

IN THE  
**Supreme Court of the United States**

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ELI LILLY AND COMPANY, *et al.*,  
*Petitioners,*

*v.*

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

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

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**BRIEF OF THE INTERNATIONAL FRANCHISE  
ASSOCIATION AND AMERICAN HOTEL & LODGING  
ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF  
PETITIONERS' PETITION FOR WRIT OF CERTIORARI**

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JOSHUA B. WAXMAN  
BRADFORD J. KELLEY  
LITTLER MENDELSON, P.C.  
815 Connecticut Avenue, NW,  
Suite 400  
Washington, DC 20006

ALLAN G. KING  
KIMBERLY RIVES MIERS  
NICOLE LEFAVE  
EMILY LINN  
LITTLER MENDELSON, P.C.  
100 Congress Avenue,  
Suite 1400  
Austin, TX 78701

LISA A. SCHRETER  
*Counsel of Record*  
RICHARD W. BLACK  
LITTLER MENDELSON, P.C.  
3424 Peachtree Road, NE,  
Suite 1200  
Atlanta, GA 30326  
(404) 760-3938  
lschreter@littler.com

ROBERT W. PRITCHARD  
LITTLER MENDELSON, P.C.  
One PPG Place, Suite 2400  
Pittsburgh, PA 15222

DAVID B. JORDAN  
LITTLER MENDELSON, P.C.  
1301 McKinney Street,  
Suite 1900  
Houston, TX 77010

*Counsel for Amici Curiae*

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## STATEMENT OF INTEREST

The International Franchise Association and American Hotel & Lodging Association (collectively, “*Amici*”) submit this brief as *amici curiae* in support of the petition for a writ of certiorari filed by Eli Lilly and Company and Lilly USA, LLC.<sup>1</sup>

Founded in 1960, the International Franchise Association (“IFA”) is the oldest and largest trade association in the world devoted to representing the interests of franchising. The IFA’s membership includes franchisors, franchisees, and suppliers. The IFA’s mission is to safeguard and enhance the business environment for franchising worldwide. In addition to serving as a resource for franchisors and franchisees, the IFA and its members advise public officials across the country about the laws that govern franchising. Through its public-policy programs, it protects, enhances, and promotes franchising on behalf of more than 1,400 brands in more than 300 different industries.

The American Hotel and Lodging Association (“AHLA”), founded in 1910, is the sole national association representing all segments of the lodging industry, including hotel owners, REITs, chains, franchisees, management companies, independent properties, bed and breakfasts, state hotel associations, and industry

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1. Counsel of record for all parties were notified 10 days in advance of the intent to file this *amicus* brief. No counsel for any party authored this brief in whole or in part and no person or entity, other than *amici curiae*, their members or their counsel made any monetary contribution specifically for the preparation or submission of this brief. S. Ct. R. 37.6.

suppliers. AHLA also represents the interests of its members in litigation that raises issues of widespread concern to the lodging industry.

The *Amici* have a strong interest in the correct application of laws affecting their members. The *Amici* seek to provide the Court with relevant industry-specific context and practical perspectives for why the petition should be granted.

The *Amici* submit this brief as *amici curiae* to ask that the Court grant Petitioners' petition.

### SUMMARY OF THE ARGUMENT

Thirty-five years ago, this Court took the unprecedented step of authorizing federal district courts to abandon their neutral role in Fair Labor Standards Act (FLSA) and Age Discrimination in Employment Act of 1967 (ADEA) collective action litigation to aid *plaintiffs* in adding nonparties to litigation in which they previously had no involvement, but failed to provide *any* guidance on the standards to be applied to determine when this extraordinary exercise of federal judicial power should be invoked. *See Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989). As a result, district courts have applied a patchwork of standards, the vast majority of which permitted “notice” to be sent to scores of nonparties on the thinnest of evidentiary records, all while ignoring contrary evidence and refusing to consider potentially dispositive threshold legal issues. This unrestrained and unwarranted exercise of federal judicial power has caused immeasurable harm to the *Amici* and their members, and countless employers across the United States.

Indeed, Justice Scalia’s dissent in *Hoffmann-La Roche* both recognized that the majority opinion was unsupported by any authority whatsoever, and warned against courts abandoning their “‘passive’ role in determining which claims come before them” and becoming “inquisitors of justice” instead. 493 U.S. at 181. Indeed, nothing in Article III of the Constitution, the FLSA, the ADEA, the Federal Rules of Civil Procedure, or the purported policies underpinning the majority’s opinion, justifies the extraordinary exercise of federal judicial power to stir up litigation among nonparties. *Hoffmann-La Roche* should therefore be overruled.

## ARGUMENT

### I. THE PETITION RAISES QUESTIONS OF IMMENSE IMPORTANCE TO THE *AMICI* AND THEIR MEMBERS.

This Court’s extraordinary decision in *Hoffmann-La Roche* took the unprecedented step of authorizing courts—without any constitutional, statutory, or legislative basis—to abandon their neutral role in FLSA and ADEA litigation and actually assist the *plaintiff(s)* in identifying, soliciting, and joining *nonparties* to join litigation in which they previously had no involvement. Worse yet, the *Hoffmann-La Roche* Court did so without providing lower courts *any* guidance on the standards to be applied in determining when such judicial intervention is appropriate.

As a result, the last 35 years have seen district courts apply a patchwork of standards, the vast majority of which embrace a lenient notice standard articulated by a single

district court decision, *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987), which has permitted “notice” to be sent to hundreds, if not thousands, of nonparties across the country without any meaningful evidentiary support, all while ignoring contrary evidence offered by defendants and deferring rulings on potentially dispositive legal issues.

The willingness of most district courts to liberally authorize notice presents an issue of particular significance with respect to the *Amici*’s members. For example, there were more than 830,000 franchise establishments, employing nearly 8,800,000 individuals, operating in the United States in 2024.<sup>2</sup> The dangers posed by *Hoffmann-La Roche* and *Lusardi* are particularly acute for the franchisee and franchisor members of the *Amici* because it is commonplace for the named plaintiff in an FLSA or ADEA “collective action” to sue not only the franchisee who employed them, but also a business-model franchisor who does not control the terms and conditions of their employment. As a result, franchisees and business-model franchisors alike are frequently drawn into protracted and expensive collective action litigation that has nothing to do with them or their employees, due to the district courts’ refusal to consider threshold joint employer issues before authorizing notice. Without action by this Court, the *Amici* and their members will continue to be plagued by unsupported court intervention that needlessly multiplies claims.

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2. International Franchise Association, 2025 Franchising Economic Outlook, at 2 (<https://indd.adobe.com/view/41aaf895-c7f7-43ff-9004-9455305199f3>).

## II. *HOFFMANN-LA ROCHE* WAS WRONGLY DECIDED AND SHOULD BE OVERRULED.

“[P]roblems . . . arise when judges create atextual legal rules and frameworks. Judge-made doctrines have a tendency to distort the underlying statutory text, impose unnecessary burdens on litigants, and cause confusion for courts.” *Ames v. Ohio Dep’t of Youth Servs.*, 605 U.S. 303, 313 (2025) (Thomas, J., joined by Gorsuch, J., concurring). Written 35 years after *Hoffmann-La Roche*, Justice Thomas’s observations could not more aptly capture the myriad problems created by the majority’s decision to allow district courts to facilitate the stirring up of litigation. It is time for *Hoffmann-La Roche* to be overruled.

The chaotic aftermath of *Hoffmann-La Roche* demonstrates both the wisdom of Justice Thomas’s admonition and the prescience of Justice Scalia’s spirited dissent in which he warned that the Court’s decision to authorize and facilitate notice to nonparties was “an extraordinary application of the federal judicial power” that exceeded constitutional limits and lacked any statutory basis. *Hoffmann-La Roche Inc.*, 493 U.S. at 175–77. Indeed, Justice Scalia quipped “one searches the Court’s opinion in vain for any explicit statutory command that federal courts assume this novel role,” and further warned against “taking [this novel role] in hand when Congress has not authorized it.” *Id.* at 176, 181.

Justice Scalia cataloged the errors in the majority’s opinion. He systematically analyzed the justifying presumptions of the majority and demonstrated how each was legally insufficient to support the “extraordinary

exercise of the federal judicial power” to permit the use of a court’s compulsory processes to compel a defendant to produce the names and addresses of current and former employees, actively assist plaintiff’s counsel in identifying, soliciting, and joining nonparties, and supervising the process of securing their consents to opt-in. *Hoffmann-La Roche*, 493 U.S. at 181. Those same reasons support overruling today what was a deeply flawed decision more than 30 years ago.

**A. Article III Limits a Court’s Case Management Authority to Parties Before the Court.**

Article III, Section 2, of the Constitution limits the jurisdiction of federal courts to “Cases” and “Controversies”, and restricts the authority of federal courts to resolving solely “the legal rights of litigants in actual controversies.” *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). As this Court observed regarding the limited power of the courts, “[t]hat judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.” *Muskrat v. United States*, 219 U.S. 346, 361 (1911).

As Justice Scalia noted in his dissent, the majority’s view departed from traditional notions of case management and exceeded constitutional limitations because those being “managed” were not actual parties to the case, but mere *potential* participants in some future case *yet to take form*. The majority opinion erred because it permitted district courts to transcend their customary roles of deciding actual “cases and controversies” by

venturing to affect participation in the *future*. As a result, the majority's expansive interpretation of a court's case management authority improperly bent "traditionally understood case-or-controversy limitations" and was a constitutionally infirm expansion of federal judicial power. *Hoffmann-La Roche*, 493 U.S. at 180.

For this reason alone, this Court should overrule *Hoffmann-La Roche*.

**B. The FLSA Does Not Authorize Court-Facilitated Notice.**

Congress passed the FLSA "to protect all covered workers from substandard wages and oppressive working hours." *Barrentine v. Arkansas-Best Freight Sys. Inc.*, 450 U.S. 728, 739 (1981). As originally enacted, the FLSA could be enforced by the Secretary of Labor or through a private action. *Laverenz v. Pioneer Metal Finishing, LLC*, 746 F. Supp. 3d 602, 609 (E.D. Wis. 2024). Private actions were "unique" from enforcement actions by the Secretary as a private action could be brought under Section 216(b), as it then existed, "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated." *Laverenz*, 746 F. Supp. 3d at 609 (quoting 29 U.S.C. § 216(b)).

Nothing in the text of Section 216(b) contains any statutory authority that would permit a district court (under the guise of case management) to undertake an activist role and affirmatively assist a plaintiffs' attorney

in identifying, soliciting, and joining nonparties to a pending action to which they had no previous involvement. *Hoffmann-La Roche*, 493 U.S. at 176. Thus, the majority’s view in *Hoffmann-La Roche* that Section 216(b) “must grant the court the requisite procedural authority to manage the process of joining multiple parties” was manifest error.

Importantly, from 1944 to 1947, the Supreme Court interpreted the FLSA quite broadly and “decided three cases determining that on-the-job travel time constituted ‘work’ within the meaning of the FLSA” and compensable working time. *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 254 (3d Cir. 2012) (collecting cases). This included “time necessarily spent by employees in walking to work on the employer’s premises.” *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 691 (1946). Unions quickly responded and, within eight months of the *Mt. Clemens* decision, filed 1,913 claims “with an aggregate amount sought approaching \$6 billion.” *Knepper*, 675 F.3d at 254 n.6 (citing S. Rep. No. 80-48, at 2 (1947)). Nearly all these lawsuits were filed by unions “as representatives of the employees, the real parties in interest.” *Id.* at 254.

In response to the “national emergency” created by *Mt. Clemens* and the resulting unexpected liability for employers, Congress enacted the Portal-to-Portal Act. *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1248 (11th Cir. 2003). Congress quickly amended Section 216(b) so that “standing to pursue an action for liability [was] statutorily limited to employees only.” *United Food & Com. Workers Union, Loc. 1564 of New Mexico v. Albertson’s*, 207 F.3d 1193, 1200 (10th Cir. 2000); see also *State of Nevada Emps.’ Ass’n v. Bryan*,

916 F.2d 1384, 1391 (9th Cir. 1990). By limiting actions to “employees,” the Portal-to-Portal Act sought to ban the representative actions previously brought by unions on behalf of employees. *Albertson’s*, 207 F.3d at 1200.

Although employees could continue to sue on behalf of other employees under Section 216(b), the 1947 amendments restricted their rights in an important way. Those amendments added an “opt-in” provision to the effect that “[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party plaintiff and such consent is filed in the court in which such action is brought.” 29 U.S.C. § 216(b). Congress’s aim was to “prevent[] large group actions, with their vast allegations of liability, from being brought on behalf of employees who had no real involvement in, or knowledge of, the lawsuit.” *Albertson’s*, 207 F.3d at 1200 (quoting *Arrington v. Nat’l Broad. Co.*, 531 F. Supp. 498, 501 (D.D.C. 1982)). “[T]he ‘consent in writing’ requirement . . . [sought] to eradicate the problem of totally uninvolved employees gaining recovery as a result of some third party’s action in filing suit.” *Arrington*, 531 F. Supp. at 502.

Despite these changes, the Portal-to-Portal Act contains no more statutory support for a court-authorized notice process than the original statutory text did.<sup>3</sup>

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3. Court-facilitated notice to nonparties also finds no support in the statutory text of the ADEA. Justice Scalia recognized this complete absence of statutory authority, stating “[b]ecause I know of no source of authority for such an extraordinary exercise of the federal judicial power, I dissent.” *Hoffmann-La Roche*, 493 U.S. at 174.

**C. The Federal Rules of Civil Procedure Do Not Support Court-Facilitated Notice.**

The Federal Rules of Civil Procedure likewise do not authorize the anomaly of nonparty judicial notice engineered by *Hoffmann-La Roche*. Although the majority opinion cites Rules 16 and 83 as additional support for the district court’s authority to facilitate notice, a close reading of these provisions reveals no such grant of authority. *See Hoffmann-La Roche*, 493 U.S. at 166 (suggesting that the Federal Rules of Civil Procedure offer “further support for the trial court’s authority to facilitate notice”).

Rule 16 governs pretrial case management and does not contemplate judicial action directed at individuals who are not yet parties to the litigation. *See* FED. R. CIV. P. 16. The text of Rule 16 does not provide any express or implied authorization for the issuance of judicial notice and solicitation to nonparties. As Justice Scalia observed, it would be “strange to confer an unusual new power by simply mentioning that power (as one of the subjects that can be considered) in a provision designed to authorize pretrial conferences.” *Hoffmann-La Roche*, 493 U.S. at 178-79.

Further, the Advisory Committee Notes reinforce that Rule 16 does not endorse any particular pretrial techniques—such as the issuance of notice under 29 U.S.C. § 216(b)—but emphasizes that “flexibility and experience are the keys to efficient management of complex cases.” FED. R. CIV. P. 16, advisory committee’s note to 1983 amendment. The Notes direct practitioners to external sources, such as the *Manual for Complex Litigation*, for

additional guidance. *Id.* Yet even the *Manual* contains no justification for the activist judicial intervention sanctioned in *Hoffmann-La Roche*, further underscoring the absence of textual or interpretive support within the Rules themselves. See Federal Judicial Center, *Manual for Complex Litigation (Fourth)* § 32.42 (2004).

Similarly, Rule 83(b), which permits courts to adopt local rules not inconsistent with the Federal Rules, cannot reasonably be construed to authorize procedural mechanisms that extend beyond the adjudication of the case or controversy before the court. Rule 83(b) provides that “[a] judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district’s local rules.” FED. R. CIV. P. 83(b). This provision is intended to fill procedural gaps, not create substantive powers exceeding constitutional limitations.

As Justice Scalia aptly noted, the contention that a district court’s action to promote the stirring up of litigation constitutes a permissible “regulation of practice” fails to address the core issue—namely, that the action in question is not directed toward resolving the dispute before the court and is therefore no response at all “unless the Court means that ‘regulating practice’ includes impositions upon the parties and their counsel *for any purpose whatever*.” *Hoffmann-La Roche*, 493 U.S. at 179 (emphasis added).

Justice Scalia further underscored the incompatibility of judicially authorized notice with the Federal Rules by scrutinizing the district court’s discovery order. *Id.* Pointing to Rule 26(b), Justice Scalia noted that the

discovery order was not aimed at uncovering evidence relevant to the parties' claims and defenses but was instead issued solely to facilitate notice to *nonparties* to the ADEA action.<sup>4</sup> *Id.* at 180. Justice Scalia correctly observed that facilitating judicial notice to nonparties “invents a discovery power beyond what the Rules confer.” *Id.*

**D. The Policy Arguments Cited by the *Hoffmann-La Roche* Majority Do Not Support Court-Facilitated Notice.**

The *Hoffmann-La Roche* majority principally relies on policy concerns regarding what the majority perceives to be the benefits of a single collective action. *Id.* at 170, 173 (“The broad remedial goal of the statute should be enforced to the full extent of its terms.”). Indeed, in the years following *Hoffmann-La Roche*, the Supreme Court has rejected “the flawed premise” that a statute’s remedial purpose should be pursued “at all costs.” *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 89 (2018).

While the *Hoffmann-La Roche* majority expressed concerns regarding inefficiencies that would result from multiple lawsuits regarding the same presumed violations, nothing in the ADEA or FLSA mandates that a single action be brought for multiple plaintiffs. Rather, those statutes only *permit*, but do not *require*, the joinder of similarly situated individuals in one action. *Hoffmann-La Roche*, 493 U.S. at 181 (Scalia, J., dissenting). But “case management,” as viewed by district courts following

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4. Justice Scalia’s analysis is no less correct under the current version of Rule 26.

*Lusardi* and *Hoffmann-La Roche*, has dangerously enabled district courts to transcend their constitutional “case or controversy” limits by recruiting nonparties (sometimes thousands, or tens of thousands), often with little to no evidentiary showing from a plaintiff that they are indeed similar while rejecting contrary evidence presented by the defendant. The burgeoning docket, in turn, motivates courts to favor expediency by, for example, limiting attorney representation to a single firm or restricting discovery to a small sample of party-plaintiffs.

As Justice Scalia noted in his dissent:

[C]ongress could give an executive agency authority to compel disclosure of prior employees’ names, so that the agency might invite to them to join an existing suit or provide their names to counsel. But giving a *court* authority to take action directed, not to the resolution of the dispute before it, but to the generation and management of other disputes, is, if not unconstitutional, at least so out of accord with age-old practices that surely it should not be assumed unless it has been clearly conferred.

...

Nothing in § 216(b) remotely confers the extraordinary authority for a court – either directly or by lending its judicial power to the efforts of a party’s counsel – to *search out* potential claimants, ensure that they are accurately informed of the litigation, and

inquire whether they would like to bring their claims before the court.

*Id.* at 176–77 (emphasis in original).

Ironically, despite Congress’s best efforts to limit large group actions by “totally uninvolved employees,” court-facilitated notice to nonparties and the liberal standards applied by district courts following *Hoffmann-La Roche* spawned the very evil the Portal-to-Portal Act sought to extinguish—namely claimants untethered from active involvement in litigation.

Neither the Constitution nor Congress granted courts the extraordinary judicial power to aid plaintiffs’ counsel in FLSA or ADEA litigation in their efforts to identify, solicit, and join nonparties to a pending action.

### **III. JUDICIAL INTERVENTION RESULTING FROM LAX NOTICE STANDARDS HARM DEFENDANTS IN FLSA AND ADEA ACTIONS.**

Justice Kennedy’s majority opinion in *Hoffmann-La Roche* cautioned that:

Our decision does not imply that trial courts have unbridled discretion in managing ADEA actions. . . . In exercising the discretionary authority to oversee the notice-giving process, courts must be scrupulous to respect judicial neutrality. To that end, trial courts must take care to avoid even the appearance of judicial endorsement of the merits of the action.

493 U.S. at 174.

This caution has gone largely unheeded in the purported service of judicial efficiency. *Hoffmann-La Roche* left district courts without any guidance on the standard to apply in deciding whether they should engage in aiding plaintiffs’ counsel in adding nonparties. As a result, the Section 216(b) jurisprudence since *Hoffmann-La Roche* has indeed proven Justice Scalia’s prescient warning that authorizing district courts to use their “compulsory process to assist counsel for the plaintiff” in “[s]eeking out and notifying sleeping potential plaintiffs” would inappropriately stir up litigation. *Id.* at 174, 181.

As detailed in the Petition, the lack of guidance in *Hoffmann-La Roche*, and the pervasive adoption of the “lenient” *Lusardi* standard, have had enormous financial consequences for, and placed extraordinary settlement pressure on, defendants in Section 216(b) litigation. *See* Dkt. No. 1 at 21–23. It is particularly untenable that a vast majority of lower courts not only readily aid in dramatically expanding the number of party-plaintiffs on the thinnest of “similarly situated” evidentiary reeds, but do so while expressly refusing to consider a defendant’s own contrary evidence or to rule on critical threshold legal issues involving, for example, joint employment allegations relied on by plaintiffs to bring collective-wide claims against employers and non-employers alike.

**A. The Impact of Judicial Intervention and Lax Notice Standards After *Lusardi* and *Hoffmann-La Roche***

*Hoffmann-La Roche*’s open invitation to actively aid plaintiffs’ counsel in identifying and adding nonparties to the litigation without providing “the details of”

how district courts should do so—coupled with the rampant adoption of the lenient standard articulated in *Lusardi*—exploded Section 216(b) collective action litigation nationwide.<sup>5</sup> *Hoffmann-La Roche*, 493 U.S. at 170. Moreover, in 2024, approximately 80% of motions for conditional certification were granted.<sup>6</sup> Certification rates remained steady over the last several years, with 75% of motions granted in 2023, 82% in 2022, and 84% in 2021. *Id.*<sup>7</sup> While nationally, certification opinions number in the hundreds, decertification opinions are in the teens, with just 15 filed in 2024. *Id.* at 467. This stark contrast demonstrates the pressure on defendants to settle following notice, reflecting that most of these cases are resolved before they ever reach decertification. See *Richards v. Eli Lilly & Co.*, 149 F.4th 901, 911 (7th Cir. 2025); *Clark v. A&L Homecare & Training Ctr.*, 68 F.4th 1003, 1008 (6th Cir. 2023).

The staggering rate at which notice motions are granted reflects a broader refusal to consider defendants’

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5. See also Seyfarth Shaw LLP, *2023 FLSA Litigation Metrics & Trends* 4 (2024) (nearly 2,700 such cases filed under the FLSA alone in 2023) ([https://www.seyfarth.com/dir\\_docs/documents/flipbooks/2023\\_FLSA\\_Litigation\\_Metrics\\_Trends.pdf](https://www.seyfarth.com/dir_docs/documents/flipbooks/2023_FLSA_Litigation_Metrics_Trends.pdf)).

6. See Duane Morris LLP, *Duane Morris Class Action Review 2025* at 466 (2025) (<https://online.flippingbook.com/view/1027553609/474>).

7. Some courts are so eager to authorize notice that they speak of a “presumption” in favor of conditional certification. See *Turner v. Chipotle Mexican Grill, Inc.*, 123 F. Supp. 3d 1300, 1309 (D. Colo. 2015) (“The proper approach . . . is to presumptively allow workers bringing the same statutory claim against the same employer to join as a collective.”); *Garcia v. Nunn*, Case No. 13-6316, 2016 WL 1169560, at \*3 (E.D. Pa. Mar. 25, 2016).

evidence at the notice stage, while accepting plaintiffs' evidence as true—an outright denial of defendants' Due Process rights. Courts regularly accept even clearly deficient plaintiffs' declarations at face value, while ignoring or discounting defendants' declarations as irrelevant. *See Vye v. Hannaford Bros. Co., LLC*, No. 2:24-cv-00339-NT, 2025 WL 2640068, at \*5 (D. Me. Sept. 15, 2025) (relying on plaintiff's fill-in-the-blank and largely identical declarations while refusing to consider the defendants' declarations *at all*); *Droesch v. Wells Fargo Bank, N.A.*, No. C20-6751-JSC, 2021 WL 1817058, at \*3 (N.D. Cal. May 6, 2021) (declining to consider defendant's challenges to plaintiffs' boilerplate declarations as contradicted by deposition testimony).

By relying on plaintiffs' evidence and ignoring defendants' evidence, courts implicitly, and sometimes explicitly, make the very credibility determinations they purport to avoid—plaintiffs' words are taken as truth, while defendants' evidence is ignored. *See, e.g., Hoti v. Patsy's Italian Rest.*, No. 24-CV-6991 (JGLC) (HJR), 2025 WL 3001850, at \*3 (S.D.N.Y. Oct. 27, 2025) (“[W]here there is a conflict between the parties as to the facts [] the court should treat the plaintiffs’ attestations as true.”); *Bitner v. Wyndham Vacation Resorts, Inc.*, 301 F.R.D. 354, 358 (W.D. Wis. 2014) (at conditional certification, “a court resolves any factual disputes in plaintiffs’ favor.”).

Perhaps the most shocking example of this trend is *Barry v. S.E.B. Service of New York, Inc.*, where the court noted that it would “not rely on defendants’ declarations, which seek to rebut plaintiffs’ allegations. No. 11-CV-5089 (SLT) (JMA), 2013 WL 6150718, at \*4 (E.D.N.Y. Nov. 22, 2013). Rather, the court will focus on plaintiffs’ declarations and the deposition testimony of the named

plaintiffs. **Of course, to the extent that any evidence defendants submit actually helps plaintiffs’ case, the Court will consider it.**” (emphasis added).

Courts’ thumbs are so firmly on the scales in favor of soliciting nonparties that they regularly authorize notice to thousands of potential litigants nationwide based on nothing more than the four corners of the complaint, a handful of cookie-cutter declarations, and minimal documentary evidence (which defendants are precluded from challenging). *See Kim v. U.S. Bancorp*, No. C20-0032RSL, 2021 WL 3665840, at \*2–3 (W.D. Wash. Aug. 18, 2021) (authorizing notice to 1,600 employees in more than 25 states based on seven declarations); *Gallagher v. Charter Foods, Inc.*, No. 2:20-cv-00049, WL 2021 2581153, at \*9–10 (W.D. Pa. Jun 23, 2021) (granting nationwide certification based on three declarations); *Ruffolo v. LaSalle Grp., Inc.*, No. 18 C 3305, 2019 WL 978659, at \*2-6 (N.D. Ill. Feb. 28, 2019) (authorizing nationwide notice based on two declarations while refusing to consider declarants’ contradictory deposition testimony).

In this way, *Lusardi* and decisions like it pervert the intentions of the Portal-to-Portal Act and return employers to a landscape where they are held hostage by “excessive and needless litigation” resulting in “windfall payments” to employees. 29 U.S.C. § 251(a). This was not what Congress intended when it intentionally rejected the Rule 23 “opt out” model in favor of the collective action mechanism to “free[] employers of the burden of representative actions.” *Hoffmann-LaRoche*, 492 U.S. at 173.

***B. Johnson v. Big Lots: The Ultimate Cautionary Tale of The Aftermath of Hoffmann-La Roche***

Perhaps the best example of the problematic current approach to collective actions is *Johnson v. Big Lots Stores, Inc.*, 561 F. Supp. 2d 567 (E.D. La. 2008). *Big Lots* was filed in November 2004 by two plaintiffs seeking to represent a nationwide collective of assistant store managers (“ASMs”) alleging they had been misclassified as exempt. *Id.* at 569. Plaintiffs sought court authorization to issue notice to thousands of current and former ASMs at more than 1,400 stores nationwide in March 2005. *Johnson*, No. 2:04-cv-03201-SSV-SS (E.D. La. Mar. 16, 2005), Dkt. 16 at 9.

Plaintiffs supported their motion with nothing more than several job advertisements for the ASM position and affidavits from the two named plaintiffs that “contain[ed] identical conclusory wording.” *Id.*, Dkt. 21 at 5. Together, the two named plaintiffs worked as ASMs at just three Florida stores and possessed no personal knowledge with respect to any other stores. In response, Big Lots submitted declarations from 196 ASMs nationwide describing the activities they performed as ASMs. *Id.*, Dkt. 36 at 4.

The court granted plaintiffs’ motion in July 2005 and authorized notice to ASMs nationwide. Noting that the standard was “fairly lenient” and “typically results” in conditional certification, the court found that plaintiffs satisfied their burden based on their complaint allegations, affidavits, and contention that Big Lots had a corporate policy or practice of misclassifying ASMs as exempt. *Id.* at 9. The court held that “[a]lthough plaintiffs’ submissions

are not overwhelming, they are enough to meet the lenient standard.” *Id.* at 13.

The court brushed aside the 196 declarations submitted by Big Lots by concluding that “the factual issues Big Lots invites the court to consider are more appropriately raised on a motion to decertify” after discovery. *Id.* at 14. Though it accepted plaintiffs’ affidavits at face-value, the court refused to consider Big Lots’ declarations because “plaintiffs [] had no opportunity to examine the declarants . . . or to take discovery from Big Lots.” *Id.* at 14.

As a result, notice was sent to more than 5,000 Big Lots ASMs nationwide, and roughly 1,200 nonparties joined the action. *Id.*, Dkt. 31 at 1; *Johnson*, 561 F. Supp. 2d at 569. Over the next two years, the parties engaged in significant discovery, including depositions of numerous opt-ins and additional declarations collected concerning the collective. *Johnson*, 561 F. Supp. 2d at 569. After discovery, Big Lots filed a motion for decertification, which was summarily denied. *Id.* Big Lots renewed its motion for decertification twice, but both motions were denied as untimely. *Id.* at 571.

About three and a half years after it was filed, the case went to a bench trial in May 2008. After seven days and 43 hours of live trial testimony, including from twenty non-expert witnesses and three expert witnesses, the court found that it needed to “confront once again” the certification question and address “the vexing question of whether the opt-in plaintiffs are sufficiently similar such that adjudication of their claims based upon representative proof may be done in a manner that respects the rights of both parties.” *Id.* at 570–71. The court concluded that the

“opt-in plaintiffs have different job responsibilities from one another” and from “day-to-day and within a single day.” *Id.* at 578–79.

As a result, just as Big Lots cautioned *years earlier* in opposing conditional certification, the court found that “[s]uch diversity in individual employment situations inhibits Big Lots from proving its statutory exemption defense as to all 936 opt-in plaintiffs on the basis of representative proof,” and, due to these dissimilarities, “the Court cannot confidently adjudicate plaintiffs’ claims or Big Lots’ defense on the merits.” *Id.* at 579. In doing so, the court expressed “regret[] that it must decertify this action at this stage, after the large investment of resources by the parties.” *Id.* at 587.

While the majority in *Hoffmann-La Roche* anchored its holding in the ideal that early activist judicial intervention would serve the interests of efficiency and economy, Big Lots demonstrates that where such intervention involves the application of lax notice standards, judicial economy and efficiency are not served, judicial resources are squandered, and defendants’ Due Process rights are trampled.

### **C. Judicial Intervention and Lax Notice Standards Particularly Harm Members of the *Amici*.**

FLSA and ADEA collective action plaintiffs frequently sue both the franchisee by whom they are actually employed *and* a business-model franchisor with no control over the terms and conditions of their employment. Making matters worse, plaintiffs frequently seek to include in the proposed collective individuals who are employed by *other*

franchisees. Courts following *Hoffmann-La Roche* and *Lusardi* have readily authorized notice without evaluating threshold legal arguments and evidence refuting the existence of any alleged joint employment relationship.<sup>8</sup>

This “shoot first, ask questions later” approach has an outsized prejudicial impact on franchisors. Indeed, because many operate regionally or nationally, business-model franchise systems are often drawn into protracted, expensive litigation where they are effectively held hostage until after notice, a flood of new party-plaintiffs, dramatically increased pressure to settle, time consuming and disruptive class-wide discovery, and potentially motions for decertification, *all before* a court finally adjudicates threshold joint employer issues in their favor *years later*.

Such is the story of *In re Jimmy John’s Overtime Litigation*, a Rule 23 class and FLSA collective action that consolidated three cases alleging the misclassification of ASMs nationwide by both Jimmy John’s franchisees

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8. See *Choimbol v. Fairfield Resorts, Inc.*, 475 F. Supp. 2d 557, 563 (E.D. Va. 2006) (declining to address joint employer allegations at conditional certification stage); *Lindberg v. UHS of Lakeside, LLC*, 761 F. Supp. 2d 752, 762 (W.D. Tenn. 2011) (at the notice stage, “the Court is only determining the issue of conditional class certification [] and any questions of particular defendant’s liability can be taken up at a later time”) (citation omitted); *Roy v. FedEx Ground Package Sys., Inc.*, 353 F. Supp. 3d 43, 69 (D.D.C. 2018) (at the notice stage, “Plaintiffs are not required to establish that FedEx Ground was the delivery drivers’ joint employer” and “Defendant’s contention concerning defenses... tread[s] too deeply into the merits and are premature without knowing who the actual class members will be.”).

and the corporate franchisor. 877 F.3d 756, 758 (7th Cir. 2017). Courts in two cases covering the same alleged claims conditionally certified collectives, then ordered the parties to confer to coordinate notice. *Id.* Both courts refused to consider any of defendants' evidence, including with respect to the threshold issue of joint employment, while authorizing *nationwide* notice to thousands based on just nine declarations covering only a handful of stores in six states, none of which were owned or operated by the franchisor. *See Brunner v. Jimmy John's, LLC*, No. 1:14-cv-05509, 2015 WL 13653079, at \*1 (N.D. Ill. Dec. 11, 2015); Dkt. 171, Exs. F-L, Q-R.

*Two and a half years* after notice was authorized, however, the court granted summary judgment in favor of the franchisor, holding that it was not the joint employer of the named and opt-in plaintiffs or 600 opt-ins who worked at stores owned and operated by franchisees. *In re Jimmy John's Overtime Litig.*, Nos. 1:14-cv-05509, 1:15-cv-01681, 1:15-cv-06010, 2018 WL 3231273, at \*23 (N.D. Ill. Jun. 14, 2018); *see also In re Jimmy John's Overtime Litig.*, 877 F.3d at 759. In other words, it was only after *four years* of expensive and protracted litigation that the district court finally adjudicated this dispositive threshold issue.

Similarly, three franchisor-defendants were forced to remain in protracted Section 216(b) litigation for more than two years before the threshold joint employment issue was addressed in *In re Domino's Pizza, Inc.*, No. 16-CV-2492 (AJN) (S.D.N.Y.). Though the parties agreed to conduct early discovery on the joint employment issue, the court refused to take up that threshold issue before ruling on conditional certification based on nothing more than the plaintiff's self-serving allegation that every putative

collective member was jointly employed by the franchisor. *See Kucher v. Domino's Pizza, Inc.*, No. 16-cv-0492-AJN, 2017 WL 2987214, at \*9 (S.D.N.Y. Feb. 13, 2017); *see also In re Domino's Pizza Inc.*, No. 16CV2492AJNKNF, 2018 WL 4757944, at \*1 (S.D.N.Y. Sept. 30, 2018). The court issued notice to individuals in New York and Connecticut relying on just four declarations and unrelated actions filed by the New York Attorney General's office. *Kucher*, 2017 WL 2987214, at \*2-3, 5-9. It was not until 19 months *after* notice was authorized that the district court granted summary judgment for the franchisor on the joint employer issue. *In re Domino's Pizza Inc.*, 2018 WL 4757944, at \*4-10.

Absent this Court overruling *Hoffmann-La Roche* or articulating a more rigorous standard for court-authorized notice, franchisees and business-model franchisors, as well as other defendants, will continue to be particularly susceptible to the worst abuses of the collective action device. This is true both where notice is authorized based on a nominal showing and where business-model franchisors—who merely provide business-operation standards and guidelines to ensure that their franchise system maintains quality and consistency and to protect their brand, but do not exercise any control over the terms and conditions of employment—are pulled into expensive, protracted, and judicially inefficient litigation only to be released years later after successful motions for summary judgment on the joint employment issue.<sup>9</sup>

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9. Courts nationwide routinely hold that business-model franchisors are not the joint employers of a franchisee's employees. *See, e.g., Reese v. Coastal Restoration & Cleaning Servs., Inc.*, No. 10-CV-36, 2010 WL 5184841, at \*3-5 (S.D. Miss. Dec. 15, 2010) (franchisor not employer under FLSA); *Singh v. 7-Eleven, Inc.*, No. 05-CV-04534, 2007 WL 715488, at \*5 (N.D. Cal. Mar. 8,

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

JOSHUA B. WAXMAN  
BRADFORD J. KELLEY  
LITTLER MENDELSON, P.C.  
815 Connecticut Avenue, NW,  
Suite 400  
Washington, DC 20006

ALLAN G. KING  
KIMBERLY RIVES MIERS  
NICOLE LEFAVE  
EMILY LINN  
LITTLER MENDELSON, P.C.  
100 Congress Avenue,  
Suite 1400  
Austin, TX 78701

LISA A. SCHRETER  
*Counsel of Record*  
RICHARD W. BLACK  
LITTLER MENDELSON, P.C.  
3424 Peachtree Road, NE,  
Suite 1200  
Atlanta, GA 30326  
(404) 760-3938  
lschreter@littler.com

ROBERT W. PRITCHARD  
LITTLER MENDELSON, P.C.  
One PPG Place, Suite 2400  
Pittsburgh, PA 15222

DAVID B. JORDAN  
LITTLER MENDELSON, P.C.  
1301 McKinney Street,  
Suite 1900  
Houston, TX 77010

*Counsel for Amici Curiae*

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2007); *Howell v. Chick-Fil-A, Inc.*, No. 92-CV-30188, 1993 WL 603296, at \*5 (N.D. Fla. Nov. 1, 1993); *Burnett v. Wahlburgers Franchising LLC*, No. 16CV4602WFKCLP, 2021 WL 12102076, at \*4-6 (E.D.N.Y. Mar. 19, 2021).