UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ELVA BENSON, Plaintiff, v. ENTERPRISE HOLDINGS, INC. and ENTERPRISE LEASING COMPANY OF ORLANDO, LLC, Defendants.	No. 6:20-cv-891-RBD-LRH

DEFENDANTS' MOTION TO CERTIFY FOR INTERLOCUTORY REVIEW AND INCORPORATED MEMORANDUM OF LAW

Defendants Enterprise Holdings, Inc. ("EHI") and Enterprise Leasing Company of Orlando, LLC ("Enterprise Orlando") (collectively, "Defendants") respectfully submit this Motion to Certify For Interlocutory Review, pursuant to 28 U.S.C. § 1292(b), a limited portion of the Court's January 4, 2021 Order (Dkt. 61) ("Order") regarding the Worker Adjustment and Retraining Notification Act's ("WARN Act's") natural disaster exception and, in support thereof, state as follows:

1. INTRODUCTION

On January 4, the Court denied Defendants' motion to dismiss Plaintiff's amended complaint because, among other reasons, the Court disagreed that Plaintiff has pled the existence of an affirmative defense under the WARN Act's statutory exception for layoffs "due to any form of natural disaster." Order at pp. 10–11 (citing 29 U.S.C. § 2102(b)(2)(B)). While the Court agreed that the Novel Coronavirus, SARS-CoV-2 ("COVID-19") pandemic may well be a "natural disaster within the meaning of the WARN Act," the Court held that the layoffs at issue did not meet the causal standard required under the natural disaster exception. *Id.* at p. 10. Specifically,

the Court held that to fall within the natural disaster exception, layoffs must have "resulted directly" from the disaster like when a "factory [is] destroyed overnight by a massive flood" or "suddenly wiped out." *Id.* at pp. 10–11. Thus, under the Court's analysis, when layoffs are not caused by the immediate impact of the act of nature itself (as is the case with COVID-19), those layoffs are "indirectly" related and not "due to" the natural disaster such that the statutory exception "doesn't apply." *Id.* at p. 11. It is not an exaggeration to state that the Court's analysis precludes application of the natural disaster exception with respect to any and all COVID-19 layoffs.

Defendants respectfully request that the Court certify the limited portion of its Order addressing the causal standard under the natural disaster exception to the United States Court of Appeals for the Eleventh Circuit, pursuant to 28 U.S.C. § 1292(b). While interlocutory review is certainly not intended to be routine, the question and circumstances presented here are precisely those for which this procedural mechanism was put in place: the statutory question at issue is one of controlling law, that is of widespread importance beyond the litigants in this action, and does not require the Eleventh Circuit to "delve beyond the surface of the record in order to determine the facts." *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1264 (11th Cir. 2004). Each of those three requisite factors for interlocutory review is met here.

First, the issue raises a pure question of law as to "the meaning of a statutory or constitutional provision," and is therefore ripe for certification because it does not require a review of the facts of this specific case. *McFarlin*, 381 F.3d at 1258.

Second, this is a novel question of law for which there is a "substantial ground for difference of opinion." *Id.* As highlighted by the significant press interest in this litigation to date—*see, e.g.*, *infra* at pp. 8-9 (this case is widely considered "a test case for the potential liability

of [employers who engaged in COVID-19 layoffs]")—the resolution of this issue and this case is of significant consequence well beyond the specific litigants here. But there is no Eleventh Circuit precedent on this question, much less binding precedent. In fact, ***no*** other federal court, at ***any*** level, has addressed the issue. Moreover, there is substantial authority from which a reasonable jurist could reach a different result than the Court and determine that layoffs could be "due to" COVID-19 even if not solely caused by the disease itself without any intermediate events. *See generally infra* at pp. 9–20. This authority includes (i) the plain meaning and common usage of the statutory text; (ii) the natural disaster exception's detailed legislative history, in which Congress specifically debated the proper causal word choice and elected not to include the word "directly" to ensure that "downstream" layoffs would *not* be excluded from the exception's protection; and even (iii) the U.S. Department of Labor ("DOL")'s own recent argument that the phrase "due to" in other statutes should result in the application of a "but-for" cause standard.

Third, immediate appellate review will "materially advance the ultimate termination of the litigation" either by permitting application of the exception on the pleadings and resolving the case in its entirety or, at minimum, by ensuring that the parties and the Court will not litigate this action to a final judgment only to be required to re-litigate it from the very beginning after the Eleventh Circuit weighs in on this question. *McFarlin*, 381 F.3d at 1259.

For all of these reasons, and as fully detailed below, Defendants respectfully request that the Court certify this question to the Eleventh Circuit for immediate review.[1]

---

[1] Defendants appreciate the Court's direction to move this matter forward expeditiously. Accordingly, Defendants are not requesting that the Court stay discovery or other deadlines in the case during the pendency of any appeal certified under this Motion. Defendants respectfully submit that the case can be advanced during this appeal by proceeding with the class certification briefing already ordered by the Court.

2. PROPOSED QUESTION OF LAW TO BE CERTIFIED

A. What causal standard is required to establish that a plant closing or mass layoff is "due to any form of natural disaster" under the WARN Act's natural disaster exception, 29 U.S.C. § 2102(b)(2)(B), and can layoffs resulting from COVID-19 meet that standard.

3. MEMORANDUM OF LAW

LEGAL STANDARD

An Order is appropriate for interlocutory appeal under § 1292(b) where the moving party establishes that: (1) the Order "involves a controlling question of law"; (2) there is "substantial ground for difference of opinion" as to that question; and (3) the resolution of that question will "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see also McFarlin*, 381 F.3d at 1264. While interlocutory review of a non-final decision is not intended for garden-variety issues, it is entirely appropriate "for situations in which the court of appeals can rule on a pure, controlling question of law without having to delve beyond the surface of the record in order to determine the facts." *McFarlin*, 381 F.3d at 1259. In other words, certification is proper if it raises "a legal question that can be plucked out from the remainder of the case, quickly resolved, and given back to the Court." *Westgate Resorts, Ltd. v. Sussman*, No. 6:17-cv-1467-Orl-37DCI, 2019 WL 3836534, at *4 (M.D. Fla. Aug. 15, 2019). As detailed below, the limited issue Defendants seek to raise for appellate review here meets this standard, and the Court should exercise its discretion to grant this motion.

ARGUMENT

I. THIS IS A CONTROLLING QUESTION OF STATUTORY LAW

The first factor under § 1292(b) requires that the issue to be appealed constitutes a "controlling question of law." *McFarlin*, 381 F.3d at 1257–58. This is satisfied where an issue raises a question as to "the meaning of a statutory or constitutional provision, regulation, or common law doctrine" and "is more of an abstract legal issue or what might be called one of 'pure

law.'" *Id.* at 1258 (quoting *Ahrenholz v. Bd. of Trs. of the Univ. of Ill.*, 219 F.3d 674, 677 (7th Cir. 2000)). Thus, the Eleventh Circuit routinely accepts interlocutory certification where the issue raised involves "question[s] of statutory construction." *Love v. Delta Air Lines*, 310 F.3d 1347, 1351 (11th Cir. 2002) (granting petition for immediate review of whether a statute created a private right of action by implication); *see also Harris v. Luckey*, 918 F.2d 888, 892 (11th Cir. 1990) (granting petition for immediate review of question regarding the circumstances in which the doctrine of abstention applied). As have other circuits. *E.g.*, *Juzwin v. Asbestos Corp.*, 900 F.2d 686, 688 (3d Cir. 1990) (holding that whether an event "tolled the statute of limitations . . . involves a controlling question of law").

That is the case here. Indeed, the limited issue Defendants seek to appeal—what causal standard this and other district courts should apply in assessing whether a layoff is "due to" a natural disaster under the WARN Act—is a matter of pure "statutory construction" and interpretation. *See Love*, 310 F.3d at 1351. This issue can be decided quickly and cleanly by the Eleventh Circuit without the need for the appellate court to study the record in this action. There is no need for the Eleventh Circuit to consider any factual matters related to Plaintiff Benson or Defendants. Rather, the appellate court will only need to consider the relevant statutory authority, regulatory authority, and legislative history in assessing and concluding what causal standard is required to establish the natural disaster defense. Accordingly, the first factor under § 1292(b) is met.

II. THE ISSUE RAISES A DIFFICULT AND NOVEL QUESTION OF FIRST IMPRESSION AND WIDESPREAD IMPORTANCE

The second requirement for § 1292(b) review is a showing that there is a "substantial ground for difference of opinion" regarding the question of law raised. Thus, the question must not be one where the Eleventh Circuit is "in 'complete and unequivocal' agreement with the district

court" or one where "the resolution of it [is] so clear." *McFarlin*, 381 F.3d at 1258 (quoting *Burrell v. Bd. of Trs. of Ca. Mil. Coll.*, 970 F.2d 785, 788–89 (11th Cir. 1992)). In assessing this factor courts also consider whether the issue is one of "significant import beyond th[e] case" at hand. *McFarlin*, 381 F.3d at 1262; *see also Lechner v. Nat'l Benefit Fund for Hosp. & Health Care Emps.*, 512 F. Supp. 1220, 1222 (S.D.N.Y. 1981). In *Lechner*, for example, the district court certified the issue for appeal, on its own motion, because the court's underlying determination was likely to "result in a flood of litigation by [other individuals]," such that "the issue [] presented [went] beyond the concerns of the immediate litigants and involve[d] a significant matter of public interest and importance." The question Defendants seek to certify fulfills this factor.

A. The Issue Presented Is One of First Impression Nationwide.

The question posed here is a novel issue, not one on which the Eleventh Circuit is already "in complete and unequivocal agreement with the district court." *McFarlin*, 381 F.3d at 1258. Defendants have not identified a single Eleventh Circuit opinion analyzing or applying the WARN Act's natural disaster exception ***at all***, much less one that opines on the causal standard to be applied under § 2102(b)(2)(B). Indeed, Defendants are not aware of a single court to have addressed that issue. In fact, the district court in *Carver v. Foresight Energy*, No. 3:16-cv-3013, 2016 WL 3812376 (C.D. Ill. July 12, 2016)—the only case in which the causal standard question appears to have even been raised—noted that "neither party" "nor [the] court [had] found any cases interpreting the natural disaster exception of the WARN Act." *Id.* at *4. And the *Carver* court never had to decide the issue either, because it determined that coal mine fires caused by poorly installed ventilation systems are not unambiguously "natural disasters under the WARN Act." *Id.* at *1, *4. Thus, if raised to the Eleventh Circuit, this question would be an issue of "first impression" within this Circuit and nationwide, strongly supporting Defendants' argument for

certification under § 1292(b).[2] *See, e.g.*, *U.S., ex rel. Powell v. Am InterContinental Univ., Inc.*, 756 F. Supp. 2d 1374, 1378–79 (N.D. Ga. 2010); *Smiley v. Costco Wholesale Corp.*, No. 8:18-cv-2410-T-33JSS, 2019 WL 4345783, at *2 (M.D. Fla. Sept. 12, 2019).

B. The Issue Holds Significant Importance Outside of This Litigation.

"The preconditions for § 1292(b) review . . . are most likely to be satisfied when a ruling involves a new legal question or is of *special consequence*." *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 111 (2009) (emphasis added). In other words, a question is especially amenable to immediate appellate review where its resolution has "significant import beyond th[e] case [at hand]." *McFarlin*, 381 F.3d at 1262; *see also Fox Television Stations, Inc. v. FilmOn X, LLC*, No. 2:12-cv-06291, 2015 WL 13648582, at *1 (C.D. Cal. July 24, 2015) (certifying question of "significant commercial importance" for appeal); *Torres v. Sec'y of Health & Hum. Servs.*, 677 F.2d 167, 168 (1st Cir. 1982) (granting § 1292(b) review "[b]ecause of the importance of the issue [presented]").

Here, there can be no doubt that both the outcome of this case and whether the natural disaster defense can apply to COVID-19 layoffs holds consequence far beyond this action. It is, unfortunately, a matter of common knowledge that tens of millions of Americans lost work during the course of the pandemic. Therefore the trajectory of this case—including not only which party ultimately prevails but also *how* the litigation unfolds—has the potential to "result in a flood of

---

[2] Notably, it is not necessary for another court to have disagreed with the district court's underlying decision to satisfy this factor. *See, e.g.*, *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011) ("A substantial ground for difference of opinion exists where reasonable jurists might disagree on an issue's resolution, not merely where they have already disagreed. Stated another way, when novel legal issues are presented, on which fair-minded jurists might reach contradictory conclusions, a novel issue may be certified for interlocutory appeal without first awaiting development of contradictory precedent.").

litigation by [others]." *Lechner*, 512 F. Supp. at 1222. Laid-off workers, plaintiffs' attorneys, and businesses all consider this action a barometer for similar potential claims. This litigation "has emerged as a test case for the potential liability of larger [employers] that made abrupt personnel cuts because of the coronavirus pandemic." Anne Cullen, *Enterprise WARN Act Ruling Spells Trouble For Big Employers*, LAW360 (Jan. 11, 2021, 8:50 PM).[3] That is exactly why this lawsuit has been at the forefront of nationwide legal headlines—and identified as one of the top "coronavirus-related employment suits to watch"—for months. Braden Campbell, *Employment Suits To Watch 6 Months Into The Pandemic*, LAW360 (Sept. 4, 2020, 11:56 AM).[4]

It is also why national press quickly covered the Court's Order on Defendants' Motion to Dismiss, including the Court's holding that the natural disaster exception is inapplicable to COVID-19 layoffs. *See, e.g.*, *id.*; *see also* Beth Graham & Patrick Mulligan, *Federal District Court Rejects Employer's Attempt to Rely on Covid-19 Pandemic as "Natural Disaster" . . .* , JDSUPRA LEGAL NEWS (Jan. 14, 2021).[5] While the Court's holding is not binding on any other court, it will "serve as a guidepost for other federal judges grappling with the same questions." Cullen, *Ruling Spells Trouble For Big Employers*. Thus, the Court's Order "knock[ing] the 'natural disaster' defense off the table" for COVID-19 layoffs is generally considered to have significant implications for the course of other potential WARN Act suits. *Id.* One commenter believes that the Court's Order "ma[d]e it clear that [employers] are not getting rid of a [WARN

---

[3] Available at https://www.law360.com/employment/articles/1343585/enterprise-warn-act-ruling-spells-trouble-for-big-employers-?nl_pk=1da9715c-79f4-4a04-b415-18686fb723f4&utm_source=newsletter&utm_medium=email&utm_campaign=employment (last visited Jan. 19, 2021).

[4] Available at https://www.law360.com/articles/1306496/employment-suits-to-watch-6-months-into-the-pandemic (last visited Jan. 19, 2021).

[5] Available at https://www.jdsupra.com/legalnews/federal-district-court-rejects-employer-9688886/ (last visited Jan. 19, 2021).

Act] claim . . . on a motion to dismiss, so [the employers] are looking at discovery," a leverage point for potential plaintiffs that may force many employers toward settlement and significantly increase the number of COVID-related WARN Act class actions filed. *Id.* Thus, swift appellate resolution of the applicability of the natural disaster exception is important to inform the decision making of litigants and potential litigants unrelated to this action.

C. The Plain Text of the Statute and Legislative History Establish That Reasonable Jurists May Reach A Different Outcome.

To demonstrate grounds for a "difference of opinion," Defendants need not demonstrate that this Court's underlying decision was legal error. Rather, Defendants need only show that there are sufficient grounds for reaching a different conclusion such that "reasonable jurists might disagree on the [proper] resolution." *Reese*, 643 F.3d at 688.

Here, the Court concluded that in order to establish that a layoff is "due to" a natural disaster under the WARN Act, the layoff must "directly result" from the disaster. Order at pp. 10–11. In setting out that standard, the Court relied on DOL regulations (20 C.F.R. § 639.9(c)) and informal DOL FAQ guidance (which the Court recognized is "not binding"). *Id.* Then, in interpreting the phrase "directly result," the Court held that business layoffs are only the "direct result" of a natural disaster when the act of nature itself makes a direct, physical contact with the business that immediately necessitates the layoff, "for example, [where] a factory [is] destroyed overnight by a massive flood" or where "facilities or staff [] disappear overnight, suddenly wiped out" by a fire or a tornado. *Id.* Stated differently, the Court appears to interpret "direct result" to require that the act of nature be the *sole* cause of the layoffs, with no contribution whatsoever from any intermediate events or actions—no matter how related those intermediate events may be to the underlying natural disaster.

Under the Court's holding, any layoffs involving intermediate events are "more tenuous" and insufficient, even if those intermediate events are just a step removed from the natural disaster on the causal chain. *Id.* For example, and as relevant here, under the Court's holding, the disease COVID-19 itself cannot have a "direct" impact with a workplace facility or inventory like a fire burning down a building. *Id.* Rather, the COVID-19 pandemic caused certain intermediate circumstances—*e.g.*, travel bans, government lockdown and quarantine orders, "global concern" about the virus, and "changes in travel patterns"—which, while themselves deriving from COVID-19, constituted the "direct" cause of the layoffs in the eyes of the Court. *Id.* Thus, under the Court's analysis, mass layoffs can never "directly result" from COVID-19.

As detailed below, there are multiple paths of legal analysis that could lead a reasonable jurist on the Eleventh Circuit to reach a different result than the Court did here: (i) by deciding that the plain and unambiguous statutory phrase "due to" compels application of a but-for, rather than sole, cause standard (just as DOL has recently argued with respect to the same language in other statutes); (ii) by deciding DOL's use of the term "direct result" is an unreasonable interpretation of the statutory text in light of detailed legislative history which reveals that Congress considered and *declined* to include the term "directly" in the statute in order to ensure that businesses harmed by the more attenuated "downstream" effects of natural disasters would still be protected by the exception; or (iii) by agreeing that the regulation's use of "direct result" is reasonable but that the Court here defined and applied that phrase more narrowly than DOL intended in light of the statutory text, legislative history, and DOL's statement that the natural disaster exception should not be "narrowly construed."

First, a reasonable appellate jurist may decide that the statutory phrase "due to" compels application of a but-for cause standard, under which layoffs can (and likely would) be considered

"due to" COVID-19. The WARN Act's plain text—"*due to* any form of natural disaster"—is unambiguous. Because "Congress has directly spoken," no deference is owed to the regulatory phrase "direct result" (assuming that phrase is defined/applied as strictly as the Court did here). *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). As detailed in Defendants' Motion to Dismiss (*see* Dkt. 42 at p. 21), "[t]he plain meaning of 'due to' is 'because of'" or "by reason of." *U.S. Postal Serv. v. Postal Regul. Comm'n*, 640 F.3d 1263, 1267 (D.C. Cir. 2011) (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 699 (1993)). That plain meaning is exactly the same now as it was in 1988 when Congress passed the WARN Act. *Due to*, WEBSTER'S NEW WORLD DICTIONARY OF AM. ENG. 420 (1988) (defining "due to" as "caused by," "resulting from," "because of").

And, as the Court is likely aware, there is a host of Supreme Court employment case law setting out the "but-for" causation standard for "because of" and analogous statutory phrases. *See e.g.*, *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013) (holding that "because of age" means that "age was the 'but-for' cause"); *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63–64 & n.14 (2007) (noting that "because of" means "based on" and that "'based on' indicates a but-for causal relationship"); *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 265–66 (1992) (equating "by reason of" with "'but for' cause"); *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1739 (2020) ("[T]he ordinary meaning of 'because of' is 'by reason of' or 'on account of.'").

Given that the plain meaning of "due to" is "because of," Congress's use of "due to" in the WARN Act compels application of the same "but for" causal standard here. In fact, DOL itself made this exact argument regarding the phrase "due to" just this past year. *See New York v. U.S. Dep't of Labor*, No. 20-CV-3020, 2020 WL 4462260, at *7 (S.D.N.Y. Aug. 3, 2020). Plaintiffs in *New York* challenged whether DOL had exceeded its authority with respect to promulgated

regulations relating to the paid-leave provisions of the Families First Coronavirus Response Act ("FFCRA"). As relevant here, the FFCRA's statutory text permitted paid leave where an employee was "unable to work (or telework) *due to* a need for leave." FFCRA §§ 5102(a), 110(a)(2)(A) (emphasis added). In defending the propriety of its regulations, DOL argued that the term "due to"—*i.e.*, the exact term at issue here under the WARN Act—is both "unambiguous" and "impl[ies] a but-for causal relationship." *New York*, 2020 WL 4462260, at *7–8.

Assuming a jurist determines application of the but-for causation standard is proper here, the jurist would reach a different result than the Court did in its Order. "[But-for] causation is established whenever a particular outcome would not have happened 'but for' the purported cause." *Bostock*, 140 S. Ct. at 1739 (noting that "[t]his can be a sweeping standard' and "[o]ften, events have multiple but-for causes"). Most importantly, but-for causation does *not* require the sole causal nexus contemplated by the Court's Order. Rather, an earlier act or event in a chain of acts or events still constitutes "but-for" cause if it set in motion the chain of intermediate events that led to the ultimate result. *See e.g.*, *United States v. James*, 986 F.2d 441, 444 (11th Cir. 1993); *Burnham v. Enters., LLC v. DACC Co*., No. 2:12-CV-111-WKW, 2013 WL 68923, at *3 (M.D. Ala. Jan. 7, 2013); *IBP, Inc. v. Hady Enterprises, Inc.*, 267 F. Supp. 2d 1148, 1161 (N.D. Fla. Feb. 26, 2002). Only intermediate events that are *unrelated* to the alleged cause (considered intervening events) can "break[] the causal chain" under a but-for standard. *See, e.g.*, *Brakeman v. BBVA Compass*, No. 2:16-01344-JEO, 2018 WL 3328909, at *22 (N.D. Ala. July 6, 2018); *IBP, Inc.*, 267 F. Supp. 2d at 1161. "In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." *Bostock*, 140 S. Ct. at 1739.

Applying this "but for" standard to the facts at issue here, there can be no doubt that the layoffs are "due to" COVID-19. While the intermediate events identified by the Court—*i.e.*, "global concern over the spread of the virus," "global shutdown," and "changes in travel patterns"—did occur, each of those were directly caused by the COVID-19 pandemic itself. *See* Order at p. 10. Thus, if we remove COVID-19 from the equation, "the outcome changes." *Bostock*, 140 S. Ct. at 1739. Without COVID-19 there is no concern about the virus, global shutdown, or stalled travel and, therefore, there is no layoff.

This interpretation is also supported by commonplace usage of the phrase "due to" in the context of the COVID-19 pandemic. As Defendants set out in prior briefing, courts, the public at large, and even Plaintiff Benson's own lawyers refer to layoffs like those at issue here as being "due to" COVID-19, the exact statutory phrase at issue. *Wenzel Fenton Cabassa*, https://www.wenzelfenton.com (last visited Jan. 19, 2021) (asking potential clients to reach out for legal services, presumably to pursue WARN Act claims, if they were "TERMINATED DUE TO COVID-19"); *United States. v. Cary*, No. M-20-361-SM, 2020 WL 4820719, at *2 (W.D. Okla. Aug. 19, 2020) ("[H]e was laid off recently due to the COVID-19 pandemic."); *see generally* Dkt. 42 at pp. 20–21; Dkt. 51 at pp. 1–3. And Plaintiff Benson's counsel has continued to use similar phraseology to describe the very layoffs at issue in this lawsuit. Dkt. 64 at p. 6 ("Enterprise Corporate expected . . . Enterprise Orlando[] to upload to its computer system . . . all terminations which *resulted from COVID*." (emphasis added)).

Second—a reasonable appellate jurist may determine that DOL's use of the phrase "direct result"[6] is not "based on a permissible construction" of the statute and its legislative history and is therefore owed no *Chevron* deference, even if the statutory phrase "due to" is deemed ambiguous. *See Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 54 (2011). Under the *Chevron* step two analysis, an agency rule shall not be afforded deference where there are flaws in the "agency's textual analysis (broadly defined, including where appropriate resort to legislative history)." *Cont'l Air Lines, Inc. v. Dep't of Transp.*, 843 F.2d 1444, 1449 (D.C. Cir. 1988). Here, there are numerous flaws of statutory interpretation with respect to DOL's cursory and insufficient analysis for including the phrase "direct result" in 20 C.F.R. § 639.9(c).

As an initial matter—and as detailed above—DOL's use of "direct result" is inconsistent with the plain meaning of the statutory phrase "due to." It is also inconsistent with DOL's own interpretation of the phrase "due to" under the FFCRA just months ago. *See supra* at pp. 11-12 (citing *New York*, 2020 WL 4462260, at *7).

Furthermore, DOL's only contemporaneous explanation for grafting the "direct result" language onto the natural disaster exception is belied by the very authority on which it rests. When DOL promulgated its final rule implementing the WARN Act regulations it rejected requests that the "direct result" language be removed from § 639.9(c). The only explanation DOL provided for refusing to do so was a conclusory statement that the WARN Act's legislative history "demonstrate[s] congressional intent that an employment action that was a direct result would fall under this exception, while one that was caused as an indirect result would not be covered."

---

[6] This subsection assumes *arguendo* that the regulatory phrase "direct result" is found to require the narrow application taken in the Court's Order. As detailed below (*infra* at pp. 18), however, a jurist might also find that use of the phrase "direct result" is reasonable, but only if it is defined and applied in a way that accords with the legislative intent.

Worker Adjustment and Retraining Notification; Interim Interpretive Rule, 53 Fed. Reg. 48884, 48889 (Dec. 2, 1988); *see also* Worker Adjustment and Retraining Notification, 54 Fed. Reg. 16042, 16063 (April 20, 1989) (to be codified at 29 C.F.R. pt. 639.9(c)) ("DOL thinks that the legislative history, considered in its entirety, supports the position taken in the proposed regulation [excluding "indirect results"] and no change has been made in the final regulations."). But even a cursory review of the legislative history reveals the opposite is true. As set out below, detailed hearing records regarding the proposal, revision, and ultimate adoption of the natural disaster exception clearly reveal not only that Congress considered and declined to use the term "directly" in the statute, but also that Congress did so to ensure that at least some layoffs "downstream" of the natural disasters—*i.e.*, at least one, if not more steps, removed from it—would fall within the exception.

Senator Bob Dole proposed the amendment that was ultimately adopted as the natural disaster exception to the WARN Act. 134 CONG. REC. S8686–89, pp. 358–63 (daily ed. June 28, 1988).[7] Dole advanced the amendment out of a concern amongst legislators that businesses that were then or soon to be affected by an ongoing drought ravaging the Midwest would not be exempt from providing lay-off notice without the amendment. *Id.* Thus, the purpose of the exemption was to ensure that "those businesses affected by [the] drought" would be exempt "from the implications and provisions of th[e WARN Act]." *Id.* at S8686, p. 358. (also explaining there was concern that it was unclear whether such business would be sheltered by the unforeseeable business circumstances exception which was part of the legislation as originally drafted).

Dole's amendment stated that no notice would be required if a layoff "is due, directly or indirectly, to any form of natural disaster . . . [including] the drought currently ravaging the

[7] Relevant excerpts of the legislative history is attached hereto as Exhibit A.

farmlands of the United States." *Id.* (emphasis added). As Dole explained on the Senate floor, the use of "directly or indirectly" was intended to ensure that it would not just be the farmers "directly" impacted by the drought who were protected but also other businesses "downstream" that were in line to suffer the ripple effects. *Id.* at S8687, p. 359 (expressing concern that "all the focus [was] on the American farmer" but that the drought's impact was "going to go far beyond the American farmer. It [was] going to go to suppliers and processors and elevator operators and barge operators," potentially even six months to a year down the line). As Senator Karnes, a supporter of the amendment, further explained, a host of non-farm businesses were expected to be "impacted if the[] drought persist[ed]," including bakeries, "meatpacking plants," and "ethanol plants," down the distribution line from the directly impacted farmers. *Id.* at S8688, p. 361. The proposed amendment was intended to cover all of those employers.

During the ensuing floor debate Senator Metzenbaum (who authored and sponsored the original legislation) argued for removal of the term "indirectly" because it is an "amorphous kind of term [that] you cannot tie [] down" or limit. *Id.* at S8687, p. 360. Had Metzenbaum's proposal been accepted and enacted, the statutory text would have read: "[N]o notice [is] required if the plant closing or mass layoff is due, directly, to any form of natural disaster," almost exactly the language DOL adopted in 20 C.F.R. § 639.9(c)(2). But Metzenbaum's proposal was rejected because, as Senator Dole explained, "we understand the direct impact [the drought] is going to have on the farmer . . . [b]ut what we are concerned about is somebody who may be downstream, somebody who *may not be in the direct line selling services or products to the farmer but in any event has the same economic difficulties because of the drought*." *Id.* In other words, Congress refused to include the term "directly" in the text of the statute because it did not want to limit the natural disaster exception only to those businesses immediately and most obviously affected by a

natural disaster. *See id.* Instead, Congress elected to remove *both* terms "directly" and "indirectly" from the statute, leaving only "due to." *Id.* The natural disaster amendment passed 95-0. *Id.* at S8688, pp. 361–62.

After passage of the Amendment, Dole issued an explicit instruction and expectation that courts applying the exception not construe the natural disaster exception narrowly. *Id.* at S8689, pp. 362–63. As Dole explained, "[w]e did in that amendment take out both words 'directly or indirectly.' So I would not want any court that might take a look at this saying, 'Why did they take out those particular words?' . . . Now [what qualifies for exception] is going to be a matter of proof, and I think that is what we intended in the first place. ***It may not be just those who serve the farmer***. ***It might be somebody downstream***. *It might be the barge operator. It might be someone else.* . . . ***go up and down the line*** – meatpacking plants, ethanol plants; all of these are going to be impacted if this drought persists . . . ***I would just hope there would not be any question about this being a broad amendment***." *Id.* (emphasis added).

Senator Metzenbaum also later affirmed that the natural disaster exception "specifically provided to take care in a drought that causes a problem for those [downstream, non-farmer] meatpackers that results in the mass layoffs." 134 CONG. REC. S8856, p. 402 (daily ed. July 8, 1988). And he later described the final language as striking a balance between ensuring that the exception would not exempt "anybody who claims they had some impact, *however small*," but would exempt any layoff that "was, indeed, actually due to the natural disaster . . . [which] may wind up having to be, in some instances, a court issue." 134 CONG. REC. S8689, p. 363.

In sum, Congress agreed that the natural disaster exception was, on the one hand, not intended to be limited strictly to those businesses immediately and physically ("directly") affected by a natural disaster. Nor, on the other, was it intended to be so broad as to open up "amorphous"

arguments of "indirect" effects "however small." The proper threshold, therefore, falls somewhere between those two extremes.

Whatever the correct position on that sliding scale may be, it certainly ***cannot*** be the "direct result" standard contained in § 639.9(c)—at least as defined by the Court here—given that Congress explicitly considered and declined to adopt an almost identical "due, directly, to" standard. Despite purporting to rely on legislative history in its analysis, DOL's interpretation is unreasonable because it cuts directly against the clear directives and legislative intent underlying the unanimous passage of the statutory language. Thus, an appellate court could reasonably decide that § 639.9(c) is due no deference.[8]

Third, a reasonable appellate jurist might accept use of the regulation's "direct result" language, but find that this Court interpreted "direct result" too narrowly, thereby sidestepping the Chevron framework altogether. In other words, a jurist applying the "direct result" language in § 639.9(c) could reasonably interpret that standard much more broadly than the Court does in its Order here—and there is ample supporting authority to do so.

As detailed at length above, both the plain meaning of "due to" and the underlying legislative history that resulted in that text support the application of the natural disaster exception to employers who are "downstream" from the initial impact of the disaster. There is also support for a broader interpretation within the regulation itself. Specifically, DOL removed language to the contrary after agreeing with commenters who cited "specific aspects of the legislative history

---

[8] Notably, this would not be the first time that the Eleventh Circuit has ignored DOL's language in 20 C.F.R. § 639.9(c) because the language runs counter to the statutory text. Section 639.9(c)(3) also states that an employer invoking the natural disaster exception must still provide "such notice as is practicable." But the Eleventh Circuit—and many other courts—have uniformly followed the WARN Act's plain text in holding that the natural disaster exception requires "no notice" at all. *E.g.*, *Sides v. Macon Cnty. Greyhound Park, Inc.*, 725 F.3d 1276, 1285 (11th Cir. 2013).

to show that the . . . natural disaster exception[] should *not* be narrowly construed." Worker Adjustment and Retraining Notification, 54 Fed. Reg. 16042, 16061 (April 20, 1989) (to be codified at 29 C.F.R. pt. 639.9). Further, the WARN Act's statutory text supports a broader construction because it specifically contemplates that the exception applies to droughts—a weather phenomenon that, by definition, is lengthy in time and, therefore, is subject to a host of intermediate events.

There is also case law supporting a broader interpretation of "direct result." For example, at least some courts that have had the occasion to analyze the phrase "direct result" in the context of causation have rejected a "sole proximate cause" interpretation. *See, e.g.*, *Flores v. Emps. Ret. Sys. of Tex.*, 74 S.W.3d 532, 548 (Tx. Ct. App. 2002) (holding that "resulting directly" does not require "a sole cause standard" because the legislature did not include language like "solely results" or "directly results *independently of all other causes*") (emphasis added)). Meanwhile, it is "axiomatic" that the "but-for" standard supported by the plain language of the statue here "is not the [same as] the 'sole cause' standard." *Shumate v. Selma City Bd. of Educ.*, No. 11-00078-CG-M, 2013 WL 5758699, at *3 (S.D. Ala. Oct. 24, 2013), *aff'd*, 581 F. App'x 740 (11th Cir. 2014); *see also, e.g.*, *Downie v. BF Weston, LLC*, No. 16-81396-civ-MARRA, 2016 WL 7451427, at *3 (S.D. Fla. Dec. 23, 2016) (collecting cases).

In short, a jurist who applies the "direct result" standard in any way that permits the coexistence of intermediate events directly caused by the natural disaster would also reach a result that certain layoffs could be "due to" COVID-19.

Any one of the three analytical avenues outlined above leads to a different result than that reached by the Court here, demonstrating more than sufficient grounds for a "difference of opinion" with respect to this question. Moreover, publications from across the legal community

demonstrate that these theoretical grounds do, in fact, yield true differences of opinion on this issue. Some commentators believe that the natural disaster defense is applicable to COVID-19 layoffs. Eric Keller, Stephen Harris & Marc Bernstein, *COVID-19 Client Alert Series: The WARN Act and Similar State Laws*, PAUL HASTINGS (Mar. 16, 2020)[9] ("While the COVID-19 pandemic very likely qualifies as a natural disaster, plaintiffs' attorneys may assert that the employment losses are not the direct result of the COVID-19 pandemic, but rather the deteriorating economic and business conditions that follow the spread of the pandemic. *However, we believe the better view is that the deterioration of economic and business conditions often will be the direct result of COVID-19*."). Similarly, the state of Vermont's Department of Labor has issued a public advisory stating it will not enforce its state law version of the WARN Act for any layoffs "due to the effects of the COVID-19 pandemic" because such layoffs would fall under the state statute's business circumstances exception "and/or" exception for layoffs "*due to* a disaster beyond the control of the employer." (emphasis added). *COVID-19 Update: Warn ACT and Notice of Potential Layoffs Act*, STATE OF VT. DEP'T OF LABOR[10]; *see also* 21 V.S.A. § 414(a)(4). Meanwhile, other legal commentators have simply conceded that the answer to the question is unclear. *E.g.*, *COVID-19 and WARN Act Compliance*, PRACTICAL LAW W-024-6108 ("It is unknown whether the COVID-19 pandemic qualifies for the natural disaster exception" and "[i]t is not clear whether business closures would be considered a direct result of the pandemic, rather than government action.").

The fact that reasonable minds may differ is sufficient to permit certification for immediate appellate review. *Reese*, 643 F.3d at 688.

---

9 Available at https://www.paulhastings.com/publications-items/details/?id=6d2ff56e-2334-6428-811c-ff00004cbded (last visited Jan. 19, 2021).

10 Available at https://labor.vermont.gov/warn-act-and-notice-potential-layoffs-act (last visited Jan. 19, 2021).

III. RESOLUTION OF THIS ISSUE WILL ADVANCE THE ULTIMATE TERMINATION OF THIS LITIGATION (AND OTHERS).

Finally, certifying this controlling question of law to the Eleventh Circuit will materially advance this case toward its resolution—satisfying the third and final criteria for immediate review. *McFarlin*, 381 F.3d at 1259. An interlocutory appeal "may materially advance the ultimate termination of the litigation" when "resolution of [the] controlling legal question would serve to avoid a trial or otherwise substantially shorten the litigation." *Id.* (quoting 28 U.S.C. § 1292(b)).

Immediate appellate resolution of this controlling question may significantly shorten the duration of litigation because the question at issue goes directly to the crux of this case: whether Plaintiff's employer was required to provide her notice under the WARN Act. As the Court correctly observed in its Order, "no notice is required" at all if the natural disaster exception applies. Order at 10; *see also Sides*, 725 F.3d at 1285 (finding that Congress intended for the natural disaster exception "to entirely eliminate the requirement for notice"). Thus, an appellate ruling in Defendants' favor could "determine the immediate future of this case" and resolve it on the pleadings. *See Harris*, 918 F.2d at 892 (granting petition for immediate review where claims would have been dismissed but for the district court's determination as to the question certified for interlocutory review). Further—while Defendants believe that any reversal on appeal would be case dispositive on the pleadings—clarity as to the potential applicability of and causal standard to apply for the natural disaster exception would, at *minimum*, facilitate a more efficient resolution of this case as the parties will be able to proceed with discovery and in addressing summary judgment with certainty as to the relevant issues and standards. If the issue is not addressed at the appellate level until after completion of all litigation at the district court, a clarification by the Eleventh Circuit could require the parties and the Court to repeat the entire process from the

beginning. Thus, in either circumstance, immediate appellate review would avoid "a waste of precious judicial time" by allowing the Eleventh Circuit to "test the correctness" of this isolated point of law, "upon which in a realistic way the whole case or defense will turn." *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697, 703 (5th Cir. 1961).

Meanwhile, immediate review poses no harm to the parties or the prompt resolution of the action. If the Eleventh Circuit disagrees with Defendants' understanding of the natural disaster exception, it can refuse to hear the appeal with little to no delay. And, as noted above, the parties can proceed with briefing on class certification during the pendency of an appeal on this issue.

4. CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Court certify for interlocutory review the question of what causal standard is required to establish that a layoff is "due to" a natural disaster under the WARN Act.

Dated: January 19, 2021

Respectfully submitted,

/s/ Jason C. Schwartz

Jason C. Schwartz (admitted *pro hac vice*)
Ryan C. Stewart, FL Bar No. 1024100
Brian Richman (admitted *pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
Phone: (202) 955-8500
Jschwartz@gibsondunn.com
Rstewart@gibsondunn.com
Brichman@gibsondunn.com

Christina M. Kennedy
Florida Bar No. 58242
FOLEY & LARDNER, LLP
111 N. Orange Avenue, Suite 1800
Orlando, F.L. 32801

Phone: (407) 244-7137
Email: ckennedy@foley.com

Michael D. Leffel (admitted *pro hac vice*)
FOLEY & LARDNER LLP
150 East Gilman Street
Madison, W.I. 53703
Phone: (608) 258-4216
Email: mleffel@foley.com

Attorneys for Defendants Enterprise Holdings, Inc., Enterprise Leasing Company of Florida, LLC, and Enterprise Leasing Company of Orlando, LLC

RULE 3.01(G) CERTIFICATION

Counsel for Defendants has conferred with counsel for Plaintiff in a good faith effort to resolve the issues raised in the motion have been unable to do so. Plaintiff intends to oppose the motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to all counsel via filing with this Court's CM/ECF system this 19th of January, 2021.

/s/ Jason C. Schwartz
Jason C. Schwartz