No. 19-935

In the
Supreme Court of the United States

CARL LEEPER,
Petitioner,
v.

HAMILTON COUNTY COAL, LLC AND
ALLIANCE RESOURCE PARTNERS, L.P.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

On February 5, 2016, Hamilton County Coal, LLC delivered to 158 of its 315 full-time employees a letter labeled "**Re: Temporary Layoff Notice**", notifying recipients: "Hamilton County Coal, LLC … is placing you on temporary layoff for the period commencing on February 6, 2016 and ending on August 1, 2016 ('Layoff Period')." Within six months, 61 full-time employees returned to work, 56 of whom were restored to pre-layoff wages and benefits. Petitioner filed this action a month after the temporary layoff, alleging a "mass layoff" under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq*., based on his theory that each notice recipient suffered a "termination" under § 2101(a)(6)(A) on February 6, 2016. Petitioner later alleged a "mass layoff" based on his theory that employees experienced a "reduction in hours of work" of under § 2101(a)(6)(C). This case presents two questions about which there is no disagreement among the circuits:

1. Whether a worker experiences an "employment termination" under 29 U.S.C. § 2101(a)(6)(A) where his or her employer expressly announces a temporary layoff, simultaneously communicating an anticipated date of return to work, and such worker does return to work within the time period specified in the temporary layoff notice.

2. Whether a worker experiences a "reduction in hours" employment loss under 29 U.S.C. § 2101(a)(6)(C) where his or her employer announces a temporary layoff, and such worker returns to work fewer than six months after implementation of the layoff.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Hamilton County Coal, LLC is a wholly-owned subsidiary of Alliance Coal, LLC. Alliance Coal, LLC is a non-governmental entity of which 99.999% of the ownership interest is held by Alliance Resource Operating Partners, L.P. Alliance Resource Operating Partners, L.P. is a non-governmental entity of which 98.9899% of the ownership interest is held by Alliance Resource Partners, L.P.

Alliance Resource Partners, L.P. is a publicly-traded master limited partnership whose limited partnership interests are traded on the NASDAQ under the ticker symbol ARLP.

DIRECTLY RELATED PROCEEDINGS

Leeper, individually and on behalf of all others similarly situated, v. Alliance Resource Partners, L.P. and Hamilton County Coal, LLC, Case No. 3:16-CV-250-NJR-DWG, U.S. Court for the Southern District of Illinois, Judgment entered December 17, 2018.

Leeper, individually and on behalf of all others similarly situated, v. Hamilton County Coal, LLC and Alliance Resource Partners, L.P., U.S. Court of Appeals for the Seventh Circuit, Case No. 19-1109. Judgment entered September 26, 2019. Petition for Rehearing and Rehearing En Banc denied October 25, 2019.

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OTHER AUTHORITY

Hamilton County Coal, LLC ("Hamilton") and Alliance Resource Partners, L.P. ("ARLP") respectfully request denial of the Petition for Writ of Certiorari filed by Carl Leeper ("Leeper").

CITATIONS OF THE REPORTS OF OPINIONS ENTERED BY COURTS BELOW

The opinion of the Seventh Circuit (App. 1-13) is reported at 939 F.3d 866. The opinion of the district court (App. 14 – 35) is reported at 356 F. Supp. 3d 761.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Seventh Circuit entered judgment on September 26, 2019 and denied Leeper's petition for rehearing and rehearing en banc on October 25, 2019.

STATUTES AND REGULATIONS INVOLVED

Statutes involved include sections 2101 and 2102 of the Worker Adjustment and Retraining Notification Act (29 U.S.C.).

Regulations involved include sections 639.1 and 639.3 of the Code of the Federal Regulations (20 C.F.R.).

INTRODUCTION

The Seventh Circuit affirmed the district court's summary judgment dismissing a putative class action filed pursuant to the Worker Adjustment and Retraining Notification Act ("WARN Act"), 29 U.S.C. § 2101, *et seq.*. The WARN Act requires certain employers to provide 60 days' advance notice before instituting a "mass layoff". 29 U.S.C. § 2102(a). Where a layoff of fewer than 500 employees is alleged, the layoff must result in an "employment loss" for at least 50 employees and 33% of the employer's workforce to meet the definition of "mass layoff". 29 U.S.C. § 2101(a)(3). The courts below held that 56 employees who returned to work fewer than six months after their employer announced a "temporary layoff" did not experience an "employment loss" within the meaning of the WARN Act. Because returning employees were excluded from those who counted as having experienced an "employment loss", Leeper failed to meet the threshold for a "mass layoff".

The result in this case is in full accord with decisional authority of other circuits and raises no federal issue compelling review by this Court. Furthermore, the decisions of the Seventh Circuit and the district court correctly apply the letter of the WARN Act and comport with the purpose of the Act, which is to give workers transition time to adjust to "prospective" loss of employment. 20 C.F.R. § 639.1 (1995). Respondents therefore respectfully request this Court to deny the Petition.

STATEMENT OF THE CASE

A. Legal Background.

The WARN Act requires certain employers to provide 60 days' advance notice before ordering a "plant closing" or "mass layoff". 29 U.S.C. § 2102(a). To meet the definition of "mass layoff," and where a layoff of fewer than 500 employees is alleged, the layoff must result in an "employment loss" for at least 33 percent of the employer's workforce and at least 50 employees. 29 U.S.C. § 2101(a)(3). The term "employment loss" means "(A) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period". 29 U.S.C. § 2101(a)(6).

Department of Labor guidance, embraced by the Seventh Circuit and every other circuit to consider the issue, provides that "for the purposes of defining 'employment loss,' the term 'termination' means the permanent cessation of the employment relationship and the term 'layoff' means the temporary cessation of the relationship." Worker Adjustment and Retraining Notification, 54 Fed. Reg. 16,042, 16,047 (Apr. 20, 1989).

With regard to an "employment loss" related to a layoff, the WARN Act also provides

> [a] layoff of more than 6 months which, at its outset, was announced to be a layoff of six months or less, shall be treated as an employment loss under this Act [*et seq*.] unless

> -- (1) the extension beyond 6 months is caused by business circumstances … 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 six months will be required.

29 U.S.C. § 2102(c).

In the action below, Leeper alleged he and putative class members experienced an "employment loss" under 29 U.S.C. § 2101(a)(6)(A) (the "employment termination" category) or (C) (the "reduction in hours of work" category).

B. Factual Background.

Hamilton operates a coal mine in Hamilton County, Illinois. ECF No. 136-3, Page #4068[1]. At a meeting held on February 5, 2016, Hamilton delivered to 158 of its 315[2] full-time employees a written notice plainly labeled "**Re: Temporary Layoff Notice**", which states "Hamilton County Coal, LLC… is placing you on temporary layoff for the period commencing on February 6, 2016 and ending on August 1, 2016 ('Layoff

[1] Unless otherwise stated, all ECF citations are to documents in the record before the district court.

[2] (ECF Nos. 136-3, 136-4). The term "full-time" used herein refers to those employees who fit within the definition set forth in 29 U.S.C. § 2101(a)(8). As of February 5, 2016, and assuming employees defined as "part-time" under 29 U.S.C. § 2101(a)(8) are included, Hamilton had a total of 363 employees, 182 of whom received the Temporary Layoff Notice. Part-time employees were excluded from consideration by the district court and Seventh Circuit for purposes of the summary judgment motion and, therefore, only full-time employees are relevant to this Petition.

Period'). On August 1, 2016, you may return to your at-will employment with Hamilton County Coal." App. 45. The letter further explains "[d]uring the Layoff Period, and beginning effective February 6, 2016, you will not be employed by Hamilton County Coal and you are free to pursue other endeavors"; and "[y]ou will receive additional information related to any separation benefits to which you may be entitled." *Id.*

As of February 5, 2016, Hamilton had never implemented a temporary layoff, and did not have in place any preexisting policy related to temporary layoffs. Accordingly, Hamilton developed and provided to Temporary Layoff Notice recipients informational materials, including a document entitled "Frequently Asked Questions Concerning the Temporary Layoffs" ("FAQ") and a pamphlet setting forth employee rights regarding unemployment benefits. App. 45; App. 47-56; ECF 71-2, Page #427, 433-442.

Page 7 of Leeper's Petition misquotes the FAQ. The Petition states "the first FAQ accompanying the letter explained that the separation was a 'termination of employment.' *Id.* at 45, 47." (Petition, 7) (purporting to quote FAQ, App. 47). This misstates the record in two regards. First, the placement of punctuation within quotation marks, a period rather than an ellipsis, fails to give notice to the reader that words completing the sentence are omitted from the quote. Second, the Petition removes the quoted language from its proper context and substitutes the term "separation" for "temporary layoff". The first FAQ actually states: "**1. If I am temporarily laid off, what is my status?**" App. 47 (emphasis in original). The answer to the first

FAQ states "[a] temporary layoff is treated as a termination of employment for purposes of wages and benefits." *Id.* Accurate construction of the FAQ requires acknowledgement that it accompanied Hamilton's explicit announcement and discussion of a "temporary layoff".

The Petition's characterization of the FAQ also is incomplete insofar as it selectively omits any reference to the FAQ's assurance that children of workers who had applied for Hamilton's scholarship program would remain under consideration as scholarship candidates during the temporary layoff. App. 54. In other words, this aspect of the employment relationship between Hamilton and recipients of the Temporary Layoff Notice was to remain in place during the Layoff Period.

In addition to the Temporary Layoff Notice and FAQ, Hamilton presented contact forms to recipients of the Temporary Layoff Notice during the February 5, 2016 meeting, and asked such employees to provide information, including alternate contact numbers, so Hamilton readily could reach the employees for the purpose of returning to work. Leeper testified the contact form was for the purpose of "call back" to work. Supp. App. 1; ECF 71-2, Page #443; ECF 71-4, Page #493-494. Leeper's omission of any reference to this contact form, together with the suggestion at page 35 of the Petition that Hamilton's written communications to employees on February 5, 2016 made no reference to any procedure applicable to return to work, is misleading.

Some employees who were placed on temporary layoff began returning to work as early as February 10,

2016. App. 16, n. 2. By August 1, 2016, 61 full-time employees had returned to work, 56 of whom were fully restored to pre-layoff wages and benefits. App. 16-17. Returning employees were not required to submit applications for employment, nor were they required to interview for their positions. App. 16. Returning employees also received years-of-service credit for purposes of their 401(k) benefits as if they had no break in service during the temporary layoff period and such employees did not lose vesting by virtue of having been placed on temporary layoff. App. 27, n. 8; ECF 136-4, Page #4129-4130.

C. The Proceedings Below.

On March 8, 2016, Leeper filed this putative class action, alleging Hamilton implemented a "mass layoff" without advance notice on the theory that the action implemented by Hamilton on February 6, 2016 was an employment "termination" under 29 U.S.C. § 2101(a)(6)(A). ECF 1. On January 4, 2017, Leeper filed an Amended Complaint, adding the alternative theory that the temporary layoff constituted a "mass layoff" under 29 U.S.C. § 2101(a)(6)(C) because at least 33% of Hamilton's full-time workforce allegedly experienced a reduction of hours of work of more than 50% during each of the six months between February 6, 2016 and August 6, 2016. ECF 37, Page #166.

Following discovery, Hamilton and ARLP moved for summary judgment on the ground that less than 33% of Hamilton's employees as of February 5, 2016 experienced an employment loss under the WARN Act. ECF 71, 71-1, Page #407. Leeper cross-filed a Motion for Partial Summary Judgment seeking a liability

judgment against Hamilton and ARLP. During the hearing on the parties' cross-motions, the district court confirmed the accuracy of the following numbers: as of February 5, 2016, Hamilton had 315 full-time employees; 158 of these full-time employees received the Temporary Layoff Notice; 61 full-time employees returned to work by August 1, 2016, five (5) whom returned at reduced wages; 16 full-time employees voluntarily declined to return to work; one (1) employee was discharged for cause; and 80 employees did not receive offers to return to work. App. 15-17, 28.

With regard to Leeper's theory that all Temporary Layoff Notice recipients experienced an "employment termination" under 29 U.S.C. § 2101(a)(6)(A), the district court recognized that "termination" for purposes of the WARN Act means the "permanent cessation of the employment relationship". App. 26-27 (citing 54 FR 16042-01 (1989). The district court found that "[o]f the 158 employees that received the written notice, 56 were fully restored to pre-layoff wages within six months", App. 27, and specifically noted that such employees received "years-of-service credit for purposes of their 401(k) benefits as if they had no break in service during the temporary layoff period and did not lose vesting by virtue of having been placed on temporary layoff." App. 27, n. 8. The district court concluded "there was no permanent cessation of the employment relationship as to these 56 employees." App. 27. The district court further concluded "[b]ecause 56 of the 158 full-time employees who received the written notice returned to work within six months, Leeper cannot establish that more than 33

percent of the 315 full-time employees experienced an employment termination." App. 28.

The district court did not conclude, as suggested at page 10 of Leeper's Petition, that excluding the 56 full-time workers who returned to work at Hamilton meant "about 32 percent of the workforce experienced an employment loss…." Petition, 10 (citing App. 28). The district court did not proceed to calculate the actual percentage of Hamilton's workforce that experienced an employment loss because it is undisputed that excluding the 56 full-time returning workers meant Leeper could not meet the WARN Act threshold under any scenario; however, the district court also recognized, and Leeper's counsel did not dispute at the hearing on the parties' cross-motions for summary judgment, that 16 full-time employees voluntarily declined to return to work and one (1) employee was discharged for cause. Hamilton and ARLP maintain that when these employees also are excluded from those who may be deemed to have experienced an employment loss, Leeper fails to satisfy the WARN Act threshold by a larger margin.

The district court also rejected Leeper's alternate theory that the employees experienced a WARN Act employment loss under section 2101(a)(6)(C) of the WARN Act. The district court observed that "[t]he WARN Act's definition of 'employment loss' separately and alternately delineates 'termination', 'layoff' and 'reduction in hours' thereby indicating that such terms encompass distinct actions by the employer." App. 30. Furthermore, the district court reasoned "if a subsection (C) 'reduction in hours' also covers the

situation in which an employer implements a layoff, there would be no purpose for subsection (B) because every layoff exceeding six months would already be addressed by subsection (C). This would render subsection (B) meaningless, redundant and superfluous." *Id*. Because Leeper failed to demonstrate that at least 33% of Hamilton's full-time employees experienced an "employment loss" as defined under section 2101(a)(6), the district court concluded "any failure by Hamilton to provide 60 days' advanced notice before instituting the layoff did not constitute a violation under the WARN Act." App. 34. The district court granted summary judgment in favor of Hamilton and ARLP. *Id*.

The Seventh Circuit affirmed the district court's judgment. With regard to Leeper's argument that more than 33% of Hamilton's workforce experienced an employment termination within the meaning of section 2101(a)(6)(A), the Seventh Circuit also adopted the Department of Labor's guidance cited by the district court and other circuits. 54 Fed. Reg. 16,042, 16,047 (Apr. 20, 1989). App. 5. In determining whether the cessation of the employment relationship was permanent or temporary, however, the Seventh Circuit departed from the reasoning of the district court by excluding any consideration of the fact and circumstances of employees' return to work following implementation of the layoff: "[t]he better reading of the statute is that § 2101(a)(6)(A) and (B) require an initial categorization of the dismissal imposed on the employees. Was the worker permanently terminated or temporarily laid off? Answering that threshold question requires an objective analysis of the

employee's dismissal notice, not a hindsight-informed count of how many employees returned within a six-month period." App. 8. Turning to the February 5, 2016 Temporary Layoff Notice and the Frequently Asked Questions documents, the Seventh Circuit concluded

> [e]ven construed in Leeper's favor, the record reveals that Hamilton announced a temporary cessation of his employment. The notice referred to the employment action as a 'temporary layoff' and defined a precise 'layoff period.' And it instructed the workers to *return* – not *reapply* to return – once that period ended: "On August 1, 2016, you may return to your at-will employment with Hamilton County Coal." Nothing in the notice suggests a "permanent cessation of the employment relationship." 54 Fed. Reg. at 16,047.

App. 10-11. The Seventh Circuit further held "Hamilton clearly announced a temporary layoff lasting under six months, and no language in either the notice or the Frequently Asked Questions shows that Leeper and his coworkers were permanently fired. …. Accordingly, the mine workers did not experience an employment termination under § 2101(a)(6)(A)." App. 11.

The Seventh Circuit also rejected Leeper's alternate theory that more than 33% of the mine workforce suffered an employment loss under section 2101(a)(6)(C). The Seventh Circuit first observed that under Leeper's reasoning, "every 'layoff exceeding 6 months' would also constitute a six-month 'reduction in

hours of work.'" App. 12. The Seventh Circuit distinguished a cessation of the employment relationship, as occurs with terminations or layoffs under section 2101(a)(6)(A) or (B), from a reduction in hours of work, which "occurs when an employer retains an employee but assigns him less work, effectively cutting his pay. That's a difference in kind, not degree." *Id.* In addition, the Seventh Circuit noted that "[i]f a temporary layoff is also a 'reduction in hours of work,' then it becomes an 'employment loss' after five and a half months, not six. That odd construction poses problems for § 2102(c), which provides that some layoffs in excess of six months do not constitute an employment loss." App. 12.

Affirming the district court's grant of summary judgment, the Seventh Circuit concluded that "Hamilton initiated a layoff lasting under six months. Under Department of Labor guidance, that temporary cessation of the employment relationship wasn't an employment termination under § 2101(a)(6)(A). And because Hamilton laid off the affected employees rather than reducing their work hours, § 2101(a)(6)(C) is irrelevant." App. 13. Therefore, the Seventh Circuit held, "Leeper cannot show that more than 33% of the mine's full-time workforce experienced an employment loss. Because this was not a mass layoff under the Act, Hamilton wasn't obligated to give the workers 60 days' notice." *Id.*

REASONS FOR DENYING THE PETITION

I. THERE IS NO CIRCUIT SPLIT ON THE ISSUES PRESENTED BY THIS CASE.

The absence of a circuit split is demonstrated by Leeper's failure to identify one case from *any* circuit wherein a court faced with similar facts rendered an opposite decision from that rendered by the courts below. What Leeper characterizes as a "split" among circuits amounts to no more than varying analyses utilized by courts presented with different factual scenarios that ultimately all reach the same conclusion: when an employer announces a temporary layoff, such action does not constitute an "employment termination" within the meaning of the WARN Act. The Petition therefore does not demonstrate any compelling reason for intervention by this Court.

A. In Cases Where Employers Have Announced A "Temporary" Layoff or Closure, Courts Below Have Universally Held Such Action Constitutes a Layoff Rather Than "Employment Termination" Under the WARN Act.

A key undisputed fact in this case is that Hamilton explicitly announced a "temporary layoff" of limited duration and identified an expected date of return to work. App. 45. Leeper has cited no decision from any circuit to support the proposition that when an employer explicitly announces a "temporary layoff" with an anticipated date of return to work, employees nevertheless may form an objectively reasonable belief that such action constitutes an "employment

termination". On the contrary, in each case cited to this Court or below where the employer has announced a temporary layoff or closure, the court held such employment action did not constitute an "employment termination" under section 2101(a)(6)(A) of the WARN Act.

In *Graphic Communs. Int'l Union, Local 31-N v. Quebecor Printing Corp.*, 252 F.3d 296 (4th Cir. 2001), for instance, the employer issued a series of three successive WARN Act notices. *Id.* at 298. The third notice announced a mass layoff and a temporary shutdown to be implemented on December 11, 1998. Five days after the third layoff was implemented, the employer permanently shut down the plant without having provided prior notice of its intent to close permanently. *Id.* At issue was whether laid-off employees were entitled to such notice. The Fourth Circuit held the employees experienced a "termination" subject to WARN Act notice requirements only when the employer permanently closed the plant. *Id.* at 299 ("employees suffered an 'employment termination' … when the … plant was permanently closed." (citing 54 Fed. Reg. 16,042, 16,047 (1989)). The Fourth Circuit further held the "December 11 layoff did not itself result in an 'employment loss' because the statute requires that a layoff 'exceed six months' in order for it to be considered an 'employment loss.'" *Id.* at 300. Applied to this case, the *Graphic* opinion yields the same result reached by the Seventh Circuit -- the February 5, 2016 announcement of a temporary layoff did not result in an "employment loss". *See also Smith v. Consolidation Coal Co.*, 948 F. Supp. 583, 585–586 (W.D. Va. 1996) (wherein the plaintiffs filed their

WARN Act claim fewer than six months after the employer implemented a temporary layoff, the district court rejected plaintiffs' argument that they experienced an employment loss based on their reasonable expectation that the layoff was expected to last longer than six months and dismissed plaintiffs' claim).

Similarly, in *Kildea v. Electro-Wire Prods., Inc.,* 144 F.3d 400 (6th Cir. 1998), the employer implemented successive layoffs, placing employees on "indefinite" leave in the fall of 1989, and then subsequently shut down permanently. *Id.* at 403. The employer provided WARN Act notices of the impending shutdown to "active" employees, but not to employees on layoff. *Id.* At issue was whether the laid-off employees were "affected employees" under section 2101(a)(5) of the WARN Act and therefore entitled to notice of a plant closing or mass layoff. *Id.* at 404–405. The Sixth Circuit affirmed the district court's finding that laid-off employees had an objectively reasonable expectation of being recalled from layoff, and therefore such employees were entitled to notice under the WARN Act. *Id.* at 406–407. Applied to this case, the *Kildea* opinion yields the same result reached by the Seventh Circuit -- Hamilton implemented a temporary layoff, not an "employment termination" within the meaning of the WARN Act. Although *Kildea* presented different facts -- the employer there had a history of layoffs for instance -- nothing in *Kildea* supports the proposition that employees who have been placed on "temporary layoff" with an anticipated return to work date may be deemed to have an objectively reasonable expectation that their employment has ended permanently.

Even where employers have allowed for the mere possibility of recall, courts have declined to treat such action as an "employment termination" under the WARN Act. In *Rifkin v. McDonnell Douglas Corp.,* 78 F.3d 1277 (8th Cir. 1996), for instance, the layoff notice stated the employees "were being laid off" and that "the layoff was 'expected to be permanent'". *Id.* at 1282. Some employees were rehired within six months. *Id.* at 1279. The plaintiffs, asserting a WARN Act violation, argued that because the layoffs were "expected to be permanent", the layoffs constituted terminations under section 2101(a)(6)(A). The Eight Circuit rejected this argument, stating "a common sense reading of the statute indicates that it is the actuality of a termination which controls and not the expectations of the employees. An employee cannot be defined as 'terminated' if he or she is, in fact, rehired in the same position." *Id.* at 1282. The Eight Circuit further opined that "the fact that the layoff was merely 'expected to be permanent' as opposed to a termination left open the possibility of rehire and thus weighs against classifying this situation as an employment termination." *Id.* Applied to this case, the *Rifkin* opinion yields the same result reached by the Seventh Circuit -- Hamilton implemented a temporary layoff, not an "employment termination" within the meaning of the WARN Act.

Leeper's prematurely filed Complaint in this case presented the issue of whether a worker experiences an "employment termination" under section 2101(a)(6)(A) of the WARN Act where his or her employer explicitly announces a temporary layoff, simultaneously communicating an anticipated date of return to work.

In this regard, the Seventh Circuit's decision is in full accord with the decisions of other circuits.[3] Indeed, it bears repeating that Leeper has identified no case in which a court, faced with analogous facts, has reached the opposite conclusion of that reached by the courts below in this case.

B. Variations in Analyses Utilized By Courts Addressing Different Factual Scenarios Do Not Demonstrate A Circuit Split On the Issues Presented By This Case.

Leeper attempts to construct a three-way "split" among the circuits for distinguishing between layoffs and terminations. In that regard, Leeper incorrectly claims the Seventh Circuit has utilized a prospective analysis based solely on the employer's written notice that cannot be reconciled with the Second and Sixth Circuits' "prospective" analysis based on multi-factor objectively reasonable expectations of recall and the Eighth Circuit's "retrospective" analysis based on whether employees placed on layoff are rehired within six months.

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[3] District courts within the First and Fifth Circuits likewise have rejected WARN Act claims by employees placed on temporary layoff for fewer than six months. *Nelson v. Formed Fiber Techs., Inc.*, 856 F. Supp. 2d 235, 240–241 (D. Me. 2012) (where plaintiff accepted alternate employment fewer than six months after being laid off based on his belief that there was not likelihood of recall, the district court rejected plaintiff's argument that he experienced an employment termination based on his "reasonable' belief that the layoff would last longer than six months); *Reyes v. Greater Texas Finishing Corp.*, 19 F. Supp. 2d 717, 719 (W.D. Tex. 1998) (the district court found that 34 employees who were recalled to work within six months of layoff did not suffer an employment loss under the WARN Act).

(1) The Seventh Circuit's Analysis Is Consistent With The Second And Sixth Circuits' Analysis.

As an initial matter, there is no substantive or material difference between the approach Leeper urged below, that which the Seventh Circuit adopted, and that which the Second and Sixth Circuits have utilized. Furthermore, the differences in reasoning utilized by courts in other factual scenarios have not produced a "split" in decisional authority.

In *Martin v. AMR Services Corp.*, 877 F. Supp. 108 (E.D.N.Y. 1995)[4], unlike in the present case, the employer did *not* announce a temporary layoff; instead, the employer eliminated a department and notified workers they had been "declared surplus" pursuant to the employer's internal reduction in force ("RIF") regulations. *Id.* at 110–111. Shortly thereafter, the employer placed some employees in other jobs pursuant to its RIF regulations. *Id.* at 112. The district court found itself called upon to define the nature of the employer's actions in eliminating a department, declaring employees "surplus", and transferring them to new jobs. The district court found "[e]mployment of the … employees was essentially continuous. No disruption sufficient to constitute an 'employ[ment] loss' occurred. At most, these employees were at risk of being laid off, not terminated. Since they were immediately transferred there was almost no period that could be construed as a layoff." *Id.* at 114–115. Leeper places significant weight on the district court's

[4] aff'd sub nom., *Gonzalez v. AMR Servs. Corp.*, 68 F.3d 1529 (2d Cir. 1995).

"test" for distinguishing between layoffs and terminations "in situations such as AMR and its employees faced". Petition, 17-18 (quoting *Martin*, 877 F. Supp. at 114). Leeper's reliance on *Martin* to demonstrate a circuit split is misplaced.

First, *Martin* is factually distinct from the present case. *Martin* involved employee transfers pursuant to preexisting RIF regulations and did not involve an explicit announcement of a "temporary layoff" with an anticipated return to work date as occurred here. Second, the court in *Martin* actually did not hold the workers at issue experienced *either* a layoff *or* an "employment termination"; rather it held the employees were "at risk" of being laid off, and ultimately experienced no employment loss because their employment was "essentially continuous...." 877 F. Supp. at 114–115. Leeper therefore relies on *dicta* to demonstrate a purported "split" in decisional authority. Third, the *Martin* court employed a practical, effects-driven approach to determine whether an employment loss occurred. *Id.* at 113 (recognizing the legislative purpose underlying the WARN Act's notice requirement (i.e., opportunity for retraining or reemployment) "requires a practical view of the actual employment situation of workers"). Utilizing this approach, the district court decided employees placed in positions shortly after being declared surplus could not show an "employment loss" sufficient to trigger WARN's notice requirements. *Id.* at 117.

The Sixth Circuit's opinion in *Kildea v. Electro-Wire Prods., Inc, supra*, also does not illustrate a split from the Seventh Circuit's decision in the present case. As

discussed above, the Sixth Circuit treated individuals who had been placed on layoff as "affected employees" entitled to notice of the employer's permanent closure. 144 F.3d 405–406. *Kildea's* holding applied to this case would mean that, if Hamilton permanently ceased operations after February 6, 2016 and while employees were still laid off, it would be incumbent upon Hamilton to give a WARN notice of the shutdown not only to active employees but also those placed on layoff. Unlike the courts here, the *Kildea* court was not confronted with the issue of whether employees who returned to work fewer than six months after the employer announced a "temporary layoff" nevertheless experienced an employment loss under the WARN Act. In *Morton v. Vanderbilt Univ.,* 809 F.3d 294, 298 (6th Cir. 2016) the Sixth Circuit specifically distinguished the issue presented by *Kildea v. Electro-Wire Prods., Inc., supra*, noting that "[i]n Kildea, the issue was whether the employees who had been temporarily laid off were 'affected employees' and so entitled to notice under the WARN Act."[5]

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[5] *Morton*, *supra*, *Long v. Dunlop Sports. Group Ams., Inc.,* 506 F.3d 299 (4th Cir. 2007) and *Martin*, *supra*, are cited by Leeper to suggest interruption of pay and benefits might weigh in favor of a finding employees experienced a termination. Petition, 22, footnote 10. In *Morton*, the employer terminated one group of employees and then notified a second group of employees their jobs would be eliminated 60 days later. 809 F.3d 294 at 295. The second group of employees remained on paid leave until their termination date. The Sixth Circuit found the second group of employees did not experience a termination until the employer ceased pay and benefits. *Id.* at 298. In *Long, supra,* the employer ceased production without prior notice but continued to pay each employee for 60 days or until he or she accepted a position with the successor company. 506 F.3d at 300. The court affirmed summary

The Petition incorrectly states the Department of Labor's definition of "employee" is set forth at 20 C.F.R. § 639.3(a). Petition, 20. That regulation sets forth the definition of "employer" and identifies types of employees who are "counted" for the purposes of determining the coverage thresholds for the definition of employer; it does not suggest a test for distinguishing between a termination and a layoff. 20 CFR § 639.3(a)(ii) states that "[w]orkers on temporary layoff or on leave who have a reasonable expectation of recall are counted as employees[]" for purposes of coverage and for identifying who are "affected employees" entitled to a WARN notice prior to a plant closing or mass layoff. Neither this regulation nor *Kildea* suggests individuals who have been laid off pursuant to an announcement of "temporary layoff" with an anticipated return to work date may objectively and reasonably view their separation as a permanent termination.

The other cases cited at pages 19-21 of the Petition do nothing to illustrate a circuit split from the Seventh Circuit in the present case. None of these cases deals with the central issue of whether employees who return to work fewer than six months after the employer

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dismissal of the WARN Act claims of employees hired by a successor company, rejecting the argument the employees had been terminated while they continued to receive pay and benefits. *Id.* at 302. None of these decisions states or suggests the WARN Act imposes an obligation upon employers to pay wages and benefits during a temporary layoff.

announces a "temporary layoff" experience an employment loss under the WARN Act.[6]

Further, neither *Collins v. Gee W. Seattle LLC*, 631 F.3d 1001 (9th Cir. 2011) nor *Burns v. Stone Forest Indus.*, 147 F.3d 1182 (9th Cir. 1998), cited at page 23 of the Petition, addresses the issues presented in this case. *Collins, supra*, involves employees who left employment in the face of an imminent company closure (i.e., permanent shut-down in advance of a sale). *Id.* at 1002. There, the Ninth Circuit considered whether the employees' departure following the announcement of the closure was "voluntary". *Id.* at 1007–1008. The sole issue in *Burns, supra*, involved how many days employees were entitled to be paid when their employer shut down operations and paid

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[6] In *Bledsoe v. Emery Worldwide Airlines, Inc.*, 635 F.3d 836 (6th Cir. 2011), the district court concluded during a bench trial the employees had no reasonable expectation of recall based on facts including a series of evolving letters to laid-off employees. The district court found, and the plaintiffs conceded, the initial layoff (although no guarantee of recall) did not constitute an employment loss. *Id.* at 839. In *Damron v. Rob Fork Mining Corp.*, 739 F. Supp. 341 (E.D. Ky. 1990), the district court rejected plaintiffs' arguments that employees who had been laid off for over ten years had a reasonable expectation of recall for the purpose of meeting the WARN Act threshold. *Id.* at 345. *Kalwaytis v. Preferred Meal Sys.*, 78 F.3d 117 (3d Cir. 1996) involved the proper calculation of damages where the employer failed to give seasonal workers notice of a permanent layoff. *Marques v. Telles Ranch*, 131 F.3d 1331(9th Cir. 1997) involved whether the employer gave a timely WARN notice to seasonal workers. Neither *NLRB v. Seawin, Inc.*, 248 F.3d 551 (6th Cir. 2001) nor *Kustom Electronics, Inc. v. NLRB*, 590 F.2d 817 (10th Cir. 1978) involves claims brought under the WARN Act.

them for 61 days after giving the notice. *Id.* at 1182–1183.

(2) The Variation Between Analyses Utilized By The Seventh Circuit In This Case and The Eighth Circuit In *Rifkin* Does Not Demonstrate a "Circuit Split".

Although the Seventh Circuit utilized different reasoning in this case from that employed by the Eighth Circuit in *Rifkin*, *supra*, the difference does not amount to split. First, it is a fallacy to say the Eighth Circuit relied exclusively on a "retrospective" analysis to reach its conclusion. The *Rifkin* court considered subsequent rehiring of employees, but also observed the announcement of a layoff "left open the possibility of a rehire and thus weighs against classifying [the] situation as an employment termination." 78 F.3d at 1282. Second, unlike the present case where Hamilton explicitly announced a "temporary layoff" with an anticipated date of return to work, the *Rifkin* case involved an employer that informed workers the layoff was "expected to be permanent"; therefore, the Eighth Circuit considered the actuality of the situation rather than relying exclusively on the employer's announcement. Finally, the result reached by the Seventh Circuit below and that in *Rifkin* is the same: employees who return to work within six months of an announced layoff do not experience an "employment loss" under the WARN Act.

C. The Court's Intervention is Not Necessary.

Leeper argues the Court's intervention is necessary to "unify" federal labor law, incorrectly asserting that employers are subject to different applications of the WARN Act depending on where their employees are located. Leeper has failed to identify a single decision from any federal circuit or district, however, in which the court has rendered a decision opposite from that rendered below when presented with similar facts (i.e., employer announced a "temporary layoff" with an expected return to work date, and employees returned to work within six months). This failure fatally undermines Leeper's assertion the Court's intervention is needed in order to unify federal labor law.

II. THE SEVENTH CIRCUIT'S DECISION IS CORRECT AND DEMONSTRATES NO COMPELLING REASON FOR INTERVENTION BY THIS COURT.

A. The Seventh Circuit's Decision That Returning Employees Did Not Experience an "Employment Termination" Is Fully Supported.

Leeper incorrectly asserts the Seventh Circuit, in concluding Hamilton implemented a "layoff" instead of an "employment termination", considered only the written notice and focused primarily on one phrase in the notice ("you may return"). Petition, 24, 33. This is an artificially narrow construction of the Seventh Circuit's opinion.

As an initial matter, it bears emphasis that the Seventh Circuit adopted the analytical approach urged

by Leeper, focusing its inquiry on "an objective analysis of the employee's dismissal notice, not a hindsight-informed count of how many employees returned within a six-month period." App. 8. Using this approach, the Seventh Circuit observed, quite correctly, that: **(1)** the "notice referred to the employment action as a 'temporary layoff'"; **(2)** the notice "defined a precise 'layoff period'"; **(3)** the notice "instructed employers to *return* - not *reapply* to return – once that period ended: 'On August 1, 2016, you may return to your at-will employment with Hamilton County Coal.'"; and **(4)** "no language in either the notice or the Frequently Asked Questions shows that Leeper and his coworkers were permanently fired." App. 10-11. The Seventh Circuit's conclusion that Hamilton announced a "temporary cessation", App. 10, of employment is fully supported by the record.

Leeper's quibble with the Seventh Circuit's construction of the word "may" is incorrect and, in any event, does not justify intervention by the Court. The definition of "may" includes to be "permitted" and to be "a possibility". Black's Law Dictionary (8th ed. 2004). The term also is "used to indicate a possibility or probability" and is "sometimes used interchangeably with *can*". https://www.merriam-webster.com/dictionary/may (last visited February 25, 2020). Read in context with the notice which announced a "temporary layoff" of a specified duration, the use of the word "may" in stating the return to work date does not convert the Temporary Layoff Notice into a termination notice.

Furthermore, it is not accurate to claim the Seventh Circuit considered only the written notice. The

Seventh Circuit opinion reflects, for instance, consideration of the FAQ, App. 3, 11, which communication was provided to recipients in the context of an explicit "temporary layoff" announcement. As mentioned above, the FAQ continued the employment relationship insofar as recipients were informed their family members remained eligible for the company scholarship program. App. 54. The decision below is further supported by undisputed evidence that, during the meeting in which employees received the Temporary Layoff Notice, Hamilton took the additional step of collecting contact information from employees for the purpose of calling them back to work. Supp. App. A.

The WARN Act does not require employers to continue wages and benefits[7] during a temporary layoff, which involves a temporary "cessation" of the employment relationship. Accordingly, neither the fact that employees experienced a temporary cessation of pay and benefits nor the set of explanations in the "Frequently Asked Questions" packet provided to Temporary Layoff Notice recipients converts the temporary layoff into a termination. Furthermore, the WARN Act does not require, as Leeper suggests, a guarantee of recall. App. 34.

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[7] Leeper's assertion that benefits afforded to Hamilton employees included "approved unpaid leave" with no interruption of other benefits mischaracterizes the record. Petition, 27. The undisputed record demonstrates that Hamilton's Benefit Plans continued coverage during "approved leave" in certain enumerated situations that did not include a temporary layoff (i.e., family medical leave, military leave, hospitalization or pregnancy disability, disability and death). (ECF 110).

Oddly, despite his argument that courts should utilize a prospective analysis and ignore events occurring after a temporary layoff notice, Leeper nevertheless suggests the Seventh Circuit should have given weight to certain post-Temporary Layoff Notice events (i.e., suspension of 401(k) loan repayments and recoupment of advance payments[8]). In this regard, the result reached by the Seventh Circuit is further supported by evidence in the record that was afforded no weight, including the fact that Hamilton began returning employees to work within mere days of the layoff, App. 16, and preserved returning employees' service credit and vesting under the retirement benefit policy. App. 27.

The record fails to demonstrate, as argued by Leeper, that the Seventh Circuit inappropriately weighed conflicting evidence or otherwise misapplied the standard applicable to summary judgment.[9]

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[8] Certain employees accepted advance payments upon becoming employed by Hamilton. (ECF 136-3, Page #4078). The FAQ does not state that Hamilton would recoup $194,000 of advance payments as mentioned several times in the Petition. *E.g.,* Petition, 27. This assertion derives from evidence related to events subsequent to the delivery of the Temporary Layoff Notice.

[9] In *Tolan v. Cotton*, 572 U.S. 650, 657–658 (2014), involving an excessive force claim brought pursuant to the Fourth Amendment, this Court found that the lower court failed to credit evidence that directly contradicted certain of its key factual findings. No similar facts exist here. *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) involved a direct review of a gerrymandering case brought pursuant to the Equal Protection Clause wherein this Court found the district court erroneously resolved a disputed fact of motivation at the summary judgment stage. *Life Plans, Inc. v. Sec. Life of Denver Ins. Co.*, 800 F.3d 343 (7th Cir. 2015), a split decision by

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); *Ellis v. DHL Express, Inc. (USA)*, 633 F.3d 522, 525–528 (7th Cir. 2011) (summary dismissal of plaintiffs' WARN Act claims held appropriate where workers who signed severance agreements were excluded from employees counted for purpose of determining whether the threshold was met; rejecting plaintiffs' argument that uncertainty of future opportunity rendered the severance agreements involuntary).

B. The Seventh Circuit Correctly Held That Workers Who Returned To Work Fewer Than Six Months After The Temporary Layoff Did Not Experience An "Employment Loss" Under 29 U.S.C. § 2101(a)(6)(C).

The WARN Act defines "employment loss" in three distinct and separate ways: "(A) an employment termination, other than discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction of hours of work of more than 50 percent during each month of any 6-month period." 29 U.S.C. § 2101(a)(6). The Seventh Circuit correctly rejected Leeper's construction of the terms "layoff" and "reduction in hours" as interchangeable and coextensive.

The Petition mischaracterizes the Seventh Circuit's opinion regarding his alternate theory that employees experienced a category (C) "reduction of hours of work"

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the Seventh Circuit regarding the ambiguity of an agreement dealing with brokerage and insurance of life insurance, also is inapposite.

employment loss. The Seventh Circuit opinion actually does not state "'a reduction of hours of work of more than 50 percent …' does not include months in which employees experience a reduction of 100 percent." Petition, 37 (citing App. 12-13). Instead, the Seventh Circuit and the district court correctly recognized Leeper's construction of section 2101(a)(6)(C) would render subsection (B) superfluous because "every 'layoff exceeding 6 months' would also constitute a six-month 'reduction of hours of work.'" App. 12; App 29. Leeper's urged construction of the statute violates the long-established rule of statutory construction that courts must "accord words and phrases their ordinary and natural meaning and avoid rendering them meaningless, redundant, or superfluous …." *In re Merchants Grain ex rel. Mahern*, 93 F.3d 1347, 1353–54 (7th Cir. 1996).

In addition, the Seventh Circuit and the district court correctly observed that Leeper's construction would mean that every temporary layoff would become a category (C) "reduction in hours of work" employment loss after five and a half months, squarely conflicting with section 2102(c) of the WARN Act, which expressly provides that some layoffs in excess of six months do not constitute an employment loss. App. 12; App 30, n.10. Leeper has not reconciled and cannot reconcile his proposed construction of section 2101(a)(6)(C) with section 2102(c). Examination of 29 U.S.C. § 2101(a)(6) in the "broader context of the statute as a whole", *United States v. Misc. Firearms*, 376 F.3d 709, 712 (7th Cir. 2004), confirms the conclusion of the Seventh Circuit and the district court is correct. By excluding certain layoffs lasting longer than six months from

those that may be considered an "employment loss", Congress has made explicit its intention that a layoff lasting six months or fewer does not, by definition, fit within the definition of "employment loss".

Finally, Leeper is unable to identify any case holding that a "layoff" and "reduction in hours" may be treated as interchangeable and coextensive under the WARN Act. Leeper's reliance on *Graphic*, *supra*, is misplaced, as the court in that case merely explained in *dicta* that employees can experience separate, successive employment losses, for example, where an employee who experienced a reduction in hours is "subsequently" laid off or terminated. 252 F.3d at 299. As the Seventh Circuit noted, *Graphic* "does not support Leeper's contention that the same employment action can satisfy both the 'layoff' and 'reduction in hours' categories." App. 13. Likewise, *Phason v. Meridian Rail Corp.*, 479 F.3d 527 (7th Cir. 2007), in which the employer announced the permanent closure of its operations and terminated all employees effective immediately, offers no support for Leeper's argument. In *Phason*, the Seventh Circuit rejected as irrelevant the defendant's argument that section 2101(a)(6)(C) was not satisfied because the plaintiffs literally demonstrated a termination under section 2101(a)(6)(A). That part of the opinion simply recognized that it did not matter whether plaintiffs could satisfy subsection (C) because the plaintiffs had suffered an "employment termination" under subsection (A). 479 F.3d at 529.

The absence of a single judicial authority supporting Leeper's alternative theory of liability under the

WARN Act demonstrates, again, the Petition fails to present a compelling reason supporting intervention by the Court.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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Counsel for Respondents

February 25, 2020

SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX

Contact Form as of February 5, 2016

Employee Information:

Name: Carl Leeper

Home Address: [redacted]

Phone Numbers: Home: [redacted] Cell:

Alternate Contact:

Name: Eula Leeper

Relationship: Wife

Address: [redacted]

Phone Numbers: Home: [redacted] Cell:

Signature: s/

Date: 2-5-16

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