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

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

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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November 5, 2004

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I. INTRODUCTION

Asociación de Trabajadores Fronterizos (ATF, or Association of Border Workers) and several of its individual members brought this action against the U.S. Department of Labor (DOL) for violating the Trade Act of 1974 (Trade Act), specifically 19 U.S.C. §§ 2296 and 2320, in its administration of job training benefits for "limited English proficient" (LEP) workers. Congress created Trade Act training as a uniform federal remedy for trade-dislocated workers, but DOL provides LEP workers with cheap remedial education instead of the bilingual vocational training that these workers need to find replacement jobs after the North American Free Trade Agreement (NAFTA) eliminated their livelihoods.

DOL violates 19 U.S.C. §§ 2296 and 2320 in three ways. First, the statute conditions training approval upon a finding that the training will render each worker completely job-ready, but DOL allows state agencies to approve incomplete training. Second, the statute requires DOL to regulate training approval decisions as necessary to achieve Congress's goal of 80% wage replacement, but DOL has failed to issue any such regulations, and instead allows state agencies to reject 80% wage-replacement as a standard for training approval. Third, the statute requires DOL to assure that Trade Act training is provided on the job insofar as possible, but DOL regulations reduce on-the-job training to an option that state agencies may ignore.

Recent Supreme Court decisions confirm that the Administrative Procedure Act (APA), 5 U.S.C. § 706, provides a framework for this Court to redress the final agency actions and failures to act at issue here. *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373, 2378-81 (2004); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000). A procedural template for deciding Plaintiffs' claims on summary judgment is provided by *UAW v. Brock*, 816 F.2d 761, 769 (D.C. Cir. 1987) (affirming summary judgment against DOL for its violation of the Trade Act). No genuine issue exists as to any material fact necessary to decide

Plaintiffs' claims, and Plaintiffs are entitled to judgment as a matter of law. Therefore, pursuant to Fed. R. Civ. P. 56, the Court should grant summary judgment.

II. BACKGROUND

A. Factual Background

El Paso has suffered roughly five times more NAFTA-related job losses than any other city in the United States. Fact 23.[1] In particular, NAFTA decimated El Paso's once-vibrant garment industry. Levi's, VF Corporation (Lee and Wrangler brands), Farah, Tony Lama Boots, and other companies closed major garment operations in El Paso, laying off some 20,000 workers, many of whom had sewn in El Paso for decades. Government, academic, and press reports thoroughly document the devastating impact that the NAFTA job losses have had on El Paso workers and their families, and on the city's entire economy. Fact 24. Of the El Paso garment workers who lost their jobs due to NAFTA, roughly 95% are of Mexican national origin, 65% are female, and 20% are female single heads of households. Fact 25. The overwhelming majority of these workers are LEP. Fact 26. Officials at the highest levels of DOL, including the Secretary of Labor personally, have repeatedly acknowledged the need to improve the efficacy of training available to LEP workers throughout the nation, and particularly along the 2,000-mile border with Mexico. Fact 27.

In general, there are two models for training workers who need both language and vocational skills: "serial" and "bilingual."[2] Under the serial approach, workers participate in

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[1] Pursuant to Loc. R. CV-7(b), a Statement of Material Facts as to Which There Is No Genuine Issue accompanies this memorandum. Each fact in this Statement is separately numbered and supported with citation to competent summary judgment evidence. The evidence itself is attached as an appendix to the Statement. Below, Plaintiffs cite each fact and its supporting evidence using "Fact" followed by a number that corresponds to the Statement.

[2] Training means supplying missing skills that a person needs to work in a particular job. Thus, before an informed choice among training options may be made, an inventory is needed of each worker's skills before training, and a list of required skills is needed for each occupation that is under consideration as a target for training. Fact 45.

remedial education — English as a Second Language (ESL) and General Education Degree (GED) courses — until they can begin vocational training provided in English. Fact 47. The bilingual approach teaches the language skills necessary for a particular occupation simultaneously with the vocational skills needed to do that particular job. Fact 46. Bilingual training is more expensive than ESL or GED courses, Facts 56 to 58, but bilingual training renders LEP workers job-ready faster and more effectively than serial training. Facts 53 to 55. Bilingual training is used successfully nationwide, and even on a limited basis in El Paso, to provide LEP workers all language and vocational skills that they need to begin work in numerous occupations paying wages above $8 per hour. Fact 48.

ATF is a membership organization through which approximately 2,000 LEP workers in El Paso seek improved training and employment options. Facts 2 to 8. Numerous ATF members have qualified for and sought the training benefits that Congress promised to trade-dislocated workers under the Trade Act. Facts 5 and 31. DOL administers the Trade Act training statute by setting and enforcing policy and by distributing federal money to state agencies, including the Texas Workforce Commission (TWC). The state agencies act as agents of DOL in approving individual applications for Trade Act training. 19 U.S.C. §§ 2311(a) and 2320; Facts 16 to 20.

In this lawsuit, Plaintiffs claim that DOL's policies cause ESL and GED courses to be approved as Trade Act training even when these courses do not meet the Trade Act's requirements for completeness, wage replacement, and on-the-job delivery. LEP workers whose Trade Act training primarily consists of ESL and GED courses exit training without the job skills needed to earn wages comparable to their prior earnings. Because of DOL's unlawful conduct,

many LEP workers in El Paso who earned $8 to $13 per hour before NAFTA now work in jobs paying at or near minimum wage.[3] Facts 106 to 115.

B. Statutory and Regulatory Background

President Ford signed the Trade Act into law on January 3, 1975. Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified at 19 U.S.C. § 2101 *et seq.*). As the D.C. Circuit explains:

> The Trade Act of 1974 gave the President broad authority to negotiate favorable trade agreements. The overall purpose was to reduce or eliminate tariff and nontariff barriers to international trade and thus realize the economic and political benefits of a trade-linked world. Congress realized that benefits and burdens of a liberalized international trade policy would not be distributed uniformly throughout the country. Some benefits are general and national, such as lower prices and expansion of more efficient industries. But liberalized trade has fairly predictable costs, costs that often have isolated impacts. One is decline of employment in those domestic industries that are less efficient than their foreign competitors. Domestic industries may also fall prey to subsidies, exchange-rate advantages, and lower wage rates enjoyed by foreign industries. Overall, liberalized international trade may lead, in trade negotiations, to the imposition of burdens on some domestic industries in order to garner benefits for other industries and advance the commonweal.
>
> Congress was of the view that fairness demanded some mechanism whereby the national public, which realizes an overall gain through trade readjustments, can compensate the particular industries and workers who suffer a loss much as the doctrine of eminent domain requires compensation when private property is taken for public use. Otherwise the costs of a federal policy that conferred benefits on the nation as a whole would be imposed on a minority of American workers and industries.

UAW v. Marshall, 584 F.2d 390, 395 (D.C. Cir. 1978) (footnotes omitted). Thus, Congress included a program of Trade Adjustment Assistance (TAA) within the Trade Act as a remedy for workers who lose their jobs as a result of changes in trade policy. *Id.*; Trade Act of 1974, Title II § 231, 88 Stat. at 1979, Title II ("Relief from Injury Caused by Import Competition"); 20 C.F.R.

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[3] The ineffective remedial education classes approved by DOL in violation of the Trade Act have been costly to federal taxpayers, largely because the classes had to be extended and repeated for many workers who needed income support during extensions of their training. *See* Fact 62 (DOL's Office of Inspector General criticizes serial training for LEP workers in El Paso as ineffective and a waste of at least $106 million in federal taxpayer dollars.).

§ 617.52(a). Congress funds job training through dozens of federal programs with varying statutory requirements, but TAA is the only federal job training program that is explicitly provided as a remedy for displaced workers. Fact 32.

Over its entire thirty-year history, the TAA's only stated purpose has been to enable trade-dislocated workers to "return to suitable employment." 20 C.F.R. § 617.2 (2004); 29 C.F.R. 91.2, 40 Fed. Reg. 16304 (Apr. 11, 1975); Fact 37. Congress defines "suitable employment" as employment paying "not less than 80% of the worker's average weekly wage" prior to a trade-induced layoff. 19 U.S.C. § 2296(e).

Funds for all TAA benefits and administration are provided by the federal government through congressional appropriations that DOL distributes among state agencies. 19 U.S.C. §§ 2296(a)(2), 2311(a), and 2317. DOL is required to monitor and enforce state agency compliance with the Trade Act as necessary, which may include assuming direct responsibility for Trade Act administration in states that have demonstrated an inability to follow DOL instructions on how the program is to be operated. 19 U.S.C. § 2311(a)-(b); 20 C.F.R. § 617.59(f)-(g).

The TAA benefits that are available to qualified workers during transition from trade-affected employment include job training, job search assistance, relocation assistance, and income support. 20 C.F.R. §§ 617.20-21.[4] Congress last amended the part of the Trade Act at issue in this litigation in 1988. The statute currently provides:

If the Secretary determines that–

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[4] Before a worker is eligible for TAA benefits, DOL must certify that the worker's employer was adversely affected by import competition. 19 U.S.C. § 2311(a); 20 C.F.R. § 617.10(a). This lawsuit raises no issue concerning DOL's certification practices, though courts sharply criticize DOL's administration of this part of the Trade Act as well. *E.g. Former Employees of Chevron v. DOL*, 298 F. Supp. 2d 1338, 1348-50 (Ct. Int'l Trade 2003) ("Whether the result of overwork, incompetence, or indifference (or some combination of the three), the Labor Department deprived workers of the job training and other benefits to which they are entitled.").

> (A) there is no suitable employment (which may include technical and professional employment) available for an adversely affected worker,
> (B) the worker would benefit from appropriate training,
> (C) there is a reasonable expectation of employment following completion of such training,
> (D) training approved by the Secretary is reasonably available to the worker from either governmental agencies or private sources (which may include area vocational education schools, as defined in section 195(2) of the Vocational Education Act of 1963, and employers)[,]
> (E) the worker is qualified to undertake and complete such training, and
> (F) such training is suitable for the worker and available at a reasonable cost,
>
> the Secretary shall approve such training for the worker. Upon such approval, the worker shall be entitled to have payment of the costs of such training (subject to the limitations imposed by this section) paid on his behalf by the Secretary directly or through a voucher system. Insofar as possible, the Secretary shall provide or assure the provision of such training on the job, which shall include related education necessary for the acquisition of skills needed for a position within a particular occupation.

Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418 § 1424, 102 Stat. 1107, 1248-49 (1988) (codified at 19 U.S.C. § 2296(a)(1) (2004)).

DOL regulations establish the following key requirements for approval of training under 19 U.S.C. § 2296:

(1) 20 C.F.R. § 617.22(f)(2) strictly limits the duration of Trade Act training to 104 weeks of total time in training.[5]

(2) Each Trade Act training program must be expected to prepare the participant to work in a particular occupation that is named at the time of training approval. 20 C.F.R. §§ 617.22(a)(3) and (f)(3).

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[5] After Trade Act amendments enacted in 2002 (which do not include any amendments to the statutes at issue in this case), DOL issued policy guidance allowing up to 26 weeks of remedial education to be added to the 104-week training time limit. Fact 39.

(3) "[I]t is the responsibility of the State agency to explore, identify, develop, and secure training opportunities" that are needed under the Trade Act. 20 C.F.R. § 617.23(a).

(4) The Trade "Act and the implementing regulations in this Part 617 shall be construed so as to assure insofar as possible the uniform interpretation and application of the Act and this Part 617 throughout the United States." 20 C.F.R. § 617.52(b).

DOL has not issued any policy describing how the Trade Act and these regulations are to be applied in the tens of thousands of cases where LEP workers qualify for Trade Act training and need both language and vocational skills to return to the workforce.[6] As TWC explains:

> the federal trade program's guidelines originally designed to assist middle-age, middle-class, English-speaking factory workers in the Midwest and northeast, were simply extended to the NAFTA trade affected worker on the Texas-Mexico border with little adjustment to compensate for the significant differences in the populations of these economically, culturally and geographically divergent areas.

Facts 44 and 60.

III. ARGUMENT

Summary judgment is to be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Consumers County Mut. Ins. Co. v. PW & Sons Trucking Inc.*, 307 F.3d 362, 365 (5th Cir. 2002). There is no dispute regarding how DOL administers the

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[6] DOL has issued general policy guidance that covers access of LEP workers to all services funded by DOL:

> In certain circumstances, failure to ensure that LEP persons can effectively participate in or benefit from federally assisted programs and activities may violate the prohibition under Title VI of the Civil Rights Act of 1964 . . . and Section 188 of the Workforce Investment Act against national origin discrimination. ... DOL will strive to ensure that federally assisted programs and activities work in a way that is effective for all beneficiaries including those with limited English proficiency.

68 Fed. Reg. 32290 (May 29, 2003). This policy guidance, however, says nothing about what kind of Trade Act training may be approved for LEP workers. Facts 43 and 60.

Trade Act training program for LEP workers. Indeed, these facts are established by DOL's own admissions, including the testimony of officials designated to speak for the agency pursuant to Fed. R. Civ. P. 30(b)(6). The issue in this case is whether DOL violates the Trade Act by allowing state agencies to approve training for LEP workers that fails to meet the Trade Act's requirements for completeness, wage replacement, and on-the-job delivery.

Plaintiffs challenge the following agency actions and failure to act:

(1) DOL unlawfully implemented a rule, as defined in 5 U.S.C. § 551(4), that carves out an exception to Congress's requirement in 19 U.S.C. § 2296(a)(1)(C) that training may not be approved unless it will render each worker fully job-ready;

(2) DOL unlawfully withheld a rule that Congress specifically required to achieve its 80% wage replacement goal for Trade Act training; and

(3) DOL unlawfully implemented a rule, 20 C.F.R. § 617.23(c), which explicitly contradicts Congress's requirement that DOL assure that all training under 19 U.S.C. § 2296(a)(1) be provided on the job "insofar as possible."

DOL has based numerous illegal final agency actions upon the actions and inaction named above, including its repeated approval of state agency procedures that reject Congress's commands (these approvals are "rules" under 5 U.S.C. § 551(4)) and its payment for individual training contracts that violate 19 U.S.C. 2296 (these payments are "relief" under 5 U.S.C. § 551(13)). As detailed below, DOL's actions are "not in accordance with law" under 5 U.S.C. § 706(2)(A) and result in training that is "short of statutory right" under 5 U.S.C. § 706(2)(C). DOL's inaction constitutes "agency action unlawfully withheld" under 5 U.S.C. § 706(1).

A. DOL Violates 19 U.S.C. § 2296(a)(1) By Allowing State Agencies to Approve Training Programs That Do Not Render LEP Workers Job-Ready.

1. The Trade Act prohibits approval of incomplete training.

The Trade Act specifies six preconditions to approval of any Trade Act training. 19 U.S.C. § 2296(a)(1)-(2). DOL agrees that this is so. Fact 63. One of the six statutory requirements is that the training must produce a "reasonable expectation of employment following completion of such training." 19 U.S.C. § 2296(a)(1)(C). Indeed, DOL states in its official policy directives to state agencies that "Reasonable expectation of employment should be the primary consideration in approval of training." Fact 64 (emphasis added). Incomplete training — training that does not provide a worker with all of the skills that the worker needs to work in the target occupation — is by definition incapable of producing any "expectation of employment" in the occupation for which training is provided, let alone a reasonable expectation.

DOL's own regulations confirm the plain meaning of the statutory text: "Conditions for approval [of Trade Act training] include the ... criterion that the individual will be job ready on completion of the training program." 20 C.F.R. § 617.22(a)(2) (emphasis added). DOL's "will be job ready" regulation has particular force because it was issued three months after Congress strengthened the Trade Act training approval provision in 1988. 53 Fed. Reg. 48474, 48485-86 (Nov. 30, 1988); *National Muffler Dealers Assn. v. United States*, 440 U.S. 472, 477 (1979) ("A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent.").[7]

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[7] *See also Brown & Williamson*, 529 U.S. at 146, 157 (FDA's contemporaneous disavowal of jurisdiction over tobacco confirms "Congress's specific intent"); *Mountain States Teleph. & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 254 (1985) (an agency's contemporaneous interpretation is "far more likely to [reflect] the actual intent of Congress"). In *Paden v. DOL*, 562 F.2d 470 (7th Cir. 1977), the court upheld DOL's regulatory interpretation of the Trade Act in part because it was DOL's contemporaneous construction of the Act's legislative history. *Id.* at 473-74.

In accord with DOL's understanding of the statute and regulations, DOL repeatedly approved the following Trade Act training policy for use in Texas:

> III. TAA TRAINING APPROVAL CRITERIA
>
> The Omnibus Trade and Competitiveness Act (OTCA) of 1988 provided an opportunity for the U.S. Department of Labor to elaborate on, and significantly expand the rules for approving TAA training. ... Following are the criteria which will be used to determine if a request for training can be approved. ....
>
> C. A reasonable expectation of employment exists following completion of the proposed training.
>
> Given the job market conditions expected to exist at the completion of the training, there must be a reasonable expectation [that] the worker will be able to find employment using the skills obtained while in training.
>
> The proposed training program must provide all the skills and requirements upon completion which are needed for the worker to be job ready. If the occupation for which the proposed training is preparing the worker requires a license, then the training program must include gaining the license. <u>The worker must be job ready in every aspect immediately upon completion of the training.</u>

Fact 66 (TWC Trade Adjustment Assistance Policy and Procedure Manual) (emphasis added).[8]

DOL's most direct and succinct interpretation of the law at issue in this case is that, although 19 U.S.C. § 2296(a)(5) lists "remedial education" among allowable Trade Act training methods, remedial education may be approved as stand-alone training "only where no skills training is necessary to make the worker job ready upon completion of the training." Fact 67. "If either the length of training or the type of training is inappropriate for the worker in relation to his/her background and the availability of jobs in the market (on completion of the training) <u>the state has the authority and responsibility to deny approval of such training.</u>" Fact 40 (emphasis added).

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[8] TWC employees are required to comply with TWC's policy manual. Fact 92. DOL decided at least three times that TWC's training completeness policy complies with the law. Fact 66. DOL is required to monitor and enforce TWC's compliance with the policy quoted above. Fact 20. Instead, DOL approves of TWC's practices despite DOL's knowledge that those practices are inconsistent with TWC's own approved policy. Facts 69 to 71.

2. DOL allows TWC to approve incomplete training.

LEP trade-dislocated workers in El Paso typically need to acquire both vocational skills and English skills before they will be job-ready in another occupation. Fact 68. Nonetheless, DOL allows TWC to approve stand-alone remedial education for these workers. Fact 72. DOL not only allows TWC to approve incomplete Trade Act training, but DOL has even studied the issue and recommended this practice. Fact 70. The natural consequence of these DOL actions is that TWC approves incomplete training for LEP workers who need both language and vocational skills before they will be job-ready. TWC does so in the following three ways:

(a) it approves ESL and GED courses as a worker's sole training program while naming "ESL/GED" or another form of remedial education as the occupation for which the worker is being trained;

(b) it approves remedial education as a worker's sole training program after naming a target occupation for the worker that requires vocational training in addition to remedial education; and

(c) it approves training programs that consist of remedial education classes followed by vocational training even while it anticipates that the training program will have to be amended later to extend the length of remedial education to the exclusion of necessary vocational training.

Facts 73 to 76. DOL explains its approval of these actions as follows:

> The statute and regulations require that there must be a reasonable expectation of employment upon completion of training and that the worker will be job ready at the completion of training. There may be cases in which the assessment of a worker's skills indicates that the available 104 weeks of training, or 130 weeks if remedial education is needed, may be insufficient to provide all of the training needed by an individual to be job ready at the completion of training, and the individual may need additional training funded by another source. In such cases,

the training program that may be approved should provide as many of the job skills as possible.

Fact 71.

Thus, while the statute's plain text and contemporaneous regulations establish that Congress specifically intended that only complete training programs be approved under the Trade Act, DOL admits that it has carved out an exception in any case "in which the assessment of a worker's skills indicates that the available 104 weeks of training, or 130 weeks if remedial education is needed, may be insufficient to provide all of the training needed by an individual to be job ready." *Id.* (emphasis added). DOL lacks authority to create this exception to the statute, rendering its action "not in accordance with law." 5 U.S.C. § 706(2)(A).

3. DOL's excuses for allowing incomplete training in violation of the Trade Act are irrelevant as a matter of law, and unpersuasive in any event.

Once a court finds that agency action is not in accordance with law, no further inquiry is needed before the court orders the agency to comply with the law. *Id.* Nevertheless, DOL will likely repeat the excuses that it made to this Court in the October 20, 2003 hearing for why DOL allows exceptions to the statutory requirement of training completeness. First, DOL may claim that the choice to undertake remedial education instead of bilingual training is ultimately left to each worker, and DOL does not presume to dictate to workers what training they may choose. But DOL already routinely and strictly limits worker choice as to Trade Act training whenever DOL and its state agencies choose to do so and have a legal reason for doing so. Fact 40. In cases directly on point here, state agencies consistently refuse to permit workers to choose law school as their Trade Act training because law school cannot not be completed within the 104 weeks allowed by law. *E.g., Marshall v. Com'r of Jobs & Training*, 496 N.W.2d 841, 843

(Minn. App. 1993).[9] The same reasoning establishes that DOL may not allow any training option to be "chosen" for an LEP worker unless that option is reasonably expected to render the worker fully job ready.[10] DOL must apply its limitations on training choice just as strictly when the "chosen" training is inexpensive (ESL) as it does when the chosen training is expensive (law school, helicopter pilot school, etc.), because in both instances the training does not conform to the statutory requirement.

Second, DOL may claim that providing LEP workers with ESL and GED courses is the best practical option available to many LEP workers considering their pre-training skill levels. But DOL has known since 1997 that bilingual training is superior to serial training for most LEP workers. Facts 53 to 55. This is why DOL has claimed to attempt to expand bilingual training opportunities in El Paso for years. After several documented failures lasting into 2003, DOL now claims that adequate bilingual training opportunities are currently available to trade-affected LEP workers in El Paso. Facts 48 to 51.[11] Indeed, DOL says it is "horrified" that some workers do not "choose" these bilingual training opportunities. Fact 52; *see also* note 10, *supra*. Thus,

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[9] *Accord Movitz v. Division of Employment & Training*, 820 P.2d 1153, 1155-56 (Col. App. 1991) (law school tuition denied because the Trade Act prohibits participant contributions to training costs); *Klomp v. Arizona Dep't of Economic Sec.*, 611 P.2d 560, 562 (Ariz. App. 1980) (law school tuition denied because the applicant was not likely to finish the program within the maximum time limit). Agencies regularly deny chosen Trade Act training in occupations that, for various reasons, do not meet the Trade Act's requirements. *See, e.g., White v. Board of Review*, 700 So.2d 929 (La. App. 1997) (court reporter training case; choice denied because program exceeded 104-week limit, would not make applicant job-ready because required passage of a certification exam with a low pass rate, and because no person approved for the program had ever completed it); Fact 40 (cataloguing worker training choices that DOL says are appropriately rejected, including training for self-employment, occupations involving commission sales, airplane pilots, helicopter pilots, taxidermists, florists, and cosmetology teachers).

[10] ATF contends that LEP workers who "choose" remedial ESL courses instead of bilingual training do so because their case managers have failed to provide sufficient information to enable the workers to make informed choices about their training options, or because the only bilingual training opportunities that were made available to the workers were of an occupation type or quality that was unacceptable to the workers. But this argument depends on disputed fact issues that are not material to decision of the claims at issue in this case.

[11] Plaintiffs dispute whether adequate bilingual training opportunities are in fact available in El Paso, but this disputed fact issue is not material to decision of the claims at issue in this case.

DOL's own admissions regarding the efficacy and availability of bilingual training belie any excuse for allowing incomplete training in the form of remedial education to substitute for bilingual training for El Paso's LEP workers.

B. DOL Violates 19 U.S.C. §§ 2296(a) and 2320 By Failing to Regulate as Necessary to Achieve the Trade Act's 80% Wage Replacement Goal.

1. Congress's goal for Trade Act training is 80% wage replacement.

DOL admits that employment paying 80% or more of each worker's prior wages is Congress's goal for Trade Act training. Fact 77; *see also* 19 U.S.C. § 2296(e); 20 C.F.R. §§ 617.2 and 617.52(a). This has been the only stated purpose of Trade Act training since the Trade Act's original enactment. *Id.*; 29 C.F.R. § 91.2, 40 Fed. Reg. 16304 (Apr. 11, 1975); Fact 37.

2. The plain language of the Trade Act requires DOL to regulate training approval decisions as necessary to achieve 80% wage replacement.

The Trade Act's text requires DOL to prescribe all regulations necessary to ensure that approved training complies with the Trade Act. 19 U.S.C. § 2296(a)(9) ("The Secretary shall prescribe regulations which set forth the criteria under each of the subparagraphs of [the training approval statute, § 2296(1)] that will be used as the basis for making determinations under paragraph (1)."); *id.* at § 2320 ("The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this part."). DOL must administer the Trade Act to achieve Congress's clearly expressed intent. *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 843 n.9 (1984); *Bureau of Alcohol, Tobacco, & Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983); *Bowsher v. Merck & Co.*, 460 U.S. 824, 836 (1983).

In deciding whether statutory text requires agency regulation, courts must give due consideration to each statute's objective:

> When interpreting an agency's enabling act under *Chevron*, the 'inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented.' The more an issue touches a statute's "core objective," or carries 'economic and political significance,' the more courts search for a statutory construction that is consistent with Congress's expressed intent. 'Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.'

Brown & Williamson, 529 U.S. at 159-60 (citations omitted).[12]

The Supreme Court's recent decision in *Norton*, 124 S. Ct. at 2379-81, identifies two limits upon courts' power to redress agency inaction under 5 U.S.C. § 706(1), neither of which applies here. First, the statutory requirement for "discrete agency action" that the Court found absent in *Norton*, 124 S. Ct. at 2381, is present in this case at 19 U.S.C. § 2296(a)(9). Second, the *Norton* Court declined to involve the judiciary in interpreting "broad statutory mandates" that are subjective, 124 S. Ct. at 2381, but the 80% wage replacement standard at issue in this case is quintessentially objective. Thus, *Norton's* rationale only confirms that DOL must regulate the Trade Act training approval process to achieve Congress's 80% wage replacement goal.

3. The ordinary tools of statutory construction show that Congress expects DOL to regulate training approval decisions as necessary to achieve 80% wage replacement.

As stated above, the Trade Act's plain language by itself establishes that DOL must regulate training approval decisions as necessary to achieve 80% wage replacement. The ordinary tools of statutory construction only confirm that Congress requires DOL to so regulate. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an

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[12] *See also Oregon Natural Resources Council v. Lyng*, 882 F.2d 1417, 1427 (9th Cir. 1989) (agency must promulgate regulations where the statute provides "the Secretary shall promulgate ... such rules and regulations as he deems necessary to accomplish the purposes ... of this title"); *Miller v. Federal Mine Safety & Health Review Commission*, 687 F.2d 194, 195 (7th Cir. 1982) (federal courts are obliged to give effect to legislative purpose "even if it is imperfectly expressed in the statutory language."); *Cherokee v. Interstate Commerce Com.*, 641 F.2d 1220, 1227 (8th Cir. 1981) (federal agencies may not "deviate from or ignore the ascertainable legislative intent").

intention on the precise question at issue, that intention is the law and must be given effect." *Chevron,* 467 U.S. at 843 n.9. "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.*[13] Thus, determination of whether Congress has spoken to the precise question at issue here — whether DOL must regulate training approval decisions as necessary to achieve Congress's 80% wage replacement goal — is ultimately based upon the Trade Act's purpose, text, structure, and history. *Brock*, 816 F.2d at 765-67.

(a) Purpose. It is undisputed that the purpose of Trade Act training is to return trade-dislocated workers to employment at 80% or more of their prior wages. Fact 77.

(b) Text. As described above, the Trade Act's text requires DOL to prescribe all regulations necessary to ensure that only training that complies with the Trade Act is approved. 19 U.S.C. §§ 2296(a)(9) and 2320. Moreover, the "[f]irst rule of construction [is that the Trade] Act and the implementing regulations ... shall be construed liberally so as to carry out the purpose of the Act." 20 C.F.R. § 617.52(a) (emphasis added). Courts further require liberal construction of the Trade Act's text to achieve the Act's single purpose. *UAW v. Brock*, 568 F. Supp. 1047, 1053 (D.D.C. 1983), *aff'd in part*, 816 F.2d at 766-67; *Marshall*, 584 F.2d at 395 & nn. 16-17. Finally, the Trade "Act and the implementing regulations ... shall be construed so as to assure insofar as possible the uniform interpretation and application of the Act and this Part 617 throughout the United States." 20 C.F.R. § 617.52(b) (emphasis added). Uniform

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[13] *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994) (The ordinary tools of statutory construction used to decide what questions Congress has decided are the "statute's language, structure, purpose, [and] legislative history."). When Congress has directly spoken to an issue, Congress's view binds agencies regardless of whether statutory text could be clearer. *E.g., MCI Telecom. Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 228 (1994); *Immigration and Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 447 (1987); *Federal Labor Relations Authority*, 464 U.S. at 97.

interpretation and application of the Trade Act and implementing regulations is only feasible if DOL specifies what actions state agencies must take in the training approval process to achieve 80% wage replacement. *See* pages 18 and 22, *infra*.

(c) Structure. Congress structured Trade Act training as a capped entitlement, which means that qualified workers across the nation have their training paid from a single limited pool of federal funds. 19 U.S.C. § 2296(a)(2). Thus, more training money for some workers can mean less for others. *Id.* Indeed, DOL has known for over a decade that state agencies use vastly differing practices for taking wage replacement into account in their training approval decisions. Facts 83 to 88. Yet DOL has refused calls from state agencies and its own Office of Inspector General to provide more regulatory control over the training approval process. Facts 44 and 88. Without regulation on wage replacement, state agencies that strive for higher wages for their workers are left to compete against more careless state agencies for limited training funds. Facts 110 to 115. DOL acknowledges the structural argument in favor of wage-replacement regulation:

> The entitlement nature of the TAA program, plus the statutory limitation on the amount of funds which may be expended on training, requires the Department to institute procedures which ensure that States are funded equitably and that the $80 million training cap is not exceeded.

Fact 84. Yet DOL has no objective basis for its funding decisions on Trade Act training. It does not even document its reasons for approving or denying the periodic requests for Trade Act training funds that it receives from 52 state agencies with differing rules and competencies. Fact 114. Accordingly, the capped entitlement structure of the Trade Act training statute itself calls for DOL regulation on how wage replacement is to be considered in training approval decisions.

See Brown & Williamson, 529 U.S. at 133 ("A court must [interpret statutes] as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole").

(d) History. The Trade Act's contemporaneous legislative history is replete with expressions of Congress's intent that Trade Act training produce "suitable employment" — replacement jobs for workers at 80% or more of their prior wages. Congress has explicitly and repeatedly made this point:

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

S. REP. NO. 97-139, 534 (1981), *reprinted in* 1981 U.S.C.C.A.N. 396, 710, 800 (emphasis added); *accord* S. REP. NO. 93-1298, 94 (1975), *reprinted in* 1974 U.S.C.C.A.N. 7186, 7280 ("It is intended that every effort be made to place workers in suitable employment ... and that training be authorized only when the Secretary finds that suitable employment is not otherwise available.") (emphasis added).

Examination of how the Trade Act's current text evolved from its original form confirms that "suitable employment" is Congress's objective for Trade Act training. When originally enacted, the Trade Act provided:

> If the Secretary determines that there is no suitable employment available for an adversely affected worker covered by a certification under Subchapter A of this chapter, but that suitable employment (which may include technical and professional employment) would be available if the worker received appropriate training, he may approve such training.

Trade Act of 1974, Pub. L. No. 93-618, § 236, 88 Stat. 1978, 2023 (1975) (codified as 19 U.S.C. § 2296(A)) (emphasis added). Congress amended the statute in 1981 to adopt the text and structure at issue in this case, which divided into subparts and elaborated upon the various determinations that the Secretary must make to approve training. Omnibus Budget

Reconciliation Act of 1981, Pub. L. No. 97-35, § 2506, 95 Stat. 357, 884-85 (1981). When Congress restructured the text of 19 U.S.C. § 2296 in 1981, it reemphasized its single objective for Trade Act training. The Senate Report accompanying the 1981 amendment reiterates that training may only be provided if "suitable employment would be available if the adversely affected worker received the appropriate training," and unequivocally states that "[t]here is no change under the bill in the Secretary's training authorities under section [2296] of the Trade Act." S. REP. NO. 97-139 at 534-35 (1981). The House Report on the 1981 amendment reaffirms the "suitable employment" objective even more forcefully:

> For purposes of amended sections [2295 and 2296] the term "suitable employment" is defined to mean "work of a substantially equal or higher skill level" than the worker's previous adversely affected employment "at not less than 80 percent of the worker's average weekly wage." ... The Committee believes it is in the interest of the Nation's overall standard of living as well as that of individual workers to seek their re-employment in equal or higher skill and wage level occupations rather than to force or retain them in minimum wage or State [Unemployment Insurance] benefit level jobs.

H. REP. NO. 97-158 at 276 (1981).[14] DOL's first final regulations implementing the 1981 amendments stated that these amendments "are designed to assist adversely affected workers to return to work in equivalent or better employment as quickly as possible." 51 Fed. Reg. 45840 (Dec. 22, 1986).

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[14] The resulting conference report describes each minute substantive change intended by the 1981 amendment (e.g., directions to provide training benefit information, authorization to defray transportation expenses when training facilities are outside commuting distance, etc.), but it says nothing about changing the key objective of Trade Act training. H.R. CONF. REP. NO. 97- 208, 1003-04 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1010, 1365-66; *accord* Library of Congress, H.R. 3982 Bill Summary and Status at Title XXV, http://thomas.loc.gov/bss/d097query.html (detailing each minor substantive Trade Act amendment without mentioning any change in the training objective). Instead, the legislative history of the 1981 Trade Act amendment is replete with expressions of intent to "strengthen" Trade Act training, vastly increase the money available for it, and make it a more attractive option for trade-dislocated workers. H. R. REP. NO. 97-158 at 251, 274, 276, 279; S. REP. NO. 97-139 at 444, 534-35.

4. DOL has no 80% wage replacement regulations, and it allows state agencies to reject 80% wage replacement in training approval decisions.

Rather than regulate as necessary to achieve 80% wage replacement, DOL instead informs state agencies that the Trade Act's 80% wage replacement standard is non-binding. Fact 78. Not only does DOL emphasize to state agencies that the 80% wage replacement standard is precatory and entirely unenforceable, but its numerous statements on this subject are so conflicting as to be incomprehensible. On the one hand, DOL states that the six criteria for training approval under 19 U.S.C. 2296(a)(1) "are intended to assure that training will lead to suitable employment," and on the other hand, it states that the absence of "suitable" before "employment" in 19 U.S.C. § 2296(a)(1)(C) shows that Congress "never intended training to lead to ... suitable employment." Facts 78 to 80. DOL has no policy describing how state agencies must consider 80% wage replacement when approving Trade Act training. Fact 81. DOL does not require state agencies to take any action in the training approval process to achieve 80% or more in wage replacement. Fact 82. In deciding how to allocate Congress's Trade Act training appropriation among states, DOL knows nothing about, and does not take into account, what wage replacement levels are expected to be achieved by workers for whom funding is sought. Fact 83.[15]

Consequently, state agencies that aggressively protect workers, in states like Pennsylvania, get the resources to enable their workers to achieve high wage replacement rates. And state agencies that are less interested in protecting workers, like TWC in Texas, get far fewer resources from DOL and have no impetus to improve their efforts on behalf of trade-

[15] DOL admits that it does not require state agencies to condition approval of Trade Act training upon any determination as to whether training could lead to employment paying 80% or more of each worker's prior wages. In fact, DOL admits that it does not require state agencies to estimate post-training wages at all, or take them into account in deciding what Trade Act training to approve. Fact 82.

dislocated workers.[16] In 1993, DOL's own Inspector General identified the need for increased DOL guidance to reduce wide variance in wage replacement consequences of Trade Act training among states. DOL still steadfastly refuses to provide any such guidance. Fact 87. Wide variance among states persists today. Fact 88. DOL knows that trade-dislocated workers in El Paso only attain 50% to 70% in wage replacement after Trade Act training. Fact 95.

Not only does DOL fail to require state agencies to take any action in pursuit of the sole purpose of Trade Act training, DOL allows state agencies to affirmatively reject the 80% wage replacement standard. DOL repeatedly approved TWC's formal instructions to its Trade Act caseworkers that "[w]hether the employment pays 80% of the affected average weekly wage is not a consideration in determining if there is a reasonable expectation of employment following training." Fact 93. TWC's policy manual says nothing else about the wage replacement consequences of training. TWC has no policy that states how its employees are to take the Trade Act's 80% wage replacement standard into account when deciding what training to approve. Fact 89. Consequently, TWC employees do not consider wage replacement in making these decisions. Fact 90. From April 1998 to March 2003, Jose Guzman supervised TWC's Regional Trade Unit in El Paso, which had final authority to approve Trade Act training contracts, and he testified that he did not believe that any wage replacement goal whatsoever applied to Trade Act training. Fact 91.

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[16] For the average Pennsylvania worker during each year between 1997 and 2002, DOL almost always spent two to 25 times the amount that it spent to train the average Texas worker under 19 U.S.C. § 2296(a). Fact 111. Averaging all of DOL's Trade Act training expenditures between 1997 and 2002 for Texas and Pennsylvania yields an average Trade Act training cost of $2,144 for Texas workers and $8,354 for Pennsylvania workers. Fact 112. DOL cannot name any objective basis for spending four times more money to train Pennsylvania workers than it does to train Texas workers who qualify for the very same training benefit. Fact 113.

DOL has violated the Trade Act by refusing to issue regulations stating what actions state agencies must take in the training approval process to achieve Congress's 80% wage replacement goal. By allowing state agencies to ignore, and even reject, Congress's single wage-replacement goal for its $2 billion Trade Act training statute, DOL violates the Trade Act. Facts 94 and 115.

5. DOL has no excuse for allowing state agencies to reject 80% wage replacement.

Since DOL itself claims that it has no objection to states seeking 80% or more in wage replacement from Trade Act training, Facts 77 to 79, it can raise no practical objection to a requirement that it decide what actions state agencies must take in the training approval process to achieve 80% wage replacement. DOL has many simple options to choose from, including requiring state agencies to:

(a) prohibit approval of any training program that is not reasonably expected to produce 80% or more in wage replacement;

(b) approve training that is reasonably expected to produce 80% or more in wage replacement whenever possible;

(c) identify and discuss every training option for each worker that may produce 80% or more in wage replacement, and inform workers that 80% or more in wage replacement is the objective of Trade Act training; or

(d) document (*i.e.*, place in a writing that is signed by the worker and reported to DOL) the expected wage replacement consequences of the training chosen by the worker and the wage replacement consequences of the alternative training options that were discussed with the worker and rejected.

See Fact 82. Although ATF maintains that Congress in fact requires DOL to implement the first of these options, the relief that ATF seeks in this litigation is more limited out of respect for DOL's prerogative to reconsider its administration of the law. *See Coal Employment Project v. Dole*, 889 F.2d 1127, 1138-39 (D.C. Cir. 1989), *enforcement ordered*, 900 F.2d 367, 368 (D.C. Cir. 1990) (affording DOL an opportunity to decide how to comply with the court's interpretation of a mine safety statute before ordering more specific compliance measures). If DOL implements any substantial requirement that state agencies work to achieve Congress's 80% wage replacement goal, as in any of the four options described above, the practical impact of one option *vis a vis* another may prove insubstantial. Workers would have to evaluate the content and impact of DOL efforts to improve the broken system before deciding whether future challenges are necessary.

For LEP workers, including ATF's membership, the practical impact of a DOL requirement that state agencies take specific actions to achieve 80% wage replacement would be to increase the number of LEP workers who participate in bilingual training. Bilingual training places more and higher-paying occupations within the reach of LEP workers as compared to the occupations for which LEP workers could train in the allowed time using serial training methods. Facts 53, 62, 95, and 108.

C. DOL Violates 19 U.S.C. § 2296(a)(1) By Allowing State Agencies to Ignore On-The-Job Training.

1. The Trade Act requires DOL to "assure" that training is provided on-the-job "insofar as possible."

The Trade Act is unambiguous: "Insofar as possible, the Secretary shall provide or assure the provision of [Trade Act] training on the job ...." 19 U.S.C. § 2296(a)(1). Where statutory text unambiguously requires agency action, courts need look no further before requiring an

agency to comply with that text. *Whitman v. Am. Trucking Assns*, 531 U.S. 457, 465 (2001); *Williams Cos. v. FERC*, 345 F.3d 910, 914 (D.C. Cir. 2003). The Trade Act's contemporaneous legislative history underscores the absolute command included in the statute's text:

> The ultimate objective of training programs is the placement of a worker in actual employment. On-the-job training is, therefore, the most desirable type of training since it accomplishes this objective at the beginning rather than at the end of the process. The bill accordingly directs the maximum feasible use of training on the job.

S. REP. NO. 93-1298 at 93, *reprinted in* 1974 U.S.C.C.A.N. at 7279 (emphasis added).

2. DOL's regulation reduces on-the-job training to an option that state agencies may ignore.

DOL has impermissibly rejected Congress's directive to "assure" that Trade Act training is provided on the job "insofar as possible." DOL's on-the-job training (OJT) regulation provides:

> (c) Methods of training. Adversely affected workers may be provided either one or a combination of the following methods of training:
> (1) Insofar as possible, priority will be given to on-the-job training ....; and
> (2) Institutional training, with priority given to providing the training in public area vocational education schools if it is determined that such schools are at least as effective and efficient as other institutional alternatives ....

20 C.F.R. § 617.23 (emphasis added). On its face, this regulation fails to "assure" that Trade Act training is provided on the job "insofar as possible" because it: (a) uses "may be provided either one or a combination of ... methods" to explicitly render on-the-job training an option rather than a preferred training method; (b) requires only that states afford an undefined "priority" to on the job training while requiring that an undefined "priority" also be afforded institutional training, without providing any guidance as to how these two competing "priorities" are to be reconciled; and (c) uses "insofar as possible" to modify the undefined "priority" while the Trade Act uses "insofar as possible" to modify "training."

DOL acknowledges the practical impact of its regulation. DOL admits that it does not require states to choose on-the-job training over institutional training when both are available to a worker and both meet the Trade Act's six statutory requirements. Fact 96. DOL also admits that a requirement that "training" be provided on the job "insofar as possible" is different and stronger than a requirement that on-the-job training be afforded a priority "insofar as possible." Fact 102. So while Congress "directs maximum feasible use of training on the job," DOL does not.

3. DOL does nothing when state agencies ignore on-the-job training altogether.

TWC does not use OJT as Trade Act training in El Paso, nor does it attempt to do so. Facts 97 and 98. DOL knows this. Even so, DOL admits that although it "discussed on-the-job training as one of the training opportunities available to dislocated workers and employers" in El Paso, it has taken "no specific action" to encourage or assist in the creation, expansion, or improvement of on-the-job training opportunities there. Facts 100 and 101. DOL has taken no action even though DOL has a number of options available to increase access to OJT for trade-affected workers. Fact 99. Since El Paso's local workforce development board successfully uses federal Workforce Investment Act money to train El Paso workers on the job, including LEP workers, it is indisputable that efforts to increase OJT opportunities in the Trade Act program could be successful. Facts 103 to 105.

4. DOL has no valid excuse for allowing state agencies to ignore on-the-job training.

Although irrelevant to the issue of whether DOL violates the Trade Act with respect to OJT, DOL will likely offer two practical justifications in defense of its OJT regulation. First, DOL may claim that its regulation is necessary to respect worker choice in training. This excuse

is inapposite because DOL regularly applies the principle that the Trade Act's requirements trump worker choice. Fact 40. Indeed, ATF submits that more LEP workers would choose OJT if DOL provided clear policy guidance to state agencies about when OJT must be supplemented with remedial education, rather than issuing inaccurate and confusing statements about the matter.[17]

Second, DOL may attempt to defend its OJT regulation by asserting that lack of interest among El Paso businesses, not DOL's regulations, explains the absence of OJT in El Paso. But DOL can hardly be heard to claim that OJT is not attractive to local businesses before it even attempts to implement the statutory requirement. Ample evidence proves that more El Paso businesses would provide OJT opportunities if this option were actively promoted. Facts 103 to 105. At most, DOL could dispute the extent to which training needs could practically be met using OJT. But this possible disputed issue of fact goes only to the extent to which ATF's members are injured by DOL's violation of law, not to whether they are injured, and is irrelevant to whether DOL's regulation violates Congress's direct statutory command.

IV. INJURY AND REMEDY

Several undisputed facts establish that ATF and its members suffer sufficient injury to secure an order requiring DOL to comply with the Trade Act in the three respects at issue in this case. ATF is comprised of numerous LEP workers in El Paso who have lost their jobs due to foreign competition. Facts 2 to 5. El Paso garment workers, including many ATF members,

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[17] The plain text of the last sentence in 19 U.S.C. § 2296(a)(1) requires OJT to be supplemented with English and other remedial courses as necessary to make each worker fully job-ready. Yet DOL has defended its indifference to the absence of OJT in El Paso as follows: "Because claimants do not receive remedial training if enrolled in OJT, claimants are reluctant to accept an OJT opportunity." Fact 105. Instead of condoning direct violations of the Trade Act's text, and citing them in its own defense, DOL should be providing state agencies with clear guidance and enforcement as necessary to ensure that workers who need remedial education receive it in conjunction with OJT — i.e., provide bilingual OJT to LEP workers. *See also* note 10, *supra.*

commonly earned between $8 and $13 per hour before they were laid off due to NAFTA. Fact 106. Numerous ATF members have undertaken and are undertaking Trade Act training programs that primarily consist of institutional ESL and GED courses, and that do not provide the skills necessary to be fully job-ready in another occupation upon completion. Fact 107. After they have undertaken institutional training that primarily consists of ESL and GED courses, the only employment available to many of El Paso's former garment workers, including numerous ATF members, has been at or near the federal minimum wage of $5.15 per hour. Facts 95 and 108. DOL knows that increasing access to bilingual training for LEP workers in El Paso is necessary to improve the economic benefit that workers derive from training. Fact 27. Bilingual vocational training, which would be increased through compliance with all three statutory requirements at issue in this case, has proved successful in enabling LEP workers in El Paso to complete training and enter occupations paying 80% or more of prior wages. Facts 48, 53, and 119. Thus, DOL's unlawful policies have hurt ATF members' earning potential. Also, if this Court agrees that any of the challenged DOL policies violate federal law, ATF members have been injured by deprivation of a federal right, which is itself injury enough to require an order remedying those violations. *U.S. v. Microsoft Corp.*, 147 F.3d 935, 944 (D.C. Cir. 1998) (quoting *United States v. Diapulse*, 457 F.2d 25, 27-28 (2d Cir. 1972) ("The passage of the statute is, in a sense, an implied finding that violations will harm the public and ought, if necessary, to be restrained.")).[18]

DOL's violations of law also injure ATF's organizational interests. The interests that ATF seeks to protect in this lawsuit are germane to its purpose. Fact 6. ATF has devoted

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[18] *Accord Elrod v. Burns*, 427 U.S. 347, 373 (1976) (constitutional violation); *Davis v. Mineta*, 302 F.3d 1104, 1115 (10th Cir. 2002) (NEPA violation); *Middleton-Keirn v. Stone*, 655 F.2d 609, 612 (5th Cir. 1981) (Title VII); *Eve of Milady v. Impression Bridal, Inc.*, 957 F.Supp. 484, 488-89 (D.C.N.Y. 1997) (copyright).

significant resources, time, and energy over seven years to undertake a broad range of actions that brought the issues presented in this case to the attention of officials at the highest levels of DOL. Fact 116. ATF's commitment to completing this work has prevented it from addressing its other priorities, fact 117, and ATF's inability to secure adequate training for its members after seven years of effort has frustrated ATF's organizational goals. Fact 118. These organizational harms are by themselves injury enough to require a court order remedying any violations of law. *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 264-65 (1991); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1981).

Plaintiffs seek the identical form of relief that courts have on at least two occasions ordered for similarly situated Plaintiffs after finding DOL in violation of the Trade Act. Fact 122. Just as the Supreme Court directed in *UAW v. Brock*, 477 U.S. 274, 287-88 (1986), these orders leave federal courts in charge of deciding what Congress requires in the Trade Act, while respecting DOL's role as Trade Act administrator, as well as the statutory role that state courts play in deciding how the Trade Act's requirements apply to the cases of individual workers. *Id.* Thus, the remedial framework established by *Brock* provides a tested roadmap for securing DOL's compliance with the Trade Act while appropriately respecting DOL's prerogative to decide for itself in the first instance how to bring its policies into compliance with federal law. ATF respectfully requests that this Court proceed in the same manner in this case.

V. CONCLUSION

For the foregoing reasons, the Court should grant summary judgment for Plaintiffs and order the following relief:

a. a declaratory judgment that Defendant U.S. Department of Labor's policies and practices for Trade Act administration contravene the requirements of 19 U.S.C. §

2296(a)(1) as to training completeness, wage replacement, and on-the-job training, and that these policies and practices violate workers' rights to training as provided in 19 U.S.C. § 2296(a)(1);

b. an injunction directing Defendant U.S. Department of Labor to—

1. disallow approval of any form of Trade Act training unless the approving agency reasonably expects the worker to be fully job ready in a named occupation upon completion of the training program that is under consideration for approval;

2. promulgate regulations naming what actions state agencies are required to take in the training approval process to achieve Congress's 80% wage replacement goal for Trade Act training;

3. replace 20 C.F.R. § 617.23(c) with a new regulation that states when on-the-job training opportunities must be approved over institutional training;

4. require state agency officials to take appropriate action to enforce the correct interpretation of 19 U.S.C. § 2296 in pending and future cases, and, consistent with state law, to correct and remedy any erroneous training approval determinations by taking all necessary and appropriate action, including without limitation providing all bilingual training that is necessary to comply with the Trade Act for workers who are limited in English proficiency; and

5. provide monthly reports to the Court and to Plaintiffs on Defendant's progress in complying with the Court's injunction;

c. an award to Plaintiffs of their costs and litigation expenses to the extent permitted by law; and

d. all other relief that the Court deems just and proper.

Respectfully submitted,
TEXAS RIOGRANDE LEGAL AID, INC.

Dated: November 5, 2004

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing document to be served upon the following counsel of record instantly by electronic mail on November 5, 2004:

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