No. 25-476

In the

Supreme Court of the United States

ELI LILLY & CO., et al.,
Petitioners,

v.

MONICA RICHARDS, individually and on behalf of all others similarly situated,
Respondents.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989), should be overruled.

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. It defends free enterprise, individual rights, limited government, and the rule of law. WLF advances that mission, in part, by appearing as amicus curiae to urge the Court to clarify the contours of the Fair Labor Standards Act, *Nvidia v. Ohman*, 604 U.S. 20 (2024), and to uphold the Constitution's careful separation of powers, *Lucia v. SEC*, 585 U.S. 237 (2018).

INTRODUCTION AND SUMMARY OF ARGUMENT

Neither section 216(b) of the Fair Labor Standards Act (FLSA), nor the Age Discrimination in Employment Act (ADEA), provides a role for district courts to facilitate the plaintiffs' bar in developing collective actions. 29 U.S.C. §§ 216(b); 626(b). Yet for nearly forty years, those courts have been commandeered into doing so thanks to *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989). There, the Court conferred on a district court a special "managerial responsibility," *id.* at 171, that "extend[s] to cases that have not actually been filed in his court." *Id.* at 175 (Scalia, J., dissenting).

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* No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, paid for the brief's preparation or submission. Every party's counsel received timely notice of WLF's intent to file this brief.

As the Petition recounts, this instruction that the lower courts regularly "bend[] traditionally understood case-or-controversy limitations" has unleashed confusion nationwide. *Id*. at 180 (Scalia, J., dissenting). No fewer than four standards—none of them precise, all of them time-consuming—have formed in response to *Hoffmann*. Pet. 11–19.

Worse yet, this judicial solicitation of new claims inevitably stacks the deck—not only by inviting the judge's early imprimatur on the side of the plaintiffs, but by increasing the settlement value of the case. *Clark v. A&L Homecare & Training Ctr., LLC*, 68 F.4th 1003, 1007 (6th Cir. 2023) ("[T]he decision to send notice of an FLSA [or ADEA] suit to other employees is often a dispositive one, in the sense of forcing a defendant to settle—because the issuance of notice can easily expand the plaintiffs' ranks a hundredfold"). In short, *Hoffmann* "has thus become an impediment, rather than an aid, to accomplishing the basic judicial task of saying what the law is." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 410 (2024) (internal quotation marks, citation, and brackets omitted).

Merely straightening out this four-way mess is reason enough for certiorari. But there's no clean way to save the precedent—even a *Hoffmann* stripped down to a one-time modest recruitment letter cannot be reconciled with the Constitution. That's because *Hoffmann*'s instruction that district courts collaborate with the plaintiffs' bar in "[s]eeking out and notifying sleeping potential plaintiffs," 493 U.S. at 181 (Scalia, J., dissenting), works at least three independent constitutional harms:

1. It imposes a party-shopping role on the courts in violation of Article III's instruction that "the judicial power . . . is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law." *Osborn v. Bank of the U.S.*, 9 Wheat. 738, 819 (1824). Yet *Hoffmann* forces district courts to engage with individuals whose claims and "cases . . . have not actually been filed in [the] court." 493 U.S. at 175 (Scalia, J., dissenting).

2. Drafting district judges into the business of soliciting claimants also risks "judicial thumbs (or anvils) on the scale" in violation of the Fifth Amendment's due process guarantee. *Swales v. KLLM Transp. Servs., LLC*, 985 F.3d 430, 436 (5th Cir. 2021). "Courts are" supposed to be "essentially passive instruments of government." *United States v. Sineneng-Smith*, 590 U.S. 371, 376 (2020) (internal quotation marks, brackets, and citation omitted). "They do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come them." *Id.* But *Hoffmann* transmogrifies district judges from umpires into plaintiff's side pinch-hitters. This strikes against "the controlling principle" of the Fifth Amendment's due process guarantee, that "'the balance'" of justice not only be, but appear to be, "'nice, clear[,] and true.'" *See Caperton v. A.T. Massey Co.*, 556 U.S. 868, 878 (2009) (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

3. There's just no basis in the statutory text for enlisting the judiciary in noticing. It is as true today as it was in 1989 that "one searches the [*Hoffmann*] Court's opinion in vain for any explicit statutory command that federal courts assume this novel role." 493 U.S. at 176 (Scalia, J., dissenting). In imposing it,

the Court rewrote the statute itself, usurping the lawmaking prerogative of the Congress and upsetting the Constitution's careful division of powers. "[T]he only serious justification for t[hat] decision" was that it might "make[] for more efficient and economical adjudication . . . of *other* cases that might later be filed separately." *Id.* at 180 (Scalia, J., dissenting) (emphasis in original). Even if that "justification" "is entirely valid," it cannot account for the theft of legislative power by the Court. *Id.*

There's no way to fashion a rule for judges to recruit plaintiffs without tripping into all three of these constitutional harms. So *Hoffmann* ought to be overruled. As the lower courts have no idea how to apply *Hoffmann* anyway and eliminating the notice requirement would extinguish no potential plaintiff's right to suit, doing so "would dislodge" no "settled rights and expectations or require an extensive legislative response." *Hilton v. S.C. Pub. Railways Comm'n*, 502 U.S. 197, 202 (1991). It would, however, bring section 216(b) back in accord with the Constitution.

ARGUMENT

I. *HOFFMANN-LA ROCHE* ISN'T WORKING.

Nearly forty years ago, this Court began a nationwide experiment on the district courts. In *Hoffmann*, the Court created a responsibility for judges to assist the plaintiffs' bar in building up and building out collective action cases brought under 29 U.S.C. § 216(b). The Court did not ground this right in text or history but in "a managerial responsibility to oversee the joinder of additional parties to assure

that the task is accomplished in an efficient and proper way." 493 U.S. at 170–71.

This "managerial responsibility" was a revolution at the time and has remained an outlier ever since. Pet. 20. And there's a good reason for that—the *Hoffmann* experiment has been a failure. Thousands of FLSA suits are filed each year, and a substantial portion of those involve section 216(b). After a long time, the district courts do stumble their way to certification, which often ends up being the dispositive turn in the case—not a merits ruling. Seyfarth Shaw LLP, *2024 FLSA Litigation Metrics & Trends*, https://perma.cc/GHN8-EDLV ("2,709 FLSA collective action cases terminated in 2024, 376 cases reached an order on conditional certification (12.6%)" while "155 cases reached an order on summary judgment (5.7%); and 34 cases went to trial (1.3%)").

Some courts apply the "deeply inefficient," Pet. App. 16a, two-step approach derived from *Lusardi v. Xerox Corporation*, 118 F.R.D. 351 (D.N.J. 1987)—which stacks the deck for plaintiffs early and compounds the time courts must spend on building the collective action class. Pet. 13–17. Others reduce certification to a single crack of the bat, but even under the strictest standard, developed by the Fifth Circuit in *Swales*, "a district court must rigorously scrutinize the realm of 'similarly situated' workers." 985 F.3d at 434 (quoting 29 U.S.C. § 216(b)). That's no small allocation of scarce judicial resources. *Id.* at 441 (noting that under the *Swales* standard "[t]he amount of discovery necessary . . . will vary case by case").

This chaos was predictable. Plaintiff-shopping just isn't a core competency of the district courts. "There is no comparison" between the judicial solicitation of plaintiffs and the need "for courts to supervise and regulate the participation of *existing* parties *in actions that are pending*." *Hoffmann*, 493 U.S. at 177 (Scalia, J, dissenting) (emphasis in original). No surprise then that certification takes extraordinary time and resources and produces inconsistent results across the country, "imped[ing] the stable and orderly adjudication of future cases." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 379 (2010) (Roberts, C.J., concurring).

"In our adversarial system of adjudication," courts "follow the principle of party presentation." *Sineneng-Smith*, 590 U.S. at 375. This preserves the rule of law—the courts "do not, or should not, sally forth each day looking for wrongs to right," but act as "essentially passive instruments of government." *Id.* at 375–76 (internal citations, quotation marks, and brackets omitted). Judges must "'rely on the parties to frame the issues for decision'" and take on merely "'the role of neutral arbiter of matters the parties present.'" *Id.* (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)). *Hoffmann* breaks that promise of neutrality—and the four-way circuit division identified in the Petition shows just how uncomfortable the courts are serving as plaintiff counsel's investigators.

Claim recruitment does more than draw judges out of their bailiwick and eat up resources—it tilts outcomes. Pet. 22–23. Many FLSA or ADEA cases settle, not necessarily due to the merits, but because of "the appearance of court-endorsed solicitation of

claims (by letting benign notice-giving for case-management purposes warp into endorsing the action's merits, or seeming to, thus stirring up unwarranted litigation)" and "the opportunity for abuse (by intensifying settlement pressure no matter how meritorious the action)." *Swales*, 985 F.3d at 435.

Unsurprisingly, *Hoffmann* is no venerable precedent—it's "managerial responsibility" doctrine has found no purchase elsewhere. Congress certainly hasn't found court-assisted plaintiff-shopping to be a panacea worthy of writing into any other law. Pet. 20. Circuit percolation has provided no clear best practice. And *Hoffmann* distorts the core function of the judiciary by making judges a servant of a plaintiff's case rather than an agent of unbiased justice. *Swales*, 985 F.3d at 436 (noting that "leniency" in certifying a collective action "exerts formidable settlement pressure"). In short, *Hoffmann* has been "undermined by experience since its announcement." *Citizens United*, 558 U.S. at 364.

If a case constitutes an "abuse of judicial authority . . . [and] was egregiously wrong from the start," stare decisis is no safe harbor. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022). When an outlier decision's "reasoning was exceptionally weak" and "has had damaging consequences," *id.*, it is proper for the Court to "be more willing to depart from that precedent." *Citizens United*, 558 U.S. at 378 (Roberts, C.J., concurring). *Hoffmann*, which supplied "no source of authority for" its "extraordinary exercise of the federal judicial power," 493 U.S. at 174 (Scalia, J., dissenting), is just such an "errant precedent." *Citizens United*, 558 U.S.

at 378 (Roberts, C.J., concurring). It should be overruled.

II. *HOFFMANN-LA ROCHE* WORKS THREE INDEPENDENT CONSTITUTIONAL HARMS.

Hoffmann is not merely an aberrant and damaging decision. It is so contrary to the Constitution that there is no way "to shore up the original mistake." *Id*. at 379. Even a bare-bones noticing requirement can't fix what ails *Hoffmann*—that would only reduce the opinion's judicial hypertrophy, not cure it. The *Hoffmann* rule violates Article III, the Fifth Amendment's due process guarantee, and that "sacred maxim of free government," the separation of powers. The Federalist, No. 47. It needs to go.

A. *Hoffmann-La Roche* can't be squared with Article III.

Article III, like Articles I and II, is no plenary delegation of sovereignty. Rather, it is premised on that "central principle of a free society that courts have finite bounds of judicial authority, some of constitutional origin, which exist to protect citizens from . . . the excessive use of judicial power." *U.S. Catholic Conf. v. Abortion Rts. Mobilization, Inc.*, 487 U.S. 72, 77 (1988). Where Article III limits them, courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Va.*, 6 Wheat. 264, 404 (1821).

Article III limits "the judicial Power . . . to all *Cases*, in Law and Equity." U.S. Const., art. III, § 2 (emphasis supplied). But *Hoffmann* forces courts to

try to solicit clients and causes not before them. 493 U.S. at 176 (Scalia, J., dissenting) ("The claims facilitated or 'managed' here had not yet been submitted to the district court") (capitalization altered). Indeed, when "a modest initiating role for a court" is usually "appropriate," *Sineneng-Smith*, 590 U.S. at 376, a district court is—at its discretion—*dismissing* a defective claim, not aggregating more plaintiffs and causes to its docket. *E.g.*, *Day v. McDonough*, 547 U.S. 198, 209 (2002) (upholding dismissal of habeas petition because "district courts are permitted, but not obliged, to consider, *sua sponte,* the timeliness of a state prisoner's habeas petition").

Contrast the *Hoffmann* rule with class certification under Rule 23, the "modern form" of the ancient "bill of peace." *Trump v. CASA, Inc.*, 606 U.S. 831, 849 (2025). Class certification complies with Article III because it involves a controversy brought through the legal fiction of a representative plaintiff, where there is enough "numerosity (*such that joinder is impracticable*)." *Id.* (emphasis supplied). Not so under *Hoffmann*—which is predicated on facilitating practical joinder. 493 U.S. at 171. Rule 23 fixes the scale of similarly situated relief because "a putative class acquires an independent legal status once it is certified under Rule 23." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75 (2013). *Hoffmann*, in contrast, involves the judicial solicitation of new clients and claims "who in turn become [additional] parties . . . by filing written consent with the court." *Id.*; *Swales*, 985 F.3d at 437 (noting "the difference between § 216(b)'s opt-in feature and Rule 23's opt-out feature").

Inviting a non-essential new party to the court to litigate is simply irreconcilable with Article III, which instantiates a passive, not an activist, judiciary—filled out by courts that "'wait for cases to come to them.'" *Sineneng-Smith*, 590 U.S. at 376 (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring) (brackets omitted)). Plaintiffs, not district court judges, are "the master of the complaint.'" *Royal Canin U. S. A., Inc. v. Wullschleger*, 604 U.S. 22, 35 (2025) (quoting *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398–99 (1987)). But when a district court joins the hunt for additional plaintiffs and causes, as *Hoffmann* asks, the judge is participating in the amendment of the complaint itself, not merely deciding the question before it. U.S. Const., art. III, § 2.

B. *Hoffmann-La Roche* can't be squared with the Fifth Amendment's due process right.

A plaintiff seeking relief is exercising "an aspect of the First Amendment right to petition the Government for redress of grievances," under the interlocking protection of the Constitution's due process guarantee. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983). When a court affirmatively seeks to backfill a plaintiff's judicial posture by enlarging the pool of claimants and increasing the suit's settlement value, a judge is transforming the plaintiff's Petition Clause activity into a warped and dangerous form of government speech—a manifestation of judicial prejudice that the Fifth Amendment forbids. "The rule of law requires neutral forums for resolving disputes." *Home Depot U.S.A., Inc. v. Jackson*, 587 U.S. 435, 446 (2019)

(Alito, J., dissenting). And so the Fifth Amendment shields against "the risk that for certain cases, some neutral forums might be more neutral than others," or just "might appear that way, which is almost as deleterious." *Id.*

Even if *Hoffmann*'s plaintiff-shopping requirement doesn't exceed Article III limits, it infringes on the Fifth Amendment rights of defendants, who are entitled to a facially neutral tribunal before "arbiters of adversarial claims," not "inquisitors of justice." *Hoffmann,* 493 U.S. at 181 (Scalia, J., dissenting). "A fair trial in a fair tribunal is a basic requirement of due process," and "our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955).

But *Hoffmann* requires judges to act unfairly by soliciting for one side of the case before them and then proceeding to adjudge those added claims on the merits. That breaks "the controlling principle" of due process—that even the possibility of pre-judgment is verboten: "'the balance'" must not only be, but appear to be, "'nice, clear[,] and true.'" *See Caperton*, 556 U.S. at 878 (quoting *Tumey*, 273 U.S. at 532).

C. *Hoffmann-La Roche* can't be squared with the statute's text.

Perhaps if section 216(b) directly limned the role that the *Hoffmann* Court established, these constitutional defects could be forgiven under stare decisis. But it is as true today as it was in 1989 that the one "searches . . . in vain for any explicit statutory command that federal courts assume this novel role."

493 U.S. at 176 (Scalia, J., dissenting). On the contrary, the statute crisply provides that "[n]o employee shall be a party plaintiff to any such [collective] action unless he gives his consent in writing to become such a party and such consent in filed in the court in which such action is brought." 29 U.S.C. § 216(b). It grants no role for the courts to assist plaintiffs in adding "similarly situated" persons to the case. *Id*.

Yet the *Hoffmann* Court read into this silence an implied sidekick role for the district courts. This was deeply wrong. Just as courts "must reject administrative constructions of the statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate," so too must courts decline the temptation to fix statutes to carry out a judicially preferred policy. *Fed. Election Comm'n v. Dem. Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) (spelling modernized).

In dissent, Justice Scalia conceded that the *Hoffmann* majority may have alighted on good policy for a "more efficient and economical adjudication of cases." 493 U.S. at 180. "The problem is that is a justification in policy but not in law." *Id*. Experience has borne out that Justice Scalia may have been too optimistic on the efficiency of court-assisted plaintiff-noticing, *see supra* at 4–7, but his constitutional objection remains. That "Congress might have acted with greater clarity or foresight does not give courts a carte blanche to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do." *United States v. Locke*, 471 U.S. 84, 95 (1985) (italics omitted). Or as Hamilton put it: "Circumstances may affect the expediency of the

measure, but they can neither add to, nor diminish its constitutionality." Alexander Hamilton, *Opinion on the Constitutionality of an Act to Establish a Bank* (Feb. 23, 1793), https://perma.cc/77PY-W9VS.

After all, courts may no longer find implied rights of action or extra liabilities in criminal or civil enforcement statutes—even if that might be a good idea. *E.g.*, *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191–92 (1994); *Skilling v. United States*, 561 U.S. 358, 415 (2010); *Fed. Election Comm'n v. Swallow*, 304 F. Supp. 3d 1113, 1118 (D. Utah 2018) (striking helping-or-assisting civil liability created by FEC for "improperly intruding into the realm of law-making that is the exclusive province of Congress"). Why? Because "Congress, not the Judiciary, must decide" those thorny policy questions. *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 268 (2018) (Kennedy, J., plurality). That same "deference to the supremacy of the Legislature," *Locke*, 471 U.S. at 95, applies with full force here. By creating a right for district court judges "to take action directed, not to the resolution of the dispute before it, but to the generation and management of other disputes," the *Hoffmann* Court seized legislative power and usurped the prerogative of Congress. 493 U.S. at 176 (Scalia, J., dissenting).

It may be that having the courts stop sending out invitations-to-suit will make life harder for the plaintiffs' bar. If so, plaintiffs' attorneys are "free to direct their complaints to Congress." *United States v. Tohono O'odham Nation*, 563 U.S. 307, 317 (2011). And if Congress wants to amend section 216(b) to (constitutionally) facilitate collective actions, it can always do so. The tailoring would matter, *see*

McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 199 (2014) (Roberts, C.J., controlling), but, as just one example, "Congress could give an executive agency authority to compel disclosure of prior employees' names, so that the agency might invite them to join an existing suit or provide their names to counsel." *Hoffmann*, 493 U.S. at 176 (Scalia, J. dissenting). But Congress has so far declined to write such a statute—and that inaction is not license for this Court to call itself in as a substitute for bicameralism-and-presentment. "The courts, no less than the political branches of the government, must respect the limits of their authority." *U.S. Catholic Conf.*, 487 U.S. at 77.

* * *

Perhaps if *Hoffmann* was working out just fine, even three separate constitutional injuries could be stomached for the sake of stare decisis. But it's not. Pet. 11–24.

And given both the confusion in the courts of appeals and that applying the plain text of section 216(b) would extinguish no potential plaintiff's right to suit, overruling *Hoffmann* "would dislodge" no "settled rights and expectations or require an extensive legislative response." *Hilton*, 502 U.S. at 202. It's time to shut down this experiment in judicial plaintiff-shopping and complaint-amending.

CONCLUSION

Ending *Hoffmann* is "the necessary result of the Constitution." *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914). The Court should grant the writ so it may do so.

Respectfully submitted,

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