No.

In the
Supreme Court of the United States

UNITED STATES WELL SERVICES, INC.,
Petitioner,

v.

SCOTT EASOM, ADRIAN HOWARD, JOHN NAU,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Worker Adjustment and Retraining Notification ("WARN") Act, 29 U.S.C. § 2101 et seq., generally requires employers to provide sixty days' notice prior to a mass layoff or plant closing. However, the WARN Act contains an exception to the sixty-day notice requirement "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." 29 U.S.C. § 2102(b)(2)(B). This case presents two questions which were each decided differently by the district court and the court of appeals:

(1) Does COVID-19 qualify as a natural disaster under the WARN Act's natural disaster exception, 29 U.S.C. § 2102(b)(2)(B)?

(2) What causal connection is required to trigger the WARN Act's natural disaster exception, which applies when a plant closing or mass layoff is *due to* any form of natural disaster?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is United States Well Services, Inc. There is no parent company or publicly held company owning 10% or more of Petitioner's stock.[1]

Respondents are individuals Scott Easom, Adrian Howard, and John Nau.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings that are directly related to this case.

[1] ProFrac Holding Corp. intends to purchase Petitioner, and that acquisition is expected to be completed in the fourth quarter of 2022, subject to the satisfaction of customary closing conditions, including the approval of USWS stockholders.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

Regulations

Rules

Other Authorities

OPINIONS BELOW

Easom v. US Well Services, Inc., 37 F.4th 238 (5th Cir. 2022). The Fifth Circuit's opinion can be found in the Appendix at Tab A.

Easom v. US Well Services, Inc., 527 F. Supp. 3d 898 (S.D. Tex. 2021). The District Court's opinion can be found in the Appendix at Tab C.

JURISDICTION

The Court has jurisdiction of this petition to review the judgment of the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1254(1). The Fifth Circuit's opinion was published on June 15, 2022. Petitioner timely sought rehearing by filing a Petition for Rehearing or Rehearing En Banc on June 29, 2022, as required by Federal Rule of Appellate Procedure 40. The Fifth Circuit denied Petitioner's request for rehearing or rehearing en banc on July 11, 2022. Petitioner timely filed this Petition for Writ of Certiorari before October 10, 2022.

The district court had original subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331, because the case involves the application of the Worker Adjustment and Retraining Notification ("WARN") Act, 29 U.S.C. § 2104(a)(5).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 2102. Notice required before plant closings and mass layoffs

(a) Notice to employees, State dislocated worker units, and local governments

An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order--

(1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; and

(2) to the State or entity designated by the State to carry out rapid response activities under section 3174(a)(2)(A) of this title, and the chief elected official of the unit of local government within which such closing or layoff is to occur.

If there is more than one such unit, the unit of local government which the employer shall notify is the unit of local government to which the employer pays the highest taxes for the year preceding the year for which the determination is made.

(b) Reduction of notification period

(1) An employer may order the shutdown of a single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good

faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.

(2)(A) 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.

(B) 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.

(3) An employer relying on this subsection 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.

(c) Extension of layoff period

A layoff of more than 6 months which, at its outset, was announced to be a layoff of 6 months or less, shall be treated as an employment loss under this chapter unless--

(1) the extension beyond 6 months is caused by business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff; and

(2) notice is given at the time it becomes reasonably foreseeable that the extension beyond 6 months will be required.

(d) Determinations with respect to employment loss

For purposes of this section, in determining whether a plant closing or mass layoff has occurred or will occur, employment losses for 2 or more groups at a single site of employment, each of which is less than the minimum number of employees specified in section 2101(a)(2) or (3) of this title but which in the aggregate exceed that minimum number, and which occur within any 90-day period shall be considered to be a plant closing or mass layoff unless the employer demonstrates that the employment losses are the result of separate and distinct actions and causes and are not an attempt by the employer to evade the requirements of this chapter.

20 C.F.R. § 639.9. When may notice be given less than 60 days in advance?

Section 3(b) of WARN sets forth three conditions under which the notification period may be reduced to less than 60 days. The employer bears the burden of proof that conditions for the exceptions have been met. If one of the exceptions is applicable, the employer must give as much notice as is practicable to the union, non-represented employees, the State dislocated worker unit, and the unit of local government and this may, in some circumstances, be notice after the fact. The employer must, at the time notice actually is given, provide a brief statement of the reason for reducing the notice period, in addition to the other elements set out in § 639.7.

(a) The exception under section 3(b)(1) of WARN, termed "faltering company", applies to plant closings but not to mass layoffs and should be narrowly construed. To qualify for reduced notice under this exception:

(1) An employer must have been actively seeking capital or business at the time that 60–day notice would have been required. That is, the employer must have been seeking financing or refinancing through the arrangement of loans, the issuance of stocks, bonds, or other methods of internally generated financing; or the employer must have been seeking additional money, credit, or business through any other commercially reasonable method. The employer must be able to identify specific actions taken to obtain capital or business.

(2) There must have been a realistic opportunity to obtain the financing or business sought.

(3) The financing or business sought must have been sufficient, if obtained, to have enabled the employer to avoid or postpone the shutdown. The employer must be able to objectively demonstrate that the amount of capital or the volume of new business sought would have enabled the employer to keep the facility, operating unit, or site open for a reasonable period of time.

(4) The employer reasonably and in good faith must have believed that giving the required notice would have precluded the employer from obtaining the needed capital or business. The employer must be able to objectively demonstrate that it reasonably thought that a potential customer or source of financing would have been unwilling to provide the new business or capital if notice were given, that is, if the employees, customers, or the public were aware that the facility, operating unit, or site might have to close. This condition may be satisfied if the employer can show that the financing or business source would not choose to do business with a troubled company or

with a company whose workforce would be looking for other jobs. The actions of an employer relying on the "faltering company" exception will be viewed in a company-wide context. Thus, a company with access to capital markets or with cash reserves may not avail itself of this exception by looking solely at the financial condition of the facility, operating unit, or site to be closed.

(b) The "unforeseeable business circumstances" exception under section 3(b)(2)(A) of WARN applies to plant closings and mass layoffs caused by business circumstances that were not reasonably foreseeable at the time that 60–day notice would have been required.

(1) An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control. A principal client's sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, and an unanticipated and dramatic major economic downturn might each be considered a business circumstance that is not reasonably foreseeable. A government ordered closing of an employment site that occurs without prior notice also may be an unforeseeable business circumstance.

(2) The test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market. The employer is not required, however, to accurately

predict general economic conditions that also may affect demand for its products or services.

(c) 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.

STATEMENT OF THE CASE

This case involves the application of the Worker Adjustment and Retraining Notification ("WARN") Act, 29 U.S.C. § 2101 *et seq.*, to the unprecedented circumstances of the COVID-19 pandemic and its rapid and disastrous impact. The WARN Act generally requires employers to provide sixty days' notice prior to a mass layoff or plant closing. However, the WARN Act contains an exception to the notice requirement "if the plant closing or mass layoff is due to any form of natural disaster." 29 U.S.C. § 2102(b)(2)(B). This case involves the novel questions of whether COVID-19 qualifies as a natural disaster under the WARN Act's exception and what causal connection is required by the exception's requirement that the plant closing or mass layoff be "due to" a natural disaster.

Defendant-Applicant, United States Well Services, Inc. ("USWS") employed Plaintiff-Respondents, Scott Easom, Adrian Howard, and John Nau until they were terminated on March 17, 2020, immediately after COVID-19 gripped the nation and dramatically altered the American way of life. At the outset of COVID-19's unprecedented impact on our nation, USWS, like many other businesses, was forced to reduce its workforce in the midst of the ensuing uncertainty and panic. Customers abruptly cancelled contracts, the government issued emergency orders, and USWS notified its workers of the unavoidable layoffs within days of the nation's experiencing an unprecedented lockdown that began on Friday, March 13, 2020.

Even though the government provided workers with emergency monetary relief in the form of

stimulus checks and additional unemployment compensation, Plaintiffs (and many others like them) filed suit against their employer under the WARN Act, seeking sixty-days wages because their employer did not have the precognition to provide sixty-days' advance notice of the closing or layoff.

In the district court and on appeal, USWS invoked the WARN Act's natural disaster exception, which provides that "No notice . . . 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." 29 U.S.C. § 102(b)(2)(B). The district court agreed that the natural disaster exception could apply to COVID-19 but declined to grant judgment in favor of USWS because the parties disputed whether the USWS layoff was "due to" COVID-19. However, because the questions presented by this case are so novel and important, the district court took the extraordinary step of certifying two questions for interlocutory appeal: (1) Does COVID-19 qualify as a natural disaster under the WARN Act's natural disaster exception, 29 U.S.C. § 102(b)(2)(B)? and (2) Does the WARN Act's natural disaster exception, 29 U.S.C. § 2102(b)(2)(B), incorporate but-for or proximate causation?

On interlocutory review, the Fifth Circuit reversed, concluding in the first instance that COVID-19 was not a natural disaster under the WARN Act. The Fifth Circuit also concluded that the phrase "due to" was ambiguous and thus deferred to regulations promulgated by U.S. Department of Labor, requiring that the natural disaster be a proximate cause of the layoff for an employer to

invoke the exception. Both of the issues decided by the court of appeals have never before been decided by a federal appellate court and should be resolved by this Court so that, when future disaster strikes, employers will have certainty about their WARN Act obligations.

REASONS FOR GRANTING THE PETITION

This Court should grant this petition and review the judgment of the court of appeals because both of the questions presented involve important issues of federal law that have not been settled by this Court. In the midst of the uncertainty that follows in the wake of a natural disaster, employers who are faced with the difficult decision of conducting a plant closing or mass layoff should have clarity on their obligations towards employees and should know whether they can rely on the WARN Act's natural disaster exception.

First, the court of appeals' decision that COVID-19 is not a natural disaster under the WARN Act contradicts nearly every other federal court to have considered that same question in other legal contexts. The WARN Act's natural disaster exception delineates an illustrative, non-exhaustive list of natural disasters which could qualify to invoke the exception, "such as flood, earthquake, or the drought currently ravaging the farmlands of the United States." 29 U.S.C. § 2102(b)(2)(B). The court of appeals improperly constrained the application of the exception to only those disasters which are hydrological, geological, or meteorological and therefore incorrectly concluded that COVID-19 is not a natural disaster under the WARN Act's exception. The court of appeals thereby precluded thousands of businesses, which were forced to shutter or drastically reduce their workforce in March 2020, immediately after COVID-19 caused one of the worst disasters in recent history, from relying on the WARN Act's natural disaster exception.

Second, because the natural disaster exception only applies when a plant closing or mass layoff is "due to" a natural disaster, the court of appeals also considered what causal connectivity is required by the phrase, "due to." The court of appeals concluded the phrase is ambiguous and therefore deferred to the Department of Labor's implementing regulations, which require that the layoff or plant closing be a *direct* result of the natural disaster in order to invoke the exception. *See* 20 C.F.R. § 639.9(c)(2). What causal standard is invoked by the phrase "due to" has not been resolved decisively by this Court, despite the common use of the phrase "due to" in statutes, regulations, and jurisprudence. This Court should resolve the purely legal questions presented.

A. COVID-19 Is a Natural Disaster Under the WARN Act

By its express terms, the WARN Act's natural disaster exception applies in the event of "*any* form of natural disaster, *such as* a flood, earthquake, or the drought currently ravaging the farmlands of the United States." 29 U.S.C. § 2102(b)(2)(B) (emphasis added). The fact that the WARN Act does not expressly list a global pandemic as a natural disaster is not determinative. The use of the modifier "any" indicates the expansive bounds of the definition of natural disaster under the exception. *See, e.g., Massachusetts v. EPA,* 549 U.S. 497, 528-29 (2007) (observing that Congress's use of the word "any" underscores an intent to embrace all types of a particular matter); *Kasten v. Saint-Gobain Performance Plastics Corp.,* 563 U.S. 1, 10 (2011) (concluding that the use of the word "any" before a

noun "suggests a broad interpretation" of that noun); *Tula Rubio v. Lynch,* 787 F.3d 288, 293 (5th Cir. 2015) ("The use of the word 'any' to modify a term 'suggests a broad meaning.'") (citation omitted). The use of the phrase "such as" before the specifically enumerated natural disasters in the WARN Act's exception indicates that the list that follows is illustrative, not exhaustive. *Ziegler v. Phillips Petrol. Co.,* 483 F.2d 858, 877 (5th Cir. 1973) (discussing the term "such as" as "illustrative language"). The WARN Act leaves room for other natural disasters not expressly named, as indicated by the expansive use of the word "any" and the illustrative list that follows.

There is no reason to exclude biological natural disasters, including COVID-19, from the WARN Act's natural disaster exception. The consequences of COVID-19 were just as bad, if not worse, than the other disasters listed in the exception. Whereas the disasters mentioned in the natural disaster exception occur routinely and are localized to a region of the country, COVID-19 had a dramatic and unprecedented national impact. If an exception is needed, it is for this type of disaster which is rare and had nationwide impact.

Further, the natural disasters enumerated in the WARN Act are like COVID-19 in that each is a disaster emerging from nature which devastatingly affects entire communities. 29 U.S.C. § 2102(b)(2)(B). The consequences and aftermath of the COVID-19 pandemic were just as (if not more) disastrous as a hurricane, "flood, earthquake, or . . . drought." *See id.* The COVID-19 pandemic caused the immediate

shutdown of many sectors of the economy as individuals were ordered to "stay at home" or "shelter in place." COVID-19 also caused or contributed to the death of over half a million Americans and the hospitalization of hundreds of thousands of Americans. Like other natural disasters (and perhaps more so), COVID-19 substantially disrupted the order of every-day life and threatened the survival of tens of thousands of businesses, including that of USWS.

The illustrative list of natural disasters contemplated by the WARN Act and its expansive language purposefully leave open the possibility that other forms of unenumerated natural disasters, including pandemics like COVID-19, also fall under the exception. *See* 29 U.S.C. § 2102(b)(2)(B). There is no reason to exclude a biological natural disaster such as COVID-19, which wreaked unprecedented carnage on all facets of life, from the coverage of the natural disaster exception.

District courts to have considered whether COVID-19 is a natural disaster under the WARN Act have uniformly concluded (or assumed) that COVID-19 qualifies as a natural disaster under the exception. *See In re Art Van Furniture, LLC*, 638 B.R. 523, 542 (Bankr. D. Del. 2022) ("the Court is satisfied that the COVID-19 pandemic qualifies is a natural disaster and may be invoked under the natural disaster exception to the WARN Act."); *Van Balderen v. FS Miami Emp., Inc.*, No. 21-21842-CIV, 2021 WL 6144644, at *6 (S.D. Fla. Sept. 15, 2021) ("assuming arguendo that the COVID-19 pandemic is a 'natural disaster'"); *Easom v. US Well Servs., Inc.*, 527 F.

Supp. 3d 898, 911 (S.D. Tex. 2021) (concluding that COVID-19 is a natural disaster under the WARN Act's exception); *Benson v. Enter. Leasing Co. of Fla., LLC*, No. 620CV891ORL37LRH, 2021 WL 1078185, at *4 (M.D. Fla. Jan. 4, 2021) (concluding that "COVID-19 may be a natural disaster within the meaning of the WARN Act"); *see also Jones v. Scribe Opco, Inc.*, No. 8:20-CV-2945-VMC-SPF, 2022 WL 813824, at *5 (M.D. Fla. Mar. 17, 2022) (declining to reach the issue of "whether the COVID-19 pandemic qualifies as a natural disaster" under the WARN Act).

Courts which have addressed the COVID-19 pandemic outside the context of the WARN Act have likewise overwhelmingly determined that it is a natural disaster. *See JN Contemp. Art LLC v. Phillips Auctioneers LLC*, 507 F. Supp. 3d 490, 501 (S.D.N.Y. 2020) ("It cannot be seriously disputed that the COVID-19 pandemic is a natural disaster"), *aff'd*, 29 F.4th 118, 124 (2d Cir. 2022) (affirming the district court's judgment without resolving the question of whether COVID-19 is a natural disaster within the meaning of the force majeure clause); *AB Stable VIII LLC v. Maps Hotels & Resorts One LLC,* No. CV 2020-0310-JTL, 2020 WL 7024929, at *58 (Del. Ch. Nov. 30, 2020), *judgment entered*, (Del. Ch. 2021), and *aff'd*, 268 A.3d 198 (Del. 2021); *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 370 (2020) ("We have no hesitation in concluding that the ongoing COVID-19 pandemic equates to a natural disaster."); *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 889 (Pa. 2020) (concluding that the "COVID-19 pandemic is, by all definitions, a natural disaster and

a catastrophe of massive proportions"), *cert. denied*, – — U.S. ——, 141 S.Ct. 239, 208 L.Ed.2d 17 (2020).

Similarly, the actions of the federal government in the immediate aftermath of COVID-19 confirm that it is a natural disaster under the WARN Act's exception. On March 13, 2020 (four days prior to the date USWS terminated Plaintiffs), the President of the United States declared COVID-19 to be a "major disaster" under the Stafford Act, such that he was able to invoke emergency aid and safety protocols. *See* FEMA, COVID-19 Disaster Declarations, (last updated Aug. 20, 2021), https://www.fema.gov/ disaster/coronavirus/disaster-declarations. The Stafford Act defines a "major disaster" as "any natural catastrophe" and lists numerous examples, including "hurricane, tornado, storm, high water, wind driven water, tidal wave, tsunami, earth-quake, volcanic eruption, landslide, mudslide, snowstorm, or drought [as well as] any fire, flood, or explosion." 42 U.S.C. § 5122. Although the enumerated list of examples of "natural catastrophes" under the Stafford Act does not include a "pandemic," the President nonetheless declared COVID-19 to be a nationwide emergency and a "major disaster."

Given the plethora of support finding COVID-19 to be a natural disaster both with respect to the WARN Act and in other legal contexts, this Court should grant the instant writ application and should conclusively determine that COVID-19 is a natural disaster under the WARN Act's natural disaster exception. Granting this writ application will give employers across the nation clarity about their

obligations to provide workers with advance notice of a plant closing or mass layoff after a natural disaster strikes.

B. The Court Should Provide Clarity on the Meaning of the Phrase "Due To"

The plain language of the WARN Act's natural disaster exception states that it applies when a plant closing or mass layoff is "due to" a natural disaster. 29 U.S.C. § 2102(b)(2)(B). However, this Court has not previously provided clarity about the meaning of the phrase "due to," and multiple circuit courts of appeals have found that phrase to be ambiguous. *See U.S. Postal Serv. v. Postal Regulatory Comm'n*, 640 F.3d 1263, 1268 (D.D.C. 2011) (concluding phrase "due to" is ambiguous because it can mean "due *in part* to" as well as "due *only* to."); *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1100 (10th Cir. 1999) ("The 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."); *Adams v. Director, OWCP*, 886 F.2d 818, 821 (6th Cir. 1989) (same). The Court should grant the instant writ application and provide clarity about the legal ramifications of the commonly-used phrase "due to."

Because of the lack of clarity about the meaning of the phrase "due to," when interpreting the WARN Act's natural disaster exception, the court of appeals applied *Chevron* deference to the Department of Labor's implementing regulations, which require the closing to be a "direct result" of a

natural disaster. *See* 20 C.F.R. § 639.9(c)(2) (requiring that the "plant closing or mass layoff [be] a direct result of a natural disaster"); *see also Chevron U.S.A., Inc., v. Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984). This Court should grant the instant writ application to definitively interpret the phrase "due to" so that lower courts and parties are not left to guess at the meaning of this "ambiguous" phrase.

CONCLUSION

The Court should grant the instant writ application to resolve two unsettled questions of law that will impact employers nationwide. First, whether COVID-19 qualifies as a natural disaster under the WARN Act's exception will provide employers with clarity on their obligations towards employees in the immediate aftermath of a natural disaster. Second, what causal connection is required by the phrase "due to" will provide employers (and others) with clarity on the legal implications of this commonly used phrase. This Court should resolve the purely legal questions presented.

Respectfully submitted,

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