IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ERIC JONES, on behalf of himself and on behalf of all others similarly situated,

Plaintiff,

vs.

SCRIBE OPCO, INC. d/b/a/ BIC GRAPHIC

Defendant.

Case No. 20-cv-02945-VMC-SPF

BRIEF OF *AMICI CURIAE* COMMUNICATIONS WORKERS OF AMERICA, SERVICE EMPLOYEES INTERNATIONAL UNION, AMERICAN FEDERATION OF TEACHERS, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AND NATIONAL EMPLOYMENT LAW PROJECT IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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 Plaintiff:

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

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

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

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

e. National Employment Law Project, and Catherine Ruckelshaus, General Counsel, Amicus Curiae in Support of Plaintiff

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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 front lines 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.

National Employment Law Project ("NELP") is a non-profit legal organization with over fifty years of experience advocating for the employment rights of workers in low-wage industries. NELP's areas of expertise include workplace standards, access to good jobs and benefits, and social safety nets for workers who lose their jobs, including those lost during the COVID-19 pandemic. NELP collaborates closely with state and federal agencies, community-based worker centers, unions, and state policy groups, including in states within the Eleventh Circuit. It has litigated and participated as amicus in numerous cases addressing workers' rights under federal and state laws. NELP has submitted testimony to the U.S. Congress and state legislatures on numerous occasions on workplace rights and economic security connected to work.

* * * * *

CWA, SEIU, AFT, AFSCME, and NELP (collectively "Amici") have a keen interest in this case because the Court's decision could have profound impacts on Amici's members. 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, and millions more are at risk of losing their jobs to layoffs or plant closings at any time.

If this Court were to accept Defendant'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.

Counsel for Amici have conferred with Counsel for Plaintiff and Counsel for Defendant. Counsel for Plaintiff has indicated that Plaintiff consents to the filing of this amicus brief. Counsel for Defendant has indicated that Defendant does not oppose the filing of this amicus brief.

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.

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 workers in the best position possible to protect their families' access to food, healthcare, and education. *See generally* H.R. Rep. No. 100-576, pt. 2, at 1045 (1988), *reprinted in* H. 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. 100-379, at 571 (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, known as the "faltering company" exception, the "unforeseeable business circumstances" exception, and the "natural disaster" exception. 29 U.S.C. § 2102(b). Courts construe each of these exceptions narrowly. *See, e.g.*, *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 notice of a layoff if that layoff is "due to" a

"natural disaster." *Id.* § 2102(b)(2)(B).

In this case, Defendant furloughed hundreds of employees and then, because of the "economic downturn caused by the COVID-19 pandemic," permanently laid off many of those workers it had furloughed—without providing notice in accordance with its duty under the WARN Act. *See* Def.'s Mot. Dismiss, ECF No. 42, at 6 (hereinafter "MTD") ("The reason Scribe was forced to furlough and ultimately terminate these workers was 'the economic downturn caused by the COVID-19 pandemic.'" (citing Answer, ECF No. 30, ¶ 58)). Defendant now claims that the "natural disaster" exception to the WARN Act's notice requirement excused its lack of notice because COVID-19—a putative natural disaster—caused the downturn and, by extension, the layoff. *Id.* In so doing, Defendant contends that the WARN Act's "natural disaster" exception is satisfied any time the employer can show that a natural disaster was a "but-for" cause of layoffs.

It is not. Amici urge this Court to reject Defendant's argument that "but-for" causation is the appropriate standard for determining whether a layoff was "due to" a natural disaster.[1] Instead, this Court should follow the decision of another court in this district and hold that the WARN Act's "natural disaster" exception applies only if a layoff is the "*direct result* of a natural disaster." *Benson v. Enter. Leasing Co.*, No. 6:20-cv-891, 2021 WL 1078410, at *5 (M.D. Fla. Feb. 4, 2021). A natural disaster that causes "an economic downturn, which affected Defendants" does not excuse a no-notice layoff under the "natural disaster" exception. *Id.*

That is precisely the conclusion reached by DOL in its regulations and accompanying guidance, 20 C.F.R. § 639.9(c)(2), (4) (1989), which are owed deference, *Sides v. Macon Cnty. Greyhound Park, Inc.*, 725 F.3d 1276, 1284 (11th Cir. 2013). DOL's regulations state that the

[1] Amici take no position on whether COVID-19 is a "natural disaster" pursuant to the WARN Act.

"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 that is typically interpreted to mean "proximate cause," *see, e.g.*, *Hemi Grp., LLC v. City of New York*, 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.[2] Defendant does not even acknowledge DOL's longstanding interpretation, much less explain why it is incorrect or due no deference.

That interpretation is compelled by the text of the statute itself, or, at the very least, is eminently reasonable given the WARN Act's legislative history and remedial purpose and is entitled to deference from the federal courts. *Chevron, Inc. v. NRDC*, 467 U.S. 837 (1984). The "natural disaster" exception requires a showing of proximate cause but, as the Eleventh Circuit has stated, excuses an employer from providing any notice of a layoff. 29 U.S.C. § 2102(b)(2)(B) ("*No notice* under this chapter shall be required if the plant closing or mass layoff is due to any form of natural disaster." (emphasis added)); *Sides*, 725 F.3d at 1284. By contrast, the "unforeseeable business circumstances" reduces, but does not eliminate, the requisite notice period. *See* 29 U.S.C. § 2102(b)(2)(A), (b)(3).

Accordingly, if a tornado destroys a plant, the plant owner can lay off its employees without providing notice because the tornado directly caused the layoff. 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 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

[2] *See* U.S. Dep't of Labor, *Worker Adjustment and Retraining Notifications Act Frequently Asked Questions* 2 (hereinafter "DOL COVID-19 Guidance"), https://bit.ly/3LFjN3G (last visited Feb. 16, 2022) (describing an employer's WARN Act obligations in light of COVID-19).

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 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. The "natural disaster" exception should be read in light of this purpose and consistently with DOL's longstanding interpretation.

For all these reasons, this Court should reject Defendant's argument and hold that proximate cause is the proper standard for determining whether the "natural disaster" exception excused the no-notice layoff at issue in this case.

ARGUMENT

I. The "Natural Disaster" Exception Requires a Showing of Proximate Cause.

Defendant argues that, under the "natural disaster" exception, it was excused from providing notice of the anticipated layoffs because COVID-19 was the but-for cause of those layoffs—i.e., that COVID-19 caused an economic downturn, which cut into Defendant's revenue, and, therefore, necessitated a corresponding reduction of its workforce. *See* MTD at 6, 13.

That is incorrect. As the Department of Labor has concluded, the "natural disaster"

exception to the WARN Act requires a showing of "direct" cause—a term often used synonymously with "proximate" cause. Because that interpretation is consistent with the plain language of the statute, and its legislative history, it is owed deference. *See Sides*, 725 F.3d at 1284 (DOL's interpretation of the WARN Act is owed deference under the *Chevron* doctrine).

Accordingly, this Court should reject Defendant's argument and deny its motion to dismiss.

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 any 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); *see also* 20 C.F.R. § 639.9(c)(2) ("To qualify for this exception, an employer must be able to demonstrate that its plant closing or mass layoff is a direct result of a natural disaster.").

Courts have interpreted the phrase "due to," and phrases that Defendant identifies as synonymous, MTD at 14, to incorporate the concept of "proximate cause." *See, e.g.*, *Crose v. Humana Ins. Co.*, 823 F.3d 344, 349–350 (5th Cir. 2016) (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); *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 267–268 (1992) ("by reason of" in RICO means "proximate cause"); *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 531–533 (1983) ("by reason of" in the

Sherman Act means "proximate cause"); *Pac. Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 222 (2012) (interpreting the phrase "result of" to mean "substantial nexus"). Indeed, the Supreme Court for decades has "found a proximate-cause requirement built into a statute that did not expressly impose one." *Paroline v. United States*, 572 U.S. 434, 446 (2014); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014) ("Congress, we assume, is familiar with the common-law rule and does not mean to displace it sub silentio.").

Following the Supreme Court's lead, this Court should interpret the phrase "due to" in the WARN Act's "natural disaster exception" to require a showing of proximate cause. That conclusion is particularly apt here because it 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 eliminates the notice requirement, an employer claiming the "unforeseeable business circumstances" exception must still give as much notice as is practicable. *See Sides*, 725 F.3d at 1284–85 (contrasting the "no-notice" natural disaster exception with the "*some* notice" unforeseeable business circumstances exception).

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 eliminate an employer's obligation to

provide notice of a layoff (pursuant to the "natural disaster" exception), but an economic downturn caused for any other reason would require an employer to still provide as much 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 United States v. Mendoza*, 565 F.2d 1285, 1288 (5th Cir. 1978) (courts should construe statutes to avoid absurd or unreasonable outcomes). Indeed, the interpretive principle establishing that words must be read in context assists courts in avoiding what the Defendant here does: "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*, 574 U.S. at 543; *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: notice is likely impossible in cases of, say, a tornado destroying a plant; by contrast, notice of some kind is likely possible in cases of, say, severe weather causing a regional economic downturn that lowers demand and causes businesses to lay off employees.[3] Recognizing this, Congress established different types of notice exceptions, excusing the directly affected plant owner of their obligation to provide notice under the "natural disaster" exception, and allowing the downstream business to provide less than 60 days of notice, but still as much as practicable, under the "unforeseeable business circumstances"

[3] Indeed, Defendant did not lay off its employees until eight months after the start of the pandemic—the putative "natural disaster," and seven months after it furloughed the same employees. MTD at 6.

exception.

That distinction is not only reasonable, it furthers Congress's express purpose in passing the WARN Act: to ensure workers are given as much notice as is possible in the case of a layoff or plant closing. Consistent with that fact and in recognition of the Act's remedial purpose, several courts of appeals 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).

For all these reasons, this Court should reject Defendant's argument and hold that the plain language of the WARN Act's "natural disaster" exception requires a showing of direct, not but-for, cause.

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

Even if there were any ambiguity in the Act's language, the legislative history of the WARN Act offers further support for the conclusion 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 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 60 days. *Id.* (statement of Sen. Metzenbaum). So, it was explained, the "natural disaster" exception, which excuses *any* 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.* at 363. The phrase "directly or indirectly" was thus struck from the amendment. *Id.*

Defendant's alternative reading of this legislative history is unpersuasive. Defendant reasons that, because the word "directly" was not included in the final bill language, courts should not read it into the statute. *See* MTD at 15. 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 but-for cause the correct standard.

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 60-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 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 notice of a layoff if a natural disaster is the proximate cause of that layoff.

C. The Remedial Purpose of the WARN Act

Beyond the plain language and legislative history of the WARN Act, this Court should consider the Act's remedial purpose. *See Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) ("[S]tatutory interpretation [i]s a 'holistic endeavor' which determines meaning by looking not to isolated words, but to text in context, along with purpose and history."). That purpose further supports the interpretation of the WARN Act offered by Amici.

1. Displaced workers are uniquely burdened

Displaced workers[4] 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

[4] 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." U.S. Bureau of Lab. Stat., Economic News Release, *Displaced Workers Summary* (Aug. 27, 2020), https://bit.ly/34Z4wtZ.

decreasing, sometimes quite significantly, their long-term earning potential.[5] In fact, one study found 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.[6]

Moreover, displaced workers are at an increased risk for a variety of mental and physical health issues.[7] 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.[8] 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.[9] And displaced workers are significantly more susceptible to problems with drug and alcohol consumption.[10]

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

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[5] *See* Bruce C. Fallick, *A Review of the Recent Empirical Literature on Displaced Workers*, 50 ILR Rev. 1, at 3–4 (1996); Christopher J. Ruhm, *Are Workers 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).

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

[7] *See, e.g.*, Leon Grunberg et al., *Differences in Psychological and Physical Health Among Layoff Survivors: The Effect of Layoff Contact*, 6 J. 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).

[8] *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).

[9] *Id.*

[10] 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 (1993).

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.

2. The importance of 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.[11] That lack of notice

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

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.

Accordingly, both DOL and the Congressional Office of Technology Assessment ("OTA") recommended that employers be required to provide 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).[12] 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 4 ("[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.

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 60 days of advanced

[12] *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.").

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). Similarly, this Court should consider the history and purpose of the WARN Act as supporting a narrow interpretation of the "natural disaster" exception—one that requires more than a mere showing of but-for causation.

II. 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*, 725 F.3d at 1284 (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.*, 559 U.S. at 13–14 (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 60-day notice requirement, unless they could prove an unforeseeable business circumstance. DOL Covid-19 Guidance, *supra* n.2. Regardless whether DOL is entitled to *Chevron* deference for such guidance documents alone, that document clarifies and applies 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 that, as a downstream effect, causes a loss of revenue that prompts a mass layoff.

CONCLUSION

For the reasons discussed above, this Court should reject Defendant's argument and hold that a showing of proximate cause is required to claim the WARN Act's "natural disaster" exception.

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Respectfully submitted,

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