No. 25-476

IN THE

Supreme Court of the United States

ELI LILLY AND COMPANY; LILLY USA, LLC,
Petitioners,

v.

MONICA RICHARDS,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

In *Hoffmann*, this Court approved "an extraordinary application of the federal judicial power," 493 U.S. 165, 175 (1989) (Scalia, J., dissenting)—permitting "court-authorized notice" of an ongoing lawsuit to *nonparties* "in an appropriate case," *id.* at 169 (majority). But the Court has never defined "an appropriate case," expressly leaving the "details" of this notice process blank. *Id.* at 170.

The result has been mass confusion among the lower courts on the legal standard for court-authorized notice—what Richards herself calls "decades" of "different variations" "around the country." BIO.3. The circuits are split 4-1-1-1, and "district-court practice" has even more "variations." BIO.6.

The question for this Court, then, should be less whether to grant, and more what to do about it. The petition presents two options: reconsider court-authorized notices to nonparties, or at least harmonize and strengthen the showing required for them. Pet.*i*.

Richards, though, chalks all this up as a nothing-to-see-here "case about discovery," BIO.1, repeatedly characterizing court-authorized notices as an ordinary application of the Federal Rules, *id.* 8, 10-12, 15. Richards's own motion for court-authorized notice, however, did not cite a single Federal Rule, and requested not discovery but "conditional certification" and court-"approve[d] Notice." S.D. Ind. ECF No. 41. For that request, Richards's motion rested on the only authority for court-authorized notices: *Hoffmann*.

Hoffmann notices have been justified as, at best, an "implied judicial power"—unsupported by "the statute," "traditional practice at common law or

equity," or anything else "one could call law." *Clark v. A&L Homecare & Training Ctr.*, 68 F.4th 1003, 1007 (6th Cir. 2023) (Kethledge, J.). Richards whistles past this problem, ignoring that while "[i]t is not at all extraordinary for courts to supervise and regulate the participation of *existing* parties *in actions that are pending*," it is truly "extraordinary" for "a court—either directly or by lending its judicial power to the efforts of a party's counsel—to" facilitate notice to *nonparties* "inquir[ing] whether they would like to bring their claims before the court." 493 U.S. at 175 (Scalia, J., dissenting).

If this Court is going to retain this implied judicial practice rather than returning to "law," it should at least explain its most basic detail: What legal standard applies before a court may authorize notice?

ARGUMENT

I. THIS PETITION PRESENTS AN IMPORTANT, ACKNOWLEDGED, AND RIPE SPLIT.

On the purely legal, certified question at issue—what legal standard applies before a district court may authorize collective-action notices to nonparties—the Seventh Circuit below acknowledged a preexisting 4-1-1 split among circuit courts. Pet.App.9a. And rather than join any of those three sides, the court did "something different," creating a 4-1-1-1 split. Pet.App.18a.

Richards cannot deny the split's existence, conceding the "many" and "different variations" of legal standards. BIO.3, 6. She instead tries to minimize the circuit split and write off the district courts completely. BIO.17-18. None of it works.

A. The Split Is Deep, Real, And Important.

Richards's assertions (BIO.16-23, 25-28) that the split is "shallow" and not "consequential" would be news to the courts, States, businesses, employees, and employers who have dealt with *Hoffmann* for nearly four decades.

1. The split is deep. The Seventh Circuit expressly recognized this, surveying the circuits, finding a 4-1-1 circuit split, and creating a fourth standard that was meaningfully "different" than any of the "various notice standards" adopted by its sister circuits. Pet.App.12a-15a.

Until it benefited her to deny it, Richards also recognized the split. She told the Seventh Circuit that "most other circuits" follow *Lusardi*—citing the very decisions from the Second, Ninth, Tenth, and Eleventh Circuits she now claims are irrelevant. Appellee's Br.34.

Richards was right then: *Lusardi* still dominates, endorsed by at least four circuits. Those circuits and the district courts within them say they are "bound by [circuit] precedent" to adhere to *Lusardi*. *Harrington v. Cracker Barrel*, 142 F.4th 678, 683 (9th Cir. 2025); *e.g.*, Pet.13-17 (collecting circuit cases); *Fuentes v. Compadres*, 2018 WL 2126840, at *2 (D. Colo. 2018) ("long-standing Tenth Circuit precedent mandat[es]" *Lusardi*); *Lazaar v. Anthem Cos.*, 678 F. Supp. 3d 434, 440 (S.D.N.Y. 2023); *Collado v. 450 N. River Drive, LLC*, 2023 WL 4251018, at *3 (S.D. Fla. 2023).

But even if Richards were right now to dismiss these four circuits, that would not move the needle on the strength of this petition. Richards readily acknowledges that, "for decades," "district-court

practice has [had] 'many variations'" and "different" legal standards for authorizing notices. BIO.3, 6. At a minimum, then, she concedes a 1-1-1 circuit split, with all three of those circuits splitting from the approach that exists in the nearly 70 district courts across the other regional circuits. So even under Richards's view, this patchwork of "inconsisten[t]" standards, Pet.App.12a, "should be[] settled by this Court," Sup.Ct.R. 10(a), (c).

2. This split is real. Pet.11-19. Richards argues otherwise (BIO.18-23) only by ignoring the majority approach among the lower courts. She begins her analysis not in 1989 with *Hoffmann*, but in 2021 with the first appellate court that split from the majority understanding of *Hoffmann*. BIO.16-17. This sleight-of-hand allows her to paint the conflict as a matter of "different formulations" without any "differ[ence] in substance." BIO.18. But she discounts the *most* substantive difference: the Fifth, Sixth, and Seventh Circuits reject the "plaintiff-friendly *Lusardi* approach" that dominates "around the country." BIO.3. And the Fifth, Sixth, and Seventh Circuits also disagree with *each other* in meaningful ways, as they themselves have emphasized. *E.g.*, *Clark*, 68 F.4th at 1009-10; Pet.App.15a.

3. The issue is important. As the lower courts and dozens of *amici* have explained, in the real world, court-authorized notice is often *the* "dispositive" decision and the split's "importance cannot be overstated." *Clark*, 68 F.4th at 1007; *Swales v. KLLM Transp. Servs.*, 985 F.3d 430, 443 (5th Cir. 2021).

In insisting otherwise, Richards minimizes the issue's financial impact and frequency and overlooks other aspects of the issue's importance.

As for financial impact: Even though so-called "conditional certification" does not itself "produce[] a class," BIO.26, it typically results in "expan[sion] of plaintiffs' ranks a hundredfold" or more, forcing settlement because of litigation costs and the threat of an untenable judgment, *Clark*, 68 F.4th at 1007. Richards's own argument proves this point. She explains that the "average" settlement totals "just" millions of dollars and increases the number of plaintiffs by "only 444" in a "representative" case. BIO.26-27. To the States, businesses, and employers litigating these cases, this isn't a matter of "just" and "only." While a million-plus-dollar settlement and a 444*x* case-size increase might not be as "significan[t]" as the largest class actions, BIO.26, it has "enormous" significance to and "burden[s]" on the employers and States who already operate on thin margins—implicating hundreds of millions of dollars annually, Chamber.Br.12, 19; States.Br.2.

As for frequency: Richards admits the issue arises *hundreds* of times per year (which is what the petition said (at 12); *contra* BIO.25 (misquoting the petition)). This again is not an "only." *Contra* BIO.25. Nor is it any comfort to employers that, even though the "decertification rate" is over 50%—meaning that over half of all notices were improper—only "a tiny fraction" of cases even get to that stage. BIO.27-28; *see* Seyfarth.Br.18. Instead, because of the immense "pressure on defendants to settle following notice," nearly all cases are "resolved before they ever reach

decertification." IFA.Br.16. Real-world examples abound. Pet.31; Seyfarth.Br.15-17; IFA.Br.19-21.

Richards's analysis ends there, but the importance of the issue does not. For one thing, "[t]he wide variation" in legal standards imposes immense logistical burdens on employers, who must comply with different rules depending on where a given plaintiff is located. SHRM.Br.2; *see id.* at 14-18 (providing examples). A lax standard for court-authorized notice also harms employee-employer relations, including because, before any rigorous review (and unlike under Rule 23), nonparty employees receive a court-endorsed letter, with a case caption and court seal, advising them to consider becoming a party plaintiff by joining a "similarly situated" coworker in suing their employer (or even their employer's franchise, IFA.Br.4).

For States, too, the issue is critical. *Hoffmann* notices facilitate "raid[ing] [of] State treasuries," harm "States' ability to govern," and ultimately undermine state "sovereignty." States.Br.2, 6-7, 15.

And for still another thing, divergent and lax notice standards erode *judicial legitimacy* by causing "unpredictability and arbitrariness." Pet.App.12a.

Along every dimension, then, the split is important.

B. Further "Percolation" Would Be Fruitless.

As a last resort, Richards pushes for more "percolation." BIO.23. But 36 years of parsing *Hoffmann*—by hundreds of lower federal courts annually—is enough percolation by any measure. And even if it were not, this is not the kind of issue where this Court can afford to wait.

1. *Hoffmann*'s fruits are plain: at least four standards across seven circuit courts, and even more variation across the district courts, trying to fill in the "details" of notice. These varying standards are based not on "law," *Clark*, 68 F.4th at 1007, but on each court's "loose" attempts to parse *Hoffmann*, *Swales*, 985 F.3d at 436. Rather than await more guesses, this Court should provide the "details" itself.

Richards argues otherwise only by again ignoring the *32 years* of percolation between *Hoffmann* and *Swales*—"a meaningful body of judicial experience," from this Court's "colleagues on the district and circuit benches," that has "reveal[ed] [the] pitfalls" with *Hoffmann*. BIO.17, 25 (citations omitted).

Even setting aside all pre-*Swales* percolation, Richards is still wrong. The "novel procedural questions" she identifies with the various newer standards are not at issue. This case instead comes to this Court as it came to the Seventh Circuit: on § 1292(b) certification of a *threshold* question of law. Richards's ancillary "procedural" questions (if court-authorized notice remains permissible) can wait.

2. Richards is wrong also that "the Court will see plenty of appropriate vehicles for resolving" the split. BIO.3. The interlocutory and fleeting nature of this issue—with no Rule 23(f) equivalent, and with the issue mooted by final judgment—means that, despite the issue's great importance, it will "rarely (if ever) reach" the appellate courts. *Swales*, 985 F.3d at 436.

Richards concedes that the "only" reliable way for notice questions to reach an appellate court is under § 1292(b). BIO.17. But she fails to grapple with what this means: appellate review is extremely rare. In the

seven circuits that have addressed this issue, there is no longer any "substantial ground for difference of opinion" under § 1292(b). Pet.34-35. And even in the other five circuits, courts consistently deny permission to appeal—usually because, in their view, their appellate courts have tacitly approved of, or their district courts have united around, the *Lusardi* standard. *E.g.*, *Cronin v. Bank of Am.*, 2024 WL 3658837, at *1 (W.D.N.C. 2024).

II. THE DECISION BELOW IS WRONG.

The lower courts have been led astray by *Hoffmann*'s atextual and ahistorical practice of "midwifing" plaintiffs-lawyers' solicitations. *Hoffmann*, 493 U.S. at 176 (Scalia, J., dissenting). Even if this Court retains that "extraordinary," "implied judicial power," *id.* at 175; *Clark*, 68 F.4th at 1007, it should at least clarify the "details of its exercise."

A. *Hoffmann* Should Be Overruled.

1. There is "no source of authority" for the notion that federal courts can use their judicial imprimatur and "compulsory process to assist counsel for the plaintiff in locating nonparties" and persuading them to bring new claims. *Hoffmann*, 493 U.S. at 174, 176 (Scalia, J., dissenting); *accord Trump v. CASA, Inc.*, 606 U.S. 831, 843-846 (2025).

Hoffmann is not just atextual and ahistorical, either. As Justice Scalia explained, it is "expressly foreclosed by" the text and history of § 216(b). 493 U.S. at 176-178 (Scalia, J., dissenting). Congress amended § 216(b) to *reduce* "excessive litigation," *id.* at 173 (majority op.), yet *Hoffmann* vastly *increased* it. SHRM.Br.5-7; States.Br.7-9. And court-authorized

notices "violate" the Federal Rules too. *Hoffmann*, 493 U.S. at 178 (Scalia, J., dissenting); *see Oppenheimer Fund v. Sanders*, 437 U.S. 340, 352 (1978) (plaintiffs' "attempt to obtain the class members' names and addresses cannot be forced into the concept of 'relevancy'" in the discovery rules).

2. Richards defends *Hoffmann* principally by rewriting it. On her telling, *Hoffmann* was a mere "discovery" case, with the "only question" being "whether district courts can resolve the employer's objections [to notice] in advance." BIO.11. *Hoffmann* gave district courts veto power over notices, Richards says, but did *not* authorize "'judicial invitations' to join lawsuits." BIO.13-14.

Would that it were so. Across the board, *Hoffmann* has been uniformly understood to authorize "court-approved" notices. *E.g.*, Pet.App.8a; *Clark*, 68 F.4th at 1009; *Swales*, 985 F.3d at 440; *see Hoffmann*, 493 U.S. at 177 (Scalia, J., dissenting). That is the whole point. Yes, these notices are ultimately sent by plaintiffs' lawyers. BIO.1. But they routinely bear the court's official letterhead or seal and inform nonparties that, for example, this "is not a solicitation from a lawyer" and "'you are similarly situated to the person who initially brought the lawsuit.'" Seyfarth.Br.6-7; Pet.13-14. If (as Richards implies) this rampant practice is not actually blessed by *Hoffmann*, this Court should say so.

3. Richards's only other defense of *Hoffmann* is an appeal to *stare decisis*. That too fails.

First, *Hoffmann* has proven demonstrably unworkable over time. Thirty-six years of widespread confusion over the most basic question under that

case—when can district courts authorize notice?—says it all. Indeed, Richards concedes the "decades" of "different" answers (BIO.3), and adds that the three new standards have produced a host of *additional* "complex" and "novel procedural questions" (BIO.23-24)—making *Hoffmann* even less workable than pointed out in the petition.

Second, the factual premise on which *Hoffmann* rested has been "upended." Seyfarth.Br.11. *Hoffmann* imposed its court-authorized-notice regime in 1989. At that time, the Court thought the "benefits" of collective actions "depend[ed] on" court intervention to help plaintiffs find other employees. *Hoffmann*, 493 U.S. at 170. No longer. Now, with LinkedIn, Google, A.I., and countless other tools, plaintiffs' lawyers have "vast, publicly accessible digital resources to advertise for, identify, and recruit potential opt-in plaintiffs," without needing to enlist the court's help. Seyfarth.Br.10-11. These "subsequent developments have eroded" *Hoffmann*'s "underpinnings." *Janus v. AFSCME*, 585 U.S. 878, 929 (2018).

Third, *Hoffmann* notices are "judge-made" and therefore "particularly" susceptible to reconsideration. *Pearson v. Callahan*, 555 U.S. 223, 233-234 (2009). Richards says *Hoffmann* is a "statutory" case (BIO.15), but *Hoffmann* described *itself* as a "case management" rule designed to enhance "efficient" procedures. 493 U.S. at 171, 174. The most *Hoffmann* could say was that its innovation was "not otherwise contrary to statutory commands." *Id.* at 170. That is akin to federal common law, not a "plain text" interpretation of a statute (BIO.12).

Fourth, overruling *Hoffmann* upsets no reliance interests, Pet.29—and Richards does not even attempt to argue otherwise. *Hoffmann* should be overruled.

B. The Seventh Circuit's Rule Is Wrong Even Under *Hoffmann*.

Until now, not even Richards thought the Seventh Circuit's decision was correct. Below she argued for the adoption of a different standard (*Lusardi*), which the Seventh Circuit rejected. Pet.App.15a-16a. Yet she now insists that this Court deny certiorari because the Seventh Circuit was "correct[]" in relevant part, for two reasons. BIO.31. Both are mistaken.

First, a more stringent standard for authorizing notice would not "force" district courts to "resolve a similarity dispute without evidence." BIO.31-33. The plaintiff is the master of her request for court-authorized notice; she decides when to file it. Before filing, as under Rule 23, plaintiffs can develop the record; they need not move for notice "without evidence."

Second, Richards claims the Seventh Circuit's standard is not "foreign" because even first-year law students know the summary-judgment ("material-dispute") standard. BIO.33. But that's not what makes this standard foreign. Summary judgment uses the existence of a material dispute to *deny* relief to the movant and let the case proceed as is. The Seventh Circuit's standard, by contrast, uses the existence of a dispute to *grant* relief that can fundamentally change the nature of the case.

III. THIS CASE IS AN IDEAL VEHICLE.

A. This Case Cleanly Raises Both Questions Presented.

Ignoring the first question presented (concededly cleanly and squarely presented), Richards contends that the second question "does not present most of the issues [Lilly] seek[s] to raise." BIO.28. But it presents *exactly* the same "controlling question of law" the Seventh Circuit certified, 28 U.S.C. § 1292(b): What legal standard applies before a court may authorize notice to nonparties?

Richards seems to mean the Seventh Circuit adopted Lilly's "preferred standard." BIO.28. But the decision below "rejected" Lilly's position, as Richards later admits. BIO.31; Pet.App.17a. Richards's counsel thus described the ruling as "'very good'" for Richards and as "'set[ting] a relatively low bar for notice,'" "'not that much different from [*Lusardi*].'" Max Kutner, *7th Circ. Adopts Flexible Standard*, Law360 (Aug. 6, 2025), https://perma.cc/B3LU-FGBF.

B. The Questions Presented Are Controlling.

Section 1292(b) certification was premised on the "controlling" nature of the legal standard, yet Richards now says "insider testimony" (from her boyfriend, another sales employee) was so compelling that she would be entitled to court-authorized notice no matter the standard. BIO.30.

That is again inapplicable for the first question presented. And for the second, every judge in this case has rejected that argument: "application of a standard more rigorous than [*Lusardi*] *would certainly affect*" the outcome. Pet.App.44a (emphasis added). The

Seventh Circuit panel agreed three times over. Pet.App.2a, 25a, 33a.

C. Richards's Remaining Vehicle Arguments Are Meritless.

First, this Court can address the legal standard for court-authorized notice without "necessarily" deciding "what it means to be 'similarly situated.'" *Contra* BIO.29. The standard of proof is separate from the underlying merits, which is why we can know the "beyond a reasonable doubt" standard applies to a criminal conviction even with widespread disagreement about the crime's elements.

Second, Richards urges the Court not to grant certiorari in an "ADEA case" because most § 216(b) cases "are brought under the FLSA." BIO.29. But *Hoffmann* itself was an ADEA case and correctly explained that considerations for court-authorized notices apply equally to both statutes. 493 U.S. at 167.

CONCLUSION

The Court should grant the petition.

DECEMBER 22, 2025

Respectfully submitted,

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