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Comments

SHUT UP AND PITCH: MAJOR LEAGUE BASEBALL'S POWER STRUGGLE WITH MINOR LEAGUE PLAYERS IN *SENNE V. KANSAS CITY ROYALS BASEBALL CORP.*

*"After twelve years in the major leagues, I do not feel I am a piece of property to be bought and sold irrespective of my wishes. . . . [A]ny system which produces that result violates my basic rights as a citizen and is inconsistent with the laws of the United States and of the several States."*¹

I. INTRODUCTION: PLAY BALL!

For over a century, baseball has reigned as America's pastime.² In 2019 alone, Major League Baseball (MLB) generated gross revenues of nearly eleven billion dollars.³ While the MLB and its players reap the benefits of its profitability, a group remains ignored: minor league players.⁴ Similar to other professional sports, the

1. Letter from Curt Flood to Bowie K. Kuhn, Commissioner of Baseball (Dec. 24, 1969) (on file with the National Archives, Identifier: 278313) (criticizing MLB's control over players).

2. See John Rowady, *America's Pastime*, MEDIAPOST (July 3, 2012), <https://www.mediapost.com/publications/article/178091/americas-pastime.html> [<https://perma.cc/4Z3W-PD76>] (reporting baseball was first dubbed "the national pastime" in 1856). "Whoever wants to know the heart and mind of America had better learn baseball" Ira Berkow, *What is Baseball's Meaning and Its Effect on America*, N.Y. TIMES (May 31, 1981), <https://www.nytimes.com/1981/05/31/sports/what-is-baseball-s-meaning-and-its-effect-on-america.html> [<https://perma.cc/3FTY-QZRS>] (quoting JACQUES BARZUN, *GOD'S COUNTRY AND MINE: A DECLARATION OF LOVE SPICED WITH A FEW HARSH WORDS* (Bos.: Little, Brown & Co. 1954)) (describing MLB's fundamental role in American society).

3. See Maury Brown, *MLB Sees Record \$10.7 Billion in Revenues for 2019*, FORBES (Dec. 21, 2019), <https://www.forbes.com/sites/maurybrown/2019/12/21/mlb-sees-record-107-billion-in-revenues-for-2019/#38e7ad2b5d78> [<https://perma.cc/GAW2-N8ZE>] (reporting 2019 marked MLB's seventeenth consecutive year of record revenue growth). Despite declining attendance and mediocre World Series ratings, "a perceived decline in the popularity of baseball in the United States" could not be further from reality. Juliette Love, *How Popular Is Baseball, Really?*, N.Y. TIMES (Oct. 22, 2019), <https://www.nytimes.com/interactive/2019/10/22/sports/baseball/baseball-popularity-world-series.html> [<https://perma.cc/26JA-ZXKG>] (explaining baseball's domination over other professional sports in America). "MLB teams play at least 2,430 regular-season games each season, compared with only 256 regular-season games for the NFL and 1,230 for the NBA. Even the 160 MLB-affiliated minor league teams sold nearly 50 million tickets in 2017." *Id.* (comparing annual ticket sales of American professional sports leagues).

4. See Garrett R. Broshuis, *Touching Baseball's Untouchables: The Effects of Collective Bargaining on Minor League Baseball Players*, 4 HARV. J. SPORTS & ENT. L. 51, 52

MLB relies on a “farm system,” known as Minor League Baseball (MiLB), for player development.⁵ Despite its dependence on the MiLB, the MLB treats minor league players as second class athletes, forcing many to accept below the minimum wages and sub-par working conditions, while still expecting players to work long hours to hone their talents in hopes of a shot in the majors.⁶

In *Senne v. Kansas City Royals Baseball Corp.*,⁷ current and former minor league players are attempting to combat poor working conditions and low payment practices with a novel legal attack.⁸ Plaintiffs in *Senne* assert the MLB, its Commissioner, and several affiliated MLB teams are in violation of federal law, under the Fair Labor Standards Act (FLSA), and various state wage-and-hour laws by paying minor leaguers below minimum wage and failing to provide overtime wages.⁹ The outcome of this case impacts the MLB, MLB affiliated teams, the MiLB, MiLB affiliated teams, current and future baseball players both amateur and professional, as well as the communities where these teams are located.¹⁰

In early 2020, tensions between the MLB and MiLB players intensified due to a global pandemic.¹¹ For the first time in twenty-five years, baseball, as well as the rest of the United States, shut down.¹² State-imposed shutdowns and shelter-in-place mandates led to a cancellation of spring training and a two week postponement of the start of the regular season.¹³ By mid-summer, MLB

(2013) (explaining how exploitation will continue until minor leaguers “gain true and real representation” at bargaining table).

5. See Doug Bernier, *What is Minor League Baseball?*, PRO BASEBALL INSIDER, <http://probaseballinsider.com/what-is-minor-league-baseball/> [https://perma.cc/ZF7T-565M] (last visited Jan. 26, 2020) (outlining basics of MiLB).

6. See Sam C. Ehrlich, *Minor Leagues, Major Effects: What If Senne Wins?*, 6 MISS. SPORTS L. REV. 23, 24 (2016) (discussing potential results if Plaintiffs succeed in *Senne v. Kansas City Royals Baseball Corp.*).

7. 934 F.3d 918 (9th Cir. 2019).

8. See Ehrlich, *supra* note 6, at 24 (detailing Plaintiffs’ claims).

9. See *Senne*, 934 F.3d at 924–25 (discussing Plaintiffs’ Second Amended Consolidated Class Action Complaint filed in Northern District of California).

10. See Ehrlich, *supra* note 6, at 26 (noting “major ramifications” on professional sports industry).

11. See James Jacaruso, *Baseball Takes a Hit, but Hits Back!*, <https://www.eisneramper.com/baseball-covid-19-0420/> [https://perma.cc/75A6-LJ6K] (Apr. 27, 2020) (discussing prior instances of MLB work stoppage).

12. See *id.* (comparing MLB players’ strike in 1995 to COVID-19 shutdown); see also Broshuis, *supra* note 4, at 78-81 (discussing MLB strike of 1994-95).

13. See Dayn Perry, Katherine Acquavella & R.J. Anderson, *Timeline of How the COVID-19 Pandemic has Impacted the 2020 Major League Baseball Season*, CBS SPORTS (July 29, 2020), <https://www.cbssports.com/mlb/news/timeline-of-how-the-covid-19-pandemic-has-impacted-the-2020-major-league-baseball-season/> [https://perma.cc/87Q7-RE6Q] (reporting timeline of COVID-19’s impact on 2020 MLB

teams eventually took the field to play in empty stadiums, while the MiLB 2020 season was completely cancelled.¹⁴ The COVID-19 pandemic undoubtedly threw professional baseball a major curveball, shining an even brighter light on the severe disadvantages minor league players are subject to compared to their MLB counterparts.¹⁵

This Note analyzes the Ninth Circuit's *Senne* decision and asserts the court's decision serves as a momentous victory for minor league players in their fight for fair wages.¹⁶ Section II establishes the relevant facts and procedural history of *Senne*.¹⁷ Section III provides a background of the law relevant to the decision as well as the relationship between the MLB and the MiLB.¹⁸ Next, Section IV summarizes the Ninth Circuit's reasoning behind their decision.¹⁹ Section V discusses the inconsistency of the Ninth Circuit's holding with other circuit court precedent and critically analyzes why this

season). Professional baseball was not alone in suffering from the pandemic, as college baseball also experienced major implications from COVID-19, including the cancellation of conference championships. See Zach Spedden, *COVID-19 Pandemic Continues to Affect NCAA Baseball*, BALLPARK DIGEST (Mar. 18, 2020), <https://ballparkdigest.com/2020/03/18/covid-19-pandemic-continues-to-affect-ncaa-baseball/> [<https://perma.cc/Q85L-PZW6>] (listing several college conferences deciding to cancel baseball championships as result of COVID-19).

14. See Christian Collins & Casey Simmons, *Major League Baseball Is Back. For Minor Leaguers Still at Home, It's a Reminder of the Pandemic's Disproportionate Economic Consequences*, URBAN INSITUTE (July 24, 2020), <https://www.urban.org/urban-wire/major-league-baseball-back-minor-leaguers-still-home-its-reminder-pandemics-disproportionate-economic-consequences> [<https://perma.cc/54C9-RAJM>] (“[T]he games not played in minor league ballparks should serve as a representation of low-wage workers’ disadvantages. . . .”).

15. See *id.* (arguing minor league disadvantages “have been exacerbated in the economic fallout from the pandemic”). Legislative action to cure low wages and unemployment, while not a novel solution, is one remedy further demonstrating the inadequacies of treatment for minor leaguers. See *id.* (noting most MiLB players received \$400 per week from MLB during the pandemic, while filing for federal unemployment insurance pays about \$600 per week). “That minor leaguers can currently make more through social safety net benefits shows how necessary these benefits have been.” *Id.* (suggesting policymakers as possible way for minor league players to achieve fair wages).

16. For further discussion of the court's opinion in *Senne*, see *infra* notes 144–184 and accompanying text. For further discussion of *Senne*'s impact, see *infra* notes 202–226 and accompanying text.

17. For further discussion of *Senne*'s factual background, see *infra* notes 22-44 and accompanying text. For further discussion of the initial class action suit and subsequent District Court decision, see *infra* notes 45-59 and accompanying text. For further discussion of the Ninth Circuit's appellate decision, see *infra* notes 60-65 and accompanying text.

18. For further discussion of class and collective actions, as well as relevant labor issues within baseball, see *infra* notes 70-143 and accompanying text.

19. For further discussion of the court's decision in *Senne*, see *infra* notes 144-184 and accompanying text.

divergence in precedent is positive for minor league players.²⁰ Lastly, Section VI predicts the impact of the Ninth Circuit ruling in *Senne* and comments on the durability of baseball's antitrust exemption in anticipation of the 2021 expiration of the Professional Baseball Agreement (PBA) and ongoing negotiations between the MLB and MiLB.²¹

II. FACTS: A STACKED DUGOUT

Coined as a rite of passage, an overwhelming majority of baseball players must endure the grind of being a minor league player before ever stepping up to the plate in a major league game.²² Minor league players are forced to accept sub-par treatment to achieve their goals of making it to the big leagues.²³ When a player is drafted or signed by an MLB team, the player is not automatically listed on the forty-man roster of the MLB team.²⁴ Rather, most athletes must vie through the ranks of the minor league system before playing for that MLB team.²⁵

20. For critical analysis of the court's decision in *Senne*, see *infra* notes 185-201 and accompanying text.

21. For further discussion of the impact of *Senne*, see *infra* notes 202-212 and accompanying text. For further discussion of how the United States Congress and local governments have stepped up to bat in support of the minor leagues, see *infra* notes 213-217 and accompanying text. For further discussion of the real-life consequences for the small towns scattered across American impacted by the MiLB, see *infra* notes 218-226 and accompanying text.

22. See Scott Orgera, 'More Than Baseball' Aims To Help Minor Leaguers With Food, Housing, Equipment And Other Services, FORBES (Feb. 20, 2019), <https://www.forbes.com/sites/scottorgera/2019/02/20/more-than-baseball-aims-to-help-minor-leaguers-with-food-housing-equipment-and-more/#24f4d84c1279> [<https://perma.cc/T5UT-JQ37>] ("Right or wrong, subpar living conditions for minor league players have long been looked upon as an accepted part of life in professional baseball.").

23. See *id.* (describing how minor league life is romanticized in films).

24. See *id.* (explaining process of playing pro baseball).

25. See *id.* (detailing most MLB players start out in minor leagues). The professional path to the MLB is much slower compared to other professional sports. See Jason Catania, *Players to Go Straight from MLB Draft to the Show*, MLB (Sept. 18, 2020), <https://www.mlb.com/news/players-who-went-directly-from-the-draft-to-mlb> [<https://perma.cc/3NRY-SL3S>] (detailing history of MLB's draft). While international players are not subject to the MLB draft, a majority of American baseball players are, and "[s]ince the MLB Draft began in June 1965, only [twenty-two] players have gone from being selected via that process straight to MLB without first playing in the Minors." *Id.* (considering rarity of playing in MLB straight from draft).

A. Underlying Claim: Minor Leaguers Look to Fight in Big League Court

Plagued with low wages and long working hours, life for a minor leaguer is anything but glamorous.²⁶ The MLB has long gotten away with paying minor leaguers below minimum wage under the guise that minor league talent is dispensable.²⁷ Many minor league players must live with multiple teammates in cramped apartments, well exceeding capacity.²⁸ Players justify these realities as means to an end.²⁹

The MLB has largely circumvented any challenges to halt this mistreatment due to baseball's infamous antitrust exemption.³⁰ Historically, all professional baseball players were subjected to the MLB's collusion power; however, major league players overcame this stronghold with the formation of the Major League Baseball Players Association (MLBPA) and negotiating collective bargaining agreements (CBA).³¹ Unfortunately, minor league players were excluded from the MLBPA, despite making up the overall majority of baseball players employed by the MLB.³² Without any organized

26. See Dirk Hayhurst, *An Inside Look into the Harsh Conditions of Minor League Baseball*, BLEACHER REPORT (May 14, 2014), <https://bleacherreport.com/articles/2062307-an-inside-look-into-the-harsh-conditions-of-minor-league-baseball> [https://perma.cc/MV3S-PLAM] (referring to unspoken rule playing in MiLB is a "brutal experience" involving low wages, decrepit facilities, and inhumane working hours).

27. See *id.* (referring to large pool of hungry amateur talent willing to endure poor conditions for chance to play pro ball).

28. See Tom Goldman, *Fight Against Low, Low Pay in Minor League Baseball Continues Despite New Obstacles*, NAT'L PUB. RADIO (Aug. 3, 2018), <https://www.npr.org/2018/08/03/635373608/fight-against-low-low-pay-in-minor-league-baseball-continues-despite-new-obsstacl> [https://perma.cc/SK5P-K9TJ] (bartering personal possessions, bats, gloves, and clothing).

29. See Hayhurst, *supra* note 26 (noting MiLB players often take on side jobs such as speaking engagements or signing events to make ends meet). Minor league life boils down to a game of who can last the longest living a life of paucity. See *id.* (implying many players do not last in the minor league system).

30. See Lucas J. Carney, *Major League Baseball's Foul Ball: Why Minor League Baseball Players Are Not Exempt Employees under the Fair Labor Standards Act*, 41 J. CORP. L. 283, 289 (2015) (referring to numerous failed attempts of players to challenge MLB); see also Broshuis, *supra* note 4, at 90–92 (summarizing effects of not having union for minor leaguers).

31. See Second Consolidated Am. Compl. for Violations of Federal and State Wage and Hour Laws, at 4, *Senne v. Kan. City Royals Baseball Corp.*, No. 3:14-cv-00608-JCS, 2015 WL 4197303 (N.D. Cal. May 20, 2015) [hereinafter "Second Consolidated Amended Complaint"] (arguing minor league players unfairly remain victim to MLB's collusion).

32. See *id.* (suggesting need for alternative way to protect minor league players). Each year, the MLB pays over half a billion dollars to approximately 7,500 minor league players; however, according to the MLB, "being a Minor League Baseball player is not a career but a short-term seasonal apprenticeship in which

MiLB bargaining unit, minor leaguers lack any power to “combat the collusive power of the MLB cartel.”³³ Furthermore, in 2018, the MLB dedicated significant resources to lobbying Congress to reinforce the MLB’s chokehold on minor leaguers, thus telling these athletes, in essence, to shut up and pitch.³⁴

Given their lack of bargaining power, Plaintiffs in *Senne* opted for an alternate method to challenge the MLB’s Front Office, filing a law suit in federal court, asserting that the MLB’s low wages for MiLB players violated federal and state wage-and-hour laws.³⁵ For example, named Plaintiff and former first baseman, Aaron Senne, played pro ball from 2010 to 2013.³⁶ During his time in the minors, Senne claimed he was paid “about \$3,000 for the entire 2010 season, \$3,000 in 2011, about \$7,000 in 2012, and \$3,000 in 2013.”³⁷ Plaintiffs claim these wages are well below the Federal Poverty Level (“FPL”).³⁸ Although Plaintiffs conceded to baseball’s antitrust exemption, they argue this antitrust loophole, “in no way provides an exemption from the federal and state wage and hour laws that the Defendants routinely violated.”³⁹

the player either advances to the Major Leagues or pursues another career.” Press Release, MLB, Major League Baseball Statement (June 30, 2016), <https://www.mlb.com/press-release/major-league-baseball-statement-187167466> [<https://perma.cc/9DZL-VWNB>] (supporting passage of congressional legislation exempting minor league players from federal minimum wage and overtime hours requirements).

33. See Second Consolidated Amended Complaint, *supra* note 31, at 5 (arguing MLB unlawfully violating anticompetitive laws).

34. See Nathaniel Grow, *The Save America’s Pastime Act: Special-Interest Legislation Epitomized*, 90 U. COLO. L. REV. 1013, 1023–26 (2019) (presenting MLB’s concerted effort to maintain power).

35. See Blake Yagman, *Senne v. Royals is the case that could change Major League Baseball*, FAN SIDED (Oct. 25, 2017), <https://fansided.com/2017/10/25/senne-v-royals-lawsuit-could-change-mlb/> [<https://perma.cc/D3HE-EHPX>] (arguing MLB paid wages below poverty levels); see also *Senne v. Kan. City Royals Baseball Corp.*, 105 F. Supp. 3d 981 (N.D. Cal. 2015) (representing *Senne*’s original case).

36. See Yagman, *supra* note 35 (noting Senne played four years at Missouri before being “drafted twice by the Minnesota Twins and once by the (then) Florida Marlins”). In 2013, Senne retired from baseball, and the following year filed this class action lawsuit against the MLB. See *id.* (reporting Senne never played in the majors during his professional baseball career).

37. Yagman, *supra* note 35 (detailing wages of Senne during career as MLB player); see also Second Consolidated Am. Compl., *supra* note 31, at 44 (detailing Senne’s allocation of wages).

38. See Yagman, *supra* note 35 (reporting \$13,860 is current Federal Poverty Level). During his time playing for the MiLB, Senne “was forced to take on additional jobs to supplement his revenue.” *Id.* (noting supplemental income covered costs for proper baseball training).

39. Second Consolidated Am. Compl., *supra* note 31, at 4 (“MLB’s longstanding exemption from the United States’ antitrust laws allows it to openly collude on the working conditions for the development of its chief commodity: young baseball players.”).

In defense, the MLB argued Plaintiffs' claims could not survive as a class action or collective action because of the variations in state laws and variations in individual players' schedules.⁴⁰ In 2018, while preliminary class certification issues were still being litigated, Congress passed the Save America's Pastime Act (SAPA), which exempted MiLB players from protections under FLSA.⁴¹ SAPA had a crucial impact on *Senne*, as it made Plaintiffs' FLSA claims moot, leaving their state claims as their only viable option.⁴² In reaction to Plaintiffs' claims, the MLB argued that minor leaguers are exempt from minimum wage requirements since they are classified as seasonal apprentices.⁴³ Furthermore, the MLB threatened that if they were to increase minor league wages, a reduction in the number of minor league teams would result.⁴⁴

40. See Zachary Zagger, *9th Circ. Ruling Puts Minor League Pay Back on The Table*, LAW360 (Aug. 21, 2019), <https://www.law360.com/articles/1190135/9th-circ-ruling-puts-minor-league-pay-back-on-the-table> [<https://perma.cc/749U-HMFL>] (referring to choice-of-law issues).

41. See *id.* (noting SAPA was passed as part of federal spending bill). "Any employee employed to play baseball who is compensated pursuant to a contract that provides for a weekly salary for services performed during the league's championship season (but not spring training or the off season) at a rate that is not less than a weekly salary equal to the minimum wage under section 206(a) of this title for a workweek of 40 hours, irrespective of the number of hours the employee devotes to baseball related activities." *Id.*; see also 29 U.S.C. § 213(a)(19) (detailing amendment exempting minor league players from FLSA); Save America's Pastime Act, Pub. L. No. 115-141, 132 Stat. 1126 (containing application of FLSA to minor league players). *But see* Grow, *supra* note 34, at 1038 (arguing SAPA "makes it substantially less likely that the *Senne* plaintiffs will be able to force MLB to significantly modify its treatment of minor league players through the suit").

42. See Zagger, *supra* note 40 ("The key to this is the reliance on state laws rather than on the federal laws, which seem to have been rendered virtually unusable."). While Plaintiffs' claims regarding future wages under the FLSA might be moot, SAPA "is not retroactive, however, meaning that players could still seek damages from the period before it went into effect." Zach Spedden, *Appeals Court Expands Scope of Class-Action MiLB Player Wage Lawsuit*, BALLPARK DIGEST (Aug. 19, 2019), <https://ballparkdigest.com/2019/08/19/appeals-court-expands-scope-of-class-action-milb-player-wage-lawsuit/> [<https://perma.cc/HE8A-LZTC>] (meaning relief still possible).

43. See Defs.' Answer to the Second Am. Compl. at 72, *Senne v. Office of the Comm'r of Baseball*, No. 3:14-cv-00608-JCS, 014 WL 10726660 (N.D. Cal. May 22, 2014) (citing 29 U.S.C. §§ 213(a)(1)-(3) (2020)) (asserting Plaintiffs FLSA claims barred by seasonal worker status exemption); see also Spedden, *supra* note 42 (reporting MLB claiming minor league jobs are "akin to seasonal apprenticeships").

44. See Spedden, *supra* note 42 (providing MLB's reaction to requests for higher wages).

B. Procedural Posture: The Innings Leading Up to the Circuit Court

In *Senne*, forty-five current and former MiLB players banded together to demand the MLB finally step up to the plate.⁴⁵ Plaintiffs challenged the MLB's wage and labor practices as archaic and described Defendants as either members or leaders of the "cartel" known as the MLB.⁴⁶ Plaintiffs' key piece of evidence supporting this claim was the poverty-level pay of \$12,000 that an average MiLB player makes per season.⁴⁷ The former and current MiLB players alleged that "the American tradition of baseball collides with a tradition far less benign: the exploitation of workers."⁴⁸

In May 2015, Plaintiffs filed their second amended consolidated class action complaint in the United States District Court for the Northern District of California.⁴⁹ Plaintiffs alleged wage-and-hour claims under the laws of eight states and the Fair Labor Standards Act (FLSA).⁵⁰ In October 2015, after the district court preliminarily certified the FLSA collective, notice was sent to approximately 15,000 current and former minor league players.⁵¹

In 2016, Defendants moved to decertify the FLSA collective and exclude Plaintiffs' expert survey, while Plaintiffs moved to certify a Fed. R. Civ. P. 23(b)(2) ("Rule 23(b)(2)") class and Fed. R. Civ. P. 23(b)(3) ("Rule 23(b)(3)") classes.⁵² The district court denied certification for the Rule 23(b)(3) classes due to failure to sat-

45. See *Senne v. Kan. City Royals Baseball Corp.*, 934 F.3d 918, 924 (9th Cir. 2019), *petition for cert. filed*, (U.S. Jan. 1, 2020) (No. 19-1339) (noting MLB Commissioner, Bud Selig, and twenty-two MLB franchises as co-defendants). Plaintiffs also brought state wage-and-hour claims as well. See *id.* (stating wage and overtime violations included: California, Florida, Arizona, North Carolina, New York, Pennsylvania, Maryland, and Oregon).

46. See Second Consolidated Am. Compl., *supra* note 31, at 4 ("The organization traces its roots to the nineteenth century. Unfortunately for many of its employees, its wage and labor practices remain stuck there.").

47. See Yagman, *supra* note 35 (reporting three class action suits attempting "to reverse the tide of Minor League Baseball's unlivable wages"); see also Broshuis, *supra* note 4, at 93 (comparing MLB and MiLB wage growth from 1976 to 2010).

48. *Senne*, 934 F.3d at 923 (suggesting MLB's unfair abuse of minor league players); see also J.J. Cooper, *MLB Proposal Would Eliminate 42 Minor League Teams*, BASEBALL AMERICA (Oct. 18, 2019), <https://www.baseballamerica.com/stories/mlb-floats-proposal-that-would-eliminate-42-minor-league-teams/> [<https://perma.cc/TBB5-ZMWG>] (reporting Plaintiffs "contend they should have been paid for their time in spring training and extended spring training").

49. See *Senne v. Kan. City Royals Baseball Corp.*, 315 F.R.D. 523, 530 (N.D. Cal. 2016) (summarizing background of case).

50. See *Senne*, 934 F.3d at 924-25 (summarizing procedural history of case).

51. See *id.* at 924 (noting 2,200 players who received notice opted in).

52. See *Senne*, 315 F.R.D. at 529-61 (summarizing procedural history of case).

isfy the predominance requirement.⁵³ The district court also decertified the FLSA collective finding that collective members were not similarly situated.⁵⁴ Further, the district court denied Defendants' motion to exclude Plaintiffs' expert survey (the "Main Survey"), finding that Defendants' challenges were "better left to a jury to evaluate."⁵⁵ Lastly, the district court denied certification of the Rule 23(b)(2) class for a lack of standing.⁵⁶

On reconsideration, Plaintiffs argued they could meet Rule 23(b)(3)'s predominance requirement and FLSA's similarly situated requirement through "a combination of the use of representative evidence and application of the so-called 'continuous workday' rule."⁵⁷ Subsequently, the district court recertified the FLSA collective and certified a California 23(b)(3) class.⁵⁸ Also on reconsideration, the district court denied certification of Plaintiffs' Arizona, Florida, and (b)(2) classes for predominance concerns.⁵⁹

On petition, the Ninth Circuit considered "whether these minor league players may properly bring their wage-and-hour claims

53. *See id.* at 585 (relying on choice-of-law issues and plaintiffs failing to be "similarly situated" for denying certification).

54. *See id.* at 586 (stating adjudicating FLSA on collective basis would be "unmanageable").

55. *See Senne*, 934 F.3d at 925 (finding Main Survey admissible). Defendants' moved for the district court to exclude the Main Survey because it failed to provide data on "the kinds of activities they performed at the facilities, or how much time they spent performing particular activities." *Id.* at 926 (arguing even if Main Survey admissible under *Daubert v. Merrell Dow Pharma., Inc.*, it fails to meet predominance and similarly situated requirements). However, the district court concluded, since Defendants' challenges went to the significance of the Main Survey and not its admissibility, Plaintiffs were permitted to use the Main Survey in combination with other evidence, such as team schedules, testimony, and payroll data, to meet the requirements of Rule 23(b)(3)'s predominance and FLSA's similarly situated. *See id.* (noting Defendants not precluded from challenging Main Survey's sufficiency on summary judgement and/or at trial).

56. *See id.* at 925 (reasoning Plaintiffs were all former, not current, players). Since all of the named Plaintiffs were former minor league players, the district court found, they failed to show any likelihood of future harm from Defendants, and therefore, lacked standing to seek injunctive relief for the Rule 23(b)(2) classes. *See Senne*, 315 F.R.D. at 584 (finding Plaintiffs failed to meet requirements for Rule 23(b)(2) certification). In an attempt to cure this deficiency, Plaintiffs requested permission to add current minor league players to their complaint; however, the court denied this request. *See id.* at 585 n. 17 (finding Plaintiffs failure to satisfy Fed. R. Civ. P. 23(a) prohibited such a remedy).

57. *Senne*, 934 F.3d at 925 (noting Plaintiffs' main representative evidence involved expert survey titled "Main Survey").

58. *See Senne*, 934 F.3d at 926 (noting FLSA collective was narrowed down).

59. *See id.* (holding "choice-of-law concerns defeated predominance for the Arizona and Florida classes and undermined 'cohesiveness' for the (b)(2) class"); *see also Senne v. Kan. City Royals Baseball Corp.*, No. 14-cv-00608-JCS, 2017 WL 5973487 at *1 (N.D. Cal. May 5, 2017) (granting Plaintiffs' motion to certify for appeal and Defendants' motion to stay).

on a collective and class-wide basis.”⁶⁰ The Ninth Circuit held in favor of Plaintiffs by expanding the scope of class action requirements.⁶¹ The Ninth Circuit’s decision marked a significant win for minor league players by clearing the path for Plaintiffs to pursue the case as a certified class on remand.⁶² This decision is only the beginning of what could be a long litigious road for the forty-five named plaintiffs in the case; however, *Senne* is significant because it initiated a much needed dialogue regarding the substandard treatment of MiLB players.⁶³ The MLB has since moved for the Ninth Circuit’s decision to be stayed pending the filing and disposition of a petition for certiorari to the United States Supreme Court.⁶⁴ However, the Supreme Court has since denied the MLB’s petition, allowing the Ninth Circuit’s class certification decision to stand and permitting the case to move forward as a class action in trial court.⁶⁵

III. BACKGROUND: WHO’S ON FIRST, WHAT’S ON SECOND

In order to fully grasp the significance of *Senne*, it is important to understand the procedural intricacies of succeeding in a federal class action.⁶⁶ In addition to explaining the mechanics of a class action, Section III also covers the relationship between the MLB and MiLB and how this dynamic effects labor conditions for professional baseball players.⁶⁷ Also in play is the Fair Labor Standards Act of 1938, which was recently amended with a provision specifically exempting baseball players from minimum wage and maximum hour protections.⁶⁸ These developments significantly

60. *Senne*, 934 F.3d at 923 (stating main issue of case).

61. See Spedden, *supra* note 42 (detailing results of appeal).

62. See *Senne*, 934 F.3d at 950 (holding certification “is consistent with the ‘great public policy’ embodied by the FLSA”).

63. See Spedden, *supra* note 42 (arguing MLB “should be complying with those laws just like Walmart is complying with those laws” (quoting Garrett Broshuis, one attorney for minor league players)).

64. See Zachary Zaggar, *Minor League Wage Suit Halted for MLB’s High Court Bid*, LAW360 (Jan. 14, 2020), <https://www.law360.com/articles/1234193> [<https://perma.cc/VSY7-8LF3>] (detailing MLB’s appeal to Supreme Court).

65. See *Kansas City Royals Baseball v. Senne*, No. 19-1339, 2020 WL 5882289, at *1 (U.S. Oct. 5, 2020) (denying petition for writ of certiorari).

66. For further discussion of class and collective actions, see *infra* notes 70–110 and accompanying text.

67. For further discussion of the significant governing bodies in the MLB and the MiLB, see *infra* notes 111–113 and accompanying text. For further discussion of labor regulations in professional baseball, see *infra* notes 114–119 and accompanying text.

68. See Maury Brown, *Court Ruling Allows Minor League Baseball Players to Seek Wage Increase As Class Action*, FORBES (Aug. 16, 2019), <https://www.forbes.com/sites/maurybrown/2019/08/16/court-ruling-allows-minor-league-baseball-players-to-seek-wage-increase-as-class-action/#2dcd78917fed> [<https://perma.cc/2FM7->

impacted Plaintiffs' strategy in focusing on state laws to overcome antitrust exemptions long enjoyed by baseball owners and executives.⁶⁹

A. Class and Collective Actions

1. *Choice-of Law Issues & Predominance*

Multistate class actions implicate substantive law of multiple jurisdictions, thus requiring a district court to utilize the choice-of-law rules of the forum state to decide what law applies.⁷⁰ Choice-of-law conflicts do not preclude a 23(b)(3) action; however, when there is a potential for variations in applicable state law, understanding which state's law applies is important before making predominance determinations.⁷¹ A class action brought in a federal district court located in California would therefore apply California law, unless a party litigant objects by invoking foreign state law.⁷²

In California, when a party invokes foreign state law, that party has the burden of satisfying California's three-step governmental interest test.⁷³ First, a court must determine whether the relevant laws differ, and if so, whether a "true" conflict exists.⁷⁴ Finally, a court must determine "which state's interest would be more impaired if its policy were subordinated to the policy of the other

G9HH] (detailing 2018 law exempting baseball players from FLSA protections); see also 29 U.S.C. § 213(a)(19) (2018) (codifying Save America's Pastime Act).

69. For further discussion of baseball's infamous antitrust exemption, see *infra* notes 120-129 and accompanying text. For further discussion of the MLB's reorganization proposal for the minor league, see *infra* notes 130-143 and accompanying text.

70. See ANDREW S. TULUMELLO & GEOFFREY C. WEIEN, A PRACTITIONER'S GUIDE TO CLASS ACTIONS 621 (Marcy Hogan Greer ed., American Bar Association (2010)) (discussing choice-of-law issues in multistate class actions); see also *Senne v. Kan. City Royals Baseball Corp.*, 934 F.3d 918, 928 (9th Cir. 2019), *petition for cert. filed*, (U.S. Jan. 1, 2020) (No. 19-1339) (citing *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496-97 (1941)) (detailing choice-of-law analysis).

71. See *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001) (stressing varying state laws may defeat predominance). The Ninth Circuit has expressed its concern with the impact of choice-of-law analysis in national consumer class actions. See e.g. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012) (regarding automobile sales in forty-four different jurisdictions).

72. See *Senne*, 934 F.3d at 928 (citing *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 561 (9th Cir. 2019)) (detailing procedure when party litigant invokes foreign state law); see also *Klaxon Co.*, 313 U.S. at 496-97 (delineating choice-of-law standard).

73. See *Senne*, 934 F.3d at 928 (explaining burden shifting process).

74. See *id.* at 929 (citing *Sullivan v. Oracle Corp.*, 254 P.3d 237, 244-47 (Cal. 2011)) (explaining first two steps of California's governmental interest test); see also *Mazza*, 666 F.3d at 590 (explaining differences in state law are material when they make difference in litigation).

state.”⁷⁵ In *Sullivan v. Oracle Corp.*,⁷⁶ the California Supreme Court held California labor laws applied to both residents and non-residents performing work within California’s state borders.⁷⁷ *Sullivan* also applied California’s three-step governmental interest test for conflicts-of-law.⁷⁸

2. Rule 23: Certification of Class Actions

Federal Rule of Civil Procedure 23 permits representative parties to pursue claims on behalf of a greater group of people.⁷⁹ So long as the plaintiff can demonstrate “(1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation,” a class action may proceed beyond this primary judicial hurdle.⁸⁰ After establishing these Rule 23(a) prerequisites, a plaintiff must show that the proposed class falls within one of the three different types of classes under Rule 23(b).⁸¹

a. 23(b)(2)’s Injunctive Class

Certification under Rule 23(b)(2) requires the party opposing the class, typically the Defendant, to have “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.”⁸² Injunctive class certification, under Rule 23(b)(2), is granted when the claim involves “a pattern or practice that is generally applicable to the class as a whole.”⁸³ Some courts

75. *Senne*, 934 F.3d at 930 (explaining third step of California’s governmental interest test); *see also* *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 922 (2006) (detailing California’s three-step governmental interest test).

76. 254 P.3d 237 (Cal. 2011).

77. *See id.* at 240-41 (concluding California law applied as matter of statutory construction). *Sullivan* involved non-resident employees of a California corporation who worked primarily in Colorado and Arizona, but also worked in California. *See id.* at 243 (noting work performed in California lasted for “entire days or weeks” at time).

78. *See Sullivan*, 254 P.3d at 244-47 (outlining analysis of governmental interest test).

79. *See Senne*, 934 F.3d at 927 (citing FED. R. CIV. P. 23(a)) (discussing class certification analysis).

80. *Id.* (listing Rule 23(a)’s four requirements).

81. *See* FED. R. CIV. P. 23(b) (providing three different types of classes); *see also* *Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 512 (9th Cir. 2013) (delineating rule for 23(b)).

82. *Senne*, 934 F.3d at 928 (alteration in original) (quoting FED. R. CIV. P. 23(b)(2)) (discussing injunctive relief class).

83. *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998); *see also* *Parsons v. Ryan*, 754 F.3d 657, 689 (9th Cir. 2014) (stating Rule 23(b)(2) classes not limited to civil rights context).

have interpreted 23(b)(2)'s "generally applicable" language as a trigger for a *cohesiveness* requirement, and subsequently have treated this class type requirement similar to Rule 23(b)(3)'s predominance inquiry.⁸⁴ Other courts, such as the Ninth Circuit, reject the triggering of a cohesiveness requirement for 23(b)(2) classes, stating those courts "demonstrate a fundamental misunderstanding of the rule."⁸⁵ In *Wal-Mart Stores, Inc. v. Dukes*,⁸⁶ the Supreme Court clarified this divergence in interpretation of 23(b)(2), holding Rule 23(b)(2) "does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant."⁸⁷

b. 23(b)(3)'s Predominance Requirement

Certification under Rule 23(b)(3) is merited if "questions of law or fact common to class members predominate over any questions impacting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."⁸⁸ Rule 23(b)(3)'s predominance inquiry "focuses on 'the relationship between the common and individual issues' and 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'"⁸⁹ In *Tyson Foods, Inc. v. Bouaphakeo*,⁹⁰ the Supreme Court clarified that even if certain matters must be tried separately according to individual class members, a proposed Rule 23(b)(3) class may be certified as long as "one or more of the central issues in the action are common to the class and can be said to predominate."⁹¹ Therefore, courts must "take a close look at whether common questions predominate over individ-

84. See *Senne*, 934 F.3d at 937 n.14 (discussing similarity between cohesiveness and predominance).

85. *Walters*, 145 F.3d at 1047 (holding "[e]ven if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate"). "Although common issues must predominate for class certification under Rule 23(b)(3), no such requirement exists under 23(b)(2)." *Id.* (rejecting predominance requirement for 23(b)(2) classes).

86. 564 U.S. 338, 360 (2011).

87. *Id.* at 360 ("Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class.").

88. *Senne*, 934 F.3d at 927 (quoting FED. R. CIV. P. 23(b)(3)) (noting 23(b)(3)'s requirements).

89. *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998)).

90. 136 S. Ct. 1036 (2016).

91. *Id.* at 1045 (quoting 7AA C. WRIGHT, A. MILLER, & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1778 (3d ed. 2005)).

ual ones to ensure that individual questions do not overwhelm questions common to the class.”⁹²

i. Representative Evidence

Differences among employees rarely defeat predominance in employment cases, “so long as liability arises from a common practice or policy of an employer.”⁹³ In *Anderson v. Mt. Clemens*,⁹⁴ the Supreme Court established the burden-shifting framework for when the employer kept inaccurate or inadequate records:

[W]e hold that 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. The 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.⁹⁵

This burden-shifting framework relieved employees from potential obstacles in pursuing a wage-and-hour claim if their employer failed to maintain adequate records.⁹⁶ In *Tyson*, the Supreme Court expanded this framework by allowing a representative sample to establish hours worked in a class action, as long as the sample “could have sustained a reasonable jury finding as to hours worked in each employee’s individual action.”⁹⁷ For pur-

92. *Senne*, 934 F.3d at 927 (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013) (internal quotation marks and citation omitted) (discussing whether predominance requirement satisfied). Rule 23(b)(3) “asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.” See also *Tyson*, 136 S. Ct. at 1045 (quoting 2 NEWBERG ON CLASS ACTIONS § 4:49 (5th ed. 2012)).

93. *Senne*, 934 F.3d at 938 (quoting 7 NEWBERG ON CLASS ACTIONS § 23:33 (5th ed. 2012)). But see *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 958 (9th Cir. 2009) (stating blanket corporate policies do not guarantee satisfaction of predominance but “often bear heavily on questions of predominance and superiority”).

94. 328 U.S. 680, 687-88 (1946).

95. *Mt. Clemens*, 328 U.S. at 687-88 (rejecting “notion allowing approximate damages in such situations would be unfair”); see also *Tyson*, 136 S. Ct. at 1045-48 (applying *Mt. Clemens* to state wage-and-hour claims).

96. See *Mt. Clemens*, 328 U.S. at 687-88 (requiring employers to provide evidence in rebuttal).

97. *Tyson*, 136 S. Ct. at 1046-47 (affirming class and collective certifications). Even where “‘reasonable minds may differ’ about whether representative evidence is sufficiently probative of the requirements for liability for a particular cause of

poses of class certification, *Tyson* permitted a class of employees to use a representative sample to “fill an evidentiary gap created by the employer’s failure to keep adequate records.”⁹⁸

ii. “Continuous Workday” Rule

In 1947, the Department of Labor (DOL) first adopted the continuous workday rule, which is still in effect today.⁹⁹ The continuous workday rule presumes that once the workday is triggered, an employee performs compensable work throughout the rest of the day until the employee completes their last principal activity.¹⁰⁰ In *IBP, Inc. v. Alvarez*,¹⁰¹ the Supreme Court interpreted the continuous workday to include “any activity that is ‘integral and indispensable’ to principal activities, even if performed outside of a scheduled shift.”¹⁰²

3. *Similarly Situated Under FLSA*

Under the FLSA, employees are permitted to bring lawsuits on behalf of “themselves and other employees *similarly situated*.”¹⁰³ The FLSA’s similarly situated requirement lacks any established definition and, as a result, two different approaches exist in the court system.¹⁰⁴ The minority approach treats a FLSA collective as an “opt-in analogue to a Rule 23(b)(3) class,” meaning a collective must satisfy Rule 23(b)(3)’s requirements of numerosity, commonality, typicality, adequacy, predominance, and superiority.¹⁰⁵ Alternatively, the majority approach involves “a flexible inquiry into the factual differences between the party plaintiffs and the desirability

action . . . that question is to be resolved by the jury, *not* at the class certification stage.” *Senne*, 934 F.3d. at 940 (quoting *Tyson*, 136 S. Ct. at 1049).

98. Wayne D. Garris Jr., *Denial of Class Certification Reversed in Major Win for Minor League Baseball Players*, WOLTERS KLUWER, <http://www.employmentlawdaily.com/index.php/news/denial-of-class-certification-reversed-in-major-win-for-minor-league-baseball-players/> [https://perma.cc/P6Q3-TF36] (last visited Mar. 21, 2020) (detailing *Tyson*’s treatment of representative evidence).

99. *See IBP, Inc. v. Alvarez*, 546 U.S. 21, 28, (2005) (noting DOL’s adoption of Court’s interpretation of continuous workday rule); *see also* 29 C.F.R. § 790.6(b) (defining continuous workday).

100. *See Alvarez*, 546 U.S. at 28 (explaining continuous workday rule).

101. 546 U.S. 21 (2005).

102. *Senne*, 934 F.3d at 941 (quoting *Alvarez*, 546 U.S. at 32-37) (expanding definition of continuous workday).

103. *Id.* at 947 (emphasis added) (quoting 29 U.S.C. § 216(b) (2018)) (explaining FLSA collective actions).

104. *See Campbell v. City of Los Angeles*, 903 F.3d 1090, 111-16 (9th Cir. 2018) (referring to minority and majority approaches).

105. *Id.* (stating no circuit court has adopted minority approach in full).

of collective treatment.”¹⁰⁶ A district court following this majority approach “focuses on points of potential factual or legal *dissimilarity* between party plaintiffs,” using a three-prong test.¹⁰⁷ In *Campbell v. City of Los Angeles*,¹⁰⁸ the Ninth Circuit rejected both tests for similarly situated and established a novel approach to FLSA collective certification.¹⁰⁹ Under the *Campbell* standard, plaintiffs deemed similarly situated in a FLSA collective must “share a similar issue of law or fact material to the disposition of their FLSA claims.”¹¹⁰

B. Professional Baseball Labor: Majors v. Minors

The MLB is comprised of thirty teams, which are evenly divided among two leagues, the American and the National.¹¹¹ Minor league players are professional athletes, contracted with the MLB, which leads many fans to improperly assume that the MLB and the MiLB work as one entity.¹¹² While the PBA binds the MLB

106. *Id.* at 1113 (citing *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1260 n.38. (11th Cir. 2008)) (referring to test as “ad hoc” test).

107. *Campbell*, 903 F.3d at 1113–16 (declining adoption due to “ad hoc” test’s two major flaws). A district court following the three-prong test considers first, any “disparate factual and employment settings of the individual plaintiffs,” second, “the various defenses available to defendants which appear to be individual to each plaintiff,” and third, “fairness and procedural considerations.” *Id.* at 1113 (quoting *Thiessen v. GE Capital Corp.*, 267 F.3d 1095, 1103 (10th Cir. 2001)) (outlining considerations involved in three-prong test).

108. 903 F.3d 1090 (9th Cir. 2018).

109. *See id.* at 1111 (referring to inconsistencies and improper treatment from prior similarly situated tests).

110. *Id.* at 1117 (holding dissimilarities in other respects should not defeat collective treatment).

111. *See MLB Team Contact Information*, MAJOR LEAGUE BASEBALL, <https://www.mlb.com/team> [<https://perma.cc/8MNE-5JRG>] (last visited Jan. 30, 2020) (listing all thirty MLB teams). The MLB is led by a commissioner, who is elected by the owners of the thirty MLB teams. *See also* Michael S. Schmidt, *Baseball Promotes Selig’s Deputy*, N.Y. TIMES (Aug. 14, 2014), <https://www.nytimes.com/2014/08/15/sports/baseball/MLB-Commissioner-Rob-Manfred-Tom-Werner-Tim-Brosnan.html> [<https://perma.cc/LK56-YAXG>] (announcing election of MLB’s tenth commissioner).

112. *See* J.J. Cooper, *A Complete History of The Working Agreement Between Major and Minor Leagues*, BASEBALL AMERICA (Oct. 18, 2019), <https://www.baseballamerica.com/stories/a-complete-history-of-the-working-agreement-between-major-and-minor-leagues/> [<https://perma.cc/YEQ8-E3GC>] (explaining common misconception of relationship between MLB and MiLB); *see also* *See Who We Are*, MINOR LEAGUE BASEBALL, <https://www.milb.com/about/> [<https://perma.cc/U3U8-N6UK>] (last visited Jan. 26, 2020) (reporting MiLB consists of 160 teams spread across 17 leagues). “The current minor league classification system divides leagues into one of five classes, those being Triple-A (AAA), Double-A (AA), Class A (Single-A or A), Class A Short Season, and Rookie.” *Overview of Baseball’s Minor League Organization*, SPORTS ADVISORY GROUP, <http://www.thesportsadvisorygroup.com/resource-library/business-of-sports/overview-of-baseballs-minor-league-organization/> [<https://perma.cc/M3GL-X4DM>] [herein-

and the MiLB together, neither organization negotiates on behalf of minor league players' interests.¹¹³

1. *Uniform Player Contract (UPC)*

Minor leaguers are governed by the Major League Rules (MLRs), despite not being able to enjoy the protections the MLBPA affords major league players.¹¹⁴ Under the MLRs, all minor leaguers are required to sign a seven-year Uniform Player Contract (UPC), which dictates the minimum salary for minor leaguers.¹¹⁵ Together, baseball's antitrust exemption and the UPC place major constraints on minor league players' contractual freedom.¹¹⁶

During the regular season and postseason, MLB teams are permitted to maintain a forty-man major league reserve list; however, outside this time period, MLB teams are only allowed to maintain twenty-six active players.¹¹⁷ While players who are listed on the forty-man roster are eligible for membership in the MLBPA, the remaining players in the minors are left to fend for themselves.¹¹⁸ As a result, minor leaguers hesitate and refrain from voicing complaints about the minor league system out of fear of jeopardizing their chances of being listed on an MLB team's active roster.¹¹⁹

after Sports Advisory Group] (last visited Feb. 22, 2020) (detailing subdivisions of Class A include Class A Advanced, and Class A).

113. See Cooper, *supra* note 112 (reasoning for poor treatment of minor leaguers).

114. See Office of the Commissioner of Baseball, *Official Baseball Rules*, MAJOR LEAGUE BASEBALL MLR 3(b) (2019) [*hereinafter* Major League Rules] https://d39ba378-ae47-400386d3147e4fa6e51b.filesusr.com/ugd/b0a4c2_6e1db097aef47d5b09187096d45fdee.pdf [<https://perma.cc/88MM-6HVL>] (showing rules governing American professional baseball); see also Sports Advisory Group, *supra* note 112 (explaining minor league players must sign player development contracts (PDC) which is the standard agreement dictated by MLB).

115. See Major League Rules, *supra* note 114, at 3(c) (listing first-year player contract terms).

116. See David Williams, *Major League Baseball's Indentured Class: Why the Major League Baseball Players Association Should Include Minor League Players*, 53 U.S.F. L. REV. 515, 532 (2019) (concluding changes to way MLB exploits minor league players must occur in order for minor leaguers to achieve proper treatment).

117. See David Adler, *These Are the Rule Changes for 2020 Season*, MLB (Feb. 14, 2020), <https://www.mlb.com/news/mlb-rule-changes-for-2020-season> [<https://perma.cc/LX49-P9SX>] (outlining rule changes for 2020 season regarding roster size); see also Sports Advisory Group, *supra* note 112 (explaining fifteen players are either placed on injured list or are brought back down to minor leagues).

118. See Sports Advisory Group, *supra* note 112 (reiterating how minor league players are unrepresented).

119. See Hayhurst, *supra* note 26 (explaining why few minor league players openly object to poor treatment).

2. *Baseball's Antitrust Exemption*

Federal antitrust laws are the bedrock on which American economics is based.¹²⁰ Antitrust laws apply to any business involved in “interstate commerce;” however, professional sports enjoy a surprising exemption from these laws.¹²¹ Baseball, in particular, “best exemplifies the implementation, application, and interpretation of the antitrust exemption issues.”¹²² In 1922, a unanimous Supreme Court established baseball’s exemption from federal antitrust laws with the case *Fed. Baseball Club of Balt., Inc. v. Nat’l League of Prof’l*

120. See Claudia Catalano, Annotation, *Application of Federal Antitrust Laws to Professional Sports*, 79 A.L.R. Fed. 2d Art. 1, 1 (noting federal antitrust laws promote competition). Massive growth of corporations in America spurred the enactment of federal antitrust laws in the late 1800s. See JULIAN O. VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REGULATION § 9.01 (2d ed. 2020) (noting concerns of corporate control over American economy as impetus for antitrust laws). In 1890, the Sherman Act was passed, to prevent monopolization within the free markets, serving as a “comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.” *The Antitrust Laws*, FED. TRADE COMM’N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> [<https://perma.cc/A8N2-9MZG>] (last visited Sept. 21, 2020) (noting Sherman Act as first antitrust law passed in United States); see also KALINOWSKI ET AL., *supra*, § 9.02 (discussing passage of Sherman Act as response to industrialization in United States). Soon thereafter, in 1914, the Federal Trade Commission Act and the Clayton Act were passed. See *id.* § 9.03 (explaining Federal Trade Commission Act created FTC). The Federal Trade Commission Act outlaws “unfair methods of competition,” while the Clayton Act “addresses specific practices that the Sherman Act does not clearly prohibit, such as mergers and interlocking directorates.” *Id.* (summarizing interaction of core federal antitrust laws). These three core federal antitrust laws all have “the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.” *Id.* (noting all three core antitrust laws are still in effect today). “In addition to these federal statutes, most states have antitrust laws that are enforced by state attorneys general or private plaintiffs.” *Id.* (acknowledging many states modeled state antitrust statutes on federal antitrust laws).

121. See *Baseball Antitrust Exemption with Gordon Hylton, Sports Law Biz Podcast* (Sept. 14, 2015) (downloaded using iTunes) (discussing impact of baseball’s antitrust exemption). Some have argued sports teams are “more like civic organizations than businesses” and as such, sports teams should be exempt from complying with federal antitrust laws. See *Antitrust Exemption*, <https://antitrustlaws.org/antitrust-exemption.html> [<https://perma.cc/D4TK-AQ62>] (last visited Sept. 21, 2020) (“Because many of the laws were created prior to million dollar salaries and televised events, this made sense and an exemption was allowed.”). “The fact that competitive sports cannot exist without some degree of cooperation between competing teams, however, has played a role in the development of general antitrust principles.” ANTITRUST LAW DEVELOPMENTS § 2-14(I) (8th ed. 2017) (indicating business of sports, rather than sports industry, is subject to general antitrust principles).

122. Howard Bartee, Jr., *The Role of Antitrust Laws in the Professional Sports Industry from a Financial Perspective*, SPORT J., Mar. 2005, at 3 (examining how antitrust laws shaped financial operations of professional sports industry).

Baseball Clubs.¹²³ After going bankrupt, the owner of the Federal Baseball Club of Baltimore filed claims against the National League of Professional Baseball Clubs, alleging that defendants “conspired to monopolize the base ball business” which purportedly violated antitrust laws.¹²⁴ However, the Supreme Court held that the baseball leagues were not engaged in interstate commerce and therefore were not subject to antitrust laws.¹²⁵ Consequently, *Federal Baseball* established an unprecedented loophole for professional baseball, which remained the law of the land for the next seventy years.¹²⁶ Players attempted to chip away at baseball’s antitrust exemption following the *Federal Baseball* decision; however, change did not occur until Congress stepped up to bat.¹²⁷ In the late

123. See 259 U.S. 200 (1922) (holding interstate commerce merely incidental to baseball). The Supreme Court’s decision in *Federal Baseball* stands “as one of the worst reasoned decisions ever.” Craig Calcaterra, *Happy Birthday to Baseball’s Antitrust Exemption*, NBC SPORTS (May 29, 2019), <https://mlb.nbcsports.com/2019/05/29/happy-birthday-to-baseballs-antitrust-exemption/> [<https://perma.cc/6QDS-WEB2>] (suggesting Supreme Court came to its decision “because Justice Holmes really, really just wanted the baseball owners to win, logic and the law be damned”).

124. *Fed. Baseball Club of Balt., Inc.*, 259 U.S. at 207 (filing antitrust action against National League). The Sherman Act “is a federal law which prevents businesses from conspiring with one another in an effort to thwart competition, agreeing to fix prices and otherwise undermining the market, which might hurt consumers.” See Calcaterra, *supra* note 123 (explaining Sherman Act “can only apply to business that engages in ‘interstate commerce’”).

125. See *Fed. Baseball, Inc.*, 259 U.S. at 209 (citing *Hooper v. California*, 155 U.S. 648, 655 (1895)) (“[T]he transport is a mere incident, not the essential thing.”). In 1922, baseball was at the center of American culture and despite operating as a money-making business, the Supreme Court at the time established a major exemption to antitrust laws for professional baseball. See *Antitrust Exemption*, *supra* note 121 (referring to non-statutory exemption to antitrust laws for baseball). Writing for a unanimous Supreme Court, Justice Oliver Wendell Holmes articulated “the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business.” *Id.* at 209 (affirming court of appeals decision).

126. See ANTITRUST LAW DEVELOPMENTS, *supra* note 121, § 2-14(I)(2) (explaining Supreme Court’s affirming of *Fed. Baseball* in 1953 and 1972). In support of upholding baseball’s antitrust exemption, the Supreme Court pointed first to Congress’s “positive inaction” in allowing the exemption from *Fed. Baseball* to continue, second to concerns overturning *Fed. Baseball* would cause confusion an retroactivity issues, and third that a change in the exemption requires legislative action that “by its nature, is only prospective in operation.” *Id.* (explaining Supreme Court’s reasoning for continuing baseball’s antitrust exemption).

127. See Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat. 2824 (1998) (codified as amended at 15 U.S.C. § 26(b) (2019)) [hereinafter Curt Flood Act] (subjecting employment of MLB players to antitrust laws). See generally *Flood v. Kuhn*, 407 U.S. 258 (1972) (involving lawsuits brought by MLB players against MLB); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953) (arguing against MLB’s reserve clause as restraint of trade in violation of antitrust laws). In 1953, professional baseball player George Toolson brought claims against the New York

1990s, new rights were carved out for MLB players under federal antitrust laws with the Curt Flood Act of 1998.¹²⁸ While the Act served as a momentous victory for MLB players, these rights only applied to athletes competing in the MLB, leaving MiLB players defenseless.¹²⁹

C. MLB's Reorganization Plan for MiLB Teams

During a virtual meeting on August 27, 2020, the MLB presented the MiLB with a proposal for a new minor league system for 2021 and beyond.¹³⁰ The MLB's proposal came just thirty-five days before the PBA between the MLB and MiLB was set to expire.¹³¹ If adopted, this proposal is reported to be the "most significant change to Minor League Baseball in at least a half century and arguably ever."¹³² Notably, the proposal could potentially strip forty-two MiLB teams of their affiliation with MLB clubs.¹³³ While

Yankees, challenging the MLB's reserve clause. *See Toolson*, 346 U.S. at 357 (requesting abandonment of Federal Baseball). Ultimately, the Supreme Court found for the MLB, holding if antitrust laws were to subsequently apply to professional baseball, legislative action would be required. *See id.* (reasoning Congressional inaction affirmed baseball's antitrust exemption). Almost two decades later, seven-time gold glove winner and two-time World Series Champion, Curt Flood took a stab at securing rights for professional baseball players. *See Flood*, 407 U.S. at 264-66 (detailing procedural history). Flood ultimately lost his challenge to the MLB's reserve clause due to Congress' "positive inaction" to disapprove of baseball's longstanding antitrust exemption legislatively. *See id.* at 284 (adhering to fifty-year precedent).

128. *See* Curt Flood Act at 2824-26 ("It is the purpose of this legislation to state that major league baseball players are covered under the antitrust laws . . . that major league baseball players will have the same rights under the antitrust laws as do other professional athletes . . ."). Proponents of the bill demand Congress "finally steps up to the plate and ends baseball's antitrust exemption." 143 Cong. Rec. E8 (daily ed. Jan. 7, 1997) (statement of Rep. Conyers) (arguing professional baseball as sole industry in United States exempt from antitrust laws and immune from alternative regulatory supervision).

129. *See* Williams, *supra* note 116, at 535 (referring to legal deficiencies).

130. *See* J.J. Cooper, *MLB Lays Out Proposal to Run Minor League Baseball*, BASEBALL AMERICA (Aug. 28, 2020), <https://www.baseballamerica.com/stories/mlb-lays-out-proposal-to-run-minor-league-baseball/> [<https://perma.cc/4U68-7PAT>] (reporting ongoing negotiations between MLB and MiLB).

131. *See id.* (indicating agreement discussions coming close to deadline).

132. *See id.* (detailing significance of MLB's proposal); *see also* Cooper, *supra* note 48 (analyzing status of MLB and MiLB's negotiations).

133. *See* Dan Gartland, *MLB Proposes Drastic Restructuring of Minor League System*, SPORTS ILLUSTRATED (Oct. 18, 2019), <https://www.si.com/mlb/2019/10/18/mlb-minor-league-system-changes-proposal> [<https://perma.cc/P2SM-XYWX>] (showing impact on MiLB players as well as local communities where cut teams are based). "At the core of the negotiations, MLB is looking to dramatically improve Minor League Baseball's stadium facilities as well as take control over how the minor leagues are organized as far as affiliations and the geography of leagues." Cooper, *supra* note 48 (discussing MLB's intentions in drastically altering landscape of MiLB).

PBA negotiations remain in the early stages, the MLB seems focused on implementing an overhaul of the minor leagues, despite public disapproval.¹³⁴

The MLB's proposal to eliminate forty-two affiliated minor league franchises for the 2021 season would be detrimental to the small towns where those teams are located.¹³⁵ As a result of this threat, local officials have banded together to take on the big leagues.¹³⁶ Although many MiLB teams will survive the proposal, those survivors will undoubtedly be in a worse position.¹³⁷ In an attempt to push back against the MLB's efforts, twenty-five mayors from across the country formed a task force to "to preserve the economic and social opportunities available for teams in minor league communities."¹³⁸ Local community leaders suggest there are numerous, less drastic, solutions the MLB could consider.¹³⁹ These

134. See Cooper, *supra* note 48 ("From the perspective of MLB clubs, our principal goals are upgrading the minor league facilities that we believe have inadequate standards for potential MLB players, improving the working conditions for MiLB players, including their compensation, improving transportation and hotel accommodations, providing better geographic affiliations between major league clubs and their affiliates, as well as better geographic lineups of leagues to reduce player travel." (quoting Dan Halem, MLB Deputy Commissioner)).

135. See Herald Editorial Board, *MLB Needn't Play Hardball with Minor League Teams*, HERALD NET (Jan. 24, 2020), <https://www.heraldnet.com/opinion/editorial-mlb-neednt-play-hardball-with-minor-league-teams/> [<https://perma.cc/D3WR-KYHZ>] ("[A] minor league team is often seen as a major league part of a city's culture and quality of life.").

136. See Jake Seiner, *Michigan Mayors Join New Task Force to Oppose Major League Baseball Minor League Contraction*, CRAIN'S DETROIT BUS. (Jan. 23, 2020), <https://www.crainsdetroit.com/sports/michigan-mayors-join-new-task-force-oppose-major-league-baseball-minor-league-contraction> [<https://perma.cc/ED2C-C3KV>] (advocating on behalf of small communities).

137. See Herald Editorial Board, *supra* note 135 (making surviving minor league teams "wonder if they could face contraction the next time the agreement is negotiated").

138. Derrek Asberry, *Charleston, Columbia Mayors Join National Effort to 'Save Minor League Baseball'*, POST & COURIER (Jan. 22, 2020), https://www.postandcourier.com/sports/charleston-columbia-mayors-join-national-effort-to-save-minor-league/article_c47a4b88-3d23-11ea-9cd0-479b4cbb2c68.html [<https://perma.cc/5R3M-JHV8>] ("It's more about providing some leadership . . . and helping preserve minor league baseball, which is family-friendly, affordable fun that 40 million Americans enjoyed last year.") (quoting Columbia Mayor Steve Benjamin); see also Jake Seiner, *Mayors Launch Task Force to Oppose Minor League Contraction*, ASS'D PRESS (Jan. 22, 2020), <https://apnews.com/a48259eb14071493c4e0167ebe27a4ca> [<https://perma.cc/74KF-756T>] ("All of us understand this plan is a major league error." (quoting Chattanooga Mayor Andy Berke)).

139. See Herald Editorial Board, *supra* note 135 (suggesting refrain from eliminating baseball in forty-two communities across the country). But see Seiner, *supra* note 138 ("I think the question there becomes who should bear all of the costs associated with the player-related improvements that we think need to be made in the minor league system." (quoting MLB Commissioner Rob Manfred)).

leaders are calling on the MLB to remember “major and minor leagues need each other, as much as America still needs baseball.”¹⁴⁰

While the MiLB has long been unsupported when dealing with the MLB, it is finally gaining the necessary support to stand up for its players’ rights.¹⁴¹ Minor league teams have also gained support from Congress, which has partnered with a local community leader task force to take on the MLB.¹⁴² The key reason for local and federal partnership is that “[m]any minor league facilities are either publicly owned or have been supported by tax dollars.”¹⁴³

IV. NARRATIVE ANALYSIS: THE NINTH CIRCUIT CALLS FOUL BALL

On appeal, the Ninth Circuit called “a great number of balls and strikes.”¹⁴⁴ The court considered the district court’s certifica-

140. Herald Editorial Board, *supra* note 135 (arguing why major leagues have interest in supporting minor leaguers); *see also* Mike Anthony, *Blumenthal Makes Necessary Noise as Part of Norwich Fight to Keep Minor League Baseball*, HARTFORD COURANT (Dec. 29, 2019), <https://www.courant.com/sports/hc-sp-norwich-baseball-blumenthal-column-20191229-zpvi5lbqjmjgwhlmmg5mixbzfla-story.html> [<https://perma.cc/Q5XZ-ND32>] (“This fight . . . is about the fundamentals of community and what makes America the greatest nation in the history of the world.” (quoting Senator Richard Blumenthal)).

141. *See* Asberry, *supra* note 138 (quoting mayoral task force on advocating “on behalf of the communities that stand to be most harmed” by the proposal). “With this proposal, MLB is willing to break the hearts of dozens of communities across the country.” *Id.* (quoting Columbia Fireflies president John Katz and Greenville Drive general manager Eric Jarinko) (referring to adverse repercussions from cutting minor league teams). The MLB needs “needs visible people to voice the fear and anger of a baseball community that Major League Baseball views as one of 42 inconveniences on its \$11 billion money trail.” Anthony, *supra* note 140 (quoting Senator Richard Blumenthal implying need for more public support).

142. *See* Seiner, *supra* note 138 (“Politicians have pummeled MLB over the plan.”). “A bipartisan congressional task force formed last month, and Democratic presidential candidate Bernie Sanders has criticized baseball Commissioner Rob Manfred over the proposed cuts.” *Id.* (noting importance of this public support).

143. *See* Seiner, *supra* note 138 (reasoning why governmental action is appropriate). “Mayors at a news conference Wednesday in New York City were frustrated to have been left in the dark on the . . . negotiations despite having provided public money for stadiums in exchange for franchises that play a major role in their communities.” *Id.* (arguing public leaders deserve a seat at negotiating table with MLB since many minor league teams are subsidized by taxpayers).

144. *Senne v. Kan. City Royals Baseball Corp.*, 934 F.3d 918, 927 (9th Cir. 2019) (paraphrasing Chief Justice John Roberts’ confirmation hearing about the role of the judiciary to highlight the Ninth Circuit’s role in considering both parties’ numerous legal challenges); *see also Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) [hereinafter Roberts Hearing] (statement of John G. Roberts, Jr., J., D.C. Circuit) (“I will remember that it’s my job to call balls and strikes, and not to pitch or bat.”).

tion of Plaintiffs' FLSA class and California class along with its denial to certify Arizona and Florida classes.¹⁴⁵ The Ninth Circuit ultimately held in favor of Plaintiffs and remanded the case, instructing that both federal and state law claims merited class certification.¹⁴⁶ The following subsections provide an in-depth look into the court's analysis and decision.¹⁴⁷

A. Choice of Law

Defendants first objected to the district court's application of California law to the California class, arguing that the choice-of-law issues defeated both predominance and adequacy for certification of the California (b)(3) class.¹⁴⁸ Specifically, Defendants argued the court must conduct choice-of-law inquiries for each California class member because most of the MLB Club affiliates are located outside California, and numerous states have a competing interest in regulating work performed in California.¹⁴⁹ Defendants contended *Sullivan* was not analogous to its case and therefore should not dictate which state's law applied.¹⁵⁰ The Ninth Circuit rejected Defendants' contentions and affirmed the district court's application of California law to the California class.¹⁵¹ The court's key con-

145. See *Senne*, 934 F.3d at 927 (introducing basis of appeal). On petition, the Ninth Circuit reviewed the Northern District of California's decision for abuse of discretion. See *id.* at 926 (noting choice of law determinations are reviewed *de novo*). The Ninth Circuit explained the district court's grant of class certification is accorded "noticeably *more* deference" than a denial. *Id.* at 926 (emphasis added) (acknowledging distinction when appellate court reviews district court's decision on class certification).

146. See *Brown*, *supra* note 68 ("[T]he U.S. Court of Appeals for the Ninth Circuit handed a legal victory to minor league baseball players seeking wages that would exceed the minimum by ruling that the players may proceed as a class action lawsuit."). The Ninth Circuit opined "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." *Senne*, 934 F.3d at 942 (referring to Plaintiffs' federal and state law claims).

147. For further discussion of the Ninth Circuit's decision, see *infra* notes 148–184 and accompanying text.

148. See *Senne*, 934 F.3d at 927-28 (noting preliminary issue). The Ninth Circuit noted its concern for the impact of choice-of-law inquiries in nationwide consumer class actions and products liability cases. See *id.* (citing *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 585, 591-94 (9th Cir. 2012); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1184-90 (9th Cir. 2001)) (demonstrating concern for choice of law issues).

149. See *Senne*, 934 F.3d at 930-32 (arguing California law should not apply to entire class).

150. See *id.* at 930-31 (suggesting district court erred in applying *Sullivan*). For further discussion of the choice-of-law analysis established by the California Supreme Court under *Sullivan*, see *supra* notes 73-78 and accompanying text.

151. See *Senne*, 934 F.3d at 933 (stating Defendants misread *Sullivan*).

sideration in determining choice-of-law issues was that when the employees worked in California, they did so for “entire days or weeks” at a time.¹⁵²

Utilizing California’s governmental interest analysis under *Sullivan*, the Ninth Circuit concluded “Arizona law should apply to the work performed in Arizona, and Florida law to the work performed in Florida.”¹⁵³ Furthermore, practical considerations strongly supported an application of California law to avoid “bizarre and untenable” results.¹⁵⁴ The Ninth Circuit also considered whether the district court improperly determined that choice of law issues defeated predominance and adequacy for the proposed Arizona and Florida 23(b)(3) classes.¹⁵⁵ While the court agreed with Defendants that the differences in state law were arguably “material,” ultimately no true conflict existed.¹⁵⁶

Next, the Ninth Circuit considered whether the district court erred in its refusal to certify Plaintiffs’ proposed Rule 23(b)(2) Arizona and Florida classes due to choice-of-law issues.¹⁵⁷ Defendants’ used the district court’s “cohesiveness” reasoning to argue the Arizona and Florida 23(b)(2) classes should not be certified.¹⁵⁸ The Ninth Circuit ultimately reversed this denial because the district court improperly imposed a cohesiveness requirement that does not exist under 23(b)(2).¹⁵⁹ The Ninth Circuit relied on *Walters v. Reno*,¹⁶⁰ which rejected any cohesiveness inquiry for 23(b)(2) classes, in support of finding the 23(b)(2) classes should have been granted certification.¹⁶¹

152. *Id.* at 932 (citing *Sullivan v. Oracle Corp.*, 254 P.3d 237, 243 (Cal. 2011)).

153. *Id.* at 933 (concluding neither of *Sullivan*’s limited circumstances applied).

154. *Id.* at 932 (holding California law applied to California class).

155. *See id.* at 933 (considering whether district court erred).

156. *See id.* (holding Arizona and Florida law should apply to work performed within each respective state boundary). Both Defendants and the dissent contended several states have “expressed an interest in applying their wage and hour laws to work performed outside their state.” *Id.* (arguing choice of law issues defeat certification).

157. *See Senne*, 934 F.3d at 937 (holding district court erred in denying certification of 23(b)(2) classes). The District Court refused to certify Plaintiffs’ Florida and Arizona 23(b)(2) classes for unpaid work at Defendants’ training facilities in those states because choice-of-law issues undermined cohesiveness. *See id.* (summarizing district courts’ analysis in denying certification).

158. *See id.* (reviewing district court’s denial of 23(b)(2) class).

159. *See id.* (“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.”).

160. 145 F.3d 1032, 1047 (9th Cir. 1998).

161. *See Senne*, 934 F.3d at 937-38 (remanding for consideration by district court). “The Ninth Circuit’s August decision said that questions about which

B. Rule 23(b)(3) – Predominance Requirement

After addressing choice-of-law questions, the Ninth Circuit turned to “the issue next up at bat,” regarding Plaintiffs’ satisfaction of the predominance requirement for the proposed California, Arizona, and Florida (b)(3) classes.¹⁶² The district court previously held that Plaintiffs met the predominance requirement for the proposed California, Florida, and Arizona (b)(3) classes “through a combination of representative evidence and application of the ‘continuous workday’ rule.”¹⁶³ In its analysis of this issue, the Ninth Circuit explained that the “predominance requirement hinges on the application of two longstanding wage-and-hour doctrines,” set out by the Supreme Court in *Mt. Clemens* and *Tyson*.¹⁶⁴

Defendants argued the district court failed to “rigorously analyze” the Main Survey Plaintiffs submitted as representative evidence, as required under *Tyson*.¹⁶⁵ The district court relied upon

states’ labor laws applied to which players could be sidestepped by simply applying the laws of the state where the players are practicing and playing ball.” Ryan Boyesen, *MLB Seeks Justices’ Input on Minor League Wage Class Cert.*, LAW360 (Jan. 10, 2020), <https://www.law360.com/articles/1233071/mlb-seeks-justices-input-on-minor-league-wage-class-cert> [<https://perma.cc/9EYN-4FDT>] (reporting MLB appeal to Supreme Court for review of this holding). “[M]any of the baseball players suing the league allegedly arrive early or stay late at the ballpark to eat, watch television or practice in the batting cages when they’re less crowded, among other things.” *Id.* (detailing varied player schedules).

162. *Senne*, 934 F.3d. at 938 (whether “questions of law or fact common to class members predominate over any questions affecting only individual members” (quoting FED. R. Crv. P. 23(b)(3))).

163. *Id.* (focusing on Plaintiffs’ representative evidence). Class certification under Rule 23(b)(3) is merited only if the district court finds the proposed class meets both *predominance* and *superiority* requirements. *See id.* at 927 (detailing requirements for (b)(3) certification).

164. *See Senne*, 934 F.3d at 927 (setting forth analysis for predominance). For further discussion of the longstanding wage-and-hour doctrines, related to predominance, established by the Supreme Court in *Mt. Clemens* and *Tyson*, *see supra* notes 94-98 and accompanying text. Predominance under Rule 23(b)(3) requires courts to consider “whether the common, aggregation-enabling issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.” *Id.* (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1049 (2016)) (distinguishing between common and non-common issues relevant to predominance). The Ninth Circuit relied on the principle that predominance in employment cases is typically unaffected by differences among class employees, “so long as liability arises from a common practice or policy of an employer.” *Id.* (indicating narrow circumstances when predominance is defeated).

165. *See Senne*, 934 F.3d at 947 (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352 (2011)) (rejecting Defendants’ argument that Plaintiffs’ survey could not meet Rule 23 certification if “no reasonable juror could find it probative of whether an element of liability was met” (quoting *Tyson*, 136 S. Ct. at 1049)). Defendants also claimed Plaintiffs’ use of representative evidence did not satisfy predominance requirements for classification of the 23(b)(3) classes. *See id.* at 927 (referring to Plaintiffs’ submission of Main survey).

Sullivan's governmental interest test and ultimately found California law applied to the 23(b)(3) California Class.¹⁶⁶ On appeal, Defendants argued this was improper due to the vast differences between their case and the *Sullivan* case.¹⁶⁷ However, the Ninth Circuit rejected Defendants argument, holding “a close reading of *Sullivan* indicates that California law should apply to the California class, even though many of the employers are not headquartered in California.”¹⁶⁸

Defendants further contended Plaintiffs’ representative evidence, the Main Survey, failed to demonstrate predominance for *any* of the 23(b)(3) classes because the survey did not include information about the activities performed while working, and because the survey demonstrated significant variations in players’ arrival and departure times.¹⁶⁹ The Ninth Circuit rejected Defendants’ argument as an “erroneous view of the record and . . . cramped reading of *Tyson*.”¹⁷⁰ The court separated the 23(b)(3) classes for this part of its analysis with regards to the representative evidence.¹⁷¹

The Ninth Circuit pointed to the time the Arizona and Florida classes spent during spring training, extended spring training, and the instructional leagues.¹⁷² Relying on *Tyson*, the Ninth Circuit concluded Plaintiffs could demonstrate liability for these two classes by showing the class members “performed *any* compensable work.”¹⁷³ However, the California class required additional analysis on this issue because Plaintiffs’ claims for this class involved work performed during a time when players did get paid.¹⁷⁴ To survive, the California class had to show its members worked more than “8 hours in a day, more than 40 hours in a week, and/or worked 7

166. See *Senne*, 934 F.3d at 929-30 (detailing district court’s analysis).

167. See *id.* at 930 (explaining Defendants’ objection to reliance on *Sullivan*).

168. *Id.* (explaining “*Sullivan* merely emphasized that employees of in-state employers would especially be covered by California law”).

169. See *id.* at 942 (outlining Defendants’ arguments).

170. *Id.* (clarifying “representative evidence offered by plaintiffs was not limited to just the Main Survey, nor are observational studies the only type of evidence permitted to fill in evidentiary gaps under *Tyson*”).

171. See *id.* at 944 (referring to complexities involved in California class certification compared to Arizona and Florida classes).

172. See *id.* at 942 (relating to unpaid work times).

173. *Id.* (detailing how Plaintiffs may establish liability). Predominance issues may be resolved “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?” *Id.* (holding these two questions hold greater importance than individual issues).

174. See *Senne*, 934 F.3d at 944 (referring to MiLB’s championship season lasting from April to September).

days in a workweek.”¹⁷⁵ Similarly, California class members must demonstrate they were not paid minimum wage to establish liability on minimum wage claims.¹⁷⁶ Ultimately, the Ninth Circuit left the district court’s certification of the California class in part due to California’s expansive definition of “employ” and “hours worked.”¹⁷⁷

In a final challenge of Plaintiffs’ representative evidence, Defendants relied on *Wal-Mart*.¹⁷⁸ Defendants argued that *Wal-Mart* required the district court to “rigorously analyze” the Main Survey, “rather than evaluating its admissibility under Daubert and its appropriateness for meeting class certification requirements under *Tyson*.”¹⁷⁹ However, the Ninth Circuit explained this argument fails under *Tyson*, which “explicitly distinguished the use of representative evidence to establish hours worked in wage and hour claims from the use of representative evidence in cases like *Wal-Mart*.”¹⁸⁰

C. FLSA Collective

Finally, the Court addressed whether the district court properly certified Plaintiffs’ federal FLSA collective.¹⁸¹ Defendants argued Plaintiffs’ representative evidence failed to demonstrate that FLSA collective members were similarly situated.¹⁸² However, the Ninth Circuit affirmed the FLSA collective’s certification because

175. *Id.* (citing Cal. Labor Code § 510; *Mendoza v. Nordstrom, Inc.*, 393 P.3d 375, 381-82 (2017)) (explaining what California class must show to prove liability on overtime claims).

176. *See id.* (outlining requirements to prove liability given variations of claims).

177. *See id.* (affirming certification of California class).

178. *See id.* at 947 (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352 (2011)) (arguing admissibility evaluation under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)). Defendants in *Senne* asserted the district court failed to “rigorously analyze” the Main Survey. *See id.* at 927, 947 (requesting reversal of district court).

179. *See Senne*, 934 F.3d at 947 (making final attempt to exclude Plaintiffs’ Main Survey).

180. *Id.* (citing *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1048 (2016)) (holding *Tyson* requires court to reject Defendants’ suggested analysis). The Ninth Circuit found Defendants’ reliance on *Wal-Mart* to be “misplaced” due to the factual similarities between *Senne* and *Tyson*, both wage and hour cases involving an employer’s failure to keep proper records. *Id.* (meaning in circumstances such as in *Senne*, courts must evaluate the admissibility of representative evidence under *Daubert* and the appropriateness for meeting class certification under *Tyson*).

181. *See Senne*, 934 F.3d at 947 (discussing FLSA parameters).

182. *See id.* at 927 (referring to Main Survey).

Plaintiffs' FLSA collective actions covered players' unpaid work.¹⁸³ Citing *Mt. Clemens*, the Ninth Circuit Court was satisfied with certification of the collective because it fell within the court's interpretation of "similarly situated," and was consistent with FLSA's "great public policy."¹⁸⁴

V. CRITICAL ANALYSIS: WHY THE NINTH CIRCUIT HIT A HOMERUN

With the *Senne* decision, the Ninth Circuit significantly "enlarged the scope" of class actions for wage-and-hour claims.¹⁸⁵ The court's choice-of-law and predominance analysis played out as expected, but allowing current and former minor league players to pursue wage-and-hour claims against the almighty MLB was unprecedented.¹⁸⁶ In past decisions, courts gave great deference to the MLB, specifically by permitting them to exploit players due to exemptions from antitrust laws.¹⁸⁷

In *Senne*, the court gave Plaintiffs the green light to continue their class action under violations of the laws in three states.¹⁸⁸ Significantly, the three states where these violations took place are the home of several minor league teams and all thirty MLB teams'

183. *See id.* at 949 (including work performed during spring training, extended spring training, and instructional leagues).

184. *Id.* at 950 (citing *Anderson v. Mt. Clemens*, 328 U.S. 680, 687 (1946)) (alluding to broad application of FLSA).

185. *See Zagger, supra* note 40 (quoting Indiana Professor, Nathaniel Grow) (referring to Ninth Circuit's allowance of classifying Plaintiffs' claims from different states); *see also Spedden, supra* note 42 (referring to Arizona and Florida players included in class action).

186. *See also Zagger, supra* note 40 ("Usually, you don't see these as a traditional class action, you only see the collective action under the FLSA." (quoting labor and employment attorney Michael Elkins of MLE Law)). For further discussion of past legal challenges brought by players against the MLB, *see supra* notes 120-129 and accompanying text. This ruling serves as a glimmer of hope for the minor league plaintiffs which was handed down almost "[a] year after Congress blocked minor league baseball players from seeking federal labor protections." *See id.* (referring to SAPA); *see also* Mike DeBonis, *Spending Bill Could Quash Minor League Baseball Players' Wage Claims*, WASH. POST (Mar. 18, 2018), https://www.washingtonpost.com/powerpost/spending-bill-could-quash-minor-league-baseball-players-wage-claims/2018/03/18/d31cd76e-2b0a-11e8-8ad6-fbc50284fce8_story.html [<https://perma.cc/5ZCP-CU56>] (detailing spending bill signed by President Trump).

187. *See, e.g., Flood v. Kuhn*, 407 U.S. 258 (1972) (upholding baseball's antitrust exemption); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953) (upholding baseball's antitrust exemption); *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922) (dismissing claims against MLB for violations under Sherman Antitrust Act).

188. *See Senne v. Kan. City Royals Baseball Corp.*, 934 F.3d 918, 950 (9th Cir. 2019) ("We are satisfied that certification of the collective is not only appropriate under our interpretation of 'similarly situated,' but also that it is consistent with 'the great public policy' embodied by the FLSA.").

spring training facilities.¹⁸⁹ Indeed, *Senne* is still in the early stages of litigation and Plaintiffs still have many innings to work through before succeeding with their claim.¹⁹⁰ However, the Ninth Circuit's rejection of Defendants' argument that variations in state laws and individual players' schedules barred the case from going forward, "reopened the door" for the athletes in their quest for better pay.¹⁹¹

In a final swing to shut down *Senne*, the MLB petitioned the Supreme Court for help, arguing the Ninth Circuit's decision created a circuit split and deviated from Supreme Court precedent.¹⁹² The two substantial questions the MLB bunted to the Supreme Court involved issues which could dramatically impact labor law.¹⁹³ First, the MLB asserted the Ninth Circuit erred in allowing class

189. See Zagger, *supra* note 40 (noting success on state claims could mean MLB "will have to pay a significant number of minor league players minimum wage and overtime for both the season and spring training regardless of the change to federal law").

190. See *id.* (referring to recent passing of SAPA which exempted minor league players from FLSA). "Unless MLB's antitrust exemption is rescinded or narrowed, claims under federal antitrust law would not be available to minor league owners. But there are other areas of law that they could invoke." See Michael McCann, *MLB Faces Tough Legal Road to Restructure Minor League Baseball*, SPORTS ILLUSTRATED (Nov. 19, 2019), <https://www.si.com/mlb/2019/11/19/minor-league-baseball-lawsuit> [<https://perma.cc/G2RR-6KR7>] (implying minor leaguers have alternate legal avenues for wage suit).

191. See Boysen, *supra* note 161 (explaining "mishmash" of states' laws creates legal morass; defeating certification in and of itself). U.S. Circuit Judge Sandra Segal Ikuta disagreed with the majority decision, "criticizing the majority for being too quick to cut through the Gordian knot with 'a simple rule' of its own device, namely 'just apply the law of the jurisdiction where the work took place.'" *Id.* (arguing choice-of-law issues defeated certification).

192. See Defendants-Appellees' Motion to Stay the Mandate at 6, *Senne v. Kan. City Royals Baseball Corp.*, 934 F.3d 918 (9th Cir. 2019) (17-16245) [hereinafter Motion to Stay the Mandate] (arguing three substantial questions implicating Circuit conflicts require review). The MLB remains confident in its defense that the Ninth Circuit's decision improperly strayed from precedent. See Boysen, *supra* note 161 ("MLB said each of those decisions conflicts with either Supreme Court precedent or decisions by other appeals courts."). Defendants' petition for writ of certiorari to the Supreme Court involves the following two issues: "(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)." Petition for Writ of Certiorari, at 2, *Senne v. Kansas City Royals Baseball Corp.*, No. 19-1339 (June 1, 2020) (presenting questions for consideration).

193. See Motion to Stay the Mandate, *supra* note 192, at 7 (claiming significant chance Supreme Court will grant review). The MLB claims delaying the case for their petition for certiorari would not adversely affect anyone involved, but minor league players are left struggling to make ends meet until an indeterminate Supreme Court decision. See Boysen, *supra* note 161 ("Because this case presents three substantial questions implicating circuit conflicts, there is a significant chance that the Supreme Court will grant review." (quoting the MLB)).

certification because it flatly ignored the Supreme Courts' prior raising of the bar for bringing wage and hour claims in a class action.¹⁹⁴ Second, the MLB contended the Ninth Circuit's ruling in *Senne* directly conflicts with a Third Circuit decision regarding the use of representative evidence to certify wage-and-hour classes.¹⁹⁵ The MLB argued that in *Senne* and *Ferreras v. Am. Airlines, Inc.*,¹⁹⁶ both circuit 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."¹⁹⁷ The MLB further argued that if the Ninth Circuit properly followed the Supreme Court's precedent in *Wal-Mart*, it would have conducted a rigorous analysis and concluded that Plaintiffs "could not proceed as a class because they 'would need individualized, not representative, evidence to prove their case.'"¹⁹⁸ The MLB's petition to the Supreme Court was shortlived, as the Court subsequently denied certiorari, allowing the case to proceed in trial court.¹⁹⁹ The Supreme Court's

194. See Boysen, *supra* note 161 (referencing Supreme Court's 2011 decision in *Wal-Mart*). The MLB argued both the district court and the Ninth Circuit failed to adhere to *Wal-Mart*'s heightened standard for "evidence proffered to satisfy Rule 23 must always be rigorously examined." See generally *Wal-Mart v. Dukes*, 564 U.S. 338 (2011) (conflicting with appellate precedent).

195. See Petition for Writ of Certiorari, *supra* note 192, at 26 (citing *Ferreras v. Am. Airlines, Inc.*, 946 F.3d 178, 181-86 (3d Cir. 2019)) (arguing Ninth Circuit improperly created wage-and-hour exception to *Wal-Mart*).

196. 946 F.3d 178 (3d Cir. 2019).

197. See Petition for Writ of Certiorari, *supra* note 192, at 26 (arguing stark conflict between *Senne* and *Ferreras* decisions). In both cases, Defendants argue, classes "sought to prove entitlement to backpay via a sample of clock-in and clock-out times," class members were not consistently working while clocked-in, and "there was substantial variability in what they were doing, even if some of it could be called work." *Id.* at 27-28. (explaining despite factual similarities between *Senne* and *Ferreras*, Ninth Circuit came to different conclusion). "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." *Id.* at 28 (alleging improper application of *Wal-Mart*).

198. *Id.* at 28 (implying individualized evidence poses issues with Rule 23 certification); see also *Ferreras*, 946 F.3d at 185-87 (holding evidence of arrival and departure times cannot establish commonality and predominance). The Ninth Circuit rejected this analysis claiming such application would mean "employees working side-by-side in the same position would not only be owed vastly different minimum wages, but also that an employer would need to set different rules for meal and rest breaks for different employees. . . ." See Zagger, *supra* note 40 (rejecting *Ferreras* analysis).

199. See Chris Bumbaca, *Minor leaguers score win in quest for fair wages as Supreme Court dismisses MLB request*, USA TODAY (Oct. 5, 2020), <https://www.usatoday.com/story/sports/mlb/minors/2020/10/05/supreme-court-mlb-minor-league-salary-wages/3625838001/> [<https://perma.cc/9MDF-8VA7>] ("The Supreme Court's decision to let the class certification decision stand is great news for minor league players.") (quoting Korein Tillery LLC, law firm representing plaintiffs).

denial serves as a valuable development in the case for the players, permitting the Ninth Circuit's class certification decision stand and thereby giving the case the green light to commence litigation.²⁰⁰ While the Justices offered no written opinion explaining its decision to deny the MLB's petition, it is conceivable that the Ninth Circuit's prominent jurisprudence shaped the Court's decision, as the Ninth Circuit is one of the largest federal appellate courts in the federal circuit and along with the Third and Second circuits, "cumulatively have accounted for 69% of the antitrust class action filings in the United States" for the past decade.²⁰¹

VI. IMPACT: MINOR LEAGUERS ARE IN NEED OF A CLOSER

*"During the offseason, these players are relegated to working as much as they can, just so they can afford to make it through the next season without going broke. . . . [B]aseball has the best developmental system of all professional sports. And in response to trying to get its members MINIMUM WAGE, the response was to attempt to gut the system."*²⁰²

Now that the Ninth Circuit's decision in *Senne* withstood the MLB's appeal to the Supreme Court, its impact will reach far beyond the MiLB.²⁰³ The circuit court's decision will not only significantly effect minor league players, but also developmental programs for other professional sports.²⁰⁴ In anticipation of the

200. See Jenna West, *Supreme Court Allows Minor Leaguers' Class-Action Lawsuit Over Pay*, SPORTS ILLUSTRATED (Oct. 5, 2020), <https://www.si.com/mlb/2020/10/05/supreme-court-allows-minor-league-players-class-action-lawsuit-pay> [<https://perma.cc/S2AU-UAUQ>] ("After almost four years on appeal, the players can now return to the trial court to ensure that Major League Baseball and team owners comply with minimum and overtime wage laws, a welcome development for minor leaguers in a very unusual year.") (quoting Korein Tillery LLC, law firm representing plaintiffs).

201. Brian Ellman & Almudena Arcelus, *The Evolving Standards for Class Certification in Antitrust Cases*, ANALYSIS GROUP, https://www.analysisgroup.com/globalassets/content/insights/publishing/the_evolving_standards_class_certification.pdf [<https://perma.cc/SM6H-4AGT>] (last visited Nov. 17, 2020) (detailing Ninth Circuit's precedent with class actions).

202. See Adam Mann, *MLB Announces MiLB Pay Increase*, FANSIDED (Feb. 16, 2020), <https://calltothepen.com/2020/02/16/mlb-announces-milb-2020-pay-increase-4-76-hr/> [<https://perma.cc/X25F-5LSP>] (detailing poor minor league working conditions).

203. See Grow, *supra* note 34, at 1023-24 (concluding *Senne* presents "significant threat" to MLB and MiLB).

204. See Ehrlich, *supra* note 6, at 26 (speculating ramifications on entire sports industry if *Senne* plaintiffs succeed). If the Supreme Court were to affirm the Ninth Circuit's holding, and down the road, Plaintiffs were then successful in litigating their case, the ramifications of requiring full and fair compensation to minor league players will drastically alter the MiLB system. See Yagman, *supra* note 35 (predicting MiLB system could potentially resemble NBA's development league).

upcoming negotiations with the MiLB, the MLB announced plans to completely overhaul the minor league system.²⁰⁵ This proposed overhaul and potential loss of jobs rubbed salt in the wounds of many minor league players, staff, and coaches.²⁰⁶ Skeptics believe the MLB's intentions are more financially motivated.²⁰⁷ Another residual consequence of the MLB's proposal is the effect on "local communities who stand to lose their teams—and accompanying jobs, business and investment" which has inspired these effected groups to "unify efforts to persuade or, if necessary, try to stop MLB."²⁰⁸

The MLB remains steadfast in the wake of the Ninth Circuit's unfavorable ruling, finding themselves only in the "first inning of negotiations" with the expiring PBA.²⁰⁹ As a result of the public

Minimum wages for MiLB players could also entice collegiate baseball players to leave the college level, causing an unexpected shift in amateur baseball. *See id.* (implying impacts trickling down to collegiate baseball). While the MLB will face obstacles in operating budgets and accounting protocols, if Plaintiffs are successful in *Senne*, other industries, beyond professional baseball, may be impacted as well. *See Ehrlich, supra* note 6, at 26, 58 (concluding plaintiffs in *Senne* may have found way to "force change outside of the traditional legal theories used by the players in the history of professional sports").

205. *See* Ben Weinrib, *MLB Has a Radical Proposal that Would Eliminate 40 Minor League Teams*, YAHOO SPORTS (Oct. 18, 2019), <https://sports.yahoo.com/mlb-radical-proposal-eliminate-40-minor-league-teams-211937863.html> [<https://perma.cc/4EJM-MLKN>] (referencing MLB's proposal to cut forty-two MiLB teams). While the MLB claims their proposal's goal is "improving facility quality and player pay, it appears likely to hurt MLB teams' ability to develop talent, cost thousands of players' jobs and leave dozens of cities without teams that their fans have grown up loving and investing in." *Id.* (detailing adverse effects from cutting local minor league teams).

206. *See* Robert M. Pimpsner, *Manfred's MiLB Plan is Bad for Baseball*, PIN-STRIPED PROSPECTS (Jan. 16, 2020), <https://www.pinstripedprospects.com/opinion-manfreds-milb-plan-is-bad-for-baseball-updated-49773/> [<https://perma.cc/QF4H-Z78H>] (detailing adverse effects of MLB's proposal).

207. *See* Mitch Rupert, *Owner: Crosscutters "Aren't Going Anywhere," SUN GAZETTE* (Jan. 17, 2020), <https://www.sungazette.com/news/top-news/2020/01/owner-crosscutters-arent-going-anywhere/> [<https://perma.cc/FT8M-ZXHC>] (reporting MLB's contention for MiLB overhaul order to fit with demands of player development). "Take Williamsport as an example: Major League Baseball takes care of our field. We probably have the best field in all of Minor League Baseball, and I say that as someone who owns a Triple-A team (the Memphis Redbirds)." *Id.* (quoting Peter Freund) (suggesting MLB's motivation is cost cutting, rather than facility improvements). "It's just the excuse Major League Baseball hides behind to say this is why we're doing it." *Id.* (quoting Peter Freund) (arguing MLB wants to cut teams to have fewer players to pay).

208. Michael McCann, *Save the Spinners: How One Town Attempts to Stave Off MLB's Contractual Plan for the Minors*, SPORTS ILLUSTRATED (Jan. 7, 2020), <https://www.si.com/mlb/2020/01/08/save-the-lowell-spinners-controversial-plan-for-milb> [<https://perma.cc/A57B-P9YX>] (detailing negative effects cutting MiLB teams will have on local communities).

209. *See* Rupert, *supra* note 207 (quoting Peter Freund) (detailing tension surrounding upcoming negotiations between MiLB and MLB).

backlash, MLB announced it plans to raise the minimum salary for minor leaguers in 2021.²¹⁰ This comes as another victory for minor league players whose salaries have “largely been stagnant since 2005, and . . . have strained to make ends meet on as little as \$5,500 per season.”²¹¹ While Commissioner Rob Manfred cites the MLB’s priority of player wellness, many criticize that a salary increase is well overdue.²¹²

A. Governmental Response

While Plaintiffs in *Senne* have a long road before achieving re-prieve, a significant relief pitcher, the U.S. Government Accountability Office (“GAO”), is taking the mound in support of the minor leaguers cause.²¹³ In early 2020, the House Oversight and Reform Committee approved legislation “to have the comptroller general of the U.S. study baseball’s minor leagues, which are trying to fend off a contraction proposal from major league clubs.”²¹⁴ Depending on the study’s findings, a GAO report would likely “become an influential document in negotiations between MLB and MiLB on a new professional agreement.”²¹⁵ While some pessimists criticize this congressional act as an excuse for baseball fanatics in govern-

210. See Associated Press, *MLB Raising Minimum Salary for Minor Leaguers in 2021*, ESPN (Feb. 14, 2020), https://www.espn.com/mlb/story/_/id/28702734/mlb-raising-minimum-salary-minor-leaguers-2021 [<https://perma.cc/TQS5-DBBK>] (“Two years after successfully lobbying Congress to exempt minor leaguers from federal minimum wage laws, MLB opted to give those players a wage increase between 38% and 72%.”).

211. *Id.* (“MLB teams are fully responsible for minor league player salaries under the current PBA.”).

212. See Mann, *supra* note 202 (“Asking the multibillion-dollar industry to fork out minimum wage salaries for its developmental players shouldn’t be a tough ask.”).

213. See Associated Press, *House Committee Approves Study of Minor Leagues by Comptroller General*, ESPN (Mar. 4, 2020), https://www.espn.com/mlb/story/_/id/28838292/house-committee-approves-study-minor-leagues-comptroller-general [<https://perma.cc/P7ZR-LLPC>] (referring to House Oversight and Reform Committee).

214. *House Asks Comptroller General to Study Minor Leagues*, ASSOCIATED PRESS (Mar. 10, 2020), <https://apnews.com/5ee506f21a100658b94aca04b70d02ca> [<https://perma.cc/RDK3-9F8Y>] (reporting House of Representatives pass legislation for study of the MiLB). The study would involve an evaluation of the “social, economic and historic contributions that the MiLB has made to American life and culture.” H.R. 6020, 116th Cong. § 2 (2020) (finding “preservation of Minor League Baseball in 160 communities is in the public interest, as it will continue to provide affordable, family friendly entertainment to those communities”).

215. Michael McCann, *What’s Next in Fight to Protect Minor League Baseball?*, SPORTS ILLUSTRATED (Mar. 4, 2020), <https://www.si.com/mlb/2020/03/04/mlb-milb-agreement-congress-review-hr-6020> [<https://perma.cc/9CQH-FSFS>] (“A GAO report on the minors would likely bring about Congressional hearings on the relationship between MLB and MiLB.”).

ment to have an excuse to talk about baseball, a GAO report could be substantially beneficial to the minor leaguers as it “would be authoritative, objective and credible.”²¹⁶ With opposition from the general public and a growing governmental coalition to take on the MLB, the league should settle *Senne* because it could repair its broken relationship with the public and ward off growing governmental pressure.²¹⁷

B. Minor Leagues, Small Towns

*“This is the connection that keeps us young and allows our rebirth every spring, as once again we hear the sounds of the smack of the ball in the glove and the crack of the bat as it makes contact with a pitched ball.”*²¹⁸

“[M]inor league teams positively impact their fan bases and local economies . . . for families who live far from big-league teams or who can’t afford major league ticket prices.”²¹⁹ “The abandonment of Minor League Clubs would devastate our communities, their bond purchasers, and other stakeholders affected by the potential loss of these clubs.”²²⁰ With America more divided than ever, the MiLB serves as neutral playing field that “connects many of us to our communities and our neighbors.”²²¹

216. *Id.* (reporting GAO report could “make it more difficult for MLB to justify sweeping changes”). *But see* Craig Calcaterra, *Congressional Task Force Passes Resolution Opposing MLB’s Minor League Contraction Plan*, NBC SPORTS (Jan. 28, 2020), <https://mlb.nbcsports.com/2020/01/28/congressional-task-force-passes-resolution-opposing-mlbs-minor-league-contraction-plan/> [<https://perma.cc/F9H2-WPA4>] (“It’s worth noting, again, that this move by Congress does nothing substantively and, rather, exists primarily to allow Members of Congress to talk about baseball, hot dogs, apple pie and America in that way that politicians like to do.”).

217. *See* Alex Gangitano, *MLB, Congress Play Hardball in Fight Over Minor Leagues*, THE HILL (Feb. 6, 2020), <https://thehill.com/business-a-lobbying/business-a-lobbying/481755-mlb-congress-play-hardball-in-fight-over-minor-leagues> [<https://perma.cc/5ELD-CPWN>] (“But MLB is facing opposition from the general public and a broad coalition of lawmakers from both parties who say closing those teams would devastate communities in their districts.”). For further discussion on the potential impact of cutting over forty MiLB teams, see *infra* notes 210–226 and accompanying text.

218. FRAN ZIMNIUCH, *SHORTENED SEASONS: THE UNTIMELY DEATHS OF MAJOR LEAGUE BASEBALL’S STARS AND JOURNEYMEN 2* (Taylor Trade Publ’g 2007).

219. McCann, *supra* note 190 (supporting congressional opposition to MLB’s proposal to eliminate minor league teams).

220. *Id.* (quoting U.S. Congresswoman Lori Trahan of Massachusetts and U.S. Congressman David McKinley of West Virginia letter in opposition to MLB’s proposal to cut several minor league teams).

221. Steve Benjamin, Andy Berke & Nan Whaley, *Why Gutting Minor League Baseball Would Be Disastrous for Our Cities*, FORTUNE (Feb. 3, 2020), <https://fortune.com/2020/02/03/mlb-minor-league-baseball-eliminate-teams/> [<https://perma.cc/QJ9U-PW4M>] (quoting Steve Benjamin, mayor of Columbia, S.C., Andy Berke, mayor of Chattanooga, Tenn., and Nan Whaley, mayor of Dayton, Ohio).

While MLB owners claim their intention of slashing more than forty teams is rooted in cutting costs to improve minor league conditions, popularity of lower tiered teams has remained consistently high for over a decade.²²² Local taxpayers have an incredible stake in the continued operation of local minor league teams, which is why the MLB's treatment of such players and their proposed restructuring is broader than just a player issue.²²³ Support from Congress is substantial for local leaders because it provides considerable leverage in taking on the MLB.²²⁴ Objectors of the MLB's proposal argue the MLB "became the giant it is today with the co-

222. See *id.* ("Last year, attendance at America's minor league ballparks exceeded 40 million—the 15th year in a row that such clubs have exceeded that benchmark.").

223. See *id.* ("To keep baseball in these communities, cities have invested valuable public resources in new ballparks."). The codependency between MiLB teams and the communities where they are based is a quality distinguishing the MiLB from the MLB. See James Wagner, *Minor League Baseball's Opposition to Overhaul Softens in Pandemic*, N.Y. TIMES (May 12, 2020), <https://www.nytimes.com/2020/05/12/sports/baseball/minor-leagues-mlb-takeover.html> [https://perma.cc/HE3W-A9AR] ("Minor league teams rely heavily on revenue derived from people in the stands — tickets, beer and hot dog sales and sponsorships tied to attendance. But for the foreseeable future, there will not be fans at games because of the coronavirus pandemic. Even in normal times, more than a handful of canceled games, typically rainouts, could mean the difference between being profitable or not."). The Dayton Dragons, a Class A MiLB team, for example, draws 540,000 fans to Dayton, Ohio each summer. See Stephen Starr, *Can Small-Town America Survive Pandemic's Hit to Minor League Baseball?*, OZY (Sept. 14, 2020), <https://www.ozy.com/news-and-politics/will-small-town-america-survive-the-pandemics-hit-to-minor-league-baseball/377099/> [https://perma.cc/4LL8-UMXJ] (reporting "baseball fans contribute \$27.5 million each year to the local economy" in Dayton). Many communities, like Dayton, "have paid to have the ballparks built in the downtown core," with the expectation that MiLB fans attending games will spend money at the businesses surrounding those MiLB parks. *Id.* (noting many MiLB teams use significant portions of their income to pay rent back to owners of the facilities in small towns). Local towns with MiLB teams invest their entire economies around baseball, which is why cutting even just a single team would have calamitous effects for the fans and workers living within a community. See Patrick Sisson, *Small Towns Across America May Lose a Crucial Community Hub*, CURBED (Dec. 27, 2019), <https://www.curbed.com/2019/12/27/21038071/minor-league-baseball-stadium-team-economic-development> [https://perma.cc/3L9P-AFZH] ("Cutting back on Minor League baseball strikes at romantic notions of the sport as a national pastime."). Despite MiLB teams suffering due to a cancelled 2020 season, many teams turned its focus to the communities where they are based, to serve as an outlet for support beyond the field. See Angelia L. Davia, *Greenville Area Events Keep Community Engaged During the Pandemic*, GREENVILLE NEWS (Sept. 22, 2020), <https://www.greenvilleonline.com/story/news/local/2020/09/09/greenville-non-profits-getting-help-from-local-businesses-groups/5747138002/> [https://perma.cc/3HZJ-NSME] (reporting MiLB team Greenville Drive hosts virtual 5K run benefitting local food bank).

224. See Seiner, *supra* note 138 (noting Congress' control over MLB's antitrust exemption). The MLB "should understand that the antitrust exemption for Major League Baseball is at risk if they persist with this misguided, deeply unfortunate plan to cripple minor league baseball for more profits." Anthony, *supra* note

operation of an entire country.”²²⁵ Minor leaguers must unite and take on the MLB as one unit to overcome the MLB’s chokehold on their careers.²²⁶

VII. CONCLUSION: A GLOBAL PANDEMIC AND ECONOMIC DESPAIR MIGHT JUST BE THE PERFECT STORM TO STRIKE OUT THE MLB

March 13, 2020 will forever be an infamous day in American history.²²⁷ On this day, the World Health Organization (WHO) confirmed the 1,000th case of COVID-19 in the United States, and with that, the MLB suspended spring training camps indefinitely.²²⁸ At a time when the American public so badly needed a distraction

140 (quoting Senator Richard Blumenthal) (implying severe consequences for MLB if it fails to act).

225. Anthony, *supra* note 140 (suggesting MLB has forgotten about this support); see also Sisson, *supra* note 223 (“In addition to nostalgic ideas of baseball bringing communities together, it’s considered an economic development engine for small towns; when minor league teams lose major league support or shutter altogether, it can have a negative economic impact, including the loss of hundreds or even thousands of jobs nationwide and the closure of stadiums that might anchor downtowns.”). “For nearly 100 years now, MLB has operated without being subject to antitrust laws, streamlining business deals that become less complicated and more lucrative.” Anthony, *supra* note 140 (suggesting MLB’s success largely attributed to facilitation from local markets and federal government). “In a capitalist economic society it is almost impossible for employees to safeguard their economic position on their own.” Williams, *supra* note 116, at 542 (concluding “[t]o level the playing field and counter Major League Baseball’s leverage” MiLB players must unionize). Many small towns across the nation are pleading with the MLB to “[s]top trying to squeeze every penny out of a situation that would choke the baseball life out of places like Dodd Stadium and beyond.” *Id.* (advocating MLB’s obligation to espouse “respect for community”). To these affected communities, the MLB’s proposal is motivated by financial greed, at all costs, even if it involves putting the MiLB “on the chopping block . . . without care to the communities, or families or charities that will suffer as a result.” *Id.* (quoting Senator Richard Blumenthal) (“That’s what really is at stake here, support for communities that have supported these teams over many, many years, and now very simply are asking these teams to respect them.”).

226. See Williams, *supra* note 116, at 543 (comparing MiLB players’ vulnerability to average employees in America). While the MLB has effectively stripped minor leaguers from challenging their low wages under the FLSA, minor leaguers still have “legal eligibility to form a union.” *Id.* (arguing under NLRA minor league players have right to engage in collective action for mutual gain); see also Carney, *supra* note 30, at 307 (suggesting MLB permit MiLB players to form union).

227. See Perry, *supra* note 13 (detailing COVID-19’s impact on MLB).

228. See *id.* (reporting MLB players given option to return home, remain near Arizona or Florida camp, or return to team’s home city); see also Press Release, Major League Baseball, Major League Baseball to Delay 2020 Opening Day by at Least Two Weeks (Mar. 12, 2020) (on file with author) (“This action is being taken in the interests of the safety and well-being of our players, Clubs and our millions of loyal fans.”).

from the horrors of a pandemic, all eyes were on major sports leagues to see how they would address safely returning to their seasons during a global crisis.²²⁹

With the already strained tensions between the MLB and MiLB leading up to this point, the COVID-19 pandemic hit especially hard on minor league players, who subsequently had their 2020 season cancelled.²³⁰ While the MLB's season finally began in late July, the decision to cancel the 2020 minor league season was a "more daunting undertaking for MiLB than for MLB. Unlike MLB franchises, minor league teams rely heavily on revenue from people in the stands — tickets, beer and hot dog sales and sponsorships tied to attendance."²³¹ The devastation from the pandemic has left the MiLB crushed; however, these circumstances could possibly be a source of bargaining power with the big leagues.²³² Now that the

229. See Joe Drape, Ken Belson & Billy Witz, *The Coronavirus Doesn't Care When Sports Come Back*, N.Y. TIMES (Apr. 19, 2020), <https://www.nytimes.com/2020/04/19/sports/coronavirus-sports-economy.html> [<https://perma.cc/GD7C-AEVM>] ("Fans are clamoring for something, anything, to distract from the pandemic and restore sports to the rhythm of American life . . .").

230. See James Wagner, *Minor League Baseball Season Is Canceled for the First Time*, N.Y. TIMES (June 30, 2020), <https://www.nytimes.com/2020/06/30/sports/baseball/minor-league-baseball-season-canceled.html#:~:text=the%20announcement%20that%20160%20minor,baseball%20season%20will%20not%20happen> [<https://perma.cc/ET9L-B3FD>] (leaving nearly 8,000 minor league players unemployed until 2021). Before the 2020 minor league season was cancelled, the MLB announced players "under a Minor League Uniform Player Contract will receive a lump sum equal to the allowances that would have been paid through April 8th." R.J. Anderson, *MLB Announces Support for Minor-League Players During Coronavirus Shutdown*, CBS SPORTS (Mar. 19, 2020), <https://www.cbssports.com/mlb/news/mlb-announces-support-for-minor-league-players-during-coronavirus-shutdown/> [<https://perma.cc/QY5Z-4H5F>] (reporting MLB's assistance of minor league players beyond April 8, 2020 remains uncertain).

231. See Wagner, *supra* note 230 ("Technically, the season's fate was sealed when Major League Baseball informed MiLB that it would not be providing the players needed for the season because of the national emergency brought on by the coronavirus pandemic."); see also *How MLB is Navigating the Coronavirus Pandemic to Play Ball*, ESPN (May 19, 2020), https://www.espn.com/mlb/story/_/id/29175321/how-major-league-baseball-finding-narrow-way-back-field-coronavirus-pandemic [<https://perma.cc/U3A6-GNDA>] (detailing various aspects required to commence baseball including cooperation of twenty-seven U.S. cities and more than 200,000 coronavirus tests); *2020 MLB Season at a Glance: Opening Day Schedule, Previews, Picks and More*, ESPN (July 9, 2020), https://www.espn.com/mlb/story/_/id/29435596/2020-mlb-season-glance-opening-day-schedule-previews-picks-more [<https://perma.cc/8RLK-UAT6>] (reporting training camp to occur prior to Opening Day).

232. See Jared Diamond, *Shortened MLB Draft Sends Baseball Prospects Into Uncertain Future*, WALL STREET J. (Apr. 15, 2020), <https://www.wsj.com/articles/shortened-mlb-draft-sends-baseball-prospects-into-uncertain-future-11586952000> [<https://perma.cc/ZSX3-TVN3>] (detailing how baseball owners are trying to cut costs). Prior to the pandemic, MiLB players were not eligible for unemployment benefits due to their status as "seasonal apprentices." See Steve Gardner, *Minor*

Supreme Court has denied the MLB's petition, the path to more equitable wages appears to be on the horizon.²³³ Plaintiffs will enter this next phase of litigation with an upper hand over the MLB: the Ninth Circuit's favorable ruling and the Supreme Court's declination of its appeal.²³⁴

A cancelled 2020 minor league season, a shortened 2020 draft from the typical forty rounds to as few as five rounds, and the looming restructuring plan of the MiLB altogether pose a substantial threat to amateur baseball.²³⁵ The coronavirus' "financial hit could lead to a moderate shakeup in ownership — team owners who lack

League Baseball Players Look for Financial Life Line as MLB Teams Halt Payments, USA TODAY (May 27, 2020) (referencing provisions under Save America's Pastime Act classifying minor leaguers as not employees of their parent clubs). However, the federal Coronavirus Aid, Relief and Economic Security Act (CARES Act) has provided relief to these minor league players as well as other Americans typically exempt from receiving unemployment benefits. See Aaron Colby & Arthur Simpson, *CARES Act Extends Unemployment Insurance Benefits to Independent Contractors*, DAVIS WRIGHT TREMAINE LLP (Apr. 30, 2020), <https://www.dwt.com/blogs/employment-labor-and-benefits/2020/04/independent-contractor-unemployment-benefits> [<https://perma.cc/ZW5A-YDPD>] (explaining U.S. Department of Labor's establishment of Pandemic Unemployment Assistance program); see also U.S. Dep't of Labor, Employment and Training Administration, Opinion Letter on Unemployment Insurance Program No. 16-20 (Apr. 27, 2020) (providing guidance on Pandemic Unemployment Assistance program).

233. See Daniel Wiessner, *SCOTUS won't take a swing at MLB minor leaguers' wage claims*, REUTERS LEGAL (Oct. 5, 2020), <https://www.reuters.com/article/employment-scotus/scotus-wont-take-a-swing-at-mlb-minor-leaguers-wage-claims-idUSL1N2GWITX> [<https://perma.cc/JLT5-5XK5>] (detailing significance of Supreme Court's denial of MLB's petition).

234. See Henry Schulman, *Ex-Giants prospect wins Supreme Court go-ahead for minor-league salary trial*, S.F. CHRONICLE (Oct. 5, 2020), <https://www.sfchronicle.com/sports/article/Ex-Giants-prospect-wins-Supreme-Court-go-ahead-15622859.php#:~:text=green%20%2F%2F%20Sports-,Ex%2DGiants%20prospect%20wins%20Supreme%20Court%20go%2Dahead,for%20minor%2Dleague%20salary%20trial&text=A%20former%20Giants%20pitching%20prospect,U.S.%20Supreme%20Court%20on%20Monday> [<https://perma.cc/DB8C-3K2E>] ("The Supreme Court refused to hear the case on the first day of its 2020-21 term. That sends it back to a judge in San Francisco, who will set a trial date. The defendants could file motions on other grounds, but their request for a Supreme Court writ was viewed as the last significant impediment to a trial.").

235. See Jeff Passan & Kiley McDaniel, *What the MLB Deal with Players Means for 2020 Season and Beyond*, ESPN (Mar. 28, 2020), https://www.espn.com/mlb/story/_/id/28964249/what-mlb-deal-players-means-2020-season-beyond [<https://perma.cc/VWM6-N76Y>] (referring to changes regarding undrafted free agents). While some clubs continue to pay weekly payments of \$400 to minor league players, many players have turned to unemployment benefits as a temporary source of income. See Emma Baccellieri, *Minor Leaguers and the Fight to Claim Unemployment*, SPORTS ILLUSTRATED (Jun. 12, 2020), <https://www.si.com/mlb/2020/06/12/minor-league-baseball-players-unemployment> [<https://perma.cc/CVJ9-CQXX>] (reporting fraught process of requesting unemployment benefits for MiLB players); see also Gardner, *supra* note 232 (reporting uncertain climate likely will drive many players out of baseball).

financial fluidity, either in their sports ownership or other business ventures, may be hard-pressed not to sell and reap the immediate financial boost.”²³⁶ Given the overall purpose of class actions and the strong policy concerns in favor of certifying multi-state claims in wage-and-hour cases, the Ninth Circuit was correct in finding for Plaintiffs.²³⁷ While minor league players have to play several more innings before they can actually hold the MLB accountable, the current state of the country might be just what the players need to finally play ball.²³⁸

*Bernadette Berger**

236. Adam Kilgore, *Amateurs with More Negotiating Power and Owners Who Might Sell*, WASH. POST (July 31, 2020), <https://www.washingtonpost.com/sports/2020/07/30/how-will-coronavirus-change-sports/?arc404=true> [https://perma.cc/8GE7-7ZFE] (reporting challenges faced by COVID-19).

237. *See Senne v. Kan. City Royals Baseball Corp.*, 934 F.3d 918, 930 (9th Cir. 2019) (explaining policy concerns of choice-of-law issues regarding labor disputes). “To permit nonresidents to work in California without the protection of our overtime law would completely sacrifice, as to those employees, the state’s important public policy goals of protecting health and safety and preventing the evils associated with overwork.” *Id.* (citing *Sullivan v. Oracle Corp.*, 254 P.3d 237, 247 (Cal. 2011)).

238. *See* Sean Roberts, *Can Minor League Players Get Paid Without a Union?*, *HARDBALL TIMES* (May 16, 2019), <https://tht.fangraphs.com/can-minor-league-players-get-paid-without-a-union/> [https://perma.cc/A7FY-SU4Q] (arguing “players and advocates can engage in both advocacy for current opportunities, and if they are able to gain momentum, could even propose proactive changes to improve their compensation”).

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