No. ______

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On February 5, 2016, Hamilton County Coal, LLC ("HCC") notified 158 full-time employees, approximately 50 percent of its full-time workforce, that their employment was ending at midnight. A month later, Carl Leeper filed this class action seeking relief for HCC's failure to provide 60-days' written notice under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq*. ("WARN Act"). Over the next 6 months, HCC rehired 56 of the 158 affected workers at their prior wages, including 50 that HCC brought back on August 1, 2016, 5 months and 24 days after the February 5 notice. This case presents two important questions of federal law, the first of which has created a split among the circuits:

1. Whether courts should distinguish between "terminations" and "layoffs" under the WARN Act by applying an objective standard that examines the employees' reasonable expectation of recall at the time of the employment cessation, based on the employer's written and oral communications, policies and practices, industry standards, and other factors.

2. Whether "a reduction in hours of work of more than 50 percent during each month of any 6-month period" under the WARN Act includes months in which the employee suffers a 100 percent reduction in hours.

PARTIES TO THE PROCEEDINGS AND RELATED CASES

All parties to the proceedings are listed in the caption.

The proceedings in federal trial and appellate courts identified below are directly related to the above-captioned case in this Court.

Leeper v. Alliance Resource Partners, L.P., and Hamilton County Coal, LLC, No. 3:16-CV-250-NJR-DGW, U.S. District Court for the Southern District of Illinois. Judgment entered December 17, 2018.

Leeper v. Alliance Resource Partners, L.P., and Hamilton County Coal, LLC, No. 19-1109, U.S. Court of Appeals for the Seventh Circuit. Judgment entered September 26, 2019. Petition for panel rehearing and rehearing en banc denied on October 25, 2019.

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Carl Leeper respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS 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

The Seventh Circuit entered judgment on September 26, 2019, and denied a timely combined petition for panel rehearing and rehearing en banc on October 25, 2019. App. 38-39. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The appendix reproduces §§ 2101 and 2102 of the WARN Act (29 U.S.C.) and §§ 639.1 and 639.3 of the Code of Federal Regulations (20 C.F.R.). App. 40-44.

INTRODUCTION

The WARN Act requires 60-days' written notice to all affected employees when at least 33 percent of all full-time employees and at least 50 full-time employees at a single site of employment are expected to experience an "employment loss." 29 U.S.C. §§ 2101(a)(3), 2102(a). "'[E]mployment 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." *Id.* § 2101(a)(6).

This case asks a fundamental question: how are courts and employers to identify when an “employment loss” occurs?

The first question presented by this case has created a direct split between the Eighth Circuit on one hand and the Second, Sixth, and Seventh Circuits on the other regarding the proper analysis for determining whether an employment cessation constitutes a “termination” or a “layoff” under the WARN Act.

These circuits have adopted the Department of Labor’s guidance explaining that a “termination” is a permanent cessation of the employment relationship. But they differ on how courts and employers should determine whether a permanent cessation has occurred.

In the Eighth Circuit, a permanent cessation must be permanent in-fact. Therefore, courts and employers must perform a retrospective analysis that requires waiting 6 months to determine if a termination has occurred. In this analysis, it is immaterial if the employment cessation is reasonably expected to be permanent at the outset, and employees who are rehired within 6 months cannot experience a “termination.”

In the Second and Sixth Circuits, a permanent cessation occurs when, at the outset of the employment cessation, employees lack a reasonable expectation of recall. These circuits perform a prospective analysis of several factors to determine employees’ reasonable expectations at the time of the employment cessation, including the employer’s communications, whether

wages and benefits ceased, the employer's policies and practices, industry standards, and other factors.

Here, the Seventh Circuit expressly rejected the Eighth Circuit's retrospective approach and adopted a prospective, reasonable expectation of recall analysis to determine whether an employment cessation was permanent. But it split from the Second and Sixth Circuits on the analysis for determining the reasonable expectation of recall. Instead of adopting the multi-factor test used in those circuits, the Seventh Circuit created an analysis based solely on the employer's written communication, without considering the employer's policies and practices, oral communications by management, industry standards, or any of the other factors considered by the Second and Sixth Circuits.

Today's frequent plant closings and reductions in force[1] call for clarity regarding the WARN Act—particularly for employers with employees stretching

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[1] *See, e.g.*, Bloomberg Finance, LP, and the Business Council for Sustainable Energy, 2019 Sustainable Energy in American Factbook, p. 1, *available at* https://www.bcse.org/wp-content/uploads/2019-Sustainable-Energy-in-America-Factbook.pdf (last visited January 21, 2020) ("Coal's role in U.S. energy waned again in 2018, dropping to only 27% of the power generation mix—the lowest share in the post-war era."); *id.* at 19 (noting the record high number of coal plant retirements in 2015 and the 19% shrinking of the coal fleet since 2011). *See also* Business Insider, More than 3,800 Stores Will Close in 2018 – Here's The Full List, *available at* https://www.businessinsider.com/stores-closing-in-2018-2017-12/ (last visited January 21, 2020).

across multiple circuits.[2] The Seventh Circuit's deepening of the circuit split will spawn inconsistency and confusion, costing employers, employees, and courts alike. Neither employees' entitlements nor employers' obligations under the WARN Act should vary based on geography, and the circuit split will leave many employers guessing about how to determine when an employment cessation constitutes an "employment loss" under the WARN Act.

The Court should grant review to resolve this circuit split and allow for uniform application of this federal law. The Second/Sixth Circuits' prospective analysis that looks beyond an employer's terminology to assess the reasonable likelihood that workers will be recalled aligns with the WARN Act's plain language, purposes, and implementing regulations, without improperly enabling employers to manipulate terminology to circumvent a federal law meant to protect workers.

The Court's intervention is further required to remedy the Seventh Circuit's legal errors. First, the Seventh Circuit incorrectly assumed the role of factfinder and selected among competing reasonable interpretations of the employer's written document. In so doing, the court, *inter alia*, ignored the plain language of the employer's notice (including the 21 instances in which the notice used the term "terminated" or "termination"), improperly found the

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[2] *See, e.g.*, Alliance Resource Partners, L.P., website, "Mines & Facilities," http://www.arlp.com/CreditRatings ("At December 31, 2018, we had approximately 1.7 billion tons of coal reserves in Illinois, Indiana, Kentucky, Maryland, Pennsylvania and West Virginia.") (last visited January 21, 2020).

phrase "you may return" to mean "you will return," and disregarded the employer's own interpretation of its notice as a "termination of employment" that did not guarantee a return to employment.

Second, the Seventh Circuit erred with respect to the second question presented. The Seventh Circuit disregarded the WARN Act's unambiguous plain language when it held that "a reduction in hours of work of more than 50 percent during each month of any 6-month period" under § 2101(a)(6)(C) does not include months in which the employee suffers a 100 percent reduction in hours. *Cf. BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 187 n.8 (2004) ("'Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.'") (quoting *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 399 (1805)).

This Court should grant certiorari and reverse the decision below by: (1) adopting the Second and Sixth Circuits' prospective, multi-factor analysis and remanding the case to the District Court for factual determination of the employees' reasonable expectation of recall; and (2) holding that "a reduction in hours of work of more than 50 percent during each month of any 6-month period" under § 2101(a)(6)(C) includes months in which employees experience a 100 percent reduction in hours.

STATEMENT OF THE CASE

1. HCC operates a coal mine in Illinois. App. 2. Between 2007 and April of 2016, power sector coal demand fell in nearly every state in the United States. Norris Dep. 131:4-16, ECF No. 138-2.[3] As HCC explained, by 2016, the coal industry had been devastated: "The well-documented devastation of America's coal industry has led to three of the top five American coal producers, along with dozens of smaller coal producers, filing for bankruptcy in the past year alone, and has caused literally thousands of coal miners to lose their jobs." Defs.' Suppl. Mem. Supp. Defs.' Mot. Dismiss 1, n.2, ECF No. 30.

In this economy, HCC experienced a drop in demand and was unable to collect revenues from customers whose business it had expected to secure. Norris Dep. 134:15–135:21, ECF No. 82-2; French Dep. 30:21-25–31:1-8, ECF No. 117-3. As a result, Respondents decided HCC would have to reduce production at the HCC mine. Pl.'s Mot. Certify Class 9-10 (¶¶ 30-36) 14-15 (¶¶ 43-49), ECF No. 82; Norris Dep. 101:11-22, ECF No. 138-2 ("Our opportunities to sell the coal reduced to the point where as of—in January of 2016 we had over 800,000 tons in inventory. So it was becoming an issue where we couldn't hold any more tons in inventory, so we had to either reduce—we had to reduce production.").

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

On February 5, 2016, in the midst of this "devastation of America's coal industry," HCC hand-delivered to 158 of its 315 full-time employees a letter and 27 "Frequently Asked Questions." App. 2, 25, 45-56. The letter stated that "due to operational considerations," HCC was placing the employees on "temporary layoff for the period commencing on February 6, 2016 and ending on August 1, 2016," and provided that "[o]n August 1, 2016, you may return to your at-will employment with [HCC]." *Id.* at 45.

Although the letter used the term "temporary layoff" 2 additional times, the letter also stated that "effective February 6, 2016, you will not be employed by HCC and you are free to pursue other endeavors," and the first FAQ accompanying the letter explained that the separation was a "termination of employment." *Id.* at 45, 47.

The letter and FAQs also invoked termination policies of HCC, explaining: workers would receive their "final paycheck" and "separation benefits"; HCC would immediately pay out employees' unused vacation days; health care, medical, dental, vision, flex spending, and prescription drug benefits would end effective February 6, 2016, which HCC described as "your employment termination date"; workers would immediately stop receiving short-term disability, long-term disability, life, additional life, and accidental death and dismemberment insurance coverage and payments; 401(k) loan repayments would not be suspended; and HCC would withhold from workers' final paychecks over $194,000 to recover advances, which, according to the "Advance Agreements," was

only to occur "upon the end of employment"—more specifically, when "your employment ends with Alliance by either retirement or termination of employment (voluntary or involuntary)." App. 45-58.

The FAQs used the terms "terminated" or "termination" 21 times. *Id.* at 47-56. The letter and FAQs contained no details about policies or procedures for returning to work. *Id.* at 45-56.[4]

Leeper testified that when HCC distributed the notice, HCC's general manager told the workers they would have to reapply and interview for any available positions. Leeper Dep. 93:2-25, ECF No. 115-1 (at the February 5 meeting, "[a worker] asked if we get a callback, does everything stay the same, and that's when we were told, no, you have to reapply and be interviewed for the positions that's available"). HCC's 30(b)(6) corporate representative similarly explained that the notice did not contain a guarantee of reemployment:

> Q. Okay. The next sentence [of the notice] says, "On August 1, 2016, you may return to your at-will employment with Hamilton County Coal." And you use the word "may return" there, correct?
>
> A. Correct.
>
> Q. Is this a guarantee that you will return?

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[4] The letter and FAQs (App. 45-56) are collectively the "notice."

A. I do not read it as a guarantee.

Norris Dep. 184:21-185:4, ECF No. 121-1.

HCC had no history of layoffs and recalls, and the notice, drafted by HCC and its attorneys, did not invoke any of HCC's policies related to temporary periods of unemployment, such as its written policy of continuing health and disability insurance benefits and suspending 401(k) loan repayments during periods of approved unpaid leave. Norris Dep. 126:14-18, 183:17-19, ECF No. 82-2; Appellee's Brief 10, Seventh Circuit ECF No. 20.

After delivering the notice, HCC invoked other permanent termination policies on February 6, such as releasing the workers from their non-compete contracts, which only applied during their "continued employment"; releasing them from non-disclosure provisions, which only applied "during my employment"; and making them return uniforms and equipment, which HCC required "upon the termination of [their] employment with Company." Norris Dep. 216:10-15, 19-22, ECF No. 138-2; Equipment Return Agreement, ECF No. 138-7; Conflicts of Interest Ack., ECF No. 138-8; Pl.'s Mot. Certify Class 21 (¶¶ 66-67), ECF No. 82.

2. Leeper filed this class action in the United States District Court for the Southern District of Illinois on March 8, 2016, a month after receiving the notice. He alleged that Respondents failed to provide 60-days' written notice of a "mass layoff" in violation of the WARN Act, § 2102(a)(1). A "mass layoff" is a reduction in force that "results in an employment loss

at the single site of employment during any 30-day period for . . . at least 33 percent of the [full-time] employees . . . ; and at least 50 [full-time] employees." 29 U.S.C. § 2101(a)(3)(B). An employment loss is "(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." *Id.* § 2101(a)(6). Jurisdiction was proper pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 2104(a)(5).

Within 6 months of February 6, 2016, HCC rehired 56 of the 158 full-time notice recipients at their prior wages, 50 of whom were rehired on August 1, 2016. App. 17; ECF No. 154-5. Leeper was not rehired.

On cross-motions for summary judgment, the district court adopted a hindsight-based analysis used by the Eighth Circuit. It held that, *because* 56 workers were rehired within 6 months at their prior wages, the event was a "layoff." App. 27-28. The court found § 2101(a)(6)(C) inapplicable once it categorized the event as a "layoff." *Id.* at 28-34. Excluding the 56 workers meant only about 32 percent of the workforce experienced an employment loss, so the WARN Act's 33 percent threshold was not met. *Id.* at 28. The court granted summary judgment for Respondents.

On appeal, Leeper urged the Seventh Circuit to reject the Eighth Circuit's hindsight-based reasoning and adopt the prospective, reasonable expectation of recall test consistent with decisions in the Second and Sixth Circuits and the federal regulations implementing the WARN Act. The Seventh Circuit

rejected the Eighth Circuit's retrospective analysis, which it found "makes § 2101(a)(6)(A) duplicative," "effectively appends a six-month waiting period to § 2101(a)(6)(A) that appears nowhere in the text," and "disregards our decision in *Phason v. Meridian Rail Corp.*, 479 F.3d 527 (7th Cir. 2007). . . . that '[a]n 'employment loss' occurs when *any one* of the subsections applies.'" App. 7-8 (quoting *Phason*, 479 F.3d at 529).

The Seventh Circuit stated that "[t]he relevant distinction between a layoff and an employment termination is whether that termination was expected to be temporary or permanent." App. 11; *see also id.* at 6-7 ("[Leeper] proposes a test based on an employee's objective expectation of recall. If a reasonable employee would interpret the firing as permanent, then Leeper would say that a § 2101(a)(6)(A) employment termination occurred. . . . Leeper has the better argument.").

While the Seventh Circuit adopted a prospective, reasonable expectation approach, it disregarded the factors that the Second and Sixth Circuits consider in assessing the reasonable expectations of recall. Instead, the Seventh Circuit "return[ed] to February 2016" and only asked: "What did Hamilton *communicate* to Leeper and his coworkers: a temporary suspension or permanent end to their employment?" *Id.* at 10 (emphasis added). The Seventh Circuit only considered the *written* communications by HCC, ultimately finding that "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." *Id.* at 11.

Finally, the Seventh Circuit found that "a reduction in hours of work of more than 50 percent during each month of any 6-month period" (§ 2101(a)(6)(C)) does not include months in which the employee suffers a 100 percent reduction in hours. *Id.* at 12. Thus, the Seventh Circuit concluded "§ 2101(a)(6)(C) is irrelevant." *Id.* at 13.

Accordingly, although the district court and the Seventh Circuit applied different analyses, the Seventh Circuit affirmed the summary judgment in favor of Respondent. The Seventh Circuit denied Leeper's combined petition for panel rehearing and rehearing en banc on October 25, 2019.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE SPLIT ON THE FIRST QUESTION PRESENTED

The WARN Act requires 60-days' written notice in the event of a "mass layoff." 29 U.S.C. § 2102(a)(1). A "mass layoff" is a reduction in force that "results in an employment loss at the single site of employment during any 30-day period for . . . at least 33 percent of the [full-time] employees . . . ; and at least 50 [full-time] employees." *Id.* § 2101(a)(3)(B). An employment loss includes "an employment termination, other than a discharge for cause, voluntary departure, or retirement" and "a layoff exceeding 6 months." *Id.* § 2101(a)(6).

The first question presented requires answering the following question: How do courts, employers and employees distinguish between a "termination" and "layoff" under the WARN Act?

Department of Labor guidance explains 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 that relationship." Worker Adjustment and Retraining Notification, 54 Fed. Reg. 16,042, 16,047 (Apr. 20, 1989). The Seventh Circuit adopted this vague framework, but noted that the distinction between a permanent and temporary cessation raises the additional question of how to analyze whether the cessation is permanent or temporary:

> This distinction raises a follow-up question: How do we evaluate whether a cessation of the employment relationship is permanent or temporary? It's always possible for a worker to be rehired in the future, so one can never know for sure whether a termination is permanent. Do we evaluate permanence from the ex-ante perspective of a worker who just received a dismissal notice, from the ex-post perspective of a court presented with evidence that workers were rehired, or something in between?

App. 6.

The Second, Sixth, and Eighth Circuits similarly hold that a "termination" occurs when there is a permanent cessation of the employment relationship.

But they differ on the proper analysis for determining whether a permanent cessation has occurred, summarized as follows:

1. **<u>Eighth Circuit: whether the employee is rehired within six months of the employment cessation.</u>** The Eighth Circuit holds that a permanent cessation of employment must be permanent in-fact, regardless of whether it is "expected to be permanent" at the outset. Thus, even if employees are told that they are permanently let-go, if they are rehired within 6 months, they cannot be defined as terminated. This retrospective analysis requires waiting 6 months to determine whether the employees have been terminated.

2. **<u>Second and Sixth Circuits: whether the employees have a reasonable expectation of recall at the time of the employment cessation based on several factors.</u>** The Second and Sixth Circuits hold that a permanent cessation of employment occurs when, at the time of the employment cessation, employees lack a reasonable expectation of recall. These circuits apply an objective standard that examines the employees' reasonable expectation of recall at the time of the employment cessation, based on the employer's written and oral communications, the employer's policies and practices, whether wages and benefits ceased, industry standards, and other factors. If there is not a reasonable expectation that employees will be recalled, the employees

> experience an immediate employment termination, regardless of subsequent rehiring.

The Seventh Circuit expressly rejected the Eighth Circuit's ex-post analysis and adopted an ex-ante analysis based on the reasonable expectations of recall at the time of the employment cessation. But the Seventh Circuit split with the Second and Sixth Circuits on how to analyze the reasonable expectations of recall. The Seventh Circuit did not adopt the multi-factor test used by those circuits to assess the reasonable expectations of recall. Instead, the Seventh Circuit assessed the reasonable expectation of recall based solely on the written notice provided by the employer, without considering the employer's oral communications, policies and practices, cessation of wages and benefits, or interpretation of its own written documents; industry standards; or the other facts existing at the time of the employment cessation.

The inconsistent approaches of these circuits create different standards based solely on geography, making compliance with the WARN Act difficult and uncertain for multi-state employers. The Court should grant review to restore uniformity to federal labor law on this question of exceptional importance.

A. The Eighth Circuit: A Retrospective Analysis Based on Whether the Employees are Rehired within 6 Months

In *Rifkin v. McDonnell Douglas Corp.*, the employer gave employees a "layoff notice" explaining that the layoff was "expected to be permanent." 78 F.3d 1277, 1282 (8th Cir. 1996). Some recipients of the notice were

rehired within six months. *Id.* at 1279. The Eighth Circuit held the rehired workers did not suffer a "termination": "A common sense reading of the statute indicates 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 Eighth Circuit's holding rested in part on the court's view of the WARN Act's purpose: "to ensure adequate opportunities (by way of notice of imminent employment loss) for retraining and/or reemployment." *Id.* (quoting *Moore v. Warehouse Club, Inc.*, 992 F.2d 27, 30 (3d Cir. 1993)). Because the rehired workers had "no need for retraining or alternative jobs," they did not suffer an "employment loss" under the Act. *Id.*[5]

Accordingly, the Eighth Circuit approach requires answering the first question presented in the negative.

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[5] District courts in the First, Fourth, and Tenth Circuits have adopted the Eighth Circuit's test. *See, e.g.*, *Nelson v. Formed Fiber Techs., Inc.*, 856 F. Supp. 2d 235, 240 (D. Me. 2012) ("[E]mployees who choose early retirement or who are rehired within six months of a layoff do not fall within the WARN Act's purpose because there is no need for retraining or alternative jobs.") (quoting *Rifkin*, 78 F.3d at 1282-83); *Smith v. Consolidation Coal Co.*, 948 F. Supp. 583, 585-86 (W.D. Va. 1996) (rejecting plaintiffs' argument that employees experienced an employment loss based on their reasonable expectation that the layoff was expected to last longer than six months); *Kephart v. Data Sys. Int'l, Inc.*, 243 F. Supp. 2d 1205, 1224 (D. Kan. 2003) ("An employee who is laid off and rehired within six months does not fall within the purpose of the WARN Act . . . .").

B. The Second/Sixth Circuit: A Prospective Analysis of the Objective Reasonable Expectations [or Likelihood] of Recall Based on Factors in Addition to the Employer's Written Notice

The Second and Sixth Circuits distinguish between a permanent "termination" and a temporary "layoff" under the WARN Act by determining whether employees would reasonably expect to be recalled. If a reasonable expectation of recall exists, the employment cessation is temporary and not a termination. These circuits determine the employees' reasonable expectations using a prospective standard that considers factors beyond the employer's written communications to affected workers.

In *Martin v. AMR Servs. Corp.*, 877 F. Supp. 108 (E.D.N.Y. 1995)[6], the employer notified 90 employees that they had been "declared surplus," a term described in the employer's internal reduction in force regulations. *Id.* at 111, 116. The notice provided that employees would be paid through Friday, June 4, 1993. *Id.* at 111. The employer immediately placed 18 of the employees in equivalent positions on either May 29, June 5, or June 7, 1993. *Id.* at 112.

The court explained that, to determine whether the 18 workers experienced a termination or layoff, it had to conduct an objective evaluation of the company's

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[6] *aff'd sub nom., Gonzalez v. AMR Servs. Corp.*, 68 F.3d 1529, 1531 (2d Cir. 1995) (affirming summary judgment "for the reasons stated in the district court's opinion").

policies and the reasonable likelihood that employment would continue:

> In distinguishing between lay offs and terminations for purposes of calculating employment loss under WARN in situations such as AMR and its employees faced, what is required is not a finding respecting each employee's subjective belief regarding his or her future with the company, but an objective evaluation of 1) whether any existing lay off or reduction in force regulation [i.e., company policy] was properly invoked; and 2) whether the lay off and transfer provisions of the regulations as applied offered a reasonable likelihood that employment would continue.

Id. at 114.

In conducting this analysis, the court examined several factors in addition to the employer's notification to employees about the employment cessation, holding that these 18 employees were not terminated because:

(1) the employer invoked its preexisting layoff policy which allowed employees to "retain[] recall rights to position(s) . . . for two years";

(2) the employees were immediately placed in other jobs within the same entity;

(3) the employees did not lose pay or time on the job; and

(4) the employees retained all employee benefits, including accrued vacation time.

Id. at 115-117.

The Sixth Circuit applies a similar objective "reasonable expectation of recall" standard to distinguish between permanent terminations and temporary layoffs. *See Kildea v. Electro-Wire Prods., Inc.*, 144 F.3d 400 (6th Cir. 1998). This reasonable expectation standard does not involve proof of the actual belief of employees:

> The Court emphasizes that the question is not whether the employees in the case at hand believed they had a fairly good chance of being recalled. And correspondingly, the employer is not required to determine which laidoff employees "truly believed" they would be recalled. Rather, the standard is whether a "reasonable employee," in the same or similar circumstances as the employees involved in the case at hand, would be expected to be recalled.

Kildea, 144 F.3d at 406.

In conducting its analysis, the Sixth Circuit "consider[s] several criteria, or factors, which are comparable to the [sic] those used by the National Labor Relations Board in analyzing a similar issue: namely, (1) the past experience of the employer; (2) the employer's future plans; (3) the circumstances of the layoff; (4) the expected length of the layoff; and (5) industry practice." *Bledsoe v. Emery Worldwide Airlines, Inc.*, 635 F.3d 836, 848 (6th Cir. 2011). *See also id.* at 849 (citing *NLRB v. Seawin, Inc.*, 248 F.3d

551, 558 (6th Cir. 2001) (when the objective circumstances do not support a reasonable expectation of recall, equivocal statements suggesting a possibility of recall do not provide an adequate basis for finding a reasonable expectation of recall).[7]

The Sixth Circuit's approach is consistent with the Department of Labor's definition of "employee" for purposes of the WARN Act. *Kildea*, 144 F.3d at 407 (citing 20 C.F.R. § 639.3(a)).[8] *See also* 20 C.F.R. § 639.3(a) ("Workers on temporary layoff . . . who have a reasonable expectation of recall are counted as employees. . . . An employee has a 'reasonable expectation of recall' when he/she understands . . . that he/she *will be* recalled to the same or to a similar job.") (emphasis added); *Morton v. Vanderbilt Univ.*, 809 F.3d 294, 297 (6th Cir. 2016) (explaining that in the WARN Act, "Congress sought to protect employees' expectation

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[7] *See also Damron v. Rob Fork Mining Corp.*, 739 F. Supp. 341, 344 (E.D. Ky. 1990), *aff'd*, 945 F.2d 121 (6th Cir. 1991) ("[In the WARN Act regulations] the Secretary [of Labor] adopted a substantially similar analysis formulated under the National Labor Relations Act by the National Labor Relations Board's [NLRB] use of the 'reasonable expectation of recall' test. The NLRB case law interpretation of that term, used in determining voter eligibility for representation elections, could then be utilized for the WARN Act. 54 Fed. Reg. 16,044."); *Kustom Electronics, Inc. v. NLRB*, 590 F.2d 817, 822 (10th Cir. 1978) ("The question whether the employees here had a reasonable expectation at the time of the election that they would be reemployed was one of fact . . . .").

[8] Neither the WARN Act nor the Department of Labor's implementing regulations define the terms "employment termination" or "layoff."

of wages and benefits") (quoting *Long v. Dunlop Sports Grp. Ams. Inc.*, 506 F.3d 299, 303 (4th Cir. 2007)).

In performing its analysis, the Sixth Circuit examines the employees' reasonable expectation at the time the notice is received. *See, e.g.*, *Morton*, 809 F.3d at 298 ("The ultimate question here, however, is whether there has been a permanent cessation of the employment relationship *at the time of notice* . . . .") (emphasis added); *Mich. Reg'l Council of Carpenters v. Holcroft LLC*, 195 F. Supp. 2d 908, 915 (E.D. Mich. 2002) ("If upon receipt of this letter the employees no longer had reasonable expectations of being recalled, this date could be considered the date they suffered a [sic] employment losses because they would no longer be considered employees under 20 C.F.R. § 639.3(a)(1). It is the practical effect of the employment action, not the employer's characterization of it, that controls.").[9]

Using this approach, the Sixth Circuit in *Kildea* determined that employees experienced a layoff rather than a termination under the WARN Act because they had a "reasonable expectation of recall" based on industry practice, the company's history of layoff and recalls, and the circumstances of the layoff, including

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[9] The Third and Ninth Circuits also recognize that employees' reasonable expectations bear on when an "employment loss" occurs under the WARN Act. *See, e.g.*, *Kalwaytis v. Preferred Meal Sys.*, 78 F.3d 117, 121-22 (3d Cir. 1996), *cert. denied*, 519 U.S. 819; *Marques v. Telles Ranch*, 131 F.3d 1331, 1335 (9th Cir. 1997).

information communicated by management as to the likelihood of recall. 144 F.3d at 403 n.2, 406-07.[10]

This prospective approach makes sense because "[w]hile a termination immediately qualifies as an employment loss, 29 U.S.C. § 2101(a)(6)(A), a layoff must last more than six months to qualify." *United Paperworkers Int'l Union & its Local 340 v. Specialty Paperboard, Inc.*, 999 F.2d 51, 52 (2d Cir. 1993).

The Second/Sixth Circuit approach also preserves independent meanings for the termination and layoff prongs of "employment loss" because it does not require a termination to last for more than 6 months. *See Marques*, 131 F.3d at 1335 ("WARN makes a clear distinction between terminations and layoffs. We assume Congress intended that distinction to have some meaning, and no reason has been advanced why that distinction should be ignored. We, thus, decline to apply WARN's layoff provisions to a termination.").

Moreover, a prospective, objective standard that considers the likelihood that a worker will be recalled is consistent with the Act's definition of "affected employees," which "means employees who may

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[10] The Second, Sixth, and Fourth Circuits also find that whether wages and benefits cease is an important factor for determining whether a permanent cessation of employment has occurred. *See Morton*, 809 F.3d. at 298 (no cessation of employment "as long as the employees continued to be paid and accrue benefits"); *Martin*, 877 F. Supp. at 115-16; *see also Long*, 506 F.3d at 303 ("'[E]mployment termination' is a 'permanent cessation of the employment relationship.' When an employer commits to continue payment of wages and benefits to its employees, the employment relationship has not ended.") (citations omitted).

reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer." 29 U.S.C. § 2101(a)(5) (emphasis added). The analysis is also consistent with the WARN Act's requirement that "the affected employees must be determined prospectively in order for the employer to give proper notice." *Collins v. Gee W. Seattle LLC*, 631 F.3d 1001, 1005 (9th Cir. 2011).

Finally, "the WARN Act 'is a wage workers' equivalent of business interruption insurance [that] protects a worker from being told on payday that the plant is closing that afternoon and his stream of income is shut off, though he has to buy groceries for his family that weekend and make a mortgage payment the next week.'" *Id.* at 1007 (quoting *Burns v. Stone Forest Indus., Inc.*, 147 F.3d 1182, 1184 (9th Cir. 1998)). Examining the reasonable expectation of recall in light of the factors outlined above: (1) prevents an employer from subverting this purpose by manipulating terminology when notifying the employees of the work cessation; and (2) furthers the WARN Act's statutory intent that workers receive clear information about their futures by incentivizing employers to establish clear policies and procedures with respect to reductions in force. *See* 20 C.F.R. § 639.1(a); *Martin*, 877 F. Supp. at 116 ("Where there is a preexisting policy that mandates a 'lay off' with *clear criteria for recall*, the concern that an employer will manipulate employment terminology to circumvent federal requirements is minimized.") (emphasis added).

Accordingly, the Second/Sixth Circuit approach requires answering the first question presented in the affirmative.

C. The Seventh Circuit: A Prospective Analysis of the Objective Reasonable Expectations of Recall Based Solely on the Employer's Written Notice

The Seventh Circuit expressly rejected the Eighth Circuit approach but did not look beyond HCC's written communications in determining whether the notice recipients suffered employment termination.

The Seventh Circuit found that the Eighth Circuit's "retrospective analysis makes § 2101(a)(6)(A) duplicative. If a period of unemployment must exceed six months to constitute an employment termination, then that category is functionally indistinguishable from § 2101(a)(6)(B)." App. 7.

Moreover, the Seventh Circuit found that the Eighth Circuit's analysis "condemns prospective WARN Act plaintiffs to statutory limbo":

> An aggrieved worker might think that evidence of an unambiguous firing clearly satisfies § 2101(a)(6)(A). But under Hamilton's reasoning, this would-be plaintiff cannot know whether an employment termination occurred until the event *also* qualifies as a "layoff exceeding six months." That disregards our decision in *Phason v. Meridian Rail Corp.*, 479 F.3d 527 (7th Cir. 2007). There we explained that "[a]n 'employment loss' occurs when *any one* of the subsections applies." *Id.* at 529. Hamilton's

> proposed interpretation effectively appends a six-month waiting period to § 2101(a)(6)(A) that appears nowhere in the text.

App. 7-8.

The Seventh Circuit further explained that the Eighth Circuit's reliance on the statutory purpose missed the mark because it ignored the statute's text and structure:

> [T]he WARN Act doesn't define "employment loss" as an event requiring retraining or an alternative job. And "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice," so we cannot simply "assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam). As we've explained, the Act delineates distinct categories in its definition of "employment loss." *See Phason*, 479 F.3d at 529. A retrospective analysis that blurs the distinctions between the categories is inconsistent with the Act's text and structure.

App. 9.

The Seventh Circuit agreed with Leeper that a prospective, reasonable expectation test should be used to distinguish employment terminations from layoffs, explaining that "[t]he relevant distinction between a layoff and an employment termination is whether that termination was expected to be temporary or permanent." *Id.* at 11; *see also id.* at 10 ("[I]f an

objective observer would conclude that an employee suffered a permanent cessation of his employment relationship, a § 2101(a)(6)(A) 'employment termination' occurred. The employer's subsequent decision to offer the employee his old job cannot retroactively transform that once-permanent firing into a temporary layoff.").

But the Seventh Circuit diverged from the Second and Sixth Circuits' analysis of the reasonable expectations of recall. Instead of examining any of the factors set forth above to determine the reasonable expectation of recall, the Seventh Circuit considered only the written notice provided by the employer:

> We now return to February 2016, when Hamilton furnished 158 full-time workers with the layoff notice and Frequently Asked Questions documents. What did Hamilton communicate to Leeper and his coworkers: a temporary suspension or permanent end to their 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.
>
> . . . .

> . . . 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.

App. 10-11.

By considering only the employer's written communications, the Seventh Circuit split with the Second and Sixth Circuits, which consider additional factors to assess the likelihood/reasonable expectation of recall. Specifically, the Seventh Circuit did not analyze (and failed to allow a factfinder to weigh) the following evidence bearing on the likelihood that the notice recipients would be recalled:

- HCC's invocation of employment policies associated with termination and HCC's failure to invoke policies associated with a temporary employment cessation, such as its written policies of continuing benefits or suspending 401(k) loan repayments during times of approved unpaid leave;

- HCC's collection of over $194,000 from its employees' "final pay" to recover for advances, which, according to the "Advance Agreements," were not to be "recovered until your employment ends with Alliance by either retirement or termination of employment (voluntary or involuntary)";

- HCC's immediate cessation of wages and benefits to everyone who received the notice;

- HCC's payments to the notice recipients for accrued and unused vacation days;
- HCC's own testimony that the notice did not guarantee a return to work;
- the oral communications by HCC's general manager on the day the notice was delivered that any employees who were called back would have to reapply and interview for available positions;
- the absence of a history of layoffs and recalls by HCC;
- the decrease in demand affecting the coal industry generally and HCC specifically, and HCC's failure to secure expected business prior to February 2016; and
- the economic background at the time of the notice—what HCC called "[t]he well-documented devastation of America's coal industry [that] has led to three of the top five American coal producers, along with dozens of smaller coal producers, filing for bankruptcy in the past year alone, and has caused literally thousands of coal miners to lose their jobs."

See supra pp. 6-9.

Accordingly, the Seventh Circuit approach requires answering the first half of the first question presented in the affirmative and the second half in the negative.

D. The Court's Intervention is Needed to Unify Federal Labor Law

By expressly rejecting the Eighth Circuit approach and failing to fully adopt the Second/Sixth Circuit approach, the Seventh Circuit deepened the current circuit split, creating different standards for determining whether a termination or layoff has occurred across the country. Alliance Resource Partners, L.P., has mines in Kentucky, Pennsylvania, Maryland, West Virginia, Illinois, and Indiana. Thus, for such employers, the application of the WARN Act would differ depending on the circuit where their employees are located.[11]

As set forth above, the Second/Sixth Circuit's ex-ante objective assessment of the reasonable expectation of recall in light of the relevant factors squares with the WARN Act's plain language and purpose, the regulations issued under the WARN Act, and decisions under the National Labor Relations Act, while preventing employers from manipulating terminology to avoid the WARN Act's requirements. In contrast, the Eighth Circuit's ex-post approach disregards the WARN Act's text, purpose, regulations, and structure. The Seventh Circuit's failure to assess the likelihood of recall in light of factors other than HCC's written communications deepens an existing circuit split, clashes with well-developed labor law, and improperly

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[11] Similarly, an employer may be subject to conflicting standards for employees at one site, who may sue under WARN in any district "in which the employer transacts business." 29 U.S.C. § 2104(a)(5).

places all the power in employers' hands, giving employers greater opportunity to circumvent federal law meant to protect workers.

The federal labor laws should be applied uniformly, but here the circuits have been at odds since the 1990s. This split will not resolve itself. Only this Court's intervention will.

Accordingly, this Court should grant review, adopt the Second/Sixth Circuit approach, reverse the Seventh Circuit, and remand the case to the trier of fact.

II. THE SEVENTH CIRCUIT'S DECISION IS INCORRECT

A. The Seventh Circuit Incorrectly Acted as Factfinder on Review of Summary Judgment

The Seventh Circuit held that no reasonable factfinder could find a reasonable employee receiving HCC's notice would have considered the employment cessation permanent. App. 10-11 ("Hamilton announced a temporary cessation of his employment. . . . Nothing in the notice suggests a permanent cessation of the employment relationship."). The court below erred by not analyzing the reasonable expectations of recall in light of the factors described by the Second and Sixth Circuits.

Even if the proper analysis only involves the written notice, here, the Seventh Circuit erred in selecting one of two competing reasonable interpretations of HCC's written notice and granting summary judgment. The

choice between these two interpretations should have been left to the factfinder.

It is a "fundamental principle that 'at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Anderson v. City of Rockford*, 932 F.3d 494, 504 (7th Cir. 2019) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). Courts examine the record "in the light most favorable to [the nonmoving party] and constru[e] all reasonable inferences from the evidence in his favor." *Tolliver v. City of Chicago*, 820 F.3d 237, 241 (7th Cir. 2016) (citing *Anderson*, 477 U.S. at 255). Although "[t]he temptation is often difficult to resist" on summary judgment, courts "may not weigh the evidence, or decide which inferences to draw from the facts." *Kodish v. Oakbrook Terrace Fire Prot. Dist.*, 604 F.3d 490, 507 (7th Cir. 2010); *see also Anderson*, 477 U.S. at 255 ("[T]he drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . .").

Furthermore, where parties offer competing reasonable inferences from extrinsic evidence, the disputed meaning "is a question for the trier of fact not appropriately resolved through summary judgment." *Life Plans, Inc. v. Sec. Life of Denver Ins. Co.*, 800 F.3d 343, 352 (7th Cir. 2015) (citing Restatement (Second) of Contracts § 212(2) (1981) ("A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence *or on a choice among reasonable inferences to be drawn from extrinsic evidence*.") (emphasis added));

see also Hunt v. Cromartie, 526 U.S. 541, 553 (1999) ("Summary judgment . . . is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact."); *First Bank & Trust v. Firstar Info. Servs. Corp.,* 276 F.3d 317, 326 (7th Cir. 2001) ("[T]he contracts are susceptible to reasonable alternate interpretations thereby rendering them ambiguous. . . . [T]he trier of fact, not this court, must resolve the conflicting interpretations of the agreement.").

In *Life Plans*, a term in a document did "not otherwise convey an 'unmistakable meaning,' but rather [was] fairly susceptible to different interpretations." 800 F.3d at 353 (citation omitted). Thus, summary judgment was inappropriate because "[t]he meaning of this term 'can only be known through an appreciation of the context and circumstances in which [it was] used,' so we must consult extrinsic evidence." *Id.* (citation omitted).

Similarly, here, HCC did not "convey an unmistakable meaning" with its written communication to employees. Although the letter used the term "temporary layoff" 3 times, the accompanying FAQs used the terms "terminated" or "termination" 21 times. The notice referenced "final paychecks" and "separation benefits." It told recipients they "will not be employed" or receive any benefits. And it said HCC would recover over $194,000 for advances, which, according to HCC's own Advance Agreements, were not to be repaid "until your employment ends with Alliance by either retirement or termination of employment (voluntary or involuntary)." App. 45-57.

The Seventh Circuit focused primarily on one phrase in the notice: "you may return." *Id.* at 10. The court interpreted this phrase to mean HCC "invited [all the workers] to return" to employment on August 1, 2016. *Id.* at 3; *cf. id.* at 10 (the notice "instructed the workers to return").

The Seventh Circuit improperly rejected Leeper's reasonable alternative interpretation that the phrase "you may return" meant "you might return." This interpretation finds support in: (1) the ordinary meaning of "may"; (2) the Seventh Circuit's own precedent interpreting "may" as "might"; (3) the neighboring words; (4) the notice's silence on reemployment procedures; and (5) the context surrounding the notice's delivery. Leeper's reasonable alternative interpretation should have been presented to a factfinder.

First, the ordinary meaning of "may" includes "might." *See* Merriam Webster's Online Dictionary, https://www.merriam-webster.com/dictionary/may (last visited January 21, 2020) ("may" is "sometimes used where *might* would be expected"); Black's Law Dictionary 993 (7th ed. 1999).

Second, the Seventh Circuit's finding that the term "may" means "will" conflicts with its own explanation, just last year, that a reasonable person would not understand "may" to mean "will." *Dunbar v. Kohn Law Firm, S.C.,* 896 F.3d 762, 764, 765 (7th Cir. 2018) ("'[M]ay' does not mean 'will' . . . . An unsophisticated consumer would not understand the word 'may' to mean 'will.'"); *see also Taylor v. Cavalry Inv., L.L.C.*, 365 F.3d 572, 574, 575 (7th Cir. 2004) (in letter stating

account "may have or will accrue interest," creditors "didn't say they would [add interest], only that they might").[12]

Third, "a word is given more precise content by the neighboring words with which it is associated." *Yates v. United States*, 574 U.S. 528, 543 (2015) (quoting *United States v. Williams*, 553 U.S. 285, 294 (2008)). HCC's choice of "may" does not appear accidental, as HCC used "will" in the very next sentence, stating Leeper "will not be employed." *See Roberts v. Fed. Hous. Fin. Agency*, 889 F.3d 397, 403 (7th Cir. 2018) ("Congress's choice of 'may' in this part of HERA does not strike us as accidental.").

Moreover, HCC's selection of the term "at-will" employment in the same sentence emphasizes that HCC was not guaranteeing a return to employment. *See Europlast, Ltd. v. Oak Switch Sys.*, 10 F.3d 1266, 1274 (7th Cir. 1993) ("One's interest in a contract terminable at will is primarily an interest in future relations between the parties, and he has no legal assurance of them.") (citation omitted).

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[12] The objective "unsophisticated consumer" is a hypothetical "person of modest education and limited commercial savvy." *Dunbar*, 896 F.3d at 764. "[H]e is wise enough to read collection letters with added care. He is reasonably intelligent and can make basic logical deductions and inferences. Stew in ridiculous circular logic he does not, because he is 'reasonable.'" *O'Boyle v. Real Time Resolutions, Inc.*, 910 F.3d 338, 344 (7th Cir. 2018) (citations omitted).

Fourth, the notice, drafted by HCC, is silent regarding reemployment procedures. The Seventh Circuit improperly construed this silence in HCC's favor. *See* App. 10 (notice "instructed the workers to *return*—not *reapply* to return"). Construed in Leeper's favor, however, this silence *undercuts* an expectation of recall. HCC prepared six pages and 27 FAQs describing policies applying to its "termination of employment," and not one of them referenced *any* policy or procedure applicable to a return to work. *Id.* at 47-56.

Finally, Leeper's interpretation draws support from the other evidence in the record, including the economic downturn in the industry, HCC's invocation of permanent termination policies rather than temporary leave policies, that HCC's general manager told the workers when he handed out these documents that they would have to reapply and interview for any positions that became available, and the testimony of HCC's own corporate representative that "you *may* return" was not a guarantee that workers would or could return. *See supra* pp. 6-9.

Construing the evidence and inferences in Leeper's favor, HCC's conduct and the notice were "fairly susceptible to different interpretations." *Life Plans*, 800 F.3d at 353. The statements in the notice, including the lack of a guaranteed return, combined with the evidence in the record, supported Leeper's interpretation that the employees had no reasonable expectation of being recalled and that the employment cessation was likely to be permanent. *See, e.g.*, 20 C.F.R. § 639.3(a) ("An employee has a 'reasonable expectation of recall' when he/she understands . . . that

he/she *will be* recalled to the same or a similar job.") (emphasis added).

"In short, we are left with two competing accounts, either of which a jury could believe. So summary judgment is not appropriate[.]" *Goelzer v. Sheboygan County*, 604 F.3d 987, 995 (7th Cir. 2010). *See also Tolan v. Cotton*, 572 U.S. 650 (2014) (per curiam) (granting petition for certiorari and summarily overturning court below where "court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party."); *Hunt*, 526 U.S. at 553; *Shaffer v. AMA*, 662 F.3d 439, 445-46 (7th Cir. 2011) ("The competing reasonable inferences that can be drawn from the record are not for us to resolve at the summary judgment stage[.]"). The Seventh Circuit's failure to remand the case to the factfinder was error that this Court should reverse.[13]

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[13] The Seventh Circuit's footnote that Alliance Resource Partners, L.P. "played no role in these events" (App. 2) also ignored the extensive factual record supporting Leeper's claim that Alliance was part of the "business enterprise" and, thus, Leeper's "employer" under § 2101(a)(1). *See* Pl.'s Mot. Certify Class 3 (¶¶ 1-3), 5 (¶¶ 12-13), 9-16 (¶¶ 30-51), 34-35, ECF No. 82; Pl.'s Mot. Partial Summ. J. 3-7 (¶¶ 1-27), 19-22, ECF No. 138.

B. The Seventh Circuit Ignored the Plain Language of the WARN Act When It Held that "a reduction in hours of work of more than 50 percent during each month of any 6-month period" Does Not Include Months in Which the Employees Suffer a 100 Percent Reduction in Hours

The WARN Act defines "employment loss" to include "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)(C). Here, at least 137 of the 315 "full-time" employees at the mine (43%) involuntarily had their regular hours of work cut by more than 50 percent during each month between February 6 and August 6, 2016. *See* Pl.'s Resp. Opp. Defs.' Mot. Summ. J. 5, ECF No. 154. Leeper argued that the months in which these employees experienced a 100 percent reduction in hours should be included as part of a § 2101(a)(6)(C) "employment loss" because a 100 percent reduction in hours is more than a 50 percent reduction.

The Seventh Circuit disagreed, holding that "a reduction in hours of work of more than 50 percent during each month of any 6-month period" does not include months in which employees experience a reduction in hours of work of 100 percent. App. 12-13. It effectively rewrote § 2101(a)(6)(C) as only applying to "a reduction in hours of work of more than 50 percent *but less than 100 percent* during each month of any 6-month period."

The plain language of the statute does not put a cap on the reduction of hours, and the Seventh Circuit's rewriting of the statute was error. *See Pavelic & LeFlore v. Marvel Ent. Grp., Div. of Cadence Indus. Corp.*, 493 U.S. 120, 126 (1989) ("Our task is to apply the text, not to improve upon it."); *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) ("The preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.' Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous.") (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992)).

The Seventh Circuit, however, reasoned that the same employment action could not "satisfy both the 'layoff' and 'reduction in hours' categories of the WARN Act." App. 12-13. This rationale disregarded the WARN Act's plain language, which does not make the 3 types of "employment loss" mutually exclusive, but separates them with "or." 29 U.S.C. § 2101(a)(6); *see also Phason v. Meridian Rail Corp.*, 479 F.3d 527, 529 (7th Cir. 2007) ("'[E]mployment loss' occurs when *any one* of the subsections [of § 2101(a)(6)] applies."); *Graphic Communs. Int'l Union, Local 31-N v. Quebecor Printing Corp.*, 252 F.3d 296, 299 (4th Cir. 2001) ("[A]ssuming that termination is not the initial employment action, an employee can suffer an 'employment loss' for any or all of an 'employment termination,' 'a layoff exceeding six months,' or 'a reduction in hours' of the magnitude and duration specified.").

Finally the Seventh Circuit's rewriting of the Act frustrates its purposes and facilitates circumvention. For example, based on the Seventh Circuit's interpretation, an employer could reduce employees' hours by 99 percent for 4 months, 100 percent for the next 5 months, and back to 99 percent the following 4 months, all without causing any "employment loss" under the Act. *See Futuresource LLC v. Reuters Ltd.*, 312 F.3d 281, 284 (7th Cir. 2002) ("Nonsensical interpretations . . . of statutes are disfavored.") (citing *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 453-54 (1989); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring)).

The Seventh Circuit's interpretation of § 2101(a)(6)(C) was error that this Court should reverse.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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