No. 25-476

In the Supreme Court of the United States

ELI LILLY AND COMPANY; LILLY USA, LLC,

Petitioners,

v.

MONICA RICHARDS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF OHIO, 19 OTHER STATES, AND THE ARIZONA LEGISLATURE IN SUPPORT OF PETITIONERS

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INTRODUCTION AND STATEMENT OF AMICI INTEREST[1]

Litigation often takes a straightforward path. A plaintiff sues. A defendant responds. And the case moves toward trial. Sometimes cases involve multiple parties. Class actions can encompass thousands of individuals. And multi-district litigation may consolidate hundreds of actions before one court. But, large or small, *all* litigation has one critical thing in common: courts address disputes among *parties*.

This case is different. Under the statute at issue here, *non-parties* invited by the court into the courtroom often determine the case's disposition. Thanks to judicial ingenuity, plaintiffs suing under 29 U.S.C. §216(b)—which applies to suits under the Fair Labor Standards Act, the Equal Pay Act, and the Age Discrimination in Employment Act—may represent other individuals in what have been termed "collective actions." Like class actions, collective actions allow plaintiff employees to bring cases on behalf of "similarly situated" employees. 29 U.S.C. §216(b). But, unlike in class actions, a "similarly situated" non-party employee "become[s] ... a party" to the suit only when "he gives his consent in writing" to the court—in other words, when he *opts in* to the lawsuit. *Id.*

Relying on that provision, this Court nearly four decades ago devised a special plaintiff-friendly rule under which an employee can represent co-workers even when they are not parties to the case. *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989). Through this so-called "conditional certification"

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[1] The *amici* States provided all parties with the notice required by Rule 37.2.

process, the plaintiff co-opts the court in soliciting other non-parties to bring their suits against the defendant—by sanctioning courts to send "notice" to non-party employees that allows them to "opt in" to the lawsuit. And even *before* non-party employees opt-in (and before they officially become parties), cases move forward with discovery and motion practice. Once a court sends notice, in other words, the case proceeds as if a class already exists.

Just one problem: no source of authority gives courts power to solicit non-party plaintiffs in this way. Not the statute. Not the Constitution. Not the federal civil rules. And certainly not any history or tradition. Conditionally "certifying" a "class" of non-parties through court-ordered notice is a creature of judicial innovation. And this judicial creativity comes with consequences. It "distort[s] the underlying statutory text, impose[s] unnecessary burdens on litigants, and cause[s] confusion for courts." *Ames v. Ohio Dep't of Youth Servs.*, 605 U.S. 303, 313 (2025) (Thomas, J., concurring). By "certifying" a "class" of non-parties, courts impose massive costs on defendants, forcing many to settle. Conditional certification is often the ballgame, resulting in hundreds of millions of dollars in settlements every year.

Many of the *amici* States know this all too well. Ohio, like other States, defends lawsuits under §216(b) involving the court-created "notice" practice. And each time, the State defendant faces the possibility that the judge will send court-approved documents to other state employees. This practice stirs up further litigation, raids State treasuries, and, thus, interferes with execution of State sovereign functions.

As if those burdens are not enough, the judge-made practice has created significant confusion in lower courts that remain flummoxed over what standard governs the decision to "conditionally" certify a class by sending court-ordered notice. Since *Hoffmann-La Roche*, at least four different standards have evolved, leaving defendants with hardly any guidance on when, why, and how courts will invite non-parties to the litigation.

This Court should grant the petition to end *Hoffmann-La Roche*'s mischief, or at least clarify the standard that applies to this judge-made practice. States, like all defendants staring down multi-million-dollar demands, deserve clear guidance. Without any clear rule, States will continue to bear the cost of a practice untethered from statutory text, constitutional principles, and history and tradition.

STATEMENT

Plaintiffs suing under 29 U.S.C. §216(b)—which applies to the Fair Labor Standards Act ("FLSA"), Equal Pay Act ("EPA"), and Age Discrimination in Employment Act ("ADEA")—may represent "similarly situated" co-workers if those employees "give[] … consent in writing to become such a party and such consent is filed in the court." 29 U.S.C. §216(b). The idea is simple: when one employee sues, others can tag along, so long as they share sufficient similarity. That avoids duplicative and unnecessary litigation, thus serving judicial economy.

Section 216's procedure has come to be known as a "collective action," which sounds like Civil Rule 23's "class action." But the two differ in meaningful ways. Most notably: collective actions contain none of the Rule 23 safeguards—numerosity, commonality,

typicality, and adequacy. And under §216, employees must affirmatively ask to join the case—a stark difference from Rule 23's "opt-out" rule.

The upshot is that employees seeking to join a coworker in a §216 action are not automatically "plaintiffs." A court must rule that they are similarly situated to the named plaintiff. But when—and how—that should occur has left lower courts stumped.

The confusion stems from a court-created doctrine called "conditional certification" or "notice." In *Hoffmann-La Roche Inc. v. Sperling*, this Court blessed that process by which courts approve and facilitate notice to non-party employees *before* final certification. 493 U.S. 165 (1989). At this "conditional certification" phase, the court can, with a minimal showing, determine that absent employees are *likely* similarly situated and send notice soliciting them to join the suit. However, at the conditional notice stage, these employees do not become parties. That comes later—at the *final* certification stage.

Lower courts, however, do not agree (or know) *when* they may send such notices. It is no wonder why. The statute's text says nothing about conditional notice to employees. And there is no historical or traditional practice of courts issuing such solicitations. So, to implement *Hoffmann-La Roche*'s plan, lower courts have conjured up best practices from thin air.

Without textual (or other) tethering, conditional-notice practice has splintered the courts in application. Lower courts now follow four separate tests in determining when to send notice—the most recent test created here. In this case, Monica Richards, an Eli Lilly employee, brought an ADEA claim alleging

that Eli Lilly denied her a promotion based on age. Richards took advantage of *Hoffmann-La Roche*'s notice regime (which applies to ADEA actions), sought conditional certification, triggering court-approved notice to other employees. After authorizing notice to non-party employees, the district court certified an interlocutory appeal.

The Seventh Circuit affirmed. And, in the process, the Circuit held that notice is proper whenever a material dispute exists as to whether employees are similarly situated. Thus, the court permitted notice even *before* any finding that the employees were similarly situated. After the Seventh Circuit's holding, the lower courts are now divided four separate ways, and this Court's guidance is needed.

SUMMARY OF ARGUMENT

More than thirty-five years ago, this Court introduced a new role for courts to oversee so-called "collective actions" under 29 U.S.C. §216(b). In this new role, courts may solicit non-parties "similarly situated" to the plaintiffs to join cases arising under the FLSA, EPA, and ADEA.

For defendants in FLSA, EPA, and ADEA suits, "the issuance of notice can easily expand the plaintiffs' ranks a hundredfold," forcing settlement regardless of the merits. *Clark v. A&L Homecare & Training Ctr., LLC*, 68 F.4th 1003, 1007 (6th Cir. 2023). Thus "the decision to send notice of an FLSA[,]" EPA, or ADEA "suit to other employees is often a dispositive one." *Id.* Litigating against adverse *parties* is one thing. But defending against scores of *non-parties* invited by the court is altogether different, creating millions of dollars in potential liability with little protection. Given the odds, defendants often give in. Faced with dozens,

hundreds, or even thousands of claims from non-parties, defendants are forced to settle. Thus, the practice forces defendants to fight with one hand behind their backs.

Amici States know. Under various federal statutes that incorporate §216(b), States face lawsuits involving *Hoffmann-La Roche*'s notice regime. And when courts conditionally "certify" these "classes" of employees, States are forced to settle or face crushing liability. The coercive court-ordered-notice practice thus inflicts violence on the States' coffers, which, in turn, erodes their sovereignty.

And the notice practice is wrong. Section 216(b)'s text says nothing at all about notice or conditional certification. *Clark*, 68 F.4th at 1009; *Fischer v. Fed. Express Corp.*, 42 F.4th 366, 376 (3d Cir. 2022). There exists no other authority—constitutional, historical, traditional, or otherwise—that allows judges to reach beyond the courthouse steps to solicit non-parties into court. In sum, court-sanctioned plaintiff solicitation sits outside the judicial power. These weighty issues show why the questions presented in this case are worthy of this Court's attention.

If that is not enough, the lack of textual and historical support has created, unsurprisingly, confusion among the lower courts. Even if the Court does not want to erase *Hoffmann-La Roche*'s error altogether, it should at least grant the petition to resolve a four-way split among courts on the standard for issuing such notices.

ARGUMENT

In addition to the reasons advanced in the petition for *certiorari*, with which the *amici* States concur in

full, the *amici* States urge this Court to accept this case for two reasons. First, many *amici* States regularly face the coercive pressure of the court-ordered notice practice in collective-action suits under §216(b). Court-ordered notice in such cases often determines whether States must pay large settlements that inflict tremendous fiscal and sovereign harm on the States. Second, because the judge-made practice is unmoored from the statute's text, the Constitution, or any historical judicial practice, soliciting non-parties in an action exceeds the bounds of the judicial power. And even if this Court is unwilling to erase the practice, it should accept this case to guide lower courts that are split on *when* courts can engage in the practice.

I. This case presents an exceedingly important question for defendants—including *amici* States—subject to collective actions under §216(b).

Collective actions under §216(b) result in defendants paying hundreds of millions of dollars in settlements every year. Because §216(b) applies to States and local governments, the provision has imposed such severe costs on States, too. That turns the statute's purpose—to *protect* defendants—on its head. The statute is thus in need of reorientation.

A. Section 216(b)'s collective-action process was designed to protect defendants, not to recruit non-parties.

Congress recognized that defendant employers needed protection when it enacted §216(b). To see why, consider the evolution of suits under the FLSA.

"The principal congressional purpose in enacting the Fair Labor Standards Act of 1938 was to protect all covered workers from substandard wages and oppressive working hours." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (citing 29 U.S.C. §202(a)). Nearly a decade later, Congress amended §216(b), adding an opt-in provision. But in doing so, Congress "did not have worker-protection in mind." *Lundeen v. 10 W. Ferry St. Operations LLC*, 156 F.4th 332, 340 (3d Cir. 2025).

Instead, the opt-in process arose "against th[e] backdrop of 'excessive and needless litigation' and the 'wholly unexpected liabilities' it imposed" under the FLSA. *Id.* at 340 (quoting *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 255 (3d Cir. 2012)). Unanticipated litigation came in the wake of this Court's holding that "portal-to-portal" time, "such as walking to work on the employer's premises, qualified as compensable work under the Act." *Lundeen*, 156 F.4th at 340 (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 691 (1946)). *Anderson* "unleashed thousands of lawsuits seeking back pay—nearly all of which were so called 'representative actions' initiated by third-party union officials who lacked any stake in the actions." *Lundeen*, 156 F.4th at 340. By requiring employees to opt-in, the FLSA "limit[ed] private FLSA plaintiffs to employees who asserted claims in their own right and free[d] employers of the burden of representative actions." *Hoffmann-La Roche*, 493 U.S. at 173.

"Congress created the opt-in scheme," then, "not as a worker-protection measure but 'primarily as a check against the power of unions' and a bar to 'one-way intervention' whereby plaintiffs could wait for a favorable outcome before choosing to opt in and be bound by the judgment." *Lundeen*, 156 F.4th at 340–41 (quoting

Knepper, 675 F.3d at 260). Thus, Congress eliminated any "representative action by plaintiffs not themselves possessing claims," and "the requirement that an employee file written consent was added." *Hoffmann-La Roche*, 493 U.S. at 173.

Said another way, by 1947, Congress recognized that defendant employers needed protection. And the opt-in procedure did just that by ensuring that cases would involve only employees with real skin in the game. Or, put differently, only employees with similar claims could become *parties* against a defendant employer.

Given this defendant-protective rule, it makes sense that Congress did not include anything in the statute about "conditional certification" or "notice" to non-parties. *Clark*, 68 F.4th at 1009. That came from *Hoffmann-La Roche* where this Court held that district courts could "facilitat[e] notice to potential plaintiffs," because the "benefits" of a collective action "depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." 493 U.S. at 170. *Hoffmann-La Roche*'s ruling has sowed confusion, but one thing remains clear: even at the notice stage, absent employees remain non-parties to the case. They must affirmatively opt-in through written consent approved by the court to become a party. Thus "whether called 'conditional certification' or otherwise—the notice determination has zero effect on the character of the underlying suit." *Clark*, 68 F.4th at 1009. The lower court here agreed with that principle. Pet.App.8a. So even when a court sends notice, those employees remain non-parties. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75 (2013).

Yet, as the court below acknowledged, "overly permissive notice standards will allow plaintiffs to artificially expand the size of a collecti[on]." Pet.App.8a–9a. So "the decision to send notice … to other employees is often a dispositive one, in the sense of forcing a defendant to settle." *Clark*, 68 F.4th at 1007. Sending notice at conditional certification is almost always the real fight in a §216(b) case with certification pressuring defendants into settlement. Thus, by importing a conditional certification test into §216(b), courts have undermined the very protections that Congress sought to create.

B. States are subject to suit under §216.

Section 216(b)'s 1974 amendments extended the statute to apply to States. Congress enacted the amendments to "extend[] the minimum wage and maximum hour provisions to almost all public employees employed by the States and by their various political subdivisions." *Nat'l League of Cities v. Usery*, 426 U.S. 833, 836 (1976). The amendments included §216(b), which allows FLSA actions "against any employer (including a public agency)." "Public agency," under the new statutory provisions included "the government of a State or political subdivision thereof [or] any agency of … a State, or political subdivision of a State." 29 U.S.C. §203(x).

Expanding liability to States caused an immediate stir—and spurred litigation. In *Nat'l League of Cities v. Usery*, the Supreme Court held that the Tenth Amendment barred Congress from applying the FLSA to States. In so ruling, the Court recognized the vast costs that the FLSA imposed on States. "Judged solely in terms of increased costs in dollars," applying the FLSA to States would result in "a significant

impact on the function of governmental bodies involved." 426 U.S. at 846. Plus, the Court explained, FLSA provisions would "displace[] state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require." *Id.* at 847. *Usery* left no doubt: the FLSA had major effects on States.

This Court later reversed course, *see Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985), but the Court did not question the FLSA's costs on States. Instead, *Garcia* rejected *Usery*'s test as unworkable. *Id.* at 546. "States and their political subdivisions" only began to "feel the full force of" the FLSA after *Garcia*. *Christensen v. Harris Cnty.*, 529 U.S. 576, 579 (2000).

"In the months following *Garcia*, Congress acted to mitigate the effects of applying the FLSA to States and their political subdivisions, passing the Fair Labor Standards Amendments of 1985." *Id.* Those amendments softened the blow on States by giving them some options—such as offering "comp time"—to avoid massive FLSA liability. If §216(b) applied to States, Congress knew that States needed protection. Although this Court ultimately held that the FLSA did not abrogate state sovereign immunity, *Alden v. Maine*, 527 U.S. 706 (1999), §216(b)'s mischief did not end there.

C. Conditional certification and court-ordered notice through §216(b) routinely impose steep costs on States.

Between the FLSA, EPA, and ADEA, States face lawsuits involving the notice practice. Each statute incorporates §216(b) under which courts order

conditional certification. These cases can put States on the hook for millions of dollars every year based on claims from non-parties.

Section 216(b) has applied to States for decades. The 1974 amendments to the FLSA (which later applied to the Equal Pay Act and Age Discrimination in Employment Act) covered "virtually all public-sector employees." *Auer v. Robbins*, 519 U.S. 452, 457 (1997); *see also* 29 U.S.C. §§216(b), 203(x) (defining public agency); *Bautista v. Ohio Univ.*, No. 2020-00592, 2022 WL 4243206, at *5 (Ohio Ct. Claims July 13, 2022) ("Public employees fall within the scope of the FLSA."). Although States retain sovereign immunity under the FLSA and ADEA, some States have waived that immunity. Moreover, courts have held that the EPA abrogated state sovereign immunity, thus allowing §216(b) suits. So state workers—as well as local county and municipal employees—can bring suit under §216.

And they do. State and local governments regularly face collective action complaints. Those cases often include motions for conditional certification. The costs are not small. When courts issue notice, States face a huge increase in potential liability and face pressure to settle—at taxpayer expense.

Consider a current example. Ohio today remains in litigation involving §216(b) notice. *See Marcus v. Ohio Civil Rights Comm'n*, Case No. 2025-0079 (Ohio Ct. Claims 2025). There, a state employee filed a "collective action complaint" purportedly "on his own behalf and on behalf of all similarly situated individuals." *See*, Second Am. Collective Action Compl. (Mar. 3, 2025), https://perma.cc/J8S6-U4GY. The plaintiff asked the court for "[p]rompt notice, pursuant to 29

U.S.C. §216(b), to all Collective Class members that this litigation is pending and that they have the right to 'opt in' to this litigation." *Id.* at 11. Plaintiffs, invoking *Hoffmann La-Roche*, then moved "that the Court facilitate notice to similarly situated potential plaintiffs about this action and their right to opt-in." *See*, Pls.' Mot. to Facilitate Court-Authorized Notice to Other Similarly Situated Potential Pls. (June 12, 2025), https://perma.cc/WS6M-U6RF. Although the State opposed sending notice, the court granted plaintiffs' motion. The Notice explains that plaintiffs "have been authorized by the Court of Claims for the State of Ohio to notify" individuals who may opt-in to the lawsuit. *See* Notice of Right to Opt-In and Consent Form (Oct. 17, 2025), https://perma.cc/M4VD-MJ6K. And the Notice "informs [the recipient] of [his] right under the Fair Labor Standards Act to participate in the case." *Id.* The Notice further informs recipients that the Ohio Civil Rights Commission "could be ordered to pay upon a finding that it denied what you earned without acting in good faith and reasonably believing that it did not owe you overtime." *Id.* By inviting plaintiffs to sue the State in droves, this Notice exposes Ohio to significant liability.

Such instances are far from rare. Ohio and its agencies frequently face litigation involving §216(b) collective actions. *See, e.g.*, *Clark v. Ohio Dep't of Rehab & Corr.*, No. 15AP-597, 2016 WL 764427 (10th Dist. Feb. 25, 2016) (FLSA collective action against Ohio Department of Rehabilitation and Corrections); *Bautista*, 2022 WL 4243206; *Keller v. Dailey*, 124 Ohio App.3d 298 (10th Dist. 1997). And those cases can involve court-issued "notice" under *Hoffmann-La Roche*. *See Oakley v. The Ohio State Univ. Wexner Med. Ctr.*, No. 18AP-843, 2019 WL 4165073 (10th Dist. Sept. 3,

2019) (explaining the court's authority to issue *Hoffmann-La Roche* notices but holding that notice decisions are non-final, non-appealable orders). Other States, too, are subject to §216(b)'s notice regime in FLSA cases. *See, e.g.*, *Myers v. Iowa Bd. of Regents*, 458 F. Supp. 3d 1075, 1084–90 (N.D. Iowa 2020).

But that is not the only front on which States must fight §216(b) collective-action lawsuits. Recall that both the Equal Pay Act and Age Discrimination in Employment Act incorporate §216. And private parties often sue States in federal court under the EPA. After all, courts have long held that the EPA abrogates state sovereign immunity. *Varner v. Illinois State Univ.*, 226 F.3d 927, 936 (7th Cir. 2000); *Kovacevich v. Kent State Univ.*, 224 F.3d 806, 819–21 (6th Cir. 2000); *Hundertmark v. Fla. Dep't of Transp.*, 205 F.3d 1272, 1275 (11th Cir. 2000); *O'Sullivan v. Minnesota*, 191 F.3d 965, 968 (8th Cir. 1999); *Timmer v. Michigan Dep't of Com.*, 104 F.3d 833, 842 (6th Cir. 1997); *Siler-Khodr v. Univ. of Texas Health Sci. Ctr. San Antonio*, 261 F.3d 542, 550 (5th Cir. 2001). So arms of the State of Ohio must continue to defend EPA lawsuits in federal court. *See Murphy v. Ohio State Univ.*, 549 F. App'x 315 (6th Cir. 2013).

Those cases, too, can include *Hoffmann-La Roche* notices. *Elberger v. Univ. of Tennessee Health Sci. Ctr. Coll. of Med.*, No. 12-2755, 2013 WL 12049105, at *7 (W.D. Tenn. Oct. 7, 2013) (approving *Hoffmann-La Roche* notice to professors in EPA collective action against Tennessee state university based on the "lenient standard for conditional certification."); *Earl v. Norfolk State Univ.*, No. 2:13CV148, 2014 WL 6608769, at *8 (E.D. Va. Nov. 18, 2014) (approving notice in an EPA collective action against Virginia university); *Ahad v. Bd. of Trs. of S. Ill. Univ.*, No. 3:15-

cv-03308, 2017 WL 4330377 (C.D. Ill. Sept. 29, 2017); *Rollins v. Ala. Cmty. College Sys.*, No. 2:09cv636, 2010 WL 4269133 (M.D. Ala. Oct. 25, 2010) (denying motion for notice and conditional certification in EPA case but recognizing applicability of *Hoffmann-La Roche*). Other local governments—such as cities and counties—also remain subject to notice and conditional certification. *See Christensen*, 529 U.S. at 579.

Make no mistake: notice under *Hoffmann-La Roche* has a direct and sizable effect on State money and activities. Whenever a public employee sues under the FLSA, EPA, or ADEA, the State could face a §216(b) conditional certification motion. That motion alone places the State at risk of spending millions of extra dollars. States, like any defendant, can be "forc[ed] … to settle—because the issuance of notice can easily expand the plaintiffs' ranks a hundredfold." *Clark*, 68 F.4th at 1007. That is because "the decision to send notice … to other employees is often a dispositive one." *Id.*

These are not hypothetical or abstract concerns. Year after year, public employees sue States and move for conditional certification. And when courts solicit plaintiffs, States can end up facing multi-million-dollar liability. Courts have long recognized that "private suits for money damages" against States can "place unwarranted strain on the States' ability to govern in accordance with the will of their citizens." *Alden*, 527 U.S. at 750–51. Sovereign states, then, must be able to control "access to the public fisc." *Id.* at 751. Court-ordered notices stand in the way of that exercise of sovereignty.

II. Court-issued notice to non-parties runs counter to longstanding limits on judicial power.

The costs imposed on States, local governments, and businesses are enough alone to warrant granting the petition here. But *Hoffmann-La Roche* has a more fundamental flaw: no authority—statutes, federal rules, history, nor tradition—permits judges to solicit non-parties to join a lawsuit. This Court should put an end to court-ordered notice altogether. And even if this Court does not go all the way to erase the textually unmoored practice, it should grant the petition at least to clean up the lower-court mess and resolve the deepening split on how court-ordered notice should be conducted. All parties—plaintiffs, States, and defendant businesses—would benefit from a clear rule. But because *Hoffmann-La Roche* has no anchor in history or tradition, any attempt to devise a workable standard would likely fail.

A. History and tradition confine judicial power to deciding disputes between parties before the Court.

In addition to constitutional limits on judicial power, *see, e.g.*, *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016) (citing U.S. Const., art. III, §2), history and tradition inform the limits of judicial power as well. They inform the boundaries of jurisdiction. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424 (2021); *GTE Sylvania, Inc. v. Consumers Union of United States, Inc.*, 445 U.S. 375, 382 (1980) ("The purpose of the case-or-controversy requirement is to limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."

(quotation omitted)). And history and tradition inform the scope of the courts' remedial authority. Just this past term, this Court reaffirmed that any remedy that "lacks a historical pedigree" falls outside of equitable authority. *Trump v. CASA, Inc.*, 606 U.S. 831, 847 (2025); *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999). Finally, traditional practice guides courts in the types of cases judges may decide. *Stern v. Marshall*, 564 U.S. 462, 484 (2011). *Sprint Comm'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 274 (2008) ("history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider"). And when a judicial practice is "conspicuously nonexistent for most of our Nation's history," that absence "settles the question of judicial authority." *CASA*, 606 U.S. at 845. Critically, Courts must not "exceed their authority as it has been traditionally understood." *Spokeo,* 578 U.S. at 338.

Traditionally, courts have the power "to render dispositive judgments." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (quoting Frank H. Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev 905, 926 (1990)). That view is widely shared by academics and both current and former members of this Court. *Murphy v. NCAA*, 584 U.S. 453, 488 (2018) (Thomas, J. concurring); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 816 (1987) (Scalia, J., concurring) ("The judicial power is the power to decide, in accordance with law, who should prevail in a case or controversy."); *see also* William Baude, *The Judgment Power*, 96 Geo. L. J. 1807, 1815 (2008) (the judicial power is "the power to make authoritative and final judgments in individual cases.").

The power to decide cases comes with corollaries. For one thing, judges have no "roving" anything-goes power to "exercise general legal oversight … of private entities." *TransUnion*, 594 U.S. at 423–24. Judges do not "opine on disputes when they do not have the power to issue binding relief," so they cannot "decide cases without litigants, or without remedies to award." William Baude & Samuel L. Bray, *The Supreme Court 2022 Term, Comment: Proper Parties, Proper Relief*, 137 Harv. L. Rev. 153, 155 (2023). There is no "undifferentiated 'governmental power'"—there is only executive, legislative, and judicial power. *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 67 (2015) (Thomas, J., concurring in the judgment). And courts cannot "exercise … any power not in its nature judicial." *Hayburn's Case*, 2 U.S. 408, 410 n.2 (1792).

Another corollary, relevant here, is that courts can issue judgments only against *parties*. Chief Justice Marshall made that clear early in the Republic: that the "judicial power … is capable of acting only when the subject is submitted to it by a party who asserts his right in the form prescribed by law." *Osborne v. Bank of the United States*, 22 U.S. 738, 819 (1824). So judicial power has long been recognized as "the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." *Muskrat v. United States*, 219 U.S. 346, 356 (1911) (quoting Samuel Freeman Miller, *Lectures on the Constitution of the United States* 314 (1891)). For that reason, courts may not issue "relief that extend[s] beyond the parties." *CASA*, 606 U.S. at 843. After all, "to allow all persons subject to [a] statute to be treated as parties to a lawsuit 'would confound the established order of judicial proceedings.'" *Id.* at 844 (quoting *Cutting v. Gilbert*, 6

F. Cas. 1079, 1080 (CC S.D.N.Y. 1865)). Courts decide only the "rights of individuals," not "hypothetical or abstract disputes." *TransUnion*, 594 U.S. at 423.

This party-centric view limits the judicial role and comports with our adversarial system in which courts "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020) (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)). As "passive instruments of government," courts take a case as it comes—how a party presents it. *Id.* at 376. In this system, judges do not investigate claims for themselves or take an active role in managing claims. That is for the parties. Were it otherwise, judges would no longer simply decide disputes—they would *create* them. But "[w]hat makes a system adversarial rather than inquisitorial is … the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of acts and arguments pro and con adduced by the parties." *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991). So parties alone "are responsible for advancing the facts and arguments entitling them to relief." *Castro v. United Sates*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment). Parties—not judges—are in control.

Our adversarial system puts parties in the driver's seat. And when evaluating the scope of the judicial power, history and tradition serve as powerful guideposts. As explained next, however, *Hoffmann-La Roche* created a notice power unmoored from the Constitution, history, tradition, or statutory text and thus expanded the judicial authority beyond its constitutional bounds.

B. Court-issued notice to non-parties exceeds the judicial power.

Court-issued notice to non-parties goes well beyond any cognizable judicial power. As the Sixth Circuit explained, "[n]either 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" to send notice. *Clark*, 68 F.4th at 1007. Justice Scalia recognized as much in his *Hoffmann-La Roche* dissent, noting that there was "no source of authority for such an extraordinary exercise of the federal judicial power." 493 U.S. at 174 (Scalia, J., dissenting). And by sending court-ordered documents to potential parties to join a case, courts "determin[e] which claims come before them" and they act as "inquisitors of justice," not "arbiters of adversarial claims." *Id.* at 181.

True, judicial power has long included "inherent" powers ancillary to the authority of issuing judgments. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43–44 (1991). And true, too, that the metes and bounds of this power are not always so clear. Even so, these "implied powers … must necessarily result to our Courts of justice from the nature of their institution … because they are necessary to the exercise of all others." *United States v. Hudson*, 11 U.S. 32, 34 (1812). And in all events, inherent powers—like all powers—must be "consistent with our history and traditions." *Missouri v. Jenkins*, 515 U.S. 70, 124 (1995) (Thomas, J., concurring); *see also Link v. Wabash R.R. Co.*, 370 U.S. 626, 629–30 (1962) (noting that inherent power to dismiss for lack of prosecution was contained in Blackstone's Commentaries); *Fisher v. Pace*, 336 U.S. 155, 159–60 (1949) (examining history of inherent power of courts).

Examples of inherent powers include contempt, sanctions, and a court's "power to control admission to its bar." *Chambers*, 501 U.S. at 43. Others include the power to "bar" a "criminal defendant who disrupts a trial," dismiss an action "on grounds of forum non conveniens," dismiss a case "for failure to prosecute," and assess attorney's fees against counsel. *Id.* at 44–45. But these are *incidental* powers to the core judicial power of deciding cases and issuing judgments over parties already before the court. Inherent powers, in other words, "fill in the interstices" in litigation. *Chambers*, 501 U.S. at 46. They do not empower judges to recruit non-parties to join a lawsuit.

Notice under *Hoffmann-La Roche* lacks any historical roots or ties to traditional practice. Remember that at the notice phase, employees seeking to "opt in" are *not* parties. So, instead of resolving a dispute, notice allows a court to "generat[e] and manage[] … other disputes" involving non-parties. *Hoffmann-La Roche*, 493 U.S. at 176 (Scalia, J., dissenting). And that is "so out of accord with age-old practices that surely it should not be assumed unless it has been clearly conferred." *Id.*

In short, *Hoffmann-La Roche* throws aside centuries of judicial tradition. Parties have always been the master of a case. But conditional certification puts non-parties at the center of §216(b) actions. Notice, in other words, flips the judicial role upside down. And there is often nothing defendants—including many *amici* States—can do about it.

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When cases come to court, everyone has a role. The judge's role is simple: decide the case before her. Judges decide *cases* or *controversies*—they do not

create them. Conditional certification mangles this historical role and places the judge as the case inquisitor, contrary to all historical practice. This Court should restore the judge's proper role in §216(b) actions, thereby protecting the interests of sovereign States and reconciling the statute with our history and tradition.

C. Without textual or historical support, courts are confused on how to conduct collective-action notice practice.

Even if this Court is not ready to do away with the collective-action-notice practice altogether, it should accept this case to clarify the confusion among lower courts. Without textual or historical guidance on court-ordered notices, lower courts have been issuing notice under §216 "with little guidance that one can call law." *Clark*, 68 F.4th at 1007. As it stands, the lower courts are now divided four separate ways. "[M]ost federal courts" adopt the *Lusardi* approach, permitting notice based solely on a plaintiff's allegations of similarity. Pet.App.38a (citing *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987)). The Fifth Circuit requires plaintiff to show similarity by the preponderance of the evidence, *Swales v. KLLM Transp. Servs., LLC*, 985 F.3d 430, 443 & n.65 (5th Cir. 2021), while the Sixth Circuit has adopted the "strong likelihood" standard "analogous" to a preliminary injunction, *Clark*, 68 F.4th at 1010–11. And the Seventh Circuit, the most recent to enter the fray, holds that notice is proper whenever a material dispute exists as to whether employees are similarly situated. Pet.App.20a–21a.

For the reasons stated above, at 7–22, *amici* States encourage this Court to grant *certiorari* and get rid of the practice altogether. Even if not, this Court should grant *certiorari* to address the deepening circuit split on when courts can order such notices. Doing so will provide much-needed guidance to the courts below.

CONCLUSION

The Court should grant the petition for a writ of *certiorari*.

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NOVEMBER 2025

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