No. 25-476

IN THE

Supreme Court of the United States

ELI LILLY & CO. AND LILLY USA, LLC,

Petitioners,

v.

MONICA RICHARDS,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Fair Labor Standards Act of 1938 relies on a unique form of group litigation that allows a covered employee to bring an action "for and in behalf of" others who are "similarly situated." 29 U.S.C. § 216(b). To join such a collective action, other employees must opt in by filing written consents. In *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989), this Court held that a plaintiff bringing a collective action can use discovery to identify other employees who may be eligible to opt in and that district courts can regulate the plaintiff's notice to those employees to ensure that it isn't misleading or otherwise inappropriate.

In this case, the Seventh Circuit held that a district court can grant a plaintiff's motion for discovery and notice under *Hoffmann* if the plaintiff either (a) shows by a preponderance of the evidence that the potential opt-in plaintiffs are similarly situated, or (b) establishes a genuine dispute of fact as to similarity and shows that the evidence necessary to resolve the dispute is likely in the hands of the potential opt-in plaintiffs. The questions presented are:

1. Whether this Court should overrule *Hoffmann*.

2. Whether the Seventh Circuit correctly held that a plaintiff should not be required to prove that potential opt-in plaintiffs are similarly situated without access to the necessary evidence.

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INTRODUCTION

This case is about discovery and preliminary case management in an unusual form of group litigation called a collective action. Unlike most plaintiffs, employees seeking redress for violations of the Fair Labor Standards Act of 1938 (FLSA) and the Age Discrimination in Employment Act (ADEA) can't bring opt-out class actions under Federal Rule of Civil Procedure 23. Instead, they must proceed under a pre-Rule 23 statute, 29 U.S.C. § 216(b). Section 216(b) gives employees a "right" to bring an action "for and in behalf of" others who are "similarly situated," but requires other employees to affirmatively opt in.

In *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989), this Court held that collective-action plaintiffs can use discovery to get the names and addresses of other employees in order to notify them about the suit. *Id.* at 170. The Court also held that district courts can regulate the plaintiffs' notice to those employees to ensure it isn't misleading. *Id.* at 172. Congress has left those holdings undisturbed even as it has repeatedly amended Section 216(b).

Petitioners' request to overrule *Hoffmann* attacks a caricature of this Court's decision. District courts applying *Hoffmann* do not "'*search out*'" potential plaintiffs or extend "judicial invitations" to join lawsuits (Pet. 1, 26 (citations omitted)). Courts do not send notices at all; plaintiffs do. Courts merely resolve discovery disputes between the existing parties and address the defendants' objections to the plaintiffs' proposed notice to employees identified in discovery. *Hoffmann* correctly held that Section 216(b) and the Federal Rules of Civil Procedure provide ample authority for those sensible case-management steps.

Although this Court has never considered what it means to be "similarly situated" under Section 216(b), petitioners also ask the Court to decide how strong a showing of similarity is required for discovery and notice under *Hoffmann*. Petitioners principally attack practices associated with a decades-old district-court case, *Lusardi v. Xerox Corp.*, 99 F.R.D. 89 (D.N.J. 1983). Pet. 2, 4, 9, 13-17, 23, 30. But no court of appeals has adopted those practices. To the contrary, only the Fifth, Sixth, and Seventh Circuits have squarely addressed the question presented. All of them have done so only in the last four years, and all of them rejected *Lusardi*. Petitioners emphasize that those courts have formulated their higher standards somewhat differently, but petitioners fail to show that those formulations yield substantively different results.

Even if this Court were inclined to take up the question presented, this case would be the wrong vehicle. The vast majority of collective actions are brought under the FLSA, so this ADEA suit involves an atypical application of Section 216(b). More fundamentally, the Seventh Circuit adopted petitioners' preferred approach—requiring a pre-notice showing of similarity by a preponderance of the evidence—except in cases where a district court determines that necessary evidence is likely in the hands of potential opt-in plaintiffs. Petitioners all but ignore that critical aspect of the Seventh Circuit's opinion. They do not explain why their narrow disagreement with the decision below warrants further review. And they do not and could not justify requiring plaintiffs to prove similarity without access to the necessary evidence.

Instead, petitioners resort to hyperbole. They insist that discovery-and-notice orders impose a

burden "even greater than the burden [defendants] face in class actions" (Pet. 1); carry "massive practical and economic significance" (Pet. 11); and pose a "dire" threat of "coercive litigation" (Pet. 23). And petitioners declare that this case is the Court's "*only*" chance to decide the question presented (Pet. 35). All of that is wrong—and demonstrably so.

Unlike a Rule 23 certification, a discovery-and-notice order does not "produce a class" or the associated settlement pressure. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75 (2013). Its "sole consequence" is that plaintiffs can send a "court-approved written notice to employees." *Id.* Only a small minority of employees who receive notice opt in, and employers are free to challenge their participation when they do. As a result, Section 216(b) collectives are typically a fraction of the size of Rule 23 classes. Combined with the small-dollar nature of most wage-and-hour claims, that means that FLSA collective actions do not give rise to anything like the massive liability threatened by many class actions.

What's more, district courts around the country have been applying different variations of the plaintiff-friendly *Lusardi* approach for decades. The recent decisions by the Fifth, Sixth, and Seventh Circuits have only improved things for employers; they do not create any urgent need for this Court's intervention. And if a true substantive disagreement among the circuits emerges down the road, the Court will see plenty of appropriate vehicles for resolving it. The petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

A. Legal background

1. Congress enacted the ADEA to "prohibit arbitrary age discrimination." 29 U.S.C. § 621(b). To enforce that prohibition, the ADEA incorporates the FLSA's collective-action procedure set forth in Section 216(b). 29 U.S.C. § 626(b).

Section 216(b) gives "[a]ny one or more employees" the right to sue "for and in behalf of" themselves "and other employees similarly situated." As originally enacted in 1938, Section 216(b) did not specify what other employees had to do to participate in a suit. Courts uniformly held that they had to "affirmatively join," but some decisions suggested they could wait until "after a [favorable] judgment" to do so. *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 255 (3d Cir. 2012).

In the Portal-to-Portal Act of 1947, Pub. L. No. 80-49, 61 Stat. 84, Congress codified the understanding that employees must opt in by specifying that an employee must "give[] his consent in writing" to join a collective action. 29 U.S.C. § 216(b). To ensure prompt opt ins, Congress provided that the FLSA's statute of limitations continues to run until "such written consent is filed." 29 U.S.C. § 256(b).

As petitioners observe (Pet. 5-6), the Portal-to-Portal Act also deleted language from Section 216(b) that had allowed so-called "representative" actions brought by unions and other non-employees lacking claims of their own. Pub. L. No. 80-49, § 5, 61 Stat. at 87. But "Congress left intact the 'similarly situated' language providing for collective actions" by employees themselves. *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989). And Congress later amended

Section 216(b) to underscore that it gives employees a "right" to sue "on behalf of" others. 29 U.S.C. § 216(b).

2. Because other employees must opt in promptly, Section 216(b) collective actions "depend on employees receiving accurate and timely notice" of the suit. *Hoffmann*, 493 U.S. at 170. Plaintiffs and their counsel have a First Amendment right to identify and notify other employees through word of mouth, advertising, or other non-judicial means. *See Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 472 (1988). But those self-help measures are inefficient and incomplete, so plaintiffs typically seek discovery from employers, who have employees' names and contact information readily available. Employers, for their part, may try to invalidate any opt-in consents plaintiffs secure on their own by arguing that the plaintiffs' notice was misleading or otherwise improper.

In *Hoffmann*, this Court addressed district courts' role in resolving those disputes. After a reduction in force, a group of employees filed an ADEA suit and obtained more than 400 opt-in consents through a mass mailing. *Hoffmann*, 493 U.S. at 168. Plaintiffs then sought discovery of the names and contact information of other potential opt-in plaintiffs so they could be notified as well. *Id.* The employer objected to that discovery and asked the court to "invalidate the consents already filed," asserting that the plaintiffs' "solicitation had been misleading." *Id.* The district court declined to invalidate the existing consents and allowed discovery to identify other employees affected by the reduction in force. *Id.* at 168-69. But to avoid further disputes, the court required the plaintiffs to send those employees a notice with "a text and form approved by the court." *Id.* at 169.

This Court upheld both the district court's grant of discovery and its authority to regulate the plaintiffs' notice. The Court held that "[t]he District Court was correct to permit discovery of the names and addresses of the discharged employees" for the purpose of sending notice because "the discovery was relevant to the subject matter of the action." *Hoffmann*, 493 U.S. at 170. As to notice, the Court reasoned that "Section 216(b)'s affirmative permission for employees to proceed on behalf of those similarly situated" gives courts "the requisite procedural authority" to regulate the process by which named plaintiffs obtain consent from others. *Id.* The Court also relied on Federal Rules of Civil Procedure 16 and 83, which give district courts broad authority to manage their cases. *Id.* at 172-73.

3. Since *Hoffmann*, "district courts have largely been left to devise their own standards" for managing collective actions. Pet. App. 6a. Although district-court practice has "many variations," courts have generally followed some version of a two-step process commonly associated with a pre-*Hoffmann* case, *Lusardi v. Xerox Corp.*, 99 F.R.D. 89 (D.N.J. 1983). Pet. App. 6a.

The first step typically begins when plaintiffs seek to discover the names and contact information of a set of potential opt-in plaintiffs—say, factory workers subject to the same overtime policy—and ask the court to approve a proposed notice. District courts that follow *Lusardi* often grant those motions if plaintiffs make a "modest factual showing" that the potential opt-in plaintiffs are similarly situated. Pet. App. 6a-7a (citation omitted). In applying that standard, district courts have sometimes declined to consider "opposing evidence" or to address similarity issues that overlap with the merits. *Id.* 7a (citation omitted).

If the court approves discovery and notice, it will resolve the defendants' objections to the plaintiffs' proposed notice and consent form. *See, e.g.*, Pet. App. 70a-76a; Notice, ECF No. 87 (notice and consent form in this case). Plaintiffs' counsel then send the notice to the approved group of employees. But those employees do not join the action unless and until their consents are filed with the court. 29 U.S.C. § 216(b).

The second step—which isn't at issue here—occurs after additional plaintiffs have opted in. At that point, defendants may move to dismiss those plaintiffs on the ground that they do not satisfy Section 216(b)'s "similarly situated" requirement. Pet. App. 7a.

4. Borrowing language from Rule 23, parties and courts sometimes call the first step of that process conditional "certification" and the second step "de-certification." Pet. App. 7a-8a. But those terms are misleading. Unlike certification under Rule 23, a discovery-and-notice order does not "produce a class" or "join additional parties." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75 (2013). Its "sole consequence" is that plaintiffs can send a "court-approved written notice to employees." *Id.*

B. The present controversy

1. Respondent Monica Richards is a "six-year veteran" of Eli Lilly "in her early fifties." Pet. App. 10a. In 2022, she was denied a promotion to become a District Sales Manager even though she had filled that position "on an interim basis for nearly six months" while achieving excellent results. *Id.* "The promotion was given instead to a much younger employee with less sales experience." *Id.*

Ms. Richards brought an ADEA collective action, alleging that Eli Lilly sought to create a more youthful workforce by systematically promoting younger employees over more qualified older employees. Pet. App. 55a-56a. She filed a motion seeking discovery of the names and contact information of ADEA-covered employees denied promotions and approval of a proposed notice. *Id.* 56a. Her supporting evidence included an affidavit from a high-level executive who had witnessed directives to promote younger employees and knew of "at least twenty" sales employees denied promotions because of their age. *Id.* 65a-66a.

The district court granted Ms. Richards's motion. Pet. App. 54a-78a. It found that her "detailed affidavits" indicated that the potential opt-in plaintiffs "were together victims of a policy or plan" that violated the ADEA. *Id.* 68a. The court initially directed petitioners to provide contact information for ADEA-covered employees who had been denied promotions throughout company. *Id.* 77a. But the parties later agreed to limit any discovery and notice to Eli Lilly's sales and marketing groups, dramatically reducing the number of potential opt-in plaintiffs. Stipulation, ECF No. 135.

2. The district court certified an interlocutory appeal under 28 U.S.C. § 1292(b) and the Seventh Circuit agreed to consider the showing a plaintiff must make to obtain discovery and notice under *Hoffmann*. Pet. App. 32a-33a, 36a-52a. Petitioners asked the Seventh Circuit to (1) "require[] courts to give the defendant an opportunity to counter the plaintiff's evidence of similarity," (2) require courts to "consider merits issues" to the extent they bear on similarity, and (3) reject "*Lusardi*'s 'modest burden'" and require a "meaningful showing" of similarity. Petr. C.A. Br. 16.

The Seventh Circuit agreed with petitioners on all three fronts. It held that "defendants must be permitted to submit rebuttal evidence." Pet. App. 20a. It instructed courts to consider evidence relevant to similarity even if it "touches on a merits issue." *Id.* 24a. And the court rejected "the modest level of scrutiny commonly employed under *Lusardi*." *Id.* 17a.

Instead, the Seventh Circuit held that plaintiffs "must first make a threshold showing that there is a material factual dispute as to whether the proposed collective is similarly situated." Pet. App. 20a. But the court "stress[ed]" that a plaintiff who makes that showing "is not automatically entitled to notice." *Id.* 21a. If the similarity dispute "can be resolved by a preponderance of the evidence before notice," the district court should resolve it and "tailor (or deny) notice accordingly." *Id.* 22a. A court can approve notice before deciding similarity by a preponderance only if it is "persuaded that the evidence necessary to resolve a similarity dispute is likely in the hands of yet-to-be-noticed plaintiffs." *Id.* 21-22a.

The Seventh Circuit declined to adopt a categorical rule requiring plaintiffs to show a "strong likelihood" of similarity or prove it by a preponderance before notice. Pet. App. 17a. The court explained that some similarity disputes will turn on evidence held by potential opt-in plaintiffs. For example, an "employer's records" might show that an employee "worked less than 40 hours per week," but "the employee might be ready to testify that she worked more." *Id.* 17a-18a (citation omitted). And the court concluded that a plaintiff can't "reasonably be expected" to prove similarity if the necessary evidence "resides with yet-to-be-noticed plaintiffs." *Id.* 17a-18a, 20a.

REASONS FOR DENYING THE WRIT

I. This Court should not revisit *Hoffmann.*

Petitioners do not cite a single court—or, for that matter, even a single judge or scholar—urging that *Hoffmann* be overruled. That is no surprise: *Hoffmann*'s holdings follow naturally from Section 216(b) and the Federal Rules of Civil Procedure. In striving to frame *Hoffmann* as "extraordinary" (Pet. 1), petitioners misread the statute, mischaracterize this Court's decision, and misunderstand the workings of collective actions. And if that were not enough, *stare decisis* counsels decisively against revisiting a statutory precedent Congress has left undisturbed.

A. *Hoffmann* was correctly decided.

In *Hoffmann*, this Court held that the named plaintiffs in a collective action may obtain discovery to identify potential opt-in plaintiffs and that district courts may regulate the terms of the named plaintiffs' notice to those potential plaintiffs. Both holdings are firmly grounded in the text of Section 216(b) and the applicable Federal Rules of Civil Procedure.

Section 216(b) gives employees a "right" to bring an action "for and in behalf of" others. 29 U.S.C. § 216(b). Congress spoke in the traditional language of group litigation, borrowing a phrase that courts had long used when allowing some members of a group to sue for others similarly harmed. *See, e.g.*, *Beatty v. Kurtz*, 27 U.S. (2 Pet.) 566, 585 (1829) (Story, J.) ("in behalf of themselves and others"). Section 216(b) is thus more than a mere joinder provision; it is an "affirmative permission for employees to proceed on behalf of those similarly situated." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989).

Hoffmann applied ordinary discovery principles in the context of that statutory right to sue on behalf of others. Federal Rule of Civil Procedure 26(b)(1) authorizes "discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." As *Hoffmann* explained, the identity and contact information of potential opt-in plaintiffs is undeniably "relevant" to the named plaintiff's claim—which is, after all, brought on their behalf. 493 U.S. at 170. Indeed, the FLSA requires each covered employer to "make, keep, and preserve" records of "the persons employed by him" to facilitate "enforcement" of the statute. 29 U.S.C. § 211(c).

Hoffmann's notice holding was equally straightforward. The question in *Hoffmann* wasn't whether plaintiffs could send notice themselves; everyone agreed that they could. The question also wasn't whether courts would play a role; "trial court involvement in the notice process is inevitable" because defendants can challenge plaintiffs' communications after the fact. *Hoffmann*, 493 U.S. at 171. Instead, the only question was whether district courts can resolve the employer's objections in advance. *Id.* at 172. The Federal Rules of Civil Procedure make clear that the answer is yes. Rule 83 gives courts broad authority to "regulate their practice in any manner not inconsistent with federal or local rules." Fed. R. Civ. P. 83(b). And Rule 16 specifically contemplates "special procedures" for cases that "may" involve "multiple parties." Fed. R. Civ. P. 16(c)(2)(L).

B. Petitioners' contrary arguments are wrong.

Petitioners insist that *Hoffmann* is atextual, extraordinary, and unworkable. It is none of those things.

1. Petitioners first assert that nothing in Section 216(b)'s text allows a court to authorize discovery of the names and contact information of "members of the public." Pet. 25. But again, Section 216(b) gives employees a "right" to sue "for and in behalf" of "other employees similarly situated." 29 U.S.C. § 216(b). That "affirmative permission," *Hoffmann*, 493 U.S. at 170, makes clear that potential opt-in plaintiffs aren't mere "members of the public."

Ignoring Section 216(b)'s plain text, petitioners insist that the statute's opt-in procedure isn't an "affirmative permission" to sue on behalf of others but instead "a *limitation* upon the affirmative permission for representative actions that already exists in Rule 23." Pet. 26 (citation omitted). That gets the history backwards. "[O]pt-out class actions" under Rule 23 "were not even available when the opt-in requirement was added to the FLSA" in 1947. *Calderone v. Scott*, 838 F.3d 1101, 1106 (11th Cir. 2016). Section 216(b) can't possibly have been a "limitation" on an opt-out procedure that wouldn't exist for another two decades. *See id.* at 1105-06.

Petitioners also protest that Section 216(b) does not spell out the details of the discovery-and-notice process. Pet. 25-26. But as the Solicitor General explained in supporting the *Hoffmann* plaintiffs, that objection is "seriously misplaced." U.S. Br. at 9, *Hoffmann*, *supra* (No. 88-1203). When Congress creates a cause of action, it seldom addresses all of the various "procedural issues that might arise." *Id.* Instead, Congress leaves those issues to be resolved under "such other sources of law as the Federal Rules of Civil Procedure." *Id.* Section 216(b) simply follows that "usual practice." *Id.*

2. Petitioners next assert that *Hoffmann* approved a "novel" and "'extraordinary exercise of the federal judicial power.'" Pet. 1, 26 (citation omitted). It did nothing of the sort.

District courts applying *Hoffmann* do not "*search out* potential claimants" (Pet. 26 (citation omitted)); they simply resolve discovery disputes between the existing parties. Nor are courts "recruiting members of the public" or issuing "judicial invitations" to join lawsuits (Pet. 1, 25, 28). Courts do not send notices at all—the plaintiffs do. Courts merely regulate those "communication[s] from the named plaintiffs." *Hoffmann*, 493 U.S. at 169. And in doing so, courts must ensure that the plaintiffs "avoid even the appearance of judicial endorsement of the merits." *Id.* at 174.

In many other contexts, courts similarly facilitate the identification or notification of people who are "nonparties" (Pet. 1) in the sense that they have not yet joined the suit. For example:

- Plaintiffs often obtain "discovery for purposes of identifying additional defendants." *Eastwood v. Sera Labs, Inc.*, 2020 WL 5440564, at *1, *5 (C.D. Cal. July 28, 2020); *see, e.g.*, *Rodriguez v. Enertis Solar, Inc.*, 2025 WL 2098751, at *3, *6 (N.D. Tex. July 25, 2025).
- In the Rule 23 context, courts regulate the parties' "communications with potential class members, even before certification." Federal Judicial Center, *Manual for Complex Litigation* 247 (4th ed. 2004).
- Even when Rule 19 does not compel joinder of an absent party, "the court in its discretion may" provide notice of the suit by "directing a letter or other informal notice to the absentee."

Fed. R. Civ. P. 19 advisory committee's notes to 1966 amendment.

- Federal courts have "authorize[d] a notice" to potential plaintiffs who would be eligible to join group suits not governed by Rule 23 or Section 216(b). *Quinault Allottee Ass'n v. United States*, 453 F.2d 1272, 1277 (Ct. Cl. 1972).

3. Finally, *Hoffmann* does not create "messy, protracted" disputes (Pet. 28); it avoids them. As petitioners' *amici* acknowledge, overruling *Hoffmann* would leave plaintiffs free to recruit opt-in plaintiffs through "websites," "social media campaigns," or other "advertising." Seyfarth Br. 10-11; *see* Chamber Br. 8. Plaintiffs could also try to discover the names and contact information of potential opt-in plaintiffs by invoking "alternative bases for the discovery"—for example, by arguing that they "might have knowledge of other discoverable matter." *Hoffmann*, 493 U.S. at 170. As a result, overruling *Hoffmann* would not end disputes over discovery and plaintiffs' communications with other employees. It would just force courts to resolve those disputes after the fact rather than in advance. And that would be worse for all involved: "Both the parties and the court benefit from settling disputes about the content of the notice before it is distributed." *Id.* at 172.

C. Statutory *stare decisis* requires adhering to *Hoffmann*.

At minimum, petitioners fail to justify a departure from this Court's "almost categorical rule of stare decisis in statutory cases." *Rasul v. Bush*, 542 U.S. 466, 493 (2004) (Scalia, J., dissenting). Where, as here, a prior decision interpreted a statute, "*stare decisis*

carries enhanced force" because "Congress can correct any mistake it sees." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015). That force is at its apex if Congress has "repeatedly amended" the relevant statute. *Id.* Here, Congress has "revised § 216 multiple times, including as recently as 2018." *Fischer v. Fed. Express Corp.*, 42 F.4th 366, 379 (3d Cir. 2022). But it has never altered *Hoffmann*.

Petitioners try to escape statutory *stare decisis* by invoking *Pearson v. Callahan*, 555 U.S. 223 (2009). Pet. 28-29. But *Pearson* overturned a "judge-made rule" about the order of decision in qualified-immunity cases and thus did not implicate the "'presumption that legislative changes should be left to Congress.'" 555 U.S. at 233. *Hoffmann*, in contrast, explicitly rested on "Section 216(b)'s affirmative permission" for collective actions, as well as "the Federal Rules of Civil Procedure." 493 U.S. at 170, 172. And statutory *stare decisis* applies with equal force "regardless whether [a prior] decision focused only on statutory text" or also relied "on the policies and purposes animating the law." *Kimble*, 576 U.S. at 456 (citations omitted).

Finally, revisiting *Hoffmann* would be especially inappropriate because concerns about this Court's decision could be addressed not only by Congress, but also by the Rules Committee. There is no reason for this Court to consider overruling a precedent based on purported "problems the Rules Committee can solve." *Parrish v. United States*, 605 U.S. 376, 394 (2025) (Gorsuch, J., dissenting).

II. The second question presented does not warrant review.

This Court should likewise decline petitioners' request to consider the showing of similarity required to obtain discovery and notice under *Hoffmann*. That question is just beginning to percolate in the circuits, and any disagreement is recent, shallow, and under-developed. Nor is there any urgency. District-court practice has long had "many variations." Pet. App. 6a. And petitioners exaggerate the practical significance of discovery and notice, which is far less consequential than certification of a Rule 23 class.

Even if the question presented were ripe for this Court's review, this ADEA case would be the wrong vehicle. Among other things, this case doesn't present most of the issues petitioners seek to raise—that is, their challenges to the various practices they associate with *Lusardi*. The Seventh Circuit squarely rejected those practices and instead instructed courts to apply petitioners' preferred approach—that is, to decide similarity under a preponderance standard before notice—unless the necessary evidence is in the hands of "yet-to-be-noticed plaintiffs." Pet. App. 21a. And in that discrete subset of cases, the Seventh Circuit simply recognized that there is no basis in law or logic for requiring plaintiffs to prove similarity without access to the necessary evidence.

A. There is no split worthy of this Court's review.

Until the Fifth Circuit took up the issue in 2021, no circuit had squarely addressed the question presented. Since then, only the Sixth and Seventh Circuits have weighed in. Petitioners greatly overstate

the differences among those courts. Most notably, the Fifth Circuit has never adopted the preponderance-of-the-evidence standard petitioners attribute to it. Instead, the Fifth, Sixth, and Seventh Circuits all adopted fact-intensive standards that leave wide latitude for district-court discretion. Petitioners have not shown that those standards will yield materially different results. At minimum, this Court should not step in until there is a meaningful body of judicial experience with the circuits' new standards.

1. Most circuits have not squarely addressed the question presented.

Petitioners assert that the Second, Ninth, Tenth, and Eleventh Circuits have approved "some version of *Lusardi*'s two-step approach." Pet. 16 (citation omitted). But commenting favorably on "some version" of a two-step approach is not the same as deciding the showing of similarity required for discovery and court-regulated notice. As petitioners emphasize, a court of appeals can decide that question "only" in an "interlocutory appeal" of a discovery-and-notice order. Pet. 33-34. Of the decisions petitioners cite, only the Ninth Circuit's arose in that posture—and that court specifically declined to address the question presented here.

Petitioners' Tenth and Eleventh Circuit cases were appeals *after* notice had been sent. They thus addressed the standard for dismissing plaintiffs who had already opted in, not the standard for discovery and notice—a question that becomes "moot" after "notice has already gone out the door." Pet. 34; *see Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1103 (10th Cir. 2001); *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1219 (11th Cir. 2001). Petitioners' Second Circuit case was an interlocutory appeal, but

the court addressed only the district court's refusal to certify a Rule 23 class for a state-law claim; it declined to review the denial of discovery and notice in the parallel FLSA action. *Myers v. Hertz Corp.*, 624 F.3d 537, 557-58 (2d Cir. 2010).

That leaves the Ninth Circuit's decision in *Harrington v. Cracker Barrel Old Country Store, Inc.*, 142 F.4th 678 (9th Cir. 2025). There, the court declined to adopt a "one-step" procedure—that is, to preclude courts from revisiting the similarity question after notice is sent and additional employees opt in. *Id.* at 683. But the Ninth Circuit emphasized that it "d[id] not reach" the question presented here—the "standard the district court should apply" in deciding whether to authorize discovery and notice—because Cracker Barrel had failed to raise it. *Id.* at 683 n.4.[1]

2. Petitioners have not shown that the Fifth, Sixth, and Seventh Circuits' new standards differ in substance.

In the last few years, the Fifth, Sixth, and Seventh Circuits became the first courts of appeals to squarely address the question presented. They agreed on most of the relevant issues. And although they used different formulations to describe the showing required for discovery and notice, petitioners have not shown that those formulations yield meaningfully different results.

a. In *Swales v. KLLM Transport Services, LLC*, 985 F.3d 430 (5th Cir. 2021), the Fifth Circuit noted

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[1] Although the question presented was not pressed or passed upon in the Ninth Circuit, Cracker Barrel has filed a petition purporting to present it for this Court's review. *Cracker Barrel Old Country Store, Inc. v. Harrington*, No. 25-559 (filed Nov. 5, 2025).

the dearth of "appellate precedent" on the standard that governs "in the notice-giving context." *Id.* at 439. The court rejected the lenient *Lusardi* approach and held that district courts can't ignore conflicting evidence or issues overlapping with the merits. *Id.* at 441. Instead, courts must determine, before approving notice, whether the merits questions in the case "can be answered collectively." *Id.* at 442. The Fifth Circuit added that this requirement should be "rigorously enforce[d]." *Id.* at 443.

The Fifth Circuit did not, however, hold that plaintiffs must prove similarity by a "preponderance of the evidence" (Pet. 2, 17 (citations omitted)). To the contrary, the word "preponderance" does not appear in the court's opinion—or in any of the four subsequent Fifth Circuit decisions applying *Swales*. Instead, as the court's most recent decision reiterates, *Swales* simply calls for a judicial assessment of "whether the 'merits question'" in the case can "be answered on a collective basis." *Badon v. Berry's Reliable Res., LLC*, 2024 WL 4540334, at *4 (5th Cir. Oct. 22, 2024); *see Klick v. Cenikor Found.*, 94 F.4th 362 (5th Cir. 2024); *Loy v. Rehab Synergies, LLC*, 71 F.4th 329 (5th Cir. 2023); *In re A&D Interests, Inc.*, 33 F.4th 254 (5th Cir. 2022). In insisting that the Fifth Circuit has adopted a preponderance standard, petitioners rely solely on how *Swales* has been "understood" in a few decisions *outside* the Fifth Circuit. Pet. 17. They do not cite—and we have not found—any district-court decision in the Fifth Circuit applying a preponderance standard.

Prompted by *Swales*, the Sixth Circuit concluded that it should address the question presented in *Clark v. A&L Homecare & Training Center, LLC*, 68 F.4th 1003 (6th Cir. 2023). Like the Fifth Circuit, the Sixth

Circuit rejected the "modest" standard associated with *Lusardi* and made clear that district courts must consider the defendant's evidence and issues overlapping with the merits. *Id.* at 1010-11. But the court rejected a preponderance standard, explaining that district courts may not be able to definitively resolve similarity questions without participation by potential opt-in plaintiffs. *Id.* at 1010. Borrowing from the equitable standard for a preliminary-injunction, the Sixth Circuit held that plaintiffs "must show a 'strong likelihood' that [other] employees are similarly situated." *Id.* at 1011.

In this case, the Seventh Circuit concluded that, in light of the Fifth and Sixth Circuits' decisions, it too should provide "clearer guidance." Pet. App. 12a. The court agreed with the Fifth and Sixth Circuits that district courts must consider "rebuttal evidence" and "merits issues" that bear on similarity. *Id.* 20a, 24a. It also "join[ed] the Fifth and Sixth Circuits" in rejecting "the modest level of scrutiny commonly employed under *Lusardi*." *Id.* 17a. Instead, the Seventh Circuit held that a plaintiff must make a "threshold showing that there is a material factual dispute" about similarity—the same standard required to survive a motion for summary judgment. *Id.* 20a; *see* Fed. R. Civ. P. 56(a). But the court "stress[ed]" that such a showing is merely necessary, not sufficient: If "a similarity dispute can be resolved by a preponderance of the evidence" without the potential opt-in plaintiffs, the district court should resolve it "before notice." Pet. App. 21a-22a. The Seventh Circuit allowed notice in advance of such a determination only if "the evidence necessary to resolve a similarity dispute is likely in the hands of yet-to-be-noticed plaintiffs." *Id.* 21a.

b. The Fifth, Sixth, and Seventh Circuits thus agree much more than they disagree. All of them require district courts to consider evidence from both sides. All of them require courts to address issues relevant to similarity even if they overlap with the merits. And all of them reject the "modest" or "lenient" standard associated with *Lusardi*. The courts' narrow disagreement concerns the proper formulation of a higher standard.

Even on that point, petitioners do not explain how the Fifth Circuit's "rigorous" inquiry into whether merits questions can be answered collectively differs from the Sixth Circuit's requirement of a "strong likelihood" of similarity. The Seventh Circuit, for its part, authorized notice based on a lesser showing only in the discrete subset of cases where necessary evidence is likely in the hands of "yet-to-be-noticed plaintiffs"—a scenario the Fifth and Sixth Circuits have not squarely confronted. Pet. App. 21a. And even then, the Seventh Circuit required plaintiffs to meet the standard for surviving summary judgment—which demands evidence that, if credited, would support a finding of similarity "by a preponderance of the evidence." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

Critically, moreover, the Fifth, Sixth, and Seventh Circuits agree that district courts have wide latitude in applying their generally worded standards to the facts of particular cases. The Fifth Circuit's "bottom line" was that district courts have "broad, litigation-management discretion." *Swales,* 985 F.3d at 443. The Sixth Circuit adopted an inherently flexible equitable standard and recognized that similarity disputes "tend to be factbound." *Clark*, 68 F.4th at 1010-11. And the

Seventh Circuit emphasized that "[t]he watchword here is flexibility." Pet. App. 22a, 24a.

c. Early district-court experience confirms that any theoretical daylight between the circuits' standards may have little practical significance. Courts in the Fifth and Sixth Circuits routinely authorize discovery and notice, often based on showings much less substantial than what petitioners appear to contemplate. For example, one court authorized company-wide discovery and notice based primarily on declarations from a handful of the affected workers. *Gudger v. CareCore Health, LLC*, 2025 WL 1311274, at *2-4 (S.D. Ohio May 6, 2025).[2]

In the Seventh Circuit, only three district courts have applied the decision below. Those decisions confirm that the Seventh Circuit's standard imposes a "meaningful" burden on plaintiffs. Pet. App. 21a. The first decision required the plaintiff to prove similarity by a preponderance of the evidence before authorizing notice. *Dobrov v. Hi-Tech Paintless Dent Repair, Inc.*, 2025 WL 2720663, at *4 (N.D. Ill. Sept. 24, 2025). The second denied notice because the plaintiff could not establish a material dispute. *Sims v. Am. Heritage Protective Servs., Inc.*, 2025 WL 3240900, at *4-6 (N.D. Ill. Nov. 20, 2025). And the third authorized notice before determining similarity by a preponderance only because "the evidence necessary to resolve th[e] dispute is likely in the hands of the yet-

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[2] *See, e.g.*, *Adams v. Merchs. Sec. Serv., Inc.*, 2025 WL 3009521, at *1-2, *4-6 (S.D. Ohio Oct. 24, 2025); *Dietrich v. Romeo's Pizza, Inc.*, 2025 WL 2494515, at *1, *10 (N.D. Ohio Aug. 29, 2025); *Stringer v. Big Texan Steak Ranch, Inc.*, 2025 WL 642050, at *3-4 (N.D. Tex. Feb. 27, 2025); *Ismail v. Grazia Italian Kitchen Pearland LLC*, 2025 WL 569699, at *2-6 (S.D. Tex. Feb. 21, 2025).

to-be-noticed [employees]." *Gower v. Roundy's Supermarkets, Inc.*, 2025 WL 3537391, at *5 (N.D. Ill. Dec. 10, 2025).

3. Even if there were a split, this Court's intervention would be premature.

Even if there were some substantive disagreement among the courts of appeals, the question presented implicates "complex" procedural issues that would benefit from "percolation in the lower courts." *Baker v. City of McKinney*, 145 S. Ct. 11, 13 (2024) (Sotomayor, J., respecting the denial of certiorari). That percolation has just begun: *Swales* was decided in 2021, and only two other circuits have had a chance to weigh in. For two reasons, this Court should allow that process to continue rather than wading in now.

First, further percolation could resolve, or at least sharpen, any disagreement among the circuits. The Fifth Circuit could address the assertion that *Swales* imposes a preponderance standard. Or the Fifth and Sixth Circuits could clarify or modify their approaches in light of the Seventh Circuit's opinion—for instance, by specifically addressing a case where the evidence necessary to show similarity is in the hands of yet-to-be-noticed plaintiffs. At the very least, experience will reveal whether and to what extent the circuits' standards differ in practice. Only time will tell, for example, how often the Seventh Circuit's approach results in notice before a determination of similarity by a preponderance.

Second, district courts are just beginning to identify the novel procedural questions raised by the circuits' new standards. For example:

- Does a standard that requires lengthy pre-notice litigation justify equitable tolling for opt-in plaintiffs whose claims become time-barred before they can be notified of the suit?[3]
- What happens if plaintiffs worried about delay independently identify and notify large numbers of opt-in plaintiffs before the court resolves a motion for discovery and notice?[4]
- Does a pre-notice determination of similarity bar a defendant from seeking to dismiss opt-in plaintiffs after notice is sent?[5]
- Can plaintiffs in the Fifth and Sixth Circuits get pre-notice discovery of the names and addresses of potential opt-in plaintiffs if that information is necessary to decide whether the potential plaintiffs are similarly situated?[6]

Resolving the question presented could require this Court to consider all of those issues and more. But at

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[3] *See Clark*, 68 F.4th at 1013 (Bush, J, concurring) ("Tolling in this context should be recognized by analogy to class actions.").

[4] *See, e.g.*, *Gomez v. Global Precision Sys., LLC*, 636 F. Supp. 3d 746, 752-56 (W.D. Tex. Oct. 20, 2022) (denying permission for 149 opt-in plaintiffs to join); *Bennett v. McDermott Int'l Inc.*, 2021 WL 4434204, at *4 (W.D. La. Sept. 27, 2021) (same for 1,305 opt-in plaintiffs).

[5] *See, e.g.*, *Hamm v. Acadia Healthcare Co.*, 748 F. Supp. 3d 404, 411-12 (E.D. La. 2024) (holding that it does).

[6] *Compare Breaux v. All. Liftboats, LLC*, 2024 WL 4058919, at *2 (E.D. La. Sept. 5, 2024) (yes), *with Springer v. Kirchhoff Auto. USA, Inc.*, 2024 WL 111782, at *4-5 (E.D. Mich. Jan. 10, 2024) (no).

this early stage, the Court would have to do so without the benefit of meaningful experience from its "colleagues on the district and circuit benches"—experience that may "yield insights (or reveal pitfalls)" that would otherwise go unnoticed. *Maslenjak v. United States*, 582 U.S. 335, 354 (2017) (Gorsuch, J., concurring in part and concurring in the judgment).

Perhaps recognizing that this Court's intervention would be premature, petitioners insist that because the question presented must be reviewed in an interlocutory appeal, this case is likely to be "*the only one*" presenting the issue for this Court's review. Pet. 35. Hardly. Ten circuits have yet to address the issue, and they will have many opportunities to do so: Employers around the country routinely invoke the Fifth, Sixth, and Seventh Circuits' decisions in other circuits. And even within the Fifth, Sixth, and Seventh Circuits, petitioners are wrong to say that once a court has decided the issue, it is "nigh impossible" for it to arise again. Pet. 21. In fact, the Fifth Circuit has already reviewed two discovery-and-notice orders since *Swales*. *See Klick*, 94 F.4th at 368; *A&D Interests*, 33 F.4th at 256.

B. Petitioners exaggerate the consequences of discovery and notice.

Petitioners assert that the question presented is important because it arises in "thousands" of FLSA suits each year. Pet. 3, 21-22. That appears to be off by an order of magnitude. In 2021, for example, the more detailed report petitioners cite (Pet. 15, 31) counts only 279 orders resolving motions for discovery and notice (which it calls "conditional certification"). Seyfarth Shaw LLP, *Workplace Class Action Litigation Report* 9 (2022), https://perma.cc/L9DU-HMWK (*Workplace*

Class Actions). Petitioners labor to inflate the significance of those orders, analogizing to Rule 23 class certification and asserting that notice threatens "colossal liability" and "blackmail settlements." Pet. 22 (citation omitted). That narrative is built on a series of distortions.

First, unlike a Rule 23 certification, a district court's approval of discovery and notice under Section 216(b) neither "produce[s] a class" nor authorizes employees to proceed collectively. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75 (2013). Its "sole consequence" is that plaintiffs send a "court-approved written notice." *Id.* If the employer believes that any employees who later opt in aren't similarly situated, it is free to move to dismiss them from the case. *See* Fed. R. Civ. P. 21(a) ("[T]he court may at any time, on just terms, add or drop a party.").

Second, collective actions do not threaten the sort of "massive liability" faced by class-action defendants. *Lab. Corp. of Am. Holdings v. Davis*, 605 U.S. 327, 333 (2025) (Kavanaugh, J., dissenting). Again, notice does not "join additional parties to the action." *Genesis Healthcare*, 569 U.S. at 75. Instead, additional plaintiffs must affirmatively opt in. And in practice, few of them do: Opt-in rates are typically around 15 percent. Charlotte S. Alexander, *Would an Opt in Requirement Fix the Class Action Settlement?*, 80 Miss. L.J. 444, 466-68 (2010). Section 216(b) collective actions are thus typically far smaller than Rule 23(b)(3) class actions. This Court's decision in *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016), is representative: A Rule 23 class for a state-law overtime claim included 3,344 workers, but only 444 of them joined the parallel FLSA collective action. *Id.* at 452.

In addition, FLSA suits typically involve relatively small-dollar minimum-wage and overtime claims by hourly workers. As petitioners concede, the average settlement in an FLSA collective action totals just $1.17 million—and the sum of *all* FLSA collective-action settlements in a year is less than the "potential damages" from a single Rule 23 class action this Court happened to consider last Term. *Lab. Corp.*, 605 U.S. at 333 (Kavanaugh, J., dissenting); *see* Pet. 22 n.11.

Third, the fact that few collective actions go to trial does not suggest that sending notice "force[s] a defendant to settle." Pet. 22 (citation omitted). After all, few cases of any kind go to trial. *See Federal Judicial Caseload Statistics*, C-4 (March 2025), https://perma.cc/9AYQ-JLMN. The more plausible explanation for settlements is that violations of the FLSA are widespread. Petitioners observe that FLSA settlements total $494 million per year (Pet. 22 n.11), but minimum-wage violations alone deprive workers of 30 times that amount. David Cooper & Teresa Kroger, Economic Policy Institute, *Employers Steal Billions from Workers' Paychecks Each Year* (May 10, 2017).

Fourth, petitioners err in implying (Pet. 31) that district courts are approving notice to large numbers of employees who turn out not to be similarly situated. Petitioners observe that in 2021, 81 percent of discovery-and-notice motions were granted, at least in part. Pet. 15. But that is on par with the 72 percent certification rate for employment-discrimination class actions under Rule 23. *Clark*, 68 F.4th at 1018 (White, J., dissenting in part). Petitioners also imply that discovery-and-notice orders are overbroad because roughly half of so-called "decertification" motions are granted. Pet. 31. But those motions reflect only a tiny

fraction of the cases where discovery and notice were authorized. In 2024, for example, one nationwide survey counted only five successful decertification motions. Duane Morris, *Wage and Hour Class and Collective Action Review* 3 (2025), https://perma.cc/53R5-JV64.

All told, petitioners' assertion that discovery-and-notice orders pose a "more dire" threat to employers than Rule 23 class actions (Pet. 23) is hard to take seriously. And their insistence that the question presented urgently demands a uniform answer from this Court (Pet. 23-24) is no more persuasive. District courts have been applying widely varying versions of *Lusardi*'s plaintiff-friendly approach for decades, yet the sky has not fallen.

C. This case would be a bad vehicle.

Even if this Court wanted to decide the standard for discovery and notice under *Hoffmann*, this case would be the wrong vehicle for four reasons.

1. Most fundamentally, this case simply does not present most of the issues petitioners seek to raise. Petitioners focus on practices associated with *Lusardi*, including a modest evidentiary standard and a refusal to consider defendants' evidence or similarity issues overlapping with the merits. *See* Pet. 2, 4, 9, 13-17, 23, 30. But the Seventh Circuit "join[ed] the Fifth and Sixth Circuits" in rejecting those practices. Pet. App. 17a. Any consideration of petitioners' challenges to the practices associated with *Lusardi* should await a case in which a court of appeals has actually blessed them.

What's more, the Seventh Circuit adopted petitioners' preferred standard—requiring a pre-notice determination of similarity by a preponderance of the

evidence—except in cases where necessary evidence is likely "in the hands of yet-to-be-noticed plaintiffs." Pet. App. 21a-22a. Petitioners do not seriously engage with that aspect of the decision below—much less explain why their disagreement with the Seventh Circuit on that narrow issue warrants further review.

2. This case also does not present a critical antecedent issue this Court should resolve before taking up the question presented. Petitioners ask the Court to decide how strong a showing of similarity a plaintiff must make to obtain discovery and notice—a genuine dispute, a strong likelihood, or a preponderance. The choice among those standards necessarily depends on what it means to be "similarly situated" in the first place. But the Court has never answered that more fundamental question. *See Tyson Foods*, 577 U.S. at 452 (reserving the issue); *see also* U.S. Br. at 30, *Tyson Foods*, *supra* (No. 14-1146) (noting lower-court disagreement). And the Court could not do so here because that question was neither pressed nor passed upon below. *See* Pet. App. 14a-25a.

3. This ADEA case also involves an atypical application of Section 216(b). Roughly 98 percent of cases seeking discovery-and-notice orders are brought under the FLSA. *Workplace Class Actions* 71-74, 81. That distinction matters because FLSA and ADEA cases present different issues.

For example, lengthy pre-notice proceedings in FLSA cases raise special problems because the statute of limitations continues to run for each opt-in plaintiff until that plaintiff files a written consent. 29 U.S.C. §§ 255(a), 256(b). Delays caused by pre-notice litigation in FLSA cases thus create a risk that "plaintiffs may not learn of the FLSA action until after the

limitations period for some or all of their claims has run." *Clark*, 68 F.4th at 1012 (Bush, J., concurring). Some courts that have considered the question presented in FLSA cases have grappled with that problem—for example, by considering whether routine equitable tolling would be consistent with the FLSA's statute of limitations. *Id.* But this case does not squarely present those timing issues because the ADEA "permit[s] opt-in plaintiffs to piggyback on the timely filed claim of the named plaintiff." Pet. App. 8a n.1.

In addition, ADEA cases raise different similarity issues because of differences in the underlying substantive law. ADEA collective actions typically proceed on a "pattern-or-practice" theory. *Thiessen*, 267 F.3d at 1106. Under that theory, a showing that the employer engaged in a "'regular procedure or policy'" of discrimination allows for group litigation because it gives rise to a "presumption" that each plaintiff was a victim of unlawful discrimination. *Id.* (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360 (1977)). Accordingly, if ADEA plaintiffs present sufficient evidence to allow a jury to find that the defendant engaged in a policy of discrimination, they qualify as similarly situated for purposes of their pattern-or-practice claim even if the employer may have "individualized defenses." *Id.* at 1107.

4. Finally, Ms. Richards would be entitled to discovery and notice under any plausible standard. She offered "detailed affidavits" showing that the potential opt-in plaintiffs "were together victims of a policy or plan" that violated the ADEA. Pet. App. 68a. Indeed, this is the rare case where a plaintiff comes to court with insider testimony from an executive who witnessed directives to favor younger employees and

was aware of "at least twenty" older employees passed over because of their age. *Id.* 65a-66a.[7]

D. The Seventh Circuit correctly declined to require plaintiffs to prove similarity without access to necessary evidence.

Petitioners maintain that plaintiffs should have to prove similarity by a preponderance of the evidence (or perhaps a strong likelihood) even when the necessary evidence lies with "yet-to-be-noticed plaintiffs." Pet. App. 21a. The Seventh Circuit correctly rejected that rigid rule, which petitioners make little effort to justify.

1. Requiring plaintiffs to prove similarity without access to the employees who have the necessary evidence would contradict common sense and hornbook discovery principles. Information is discoverable if it is "relevant" and "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). When "the evidence necessary to establish similarity resides with yet-to-be-noticed plaintiffs," Pet. App. 17a, the names and contact information of those individuals is undeniably relevant to the similarity dispute. Discovery is likewise proportional: For plaintiffs, it leads to essential evidence of similarity; for employers, it is a straight-

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[7] In the Seventh Circuit, petitioners asserted that the district court had concluded that Ms. Richards could not satisfy a higher standard. C.A. Br. 4. That is wrong. The court suggested that a preponderance standard "would potentially result in a smaller collective." Pet. App. 50a. But that was a reference only to the *scope* of notice—the court made clear that notice to some group of potential opt-in plaintiffs would be warranted under any standard. *Id.* And the court's tentative reference to "potential[]" narrowing came before the parties themselves agreed to a far narrower group. Stipulation, ECF No. 135; *see* p. 8, *supra*.

forward retrieval of records they are required by law to keep. 29 U.S.C. § 211(c); 29 C.F.R. § 516.2(a)(1)-(2).

2. Petitioners' higher evidentiary standards would be inconsistent with *Hoffmann* and unworkable.

First, *Hoffmann* held that the district court in that case "was correct to permit the discovery of the names and addresses of the discharged employees" for the purpose of providing notice. *Hoffmann*, 493 U.S. at 170. But the district court did not apply anything like the standards petitioners urge. To the contrary, it emphasized that notice "need not await a conclusive finding" of similarity. *Sperling v. Hoffman-La Roche, Inc.*, 118 F.R.D. 392, 406 (D.N.J. 1988). The court held that the *Hoffmann* plaintiffs had carried their burden by offering "affidavits which successfully engage[d] defendant's affidavits." *Id.* Any test that would render such a showing insufficient would contradict *Hoffmann*'s unqualified holding that the district court's grant of discovery was "correct." 493 U.S. at 170.

Second, *Hoffmann* recognized that Section 216(b) depends on employees receiving "timely notice." 493 U.S. at 170. Petitioners' inflexible standards would "foster delay and inefficiency" by requiring extensive pre-notice discovery and litigation. Pet. App. 18a. That is a particular problem because employers have powerful financial incentives to try to run out the statute of limitations by delaying notice as long as possible—a dynamic that threatens "to deplete remedies Congress has duly provided" for workers denied the wages and overtime mandated by the FLSA. *Clark*, 68 F.4th at 1013 (Bush, J., concurring).

Third, petitioners' inflexible standards would thwart Section 216(b) by creating an "insurmountable barrier for even meritorious collective actions." Pet.

App. 18a. If a district court concludes that it can't resolve a similarity dispute without evidence "in the hands of yet-to-be-noticed plaintiffs," *id.* 21a, petitioners would force it to do so anyway. That would leave "some plaintiffs in limbo, unable to make the required showing without access to evidence held by individuals who are not yet parties to the case." *Id.*

3. Petitioners fail to justify that illogical result.

Petitioners first assert that the Seventh Circuit's standard conflicts with *Hoffmann*'s prohibition on judicial solicitation of claims. Pet. 30-32. Their theory is that approving notice to employees who might ultimately be deemed ineligible "amounts to solicitation of those employees to bring suits." Pet. 30 (citation omitted). But *Hoffmann* said just the opposite: "Court intervention in the notice process for case management purposes is distinguishable in form and function from the solicitation of claims." 493 U.S. at 174. Of course, *Hoffmann* cautioned that courts must scrupulously "respect judicial neutrality." *Id.* But that was not a concern about plaintiffs sending "too many notices" (Pet. 30); instead, it was about the *content* of the notices. *Hoffmann*, 493 U.S. at 174. The Court emphasized, for example, that district courts must ensure that notices "avoid even the appearance of judicial endorsement of the merits of the action." *Id.*

Petitioners also maintain that insofar as the Seventh Circuit's standard sometimes permits discovery and notice based in part on the existence of a material dispute of fact, it is "foreign in the law." Pet. 32. The assertion that the summary-judgment standard taught to every first-year law student is "foreign" strains credulity. Petitioners' real argument seems to be that discovery and notice should require a higher

showing because (on petitioners' telling) it is "substantial, often case-dispositive, relief." Pet. 30. But again, discovery-and-notice orders do not alter the parties' legal rights, create a class, or join additional plaintiffs to the case. They simply resolve a discovery dispute and regulate plaintiffs' use of discovered material to communicate with potential parties. There is nothing "foreign" about resolving such case-management matters under a standard that gives district courts flexibility to decide whether they need evidence from potential opt-in plaintiffs in order to determine whether those plaintiffs are similarly situated.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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