No. _____

In the Supreme Court of the United States

STATE OF MICHIGAN, DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS, UNEMPLOYMENT INSURANCE AGENCY/TRA SPECIAL PROGRAMS UNIT, PETITIONER

v.

DAWN GERSTENSCHLAGER

ON PETITION FOR A WRIT OF CERTIORARI TO THE HURON COUNTY CIRCUIT COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Trade Act of 1974 prescribes a deadline for a claimant seeking a training waiver as a prerequisite to obtaining benefits under the Act.

2. Whether a federal agency's operating instruction, which states are bound to follow by statutory agreement, is entitled to *Chevron* deference.

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the caption. The Petitioner is the State of Michigan, Department of Licensing and Regulatory Affairs, Unemployment Insurance Agency, TRA Special Programs Unit. The Respondent is Dawn Gerstenschlager.

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The Huron County Circuit Court order, App. 4a–7a, is not reported. The Michigan Court of Appeals order denying Petitioner leave to appeal, App. 3a, is not reported. The Michigan Supreme Court decision denying Petitioner leave to appeal, App. 2a, is available at 810 N.W.2d 37. The Michigan Supreme Court decision denying Petitioner's motion for reconsideration, App. 1a, is available at 815 N.W.2d 429. The Michigan Court of Appeals opinion on which the decisions in this case relied, *Department of Labor and Economic Growth*, *Unemployment Insurance Agency* v. *Dykstra*, App. 8a–28a, is available at 771 N.W.2d 423.

JURISDICTION

The Michigan Supreme Court entered its order denying Petitioner's application for leave to appeal on March 30, 2012. It denied Petitioner's motion for reconsideration on June 25, 2012. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a) because this appeal involves a question as to the meaning of a federal statute.

STATUTORY PROVISION INVOLVED

At the relevant time, the Trade Act of 1974, 19 U.S.C. § 2101 *et seq.*, provided in pertinent part:

19 U.S.C. § 2291:

(a) **Trade readjustment allowance conditions** Payment of a trade readjustment allowance shall be made to an adversely affected worker covered by a certification under subpart A of this part who files an application for such allowance for any week of unemployment which begins more than 60 days after the date on which the petition that resulted in such certification was filed under section 2271 of this title, if the following conditions are met:

* * *

(5) Such worker—

(A)(i) is enrolled in a training program approved by the Secretary under section 2296(a) of this title, and

(ii) the enrollment required under clause (i) occurs no later than the latest of—

(I) the last day of the 16th week after the worker's most recent total separation from adversely affected employment which meets the requirements of paragraphs (1) or (2),

(II) the last day of the 8th week after the week in which the Secretary issues a certification covering the worker,

(III) 45 days after the later of the dates specified in subclause (I) or (II), if the Secretary determines there are extenuating circumstances that justify an extension in the enrollment period, or

(IV) the last day of a period determined by the Secretary to be approved for enrollment after the termination of a waiver issued pursuant to subsection (c) of this section,

(B) has, after the date on which the worker became totally separated, or partially separated, from the adversely affected employment, completed a training program approved by the Secretary under section 22296(a) of this title, or

(C) has received a written statement under subsection (c)(1) of this section after the date described in subparagraph (B).

* * *

(c)(1) **Issuance of waivers** The Secretary may issue a written statement to an adversely affected worker waiving the requirement to be enrolled in training described in subsection (a)(5)(A) of this section if the Secretary determines that it is not feasible or appropriate for the worker, because of 1 or more of the following reasons:

(A) **Recall** The worker has been notified that the worker will be recalled by the firm from which the separation occurred.

(B) **Marketable skills** The worker possesses marketable skills for suitable employment . . . and there is a reasonable expectation of employment at equivalent wages in the forseeable future.

(C) **Retirement** The worker is within 2 years of meeting all requirements for entitlement to either (i) old-age insurance benefits under title II of the Social Security Act . . . or (ii) a private pension sponsored by an employer or labor organization.

(D) **Health** The worker is unable to participate in training due to the health of the worker . . . .

(E) **Enrollment unavailable** The first available enrollment date for the approved training of the worker is within 60 days after the date of the determination made under this paragraph, or, if later, there are extenuating circumstances for the delay in enrollment . . . .

(F) **Training not available** Training approved by the Secretary is not reasonably available to the worker from either government agencies or private sources . . ., no training that is suitable for the worker is available at reasonable cost, or no training funds are available.

INTRODUCTION

The Trade Act of 1974 provides readjustment benefits to workers who have lost their jobs because of competition from foreign companies. 19 U.S.C. § 2101 *et seq*. The Act conditions a displaced worker's benefits on three alternative events: (1) enrollment in an approved retraining program; (2) completion of such a program; or (3) receipt of a training waiver. The Act expressly sets an 8- or 16-week deadline (the "8/16 deadline") for enrolling in an approved retraining program. 19 U.S.C. § 2291(a)(5)(A). But the Act is silent regarding the deadline for having completed such a program or petitioning for a training waiver. 19 U.S.C. § 2291(a)(5)(B), (C).

The United States Department of Labor has reasonably interpreted § 2291(a)(5)(C) as requiring a displaced worker to petition for a training waiver within the same 8/16 deadline as a worker who enrolls in an approved training program. And since the Department's uniform agreement with states administering the program, see 19 U.S.C. § 2311, requires states to adhere to Department interpretations, the Department requires states to deny readjustment benefits to workers who neither enroll in a training program nor petition for a training waiver before the 8/16 deadline.

Michigan's dilemma is that the Michigan Court of Appeals has consistently rejected the Department's interpretation and required Michigan to provide readjustment benefits no matter when a displaced worker chooses to petition for an enrollment waiver. And the Michigan Supreme Court has declined to take

up the issue. As a result, Michigan is in the untenable position of having to choose whether to comply with the Department's agreement or risk contempt of court.

The Michigan Court of Appeals' decision perpetuates a multi-state conflict on the question presented. (Because states typically administer the distribution of readjustment benefits, the issue has been litigated exclusively in state, rather than federal, courts.) Whereas a claimant in Illinois, Nebraska, Pennsylvania, or Wisconsin is barred from Trade Act benefits unless she takes action within the 8/16 deadline, a claimant in Michigan or Minnesota can wait until long after the deadline passes, petition for a training waiver, and still receive benefits. As a result, a displaced worker's entitlement to federal readjustment benefits depends entirely on the state where she lives and works.

Only this Court can resolve the mature conflict regarding the recurring issue presented. Accordingly, the petition for certiorari should be granted, and the Michigan Court of Appeals' interpretation of the Trade Act should be reversed.

STATEMENT OF THE CASE

A. Trade Act benefit prerequisites

The Trade Act of 1974 assists workers in returning to suitable employment after they have lost their jobs due to import competition. *Int'l Union* v. *Brock*, 477 U.S. 274, 277 (1986); 20 C.F.R. § 617.2. Federal readjustment benefits provide income support to affected individuals as they are training for new work. *Former Employees of BMC Software*, *Inc.* v. *Sec'y of Labor*, 454 F. Supp. 2d 1306, 1309, 1342 n.63 (Ct. Int'l. Trade 2006). A claimant can obtain benefits only if, among other requirements, she has (1) enrolled in a training program, (2) already completed such a program, or (3) received a waiver of the enrollment requirement. 19 U.S.C. § 2291(a)(5)(A)–(C).

The Trade Act allows waiver of the training requirement only if enrollment is unfeasible or inappropriate, for example, due to a worker's health, or the short-term unavailability of a training program. 19 U.S.C. § 2291(c)(1). Waivers are effective for six months, and the Act requires revocation if the circumstances giving rise to the waiver no longer exist. 19 U.S.C. § 2291(c)(2). After a waiver's expiration or revocation, claimants must timely enroll in a training program to continue receiving benefits. 19 U.S.C. § 2291(a)(5)(A)(ii)(IV); 19 U.S.C. § 2291(b)(1).

B. Trade Act deadlines

In 2002, Congress amended § 2291 and created the 8/16 deadline for displaced workers enrolling in an approved training program. Pub. L. No. 107–210,

§ 114–115, 116 Stat. 933, 939–40 (2002). To qualify for benefits, a claimant must enroll in training no later than the end of the 8th week after his employment was certified as covered by the Act's programs, or the end of the 16th week after his separation from covered employment. 19 U.S.C. § 2291(a)(5)(A)(ii)(I), (II).

The Act is silent regarding the deadlines for the two alternate benefit preconditions—completion of an approved training program or receipt of a training waiver. To resolve any ambiguity regarding training waivers, the Department issued an operating instruction: claimants seeking a waiver must petition for that relief within the same 8/16 deadline applicable to training enrollment. Trade Adjustment Assistance Program: Training and Employment Guidance Letter Interpreting Federal Law, 69 Fed. Reg. 60,903 (Oct. 13, 2004) ("Section 114 of the 2002 amendments, which amended section 231(a)(5)(A) of the Trade Act, imposed *a deadline by which a worker must be enrolled in approved training*, ***or have a waiver of this requirement***, in order to be eligible for [benefits].") (emphasis added).

The Department's operating instructions are significant, because they bind state administration of readjustment benefits. *Id.* States administer benefits as agents of the federal government under a uniform agreement with the Department. 19 U.S.C. § 2311; 20 C.F.R. § 617.59(e). And that agreement requires states to administer benefits "in accordance with the Act and the regulations and operating instructions issued thereunder by the United States Department of Labor." App. 31a. The Department's regulations require a state to forward to the Department a copy of

any judicial decision regarding a worker's entitlement to benefits, 20 C.F.R. § 617.52(c)(1); direct the state not to "follow such . . . decision as a precedent" if the Department believes the decision is inconsistent with the Department's own interpretation of the Act, 20 C.F.R. § 617.52(c)(2); and authorizes the Secretary to terminate the parties' agreement if the state nonetheless treats the decision as a precedent, 20 C.F.R. § 617.52(c)(4).

Michigan's executive branch agreed to administer Trade Act programs as an agent for the federal government. Accordingly, Michigan must follow the Department's operating instructions, including the Department's directive to apply the 8/16 deadline to waiver applications. Pursuant to Michigan Executive Order 1997–19, Petitioner is one of the agencies tasked with administering the Trade Act.

C. Michigan courts' rejection of the U.S. Department of Labor's interpretation

In 2009, the Michigan Court of Appeals considered the Department's operating instruction and rejected it, holding that the Trade Act imposed no deadline on claimants seeking waivers. *Dep't of Labor and Econ. Growth*, *Unemployment Ins. Agency* v. *Dykstra*, 771 N.W.2d 423 (Mich. Ct. App. 2009), App. 8a–28a. The court reasoned that if Congress wanted to create a deadline for training waivers, it would have done so explicitly, as it did with enrollment deadlines. The court held that Congress's silence with respect to a waiver deadline was conclusive. Thus, while claimants had to enroll in training within the 8/16 deadline, they could seek a waiver of that requirement long after the

deadline without losing the ability to obtain readjustment benefits. In so holding, the court acknowledged, but disregarded, the Department's directive and other state-court decisions adhering to it. App. 21a–28a.

D. Respondent's benefits claim

Respondent Dawn Gerstenschlager was laid off as a result of import competition. While she was collecting unemployment benefits, she was not informed of the potential additional benefits offered by the Trade Act program, nor was she aware of its deadlines because her employer failed to give the state Gerstenschlager's contact information.[1] (Cert. Rec. of Admin. Proceedings at 18, 28.) After the 8/16 deadline passed, she was informed of the program and sought to apply for benefits. (*Id.* at 17.) Bound by the Department's operating instructions, Petitioner denied Gerstenschlager's claim because she failed to enroll in training or seek a waiver before the 8/16 deadline. (*Id.* at 16.)

Relying exclusively on *Dykstra*, a Michigan court reversed Petitioner's decision on appeal. App. 4a–7a. The Michigan Court of Appeals denied leave to appeal, App. 3a, as did the Michigan Supreme Court. App. 2a. The Michigan Supreme Court also denied Petitioner's motion for reconsideration. App. 1a.

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[1] Congress has since amended the Trade Act to extend the enrollment deadline for applicants who filed late "due to the failure to provide the worker with timely information regarding the [enrollment deadline] date." 19 U.S.C. § 2291(a)(5)(A)(iv).

REASONS FOR GRANTING THE PETITION

I. The Michigan courts' interpretation of the Trade Act conflicts with federal mandates and other state-court decisions, thwarting uniform benefit administration.

The Trade Act and its regulations emphasize that the Act is to be administered uniformly throughout the United States. 19 U.S.C. § 2311; 19 U.S.C. § 2275; 20 C.F.R. § 617.52(b). That is why Congress and the Department instituted mechanisms to guard against state-created deviations in how the Act is interpreted and applied. *Orrs* v. *Unemployment Comp. Bd. of Review*, 910 A.2d 110, 112 (Pa. Commw. Ct. 2006). The most prominent mechanism is the uniform agreement, which simultaneously grants and limits the states' authority under the Trade Act. 19 U.S.C. § 2311(a); 20 C.F.R. § 617.59(a). Under the agreement, the states operate as Department agents, 20 C.F.R. § 617.59(e), administering the Act in accord with its terms, the Department's regulations, and operating instructions.

The Department's regulations further guard against deviation by providing the Department extensive oversight. 20 C.F.R. § 617.52. The Department reviews every administrative and judicial decision ruling on an individual's entitlement to Trade Act benefits. 20 C.F.R. § 617.52(c)(1). If the Department believes that a decision is not consistent with its interpretation of the Act "the State agency . . . shall not follow such . . . decision as precedent" and "shall make all reasonable efforts . . . to obtain modification, limitation, or overruling of the . . . decision." 20 C.F.R. § 617.52(c)(2).

Non-compliant states face severe consequences. The Department can terminate its agreement with the state. 20 C.F.R. § 617.52(c)(4)(ii). The Department can also require a state to pay back to the federal government any sums paid as a result of a non-conforming decision. *Id.* In addition, the state's employers risk losing federal tax credits. 20 C.F.R. § 617.59(f); 26 U.S.C. § 3302(c)(3)(B).

The Michigan courts have disrupted this nationally uniform program by rejecting the Department's interpretation of the Trade Act's deadlines. In *Dykstra*, the Michigan Court of Appeals held that "the Department's determination that the § 2291(a)(5)(ii) deadlines should apply to the waivers permitted under § 2291(a)(5)(C) and § 2291(c) is not entitled to any deference." 771 N.W.2d at 433; App. 26a. Indeed, the court concluded that the Department's reasonable construction "contradicts Congress's unambiguously stated intent." *Id.* Only this Court can mend the chasm between Michigan and the U.S. Department of Labor.

The first question presented by this case has not only divided the Department and Michigan, but Michigan and other states. Joining Michigan as a no-waiver-deadline state is Minnesota. *Vanguilder* v. *Dep't of Employment and Econ. Dev.*, 2009 WL 1048503, at *3 (Minn. Ct. App. 2009) ("[T]he [Trade] Act does not specify that the receipt of a waiver of training must occur within the same time frame as enrollment in a training program. The plain language of the statute does not support such an interpretation.").

On the opposite side of the conflict are Nebraska and Wisconsin, which have explicitly held the 8/16 deadline applicable to waiver requests. *Reed* v.

Nebraska Dep't of Labor, 717 N.W.2d 899, 904 (Neb. 2006) ("Reed argues that when scrutinized, 19 U.S.C. § 2291 provides no deadline for securing training waivers. . . . Although inventive, Reed's argument loses its luster on further scrutiny."); *Wisconsin Dep't of Workforce Dev.* v. *Labor and Industry Review Comm'n*, 725 N.W.2d 304, 312 (Wis. Ct. App. 2006) ("An indefinite time period within which to grant waivers undermines the[ ] other time limitations, at least in certain situations. Because there are two reasonable constructions of the statutory language at issue, we conclude it is ambiguous. We do not resolve this ambiguity, however, because, as we explain in the next section, LIRC is obligated to follow DOL's reasonable construction in the 11–02 guidance letter.")

Illinois and Pennsylvania join Wisconsin as waiver-deadline states. Although courts in those states have not confronted the issue head on, each state's courts have at least implicitly acknowledged the existence of a waiver deadline. E.g., *Williams* v. *The Board of Review*, 948 N.E.2d 561, 564–65 (Ill. 2011) (equitable tolling is available when a claimant is ineligible for benefits due to failure to enroll in a training program or request a waiver within the 8/16 deadline); *Lowe* v. *Unemployment Comp. Bd. of Review*, 877 A.2d 494 (Pa. Commw. Ct. 2005) (claimant ineligible for benefits due to his failure to enroll in a training program or request a waiver within the 8/16 deadline).[2]

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[2] The Pennsylvania Commonwealth Court later noted that *Lowe* has been superseded by state waiver principles that Congress made applicable to Trade Act determinations in adopting 19 U.S.C. § 2294(b). See *Hall* v. *Unemployment Comp. Bd. of Review*, 42 A.3d 1204 (Pa. Commw. Ct. 2005).

In sum, depending on whether a displaced worker lives in Michigan or Minnesota on the one hand, or Illinois, Nebraska, Pennsylvania, or Wisconsin on the other, the worker will experience a different result when filing a waiver request as a prerequisite to receiving readjustment benefits. And because this issue is litigated exclusively in the state courts, further percolation is unlikely to resolve the conflict. Rather, percolation will exacerbate the conflict and lack of uniform program administration. Certiorari is warranted.

II. Courts should defer to the Department's conclusion that the Trade Act imposes an 8/16 deadline on training waiver requests.

A. The Trade Act is susceptible to conflicting interpretations with respect to the existence of a waiver deadline.

As this Court has observed, "silence . . . normally creates ambiguity. It does not resolve it." *Barnhart* v. *Walton*, 535 U.S. 212, 218 (2002). That observation applies forcefully here.

It is true that the Trade Act does not contain express language that requires a waiver to be granted with the 8/16 deadline. But such a requirement can be inferred from the text and structure of section 2291(a)(5).

Subsection (a)(5)(A) pertains to the enrollment option. It expressly imposes the 8/16 deadline, and Congress wrote the subsection in the present tense. 19 U.S.C. § 2291(a)(5)(A)(ii) (a worker "*is enrolled* in a training program" by the 8/16 deadline).

Subsections (a)(5)(B) and (C) pertain to the completed-training and waiver options. Unlike subsection (A), Congress wrote both subsection (B) and (C) in the past tense. 19 U.S.C. § 2291(a)(5)(B) (a worker "*has* . . . *completed* a training program"); (a)(5)(C) (a worker "*has received* a written [waiver] statement). There is no express deadline for either.

Considering the entire text and context of section 2291(a)(5), the best construction of subsection (B) is that a displaced worker is exempt from the enrollment requirement if she has already "completed" a training program *by the 8/16 deadline*. Without such a construction, a displaced worker can easily circumvent the 8/16 deadline by enrolling many months later, completing the training program, and claiming eligibility under subsection (B). That regime runs counter to Congress's apparent intent in creating the 8/16 deadline for enrollment in the first instance. By writing subsection (B) in the past tense, Congress contemplated a displaced worker who had *already* completed training, before the 8/16 enrollment deadline, rendering moot any need to enroll in a training.

The same logic applies to subsection (C), the waiver option. If this subsection is interpreted without reference to the rest of section (5)'s text and structure, a displaced worker could sit on her rights long after the 8/16 deadline (and any 45-day extension under subsection (a)(5)(A)(ii)(III)) before finally requesting a waiver and seeking benefits. In the absence of a deadline, any worker satisfying the criteria would receive a waiver. And when that waiver expired, the worker's opportunity to enroll would begin anew.

19 U.S.C. § 2291(b)(2). By writing subsection (C) in the past tense, as in subsection (B), Congress contemplated a displaced worker who had *already* applied for a waiver, before the 8/16 deadline.

As the Wisconsin Court of Appeals recognized, these two conflicting interpretations of the Trade Act are equally plausible. With respect to the no-deadline approach, the court said:

> [B]ecause there is no express language that requires a waiver to be granted within the 16/8-week deadline, it is reasonable to construe the language as not imposing this deadline on waivers. Such a construction . . . ensures that workers who meet the grounds for waiver of training obtain the allowance. In addition, . . . certain grounds for waiver . . . would appear to be permanent, and, thus, a time period for granting a waiver from training on such a ground would not appear to have a function.

Wisconsin Dep't of Workforce Dev., 725 N.W.2d at 311 (citations omitted). Conversely, the Wisconsin Court of Appeals also saw merit in the Department's interpretation:

> We also conclude that it is reasonable to construe the language as imposing the 16/8-week deadline thereof on the granting of waivers, as DOL has done in the 11-02 guidance letter. . . . The six-month limitation on the length of waivers unless the Secretary determines otherwise, and the provision for the Secretary to establish a time period for enrollment when a waiver terminates, express

> the purpose that, even when waivers are granted, prompt enrollment in appropriate training remains a goal. An indefinite time period within which to grant waivers undermines these other time limitations, at least in certain situation.

Id. at 311–12 (citations omitted).

Lending further support to the Department's interpretation is the fact that Congress has implicitly adopted it. This Court has long recognized that "Congress is presumed to be aware of an administrative . . . interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard*, *Div. of Loew's Theaters*, *Inc.* v. *Pons*, 434 U.S. 575, 580 (1978).

Here, in 2009 and again in 2011, Congress amended the Trade Act and reenacted the waiver provision without altering the Department's training-waiver deadline. Pub. L. No. 111–5, §1821, 123 Stat. 115, 375 (2009); Pub. L. No. 112–40, § 212, 125 Stat. 401, 404 (2011). While a skeptic might argue that the legislative-reenactment theory of agency interpretation sometimes provides judicial imprimatur even to Congress's inadvertent omissions, that is not the case here.

In reenacting the Trade Act, Congress expressly precluded other Department interpretations of deadlines. Pub. L. No. 111–344, § 102, 124 Stat. 3611, 3614 (2010) (altering the Department's deadline, outlined in 20 C.F.R. § 618.890(b), that mandated when administering state agencies had to comply with merit-staffing requirements). Yet Congress left the

Department's interpretation of the training waiver deadline untouched. Indeed, Congress did so with express awareness of the Department's instruction that training waivers must be obtained within the 8/16 deadline. See H.R. Rep. No. 111–16, at 665 (2009), citing General Accounting Office Report 04–1012. If the Department's waiver deadline contravened Congress's intent, Congress would have acted to stop the deadline's national application.

At a bare minimum, the competing, reasonable constructions of the Trade Act render it ambiguous. Accordingly, it is appropriate to defer to the Department's interpretation of the statute it administers.

B. The Department's interpretation of the waiver provision is entitled to *Chevron* deference.

Congress authorized the Department to enter into and enforce the uniform agreement with every state, demonstrating Congress's intent that the Act be administered uniformly throughout the country. 19 U.S.C. § 2311. The Department's interpretation of the waiver provision, issued as an operating instruction that binds state agencies through the agreement, is entitled to deference. *Chevron USA*, *Inc.* v. *Natural Resources Defense Council*, *Inc.*, 467 U.S. 837 (1984).

The Michigan Court of Appeals declined to defer to the Department's reasonable construction of the Trade Act, citing two reasons. First, the court said that *Chevron* deference could not apply where the Department's interpretation appeared in a guidance letter, rather than codified as a regulation. App. 27a n.8. That analysis is faulty. Under *United States* v.

Mead Corp., 533 U.S. 218 (2001), the inquiry is whether, based on the "agency's generally conferred authority and other statutory circumstances . . . congress . . . expect[ed] the agency to be able to speak with the force of law." *Id.* at 229. An agency's interpretation "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* at 226–27. The rule need not be codified or promulgated using notice and comment-making. *Id.* at 231. "Delegation of such authority may be shown in a variety of ways." *Id.* at 227.

Here, Congress authorized the Department to enter into the uniform agreement with state agencies. 19 U.S.C. § 2311. Congress also gave the Department authority to oversee and enforce state compliance with the agreement. 19 U.S.C. § 2275(a). In so doing, Congress gave the Department great latitude to establish the agreement's terms and conditions. 19 U.S.C. § 2311(f). Congress also required each state agency to cooperate with the Secretary of Labor under these agreements. 19 U.S.C. § 2311(a). All 50 states have entered into these statutorily authorized agreements. *Brock*, 477 U.S. at 277.

The uniform agreement requires the administering state agency to follow operating instructions issued by the Department. App. 31a. The interpretation regarding the waiver deadline was published as an operating instruction. 69 Fed. Reg. 60,903. The waiver deadline is a term incorporated into the statutorily authorized agreement and has the force of law. It is

readily apparent that Congress delegated authority to the Department to interpret the Trade Act, and it is equally apparent that the Department exercised that authority when publishing an interpretation in the Federal Register that bound the 50 states via their agreements. Accordingly, the Department's interpretation is entitled to *Chevron* deference.

Second, the Michigan Court of Appeals said that the Department's letter interpretation "is inconsistent with the statute's language and underlying purpose." App. 27a–28a n.8. This reason is simply a rehash of the court's conclusion that § 2291 is not ambiguous. As explained above, the Department's interpretation is faithful to the statutory text, context, and purpose.

III. This Court's immediate review is required to relieve Michigan of its Catch 22: administer benefits consistent with the Department's directive or with the conflicting directive of Michigan state courts.

As things currently stand, Michigan and Minnesota are caught between the proverbial rock and a hard place. If these states follow the command of their courts, they must administer the Trade Act program in violation of the Department's directive and risk termination of the state's agreement. See 20 C.F.R. § 617.52(c)(1) (state must forward to the Department a copy of any judicial decision regarding a worker's entitlement to benefits); 20 C.F.R. § 617.52(c)(2) (if the Department believes the decision is inconsistent with the Department's interpretation of the Act and makes its view known to the state, the state "shall not follow such . . . decision as a

precedent"); 20 C.F.R. § 617.52(c)(4) (if a state treats such a decision as a precedent, the Secretary may terminate the parties' agreement).

Conversely, if the states honor their agreement with the Department, they must risk contempt and administer the program in violation of a judicial mandate. Neither position is tenable.

The consequences of contempt are well known and include the possibility of fine and incarceration. See generally, e.g., Mich. Comp. Laws § 600.1715. But the consequences for a state's refusal to honor its Trade Act agreement can be equally significant.

To begin, if the Secretary of Labor determines that a state is issuing benefits improperly, the "state shall be required to restore the funds of the United States for any sums paid" as a result of noncompliance. 20 C.F.R. § 617.52(c)(4)(ii). (An administering state receives federal funds quarterly to pay for benefits.) A state's unemployment trust fund, which exists to provide unemployment benefits, will be significantly impacted by such a repayment obligation, which could amount to a multi-million-dollar refund.

Noncompliance could also harm state employers. Under federal law, employers are required to pay a 6% tax on the total amount of wages they pay their employees each year. 26 U.S.C. § 3301. Because employers are already taxed on their payroll through state unemployment insurance programs, Congress alleviated the burden of this federal tax through various tax credits. 26 U.S.C. § 3302. These credits are conditioned on employer and state compliance with specific regulations, including adherence to the agree-

ment. But if the Secretary of Labor determines a state has breached, employer tax credits will be reduced. 26 U.S.C. § 3302(c)(3)(B); 20 C.F.R. § 617.59(f). In other words, private employers will be punished for the state's decision to comply with state-court decisions.

For all these reasons, the Department, the states, and private employers would benefit from this Court's immediate resolution of the question presented.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: SEPTEMBER 2012

PETITION APPENDIX TABLE OF CONTENTS

Orders

Related Orders

Other

Order
June 25, 2012

Michigan Supreme Court
Lansing, Michigan

143837(19)

Robert P. Young, Jr.,
Chief Justice

Michael F. Cavanagh
Marilyn Kelly
Stephen J. Markman
Diane M. Hathaway
Mary Beth Kelly
Brian K. Zahra,
Justices

UNEMPLOYMENT INSURANCE AGENCY/
TRA SPECIAL PROGRAMS UNIT,
Petitioner-Appellant,
v SC: 143837
COA: 304928
Huron CC: 10-004535-AE
DAWN GERSTENSCHLAGER,
Respondent-Appellee.
_____/

On order of the Court, the motion for reconsideration of this Court's March 30, 2012 order is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 25, 2012 Corbin R. Davis
Clerk

Order
March 30, 2012

Michigan Supreme Court
Lansing, Michigan

143837

Robert P. Young, Jr.,
Chief Justice

Michael F. Cavanagh
Marilyn Kelly
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UNEMPLOYMENT INSURANCE AGENCY/
TRA SPECIAL PROGRAMS UNIT,
Petitioner-Appellant,
v SC: 143837
COA: 304928
Huron CC: 10-004535-AE
DAWN GERSTENSCHLAGER,
Respondent-Appellee.
_____/

On order of the Court, the application for leave to appeal the August 25, 2011 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 30, 2012 Corbin R. Davis
Clerk

Court of Appeals, State of Michigan
ORDER

Amy Ronayne Krause
Presiding Judge

Donald S. Owens

Michael J. Kelly
Judges

Unemployment Insurance Agency
v Dawn Gerstenschlager

Docket No. 304928

LC No. 10-004535-AE

The Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented.

A true copy entered and certified by Larry S. Royster, Chief Clerk, on

AUG 25 2011 — Date

Larry S. Royster — Chief Clerk

STATE OF MICHIGAN
CIRCUIT COURT FOR THE FIFTY-SECOND
JUDICIAL CIRCUIT
HURON COUNTY

STATE OF MICHIGAN, DELEG,
UNEMPLOYMENT INSURANCE AGENCY/TRA
SPECIAL PROGRAMS UNIT,

Case No. 10-004535-AE-K
Hon. M. RICHARD KNOBLOCK

(n/k/a) STATE OF MICHIGAN, DEPT. OF
LICENSING & REGULATORY AFFAIRS,
UNEMPLOYMENT INSURANCE AGENCY/TRA
SPECIAL PROGRAMS UNIT,
Appellant,
v

DAWN GERSTENSCHLAGER,
Appellee.
_____/

A TRUE COPY
CIRCUIT COURT
HURON COUNTY, MICHIGAN
52nd Judicial Circuit

_____
PEGGY A. KOEHLER
COUNTY CLERK
DATED 6-15-11
BAD AXE, MICHIGAN 48413

ORDER REVERSING DECISION OF THE MICHIGAN EMPLOYMENT SECURITY BOARD OF REVIEW

At a session of said Court held in the City of Bad Axe, County of Huron, State of Michigan, on

PRESENT: M. Richard Knoblock
Circuit Judge

This matter came to the Court on an appeal from a July 21, 2010 decision of the Michigan Employment Security Board of Review issued on remand by this Court.

In 2006 the MES Board of Review affirmed the Administrative Law Judge's decision that estopped the Agency from applying provisions of the Trade Act of 1974 under the procedures of the United States Department of Labor. This Court's July 11, 2006 Order reversed, holding:

> That Board of Review decision, that affirmed the application of estoppel to the Agency, is contrary to decisions of the U.S. Supreme Court and is REVERSED. Because the Board of Review did not examine a related issue, whether claimant established eligibility for TRA benefits under § 2291 (a)(5)(C), the Court REMANDS this case to the Board of Review for a decision on that issue.

On remand, the Board of Review again affirmed the Administrative Law Judge's application of law and decision that relied solely on estoppel. The Board of Review held:

> We find the Referee's September 7, 2005 decision is in conformity with the facts as

> developed at the referee hearing. We also find the Referee properly applied the law to the facts.

Thereafter, the Board of Review twice stated the Referee's decision "is affirmed."

The Michigan Unemployment Insurance Agency appealed the Board's affirmance of the Administrative Law Judge decision that exclusively applied estoppel. Appellant also requested that this Court's rule on Appellee's eligibility for Trade Act benefits under § 2291(a)(5)(C).

Appellant informed this Court that, in 2009, the Michigan Court of Appeals issued *Dep't of Labor and Economic Growth, Unemployment Insurance Agency* v *Dykstra, Dep't of Labor and Economic Growth, Unemployment Insurance Agency* v *Jordan,* 283 Mich App 212; 771 NW2d 423 (2009) that addressed the application of § 2291 (a)(5)(C) and held that section lacks the deadlines found in § 2291(a)(5)(A). Appellant's supplemental brief expresses its disagreement with the analysis set forth in *Dykstra.*

And the Court being fully advised in the premises, having reviewed the certified record, considered the briefs of the parties and heard oral argument,

IT IS HEREBY ORDERED for reasons stated herein that the decision of the Michigan Employment Security Board of Review is hereby REVERSED.

IT IS FURTHER ORDERED THAT with regard to Appellee's eligibility for Trade Act benefits, the Court of Appeals precedential *Dykstra* decision holds that §

2291 (a)(5)(C) lacks any deadlines to establish Trade Act benefit eligibility under that provision. In light of *Dykstra,* Appellee is eligible for the receipt of Trade Act benefits because she met the eligibility criteria of § 229l(a)(5)(C). **This Order closes the case and resolves the last pending claim.

M. Richard Knoblock
Circuit Judge 6-15-11

STATE OF MICHIGAN
COURT OF APPEALS

DEPARTMENT OF LABOR & ECONOMIC GROWTH, UNEMPLOYMENT INSURANCE AGENCY, Appellant,	FOR PUBLICATION April 7, 2009 9:00 a.m.
v	No. 280591 Kent Circuit Court
TRACEY DYKSTRA, Claimant-Appellee.	LC No. 05-011956-AE

DEPARTMENT OF LABOR & ECONOMIC GROWTH, UNEMPLOYMENT INSURANCE AGENCY, Appellant,	
v	No. 280592 Kent Circuit Court
ROBERT D. JORDAN, Claimant-Appellee.	LC No. 05-009850-AE
	Advance Sheets Version

Before: Beckering, P.J., and Whitbeck and M. J. Kelly, JJ.

M. J. KELLY, J.

In these consolidated appeals, the Department of Labor and Economic Growth, Unemployment Insurance Agency (the Agency), appeals by leave granted the trial court orders affirming the decisions of the Employment Security Board of Review (the Board)

granting federal trade readjustment allowance (TRA) benefits to claimants Tracey Dykstra and Robert Jordan under the Trade Act of 1974. See 19 USC 2101 *et seq*. On appeal, we must determine whether the time limits provided under 19 USC 2291(a)(5)(A)(ii) limit the period within which a claimant may obtain a waiver of the Trade Act's training requirement. See 19 USC 2291(a)(5)(C) and 19 USC 2291(c). We conclude that, under the statute's plain terms, the time limits provided under 19 USC 2291(a)(5)(A)(ii) do not apply to the waivers permitted by 19 USC 2291(a)(5)(C) and 19 USC 2291(c). Further, because the statute is not ambiguous, the Agency had to comply with its terms notwithstanding the contrary interpretation of the federal Department of Labor (the Department). Therefore, the trial courts did not err when they issued orders affirming the Board's decisions. For these reasons, we affirm in both cases.

I. Background, Basic Facts, and Procedural History

A. TRA Benefits

Under the Trade Act, Congress established a program of benefits intended to supplement state unemployment benefits for workers who have lost their jobs as a result of competition from imports. See *Int'l Union, United Automobile, Aerospace, & Agricultural Implement Workers of America v Brock*, 477 US 274, 277; 106 S Ct 2523; 91 L Ed 2d 228 (1986).

> Under the Act's scheme, a group of workers, their union, or some other authorized representative may petition the Secretary of Labor to certify that their firm has been adversely affected by imports. [19 USC 2271 to

> 2273.] If the Secretary issues a certificate of eligibility for such a group, workers within that group who meet certain standards of individual eligibility may then apply for and receive TRA benefits. These benefits are funded entirely by the Federal Government, as is the cost of administering the program. [*Id.*]

Although the Trade Act requires the Secretary of Labor to make the initial certification, the Trade Act permits the secretary "to contract out the job of making individual eligibility determinations to the state agencies that administer state unemployment insurance programs." *Id.*; see 19 USC 2311(a). In Michigan, the Agency has been empowered to make the individual eligibility determinations. Nevertheless, Congress has charged the Department with the duty of prescribing regulations necessary to carry out the Trade Act, see 19 USC 2320, and the Agency is "bound to apply the relevant regulations promulgated by the Secretary of Labor and the substantive provisions of the Act." *Brock*, 477 US at 278.

In order for a worker to be eligible for benefits, the worker must meet one of three eligibility criteria: the worker must be enrolled in an approved training program, have completed an approved training program, or have obtained a written waiver of the training requirement. See 19 USC 2291(a)(5)(A) to (C); see also 19 USC 2291(c). With regard to the first criterion— enrollment in an approved training program—19 USC 2291(a)(5)(A)(ii) also provides that the worker must enroll no later than the latest of

> (I) the last day of the 16th week after the worker's most recent total separation from

> adversely affected employment which meets the requirements of [19 USC 2291(a)(1) and (2)],
>
> (II) the last day of the 8th week after the week in which the Secretary issues a certification covering the worker,
>
> (III) 45 days after the later of the dates specified in subclause (I) or (II), if the Secretary determines there are extenuating circumstances that justify an extension in the enrollment period, or
>
> (IV) the last day of a period determined by the Secretary to be approved for enrollment after the termination of a waiver issued pursuant to [19 USC 2291(c)].

Congress added these deadlines in 2002, and they are commonly referred to as the "8/16 deadline." See PL 107-210, § 114(b)(3), 116 Stat 939. The Department explained that the amendment was designed to accelerate a worker's reentry into the work force:

> To promote adjustment and accelerate reemployment, the Reform Act[1] provides that eligibility for TRA, which is additional income support after unemployment insurance (UI) is exhausted, will be contingent on a worker's enrollment in training not later than 16 weeks after separation from employment or 8 weeks after the petition for eligibility has been approved, whichever date is later. In

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[1] PL 107-210, §§ 101 *et seq*., 116 Stat 939.

> extenuating circumstances, these deadlines for enrollment in training may be extended up to 45 days; and a waiver of the enrollment in training requirement to receive basic TRA may be issued only under limited and specified conditions. The Reform Act also increased the length of time that TRA is available to an adversely affected worker who is in training by increasing the availability of "additional" TRA from 26 to 52 weeks and by further adding up to 26 additional weeks of TRA if a worker is enrolled in a course of remedial education. The primary purpose of this extended income support is to minimize workers' financial hardship until they complete training. By requiring that workers expeditiously enroll in training as a condition of receiving TRA, the Reform Act amendments provide that workers will be more likely to complete the training within the duration of that income support. [71 Fed Reg 50760, 50762 (August 25, 2006).]

To that end, the Department has determined that the deadlines stated in § 2291(a)(5)(A) apply to the waivers permitted under § 2291(c):

> This deadline is either the last day of the 8th week after the week of issuance of the certification of eligibility covering the worker or the last day of the 16th week after the worker's most recent total qualifying separation, whichever is later (commonly referred to as the 8/16 week deadline). The "8/16 week deadline" applies to eligibility for all TRA, both basic and additional TRA. If a

> worker fails to meet the applicable 8/16 week deadline, then the worker is not eligible for any TRA (basic TRA or additional TRA, including TRA for remedial training) under the relevant certification. In many cases, the 8/16 week deadline for a worker will be reached while the worker is still receiving unemployment insurance (UI). Some workers are not aware that this deadline may apply before they exhaust their UI. The SWA [State Workforce Agency] is responsible for informing workers of these requirements. *The SWA must also assist such workers in enrolling in an approved training program prior to the 8/16 week deadline, or issue the workers waivers prior to the 8/16 week deadline, if appropriate.* [Trade Adjustment Assistance Program, Training and Employment Guidance Letter No 11-02, Change 1, 69 Fed Reg 60903 (October 13, 2004) (emphasis added).]

Thus, under the Department's interpretation of 19 USC 2291(a)(5)(A) to (C), a worker must enroll in training or obtain a waiver before the 8/16 deadline in order to qualify for TRA benefits

In the present cases, the Secretary of Labor certified that both claimants' firms were adversely affected by imports. Hence, both Dykstra and Jordan were entitled to TRA benefits if they met the individual eligibility requirements. However, although both Dykstra and Jordan obtained waivers under 19 USC 2291(c), they did not obtain the waivers within the 8/16 deadline provided under 19 USC 2291(a)(5)(A)(ii). For

that reason, the Agency denied both claimants' requests for TRA benefits.

B. Tracey Dykstra

Dykstra appealed the Agency's decision in April 2005. A hearing referee held a hearing on the matter in June 2005. At the hearing, an unemployment claims examiner for the Agency specializing in TRA claims testified that Michigan Works![2] was responsible for notifying employees of their right to receive TRA benefits. The examiner indicated that one method of notification used with companies that have large numbers of employees who are being laid off because of foreign competition is to hold an en masse meeting. Dykstra attended such a meeting after she was laid off, but stated that she was not informed that she needed to fill out Form 802, which is the request for waiver of the TRA training requirement permitted by 19 USC 2291(a)(5)(C). Dykstra stated that she filed the form only after she learned about it from a coworker. However, she filed the form after the enrollment deadlines stated in 19 USC 2291(a)(5)(A). The unemployment examiner testified that it was her opinion that Michigan Works! was at fault for Dykstra's untimely filing because it failed to timely notify Dykstra of the need to submit the form. The

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[2] Michigan Works! is an association of local agencies. See MCL 408.113(d). The local agencies are selected by local workforce development boards, which also oversee the entities' provision of workforce services under the Michigan Works One-Stop Service Center System Act, MCL 408.111 *et seq*. See MCL 408.119 and MCL 408.123. The local Michigan Works! agencies are authorized to serve as the administrators for state and federal funding provided for workforce development services and activities. See MCL 408.127, MCL 408.129, and MCL 408.131.

referee then reversed the Agency's decision to deny Dykstra's application for benefits. The referee reasoned that the failure of Michigan Works! to comply with its statutory duty 19 USC 2311(f)(1) to notify Dykstra of her eligibility for TRA benefits under constituted good cause for her untimely application.

The Agency then appealed to the Board, which affirmed the referee's decision. The Board determined that Dykstra acted on the faulty advice of a Michigan Works! employee. It also rejected the Agency's argument that Michigan Works! was not authorized to act on the Agency's behalf.

On appeal in the circuit court, the Agency argued that TRA benefits were only available to claimants who met the statutory requirements, including the deadlines set forth in 19 USC 2291(a)(5)(A)(ii), and that because Dykstra did not meet the deadlines, she was ineligible for benefits. The Agency asserted that the Board's decision was contrary to law and had to be reversed. It also argued that Dykstra could not use the doctrine of estoppel to expand the deadlines on the basis of governmental workers' errors. The circuit court disagreed and determined that the Agency should be estopped from denying Dykstra benefits when it had failed to exercise its statutory duty. The Agency moved for reconsideration, which was granted in part and denied in part. The circuit court vacated that portion of its previous order applying the doctrine of estoppel, but upheld its previous order to the extent that it awarded Dykstra benefits. It reasoned that the deadlines stated in 19 USC 2291(a)(5)(A)(ii) did not apply to a waiver obtained under 19 USC 2291(a)(5)(C) and 19 USC 2291(c).

C. Robert Jordan

After a chance encounter with a former coworker, Jordan discovered that he might be eligible to receive TRA benefits. Jordan later went to a local Michigan Works! office and applied for TRA benefits and requested a waiver of the training requirement on the ground that he was within two years of meeting the requirements for retiring. See 19 USC 2291(c)(1)(C). Although Jordan obtained his waiver, the Agency denied him benefits on the ground that he obtained the waiver outside the deadlines imposed by 19 USC 2291(a)(5)(A)(ii). Jordan appealed the Agency's decision, and the referee assigned to his case held a hearing in April 2005. The referee affirmed the Agency's denial of benefits because Jordan did not file within the statutory deadlines and failed to establish "good cause" for his late application.

Jordan then appealed to the Board. The Board determined that the deadlines in 19 USC 2291(a)(5)(A)(ii) did not apply to the waivers permitted by 19 USC 2291(a)(5)(C). Therefore, because Michigan Works! had issued Jordan a valid waiver, the Board determined that Jordan was eligible for TRA benefits. The Board further found the Agency's argument that Michigan Works! was not its agent to be disingenuous. Accordingly, the Board reversed the referee's decision.

On appeal in the circuit court, the Agency argued that TRA benefits were only available to claimants who met the statutory deadlines set forth in 19 USC 2291(a)(5)(A)(ii). Because Jordan did not meet the requisite deadlines, the Agency contended, he was ineligible for benefits. The Agency also reiterated its argument that the doctrine of estoppel did not apply.

Jordan responded that the Board's decision was not contrary to law because it correctly determined that the deadlines in § 2291(a)(5)(A)(ii) applied only to the enrollment provisions of § 2291(a)(5)(A)(i). He noted that there was no time requirement under the section applicable to waivers. He also argued that it would be inequitable to apply a deadline for benefits that he had not known existed. He asserted that such a result was contrary to the purpose of the law. The Agency countered that the Board's decision was contrary to the Department's interpretation of the statute, which was entitled to deference.

The circuit court held a hearing on the matter in July 2006. In August 2006, the circuit court issued an order affirming the Board's decision.

D. The Appeals

After the circuit courts affirmed the reinstatement of benefits, the Agency applied for leave to appeal in this Court in both cases, which this Court denied for lack of merit. See *Dep't of Labor & Economic Growth, Unemployment Ins Agency v Dykstra*, unpublished order of the Court of Appeals, entered October 16, 2006 (Docket No. 271535); *Dep't of Labor & Economic Growth v Jordan*, unpublished order of the Court of Appeals, entered December 12, 2006 (Docket No. 272634). However, in lieu of granting leave to appeal, our Supreme Court remanded each case to this Court for consideration as on leave granted. See *Dep't of Labor & Economic Growth v Dykstra*, 480 Mich 869 (2007); *Dep't of Labor & Economic Growth v Jordan*, 480 Mich 869 (2007). This Court thereafter consolidated the appeals.

II. The Statutory Deadlines

A. Standard of Review

Congress has determined that the review of a determination by a cooperating state agency is to be done "in the same manner and to the same extent as determinations under the applicable State law and only in that manner and to that extent." 19 USC 2311(d). This Court reviews "a lower court's review of an agency decision to determine 'whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings.'" *Dignan v Michigan Pub School Employees Retirement Bd*, 253 Mich App 571, 575; 659 NW2d 629 (2002) (citation omitted). The circuit court's review of the Agency's decision "is limited to determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law." *Id.* at 576. However, this Court reviews de novo the proper interpretation of statutes, such as the Trade Act. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

B. Principles of Agency Deference

The present case involves the proper interpretation of the Trade Act. As already noted, the Department has interpreted the Trade Act and determined that the deadlines stated under 19 USC 2291(a)(5)(A)(ii) apply to the waivers permitted by 19 USC 2291(a)(5)(C). Because Congress has charged the Department with

the responsibility of promulgating regulations to implement the Trade Act, see 19 USC 2320, the Department's interpretation of the relevant statutory provisions may be entitled to deference. See *Chevron U S A, Inc v Natural Resources Defense Council, Inc*, 467 US 837, 842-843; 104 S Ct 2778; 81 L Ed 2d 694 (1984). As the Supreme Court explained in *Chevron*, whether a court must defer to an agency's interpretation of a statute depends first on 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." *Id.*; see also *State Treasurer v Abbott*, 468 Mich 143, 148; 660 NW2d 714 (2003). However, if Congress has not directly addressed the precise question at issue, the reviewing court does not "simply impose its own construction on the statute . . . . 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." *Chevron*, 467 US at 843.

This deference follows from Congress's decision to commit the administration of a particular program to the agency:

> "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 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 843-844 (citation omitted).]

The level of deference is strong; the "court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n 11. Nevertheless, the Supreme Court noted that, ultimately, the

> judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect. [*Id.* at 843 n 9 (citations omitted).]

Accordingly, the first question that must be answered is whether Congress has spoken on the issue of a deadline for filing a training waiver.

C. Timing and Waivers

The Agency argues that, because 19 USC 2291(a)(5)(C) is silent or ambiguous with regard to time constraints, this Court must defer to the Department's interpretation that the enrollment deadlines provided under 19 USC 2291(a)(5)(A)(ii) should also apply to the waivers permitted under 19 USC 2291(a)(5)(C). However, this Court will not read statutes in isolation, and, after examining the statutory scheme as a whole, see *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 159-160; 627 NW2d 247 (2001), we do not agree that Congress was silent on the timing applicable to the waivers permitted by § 2291(a)(5)(C).[3]

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[3] We note that the Department is rewriting the applicable regulations, which will be codified at 20 CFR 618, and has recognized that it is possible that Congress did not intend for the deadlines (continued…)(…continued)

stated in 19 USC 2291(a)(5)(A)(ii) to apply to waivers. See 71 Fed Reg 50760 (August 25, 2006). The Department has solicited public comment on this issue:

> A related issue, on which the Department seeks public comment, is whether the deadlines should apply to waivers of the training requirement in the case of adversely affected workers who do not enroll in training by the applicable deadline; whether the issuance of a waiver after the deadline has passed can revive eligibility for basic TRA. The Department's current position, reflected in § 618.725(a) [of the proposed regulations], is that an adversely affected worker who neither enrolls in training by the applicable deadline, nor receives a waiver of the training requirement by that deadline, may not become eligible for TRA by later receiving such a waiver. This position was articulated in the operating instructions in

A worker does not have to apply for TRA benefits in order to be eligible for training, but he or she does need to meet at least one of the training requirement alternatives stated in § 2291(a)(5) in order to receive monetary benefits. See 19 USC 2291(a); 19 USC 2296; 20 CFR 617.11. Section 2291(a)(5) clearly provides three alternative ways to meet the training requirement: enroll in training, complete training, or

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> Training and Employment Guidance Letter (TEGL) No. 11-02, Change 1 (69 FR 60903 (2004)), which interpreted [19 USC 2291(a)(5)(A)] as imposing "a deadline by which a worker must be enrolled in approved training, or have a waiver of this requirement, in order to be eligible for TRA." However, a CSA [cooperating state agency] recently brought to the Department's attention an alternative reading, based on the structure of the Act, that the applicable deadline applies only to enrollment in training and not to waivers of the training requirement. The argument is that the alternative deadlines are contained only in the Act's provision on the enrollment in training requirement, [19 USC 2291(a)(5)(A)]; that language in [19 USC 2291(a)(5)(A)(ii)] suggests the requirement applies only to the enrollment in training requirement in [19 USC 2291(a)(5)(A)(i)]; and that the alternative requirement that the worker receive a waiver of the training requirement is contained in a separate provision, [19 USC 2291(a)(5)(C)] of the Act. While this argument is plausible, the Department is concerned that it effectively undermines Congress' intent that TAA-eligible [eligible for trade adjustment assistance] workers be quickly returned to work or quickly provided with the training they need to succeed in the labor market. In light of this argument, the Department encourages public comments on this issue. [*Id.* at 50784-50785.]

obtain a waiver of the training requirement. See also 20 CFR 617.11(a)(2)(vii)(A). Although the statute does provide a specific deadline within which the enrollment alternative must be met, Congress unequivocally provided that the deadlines stated in 19 USC 2291(a)(5)(A)(ii) were to apply to the "enrollment required under clause (i)." Likewise, when crafting an extension for extenuating circumstances, Congress clearly indicated that the extension applied to the "enrollment period." 19 USC 2291(a)(5)(A)(ii)(III). Hence, under a plain reading, it appears that Congress intended the timing deadlines stated in § 2291(a)(5)(A)(ii) to apply only to enrollments under § 2291(a)(5)(A)(i). Further, the provision of a deadline for the enrollment alternative without providing a similar deadline for the waiver alternative is consistent with the statutory scheme and the purpose behind the TRA benefits.

As the Agency aptly notes, the primary purpose of TRA benefits is to assist workers who have lost their jobs because of competition from imports to quickly return to suitable employment. See 20 CFR 617.2; see also 19 USC 2102(4). Congress has determined that this goal can best be accomplished in many cases by retraining the adversely affected worker. See, e.g., 19 USC 2291(a)(5). In such cases, it makes sense to require the worker to demonstrate a commitment to be retrained by requiring the worker to enroll in an approved training program within a specified time. However, Congress also determined that TRA benefits should be paid to some workers who are adversely affected by foreign competition even without the worker completing or enrolling in a retraining program. To this end, Congress empowered the

Secretary of Labor to waive the training requirement imposed under 19 USC 2291(a)(5)(A).[4] See 19 USC 2291(a)(5)(C); 19 USC 2291(c). And the purpose behind a strict deadline for enrollment in retraining does not apply equally to cases involving waivers.

A worker can only qualify for a waiver of the training requirement when there are circumstances that make it "not feasible or appropriate for the worker" to enroll in a training program. 19 USC 2291(c)(1). These circumstances include situations in which the worker will be recalled to work, already has marketable skills, will be retiring, or has health issues that preclude enrollment in an approved training program or when an approved program is unavailable or the worker has good reason for delaying enrollment. See 19 USC 2291(c)(1)(A) to (F). Thus, Congress has specifically provided that TRA benefits may be available to workers who will not participate in a training program. Indeed, in the case of workers who are about to retire, the worker may never even return to active employment.[5] In such cases, a strict deadline would serve only to deprive workers of the TRA benefits that Congress deemed appropriate. Further, given that some circumstances that give rise to

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[4] We find it noteworthy that Congress framed this authority as the power to waive "the requirement to be enrolled in training described in subsection (a)(5)(A)," which is the same subsection that contains the deadlines. See 19 USC 2291(c)(1). Because the deadlines are contained in this subsection, when waiving the requirements of § 2291(a)(5)(A), the Secretary of Labor also presumably waives the accompanying deadlines. This is evidence that Congress contemplated that the Secretary of Labor might issue waivers even after the deadlines found in § 2291(a)(5)(A)(ii).

[5] This is may very well be the case for Jordan.

eligibility for a waiver may not be known within the deadlines provided under § 2291(a)(5)(A)(ii), application of those deadlines to the training waivers permitted under § 2291(a)(5)(C) might defeat the purpose behind the waiver provision. It is also noteworthy that Congress provided limits on the provision of TRA benefits, which include general limitations on the period within which benefits may be paid to a worker. See 19 USC 2291(a)(1) (requiring workers to apply for TRA benefits before the expiration of a 2-year period or the termination of certification); 19 USC 2293 (placing substantive limits on the payment of TRA benefits). Thus, Congress actually provided deadlines for the provision of benefits that are applicable to benefits paid under a waiver of the training requirement. These deadlines are consistent with the purpose behind the waiver provision and Congress's decision to limit the application of the deadlines stated in § 2291(a)(5)(A)(ii) to the enrollment provision found in § 2291(a)(5)(A)(i). We further note that Congress crafted specific limitations on the duration of waivers and provided for the revocation of waivers when the basis for granting the waiver is no longer applicable.[6] 19 USC 2291(c)(2). Hence, in

[6] Congress also provided that, when a waiver is revoked, a worker might still obtain TRA benefits under the enrollment provision if the worker enrolls in an approved training program within a period set by the Secretary of Labor after the termination of the waiver. See 19 USC 2291(a)(5)(A)(ii)(IV). It is telling that Congress did not choose to effect this provision through a tolling mechanism—that is, Congress did not provide that the grant of a waiver tolls the period provided under § 2291(a)(5)(A)(ii). Instead, it authorized the secretary to establish a new period after the revocation of the waiver. The decision to handle revocations in this manner further suggests that Congress understood that a

addition to directly limiting application of the deadlines found under § 2291(a)(5)(A)(ii), Congress provided clear guidance on the timing and efficacy of waivers.

D. Conclusion

When the relevant statutory scheme is interpreted as a whole, Congress's decision to limit the strict deadlines specified under § 2291(a)(5)(A)(ii) to enrollments under § 2291(a)(5)(A)(i) and its refusal to create a similar deadline for the waivers permitted by § 2291(a)(5)(C) must be understood to have been deliberate. For this reason, we conclude that Congress was not silent on the issue; rather, Congress unambiguously provided that the deadlines stated in § 2291(a)(5)(A)(ii) only applied to the enrollment option provided by § 2291(a)(5)(A)(i). And Congress clearly intended the waivers permitted by § 2291(a)(5)(C) to be subject only to the timing restrictions generally applicable to the provision of TRA benefits. See 19 USC 2291(a)(1). Because Congress's intent is clear, the Department's determination that the § 2291(a)(5)(A)(ii) deadlines should apply to the waivers permitted under § 2291(a)(5)(C) and § 2291(c) is not entitled to any deference. Indeed, because the Department's construction of the statutory scheme contradicts Congress's unambiguously stated intent to limit application of the § 2291(a)(5)(A)(ii) deadlines, we must reject that construction.[7] *Chevron*, 467 US at 843 n 9.

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waiver could be granted outside the period provided under 19 USC 2291(a)(5)(A)(ii).

[7] We also do not share the Agency's concern that it must follow the Department's interpretation or risk breaching its agreement with the Department. Under the Department's own regulations,

With regard to both claimants, the Board properly determined that the claimants were entitled to TRA benefits. Because the Board did not err in this regard, the trial courts properly affirmed the Board's decisions.

We are cognizant that at least one foreign jurisdiction has determined that the statutory language at issue is sufficiently ambiguous to warrant deference to the Department's interpretation. See *Wisconsin Dep't of Workforce Dev v Labor & Industry Review Comm*, 297 Wis 2d 546; 725 NW2d 304 (Wis App, 2006); see also *Lowe v Unemployment Compensation Bd of Review*, 877 A2d 494, 498 (Pa Cmwlth, 2005). However, foreign authorities are not binding on this Court, and we find these authorities unpersuasive. See *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006) (noting that judicial decisions from foreign jurisdictions are not binding on this Court). The statutory provisions at issue are not ambiguous, and we will enforce them as written.[8] See

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the Agency is tasked with following the law. See 20 CFR 617.59. And because we have determined that Congress plainly provided that the deadlines stated in 19 USC 2291(a)(5)(A)(ii) do not apply to waivers, that determination is the law and must be given effect. *Chevron*, 467 US at 843 n 9.

[8] Even if we were to conclude that the statutory language was ambiguous, we would nevertheless decline to defer to the Department's construction. The Department's interpretation is not codified as a regulation. Instead, the Department's interpretation is found in a letter intended to provide guidance to the various agencies charged with making TRA benefit determinations. Hence, it is not entitled to *Chevron* deference. See *United States v Mead Corp*, 533 US 218, 231-235; 121 S Ct 2164; 150 L Ed 2d 292 (2001) (explaining that agency policy statements, manuals, and enforcement guidelines are not entitled to *Chevron* deference). Further, although the letter is persuasive authority, see *Skidmore v Swift & Co*, 323 US 134, 140; 65 S Ct 161; 89 L Ed

Macomb Co Prosecutor, 464 Mich at 158 (noting that courts will enforce unambiguous statutes as written).

There were no errors warranting relief.[9]

Affirmed in both cases. Because the cases involved important questions of public policy, none of the parties may tax costs under MCR 7.219.

/s/ Michael J. Kelly
/s/ Jane M. Beckering
/s/ William C. Whitbeck

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124 (1944), because the letter is inconsistent with the statute's language and underlying purpose, we would decline to follow it.

[9] Given our resolution of this issue, we decline to address the parties' alternative arguments concerning estoppel.

AGREEMENT BETWEEN THE STATE OF MICHIGAN AND THE SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR TO CARRY OUT THE PROVISIONS OF

SUBCHAPTERS B, C AND D OF CHAPTER 2 OF TITLE II OF THE TRADE ACT OF 1974, AS AMENDED BY THE TRADE ADJUSTMENT ASSISTANCE REFORM ACT OF 2002

INTRODUCTION

The Trade Adjustment Assistance (TAA) program for workers was created by the Trade Act of 1974. The Trade Act has been amended several times since its initial enactment. The TAA Reform Act of 2002 (Pub. L. 107-210) was signed into law on August 6, 2002. It repealed the North American Free Trade Agreement Transitional Adjustment Assistance (NAFTA-TAA) program, reauthorized the TAA program, and implemented reforms to the TAA program. These reforms expanded the program's coverage and provided an opportunity to ensure that effective strategies are utilized to help trade-affected workers obtain new employment. It is essential that the U.S. Department of Labor (Department), States, and Commonwealths work together to move trade-affected (referred to in the Act as adversely affected) workers into new jobs as quickly and effectively as possible so that they continue to be productive members of the workforce. To this end, the intervention strategies used for program benefits and services will be aimed toward rapid, suitable, and

long-term reemployment for adversely affected workers. Under the Trade Act, as amended by the TAA Reform Act, States and Commonwealths must:

1. Increase the focus on early intervention, upfront assessment, and reemployment services for adversely affected workers.

2. Use One-Stop Career Centers as the main point of participant intake and delivery of benefits and services.

3. Maintain fiscal integrity and promote performance accountability.

TERMS OF AGREEMENT

The Secretary of Labor, United States Department of Labor, hereinafter referred to as the Secretary, and the State of Michigan, hereinafter referred to as the State, in order to carry out the worker adjustment assistance provisions of Subchapters B, C and D of Chapter 2 of Title II of the Trade Act of 1974 (Pub. L. 93-618), as amended, hereinafter referred to as the Trade Act, hereby agree as follows:

I. This Agreement is entered into under Section 239 of the Trade Act (19 U.S.C. 2311), and shall take effect upon the signatures of both parties. This agreement supersedes all prior Agreements (and the modifications thereof made from time-to-time) between the Secretary and the State.

II. A. The Michigan Department of Career Development (Name of the State Agency Designated by the Governor)

In coordination with the State agency that administers the State unemployment compensation law, and such other agency or agencies of the State as the Governor of the State may designate to cooperate with such State agency, will act as the agent of the United States in receiving applications from workers for Trade Adjustment Assistance (TAA) and North American Free Trade Agreement Transitional Adjustment Assistance (NAFTA-TAA) training (including applications for training from agricultural commodity producers under the TAA for Farmers program), the Alternative TAA Program for Older Workers (ATAA), job search and relocation allowances, subsistence payments, transportation payments, ATAA payments, and trade readjustment allowances (TRA) under the Act, and in providing services and making payments as provided for under the Act and in accordance with this Agreement. The State will ensure that basic reemployment services, including, but not limited to, testing, counseling, assessment, selection and referral to training, and placement services be made available to eligible workers for whom a certification has been issued under the Trade Act of 1974, as amended, as well as to agricultural commodity producers under the TAA for Farmers program. The functions and duties undertaken under this Agreement will be performed in accordance with the Act and the regulations and operating instructions issued thereunder by the United States Department of Labor, hereinafter referred to as the Department. The State shall perform such duties and functions in accordance with the Department's

administrative requirements for grants and cooperative agreements to State and local governments at 29 CFR Parts 31, 32, 37, 96, 97, 98 and 99.

TAA program staff need not be merit staffed, except that employees of the State unemployment compensation (UC) or employment service (ES) agency who perform functions under both the TAA program and the UC and/or ES programs must be merit staffed.

B. The State agrees that the TAA program is a required partner in the comprehensive One-Stop system established under the Workforce Investment Act of 1998 (WIA) section 121(b)(1)(B)(viii), and will ensure integration of the TAA program into its One-Stop system, and will comply with all applicable laws, regulations, and policy guidance issued under the WIA.

C. The State will ensure that rapid response assistance and appropriate core and intensive services (as described in section 134 of the WIA) are made available to workers for whom a petition for trade adjustment assistance has been filed.

D. The State agrees that the TAA program will be the primary source of assistance to adversely affected workers. The State also agrees that to the extent trade certified workers enrolled in the TAA program require assistance or services not authorized under the TAA program or assistance or services for which TAA program funds are unavailable or insufficient (such as those discussed under section II.A.), such assistance will be made available under Title I of the WIA, to the extent that Local Workforce Investment Boards and/or One-Stop operators can provide or arrange for such assistance in accordance with the terms of the local

memoranda of understanding (MOU) established under WIA section 121(c). Additionally, where WIA Title I funds are used for training, the training must be approvable under Section 236(a) of the Trade Act and the regulations and operating guidelines of the Department. The State will otherwise cooperate with the Department, other State and Federal agencies, and with service providers under WIA in providing payments and services in accordance with this Agreement.

E. In carrying out the terms of this Agreement, the State must: (1) advise each adversely affected worker as soon as practicable after separation (or, if later, after a certification is issued) of the TAA program benefits and services and the procedures and deadlines for applying for such benefits and services; (2) facilitate the early filing of petitions for any workers who reasonably may be or become eligible for benefits under the Act; and (3) as soon as practicable after a worker's separation from adversely affected employment (or, if later, after a certification is issued) inform the adversely affected worker about suitable training opportunities, review such opportunities with the worker, and provide such additional information as time limits for applying for benefits and services, and advice and assistance to workers as is required by the Act, regulations and operating instructions issued thereunder by the Department.

III. This Agreement authorizes the State to issue waivers of training requirements in accordance with Section 231(c) of the Trade Act. The State agrees to provide to the Secretary reports on waivers, as required by the Trade Act and consistent with the

Secretary's instructions contained on the ETA-563, Quarterly Determinations, Allowance Activities, and Employability Services Under the Trade Act and ETA-9027, Training Waivers Issued and Revoked. Both forms are under OMB Control Number 1205-0016. In addition, upon the request of the Secretary, or his or her designee, the State agrees to provide a copy of any or all waivers issued together with a statement of reasons for each such waiver, and a copy of any or all revocations issued together with a statement of reasons for each such revocation.

IV. For TAA certifications resulting from petitions filed on or before November 3, 2002, the State agrees to follow the eligibility criteria and procedures for the TAA program under Subchapter B of Chapter 2 of Title II of the Trade Act of 1974, as amended, and 20 CFR part 617, and 29 CFR part 90.

The State agrees to:

1. Provide benefits and services to TAA eligible individuals in accordance with the Trade Act and implementing regulations at 20 CFR part 617 and 29 CFR part 90.

2. Comply with all Training and Employment Guidance Letters (TEGLs), General Administration Letters (GALs), and other such program letters issued by the Department applicable to the TAA program.

V. For NAFTA-TAA petitions filed on or before November 3, 2002, the State agrees to follow the eligibility criteria and procedures for the NAFTA-TAA program determination process under Subchapter D of

Chapter 2 of Title II of the Trade Act of 1974, as amended, and the operating instructions in General Administration Letter (GAL) 7-94. *Note: Section 123 of the Trade Adjustment Assistance Reform Act of 2002 (Pub. L. 107-210) repeals the NAFTA-TAA program for petitions filed on or after November 4, 2002.*

The State agrees to continue to provide benefits and services, under NAFTA-TAA certifications, to NAFTA-TAA eligible individuals so long as they remain so eligible.

VI. For petitions filed on or after November 4, 2002, the State agrees to follow the eligibility criteria and procedures for the TAA program under Subchapters B and C of Chapter 2 of Title II of the Trade Act of 1974, as amended, operating instructions under Training and Employment Guidance Letter (TEGL) 11-02, Operating Instructions for implementing the Amendments to the Trade Act of 1974 Enacted by the Trade Act of 2002; TEGL 11-02, Change 1, Operating Instructions for Implementing the Amendments to the Trade Act of 1974 Enacted by the Trade Act of 2002; and TEGL 2-03, Interim Operating Instructions for Implementing the Alternative Trade Adjustment Assistance (ATAA) for Older Workers Program Established by the Trade Adjustment Assistance Reform Act of 2002; and any future Department program letters and implementing regulations.

The State agrees to assist in the filing of petitions for certification of eligibility for TAA assistance with the Department and otherwise assist the Secretary upon request, as required under Section 221(a)(2)(B) of the Trade Act. The State will keep confidential any

confidential business information, as defined at 29 CFR part 90.33 and its successor provisions, it obtains or receives in the course of fulfilling its obligations under this paragraph and shall not disclose such information to any person, organization, or other entity except as authorized by applicable State and Federal laws.

VII. The State will assist in the administration of the health coverage tax credit program under Sections 35, 7527, and 6050T of the Internal Revenue Code of 1986 and section 2745 of the Public Health Service Act, in accordance with TEGL No. 10-02, Unemployment Insurance Program Letter No. 02-03, and all Department program letters, and implementing regulations. The State will keep confidential any information it receives about each claimant in the course of fulfilling its obligations under this paragraph to the extent required under all applicable State and Federal laws.

VIII. The State will assist in the administration of the ATAA for Older Workers program under Section 246 of the Trade Act, as required by implementing operating instructions, program letters and regulations. The State will keep confidential any information it receives about each claimant in the course of fulfilling its obligations under this paragraph to the extent required under all applicable State and Federal laws.

IX. When a single or multiple State agencies administer the TAA program benefits and services under Sections 236 and 250(d)(1) and (2) of the Trade Act of 1974, as amended, and the programs under Title I of the WIA, the State agrees that such State agency

will take such action as may be necessary to ensure the coordinated delivery of services and payments under these programs to adversely affected workers. When the programs under this Agreement and WIA are administered by different State agencies, in whole or in part, the State agency (or agencies) administering TAA benefits and services under this Agreement and the State agency administering programs under Title I or the WIA must enter into an interagency agreement to ensure coordination of, and avoid duplication among, the activities identified at Section 112(b)(8) of the WIA.

X. A determination by a State agency with respect to an individual's entitlement to any TAA program benefits or services shall be subject to review in the same manner and to the same extent as determinations with respect to unemployment compensation under the State unemployment compensation law, and only in that manner and to that extent.

XI. The State or any State agency will not deny or reduce unemployment compensation otherwise payable to an adversely affected worker under any State or Federal unemployment compensation law for any week by reason of any right to a payment of any TAA program benefit. If, with respect to any week of unemployment beginning on or after April 3, 1975, any reduction or denial of unemployment compensation was made under the unemployment compensation law of the State, on account of any TAA program benefit paid to an individual, the State (including the State agency) agrees to pay the individual the full amount of the reduction or denial, except for additional

compensation not reimbursed by any Federal funds as allowed under section 231(a)(3)(B) of the Trade Act.

XII. Allowable costs, including the costs of performing services for another State under the Act, shall be determined in accordance with the Office of Management and Budget Circular A-87 (Revised).

XIII. The State will comply with the provisions contained in the State's Annual Cooperative Financial Agreement (Financial Agreement) and accompanying certifications and assurances. All funds allocated to the State under the Financial Agreement will be used solely for the purposes for which they are allocated to the State. Any such funds that are not needed for the purpose(s) for which they were allocated will be returned to the United States Treasury as soon as reasonably possible.

XIV. The State will take such action as is reasonably necessary to recover for the account of the United States all amounts paid out as program benefits or services which were erroneously paid to ineligible claimants or others and to restore any losses or misapplication of funds allocated to the State for Trade Act program benefits or services.

XV. The State will, by and through the State agency or agencies referred to in Article II.A. of this Agreement, maintain such records, in accordance with 29 CFR part 97.42 and any successor provisions, pertaining to the administration of the Trade Act as the Department requires, including, but not limited to, the identification of workers determined eligible for TRA and other program services and/or benefits, and the services and benefits provided to or on behalf of

such individuals. The State will make such records available for inspection, examination, and audit by such Federal officials or employees as the Department may designate or as may be required by law.

XVI.A. The State agrees to provide accurate and timely submissions of all required reports, including the Trade Act Participant Report, which details participant outcome data required in Training and Employment Guidance Letter No. 11-00 (OMB Control No. 1205-0392), and any subsequent guidance. The State agrees to provide reports as required by the Department in support of performance measures established for the TAA program for entered employment, retention in employment, and wage replacement under the Government Performance and Results Act of 1993 (GPRA) and entered employment, retention in employment, earnings increase, and program efficiency under the OMB common measures, TEGL 15-03, Common Measures Policy, and any succeeding measures developed by the Secretary. The State will communicate these GPRA goals and common measures to all necessary parties, conduct appropriate monitoring of performance progress and take necessary steps to meet established goals.

B. The State agrees to provide, in such forms as the Secretary requires, the description and information described in Section 112(b)(8) and (14) of WIA (29 U.S.C. 2822 (b)(8) and (14)), OMB Control Numbers 1205-0398 and 1205-0407.

XVII. The State agency or agencies referred to in Article II.A. of this Agreement will make available to any individual or organization a copy of this Agreement for inspection and copying. Copies of this

Agreement may be furnished on request to any individual or organization upon payment of the same charges, if any, as apply to furnishing copies of other records of the State agency.

XVIII. If the State, or any State agency, has not fulfilled the commitments under this Agreement, and the Secretary has made a determination to that effect, Section 3302(c)(3) of the Internal Revenue Code of 1986, as amended, shall be implemented, and the total credits otherwise allowable to taxpayers subject to the unemployment compensation law of the State shall be reduced as provided in Section 3302(c)(3). A State, or a State agency, will be notified and afforded an opportunity for a hearing before such a determination is made. Pending the making of a determination as provided herein, the Secretary may, when the Secretary determines that the seriousness of the situation warrants the action, suspend the Agreement by written notice to the State, and make such arrangements as the Secretary deems necessary or appropriate to assure the continuing administration of the Act in the State in accordance with the Act and the regulations and operating instructions issued thereunder.

XIX. This Agreement shall remain in effect until such time as it is modified or terminated. A written request by the State for a modification or termination must be submitted to the Secretary at least thirty (30) days before such action may take effect. If this Agreement is terminated by the State, all matters concerning the administration of the Act and this Agreement in the State shall be concluded as soon thereafter as possible. On or before the date of

termination, the State shall turn over to the Department all pending applications for TAA program benefits and/or services and all State-maintained TAA records.

STATE OF MICHIGAN:

By: /s/
Governor (or duly authorized representative)

DATED: September 13, 2004

U.S. DEPARTMENT OF LABOR:

By: /s/
Secretary of Labor

DATED: January 26, 2005

CERTIFICATION
(If signed by other than Governor)

Dennis J. Sykes, has the
(Name and Title)
authority under the Constitution and laws of this State to sign this foregoing Agreement on behalf of the State of Michigan.

Signature: Thomas F. Schimpf

Title: Assistant Attorney General

Date: September 13, 2004