Case No. 21-20202

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SCOTT EASOM, *et al.*
Plaintiffs-Appellants,

v.

U.S. WELL SERVICES, INC.,
Defendant-Appellee.

On appeal from the
United States District Court for the Southern District of Texas

BRIEF FOR THE COMMUNICATIONS WORKERS OF AMERICA, SERVICE EMPLOYEES INTERNATIONAL UNION, AMERICAN FEDERATION OF TEACHERS, AND AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Amici state that none has a parent corporation; that none is a publicly held corporation; and that no publicly held corporation has 10% or greater ownership in any amicus.

Pursuant to Rule 26.1-1, Amici make the following additions to the Certificate of Interested Persons filed by Appellants:

a. Communications Workers of America, and Patricia M. Shea, General Counsel, Amicus Curiae in Support of Appellants;

b. Service Employees International Union, and Nicole Berner, General Counsel, Amicus Curiae in Support of Appellants;

c. American Federation of Teachers, and David Strom, General Counsel, Amicus Curiae in Support of Appellants;

d. American Federation of State, County and Municipal Employees, and Judith E. Rivlin, General Counsel, Amicus Curiae in Support of Appellants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF THE AMICI CURIAE

Communications Workers of America, AFL-CIO ("CWA") is a union of hundreds of thousands of public and private sector workers in communities across the United States, Canada, Puerto Rico, and other U.S. territories. Its members work in telecommunications and IT, the airline industry, manufacturing, news media, broadcast and cable television, education, health care, public service, and other fields. For years, CWA members have fought to improve workplaces by bargaining to improve pay and benefits, and for equal treatment, while advocating for legislation that protects the safety and economic wellbeing of all workers. In telecommunications and manufacturing, among other sectors, CWA members rely on the WARN Act to provide advance notice before an employer closes a facility.

The Service Employees International Union ("SEIU") is a union of more than two million workers, including more than one million workers in frontline healthcare roles. SEIU has a long history of advocating for workplace protections to improve the treatment of employees and ensure their economic security.

The American Federation of Teachers, AFL-CIO ("AFT") was founded in 1916 and today represents approximately 1.7 million members in more than three thousand local affiliates nationwide. AFT represents a variety of employees in both the public and private sectors, including in education, healthcare, and local, state, and federal government. AFT members have been on the frontlines of the COVID-19 pandemic.

The American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME") is a labor organization representing 1.4 million working men and women who provide vital public services around the nation. AFSCME represents members in hundreds of different occupations, including nurses, childcare providers, corrections officers, EMTs, sanitation workers and more. AFSCME members are often first responders to natural disasters and have been on the front lines of the COVID-19 pandemic.

The unions—CWA, SEIU, AFT, and AFSCME (collectively "Amici")—have a keen interest in this case. The Court's decision in this case could have profound impacts on members of Amici. Millions of workers protected by the WARN Act's notice requirement—including

many of Amici's members—have lost their jobs since the beginning of the pandemic.

If this Court were to accept Appellee's interpretation of the WARN Act's "natural disaster" exception, many of the workers who have lost, and continue to lose, their jobs during the pandemic will no longer be protected by the WARN Act's notice requirement. As labor unions representing millions of workers across the United States in a range of industries, Amici thus have a strong interest in this case and the proper interpretation of the WARN Act's "natural disaster" exception.

Pursuant to Fed. R. App. P. 29(a)(2), Counsel for Amici have conferred with Counsel for Appellants and Counsel for Appellee. Counsel for Appellants has indicated that Appellants consent to the filing of this amicus brief. Counsel for Appellee did not provide a response. No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae, their members, and counsel contributed money that was intended to fund the preparation or submission of this brief.

STATEMENT OF ISSUES

Whether the "natural disaster" exception to the WARN Act's requirement of sixty-day notice requires a showing that the natural disaster was a but-for or proximate cause of a mass layoff.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress passed the Worker Adjustment and Retraining Notification ("WARN") Act of 1988 so that employers would be required to provide adequate notice to all employees before ordering a mass layoff or plant closing. 29 U.S.C. § 2102(a). As Congress found, advance notice of mass layoffs is critical to protecting workers, their families, and their communities. It gives workers time to retrain, apply for new jobs, and adjust their financial circumstances before losing their income. It enables state and local governments to help laid off employees find new jobs. And it places families in the best position possible to protect their access to food, healthcare, and education. *See generally* H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1045 (1988), reprinted in House Subcomm. On Lab.-Mgmt. Relations of the Comm. on Educ. & Lab., 101st Cong., 2d Sess., Legislative History of S. 2527, 100th Cong., WARN, Pub. L. No. 110-379, 571 (Feb. 6, 1990) (hereinafter "Leg. Hist."); U.S. Dep't of Labor, *Economic Adjustment and Worker Dislocation in a Competitive Society: Report of the Secretary of Labor's Task Force on Economic Adjustment and Worker Dislocation* 10 (1986) (hereinafter "1986 DOL Report")

(congressionally commissioned report that led to the passage of the WARN Act).

Under the WARN Act, "[a]n employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order." 29 U.S.C. § 2102(a). Congress enumerated three limited exceptions to the 60-day notice requirement: the "faltering company" exception, the "unforeseeable business circumstances" exception, and the "natural disaster" exception, 29 U.S.C. § 2102(b), each of which courts construe narrowly, *see Carpenters Dist. Council v. Dillard Dep't Stores, Inc.*, 15 F.3d 1275, 1282 (5th Cir. 1994). This case involves the proper interpretation of the "natural disaster" exception, which excuses an employer of its obligation to provide advance notice of a layoff if that layoff is "due to" a "natural disaster." *Id.* § 2102(b)(2)(B).

In this case, Appellee laid off many of its workers without providing any notice. *See* Easom Br. 8. Appellee claimed that it did so because of the drop in oil prices, and consequential drop in customer demand, precipitated by COVID-19. D. Ct. Op. 5. It thus claims that the "natural disaster" exception to the WARN Act's notice requirement excused the

lack of notice because COVID-19—a putative natural disaster—was the but-for cause of the layoff. *Id.*

The district court agreed. It held that COVID-19 is a "natural disaster" under the WARN Act, that the "natural disaster" exception excuses Appellee of the obligation to provide *any* notice of a layoff, and that the "natural disaster" exception incorporates a but-for standard of causation. *Id.* It thus denied Appellants' motion for summary judgment. *Id.* 31.

Amici take no position on whether COVID-19 is a "natural disaster" pursuant to the WARN Act. Nor do they take a position on whether the "natural disaster" exception, if it applied, would excuse the Appellee here of its obligation to provide advance warning. Instead, Amici urge this Court to reverse the district court because "but-for" causation is not the appropriate standard. Even if COVID-19 were a "natural disaster," and even if the "natural disaster" exception entirely eliminated the need for notice under the WARN Act, that exception would not excuse the no-notice layoff here because COVID-19 was, at most, the but-for cause, not the proximate cause, of the layoff.

Appellants are correct that proximate cause is the standard for determining whether a layoff was "due to" a "natural disaster." *See, e.g.*, *Crose v. Humana Ins. Co.*, 823 F.3d 344, 350 (5th Cir. 2016) (interpreting "due to" to mean "proximate cause"). Indeed, that is precisely the conclusion reached by DOL in its regulations and accompanying guidance—which are owed deference, *Huawei Techs. V. FCC*, 2 F.4th 421, 433-34 (5th Cir. 2021) (citing *Chevron USA, Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984)). DOL's regulations state that the "natural disaster" exception requires that the layoff be a "direct result" of the natural disaster, 20 C.F.R. § 639.9(c)(2)—a phrase which this Court has interpreted to mean "proximate cause," *see Hemi Grp., LLC v. New York City*, 559 U.S. 1, 13-14 (2010). DOL has thus explained that a layoff caused by the economic downturn precipitated by COVID-19 can be excused, if at all, under the "unforeseeable business circumstances" exception.[1]

[1] *See* U.S. Dep't of Lab., *Worker Adjustment and Retraining Notifications Act Frequently Asked Questions* 2, https://www.dol.gov/sites/dolgov/files/ETA/Layoff/pdfs/WARN%20FAQ%20for%20COVID19.pdf (last visited Oct. 5, 2021) (describing an employer's WARN Act obligations in light of COVID-19) (hereinafter "DOL COVID-19 Guidance").

That interpretation is compelled by the text of the statute itself, or is, at the very least, eminently reasonable given the WARN Act's legislative history and remedial purpose. The "natural disaster" exception requires a showing of proximate cause but excuses an employer from providing any *advance* notice of a layoff if advance notice is impracticable. 20 C.F.R. § 639.9(c)(3) (notice requirement can be satisfied by after-the-fact notice for purposes of the "natural disaster" exception). By contrast, the "unforeseeable business circumstances" exception still requires as much advance notice as is practicable. *See* 29 U.S.C. § 2102(b)(3).

Accordingly, if a tornado destroys a plant, the plant owner can lay off its employees without providing advance notice because the tornado proximately caused the layoff, and, in fact, advance notice would be impossible in that case. By contrast, a store in the area that loses business because of the economic consequences of the damage caused by the tornado must still provide its employees with as much advance notice of an impending layoff as is practicable—which it is better positioned to do given that the store will have more time to learn of, respond to, and attempt to mitigate any economic downturn associated with the tornado.

That is the careful balance enacted by Congress in its efforts to ensure that workers have as much notice as is possible of a potential layoff. Indeed, Congress itself rejected an amendment to the WARN Act that would have expanded the "natural disaster" exception to cover instances like this one: where a business is negatively affected by the economic downturn associated with natural disasters, reasoning that such cases were *already covered* by the "unforeseeable business circumstances" exception. *See* Leg. Hist. at 358-62.

At bottom, the purpose of the WARN Act is always to provide as much notice as possible, up to 60 days. *See* 29 U.S.C. § 2106. And that purpose is supported by extensive evidence detailing the immense harm to both individual workers and communities, as well as the drain on the public fisc, that occurs when workers are laid off, en masse, without sufficient warning.

For all these reasons, this Court should reverse the district court and hold that proximate cause is the proper standard for determining whether the "natural disaster" exception excused Appellee's no-notice layoff.

ARGUMENT

The issue in this case—whether COVID-19 caused the layoff for purposes of the WARN Act's "natural disaster" exception—could have massive implications for millions of workers across the country. COVID-19 precipitated an unprecedented economic downturn, with more than 60 million Americans filing for unemployment insurance within the first six months of the pandemic.[2] Many companies saw a reduction in their access to needed supplies as well as a drop off in customer/market demand. Accordingly, large employers in a variety of fields, including travel, oil, shipping, finance, entertainment, retail, and defense, laid off millions of workers.[3]

Many employers did what DOL advised, *see* DOL COVID-19 Guidance, with regard to the WARN Act: they provided as much advance

[2] Taylor Borden, *et al.*, *The Coronavirus Outbreak Has Triggered Unprecedented Mass Layoffs and Furloughs*, Business Insider (Oct. 8, 220), https://www.businessinsider.com/coronavirus-layoffs-furloughs-hospitality-service-travel-unemployment-2020.

[3] *Id.*

notice as practicable, relying on the "unforeseeable business circumstances" exception to the WARN Act.[4]

But some did not, including the Appellee in this case. Instead, these employers argue, relying on the WARN Act's "natural disaster" exception, that they were excused of their obligation to provide any advance notice of the layoffs because COVID-19 was the but-for cause of the layoffs.[5]

For the reasons discussed below, these employers are incorrect. The WARN Act's text, history, and purpose—in addition to the reasoned judgment of DOL—make clear that the "natural disaster" exception requires a showing of proximate, not but-for, cause.

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[4] Andre Tartar & Jeremy C.F. Lin, *Job Cuts in Pandemic Come So Fast That Warning Laws Are Gutted*, Bloomberg (Apr. 17, 2020), https://www.bloomberg.com/graphics/2020-mass-layoff-notice/.

[5] *See, e.g.*, *Benson v. Enter. Leasing Co.*, Case No. 6:20-cv-891, 2021 WL 1078410 (M.D. Fla. Feb. 4, 2021) (rejecting defendants' argument that COVID-19 excused the no-notice layoff under the "natural disaster" exception); Defs.' Mot. to Dismiss, *Jones v. Scribe OPCO, Inc.*, Case No. 20-cv-02945, Dkt. 14 (M.D. Fla. Feb. 16, 2021); Defs.' Mot. to Dismiss, *Balderen v. FS Miami Emp., Inc.*, 1:21-cv-21842, Dkt. 14 (S.D. Fla. June 18, 2021).

I. The Remedial Purpose of the WARN Act.

To put the specific statutory issue here in context, amici begin with a brief overview of Congress's remedial purpose in passing the WARN Act: to protect workers.

A. Displaced workers are uniquely burdened.

Displaced workers[6] face potentially devastating challenges upon being laid off from a job. *See, e.g.*, 1986 DOL Report 3 ("Worker dislocation constitutes a markedly different kind of unemployment in many respects."). Especially during a broad economic downturn, they often face problems finding full-time work that provides equivalent pay and benefits as the lost job, thereby decreasing, sometimes quite significantly, their long-term earning potential.[7] In fact, one study found

[6] The Bureau of Labor Statistics defines a "displaced worker" as a person "who lost or left jobs because their plant or company closed or moved, there was insufficient work for them to do, or their position of shift was abolished." *Displaced Workers Summary,* U.S. Bureau of Lab. Stat. (Aug. 27, 2020), https://www.bls.gov/news.release/disp.nr0.htm#:~:text=Displaced%20workers%20are%20defined%20as,position%20or%20shift%20was%20abolished.

[7] *See* Bruce C. Fallick, *A Review of the Recent Empirical Literature on Displaced Workers*, 50 ILR Rev. at 3-4 (1996); Christopher J. Ruhm, *AreWorkers Permanently Scarred by Job Displacements?*, 81 Am. Econ. Rev. 319, 322 (1991); Louis S. Jacobson, *et al.*, *Earnings Losses of Displaced Workers*, 83 Am. Econ. Rev. 685, 706 (1993).

that displaced workers who have been at their jobs for 20 years would see a 20 to 40 percent dip in their income upon reentering the workforce.[8]

Moreover, displaced workers are at an increased risk for a variety of mental and physical health issues.[9] For example, studies have found that they are more susceptible to depression and anxiety, and suffer from a host of other physical conditions, including obesity, high blood pressure, and diabetes.[10] Studies also show that familial and social ties deteriorate following a layoff, connecting layoffs with an increased incident rate of spousal and child abuse, as well as divorce.[11] And displaced workers are significantly more susceptible to problems with drug and alcohol consumption.[12]

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[8] Louis Jacobson, *et al.*, *Is Retraining Displaced Workers a Good Investment*, 29 Econ. Perspectives 47, 48 (2005).

[9] *See, e.g.*, Leon Grunberg & Sarah Y. Moore, *Differences in Psychological and Physical Health Among Layoff Survivors: The Effect of Layoff Contact*, 6 J. of Occupational Health Psych. 15, 15-25 (2001) (citing studies); Kate W. Strully, *Job Loss and Health in the U.S. Labor Market*, 46 Demography 221, 221 (2009).

[10] *Id.*; Tomas Korpi, *Accumulating Disadvantage: Longitudinal Analyses of Unemployment and Physical Health in Representative Samples of the Swedish Population*, 17 Eur. Socio. Rev. 255, 270 (2001).

[11] *Id.*

[12] Ralph Catalano, *et al.*, *Job Loss and Alcohol Abuse: A Test Using Data from the Epidemiological Catchment Area Project*, 34 J. Health & Soc. Behav. 215, 215-225 (1993).

Congress passed the WARN Act to attempt to minimize and mitigate these types of challenges. Congress acknowledged that "most workers—and particularly older workers displaced by plant closings, suffer large income reductions even when they succeed in finding new work." Leg. Hist. at 593. Indeed, DOL had reported to Congress that between 1979 and 1984, displaced workers saw "average real earnings losses of 10 to 15 percent upon reemployment," with many displaced workers having "losses of 25 percent or more." 1986 DOL Report at 14.

Congress also explained that "the health effects of job loss can be even more dramatic," noting that research had documented "numerous physiological changes caused by stress following plant closures, including increased uric acid, blood pressure, blood sugar, and cholesterol levels." Leg. Hist. at 593. It also explained that displaced workers are more likely to experience mental health issues, including depression, and that "[s]uicide rates increase dramatically among those who experience plant closings." *Id.*

Congress was also concerned with the families of displaced workers. It explained that "Social Service agencies report huge increases in child abuse and spouse abuse after mass layoffs as the displaced workers vent

their anger and frustration on their families," and that "[d]esertion and divorce increase especially in families where the breadwinner remains unemployed a year or more after the closure and family savings begin to be depleted." *Id.* at 593-94.

Finally, Congress explained that mass layoffs and plant closings have a "domino or ripple effect," citing "dozens of mayors, city managers, and other local leaders" who had testified about the public consequences of private sector disinvestment. *Id.* at 594.

B. The importance of advance notice.

Congress did not just recognize the problem; it sought to fix it. The General Accounting Office ("GAO") reported to Congress that, between 1979 and 1984, "the vast majority of workers receive[d] little or no notice of closings or layoffs." Leg. Hist. at 596.[13] That lack of notice exacerbated the problems inherent in job loss: workers did not have time to look for new jobs and/or make financial adjustments before the layoff, and state and local governments were unable to develop effective adjustment programs.

[13] *See also Dislocated Workers: Extent of Business Closures, Layoffs, and the Public and Private Response*, Gov't Acct. Off. 3, https://www.gao.gov/assets/hrd-86-116br.pdf (July 1, 1986) (hereinafter "GAO Report").

Accordingly, both DOL and the Congressional Office of Technology Assessment ("OTA") recommended that employers be required to provide advance notice. *See* Leg. Hist. at 596-97. As DOL has explained, "[a]dvance notice provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market." 20 C.F.R. § 639.1(a).[14] It also "provides for notice to State dislocated worker units so that dislocated worker assistance can be promptly provided." *Id.*; *see also* 1986 DOL Report 11 ("[T]he earliest notification possible leads to more effective delivery of public and private services to dislocated workers."). And OTA stressed the economic benefits that could accompany mandatory advance notice, estimating that the federal government could save between $257 and $384 million dollars in unemployment insurance. Leg. Hist. at 184.

[14] *See also Collins v. Gee West Seattle LLC*, 631 F.3d 1001, 1007 (9th Cir. 2011) (the WARN Act "is a wage workers' equivalent of business interruption insurance. It protects a worker from being told on payday that the plant is closing that afternoon and his stream of income is shut off, though he has to buy groceries for his family that weekend and make a mortgage payment the next week.").

Congress heeded DOL and OTA's recommendations in passing the WARN Act in 1988. A House Report on the bill that became the WARN Act explained that "it is in the interest of both the health of our economy and the well being of American workers to devote significant resources to a sensible and effective worker readjustment program." Leg. Hist. at 587. It further found that "advance notification is an essential component of a successful adjustment program." *Id.* 586.

The WARN Act thus requires that, generally, employers must provide sixty days of advanced notice of a mass layoff. *See* 29 U.S.C. § 2102(a). And it made clear that employers cannot "evade" the notice requirement by engaging in sleight of hand—e.g., laying off smaller groups of people in short succession so as to not meet the threshold numerical requirement of a "mass layoff." *Id.* § 2102(d). Indeed, the Act encourages maximum notice be provided even when not statutorily mandated: "It is the sense of Congress that an employer who is not required to comply with the notice requirements … should, to the extent possible, provide notice to its employees about a proposal to close a plant or permanently reduce its workforce." 29 U.S.C. § 2106; *see also Oil, Chem. & Atomic Workers Int'l Union v. RMI Titanium, Co.*, 199 F.3d 881,

886 (6th Cir. 2000) ("WARN expressly encourages employers to notify employees before permanent layoffs are effected, whether or not the statute's triggering thresholds are met.").

Given the strong indications from Congress in passing the WARN Act about the importance of advance notice, DOL has thus set forth in regulations the general rule that "in ambiguous situations," employers should give notice. 20 C.F.R. § 639.1(e).

With this context in mind, Amici turn now to the specific issue presented here.

II. The "Natural Disaster" Exception Requires a Showing of Proximate Causation.

The district court held that the Appellee need only show that COVID-19 was the but-for cause of the layoffs, in order to claim the benefit of the "natural disaster" exception to the WARN Act's notice requirements.

That is incorrect. Reading the statute as a whole, and in light of its legislative history, it is clear that, as DOL has concluded, the "natural disaster" exception is best read to require a showing of proximate cause. This Court should therefore reverse the district court's decision.

A. The Act's plain language requires a showing of proximate cause.

The WARN Act mandates that an employer "shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order … [to] affected employees." 29 U.S.C. § 2102(a). Congress adopted three exceptions to this notice requirement: the "faltering company" exception, the "unforeseeable business circumstances" exception, and the "natural disaster" exception. *Id.* § 2102(b).

The "natural disaster" exception relieves an employer of its obligation to provide advance notice of a plant closing or layoff if it was "*due to* any form of natural disaster, such as a flood, earthquake, or … drought." *Id.* § 2102(b)(2)(B) (emphasis added); 20 C.F.R. § 639.9(c)(3). Under this Court's precedent, the phrase "due to" means "proximate cause." *Crose*, 823 F.3d at 350 (interpreting the phrase "due to" in an insurance contract to require "a more direct causal nexus than 'but for' causation" and adopting "proximate cause" as the standard); *see also Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 267 (1992) ("by reason of" in RICO means "proximate cause"); *Associated Ge. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 533 (1983) ("by

reason of" in the Sherman Act means "proximate cause"); *see also Pac Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 222 (2012) (interpreting the phrase "result of" to mean "substantial nexus").

That conclusion is particularly apt here because interpreting the "natural disaster" exception to require a showing of proximate cause accords with the broader statutory context. *See Yates v. United States*, 574 U.S. 528, 543 (2015) (statutes must be read in context). Congress laid out three notice exceptions, including the "unforeseeable business circumstances" exception—which applies when layoffs or plant closings are "caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required," 29 U.S.C. § 2102(b)(2)(A). That exception covers circumstances where a layoff or plant closing stems from "an unanticipated and dramatic major economic downturn," 20 C.F.R. § 639.9(b)(1). However, in such cases, and in contrast to the "natural disaster" exception, which allows after-the-fact notice, an employer claiming the "unforeseeable business circumstances" exception must still give as much *advance* notice as is practicable. *See Sides*, 725 F.3d at 1284-85.

Reading those two statutory exceptions in tandem, the "natural disaster" exception must require something more than a mere showing of but-for causation. Otherwise, an unanticipated economic downturn caused by a natural disaster would allow an employer to provide no advance notice of a layoff—pursuant to the "natural disaster" exception. But an economic downturn caused by something other than a natural disaster would require an employer to still provide as much advance notice of a layoff as is practicable—pursuant to the "unforeseeable business circumstances" exception.

There can be no reason for such an unreasonable conclusion, so the statute should not be read in such a way. *See Carpenters Dist. Council v. Dillard Dep't Stores, Inc.*, 15 F.3d 1275, 1285 (5th Cir. 1994) ("A well-accepted canon of statutory construction requires the reviewing court to avoid any interpretation that would lead to absurd or unreasonable outcomes."). Indeed, the interpretive principle establishing that words must be read in context assists courts in avoiding what the district court here did: "ascrib[e] to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Yates v. United States*, 574 U.S. 528, 543 (2015); *see also*

RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645 (2012) (the "general/specific canon … has full application … to statutes … in which a general authorization and a more limited, specific authorization exist side-by-side. There the canon avoids not contradiction but the superfluity of a specific provision that is swallowed by the general one").

In any event, the distinction Congress drew between the "natural disaster" and "unforeseeable business circumstances" exceptions makes sense: advance notice is likely impossible in cases of, say, a tornado destroying a plant; by contrast, advance notice of some amount is likely possible in cases of, say, severe weather causing a regional economic downturn that lowers demand and causes businesses to lay off employees. Recognizing this, Congress established different types of notice exceptions, allowing the plant owner to provide after-the-fact notice, under the "natural disaster" exception, and allowing the downstream business to provide less than sixty days of notice, but still as much as practicable, under the "unforeseeable business circumstances" exception.

That distinction is not only reasonable, but also furthers Congress's express purpose in passing the WARN Act: to ensure workers are given as much notice as possible in the case of a layoff or plant closing. Consistent with that fact and in recognition of the Act's remedial purpose, this Court and many others have held that exceptions to the WARN Act's notice requirement must be narrowly interpreted. *See Carpenters Dist. Council*, 15 F.3d at 1282 (WARN Act exceptions are "narrowly construed"); *Day v. Celadon Trucking Servs. Inc.*, 827 F.3d 817, 836 (8th Cir. 2016) (same); *Castro v. Chicago Hous. Auth.*, 360 F.3d 721, 730 (7th Cir. 2004) (same); *Loc. Union 7107 v. Clinchfield Coal Co.*, 124 F.3d 639, 640-41 (4th Cir. 1997) (same).[15]

The district court nevertheless reasoned that, because the "unforeseeable business circumstances" and "natural disaster"

[15] The Supreme Court recently modified its approach to interpreting remedial legislation in a different context. *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018). But the Court's analysis in *Encino* was limited to the Fair Labor Standards Act ("FLSA"). The Court "rejected" the principle of interpreting exceptions to remedial legislation narrowly as not "a useful guidepost for interpreting the FLSA" because "the FLSA gives no textual indication that its exemptions should be construed narrowly." *Encino Motorcars*, 138 S. Ct. at 1142. This case is distinguishable. In contrast to the FLSA, the WARN Act includes textual evidence that Congress intended the exceptions to be construed narrowly. *See* 29 U.S.C. §§ 2102(d); 2106.

exceptions use different statutory language, they must mean something different. D. Ct. Op. 25. As the district court stated, because "caused by" in the "unforeseeable business circumstances" exception means "proximate cause," "due to" in the "natural disaster" exception must mean "but-for" cause. *Id.*

But the Supreme Court has cautioned against overreliance on the "negative pregnant" canon of construction, explaining that the rule "is weakest when it suggests results strangely at odds with other textual pointers." *Field v. Mans*, 516 U.S. 59 74 (1995). That caution is especially apt here, where reading the statute as the district court did leads to unreasonable results, collapses the distinction between two distinct statutory exemptions, and thwarts Congress's remedial purpose. Moreover, and as the district court acknowledged, no court has ever expressly held that the "unforeseeable business circumstances" exception requires a showing of proximate cause. D. Ct. Op. 25. The two exceptions might indeed incorporate different standards for causation, but that does

not mean that the "natural disaster" exception does not require a showing of proximate cause.[16]

If anything, the interpretation proffered by the district court merely suggests that the statute is ambiguous, requiring the Court to look at the WARN Act's legislative history and the interpretation proffered by DOL. Both, as discussed below, further support the reading compelled by the text and context: that the "natural disaster" exception to the WARN Act requires a showing of proximate cause.

B. The Act's legislative history requires a showing of proximate cause.

The legislative history of the WARN Act further supports the reading offered by Appellees in this case: that a natural disaster must be the proximate cause of a layoff for the "natural disaster" exception to apply.

The "natural disaster" exception was proposed as an amendment to the original bill to excuse a no-notice layoff that was "due, *directly or indirectly*," to a natural disaster. *See* Leg. Hist. at 358-62 (emphasis

[16] In fact, this Court has previously used the phrase "caused by" synonymously with "but-for" causation. *See United States v. Ruiz-Hernandez*, 890 F.3d 202, 212 (5th Cir. 2018) ("A particular result can be caused by … multiple but for causes.").

added). As the amendment's proponent expressed: "I am offering this amendment which stipulates that plant closing notifications will not be required in cases where businesses are shut down due to natural disasters." *Id.* at 358 (statement of Sen. Dole). He went on to state that the word "indirectly" was included to clarify that the "natural disaster" exception would cover the economic hardships of "somebody who may be downstream." *Id.* at 360.

Opponents of the "indirect" language made clear, however, that such a circumstance was already covered by the exception "in connection with unforeseeable business circumstances," which made sense given that oftentimes notice "can be given" by those affected downstream of a natural disaster—even if not the full sixty days. *Id.* (statement of Sen. Metzenbaum). So, it was explained, the "natural disaster" exception, which excuses *any* advance notice, could not be used as "a carte blanche so that anybody who claims they had some impact, however small … would not have to give notice." *Id.* The phrase "directly or indirectly" was thus struck from the amendment. *Id.*

The district court's alternative reading of this legislative history is unpersuasive. It reasoned that, because the word "directly" was not

included in the final bill language, courts should not read it into the statute. *See* D. Ct. Op. 21-22. But the legislative history makes clear that the concern in striking the phrase "directly or indirectly" was about the word "indirectly." And certainly nothing in the legislative history suggests that Congress intended, in this act of rejecting the proposed phrase as a whole, to make clear that but-for cause is the correct standard.

And lest there be any doubt, other pieces of the legislative history make clear that Congress did not intend the "natural disaster" exception to apply in cases like this one. Rather, the House Report, issued about a month after the debate about the direct/indirect language, listed several examples of unforeseeable business circumstances that might excuse the sixty-day notice requirement, including that "a natural disaster may destroy *part* of a plant." Leg. Hist. at 575 (emphasis added). That example makes clear that, in Congress's view, the existence of a natural disaster, by itself—even if it can be said to be a but-for cause of the layoff—does not mean that the "natural disaster" exception applies to completely absolve an employer of its obligations under the Act to provide advance notice of a layoff.

Moreover, the Report listed examples of "unforeseen business circumstances" that are similar in substance to the ones here presented: where "a principal client of the employer may suddenly and unexpectedly terminate or repudiate a major contract" or where "an employer may experience a sudden, unexpected and dramatic change in business conditions such as price, cost, or declines in customer orders." *Id.* Again, the examples demonstrate that an economic downturn—regardless of the instigating event—is covered, if at all, by the "unforeseeable business circumstances" exception. That means the "natural disaster" exception covers something different—namely, that an employer is excused from providing advance notice of a layoff if a natural disaster is the proximate cause of that layoff.

C. This Court should defer to DOL's interpretation of the Act, requiring a showing of proximate cause.

Even if this Court has any doubt about the best reading of the statute, it should defer to DOL's interpretation. *See Sides v. Macon Cnty. Greyhound Park, Inc.*, 725 F.3d 1276, 1284 (11th Cir. 2013) (holding that DOL is owed *Chevron* deference for its interpretations of the WARN Act).

According to DOL, "[t]o qualify for [the natural disaster] exception, an employer must be able to demonstrate that its plant closing or mass

layoff is a *direct result* of a natural disaster." 20 C.F.R. § 639.9(c)(2) (emphasis added). That requires proximate cause rather than but-for causation. *See Hemi Grp., LLC, v. New York City*, 559 U.S. 1, 13-14 (2010) (equating "proximate" and "direct" causation); *Dixie Pine Prods. Co. v. Maryland Cas. Co.*, 133 F.2d 583, 585 (5th Cir. 1943) ("It is well settled that the words 'direct cause' ordinarily are synonymous in legal intendment with 'proximate cause.'"). By contrast, as DOL explained, "[w]here a plant closing or mass layoff occurs as an *indirect result* of a natural disaster, the exception does not apply but the 'unforeseeable business circumstance' exception … may be applicable." 20 C.F.R. § 639.9(c)(4) (emphasis added).

DOL reached that interpretation after notice-and-comment rulemaking and based on its interpretation of the WARN Act and its legislative history. 54 Fed. Reg. 16,042, 16,063 (Apr. 20, 1989). For the reasons discussed above, that conclusion is a reasonable one, and this Court should defer. *Sides*, 725 F.3d at 1284.

Moreover, DOL has expressly articulated how the WARN Act applied specifically in the context of COVID-19, advising employers that they must comply with the sixty-day notice requirement, unless they

could prove an unforeseeable business circumstance. DOL Covid-19 Guidance. Although DOL may not be entitled to *Chevron* deference for such guidance documents alone, here that document merely clarifies an application of the agency's regulations, which, as discussed, are due deference. In any event, the Court should defer to the guidance itself to the extent it has the "power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). For the reasons discussed above, it is persuasive to interpret the "unforeseeable business circumstances" exception—not the "natural disaster" exception—in the WARN Act to cover instances, like the one here presented, where a natural disaster causes an economic downturn, which, in turn, causes a loss of revenue that necessitates a mass layoff.

CONCLUSION

For the reasons discussed above, this Court should reverse the district court's order denying Appellants' Motion for Summary Judgment.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 29(a)(4)(g), I certify that this brief meets the type-volume limitations of Rule 29(a)(5) because it contains 5,773 words.

Dated: October 6, 2021

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