No. 19-1339

IN THE
Supreme Court of the United States

KANSAS CITY ROYALS BASEBALL CORP. ET AL.,
Petitioners,

v.

AARON SENNE ET AL., ON BEHALF OF
THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners' two undisputed employment policies—not to pay wages during training seasons and never to pay overtime—cut across every owner, every team, every player position, and thus every single minor league player. In this wage-and-hour challenge to those policies, the players offered an array of evidence of hours worked that included team pre-game and game schedules, travel itineraries, payroll data—and also a survey of players' arrival and departure times. Under applicable state wage laws, compensable hours worked include "all the time" an employee is "suffered or permitted to work, whether or not required to do so." The players offered the survey to approximate start and end times of a team's typical workday. The district court found that a team's workday is similar across teams and "routinized" across players. In *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), the Court held that wage-and-hour employees may use a statistical average to establish the time employees engaged in uncompensated work activities, if the evidence would be admissible in an employee's individual action. On appeal, petitioners abandoned their challenge to the survey's admissibility, arguing that expert evidence must satisfy a heightened "admissibility-plus" standard. Following *Tyson*, however, the lower courts applied a "no reasonable juror" standard.

The questions presented are:

1. Whether under *Tyson* an admissible survey offered to establish hours worked in a wage-and-hour class action must satisfy a higher standard than the "no reasonable juror" standard.

2. Whether Rule 23(b)(2) has an extratextual "cohesiveness" component that requires a Rule 23(b)(3) predominance-like inquiry.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

INTRODUCTION 1

COUNTERSTATEMENT 3

A. Factual Background 3

B. Proceedings Below 5

C. The Ninth Circuit's Decision 9

REASONS FOR DENYING THE PETITION 15

I. THE DECISION BELOW IS CORRECT AND DOES NOT CONFLICT WITH *WAL-MART* OR *FERRERAS*. 15

A. The decision in *Tyson* 16

1. *Tyson*: an average of hours worked can be used to prove a class's hours worked..... 18

2. *Tyson*: the persuasiveness of evidence of average hours worked is a jury question. 19

B. The decision below is a straightforward application of *Tyson*. 20

C. The Ninth Circuit created no wage-and-hour *Tyson*-exception to *Wal-Mart*. 21

D. The Ninth Circuit conducted the required "rigorous analysis" of the survey. 23

E. There is no split with the Third Circuit. 25

II. THERE IS NO CIRCUIT SPLIT AS TO RULE 23(b)(2) COHESIVENESS. 26

III. THIS CASE IS A POOR VEHICLE FOR CONSIDERING EITHER QUESTION. 29

A. Both questions hinge on waived issues. 30

1. Petitioners have waived key elements of the survey question. 30

2. The “cohesiveness” question was neither preserved nor decided below.......... 31

B. Reversal on either question would have little or no practical effect on the outcome of proceedings on remand. 32

1. The FLSA collective will proceed. 32

2. The Rule 23 classes will proceed. 32

CONCLUSION... 34

TABLE OF AUTHORITIES

Page(s)

Cases

Campbell v. City of Los Angeles,
903 F.3d 1090 (9th Cir. 2018) 32

Ebert v. General Mills,
823 F.3d 472 (8th Cir. 2016) 29

Ferreras v. American Airlines, Inc.,
946 F.3d 178 (3d Cir. 2019)........................1, 25, 26

Gates v. Rohm and Haas Co.,
655 F.3d 255 (3d Cir. 2011)................................ 29

IBP, Inc. v. Alvarez,
546 U.S. 21 (2005) 10

Kartman v. State Farm Mut. Auto. Ins. Co.,
634 F.3d 883 (7th Cir. 2011) 28

Padilla v. Hanft,
126 S. Ct. 1649 (2006) 32

Reeves v. Sanderson Plumbing Prods., Inc.,
530 U.S. 133 (2000) 25

Romberio v. Unumprovident Corp.,
385 F. App'x 423 (6th Cir. 2009)....................28, 29

Shook v. Bd. of Cty. Comm'rs of El Paso,
543 F.3d 597 (10th Cir. 2008) 27, 28

Tyson Foods, Inc. v. Bouaphakeo,
136 S. Ct. 1036 (2016) ....*passim*

United States v. Williams,
504 U.S. 36 (1992) 30

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) ....*passim*

Zivotofsky v. Clinton,
566 U.S. 189 (2012) 30

Statutes

29 U.S.C. § 216(b) 32

Fla. Stat. § 448.110(3)... 24

Other Authorities

29 C.F.R. § 778.223.. 24

29 C.F.R. § 790.6.. 24

Ariz. Admin. Code R20-5-1202................................ 24

INTRODUCTION

Petitioners have a uniform training season policy: no pay. They have a uniform overtime policy: no overtime pay. Those policies "touch and concern all members of the class" in precisely the same way—they uniformly deprive players of compensation. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 n.10 (2011). And the truth or falsity of the players' claim that those policies violate applicable wage laws will be determined for all class members "in one stroke," despite the drove of unimportant differences petitioners identify. The answer will not differ for a New York pitcher, San Diego outfielder, or Chicago shortstop.

And in fact, as the case comes to this Court, petitioners have conceded Rule 23(a)(2) "commonality—the rule requiring a plaintiff to show that 'there are questions of law or fact common to the class.'" *Wal-Mart*, 564 U.S. at 349. As the Ninth Circuit noted, petitioners did not contest commonality on appeal. App.11 n.5. And that concession disposes of petitioners' claim that the decision below conflicts with either *Wal-Mart* or *Ferreras v. American Airlines, Inc.*, 946 F.3d 178 (3d Cir. 2019), because the "crux" of both those cases was Rule 23(a)(2) commonality. 564 U.S. at 349; *Ferreras*, 946 F.3d at185-86. The Ninth Circuit here, by contrast, did not decide any commonality question because petitioners did not present one.

Petitioners' first question is even more surprising because it showcases not just one, but two issues conceded below. On appeal, petitioners also abandoned their objections to the admissibility of the player survey, the focal point of their first question. App.51. Instead they argued that admissibility is not enough. They contended that the survey "must satisfy a 'heightened 'admissibility-plus' standard"—for which they cited no authority.

The third strike for petitioners' first question is that it is academic. Even if the Court reversed on petitioners' survey question, that decision would not undo the certifications of any of the Rule 23(b)(3) classes here. While the survey takes center stage in petitioners' arguments, it assumes no such role in the players' case. As both courts below explained, the training classes can establish their claims independently of the survey through other voluminous evidence, like the hundreds of team schedules already part of the record below. And the third, California class can as well for a substantial portion of their claims. All three (b)(3) classes will proceed regardless of how this Court answers the first question presented.

Petitioners' second question fares no better. Contrary to petitioners' assertion, the court of appeals did not hold that Rule 23(b)(2) has no "cohesiveness" requirement. More precisely, it held that (b)(2) requires no (b)(3)-like predominance inquiry. This Court said the same thing in *Wal-Mart*: "When a class seeks an indivisible injunction benefiting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate .... Predominance and superiority are self-evident." 564 U.S. at 362-63. And petitioners cite no decision in which a *circuit court* has ever held that (b)(2) *does* require a (b)(3)-like predominance inquiry. Besides, that question is also academic because petitioners' *sole* claim below that the (b)(2) class lacked cohesiveness was based on choice-of-law, an issue not before this Court. Petitioners' second question, having been neither presented nor decided below, is thus waived.

Neither question merits this Court's interlocutory review. The petition for certiorari should be denied.

COUNTERSTATEMENT

A. Factual Background

Forty-five baseball players brought this wage-and-hour class action challenging two wage policies that apply to every player in the minor leagues: petitioners pay no wages during training seasons and no overtime at any time. The players allege that petitioners' failure to pay them minimum and overtime wages violated state and federal wage-and-hour laws. App.5-6.

Minor League Baseball consists of professional baseball leagues that compete at levels below Major League Baseball. Each minor league team is affiliated with one of thirty major league teams, and MLB and the major league franchises employ minor league players. App.2.

The structure of the minor league system, including players' employment terms, is governed by the Major League Rules. Rule 3(b)(2) requires every minor league player to sign a standardized contract—the Uniform Player Contract—"to produce the similarity of conditions necessary for keen competition." App.2. That contract obligates each player to "perform professional services" throughout the calendar year, even though "salary payments are to be made only during the actual championship playing season." App.2. It also provides a fixed, bimonthly salary during the championship season, meaning a player's pay does not vary in amount, regardless of the number of hours worked. App.49. Those provisions–a part of every player's contract–codifies petitioners' no-pay policies. As the court of appeals noted, petitioners no longer "seriously contest" or "credibly dispute" either policy. App. 45, 49.

Minor league teams follow the same, well-established calendar each year. App.3-4. Spring training lasts four weeks, starting in early March at training

complexes in Florida or Arizona owned by the MLB teams. App.3. After spring training, players assigned to a team begin the regular "championship" season, from April through September. App.4. Players not assigned to a team remain at their Florida or Arizona training complex for extended spring training. App.4. Fall Instructional Leagues follow the regular season at the training complexes. App.5.

Although petitioners claim there is no typical minor league workday, the players presented "a variety" of representative evidence of the similarity of routines across clubs, including "hundreds of team schedules," payroll data, and testimony from players and management. App.8; *see* App.174 (finding variations not "significant"). During training seasons, players work seven days without a day off. App.3. Players arrive for morning routines in preparation for daily games that typically start at 1:00 p.m. App.3.-4. Games last about three hours. App.105. The championship season is similar, except most games are played in the evening with a 6:00 to 7:00 start time. CA9.FER150; CA9.FER054. Games are typically played seven days per week with only a couple of scheduled "off days" each month. App.4, 50. As in training seasons, pregame drills precede each game. CA9.FER49-75.

There are practical reasons schedules are fairly homogeneous across clubs. Uniformity in routines is an inherent part of baseball for the simple reason that it is a team sport. Not only do players play together as teams, they play against other teams, and the teams all play the same nine-inning game according to standardized rules. Players arrive several hours before games to perform team-related activities, including drills, team stretches, throwing, fielding practice, and batting practice. CA9.FER025-29, 038-40, 49-61, 102-04, 122-36, 179, 183-84. The home team performs its pregame activities first, followed by the visiting team.

CA9.FER50-51, 55-56, 179, 183-84. And in both the regular and training seasons, teams perform daily pregame routines based on game times. CA9.ER214 (because of similar game times, "your pregame work is going to be done [at] similar times"). One inescapable reality cuts across leagues, teams, positions, employers, and worksites: teams have to share a single field before games. Workdays are similar as a matter of necessity.

B. Proceedings Below

The players explained to the district court how they would prove their claims on a classwide basis. Establishing employee status would be primarily based on petitioners' own documents in which they repeatedly refer to players as "employees." The Uniform Player Contract also uses variants of "employ" time and again. App.3. In addition, petitioners provide employee benefits, like health insurance, workers' compensation, and pension plans. And during the season—when petitioners pay some wages—petitioners deduct employment-related withholdings like taxes.

Proving hours worked would be less straightforward because petitioners did not keep time records, and that is because they consider themselves exempt from wage laws and associated time-keeping requirements. Nevertheless, a variety of internal records will "fill [that] evidentiary gap."[1] App.8. Pre-game schedules, game schedules, travel itineraries, recorded game lengths, payroll data, and testimony of dozens of witnesses can prove the lion's share of a typical minor league workday. App.130.

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[1] *See Tyson*, 136 S. Ct. at 1040.

Many witnesses testified, however, that team schedules do not tell the whole story.[2] Required team activities began earlier and continued later than schedules reflect, including things like team meetings. App.130-31 n.4. To estimate start-of-day and end-of-day team activities, the players commissioned a player survey. App.99-106. And contrary to petitioners' unsupported assertions (at 2, 25), the survey sample was, indeed, "random" in accordance with standard survey methodology, as the district court mentioned three times. App.100, 139, 162. The survey asked players when they most often arrived at and departed from their ballparks or training complexes. The players suggested a jury could use "[t]he 10th percentile … to reveal when the *required* team work began because it represents the time by which 90% of respondents had already arrived at work." App.130.

In early proceedings, the district court certified a Fair Labor Standards Act (FLSA) collective. Later, the players moved for Rule 23 certification of classes under the wage-and-hour laws of eight states, covering not only training seasons and the championship season, but also winter conditioning. Petitioners simultaneously moved to *de*certify the FLSA collective. They also filed a motion to exclude the player's preliminary "pilot" survey. The district court granted petitioners' motions and denied plaintiffs' motion for certification.

Days later, the main survey of over 700 players was completed. App.99. It addressed the criticisms petitioners had made of the pilot survey, and the players sought leave to propose a narrowed FLSA collective and Rule 23 classes, which the district court granted.

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[2] *See, e.g.*, CA9.FER214; CA9.FER063-67, 074, 211; CA9.FER162-67; CA9.SER844; CA9.SER405-06; CA9.SER425-26; CA9.SER311; CA9.SER361; and CA9.SER374.

App.99-106. The players narrowed their class proposals "significantly," proposing two Rule 23(b)(3) training classes under Arizona and Florida law, and one championship season class for the California League. App.106-07, 174. They also proposed a Rule 23(b)(2) injunctive relief class and FLSA collective with definitions that tracked the narrowed (b)(3) classes. App.106-07.

Petitioners again moved to exclude the players' survey on relevancy and *Daubert* grounds, raising a raft of new criticisms since their earlier objections had been addressed. App.138. Though they cursorily disputed Rule 23(a)(2) commonality in a footnote, petitioners' primary focus was Rule 23(b)(3)'s predominance requirement. App.122, 124. First, they argued that variances among players' work activities and schedules defeated predominance. App.122. Second, they argued that choice-of-law questions would turn on individualized inquiries. App.123.

This time, the district court denied petitioners' motion to exclude the survey, concluding that it was relevant and had been conducted in accordance with accepted principles of survey methodology. App.154-57. Specifically, the court held that under labor law's "continuous workday" rule—which presumes all activities after the "whistle blows" are compensable—the survey's average player arrival and departure times would "be helpful to the jury, especially when considered in combination with other evidence such as the daily schedules and witness testimony." App.154-55.

With respect to all proposed classes and the FLSA collective, the court found "a number of common and central questions that are likely to give rise to common answers," including:

> 1) whether the Clubs and MLB are joint employers; 2) whether the activities Minor

> League players perform at the ballpark and/or in connection with games constitute "work" …; and 3) whether the common compensation policies applied to Minor Leaguers by Defendants under the Minor League Rules and Uniform Player Contracts—including failure to pay players a salary outside the championship season and failure to pay minimum wage and overtime during the championship season—violate the applicable wage and hour laws.

App.165-66.

The court also found that variances in player work activities and workday length did not predominate over the common questions. By focusing on team activities, the players "have significantly reduced the variations" and "the remaining variations are not so significant as to preclude a jury from addressing Plaintiffs' claims on a classwide basis." App.173-74. The court also found "that the activities of minor league players are, in fact, routinized." App.159. And the court found that the survey, "in combination with other evidence … may be sufficient to allow a jury to draw conclusions based on reasonable inference as to when players were required to be at the ballpark and how long after games they were required to remain at the ballpark." App.176.

Since the FLSA collective action would obviously be controlled by federal law, there were no choice-of law issues that could defeat certification, and it recertified the collective. App.195. Likewise, the court concluded that the proposed California class presented no choice-of-law issues because California law applied to those claims, so it also certified a California class. App.187.

But the court denied certification of Arizona and Florida classes due to its uncertainty that only Arizona and Florida law would apply to work performed

exclusively in those states: "the choice of law questions that are likely [to] arise in connection with the Florida and Arizona classes defeat the predominance requirement as to those classes." App.189, 192.

The court also denied certification of a Rule 23(b)(2) class. Contrary to petitioners' recitation (at 9), however, the court's *sole* reason was choice-of-law concerns:

> As discussed above, it is not apparent that [it] is appropriate to apply the law of the states where spring training is conducted to the claims of all class members. As a consequence, the Court could not necessarily adjudicate the claims of the Rule 23(b)(2) classes or fashion a remedy (assuming Plaintiffs' claims are meritorious) based on the law of only one or two states. Instead, it could potentially be required to apply the law of numerous states to Plaintiffs' claims, which undermines the cohesiveness of the class and makes certification of Plaintiffs' proposed (b)(2) class inappropriate.

App.192. The court found no other "cohesiveness" impediments to those classes.

Both sides petitioned for Rule 23(f) interlocutory review, and the parties' appeals followed.

C. The Ninth Circuit's Decision

Much of the Ninth Circuit's decision focused on the choice-of-law question. In its reversal on that issue, the court of appeals held that Florida law governs the wage-and-hour claims for work performed exclusively in Florida, and the same for Arizona. App.33-34. That ruling, , which is not before this Court, thus removed the only obstacle the district court had found to certification of the Florida, Arizona, and (b)(2) classes.

With that issue resolved, the court turned to Rule 23(a)'s four threshold requirements—commonality,

typicality, numerosity and adequacy. The court noted that "defendants contest only adequacy on appeal" (an issue not raised in the petition) and therefore did not consider commonality, instead focusing on petitioners' (b)(3) predominance arguments. App.11 n.5.

As a preface to its predominance analysis, the court explained two other rules upon which the players had relied: the continuous workday rule and this Court's holding regarding the use of representative evidence in a wage-and-hour class action in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016). The continuous workday rule, recognized in *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), "presumes that once the beginning of the workday is triggered, an employee performs compensable work throughout the rest of the day until the employee completes their last principal activity … whether or not the employee actually engages in work throughout that entire period." App.42. And in *Tyson*, this Court held that "representative evidence" could be used to prove liability in a wage-and-hour class action, so long as the evidence would be admissible in an individual action. App.40-41.

The Ninth Circuit's discussion addressed petitioners' two main predominance arguments. First petitioners contended that because the survey "asked only about arrival and departure times at the ballpark and not about what activities the players actually performed while at the ballpark," the players could not rely on the continuous workday rule "because there is no way to determine the beginning or end of the 'workday.'" App.43-44. Second, they contended that "significant variations in players' arrival and departure times" defeated predominance. App.44.

With respect to the Florida and Arizona classes, the court of appeals "easily" affirmed the district court's Rule 23(b)(3) finding that the common questions predominated over any individualized questions because

during those training seasons "virtually all players are completely unpaid for their participation." App.44.

> Therefore—as the district court correctly held—liability can be established simply by showing that the class members performed *any* compensable work. That is easily resolved on a classwide basis by answering two questions: (1) are the players employees of defendants, and (2) do the minor league team activities during these periods constitute compensable work under the laws of either Arizona or Florida? We hold that these two "common, aggregation-enabling issues in the case are more prevalent [and] important than the non-common, aggregation-defeating, individual issues," therefore making certification appropriate.

App.45 (quoting *Tyson*, 136 S. Ct. at 1045). The court agreed "that as to these classes, many of defendants' protests go to damages, not liability." App.46.

The court further noted that the survey "was but one piece of the plaintiffs' representative evidence—evidence that also included hundreds of internal team schedules and public game schedules, payroll data, and the testimony of both players and league officials." *Id.*; *see* App.44 ("despite defendants' repeated suggestions to the contrary, the representative evidence offered by plaintiffs was not limited to just the Main Survey"). Even without the survey, "team schedules will serve to conclusively demonstrate that the players spent time working for which they were uncompensated." App.47-48.

The court also affirmed the district court's finding that common questions predominated for the California class. Because California class members "*do* get paid, albeit not much," their claims would require

more than just proof of "*any* compensable work," unlike the Florida and Arizona classes. App.45, 48. But even so, "team schedules alone—independent of the Main Survey or any other evidence—may suffice to show overtime liability" because "65-85% of California League players had at least one workweek with games on all seven days, and … nearly half of all workweeks included games on all seven days. For those workweeks, the players would be entitled to overtime pay for their work on the seventh day of the workweek." App.49-50.

The court also rejected petitioners' survey-related predominance arguments. Petitioners did not challenge the district court's *Daubert* ruling, so the Ninth Circuit did not consider any question concerning the survey's admissibility. Petitioners instead argued that admissibility is not enough at the certification stage: "The rigorous analysis of expert evidence proffered to satisfy class … requirements is not a question of threshold admissibility" because such evidence must satisfy a "heightened 'admissibility-plus' standard." Def. Br. (ECF No. 38) at 45. The court of appeals disagreed, holding that under *Tyson*, "where the evidence is admissible—for expert evidence, using the *Daubert* standard—then the 'no reasonable juror' standard at the class certification stage applies." App.41.

> Because defendants do not challenge the district court's ruling on admissibility under *Daubert*, the defects they have identified with the Main Survey could only have defeated certification upon a conclusion that all of the representative evidence offered—the Main Survey, schedules, testimony, and the like—could not have "sustained a reasonable jury finding as to hours worked in each employee's individual action."

App.51 (quoting *Tyson*, 136 S. Ct. at 1046-47). The district court had "found the opposite"—that the survey in combination with other evidence was sufficient to sustain such a jury finding—so the Ninth Circuit then considered "whether 'the record here provides [a] basis for [us] to second-guess that conclusion.'" App.51 (quoting *Tyson*, 136 S. Ct at 1049).

The Court looked to the definition of "hours worked," which "includes all the time the employee is suffered or permitted to work, whether or not required to do so.'" App.52; *see also* discussion at note 5, *infra*, (noting similarity of Arizona and Florida law). The court concluded that California's interpretation of those definitions entitle an employee to compensation for "all time the employer 'permit[s]' an employee to work, even if the work is *not* required." App.53. (emphasis in original). "Thus, a player who arrives early or stays late at the ballpark of their own volition and performs 'work' activities during that time is still owed compensation because the player was 'permitted' to work, despite the work not being required." App.53.

And under California law, "if players were expected to arrive or depart at a particular time—whether that requirement was de facto or official—it is immaterial what activities the players actually engaged in while at the ballpark." App.53. So "[e]ven if the players spent their time at the ballpark doing things like eating or showering, they were still … owed compensation." App.53. Thus, the Court affirmed the district court's conclusion that the players may "use their representative evidence—especially the Main Survey and the testimony of players and league officials—to persuade a jury that they were required to be at the ballpark at particular times." App.51-52, 54.

Last, the court of appeals held that Rule 23(b)(2) has no extra-textual (b)(3)-like "cohesiveness" requirement. App.34. The district court had held that because

"it could potentially be required to apply the law of numerous states" to the proposed (b)(2) class's claims for injunctive relief, the class was insufficiently "cohesive" for (b)(2) certification. App.192. The Ninth Circuit reversed: "Although we have never explicitly addressed whether 'cohesiveness' is required under Rule 23(b)(2), courts that have imposed such a test treat it similarly to Rule 23(b)(3)'s predominance inquiry—something we have previously rejected in no uncertain terms." App.34. The court "therefore remand[ed] for the district court to consider anew whether to certify the proposed Rule 23(b)(2) class." App.35.

Judge Ikuta dissented, but only on state law grounds (specifically choice-of-law grounds). App.64-89. She expressed no disagreement with any other aspect of the majority's Rule 23 analysis. Petitioners moved for rehearing en banc, but no judge called for a vote. App.90-91.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW IS CORRECT AND DOES NOT CONFLICT WITH *WAL-MART* OR *FERRERAS*.

This Court held in *Wal-Mart*, as did the Third Circuit in *Ferreras*, that the plaintiff-employees had failed to demonstrate company-wide policies that resulted in the same injury to all members of those proposed classes. The plaintiffs had thus failed to establish any requisite Rule 23(a)(2) common question necessary to proceed as a class action.

In this case, by contrast, the players established league-wide policies not to pay wages during training seasons and never to pay overtime. The district court found those policies give rise to common questions that "give rise to common answers," including whether players are petitioners' "employees," whether their baseball activities constitute "work," and whether petitioners' policies violate applicable wage-and-hour laws. App.165. And because petitioners did not challenge that commonality finding on appeal, App.11 n.5, the Ninth Circuit did not decide any commonality question. Nor did the Ninth Circuit have reason to create an "exception" to *Wal-Mart*'s commonality holding.

The Ninth Circuit thus correctly held that petitioners' challenge to the player survey in "reliance on *Wal-Mart* is misplaced" and that a different decision of this Court—*Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016)—"controls." App.55-56. In *Tyson*, this Court held that statistical "representative" evidence may be used in wage-and-hour class actions for "inferring the hours an employee has worked … so long as the [evidence] is otherwise admissible," even though individual employees took different amounts of time to perform the uncompensated task. *Id.* at 1047-49. But petitioners did "not challenge the district court's ruling on

admissibility" (App.51), and instead insisted that "[t]he rigorous analysis of expert evidence proffered to satisfy class … requirements is not a question of threshold admissibility" because such evidence must satisfy a "heightened 'admissibility-plus' standard." Def. Br. (ECF No. 38) at 45. The court rejected that view, relying on *Tyson*'s holding that "[o]nce a district court finds [representative] evidence to be admissible, its persuasiveness is, in general, a matter for the jury." 136 S. Ct. at 1049. It is to be judged under the "no reasonable juror" standard—"the same standard of proof that would apply in any case." *Id.* at 1051 (Roberts, C.J., concurring).

So, the court of appeals held that the concededly admissible player survey could, in combination with other evidence, be used in this wage-and-hour class action to establish the average hours players worked. It also held that the players' evidence of hours worked—not just the survey in isolation—must be judged by the "no reasonable juror" standard applicable in any other case. The decision below is thus a straightforward application of *Tyson* and does not merit this Court's review.

A. The decision in *Tyson*

"Whether and when statistical evidence can be used to establish classwide liability will depend on the purpose for which the evidence is being introduced and on the elements of the underlying cause of action." *Tyson*, 136 S. Ct. at 1046 (internal punctuation omitted). In a wage-and-hour class action involving an employer's violation of its duty to keep time records, statistical proof of the average time employees spent in uncompensated work activities is admissible if that evidence would be admissible in an individual employee's case, even though individual employees took different amounts of time to perform the uncompensated work. *Id.* at 1047-49.

In *Tyson*, employees at a pork processing plant filed a class action for unpaid, off-the-clock time spent donning and doffing protective gear. *Id.* at 1042. Class members performed different work, worked in different departments, and wore different protective gear: "The exact composition of the gear depend[ed] on the tasks a worker perform[ed] on a given day." *Id.* (kill, cut, and retrim departments, where hogs are slaughtered, trimmed, or prepared for shipment). And "employees in different departments donned and doffed for *different* amounts of time." *Id.* at 1052 (Roberts, C.J., concurring) (emphasis added). Because Tyson had not kept records of time spent donning and doffing, the workers offered "representative evidence" from a sample, based on an expert's estimation of the average time workers spent donning and doffing. *Id.* at 1043-44.

Tyson did not challenge "the statistical validity" of the workers' studies under *Daubert*, but instead argued "that the varying amounts of time it took employees to don and doff different protective equipment made the lawsuit too speculative for classwide recovery." *Id.* at 1044. It objected to class certification "because of the variance in protective gear each employee wore," which meant "the employees' claims were not sufficiently similar to be resolved on a classwide basis." *Id.* at 1043.

Tyson also did "not dispute that there [were] important questions common to all class members, the most significant of which is whether time spent donning and doffing the required protective gear is compensable work." *Id.* at 1045-46. But because every employee needed to prove that time spent donning and doffing resulted in overtime for which they had not been paid, Tyson argued "that these necessarily person-specific inquiries into individual work time pre-

dominate over the common questions raised by respondents' claims, making class certification improper." *Id.* at 1046.

The employees contended that "individual inquiries are unnecessary because it can be assumed each employee donned and doffed for the same average time observed." *Id.* Tyson argued "that [the] study manufactures predominance by assuming away the very differences that make the case inappropriate for classwide resolution. Reliance on a representative sample, petitioner argues, absolves each employee of the responsibility to prove personal injury, and thus deprives petitioner of any ability to litigate its defenses to individual claims." *Id.*

1. ***Tyson*: an average of hours worked can be used to prove a class's hours worked**

Whether a jury could "assume[] each employee donned and doffed for the same average time" was "the central dispute" in *Tyson*. 136 S. Ct. at 1046. And in a wage-and-hour action involving an employer's violation of its statutory duty to keep time records, the Court held, such an inference is permissible:

> Instead of punishing "the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work," … "an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." Under these circumstances, "[t]he burden then shifts to the employer to come forward with evidence of the precise amount of work performed

> or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence."

Id. at 1047 (citations omitted) (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)).

So according to *Tyson*, an average donning-and-doffing time constituted "sufficient evidence" under *Mt. Clemens* "to show the amount and extent of … work as a matter of just and reasonable inference." That kind of representative evidence, the Court held, could thus also be used in a class action because it would have been "sufficient to sustain a jury finding as to hours worked if it were introduced in each employee's individual action." *Id.* at 1048.

2. *Tyson*: the persuasiveness of evidence of average hours worked is a jury question.

The Court also addressed the standard for judging the sufficiency of evidence of average hours worked in a wage-and-hour class action at certification:

> Once a district court finds evidence to be admissible, its persuasiveness is, in general, a matter for the jury. Reasonable minds may differ as to whether the average time [an expert] calculated is probative as to the time actually worked by each employee. Resolving that question, however, is the near-exclusive province of the jury. The District Court could have denied class certification on this ground only if it concluded that no reasonable juror could have believed that the employees spent roughly equal time donning and doffing. The District Court made no such finding, and the record here provides no basis for this Court to second-guess that conclusion.

136 S. Ct. at 1049 (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250-52 (1986)).

B. The decision below is a straightforward application of *Tyson*.

Given the posture of this case before the Ninth Circuit, the court correctly held that "*Tyson* controls." App.55. Both are "wage and hour cases where the employer has failed to keep proper records." App.55. In both cases, "the employees … were paid under the same policy"—or rather *not* paid under common policies. 136 S. Ct. at 1040, 1042. Here, players were never paid overtime and not paid at all during training seasons pursuant to uniform policies that petitioners no longer "seriously contest" or "credibly dispute."[3] App.45-49. In both cases, the employers conceded the existence of Rule 23(a)(2) common questions, questions that can be resolved for all class members in "one stroke." *Wal-Mart*, 564 U.S. at 350.

And in both cases, the employers conceded the admissibility of the statistical studies offered as representative evidence of hours worked. Although petitioners initially moved to exclude the player survey here, the district court denied their motion, and petitioners did not challenge that ruling on appeal. App.51. The consequence of that concession under *Tyson* is clear and dispositive of petitioners' first question: though "[r]easonable minds may differ as to whether the average" arrival and departure time "is probative as to the time actually worked by each employee," "[r]esolving that question … is the near-exclusive province of the jury." 136 S. Ct. at 1049.

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[3] Petitioners say players "were paid under different compensation terms." Pet. at i, 35. But the wages players *received* is not at issue; at issue is the pay players did not receive, and that does not vary from class member to class member. None received pay during training seasons, and none were paid overtime. So like the workers in *Tyson*, all players were denied compensation "under the same policy." 136 S. Ct. at 1048.

As the Ninth Circuit explained, because petitioners did "not challenge the district court's ruling on admissibility under *Daubert*, the defects they have identified with the Main Survey could only have defeated certification upon a conclusion that all of the representative evidence offered—the Main Survey, schedules, testimony, and the like—could not have 'sustained a reasonable jury finding as to hours worked *in each employee's individual action*.'" App.51 (emphasis added). Which also disposes of petitioners' contrived claim (at 16) that "[u]nder the Ninth Circuit's view, … supposedly 'representative' evidence suffices to justify class certification so long as it is minimally probative, even if it would plainly not suffice in a class member's individual action." The court expressly acknowledged that representative evidence of hours work must be capable of sustaining a jury finding "in each employee's individual action." App.51.

C. The Ninth Circuit created no wage-and-hour *Tyson*-exception to *Wal-Mart*.

The decision below does not conflict with *Wal-Mart*, and because there is no conflict, the court of appeals had no reason to create—and did not create—any kind of exception to *Wal-Mart*. "The crux" of *Wal-Mart*, a Title VII sex discrimination case, was "commonality—the rule requiring a plaintiff to show that 'there are questions of law or fact common to the class.'" 564 U.S. at 349. In a sex discrimination case, a would-be class representative must provide "significant proof" of an employer's policy of discrimination, which acts as "glue" in a class action, so that "all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*." *Id.* at 352-53.

The plaintiffs in *Wal-Mart* lacked such a discriminatory policy, so they proposed to use statistical evidence of disparate impact on the female-employee class. This

Court held that "[m]erely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice" to demonstrate a discriminatory policy. 564 U.S. at 357. At bottom, "[b]ecause respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question." *Id.* at 359.

In *Tyson*, this Court said Tyson's "reliance on *Wal-Mart*" was "misplaced" because in *Wal-Mart* "this Court did not reach Rule 23(b)(3)'s predominance prong, holding instead that the class failed to meet even Rule 23(a)'s more basic requirement that class members share a common question of fact or law." 136 S. Ct. at 1048. Without a common policy of discrimination, the employees could not "have prevailed in an individual suit by relying on depositions detailing the ways in which other employees were discriminated against by their particular store managers." *Id.* "In contrast, the study [in *Tyson*] could have been sufficient to sustain a jury finding as to hours worked if it were introduced in each employee's individual action." *Id.*

The same is true here. Average arrival and departure times would be admissible in an individual players' case to estimate the beginning and ending of team activities, just as average donning and doffing times would have been admissible in a Tyson worker's individual case. And like *Tyson*, the decision below does not conflict with *Wal-Mart* because *Wal-Mart* is a commonality case; this case is not. Petitioners have conceded commonality, no doubt because of their two undisputed policies not to pay minimum and overtime wages—league-wide policies that further distinguish this case from *Wal-Mart*. The players here never needed statistical evidence to overcome the absence of

common policy, and the Ninth Circuit did not pass on any such question. There is no conflict with *Wal-Mart*.

D. The Ninth Circuit conducted the required "rigorous analysis" of the survey.

Both lower courts conducted the "rigorous analysis" Rule 23 requires. And under *Tyson*, the required analysis of representative evidence of hours worked in a wage-and-hour case has two components: "admissibility under *Daubert* and its appropriateness for meeting class certification requirements under *Tyson*." App.55. Here, because petitioners did not challenge the district court's admissibility ruling, the Ninth Circuit proceeded directly to the *Tyson* analysis and applied "the same standard of proof that would apply in any case"—the "no reasonable juror" standard. *Tyson*, 136 S. Ct. at 1051 (Roberts, C.J., concurring). "Once a district court finds [representative] evidence to be admissible, … [t]he District Court could have denied class certification on this ground only if it concluded that no reasonable juror could have believed that the employees spent roughly equal time" working. That is precisely the analysis the Ninth Circuit conducted. App.51-54.

Instead of engaging the court's analysis, petitioners ridicule the survey (at 15), suggesting that a measure of players' arrival and departure times is "borderline irrelevant." But as the Ninth Circuit explained, arrival and departure times are probative of "hours worked" under California law: "'hours worked' includes all time the employer 'permit[s]' an employee to work, even if the work is *not* required and the employee is *not* under the employer's control." App.53 (quoting *Morillion v. Royal Packing Co.*, 995 P.2d 139, 143 (Cal. 2000)). "Thus, a player who arrives early or stays late at the ballpark of their own volition and performs 'work' activities during that time is still owed

compensation because the player was 'permitted' to work, despite the work not being required."[4]

The "rigorous analysis" this Court's precedents require "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Wal-Mart*, 564 U.S. at 351. That is precisely what the Ninth Circuit did—it considered "the factual and legal issues comprising the plaintiff's cause of action." It is petitioners who undertake no such analysis, resorting instead to analysis-by-labels, like their assertion that the survey is "borderline irrelevant." Putting aside their relevancy waiver, petitioners never explain by what standard—if any—they judge the survey's relevancy.

And petitioners' urge "rigorous analysis" of the survey in isolation from all other evidence of hours worked, but that would be improper. In *Wal-Mart*, for example, the Court reviewed *all* the evidence the employees proffered. 564 U.S. at 346 ("three forms of proof," statistical, anecdotal, and testimonial). That is

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[4] The court's discussion focused on California law because of its earlier determination that "the Arizona and Florida classes can demonstrate liability simply by showing they worked any hours," while proving some of the California overtime claims might require use of the survey. App.49. But the survey is certainly relevant under both Arizona and Florida law, too. *See* Ariz. Admin. Code R20-5-1202 (defining "hours worked" as "including all time during which an employee is on duty or at a prescribed work place and all time the employee is suffered or permitted to work"); Fla. Stat. § 448.110(3) (incorporating federal law "as interpreted by applicable federal regulations"); 29 C.F.R. § 778.223 (requiring compensation for "(a) [a]ll time during which an employee is required to be … on the employer's premises or at a prescribed workplace; and (b) [a]ll time during which an employee is suffered or permitted to work whether or not he is required to do so"); § 790.6(b) (defining "workday" and "includ[ing] all time within" the workday "whether or not the employee engages in work throughout all of that period").

what the "no reasonable juror" standard requires and exactly what the lower courts did here. App.51.; *see Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000).

E. There is no split with the Third Circuit.

Petitioners attempt to invent a circuit split, arguing the decision below conflicts with the Third Circuit's later decision in *Ferreras v. American Airlines, Inc.*, 946 F.3d 178 (3d Cir. 2019). But *Ferreras*, like *Wal-Mart*, is a Rule 23(a)(2) commonality case in which the plaintiffs could not "satisfy even the commonality standard." 946 F.3d at 185. So, for all the same reasons that the Ninth Circuit's decision is not in conflict with *Wal-Mart*, it is also not in conflict with *Ferreras*.

Ferreras is also distinguishable because American Airlines had a policy of *paying* for the work at issue, so long as it was approved by a supervisor as an "exception" to "ordinary work hours." *Id.* at 181. Unlike here, the *Ferreras* plaintiffs did not allege that the "overarching [American] policy regarding exceptions has deprived anyone in particular of compensation to which he or she was entitled." *Id.* at 185. American's policy to pay for supervisor-approved time is the very opposite of the players' claim here of petitioners' policies *not* to pay.[5]

Petitioners also claim (at 27) that "the Third Circuit held that survey evidence of arrival and departure times was not sufficient to allow the employees to litigate their claims on a classwide basis." That is untrue. The *Ferreras* plaintiffs *offered no representative evidence*, yet another critical difference between this case

[5] The lack of a common policy also led inescapably to the court's conclusion that the plaintiffs had failed to show predominance. 946 F.3d at 186.

and *Ferreras*. *Id*. at 187. There is no conflict between the Ninth Circuit's decision and *Ferreras*.

II. THERE IS NO CIRCUIT SPLIT AS TO RULE 23(b)(2) COHESIVENESS.

Rule 23(b)(2) authorizes injunctive relief classes when "final injunctive relief … is appropriate respecting the class as a whole." The Ninth Circuit rejected any (b)(3)-like "predominance" inquiry masquerading as an extratextual (b)(2) "cohesiveness" requirement: "Although we have never explicitly addressed whether 'cohesiveness' is required under Rule 23(b)(2), courts that have imposed such a [cohesiveness] test treat it similarly to Rule 23(b)(3)'s predominance inquiry—something we have previously rejected in no uncertain terms." App.34.

That holding is unquestionably correct. Even petitioners do not deny that "Rule 23(b)(2) does not contain a separate requirement that 'questions of law or fact common to class members predominate.'" Pet. at 29. The Ninth Circuit's view of (b)(2) mirrors what this Court has held:

> The procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class*. When a class seeks an indivisible injunction benefiting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate …. Predominance and superiority are self-evident.

Wal-Mart, 564 U.S. at 362-63 (emphasis in original).[6] Neither this Court nor the court below held that a (b)(2) class need not be "cohesive," but they both explicitly held that (b)(2) does not require *predominance inquiries* to ensure (b)(2) "cohesiveness." In other words, "cohesiveness" is a built-in feature of Rule 23(b)(2)'s text, which achieves all the cohesiveness required because predominance is "self-evident."

In the nine years since this Court decided *Wal-Mart*, no circuit has held that Rule 23(b)(2) requires a predominance-like inquiry. And in the year since the Ninth Circuit issued its decision, no court has disputed its holding that Rule 23(b)(2) does not require a predominance-like inquiry. *Nor do petitioners*. Pet. at 29 ("Rule 23(b)(2) does not contain a separate requirement that 'questions of law or fact common to class members predominate"). And though the Ninth Circuit mentioned other "courts," it did not name any courts, nor did it say that a sister *circuit* had engaged in a (b)(3)-like predominance inquiry under the guise of a (b)(2) cohesiveness requirement.

Petitioners cite five circuit decisions as conflicting with the decision below. The outcome in none turned on the application of a (b)(3)-like predominance inquiry. Three of the decisions pre-date *Wal-Mart*, so even if they did conflict, further percolation in the lower courts would likely resolve the split, once those circuits consider the issue in light of *Wal-Mart*.

The Tenth Circuit's decision in *Shook v. Bd. of Cty. Comm'rs of El Paso*, 543 F.3d 597 (10th Cir. 2008), does not conflict with *Wal-Mart* or the decision below. Although the court held that "Rule 23(b)(2) demands a certain cohesiveness among class members with respect to their injuries," *id*. at 604, it did not undertake

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[6] In *Wal-Mart*, the Court addressed both Rule 23(a)(2) commonality and the (b)(2) requirement for an injunctive relief class.

a predominance-like inquiry under the rubric of "cohesiveness." It instead adhered to the text of Rule 23(b)(2).

As then-Judge Gorsuch explained, "[t]he latter half of Rule 23(b)(2) requires that final injunctive relief be appropriate for *the class as a whole*." *Id.* (emphasis in original). "[U]nder Rule 23(b)(2) the class members' injuries must be sufficiently similar that they can be addressed in a single injunction that need not differentiate between class members." *Id.* Though the court couched that textual requirement in terms of "cohesiveness," the court conducted no (b)(3)-like predominance inquiry. The court instead noted that the plaintiffs' "prayer for relief asks the district court to craft an injunction that takes into account the specific circumstances of individual inmates' plights." *Id.* at 605. So "different injunctions would be required to establish the appropriate behavior towards different groups of class members." *Id.* "[D]ifferences in proof or individualized issues" can defeat (b)(2) certification, and when they do, it is for "failure to meet Rule 23(b)(2)'s requirement that relief apply to the class as a whole." *Id.* at 608. There is no conflict between *Shook* and the decision below. What the court wrote in *Shook* is essentially what *Wal-Mart* said later: the cohesiveness Rule 23(b)(2) requires is an integral feature of the rule's requirement "that final injunctive relief be appropriate for the class as a whole."

Nor did the Seventh Circuit approve a (b)(3)-like predominance inquiry in *Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883 (7th Cir. 2011). That court observed, "Where a class is not cohesive such that a uniform remedy will not redress the injuries of *all* plaintiffs, class certification is typically not appropriate." 634 F.3d at 893 n.8 (citing *Shook*). Which is no more than a faithful restatement of the Rule's text.

In *Romberio v. Unumprovident Corp.*, 385 F. App'x 423 (6th Cir. 2009), the court expressly acknowledged

that "Rule 23(b)(2), unlike Rule 23(b)(3), contains no predominance requirement." *Id.* (citing *Barnes v. Am. Tobacco Co.,* 161 F.3d 127, 143 (3d Cir. 1998)). And the court undertook no predominance-like inquiry.[7] It instead found (b)(2) certification inappropriate because the constructive trust the plaintiffs' sought could not be imposed for the class as a whole "without individualized review of every claim." *Id.*

Neither of the two post-*Wal-Mart* cases on which petitioners rely come close to conflicting with the decision below. In both, the courts expressly held that "a Rule 23(b)(2) class need not meet the additional predominance and superiority requirements of Rule 23(b)(3)." *Ebert v. General Mills*, 823 F.3d 472, 480 (8th Cir. 2016); *see Gates v. Rohm and Haas Co.*, 655 F.3d 255, 263-64 (3d Cir. 2011). *Ebert*, quoting *Wal-Mart*, explained that for a (b)(2) class, "the relief sought must perforce affect the *entire class at once*." 823 F.3d at 480. And *Gates* relied on *Wal-Mart*'s holding that "[t]he key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." 655 F.3d at 264. Both cases adhere to Rule 23(b)(2)'s text, and neither employed nor approved a (b)(3)-like predominance inquiry. There is no circuit split.

III. THIS CASE IS A POOR VEHICLE FOR CONSIDERING EITHER QUESTION.

Both questions presented involve intractable waiver problems, arising from issues abandoned or not raised below and not considered by the court of appeals.

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[7] The dissent's criticisms did not accuse the majority of utilizing a (b)(3)-like predominance inquiry under the guise of (b)(2) cohesiveness. 385 F. App'x at 433 (Clay, J., dissenting).

Equally problematic is that resolution of either question is not only premature, but will also *not impact* the certification of any class. A reversal on question one will not result in the decertification of any (b)(3) class, and a reversal on question two will have no effect on (b)(2) proceedings on remand. Interlocutory review in this case implicates many of the problems this Court has repeatedly identified in interlocutory petitions. For these reasons alone, the petition should be denied.

A. Both questions hinge on waived issues.

The Court's "traditional rule" is to deny certiorari "when the question presented was not pressed or passed upon below." *United States v. Williams,* 504 U.S. 36, 41 (1992) (internal quotation marks omitted). Ordinarily, the Court does "not decide in the first instance issues not decided below," "without the benefit of thorough lower court opinions to guide [its] analysis of the merits. Ours is 'a court of final review and not first view.'" *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012).

1. Petitioners have waived key elements of the survey question.

Petitioners have waived key elements of the question "whether *Tyson* sanctions the use of statistical surveys to establish commonality and predominance for a wage-and-hour class." As already noted, petitioners abandoned any challenge to Rule 23(a) commonality below. Without ever acknowledging what the common questions are, petitioners repeatedly insisted that the common questions were swamped by individualized questions.[8] The court of appeals noted that petitioners did not contest commonality, so it unsurprising that the court did not pass on the question. App.11 n.5. Petitioners' commonality arguments are waived.

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[8] Def. Br. (ECF No. 38) at 3, 24, 28, 59, 62, 75.

Question one is also an attempt to resuscitate the issue of "the *use of* statistical surveys." Petitioners say (at 3) the players' "purportedly 'representative' evidence ... would never suffice to establish liability (or even be admissible) in an individual action," but that, too, is a waived issue because petitioners did "not challenge the district court's ruling on admissibility." App.51. Nor did they appeal the district court's finding that the survey "may be helpful to the jury, especially when considered in combination with other evidence such as the daily schedules and witness testimony." App.155. Even in this Court, petitioners concede the survey's relevance, however grudgingly. Pet. 15 (survey is "borderline-irrelevant"). No question of the survey's admissibility was presented to or decided by the court of appeals.

Commonality and admissibility are central components of question one. The question is thus waived.

2. The "cohesiveness" question was neither preserved nor decided below.

Petitioners' second question—"whether cohesiveness is required for class certification under Rule 23(b)(2)"—is not an issue they pressed below. Nor did the Ninth Circuit hold that (b)(2) does not require "cohesiveness," petitioners' contrary assertion notwithstanding. The court narrowly held that Rule 23(b)(2) requires no (b)(3)-like predominance inquiry. App.34-35.

Petitioners barely mentioned "cohesiveness" in the lower courts. They did argue that choice-of-law issues "undermine the cohesiveness of the class." Def. Br. (ECF No. 38) at 76-77. But in response to the players' challenge to the district court's adoption of a (b)(2) predominance-like "cohesiveness" requirement,[9] petition-

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[9] *See* Plf. Br. (ECF No. 16) at 45.

ers did not defend the district court's ruling. They neutrally footnoted that a "majority of the Circuits have expressly recognized a 'cohesiveness' requirement in Rule 23(b)(2)." *Id.* at 77 n.21. Even then they took no position on the question and did not argue that the proposed (b)(2) class is not cohesive, apart from their choice-of-law argument. Thus, the question presented to this Court, having not been pressed or decided below, is not preserved.

B. Reversal on either question would have little or no practical effect on the outcome of proceedings on remand.

1. The FLSA collective will proceed.

Petitioners discuss FLSA collectives at length in their petition, but neither question presented does. They are both Rule 23 questions. FLSA collectives are certified under the FLSA, not Rule 23. The "FLSA permits employees to bring lawsuits on behalf of 'themselves and other employees similarly situated.' 29 U.S.C. § 216(b)." App.56. Under Ninth Circuit precedent, the FLSA's standard differs from Rule 23 because it does not include the rule's "predominance, adequacy, and superiority requirements." *See Campbell v. City of Los Angeles*, 903 F.3d 1090 (9th Cir. 2018).

The Ninth Circuit thoughtfully "address[ed] whether the district court properly certified the FLSA collective action," and petitioners present no question challenging that ruling. Petitioners have thus waived any question regarding the FLSA collective.

2. The Rule 23 classes will proceed.

There are "strong prudential considerations disfavoring the exercise of the Court's certiorari power" when the parties' rights "would be unaffected" or the question presented "hypothetical." *Padilla v. Hanft*, 126 S. Ct. 1649, 1650 (2006) (Kennedy, J., concurring

in denial of certiorari). A reversal here on either question would not affect any class certification on remand.

Taking the second question first, no (b)(2) class has even yet been certified, much less an allegedly "incohesive" one. The Ninth Circuit remanded the question of (b)(2) certification with only one directive: that the district court not conduct a (b)(3) predominance inquiry as part of its reconsideration. App.35. So until a (b)(2) class is certified over some yet-to-be-discovered "cohesiveness" objection, there is no question about (b)(2) "cohesiveness" this Court can resolve that could conceivably "affect the rights" of the parties here.

Petitioners' first question is similarly flawed. A reversal would not undo any of the (b)(3) class certifications. It could not affect the Arizona or Florida classes because those certifications did not depend on use of the survey. Both are training season classes "during which virtually all players are completely unpaid for their participation" (App.44), so both can establish liability "simply by showing that the class members performed *any* compensable work." App.45-47.

The California class can also prove many of their claims through "team schedules alone—independent of the Main Survey or any other evidence." App.49. Working seven days in a workweek constitutes overtime under California law, and "approximately 65-85% of California League players had at least one workweek with games on all seven days" and half the season included seven-day workweeks, all of which can be established without the survey. App.48-49, 50.

The "strong prudential considerations disfavoring the exercise of the Court's certiorari power" when the parties" rights "would be unaffected," could scarcely be stronger than in the context of this case: an interlocutory appeal from a class certification decision that would not be impacted by a decision of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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