No. 21-90008

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

ENTERPRISE LEASING COMPANY OF ORLANDO, LLC,
ENTERPRISE HOLDINGS INC.,

Petitioners,

v.

ELVA BENSON,

Respondent.

On Petition for Permission to Appeal an Order of the
United States District Court for the Middle District of Florida
Case No. 6:20-cv-00891

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

Tara S. Morrissey
Jennifer B. Dickey
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062
T. 202.463.5337

Philip A. Miscimarra
Lead Counsel
John C. Sullivan
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
T. 202.739.3000
F. 202.739.3001
philip.miscimarra@morganlewis.com
john.sullivan@morganlewis.com

Counsel for Amicus Curiae
Chamber of Commerce
of the United States of America

Enterprise Leasing Company of, et al. v. Elva Benson
No. 21-90008

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* the Chamber of Commerce of the United States of America discloses the following information. The Chamber of Commerce of the United States of America has no parent corporation and no publicly held corporation holds more than 10 percent of its stock.

Pursuant to 11th Cir. R. 26.1-1 through 11th Cir. R. 26.1-3, *Amicus Curiae* the Chamber of Commerce of the United States of America adopts the Certificate of Interested Persons and Corporate Disclosure Statement filed by Petitioners Enterprise Leasing Company of Orlando, LLC, and Enterprise Holdings, Inc., and makes the following additions to the list of persons and entities that have an interest in the outcome of this case:

- Chamber of Commerce of the United States of America, *Amicus Curiae* in Support of Petitioners;
- Dickey, Jennifer, Counsel for Chamber of Commerce of the United States of America, *Amicus Curiae* in Support of Petitioners
- Miscimarra, Philip A., Lead Counsel for Chamber of Commerce of the United States of America, *Amicus Curiae* in Support of Petitioners;

Enterprise Leasing Company of, et al. v. Elva Benson
No. 21-90008

- Morgan, Lewis & Bockius LLP, Counsel for Chamber of Commerce of the United States of America, *Amicus Curiae* in Support of Petitioners;
- Morrissey, Tara S., Counsel for Chamber of Commerce of the United States of America, *Amicus Curiae* in Support of Petitioners;
- Sullivan, John C., Counsel for Chamber of Commerce of the United States of America, *Amicus Curiae* in Support of Petitioners; and
- U.S. Chamber Litigation Center, Counsel for Chamber of Commerce of the United States of America, *Amicus Curiae* in Support of Petitioners.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

This is one such case. As employers, members of the Chamber have a strong interest in the proper interpretation of the Worker Adjustment and Retraining Notification Act ("WARN Act" or the "Act"), 29 U.S.C. § 2101 *et seq.* The causation standard for the WARN Act's "natural disaster" exception is important to employers, who need flexibility to restructure their businesses in light of an unexpected natural disaster without facing protracted litigation and discovery.[1]

[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. *See* FED. R. APP. P. 29(a)(4)(E).

INTRODUCTION

This case brings into sharp focus the delicate balancing of interests reflected in the WARN Act. Enacted roughly 30 years ago, the Act generally requires 60 days' advance written notice prior to any "plant closing" or "mass layoff." WARN Act § 3(a), 29 U.S.C. § 2102(a).[2] But Congress recognized that inflexible application of this notice requirement would cause substantial injury to precisely those parties whom the Act was intended to benefit. Therefore, Congress included important exceptions,[3] exemptions,[4] and exclusions.[5]

The focus of the Petition in this case is the WARN Act's "natural disaster" exception, which states: "No notice under this Act shall be required if the plant closing or mass layoff *is due to any form of natural disaster*, such as a flood,

---

[2] The Act defines a "plant closing" as "the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees." WARN Act § 2(a)(2), 29 U.S.C. § 2101(a)(2).

A "mass layoff" is defined as a reduction in force that "is not the result of a plant closing" and causes an employment loss at a single site during any 30-day period for (i) "at least 33 percent of the employees (excluding any part-time employees)" that amount to "at least 50 employees (excluding any part-time employees)," or (ii) at least 500 employees (excluding any part-time employees)." WARN Act § 2(a)(3), 29 U.S.C. § 2101(a)(3).

[3] WARN Act § 3(b), 29 U.S.C. § 2102(b) ("Reduction of notification period").

[4] WARN Act § 4, 29 U.S.C. § 2103 ("Exemptions").

[5] WARN Act § 2(b), 29 U.S.C. § 2101(b) ("Exclusions from definition of employment loss").

earthquake, or the drought currently ravaging the farmlands of the United States." 29 U.S.C. § 2102(b)(2)(B) (emphasis added). When enacting the natural disaster exception, Congress understood that the devastation caused by natural disasters does not merely involve those businesses that are directly affected. Rather, natural disasters have a cascading impact on many "downstream" employers and their employees, warranting special treatment under the Act. 134 CONG. REC. 16,123 (1988) (Senator Dole, explaining amendment adding natural disaster exception, stating, "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"). This is why Congress rejected a Senate Amendment that would have limited the natural disaster exception to those employers "directly" affected by a natural disaster. *See* 134 CONG. REC. 16,122-16,124.

Enter the COVID-19 pandemic, which caught the world off-guard. The pandemic unquestionably affected all kinds of businesses in our complicated global economy. Throughout the United States, most citizens were forced to stay at home (whether by mandate, fear, or personal circumstances). People didn't travel, which means they didn't rent cars. To address the sudden lack of car rentals, Enterprise was forced to abruptly reduce some of its work force. Countless other businesses have faced this same necessity over the past year. *See, e.g.*, Vanessa L. Towarnicky,

WARN Act COVID-19 Lawsuits on the Rise, NAT'L LAW REV., Feb. 4, 2021 ("The onset of the pandemic found some employers, especially those in the hospitality industry, in a difficult position with the country shutting down so quickly. That left them with little to no time to issue WARN notices before either laying off their employees in what they hoped would be 'temporary furloughs' or shuttering their businesses entirely.").

What does the WARN Act require when a global pandemic causes the immediate shutdown of many sectors of our economy, threatening the survival of tens of thousands of businesses? The COVID-19 pandemic—no less than a hurricane, "flood, earthquake, or . . . drought"—constitutes a "natural disaster" within the meaning of the Act. WARN Act § 3(b)(2)(B), 29 U.S.C. § 2102(b)(2)(B). Yet it is hardly the only type of natural disaster that causes disruption for businesses and their employees, surrounding communities, and state and local government officials. And to be sure, there is nothing to suggest that the recent, considerable WARN Act litigation will slow down.

The Petition asks this Court to address the causal standard for determining whether a plant closing or mass layoff is "*due to* any form of natural disaster." *Id.* (emphasis added). If this standard is satisfied, then "[n]o notice" is required. *Id.* As Petitioners explain, this case readily satisfies the standard for review under 28 U.S.C. § 1292(b). *See* Pet. at 8-21. In addition, review is warranted because resolution of

this issue has "significant import beyond this case." *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1262 (11th Cir. 2004); *see* Pet. 21-22. Petitioners' arguments are underscored by two considerations. First, this case is of exceptional importance to employers faced with natural disasters, both in the COVID-19 context and beyond. Second, the recurring nature of WARN Act litigation means that this Court's quick direction will benefit many other cases (and courts) moving forward.

ARGUMENT

I. The Issue Presented Is Of Exceptional Importance To The Nation's Employers.

As this case highlights, natural disasters will often limit the time available for the notice required by the WARN Act; employers need the ability to adapt quickly under extreme circumstances. That is why Congress provided the natural disaster exception. The proper interpretation of this exception is critically important to the Nation's employers, both in how they are able to deal financially with the immediate disaster and in how they can protect themselves from subsequent litigation for exercising their rights under the statute.

First, employers must have the ability to restructure their businesses in light of an unexpected disaster that effects a dramatic change in demand for their products or services. When COVID-19 swept across the globe and slashed the car rental market, Enterprise needed to downsize its staff. And because the downturn was so sharp—as will often be the case with a natural disaster—the business needed to move

quickly to reduce payroll in order to keep the company from having to make even more cuts later on. *See* Towarnicky *supra*. It is vital that businesses across the Nation have that ability to cope with sudden, unforeseen shifts to their industry when a national disaster strikes. But under the district court's decision (particularly given the steep penalties for WARN Act infringement) companies may face significant liability for making tough decisions in the face of a pandemic or hurricane suddenly undermining their business. Artificially limiting the natural disaster exception—contrary to Congress's intent—would cause long-term damage to those businesses and, as a result, the economy. This Court's guidance will help employers understand their rights and obligations under the WARN Act, which arise amidst an incredible array of challenges caused by natural disasters.

Second, resolution of the issue presented is important to employers who find themselves in WARN Act litigation over their crisis-related employment decisions. The WARN Act exceptions serve as gatekeepers to filter out unnecessary claims that would otherwise consume valuable resources of companies and courts alike. And that gatekeeping function is particularly important because WARN Act cases bring with them the added complexity and costs of class litigation, which imposes enormous burdens on businesses and courts. It is therefore essential that courts enforce the protections Congress afforded employers faced with burdensome WARN Act litigation. Such enforcement also has the salutary benefit of

safeguarding resources of the very businesses that are struggling in the wake of a natural disaster. This will prevent the WARN Act from harming those it was meant to protect—both employers and employees—through litigation that could potentially shutter businesses altogether.

The natural disaster exception plays a particularly important gatekeeping role because "[n]o notice" is required when the exception applies. Properly interpreting this exception will prevent courts and employers from wading into the less certain waters of the "unforeseeable business circumstances" exception. *See* WARN Act § 3(b)(2)(A), 29 U.S.C. § 2102(b)(2)(A).[6] Unlike the "natural disaster" exception, the "unforeseeable business circumstances" exception requires "as much notice as is practicable," and thus may not lend itself to quick resolution. *See* WARN Act § 3(b)(3), 29 U.S.C. § 2102(b)(3). The district court here already noted that determination of how much notice is "practicable" is in this case (and will be in other cases) "a hotly contested factual issue." ECF 77 (Order) at 12. In other words, even if the business ultimately prevails, it will only be after protracted discovery and litigation—further consuming judicial and party resources—if the company cannot rely on the natural disaster exception. Commentators have warned of that exact

[6] The "unforeseeable business circumstances" exception states: "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." WARN Act § 3(b)(2)(A), 29 U.S.C. § 2102(b)(2)(A).

threat under the district court's ruling in this case. Corey Clay & Brad Wenclewicz, *The WARN Act and COVID-19 Litigation: Early Signs*, JDSUPRA, Jan. 13, 2021 ("Although the *Enterprise* court's ruling is not binding on other courts, employers should be aware of the precedent and be prepared to litigate the issue of practicality of notice during the COVID-19 pandemic. Given the apparent factual dispute this issue raises, courts may be hesitant to grant summary judgment of these issues too. Leaving these matters to a jury provide legal risk which employers need to consider as they navigate these type of claims."). Litigation involving this exception may also place employers in a difficult situation regarding disclosure of internal financial decisions while trying to defend against a WARN Act claim, further placing undue settlement pressure on companies. *See* Anne Cullen, Enterprise *WARN Act Ruling Spells Trouble For Big Employers*, LAW360.COM, Jan. 11, 2021.

When a natural disaster threatens the existence of certain businesses, Congress allowed those businesses to quickly adapt through plant closings or layoffs, without providing the WARN Act notice. Businesses that are able to survive the natural disaster will then be in a better position to recall employees once the emergent circumstances pass. Employers who take such action should not be penalized with expensive litigation and discovery burdens associated with that already difficult choice. The quick resolution of this issue is thus of extreme importance to the Nation's employers.

II. The Frequent Recurrence Of WARN Act Litigation Counsels In Favor Of Immediate Review Here.

Not only is the question presented important, it is a frequently recurring issue that counsels in favor of granting the Petition. In the wake of the COVID-19 pandemic, there has been considerable litigation under the WARN Act. And not only will COVID-19 cases continue to rise, this issue will affect employers well beyond the current pandemic. It will thus be of great value to both lower courts and employers regulated by the WARN Act for this Court to grant permission to appeal the issue presented now.

Courts across the country are beginning to deal with employment claims due to COVID-19 where the natural disaster exception is at issue. *See, e.g.*, *Easom v. U.S. Well Servs.*, Docket No. 4:20-cv-02995 (S.D. Tex. Aug. 26, 2020); *Brazier v. Real Hosp. Grp., LLC*, Docket No. 1:20-cv-08239-VM (S.D.N.Y. Oct. 30, 2020); *Foy et al v. Durham D&M LLC*, Docket No. 2:20-cv-02750 (W.D. Tenn. Oct. 5, 2020). And in this Circuit, multiple class actions are pending that implicate the WARN Act. *See, e.g.*, *Jones v. Scribe Opco, Inc.*, Docket No. 8:20-cv-02945 (M.D. Fla. Dec 09, 2020); *Turner v. Rosen Hotels & Resorts, Inc.*, Docket No. 6:21-cv-00161-CEM-GJK (M.D. Fl. Jan. 22, 2021) (class represented by the same attorneys as this case). This number will only increase.

COVID-19 will hardly be the last time the issue presented arises. In a Circuit that sees more than its share of hurricanes and other natural disasters, the exception

here will continue to be at issue throughout the lower courts. The potential for recurrence of this same legal question counsels in favor of its quick resolution now in order to conserve both party and judicial resources. This is especially important during a time when a pandemic is already causing courts to struggle with maintaining trial dockets. By granting the Petition, this Court can provide much-needed guidance for district courts within this Circuit, as well as those courts across the country that are confronting WARN Act litigation.

CONCLUSION

The Petition for Permission to Appeal should be granted.

Dated: February 19, 2021

Respectfully submitted,

/s/ Philip A. Miscimarra

Philip A. Miscimarra
Lead Counsel
John C. Sullivan
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
T. 202.739.3000
F. 202.739.3001
philip.miscimarra@morganlewis.com
john.sullivan@morganlewis.com

Tara S. Morrissey
Jennifer B. Dickey
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062
T. 202.463.5337

Counsel for *Amicus Curiae*

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g)(1), I certify that the foregoing *amicus* brief complies with the type-volume limitation of Rule 32(a)(7) because, excluding the parts of the document exempted by Rule 32(f), it contains 2,311 words.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Dated: February 19, 2021

/s/ Philip A. Miscimarra
Philip A. Miscimarra

Counsel for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of February, 2021, a copy of the foregoing was filed electronically and served to all counsel through this Court's CM/ECF system.

Dated: February 19, 2021

/s/ Philip A. Miscimarra
Philip A. Miscimarra

Counsel for *Amicus Curiae*