No. 23-283

IN THE

Supreme Court of the United States

TRI-CITY VALLEYCATS, INC., *et al.*,

Petitioners,

v.

THE OFFICE OF THE COMMISSIONER OF BASEBALL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* THE COMMITTEE TO SUPPORT THE ANTITRUST LAWS IN SUPPORT OF PETITIONERS

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I. Interest of the *Amicus Curiae*

"Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). "The statutory policy of the Act is one of competition and it precludes inquiry into the question whether competition is good or bad." *NCAA v. Alston*, 141 S. Ct. 2141, 2159 (2021) (internal citation omitted). As such, exemptions from the antitrust laws are disfavored, and even when an industry is clearly exempted by an act of Congress the exemption is strictly and narrowly construed. *Union Lab. Life Ins. Co.* v. *Pireno*, 458 U.S. 119, 126 (1982). For over a hundred years, the judicially created antitrust exemption for Major League Baseball, first established in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922), has stood in anomalous defiance of the Sherman Act's guiding principles and this Court's subsequent precedents.

The Committee to Support the Antitrust Laws ("COSAL") is an independent, nonprofit corporation devoted to promoting and supporting the enactment, preservation, and enforcement of a strong body of antitrust laws in the United States. *See* https://www.cosal.org/about.[1] COSAL has advocated for these ends through

1. Pursuant to Rules 37.2 and 37.6, COSAL affirms that no counsel for a party authored this brief in whole or in part, and no person other than COSAL and their counsel made a monetary

legislative efforts, public policy debates, and by serving as *amicus curiae* before the circuit courts and this Court.

Major League Baseball has enjoyed judicial (not legislative) immunity under the antitrust laws that this Court denies to every other American sports league. In the case pled below, Major League Baseball flexed this immunity to restrain horizontal competition—in some cases, to eliminate many horizontal competitors altogether—within Minor League Baseball's ranks. In many geographies, Minor League Baseball is the only professional sport available; in virtually all geographies, it is a vital component of the local economy. H.R. Res. 815, 116th Cong. (2020) ("[T]he economic stimulus and development provided by Minor League Baseball clubs extends beyond the cities and towns where it is played, to wide and diverse geographic areas comprising 80 percent of the population in the Nation."). COSAL thus has a strong interest in the repudiation of Major League Baseball's antitrust exemption and restoring the benefits of competition in the communities affected by this judicially blessed cartel. Samuel A. Alito, Jr., *The Origin of the Baseball Antitrust Exemption*, 38 Baseball Rsch. J. 86, 92 (Fall 2009) (the "irony" of *Federal Baseball* is that "the real losers in the case were local people").

II. Summary of the Argument

Major League Baseball is accused of an overt agreement—promoted in the press rather than hatched in

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contribution intended to fund its preparation or submission. All parties received notice of COSAL's intent to file an amicus brief in this matter more than ten days prior to the deadline.

a smoke-filled room—to suppress horizontal competition among its minor leagues. Major League Baseball's thirty independently-owned horizontal competitor franchises agreed among themselves to reduce the number of affiliated Minor League Teams from 160 to 120 and forbid their remaining affiliated Minor League Teams even from competing in unofficial baseball exhibitions with the ousted teams. In so doing, Major League Baseball has not just injured (in some instances, outright destroyed) the affected Minor League Teams, but has also stifled or eliminated jobs, economic growth, and entertainment options in the local communities served by the formerly affiliated Minor League Baseball teams.

As the lower courts concluded, Petitioners are without redress for these alleged wrongs because of Major League Baseball's antitrust exemption. The policy justifications for this exemption are non-existent, and its continued vitality is antithetical to this nation's competition laws and policies; the exemption persists today only on grounds of *stare decisis*. To be sure, *stare decisis* ordinarily compels adherence to this Court's past antitrust precedents. This Court reconsiders its antitrust decisions "with the utmost caution" and does "not 'lightly assume that the economic realities underlying earlier decisions have changed, or that earlier judicial perceptions of those realities were in error.'" *State Oil v. Khan*, 522 U.S. 3, 20–21 (1997) (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 731–32 (1988)).

Indeed, in the 133 years since enactment of the Sherman Act, this Court has overturned its antitrust precedents only three times, with each instance concerning a single line of cases concerning *per se*

illegality for vertical restraints of trade traceable to the (now-repudiated) reasoning underlying *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). But like the overturned *Dr. Miles* trilogy, the "Baseball Trilogy" of *Federal Baseball*, *Toolson*, and *Flood* are among the rare instances where adherence on *stare decisis* principles alone does not justify repeating a mistake. *Amicus Curiae* therefore supports Petitioners. The Petition for a Writ of *Certiorari* should be granted so this Court can overturn the Baseball Trilogy and subject Major League Baseball to the Sherman Act—the same way this Court treats every other sports league operating within the United States.

III. Argument

A. Exemptions from the Antitrust Laws are Disfavored

"[E]xemptions from the antitrust laws are strictly construed and strongly disfavored." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 421(1986). Such exemptions "must be construed narrowly." *Union Lab. Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982) (citing *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973)). The antitrust laws "are to be construed liberally, and [] exceptions from their application are to be construed strictly." *Abbott Lab'ys v. Portland Retail Druggists Ass'n, Inc.*, 425 U.S. 1, 11 (1976).

Most antitrust exemptions are expressly legislated by Congress after significant deliberation and on a full record. *See, e.g.*, The Sports Broadcasting Act, 15 U.S.C. § 1291 (clearly stating that "[t]he antitrust laws . . . shall not apply to" certain broadcasting agreements for professional

sports). Some antitrust exemptions are implied by courts where the antitrust laws would otherwise conflict with another statute or regulatory scheme. *See, e.g.*, *Brown v. Pro Football, Inc.*, 518 U.S. 231, 254 (1996) (Stevens, J., dissenting) (recognizing that the "nonstatutory labor exemption" immunizes certain activity from the Sherman Act to "accommodat[e] . . . the congressional policy favoring collective bargaining."). Whether an antitrust exemption is express or implied, Congress's legislative intent dictates the outer bounds of the Sherman Act, and even then, courts "strictly construe" express exemptions and have "strongly disfavored" implied immunities, granting them only "in cases of plain repugnancy between the antitrust and regulatory provisions." *Square D*, 476 U.S. at 421 (quoting *Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213, 217–18 (1966)).

And then there is Major League Baseball's antitrust exemption, which falls under neither category and instead was created out of whole cloth over one hundred years ago in *Federal Baseball*. Antitrust exemptions created by judicial fiat, like this one, are particularly disfavored; in *Alston*, when asked to provide similar immunity to the NCAA, this Court recognized that "the 'orderly way' to temper the [Sherman] Act's policy of competition is 'by legislation and not by court decision.'" 141 S. Ct. at 2160 (quoting *Flood v. Kuhn*, 407 U.S. 258, 279 (1972)). *Cf. United States v. Rutherford,* 442 U.S. 544, 559 (1979) (declining to find express or implied exemption from Federal Food, Drug, and Cosmetic Act and holding that "[w]hether, as a policy matter, an exemption should be created is a question for legislative judgment, not judicial inference.").

Contrary to these pronouncements by this Court, Major League Baseball's exemption from the antitrust

laws has been repeatedly upheld, despite its lack of any statutory basis, its non-sensical nature, and its negative effects upon local businesses. The time has come to remove Major League Baseball's exemption and bring it in line with in with the law of this Court.

B. While *Stare Decisis* Ordinarily Compels Adherence to Settled Antitrust Principles, the "Baseball Trilogy" Is Among the Rare Exceptions

1. This Court Reconsiders its Antitrust Precedents with the Utmost Caution and Ordinarily Adheres to Principles of *Stare Decisis*

Even where past antitrust precedents "established an erroneous rule '*[s]tare decisis* reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right.'" *Leegin Creative Leather Prods., Inc.*, 551 U.S. 877, 899 (2007) (alteration in original) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)); *see also Leegin*, 551 U.S. at 899 ("there is an argument for [antitrust precedent's] retention on the basis of *stare decisis* alone"). "This Court has expressed its reluctance to overrule decisions involving statutory interpretation" such as cases interpreting the Sherman Act. *Khan*, 522 U.S. at 20 (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977)); *Leegin*, 551 U.S. at 899 ("[C]oncerns about maintaining settled law are strong when the question is one of statutory interpretation.").[2]

2. *Amicus Curiae* expresses no view on the boundaries or scope of *stare decisis* outside of the antitrust context, such as judicial deference to past constitutional decisions.

So, in antitrust cases, "the reconsideration of decisions of this Court [is approached] with the utmost caution." *Khan*, 522 U.S. at 20. For example, this Court has invoked *stare decisis* as "weigh[ing] heavily" in favor of its decision not to "cut back or abandon the *Hanover Shoe* rule," even if "the use of pass-on theories" barred by *Hanover Shoe* were "more consistent with the policies underlying the treble-damages action" available under the Sherman Act. *Illinois Brick*, 431 U.S. at 736–37; *see also Hanover Shoe Inc. v. United States Shoe Mach. Corp.*, 392 U.S. 481, 488 n.6 (1968). And in *Square D*, the Court declined to overturn the filed rate antitrust defense established in *Keogh v. Chicago Northwestern Railway Co.*, 260 U.S. 156 (1922), reasoning that "*[s]tare decisis* is usually the wise policy . . . in most matters" and finding itself "reluctant to reject this presumption." 476 U.S. at 424.

Next, in *Kodak*, the Court affirmed a lower court decision imposing liability on a monopolist that tied together the sales of branded printers (where it held a natural monopoly) to the sale of parts and repair services (where it faced competition). *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 479 n.29 (1992). There, the Court dutifully adhered to its "past precedents" holding "many times that power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if 'a seller exploits his dominant position in one market to expand his empire into the next.'" *Kodak*, 504 U.S. at 479 n.29 (quoting *Times–Picayune Pub'g Co. v. United States*, 345 U.S. 594, 611 (1953)). The *Kodak* Court reasoned that "our past decisions are reason enough to" treat "derivative aftermarkets [the same as] every other separate market," rejecting a proposal to disregard those past decisions and

"exempt a vast and growing sector of the economy from antitrust laws." *Id.* (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989)).

Petitioners assert that antitrust cases are afforded weaker *stare decisis* effect than other statutory interpretations. Pet. at 24–25; *see also id.* at 29 ("*Flood* and *Toolson* are entitled to little, if any, precedential value at the outset"). Not so. It is true that *stare decisis* in antitrust jurisprudence is not "immovable." *Leegin*, 551 U.S. at 899. But it is far from weak. This Court does "not 'lightly assume that the economic realities underlying earlier decisions have changed, or that earlier judicial perceptions of those realities were in error.'" *Khan*, 522 U.S. at 21 (quoting *Bus. Elecs.*, 485 U.S. at 732). In 133 years, this Court has overruled its antitrust precedents only *three times*, with each instance involving the same disfavored line of cases concerning the proper mode of antitrust analysis for vertical restraints of trade.

The most recent of those three instances was the Court's 2007 decision in *Leegin*, which abandoned *per se* illegality for vertical resale price maintenance claims (i.e., intrabrand price floors) in favor of scrutiny under the more searching rule of reason mode of antitrust analysis. 551 U.S. at 907 (overturning *Dr. Miles*, 220 U.S. 373). The *Leegin* Court observed that *Dr. Miles's* establishment of the "*per se* rule against vertical price restraints" occurred nearly 100 years ago, "not long after enactment of the Sherman Act when the Court had little experience with antitrust analysis." 551 U.S. at 900–01. "Only eight years after *Dr. Miles*, moreover, the Court reigned in the decision" by permitting termination of distributors who do not follow unilaterally imposed vertical resale price

maintenance policies. *Id.* at 901 (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307–08 (1919)). And still other decisions of the Court "defined legal rules to limit the reach of *Dr. Miles*." *Leegin,* 551 U.S. at 901 (citing *Bus. Elecs.*, 485 U.S. 726–28; *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763–64 (1984)). Since *Dr. Miles*, there had developed "widespread agreement that resale price maintenance can have procompetitive effects." *Leegin*, 551 U.S. at 900. This included recommendations from the Department of Justice and the Federal Trade Commission, "the antitrust enforcement agencies with the ability to assess the long-term impacts of resale price maintenance" that this Court permit assessment of procompetitive justifications for vertical resale price maintenance claims under the rule of reason. *Ibid.*

Nothing in *Leegin* suggests that the Court affords antitrust decisions "weak" *stare decisis* and overrules them at its whim. To the contrary, it overruled *Dr. Miles* against the unique backdrop of a virtually unanimous view that *Dr. Miles* was unsound.

Before *Leegin*, this Court's 1997 decision in *Khan* reconsidered the *per se* prohibition of vertical maximum price fixing laid out in *Albrecht*. *Khan*, 522 U.S. at 7 (overturning *Albrecht v. Herald Co.*, 390 U.S. 145, 152–54 (1968)). While *Albrecht* was 29 years old at the time it was reversed, *Albrecht*'s reasoning also found its roots "with [the] *Dr. Miles*" decision from 1911. *Khan*, 522 U.S. at 10–11. Strangely enough, vertical price fixing ordinarily manifested as a prohibition on both raising *as well as discounting* prices: the petitioner in *Khan*, a gasoline retailer, complained that the vertical restraint at issue "prevent[ed] respondents from raising *or lowering* retail

gas prices." *Id.* at 8 (emphasis added). Justice Harlan penned a "vigorous dissent," asserting "that the majority had erred in equating the effects of maximum and minimum price fixing." *Id.* at 12. As with *Dr. Miles*, the rule in *Albrecht* was criticized by "several of [this Court's subsequent] decisions, as well as a considerable body of scholarship," with "both courts and antitrust scholars" noting that *Albrecht*'s rule may "harm consumers and manufacturers." *Khan,* 522 U.S. at 15–18; *id.* at 21 ("*Albrecht* has been widely criticized since its inception."). So *Khan* jettisoned the rule of *per se* liability for vertical maximum price fixing established in *Albrecht*, leaving them to be evaluated on a case-by-case basis under the rule of reason. *Id.* at 22.

But in reversing past antitrust precedent, the Court proceeded with the "utmost caution," and refused to "lightly assume that the economic realities underlying earlier decisions have changed, or that earlier judicial perceptions of those realities were in error." *Khan,* 522 U.S. at 20–21 (second quoting *Bus. Elecs.*, 485 U.S. at 732). It was only after that searching inquiry that *Khan* disturbed the Court's prior holding in *Albrecht*. 522 U.S. at 21 (as "the views underlying [*Albrecht*] have been eroded by this Court's precedent, there is not much of that decision to salvage.").

The only other instance of this Court revisiting its past antitrust reasoning was the 1977 decision in *Continental T.V., Inc. v. GTE Sylvania Inc.*, which reversed *per se* condemnation of vertical non-price restraints in favor of rule of reason scrutiny. 433 U.S. 36, 57–59 (1977) (overturning *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)). Like *Albrecht*, the rule in *Schwinn* sprouted from this Court's disfavored *Dr. Miles* decision,

which this Court would eventually overturn in *Leegin*. *GTE Sylvania*, 433 U.S. at 66 (White, J., concurring) ("The first case cited by the Court in *Schwinn* . . . was this Court's seminal decision holding a series of resale-price-maintenance agreements *per se* illegal.") (citing *Dr. Miles*, 220 U.S. at 404, 407–08). Also like *Albrecht*, "[s]ince its announcement, *Schwinn* ha[d] been the subject of continuing controversy and confusion, both in scholarly journals and in the federal courts." *GTE Sylvania*, 433 U.S. at 47. Another similarity between *Albrecht*, *Schwinn*, and *Dr. Miles* was the near-unanimous opposition to their reasoning and policy justifications. *Id.* at 47–48. ("The great weight of scholarly opinion has been critical of the decision, and a number of the federal courts confronted with analogous vertical restrictions have sought to limit its reach.").

As these cases illustrate, the circumstances justifying reversal of this Court's antitrust precedents are few, far between, and limited to a particular line of cases. For practical purposes, and as a remarkable analogue to the Baseball Trilogy, the Court has only truly reconsidered its past precedents in three cases all involving *per se* illegality for vertical restraints of trade. While *Amicus Curiae* agrees with Petitioners that the aberrational Baseball Trilogy, like the *Dr. Miles* trilogy, is among those rare instances in which their near-unanimous opposition makes deference on *stare decisis* grounds alone unwarranted (*see infra*), any suggestion that *stare decisis* in antitrust cases is weak, or that this Court disregards its antitrust precedents whenever there are grounds to question them, is without support in this Court's jurisprudence.

C. *Stare Decisis* Does Not Save the Aberrational Baseball Antitrust Exemption

1. The "Baseball Trilogy" is Inconsistent with the Policies and Decisions of This Court

a. This Court's Precedents Subject a Sports League's Conduct—at Minimum—to Rule of Reason Antitrust Scrutiny

"[E]xemptions from the antitrust laws are strictly construed and strongly disfavored." *Square D*, 476 U.S. at 421. The baseball exemption strays from this long-held admonition, perhaps because it originated—as did the century old rule in *Dr. Miles* that *Leegin* cast aside, "not long after enactment of the Sherman Act when the Court had little experience with antitrust analysis." *Leegin*, 551 U.S. at 900–01.

Since *Federal Baseball*, no similar exemption has been afforded to any sports league, professional or amateur. All "[o]ther professional sports operating interstate—football, boxing, basketball, and, presumably, hockey and golf—are not so exempt." *Flood*, 407 U.S. at 282–83. This is not for lack of occasion to grant such exemptions. This Court[3] and

3. *See, e.g.*, *United States v. Int'l Boxing Club*, 348 U.S. 236, 244–45 (1955) (declining to extend *Federal Baseball* to boxing); *Radovich v. Nat'l Football League*, 352 U.S. 445, 450–52 (1957) (same for football); *see also Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204, 1205 (1971) ("Basketball . . . does not enjoy exemption from the antitrust laws."); *Alston*, 141 S. Ct. at 2169 (Kavanaugh, J., concurring) ("The NCAA is not above the law.").

the lower courts following in its stead[4] have consistently refused invitations to extend similar antitrust exemptions to any other sports league. Instead, this Court has described the exemption as an aberration, *Alston*, 141 S. Ct. at 2159, likely because the concept of interstate commerce underlying *Federal Baseball* was "extremely dubious" at the time it was decided and with subsequent decisions of this Court, its rationale "ha[s] all but vanished," *Salerno v. Am. League of Prof'l Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir. 1970) (Friendly, J.).

In *Federal Baseball*'s wake, the federal courts have subjected most sports leagues' conduct—if arguably in furtherance of the league's legitimate business interests—to scrutiny under "ordinary rule of reason review," *Alston*, 141 S. Ct. at 2156, while for other more brazen conduct, "a quick look [is] thought sufficient before rejecting . . . procompetitive rationales," *id.* at 2157 (citing *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 109 n.39 (1984)). The baseball exemption is at odds with this approach, effectively rubber-stamping anticompetitive conduct without any inquiry into whether the challenged conduct has any redeeming procompetitive virtues. It is thus inescapable that the baseball exemption is inconsistent with the subsequent decisions of this Court and inconsistent with this nation's competition policies. *Radovich*, 352 U.S. at 452; *Alston*, 141 S. Ct. at 2159.

4. *See, e.g.*, *Amateur Softball Ass'n of Am. v. United States*, 467 F.2d 312, 314 (10th Cir. 1972) (no antitrust exemption for amateur softball); *Bos. Prof'l Hockey Ass'n v. Cheevers*, 348 F. Supp. 261, 265 (D. Mass. 1972) (same for professional ice hockey).

b. The Court's Precedents Would Subject Certain Categories of Conduct by a Sports League to *Per Se* Scrutiny

Petitioners suggest that "MLB's conduct should be subject to the flexible, market-specific rule-of-reason analysis applicable to other sports leagues and businesses." Pet. at 15; *see also id.* at 32 (baseball should be subject to the "rule of reason" rather than "*per se* treatment"). *Amicus Curiae* agrees that in many instances, a restraint of trade effectuated by a sports league would be subject to rule of reason or quick look scrutiny rather than *per se* condemnation. After all, sports leagues require "some agreement among rivals—on things like how many players may be on the field or the time allotted for play." *Alston*, 141 S. Ct. at 2147, 2156. But that does not mean Major League Baseball, or any other sports league, can engage in classic *per se* antitrust violations unnecessary to carry on the sport's business and justify them under the rule of reason notwithstanding their "predictable and pernicious anticompetitive effect." *Khan*, 522 U.S. at 10. Such *per se* violations are "all banned because of the actual or potential threat to the central nervous system of the economy" and "the law does not permit an inquiry into [per se restraints'] reasonableness" or "economic justifications." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940).

To the extent congressional action or inaction has any bearing upon this matter, [5] it is the fact that Congress

5. *Amicus Curaie* agrees with Petitioners that the Curt Flood Act does not codify the judicial baseball exemption. Pet. at 28–29. President Clinton himself declared when signing the Act into law that it "in no way codifies or extends the baseball exemption."

recently doubled down on the *per se* unreasonableness of certain categories of conduct: "[c]onspiracies among competitors to fix prices, rig bids, and allocate markets are *categorically and irredeemably* anticompetitive and contravene the competition policy of the United States." 15 U.S.C. § 7a note (Findings; Purpose of 2020 Am.) (emphasis added).

Consider a few examples. If Major League Baseball teams conspired to fix the prices of baseball admission tickets sold to consumers, surely that activity is unrelated or unnecessary to any legitimate business operation, and should be condemned *per se*. Or if the constituent members of a sports league conspired to suppress the *wages* of the sales personnel that sold those tickets to the general public, or the staff that worked concession stands, surely that conduct is plainly irredeemable and properly subject to *per se* condemnation.[6] "Just as the ability of McDonald's franchises to coordinate the release of a new hamburger does not imply their ability to agree on wages for counter workers, so the ability of sports teams to agree on a TV contract need not imply an ability to set wages[.]" *Alston*, 141 S. Ct. at 2157 (quoting *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n.*, 95 F.3d 593, 600 (7th Cir. 1996)).

Presidential Statement on Signing the Curt Flood Act of 1998, 2 Pub. Papers 1884, 1885 (Oct. 27, 1998).

6. *See, e.g.*, *Socony-Vacuum Oil Co.*, 310 U.S. at 223 (agreements with the "effect of raising, depressing, fixing, pegging, or stabilizing" price all constitute *per se* unlawful horizontal price-fixing); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (*per curiam*) (the Supreme Court has "held agreements . . . [with a] less direct impact on price" still "fall[] squarely within the traditional *per se* rule against price fixing").

This Court should make clear that sports leagues are not immune from *per se* liability for antitrust violations that are plainly unnecessary to their legitimate operations.

2. The "Baseball Trilogy" Has Faced Almost Unanimous Opposition from Antitrust Scholars and Jurists, Including from This Court

A common thread across *GTE Sylvania*, *Khan*, and *Leegin* is that in each instance, the decision that was overturned had been met with near unanimous opposition in intervening years. In *Leegin*, there was "widespread agreement" that the rule in *Dr. Miles*—which this Court "reigned in" with subsequent opinions—had been wrongly decided. *Leegin*, 551 US. at 900–01. Likewise, in *Khan*, the rule in "*Albrecht* ha[d] been widely criticized since its inception," including by "several of [this Court's subsequent] decisions, as well as a considerable body of scholarship." *Khan*, 522 U.S. at 15, 21. And in the same vein, in *GTE Sylvania* the rule in *Schwinn* "ha[d] been the subject of continuing controversy and confusion, both in scholarly journals and in the federal courts." 433 U.S. at 47–48 ("The great weight of scholarly opinion has been critical of the decision, and a number of the federal courts confronted with analogous vertical restrictions have sought to limit its reach."). So too with the Baseball Trilogy.

Apart from Major League Baseball itself, "[s]carcely anyone believes that baseball's exemption makes any sense." Stuart Banner, The Baseball Trust: A History of Baseball's Antitrust Exemption, at xi (2013). The antitrust literature is replete with references to the economic woes that the exemption has caused and its

lack of legal or economic policy justifications. *See, e.g.*, Morgen A. Sullivan, *A Derelict in the Stream of the Law: Overruling Baseball's Antitrust Exemption*, 48 DUKE L.J. 1265, 1294 & n.163 (1999) (collecting sources critical of the exemption's "negative legal and economic consequences"). Antitrust regulators have similarly been critical of the exemption. *Compare* Gov't C.A. Br. (Department of Justice *amicus curiae* brief supporting Petitioners) *with Leegin*, 551 U.S. at 900 (the Department of Justice and Federal Trade Commission had recommended that "this Court replace the *per se* rule with the traditional rule of reason" for vertical resale price maintenance claims).

And judicial discourse has been no friendlier to the exemption than the antitrust literature. The Second Circuit has described *Federal Baseball* as "not one of Mr. Justice Holmes' happiest days." *Salerno*, 429 F.2d at 1005 (Friendly, J.). And the Eleventh Circuit has described *Flood* as "[h]ardly a model of clarity." *Major League Baseball v. Crist*, 331 F.3d 1177, 1185 (11th Cir. 2003). On multiple occasions, this Court has decried the exemption as being "inconsistent" and "illogical," *Radovich*, 352 U.S. at 452, or "unrealistic" and "aberrational." *Alston*, 141 S. Ct. at 2159. Even Justice Douglas, who "joined the Court's opinion in *Toolson*" upholding the exemption, dissented from the subsequent decision to maintain the exemption in *Flood*, writing that he "lived to regret" upholding the exemption and "would now correct what [he] believe[d] to be its fundamental error." *Flood*, 407 U.S. at 286 n.1 (Douglas, J., and Brennan, J., dissenting).

While this Court does not lightly reexamine economic realities and its judicial perceptions thereof, *Khan*, 522 U.S. at 20–22, the near unanimity of the opposition to the

baseball exemption from scholars and jurists alike places the Baseball Trilogy among the rare instances in which adherence to past antitrust precedent on *stare decisis* grounds is unwarranted.

3. The Baseball Trilogy Has Been Inconsistently Interpreted

Another factor that has led the Court to revisit its past antitrust precedents is whether they have "been the subject of continuing controversy and confusion . . . in the federal courts." *GTE Sylvania*, 433 U.S. at 47–48; *see also ibid.* (noting that "*Schwinn* itself was an abrupt and largely unexplained departure from [its earlier decision in] *White*" that merited "clarification of the law") (citing *White Motor Co. v. United States*, 372 U.S. 253 (1963)). The baseball exemption, which is "[h]ardly a model of clarity," *Crist*, 331 F.3d at 1185, has similarly caused confusion in the lower courts, which "have developed their own muddled, conflicting standards, resulting in three general categories of divergent precedent," Nathaniel Grow, Defining the "Business of Baseball": A Proposed Framework for Determining the Scope of Professional Baseball's Antitrust Exemption, 44 U.C. Davis L. Rev. 557, 580 (2010).

In the first category of precedents (and at one extreme of the judicial spectrum) a minority of courts have concluded that the baseball exemption is a dead letter, applying it narrowly to only cover the (long-since-abandoned) "reserve clause"[7] that was at the center of *Federal Baseball*, *Toolson*, and *Flood*—and nothing

7. The reserve clause prevented players from signing with other teams even after their current contract had expired; players violating the reserve clause were blacklisted from contracting with major league franchises. *Fed. Baseball*, 259 U.S. at 208–09.

else. *See, e.g.*, *Piazza* v. *Major League Baseball*, 831 F. Supp. 420, 437 (E.D. Pa. 1993) (*Flood* "confin[ed] the precedential value of *Federal Baseball* and *Toolson* to the precise facts there involved"); *Minnesota Twins P'ship v. Minnesota*, No. 62-CX-568, 1998 WL 35261131 (Minn. Dist. Ct. Apr. 20, 1998) ("*Flood* confines the antitrust exemption to the narrow area of the reserve clause").[8] In the second category, some courts wade into the murky waters of trying to discern what are the "integral" or "central" aspects of the business of baseball, and applying the exemption only to those integral or central aspects and nothing else. *Pro. Baseball Schs. & Clubs, Inc. v. Kuhn*, 693 F.2d 1085, 1086 (11th Cir. 1982) (*per curiam*).

In the third category (and at the other extreme of the judicial spectrum) courts have interpreted the exemption broadly, applying it to the "business of baseball" generally, "not any particular facet of that business." *Charles O. Finley & Co.* v. *Kuhn*, 569 F.2d 527, 541 (7th Cir. 1978); *see also Portland Baseball Club, Inc. v. Kuhn*, 491 F.2d 1101, 1103 (9th Cir. 1974) (*per curiam*). Though even those courts interpreting the exemption broadly concede that the line of demarcation for where the "business of baseball" begins and ends remains amorphous and poorly defined. *See, e.g.*, *O. Finley*, 569 F.2d at 541 n.51 (the exemption cannot "apply wholesale to all cases which may have some attenuated relation to the business of baseball"); *City of San Jose v. Office of the Comm'r of Baseball*, 776 F.3d 686, 690 (9th Cir. 2015) (the exemption "doesn't necessarily mean all antitrust suits that touch on the baseball industry are barred").

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8. *See also, e.g.*, *Butterworth v. Nat'l League of Pro. Baseball Clubs*, 644 So. 2d 1021, 1025 (Fla. 1994) (agreeing with *Piazza*); *Morsani v. Major League Baseball*, 663 So. 2d 653, 657 (Fla. Dist. Ct. App. 1995) (following *Butterworth* and *Piazza*).

These divergent approaches have led, unsurprisingly, to inconsistent results and confusion in the lower courts. After the decision in *Toolson* but before the decision in *Flood*, the Second Circuit held that Major League Baseball was immune from antitrust suit by baseball umpires. *Salerno*, 429 F.2d at 1005 (Friendly, J.). Then, after this Court's decision in *Flood*, a lower court in the Second Circuit reached the exact opposite conclusion, finding that the exemption does not reach "[a]nticompetitive conduct toward umpires" because it reasoned that umpiring—an activity that is a required component of each and every baseball exhibition throughout history—is "not an essential part of baseball." *Postema v. Nat'l League of Prof'l Baseball Clubs*, 799 F. Supp. 1475, 1489 (S.D.N.Y. 1992), *rev'd on other grounds,* 998 F.2d 60 (2d Cir. 1993). And while post-*Flood* decisions within the Second Circuit have stopped the exemption short of reaching the claims of umpires, they have extended it to cover the claims of baseball scouts, even though baseball exhibitions require the former, but not the latter. *Wyckoff v. Off. of the Comm'r of Baseball*, 211 F. Supp. 3d 615, 626 (S.D.N.Y. 2016) (baseball scouts are not "'incidental' to the business of professional baseball"), *aff'd,* 705 F. App'x 26 (2d Cir. 2017).

Lower courts have held that the exemption does not apply to efforts to restrict the broadcasting of baseball games to home audiences. *Henderson Broad. Corp. v. Houston Sports Ass'n*, 541 F. Supp. 263, 265, 271 (S.D. Tex. 1982). But they have applied the exemption to efforts to restrain trade in connection with rooftop audiences on buildings adjacent to Wrigley Field, finding them to be "part and parcel" of "providing public baseball games for profit." *Right Field Rooftops, LLC v. Chicago Cubs Baseball Club, LLC*, 870 F.3d 682, 689 (7th Cir. 2017).

No one seriously disputes that under the existing baseball antitrust exemption, Minor League Baseball, by virtue of its relationship with Major League Baseball, is an exempted activity. *E.g.*, *Miranda* v. *Selig*, 860 F.3d 1237, 1243–44 (9th Cir. 2017); *Concepcion* v. *Off. of Comm'r of Baseball*, No. 22-cv-1017, 2023 WL 4110155, at *10 (D.P.R. May 31, 2023), *report and recommendation adopted*, 2023 WL 4109788 (D.P.R. June 21, 2023). But this year, for the first time, a lower court exempted the activities of a "professional baseball venture NOT associated with Major League Baseball," finding that the exemption covered any entity in the "business of providing public baseball games for profit." *Cangrejeros de Santurce Baseball Club, LLC* v. *Liga de Beisbol Profesional de P.R., Inc.*, No. 22-cv-01341, 2023 WL 4195663, at *1, *5 (D.P.R. June 27, 2023). No other court has ever extended the exemption past Major League Baseball's borders, and if that lower court decision were upheld on appeal, its potential application to amateur NCAA baseball would be on a collision course with this Court's recent decision in *Alston*, 141 S. Ct. at 2169 (Kavanaugh, J., concurring). Absent intervention by this Court, further confusion is all but inevitable.

Perhaps the only guiding principle that can be distilled by these disparate outcomes is that the baseball exemption amounts to "whatever the reviewing court says it is." Joseph J. McMahon, Jr. & John P. Rossi, *A History and Analysis of Baseball's Three Antitrust Exemptions*, 2 Vill. Sports & Ent. L.F. 213, 243 (1995). The fact that the exemption has "been the subject of continuing controversy and confusion . . . in the federal courts," coupled with its near unanimous opposition (by all but Major League Baseball itself), is the sort of once-in-a-generation circumstance that warrants reconsideration. *GTE Sylvania*, 433 U.S. at 47–49.

I.V. Conclusion

For the foregoing reasons, this Court should grant the Petitioners' request for review of the Second Circuit's decision to enable it to decide whether to overturn the Baseball Trilogy and subject Major League Baseball to the same scrutiny imposed upon every other sports league in the nation. The Petition for a Writ of *Certiorari* should be granted and the judgment below should be reversed.

Date: October 23, 2023

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