UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Tampa Division

ERIC JONES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 8:20-cv-02945-VMC-SPF
	)	
SCRIBE OPCO, INC.,	)	
	)	
Defendant.	)	
	)	

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

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INTRODUCTION

This dispute arises out of Defendant Scribe Opco, Inc.'s alleged failure to provide a putative class of employees with the requisite statutory notice of an impending layoff. The United States Department of Justice files this Statement of Interest to address Defendant's assertions, made in its motion to dismiss filed on January 13, 2022 (Dkt. No. 42), regarding the causation standard set forth in the "natural disaster" exception to the Worker Adjustment and Retraining Notification ("WARN") Act, 29 U.S.C. § 2102(b)(2)(B), and its accompanying regulation, 20 C.F.R. § 639.9(c).[1]

Congress enacted the WARN Act with the goal of providing workers and state and local governments with time to prepare for a mass layoff, and thus provided three circumscribed exceptions to the requirement that employers provide at least 60 days' notice of an impending layoff. One such exception, relevant here, is when a mass layoff is "due to" a natural disaster. 29 U.S.C. § 2102(b)(2)(B). The Secretary of Labor promulgated a regulation interpreting this natural disaster exception as applying where a layoff is the "direct result" of a natural disaster. 20 C.F.R. § 639.9(c). The Secretary's interpretation comports with the text, structure, and purpose of the WARN Act, and further harmonizes the natural disaster exception

[1] Under 28 U.S.C. § 517, the Attorney General may send any officer of the United States Department of Justice "to attend to the interests of the United States in a suit pending in a court of the United States . . . ." *See also id.* § 518 (authorizing the Attorney General to send Department attorneys to argue such cases); *Alvey v. Gualtieri*, No. 8:15-cv-1861, 2016 WL 6071746, at *1-2 (M.D. Fla. Oct. 17, 2016) (Covington, J.) (denying motion to strike the United States' Statement of Interest where it was "related to the issues to be decided in this case," "not redundant because it is the United States' only briefing in this case," and "timely").

with its companion "unforeseeable business circumstances" exception. The Secretary's interpretation is more than reasonable, and this Court should not adopt Defendant's disregard of the regulation and contrary interpretation of the statute.

INTEREST OF THE UNITED STATES

The Secretary of Labor administers the WARN Act, 29 U.S.C. § 2101 *et seq.*, and possesses broad authority to "prescribe such regulations as may be necessary to carry out" the Act, *id.* § 2107(a). Pursuant to that authority, the Secretary promulgated 20 C.F.R. § 639.9, which, among other things, identifies the circumstances under which the WARN Act's natural disaster exception, 29 U.S.C. § 2102(b)(2)(B), excuses an employer from providing employees with the full 60 days' notice of an impending mass layoff. In the instant action, Defendant urges the Court to adopt an interpretation of the WARN Act's natural disaster exception that is at odds with the Secretary's regulation. The United States has a strong interest in defending duly promulgated regulations, in the correct interpretation and application of the WARN Act, and in providing clear guidance to employers and employees about their obligations and rights under the WARN Act. The United States therefore files this Statement of Interest to aid the Court in its deliberations.

BACKGROUND

I. Statutory and Regulatory Background

The WARN Act requires businesses that employ 100 or more employees to provide employees and state and local government authorities with 60 days' notice of a forthcoming "plant closing" or "mass layoff." *See* 29 U.S.C. § 2102(a). An

employer who fails to give the required notice may be liable to each employee for back pay and benefits for each day that the required notice was not supplied, up to 60 days. *See id.* § 2104(a)(1)-(2). An employer is also subject to civil penalties for failing to provide local government officials with the required notice. *See id.* § 2104(a)(3).

The Act specifies three circumstances under which an employer may provide less than the required 60 days' notice. *See* 29 U.S.C. § 2102(b). The first, known as the "faltering business" exception, *id.* § 2102(b)(1), is not relevant here. The second, known as the "unforeseeable business circumstances" exception, provides:

> An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required.

Id. § 2102(b)(2)(A).

The third, known as the "natural disaster" exception, provides:

> No notice under this chapter shall be required if the plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, or the drought currently ravaging the farmlands of the United States.

Id. § 2102(b)(2)(B). The Act further provides that "[a]n employer relying on this subsection [(setting out the three exceptions that allow reduction of the notice period)] shall give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period." *Id.* § 2102(b)(3).

Congress tasked the Secretary of Labor with administering the WARN Act. Specifically, Congress authorized the Secretary of Labor to "prescribe such regulations as may be necessary to carry out" the Act. 29 U.S.C. § 2107(a). Pursuant

to that authority, the Secretary promulgated a regulation interpreting the Act's three exceptions to its notice requirement. *See* 20 C.F.R. § 639.9. With respect to the Act's natural disaster exception, the Department of Labor's regulation provides:

> The "natural disaster" exception in section 3(b)(2)(B) of WARN applies to plant closings and mass layoffs due to any form of a natural disaster.
>
> (1) Floods, earthquakes, droughts, storms, tidal waves or tsunamis and similar effects of nature are natural disasters under this provision.
>
> (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.
>
> (3) While a disaster may preclude full or any advance notice, such notice as is practicable, containing as much of the information required in § 639.7 as is available in the circumstances of the disaster still must be given, whether in advance or after the fact of an employment loss caused by a natural disaster.
>
> (4) Where 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 described in paragraph (b) of this section may be applicable.

Id. § 639.9(c).

II. Procedural History

In this action, Plaintiff is a former employee of Defendant who alleges, on behalf of himself and a putative class, that Defendant violated the WARN Act when it terminated his employment with no advance notice because of "the economic downturn related to the COVID-19 pandemic." Dkt. No. 30 ¶¶ 4-5. Defendant has moved to dismiss, asserting that the WARN Act's natural disaster exception applies to excuse its lack of notice. Dkt. No. 42. Specifically, Defendant contends that (1) the

COVID-19 pandemic is a natural disaster within the meaning of the statute, and (2) its layoffs occurred "due to" the COVID-19 pandemic because the pandemic was a "but-for" cause of the layoffs. *Id.*

The United States respectfully submits this Statement of Interest to address Defendant's latter argument (causation) only.

ARGUMENT

The WARN Act requires most employers to provide 60 days' notice of a forthcoming mass layoff or plant closure. *See* 29 U.S.C. § 2102(a). The Act provides an exception to that requirement where the "plant closing or mass layoff is due to any form of natural disaster." *Id.* § 2102(b)(2)(B). Pursuant to its congressionally delegated authority, the Department of Labor issued a regulation interpreting the ambiguous phrase "due to any form of a natural disaster" to require that the mass layoff or plant closure be the "direct result" of a natural disaster. 20 C.F.R. § 639.9(c). The Department of Labor's interpretation is consistent with the natural disaster exception's text, context, and purpose. The Secretary's interpretation is the most natural reading of the statute and is, at a minimum, a reasonable one. The regulation is therefore entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). *See Sides v. Macon Cty Greyhound Park, Inc.*, 725 F.3d 1276, 1284 (11th Cir. 2013) ("Where there is statutory ambiguity we defer to the interpretation of the WARN Act by the agency charged with its implementation, the Department of Labor (DOL).").

I. THE DEPARTMENT OF LABOR'S REASONABLE INTERPRETATION OF THE NATURAL DISASTER EXCEPTION'S CAUSATION REQUIREMENT IS ENTITLED TO DEFERENCE

To determine whether an agency's interpretation of a statute it is tasked with administering is entitled to deference, courts follow the familiar two-step framework set forth in *Chevron*. *See Smith v. BellSouth Telecomms., Inc.*, 273 F.3d 1303, 1307 (11th Cir. 2001). At step one, the court asks "whether Congress has directly spoken to the precise question at issue." *Id.* If "the will of Congress is clear from the statute itself, [the court's] inquiry ends." *Id.* If the statute is silent or ambiguous with respect to the specific issue, the court "next ask[s] whether the agency's construction of the statute is reasonable." *Id.* If the agency's construction of an ambiguous statute is reasonable, a court must defer to it. *Sides*, 725 F.3d at 1284. A "court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Smith*, 273 F.3d at 1307.

The Secretary's regulation interpreting the natural disaster exception's causation requirement satisfies both criteria. The statutory phrase requiring that a mass layoff be "due to" a natural disaster is ambiguous, and the Secretary reasonably concluded that the natural disaster exception applies where a mass layoff is the "direct result" of a natural disaster, such as where a flood destroys an employer's plant. *See* 20 C.F.R. § 639.9(c). Accordingly, the regulation is entitled to deference. *See Sides*, 725 F.3d at 1284.

A. The Statutory Phrase "Due To" Is Ambiguous.

In requiring that a mass layoff be "due to" a natural disaster in order for the natural disaster exception to apply, 29 U.S.C. § 2102(b)(2)(B), Congress did not unambiguously define the required causal connection between the layoff and the natural disaster. To the contrary, as numerous courts have recognized,

> [t]he phrase "due to" is ambiguous. The words do not speak clearly and unambiguously for themselves. The causal nexus of 'due to' has been given a broad variety of meanings in the law ranging from sole and proximate cause at one end of the spectrum to contributing cause at the other.

U.S. Postal Serv. v. Postal Regulatory Comm'n, 640 F.3d 1263, 1268 (D.C. Cir. 2011) (quoting *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1100 (10th Cir. 1999)); *see also Adams v. Director, OWCP*, 886 F.2d 818, 821 (6th Cir. 1989). Because the scope of the natural disaster exception's "due to" causation standard is ambiguous, "Congress left it to the [Secretary] to determin[e] how closely" the connection between the natural disaster and the layoff must be to trigger the exception. *Alliance of Nonprofit Mailers v. Postal Regulatory Comm'n*, 790 F.3d 186, 193 (D.C. Cir. 2015). For the reasons explained *infra* Part B, the Secretary reasonably concluded that the layoff must be the "direct result" of the natural disaster.

While Defendant's brief does not cite 20 C.F.R. § 639.9 and its "direct result" standard, it does contend that the phrase "due to" in the statute must refer only to "but for" causation. Dkt. No. 42 ("Def.'s Br.") at 13-14. Defendant's arguments, however, do not establish that "due to" *unambiguously* refers exclusively to "but for" causation, and, as noted above, numerous courts have recognized that the phrase

"due to" is ambiguous. One court did so in a decision roughly contemporaneous with the enactment of the WARN Act, underscoring that the phrase lacked a settled meaning during the relevant time period. *See Adams*, 886 F.2d at 821.

In fact, in certain contexts, courts have "concluded that 'due to' should be read as *requiring* a proximate cause analysis." *Crose v. Humana Ins. Co.*, 823 F.3d 344, 350 (5th Cir. 2016) (emphasis added); *see also Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1006 (2d Cir. 1974) (stating that the phrase "due to or resulting from" "clearly refers to . . . proximate cause"). Defendant's contention that Congress understood the phrase "due to" as unambiguously requiring only "but for" causation cannot be squared with these authorities.

Defendant's interpretation of the natural disaster exception's causation requirement is also at odds with the exception's statutory context. Enacted in "response to the extensive worker dislocation that occurred in the 1970s and 1980s," *Hotel Emps. & Rest. Emps. Int'l Union Local 54 v. Elsinore Shore Assocs.*, 173 F.3d 175, 182 (3d Cir. 1999), the WARN Act requires employers to provide workers, that state's dislocated worker office, and the chief elected official of the relevant local government with notice of an impending mass layoff or plant closing, 29 U.S.C. § 2102(a). The Act is thus designed to ensure that workers have sufficient time "to adjust to the prospective loss of employment, to seek and obtain alternative jobs and . . . to enter skill training or retraining that will allow these workers to successfully compete in the job market." *Sides*, 725 F.3d at 1281 (quoting 20 C.F.R. § 639.1(a)); *Hotel Employees*, 173 F.3d at 182 ("The thrust of WARN is to give fair warning in

advance of prospective plant closings."). The Act is likewise designed to provide state and local government agencies with advance notice of layoff or plant closure so those entities may timely prepare and initiate worker outreach and other support programs. *See* 20 C.F.R. § 639.1(a).[2] Because the WARN Act's exceptions to its notice requirements run counter to the Act's fundamental design, they are "narrowly construed." *Carpenters Dist. Council of New Orleans & Vicinity v. Dillard Dep't Stores, Inc.*, 15 F.3d 1275, 1282 (5th Cir. 1994); *see also San Antonio Sav. Ass'n v. Comm'r*, 887 F.2d 577, 586 (5th Cir. 1989) (noting the "general principle of narrow construction of exceptions").

Defendant's interpretation, by contrast, would improperly create an exception to the Act's notice requirement that is potentially expansive in scope. The "but-for" causation standard "can be a sweeping standard." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020); *see also United States v. George*, 949 F.3d 1181, 1187 (9th Cir. 2020) ("But-for causation is a relatively undemanding standard."). "'[B]ut for' events can be very remote," *Cambridge Literary Props., Ltd. v. W. Goebel Porzellanfabrik G.m.b.H. & Co.*, 295 F.3d 59, 65 (1st Cir. 2002), and may contribute only modestly to the end result, *General Refractories Co. v. First State Ins.* Co, 855 F.3d 152, 161 (3d Cir. 2017) ("'But for' causation 'is a *de minimis* standard of causation, under which even the most remote and insignificant force may be considered the cause of an

[2] Notice to the state dislocated worker unit and the local government allows those bodies to prepare services for the soon-to-be laid off workers. Those services, which are funded in part by the Department of Labor, include rapid response programs, job training, job search support, and career counseling. *See* https://www.dol.gov/agencies/eta/workforce-investment/dislocated-workers.

occurrence.'"). Thus, if "but for" causation is all the WARN Act's natural disaster exception requires, an employer may be excused from providing 60 days' advance notice of a layoff even in circumstances where the relevant natural disaster occurred months earlier, its effects on the employer's business are modest and were known to the employer for a significant period of time, and the employer could readily have provided notice of the forthcoming layoff. Such a potentially sweeping loophole is inconsistent with the statute's text and purpose, and could not have been what Congress intended. *See, e.g.*, *Hotel Employees*, 173 F.3d at 182 (concluding that government-ordered plant closings do not exempt employers from the WARN Act's notice requirements because, among other things, Congress intended the WARN Act to apply whenever an employer knows of an impending layoff, regardless of its cause).

Defendant's interpretation of the exception's causation requirement is also at odds with other principles of statutory interpretation. Congress is "understood to legislate against a background of common-law . . . principles." *Samantar v. Yousuf*, 560 U.S. 305, 320-21 & n.13 (2010). "Thus, where a common-law principle is well established[,] . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." *Horton v. Reliance Standard Life Ins. Co.*, 141 F.3d 1038, 1041 (11th Cir. 1998); *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*.").

The "requirement of proximate causation" is a "venerable" and "well established" common-law principle that Congress is presumed to incorporate into causation requirements. *Lexmark*, 572 U.S. at 132; *see also id.* (citing cases in which the Court has presumed that Congress intended to incorporate a proximate-cause requirement); *Paroline v. United States,* 572 U.S. 434, 446 (2014) ("Given proximate cause's traditional role in causation analysis, this Court has more than once found a proximate-cause requirement built into a statute that did not expressly impose one.") (citing cases). Congress's use of the general phrase "due to" in describing the natural disaster exception's causal component does not in any way indicate Congress's intent to negate the traditional common-law proximate-cause requirement. Far from running contrary to Congress's statutory purpose in enacting the WARN Act, a proximate-cause requirement furthers Congress's intent by appropriately cabining the circumstances in which an employer may evade the Act's 60-day notice requirement.

Defendant gets the law backwards when it suggests that Congress could have incorporated a proximate causation requirement by including the phrase "direct cause" in the statutory text. Def.'s Br. 14. Under settled principles of statutory construction, Congress is presumed to adopt proximate causation unless it states otherwise. It is not presumed to exclude proximate causation unless it expressly adopts it. As the Supreme Court has emphasized, it regularly finds a "proximate-cause requirement built into . . . statute[s] that did not expressly impose one." *Paroline,* 572 U.S. at 446.

In asserting that the statutory phrase "due to" may only mean "but for" causation, Defendant argues that "due to" is "regularly used interchangeably with the phrases 'but for' and 'but for cause.'" Def.'s Br. 14. This argument is unpersuasive. First, Defendant over-reads the handful of cases it cites, in which the courts loosely used "due to" and "but for" in a passing sentence, and outside the context of any exercise in statutory construction. *See, e.g.*, *Kind v. Frank*, 329 F.3d 979, 981 (8th Cir. 2003) (noting that where the record showed an inmate was transferred "due to" misconduct, the inmate had not shown that he would not have been transferred "but for" his protected activity); *Griffin v. Cmty. Health Network*, No. 1:19-cv-0418, 2021 WL 2948823, at *7 (S.D. Ind. July 14, 2021) (finding that the plaintiff had sufficiently pled "but-for causation" by alleging that "Defendant, as a result of terminating Plaintiff due to her race, violated 42 U.S.C. § 1981"); *Rosenwinkel v. Entrust Datacard Corp.*, No. 17-4788, 2019 WL 1544177, at *4 (D. Minn. Apr. 9, 2019) (stating that an employee alleging termination "due to" or "by reason of" jury service must prove that jury duty was the "but-for" cause). Those cases simply did not analyze whether (much less hold that) "due to" necessarily excludes proximate causation. *See Burrage v. United States*, 571 U.S. 204, 211 (2014) ("The law has long considered causation a hybrid concept, consisting of two constituent parts: actual [or 'but-for'] cause and legal [or 'proximate'] cause."). In *Burrage*, for example, the Supreme Court expressly declined to reach the question whether the relevant statute imposed a proximate cause requirement in addition to a "but for" requirement. 571 U.S. at 210. And in *University of Texas Southwestern*

Medical Center v. Nassar, 570 U.S. 338 (2013), which Defendant cites, the Supreme Court similarly addressed only the question whether the relevant statute incorporated a "but for" causation requirement. Neither decision mentioned proximate causation, let alone addressed the question whether Congress intentionally overrode the traditional proximate cause requirement.

Nor does Defendant's reference to a dictionary definition cited in *U.S. Postal Service*, 640 F.3d at 1267, clarify the ambiguity in "due to." Def.'s Br. 14. On the contrary, the D.C. Circuit in *U.S. Postal Service* concluded that, while the phrase "has a plain meaning regarding causal connection *vel non*," "it has no similar plain meaning regarding the *closeness* of the causal connection." 640 F.3d at 1268 (emphasis added). "In other words," the Court explained, "the phrase can mean 'due *in part* to' as well as 'due *only* to,'" *id.* at 1268 (emphasis in original), confirming the ambiguity in the phrase.[3]

Defendant additionally argues that Congress "considered and rejected inserting a 'direct cause' requirement into the natural disaster exception," which "weighs heavily against" an interpretation of "due to" that would incorporate

[3] Moreover, "due to" is also often defined as "caused by" and "as a result of." *See, e.g.*, *Due to*, The Oxford English Dictionary 1105 (2d ed. 1989) ("due to" means "caused by"); *Due to*, Oxford English Dictionary Online (June 2021) ("caused by"; "as a result of"); *Due to*, Merriam Webster Online Dictionary (Aug. 2021) ("as a result of"). Courts have regularly interpreted such phrases as incorporating proximate causation. *See, e.g.*, *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 536 (1995) ("The Act uses the phrase 'caused by,' which more than one Court of Appeals has read as requiring what tort law has traditionally called 'proximate causation.'"); *Robers v. United States*, 572 U.S. 639, 645 (2014) ("as a result of" denotes proximate cause); *United States v. Monzel*, 641 F.3d 528, 536 (D.C. Cir. 2011) ("By defining 'victim' as a person harmed 'as a result of' the defendant's offense, the statute invokes the standard rule that a defendant is liable only for harms that he proximately caused.").

proximate causation. Def.'s Br. 15 (quoting 134 Cong. Rec. 16,122-23 (1988)). The Act's legislative history suggests the language may have been dropped due to confusion over the meaning of the terms "directly" and "indirectly." *See, e.g.*, 134 Cong. Rec. S8689 (daily ed. June 28, 1988) (remarks of Sen. Dole) (explaining that the language was removed because "there was some question what 'directly' means and what 'indirectly' means"); *id.* at S8687 (remarks of Sen. Metzenbaum) (objecting to the inclusion of "indirectly" because " 'indirectly' is such an amorphous kind of term you cannot tie it down"); *id.* at S8689 (remarks of Sen. Dole) (agreeing that the removal of "indirectly" was a "good" suggestion given its amorphous character). The most logical inference to be drawn from the failed amendment is that Congress chose the ambiguous phrase "due to" on the understanding that the Secretary of Labor would define the phrase pursuant to his rulemaking authority, and that courts would establish the contours of the exception's causation requirement.

Finally, Defendant argues that "imposition of a 'direct cause' standard . . . would effectively rewrite the statute, and make the natural disaster exception a nullity in the large majority of cases." Def.'s Br. 15. But Congress specifically authorized the Secretary of Labor to "prescribe such regulations as may be necessary to carry out" the Act." 29 U.S.C. § 2107(a). That is precisely what the Secretary did when he clarified an ambiguity in the natural disaster exception's causation standard with a regulation that not only comports with the statute's text, structure, and purpose, but also brings it into harmony with its companion "unforeseeable business circumstances" exception.

B. The Department of Labor's Interpretation Is Reasonable.

The Secretary of Labor reasonably interpreted the WARN Act's natural disaster exception as applying where a mass layoff or plant closure is the "direct result" of a natural disaster. *See* 20 C.F.R. § 639.9(c). The Secretary's interpretation is consistent with the Act's "central focus," *Alliance of Nonprofit Mailers*, 790 F.3d at 193, of ensuring that workers and state and local governments receive adequate notice of a forthcoming mass layoff, so that they may prepare for that eventuality, *see Sides*, 725 F.3d at 1281; 20 C.F.R. § 639.1. By requiring a direct connection between the natural disaster and the mass layoff, the Secretary's interpretation ensures that the exception will not permit employers to rely on the lingering or remote effects of a natural disaster to evade the WARN Act's notice requirements where notice would have been practicable. At the same time, it provides relief to employers where a natural disaster has a direct and immediate adverse impact on an employer's business, such that an employer had to immediately shut its plant or lay off many of its employees.

The Department of Labor's regulation also accords with the statute's text. The WARN Act states that "[n]o notice . . . shall be required" where a mass layoff is due to a natural disaster. 29 U.S.C. § 2102(b)(2)(B). That Congress specified that "no notice" is required under the natural disaster exception indicates that Congress understood the exception as applying in circumstances where supplying advance notice of a mass layoff or plant closure is likely to be impracticable. *See* H.R. Rep.

No. 100-285, at 34 (1987) (suggesting that a precursor to the natural disaster exception covered situations where notice was "impossible").

The regulation's "direct result" requirement is consistent with that congressional intent. Where a layoff results directly from a natural disaster, such as where a natural disaster destroys the employer's factory or place of business in a short period of time, advance notice of a layoff is likely to be impracticable. Conversely, where a natural disaster only indirectly results in a layoff—such as where a natural disaster reduces the demand for an employer's product, eventually leading to a layoff—some amount of notice is likely to be feasible.[4]

The Secretary's interpretation also harmonizes the natural disaster exception with the WARN Act's unforeseeable business circumstances exception. As the Department's regulation recognizes, the Act's unforeseeable business circumstances exception, 29 U.S.C. § 2102(b)(2)(A), covers situations where a natural disaster indirectly causes a layoff by, for example, causing "an unanticipated and dramatic major economic downturn" or a "sudden, dramatic, and unexpected" loss of business for the employer. 20 C.F.R. § 639.9(b)(1); *see also id.* § 639.9(c)(4) (emphasizing that "[w]here a plant closing or mass layoff occurs as an indirect result of a natural disaster, . . . the 'unforeseeable business circumstance' exception . . . may be applicable"). By requiring that a mass layoff be the "direct result" of a natural

[4] In 29 U.S.C. § 2102(b)(3), Congress required employers "relying on" any of the Act's three exceptions, including the natural disaster exception, to "give as much notice as is practicable." Ambiguity therefore exists over whether an employer must provide notice of a layoff when relying on the natural disaster exception.

disaster, the Secretary ensured that the natural disaster and unforeseeable business circumstances exceptions complement one another and that the unforeseeable business circumstances exception is the properly invoked exception when an unforeseeable business circumstance (such as an unexpected and sudden drop in demand for an employer's services) causes a mass layoff. In other words, the Secretary's interpretation assures that the natural disaster exception does not extend so far that the unforeseeable business circumstances exception is lost whenever a layoff can be traced in some way to a natural disaster.

Differences in the text of the two exceptions lend further support to the Secretary's reading of the interplay between the two. In using the separate phrase "caused by" in describing the unforeseeable business circumstances exception's causation standard, *see* 29 U.S.C. § 2102(b)(2)(A), Congress understood the natural disaster exception as applying in a narrow range of circumstances—*i.e.*, where advance notice is generally not practicable. The Secretary thus sensibly read "due to" as requiring that a layoff be the "direct result" of a natural disaster, while recognizing that a layoff indirectly caused by a natural disaster might be covered by the broader unforeseeable business circumstances exception.

Although this Court need not resort to the natural disaster exception's limited legislative history, that history also lends support to the Secretary's interpretation of the exception's causation requirement. The natural disaster exception was added to the WARN Act during a Senate floor debate. *See* 134 Cong. Rec. at S8686–89. As described above, a proposed version of the exception provided that it applied where a

layoff was "due, directly or indirectly, to" a natural disaster. *See id.* The WARN Act's primary sponsor, Senator Metzenbaum, objected to the word "indirectly," deeming it too "amorphous" and likely to sweep too broadly. *See id.* at S8687. Ultimately, the Senate agreed to include the amendment without the "directly or indirectly" modifier. Senator Metzenbaum made clear, however, that the exception as enacted was not intended to apply where "notice can be given." *Id.* at S8687. He further emphasized that the exception did not provide "carte blanche" to employers to evade the Act's notice requirements merely because a drought or other natural disaster had "some impact" on the employer's business. *See id*. For the reasons explained above, the Department's "direct result" standard comports with that understanding of the exception, as it limits the exception's reach to situations where a natural disaster has a direct impact on an employer's business and where advance notice of a layoff is likely infeasible.

CONCLUSION

For the foregoing reasons, the Court should conclude that, consistent with 20 C.F.R. § 639.9, the WARN Act's natural disaster exception applies where a mass layoff is the "direct result" of a natural disaster.

Date: February 14, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States District Court for the Middle District of Florida by using the CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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