No. 25-____

IN THE

Supreme Court of the United States

ELI LILLY AND COMPANY; LILLY USA, LLC,
Petitioners,

v.

MONICA RICHARDS,
Respondent.

On Petition for a 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

Both the Fair Labor Standards Act and the Age Discrimination in Employment Act allow "similarly situated" employees to join an existing lawsuit, but only if those employees *opt in*. 29 U.S.C. §§ 216(b), 626(b). In *Hoffmann-La Roche Inc. v. Sperling*, this Court permitted district courts to use their "compulsory process to assist counsel for the plaintiff" in finding employees who have not opted in and notifying them of their opportunity to do so. 493 U.S. 165, 174 (1989) (Scalia, J., dissenting). This Court did not, however, establish a standard for when district courts could or should authorize notice to these other, nonparty employees. *Id.* at 170 (majority op.).

Thirty-six years later, lower courts are still left with "little guidance that one can call law" on the showing plaintiffs must make to obtain court-authorized notice to other employees. *Clark v. A&L Homecare & Training Ctr.*, 68 F.4th 1003, 1007 (6th Cir. 2023) (Kethledge, J.). The circuits have filled this gap with *four* different standards, the latest of which comes from the Seventh Circuit in the decision below.

The questions presented are:

1. Whether this Court should overrule *Hoffmann-La Roche*'s holding that district courts may authorize and facilitate notice to nonparties on behalf of plaintiffs.

2. If this Court does not overrule *Hoffmann-La Roche*, what standard must plaintiffs satisfy in order for a district court to authorize and facilitate notice to nonparties on behalf of plaintiffs?

PARTIES TO THE PROCEEDING

Petitioners, Eli Lilly and Company, and Lilly USA, LLC, were defendants in the district court and appellants in the court of appeals.

Respondent Monica Richards was plaintiff in the district court and appellee in the court of appeals.

RULE 29.6 STATEMENT

Eli Lilly and Company is the sole member of Lilly USA, LLC, and thus its parent corporation. The stock of Eli Lilly and Company is traded on the New York Stock Exchange. No company holds more than 10% of Eli Lilly and Company's stock.

STATEMENT OF RELATED PROCEEDINGS

United States District Court (S.D. Ind.):

Monica Richards v. Eli Lilly and Company, et al., No. 1:23-cv-242 (Mar. 25, 2024).

Monica Richards v. Eli Lilly and Company, et al., No. 1:23-cv-242 (May 10, 2024).

United States Court of Appeals (7th Cir.):

In re Eli Lilly and Company, et al., No. 24-8017 (Aug. 29, 2024).

Monica Richards v. Eli Lilly and Company, et al., No. 24-2574 (Aug. 5, 2025).

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INTRODUCTION

This case presents an acknowledged, four-way circuit split on an issue whose "importance cannot be overstated": when (if ever) courts may authorize and facilitate notice to nonparties, inviting them to join a collective action. *Swales v. KLLM Transp. Servs., LLC*, 985 F.3d 430, 443 (5th Cir. 2021).

The issue arises under the FLSA and ADEA, both of which permit employees to sue on behalf of themselves and "other employees similarly situated." 29 U.S.C. § 216(b). Unlike class actions, however, collective actions do not presume participation by similarly situated employees. To join a collective, employees must *opt in* via written consent. *Id.* Congress deliberately rejected the opt-out model of class actions to "free[] employers of the burden of representative actions." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989).

Decades later, this Court imposed a new burden on employers—even greater than the burden they face in class actions. In pursuit of "efficient resolution" of collective claims, *id.* at 170, the Court allowed district courts to "facilitat[e] notice" to employees who have *not* opted in, thereby endorsing, for the first time, judicial invitations to *nonparties* to join a pending lawsuit, *id.* at 169.

This was a striking innovation. As Justice Scalia explained in dissent in *Hoffmann-La Roche*, there exists no historical analogue and "no source of authority for such an extraordinary exercise of the federal judicial power." 493 U.S. at 174. Even today, over three decades later, there is no other area of law in which courts engage in this practice.

And this Court has never filled in "the details of [this practice]." *Id.* at 170 (majority op.). In *Hoffmann-La Roche*, the Court expressly left open the question of the proper standard for issuing notice. *Id.* Since then, this Court has never addressed notices, leaving courts with "little guidance one can call law" on the proper standard. *Clark v. A&L Homecare & Training Ctr.*, 68 F.4th 1003, 1007 (6th Cir. 2023) (Kethledge, J.). So lower courts have had to "devise their own standards for facilitating notice." Pet.App.6a. They have struggled mightily. "Consensus," to put it mildly, "remains elusive." *Id.* at 9a. The result is an entrenched split across seven circuit courts, and deep confusion in district courts nationwide.

Most courts follow the so-called *Lusardi* standard, which permits notice on "nothing more than [a plaintiff's] substantial allegations" that other employees are similarly situated. *Thiessen v. Gen. Elec. Cap. Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001). "Recently," though, "two circuits have expressly rejected *Lusardi*'s modest notice standard in favor of a heightened burden of proof," Pet.App.9a—the Fifth Circuit, which prohibits court-licensed notice unless the plaintiff can prove by a preponderance of the evidence that other employees are "similarly situated," *Swales*, 985 F.3d at 434; and the Sixth Circuit, which prohibits notice unless the plaintiff can show a "strong likelihood" that other employees are similarly situated, *Clark*, 68 F.4th at 1011.

In the decision below, the Seventh Circuit "chart[ed]" yet a *fourth* path, expanding the split even further. Pet.App.15a. While rejecting the majority *Lusardi* approach, the court also "decline[d]" to "adopt

the Fifth Circuit's preponderance" standard or "the Sixth Circuit's strong likelihood of similarity standard." *Id.* at 17a. The court instead adopted a different standard: notice to nonparties may issue whenever "there is a material factual dispute," not resolvable without notice, "as to whether the proposed collective is similarly situated." *Id.* at 20a.

This Court's intervention is overdue. The standard for court-authorized notice is the defining question in virtually every collective action; once notice issues, it often "expand[s] the plaintiffs' ranks a hundredfold" and effectively forces settlement. *Clark*, 68 F.4th at 1007. Yet the governing law varies dramatically by geography, despite thousands of collective actions filed every year.[1] Crucial legal standards governing such prevalent lawsuits should not vary so wildly by circuit.

The split is also simple to resolve. The most straightforward way would be to revisit *Hoffmann-La Roche* and adopt Justice Scalia's view: nothing in the Constitution, statutes, or federal rules gives district courts the authority to use their "compulsory process to assist counsel for the plaintiff in locating nonparties to the litigation who may have similar claims, and in obtaining their consent to his prosecution of those claims." 493 U.S. at 174-181 (dissenting op.). That practice, invented by *Hoffmann-La Roche*, is, "if not unconstitutional, at least so out of accord with age-old practices that surely it should not be assumed." *Id.* at 176.

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[1] *See* Seyfarth Shaw LLP, 2023 FLSA Litigation Metrics & Trends ("2023 Seyfarth Report") 4, 8 (2024), https://perma.cc/ZW9H-HTM8 (finding that, in 2023, 2,689 collective actions were filed under the FLSA alone).

But at a minimum, the Court should answer the second question presented—making clear that there must be a meaningful showing before court-facilitated notice may issue. The proper standard for notice cannot be the Seventh Circuit's standard, where a plaintiff can win the right to court intervention in her favor based on the mere existence of a fact dispute about similarity. And it certainly cannot be the *Lusardi* standard that still dominates among lower courts, which permits court-licensed notice to issue on mere *allegations* by the plaintiff—without consideration of the defendant's rebuttal evidence or affirmative defenses. If a court is to be an *adjudicator* rather than an *assistant* to plaintiffs' counsel, it must demand that counsel *persuade* before obtaining relief, as the Fifth and Sixth Circuits now require.

The one path the Court should avoid is leaving lower courts in disarray. The issue here arises on an interlocutory appeal under § 1292(b)—presenting only (and necessarily) an important and recurring issue of law. As more circuits resolve the question, moreover, fewer § 1292(b) appeals will be certified. And once notices go out the door (and after final judgment), courts will not be able to review issues around sending notice; they will be moot. In short, if this Court believes it should *ever* resolve the division, it should do so now—in this cleanest of possible vehicles.

OPINIONS BELOW

The Seventh Circuit's decision (Pet.App.1a-2a) is published at 149 F.4th 901. The Seventh Circuit's decision granting permission to appeal (Pet.App.32a-33a) is unpublished. The District Court's decision certifying an interlocutory appeal (Pet.App.36a-53a) is

unpublished but accessible at 2024 WL 2126103. The District Court's decision approving the putative notice collective (Pet.App.54a-79a) is published at 725 F. Supp. 3d 881.

JURISDICTION

The district court certified its order for interlocutory appeal under 28 U.S.C. § 1292(b) on May 10, 2024. The Seventh Circuit granted permission to appeal on August 29, 2024, and issued its judgment on August 5, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The statutory provision authorizing collective actions under the FLSA is codified at 29 U.S.C. § 216(b) (Pet.App.84a-85a), and is incorporated by the ADEA at 29 U.S.C. § 626(b) (Pet.App.82a-83a).

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

A. Collective Actions

Both the FLSA and ADEA authorize employees to sue on behalf of "other employees similarly situated." 29 U.S.C. § 216(b); *see id.* § 626(b). But those "other employees" must affirmatively *opt in*: they must file "consent in writing" to join the lawsuit. *Id.* § 216(b). Collective actions thus differ from class actions. Unless and until other employees join the existing lawsuit, they are not parties and are not bound by any judgment. *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75 (2013).

The difference between opt *in* (collective actions) and opt *out* (class actions) reflects Congress's conscious choice. In 1947, concerned that the labor

laws had "been interpreted judicially" to "creat[e] wholly unexpected liabilities" for employers, Congress amended § 216(b). 29 U.S.C. § 251(a) (congressional findings and declaration of policy). Congress specifically "repeal[ed] the authority" that had allowed "[r]epresentative actions" where employees "designat[ed] an agent" for all those "similarly situated." H.R. Rep. No. 80-326, at 14 (1947) (Conf. Rep.). This amendment's purpose and effect was to "free[] employers of the burden of representative actions," *Hoffmann-La Roche,* 493 U.S. at 173, and to free "the courts of the country" from "excessive and needless litigation and champertous practices," § 251(a).

The resulting statute, amended 29 U.S.C. § 216(b), permits "similarly situated" persons to become "party plaintiff[s]" by "consent . . . filed in the court"—but provides no mechanism, or authority, for issuing notice to anyone, especially nonparties.

B. *Hoffmann-La Roche*'s Notice Invention

1. Forty-two years later, in 1989, a divided Supreme Court permitted district courts to help plaintiffs notify other possibly "similarly situated" employees of the existence of the plaintiffs' lawsuit. *Hoffmann-La Roche*, 493 U.S. at 169-173. The majority did not rely on any statutory text or historical practice permitting such notice. Instead, it averred to policy concerns, reasoning that any statute giving "affirmative permission" to join a collective suit "must" implicitly grant "procedural authority" to ensure that parties are joined "in an efficient and proper way." *Id.* at 170-171. One way district courts could enhance

efficiency, the majority believed, is by "facilitating notice to potential plaintiffs." *Id.* at 169.

Justice Scalia dissented, joined by Chief Justice Rehnquist. He explained that there is "no source of authority" for the "extraordinary" notion that a "district court can use its compulsory process to assist counsel for the plaintiff in locating nonparties to the litigation who may have similar claims, and in obtaining their consent to his prosecution of those claims." *Id.* at 174 (dissenting op.).

2. *Hoffmann-La Roche* expressly avoided filling in any "details" of the standard for when notice could or should go out. *Id.* at 170 (majority op.). It disclaimed "unbridled discretion" and emphasized the need to "respect judicial neutrality" and avoid "the solicitation of claims"—but it did not elaborate. *Id.* at 174. Further, because *Hoffmann-La Roche* was *sui generis*, it offered no textual or historical roadmap for its application. So the rub for lower courts has been in determining *who* should receive notice, *when*, and *upon what evidentiary showing*.

3. The "minimal guidance" from this Court has meant lower "courts have largely been left to devise their own standards." Pet.App.6a. "Consensus as to the proper standard for notice remains elusive." *Id.* at 9a. Even when ad hoc standards were widely adopted, they often "lack[ed] definition," even after being "used repeatedly for years." *Fitzgerald v. Forest River Mfg. LLC*, 2022 WL 558336, at *4 (N.D. Ind. Feb. 23, 2022). And this Court "has provided no further guidance regarding the notice-giving process," exacerbating the "widespread confusion." *Swales*, 985 F.3d at 434, 436.

II. PROCEDURAL BACKGROUND

This confusion was on full display in the proceedings below.

A. District Court Proceedings

Monica Richards is a Lilly employee who claims she was denied a promotion due to her age, violating the ADEA. She also alleges that other Lilly employees over 40 were likewise disfavored for promotion. Pet.App.56a.

No other employees, though, successfully opted in to her lawsuit, as required by statute. § 216(b). So she remains the only plaintiff.

To try to drum up joiners for her putative collective, Richards requested that the district court follow the notice process created by *Hoffmann-La Roche*. Relying on four declarations (including hers and her boyfriend's), as well as allegations that others were similarly situated, she asked that court to authorize and facilitate notice to a broad group of thousands of employees. Pet.App.57a, 61a; *see* Memorandum In Support, *Richards v. Eli Lilly and Co.*, No. 1:23-cv-242 (S.D. Ind. July 17, 2023), ECF 42.

Lilly countered that Richards had not shown that these other employees were similarly situated, and Lilly provided rebuttal evidence to that effect. Pet.App.56a, 67a. Court-licensed notice should not go out, Lilly argued, because issuing notice on a "minimal" showing "inflames the risk that notice will facilitate abuse of the collective-action device," including for settlement leverage. Opposition to Motion at 20-22, *Richards v. Eli Lilly and Co.*, No. 1:23-cv-242 (S.D. Ind. Aug. 14, 2023), ECF 45.

The district court evaluated the notice question under the majority standard—the "*Lusardi*" test, named after an early notice case, *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 361 (D.N.J. 1987). As that test has come to be applied, the burden to obtain notice is so modest that it barely qualifies as a burden at all: a plaintiff need present "nothing more than substantial allegations" that the proposed recipients are similar to herself. *Thiessen*, 267 F.3d at 1102. The required showing is not only openly "lenient," but also irrebuttable: district courts will not even consider "opposing evidence presented by a defendant" showing that other employees are *not* "similarly situated." Pet.App.63a. Nor will courts "make merits determinations," even when relevant to similarity. *Id.*

Under this extraordinarily lenient standard, and after refusing to "consider opposing evidence" from Lilly, the district court "conditionally certified" a collective—*i.e.*, it authorized notice to nonparties. *Id.* at 67a, 77a. Notice of Richards's lawsuit could go out, the court held, to all persons who were 40 or older when denied a promotion. *Id.* All meaningful review of whether the evidence permits a collective proceeding—whether these other employees were actually "similarly situated" to Richards, § 216(b)—would be deferred until a second step, after notice had already gone out, *see* Pet.App.70a.[2]

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[2] Many courts, the district court here included, loosely refer to the notice step as "conditional certification" and the post-notice step as "decertification." But that "characterization" is misleading. *Clark*, 68 F.4th at 1009. "[T]he notice determination," what courts call "conditional certification," "has zero effect on the character of the underlying suit." *Id.* And

Recognizing the confusion on the "purely legal question" of what standard should apply for authorizing notice—and relying on the "well[-]reasoned" opinions of the Fifth and Sixth Circuits that "conflict[]" with the *Lusardi* standard—the district court certified an interlocutory appeal under § 1292(b). Pet.App.47a.

B. Seventh Circuit Proceedings

After initially denying Lilly permission to appeal, the Seventh Circuit granted panel rehearing and accepted the appeal. *Id.* at 32a-33a.

On the merits, the Seventh Circuit reviewed the three "different" approaches among the circuits—but rejected all of them. *Id.* at 17a. It instead created a fourth standard, holding that district courts may facilitate notice when there is a "material factual dispute as to whether the proposed collective is similarly situated." *Id.* at 20a. Unlike *Lusardi*, the Seventh Circuit permits a district court to address a "similarity dispute" before notice—but only if "the court is confident" that the issue "can be resolved by a preponderance of the evidence" at that stage. *Id.* at 22a. If it lacks that confidence, it may proceed with sending out notice under "a two-step approach" and, like *Lusardi*, defer resolution of the "similarity" issues to a "second step." *Id.* at 21a-22a. The Seventh Circuit emphasized that its new standard does not lend itself to any "categorical[]" rule but instead "empowered [district courts] to use their discretion to strike the proper balance between timely notice and judicial

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"decertification" means severing improper joiners—employees who received notice but who are not "similarly situated." *See* Pet.App.7a-8a.

neutrality." *Id.* at 17a, 22a, 24a. This, the Seventh Circuit thought, would best advance "the remedial goals of the FLSA and ADEA." *Id.* at 22a.

Because the Seventh Circuit acknowledged that it was adopting "something different" from any other court, *id.* at 18a—and after finding that this "petition would present a substantial question and that there is good cause for a stay," Fed. R. App. P. 41(d)(1)—the Seventh Circuit stayed its mandate to permit Lilly to seek certiorari before any notices could go out, *see* Pet.App.1a-2a.

REASONS FOR GRANTING THE PETITION

I. THERE IS AN ACKNOWLEDGED, FOUR-WAY SPLIT OVER A RECURRING AND IMPORTANT QUESTION OF FEDERAL LAW.

When it comes to the standards for granting certiorari, this case has it all: an acknowledged, pervasive circuit split on a pure question of law whose "importance cannot be overstated." *Swales*, 985 F.3d at 443; *see* Sup. Ct. R. 10. The split (A) is undeniable and growing; (B) can effectively be resolved only by this Court; and (C) carries massive practical and economic significance.

First, the split is openly acknowledged and clear-cut—involving a *legal standard* not blurred by any varying fact patterns. Every circuit weighing in acknowledges the division on this "controlling question of law," 28 U.S.C. § 1292(b)—as does,

reportedly, respondent's own counsel.[3] Pet.App.18a; *Clark*, 68 F.4th at 1009; *Swales*, 985 F.3d at 436-437. And the split is rapidly widening, too, with three circuits over the past five years creating three new and different legal standards.

Second, the split is enduring—it cannot be resolved without this Court's guidance. This Court created the notice process but left lower courts without the "details of its exercise." *Hoffmann-La Roche*, 493 U.S. at 170. Lower courts have tried to fill that gap, but without "statutory or case law guidance," or even a similar device in practice, they have been unable to do so with any consistency. *Swales*, 985 F.3d at 436; *see also, e.g.*, *Clark*, 68 F.4th at 1007. And consistency is now impossible without this Court's intervention—for once a circuit resolves this interlocutory issue, the issue is not likely to be certified again under § 1292(b), and is effectively unreviewable after final judgment. This is therefore a quintessential "question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

Third, the split is on an important issue. The notice issue arises at least hundreds of times per year, implicating hundreds of millions of dollars. *See Swales*, 985 F.3d at 443. And the issue will "often" be "dispositive" to a collective action. *Clark*, 68 F.4th at 1007. *Not* weighing in on the split will subject employers to wildly different "litigation costs," Pet.App.16a, and pressure that "forc[es] a defendant to settle," *Clark*, 68 F.4th at 1007, based solely on the location of the district court. As the court below

[3] *See* Avalon Zoppo, *Circuit Split Widens on Judicial Approach to Sending FLSA Collective Action Notices*, Nat. L. J. (Aug. 11, 2025), https://perma.cc/2N38-88RD.

recognized, "disuniformity . . . creat[es] the appearance of a system that permits unpredictability and arbitrariness." Pet.App.12a.

A. The Circuits Have Openly Divided Across Four Legal Standards.

1. The *Lusardi* Approach

"[M]ost federal courts" have coalesced around the "lenient" two-step *Lusardi* approach, which permits notice to go out merely on the plaintiff's allegations, without consideration of affirmative defenses or rebuttal evidence. Pet.App.38a; *see Clark*, 68 F.4th at 1008. This approach hands plaintiffs an enormous advantage before any discovery takes place—"easily expand[ing their] ranks a hundredfold"—and makes adjudication on the merits extremely risky and expensive for defendants. *Clark*, 68 F.4th at 1007.

At step one, a plaintiff obtains authorization to send notices to potential members of a collective—often thousands of individuals. A typical notice, issued under a case caption,[4] tells the nonparty recipient that "you potentially are 'similarly situated' to the named Plaintiffs" and that the notice's "contents have been authorized by the federal district court."[5] Some go even further—for example, informing the recipient that "[y]ou may join the lawsuit because the Court found you are similarly situated to the person who

[4] *See, e.g.*, *Taylor v. NYC Health + Hosps.*, 2020 WL 4932798, at *2 (S.D.N.Y. Aug. 24, 2020) (model notice); *Cardoza v. Bloomin' Brands Inc.*, 2014 WL 5454178, at *6 (D. Nev. Oct. 24, 2014) (rejecting objection to including caption).

[5] 2 Les A. Schneider & J. Larry Stine, *Wage and Hour Law: Compliance and Practice* app. 20K-2 (Mar. 2025 update) (de-capitalizing); *see, e.g.*, *Gjurovich v. Emmanuel's Marketplace, Inc.*, 282 F. Supp. 2d 101, 106, 108 (S.D.N.Y. 2003) (same).

initially brought the lawsuit." *E.g.*, *Riddle v. Suntrust Bank*, 2009 WL 3148768, at *5 (N.D. Ga. Sept. 29, 2009).

Only after court-authorized notices go out, at *Lusardi*'s "step two," does a court consider both sides' evidence on whether the other employees—who received notice to join the lawsuit—are *in fact* "similarly situated." § 216(b).

As *Lusardi* has been applied over the years and throughout the country, three features stand out.

First, to secure notice under *Lusardi*, a plaintiff need only make a "modest factual showing" that proposed notice recipients were "victims of a common policy or plan" alleged to be unlawful. Pet.App.6a-7a. This standard is "loosely akin to a plausibility standard," *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1109 (9th Cir. 2018), requiring "nothing more than substantial allegations," *Thiessen*, 267 F.3d at 1102. *Accord, e.g.*, *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1218-1219 (11th Cir. 2001) ("fairly lenient standard"); *Myers v. Hertz Corp.*, 624 F.3d 537, 555 (2d Cir. 2010) ("low standard of proof").

Unsurprisingly, this "lenient standard generally results in conditional certification" approving notice to nonparties. *Haworth v. New Prime, Inc.*, 448 F. Supp. 3d 1060, 1066 (W.D. Mo. 2020); *accord Knox v. Jones Grp.*, 208 F. Supp. 3d 954, 958 (S.D. Ind. 2016).[6] The

[6] *See also, e.g.*, *Hernandez v. NGM Mgmt. Grp. LLC*, 2013 WL 5303766, at *3 (S.D.N.Y. Sept. 20, 2013) ("[C]ourts in this Circuit have routinely granted conditional collective certification based solely on the personal observations of one plaintiff's affidavit."); *Li v. Escape Nails & Spa, LLC*, 2024 WL 2728497, at *3 (D. Md. May 28, 2024) ("single declaration or affidavit" sufficed); *Delgado*

numbers bear this out, too. "In 2021, for example, district courts nation-wide granted 81% of conditional certification motions." *Laverenz v. Pioneer Metal Finishing, LLC*, 746 F. Supp. 3d 602, 614 (E.D. Wis. 2024).[7]

Second, as courts used to do with class certification, courts applying *Lusardi* set aside any questions overlapping with "merits determinations." Pet.App.7a; *contra Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-351 (2011). Only after notices have gone out, and nonparties have been invited to join, does a court apply a "more rigorous review." Pet.App.7a, 16a; *see Clark*, 68 F.4th at 1008; *Swales*, 985 F.3d at 437.[8]

Third, under *Lusardi*, courts also refuse to "consider opposing evidence presented by a defendant," Pet. App.7a, relying instead only "on the pleadings and declarations" of *plaintiffs*. *Holmes v. Swissport Fueling, Inc.*, 2017 WL 8794900, at *8 (M.D.

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v. Ortho-McNeil, Inc., 2007 WL 2847238, at *1 (C.D. Cal. Aug. 7, 2007) ("[C]onditional certification is commonly granted.").

[7] *See* Seyfarth Shaw LLP, *18th Annual Workplace Class Action Report* 10 (2022), https://www.content.seyfarth.com/publications/ Workplace-Class-Action-Report-2022/ ("Class Action Report 2022"); *see also id*. (noting prior two years' "success rate" of 84% and 81%).

[8] *See also, e.g.*, *Bethel v. BlueMercury, Inc.*, 2022 WL 3594575, at *6 (S.D.N.Y. Aug. 22, 2022) (noting "ample case law holding that consideration of the merits is absolutely inappropriate at the conditional approval stage"); *Fares v. H, B, & H, LLC*, 2022 WL 72081, at *3 (E.D. Wis. Jan. 7, 2022) (refusing to address "merits issue" whether notice recipients were "employees" or independent contractors); *White v. 14051 Manchester Inc.*, 2012 WL 5994263, at *2-3 (E.D. Mo. Nov. 30, 2012) (refusing to resolve dispute over whether proposed notice recipients worked at locations "not controlled by the Defendants").

Fla. Sept. 1, 2017).[9] This means that defendants must undergo years of expensive, protracted discovery before they have any prospect of severing improperly joined plaintiffs—or else settle prematurely against an untested collective. *See, e.g., Hinterberger v. Cath. Health Sys.*, 299 F.R.D. 22, 27, 55 (W.D.N.Y. 2014) (severing improperly joined employees four-and-a-half years after notice was sent).

In all, *Lusardi* requires only an unrebuttable "light burden of production" before a court authorizes and approves notice. *See, e.g., McKnight v. D. Houston, Inc.*, 756 F. Supp. 2d 794, 804 (S.D. Tex. 2010).

Four circuits—the Second, Ninth, Tenth, and Eleventh—have "approved the use of some version of *Lusardi*'s two-step approach." Pet. App.9a (collecting cases and citing *Harrington v. Cracker Barrel Old Country Store, Inc.*, 142 F.4th 678 (9th Cir. 2025); *Thiessen*, 267 F.3d 1095 (10th Cir. 2001); *Myers*, 624 F.3d 537 (2d Cir. 2010); *Hipp*, 252 F.3d 1208 (11th Cir. 2001)). And two others—the First and Third—have noted *Lusardi*'s use in their circuits as well. *See Kwoka v. Enter. Rent-A-Car Co. of Bos., LLC*, 141 F.4th 10, 22 (1st Cir. 2025); *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 243 (3d Cir. 2013)

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[9] *See, e.g.*, *Bitner v. Wyndham Vacation Resorts, Inc.*, 301 F.R.D. 354, 362 (W.D. Wis. 2014) (granting certification despite "strong argument" against similarity, because "court resolves factual disputes in plaintiffs' favor at this stage"); *Kress v. PricewaterhouseCoopers*, LLP, 263 F.R.D. 623, 628 (E.D. Cal. 2009) ("In determining whether plaintiffs have met [the notice] standard, courts need not consider evidence provided by defendants"); *Hinterberger v. Cath. Health Sys.*, 2009 WL 3464134, at *8-9 (W.D.N.Y. Oct. 21, 2009) (refusing to review defendants' "evidentiary submissions" regarding the claims' individualized nature).

("Courts in our Circuit follow a 'fairly lenient standard.'").

2. The Fifth Circuit's Preponderance Standard

In 2021, the Fifth Circuit became the first circuit to expressly "reject *Lusardi*'s two-step certification rubric," and particularly its "lenient, step-one" standard for when notice should go out. *Swales*, 985 F.3d at 434. The court found it particularly "improper to ignore evidence" of whether notice recipients could ever participate in the litigation. *Id.* at 441. Such a standard, the court explained, is "likely to send notice to employees who are not potential plaintiffs," making notice a "claims-solicitation tool." *Id.* at 442.

Instead, "embrac[ing] interpretive first principles" from § 216(b)'s text, which is silent on notice, and from *Hoffmann-La Roche*'s "admonition" to avoid "stir[ring] up litigation," the Fifth Circuit adopted a new standard. *Id.* at 434. A district court may send notice only to those determined to be "actually similar to the named plaintiffs" using "all available evidence." *Id.* at 434, 443. This rule has been understood as a "preponderance of the evidence" standard—the ordinary burden of persuasion, including under the FLSA and ADEA. Pet.App.9a (explaining *Swales*); *Clark*, 68 F.4th at 1009-1010 (same); *see EMD Sales, Inc. v. Carrera*, 604 U.S. 45, 47 (2025).

3. The Sixth Circuit's Strong-Likelihood Standard

Two years later, the Sixth Circuit accepted an interlocutory appeal to evaluate whether it "should adopt the *Lusardi* approach" or "the Fifth Circuit's

approach." *Clark*, 68 F.4th at 1009. But it "adopt[ed] neither of these approaches." *Id.*

As for the *Lusardi* approach, the Sixth Circuit held that it conflicted with the "little guidance" *Hoffmann-La Roche* provided. A court's "facilitation of notice must not 'in form or function' resemble 'the solicitation of claims.'" *Id.* at 1010 (quoting *Hoffmann-La Roche*, 493 U.S. at 174). Yet *Lusardi*'s "lenient standard" does just that: it allows notice sent "to employees who are not, in fact, eligible to join the suit." *Id.*

But the court also declined to adopt the Fifth Circuit's preponderance approach. Trying to grapple with *Hoffmann-La Roche* and the lack of "law" on this issue, the Sixth Circuit reasoned that, "as a practical matter," it is often difficult to "make 'similarly situated' determinations" as to employees who are not present in the case. *Id.* at 1010.

So the Sixth Circuit created a standard of its own. By "analog[y]" to a "preliminary injunction," it required "plaintiffs [to] show a 'strong likelihood'" that notice recipients are similarly situated, considering all available evidence. *Id.* at 1010-1012.

4. The Seventh Circuit's Material-Dispute Standard

Here, the Seventh Circuit reviewed the three prevailing legal standards but "decline[d]" to adopt any of them. Pet.App.17a. After surveying the three-way circuit split, the court "chart[ed] a different path," adopting "something different" from any other court. *Id.* at 15a, 18a.

The Seventh Circuit found the majority *Lusardi* standard "deeply inefficient" and harmful to judicial

"neutrality." Pet.App.16a. But it also thought that the Fifth and Sixth Circuits did not respect a "core principle" of *Hoffmann-La Roche*: "judicial discretion." Pet.App.18a. It thus rejected those circuits' standards as "inflexible" and an impediment to a court wishing to implement the "'broad remedial goal'" of the FLSA and ADEA. Pet.App.18a.

Under the Seventh Circuit's new framework—urged by neither party—a plaintiff can obtain court-licensed notice when she makes "a threshold showing that there is a material factual dispute as to whether the proposed collective is similarly situated." Pet.App.20a. If such a dispute exists, the district court has two options. The court (1) "may proceed with a two-step approach" similar to *Lusardi*'s by issuing notice immediately and deferring resolution of the "similarly situated" dispute until after notice issues, or (2) "if the court is confident that a similarity dispute can be resolved by a preponderance of the evidence before notice, it may authorize limited and expedited discovery" and make the *Hoffmann-La Roche* notice decision accordingly. Pet.App.21a-22a.

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With four expressly different standards across the country, it could not be clearer that the circuit courts increasingly and openly disagree on this pure legal question. Review is warranted. *See* Sup. Ct. R. 10(a).

B. Resolving The Split Requires This Court's Intervention.

Unlike with some circuit splits, this one does not reflect circuit-court unwillingness to engage with this Court's precedent or direction. The circuits here are trying their hardest to fill the gap this Court created

in *Hoffmann-La Roche*, when it invented the notice procedure but did not outline "the details of its exercise." 493 U.S. at 170. That question—about the legal standard for issuing notice, the bare minimum lower courts should know about when to authorize notice—"has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

Lower courts are in the dark. They cannot turn to statutory text; there is none on notice. They cannot turn to history or tradition; the notice-giving process is "out of accord with age-old practices." *Hoffmann-La Roche*, 493 U.S. at 176 (Scalia, J., dissenting). And they cannot turn to this Court's precedent; it has left the "details" blank. *Id.* at 170 (majority op.).

The circuits have noted this lack of guidance. As Judge Kethledge put it: "Neither the statute, nor *Hoffmann-La Roche*, nor (so far as we can tell) any traditional practice at common law or equity says much about what the requisite showing should be," leaving "little guidance that one can call law." *Clark*, 68 F.4th at 1007; *see also, e.g.*, *Swales*, 985 F.3d at 436 (noting the lack of "statutory or case law guidance" on how to apply *Hoffmann-La Roche*). Simply put, "there is no legal standard." Pet.App.13a (op. below). Nor are modern practices of any help—there is, after all, no other area of law in which courts issue joinder invitations to nonparties. *See Clark*, 68 F.4th at 1007.

The "little guidance" courts do have, moreover, is blurry as could be. *Id.* Parts of *Hoffmann-La Roche* suggest "enforc[ing] to the full extent" the "broad remedial goal of the [FLSA and ADEA]," including by authorizing and facilitating notice to nonparties. 493 U.S. at 173. But the very next line claims that this

"does not imply that trial courts have unbridled discretion" to send out notices. *Id.* at 174. Where a court's discretion stops, though, was left unsaid. The only "details" provided were that "courts must be scrupulous to respect judicial neutrality" and "must take care to avoid even the appearance of judicial endorsement of the merits of the action." *Id.* As evidenced by the four-way circuit split, *Hoffmann-La Roche*'s scant guidance has proved insufficient. *See, e.g.*, *Swales*, 985 F.3d at 434, 436.

And any further guidance must come from this Court. As more lower courts have certified the issue for interlocutory appeal, the confusion has only worsened—and become more entrenched. With their new and increasingly conflicting standards, the circuits have added "new life [to] the national debate." *Laverenz*, 746 F. Supp. 3d at 612-613. And now, across the circuits, district courts are *locked into* conflict with their peer courts. Nor can *en banc* harmonization fix the problem, for certification of an interlocutory appeal is nigh impossible in a circuit that has *already decided* the issue. *See infra* at 29-31. The issue is instead one only this Court can resolve.

C. The Issue Is Exceptionally Important.

The one aspect of the notice standard that courts *do* agree on is its immense "importance." *Swales*, 985 F.3d at 443. The notice question "matters greatly" to plaintiffs, employers, courts, and the public alike. Pet.App.8a-9a.

For one thing, the issue arises frequently. Thousands of FLSA collective actions are filed each

year, to say nothing of ADEA collective actions.[10] In nearly every one, plaintiffs will request "conditional certification" (*i.e.*, court-licensed notice to nonparties) before any meaningful discovery has taken place. *Id.* at 7a. And why would they *not*? After all, "the issuance of notice can easily expand the plaintiffs' ranks a hundredfold," or more. *Clark*, 68 F.4th at 1007. This preliminary issue is thus often *the* "dispositive" issue in the case, "in the sense of forcing a defendant to settle," *id.*, "no matter the action's merits," Pet.App.9a.

It makes sense, then, that this issue also implicates hundreds of millions of dollars annually.[11] An employer who, after notice, suddenly faces a lawsuit against not one but hundreds or thousands of employees—with all the "litigation costs," years of discovery, and internal pressures accompanying litigation of that size and scope, *id.* at 16a-17a—may well choose to settle rather than litigate. The related, class-action experience is instructive—"where the possibility of colossal liability can lead to what Judge Friendly called 'blackmail settlements.'" *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 743 (2023). Getting class certification (or, here, "conditional certification") wrong thus matters greatly: It can "coerce businesses into costly settlements that they sometimes must reluctantly swallow rather than betting the company on the uncertainties of trial." *Lab'y Corp. of Am.*

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[10] *See* 2023 Seyfarth Report, *supra*, at 4 (finding that 2,689 collective actions were filed under the FLSA alone in 2023, apart from, *e.g.*, ADEA actions).

[11] *See* 2023 Seyfarth Report, *supra*, at 15 ("In 2023, 423 FLSA collective actions settled in federal court," totaling "$493,571,392, for an average of $1,166,835 per case.").

Holdings v. Davis, 605 U.S. 327, 333 (2025) (Kavanaugh, J., dissenting).

The threat of coercive litigation is indeed even more dire in the collective-action context. With class actions, notice to absent class members does not go out until *after* plaintiffs have satisfied the "rigorous" certification requirements of Rule 23 by a preponderance of the evidence. *Wal-Mart*, 564 U.S. at 351; *see also Farmers Co-op. Co. v. United States*, 90 Fed. Cl. 72, 73 (2009) (courts and commentators have "categorically denounced the issuance of such pre-certification notice" for class actions). Yet in the collective-action context, courts in every circuit except the Fifth issue notice on a more lenient showing—even though recipients (unlike absent class members) are *not* presumptive parties to the litigation, and even though Congress specifically amended the FLSA to make collective actions *less* "burdens[ome]" to defendants than class actions. *Hoffmann-La Roche*, 493 U.S. at 173.

Apart from its frequency and financial impact, the notice issue also matters for actual and perceived "judicial neutrality." *Swales*, 985 F.3d at 436. The *Lusardi* majority standard and the decision below place "judicial thumbs (or anvils) on the scale" in a way that may effectively decide a case. *Id.* Ensuring that a court does not extend the "federal judicial power" beyond "cases and controversies" is a matter of constitutional concern, more than just dollars and cents. *Hoffmann-La Roche,* 493 U.S. at 175 (Scalia, J., dissenting).

Finally, the existing "disuniformity" among the lower courts "creat[es] the appearance of a system that

permits unpredictability and arbitrariness." Pet.App. 12a. This is especially important to correct here, where Congress desires "a uniform national policy." *Tenn. Coal, Iron & R. Co. v. Muscoda Loc. No. 123*, 321 U.S. 590, 602-603 (1944). The Court should grant the petition and provide just that.

II. THE DECISION BELOW IS WRONG.

The decision below is wrong both because (A) it is grounded on the faulty foundation of *Hoffmann-La Roche* and (B) it disregards even the limited guardrails *Hoffmann-La Roche* established. Either error (corresponding to the first and second questions presented) is worth this Court's intervention. Together they make a compelling case for it.

A. The Seventh Circuit Is Wrong Because *Hoffmann-La Roche* Is Wrong.

The main reason lower courts diverge on the standard for authorizing and facilitating notices to nonparties is because that practice is "so out of accord" with statutory text, history, and tradition. *Hoffmann-La Roche,* 493 U.S. at 176 (Scalia, J., dissenting). "The activity approved [by *Hoffmann-La Roche*] is an extraordinary application of the federal judicial power," unauthorized by Article III or Congress. *Id.* at 175, 181. *Hoffmann-La Roche* was wrong the day it was decided, *id.*, and has proved badly unworkable since. This Court should grant certiorari to correct course.

1. *Hoffmann-La Roche* is egregiously wrong. Justice Scalia, joined by Chief Justice Rehnquist, explained why: There is "no source of authority"—constitutional, statutory, rules-based, or otherwise—for the notion that federal courts can (or should) use

their compulsory process to assist plaintiffs or plaintiffs' lawyers in identifying and recruiting members of the public to join their lawsuits. 493 U.S. at 174 (Scalia, J., dissenting). The collective-action statute Congress enacted—§ 216(b)—requires other employees to themselves opt in; there is no basis for courts to reach out and invite them to do so.

Start with the Constitution, which limits the federal judicial power to resolution of "Cases" and "Controversies." Art. III, § 2, cl. 1. Federal courts are "capable of acting," consistent with this clause, "*only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law*." *Hoffmann-La Roche,* 493 U.S. at 175-176 (Scalia, J., dissenting) (quoting *Osborn v. Bank of United States*, 9 Wheat. 738, 819 (1824)). The targets of *Hoffmann-La Roche*'s notices, though, do not fit that bill. They are "members of the public at large," at most *potential future* plaintiffs with *potential future* claims. *Id.* at 178. Permitting courts to take an active role in the "generation and management" of these potential disputes "is, if not unconstitutional, at least so out of accord with age-old practices" that "it should not be assumed unless it has been clearly conferred." *Id.* at 176; *see Clark*, 68 F.4th at 1007.

No statutory text confers this "novel role" on courts. *Hoffmann-La Roche,* 493 U.S. at 176-180 (Scalia, J., dissenting). The most *Hoffmann-La Roche* could offer was an inference from § 216(b)—that § 216(b), by granting "affirmative permission for employees to proceed on behalf of those similarly situated," *implicitly* also conferred the "requisite procedural authority to manage the process of joining multiple parties in a manner that is orderly, sensible, and not

otherwise contrary to [law]." *Id.* at 170 (majority op.). But Justice Scalia correctly dismantled that reasoning. "[T]he reality of the matter is that [§ 216(b)] is not an 'affirmative permission' for representative actions at all, but rather a *limitation* upon the affirmative permission for representative actions that already exists in Rule 23." *Id.* at 176. And even "accepting the notion that Section 216(b) is an 'affirmative permission' for representative actions," it is not an "implied authorization for courts to undertake the unheard-of role of midwifing those actions." *Id.* "Nothing in § 216(b) remotely confers the extraordinary authority for a court—either directly or by lending its judicial power to the efforts of a party's counsel—to *search out* potential claimants, ensure that they are accurately informed of the litigation, and inquire whether they would like to bring their claims before the court." *Id.* at 177.

The *Hoffmann-La Roche* majority also relied on the Federal Rules, but that reliance was "so strained that it snaps." *Id.* at 179. In fact, the "[a]uthority for the courts to use their power for a purpose that neither achieves nor assists the resolution of claims before them" is "expressly *foreclosed*" by the Rules. *Id.* at 178 (emphasis added); *see* Fed. R. Civ. P. 82. And anyway, the Rules at most permit district courts in various ways to "manage actions"—which "cannot reasonably be read to refer to the management of claims and parties *not before the court*." *Hoffmann-La Roche,* 493 U.S. at 178-179 (Scalia, J., dissenting) (emphasis added).

What the *Hoffmann-La Roche* majority was left with as the basis for its novel, notice-giving power was speculation that it would "make[] for more efficient

and economical adjudication of cases—not more efficient and economical adjudication of the *pending* case, but of *other* cases that might later be filed separately on behalf of plaintiffs who would have been perfectly willing to join the present suit instead." *Id.* This, though, "is a justification in policy but not in law." *Id.* And it is bad policy at that. It conflicts with *Congress's* policy in amending the FLSA, which was to make other employees opt in themselves, thereby "freeing employers of the burden of representative actions." *Hoffmann-La Roche,* 493 U.S. at 173 (majority op.). It is not the type of "careful analysis" that commands adherence on *stare decisis* grounds. *Arizona v. Gant*, 556 U.S. 332, 348 (2009); *see, e.g.*, *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 411 (2024) (*stare decisis* does not require adherence to an atextual "judicial invention").

2. *Hoffmann-La Roche* is not only wrong in principle—it is also unworkable in practice. Experience has borne this out. Lower courts have tried to fashion a "workable, gatekeeping framework," *Swales*, 985 F.3d at 433, but that has only generated a four-way circuit split. *See supra* at 11-14.

The circuit split was inevitable, too. With *Hoffmann-La Roche* grounded in policy, not law, courts cannot draw from text, precedent, or "traditional practice at common law or equity"; none of that "says much about what the requisite showing [for notice] should be." *Clark*, 68 F.4th at 1007. *Hoffmann-La Roche* did not explain what burden plaintiffs bear to obtain court-authorized notice; did not describe the evidence available for consideration at the notice stage; did not discuss whether or how the notice inquiry should account for affirmative defenses;

and did not explain how its prohibition on the "solicitation of claims," 493 U.S. at 174, could be squared with endorsing judicial invitations to nonparties to join plaintiffs' lawsuits. Lower courts, unsurprisingly, disagree on *all* these questions. *Supra* at 11-14; *compare, e.g.*, *Bigger v. Facebook, Inc.*, 947 F.3d 1043, 1050 (7th Cir. 2020) ("[A] court may not authorize notice to individuals" who "entered mutual arbitration agreements waiving their right to join the action."), *with, e.g.*, *Harrington*, 142 F.4th at 684 (courts may "reserve" the arbitrability question until "after the prospective plaintiffs have . . . opted into the litigation").

That lower courts must resort to "guesswork and intuition" to understand and apply *Hoffmann-La Roche*'s notice holding shows that something is wrong with the holding itself. *Johnson v. United States*, 576 U.S. 591, 601 (2015). Lower courts' disagreement has only deepened with time, providing strong evidence that *Hoffmann-La Roche*'s notice-sending experiment is "a failed enterprise." *Id.* at 601-602.

3. As a procedural, "judge-made rule" with no historical pedigree that was "adopted to improve the operation of the courts," *Hoffmann-La Roche* is also the *type* of case in which "[r]evisiting precedent is particularly appropriate." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009).

What the *Hoffmann-La Roche* majority thought would be "orderly," "sensible," and "efficient" has been anything but. 493 U.S. at 170-171. Instead of being "orderly," court-authorized notice has led to messy, protracted discovery disputes that delay proceedings, consume vast party and judicial resources, and

distract from the merits. Instead of being "sensible," court-authorized notice has sown discord and confusion nationwide. And instead of being "efficient," court-authorized notice has precipitated an explosion in both the number of collective actions and the cost of settling them—without any determination about whether notice recipients are in fact similar. This "considerable body of new experience" is reason to find that the judge-made rule in *Hoffmann-La Roche* "should not be retained." *Pearson*, 555 U.S. at 234.

4. Because *Hoffmann-La Roche* grounded its holding in lower courts' "discretionary authority" over "case management" issues, 493 U.S. at 174, ending that practice would not upset reliance interests. "Considerations in favor of *stare decisis*" are at their lowest "in cases involving procedural and evidentiary rules." *Pearson*, 555 U.S. at 233 (cleaned up). These case-management rules, by their nature, do not "affect the way in which parties order their affairs," and so revisiting them "would not upset settled expectations on anyone's part." *Id.*

With all *stare decisis* factors pointing in the same direction, this Court should grant certiorari on the first question presented, resolving the split in the most straightforward way: by overruling *Hoffmann-La Roche*. That would end altogether the "extraordinary" and "disreputable" practice of a court authorizing notices to nonparties on behalf of plaintiffs' counsel, *Hoffmann-La Roche*, 493 U.S. at 177, 181 (Scalia, J., dissenting), and would return Article III courts to the rule that "plaintiffs come to the courts, rather than vice versa," *Clark*, 68 F.4th at 1007 (Kethledge, J.) (citing *Osborn*, 9 Wheat. at 819).

B. The Seventh Circuit's Rule Is Wrong Even If The Court Retains *Hoffmann-La Roche*.

Even accepting *Hoffmann-La Roche*, the Seventh Circuit should be reversed. Its standard, like the *Lusardi* one still dominating lower courts, cannot be squared with (1) the guardrails in *Hoffmann-La Roche* or (2) anything else federal courts do.

1. The Seventh Circuit's standard—whereby notice may issue when a court finds a fact dispute on similarity—leads to exactly what this Court prohibited: the effective "solicitation of claims." *Hoffmann-La Roche,* 493 U.S. at 174.

The decision below permits notice to issue even if the plaintiff's evidence that other employees are "similarly situated" is not *persuasive*. It claims to do so to maximize "flexibility" and "discretion." But the Seventh Circuit pursues those ends at the cost of *Hoffmann-La Roche's* prohibition on soliciting claims. Pet.App.21a-22a. As the Fifth and Sixth Circuits explain, *Hoffmann-La Roche* at minimum requires a plaintiff to carry a serious persuasive burden—since notice to ineligible plaintiffs "amounts to solicitation of those employees to bring suits of their own." *Clark*, 68 F.4th at 1010; *accord Swales*, 985 F.3d at 442. A fact dispute, though, is no serious burden at all—especially so early in the case before contrary evidence has been developed.

Like the *Lusardi* standard, therefore, the Seventh Circuit's standard permits too many notices to go out. And when courts send out notices too liberally, they find themselves inviting nonparties who, it later

becomes clear, are not actually "similarly situated." *See* Pet.App.16a.

The unusually high rate of "decertification" (severance) decisions—in the relatively few cases that do not prematurely settle—illustrates this problem: "over half of those conditionally certified putative [collectives] failed to survive upon a more rigorous review." *Laverenz*, 746 F. Supp. 3d at 614; *see* Class Action Report 2022, *supra*, at 10. The invited nonparties turn out to have different duties, decisionmakers, or circumstances.[12] But by the time all this becomes clear under a standard like the Seventh Circuit's, it is too late. The belated determination of similarity often means the waste of a "large investment of resources by the parties" and courts, including years of discovery and related proceedings. *See, e.g.*, *Johnson*, 561 F. Supp. 2d at 570, 587 (expressing "regret[]" for resources spent, including "43 hours of live trial testimony"); *Kwoka*, 141 F.4th at 18, 27 (affirming a collective's "decertification" with nearly 1,500 opt-ins, after *seven years* of litigation).

Deciding similarity upfront and by a preponderance, as in the Fifth Circuit, saves time and money and protects judicial neutrality. *Accord Wal-Mart*, 564 U.S. at 350-352. While class and collective actions differ in many respects, in both settings, the certification or notice decision on "similarity" delivers

[12] *See, e.g.*, *Karlo v. Pitt. Glass Works, LLC*, 849 F.3d 61, 86 (3d Cir. 2017) (variation in title, duties, and decisionmakers); *Peterson v. Seagate US LLC*, 809 F. Supp. 2d 996, 1003 (D. Minn. 2011) (employees taking voluntary retirement not similarly situated to those fired); *Johnson v. Big Lots Stores, Inc.*, 561 F. Supp. 2d 586, 586 (E.D. La. 2008) ("dissimilarity" of job duties).

plaintiffs a decisive victory and fundamentally reshapes the case. Applying the same "usual standard of proof in civil litigation"—preponderance—to both determinations would harmonize and simplify the law. *EMD Sales*, 604 U.S. at 47.

2. The Seventh Circuit's standard is also foreign in the law. It enables a court to grant substantial, often case-dispositive, relief to one party that has done nothing to *prove* its entitlement to the relief. The Seventh Circuit could not identify any analogous area of law where courts take such serious action on such a minimal showing.

The Fifth and Sixth Circuits' standards, by contrast, resemble the *kinds* of showings courts normally require of moving parties before granting them relief. The Fifth Circuit's preponderance standard is the most familiar. But even the Sixth Circuit's strong-likelihood standard is drawn from the preliminary-injunction context—another area that, like collective-action notice, requires courts to issue a preliminary decision that nevertheless has "immediate consequences for the parties." *Clark*, 68 F.4th at 1010-1011. When courts deal with these familiar standards, some level of predictability ensues across decisions, district courts, and geography—as opposed to the Seventh Circuit's foreign standard, which leaves district courts with little more than to be "flexib[le]." Pet.App.22a.

There is no good reason why this foreign, lenient approach should apply when a plaintiff seeks to notify nonparties of a supposedly "similarly situated" collective. Like a class-certification order or a preliminary injunction, the issuance of notice involves

court intervention in favor of one party, to the other's detriment. And like class certification and preliminary-injunctive relief, it has real—often "dispositive"—consequences for the defendant. *Clark*, 68 F.4th at 1007. So just as with a certification order or a preliminary injunction, the plaintiff should have to bear a meaningful evidentiary burden to assure the court that the facts warrant relief.

The Seventh Circuit was wrong to reject those standards, even taking *Hoffmann-La Roche* as given. *See Citizens United v. FEC*, 558 U.S. 310, 384 (2010) (Roberts, C.J., concurring) (*Stare decisis* "counsels deference to past mistakes, but provides no justification for making new ones.").

III. THIS PETITION IS AN IDEAL VEHICLE FOR AN ISSUE THAT NORMALLY EVADES APPELLATE REVIEW.

This case is an ideal vehicle to review the questions presented. It arises out of a certification for interlocutory appeal under 28 U.S.C. § 1292(b), and was thus limited below to a pure and controlling question of law: What legal standard governs courts' decisions to issue notice? Pet.App.11a. That was the only question addressed by the Seventh Circuit, *id.*, making this case a remarkably clean vehicle. The Seventh Circuit also expressly acknowledged the four-way circuit split—that it was rejecting "the notice frameworks outlined in *Lusardi*, *Swales*, and *Clark*" and adopting "something different." *Id.* at 18a.

The interlocutory-appeal posture makes this case an attractive vehicle for another reason, too: It offers the "rare[]" opportunity to address an issue that, despite its immense importance, normally evades

appellate review. *Id.* at 11a. A district court's decision to issue notice is not a final, appealable one, so it requires what happened here: a district court to certify its notice order for appeal under § 1292(b) and a circuit court to accept the appeal. If that does not happen, the notice issues disappear. After final judgment, after all, notice has already gone out the door—meaning the harm has been done and the notice questions are moot. And that is *if* a collective ever reaches final judgment; nearly none do. "[T]he leniency" of *Lusardi* and similar standards "exert[] formidable settlement pressure," often ending these cases in their infancy. *Swales*, 985 F.3d at 436. The upshot is that the questions presented here, by their nature and despite their immense importance, "rarely (if ever) reach the courts of appeals," *Swales*, 985 F.3d at 436—far less this Court.

On top of all that, the difficulty of obtaining interlocutory review means that further percolation either will not occur—or, at best, will only deepen the split. Interlocutory review is generally available only when *existing circuit precedent* leaves room for "substantial ground for difference of opinion" about an issue. 28 U.S.C. § 1292(b); *see In re Miedzianowski*, 735 F.3d 383, 384 (6th Cir. 2013) ("circuit split" not a basis for granting interlocutory review unless "*our own circuit has not answered*" the question). In over half the circuits, therefore, the issue has almost no chance of being certified for appellate review again. This unusual circumstance—appellate review only by special permission, and only for open questions of law—means that, unlike with most splits, the circuits will likely not have the opportunity to harmonize their

own precedent with others via *en banc* review. Absent this Court's intervention, division will be locked in.

The Court should not pass up this chance—*the only one of its kind*—to resolve these important issues in a case in which those issues are undeniably preserved, squarely presented, outcome dispositive, and uncomplicated by any fact disputes or jurisdictional concerns.

CONCLUSION

The Court should grant the petition.

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