

No. 25-476

In the Supreme Court of the United States

ELI LILLY AND COMPANY, ET AL,

Petitioners,

v.

MONICA RICHARDS, INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,

Respondent.

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

**BRIEF OF AMICI CURIAE THE CHAMBER OF
COMMERCE OF THE UNITED STATES OF AMERICA AND
THE CHRO ASSOCIATION SUPPORTING PETITIONERS**

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INTERESTS OF AMICI CURIAE

The Chamber of Commerce of the United States of America (“Chamber”) is the world’s largest business federation.¹ It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the Nation’s business community.

The CHRO Association is a public policy organization that represents the most senior human resource officers in more than 360 of the largest corporations doing business in the United States and globally. Collectively, member companies employ more than 10 million employees in the United States, nearly nine percent of the private sector workforce, and 20 million employees worldwide. The CHRO Association’s member companies are committed to ensuring that laws and policies affecting the

¹ No counsel for a party authored this brief in whole or in part, and no person or entity other than Amici, their members, or their counsel contributed money intended to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Amici provided notice of its intent to file this brief to counsel of record for both parties at least 10 days before the brief’s due date. *See* Sup. Ct. R. 37.2.

workplace are sound, practical, and responsive to the needs of the modern economy.

Employers such as Amici’s members face thousands of cases filed every year under the Fair Labor Standards Act (“FLSA”), the Equal Pay Act (“EPA”), and Age Discrimination in Employment Act (“ADEA”), which incorporate the FLSA’s collective-action provision. Under this Court’s decision in *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989), courts across the country routinely facilitate notice to potential collective-action plaintiffs, often based on the mere *allegation* that similarly situated employees exist. This practice is not only confusing to the potential plaintiffs but also threatens Amici’s members with enormous liability, coercing costly settlements in otherwise weak or meritless cases. Amici urge this Court to grant review and provide district courts with clear procedural and substantive guidance for certifying collective actions in accordance with the statutory text.

SUMMARY OF ARGUMENT

Hoffmann-La Roche’s burdensome, judicially created notice procedure should be overturned—or at minimum properly restrained to align with the statutory text as much as possible. Outside of certified class actions, courts are not in the business of requiring defendants to identify potential plaintiffs or order that notices of the lawsuit be sent to them. Federal courts *resolve* cases and controversies—they ought not create them. No statutory or constitutional text, civil rule, or historical practice supports this “extraordinary exercise of the federal judicial power”

Hoffmann-La Roche, 493 U.S. at 174 (Scalia, J., dissenting). To the contrary, Congress made FLSA collective actions opt-in for the express purpose of *reducing* the “burden[s]” associated with “excessive and needless litigation and champertous practices” flowing from FLSA class actions. Portal-to-Portal Act of 1947, § 1, 61 Stat. 84 (codified at 29 U.S.C. § 251(a)). *Hoffmann-La Roche*’s authorization for district courts to solicit co-plaintiffs and thus greatly expand the scope of collective actions undoes that congressional limitation.

The decades since have proven as much. Collective actions under the FLSA and ADEA are commonplace. And many courts grant notice almost as a matter of course because *Hoffmann-La Roche* gave no guidance to district courts on when to order such notice. That dynamic allows plaintiffs to greatly expand the scope of collective actions at will, creating significant *in terrorem* settlement pressure. Indeed, most collective actions settle, typically for seven figures. The collective actions thus look very much like the class actions that Congress expressly rejected for suits under the FLSA and ADEA.

These harmful consequences are reason enough to grant review and reconsider *Hoffmann-La Roche*. But if that decision is to remain the governing law, then this Court should, at minimum, grant review to establish clear standards for *when* district courts may order notice to non-party employees. Properly understood, 29 U.S.C. § 216(b) requires plaintiffs to prove by a preponderance of the evidence that similarly situated employees exist at the *outset* of the

collective action. Courts should rigorously enforce that requirement, just as they do in the Rule 23 class-action context. But the circuits remain deeply divided over whether to require any meaningful showing of similarity before ordering notice. The majority approach—the so-called *Lusardi* standard—allows district courts to order notice based on mere *allegations* of similarity, giving little attention to rebuttal evidence. Although district courts applying this approach eventually require plaintiffs to prove that similarly situated employees exist, that review comes too late, only after discovery. At that point, the case has greatly expanded with opt-in plaintiffs. The significant discovery costs that come with a collective action typically coerce a settlement long before that stage. Some circuits have rejected *Lusardi* in favor of more stringent standards. But even those circuits remain deeply divided over the proper rule. If *Hoffmann-La Roche* is to stand, clarity from this Court is urgently needed.

ARGUMENT

I. *Hoffmann-La Roche* should be overturned because it created an unworkable rule out of whole cloth.

This Court should grant review to reconsider *Hoffmann-La Roche*, which misinterprets the statute and has proven to be unworkable in the decades since it was decided.

A. Congress amended 29 U.S.C. § 216(b) to limit burdensome collective actions, not promote them.

Hoffmann-La Roche held that district courts may order defendants in a collective action under the Fair Labor Standards Act or Age Discrimination in Employment Act to identify similarly situated employees and then authorize the plaintiff to notify those employees of the action.

The Court purported to locate this unprecedented power in 29 U.S.C. § 216(b)’s “affirmative permission for employees to proceed on behalf of those similarly situated.” 493 U.S. at 170. But nothing in § 216 suggests that courts should aid plaintiffs in identifying “other employees similarly situated.” Rather, Section 216(b) states that “[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party” to the court. This opt-in requirement is unmistakably “a *limitation*” on the ability of plaintiffs to bring FLSA and ADEA mass actions. *Hoffmann-La Roche*, 493 U.S. at 176 (Scalia, J., dissenting). But for Section 216(b)’s opt-in requirement, plaintiffs could bring FLSA and ADEA opt-out class actions under “Rule 23 of the Federal Rules of Civil Procedure.” *Id.* Section 216(b) thus reflects congressional intent to *limit* representative actions under the FLSA and ADEA.

The statutory history confirms this straightforward reading. In 1947, Congress amended the FLSA with the express purpose of *curbing* a flood of representative actions. As originally enacted, the FLSA permitted plaintiffs to bring opt-out class

actions of behalf of similarly situated plaintiffs. *See* Fair Labor Standards Act of June 25, 1938, Public Law 75-718, 52 Stat. 1060, 1069. But in 1946, this Court held that “preliminary activities,” like “preparing the equipment for productive work,” “must be accorded appropriate compensation.” *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692-93 (1946).

After *Anderson*, “a virtual flood of litigation ensued in the form of class actions.” *Dolan v. Project Const. Corp.*, 725 F.2d 1263, 1266 (10th Cir. 1984), *abrogated by Hoffmann-La Roche*, 493 U.S. 165. Congress responded by amending the FLSA through the Portal-to-Portal Act of 1947, Pub.L. 49, ch. 52, 61 Stat. 84. In the codified preamble to the Portal-to-Portal Act, Congress found “that the Fair Labor Standards Act . . . ha[d] been interpreted judicially” in a way that “create[d] wholly unexpected liabilities immense in amount.” Portal-to-Portal Act of 1947, § 1, 61 Stat. 84 (codified at 29 U.S.C. § 251(a)). Congress explained that the amendment was necessary to ensure that “the courts of the country” would not be “burdened with excessive and needless litigation and champertous practices.” *Id.*

Titled “Representative Actions Banned,” Section 5 of the Portal-to-Portal Act established the current opt-in regime for FLSA actions. Portal-to-Portal Act of 1947, § 5, 61 Stat. 87 (codified at 29 U.S.C. § 216(b)). In other words, “[t]he opt-in language of § 216(b) was a direct result of this clear congressional dissatisfaction with the original class action provisions of the FLSA.” *Dolan*, 725 F.2d at 1267. “While still providing for collective and representative actions,” Congress

intended “to limit the nature of a class action suit based upon an alleged FLSA violation.” *Id.*

Hoffmann-La Roche conceded that Congress amended Section 216(b) “for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions.” 493 U.S. at 173. But the Court did not square this unambiguous congressional purpose to *limit* the burden imposed by mass-party FLSA suits with its holding that district courts should help plaintiffs *solicit* co-plaintiffs. *Id.* Citing the “broad remedial goal of the statute,” it simply held that the district court “was correct” to order “discovery of the names and addresses” of putatively similarly situated employees because “[t]he judicial system benefits by efficient resolution . . . of common issues of law and fact.” *Id.* at 170, 173. These “generalized references to the ‘remedial purpose’” of the statute cannot substitute for statutory authorization. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979). “[T]he FLSA” does not “pursue[] its remedial purpose at all costs.” *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 89 (2018) (quotation marks and citation omitted).

Court-ordered notice is not necessary to vindicate the rights protected by FLSA or ADEA. Most other civil-rights statutes also reflect “broad remedial measure[s],” but they require plaintiffs to find co-plaintiffs without judicial assistance. *E.g.*, *Pullman-Standard v. Swint*, 456 U.S. 273, 276 (1982). There is nothing about the context in which FLSA or ADEA claims arise that supports a unique, contrary rule. If

anything, employees are *more* likely to find current or former co-employees that are similarly situated without help from the court compared to other civil rights plaintiffs that do not work with potential co-parties. Nor is court-ordered notice necessary to incentivize defendants to fix violations. FLSA and ADEA plaintiffs always remain free to solicit co-plaintiffs without judicial assistance. And even the threat of a small collective action provides great incentive for defendants to avoid unlawful practices.

B. *Hoffmann-La Roche* made collective actions commonplace and often abused.

The *Hoffmann-La Roche* regime has not aided the “efficient resolution” of FLSA claims. 493 U.S. at 173. On the contrary, decades of experience prove that it has *produced* “excessive litigation spawned by plaintiffs lacking a personal interest.” *Id.*

Hoffmann-La Roche has exploded the number of collective-action suits. Every year, thousands of FLSA actions are filed. *See Federal Judicial Caseload Statistics, Table C-2* (March 31, 2025), <https://perma.cc/824H-4EU6> (reporting 5,002 FLSA cases filed between March 31, 2024, and March 31, 2025). Many of those lawsuits are collective actions. In 2024, for instance, approximately 2,300 of the 5,465 FLSA lawsuits were putative collective actions. *2024 FLSA Litigation Metrics & Trends* at 4, Seyfarth Shaw (2025), <https://perma.cc/FF72-A6QK>. And that reflects just the FLSA cases. The Age Discrimination in Employment Act (“ADEA”) incorporates the same collective-action scheme. *See* 29 U.S.C. § 626(b) (incorporating the “powers, remedies, and procedures

provided in” 29 U.S.C. § 216(b)). Plaintiffs thus file even more collective actions under the ADEA every year. *See Statute by Issue (Charges Filed with EEOC), Age Discrimination in Employment Act*, EEOC, <https://perma.cc/3YQP-N7VX> (last visited November 16, 2025) (EEOC received almost 10,000 complaints of age-related terminations in 2024 alone, many of which become federal-court collective actions).

Hoffmann-La Roche expressly declined to fill in the “details” of its holding, such as the showing plaintiffs must make to obtain court-ordered notice to potential collective-action plaintiffs. 493 U.S. at 170. In the absence of guidance from this Court, most lower courts have abdicated any meaningful role in policing collective actions. “[M]otions for conditional certification”—meaning a request for the district court to order notice to employees that *may* be similarly situated—are “granted in a large majority of [FLSA] cases.” *Wage & Hour Class and Collective Action Review 2025* at 2, Duane Morris LLP (2025), <https://perma.cc/U346-XNJK>. In 2024, district courts granted 80% of motions seeking court-ordered notice. *Id.* Plaintiffs have enjoyed similar success in past years. *Id.* (explaining that 75% of conditional certification motions were granted in 2023, 82% in 2022, and 84% in 2021).

The ubiquity of FLSA and ADEA collective actions brings with it significant “potential for misuse.” *Hoffmann-La Roche*, 493 U.S. at 171. “[T]he decision to send notice of an FLSA suit to other employees is often a dispositive one . . . because the issuance of notice can easily expand the plaintiffs’

ranks a hundredfold.” *Clark v. A&L Homecare & Training Ctr., LLC*, 68 F.4th 1003, 1007 (6th Cir. 2023). The notices often state that they are “court authorized,” thus giving the impression of judicial imprimatur. *E.g.*, *Williams v. TopHat Logistical Sols., LLC*, 703 F. Supp. 3d 913, 926 (N.D. Ill. 2023). When the court is involved in soliciting potential claimants, collective actions can have thousands of potential opt-in plaintiffs and “mind-boggling” discovery costs. *Williams v. Accredited Home Lenders, Inc.*, 2006 WL 2085312, at *5 (N.D. Ga. July 25, 2006); *see, e.g.*, *In re JPMorgan Chase & Co.*, 916 F.3d 494, 497 (5th Cir. 2019) (describing collective action in which district court sent notice to approximately 42,000 employees); *Pippins v. KPMG LLP*, 2011 WL 4701849, at *3 (S.D.N.Y. Oct. 7, 2011) (describing a collective action with 500 members and 2,300 potential members in which the defendants had already incurred “more than \$1,500,000” in evidence-preservation costs).

Given the burdens associated with collective actions, plaintiffs often “wield the collective-action format for settlement leverage.” *Bigger v. Facebook, Inc.*, 947 F.3d 1043, 1049 (7th Cir. 2020). “[I]n *terrorem*’ settlements” are a “risk” whenever a plaintiff can combine “a vast number of claims” into a single action. *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 662 (2022) (citation omitted). When the size of the action multiplies, that expansion necessarily “intensif[ies] settlement pressure no matter how meritorious the action.” *Swales v. KLLM Transp. Servs., L.L.C.*, 985 F.3d 430, 435 (5th Cir. 2021). Just like in the class-action certification

context, conditional certification of a collective action “may so increase the defendant’s potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). “Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011).

In the class-action context, courts guard against the risk of *in terrorem* settlements by strictly enforcing the standards for class certification. *See Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 678 (7th Cir. 2009); Pet. 23. But *Hoffmann-La Roche* did not endorse similar protections for defendants in collective actions. It does not require district courts to meet a similar standard, or any standard, before issuing notice of the collective action to employees that are, allegedly, similarly situated.

That permissive notice regime means that “most collective actions settle.” 7B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1807 (3d ed.). In 2024, for instance, 376 FLSA cases were resolved after “reach[ing] an order on conditional certification.” *2024 FLSA Litigation Metrics & Trends*, *supra*, at 14. Some of those cases were decided at summary judgment or at trial. But 219 FLSA cases—over half of the cases resolved after conditional certification—were settled “on a collective basis with publicly available settlement data.” *Id.* at 15.

Nor were these token settlements. In 2024, the average settlement in an FLSA collective action was

\$1.2 million. *Id.* All told, FLSA collective-action settlements “totaled approximately \$270 million” in 2024. *Id.* In 2023, that number was \$460 million. *Id.*

Hoffmann-La Roche has thus produced exactly what Congress amended Section 216(b) to prevent—an avalanche of burdensome mass-party suits that are expensive to litigate, improperly coerce settlements, and create the misperception that federal courts are soliciting litigation. This Court should grant review and overturn *Hoffmann-La Roche*.

II. If *Hoffmann-La Roche* stands, this Court’s review is necessary to establish guardrails on its application.

If this Court declines to reconsider *Hoffmann-La Roche*, it should at minimum give lower courts guidance on when they may “facilitat[e] notice to potential plaintiffs.” 493 U.S. at 169. Without clarity from this Court, the abuses that *Hoffmann-La Roche* has enabled will proliferate. Many courts have adopted the overly lax “*Lusardi* standard,” permitting district courts to order notice based on mere *allegations* that similarly situated employees exist. That lenient standard exacerbates the burdens associated with collective actions. Other circuits have adopted more stringent standards, but each articulate the test differently.

This patchwork of inconsistent standards hurts employers and employees by “permit[ting] unpredictability and arbitrariness.” Pet.App. 12a. Only this Court can resolve the intractable conflict.

A. Section 216(b) requires courts to determine whether other employees are “similarly situated” *before* authorizing notice.

The FLSA and ADEA expressly limit collective actions to suits brought by plaintiffs “and other employees *similarly situated*.” 29 U.S.C. § 216(b) (emphasis added). The plain text imposes two clear requirements: (1) plaintiffs must bring claims that are capable of common resolution in the same action; and (2) courts must make that determination at the outset of litigation, *before* permitting extensive discovery.

1. “[A]n essential condition of maintaining” a collective action is “that the members of the class be ‘similarly situated’ to one another.” *Jonites v. Exelon Corp.*, 522 F.3d 721, 726 (7th Cir. 2008). Although Section 216(b) does not define what makes employees “similarly situated,” the statutory context makes clear that their claims must be capable of “efficient resolution in one proceeding of *common issues of law and fact* arising from the same alleged” misconduct. *Hoffmann-La Roche*, 493 U.S. at 170 (emphasis added). Phrases like “common questions” and “similarly situated” must be interpreted in the context of the purpose they serve in the litigation—that is, determining whether “all the[] claims can productively be litigated at once” through a “common contention . . . that it is capable of classwide resolution.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

That analysis naturally overlaps with the standards for certifying class actions under Federal

Rule of Civil Procedure 23. This Court has long referred to Rule 23 class members as “similarly situated” plaintiffs. *See, e.g., Cooper v. Fed. Rsv. Bank of Richmond*, 467 U.S. 867, 875 (1984); *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 332 (1980); *Coopers & Lybrand*, 437 U.S. at 465; *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549 (1949). And this Court has described the putative class in *Dukes*—which failed Rule’s 23 commonality requirement—as “not similarly situated.” *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 458 (2016) (discussing *Dukes*).

The drafters of Rule 23 likewise understood class members as “similarly situated” plaintiffs, which is instructive because “the Advisory Committee Notes provide a reliable source of insight into the meaning of a rule.” *United States v. Vonn*, 535 U.S. 55, 64 n.6 (2002). When Rule 23 was amended into its current form, the 1966 advisory committee note described a class action under Rule 23(b)(3) (which requires “common” issues to predominate over individual issues) as involving “persons similarly situated.” *See* Fed. R. Civ. P. 23, 1966 advisory committee’s note. This same advisory committee note also explains that the “provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23,” *id.*, which, in context, makes clear that § 216(b)’s *opt-in* provision was intended to remain valid and effective even with Rule 23’s “opt-out” requirements. *See* Fed. R. Civ. P. 23(c).

The commonality, typicality, and predominance requirements of Rule 23 thus offer ready-made standards for ensuring that collective actions involve

common issues capable of efficient resolution.² See *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 772 (7th Cir. 2013) (explaining “there isn’t a good reason to have different standards for the certification” of the Rule 23 and collective-action standards, “and the case law has largely merged the standards”). And because courts uniformly require plaintiffs to prove the class-certification factors by a preponderance of evidence, the same standard should apply to collective actions. *E.g.*, *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012).

Commonality requires “questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). This ensures that plaintiffs assert a “common contention . . . of such a nature that it is capable of [collective] resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Dukes*, 564 U.S. at 350. To be similarly situated, therefore, plaintiffs cannot simply

² *Genesis Healthcare Corporation v. Symczyk*, 569 U.S. 66, 74-75 (2013), recognized that Rule 23 class actions create a class “with an independent legal status,” which does not occur when a collective action has been conditionally approved. Rather, the “sole consequence” of conditional certification is facilitation of “court-approved written notice to employees.” *Id.* at 75 (citing *Hoffmann-La Roche*, 493 U.S. at 171-72). But both Section 216(b) and Rule 23 turn on whether other plaintiffs are “similarly situated” before a collective or class action is allowed to proceed. Conditional certification also creates the same significant settlement pressures and discovery burdens as Rule 23 class certification.

raise “common ‘questions’—even in droves.” *Id.* (citation omitted). Instead, they must raise questions that are capable of “generat[ing] common *answers* apt to drive the resolution of the litigation.” *Id.* (citation omitted).

Typicality ensures that “claims or defenses of the representative parties are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). Collective actions may not have “representatives.” But the typicality requirement is still probative for the similarly-situated inquiry. If the named plaintiff’s claim is atypical, he or she is not similarly situated to other potential plaintiffs. Nor will resolution of an atypical claim drive resolution of the claims of other plaintiffs. In other words, “[t]he commonality and typicality requirements of Rule 23(a) . . . [b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical.” *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). That is precisely what should determine whether employees are similarly situated for purposes of a collective action. *See Hoffmann-La Roche*, 493 U.S. at 170.

Finally, Rule 23(b)(3)’s predominance requirement—that “questions of law or fact common to class members predominate over any questions affecting only individual members”—should also guide the collective action analysis. *See Espenscheid*, 705 F.3d at 772 (suggesting the Rule 23 and “similarly situated” analyses have been “largely merged”). Collective actions seek monetary damages akin to those sought in a Rule 23(b)(3) action, and thus the

standards for identifying when plaintiffs seeking monetary damages are “similarly situated” are particularly apt. If individualized questions overwhelm common questions, the employees are not “similarly situated” for purposes of efficient collective litigation.

So although Rule 23 class actions and collective actions are not the same in every respect, *see Genesis Healthcare Corp.*, 569 U.S. at 74-75, the existing body of law on Rule 23 helps define what it means to be “similarly situated” under Section 216(b).

2. Courts should “rigorously enforce” this “similarly situated” requirement “at the outset of the litigation.” *Swales*, 985 F.3d at 443.

A court “errantly appl[ies] *Hoffman*” when it provides notice to those “who cannot ultimately participate in the collective” action. *JPMorgan*, 916 F.3d at 502, 504 (citing *Hoffmann-La Roche*, 493 U.S. at 174). “[N]otice sent to employees who are not, in fact, eligible to join the suit amounts to solicitation of those employees to bring suits of their own.” *Clark*, 68 F.4th at 1010; *see also In re A&D Ints., Inc.*, 33 F.4th 254, 259 (5th Cir. 2022) (per curiam) (same).

The only way to avoid this improper solicitation is to conduct at the outset “a rigorous analysis”—like requiring proof by a preponderance of the evidence—of whether the proposed collective action truly involves “similarly situated” employees. *Dukes*, 564 U.S. at 350-51. “Frequently that ‘rigorous analysis’ will entail some overlap with the merits of the plaintiff’s underlying claim.” *Id.* at 351. It might be

“necessary for the court to probe behind the pleadings before coming to rest on the certification question,” and thus courts may authorize limited discovery to facilitate a determination about whether putative plaintiffs are similarly situated. *Gen. Tel. Co. of Sw.*, 457 U.S. at 160. If that rigorous evaluation demonstrates that the plaintiffs will not be able to litigate towards a common answer collectively resolving their claims, the district court cannot allow sending notice to non-similarly situated people. *See Clark*, 68 F.4th at 1011 (“[F]or a district court to facilitate notice of an FLSA suit to other employees, the plaintiffs must show a ‘strong likelihood’ that those employees are similarly situated to the plaintiffs themselves.”).

But in all events, courts must conduct this rigorous analysis *before* facilitating any notice to prospective members of the collective action. *See id.*; *Swales*, 985 F.3d at 441 (explaining the district court must take steps “at the outset of the case” to “determine if and when to send notice to potential opt-in plaintiffs”). Otherwise, Congress’s attempt to impose *greater* limits on representative actions under the FLSA and ADEA than “already exist[] in Rule 23 of the Federal Rules of Civil Procedure” has been largely nullified. *Hoffmann-La Roche*, 493 U.S. at 176 (Scalia, J., dissenting).

B. Many lower courts have adopted lax notice standards, which produce enormous litigation costs and improper settlement pressures.

Most courts conduct no meaningful analysis of whether similarly situated employees exist before ordering notice of a collective action. While a few circuits have adopted more stringent standards, those approaches vary wildly. This lax and inconsistent enforcement of Section 216(b)'s "similarly situated" requirement produces significant harms.

1. The dominant approach is the lenient standard created in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987); *see* Pet. 13-17. The *Lusardi* method "has no universally understood meaning." *Swales*, 985 F.3d at 439. Yet courts applying this method generally "determine whether plaintiffs are similarly situated in a two-step process, the first at the beginning of discovery and the second after all class plaintiffs have decided whether to opt-in and discovery has concluded." *White v. Baptist Mem'l Health Care Corp.*, 699 F.3d 869, 877 (6th Cir. 2012). The first step, often called "conditional certification," involves the decision to order further notice to potential co-plaintiffs. *Swales*, 985 F.3d at 436. The second step, which comes only after opt-in plaintiffs have consented to join the case and the parties have conducted discovery, considers the evidence and makes a final determination about whether similarly situated plaintiffs actually exist. *Id.* at 437.

At the notice stage, "[d]istrict courts use a 'fairly lenient standard' that 'typically results in conditional

certification of a representative class.” *White*, 699 F.3d at 877 (quoting *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 547 (6th Cir. 2006)). Though courts vary in how they describe this standard—“sometimes articulated as requiring ‘substantial allegations,’ sometimes as turning on a ‘reasonable basis’”—it is “loosely akin to a plausibility standard.” *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1109 (9th Cir. 2018) (emphasis added) (citations omitted). Plaintiffs often merely “contend[] that they have at least *facially satisfied* the ‘similarly situated’ requirement.” *Id.* at 1100 (emphasis added; citation omitted). That minimal showing is enough under the *Lusardi* method to “conditionally certify” a collective action. *See* Pet 14-15 & n.6 (collecting cases in which district courts note the meager factual allegations supporting conditional certification under *Lusardi*).

The District Court’s ruling in this case demonstrates the leniency of the *Lusardi* standard. The District Court conditionally certified a collective action of former and current Eli Lilly employees based on three affidavits submitted by Richards, none of which identified a similarly situated Eli Lilly employee. Pet. App. 61a-62a. The District Court admitted that this evidence may be “conclusory and speculative,” Pet. App. 64a, and that Eli Lilly had submitted its “own substantial allegations” rebutting Richards’ affidavits, Pet. App. 63a. But the court sidestepped the factual dispute entirely—“at this initial notice stage of the proceedings, the Court does ‘not make merits determinations, weigh evidence, determine credibility, or specifically consider opposing

evidence presented by a defendant.” Pet. App. 63a (citation omitted).

Given this lax standard, it should not be surprising that district courts reaching *Lusardi*’s second step frequently conclude that they had mistakenly ordered notice to employees that were not similarly situated. Of the “conditionally certified putative classes” that do not settle before reaching *Lusardi*’s second step, many “fail[] to survive upon a more rigorous review.” *Laverenz v. Pioneer Metal Finishing, LLC*, 746 F. Supp. 3d 602, 614 (E.D. Wis. 2024). For instance, in 2022, courts granted 82% of FLSA conditional-certification motions. *Wage & Hour Class and Collective Action Review 2025*, *supra* at 3. But district courts granted 50% of decertification motions that year, meaning that courts ultimately determined that notice had been improperly sent to plaintiffs that were *not* similarly situated. In later years, the percentage of de-certified collective actions has been lower—between 44% and 33%. *Id.* The decrease in de-certification is likely attributable to the more stringent notice standards some circuits have adopted. But those numbers still confirm that many district courts are issuing notice when they should not.

Yet *Lusardi*’s second step—where the court determines whether the prospective co-plaintiffs are, *in fact*, similarly situated—usually comes too late. “[M]ost collective actions settle” due to the pressures inflicted by conditional certification before reaching the second stage. Wright & Miller § 1807. The reasons are simple. While “conditional” in name, a “conditionally certified” collective action is, in all

practical respects, a full-bore collective action that “proceeds as a representative action *throughout discovery*.” *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1214 (5th Cir. 1995) (emphasis added). The discovery process often expands the litigation, as it creates opportunity for more plaintiffs to opt in. Furthermore, the fact that the *court* is involved in sending notice creates a risk that the court could be misunderstood as endorsing and actively soliciting claims from potential plaintiffs. *Swales*, 985 F.3d at 436. This imposes many of the defense burdens of traditional class actions, but without any of the procedural protections that govern their certification.

Worse still, defendants often have no remedy for the distortions to the litigation process that occur when a district court improperly issues notice to potential co-plaintiffs. *See In re New Albertsons, Inc.*, No. 21-2577, 2021 WL 4028428, at *2 (7th Cir. Sept. 1, 2021) (denying mandamus relief for conditional certification); *JPMorgan*, 916 F.3d at 497 (absent interlocutory appeal, improper conditional certification is “irremediable on ordinary appeal”); *Holder v. A&L Home Care & Training Ctr., LLC*, 552 F. Supp. 3d 731, 747 (S.D. Ohio 2021) (“This pressure, in turn, may materially affect the case’s outcome.” (citation omitted)). Settlement becomes the only realistic option.

The inconsistent criteria that district courts apply at the “decertification” stage deepen these problems. Some courts consider “the ‘factual and employment settings of the individual[] plaintiffs, the different defenses to which the plaintiffs may be subject on an

individual basis, [and] the degree of fairness and procedural impact of certifying the action as a collective action.” *O’Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 584 (6th Cir. 2009) (alterations in original) (quoting Wright & Miller, § 1807 n.65). Not all courts, however, consider these factors, and even those courts that *do* may not apply the requirements as rigorously as they would in the context of a Rule 23 class action. *See Valte v. United States*, 155 Fed. Cl. 561, 570-71 (2021) (collecting examples). “By encouraging courts to rely on an array of different factors and considerations without firmly relating them to a clear understanding of what it means to be similar, the [*Lusardi*] test operates ‘at such a high level of abstraction that it risks losing sight of the statute underlying it.’” *Id.* at 570 (quoting *Campbell*, 903 F.3d at 1114).

Lusardi’s failure to limit collective actions at the outset distorts the litigation process, imposing significant discovery costs upon defendants and exerting hydraulic settlement pressures. *Bigger*, 947 F.3d at 1049; *see supra* pp. 8-12. And even worse, it “leads to collective actions that cannot be managed, and where trial does not lead to common answers to common questions,” *Valte*, 155 Fed. Cl. at 570 (citation omitted). *Lusardi* thus enables the precise abuses of the collective action that Congress amended Section 216(b) to prevent. *Supra* pp. 5-8.

2. In this case, the Seventh Circuit rejected *Lusardi* in favor of a more stringent standard. Pet. App. 17a.

Counsel for Richards has described the Seventh Circuit’s standard as “not that much different from the modest showing standard that other circuits have approved.” Max Kutner, *7th Circ. Adopts Flexible Standard For Collective Actions*, Law360 (Aug. 6, 2025), <https://perma.cc/53MQ-YRQ8>. That is exactly right. The Seventh Circuit’s test—which directs district courts to issue notice and compel discovery so long as there is a “fact dispute” on similarity—is still a trivial burden that plaintiffs will easily meet. Pet. App. 20a. Under this test, a plaintiff need only “produce some evidence.” Pet. App. 21a. And if, as will often be the case, the district court believes that “the evidence necessary to resolve a similarity dispute is likely in the hands of yet-to-be-noticed plaintiffs, it may proceed with a two-step approach” that is functionally *Lusardi* all over again. Pet. App. 21a-22a. “[T]hat is, it may issue notice to the proposed collective while postponing the final determination as to whether plaintiffs are similarly situated until plaintiffs move for certification after opt-in and discovery are complete.” Pet. App. 21a-22a.

The Seventh Circuit’s approach will thus produce the same abuses as *Lusardi*. Under that approach, a district court may order notice to potential plaintiffs without making a “final determination as to whether plaintiffs are similarly situated.” Pet. App. 22a. Employers will thus often face protracted discovery before they can challenge the size of the putative collective action, creating substantial pressure to settle even meritless collective actions. *See supra* pp. 10-11.

3. Only the Fifth and Sixth Circuits meaningfully enforce, at the outset of the lawsuit, Section 216(b)'s requirement that the members of a collective action be similarly situated.

The Fifth Circuit has squarely held that district courts must “rigorously enforce” the “FLSA’s similarity requirement” at “the outset of the litigation.” *Swales*, 985 F.3d at 443. That means plaintiffs must demonstrate similarity by a preponderance of the evidence. *See E.M.D. Sales, Inc. v. Carrera*, 604 U.S. 45, 47 (2025) (explaining that standard is the “usual standard of proof in civil litigation”). The Sixth Circuit has held that “plaintiffs must show a ‘strong likelihood’” that similarly situated employees exist, analogizing to the preliminary-injunction context. *Clark*, 68 F.4th at 1010-11.

Assuming courts should be involved *at all* in soliciting claims from similarly situated employees, the Fifth Circuit’s approach best respects the statutory requirement that plaintiffs establish that similarly situated employees exist. But both the Fifth and Sixth Circuits’ standards are far better than the status quo in most courts. And whatever the right answer, courts and litigants urgently need this Court’s guidance. If *Hoffmann-La Roche* is to stand, this Court should grant review to place needed guardrails around collective actions.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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November 2025