No. 19-1339

In the
Supreme Court of the United States

KANSAS CITY ROYALS BASEBALL CORP., et al.,

Petitioners,

v.

AARON SENNE, on behalf of himself and all others similarly situated, et al.,

Respondents.

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

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The Ninth Circuit's decision in this case squarely conflicts with decisions of multiple other circuits and badly misreads this Court's class-action precedents. This Court held in *Wal-Mart* that Rule 23 precludes certification by transforming individualized cases into a "trial by formula" where statistical evidence substitutes for the kind of plaintiff-specific evidence that would be central in individual cases. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 366-67 (2011). This Court reinforced those principles in *Tyson*, while recognizing a narrow exception allowing the use of "representative" evidence in wage-and-hour class actions when that same evidence would be admissible in individual wage-and-hour cases. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1048 (2016). Other circuits, including the Third Circuit in *Ferreras v. American Airlines, Inc.*, 946 F.3d 178 (3d Cir. 2019), have correctly recognized that *Tyson* did not create a wage-and-hour exception to *Wal-Mart* and correctly rejected efforts to certify wage-and-hour classes spanning different kinds of workers in disparate circumstances. In stark contrast, the Ninth Circuit not only (mis)read *Tyson* as permitting the routine use of representative evidence in wage-and-hour litigation to overcome vast differences among workers and satisfy Rule 23's requirements, but explicitly rejected the Rule 23(b)(2) cohesiveness requirement that five other circuits have correctly derived from *Wal-Mart* and the Rule itself.

Respondents offer little to reconcile the decision below with *Wal-Mart*, *Ferreras*, or the "cohesiveness" requirement employed by multiple circuits. Instead,

respondents offer waiver theories that depend on the same misunderstandings of this Court's precedents that pervade the decision below.

For example, respondents insist that *Wal-Mart* and *Ferreras* have no application when defendants concede at least one common issue. But neither decision is so limited, and here the Ninth Circuit erred in its predominance analysis by wrongly treating the length of the workday as a common issue. Petitioners never conceded that *that issue* was common, and both *Wal-Mart* and *Ferreras* make clear that it is not. And if the workday issue is not common, then common issues plainly do not predominate. Respondents also suggest that petitioners conceded the admissibility of the Main Survey. But petitioners never conceded that the Main Survey would be admissible in an *individual* case to prove the length of a player's workday. It would not, as the Main Survey is useful only for a classwide "trial by formula" that ignores differences among players at different positions on different teams.

Finally, respondents suggest that none of these problems would prevent this case from proceeding as a class in the Ninth Circuit. But that just underscores the need for this Court's review. Simply put, this effort to bridge the vast differences among class members would not be certified as a class action in the Third Circuit or any other circuit faithfully applying *Wal-Mart* and *Tyson*.

ARGUMENT

I. The Decision Below Squarely Conflicts With *Wal-Mart*, *Tyson*, And Third Circuit Precedent Faithfully Applying Them.

1. The decision below converts *Tyson* into a gaping wage-and-hour exception to *Wal-Mart*'s rule against "trial by formula" and its requirement to conduct a "rigorous analysis" before certifying a class under Rule 23. *See Wal-Mart*, 564 U.S. at 350-51. That much is clear from respondents' efforts to defend the decision, for rather than attempt to reconcile it with *Wal-Mart*, they insist that *Wal-Mart* has no role to play either in a wage-and-hour case or in any case where there is at least one common issue.

Respondents insist that because they sought to use representative evidence to establish how many hours class members worked, rather than to establish that class members were subject to "company-wide policies," "a different decision of this Court—*Tyson*[]—'controls.'" BIO.15 (quoting Pet.App.55-56). Under *Tyson*, they claim, "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." BIO.15. In other words, in respondents' view, workday length is *always* a common question in wage-and-hour cases—even if class members performed different jobs at different worksites for different employers—and the only real issue for courts is whether purportedly "representative" evidence is admissible in the class proceeding. If it is, then whether it suffices to

establish how many hours each employee worked is "'the near-exclusive province of the jury.'" BIO.19 (quoting *Tyson*, 136 S. Ct. at 1049).

That reasoning converts *Tyson* into exactly the kind of "special, relaxed rule authorizing plaintiffs to use otherwise inadequate representative evidence in FLSA-based cases" that multiple members of this Court warned against. *Tyson*, 136 S. Ct. at 1051 (Roberts, C.J., concurring); *see also id.* at 1056 (Thomas, J., dissenting). *Tyson* was never intended to obviate the need to ask whether workday length is actually a common question or whether proffered "representative" evidence would be admissible to prove workday length in an individual case. And it certainly was not intended to replace *Wal-Mart*'s "rigorous analysis" or aversion to "trial by formula" with a test under which the commonalty of class members' hours worked is "the near-exclusive province of the jury" in wage-and-hours cases.

Instead, *Tyson* simply stands for the unremarkable proposition that a class may use representative evidence to try to prove hours worked when that is actually a common question and the same evidence would be used in an individual case. Whether that hours-worked question is common is a question for the court applying the "rigorous analysis" of *Wal-Mart*, not for the jury. While that question may be common when all employees "worked in the same facility, did similar work, and [were] paid under the same policy," *Tyson*, 136 S. Ct. at 1048 (maj. op.), it is manifestly not common simply because plaintiffs purport to prove an average workday based on a survey. And it is certainly not common here, where

the classes span disparate plaintiffs playing different positions for different employers at different workplaces, and who did not even spend all time at "the workplace" working.

Respondents' mantra that "*Wal-Mart* is a commonality case" and "this case is not," BIO.22, simply repeats the same mistake as the decision below. To be sure, petitioners do not contest that respondents have identified *some* common questions. But that does not obviate the need to determine whether the hours-worked question is common. The commonality of *that* question is critical to the predominance inquiry and to the court's obligation "to give careful scrutiny to the relation between common and individual questions" even where some common issues are present. *Tyson*, 136 S. Ct. at 1045. Thus, it is precisely because *Wal-Mart* is a "commonality case" that it is central to determining whether the hours-worked question is common here. And it is obviously not, as the class spans workers as disparate as a Cubs shortstop in rookie ball who is a fixture around the clubhouse and a longtime AAA pitcher in the Marlins organization who is rarely seen when he is not scheduled to start. In that situation, using a survey (or evidence of a master schedule) to overcome the differences in hours worked is just *Wal-Mart*'s "trial-by-formula" all over again. Contrary to the views of respondents and the Ninth Circuit, nothing in *Tyson* creates an exception to *Wal-Mart*'s approach to commonality or its aversion to trial by formula.

2. Respondents fare no better with their effort to distinguish the Third Circuit's decision in *Ferreras*, which squarely contradicts their claim that *Tyson*, not

Wal-Mart, "controls" whenever a class seeks to prove hours worked. Indeed, respondents' misunderstanding of *Wal-Mart* leaves them with no meaningful basis to deny the conflict between the decision below and *Ferreras*' denial of certification of a far more modest putative wage-and-hour class. Respondents insist that *Ferreras,* like *Wal-Mart*, is a case about commonality. Exactly. That is precisely why *Ferreras* (like *Wal-Mart*) demonstrates that the hours-worked issue here is not common, and thus that individualized issues predominate. Indeed, *Ferreras* found an hours-worked issue "inherently individualized" even though the putative class was limited to workers of a single employer at a single airport. 946 F.3d at 186. That same analysis makes the hours-worked issue here individualized *a fortiori*, given the far more disparate circumstances of players at ballparks all across the country.

Respondents' observation that *Ferreras* did not involve survey evidence is equally wide of the mark. The Third Circuit did not deny class treatment because of an absence of representative proof. It denied certification because "the employees would need *individualized*, not representative, evidence to prove their case." *Id.* at 187 (emphasis added). Indeed, that the plaintiffs in *Ferreras* did not intend to employ representative or statistical evidence should have minimized the *Wal-Mart* problem. That the Third Circuit found that *Wal-Mart* precluded certification nonetheless makes the conflict with the decision below even starker. There is simply no denying that the classes the Ninth Circuit green-lighted here would be non-starters in the Third Circuit.

3. Had the Ninth Circuit engaged in any meaningful analysis of whether the hours-worked issue is a common question, the answer plainly would have been no. Respondents do not work in a single facility or seek compensation for a single activity. They span thousands of minor-leaguers who play different positions for different affiliates of different Clubs in different states and who seek compensation for all "baseball activities." Moreover, respondents themselves acknowledge that class members "were paid under different compensation terms," BIO.20 n.3, creating potential disparities as to who was and was not adequately compensated for whatever time may be compensable. On the spectrum of commonality, this case falls at very nearly the opposite end of *Tyson*, where—unlike here—all class members worked at a single plant and sought compensation for a single, common task that was indisputably compensable.

Respondents resist that conclusion, suggesting that expansive state-law definitions of "hours worked," the "continuous workday" rule, or some combination thereof render all these intra-class distinctions irrelevant. BIO.23-24 & n.4. But they provide no support for their credulity-straining claim that three different states uniformly treat watching TV and relaxing in the locker room as "work." Nor do they acknowledge that the "continuous workday rule" is only a presumption—and one easily overcome here by the highly *individualized* evidence of what hours each player actually worked. The "continuous workday rule" was in effect in *Tyson* too, and yet no Justice suggested that it was sufficient to make *Wal-Mart* inoperative. And while respondents try to downplay differences in compensation by noting that

this case is about "the pay players did *not* receive," BIO.20 n.3 (emphasis added), the amount of any overtime due would depend on differences in base pay.

Respondents' efforts to defend the decision below thus succeed only in confirming that it carves wage-and-hour cases out from the ordinary requirements of Rule 23 and puts *Tyson* on a collision course with *Wal-Mart*. The Third Circuit plainly chose a different path in following *Wal-Mart* and refusing to certify a far more modest wage-and-hour class. This Court's review is sorely needed.

II. The Decision Below Squarely Conflicts With Multiple Circuits' Rule 23(b)(2) Decisions.

The decision below also creates a circuit split on whether a Rule 23(b)(2) class must be cohesive. The Ninth Circuit openly acknowledged as much: It recognized that other courts have held that a "[](b)(2) class" must satisfy "a 'cohesiveness' requirement," and it explicitly "rejected" "such a test." Pet.App.34-35. *But see, e.g.*, *Ebert v. Gen. Mills*, 823 F.3d 472, 480 (8th Cir. 2016); *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 264 (3d Cir. 2011); *Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 893 & n.8 (7th Cir. 2011); *Romberio v. Unumprovident Corp.*, 385 F. App'x 423, 432 (6th Cir. 2009); *Shook v. Bd. of Cty. Comm'rs of El Paso*, 543 F.3d 597, 604 (10th Cir. 2008).

Respondents inexplicably claim that the Ninth Circuit "did not hold that Rule 23(b)(2) has no 'cohesiveness' requirement." BIO.2. But the decision below speaks for itself: "We further hold that the district court erred in imposing a 'cohesiveness' requirement for the proposed Rule 23(b)(2) class." Pet.App.34. That holding was unambiguous and

outcome-determinative: The Ninth Circuit vacated the district court's decision denying (b)(2) certification based on its view that (b)(2) has *no cohesiveness requirement*, not because the district court was too demanding in applying the cohesiveness test. Pet.App.34-35 & n.15. Respondents attempt to recast the Ninth Circuit's ruling as simply rejecting "a predominance-like inquiry" that no circuit applies. BIO.27-29. But that is doubly wrong. In reality, the court rejected *any* cohesiveness inquiry, including the test applied by numerous other circuits, which the Ninth Circuit itself described as "similar[] to Rule 23(b)(3)'s predominance inquiry." Pet.App.34-35.

That holding conflicts not only with five other circuits, but with this Court's precedents and the text of Rule 23(b)(2). As *Wal-Mart* explained, Rule 23(b)(2) lacks an explicit predominance requirement not because the predominance of common issues in a (b)(2) class is optional, but because "[p]redominance and superiority are self-evident" if the class truly "seeks an indivisible injunction benefiting all its members at once," 564 U.S. at 362-63—or, in the words of the rule, relief "respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). In other words, there is no need to ask whether individualized issues predominate in a proper (b)(2) class because a proper (b)(2) class will not present any individualized issues, but will instead provide injunctive relief for "the class as a whole." *Id.*

Respondents contend that petitioners identified no case from another circuit in which the "outcome … turned on" a "predominance[-like]" cohesiveness inquiry. BIO.27. Wrong again. The Eighth Circuit decertified the (b)(2) class in *Ebert* because a

determination that the defendant *could* be held liable for certain environmental contamination would "not apply uniformly to the entire class" and would still leave "highly individualized" inquiries to determine whether the defendant was *actually* liable to each class member and, if so, what relief was appropriate. 823 F.3d at 481. Likewise, in *Gates*, the Third Circuit refused to certify a (b)(2) class for lack of cohesiveness because "individual issues were significant to certain elements of the medical monitoring claims" the class sought to press. 655 F.3d at 264; *see also, e.g.*, *Shook*, 543 F.3d at 604 (examining whether "individualized issues relating to class members' injuries overwhelm[ed] class cohesiveness"). Here too, a host of individualized issues posed an obstacle to certification of a (b)(2) class as long as cohesiveness is required, as the district court's analysis demonstrates.

Respondents suggest that all the cases requiring cohesiveness are wrong, and that this square split will resolve itself "once those circuits consider the issue in light of *Wal-Mart*." BIO.27. But some of those decisions not only post-date *Wal-Mart*, but correctly invoke *Wal-Mart* as *support* for the cohesiveness requirement. *See, e.g., Gates*, 655 F.3d at 264 ("*Wal-Mart* recently highlighted the importance of cohesiveness in light of the limited protections for absent class members under subsections (b)(1) and (b)(2)."). In all events, if most circuits really were applying a cohesiveness test that contradicts *Wal-Mart*, that would only underscore the need for this Court's review.

III. This Case Is An Excellent Vehicle To Resolve Exceptionally Important Questions.

The decision below defies this Court's cases, creates two circuit splits, and creates a wage-and-hour exception to the normal rules of class certification. Respondents hope to forestall review nonetheless by raising a number of waiver and related vehicle problems. None has merit. Instead, they reflect the same misguided views of Rule 23 that permeate the Ninth Circuit's ruling.

Respondents first fault petitioners for failing to contest commonality below. BIO.30. But, as noted, petitioners have consistently argued that the critical hours-worked issue is not common, and that the individualized nature of that issue precludes common issues from predominating. That petitioners do not contend that there is *no* common issue makes absolutely no difference—and to the extent respondents believe that *Wal-Mart* is inoperative whenever there is *any* common issue, that just repeats the Ninth Circuit's basic error.

Respondents also fault petitioners for declining to challenge the admissibility of the Main Survey on appeal. BIO.31. But the relevant question here is not whether the Main Survey is minimally probative *if there is to be a class proceeding*, but whether it would be admissible to prove an individual player's hours-worked *in an individual case*. Petitioners have consistently argued that the Main Survey would not be admissible in an individual case as part and parcel of their argument that respondents have an insuperable *Wal-Mart* problem that *Tyson* does not fix. *See, e.g.*, CA9.Br.36-37 ("[N]o putative class

member could have relied on the survey to prove how much time he spent on team-related activities in an individual litigation.").

Respondents next repeat their baffling contention that the cohesiveness issue "was neither preserved nor decided below." BIO.31. But no matter how many times they deny it, the decision below speaks for itself: "We further hold that the district court erred in imposing a 'cohesiveness' requirement for the proposed [](b)(2) class." Pet.App.34.

Finally, respondents claim that "[r]eversal on either question [presented] would have little or no practical effect." BIO.32. That is both wrong and counterproductive. First, the Ninth Circuit plainly premised its rulings on the lack of a cohesiveness test and its (mis)reading of *Tyson*: "[*M*]*ost significantly*, we are persuaded that under *Tyson*, the representative evidence plaintiffs offered was adequate to meet their burden at this stage." Pet.App.50 (emphasis added). Second, to the extent certification of these classes is inevitable under Ninth Circuit precedent, that just underscores how far out of step the Ninth Circuit's class-action jurisprudence is from that of its sister circuits and this Court.

In reality, this case is an excellent vehicle for this Court's review. If these sprawling classes spanning plaintiffs playing different positions for different teams at different ballparks under different compensation structures can be certified, then so can any wage-and-hour class. That is contrary to the holdings of other circuits, and it is contrary to the assurances of numerous Justices in *Tyson*. Certiorari is plainly warranted.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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