No. _____

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

PETITION FOR WRIT OF CERTIORARI

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June 1, 2020

QUESTIONS PRESENTED

This sprawling class proceeding involves multiple classes covering thousands of minor-league baseball players who played at different positions for dozens of affiliates across 30 Major League Clubs who were paid under different compensation terms. Under the clear teaching of cases like *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), the thousands of disparate individual actions encompassed by these proceedings cannot be shoehorned into a class action for a "trial by formula" that would look nothing like a class member's individual trial. Nonetheless, the Ninth Circuit certified these sprawling (b)(3) classes by reading this Court's decision in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), to create what amounts to a wage-and-hour exception to *Wal-Mart*. The court then exacerbated that error by reversing the district court's refusal to certify a (b)(2) class as not cohesive—not by disagreeing with the district court's judgment, but by expressly discarding the cohesiveness requirement that every other circuit to consider the question has derived from *Wal-Mart*.

The questions presented are:

1. Whether *Tyson* sanctions the use of statistical surveys to establish commonality and predominance for a wage-and-hour class that encompasses different kinds of employees performing different kinds of work for different employers at different worksites under different compensation terms.

2. Whether cohesiveness is required for class certification under Rule 23(b)(2).

PARTIES TO THE PROCEEDING

Petitioners are the Kansas City Royals Baseball Corporation, Office of the Commissioner of Baseball, Angels Baseball LP, AZPB Limited Partnership, Athletics Investment Group LLC DBA Oakland Athletics Baseball Company, The Baseball Club of Seattle, LLLP, Chicago Cubs Baseball Club, LLC, The Cincinnati Reds LLC, Colorado Rockies Baseball Club, Ltd., Detroit Tigers, Inc., Houston Astros, LLC, Los Angeles Dodgers LLC, Miami Marlins, LP., Milwaukee Brewers Baseball Club, Limited Partnership, Minnesota Twins, LLC, New York Yankees Partnership, Padres L.P., Pittsburgh Associates, Rangers Baseball LLC, Rogers Blue Jays Baseball Partnership, San Francisco Giants Baseball Club LLC, St. Louis Cardinals, LLC, and Sterling Mets, L.P. Petitioners were defendants in the trial court and Ninth Circuit.

Respondents are Aaron Senne, Michael Liberto, Oliver Odle, Brad McAtee, Craig Bennigson, Matt Lawson, Kyle Woodruff, Ryan Kiel, Kyle Nicholson, Brad Stone, Matt Daly, Aaron Meade, Justin Murray, Jake Kahaulelio, Ryan Khoury, Dustin Pease, Jeff Nadeau, Jon Gaston, Brandon Henderson, Tim Pahuta, Lee Smith, Joseph Newby, Ryan Hutson, Matt Frevert, Roberto Ortiz, Witer Jimenez, Kris Watts, Mitch Hilligoss, Daniel Britt, Yadel Marti, Helder Velaquez, Jorge Jimenez (State Prisoner: AS 5085), Jorge Minyety, Edwin Maysonet, Jose Diaz, Nick Giarraputo, Lauren Gagnier, Leonard Davis, Gaspar Santiago, Grant Duff, Omar Aguilar, Mark Wagner, David Quinowski, Brandon Pinckney, Individually and on Behalf of All Those Similarly

Situated, Jake Opitz, and Brett Newsome. Respondents were Plaintiffs in the trial court and Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

The Office of the Commissioner of Baseball (which does business as "Major League Baseball" or "MLB") is an unincorporated association and has as its members the thirty Major League Baseball Clubs. MLB has no corporate parent, and no publicly held corporation owns 10% or more of MLB.

Angels Baseball LP is a California limited partnership. The general partner of Angels Baseball LP is Moreno Baseball, LP, which is a California limited partnership. There is no publicly held company that owns 10% or more of Angels Baseball LP or Moreno Baseball LP.

AZPB Limited Partnership is a Delaware limited partnership. The general partner of AZPB Limited Partnership is AZDB I, LLC, which is a Delaware limited liability company. There is no publicly held company that owns 10% or more of AZPB Limited Partnership or AZDB I, LLC.

Athletics Investment Group LLC DBA Oakland Athletics Baseball Company is a California limited liability company. Athletics Investment Group LLC is wholly owned by Athletics Holdings LLC, which is a Delaware limited liability company. There is no publicly held corporation that owns 10% or more of Athletics Holdings LLC.

The Baseball Club of Seattle, LLLP is a Washington limited liability limited partnership. The managing general partner of The Baseball Club of Seattle, LLLP is Mariners Baseball LLC, which is a Washington limited liability company. The limited partner of The Baseball Club of Seattle, LLLP is Mariners Investment LLC, which is a Washington

limited liability company. Mariners Baseball LLC and Mariners Investment LLC are each wholly owned by First Avenue Entertainment LLLP, which is a Washington limited liability limited partnership. Nintendo of America, Inc. owns 10% or more of First Avenue Entertainment LLLP. Nintendo of America is wholly owned by Nintendo Company Ltd., which is a publicly held Japanese corporation.

Chicago Cubs Baseball Club, LLC, is a Delaware limited liability company. Chicago Cubs Baseball Club, LLC is wholly owned by Chicago Baseball Holdings, LLC, which is a Delaware limited liability company. Chicago Baseball Holdings, LLC is wholly owned by Chicago Entertainment Ventures, LLC, which is a Delaware limited liability company. There is no publicly held corporation that owns 10% or more of Chicago Entertainment Ventures, LLC.

The Cincinnati Reds LLC is a Delaware limited liability company. There is no corporate parent or publicly held corporation that owns 10% more of The Cincinnati Reds LLC.

Colorado Rockies Baseball Club, Ltd. is a Colorado limited partnership. The general partner of Colorado Rockies Baseball Club Ltd. is Colorado Baseball 1993, Inc., which is a Colorado corporation. There is no publicly held corporation that owns 10% or more of Colorado Rockies Baseball Club, Ltd. or Colorado Baseball 1993, Inc.

Detroit Tigers, Inc. is a Michigan corporation. There is no corporate parent or publicly held corporation that owns 10% or more of Detroit Tigers, Inc.

Houston Astros, LLC is a Texas limited liability company. Houston Astros, LLC is wholly owned by HBP Team Holdings, LLC, which is a Delaware limited liability company. HBP Team Holdings, LLC is wholly owned by Houston Baseball Partners, LLC, which is a Delaware limited liability company. There is no publicly held corporation that owns 10% or more of Houston Baseball Partners, LLC.

Kansas City Royals Baseball Corporation is a Missouri corporation. There is no corporate parent or publicly held corporation that owns 10% or more of Kansas City Royals Baseball Corporation.

Los Angeles Dodgers LLC is a Delaware limited liability company. Los Angeles Dodgers LLC is wholly owned by Los Angeles Dodgers Holding Company LLC, which is a Delaware limited liability company. Los Angeles Dodgers Holding Company LLC is wholly owned by LA Holdco LLC, which is a Delaware limited liability company. There is no publicly held corporation that owns 10% or more of LA Holdco LLC.

Miami Marlins, L.P. has been renamed WSC03, LP. WSC03, LP is a Delaware limited partnership. The general partner of WSC03, LP is Double Play Company, which is a Nova Scotia corporation. There is no publicly held company that owns 10% or more of WSC03, LP or Double Play Company.

Milwaukee Brewers Baseball Club, Limited Partnership is a Wisconsin limited partnership. The general partner of Milwaukee Brewers Baseball Club, Limited Partnership is Milwaukee Brewers Holdings LLC, which is a Wisconsin limited liability company. There is no publicly traded company that owns 10% or more of Milwaukee Brewers Baseball Club, Limited

Partnership or Milwaukee Brewers Holdings LLC. Milwaukee Brewers Baseball Club, Inc. is a Wisconsin corporation. There is no corporate parent or publicly-held corporation that owns 10% or more of its stock.

Minnesota Twins, LLC is a Delaware limited liability company. There is no corporate parent or publicly held corporation that owns 10% more of Minnesota Twins, LLC.

New York Yankees Partnership is an Ohio limited partnership. There is no corporate parent or publicly held corporation that owns 10% or more of New York Yankees Partnership.

Padres L.P. is a Delaware limited partnership. The general partner of Padres L.P. is Padres GP, LLC, which is a Delaware limited liability company. P adres GP, LLC is wholly owned by SoCal SportsNet, LLC, which is a Delaware limited liability company. There is no publicly held corporation that owns 10% or more of Padres L.P. or SoCal SportsNet, LLC.

Pittsburgh Associates is a Pennsylvania limited partnership. The general partner of Pittsburgh Associates is Pittsburgh Baseball Holdings, Inc., which is a Pennsylvania corporation. There is no publicly held company that owns 10% or more of Pittsburgh Associates or Pittsburgh Baseball Holdings, Inc.

Rangers Baseball LLC is a Delaware limited liability company. Rangers Baseball, LLC is wholly owned by Rangers Baseball HoldCo LLC, which is a Delaware limited liability company. Rangers Baseball HoldCo LLC is wholly owned by Rangers Baseball Express LLC, which is a Delaware limited liability

company. There is no publicly held corporation that owns 10% or more of Rangers Baseball Express, LLC.

Rogers Blue Jays Baseball Partnership is an Ontario general partnership. The partners of Rogers Blue Jays Baseball Partnership are Rogers Sports Holdings, Inc. and Blue Jays Holdco, Inc., each of which is an Ontario corporation. Rogers Sports Holdings, Inc. and Blue Jays Holdco, Inc. are each wholly owned by Rogers Media Inc., which is an Ontario corporation. Rogers Media Inc. is wholly owned by Rogers Communications Inc., which is a publicly held Ontario corporation.

San Francisco Giants Baseball Club LLC is a Delaware limited liability company. San Francisco Giants Baseball Club LLC is wholly owned by San Francisco Baseball Associates LLC, which is a Delaware limited liability company. There is no publicly held corporation that owns 10% or more of San Francisco Baseball Associates LLC.

St. Louis Cardinals, LLC is a Missouri limited liability company. St. Louis Cardinals, LLC is wholly owned by SLC Holdings, L.L.C., which is a Missouri limited liability company. There is no publicly held corporation that owns 10% or more of SLC Holdings, L.L.C.

Sterling Mets, L.P. is a Delaware limited partnership. The general partner of Sterling Mets, L.P. is Mets Partners, Inc., which is a New York corporation. There is no publicly held corporation that owns 10% or more of Sterling Mets, L.P. or Mets Partners, Inc.

STATEMENT OF RELATED PROCEEDINGS

United States District Court (N.D. Cal):

Senne v. Office of the Commissioner of Baseball, No. 14-cv-00608-JCS (Mar. 7, 2017)

United States Court of Appeals (9th Cir.):

In re Yadel Marti v. USDC-CASF,

No. 15-72971 (Nov. 16, 2015)

Senne v. Kansas City Royals Baseball Corp.,

No. 17-80043 (Jun. 14, 2017)

Senne v. Kansas City Royals Baseball Corp., Nos. 17-16245, 17-16267, 17-16276 (Jan. 3, 2020)

Senne v. Kansas City Royals Baseball Corp.,

Nos. 17-16245, 17-16267, 17-16276 (Aug. 16, 2019)

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PETITION FOR WRIT OF CERTIORARI

This sprawling and ambitious effort to change the compensation system for minor-league baseball players should never have been certified as a series of class actions. The putative wage-and-hour classes here are composed of thousands of minor-league baseball players who live in more than a dozen different states, played at different positions for dozens of affiliates across 30 Major League Clubs, and were compensated under different terms. Complicating matters further, there is no typical workday for minor-league baseball players, who are more interested in making the big-league club than with "punching in" at the ballpark at set times or for uniform periods. The claims and interests of the various players are wildly disparate, survey evidence of average arrival and departure times is misleading and entirely insufficient to create a common issue, and the (b)(2) class is far from cohesive. Yet none of these obstacles proved sufficient to stop the Ninth Circuit, which departed from the precedents of this Court and the law of its sister circuits in allowing these class actions to proceed.

In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), this Court warned against turning individual employment cases that would turn on individualized facts into sprawling class proceedings that overcome differences in individualized circumstances via "trial by formula." Four years ago, this Court recognized that, fully consistent with the teaching of *Wal-Mart*, there are narrow circumstances in which representative evidence may be used to satisfy commonality and predominance and prove liability in

class proceedings. But the Court allowed such representative evidence to be used only if the same representative evidence would be "sufficient to sustain a jury finding as to hours worked if it were introduced in each employee's individual action." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1048 (2016).

Applying that rule, this should have been a straightforward case. The putative classes included players for different teams at different positions in an industry where there is no such thing as a typical workday. Yet the principal evidence the plaintiffs claimed would demonstrate a common issue concerning hours worked is a survey of what time a nonrandom sample of players typically arrived at and left their ballparks or training facilities. The notion that this would suffice to prove the number of compensable hours a player worked—or would even be admissible—in an individual case is fanciful. It is certainly not enough to convert highly individualized issues of when the workdays of class members began and ended and the compensability of what they did in between into common issues. The survey did not even ask players what they were doing while they were at the ballpark—a considerable problem given the copious evidence that players often just "hang out" at the ballpark in ways that are not compensable and have no obvious parallel at meatpacking facilities or other more typical workplace. That generalized survey ignored not only this critical issue, but the fact that what time is compensable and uncompensated depends on (among other things) what position a player played, for what Club, and under what terms.

The Ninth Circuit nonetheless deemed this purportedly "representative" survey sufficient to demonstrate commonality and predominance by (mis)reading *Tyson* as effectively creating a wage-and-hour exception to *Wal-Mart*. Indeed, by allowing a putative class to establish commonality and predominance through purportedly "representative" evidence that would never suffice to establish liability (or even be admissible) in an individual action, the Ninth Circuit replaced the "rigorous analysis" that Wal-Mart requires with exactly the kind of relaxed rule for the use of representative evidence that multiple Justices in *Tyson* cautioned against. The Ninth Circuit's error is underscored by the Third Circuit's rejection of a comparable effort to use *Tyson* to certify a sprawling wage-and-hour class action with more in common with the putative *Wal-Mart* class (and this case) than the more targeted class at issue in *Tyson*. The Third Circuit squarely rejected that effort even in the context of a putative class involving a single employer at a single workplace. Thus, by certifying multiple (b)(3) classes here covering dozens of employers and worksites, the decision below squarely conflicts with decisions of this Court and the Third Circuit.

The Ninth Circuit compounded that Rule 23(b)(3) error by creating a circuit split on an important Rule 23(b)(2) question: whether a class seeking only injunctive relief must be cohesive to be certified under Rule 23(b)(2). Every circuit to address that question has concluded that a (b)(2) class must be cohesive—in no small measure because this Court indicated as much in *Wal-Mart*. As this Court explained, because a (b)(2) class may be certified only if the complained-

of 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," a class for which liability cannot be established for all members at once is, by definition, not an appropriate (b)(2) class. 564 U.S. at 360. Yet while in other circuits (and in the district court here) the failure to demonstrate cohesiveness prevents a (b)(2) class from being certified, under the Ninth Circuit's rule, such cohesion is unnecessary, and thus the district court's refusal to certify a (b)(2) class was reversed.

The ultimate result of the decision below is to make it radically easier to certify wage-and-hour classes—the single most prevalent kind of class action—in the Ninth Circuit than anywhere else in the country. That incongruity is exacerbated by the fact that the federal Fair Labor Standards Act ("FLSA") allows for nationwide collective actions. Making matters worse, the Ninth Circuit embraced a distorted choice-of-law analysis that facilitates using state wage-and-hour law to certify classes involving far-flung employers. In short, the decision below is irreconcilable with this Court's precedent, creates two circuit splits, and provides a roadmap to virtually automatic certification of both federal and state-law wage-and-hour classes in the Ninth Circuit even when (as here) individualized issues are pervasive and unavoidable. This Court should grant certiorari.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 934 F.3d 918 and reproduced at App.1-89. The district court's opinion is available at 2017 WL 897338 and reproduced at App.92-195.

JURISDICTION

The Ninth Circuit issued its opinion on August 16, 2019, and denied rehearing en banc on January 3, 2020. App.90-91. On March 19, 2020, this Court "extended" "the deadline to file any petition for a writ of certiorari due on or after" that date "to 150 days." This Court has jurisdiction under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

A. Factual and Procedural Background

1. The minor leagues operate as a training ground in which players play in leagues at various levels and, in some cases, advance to the Majors. While minor-league games provide countless fans with entertainment in a typical year, the primary purpose of minor-league baseball is to enhance players' skills through instruction, training, and development programs, with the ultimate goal to help players reach a coveted spot on a Club's Major League roster. App.2.

The baseball year typically begins in March when pitchers and catcher report for spring training in either Arizona or Florida. App.3. During spring training, each Club's staff trains and evaluates each player and decides whether he should be assigned to the Major League Club to start the regular season, or, if not, to one of the Club's minor-league affiliates. App.4. The duration of each player's participation in spring training depends on his Club's preferences, his skill level, and his position.

After spring training, some players participate in extended spring training for additional instruction or treatment. App.4. Most others begin to play regular-season minor-league games, during what is known as

the "championship season," for one or more of their Clubs' minor-league affiliates, which span 44 states. App.4. At the end of the championship season in September, most players go home for the offseason. Some Clubs invite a select group of players to participate in their respective instructional leagues, which provide players with individualized instruction, either to address a specific skill or to recognize superior performance and potential. App.5. A handful of minor leaguers are called up the big-league Club, which in a typical year is allowed to expand its roster on September 1.

2. Players are paid by their respective MLB Clubs, not by the minor-league affiliates for which they play. App.3. There are nearly 200 minor-league affiliates across the country, spanning 44 states. App.2. The affiliates belong to a number of different leagues, which are classified by skill level, ranging from Rookie Ball to Triple-A.

The Clubs pay players varying salaries and benefits. App.3. Although each player receives the same base salary during his first year in the minors, most players receive signing bonuses, performance bonuses, or other merit-based awards, which can be worth several million dollars. App.3. Compensation varies even more substantially thereafter according to Club/affiliate, skill, service time, past performance, potential, and contractual terms.

As for spring training, players do not receive a base salary, but they do receive housing, food, and a stipend from their Clubs. Spring training is akin to an audition, especially for minor-league players. The minor leaguers who participate in spring training are

generally motivated by the prospect of making the big-league club and signing a Major League contract, which can be orders of magnitude more valuable than the typical minor-league deal.

The minor-league work environment is unique. Perhaps its defining criterion is the fact that, while players work together as a team during games, they are constantly trying to distinguish themselves from their teammates to earn a call up to the big leagues. To that end, many players often arrive early and/or stay late to engage in a variety of discretionary activities, such as exercising, stretching, taking extra batting practice, or receiving physical treatment. They do so of their own volition. The type and length of these activities vary extensively based on each player's priorities, discretion, skill, position, affiliate, and developmental needs. One player's activities and hours on a given day may bear little resemblance to another's. There is, in short, no typical day for a minor-league baseball player.

Nor is there a typical worksite. Each player spends time training and playing baseball in multiple states during the season. A player may have different home ballparks during the season and will visit many away-ballparks as well. And although minor leaguers are professionals, many view spending off-hours at the ballpark very differently from how more typical workers view their worksite.

3. In May 2015, 45 current and former minor leaguers sued MLB and its 30 Clubs, alleging that they failed to pay minimum wage and overtime for time players spent on baseball-related activities. App.5-6. After the district court conditionally certified

a collective action under the FLSA,[1] 29 U.S.C. §201 *et seq.*, court-authorized notice was distributed to approximately 15,000 minor leaguers; roughly 2,200 opted in. App.6. The opt-ins included players from all 30 MLB Clubs. App.5 n.5.

After the close of discovery, defendants moved to decertify the conditionally certified FLSA collective action. Plaintiffs, meanwhile, moved to certify eight classes under Rule 23(b)(3)—one apiece under the laws of the eight states they referenced in the complaint (Arizona, California, Florida, Maryland, New York, North Carolina, Pennsylvania, and Oregon)—plus an injunctive relief class under Rule 23(b)(2).[2] App.6. In support of their class-certification motion, plaintiffs asserted that the number of

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[1] The FLSA allows plaintiffs alleging violations of its minimum-wage and overtime provisions to recover damages in a collective action on behalf of other "similarly situated" employees. 29 U.S.C. §216(b). FLSA collective actions largely mirror class actions brought under Rule 23(b)(3), with a few exceptions, including that the FLSA allows for conditional certification and requires participants to opt in, rather than opt out.

[2] Such "[h]ybrid suits" combining a FLSA collective action with a class (or classes) alleging state-law wage-and-hour violations are increasingly common. Daniel B. Abrahams et al., *Employers' Guide to the Fair Labor Standards Act* ¶927 (2015). That is no accident. Whereas individuals who fit a class definition are presumptively in the class unless they opt out, individuals who fit a FLSA collective action are presumptively out of a conditionally certified collective action unless they opt in. *Tyson*, 136 S. Ct. at 1043; *see* 29 U.S.C. §216. Class actions are thus far more potentially lucrative for plaintiffs' lawyers (and far more potentially costly for employers) than FLSA collective actions, since "few people actually take the effort to opt out." Abrahams, *supra*, at ¶927.

compensable hours each player worked was a common issue that could be proven via a "pilot survey" that asked a sample of players who opted in the time of day they "most often" arrived at the ballpark during the championship season, how much time they spent there "on average" after a game, and the number of hours they spent at the training facility each week during spring training. App.117-18.

B. The District Court's Certification Orders

1. The district court denied certification of the eight state-law classes and decertified the previously-conditionally-certified FLSA collective action. Starting with the (b)(3) classes, the court concluded that a host of individualized issues—including, *inter alia*, the determination of which of the players' activities constitute compensable "work"; the amount of time each player spent engaging in those activities; the nature and amount of each player's compensation; the analysis of which state's law would govern each player's claims; and the availability of certain defenses—predominated over common issues. App.94-97. The court found that these individualized issues pervaded all parts of the season, from spring training in March through instructional leagues in September. App.96-97.

The court also declined to certify the proposed (b)(2) class, which "is aimed at alleged wage and hour violations arising from spring training activities in Florida and Arizona," App.191-92, finding no evidence to support plaintiffs' claim that injunctive relief was their primary objective or that their request for monetary relief was merely incidental. App.192.

The court's reasoning with respect to the FLSA collective action "largely mirror[ed]" its (b)(3) analysis. App.193. Given the "wide variations among the players as to the types of activities in which they engaged and the circumstances under which they" did so, "collective adjudication" would be "unmanageable and potentially unfair" to defendants. App.193.

2. Plaintiffs moved for reconsideration with respect to three of the eight state-law classes: one seeking wages for the time players spent in training activities (spring training, extended spring training, and instructional league) in Arizona, a similar class for Florida, and a third seeking wages and overtime on behalf of players who participated in the California League, a championship-season league. App.106-07. Most Clubs named as defendants in the California League class are located outside California, and each one has multiple additional affiliates in other states. App.114. In addition, roughly three-quarters of California League players played for affiliates in 38 other states—and one-quarter played in three or more states—during a season in which they played in the California League. App.115.

Plaintiffs also proposed "a separate Rule 23(b)(2) injunctive relief class," which they defined to include: "[a]ny person who is a) signed to a Minor League Uniform Player Contract, b) has never signed a Major League Player Contract, and c) participates in spring training, instructional leagues, or extended spring training in Florida or Arizona." App.107. In support of these requests, plaintiffs submitted a new survey, which they dubbed the "Main Survey." App.99.

The Main Survey asked players which teams they had played for during the relevant championship seasons and what time they "most often" arrived at and departed from ballparks and spring training facilities. It did not ask players what they did while there, how much time they spent performing specific baseball activities, or whether they engaged in non-baseball activities while there. App.117-18, 143. That made the survey "representative" of little, if anything, for there was considerable evidence that players often "hang out" at the ballpark or training facility, spending time there of their own volition. *See, e.g.*, CA9.SER.336 (player often arrived up to two-and-a-half hours before games to eat and digest his meal); 407-09 (player arrived early on certain days so that his roommate could drive him to the ballpark); 471-72 (after games, player needed to decompress, eat, and shower before departing the facility and was not "in any rush"); 931-32 (player liked to arrive early to "relax in the locker room" or "maybe watch some baseball if it was on TV"). Nor did the survey ask which affiliate the players played for to identify whether any were in the California League.

The district court granted reconsideration in part, certifying one (b)(3) class (the California League class) and a new FLSA collective action based principally on the Main Survey. App.195-96. In the court's view, the new "survey data," "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. Although the court recognized that the Main Survey's description of ballpark arrival

and departure times "may or may not be sufficient to establish the ultimate issue of how much actual work was performed by the putative classes," and that "some individualized issues will remain" as to which types of activities should be considered "work," the court certified the California League class anyway, reasoning that defendants could attack the persuasive value of the Main Survey as a measurement of compensable work on summary judgment or at trial. App.155, 174. It also recertified the FLSA collective action under a similar analysis. App.192-93.

In contrast, the court declined to reconsider its refusal to certify the spring training classes or the proposed (b)(2) class. Because many players traveling to Arizona or Florida for spring training hailed from states that "have recognized an interest in applying the law of that state to residents who work outside of the state," the court concluded that choice-of-law questions precluded predominance. App.189. As for the proposed injunctive-relief class, the court ruled that it lacked the "cohesiveness" required for certification under Rule 23(b)(2). App.191-92.

C. The Ninth Circuit's Decision

Over a dissent from Judge Ikuta, the Ninth Circuit reversed in part, vacated and remanded in part, and affirmed in part. The court affirmed certification of the California League class, held that the spring training classes should have been certified as well, and vacated the denial of certification of the proposed (b)(2) injunctive-relief class.

The court began its analysis by waving away the choice-of-law concerns that the district court identified in concluding that plaintiffs failed to prove that

common questions would predominate for the two spring training classes. Even though the proposed classes consisted of players "who reside in at least 19 states, [and] who are suing employers who are headquartered in at least 22 states, relating to work that took place in three different states" with materially different laws, the majority "appl[ied] a simple rule of its devise" to evade choice-of-law concerns: "just apply the law of the jurisdiction where the work took place." App.64 (Ikuta, J., dissenting). The majority thus held that California law applied to all claims in the California League class even though several members played for teams headquartered outside of California, and that Arizona/Florida law applied to all claims in the Arizona/Florida spring training classes even though several class members hailed from states with recognized interests in applying their law to residents who work out of state.

Having distorted choice-of-law principles to reduce legal disparities, the majority turned to the radically different factual circumstances that separate an outfielder who is a gym rat and loves to hang around the ballpark and a pitcher on a different affiliate of a different Club who minimizes his time in the clubhouse. Invoking *Tyson*, the majority concluded that, despite those wildly variant factual circumstances, a combination of the Main Survey and evidence of game schedules sufficed to make the question of compensable time a common issue that predominated, and hence that plaintiffs had met their burden of proving that all three (b)(3) classes should be certified.

The majority acknowledged the considerable record evidence that many players "did not begin compensable work upon arriving at the ballpark," and "that players stopped engaging in compensable work long before they left the ballpark." App.50. But it nonetheless hypothesized that plaintiffs may be able to invoke the "continuous workday" rule and "California's expansive definition of 'employ' and 'hours worked'" to argue that *all* time spent at the ballpark is compensable. App.51-52. The majority also acknowledged that a jury may well find "the Main Survey's estimated arrival and departure times … insufficient to clear the preponderance hurdle." App.50. But in the majority's view, "*Tyson* counsels that such criticisms do not doom certification here *unless* no reasonable jury could conclude that the combination of the Main Survey and plaintiffs' other representative evidence was probative of the amount of time players actually spent performing compensable work." App.50. Applying that rule and circuit precedent that "accord[s] the district court noticeably more deference" when "we review a grant of class certification … than when we review a denial," the court deemed plaintiffs' evidence sufficient to permit certification. App.54-55.

Finally, the majority held—in express disagreement with every other circuit to squarely confront the issue—that there is no "'cohesiveness' requirement for … Rule 23(b)(2) class[es]," and thus vacated the district court's denial of (b)(2) certification on that basis. App.34.

Judge Ikuta dissented. She focused her opinion on the majority's distortion of choice-of-law principles

to eliminate legal disparities among class members. Because "[t]he proposed classes here comprise employees who reside in at least 19 states, who are suing employers who are headquartered in at least 22 states," Judge Ikuta concluded that "[d]etermining whether to certify a class" would "require identifying the relevant laws of each of the potentially affected jurisdictions, … determin[ing] whether a true conflict exists, and then deciding which jurisdiction's interest would be most impaired if its law were not applied"—all of which would defeat predominance. App.64.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision to certify these sprawling employment-law class actions not only departs substantially from this Court's precedents, but squarely conflicts with decisions of other circuits on the basic requirements of Rule 23. Thousands of minor-league baseball players with different positions, employers, and workplaces seek here to prove entitlement to additional compensation principally through a survey that failed to reasonably capture the amount of time *any* individual ballplayer spent on compensable activities. Given that glaring deficiency, no individual plaintiff could have relied on that evidence to establish the length of his workday or to prove his entitlement to additional compensation in an individual action. Yet the Ninth Circuit nonetheless found no Rule 23 or Rules Enabling Act problem with allowing these thousands of disparately situated individuals to band together and proceed as a class on the basis of such borderline-irrelevant representative evidence.

Even more remarkably, the Ninth Circuit claimed that *this Court's* caselaw compelled this certification "by formula" approach to Rule 23. According to the Ninth Circuit, *Tyson* commands that district courts in putative wage-and-hour class actions "may only deny [statistical evidence's] use to meet the requirements of Rule 23 certification if 'no reasonable juror' could find it probative of whether an element of liability was met." App.55. Under the Ninth Circuit's view, in other words, 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.

As the Third Circuit recently recognized in rejecting a putative class's effort to use *Tyson* and similar "representative" evidence to certify a far less ambitious class, that fundamentally misunderstands Rule 23, the Rules Enabling Act, and this Court's precedents enforcing them. It converts *Tyson* from a decision allowing the modest use of representational evidence in narrow circumstances into a full-blown wage-and-hour exception to *Wal-Mart*. Indeed, the Ninth Circuit was explicit that it viewed *Tyson* as displacing *Wal-Mart*'s requirement of "rigorous analysis" in the wage-and-hour context.

Adding insult to injury, the decision below puts the Ninth Circuit on the wrong side of a five-to-one circuit split on whether Rule 23(b)(2) requires a class to be cohesive. Rule 23(b)(2) provides an attractive target for plaintiffs, as it dispenses with the requirements of predominance, superiority, and opt-out necessary for a (b)(3) class. Given that attractiveness—and the potential for misuse—this

Court made clear in *Wal-Mart* that (b)(2) certification is appropriate only when the complained-of 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," 564 U.S. at 360—in other words, when the class is cohesive. Consistent with that understanding, every other circuit to address the issue has held that a (b)(2) class must be cohesive. The decision below openly parts company with those five circuits, and in doing so defies this Court's clear teachings. Making matters worse, procedural aspects of the FLSA and the decision's unorthodox choice-of-law regime will make it particularly easy for plaintiffs' lawyers to litigate nationwide wage-and-hour classes within the friendly confines of the Ninth Circuit and its class-action jurisprudence. This Court should grant certiorari and bring the Ninth Circuit's doubly lax class-certification law back in line with this Court's precedent.

I. The Decision Below Conflicts With Rule 23(b)(3) And FLSA Decisions Of This Court And The Third Circuit.

In *Wal-Mart v. Dukes*, this Court warned against allowing putative classes to use statistical and supposedly representative evidence to convert individualized employment disputes into common questions capable of resolution on a classwide basis. Consistent with the Rules Enabling Act, which forbids courts from applying the Federal Rules of Civil Procedure to "abridge, enlarge or modify any substantive right," 28 U.S.C. §2072(b), this Court rejected a Ninth Circuit decision allowing the use of statistical evidence that would have been insufficient, if not inadmissible, to establish liability in individual

cases to be the basis for classwide proceedings. As the Court explained, even assuming that evidence could support an inference of a general pattern of discrimination, it would not prove that any particular adverse employment action was the product of discrimination. The evidence thus provided "no cause to believe that all [the class members'] claims can productively be litigated at once." *Wal-Mart*, 564 U.S. at 350.

Four years ago, this Court revisited the use of representative evidence in the context of a very different class action. *Tyson* involved a class of employees who worked at a single pork-processing plant and claimed they were under-compensated because they were not paid for time spent "donning" and "doffing" required protective clothing. 136 S. Ct. at 1042. To prevail, they needed to establish that donning and doffing was a compensable part of the workday, and "each employee had to show he or she worked more than 40 hours a week" if donning and doffing time were included. *Id.* at 1043. Because the employer had not kept records of the time spent donning and doffing, the class introduced an occupational study estimating the average donning and doffing time for each type of employee at the plant. *Id.*

In upholding the use of that study to establish both liability and that the class had established commonality and predominance, this Court declined the parties' invitations "to establish general rules governing the use of statistical evidence, or so-called representative evidence, in all class-action cases." *Id.* at 1046. Instead, the Court concluded that "[w]hether

a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action." *Id.* at 1049. The Court similarly declined to establish a rule for all wage-and-hour disputes; instead, the Court concluded that in such cases the analysis turns on whether the evidence "could 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.

Emphasizing that each plaintiff "worked in the same facility, did similar work, and was paid under the same policy," and that time records were not available, the Court concluded that the same kind of representative study likely would have been both necessary and sufficient even in individual class members' donning and doffing cases. *Id.* at 1043, 1048. The Court therefore concluded that foreclosing the plaintiffs from relying on the study just because they proceeded as a class would violate the Rules Enabling Act.

At the same time, however, the Court made clear that, just as the Rules Enabling Act cannot tolerate a rule that makes it *harder* for a class to rely on representative evidence in class proceeding than for an individual to do so in an individual case, the converse is also true: The Act cannot tolerate a rule that makes it *easier* for a class to use representative evidence than for individual litigants, especially when statistical evidence is being used to bridge or disguise differences among class members. As the Court thus explained, nothing in its decision called into question the reasoning or holding of *Wal-Mart*, for the reason

the *Wal-Mart* plaintiffs could not rely on representative evidence was because "none of them could 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.* at 1048.

The separate opinions in *Tyson* reinforced the decision's limited scope. While Justice Thomas expressed concern that the majority's opinion could be read as "creat[ing] a special, relaxed rule authorizing plaintiffs to use otherwise inadequate representative evidence in FLSA-based cases," *id.* at 1056 (Thomas, J., dissenting), the Chief Justice authored a concurring opinion explaining that he did "not read the Court's opinion," which he joined, to embrace any such relaxed rule, *id.* at 1051 (Roberts, C.J., concurring).

2. Under a straightforward application of *Tyson*, this should have been an easy case. Indeed, this case is a replay of *Wal-Mart*, not *Tyson*, as the plaintiffs here are using representative evidence to bridge gaps and generate commonality, rather than simply using evidence that would be admissible and likely dispositive in individual cases.

Plaintiffs here do not work scheduled shifts in the same facility or seek compensation for a single activity with only minor variations in how many minutes it took them to perform it. They are minor-league baseball players who played different positions for dozens of affiliates across 30 different Clubs and were paid under varying compensation terms. This is not a simple matter of estimating how long it took the average Royals' catcher to don or doff his protective

gear. This is an effort to fundamentally transform minor-league baseball compensation that cuts across teams, positions, employers, and worksites. That puts this case at very nearly the opposite end of the spectrum from the plant workers in *Tyson*. The representational evidence here is a blatant effort to bridge the gaps that separate the class members and create a homogeneous class proceeding that would meld together the very different individual claims of an outfielder for one Club and a pitcher for another.

The first fatal problem here is that, unlike in *Tyson*, plaintiffs do not claim that their employers failed to compensate them for a single, uniform activity, like donning protective gear or traveling to a worksite. Instead, they claim that all manner of baseball-related activities should be compensable. But because plaintiffs play different positions for different employers, what is compensable for one plaintiff may not be compensable for another. For instance, the most basic fact about spring training is that pitchers and catchers must report early. That reflects that players at those positions have specialized regimens and that what is mandatory for a pitcher may be optional for most field players. Thus, a baseball-related activity that is mandatory (and thus arguably compensable) for a pitcher on a Single-A affiliate for one Club may be optional (and thus plainly non-compensable) for a right fielder on the same team—to say nothing of players on different affiliates of different Clubs. And an activity that is compensable for the third-string shortstop on one Club's Double-A affiliate may *not* be compensable for the shortstops ahead of him on the depth chart, since some players received signing bonuses, others are

working toward year-end performance bonuses, and so on.

Given those inherent and pervasive disparities and the sheer breadth of the classes, it is difficult to conceive of any form of representative evidence that would be common to the class and still could be "sufficient to sustain a jury finding as to hours worked if it were introduced in each employee's individual action." *Tyson*, 136 S. Ct. at 1048. Simply put, like questions concerning the motivation for millions of employment decisions across thousands of stores in *Wal-Mart*, the question of how many compensable hours a minor-league baseball player worked is not one that can be answered "in one stroke" for all players. *Wal-Mart*, 564 U.S. at 350. Indeed, even the most statistically pristine evidence concerning the average arrival time, average hours worked, or the like would not meet the *Tyson* standard, or likely even be admissible in an individual player's case. The variations among class members would make such evidence of averages or the hypothetical "typical" minor-leaguer irrelevant in any one player's case.

The Main Survey's specific defects only amplify the problems with its use to disguise fundamental differences among class members. The survey asked players nothing more than what time they "most often" arrived at and left ballparks and spring training facilities. App.8-9. It "did not ask players about the kinds of activities they performed at the facilities, or how much time they spent performing particular activities," or whether they were even working at all while there. App.8-9.

Those are no minor oversights, given the unique nature of the "workplace" at issue here. While in most industries it may be a reasonable inference that a worker reports to his worksite only to work, spending time at a ballpark or training facility is quite different from spending time in a factory changing area. Not surprisingly, extensive evidence confirmed that baseball players often "hang out" at the ballpark or training facility, spending time there entirely of their own volition. *See, e.g.*, CA9.SER.336 (player often arrived up to two-and-a-half hours before games to eat and digest his meal); 407-09 (player arrived early on certain days so that his roommate could drive him to the ballpark); 471-72 (after games, player needed to decompress, eat, and shower before departing the facility and was not "in any rush"); 931-32 (player liked to arrive early to "relax in the locker room" or "maybe watch some baseball if it was on TV"). Arrival and departure times thus are not even a reliable indicator of when a player was engaged in baseball-related activities, let alone in activities that might be compensable.[3]

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[3] Contrary to the Ninth Circuit's contentions (at App.51-52), neither the "continuous workday" doctrine nor "California's expansive definition of 'employ' and 'hours worked'" can fix these problems. As for the former, the panel acknowledged that it is only a presumption, App.28 n.11; and that presumption is in considerable tension with record evidence, and could be rebutted by highly individualized evidence. As for the latter, the panel cited no authority for the proposition that California would treat time voluntarily spent watching baseball on television or relaxing in the locker room as "work." In all events, neither doctrine solves the equally fundamental problem that the Main Survey does not even establish when each player's workday began or ended.

In short, unlike *Tyson*, this is manifestly not a case in which a representative sample would be "sufficient to sustain a jury finding as to hours worked if it were introduced in each employee's individual action." *Tyson*, 136 S. Ct. at 1048. To the contrary, this is the prototypical case in which "there would be little or no role for representative evidence" if each plaintiff brought his own suit alleging that he worked compensable time for which he was not compensated. *Id.* The evidence in any individual player's case would focus not just on the hours that individual spent at the ballpark or training facilities, but on the specific activities he typically performed while there, the nuances of his contract, his specific service time, and so on. Because the evidence on which the class relied here would be patently insufficient to establish liability in an individual case, it cannot be used to establish a common, let alone predominant, question for Rule 23(b)(3) purposes.[4]

3. The Ninth Circuit nonetheless concluded that the "evidence plaintiffs offered was adequate to meet their burden at this stage." App.50. While the court committed several errors in reaching that conclusion, the critical flaw was in treating *Tyson* not as a narrow decision allowing the use of representative evidence for workers donning and doffing protective gear for a single employer at a single facility, but instead as effectively creating a wage-and-hour exception to *Wal-Mart*. In doing so, the Ninth Circuit embraced exactly

[4] That failure dooms plaintiffs' FLSA collective action as well, for the FLSA's "similarly situated" requirement is at least as stringent as Rule 23(b)(3)'s commonality and predominance requirements. *See supra* n.1; *cf. Tyson*, 136 S. Ct. at 1045.

the kind of lax rule for wage-and-hour class actions that the Chief Justice and the dissenters cautioned against. *See Tyson*, 136 S. Ct. at 1051 (Roberts, C.J., concurring); *id.* at 1056-57 (Thomas, J., dissenting). After all, if a single nonrandom study of the hours minor leaguers spend at the ballpark can suffice to prove commonality and predominance at the class-certification stage even though it would be patently insufficient to establish liability in an individual player's case, then *Wal-Mart* is a dead letter, at least in wage-and-hour cases.

Indeed, the Ninth Circuit was quite candid in acknowledging the incompatibility of its holding and any straightforward reading of *Wal-Mart*. When petitioners argued that *Wal-Mart* demands a "rigorous analysis" of whether plaintiffs' proposed evidence *in fact* suffices to establish commonality and predominance, *see Wal-Mart*, 564 U.S. at 351-52, the Ninth Circuit responded that "*Tyson* requires that we reject this argument" in favor of a rule that a district court "may only deny [the] use [representative evidence] to meet the requirements of Rule 23 certification if 'no reasonable juror' could find it probative." App.55. In other words, at least for wage-and-hour cases, the Ninth Circuit has read *Tyson* as replacing *Wal-Mart*'s "rigorous analysis" with a "bare relevance" test.

That reading not only puts *Tyson* on a collision course with *Wal-Mart*, but creates exactly the Rules Enabling Act problem that *Tyson* sought to avoid—just in reverse. The Rules Enabling Act ensures that the procedural rules remain just that—procedural rules. Rule 23 is designed to aggregate individual

suits, not to transform them into a battle of the experts or a battle of the averages. It is not designed to make evidence that would be marginal or even inadmissible in individual cases the centerpiece of a class action, let alone sufficient for a finding of commonality and predominance. The class action in *Tyson* honored the Rules Enabling Act by allowing the use of targeted representative evidence that would have been admissible and sufficient in an individual case. The putative class actions here and in *Wal-Mart* violate the Act by allowing survey evidence and averages that would play no meaningful role in an individual case to drive the certification decision and transform individual cases into something altogether different. By certifying the classes anyway, the Ninth Circuit read *Tyson* in a way that puts it in fundamental conflict with *Wal-Mart* and other cases establishing critical constraints on the use of the class-action device.

4. The Ninth Circuit's decision also conflicts with the Third Circuit's recent decision in *Ferreras v. American Airlines, Inc.*, 946 F.3d 178 (3d Cir. 2019). Both courts confronted efforts to use representative evidence to certify sprawling wage-and-hour classes vastly exceeding the scope of the class in *Tyson*. Both courts were invited to read *Tyson* as creating a wage-and-hour exception to *Wal-Mart*; the Ninth Circuit accepted that invitation, while the Third Circuit declined it.

Ferreras involved a putative class of passenger-service agents, fleet-service employees, and mechanics who claimed they had been deprived of overtime pay. *Id.* at 181-82. The putative class proceeding involving

multiple different kinds of employees was more ambitious than the *Tyson* class, but more modest than the effort here, as it focused on a single employer at a single airport. As in this case, the plaintiffs sought to rely on a "representative" survey that showed clock-in and clock-out times. *Id.* at 182. As in this case, "the record evidence show[ed] that employees arrived early and left late for a variety of reasons and engaged in personal activities" such as "chat[ting] with co-workers" or "watch[ing] TV" "before and after their shifts." *Id.* at 181, 186. But unlike in this case, 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. *Id.* at 186.

As the court explained, "whether hourly-paid American employees at Newark airport are not being compensated for all hours worked" was not a question that could be answered for all class members in one stroke, because even if the survey evidence were taken into account, each plaintiff would still need "to offer individualized proof to show [he or she was] actually working during the various time periods" when he or she was clocked in. *Id.* at 185-86. Because the plaintiffs failed to establish these questions were common issues, they likewise failed to establish predominance. *Id.* at 186.

The conflict between the decision below and *Ferreras* is stark. In both cases, the classes sought to prove entitlement to backpay via a sample of clock-in and clock-out times. In both cases, the class members "were not always working while clocked in." *Id.* In both cases, "there was substantial variability in what

they were doing, even if some of it could be called work." *Id.* at 186-87. Yet in one case, the court held that the plaintiffs could not proceed as a class because they "would need individualized, not representative, evidence to prove their case," whereas in the other, the court held that proceeding on a classwide basis posed no Rule 23 or Rules Enabling Act problems. That is because, unlike the Ninth Circuit, the Third Circuit correctly recognized that nothing in *Tyson* obviated the need to conduct the "rigorous analysis" that *Wal-Mart* commands. *See id.* at 187.

Had the Ninth Circuit faithfully followed this Court's precedents, it would have reached the same conclusion as the Third Circuit. Instead, it held exactly the opposite—and in doing so, defied this Court's teachings and opened up a circuit split. This Court should grant certiorari to resolve that split and confirm that *Tyson* did not create either a wage-and-hour exception to *Wal-Mart* or "a special, relaxed rule authorizing plaintiffs to use otherwise inadequate representative evidence" in employment-law class actions. 136 S. Ct. at 1053 (Roberts, C.J., concurring).

II. The Decision Below Expands Rule 23(b)(2) And Splits With Five Other Circuits.

1. The decision below also opens an acknowledged circuit split on whether a class must be cohesive to be certified under Rule 23(b)(2). Every other circuit to address the issue has held that Rule 23(b)(2) requires cohesiveness among class members. *See, e.g.*, *Ebert v. General 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, 433 (6th Cir. 2009); *Shook v. Bd. of Cty. Comm'rs of El Paso*, 543 F.3d 597, 604 (10th Cir. 2008). It is not hard to see why, as both the plain meaning of the Rule and this Court's discussion of it in *Wal-Mart* compel that result.

Rule 23(b)(2) authorizes class treatment only when the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted.'" *Wal-Mart*, 564 U.S. at 360. Certification thus is appropriate under Rule 23(b)(2) only when the complained-of 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." *Id.* After all, the only way a single indivisible injunction could remedy each class member's injury is if each class member's claim depends entirely upon the same common contention(s)—in other words, if the class is cohesive. *Id.* at 362-63; *see also Gates*, 655 F.3d at 264 (noting that *Wal-Mart* "highlighted the importance of cohesiveness" for a (b)(2) class).

To be sure, unlike Rule 23(b)(3), Rule 23(b)(2) does not contain a separate requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members" or "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). But as this Court explained in *Wal-Mart*, those requirements "are

missing from (b)(2) not because the Rule considers them unnecessary," but because a class that seeks the kind of truly indivisible relief (b)(2) contemplates will necessarily satisfy them. 564 U.S. at 362.

That also explains why Rule 23(b)(2) does not require "mandatory notice" to absent class members or "the right to opt out." *Id.* When a defendant "has acted or refused to act on grounds that apply generally to the class," Fed. R. Civ. P. 23(b)(2), the same injunction or declaration will remedy each class member's injury. Indeed, even an injunction obtained by a single plaintiff in individual litigation would benefit a properly defined (b)(2) class. For example, an injunction eliminating an improper criterion in a college's admission process would benefit a class of would-be applicants whether it was procured by one litigant or by a properly defined class. "[A]llowing individual members of the class to pursue relief on their own" thus would be "pointless"; if the action succeeds, then all members' injuries will be remedied in full regardless of whether some potential class members would prefer to opt out. 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* §5:21 (16th ed. 2019).

But, by the same token, if the class seeks relief that may not benefit some members—or, worse still, may benefit some members at the expense of others—then the answer is not to let those members opt out. It is to refuse to certify the class under Rule 23(b)(2) at all for failure to pursue indivisible relief on behalf of a cohesive class. After all, certifying loosely connected classes (like this one) not only harms defendants, but risks binding absent class members to

dispositions that are substantially divorced from the merits of their individual claims.

2. The decision below expressly breaks with that consensus, explicitly and unequivocally "reject[ing]" the view that "'cohesiveness' is required under Rule 23(b)(2)" and declaring that whether "common issues … predominate" is a question that matters only for a (b)(3) class. App.34-35. The Ninth Circuit's rejection of a cohesion requirement not only put it in a minority of one with respect to this circuit split, but was outcome determinative, for the court vacated the district court's decision denying (b)(2) certification on lack-of-cohesiveness grounds. App.34-35. In doing so, the court not only created a textbook circuit split, but reached a result that cannot be reconciled with this Court's precedent.

In every other circuit that has considered the issue, the (b)(2) class proposed here would have flunked the cohesiveness test because it suffers a basic flaw: There is no way to determine all at once whether every class member is entitled to relief. Again, this is not a case in which the plaintiffs are alleging that the defendant had a discrete policy of not providing pay for time spent on a discrete activity (say, donning and doffing their uniforms). Plaintiffs seek a remedy for all "compensable" activities. But what is compensable for a pitcher on a Double-A affiliate of Club *A* may not be compensable for a pitcher on a Triple-A affiliate of Club *B*—let alone for a center fielder or third baseman in rookie ball. Indeed, because each minor leaguer engaged in different spring-training activities to different degrees at different times with different frequencies and for different employers, the defining

characteristic of the proposed (b)(2) class is the pervasiveness of "'disparate factual circumstances of class members.'" *Gates*, 655 F.3d at 264 (quoting *Carter v. Butz*, 479 F.2d 1084, 1089 (3d Cir. 1973)). Certification under Rule 23(b)(2) thus should have been a nonstarter.

The Eighth Circuit's decision in *Ebert v. General Mills* is instructive. There, the district court certified a (b)(2) class of homeowners seeking to litigate whether General Mills was liable for environmental contamination to their properties that allegedly resulted from its disposal of hazardous materials. 823 F.3d at 475. The Eighth Circuit decertified the class for lack of cohesiveness. As the court explained, for each class member's property, distinct questions would need to be answered about the extent of any contamination, whether General Mills was the cause, what mitigation had already occurred, and so on. *Id.* at 479. Accordingly, while a general "determination regarding General Mills' liability, in the broad sense, could *impact* the entire class," "resolution of that single question [would] not apply uniformly to the entire class," for it would not resolve the "highly individualized" issues of whether General Mills was actually liable to each class member and, if so, what relief was appropriate. *Id.* at 481 (emphases altered).

So too here. Even a general determination that defendants are legally obligated to compensate plaintiffs for all hours worked would not necessarily establish that defendants are liable to any class members, let alone all of them, or what (if any) changes to their compensation that would require on a going-forward basis. Instead, liability and the

appropriate remedy would still depend on highly individualized assessment of which activities each player performed were compensable and were compensated in light of his particular circumstances. In every other circuit that has addressed the issue, that lack of cohesiveness would have doomed plaintiffs' (b)(2) class. Yet in the Ninth Circuit, it is legally irrelevant. This Court should grant certiorari to resolve the circuit split and the conflict with *Wal-Mart* that the decision below creates.

III. The Questions Presented Are Exceptionally Important.

The decision below not only defies this Court's caselaw, but conflicts with other circuits on important questions concerning both (b)(3) and (b)(2) class actions. Equally important, the Ninth Circuit's treatment of wage-and-hour class actions threatens to metastasize that already burgeoning litigation and concentrate it in the Ninth Circuit. The FLSA creates special rules that allow for nationwide collective actions to be brought in any circuit. Given the decision below, especially in light of the Third Circuit's contrary approach in *Ferreras*, there will be little motivation for class-action lawyers to bring FLSA actions elsewhere. Making matters worse, the panel's questionable approach to choice-of-law principles will make it easy for state-law wage-and-hour claims to be brought in the Ninth Circuit, as this case well illustrates.

Although Rule 23 was intended to "impose[] stringent requirements for certification that in practice exclude most claims," *Am. Express Co. v. Italian Color Rest.*, 570 U.S. 228, 234 (2013), class

certification continues to be the rule rather than the exception, especially in wage-and-hour cases. One study reports that "90% of all federal and state court employment law class actions filed in the United States are wage and hour class or collective actions." Laurent Badoux, ADP, *Trends in Wage and Hour Litigation Over Unpaid Work Time and the Precautions Employers Should Take* 1 (2012), https://bit.ly/2YMTDpK. Given the sheer number of these sprawling class actions and their potential for massive judgments, *see supra* n.2, it is imperative that the Court make clear that there is no wage-and-hour exception to *Wal-Mart*.

That concern is magnified by the reality that the FLSA allows nationwide collective actions. *See* 29 U.S.C. §216(b). Accordingly, so long as an employer operates anywhere in the Ninth Circuit, a putative nationwide class will be able to sue in the Ninth Circuit and invoke its lax rules to make it easier to secure certification. The panel's indefensible choice-of-law analysis further exacerbates that temptation, as it makes it easier to bring not just FLSA actions, but state-law actions, in the Ninth Circuit. Notwithstanding the fact that plaintiffs "reside in at least 19 states" and "are suing employers who are headquartered in at least 22 states, relating to work that took place in three different states" with materially different laws, the majority "appl[ied] a simple rule of its devise" to evade choice-of-law concerns: "just apply the law of the jurisdiction where the work took place." App.64 (Ikuta, J., dissenting). That rule is patently inconsistent with the California cases the court invoked. App.70-75. But so long as it remains Ninth Circuit law, it too will facilitate

rampant forum shopping—particularly since the panel made clear that its broad construction of *Tyson* applies to FLSA and state-law wage-and-hour cases alike.

There is no better illustration of that than this case. After all, if a class composed of baseball players who played different positions under different compensation terms for up to 200 different affiliates across 30 Clubs spanning 44 states can nonetheless be deemed sufficiently similarly situated to satisfy the requirements of Rule 23, then so could a class of every Wal-Mart employee or every American Airlines employee. That result cannot be reconciled with *Wal-Mart*, *Ferreras*, Rule 23, or the Rules Enabling Act. The Court should grant certiorari and once again bring the Ninth Circuit's outlier class-action doctrine back in line with what this Court's precedent commands.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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