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 OF *AMICUS CURIAE* THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF PETITIONERS

KYLE WINNICK
SEYFARTH SHAW LLP
620 Eighth Avenue
New York, NY 10018

LENNON HAAS
RALPH CULPEPPER III
SEYFARTH SHAW LLP
1075 Peachtree Street
Atlanta, GA 30309

NOAH FINKEL
Counsel of Record
RICHARD LAPP
SEYFARTH SHAW LLP
233 South Wacker Drive,
Suite 8000
Chicago IL 60606
(312) 460-5913
nfinkel@seyfarth.com

Attorneys for Amicus Curiae
The Society For Human Resource Management

387432

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTERESTS OF THE *AMICUS CURIAE*[1]

SHRM, the Society for Human Resource Management, is a member-driven catalyst for creating better workplaces where people and businesses thrive together. As the trusted authority on all things work, SHRM is the foremost expert, researcher, advocate, and thought leader on issues and innovations impacting today's evolving workplaces. With nearly 340,000 members in 180 countries, SHRM touches the lives of more than 362 million workers and their families globally. SHRM's mission, as set forth in its bylaws, is to promote the use of sound and ethical human resource management practices in the profession, and (a) to be a recognized world leader in human resource management; (b) to provide high-quality, dynamic, and responsive programs and service to its customers with interests in human resource management; (c) to be the voice of the profession on human resource management issues; (d) to facilitate the development and guide the direction of the human resource profession; and (e) to establish, monitor, and update standards for the profession. As an influential voice, SHRM advances the human resource profession to ensure that human resources is recognized as an

[1] Pursuant to Supreme Court Rule 37.6, SHRM 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 SHRM, its members, or their counsel made a monetary contribution to this brief's preparation or submission. Pursuant to Supreme Court Rule 37.2, SHRM's attorneys notified counsel for the parties via email on November 6, 2025 of SHRM's intent to file this brief, and no party responded with an objection to the filing.

essential partner in developing and executing organizational strategy.

SHRM offers this amicus brief in support of Petitioner because the issues raised in this appeal are of exceptional importance to both SHRM's members and the business community at large. Fair Labor Standards Act (FLSA) collective actions are among the most costly and disruptive lawsuits that employers face. Nearly every aspect of employee compensation can trigger liability.

SHRM has firsthand knowledge of these challenges. Through our HR Knowledge Advisors—a member benefit that provides access to experts offering guidance, real-world insights, and practical resources—we see that compliance questions remain a persistent concern for HR professionals and their counterparts in payroll, compensation, and legal departments, particularly when navigating issues that touch on the FLSA.

The wide variation in collective action notice procedures across circuits, amplifies compliance difficulties, creates inconsistencies in how employers address notice, and destabilizes business practices, none of which align with SHRM's mission to support clear, consistent, and compliance-oriented workplace laws. The resulting confusion serves neither employers nor employees.

Notice procedures, if allowed at all, should instead be clear, consistent, and rooted in the FLSA's text and purpose. Granting Petitioner's request for certiorari and answering either question presented achieves those goals.

SUMMARY OF THE ARGUMENT

Human resource (HR) professionals are charged with myriad responsibilities that sit at the intersection of people management and business compliance. Pertinent here, it is HR professionals who develop and implement workplace policies, conduct investigations when allegations arise, and often serve as intermediaries with courts, parties, or juries to explain the employer's relevant policies and procedures. This includes helping organizations and their employees navigate the complex and inconsistent landscape of FLSA collective action notice requirements, particularly for employers operating across multiple states and federal circuits. In the often nuanced, years-long litigation that may follow issuance of collective action notice, HR professionals are frequently found at the center of the ensuing litigation and compliance steps necessary to send out the notice.

HR professionals' collective action-related responsibilities have exploded in complexity and volume since this Court's decision in *Hoffman-La Roche v. Sperling*, 493 U.S. 165, 173 (1989), and the flood of litigation it created. Yet that explosion runs counter to Congress's explicit desire to constrain collective actions when it enacted the Portal-to-Portal Act over 70 years ago. The five or so standards for collective action notice developed by lower courts after *Hoffman-La Roche* only amplify the problem.

Ultimately, *Hoffman-La Roche*-induced FLSA collective litigation and the associated patchwork quilt of notice regimes (1) create confusion for the employers and employees served by HR professionals,

and (2) impose severe and unnecessary burdens on them. They run counter to stable workplace policy and inject unacceptable uncertainty into compliance guidance. This, in turn, disrupts previously constructive employer-employee interactions, as even employers acting in good faith struggle to operate when rules and guidelines are unclear—and federal courts themselves cannot agree on a single standard.

That unnecessarily expensive, burdensome, and harmful state of affairs should not exist. SHRM thus asks this Court to grant Eli Lilly's petition for certiorari to answer one or both of the questions the petition presents, and reverse the erroneous standard imposed by the Seventh Circuit.

ARGUMENT

I. CONGRESS ENACTED THE PORTAL TO PORTAL ACT TO CONSTRAIN COLLECTIVE ACTIONS, SOMETHING LOWER COURTS' INTERPRETATIONS OF *HOFFMAN-LA ROCHE* HAVE UNDERMINED.

In 1947, Congress added an opt-in requirement to the FLSA's collective action mechanism to curb what it viewed as excessive litigation stirred up by union officials. That opt-in feature, of course, did not apply only to unions. Despite that congressional intent, this Court held 42 years later that district courts have discretion to facilitate notice to potential collective members, an authority found nowhere in the FLSA's plain text. *See Hoffman-La Roche, Inc.*, 493 U.S. at 173. As interpreted by lower courts, that decision ignited an expansion of aggregate litigation and undid the balance that the Portal-to-Portal Act ushered in 42 years earlier.

A. Congress Amended the FLSA in Response to Excessive Litigation.

Federal regulation of compensation began in 1938. *See* Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified at 29 U.S.C. §§ 201–209). The law protects employees by establishing minimum wage requirements and limiting the number of hours they may be required to work before receiving overtime compensation unless exempted. Originally, the FLSA allowed employees (i) to maintain suits "for and in behalf of himself or themselves and other employees similarly situated," or (ii) "designate an agent or representative to maintain such action for

and in behalf of all employees similarly situated." 52 Stat. at 1069.

In 1946, this Court held that "portal-to-portal" time, such as walking to work on the employer's premises, constituted "work" under the FLSA and therefore contributed to the maximum hours for calculating overtime. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690–92 (1946). This decision triggered thousands of "representative" lawsuits seeking back pay for such time. *See Knepper v. Rite Aid Corp.*, 675 F.3d 249, 254 n. 6 (3d Cir. 2012) (citing S. Rep. No. 80-48, at 2 (1947)).

> The procedure in these suits follow[ed] a general pattern. A petition [was] filed under section 16(b) by one or two employees in behalf of many others. To [these petitions were] attached interrogatories calling upon the employer to furnish specific information regarding each employee during the entire period of employment. The furnishing of this data alone [was] a tremendous financial burden to the employer.

H.R. Rep. No. 80-71 (1947) (reprinted in Bureau of Nat'l Affairs, The Portal to Portal Act of 1947: What It Does, How It Applies, What It Means 2 (1947)).

In response to this "excessive litigation," *Hoffman-La Roche*, 493 U.S. at 173, and the "national emergency" it created, *Arrington v. Nat'l Broadcasting Co., Inc.*, 531 F. Supp. 498, 500 (D.D.C. 1982), Congress passed the Portal-to-Portal Act. *See*

Portal-to-Portal Act of 1947, Pub. L. No. 80-49, 61 Stat. 84, 87 (1947).

The Portal-to-Portal Act amended the FLSA by, among other things, disallowing representative actions and an employee's participation in a collective action "unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b). This opt-in requirement "was part of a broad Congressional response to court decisions imposing unwanted liabilities and burdens on employers under the [FLSA]." *Shushan v. Univ. of Colorado at Boulder*, 132 F.R.D. 263, 266 (D. Colo. 1990).[2]

"Thus, Congress created the opt-in scheme, 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 v. 10 W. Ferry St. Operations LLC*, 156 F.4th 332, 340-41 (3d Cir. 2025) (citing *Knepper*, 675 F.3d at 260).

B. Lower Courts' Interpretations of *Hoffman-La Roche* Have Unleashed Excessive Litigation.

Hoffman-La Roche held that "district courts have discretion, in appropriate cases, to implement 29 U.S.C. § 216(b) . . . by facilitating notice to potential plaintiffs." 493 U.S. at 169. But it never addressed the

[2] *See also* Note, Fair Labor Standards Under the Portal to Portal Act, 15 U. Chi. L. Rev. 352, 360 (1948) ("The banning of representative actions for unpaid wages is an obvious device to prevent the maintenance of employee suits by labor unions.").

procedures and standards to be applied in determining whether courts *should* facilitate notice. Instead, this Court warned that district courts must not "use their power for a purpose that neither achieves nor assists the resolution of claims before them," *id*. at 178, and should limit court-authorized notice where doing so would "make for more efficient and economical adjudication of cases." *Id*. at 180.

Following *Hoffman-La Roche*, as Petitioners delineated in their petition, district courts have largely coalesced around a two-step process enunciated by *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987). At the first step of this approach—and echoing the "representative actions" initiated by union officials before the passage of the Portal-to-Portal Act—motions for "conditional" certification[3] typically are accompanied by requests for contact information of the putative collective members and for the district court's approval of a notice to be disseminated. This step is oft-described as a "low" evidentiary standard, which may be met by "a single plaintiff's affidavit,"[4] with courts ignoring any contrary proof submitted by the defendant.[5]

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[3] A "certification" process for 216(b) collective actions, whether akin to Rule 23's or not, exists nowhere in the FLSA, much less a "conditional" one. Those terms and concepts are purely a product of judge-made law created in response to *Hoffman-LaRoche*.

[4] *See, e.g.*, *Escobar v. Motorino E. Vill. Inc.*, 2015 WL 4726871, at *2 (S.D.N.Y. Aug. 10, 2015) (collecting cases).

[5] *See* Jarod S. Gonzalez, Solving Fair Labor Standards Act Collective Action Law, 58 Tulsa L. Rev. 45, 52 (2022) (The "conditional certification" stage is "judged at a very low level of generality and is viewed as a very lenient standard.").

The paradox of this low standard, and in particular courts' refusal to even consider an employer's evidence of dissimilarity, rests with the potential that courts grant a "plaintiff's motion for conditional certification despite already possessing evidence which would require [them] to grant a motion for decertification." *Green v. Atlas Senior Living, LLC*, 2022 WL 2007398, at *5 (S.D. Ga. June 6, 2022) (cleaned up).

More troublingly, "[t]he ease with which plaintiffs have achieved first-stage certification in the FLSA wage & hour context surely has contributed to the number of [FLSA] filings.'" *Laverenz v. Pioneer Metal Finishing, LLC*, 746 F. Supp. 3d 602, 615 (E.D. Wis. 2024) (quoting Seyfarth Shaw LLP, 18th Annual Workplace Class Action Report 9 (2022)).

Indeed, since *Hoffman-La Roche*, the number of FLSA collective actions has exploded, more than tripling between 2000 and 2009.[6] The next decade saw a spike in FLSA cases being filed in federal court to approximately 8,200 per year, and today sits around 6,040 each year—still far more than existed annually between 1947 and 1988, the year before *Hoffman-La Roche* changed the collective action landscape.[7]

The high percentage of FLSA actions conditionally certified has had various practical

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[6] *See* William C. Martucci and Jennifer K. Oldvader, Addressing the Wave of Dual-Filed FLSA and State law "Off-the-Clock" Litigation: Strategies for Opposing Certification and a Proposal for Reform, 19 Kan. J.L. & Pub. Pol'y 433, 433 (2010).

[7] *See* Seyfarth Shaw LLP, FLSA Litigation Metrics & Trends (2024), https://tinyurl.com/4burtz47.

effects. *First*, *Lusardi*'s lenient standard has resulted in the dissemination of notice in FLSA actions far more than any other type of workplace claim.[8] In 2021, for example, federal courts conditionally certified 226 FLSA collective actions (out of 279 cases where a motion for conditional certification was filed), while they certified—and, thus, disseminated notice in—only 13 discrimination class actions and eight ERISA class actions in the same year.[9]

Second, conditional certification triggers expensive litigation-related activities, such as discovery of the names and addresses of the putative collective members, notice to same, an opt-in period, and discovery to ascertain whether the opt-in plaintiffs are indeed similarly situated to the named plaintiffs, which may range from requiring the opt-in plaintiffs to answer written discovery to sitting for depositions.[10] "Only after these litigation-related activities have been completed will the plaintiff seek

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[8] Seyfarth Shaw LLP, 18th Annual Workplace Class Action Report 2 (2022), https://tinyurl.com/43jsu92e.

[9] *Id*. at 9.

[10] *See, e.g.*, *Abubakar v. City of Solano*, 2008 WL 508911, at *10 (E.D. Cal. Feb. 22, 2008) (individual discovery of approximately 160 opt-ins); *Ingersoll v. Royal & Sunalliance USA, Inc.*, 2006 WL 2091097 at *2 (W.D. Wash. July 25, 2006) (individualized discovery of all 34 opt-ins); *Coldiron v. Pizza Hut, Inc.*, 2004 WL 2601180, at *5–7 (C.D. Cal. Oct. 25, 2004) (individual discovery of all 306 opt-in plaintiffs); *Krueger v. New York Telephone Co.*, 163 F.R.D. 446 (S.D.N.Y. 1995) (permitting discovery addressed to all 152 opt-in plaintiffs); *Rosen v. Reckitt & Colman, Inc.*, 1994 WL 652534 (S.D.N.Y. 1994) (allowing individual discovery of 49 opt-ins); *Brooks v. Farm Fresh, Inc.*, 759 F. Supp. 1185, 1188 (E.D. Va. 1991) (allowing discovery of all 127 opt-ins); *Kaas v. Pratt & Whitney*, 1991 WL 158943 (S.D. Fla. 1991) (authorizing individual discovery of all 100 opt-in plaintiffs).

final certification or the defendant seek decertification." 7 Newberg and Rubenstein on Class Actions § 23:38 (6th ed.).

Finally, because the grant of conditional certification "exerts formidable settlement pressure" on employers, *Swales v. KLLM Transp. Servs., L.L.C.*, 985 F.3d 430, 436 (5th Cir. 2021), only a small percentage of conditionally certified collective actions reach the decertification stage, with the vast majority of such cases resulting in settlement. In 2021, for example, of the 226 conditionally certified collective actions, only 19 reached final certification decisions. As such, "[w]hichever way a court rules on the conditional certification motion, the decision will likely be final." 7 Newberg and Rubenstein on Class Actions § 23:38 (6th ed.).

The widespread dissemination of notice of so-called conditional certification and resulting litigation costs and settlement pressure has severely undermined the Portal-to-Portal Act's goal of curtailing excessive FLSA litigation, all because of the way lower courts have interpreted *Hoffman-La Roche*. The "little guidance" provided by *Hoffman-La Roche* regarding *when* notice is appropriate, *see Clark v. A&L Homecare & Training Ctr., LLC*, 68 F.4th 1003, 1007 (6th Cir. 2023), has only aggravated that state of affairs.

II. THERE IS A SIGNIFICANT CIRCUIT COURT AND DISTRICT COURT SPLIT ON THE APPLICABLE STANDARD FOR CONDITIONAL CERTIFICATION OF AN FLSA ACTION.

As Petitioners note, there is a "pervasive circuit split on a pure question of law whose 'importance cannot be overstated.'" (Pet. at 11-19.) And although the split is oft-described as a "four-way circuit split," this omits some district courts' adoption of a *fifth* approach "by applying the standards of Rule 23 class certification in FLSA collective actions." *Valte v. United States*, 155 Fed. Cl. 561, 568 (2021); *see also Shushan*, 132 F.R.D. at 268.

"[C]ourts that apply [this] approach consider 'numerosity,' 'commonality,' 'typicality,' and 'adequacy of representation' to determine whether to certify a collective action under the FLSA." *Skiba v. Timothy*, No. 4:20-CV-02656, 2023 WL 11915621, at *2 (S.D. Tex. Mar. 21, 2023). No Circuit Court has adopted this approach because conditional certification does not result in a final appealable order and thus decisions like *Shushan* normally evade appellate review. (*See* Pet. at 33-34.) Even so, because of *Hoffman-La Roche*, district courts are free to adopt, or reject, the Rule 23 approach should they choose to exercise their judge-made, and statutorily unsupported, discretion.

Even *within* the same Circuit, courts apply varying standards under *Hoffman-La Roche*. *Compare Valte*, 155 Fed. Cl. at 568 (utilizing a single-step process and noting that the lack of uniformity has created "judge-made procedure unmoored from

the statute. . . and has led to confusion about the terms and the doctrine.") *with Newson-Pace v. United States,* 177 Fed. Cl. 262, 270 (2025) ("The Court appreciates the efficiency and appeal of a single-step standard, but finds the two-step analysis more appropriate for this case.").

Without this Court's intervention—and this case offers an ideal vehicle for addressing the questions presented—this patchwork of standards will remain unresolved.

III. THE MULTITUDE OF NOTICE STANDARDS ADOPTED SINCE *HOFFMAN-LA ROCHE* AND THE LITIGATION PROLIFERATION THEY HAVE SPAWNED UNNECESSARILY BURDENS HUMAN RESOURCE PROFESSIONALS AND MULTI-STATE ENTERPRISES.

Resolving the split *Hoffman-La Roche* created (or eliminating district courts' ability to solicit the participation of third-parties in putative collective actions)[11] is important, not only for the reasons Eli Lilly's petition outlines. *See* Sup. Ct. R. 10(a).

[11] Both this case and *Hoffman-La Roche* involved the ADEA, which incorporates 216(b)'s collective action mechanism, not the FLSA. That only amplifies the importance of the issues Eli Lilly's petition highlights. However, many tens (hundreds?) of thousands of FLSA cases have been filed since *Hoffman-La Roche* (not 216(b) or any actual statutory text) gave district courts notice authority, that number only increases when ADEA cases are included. The substantive differences between the two claims likewise elevate the criticality of the issues Eli Lilly presents because ADEA claims require human resources professionals to track and marshal very different types of business records and potential testifying employees than do FLSA cases.

Consistency in notice regimes matters for those reasons, but also because the current inconsistency of standards generates confusion for employers *and* employees, not to mention burdensome compliance difficulties.

Granting Eli Lilly's petition and either overturning *Hoffman-La Roche*, or creating a single notice standard nationwide, would install in those problems' stead a clear, consistent, and compliance-oriented collective action mechanism that would benefit employers, employees, and courts (not to mention promote the remedial purpose of statutes like the FLSA).

A. Confusion for Employers and Employees Reigns When Inconsistent Legal Standards Proliferate.

Imagine a company that owns and operates a business with retail locations in Tennessee, Georgia, Mississippi, and Illinois that employ thousands of people. Like many multi-state enterprises, the business's various divisions share administrative functions like legal, tax, and human resources. Imagine, too, that the company is sued in each of the four states in which you operate, alleging FLSA violations on a collective basis.

The case in Georgia requires the company's HR department to create out of whole cloth a notice list of current and former employees—a document that did not previously exist, and one that some companies might have difficulty creating depending on the sophistication of their HRIS systems—almost

immediately because district courts in the Eleventh Circuit largely continue to embrace *Lusardi*'s leniency.

The cases in Tennessee and Mississippi, and the application of *Clark* and *Swales*, respectively, force HR to immediately begin coordinating the collection of relevant documents so outside counsel can try and prove that there's no strong likelihood the similarity that 216(b) requires exists (Tennessee), or that a preponderance of the evidence shows no similarity (Mississippi). No one really knows whether HR should collect more and different types of materials in Mississippi than Tennessee.

Meanwhile, in Illinois, the company's HR professionals have no clear guidance because *Richards*' "material factual dispute" standard is so unlike any of the three other, older standards, and so amorphous, that compliance becomes an experiment, with potentially devastating consequences.

The above is an extreme example, to be sure, but one that occurs with some regularity for larger employers targeted by sophisticated wage and hour plaintiff's counsel. And it is one that illustrates well the confusion the current state of affairs generates for HR professionals.

That confusion benefits no one. Certainly it impairs HR departments' ability to provide clear

guidance to employees.[12] But it also inhibits their ability to operate effectively by consuming HR resources that would otherwise be spent on assisting employees navigate applying for a leave of absence, or advising management on staffing challenges in a particular location, for instance. Instead of focusing on those normal functions, HR departments must also juggle the multiplicity of notice standards and collective actions foisted upon them by *Hoffman-La Roche*'s "Jesus take the [a-textual] wheel" approach to collective actions.

B. Inconsistent Collective Action Notice Standards Unnecessarily Burden HR Professionals.

Addressing either of Eli Lilly's Petition's questions presented—and either reversing *Hoffman-La Roche*, or adopting a unified standard for collective action notice—would materially reduce the unnecessary burdens the last 36 years of collective action litigation has created for SHRM's members.

As noted, those burdens include supporting businesses' defenses against ADEA or FLSA claims by collecting and explaining a variety of business

[12] In this hypothetical, today's applesaucian assortment of collective action notice standards could lead to Georgia employees receiving a letter that most laypeople think looks like a federal court document, while at the very same time employees merely 30 miles north receive nothing. The questions from Tennessee employees upon learning about the Georgia invitation to joint a lawsuit would be (a) understandable (why are our colleagues getting these and we're not?), and (b) difficult to answer by HR professionals with much more than a shoulder shrug emoji.

documents to plaintiff's counsel in depositions, and courts in declarations and trial testimony; engaging with confused employees who may have received notice of a lawsuit or outreach from plaintiff's counsel; and attempting to create policies and processes to handle the multitude of notice standards applied across the geographies in which multi-state enterprises operate, among others.

Hoffman-La Roche and the five collective action notice approaches it has generated (so far) burden HR professionals not just because of the volume of work they generate because of their inherently confusing and divergent characteristics. Employees suffer too because of the deluge of aggregate litigation that flooded courts, employers, and their HR departments after this Court issued that decision and created a wild west of lower court discretion.

It goes without saying that more and bigger lawsuits—a result directly at odds with Congress's intent in enacting the Portal-to-Portal Act—increase legal costs, clog dockets, and, most importantly for SHRM's members, increase the amount of work HR professionals must shoulder. Instead of assisting employees, counseling management, and ensuring compliance with workplace laws, HR professionals, because of *Hoffman-La Roche* and its downstream effects, must now spend significant amounts of time managing the consequences of, and assisting legal teams with litigation.

The current state of play benefits no one. Employees may be confused or unsure how to access the remedies guaranteed by law if a violation occurs.

Employers, meanwhile, face uncertainty about how to properly defend against alleged wrongdoing due to the unclear and inconsistent standards.

These deleterious burdens need not, and should not, exist. Granting certiorari in this case and returning to 216(b)'s text, which says nothing about judicially approved notice to non-parties in collective actions, *or* adopting one consistent notice standard across the country, would mitigate the confusion and burdensome consequences HR professionals experience today.

CONCLUSION

For the foregoing reasons, this Court should grant Eli Lilly's petition for certiorari.

Respectfully submitted,

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Noah Finkel
Counsel of Record
Richard Lapp
SEYFARTH SHAW LLP
233 S. Wacker Dr.,
Suite 8000
Chicago, IL 60606
(312) 460-5913
nfinkel@seyfarth.com

Lennon Haas
Ralph Culpepper III
SEYFARTH SHAW LLP
1075 Peachtree Street
Atlanta, GA 30309

Kyle Winnick
SEYFARTH SHAW LLP
620 Eighth Avenue
New York, NY 10018

Counsel for Amicus Curiae