manager. DOL Resp. at 26 n.27; *see also* Fact 98. This mocks Congress's command that DOL assure that OJT be provided insofar as possible.

over failing to provide on-the-job training under its current regulatory scheme precisely to ensure that the available training options are as expansive as required by law. There is no genuine dispute but that through August 2003 over 17,000 workers qualified for Trade Act training in El Paso, and TWC did not provide Trade Act training on the job to a single one of them nor attempt to do so. Facts 23, 97-100. Nor is there a genuine dispute but that DOL knows that its current regulatory scheme provides cost and administrative disincentives to state agencies to provide training on-the-job. Fact 105. This, of course, means that state agencies may not provide training on the job for reasons much less honorable than achieving "the best results" for workers, and much less defensible. In sum, DOL's existing regulatory scheme is not only facially inconsistent with Congress's unequivocal command, but in practice it has proved that DOL does not assure that Trade Act training is provided on the job insofar as possible.

The injunction sought by Plaintiffs would leave to DOL, in the first instance, the decision as to how it will respect Congress's directive. DOL has many options available to it that will expand workers' access to on-the-job training as Congress commanded, including without limitation telling state agencies how they are expected to evaluate whether on-the-job training is appropriate for a worker, and how the choice of training options is to be made when multiple options meet the Trade Act's requirements for a particular worker.

V. Conclusion

The training at issue here is desperately needed by thousands of workers whose jobs were sacrificed for the sake of free trade and who were promised a remedy under the Trade Act. DOL's administration of the law fails to improve the job skills of LEP workers. The injunction sought by Plaintiffs requires no more than straightforward compliance with the statute, and will enable DOL to focus specifically on what rules are needed for training approval when qualified workers do not

speak English. DOL has failed to name any reason in fact or law as to why this case should not be resolved by issuing the proposed order that Plaintiffs' submitted with their summary judgment motion.

Respectfully submitted,
TEXAS RIOGRANDE LEGAL AID, INC.

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I hereby certify that I caused a true and correct copy of the foregoing document to be served upon the following counsel of record instantly by electronic mail on December 21, 2004:

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