No. 12-379

In the Supreme Court of the United States

MICHIGAN DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS, TRA SPECIAL PROGRAMS UNIT, PETITIONER

v.

DAWN GERSTENSCHLAGER

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Trade Act of 1974, 19 U.S.C. 2101 *et seq.*, prescribes a deadline for a claimant seeking a training waiver as a prerequisite to obtaining trade readjustment allowance benefits under the Act.

2. Whether the Department of Labor's operating instructions set forth in Training and Enforcement Guidance Letters are entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The Trade Act of 1974 (Trade Act), 19 U.S.C. 2101 *et seq.*, established a program of adjustment assistance for workers, including trade readjustment allowance (TRA) benefits as a supplement to state unemployment insurance benefits "[t]o aid workers who have lost their jobs because of import competition." *International Union, United Auto., Aerospace & Agric. Implement Workers of Am.* v. *Brock*, 477 U.S. 274, 277 (1986) (*Unit-*

ed Auto Workers).[1] Under the statutory scheme, "a group of workers, their union, or some other authorized representative may petition the Secretary of Labor [(Secretary)] to certify that their firm has been adversely affected by imports." *Ibid.*; see 19 U.S.C. 2271-2273. If the Secretary issues a certification of eligibility, workers within the certified group "who meet certain standards of individual eligibility may then apply for and receive TRA benefits." *United Auto Workers*, 477 U.S. at 277; see 19 U.S.C. 2291.

a. 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." *United Auto Workers*, 477 U.S. at 277; see 19 U.S.C. 2311(a); 20 C.F.R. 617.59. The Secretary has "entered into such agreements with unemployment insurance agencies in each State and in the District of Columbia and Puerto Rico." *United Auto Workers*, 477 U.S. at 277. A State's eligibility determinations are subject to administrative and judicial review as provided by state law. See 19 U.S.C. 2311(d); *United Auto Workers*, 477 U.S. at 278-279, 284-285. Each cooperating state agency acts as an agent of the United States and is "bound to apply the relevant regulations promulgated by the [Secretary] and the substantive provisions of the Act." *Id.* at 278; see 19 U.S.C. 2311(d); cf. Pet. App. 31a (providing that the agreement will be performed "in accordance with the Act and the regulations and operating instructions issued thereunder"). To ensure "uniform interpretation and application of the

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[1] Unless otherwise noted, all references to the United States Code are to the 2006 version. Although the Trade Act was subsequently amended on a number of occasions, this case is governed by the 2002 Amendments. See note 2, *infra*.

Act," cooperating state agencies must provide the Department of Labor (Department) with judicial or administrative decisions ruling on individual eligibility determinations, and must coordinate with the Department regarding how to respond to adverse decisions concerning eligibility under state procedures for administrative and judicial review. See 20 C.F.R. 617.52(c). Cooperating state agencies are also charged with providing information, advice, and assistance to eligible workers regarding the availability of TRA benefits and the relevant procedures and deadlines. See 19 U.S.C. 2311(f).

b. To be individually eligible for benefits, a claimant must either (i) be enrolled in an approved training program, (ii) have completed an approved training program, or (iii) have obtained a waiver of the training requirement. See 19 U.S.C. 2291(a)(5) and (c). Under the amendments to the Trade Act enacted in 2002, enrollment in training must occur no later than eight weeks after the Secretary's certification of the claimant's worker group, or 16 weeks after the claimant's job loss, whichever is later. See Trade Act of 2002 (2002 Amendments), Pub. L. No. 107-210, § 114(b)(3), 116 Stat. 939 (19 U.S.C. 2291(a)(5)(A)(ii)(I)-(II)).[2] The so-called

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[2] This case is governed by the 2002 Amendments. In 2009, Congress extended the statutory deadline to 26 weeks, see American Recovery and Reinvestment Act of 2009 (2009 Amendments), Pub. L. No. 111-5, § 1821(a)(1), 123 Stat. 375; further extended the deadline for claimants who enrolled late "due to the failure to provide the worker with timely information regarding" the relevant deadline, § 1821(a)(4), 123 Stat. 376; and incorporated state-law good cause exceptions for any time limitation, § 1825(1), 123 Stat. 378. In 2011, Congress substantially narrowed the substantive criteria for obtaining a waiver of the training requirement, see Trade Adjustment Assistance Extension Act of 2011 (2011 Amendments), Pub. L. No. 112-40, § 212(a)(1), 125 Stat. 404, and directed the Secretary to estab-

"8/16 deadline" can be extended for up to 45 days if there are extenuating circumstances. 19 U.S.C. 2291(a)(5)(A)(ii)(III).

The Secretary may issue a waiver of the training requirement if "the Secretary determines that it is not feasible or appropriate for the worker" to enroll in training because (1) the worker will be recalled to work reasonably soon; (2) the worker has marketable skills for suitable employment and a reasonable expectation of employment in the foreseeable future; (3) the worker is nearing retirement age; (4) the worker is unable to participate in or complete training due to a health condition; (5) a training enrollment date is not immediately available; or (6) no training program is reasonably available. 19 U.S.C. 2291(c)(1). A training waiver is generally effective for six months, but may be renewed or revoked by the Secretary. 19 U.S.C. 2291(c)(2). Upon revocation or expiration, the claimant must enroll in training within the time period specified by the Secretary. 19 U.S.C. 2291(a)(5)(A)(ii)(IV).

c. The Department of Labor uses Training and Employment Guidance Letters (TEGLs) to inform cooperating state agencies of the Department's interpretation of the Trade Act. Shortly after enactment of the 2002 Amendments, the Department issued TEGL No. 11-02, Change 1, setting forth its position that the 8/16 deadline applies to waivers of the training requirement. See

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lish a "good cause" exception to the relevant time limitations, § 212(b), 125 Stat. 404. Neither amendment applies here. The governing law is determined by the filing date of the petition for certification that covers an eligible worker, see 2011 Amendments § 201(b), 125 Stat. 403; 2009 Amendments § 1891, 123 Stat. 420-421; 2002 Amendments § 151, 116 Stat. 953-954, not the date an employer is first certified (Reply Br. 3), or the date a worker's claim is filed (Br. in Opp. 14 n.7).

69 Fed. Reg. 60,903 (Oct. 13, 2004). The Department stated that the 2002 Amendments "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 TRA [benefits]." *Ibid.*; see *ibid.* (directing cooperating state agencies to "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 deadline, if appropriate"). Subsequent amendments to TEGL No. 11-02 reaffirmed that interpretation. See TEGL No. 11-02, Change 3, at 3 (May 25, 2006), http://wdr.doleta.gov/directives/attach/TEGL11-02_ch3.pdf (TEGL No. 11-02 Change 3) ("Eligibility for TRA requires that the worker enroll in approved training or receive a waiver of the training requirement by the later of 8 weeks after the certification is issued or 16 weeks after the worker's total or partial separation from adversely affected employment.").

On August 25, 2006, in a notice of proposed rulemaking, the Department solicited comments on "whether the [8/16] deadlines should apply to waivers of the training requirement." 71 Fed. Reg. 50,784-50,786. The Department reiterated its "current" position, *i.e.*, "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." *Id.* at 50,785. Although the Department recognized that it might be "plausible" to read "the applicable deadline [as] appl[ying] only to enrollment in training and not to waivers of the training requirement," it expressed concern that such a reading would "effectively undermine Congress' intent" that eligible workers return to

work "quickly" and to "quickly" provide such workers "with the training they need to succeed in the labor market." *Ibid.*[3]

In 2011, the Department reaffirmed that "waivers may only be issued before the expiration of the applicable deadline for enrollment in training, not after it has expired." TEGL No. 8-11, at 5 (Oct. 19, 2011), http://wdr.doleta.gov/directives/attach/TEGL/TEGL08-11.PDF (TEGL No. 8-11). In TEGL No. 8-11, however, the Department informed cooperating state agencies that the 8/16 deadline could be tolled for equitable reasons, and advised them to determine whether equitable tolling would be appropriate before denying an application for TRA benefits based on an untimely waiver. See *id.* at 3-5.

2. On July 12, 2004, the Secretary certified that respondent's employer was moving its automobile wire harness operations to another country and that workers adversely affected would be eligible to apply for TRA benefits. As a result of that exportation of operations, on November 5, 2004, respondent was laid off from her job. See Certification of and Record of Admin. Proceedings (C.R.) 25, 27; TAA Decision 55,199, http://www.doleta.gov/tradeact/taa/taadecisions/taadecision.cfm?taw=55199 (Sept. 2, 2004).

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[3] No relevant changes to TEGL No. 11-02 were ultimately made. Cf. Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, Div. F, Title I, § 110, 123 Stat. 762 (providing that no funds "shall be available to finalize or implement any proposed regulation" under the Trade Act); Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, Div. G., Title I, § 110, 121 Stat. 2168 (same); Revised Continuing Appropriations Resolution, 2007, Pub. L. No. 110-5, § 2, 121 Stat. 8, 28-29 (same).

On June 10, 2005, approximately seven months later, respondent applied for TRA benefits. C.R. 25-26. Petitioner, a state agency authorized to make individual eligibility determinations for the State of Michigan, does not dispute that respondent's delay in filing was the result of incomplete and inaccurate information regarding the availability of TRA benefits. Pet. 9-10. Michigan Works!, an association of local agencies charged with assisting in the administration of TRA benefits, failed to inform respondent of the availability of TRA benefits or the relevant deadlines to apply for those benefits, and, in response to one call, stated that such benefits were unavailable. Pet. App. 14a n.2; C.R. 17-21, 28. In June 2005, after the expiration of the 8/16 deadline, respondent first learned that she was eligible to apply for TRA benefits and, shortly thereafter, she filed an application and sought a training waiver. C.R. 17, 28. After concluding that respondent "possess[es] marketable skills for suitable employment," Michigan Works! waived the training requirement. C.R. 27, 43.

3. a. Petitioner denied respondent's TRA benefits application as untimely because respondent did not obtain the necessary waiver within the 8/16 deadline. C.R. 13, 16-17. An Administrative Law Judge (ALJ), however, held that petitioner was estopped from denying respondent's claim as untimely because "Michigan Works did not provide [respondent] with the correct information regarding benefits," and respondent had "relied on the information provided by Michigan Works." C.R. 29-30. The Michigan Employment Security Board of Review (Board of Review) affirmed the ALJ's estoppel determination, agreeing that respondent "acted on the faulty advice of a Michigan Works! employee." C.R. 34-35.

The Huron County Circuit Court reversed. C.R. 38-39. The court held that petitioner could not be estopped from denying the benefits application, but it remanded for the Board of Review to "examine a related issue, whether claimant established eligibility for TRA benefits under [Section] 2291(a)(5)(C)," which provides for a waiver of the training requirement. C.R. 34.

b. While the case was pending on remand, the Michigan Court of Appeals decided *Department of Labor & Economic Growth* v. *Dykstra*, 771 N.W.2d 423 (2009), holding that the 8/16 deadline does not apply to the issuance of a training waiver. See Pet. App. 8a-28a. The court in *Dykstra* explained that, "under a plain reading, it appears that Congress intended the timing deadlines stated in [Section] 2291(a)(5)(A)(ii) to apply only to enrollments under [Section] 2291(a)(5)(A)(i)," and that this reading "is consistent with the statutory scheme and the purpose behind the TRA benefits." *Id.* at 23a. The court explained further that Congress had "provided clear guidance on the timing and efficacy of waivers" by specifying the circumstances under which waivers were appropriate, by "craft[ing] specific limitations on the duration of waivers," and by "provid[ing] for the revocation of waivers when the basis for granting the waiver is no longer applicable." *Id.* at 24a-26a. In the end, the court concluded that Congress "clearly intended the waivers * * * to be subject only to the timing restrictions generally applicable to TRA benefits," and that Congress's failure to establish an explicit deadline for the issuance of waivers was "deliberate." *Id.* at 26a (citing 19 U.S.C. 2291(a)(1)).[4]

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[4] For the TRA benefits at issue here, Section 2291(a)(1)(A) and (B) provide that a worker's separation must have occurred "on or after the date" specified in the certification and "before the expiration of

Because the court in *Dykstra* found Congress's intent to be "clear," it declined to defer to the Department's contrary interpretation as expressed in the TEGLs. Pet. App. 26a. In a footnote, however, the court noted that, "[e]ven if" there had been ambiguity, the Department's construction would not be entitled to deference. *Id.* at 27a n.8. The court explained that deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), is not warranted because the Department's construction "is found in a letter intended to provide guidance to the various agencies charged with making TRA benefits determinations," and is "not codified as a regulation." Pet. App. 27a n.8. And while the court recognized that the letter would still be "persuasive authority" under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), the court stated that it "would decline to follow it" because "the letter is inconsistent with the statute's language and underlying purpose." Pet. App. 27a n.8.

c. On July 21, 2010, the Board of Review again held that respondent is eligible for TRA benefits—this time applying *Dykstra*. C.R. 42-44. The Huron County Circuit Court, apparently believing that the Board of Review had impermissibly relied on estoppel, reversed the Board's decision. Pet. App. 5a-6a. Then, applying *Dykstra* (rather than estoppel), the court agreed that respondent is eligible for benefits. *Id.* at 6a-7a.

The Michigan Court of Appeals declined petitioner's request for leave to appeal, Pet. App. 3a, as did the

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the 2-year period beginning on the date" of certification. 19 U.S.C. 2291(a)(1)(A) and (B); see Pet. App. 25a. TRA benefits "shall not be paid" after "the close of the 104-week period" beginning during the "first week following the week" of the worker's separation from employment. 19 U.S.C. 2293(a)(2).

Michigan Supreme Court, *id.* at 2a. The Michigan Supreme Court also denied petitioner's motion for reconsideration. *Id.* at 1a.

DISCUSSION

The Michigan Court of Appeals, in a decision that bound the Huron County Circuit Court in this case, erred in holding that the statutory deadline for eligibility for Trade Act readjustment benefits has no application to a waiver of the training required for TRA benefits eligibility. Congress did not speak directly to that issue, and the Department of Labor is entitled to a measure of deference as the expert agency. Nonetheless, review is not warranted. There is no conflict among state courts of last resort, and any conflict among intermediate state appellate courts is narrow and does not warrant this Court's review. The first question presented, moreover, is of limited practical importance because the Department of Labor has interpreted the Trade Act to permit equitable tolling of the deadline and because of subsequent amendments to the Trade Act. Because respondent is likely entitled to TRA benefits for other reasons, and because the Department of Labor has assured petitioner that it may follow the Michigan Court of Appeals' decision without breaching its contractual obligations to the federal government, the petition for a writ of certiorari should be denied.

A. The Michigan Intermediate Appellate Court Decision That Bound The Huron County Circuit Court Here Is Incorrect

In *Department of Labor & Economic Growth* v. *Dykstra*, 771 N.W.2d 423 (2009), the Michigan Court of Appeals held that the 8/16 deadline applies only to enrollment in an approved training program, and not to

the waiver of that training requirement. That interpretation, while "plausible" (71 Fed. Reg. at 50,785), is not compelled by the statutory text or purpose. Because the statute is ambiguous, and because the Department has consistently and reasonably construed the 8/16 deadline as applying equally to training waivers, the *Dykstra* decision (which bound the Huron County Circuit Court here) was incorrect.

1. To be eligible for TRA benefits, a claimant must satisfy the training requirement in one of three ways: (i) by enrolling in an approved training program, (ii) by completing an approved training program, or (iii) by obtaining a waiver of the training requirement. 19 U.S.C. 2291(a)(5). In 2002, Congress amended the Trade Act to include a specific time deadline for enrolling in the required training. See 2002 Amendments § 114(b)(3), 116 Stat. 939. The so-called 8/16 deadline expressly applies to "the enrollment required under clause (i)." *Ibid.* The statute, however, is silent about when a claimant must complete an approved training program, 19 U.S.C. 2291(a)(5)(B), or obtain a training waiver, 19 U.S.C. 2291(a)(5)(C)—except to say that it must occur after the date of separation.

The court in *Dykstra* construed that statutory silence as a "deliberate" choice by Congress to allow claimants to obtain a training waiver after expiration of the 8/16 deadline. Pet. App. 26a. That is not, however, the only reasonable reading of the statute. As *Dykstra* recognized, "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." 771 N.W.2d at 431 (emphasis added). And the purpose of the 8/16 deadline is to "encourage workers to *promptly* enroll in training that is available and feasible." *Wis-*

consin Dep't of Workforce Dev. v. *Labor & Indus. Review Comm'n*, 725 N.W.2d 304, 312 (Wis. Ct. App. 2006) (emphasis added). Those purposes are furthered by requiring claimants to either enroll in training, complete training, or obtain a waiver of training within the specified time frame.

The alternative means of satisfying the training requirement are closely related to one another. For example, if a claimant is unable to obtain a waiver, she will have to enroll in an approved training program. And if the 8/16 deadline has already passed, she will be unable to qualify for TRA benefits. Within the time deadlines, a claimant who receives an adverse waiver decision may still have the opportunity to enroll in training and receive TRA benefits. Similarly, training waivers are themselves time limited. See 19 U.S.C. 2291(c)(2). Once a waiver expires or is revoked, the claimant must enroll in training within the time period specified by the Secretary. See 19 U.S.C. 2291(a)(5)(A)(ii)(IV). Any delay in obtaining the initial waiver would, in turn, have postponed the necessary job training. Accordingly, "prompt enrollment in appropriate training remains a goal," even when a claimant requests (or receives) a training waiver. *Wisconsin Dep't of Workforce Dev.*, 725 N.W.2d at 312; cf. 71 Fed. Reg. at 50,785 (expressing concern that the absence of a time deadline for training waivers would "effectively undermine[] Congress's intent" that "eligible workers be quickly returned to work or quickly provided with the training they need to succeed in the labor market").

There is also a significant flaw in the *Dykstra* court's textual analysis: it applies equally to the *completion* of a training program under 19 U.S.C. 2291(a)(5)(B). The court concluded that under a "plain reading" of the stat-

ute, the 8/16 deadline applies "only to enrollments under [Section] 2291(a)(5)(A)(i)." Pet. App. 23a. If true, a claimant who missed the time deadline for enrolling in training could simply enroll at a later date, complete training, and then apply for TRA benefits, claiming eligibility under 19 U.S.C. 2291(a)(5)(B). That interpretation would directly undermine the specific statutory time limit on enrollment.

2. The Department's consistent interpretation of the 8/16 time deadline as applying equally to training waivers reasonably effectuates congressional intent.

In a TEGL interpreting the 2002 Amendments, the Department informed cooperating state agencies that the amendments impose "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." 69 Fed. Reg. at 60,903 (emphasis added); *ibid.* (explaining that state agencies must "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 deadline*, if appropriate") (emphasis added). The Department later reaffirmed that "[e]ligibility for TRA requires that the worker enroll in approved training *or receive a waiver of the training requirement* by the later of 8 weeks after the certification is issued or 16 weeks after the worker's total or partial separation from adversely affected employment." TEGL No. 11-02 Change 3, at 3 (emphasis added); see TEGL No. 8-11, at 5 (reiterating that "waivers may only be issued before the expiration of the applicable deadline for enrollment in training, not after it has expired"). As the Department explained in a notice of proposed rulemaking, a contrary construction could "effectively undermine[]" Congress's intent to return workers to the workforce

"quickly" and to "quickly provide[]" them with the "training they need to succeed in the labor market." 71 Fed. Reg. at 50,785.[5]

That consistent and contemporaneous construction of the 8/16 deadline is reasonable and consistent with congressional intent. See *Wisconsin Dep't of Workforce Dev.*, 725 N.W.2d at 311-312, 314 (concluding that the Department's guidance letter gives the statutory language "a reasonable meaning"). When Congress amended Section 2291(a)(5) in 2009, and again in 2011, it did nothing to alter the Department's interpretation, which had been specifically drawn to its attention. The 2009 Amendments extended the 8/16 deadline to 26 weeks because of criticism by the Government Accountability Office (GAO), among others, that the time frame was too short. H.R. Conf. Rep. No. 16, 111st Cong., 1st Sess. 665 (2009). The Conference Report specifically cites a GAO Report, which itself repeatedly described the 8/16 deadline as applying to the issuance of training waivers. See *ibid.* (citing GAO, GAO 04-1012, *Trade Adjustment Assistance: Reforms Have Accelerated Training Enrollment, but Implementation Challenges Remain* (Sept. 2004), http://www.gpo.gov/fdsys/pkg/GAOREPORTS-GAO-04-1012/pdf/GAOREPORTS-GAO-04-1012.pdf) (GAO Report); GAO Report 3 ("[Forty-one] of the 50 states reported that workers are now enrolling in training sooner as a result of the new training enrollment deadline which requires workers to be enrolled in training or have a training waiver by the later of 8 weeks after the petition is certified or 16

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[5] Although the Department solicited comments on whether it should reconsider its interpretation notwithstanding that concern, see 71 Fed. Reg. at 50,784-50,786, no relevant changes to TEGL No. 11-02 have been made. See note 3, *supra*.

weeks after the worker is laid off.").[6] "[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827-828 (2013) (quoting *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986)).

The Department's reasonable interpretation, which Congress has not seen fit to alter, is entitled to deference. Even if the Department's interpretation is not entitled to *Chevron* deference, as the *Dykstra* court suggested (Pet. App. 27a n.8), it is still entitled to respect under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). See Pet. App. 27a n.8 (acknowledging that guidance letter is "persuasive authority"); cf. *Williams* v. *Board of Review*, 948 N.E.2d 561, 569 (Ill. 2011) (acknowledging that "TEGLs may merit some deference") (citing *United States* v. *Mead Corp.*, 533 U.S. 218, 234-235 (2001)).

B. There Is No Conflict Among State Courts Of Last Resort

Petitioner contends (Pet. 12-14) that the decision of Michigan's intermediate appellate court in *Dykstra* conflicts with decisions of other state courts. The purport-

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[6] See also, *e.g.*, GAO Report 8 ("Participant must be enrolled in training or have a waiver from this requirement by the later of 16 weeks after separation or 8 weeks after certification to qualify for extended income support."); *id.* at 15 ("The deadline requires workers to be enrolled in training or have a training waiver by the later of two dates: either 16 weeks after being laid off or 8 weeks after the petition is certified.").

ed conflict is overstated and, in any event, does not warrant this Court's review.[7]

1. Only two of the state court decisions cited by petitioner are from state courts of last resort, and neither squarely addresses the applicability of the statutory time deadline to training waivers. See *Williams*, *supra*; *Reed* v. *Nebraska Dep't of Labor*, 717 N.W.2d 899 (Neb. 2006). In *Williams*, the Illinois Supreme Court held that the statutory deadline is subject to equitable tolling and that tolling was appropriate in that case. 948 N.E.2d at 567-574. The court did not consider, let alone decide, whether the statutory deadline applied to training waivers. *Id.* at 566 (noting only that the worker had proposed that point as an "[a]lternative[]" argument). *Reed* too did not directly present the question whether the statutory deadline applied to training waivers because the worker there never requested a waiver of the training requirement. See State of Nebraska Br. at 8, No. S-05-1473, 2006 WL 4528603 (Mar. 13, 2006) ("There is no evidence in the record that Reed ever requested a waiver of the TRA training requirement."); *Reed*, 717

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[7] Petitioner does not identify any conflict among the federal courts of appeals (or state courts of last resort) on the second question presented, *i.e.*, whether the Department's interpretation expressed in a guidance letter to cooperating state agencies warrants *Chevron* deference. Cf., *e.g.*, *Lang* v. *Director, Ohio Dep't of Job & Family Servs.*, 982 N.E.2d 636, 640-641 (Ohio 2012) (deferring to cooperating state agency's reasonable interpretation of Trade Act provision that adopted the Department's reading), cert. denied, No. 12-1125 (May 13, 2013); *Adams* v. *Division of Emp't Sec.*, 353 S.W.3d 668, 674 n.8 (Mo. Ct. App. 2011) (noting that parties did not dispute that Department's interpretation in relevant TEGLs was entitled to deference); *Williams*, 948 N.E.2d at 569 (noting that although "TEGLs may merit some deference," the relevant TEGLs did not address issue at hand).

N.W.2d at 902 (noting that "Reed filed a training approval request"). Although the worker did argue that Section 2291 "provides no deadline for securing training waivers" notwithstanding the absence of a waiver request, the court appeared to focus on whether there were exceptions to the statutory time deadline, not on whether the statutory deadline applied to training waivers in the first instance. See 717 N.W.2d at 904.

2. The other three state court decisions petitioner relies on are, like the decision in *Dykstra*, from intermediate appellate courts. See *Vanguilder* v. *Department of Emp't & Econ. Dev.*, No. A08-1023, 2009 WL 1048503 (Minn. Ct. App. 2009); *Wisconsin Dep't of Workforce Dev.*, *supra*; *Lowe* v. *Unemployment Comp. Bd. of Review*, 877 A.2d 494 (Pa. Commw. Ct. 2005). As an initial matter, any purported conflict among the States' intermediate appellate courts would not warrant this Court's review. See Sup. Ct. R. 10(b). Moreover, the purported conflict among those courts is overstated.

Like *Williams* and *Reed*, the decision in *Lowe* did not squarely address the applicability of the statutory time deadline to training waivers. In *Lowe*, the court held that the specified time limits in the Trade Act are not subject to equitable exceptions. 877 A.2d at 497-498; see *Hall* v. *Unemployment Comp. Bd. of Review*, 42 A.3d 1204, 1208 (Pa. Commw. Ct. 2012) (explaining that *Lowe* was about "the applicability of equitable relief from the program's deadline").[8] The court may have assumed, *sub silentio*, that the time deadline otherwise applied to training waivers, but it did not specifically decide that issue.

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[8] For the reasons explained in *Hall*, *supra*, and for the reasons discussed at p. 19, *infra*, equitable relief from the statutory deadline is now available.

Wisconsin Department of Workforce Development and *Vanguilder* are closer to the issue in this case, but they still do not present a square conflict. In *Wisconsin Department of Workforce Development*, the court concluded that the relevant statutory language pertaining to the 8/16 deadline was "ambiguous" and that the Department's construction, as expressed in the guidance letter, was reasonable. 725 N.W.2d at 306, 311-312. The court's decision, however, rested on its conclusion that the state entity charged with reviewing the eligibility determination was required to follow the Department's guidance letter and had erred in failing to do so. *Id.* at 312-314.

In *Vanguilder*, the Minnesota Court of Appeals held that the 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." 2009 WL 1048503, at *3. But the court declined to consider the Department's contrary interpretation because the record in that case did not include a guidance letter from the Department to the State of Minnesota. *Id.* at *3 n.2. Indeed, the court distinguished *Wisconsin Department of Workforce Development* for precisely that reason. *Ibid.* *Vanguilder*, moreover, is unpublished and not precedential. See Minn. Stat. Ann. § 480A.08(c) (West 2002).

C. This Court's Review Is Not Otherwise Warranted

There is no reason for this Court to review a decision of the Huron County Circuit Court (relying on a decision of the Michigan intermediate appellate court) in the absence of a cognizable conflict among state courts of last resort or federal courts of appeals. The first question presented is of limited practical importance; respondent is likely entitled to TRA benefits for other

reasons; and the "Catch 22" (Pet. 20) petitioner fears will not come to pass.

1. The first question presented is of limited practical importance for at least two reasons.

First, States are required to notify claimants of their eligibility for TRA benefits and the relevant time deadlines, 20 C.F.R. 617.4, and the Department of Labor has concluded that the 8/16 deadline is subject to equitable tolling, TEGL No. 8-11; see *Adams* v. *Division of Emp't Sec.*, 353 S.W.3d 668, 673-675 (Mo. Ct. App. 2011). If properly notified, claimants should have little difficulty obtaining a training waiver in the requisite time frame, if a waiver is otherwise appropriate. If notification is deficient, claimants can seek to have the deadline tolled for equitable reasons. See TEGL No. 8-11, at 3-4 (explaining that equitable tolling may be available if, for example, "a worker was not informed of the 8/16 deadline while receiving unemployment insurance and before the 8/16 deadline expired"). In 2011, the Department made clear that its "interpretation concerning equitable tolling" should apply "to all workers in a group covered under any [TRA] certification, whether the certification is under the 2002 or 2009 Amendments or any future law governing the [TRA] program." *Id.* at 5; cf. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 826-829 (deferring to agency's interpretation of statutory time limit as precluding equitable tolling).

Second, subsequent amendments to the Trade Act narrow the availability of training waivers and substantially decrease the likelihood of an inexcusably late filing. In 2009, Congress extended the statutory deadline to 26 weeks, see American Recovery and Reinvestment Act of 2009 (2009 Amendments), Pub. L. No. 111-5, § 1821(a)(1), 123 Stat. 375; further extended the deadline

for claimants who enrolled late "due to the failure to provide the worker with timely information regarding" the relevant deadline, § 1821(a)(4), 123 Stat. 376; and incorporated state-law good cause exceptions for any time limitation, § 1825(1), 123 Stat. 378-379; see, *e.g.*, Mich. Admin. Code r. 421.210(2)(e) and (6) (2013). In 2011, Congress substantially narrowed the substantive criteria for obtaining a waiver of the training requirement, see Trade Adjustment Assistance Extension Act of 2011 (2011 Amendments), Pub. L. No. 112-40, § 212(a)(1), 125 Stat. 404, and directed the Secretary to establish a "good cause" exception to the relevant time limitations, § 212(b), 125 Stat. 404; see TEGL No. 10-11, at 22-23 (Nov. 18, 2011), http://wdr.doleta.gov/directives/attach/TEGL/TEGL10-11acc.pdf. Accordingly, a worker covered by the 2011 Amendments is less likely to secure a waiver of the training requirement but, if she does, she is less likely to have her TRA benefits application denied because that waiver was untimely. See note 2, *supra* (explaining when the 2009 or 2011 Amendments apply).[9]

Accordingly, the *Dykstra* decision directly applies only to the subset of claimants in Michigan who are governed by the 2002 Amendments and who obtained an untimely waiver for reasons that do not qualify for equitable tolling.

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[9] Sunset provisions govern both the 2009 and 2011 Amendments. See Omnibus Trade Act of 2010, Pub. L. No. 111-344, § 101(b), 124 Stat. 3612 (2009 Amendments generally do not apply after February 13, 2011); 2011 Amendments § 233(a), 125 Stat. 416 (2011 Amendments generally do not apply after January 1, 2014). Absent congressional action, on January 1, 2014, the federal and state good-cause exceptions will expire and the 8/16 deadline will be reinstated. Equitable tolling, however, would remain available pursuant to the Departmental guidance.

2. This case also would present a poor vehicle to address the questions presented. The facts at issue here, which are not disputed (Pet. 10), strongly suggest that respondent is entitled to equitable tolling under the Department's interpretation. Michigan Works! failed to inform respondent of the availability of TRA benefits or the relevant deadlines and, in response to one call, stated that such benefits were unavailable. C.R. 17-21, 28. When respondent first learned that she was eligible to apply for TRA benefits, after the expiration of the 8/16 deadline, she immediately filed her application and sought a training waiver. C.R. 17, 28. On those facts, the ALJ and the Board of Review both found that equitable relief was appropriate. See C.R. 30 (ALJ finding that "it is apparent from the record herein that Michigan Works did not provide claimant with the correct information regarding benefits" and that respondent "relied on the information provided by Michigan Works"); C.R. 34 (Board of Review agreeing that respondent "acted on the faulty advice of a Michigan Works! employee").[10] Because the circumstances of this case and the administrative rulings below indicate that compliance with the 8/16 deadline should be excused for equitable reasons, and because respondent has obtained a waiver of the training requirement and is otherwise entitled to benefits, the Huron County Circuit Court's erroneous decision will apparently have no effect on the outcome here.

3. Contrary to petitioner's contentions (Pet. 20-22), petitioner will not be forced to choose between two conflicting directives—*i.e.*, that of the Department or that

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[10] Although they analyzed respondent's claim as one of equitable estoppel, equitable tolling is the proper framework of analysis, as set forth in TEGL No. 8-11.

of the Michigan Court of Appeals—absent this Court's review.

On May 21, 2013, the Department of Labor sent a letter to petitioner making clear that the State of Michigan may follow *Dykstra* without running afoul of its contractual obligations to the Secretary under the TRA program. See App., *infra*, 1a-5a. The letter explains that the Department had previously informed petitioner, "albeit informally, that [it] need not appeal adverse decisions, both administrative and judicial, under the 2002 Trade Act that do not apply the 8/16 deadlines to training waivers based on *Dykstra*." *Id.* at 3a. The letter also advises petitioner to first "conduct fact-finding to determine whether the doctrine of 'equitable tolling' provides relief from the 8/16 deadlines," so that the Department can "determine the number of cases actually affected by *Dykstra* and, perhaps more importantly, to evaluate the effectiveness of Michigan's policies and practices aimed at preventing workers from missing the 8/16 deadlines." *Id.* at 3a-4a. The letter concludes by assuring petitioner that its "compliance with *Dykstra* as advised herein will not place Michigan in jeopardy of breaching its agreement with the Secretary on the ground of failing to follow the Secretary's guidance." *Id.* at 4a. Accordingly, this Court's review is not needed to solve petitioner's asserted "Catch 22" (Pet. 20).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2013

APPENDIX

U.S. Department of Labor [SEAL OMITTED]

Office of the Solicitor
Washington, D.C. 20210

May 21, 2013

John J. Bursch
Michigan Solicitor General
P.O. Box 30212
Lansing, MI 48909

Dear Mr. Bursch:

This letter is intended to update and clarify previous guidance provided to the State of Michigan, Unemployment Insurance Agency (MUIA), about *State of Michigan, LARA, Unemployment Insurance Agency v. Gerstenschlager*, No. 12-379, which is pending before the United States Supreme Court on Michigan's petition for a writ of certiorari.

As you know, *Gerstenschlager* concerns the payment of income support benefits, or Trade Act Allowances (TRA), available under chapter 2 of title II of the Trade Act of 1974, as amended in 2002 (the TAA Program). To obtain TRA, a claimant such as Gerstenschlager must satisfy several qualifying conditions, including that the claimant be enrolled in training or have completed training, or have obtained a waiver

of the training requirement. The 2002 Trade Act amendments provide an explicit deadline for enrollment in training—within 8 weeks of the Secretary's certification of the claimant's work group as eligible for TAA Program benefits or within 16 weeks of the claimant's separation from employment. The question presented in *Gerstenschlager* (who requested a training waiver well after the 8/16 deadlines) is whether this same 8/16 week deadline applies to the issuance of a waiver of the training requirement.

The Department has consistently taken the position that the 8/16 week deadline uniformly applies to the issuance of training waivers. Various Departmental guidance documents, including Training and Employment Guidance Letter (TEGL) No. 11-02 and its changes, TEGL No. 22-08 and TEGL No. 10-11, as well as TEGL No. 8-11, instruct the States to issue waivers of the training requirement *only before* the 8/16 deadlines, unless the deadlines can be tolled for equitable reasons.

The Michigan state courts, however, have interpreted the 2002 Trade Act amendments differently. In *Department of Labor and Economic Growth, Unemployment Agency v. Dykstra*, 771 N.W. 2d 423 (Mich. Ct. App. 2009), the Michigan intermediate appellate court ruled that the 2002 Trade Act 8/16 enrollment deadlines do not apply to a waiver of the training requirement. Following that decision, the trial court in *Gerstenschlager* likewise ruled that the 8/16 deadlines did not prohibit Ms. Gerstenschlager's training waiver request.

In correspondence dated February 23, 2010, July 15, 2010, and April 20, 2012, the Department explained to the State of Michigan that the *Dykstra* ruling is inconsistent with our uniform interpretation of the 2002 Trade Act amendments. We further informed the State that it must continue to apply the Department's interpretation, not *Dykstra*, and to take all appropriate steps to have *Dykstra* reversed. MUIA has taken, and continues to take, such appropriate steps. In regards to the *Gerstenschlager* case specifically, the April 20, 2012, correspondence indicated that MUIA should ask the Michigan Supreme Court to reconsider its denial of discretionary review and hear the case, and MUIA did so. However, the Michigan Supreme Court denied MUIA's motion for reconsideration on June 25, 2012.

In light of that decision, we advised MUIA, albeit informally, that Michigan need not appeal adverse decisions, both administrative and judicial, under the 2002 Trade Act that do not apply the 8/16 deadlines to training waivers based on *Dykstra*. That advice remains in effect and this letter serves as formal recognition of it. For training waiver cases under the 2002 Trade Act that are currently within Michigan's jurisdiction, *i.e.*, new cases or cases on remand or reconsideration, Michigan should conduct fact-finding to determine whether the doctrine of "equitable tolling" provides relief from the 8/16 deadlines. This position was conveyed in the guidance provided to all states in TEGL No. 8-11. However, in light of the court decisions in Michigan, MUIA may follow *Dykstra* and find the 8/16 deadlines inapplicable even when a determination is

made after fact-finding that equitable tolling is not available. Although the end result may be the same—forbearance of the 8/16 deadlines—it is important for MUIA to perform the equitable tolling analysis in order for the Department to determine the number of cases actually affected by *Dykstra* and, perhaps more importantly, to evaluate the effectiveness of Michigan's policies and practices aimed at preventing workers from missing the 8/16 deadlines, including rapid intervention and outreach strategies.

For cases in Michigan under the 2009 and 2011 amendments in which the timeliness of a training waiver are at issue in the denial of the waiver request or TRA benefits, MUIA must implement procedures similar to those outlined in the preceding paragraph. In particular, MUIA must first conduct fact finding to determine whether equitable tolling, Michigan's "state good cause" standard (applicable in 2009 TAA Program cases), or the "federal good cause" standard (described in section 5.C.6 of TEGL No. 10-11 and applicable in 2011 TAA Program cases) may extend the 26-week waiver application deadline. If none is available, MUIA should deny the waiver application as untimely or deny TRA. The applicants should be notified that they have the right to file an administrative appeal.

In sum, unless and until otherwise advised, MUIA's compliance with *Dykstra* as advised herein will not place Michigan in jeopardy of breaching its agreement with the Secretary on the ground of failing to follow the Secretary's guidance.

Questions may be directed to Lois Zuckerman in my office. Her telephone number is 202-693-5736 and Zuckerman.Lois@dol.gov is her e-mail address.

Sincerely,

GARY M. BUFF
GARY M. BUFF

Associate Solicitor for Employment
and Training Legal Services

Cc: Clifford Sloan, Esq. (by first class and e-mail)
John J. Bursch, Esq. (by e-mail)