No. 23-283

IN THE

Supreme Court of the United States

TRI-CITY VALLEYCATS, INC. AND ONEONTA ATHLETIC CORPORATION,

Petitioners,

v.

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 *AMICI CURIAE* BASEBALL ANTITRUST SCHOLARS IN SUPPORT OF PETITIONER

BRAD SNYDER
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave NW
Washington, DC 20001

KEVIN D. MCDONALD
MEMBER, DISTRICT OF COLUMBIA BAR
1907 Ballycor Drive
Vienna, VA 22182

GARRETT R. BROSHUIS
Counsel of Record
KOREIN TILLERY, LLC
One U.S. Bank Plaza,
Suite 3600
St. Louis, MO 63101
(314) 450-4097
gbroshuis@koreintillery.com

Counsel for Amici Curiae

324235

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

This brief is submitted by a group of professors and attorneys ("Baseball Antitrust Scholars") who have spent decades studying baseball's antitrust exemption. One of the amici has written an influential book in the area (A WELL-PAID SLAVE: CURT FLOOD'S FIGHT FOR FREE AGENCY IN PROFESSIONAL SPORTS, (Viking/Penguin 2006)), while another spent nearly four decades as an antitrust litigator and has published widely cited articles on the topic (including *Antitrust and Baseball: Stealing Holmes*, 1998 J. SUP. CT. HIST. V.II 89 (1998)). One of the amici also has seen the effects of the antitrust exemption first hand, having played minor league baseball for six years in the San Francisco Giants' organization, and then later serving as class counsel in the landmark Minor League Baseball player case of *Senne v. Office of the Comm'r of Baseball*.

As such, these amici have a deep appreciation of the history of the exemption, its impact on the industry, and its damage to the reputation of this Court. Amici seek to aid the Court in understanding what went wrong and how it may be fixed.

SUMMARY OF ARGUMENT

In 1922, the Court held that baseball, as it then existed and as the Commerce Clause was then interpreted, did not involve interstate commerce and thus

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[1] No party's counsel authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. Both parties received notice of the filing of this brief as required in Rule 37.2.

was not subject to federal regulation under the Sherman Act. *Federal Baseball v. National League*, 259 U.S. 200, 208-09 (1922)

Thirty-one years later, no one could have disputed that the business of baseball did, in fact, occur in interstate commerce. But instead of making the fact-specific inquiry called for by *Federal Baseball*, the Court took a wrong turn in *Toolson v. New York Yankees*. 346 U.S. 356 (1953). In just a six-sentence opinion, the Court stated for the first time that Congress had intended to exempt the business of baseball from the antitrust laws. The Court cited nothing to support that conclusion in the statute or its legislative history, or in *Federal Baseball* itself. Nor could it. The exemption was created by a last-minute edit to *Toolson*'s final sentence.

In 1972, the Court recognized that the exemption for baseball was an "illogical" "aberration." *Flood* v. *Kuhn*, 407 U.S. 258, 282 (1972) (quotation omitted). Yet it upheld *Toolson* based on *stare decisis*, expressly refusing to "withdra[w] from the conclusion as to congressional intent made in *Toolson*…." *Id.* at 284.

Although MLB's antitrust exemption has been consistently derided for decades, this Court has not revisited the issue for over half a century. Now is the time to finally correct the fundamental error of *Toolson*. Nothing that Congress has done before or since 1953 prevents this Court from correcting its own mistake. The Petition should thus be granted. Seventy years of an aberrational antitrust exemption are enough.

ARGUMENT

I. The Court Should Correct the "Fundamental Error" Caused by *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953)

It is difficult to fix something properly without understanding how it came to be broken. The common view that this Court's decision in *Federal Baseball v. National League*, 259 U.S. 200 (1922) exempted major league from the antitrust laws is mistaken. That exemption sprung from the last sentence of the one-paragraph, *per curiam* opinion in *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953). It subsequently proved to be a surprise to the bench and bar, to major league baseball, and to multiple members of the Court who had joined the *Toolson* opinion. The Court should overrule *Toolson* and hold that the antitrust laws apply to all persons and entities not expressly exempted by Congress.

A. *Federal Baseball* Supports, Rather Than Forecloses, Application of the Sherman Act to The Business of Baseball

The dispute in *Federal Baseball v. National League*, 259 U.S. 200 (1922), arose from the creation of a third "major" league in 1913, the Federal League. A group of wealthy businessmen re-christened their existing minor league "major," erected eight new ball parks, touched off a bidding war for star players (Tris Speaker was paid the unearthly sum of $18,000 to stay with the Red Sox), and competed with reasonable success for two seasons. In 1915, the so-called Peace Agreement with MLB put an end to the Federal League, by assuming its debts and acquiring its best assets (including the friendly confines of Wrigley Field). The Federal League's Baltimore franchise, however, was excluded from the deal and brought an antitrust suit. It prevailed at trial, but the Court of

Appeals reversed, holding that baseball did not constitute "commerce among the states," 259 U.S. at 202, and this Court agreed.

On its face, this Court's unanimous opinion by Justice Holmes hardly seems to merit the calumny that it receives today. Contrary to the myth that he found baseball to be a sport rather than a business, he referred to organized baseball as a "business" five times in two-and-one-half pages. 259 U.S. at 207–09. He noted that the "constant" interstate travel of the clubs was "provided for, controlled and disciplined by the [leagues]." *Id.* at 207. He emphasized that "to attain for these exhibitions the great popularity they have achieved, competitions must be arranged between clubs from different cities and States." *Id.* Yet the analysis the Court employed in 1922—the same one employed by both parties in their arguments—was whether the interstate aspects of the business were essential to its character or merely "incidental."

That test was applied to a business fundamentally different from baseball today. There was no radio or television. There were no minor leagues. Gambling, though celebrated today, was then considered a scandal. The Court thus concluded that the relevant product (in modern antitrust terms) – the "essential thing" – was the game itself: "The business is giving exhibitions of baseball, which are purely state affairs." *Id.* at 208. That is, when the game was played in 1922, only local fans partook. No interstate transaction occurred, as it would a decade later by virtue of radio broadcasts. For Holmes, Brandeis, Taft and the rest of the Court, the pre- and post-game transport of players and equipment was "a mere incident." *Id.* at 209. *Federal Baseball* thus turned on a fact-driven analysis of the connection of the business to interstate commerce,

which had this abiding virtue: whether one agrees with the Court's conclusion or not, the result under such an "incidental effects" test will change as soon as the facts do. If the advent of radio and television convert the "essential thing" into an interstate transaction, then the Sherman Act applies.

Then why is it, as Justice Alito has pointed out, that *Federal Baseball* "has been pilloried pretty consistently in the legal literature since at least the 1940s"?[2] What happened in the 1940s?

One thing that happened was the decision in *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949). Danny Gardella was a New York Giants outfielder suspended by baseball for jumping briefly to the "Mexican League," which had begun offering enormous salaries to U.S. players after World War II. His antitrust complaint had been dismissed, but the Second Circuit reversed, 2-1. The two Judges ruling in favor of Gardella were Learned Hand and Jerome Frank. Hand's opinion was a straight-forward application of the incidental effects test of *Federal Baseball* under the updated facts of 1949. Broadcasting made modern baseball the equivalent of "a 'ball park' where a state line ran between the diamond and grandstand." *Id.* at 407. Indeed, "the players are the actors, the radio listeners and the television spectators are the audiences." *Id.* at 408. The interstate aspects were no longer "merely incidents" but "part of the business itself." *Id*.

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[2] Samuel A. Alito, Jr., *The Origin of the Baseball Antitrust Exemption*, 38 THE BASEBALL RESEARCH J. 86, 87 (Fall 2009) (*available* at https://sabr.org/journal/article/alito-the-origin-of-the-baseball-antitrust-exemption/) (last accessed March 8, 2021).

Judge Frank, on the other hand, was far more critical of *Federal Baseball*, labelling it "[an] impotent zombi[e]." 172 F.2d at 409. He agreed that baseball's interstate aspects had become more than incidental, but he also asserted that "the Court [in *Federal Baseball*] assigned as a further ground of its decision that the playing of the games, although for profit, involved services, and that services were not 'trade or commerce' as those words were used in the Sherman Act." *Id*. at 412. Judge Frank argued that the Second Circuit was free to ignore that alternative ground because later Supreme Court cases had subjected services to the Sherman Act.

The view that *Federal Baseball* excluded services from the Act was simply wrong. This Court had applied the Act to services not only after *Federal Baseball*, but long *before* it as well. *E.g*., *Northern Securities Co.* v. *United States*, 193 U.S. 197 (1904) (railroad transportation services). Indeed, the first Justice Harlan had debunked that view years earlier in a case involving mail order educational services. *International Text-Book Co. v. Pigg*, 217 U. S. 91, 107 (1910) ("[A]ll interstate commerce is not sales of goods. …. [All] such importation, whether it be of goods, persons, *or information,* is a transaction of interstate commerce.") (quotation omitted; original emphasis).

When Holmes said that "the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words," he was asserting that, during the game, no such "transaction of interstate commerce" occurred, not that all "services" – a term he did not use – were beyond the Act.[3]

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[3] *See* Kevin McDonald, *Antitrust and Baseball: Stealing Holmes*, 1998 J. SUP. CT. HIST. 89, 116-18 (1998).

Three points refute the common misreading of *Federal Baseball*: (1) It renders the incidental effects test applied by this Court, the lower courts, and all the parties to the case irrelevant. If playing baseball is a service and services are not subject to the Sherman Act, the case is over. That simply was not the case.

(2) Holmes held that a business based on services could pass the incidental effects test the very next term, in *Hart v. B.F. Keith Vaudeville Exchange*, 262 U.S. 271 (1923). *Hart* involved an interstate vaudeville circuit, presenting local exhibitions in a manner legally indistinguishable from *Federal Baseball*. Yet the lower court had dismissed the complaint, not giving the plaintiff a chance to prove that the interstate travel involved was more than "incidental." Holmes, writing again for a unanimous Court, reversed. Notwithstanding "the *Baseball Club Case*," which had come to the Court after a full trial, "it may be that what in general is incidental in some instances may rise to a magnitude that it requires that it be considered independently." *Id.* at 273–74. Thus, the plaintiff in the vaudeville case could prevail in theory, even though the actors on a stage are engaged in "personal effort" in precisely the same sense as baseball players.

(3) The third point is that Learned Hand got it right. On the Second Circuit for nearly forty years, he was familiar with *Federal Baseball* and the incidental effects test. In 1926, he sat on the Second Circuit panel that reviewed the same vaudeville case after it was remanded by this Court. *Hart v. B.F. Keith Vaudeville Exchange*, 12 F.2d 341 (2d Cir. 1926). Deciding *Gardella* in 1949, he understood the flaw in Judge Frank's reasoning regarding "services," and pointed out that the Sherman Act had always condemned "a

contract which unreasonably forbids any one to practice his calling." 172 F.2d at 408.

In sum, *Federal Baseball* provides no obstacle to the conclusion that baseball is subject to antitrust laws. Its treatment here should be similar to this Court's treatment of the 1984 *NCAA* decision in *NCAA v. Alston*, 141 S. Ct. 2141 (2021). In *Alston*, the *Board of Regents* argued that the Court had previously blessed its restraints on athlete compensation based on dicta in *NCAA v. Board of Regents*, 468 U.S. 85 (1984). This Court responded that antitrust analysis "depends on a careful analysis of market realities" and that "the market realities have changed significantly since 1984…." 141 S.Ct. at 2158. As a result, "it would be particularly unwise to treat an aside in *Board of Regents* as more than that." *Id*. So too here, application of *Federal Baseball* to the "market realities" of today is fully consistent with the application of antitrust law to baseball.

B. The "Fundamental Error" of *Toolson*

After Learned Hand's decision, MLB quickly undid the suspensions of those who went to the Mexican League. It also settled with Gardella because as the commissioner later acknowledged, "the lawyers thought we could not win."[4] Then in the early 1950s, Congress began considering legislation to exempt baseball from the antitrust laws. No such statute was passed. At that point, this Court once again considered the issue of baseball and antitrust.

George "Earl" Toolson was a career minor league pitcher stuck at Triple-A in the New York Yankees' extensive minor league system. The reason? The

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[4] Brad Snyder, *A Well-Paid Slave* 25–27 (Viking/Penguin, 2006) (settlement); G. Edward White, *Creating the National Pastime*, 295 (Princeton U. Press, 1996) (lawyers' assessment).

standard player contracts of the day contained a mandatory provision known as the "reserve clause" that allowed teams to retain the right to players for life.

Toolson challenged the reserve clause as a group boycott and a price-fixing scheme in violation of the Sherman Act, which appeared to be true under the Court's precedents in 1953. But the lower court adopted the view that the Sherman Act did not cover services, and dismissed the complaint on that basis alone.[5]

The Warren Court was in its infancy when it heard Toolson's case. On October 2, 1953, President Eisenhower had nominated California Governor Earl Warren to be chief justice as a recess appointment (Warren was not confirmed by the Senate until 1954). When he joined the Court three days later, the future Chief Justice had never argued a Supreme Court case and was unfamiliar with Court procedures. Justice Black, the Court's most senior associate justice, was then serving as the acting chief. Jim Newton, *Justice for All* 277 (Riverhead Books, 2006).

During Warren's first two weeks, the justices heard oral argument in *Toolson* and discussed it at conference. Justice Black suggested affirming *Federal Baseball*—without any factual examination of the business of baseball in 1953—in a *per curiam* opinion. Black said he did "not agree" with *Federal Baseball* on the merits, William O. Douglas Conference Notes, *Toolson v. New York Yankees*, Oct. 17, 1953, at 1, William O. Douglas Papers, Box 1147, but apparently construed it as exempting baseball from the Sherman Act for all time.

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[5] *Toolson* v. *New York Yankees*, 101 F. Supp. 93, 94 (1951) ("The character of baseball, in the Federal Baseball Club case, was held to be not commerce or trade but sport.")

Justice Stanley Reed voted to reverse because "the sport of baseball is a trade under the Act." *Id.* at 2. Justice Harold Burton agreed. Justices Frankfurter and Douglas voted to affirm *Federal Baseball* because it was a statutory case. Justice Robert Jackson, the former head of the Justice Department's antitrust division, agreed to affirm but wanted to lay out the reasons. *Id*. Justice Tom Clark voted to affirm even though he observed that the "farms"—the extensive network of minor league teams controlled by the major league teams—did not exist when Holmes decided *Federal Baseball* in 1922. *Id.* at 2. Justice Sherman Minton simply voted to affirm. *Id.*

Chief Justice Warren spoke last: "we can't say that baseball is immune no matter what they do—very substantial differences in the game—hooked up with movies—with radio—with television—the farms—all these change the character in the game need not reverse the old case to hold that the present method of handling the game is different—if the decision is made in per curiam in short form he will go along—but he will not agree on the merits." *Id.* at 2–3.

Justice Black then drafted a six-sentence *per curiam* opinion. It declared that baseball had developed "for thirty years . . . on the understanding that it was not subject to existing antitrust legislation," and that, if there are antitrust evils" in baseball, the remedy "should be by legislation." The final sentence initially stated that, "[w]ithout re-examination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, *supra*."

After Justice Black circulated the first draft, however, Chief Justice Warren asked that the final sentence be revised. Memorandum from Warren to Black, Oct. 23, 1953, Earl Warren Papers, Box 631 & Hugo Lafayette Black Papers, Box 321. Warren added that

Federal Baseball was being affirmed "*so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws*." *Id.*; *Toolson*, 346 U.S. at 357 (emphasis added). Justice Black agreed, and the opinion issued with Warren's concluding phrase. Memorandum Black to Conference, Oct. 24, 1953, Black Papers, Box 321 & Harold Hitz Burton Papers, Box 245, Folder 3; Snyder, *A Well-Paid Slave*, 22–23.

Toolson's last sentence is insupportable for multiple reasons. It is contrary to the Sherman Act's plain language, which does not mention baseball. It is contrary to the legislative history of the fifty-first and sixty-third congresses that passed the Sherman Act in 1890 and the Clayton Act in 1914, neither of which mentioned baseball, much less an intent to exempt it from antitrust enforcement. And, finally, it misrepresented *Federal Baseball*, which did not contain the word "exemption" and said absolutely nothing about Congress's intent regarding baseball. Nor did *Federal Baseball* suggest that its result could be "remedied" by legislation (because Congress lacked the power to regulate baseball unless and until its effects on interstate became more than incidental). As one commentator pointed out at the time, if *Toolson* affirmed Federal Baseball "so far as that decision determine[d] that Congress" meant to exempt baseball, "Toolson would then seem to reaffirm nothing."[6]

Perhaps because it lacked any basis in the statute or precedent, the last sentence of *Toolson* made no impression on lower courts. Rather, they construed the Court's failure to overrule *Federal Baseball* as evidence that the antitrust laws would not apply to any business legally indistinguishable from baseball. The Supreme Court, therefore, was forced to take several

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[6] Note, Recent Cases, 105 U. Pa. L. Rev. 110, 112-13 n.24 (1956).

cases in the ensuing terms to make it clear that defendants in such businesses as entertainment and even other sports *would* be subject to the Sherman Act.[7]

In *United States v. International Boxing Club*, 348 U.S. 236 (1955), Chief Justice Warren began to make clear his intention to limit the exemption created in *Toolson* to baseball alone. His opinion applied the antitrust laws to professional boxing in part because up to 25 percent of its revenue "derived from interstate operations through the sale of radio, television, and motion picture rights." 348 U.S. at 241.

The three dissenting Justices in *International Boxing* included two who had joined the opinion in *Toolson* without realizing that it created an exemption for a single sport. Justice Frankfurter, joined by Justice Minton, could find no justification for the Court "writing into the Sherman Law an exemption of baseball to the exclusion of every other sport different not one legal jot or tittle from it." *Id.* at 250 (Frankfurter, J., dissenting).

But the lower courts still could not fathom an express exemption where none existed. In a subsequent antitrust case involving professional football, the Ninth Circuit groped for a principled distinction between the decisions involving baseball and boxing, resulting in this epiphany: The Sherman Act exempts all *team* sports, such as baseball and football, but not *individual* sports, such as boxing. *Radovich v. Nat'l Football League*, 352 U.S. 445, 447–48 (1957). This Court reversed again.

In a 6-3 opinion, the Court limited the decisions in "*Toolson* and *Federal Baseball* [to] … to the facts there involved, i.e., the business of organized professional

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[7] *See, e.g.*, *U.S. v. Shubert*, 348 U.S. 222 (1955).

baseball. *Id.* at 451. The Court recognized that exempting baseball but not football relied on "unrealistic, inconsistent, or illogical" distinctions. *Id.* at 452. The only defense offered was this: "But *Federal Baseball* held the business of baseball outside the scope of the Act. No other business claiming the coverage of those cases has such an adjudication." *Id.*[8]

The dissenting Justices in *Radovich* included two members who were new to the Court since *Toolson*. John Marshall Harlan II and William Brennan agreed with Justice Frankfurter that *Toolson's* "narrow application of stare decisis" was too narrow to make sense. They were "unable to distinguish football from baseball under the rationale of *Federal Baseball* and *Toolson*." *Id.* at 456 (Harlan, J., dissenting). With *Radovich*, the supposed Congressional exemption for baseball invented in *Toolson* was complete. The Court's mistake in *Toolson* continues to haunt the baseball industry today.

C. *Flood* Embraced *Toolson*'s Error

When the St. Louis Cardinals attempted to trade Curt Flood to the Philadelphia Phillies, he simply refused to play for them. His antitrust assault on the reserve clause quickly made its way to the Supreme Court, which granted certiorari "to look once again at this troublesome and unusual situation." *Flood v. Kuhn*, 407 U.S. 258, 269 (1972). Justice Blackmun's opinion began with a paean to baseball's "colorful days." He included a list of *eighty-eight* of his favorite old-time ballplayers, noting (accurately) that "[t]he list seems endless." 407 U.S. at 262–63. Only two other Justices joined that part of the opinion.

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[8] Having rejected any exemption for football, Justice Clark went on to find the plaintiff's complaint sufficient to state a claim, citing (without apparent irony) Justice Holmes's opinion in *Hart*, the 1923 vaudeville case. 352 U.S. at 453.

Flood reaffirmed the baseball exemption on the ground that any solution to the problem created by *Federal Baseball* should come from Congress, not the Court. Justice Blackmun gave three principal reasons: First, Congress had considered the issue of baseball's antitrust exemption several times, but had passed no law. Thus, by its "positive inaction," Congress has "clearly evinced a desire not to disapprove" of *Federal Baseball*. *Id.* at 258–61. Second, "since 1922, baseball has been allowed to develop and expand unhindered by federal legislative action." *Id.* Given this reliance, there would be inevitable "retroactivity problems" if there were "a judicial overturning of *Federal Baseball*." *Id.* at 283. Third, the rule of *Federal Baseball* may be "an anomaly" and "an aberration," but it is "an established one that has been with us now for half a century." *Id.* at 282-84. To overrule it now, would require "withdrawing from the conclusion as to congressional intent made in *Toolson*." *Id.* at 284.

These reasons do not withstand scrutiny. First, reliance on Congressional inaction has been repeatedly criticized by this Court because "it is impossible to assert with any degree of assurance that Congressional failure to act represents affirmative Congressional approval of the Court's statutory interpretation."[9] But even if the doctrine were sound, it would plainly cut the other way in *Flood*: Congress had repeatedly failed to *enact* an exemption, not failed to "disapprove" it.

Second, baseball's alleged reliance on an antitrust exemption is also a myth. As noted, the commissioner told Congress in 1951 (after *Gardella*, but before *Toolson*) that his lawyers told him he could not prevail in

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[9]*Alexander v. Sandoval*, 532 U.S. 275, 292 (2001); *see United States v. Craft*, 535 U.S. 274, 287 (2002) ("Congressional inaction lacks persuasive significance") (quotation omitted); *Johnson v. Transportation Agency*, 480 U.S. 616, 672 (1987) (Scalia, J. dissenting) ("vindication by Congressional inaction is a canard").

Gardella. *See supra* at 8. A baseball historian writing in 1950 also concluded that "[i]n three quarters of a century, the validity of the reserve clause has sometimes been affirmed in court, but usually it has been denied. The issue is not yet settled . . . ."[10]

Finally, any attempt to give the "aberrant" baseball "exemption" a fifty-year pedigree does not persuade. The *Federal Baseball* opinion did not use the word exemption, nor turn on Congressional intent. Nor did it imply that its rationale would apply differently to *other* sports. Thus, the baseball exemption—while factually and historically groundless in 1953—did not become an "aberration" until later cases made it clear that the same faulty reasoning would not apply to boxing (1955) or football (1957).

The final sentence in *Flood* added another layer to the rewriting of *Federal Baseball*: "And what the Court said in *Federal Baseball* in 1922 and what it said in *Toolson* in 1953, we say again here in 1972; the remedy, if any is indicated, is for congressional, and not judicial, action." Of course, *Federal Baseball* said no such thing—nor could it, as its rationale was based on Congress's power to regulate interstate commerce.[11]

Three Justices dissented in *Flood*: Douglas, Brennan, and Thurgood Marshall. Justice Douglas, who famously labeled *Federal Baseball* "a derelict in the stream of the law," acknowledged that he had "lived to regret" his vote in *Toolson*, 407 U.S. at 286 & n.1, just

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[10] Lee Allen, *100 Years of Baseball* at 72 (Bartholomew House, 1950).

[11] As Justice Alito has observed, *Federal Baseball* has been "'scorned principally for things that were not in the opinion, but later added by *Toolson* and *Flood*.'" Alito, *supra* n.2 at 87 (quoting McDonald, *supra* note 3 at 122).

as Justice Brennan had apparently lived to regret his vote in *Radovich*.

Flood was wrongly decided because it was premised on the same error as *Toolson*. Ruling for Flood would have required "withdrawing from the conclusion as to congressional intent made in *Toolson*...." *Id.* at 284. But that conclusion was a fabrication; no one has tried to defend it—indeed, no one argued for it at the time. This Court should overrule *Toolson*, and hence *Flood*, to correct that fundamental error.

II. Courts Have Misread the Curt Flood Act of 1998, Which Is Another Reason for Granting the Petition

In recent decades, baseball has pointed to the Curt Flood Act of 1998 (the "CFA") as evidence that Congress has approved of the Court's path. That Act is, by its express terms, irrelevant to the Court's decision here. Indeed, another reason to grant the petition in this case is that lower courts have severely misread the statute.

Twenty-five years after *Flood*, Congress spoke for the first time on the antitrust exemption, but in a very limited manner. Stemming from a 1994 labor dispute that canceled the World Series, the CFA did just one thing: it abolished the exemption with respect to Major League players. The purpose of the Act was limited to ensuring "that major league baseball players are covered under the antitrust laws." Pub. L. No. 105-297, § 2, 112 Stat. 2824 (Oct. 27, 1998). Nothing more.

Indeed, the statute expressly leaves consideration of all other aspects of the exemption for the courts to decide: "No court shall rely on the enactment of this section as a basis for changing the application of the antitrust laws to any conduct, acts, practices, or agreements other than those set forth in subsection (a) [i.e.,

major league players]." 15 USC § 26b(b). The legislative history is equally clear that the act was "not intended to affect *the applicability or inapplicability of the antitrust laws* in any other manner or context." S. Rep. 105-118, at 2 (1997) (emphasis added).[12]

There was good reason for Congress to remain agnostic with respect to the exempt status of anything besides big leaguers. In 1998, the breadth of baseball's antitrust exemption was not so clear. Some courts had taken a broad view of the exemption, holding that it reached the entire business of baseball. But other courts had taken a narrower view of the exemption. Finding that the exemption only applied to baseball's reserve system, these cases permitted challenges involving a team's potential relocation to go forward. *Butterworth v. Nat'l League of Prof'l Baseball Clubs*, 644 So. 2d 1021 (Fla. 1994); *Piazza v. Major League Baseball*, 831 F. Supp. 420 (E.D. Pa. 1993); *Minnesota Twins Partnership v. Minnesota*, No. 62-CX-98-568, 1998 WL 35261131 (Minn. Dist. Ct. April 20, 1998); *see also Morsani v. Major League Baseball*, 663 So. 2d 653, 657 (Fla. Dist. Ct. App. 1995) (baseball exemption limited to reserve system). Yet another court had held that MLB's relationship with its umpires was outside the scope of the exemption. *Postema v. National League of Professional Baseball Clubs*, 799 F. Supp. 1475 (S.D.N.Y. 1992).

Despite the clear statement from Congress that it was only acting with respect to Major League players,

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[12] The bill's sponsor, Senator Hatch, emphasized that "[the Act] is absolutely neutral with respect to the state of the antitrust laws between all entities and in all circumstances other than in the area of employment as between major league owners and players." 144 Cong. Rec. S9496 (July 30, 1998).

some courts have misinterpreted the CFA as providing a congressional blessing of a broad antitrust exemption. In *City of San Jose v. Off. of the Comm'r of Baseball*, 776 F.3d 686 (9th Cir. 2015), the Ninth Circuit stated that, because Congress chose not to alter the status quo with respect to franchise relocation, Congress must have intended that issue to fall within the exemption. *Id.* at 690; *see also Wyckoff v. Off. of Comm'r of Baseball*, 705 F. App'x 26, 29 (2d Cir. 2017) (citing the CFA to support its holding that a scout's antitrust claims were properly dismissed).

Nothing in the text or the legislative history supports those holdings. In fact, that reading turns the intent of the Act on its head: "[T]he [Curt Flood Act] never explicitly forecloses the right to bring any sort of lawsuit against MLB; instead, the Act merely clarifies that it does not actively establish a right to challenge certain activities under antitrust law." Nathaniel Grow, *The Curiously Confounding Curt Flood Act*, 90 Tul. L. Rev. 859, 892 (2016) ("Grow"). Contrary to the reasoning of *San Jose*, Congress explicitly sought to prevent courts from trying to divine meaning from its silence.[13]

The exemption was of this Court's making, and it remains of this Court's making. Other than in the area of Major League player relations, Congress has not spoken. This Court remains free to correct its own error.

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[13] *See* Grow, 90 Tul. L. Rev. at 892 ("Thus, the Flood Act is more properly read as remaining neutral regarding the applicability of the exemption in such [other] cases, neither endorsing nor prohibiting lawsuits challenging the practices delineated in subsection (b).").

III. It Is Time to Correct the Court's Course.

Monopolies create tremendous economic inefficiencies, hurt consumers, and permit competitors to run roughshod over smaller competitors through the exercise of market power, rather than competition on the merits. True to the common law roots of the Sherman Act, this Court has changed the way it applies the antitrust laws to the big businesses of professional and college sports as the facts surrounding those businesses has changed.

But those rules have not been applied to baseball, due to the "aberrant" antitrust exemption created by *Toolson* and confirmed by *Flood*.[14] Major League Baseball and its Clubs have been protected by the exemption in a wide range of dealings: in controlling franchise relocations,[15] in limiting fans' ability to watch games,[16] and in suppressing employee mobility and pay.

For instance, MLB and its Clubs fixed the salaries of their Minor League Baseball players for decades. *See, e.g.*, Garrett Broshuis, *Touching Baseball's Untouchables: The Effects of Collective Bargaining on Minor League Baseball Players*, 4 Harv. J. Sports and Ent. L. 51, 61 (2013). The players lacked a union, so they had no means of combatting the wage fixing. As a result, many minor league players, who played in front of thousands of fans each night, received salaries

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[14] The criticism of the exemption is abundant and one-sided. For a collection of scholarly books and articles criticizing the exemption, *see* Alito, *supra* n.2 at 69-75.

[15] *City of San Jose v. Off. of the Comm'r of Baseball*, 776 F.3d 686, 690 (9th Cir. 2015)

[16] *Right Field Rooftops, LLC v. Chi. Baseball Holdings, LLC*, 870 F.3d 682 (7th Cir. 2017).

that put them below the poverty line.[17] And their uniform contracts contained highly restrictive covenants, relative to other boilerplate employee agreements.[18]

MLB and its Clubs have thus far been shielded by the exemption in their restructuring and downsizing of the Minor Leagues. That is what is at issue in this case. The New York-Penn League had provided local fans with minor league baseball entertainment since 1939.[19] In an instant, MLB eliminated it.

If MLB lacked an antitrust exemption, these allegedly anticompetitive practices would be tested in full against the strictures of the Sherman Act—just as the conduct of the NBA, NFL, NCAA, and every other professional sports organization has been. Perhaps MLB can survive some or all of these challenges, but it is arguable that its horizontal restrictions are no more legal than those struck down by this Court in *Board of Regents* and *Alston*. See, e.g., *NCAA v. Alston*, 141 S. Ct. 2141, 2166 (2021) (Kavenaugh, J. concurring) ("Price-fixing labor is price-fixing labor.").

The time has come for this Court to remove from this process the artificial barrier of the baseball exemption, to apply the Sherman Act to MLB's practices on a case-by-case basis, and to overrule a decision—*Toolson v. New York Yankees*—that caught the nascent Warren Court looking at a fat pitch.

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[17] Until the Minor League players recently unionized, their annual salary fell between $4,000 and $14,000. *See* Broshuis, 4 HARV. J. SPORTS AND ENT. L. at 63.

[18] *See id.* at 64 (describing contract provisions).

[19] *MLB down to 120 farm teams after 40 cities dropped as affiliates*, ESPN.com, https://www.espn.com/mlb/story/_/id/30486689/mlb-120-farm-teams-40-cities-dropped-affiliates (last visited Sep. 12, 2023).

CONCLUSION

In *Toolson* and again in *Flood*, the Court misapplied *Federal Baseball*, attributing an intent to Congress to exempt the business of baseball from the antitrust laws—where no such intent existed. Current economic realities dictate that the antitrust laws should apply to the business of baseball just as they do to all other professional and college sports. The Court should grant the petition for certiorari and overrule *Toolson* and *Flood*.

Respectfully submitted,

GARRETT R. BROSHUIS
Counsel of Record
KOREIN TILLERY, LLC
One U.S. Bank Plaza
Suite 3600
St. Louis, MO 63101
(314) 450-4097
gbroshuis@koreintillery.com

BRAD SNYDER
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave NW
Washington, DC 20001

KEVIN D. MCDONALD
MEMBER, DISTRICT OF COLUMBIA BAR
1907 Ballycor Drive
Vienna VA 22182

Counsel for Amicus Curiae

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