No. D070620

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, ET AL.,

Plaintiffs and Respondents,

vs.

NASSCO HOLDINGS INCORPORATED, ET AL.,

Defendants and Appellants.

APPEAL FROM THE SAN DIEGO SUPERIOR COURT
THE HONORABLE JOHN S. MEYER
CASE NO. 37-2014-00041656-CU-OE-CTL

PROPOSED AMICUS CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, CALIFORNIA MANUFACTURERS & TECHNOLOGY ASSOCIATION, AND SHIPBUILDERS COUNCIL OF AMERICA IN SUPPORT OF APPELLANTS

U.S. CHAMBER LITIGATION CENTER
Janet Galeria
(SBN 294416)
1615 H. Street, NW
Washington, DC 20062
Telephone: (202) 463-5337
Facsimile: (202) 463-5346

MUNGER, TOLLES & OLSON LLP
*Fred A. Rowley, Jr.
(SBN 192298)
350 So. Grand Avenue, 50th Floor
Los Angeles, California 90071-3426
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

CALIFORNIA MANUFACTURERS &
TECHNOLOGY ASSOCIATION
Dorothy E. Rothrock
(SBN 189614)
1115 11th Street
Sacramento, CA 95814
Telephone: (916) 498-3319
Facsimile: (916) 441-5449

MUNGER, TOLLES & OLSON LLP
Aaron D. Pennekamp
(SBN 290550)
560 Mission Street, 27th Floor
San Francisco, California 94105-2907
Telephone: (415) 512-4000
Facsimile: (415) 512-4077

Attorneys for Amici Curiae Chamber of Commerce of the
United States of America, et al.

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, rule 8.208(e), counsel states that it knows of no entity or person that either: (1) has an ownership interest of 10 percent or more in the party; or (2) has a financial or other interest in the outcome of the proceeding that the party reasonably believes the justices should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: May 1, 2017 MUNGER, TOLLES & OLSON LLP

By: /s/ *Fred. A. Rowley, Jr.*

Attorney for Amici Curiae Chamber of Commerce of the United States of America, et al.

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INTERESTS OF THE AMICI CURIAE

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the nation's largest federation of businesses and associations. The U.S. Chamber represents 300,000 members directly and represents indirectly the interests of more than three million United States businesses and professional organizations of every size and in every relevant economic sector and geographic region, including California. The U.S. Chamber often represents its members' interests by filing amicus curiae briefs in cases involving issues of national concern to American business.

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The California Manufacturers & Technology Association ("CMTA") is a mutual, non-profit 501(c)(6) trade association established in 1918 to promote the interests of manufacturers and technology-based companies before state legislators, regulators, and courts with regard to matters that affect their ability to produce and sell products in California and compete in global markets. Manufacturers in the State employ 1.2 million workers,

provide high wages and create many more jobs in other sectors of the California economy. CMTA regularly submits amicus curiae briefs in cases like the present one that affect its members and the manufacturing and technology sectors, both in California and across the Nation.

The Shipbuilders Council of America ("SCA") is the national trade association representing the United States shipyard industry. SCA members constitute the shipyard industrial base that builds, repairs, maintains, and modernizes United States Navy ships and craft, United States Coast Guard vessels of all sizes, as well as vessels for other government agencies. In addition, SCA members build, repair, and service America's fleet of commercial vessels and also represent the critical supplier companies that are the foundation of the United States shipyard industrial base.

INTRODUCTION

In 2002, the California Legislature passed the California Worker Adjustment and Retraining Notification Act ("California WARN Act") in order to "preclude employers from ordering a mass layoff . . . of an industrial or commercial facility . . . without first giving 60 days' notice to affected employees and specified government agencies." (2002 Cal. Legis. Serv. Ch. 780 (A.B. 2957); see Cal. Lab. Code, § 1400 et seq.) The law was meant to "mirror[]" and "supplement" the federal version of the WARN Act, which imposes advance-notice obligations on layoffs "exceeding 6 months" in length. (29 U.S.C. § 2101(a)(6).) The principal reason the California Legislature adopted supplemental layoff protection was that the federal WARN Act was limited to "mass layoffs" involving 500 or more employees; by its mini-WARN Act, the California Legislature extended notice protections to layoffs involving 50 or more employees.

In the face of the California Legislature's clear purpose in adopting the State's WARN Act, the Superior Court below adopted an exceedingly broad definition of the term "layoff," holding that a "layoff" occurs not just when an employer terminates employees, but any time "employees [go] without work . . . for a period of time," even if they remain employed. (5JA:1876.) Under the Superior Court's interpretation, an employer must satisfy the WARN Act's notice requirements if it imposes any temporary work stoppage or furloughs employees for any length of time, whether for a single day or, as in this case, for a period of weeks. That result cannot be squared with the Legislature's express intent to "mirror[]" federal protections for laid-off employees, and to expand those protections with respect to the *size* of the layoff—not its fundamental definition.

This straightforward construction, as set forth in the Opening Brief by NASSCO Holdings, Inc. ("NASSCO"), is undergirded by three key

points. *First*, the plain meaning of the word "layoff" requires a complete "separation" between the affected worker and the employer, *viz.*, it contemplates the "termination" or "cessation" of the employment relationship. That meaning is demonstrated not only by the way that word is used in ordinary parlance, but also in the way that *other* jurisdictions, including the Federal Government and the States, interpret and apply their own advance warning statutes. Because Plaintiffs offer no good reason to reject this broadly accepted, plain meaning, this Court should embrace it and reverse the Superior Court.

Second, Amici submit that Appellants' understanding of the word "layoff" also best furthers the purposes driving advance-warning statutes, in general, and the California WARN Act, in particular. While the California WARN Act was intended to expand the scope of the federal WARN Act's protections to encompass more (and smaller) employers, it nevertheless sought to achieve the same primary goal of other WARN acts: providing laid-off employees and their communities additional time to mitigate the effects of unemployment. Far from advancing this goal, however, the Superior Court's interpretation, if adopted, would impose burdens on employers that the Legislature manifestly did not contemplate, and that would distort its goal of helping terminated employees find new work. By treating any work shortage or pause as though it involves terminations, the order below requires employers to bear the significant administrative and reporting costs associated with notice even where an employee does not actually need to find a new job. This would force employers to choose between over-warning employees, avoiding the costs altogether by hiring fewer employees, or moving their businesses to another State (where the WARN obligations are less onerous). None of these outcomes serves the California WARN Act's purposes, and there is no reason to believe that the

California Legislature intended to place California employers in such a position.

Third, and finally, Plaintiffs' concerns about "absurd result" are overwrought. The California courts are more than capable of discerning, and administering, the practical distinctions among "terminations," "layoffs," "furloughs," and other similar employment actions. There is no reason to believe, then, that employers will be able to evade the California WARN Act's notice obligations by artfully characterizing employment actions. Nor have Plaintiffs pointed to evidence that employers have sought to exploit, or successfully exploited, this commonsense distinction to avoid giving notice when they actually lay off employees.

This Court should therefore reverse the Superior Court and restore the California Legislature's chosen definition of the word "layoff."

DISCUSSION

I. THE SUPERIOR COURT ERRED BY GIVING THE STATUTORY TERM "LAYOFF" AN EXPANSIVE, NONTEXTUAL MEANING

The case for reversal begins with the California WARN Act's text. The California Legislature adopted a specific definition for the word "layoff," and the Legislature's chosen definition simply cannot support Plaintiffs' reading of that term. Indeed, a review of the plain language of the California WARN Act makes clear that the word "layoff" connotes only situations in which the employment relationship has *ended*. The point is confirmed by the way similar language in other California labor provisions has been construed, as well as the way similar WARN statutes in other States have been interpreted.

A. A Temporary Furlough Is Not A "Layoff" Within The Plain Meaning Of The Statute

According to the California WARN Act, "'[l]ayoff' means a *separation* from a position for lack of funds or lack of work." (Lab. Code, § 1400, subd. (c), italics added.) Although the Legislature chose not to further define what counts as a "separation" within the meaning of section 1400, that word has a commonsense definition that fully applies here. (See *Fluor Corp. v. Superior Court* (2015) 61 Cal.4th 1175, 1198 [explaining that courts will give the words in a statute their "ordinary and usual meaning"].) Namely, "separation" means the "[c]essation of a contractual relationship, esp[ecially] in an employment situation." (Black's Law Dictionary (8th ed. 2004) 1396; see also Webster's Third New Int'l Dictionary (2002) 2070 [defining "separation" as the "termination of a contractual relationship"]; Am. Heritage New Dictionary (2d coll. ed. 1985) 1118 [defining "separation" as a "[d]ischarge, as from employment or military service"].)[1] As NASSCO explains, however, the temporary furloughs at issue here did not amount to such a complete "cessation," "termination," or "discharge"—either temporary or permanent—of the contractual relationship. (See NASSCO Opening Br. at pp. 14, 18.) These temporary furloughs thus should not have triggered the California WARN Act's notice provisions, and the Superior Court erred when it concluded

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[1] That the California Legislature defined "layoff" in the California WARN Act to require a "separation" (*i.e.*, an end to the employment relationship) should come as no surprise. Other provisions of the California Labor Code also draw this same connection between "layoffs" and relationship "terminations." For example, in Labor Code section 201.5, subdivision (d), the Legislature explained that "an employment terminates *when the employment relationship ends*, whether by discharge, *lay off*, resignation, completion of employment for a specified term, or otherwise." The Legislature's definitional choice in the California WARN Act is thus not at all unusual.

otherwise.

That error is only confirmed by other California sources discussing the meaning of the word "separation" when used in the employment context. Indeed, various reported cases make clear that employment actions falling short of true "terminations" of the employment relationship simply are not "separations" as the California Legislature generally understands that term. (See *White v. County of Sacramento* (1982) 31 Cal.3d 676, 682 ["'Under general rules of statutory construction, [California courts] may, in construing a statute, consider other statutes that might bear on the meaning of the statute at issue'"].)

Gonzalez v. Department of Corrections and Rehabilitation (2011) 195 Cal.App.4th 89 (*Gonzalez*), well illustrates this point. In *Gonzalez*, an employee suffered a workplace injury that permanently prevented him from returning to work as a correctional officer. The California Department of Corrections and Rehabilitation sought to accommodate the employee's workplace restrictions by offering him a "medical demotion to an office assistant position." (*Id.* at p. 92.) The employee protested, asking the Department to—instead—help him apply for disability retirement benefits. When the Department refused, the employee sued, claiming that the Department had violated California Government Code section 21153, which provides that "an employer may not *separate* because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled." (See 195 Cal.App.4th at pp. 93–94.) But the Court of Appeal rejected the employee's claim, holding that "[s]ection 21153 prohibits only 'separation' of a disabled employee, i.e., *termination*; it does not prohibit demotion or transfer" of that employee. (*Id.* at p. 96, italics added.)

In *Mooney v. County of Orange* (2013) 212 Cal.App.4th 865

(*Mooney*), the Court of Appeal reached a similar conclusion regarding the meaning of the word "separate." There, a county probation counselor suffered a series of injuries at work that forced her to take medical leave. When the counselor's temporary, injury-related work restrictions became permanent, the county told the counselor "not to return to work until a final decision [could be] made" regarding the county's ability to accommodate the counselor's restrictions. (*Id.* at p. 868.) The county later offered the counselor a different position—but the position didn't pay as much and came with fewer benefits. The counselor thus declined the job offer and sued the county, claiming that it had improperly "dismissed" or "separated" her within the meaning of California law. (*Id.* at pp. 870, 873, 878.) But again, the Court of Appeal rejected the counselor's claims, holding that both a "separation" and "'a dismissal as contemplated by [California law] require[] an employer action that results in *severance of the employment relationship*.'" (*Id.* at p. 874, italics added]; see also *id.* at pp. 879–880.)

To be sure, in reaching this conclusion, the Court of Appeal *did* explain that "the terms 'separate' and 'dismissed,' when used generally in employment law, are not necessarily interchangeable terms." (*Mooney*, *supra*, 212 Cal.App.4th at p. 879.) But the court's distinction between these words had nothing to do with whether both "separate" and "dismiss[]"—when used in the employment context—imply an end to the employment relationship. Instead, the court explained that the terms were distinguishable based on *who initiates* that relationship severance. If the employer initiates the severance, then "dismissed" is clearly the appropriate term; but if "either the employer or the employee may initiate" the relationship's end, then the term used by employment lawyers is, typically, "separation." (*Ibid.*) The Court of Appeal's distinction thus underscores NASSCO's position here: When the California Legislature defined

"layoff" as a "separation," it meant to capture only those instances where the employment relationship has ended.

Other reported California cases further suggest that the term "separation" is generally synonymous with a complete termination of the employment relationship (and, thus, that the furloughs at issue here do not trigger the California WARN Act's notice obligations). In *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, for example, the Supreme Court of California considered "whether the separation from state employment effected by the . . . 'automatic resignation' provision [of Cal. Gov. Code, § 19996.2] [amounted to] a deprivation of property by the state." (*Id.* at p. 1113.) In holding that such a "separation from state employment" was not subject to due process protections, the Court explained that when an employee "separate[es]" by automatically resigning, "it is the employee who *severs the employment relationship*, not the state." (*Id.* at p. 1115.) Just as in *Gonzalez* and *Mooney*, then, the *Coleman* Court drew a clear connection between the "separation" from employment and the "sever[ance]" of the employment relationship.

These California cases are not outliers. A review of employment-related sources from other jurisdictions confirms that the California WARN Act's "separation" language plainly requires a true "termination" of the employment relationship. For example, federal employment regulations define certain employment "separations" as "termination[s] of employment with the employer." (26 C.F.R. § 1.409A-1(h).) Federal employment cases likewise acknowledge that the terms "separation" and "termination" can be synonymous. (See, e.g., *In re Aquatic Pools, Inc.* (D.N.M. Bankr., May 27, 2016, No. 15-11406 t11) 2016 WL 3193648, at *1, fn. 3 ["For purposes of this opinion, 'separation' and 'termination' refer to the end of the

employment relationship."].) And state-level sources frequently draw similar conclusions regarding the meaning of the word "separation" in the employment context. (See, e.g., *Blue v. Dep't of Labor* (Vt. 2011) 27 A.3d 1096, 1100 [citing with approval cases concluding that statutes using the phrase "separation from employment" "contemplate[] a complete 'termination of the employer-employee relationship'"] [original italics]; *State ex rel. Richard v. City of Springfield* (Ohio 1990) 549 N.E.2d 164, 166 [holding that statutory term "separation" meant "'termination of a contractual relationship'"]; *Wayne County v. AFSCME Council 25* (Mich.Ct.App., Feb. 13, 2014, No. 303672) 2014 WL 587013, at *2 (per curiam) (unpub.) [noting that "[t]he parties' contract defines the term 'layoff' as 'a separation from employment as the result of lack of work or lack of funds,'" and concluding "that the term 'separation from employment' requires the 'termination of a contractual relationship'"].)

* * *

These sources confirm what is apparent from the plain text of the WARN Act: when the California Legislature defined "layoff" in the California WARN Act as a "*separation* from a position," it meant to capture only those instances where qualifying employers "separated" employees from their jobs in the sense of "terminating" or "discharging" them. No such "separation" occurred here. Instead, the furloughed employees maintained their previous employment relationship. They remained on NASSCO's payroll; they continued to accrue seniority within their positions; they continued to enjoy health and dental benefits that came with their positions; and they all received definite instructions regarding when to report back to work. These facts are "inconsistent with an express or implied severance of [the] employment relationship" of these furloughed employees (*Mooney*, *supra*, 212 Cal.App.4th at p. 877), and thus

NASSCO's temporary furloughs do not fall within the plain meaning of "layoff" as defined in the California WARN Act. For this reason alone, the Court should reverse and remand to the Superior Court with instructions to enter judgment in NASSCO's favor.

B. Adopting This Definition Of "Layoff" And "Separation" Would Bring The California WARN Act In Line With Similar Statutes In Other Jurisdictions

The "unambiguous" definition of the terms "layoff" and "separation" alone forecloses the trial court's construction. (See *MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1086 (*MacIsaac*).) But even if this Court were somehow to deem those terms ambiguous, NASSCO's understanding of those terms resonates with the way other jurisdictions interpret and apply their own, similar advance notice provisions. (See, e.g., *Kinley v. Largent* (1921) 187 Cal. 71, 75–76 ["This interpretation gives to the statute the same meaning as that expressed in those statutes of other jurisdictions."]; *RSL Funding, LLC v. Alford* (2015) 239 Cal.App.4th 741, 746 ["'Where, as here, there is no California case directly on point, foreign decisions involving similar statutes and similar factual situations are of great value to the California courts.'"]; *McNairy v. C.K. Realty* (2007) 150 Cal.App.4th 1500, 1507 [noting that "the interpretation of similar statutes in other jurisdictions" can inform the reading of California statutes].) Here, the constructions that courts have given both the WARN Act and other supplemental state WARN acts makes clear that "layoff" as used in California's statute requires a true termination of the employment relationship.

To start, the Executive Branch and federal courts have long interpreted the federal WARN Act generally to require a "cessation" of the employment relationship to trigger the Act's advance-notice provisions. The federal WARN Act "requires that an employer give 60 days advance

notice before any 'plant closing' or 'mass layoff.'" *Internat. Alliance of Theatrical & Stage Employees & Moving Picture Machine Operators, AFL-CIO v. Compact Video Services, Inc.* (9th Cir. 1995) 50 F.3d 1464, 1466 (*Internat. Alliance*). And both the "plant closing" and "mass layoff" events are defined in terms of an "employment loss," meaning:

> (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); see also *id.* § 2101(a)(2) [defining "plant closing" as "the permanent or temporary shutdown of a single site of employment . . . [that] results in an employment loss"]; *id.* § 2101, subd. (a)(3)(B) [defining "mass layoff" as "a reduction in force which . . . results in an employment loss"].) In interpreting the "employment loss" provision, the Department of Labor has explained that the words "termination" and "layoff" should be given "their common sense meanings. Thus, . . . the term 'termination' means the permanent *cessation of the employment relationship* and the term 'layoff' means the temporary *cessation of that relationship*." (54 Fed. Reg. 16042, 16047 (1989), italics added.)

Federal courts have accepted and applied these agency interpretations of "termination" and "layoff" in determining employers' federal WARN Act liability. (See, e.g., *Internat. Alliance*, *supra*, 50 F.3d at pp. 1466, 1468–1469 [finding that a "pay and benefits cut" was not an "employment loss" within the meaning of the federal WARN Act]; *Acevedo v. Heinemann's Bakeries, Inc.* (N.D. Ill. 2008) 619 F.Supp.2d 529, 534–535 [finding no "employment loss" where both "defendant and its employees understood that the employer-employee relationship would continue," because employees "were told to contact defendant on [a certain

date] for ʻa possible work schedule'"].) The upshot is that employers generally are not liable under the federal WARN Act until they have *severed* the employment relationship with the requisite number of employees for the requisite period of time. (See, e.g., *Rifkin v. McDonnell Douglas Corp.* (8th Cir. 1996) 78 F.3d 1277, 1282 (*Rifkin*) ["A common sense reading of the statute indicates it is the actuality of a termination which controls."].) Because "[f]ederal decisions have frequently guided our interpretation of state labor provisions the language of which parallels that of federal statutes" (see *Bldg. Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 658), the construction of the federal WARN Act bears critically on the proper reading of the California WARN Act. (See also *Monzon v. Shaefer Ambulance Service, Inc.* (1990) 224 Cal.App.3d 16, 31 ["California courts have recognized th[at] California's wage laws are patterned on federal statutes and that the authorities construing those federal statutes provide persuasive guidance to state courts."].)

Other jurisdictions' advance-warning laws likewise suggest that liability under the California WARN Act should be limited to those situations where employers (without notification) "terminate" the employment relationship with employees. Indeed, several States and territories have directly borrowed the federal WARN Act's language concerning "employment loss[es]." The New York advance-warning statute, for example, "mirrors the federal WARN Act" (*1199 SEIU United Healthcare Workers East v. South Bronx Mental Health Council, Inc.* (S.D.N.Y. Nov. 13, 2013, No. 13 Civ. 2768) 2013 WL 6003731, at *2, report and recommendation adopted (S.D.N.Y. Dec. 3, 2013) 2013 WL 6244716), in that its notice requirements generally are triggered by an "employment loss," which is defined as, among other things, "an

employment *termination*" (N.Y. Lab. Law, § 860-a, subd. (2)(a), italics added). Other jurisdictions use the same or similar language. (See, e.g., 820 I.L.C.S., § 65/5, subd. (b) [Illinois]; O.R.S., § 285A.510, subd. (2) [adopting federal definitions of "mass layoff" and "plant closing"] [Oregon]; 24 V.I.C., § 471, subd. (6) [defining "[e]mployment loss" as "an employment termination" or a "permanent layoff"] [Virgin Islands].) And even jurisdictions that use quite different language nevertheless seem to require a real "termination" of the employment relationship before imposing WARN act liability. (See, e.g., N.J.S. §§ 34:21-1, 2 [mandating advance notice for certain "termination[s] of employment," and defining "termination of employment" as "the layoff of an employee *without a commitment to reinstate the employee to his previous employment* within six months of the layoff"], italics added [New Jersey].)

Because these statutes use similar language and are parallel in purpose, they are instructive in construing California's WARN Act despite variations in structure. The California Legislature could not have been more clear that it intended its advance-warning statute to "*mirror*[] the federal WARN Act." (2JA:487, italics added; see also *id.* at pp. 575, 578, 612 [same]), in precisely the way other States designed their mini-WARN statutes. And the California Court of Appeal has already *confirmed* that the California WARN Act should be read in concert with federal law. In *MacIsaac*, *supra*, the plaintiff "s[ought] to avoid the import of the unambiguous statutory language [of the California WARN Act] by contrasting California's statute with the federal WARN Act." (134 Cal.App.4th at p. 1088.) The plaintiff argued that "if the Legislature had intended to require that notice be triggered only by an actual loss of employment, then it would have followed the federal statute and said so specifically." (*Ibid.*) But the Court of Appeal rejected this argument,

holding that "California's statute *does* make the notice requirement dependent upon 'employment loss'; it simply uses very different language to do so." (*Id.* at p. 1088, italics original.) Put differently, "the Legislature did not need to state specifically that notice was required only in instances of employment loss, because the requirement of an employment loss (separation from a position) was *built into* the definition of 'layoff.'" (*Id.* at p. 1089, italics added.) Given the meaning of "employment loss" in the federal WARN Act, that holding controls this case: This Court should conclude that there is no "layoff" under the California WARN Act until there has been a "cessation of the employment relationship." (54 Fed. Reg. at p. 16047.)

C. The Authorities Plaintiffs Cite Do Not Command A Contrary Result

Plaintiffs resist this understanding of the word "layoff," and they primarily rely on two sources to promote their novel, expansive definition of that term. (See Resp. Br. at pp. 28–31 [discussing *MacIsaac*, *supra*, 134 Cal.App.4th 1076], and Rutter Group, California Practice Guide: Employment Litigation (2017) ¶¶ 6:791, 6:795 (*Rutter Group*)].) But neither source helps Plaintiffs. Indeed, both sources suggest (as Amici and Appellants have argued here) that "layoff" as used in the California WARN Act requires a true "termination" of the employment relationship—just as the California Legislature intended.

As noted, Plaintiffs' first source, *MacIsaac*, refutes, rather than supports, their interpretation. There, the Court of Appeal was asked to determine whether an employee who had merely changed employers had been laid off within the meaning of the California WARN Act. (134 Cal.App.4th at pp. 1078, 1080.) The court answered that question in the negative, holding that the California WARN Act does not cover "severance

of [an employee's] relationship" with any particular employer, but covers, instead, "severance of [an employee's] relationship" with a particular job. (See *id.* at pp. 1086–1087.) Because the plaintiff in *MacIsaac* had suffered only the former type of "severance," the defendant was not obliged to give the plaintiff any advance notice. That same result follows *a fortiori* here, where Plaintiffs have suffered *neither* the former *nor* the latter kind of "severance." That is, because there has been no "severance" at all in this case—including no "severance" from any "position" (*i.e.*, no "employment loss" under the federal WARN Act (see *id.* at p. 1089; see also *ante* Part I.B)—the California WARN Act simply does not apply.

The California Practice Guide says nothing to change that conclusion. The Guide notes that the California WARN Act "does not state how long the employees must be off the job to constitute a 'layoff.'" (*Rutter Group*, *supra*, ¶ 6:792.) And the Guide therefore concludes that "[p]resumably, . . . notice may be required even where the employer plans to and does *rehire* the affected employees within a few weeks or months." (*Ibid.*, italics original); see also Cal. Bus. Law Deskbook (2016) § 20:4(b)(1).) The emphasized word makes all the difference, however: there would be no need to "*rehire*" an individual unless the individual's previous employment relationship had been severed. Thus, to the extent the Court finds the California Practice Guide at all persuasive in this case (but see *MacIsaac*, *supra*, 134 Cal.App.4th at p. 1089, fn. 11 ["[T]he use of the word 'presumably' indicates the very tentative nature of the authors' conclusion."]), the Guide should be understood to support NASSCO's reading of the California WARN Act's "layoff"/"separation" language—not Plaintiffs' reading.

II. THE SUPERIOR COURT'S BROAD "LAYOFF" DEFINITION WILL NOT ADVANCE—AND WILL LIKELY UNDERMINE—THE CALIFORNIA WARN ACT'S PURPOSES, AND WILL LEAD TO ABSURD RESULTS

Plaintiffs' interpretation of "layoff" is not only contrary to the text of the California WARN Act, but also runs counter to the California Legislature's purposes in adopting the Act to begin with. Advance-warning statutes, in general, and the California WARN Act, in particular, are aimed primarily at relieving the strain on workers who—without such advance-notice laws—might otherwise lose their jobs and have to seek new employment at the drop of a hat. But Plaintiffs' reading of "layoff" does little to advance that laudable goal; indeed, it does much to undermine it, as it produces absurd results and threatens to destabilize job growth in the State.

A. Advance-Warning Statutes—Like California's WARN Act—Serve Specific Employment Transition Purposes

After more than a decade of debate, Congress passed the federal WARN Act in 1988. (See Pub. L. No. 100-379, 102 Stat. 890 (1988) [codified at 29 U.S.C. § 2101 et seq. (1988)].) This federal legislation came at a time when significant numbers of adult American workers were losing their jobs each year due to plant closings and relocations. (See Richard W. McHugh, *Fair Warning or Foul?–An Analysis of the Worker Adjustment and Retraining Notification (WARN) Act in Practice*, 14 Berkeley J. Emp. & Labor L. 1, 4 (1993) [citing Department of Labor's Bureau of Labor Statistics surveys]; see also Ehrenberg & Jakubson, *Advance Notice Provisions in Plant Closing Legislation: Do They Matter?*, NBER Working Paper Series No. 2611 (1988), 2 http://digitalcommons.ilr.cornell.edu/articles/746/ [as of Apr. 27, 2017] [noting that "[i]nterest in plant closing legislation in the United States ha[d] grown since the deep

recession of the mid-1970s and the relatively large number of plant closings and permanent layoffs in major manufacturing industries since then".)

Given this environment, the purposes driving passage of the federal WARN Act were clear: Congress wanted to help ease the transition of workers who had been displaced from their jobs and forced to change employers. As Senator Edward Kennedy (a key sponsor of the bill) explained, the purpose of the federal WARN Act was to promote "the successful adjustment of . . . workers to the job loss caused by changing economic conditions. Times have changed for American workers. The person who will stay with one employer for thirty years is becoming more the exception and less the rule." As he saw things, the "advance notice provision insures that large numbers of workers will not be displaced without warning and without planning." (Remarks of Sen. Kennedy, 134 Cong. Rec. S8376 (June 22, 1988).)

Other sources confirm Senator Kennedy's perspective. For example, Department of Labor regulations implementing the federal WARN Act conclude that:

> The [WARN Act] provides protection to workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. Advance notice provides workers and their families some transition time to adjust to the prospective *loss of employment*, to seek and obtain *alternative jobs* and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete *in the job market*. WARN also provides notice to State dislocated worker units so that dislocated worker assistance can be promptly provided.

(20 C.F.R. § 639.1(a), italics added.) And courts have likewise highlighted the federal WARN Act's new-jobs/new-employers focus. (See, e.g., *Alarcon v. Keller Indus., Inc.* (9th Cir. 1994) 27 F.3d 386, 388 [citing 20

C.F.R. § 639.1, subd. (a)]; *Rifkin, supra,* 78 F.3d at p. 1282 ["Employees in the situation at hand who were in fact rehired do not fall within the purpose of the WARN Act *because there is no need for retraining or alternative jobs*."], italics added.)

The California Legislature had the same goals in mind when it proposed and debated its own version of an advance-notification law. Indeed, supporters of the proposed California WARN Act argued "that advance notification allows local government agencies to explore alternatives with the employer and provide retraining and *placement services* to dislocated workers, and allows affected workers the opportunity to make plans and adjustments, explore educational and retraining opportunities, and seek *new employment*." (2JA:485, italics added; see also *MacIsaac, supra,* 134 Cal.App.4th at p. 1090 [summarizing the California WARN Act's goals].)

In explaining that its version of the WARN Act was meant to "mirror[]" the federal statute, (see, e.g., 2JA:487), California lawmakers highlighted one key difference between the California and federal versions of the law. That is, the federal WARN Act's advance-notice provisions generally applied only to layoffs of 500 or more employees, but the California Legislature wanted its advance-notice law to capture many smaller (but still large) layoffs within the State—*i.e.*, those involving between 50 and 499 employees. The California bill's supporters made this overriding concern explicit:

> [T]he federal WARN Act applies to layoffs of 500 or more workers, or 50 or more workers who constitute at least one-third of the entire workforce. Frequently, substantial layoffs that may have major impacts on small communities nevertheless do not trigger the notification requirement under the federal law. For example, a lay off of 400 employees in a small or medium sized community may have a dramatic

> impact, but would not be covered by the federal act. By lowering the notice trigger to 50 employees or one-third of the total workforce, this bill would reach and allow for intervention in many more large layoffs.

(2JA:488; see also *id.* at p. 500 [explaining that "[t]he concern over WARN is there can be a mass layoff of 499 or fewer with no notice to the community because the employees laid off do not constitute a third of the workforce"]; see also *MacIsaac*, *supra*, 134 Cal.App.4th at p. 1090 [crediting this same legislative history].)

The California Legislature thus never intended the California WARN Act to dramatically depart from its federal predecessor (as Plaintiffs would like). Instead, the Legislature intended to "*supplement*[] the federal plant closure law, by requiring notification of layoffs, terminations, and relocations, which affect 499 or fewer employees." (2JA:502, italics added.) Put slightly differently, the key goals of the California WARN Act remained those of the federal law: to protect workers and communities by giving them time to manage the transition to unemployment and/or new jobs. And the mechanisms for achieving those goals likewise remained the same: to require 60 days advance notice to affected employees and specified members of the community whenever the number of laid off employees passed a certain threshold.

B. The Superior Court's Expansive Reading Of The Term "Layoff" Does Little To Advance These Purposes—And Does Much To Undermine Them

Plaintiffs' expansive reading of the term "layoff" fails to advance, and indeed distorts, the Legislature's goals. Plaintiffs' construction does not address the California Legislature's goal of decreasing the advance-notice threshold from 500 laid-off-employees (under the federal law) to 50 employees (under the California law). Rather, it aims to expand the

definition of what a "layoff" is in the first instance. Because the statute already specifies the lower threshold for number of affected workers (see Cal. Lab. Code, § 1400, subd. (d) [defining "[m]ass layoff" as "a layoff during any 30-day period of 50 or more employees at a covered establishment"]), that goal is not furthered by rewriting the statute to cover work stoppages other than layoffs, or to decrease the time that "laid off" employees are off the job from six months (under the federal law) to a single day (as the Superior Court suggests). (See 5JA:1876.) That construction would impermissibly amend the text, contravening the court's "'fundamental task in construing a statute'," which is "'to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute.'" (See, e.g., *Martinez v. Combs* (2010) 49 Cal.4th 35, 51); see also *Ricketts v. Morehead Co.*, 122 Cal.App.2d 948, 955 (1954) [rejecting an interpretation of a statute that was "neither required nor justified by the language of the statute," and that "would . . . conflict with [the statute's] spirit and intent"].)

Nor does Plaintiffs' reading clearly support the California WARN Act's other primary goal: to give employees and communities advance notice of job terminations, so that those employees can access "retraining and placement services" and "seek new employment." (2JA:485.) Indeed, by construing the term "layoff" expansively, and non-textually, to include *any* time away from work, no matter how short, Plaintiffs' reading would force employers to issue warnings for pauses or stoppages in work that are routine and bear none of the hallmarks of a mass termination. Under Plaintiffs' construction, the California WARN Act could potentially impose liability on employers who send 50 or more employees home early without pay for a long holiday weekend, or for an unexpected work stoppage due to the illness of a key supervisor. That would give employers little choice but to send constant "rolling" WARN notices to those employees. Absent such

"rolling" notices, the risk to employers would be significant. (See Cal. Lab. Code, §§ 1402, 1403 [imposing "back pay" and "civil penalt[ies]" for failures to provide notice].) But such notices provide employees with no meaningful notice at all (see 20 C.F.R. § 639.10(b) ["Rolling notice . . . evade[s] the purpose of the [the federal WARN] Act rather than give[s] specific notice."]), while requiring employers to bear needless burden and expense.

This cannot be what the California Legislature intended. In fact, federal regulations implementing the federal WARN Act's notice provisions *preclude* employers from engaging in this kind of "rolling notice" practice. (See 20 C.F.R. § 639.8 ["A ticketed notice, i.e., preprinted notice regularly included in each employee's pay check or pay envelope, does not meet the requirements of WARN."]; *id.* § 639.10(b) ["Rolling notice . . . is not acceptable."].) And for good reason: Congress was concerned that too-frequent notices would "lull" employees "into a false sense of security" and thereby "evade" the notification purposes of the Act. (Remarks of Sen. Metzenbaum, 134 Cong. Rec. S8680 (June 28, 1988).) It would be passingly strange for this Court to adopt a reading of the California WARN Act that encourages employers to engage in a notification practice that the Federal Government has so squarely rejected.

Plaintiffs' interpretation of the California WARN Act undercuts the Act's unemployment-mitigation purposes in more fundamental ways as well. Recent studies suggest that Plaintiffs' broad-based reading of the Act is likely to harm the prospects for job growth (and, thus, increase unemployment) in the State. For example, the United States Chamber of Commerce conducted "a comprehensive survey of the 50 states' labor and employment policies," and "performed an econometric study [to assess] the impact of state regulatory burdens . . . on . . . the unemployment rate and

new business formation" in each State. (United States Chamber of Commerce, *The Impact of State Employment Policies on Job Growth: A 50-State Review* (2011) 5, <https://www.uschamber.com/sites/default/files/legacy/reports/201103WFI_StateBook.pdf> [as of Apr. 27, 2017].) Overall, the study found that "the costs of excessive regulation [were] considerable. States with the heaviest regulatory burdens [were] sacrificing opportunities to reduce their unemployment rate and generate new business start ups." *Id.* And a key factor in measuring each State's "regulatory burden" was "whether the state ha[d] passed a Mini-WARN Act in excess of federal standards." (*Id.* at p. 11; see also *id.* at p. 24 [listing the "Existence of Mini-WARN Acts" as a "Key Aspect[] of State Employment Policies"].) As the study's authors explained it, "extensive literature" had examined the impact of policies that make "it very difficult to lay off or otherwise dismiss employees," and had found that such policies "made employers reluctant to take on new employees," which can contribute to "high unemployment." (*Id.* at p. 14.)

The threat to California's employment levels is particularly acute in this case, where Plaintiffs ask this Court to read the California WARN Act to be far more sweeping than the similar acts of other jurisdictions. (Compare *ante* Part I.B.) Critics of advance-notice legislation have long noted the costs that such notice can place on employers, particularly on small businesses. The time and cost of complying with notice requirements may cause businesses to lose customers, revenue, and access to credit. (See U.S. Congress, Office of Technology Assessment, *Plant Closing: Advance Notice & Rapid Response–Special Report*, OTA-ITE-321 (1986), at pp. 19–23 http://ota.fas.org/reports/8619.pdf [as of April 28, 2017].) Based on these potential costs, one study suggested that a uniform federal rule would be preferable to "state-by-state rules," because national uniformity would

"reduce the possibility that locational decisions by firms would be influenced by . . . differences" among the States in the cost of imposing layoffs. (Ehrenberg & Jakubson, *supra*, at p. 3.) The California Legislature gave no sign that it intended to adopt a law that would (potentially) *exacerbate* the State's unemployment problems by driving employers to other jurisdictions; instead, lawmakers clearly intended to "mirror[]" other advance-warning statutes and *lessen* the strain of unemployment on California's communities. (See, e.g., 2JA:487, 504.) This Court should accordingly reject Plaintiffs' far-too-broad understanding of the California WARN Act.

For their part, Plaintiffs downplay these and other concerns, claiming that California employers can easily avoid liability under the California WARN Act for brief work stoppages by distributing holiday schedules and the like to employees each year. (See Resp. Br. at p. 53 [claiming that "adequate notice would be provided via regular company policies"]; see also 5JA:1876.) But these concerns are demonstrably misplaced. First, as NASSCO points out, a holiday schedule cannot possibly account for the many "unexpected circumstances" that cause work slow-downs and stoppages (and that would trigger WARN Act liability under Plaintiffs' theory). (NASSCO Opening Br. at pp. 20–21 .) Any number of unexpected circumstances may cause a business to shut down or stop work temporarily. For example, street closures, municipal construction, concerts, and other special events all might require an employer to shutter its business for a short period of time. But it would be absurd to suggest that the California WARN Act makes these employers liable for back pay and civil penalties whenever employees miss work due to such unplanned, short-term pauses in work that are entirely outside the employers' control. (See Cal. Lab. Code, § 1401, subd. (c) [creating

narrow exception to notice requirement for layoffs due to "physical calamit[ies] or act[s] of war"].)

Second, under the terms of the California WARN Act, even a clairvoyant employer that sent employees a schedule covering every possible day off would not necessarily be safe under the Act. The statute requires, after all, that employers send advance notice to not just "[t]he employees of the covered establishment affected by the order," *but also to* "[t]he Employment Development Department" for the State, "the local workforce investment board," and "the chief elected official of each city and county government within which the termination, relocation, or mass layoff occurs." (Cal. Lab. Code, § 1401, subd. (a).) It is absurd to think that the California Legislature intended employers to choose between (a) sending meaningless day-off notices to (among other people) the city mayors and county supervisors of this State, or (b) violating the notice requirements of the California WARN Act. (See *People v. Clark* (1990) 50 Cal.3d 583, 605 ["In construing a statute, we must avoid such arbitrary, unjust, and absurd results whenever the language of the statute is susceptible of a more reasonable meaning."].)

III. PLAINTIFFS' RELIANCE ON THE ABSURDITY CANON IS UNAVAILING

Rather than address the anomalies and problems identified by NASSCO, Plaintiffs insist that a straightforward reading of "layoff" to require a "separation" from a position will itself produce absurd results. Plaintiffs maintain that employers will evade their WARN Act duties by abusing the "furlough" concept; that is, by keeping employees on the payroll to maintain the employment relationship, even though there is "no meaningful possibility of recall[ing]" those employees to work. (Resp. Br. at pp. 53–54.)

This concern is illusory. As an initial matter, as NASSCO explains, what governs the application of California's labor and employment laws is *not* what employers call their employment actions; what governs, instead, is what those employment actions really amount to in practical effect. (See NASSCO Reply Br. at pp. 12–13.) That is why, in *Mooney*, the Court of Appeal did not decide that there was no "dismissal" or "separation" just because the county never used those words with respect to the plaintiff; instead, the court looked at the circumstances surrounding the plaintiff's employment to decide whether she had been, in reality, "dismissed" or "separated." (See 212 Cal.App.4th at p. 876 [noting that plaintiff "remained on disability leave until the date she signed the declaration filed in opposition to the County's motion for summary adjudication," and that the county engaged in "ongoing efforts to accommodate [plaintiff] by finding her an alternative position with her work restrictions"]); *see also Kelly v. County of Los Angeles* (2006) 141 Cal.App.4th 910, 924–925 [assessing the circumstances of an employment action to determine whether a county employee had been "functionally terminated"].) The point is that courts are well-equipped to review the facts of any purported "furlough" to determine whether it is really a "termination," a "layoff," or something else. Plaintiffs' alleged absurd result is thus unlikely to ever come to pass.

That conclusion is doubly so, here, where Plaintiffs fail to identify any real-world instance of employers engaging in this kind of evasive behavior. The federal WARN Act has been on the books for nearly thirty years, and that law generally requires a "cessation of the employment relationship" before the law's advance-notice provisions come into play. (See *ante*, Part I.B.) Yet Plaintiffs have not identified (and Amici have not found) any case where an employer successfully evaded its WARN Act responsibilities by improperly labeling long-term employee "layoffs" as

"furloughs." Because Plaintiffs' alleged absurd result is so far-fetched as to be imaginary, this Court need give it little weight. (See *In re Grant's Estate* (1935) 2 Cal.2d 661, 668 ["The fact that these sections of the code have been in effect almost from the foundation of our state government, and . . . [none] of the absurd results, which counsel for respondent appear to fear, ever engaged the attention of the appellate courts of the state, leads us to believe . . . that the unjust and absurd results which may possibly flow from their enforcement are more imaginary than real."].)

CONCLUSION

For the reasons explained above, and for the reasons given in NASSCO's Opening Brief and Reply Brief, the judgment of the Superior Court should be reversed and the case remanded to the trial court with directions to enter a judgment in favor of NASSCO.

Dated: May 1, 2017

MUNGER, TOLLES & OLSON LLP

By: /s/ *Fred. A. Rowley, Jr.*

Attorney for Amici Curiae Chamber of Commerce of the United States of America, et al.

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies, pursuant to Rule 8.204(c)(1) of the California Rules of Court, that the enclosed Brief of Amici Curiae contains approximately 7,626 words, including footnotes. Counsel relies on the word count of the Microsoft Word computer program used to prepare this brief.

Dated: May 1, 2017 MUNGER, TOLLES & OLSON LLP

By: /s/ *Fred. A. Rowley, Jr.*

Attorney for Amici Curiae Chamber of Commerce of the United States of America, et al.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and **not a party to this action.** I am employed in the County of San Francisco, State of California. My business address is 560 Mission Street, Twenty-Seventh Floor, San Francisco, California 94105-2907.

On May 1, 2017, I served true copies of the following document(s) described as

PROPOSED AMICUS CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, CALIFORNIA MANUFACTURERS & TECHNOLOGY ASSOCIATION, SAN DIEGO CHAMBER OF COMMERCE, AND SHIPBUILDERS COUNCIL OF AMERICA IN SUPPORT OF APPELLANTS

on the interest parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY ELECTRONIC TRANSMISSION VIA TRUEFILING: Based on a court order and/or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent via TrueFiling to the persons indicated on the Service List as receiving electronic service. According to the TrueFiling website, these persons are registered TrueFiling users who have consented to receive electronic service of documents in this case. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

BY MAIL: I enclosed the documents in a sealed envelope or package addressed to the persons indicated in the Service List as receiving mail service. I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with a postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 1, 2017, at San Francisco, California.

Marsha Poulin

Marsha Poulin

SERVICE LIST

Electronic Service via TrueFiling

Miriam A. Vogel
James R. Sigel
Morrison & Foerster, LLP
425 Market Street
San Francisco, CA 94105
Attorneys for Appellants

Jason S. Mills
Anna Kim
Morgan, Lewis & Brockius, LLP
300 S. Grand Avenue, Ste. 2200
Los Angeles, CA 90071
Attorneys for Appellants

Amy Semmel
Paul M. Kelley
Kelley Semmel, LLP
5757 Wilshire Boulevard Penthouse 5
Los Angeles, CA 90036
asemmel@kelleysemmel.com
pkelley@kelleysemmel.com
Telephone: (323) 592-3450
Attorneys for Plaintiffs and Respondents

Joseph Scott Klapach
Klapach & Klapach
8200 Wilshire Boulevard
Suite 300
Beverly Hills, CA 90211
joseph@klapacklaw.com
Telephone: (310) 525-3724
Attorneys for Plaintiffs and Respondents

Clerk of Court
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4794

Mail Service:

Clerk of Court
Superior Court of California
County of San Diego
Attn: Hon. John S. Meyer
220 West Broadway
San Diego, CA 92101