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

BRIEF FOR *AMICUS CURIAE* SEYFARTH SHAW LLP'S WAGE AND HOUR LITIGATION PRACTICE GROUP IN SUPPORT OF PETITIONERS

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Seyfarth Shaw LLP is one of the largest law firms in the United States. Founded by management-side labor lawyers in 1947, the firm today includes more than 400 U.S. labor and employment lawyers. Seyfarth's labor and employment practice is consistently ranked among the best in the nation.

Seyfarth's Wage and Hour Litigation Practice Group ("WHLPG") includes more than 100 Seyfarth attorneys who devote at least a substantial portion of their practices to defending wage and hour class and collective actions. Attorneys in the WHLPG author and publish the treatise, *Wage & Hour Collective and Class Litigation*,[2] and maintain the group's Wage and Hour Litigation Blog.[3] Members of the WHLPG have represented employers in hundreds of collective and class actions during the past two years alone, and in thousands of such cases since the Court's 1989 *Hoffmann-La Roche* decision.

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[1] Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus made a monetary contribution to this brief's preparation or submission. Pursuant to Supreme Court Rule 37.2, amicus notified counsel for the parties of its intent to file this brief.

[2] NOAH A. FINKEL, BRETT C. BARTLETT, ANDREW M. PALEY, WAGE & HOUR COLLECTIVE AND CLASS LITIGATION (Law Journal Press 2012-2025).

[3] Wage & Hour Litig. Blog, SEYFARTH SHAW LLP, https://www.wagehourlitigation.com/ (last updated on Nov. 7, 2025).

The primary authors[4] of this brief have dedicated substantial portions of their careers to representing employers in wage-related litigation. We have spent thousands of hours researching, briefing and arguing procedural issues relating to plaintiffs' efforts to pursue claims under the Fair Labor Standards Act ("FLSA") on a collective action basis. For decades, we have seen how would-be collective actions play out in discovery, in complex motion practice, and at trial. And we have seen how a court's ruling on the "conditional certification" of a collective action affects a case, including the impact on the timely disposition of a claim, the resources necessary to adjudicate it, and the rights and obligations of the parties.

As explained below, we have seen first-hand widespread judicial inefficiencies and unfairness to employers resulting from the misinterpretation of the FLSA and this Court's *Hoffmann-La Roche* decision. We offer this amicus brief in an effort to shed light on how FLSA collective actions have been litigated by parties and managed by district courts. We respectfully urge the Court to grant *certiorari* and guide district courts to manage FLSA collective actions more fairly, more efficiently, and with greater attention to a district court's proper role.

SUMMARY OF THE ARGUMENT

For decades, in hundreds of FLSA cases, district courts have semi-routinely granted motions

[4] The primary authors are Barry J. Miller, Molly C. Mooney, Hillary J. Massey, Steven DiBeneditto, Erin Chow, and the undersigned counsel of record Patrick J. Bannon on behalf of Seyfarth's WHLPG.

for "conditional certification" of FLSA collective actions, often stating that such motions should be subject to a "lenient" standard and often relying on this Court's decision in *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989). These rulings have required employers to provide plaintiffs and their counsel with the names and addresses of large numbers of current and former employees and have permitted plaintiffs and their counsel to send those employees documents that have the appearance of court notices but are in fact nothing more than invitations from the plaintiffs' counsel to join the suit.

The easy availability of these so-called "conditional certification" orders has allowed almost any current or former employee willing to allege an FLSA violation to impose tremendous litigation costs on an employer. FLSA claims have skyrocketed. Almost all large employers have faced FLSA collective actions. Because "conditional certification" orders are interlocutory, employers have struggled for decades to obtain appellate relief. Finally, in the past several years, the Fifth, Sixth, and Seventh Circuit Courts of Appeal have addressed conditional certification. But the courts of appeal are divided, and they have been unable to agree on what to make of *Hoffmann-La Roche*.

This *amicus curiae* respectfully urges the Court to grant Eli Lilly's petition for *certiorari* and clarify what involvement district courts may and may not have in communications to individuals who are prospective opt-in plaintiffs in would-be collective actions. A simple and workable rule is available: District courts are permitted to involve themselves in communicating with potential

plaintiffs about whether to join FLSA (or Age Discrimination in Employment Act) lawsuits only when doing so would be an effective case management tool, as in *Hoffmann-La Roche*, where the parties disputed whether hundreds of opt-in plaintiffs had properly joined the case. But district courts may not act as adjunct law enforcement agencies by lending court imprimatur to communications from plaintiffs' lawyers, for the purpose of encouraging more employees to assert FLSA claims.

ARGUMENT

I. COURT-FACILITATED NOTICES MISLEAD RECIPIENTS.

An FLSA opt-in notice is an invitation from a plaintiff's counsel to join the plaintiff's would-be collective action. But in practice, such notices almost always give recipients the impression that they are from a United States District Court. That misimpression is important because recipients might understandably assume that a court would not invite a person to consider joining a lawsuit unless the lawsuit had merit.

The problem is not curable. An opt-in notice can be non-misleading only if it is explicitly a solicitation from the plaintiff or the plaintiff's counsel, but in all but the rarest cases, *Hoffmann-La Roche* forbids district courts from facilitating such claim solicitation.

A. An FLSA Opt-In Notice Is An Invitation From Plaintiff's Counsel To Join A Lawsuit.

A plaintiff who wishes to pursue an FLSA claim may do so as a single plaintiff or through a proposed collective action. Only a plaintiff — not a court or the defendant — can choose the collective action vehicle. And, if a plaintiff decides to pursue a collective action, it is the plaintiff who decides whom to invite to join the case and when. A plaintiff could seek to invite every current and former employee of an employer nationwide for the maximum statute of limitations period, or the plaintiff could choose to define the action to include only individuals who worked in a specific state, in a specific location or department, on a specific shift, under a specific compensation structure, or during a specific period of time. Neither a court nor a defendant can force the plaintiff to broaden the plaintiff's chosen scope.

Thus, an FLSA opt-in notice is an invitation from the plaintiff – not from the court or the defendant – to join the plaintiff's lawsuit. *See Hoffmann-La Roche*, 493 U.S. at 169 (describing FLSA notice as a "communication from the named plaintiffs").

B. Most FLSA Opt-In Notices Give The Appearance That They Are From Courts.

Even though FLSA notices are invitations from the plaintiff, in practice, they almost always give recipients the impression that they are from the district court. They usually mimic the basic format of Rule 23 notices. They almost always appear under a case caption, meaning that the first words

the recipient sees are "United States District Court."[5]

In a handful of cases, courts have recognized the impropriety of using a case caption.[6] But these decisions are a small minority.[7]

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[5] *See*, *e.g.*, *Kalenga v. Irving Holdings Inc.,* No. 3:19-CV-1969-S, 2020 WL 2841396, at *5 (N.D. Tex. June 1, 2020) ("[N]umerous courts in the Fifth Circuit have held that inclusion of the caption of the court in a notice does not undermine judicial neutrality.") (internal quotation marks omitted, alteration in original); *Adkinson v. Tiger Eye Pizza, LLC,* No. 4:19-cv-4007, 2019 WL 5213957, at *8 (W.D. Ark. Oct. 16, 2019) ("The Court does not agree that the header of the notice, containing the full case caption, implies judicial endorsement of the merits of the action. Courts within the Western District of Arkansas have previously approved collective action notices with a header bearing the case caption."); *Sullivan v. Dent Wizard Int'l, LLC*, No. 4:25-cv-00097-AGF, 2025 WL 1489243, at *5 (E.D. Mo. May 22, 2025) ("However, the inclusion of the case caption and court name in a notice of class or collective action is standard and necessary to fully inform the notice recipients of the identity of the case."); *Adams v. Inter-Con Sec. Sys., Inc.*, 242 F.R.D. 530, 540 (N.D. Cal. 2007) (noting notices typically contain a court caption); *Douglas v. Xerox Bus. Servs., LLC*, No. C12-01798-JCC, 2015 WL 12930486, at *2 (W.D. Wash. Feb. 9, 2015) ("FLSA notices regularly contain the court caption and case number at the top of the first page.").

[6] *See*, *e.g.*, *Woods v. N.Y. Life Ins. Co.*, 686 F.2d 578, 580-82 (7th Cir. 1982) (vacating district court order authorizing notice to potential opt-ins on district court letterhead); *Barber v. Hum. Cont., LLC*, No. CV-09-964-VBF(CTX), 2009 WL 10673170, at *5 (C.D. Cal. Dec. 11, 2009) (rejecting proposed notice and observing that "omitting the case name, court name, case number, and judicial initials from the caption box would more clearly mitigate any potential misperception of judicial endorsement of the action, and the inclusion of this information

To make matters worse, FLSA opt-in notices commonly include (again mimicking Rule 23 notices) a prominent statement that the notice was authorized by the court and often that the notice is not a solicitation from a lawyer.

A number of courts have overruled objections to court-captioned notices, relying on inclusion of a

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in the body of the Notice is a sufficient means of providing the information to potential class members"); *DeKeyser v. Thyssenkrupp Waupaca, Inc.*, No. 08-C-488, 2008 WL 5263750, at *6 (E.D. Wis. Dec. 18, 2008) (agreeing that inclusion of court name atop the notice "could have the effect of creating the appearance of judicial sponsorship of the notice"); *Gerlach v. Wells Fargo & Co.*, No. C 05–0585 CW, 2006 WL 824652, at *4 (N.D. Cal. Mar. 28, 2006) ("Plaintiffs' form has a Court caption, which as Defendants note could be perceived as a judicial endorsement of this action; the caption should be omitted.").

[7] *See*, *e.g.*, *Pares v. Kendall Lakes Auto., LLC*, No. 13–20317–CIV, 2013 WL 3279803, at *11 (S.D. Fla. June 27, 2013) (permitting inclusion of case name and number in notice to show putative plaintiffs "that the Court has approved the notice and that the notice is more than a mere solicitation"); *Byard v. Verizon W. Va., Inc.*, 287 F.R.D. 365, 367 (N.D. W. Va. 2012) (concluding "the case caption does not suggest any judicial bias"); *North v. Bd. of Trs. of Ill. State Univ.,* 676 F. Supp. 2d 690, 699 (C.D. Ill. 2009) (finding inclusion of case caption and judges' names "not likely to mislead a recipient into believing that the notice constitutes an 'invitation' from the Court"); *Carlson v. Leprino Foods Co.*, No. 1:05-cv-798, 2006 WL 2375046, at *1 (W.D. Mich. Aug. 15, 2006) (finding use of case caption "important so that readers will not confuse th[e] notice with junk mail"); Fed. Lab. Standards Legis. Comm. Section of Lab. & Emp. Law Am. Bar Ass'n, The Fair Labor Standards Act, 17-143-144, 17-144 n.294 (Ellen C. Kearns et al. eds., 3d ed., Bloomberg BNA 2015) (collecting cases allowing and refusing to allow use of court caption on FLSA notices).

disclaimer that the court is taking no position on the merits of plaintiffs' claims.[8] But such a disclaimer does not address *who* is inviting recipients to opt in to the case. If potential opt-ins believe that a judge is inviting them to opt-in to a case, that misinformation is likely to influence their decision, regardless of any disclaimer.[9] As the Federal Trade Commission has stated in regulations about deceptively formatted advertisements, "[k]nowing the source of an advertisement or promotional message typically affects the weight or credibility consumers give it" and "deception occurs when consumers acting reasonably are misled about its source." FTC, Enforcement Policy Statement on Deceptively Formatted Advertisements, 81 Fed. Red. 74, 22596 (Apr. 18, 2016).

Many recipients likely treat a notice from a federal judge as signaling that the case described in the notice has merit.[10] Yet, FLSA opt-in notices are routinely formatted to look like court notices and are

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[8] *See*, *e.g.*, *Russell v. Ill. Bell Te. Co.*, 575 F. Supp. 2d 930, 938-39 (N.D. Ill. 2008); *Will v. Panjwani*, No. 1:13-CV-1055-JMS-MJD, 2013 WL 5503727, at *4 (S.D. Ind. Oct. 1, 2013).

[9] *See* Scott A. Moss & Nantiya Ruan, *No Longer a Second-Class Class Action? Finding Common Ground in the Debate Over Wage Collective Actions with Best Practices for Litigation and Adjudication*, 11 Fed. Cts. L. Rev. 27, 64 (2019) (acknowledging that court-approved notice is likely to be more persuasive than notice sent independently by plaintiffs' counsel).

[10] *See Jirak v. Abbott Labs., Inc.*, 566 F. Supp. 2d 845, 851 (N.D. Ill. 2008) (arguing inclusion of court name atop notice "could suggest to potential plaintiffs that the Court has lent its imprimatur to the merits of th[e] case").

issued in cases in which the court has not even considered whether the claims have any merit.

C. The Problem Is Not Curable Because A Non-Misleading FLSA Notice Would Almost Always Be A Solicitation Of Claims – Off-Limits For A District Court.

In *Hoffmann-La Roche*, the district court involved itself in the plaintiffs' counsel's efforts to contact potential opt-in plaintiffs only after the parties' independent communications with potential plaintiffs created a true litigation mess, with the defendant accusing plaintiffs' counsel of misleading communications and challenging the validity of 400 opt-in consent forms. 493 U.S. at 172. This Court held that the district court had authority to take charge of this opt-in process gone uniquely awry by virtue of its general authority "to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases." *Id.* at 173 (internal quotations and citations omitted).

The Supreme Court in *Hoffmann-La Roche* warned district courts, however, that their case management power does not include the power to encourage individuals to sue. 493 U.S. at 174; *see also Laney v. Clements Fluids Mgmt., LLC*, No. 6:18-cv-00497, 2020 WL 1451739, at *4, *6 (E.D. Tex, Mar. 25, 2020) (denying motion for "conditional certification" and stating "the court prefers to remain neutrally silent on the desired amount or type of litigation brought before it"). In the ordinary FLSA case, ordering the defendant to give the plaintiff a database of names and addresses of individuals for the express purpose of allowing the plaintiff's counsel to solicit the individuals to join the

lawsuit falls outside anything *Hoffmann-La Roche* authorized. Once it is recognized that opt-in notices are almost always pure solicitations by plaintiffs' counsel, it follows from *Hoffmann-La Roche* that district courts should almost never be involved in sending them.

II. PLAINTIFFS' FIRMS OFTEN USE COURT-FACILITATED NOTICES TO SUPPLEMENT THEIR INDEPENDENT SOLICITATIONS.

In 1989, when *Hoffmann-La Roche* was decided, the internet was in its infancy and social media did not exist. This Court's primary concern was the judiciary's obligation to manage collective actions efficiently and fairly and, in particular, to "avoid[] a multiplicity of duplicative suits." *Hoffmann-La Roche*, 493 U.S. at 166. Employers alone typically possessed the contact information for potential claimants, and there was no platform on which prospective litigants could efficiently share information. That informational scarcity provided at least arguable grounds for court-facilitated notice, at least where it was likely that a material number of employees would assert similar claims against the same employer in parallel, without information about one another's litigation efforts.

Today, plaintiffs' firms and advocacy groups have access to – and have become adept at using – vast, publicly accessible digital resources to advertise for, identify, and recruit potential opt-in plaintiffs for FLSA collective actions. These firms

routinely use dedicated websites,[11] targeted social media campaigns and ads, including on TikTok,[12] Facebook,[13] and LinkedIn,[14] and online advertising to publicize planned or pending FLSA cases and to solicit plaintiffs. Entire websites, such as "TopClassActions"[15] and "ClassAction.org,"[16] compile and promote open class and collective actions to potential claimants.

These developments have upended the considerations that provided grounds for courts to intervene in or referee the information-gathering practices that might facilitate efficient case management and avoid the "multiplicity" of parallel claims that *Hoffmann-La Roche* was intended to prevent. As the Seventh Circuit cautioned, "notice giving, in certain circumstances, may become indistinguishable from the solicitation of claims—which is a process 'distinguishable in form and

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[11] *Uber Drivers: Read Here About Our Decade-Long Work Fighting to Recover Wages and Expenses for Uber Drivers*, LICTHEN & LISS-RIORDAN, P.C., https://perma.cc/5EY7-LDCB (last accessed Nov. 12, 2025).

[12] Craigleveyesq (@craigleveyesq), TIKTOK, https://perma.cc/2B36-5YKR (last accessed Nov. 12, 2025).

[13] Ortiz & Moeslinger, PC, FACEBOOK, https://perma.cc/CKL8-PLUC (last accessed Nov. 12, 2025).

[14] Rodman Employment Law, LINKEDIN, https://perma.cc/Z7HG-ZT9E (last accessed Nov. 12, 2025).

[15] *Lawsuits to Join*, TOP CLASS ACTIONS, https://perma.cc/5ZX3-HTFU (last accessed Nov. 12, 2025).

[16] *List of Open, Current & New Class Action Lawsuits, Mass Torts*, CLASSACTION.ORG, https://perma.cc/8DTJ-SZXA (last accessed Nov. 12, 2025).

function' from court intervention in the notice process for case management purposes." *Bigger v. Facebook, Inc.*, 947 F.3d 1043, 1049 (7th Cir. 2020) (quoting *Hoffmann-La Roche*, 493 U.S. at 174). Now, because plaintiffs' attorneys can and do identify and contact potential plaintiffs without court involvement, the risks inherent in the appearance of court-sponsored solicitation will almost always outweigh any theoretical danger that multiple individuals will overburden the court's docket with duplicative individual FLSA claims.

III. "CONDITIONAL CERTIFICATION" ORDERS EXCEEDS THE PERMISSIBLE SCOPE OF CIVIL DISCOVERY.

A district court's "conditional certification" of an FLSA collective action almost always requires the defendant to provide the names and contact information of the individuals who will be invited to join the suit. In *Hoffmann-La Roche*, the majority found such information discoverable, noting that "the employees might have knowledge of other discoverable matter" and that the employees' names and addresses were "relevant to the subject matter of the action." 493 U.S. at 170. Whatever the merits of that conclusion in 1989 (*see id.* at 180 (Scalia, J., dissenting)), the scope of permissible discovery has been considerably narrowed in the past thirty-five years. Today, discovery of hundreds or thousands of employee names and addresses for the purpose of inviting them to join the lawsuit is beyond the scope of permissible discovery under Rule 26(b)(1).

Under the current Rule 26(b)(1), information is not discoverable unless it is "relevant to any party's claim or defense" and "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). Possibly,

the names and contact information of a reasonable number of employees who worked with an FLSA plaintiff or otherwise have information regarding the plaintiff's employment might fit within that scope. But "conditional certification" orders often require disclosure – all at once – of the names and contact information of dozens, hundreds, or thousands of employees who know nothing about the plaintiff's employment. Requiring production of information about all of them would almost never be justified. Indeed, district courts generally do not even attempt to square the disclosure requirements that are embedded in FLSA "conditional certification" orders with Rule 26(b)(1).

The burden associated with disclosing the names and contact information for members of a conditionally certified collective is by no means limited to the ministerial efforts that the employer must undertake to compile the information or the inconvenience of being sued by additional employees when the plaintiffs' attorneys use that information to solicit. Often, employees included in the collective react negatively to learning that their employer has disclosed information about them and their employment to a third party without their authorization. Some regard this as an invasion of their privacy interests, which in turn strains a defendant's employee-relations interests. All of this is visited on the employer without any finding that it has violated any law.

In sum, an order requiring a defendant to provide information at the request of an opposing party is subject to Rule 26(b)(1). Yet it has become routine for district courts to ignore the limits of that

Rule when ordering "conditional certification" in FLSA cases.

IV. "CONDITIONAL CERTIFICATION" IMPAIRS, RATHER THAN PROMOTES, JUDICIAL ECONOMY.

We have litigated FLSA collective actions for decades in the wake of *Hoffmann-La Roche* and have seen the conditional certification of collectives proliferate litigation, rather than produce any efficiencies.[17] FLSA cases typically can be managed more effectively without the publication of a court-sponsored notice to droves of individuals who would otherwise never assert a claim, and inviting individuals to join a case from which they stand a substantial chance of being later dismissed creates confusion and distrust in the legal system.[18]

The inefficiency that often arises from granting FLSA plaintiffs' bids for conditional certification under *Hoffmann-La Roche* is illustrated

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[17] *See* Charlotte S. Alexander, *Litigation Migrants*, 56 Am. Bus. L. J. 235, 240 (2019) (noting 400% increase in FLSA lawsuits filed in federal court between 2000 and 2016).

[18] *See Laverenz v. Pioneer Metal Finishing, LLC*, 746 F. Supp. 3d 602, 614, 617-19 (E.D. Wis. 2024) (denying FLSA notice because "notice authorized too early, before any concrete determinations are made as to whether the potential plaintiffs actually are similarly situated, creates bad incentives"); *Basco v. Wal-Mart Stores, Inc.*, No. Civ.A. 00–3184, 2004 WL 1497709, at *5, *8 (E.D. La. July 2, 2004) (denying collective certification based on lack of evidentiary support and explaining that collective certification without proper support is "an exercise in futility and wasted resources for all parties involved").

by three recent cases before three different judges in the United States District Court for the District of Massachusetts. These cases are not unique; they represent a common procedural arc in the collective actions that we have litigated and observed across the country.

In one recent example, a trial court applied the directives of *Hoffmann-La Roche* and "conditionally certified" a nationwide FLSA collective of optical clinic managers at an early procedural stage of the case, over defendant's objection. *Clark v. Cap. Vision Servs., LLC*, No. 22-CV-10236-DJC, 2022 WL 2905356, at *1-3 (D. Mass. July 22, 2022); *rev'd*, 2024 WL 3458525, at *15-16 (D. Mass. July 18, 2024) (decertifying collective in exempt misclassification case). In response to court-authorized notice, approximately three hundred individuals joined the case. *Clark,* No. 22-CV-10234-DJC, Def.'s Mot. to Decertify FLSA Collectives, at 1 (D. Mass. July 18, 2024), Dkt. No. 211. Two years of substantial discovery and motion practice followed, including twenty-eight depositions and two hundred filings on the court's docket. At the conclusion of those efforts, the court granted the employer's motion to decertify the collective, based in large part on significant differences in duties that were relevant to the employer's defenses, "namely that Plaintiffs qualified for the executive and administrative [overtime] exemptions, [that] require individual-specific factual analyses and considerations." *Clark*, 2024 WL 3458525, at *17. The court then dismissed all opt-in plaintiffs and disbursed the claims of several named plaintiffs to the districts around the country in which they worked, leaving only the claims of the two named

plaintiffs who worked in Massachusetts for trial in that district.[19] The employer incurred significant cost and distraction, and the net result of this long procedural battle was a modest claim on behalf of two individuals, who recovered nuisance value sums to end the litigation short of trial. *Clark*, No. 22-CV-10236-DJC, Pl.'s Unopposed Mot. For Approval of Fair Labor Standards Act Settlement, at 4 (D. Mass. July 18, 2024), Dkt. No. 262 (providing for payment of $2,550 to each plaintiff). Conditional certification provided no efficiency. On the contrary, it squandered significant private resources, along with many hours of the trial court's time and attention.

Similarly, in *Roy v. FedEx Ground Package Sys., Inc.*, another judge in the U.S. District of Massachusetts granted an employer's motion for decertification of an FLSA collective after *nearly six years* and almost 350 docket entries of interim proceedings relating to the approximately 550 opt-in plaintiffs who had joined the case. No. 3:17-CV-30116-KAR, 2024 WL 1346999, at *2, *12 (D. Mass. Mar. 29, 2024). The court noted that, in light of the "myriad differences among the opt-in Plaintiffs who participated in discovery . . . Plaintiffs, who have the burden of proof by a preponderance of the evidence, have not shown that they can present common or representative evidence to establish" their claims. *Id.* at *10. Again, massive resources were spent, and nothing was accomplished that promoted judicial economy in any respect.

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[19] *See Clark*, No. 22-CV-10236-DJC, Electronic Order (D. Mass. Apr. 29, 2025), Dkt. No. 250; *Clark*, No. 22-CV-10236-DJC, Electronic Order (D. Mass. Apr. 29, 2025), Dkt. No. 251.

In a third example, another judge in the District of Massachusetts conditionally certified an FLSA collective that resulted in more than four hundred opt-in plaintiffs joining the action, only to be dismissed after the employer prevailed at summary judgment on the outside sales overtime exemption. *Modeski v. Summit Retail Sols., Inc.*, 470 F. Supp. 3d 93, 99, 110-11 (D. Mass. 2020), *aff'd*, 27 F.4th 53 (1st Cir. 2022). Hundreds of individuals were brought before the court – perhaps assuming (*see* Section I above) that the claims in the case had merit – only to find out four years later that those claims were unfounded. Even the named plaintiffs paid a price, spending four years litigating a large and complex case that could have been smaller and simpler and ending up with an adverse judgment for thousands of dollars of costs. *Modeski*, No. 18-12383-FDS, Mem. and Order on Mot. Regarding Costs, at 1, 6 (D. Mass. Aug. 25, 2020), Dkt. No. 179. Yet again, untold time and resources of the parties and the court were misspent.

These cases are typical of statistical trends. Courts granted "conditional certification" more than 70% of the time in 2017,[20] 2018,[21] and 2019,[22] using

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[20] SEYFARTH SHAW LLP, 14TH ANNUAL WORKPLACE CLASS ACTION LIT. REPORT 2, 10, 13 (2018), http://seyfarth-classaction.com/WCAR2018/ (last accessed Nov. 13, 2025) (reporting 73% of conditional certification motions granted).

[21] SEYFARTH SHAW LLP, 15TH ANNUAL WORKPLACE CLASS ACTION LIT. REPORT 2, 9, 12-13 (2019), http://seyfarth-classaction.com/2019WorkplaceClassActionLitigation/ (last accessed Nov. 13, 2025) (reporting 79% of conditional certification motions granted).

a lenient standard before an assessment of the merits. And in more than 50% of such cases, courts later granted motions for "decertification" using a more rigorous standard.[23] Most of these cases would have proceeded more efficiently if the court had simply addressed whether any additional would-be plaintiffs were "similarly situated" through routine joinder motions.

The squandering of resources in collective actions is not limited to procedural skirmishing. In modern discovery, FLSA defendants are frequently required to spend hundreds of thousands of dollars or more on discovery relating to the members of the collective, regardless of the merits of the dispute and before the court even considers whether the matter can proceed to judgment on a collective basis. In all of the cases noted above, plaintiffs' counsel sought extensive ESI discovery on a collective basis, raising expensive disputes about the proper scope of that discovery. These costs create leverage for plaintiffs' attorneys and pressure employers to settle claims, irrespective of the underlying merits. *See*, *e.g.*, *Bigger*, 947 F.3d at 1049 ("One is the opportunity for

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[22] SEYFARTH SHAW LLP, 16TH ANNUAL WORKPLACE CLASS ACTION LIT. REPORT 6, 9-11 (2020), https://perma.cc/RPT9-5QA5 (reporting 81% of conditional certification motions granted).

[23] *See* 16TH ANNUAL WORKPLACE CLASS ACTION LIT. REPORT, *supra* at 10 (reporting 58% of decertification motions granted); 15TH ANNUAL WORKPLACE CLASS ACTION LIT. REPORT, *supra* at 9 (reporting 52% of decertification motions granted); 14TH ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORT, *supra* at 10 (reporting 63% of decertification motions granted).

abuse of the collective-action device: plaintiffs may wield the collective-action format for settlement leverage. Generally speaking, expanding the litigation with additional plaintiffs increases pressure to settle, no matter the action's merits.") (internal citation omitted). We have seen the pattern in scores of cases: plaintiffs pursue certification of a broad collective and then seek burdensome collective-wide discovery.

In sum, when courts grant motions for FLSA "conditional certification" based on superficial, conclusory, and preliminary information, it is foreseeable that individuals will join a case from which they will likely be dismissed later.[24] *Cf.*

[24] Some courts even authorize notice to employees who probably *cannot* join the case. For example, the Ninth Circuit recently affirmed a ruling that notice of an invitation to join a collective action could be extended to employees who had signed arbitration agreements. *Harrington v. Cracker Barrel Old Country Store, Inc.*, 142 F.4th 678, 684 (9th Cir. 2025) ("Applying these rules to the case before us, there was no abuse of discretion. The district court found that multiple fact issues remained that would need to be resolved before the court could determine which prospective opt-in plaintiffs might be required to arbitrate their claims."); *cf. Bigger*, 947 F.3d at 1047 (holding that notice must not issue to employees who signed arbitration agreements); *In re JPMorgan Chase & Co.*, 916 F.3d 494, 502-04 (5th Cir. 2019) (concluding district court erred in approving notice to employees with arbitration agreements: "*Hoffmann-La Roche* does not give district courts discretion to send or require notice of a pending FLSA collective action to employees who are unable to join the action because of binding arbitration agreements"). Using the collective action device to embrace claims from individuals who were presumptively precluded from filing claims in court at all cannot be justified as efficient adjudication of claims by Article III courts.

Espenscheid v. DirectSAT USA, LLC, 705 F.3d 770, 776-77 (7th Cir. 2013) (affirming decertification of 2,341 field technicians on eve of trial); *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 950, 953-54 (11th Cir. 2007) (affirming decertification of approximately 2,200 production workers who were not similarly situated). The practice surely confuses employees who received notice, joined the case, and then received further notice informing them they were no longer part of the case.

V. CONFLICTING STANDARDS ACROSS COURTS OF APPEAL HAVE NOT SOLVED THE ISSUES WITH *HOFFMANN-LA ROCHE*.

The Courts of Appeals' decisions in *Swales, Clark*, and *Richards* reflect a growing recognition that the current framework for court-authorized notice has failed to promote fairness and efficiency.[25]

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[25] *Richards v. Eli Lilly & Co.*, 149 F.4th 901, 911 ("Because its overly permissive notice standard places a judicial thumb on the plaintiff's side of the case, we join the Fifth and Sixth Circuits in concluding that the modest level of scrutiny commonly employed under *Lusardi* inevitably conflicts with a district court's obligation to maintain neutrality and to shield against abuse of the collective-action device.") (internal citations and quotations omitted); *Clark v. A&L Homecare & Training Ctr., LLC*, 68 F.4th 1003, 1010 (6th Cir. 2023) ("The Supreme Court made clear in *Hoffmann-La Roche* that the court's facilitation of notice must not in form or function resemble the solicitation of claims. And notice 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.") (internal citations and quotations omitted); *Swales v. KLLM Trans. Servs., L.L.C.*, 985 F.3d 430, 440 (5th Cir. 2021) (describing the lenient conditional certification

Each of these courts has adopted a different framework for analyzing when notice should issue to "similarly situated" individuals. Yet none of these approaches has yielded a workable or predictable standard, and they do not resolve the fundamental issues presented by court-authorized notice.

Swales represents the most rigorous and text-based effort to rework the notice process. In that case, the Fifth Circuit held that courts must rigorously scrutinize whether workers are "similarly situated" *before* issuing notice. 985 F.3d at 434. Courts in the Fifth Circuit are thus now directed to resolve threshold issues such as whether arbitration agreements exist or whether employees are properly classified before issuing notice. While this approach is preferred over the "lenient" standard – it overlooks the reality that court-authorized notice is not needed at all. Plaintiffs' lawyers already notify potential plaintiffs through extensive online advertising and social-media outreach. As the court in *Branson v. Alliance Coal, LLC*, No. 4:19-CV-00155-JHM, 2021 WL 1550571, at *4 (W.D. Ky. Apr. 20, 2021), observed, "Plaintiffs' counsel, with no judicial involvement, has added more than ninety opt-in plaintiffs since this litigation began . . . [t]he Court exercised no role whatsoever in Plaintiffs' counsel's solicitation of these potential plaintiffs." The tacit assumption that court-facilitated notice is necessary to inform potential opt-ins is outdated.

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framework as an "amorphous and ad-hoc test [that] provides little help in guiding district courts in their notice-sending authority").

The Sixth Circuit's decision in *Clark* similarly raised the bar for "conditional certification," requiring plaintiffs to show a "strong likelihood" that employees are similarly situated, borrowing from the preliminary-injunction context. 68 F.4th at 1011. While *Clark* rightly emphasizes neutrality and procedural fairness, its "strong likelihood" threshold remains ill-defined, and district courts have already expressed frustration with its practical application.[26]

The Seventh Circuit's decision in *Richards* introduces yet another approach. For multi-state employers facing collective actions across multiple jurisdictions, the result is an inconsistent and unpredictable landscape where the same FLSA claim can proceed under different procedural regimes depending on venue. Such a patchwork of standards incentivizes plaintiffs' attorneys to file their most ambitious cases in jurisdictions where the standard for certification of collective actions is most relaxed. This dynamic will create more work for those courts that are most likely to permit court-authorized notice in collective actions, both by bringing more

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[26] *See Beissel v. Warren Transp., Inc.*, No. 24-CV-90-CJW-MAR, 2025 WL 2650901, at *5 (N.D. Iowa June 10, 2025) (rejecting *Clark* because a deep dive into the facts early in the case will be flawed, "especially about facts known by other potential members of the collective"); *Lee v. Sutherland Glob. Servs., Inc.*, No. 6:23-CV-06549 EAW CDH, 2025 WL 2426352, at *4 (W.D.N.Y. Aug. 22, 2025) (declining to apply *Clark* as impracticable when no depositions have been taken); *Tay v. N.Y. & Presbyterian Hosp.*, No. 22-CV-8379 (KMK), 2024 WL 4286226, at *5-6 (S.D.N.Y. Sept. 24, 2024) (questioning *Clark* because court-issued notice could reach non-similarly situated employees under either standard).

cases to those courts and by more readily expanding the scope of those cases through the notice process. This result reflects a fundamental irony of *Hoffmann-La Roche* and its promise of "efficient and proper" case management (493 U.S. at 171) – in an effort to reduce the burden on the courts posed by the prospect of a multiplicity of individual claims, certain courts have multiplied their burden by drawing more cases and larger, more complex collectives on to their dockets.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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