NO. 17-1074

In the
Supreme Court of the United States

RIGHT FIELD ROOFTOPS, LLC, et al.,

Petitioners,

v.

CHICAGO CUBS BASEBALL CLUB, LLC, et al.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Nearly a century ago, this Court held that federal antitrust laws do not apply to the "business of baseball." This Court has twice reaffirmed that principle and rejected efforts to overrule it. Petitioners allege the Chicago Cubs violated federal antitrust law by seeking to monopolize the market for tickets to watch the Chicago Cubs play live baseball at Wrigley Field.

The questions presented are:

1. Whether selling tickets to watch live baseball games is part of the "business of baseball."

2. Whether, despite decades of congressional acceptance of baseball's antitrust exemption and baseball's development in reliance on that exemption, this Court should overrule *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); and *Flood v. Kuhn*, 407 U.S. 258 (1972).

CORPORATE DISCLOSURE STATEMENT

Chicago Cubs Baseball Club, LLC is a Delaware limited liability company. The sole member of Chicago Cubs Baseball Club, LLC is Chicago Baseball Holdings, LLC, which is a Delaware limited liability company.

Wrigley Field Holdings, LLC is a Delaware limited liability company. The sole member of Wrigley Field Holdings, LLC is Chicago Baseball Holdings, LLC, which is a Delaware limited liability company.

Chicago Baseball Holdings, LLC is a Delaware limited liability company. The sole member of Chicago Baseball Holdings, LLC is Chicago Entertainment Ventures, LLC, which is a Delaware limited liability company.

No publicly held company owns 10% or more of Chicago Cubs Baseball Club, LLC, Chicago Baseball Holdings, LLC, Wrigley Field Holdings, LLC, or Chicago Entertainment Ventures, LLC.

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INTRODUCTION

As this Court made clear nearly a century ago, and has reaffirmed multiple times since, the federal antitrust laws do not apply to the "business of baseball." *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953), *reaff'g Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922). This case is about the business of baseball, specifically, allegations the Chicago Cubs improperly controlled the market to watch the Chicago Cubs play live baseball at Wrigley Field. Whatever debates could be had about the scope of the "business of baseball," there can be no serious question that selling tickets to watch live baseball games is included. Baseball without a paying audience would still be baseball, but it would not be the *business* of baseball. This case therefore does not present any meaningful question about the outer perimeters of baseball's antitrust exemption. That question would not warrant review in any event, as every circuit to consider its scope has construed baseball's antitrust exemption broadly to cover the entire "business of baseball." There is no circuit split.

Similarly, whatever could be said about the correctness of *Federal Baseball* as an original matter, there is no basis to revisit that decision, and this case would be a poor vehicle for doing so in any event. This Court has twice considered and rejected calls to overrule *Federal Baseball*, explaining in both cases that calls to overrule such a longstanding statutory decision should be directed to Congress. Congress has modified the exemption only once and only in one narrow respect, explicitly leaving the bulk of the

exemption intact. Considerations of both *stare decisis* and congressional intent, not to mention the reliance interests of an entire industry, all counsel in favor of retaining this longstanding exemption. And even if this Court were interested in reconsidering its precedent, this would be a poor vehicle. Petitioners' novel theory that the Cubs have improperly controlled the market for Cubs' games has multiple fatal flaws even apart from the exemption, as underscored by the district court's two alternative holdings concerning market definition and anticompetitive conduct.

STATEMENT OF THE CASE

A. Legal Background

This Court first considered baseball's status under federal antitrust laws in *Federal Baseball*. The *Federal Baseball* case arose out of the Federal League's failed attempt to compete with the National and American Leagues. *See* Samuel A. Alito, Jr., *The Origin of the Baseball Antitrust Exemption*, 34 J. Sup. Ct. Hist. 183, 186-89 (2009). After the Federal League's money ran out, and after the National and American Leagues rebuffed merger inquiries, the owners of the Federal League's eight teams filed an antitrust suit against the other leagues. *See* Stuart Banner, *The Baseball Trust* 53 (2013); Nathaniel Grow, *Baseball on Trial* 65-68 (2014). The National and American Leagues eventually settled with the owners of seven of the Federal League's eight teams. Grow, *supra*, at 101-07. The owner of the Baltimore Terrapins (also known as the "BaltFeds"), however, refused to settle and instead filed a new lawsuit alleging that the National and American Leagues had "conspired to monopolize the base ball business" in

various ways, all in violation of the Sherman Act. *Fed. Baseball*, 259 U.S. at 207.

When the case reached this Court, the question presented was whether professional baseball was interstate commerce subject to federal antitrust law. That was a close question under the Commerce Clause jurisprudence of the day. *See* Banner, *supra*, at 81 ("Under the constitutional law of the era, there were good arguments on both sides."). Indeed, in the decision on review, the D.C. Circuit had unanimously held that baseball games were purely *intra*state affairs, and that the interstate aspects of the sport—the movement of players and equipment to the site of the next baseball game—was merely incidental to the games themselves. *See Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Balt., Inc.*, 269 F. 681, 684-85 (D.C. Cir. 1920).[1]

This Court affirmed in a unanimous opinion authored by Justice Holmes. The opinion rested on two independent grounds. First, the Court concluded the business of baseball was not interstate: "The business is giving exhibitions of base ball, which are purely state affairs." *Fed. Baseball*, 259 U.S. at 208. While "competitions must be arranged between clubs from different cities and States," the mere fact that "the Leagues must induce free persons to cross state lines … is not enough to change the character of the business," which is intrastate. *Id.* at 208-09. Second,

[1] The D.C. Circuit opinion was authored by Chief Justice Constantine J. Smyth, who "was no antitrust slouch"—he had previously spent four years as Special Assistant to the Attorney General, overseeing the government's prosecution of antitrust cases. Alito, *supra*, at 191.

the Court concluded that the exhibition of baseball games was not "trade or commerce in the commonly accepted use of those words" because "personal effort, not related to production, is not a subject of commerce." *Id.* at 209. The Court thus held that federal antitrust laws did not apply to the business of baseball.

The question of baseball's status under the antitrust laws was re-examined by Congress and this Court in the early 1950s. By that time, both the business of baseball and this Court's Commerce Clause jurisprudence had changed substantially. Those changes had not gone unnoticed by Congress—the Subcommittee on Study of Monopoly Power of the House Judiciary Committee held 16 days of hearings in 1951 about whether to recommend legislation regarding baseball and the antitrust laws. *See* Banner, *supra*, at 106-11. The Subcommittee's final report recognized that baseball was "intercity, intersectional, and interstate," and therefore "Congress has jurisdiction to investigate and legislate on the subject of professional baseball." H.R. Rep. No. 2002, at 4, 5-7 (1952). But the subcommittee nonetheless reported unfavorably on all pending legislation, recommending that Congress allow the current state of affairs to continue unchanged—*i.e.*, to leave *Federal Baseball* undisturbed. Banner, *supra*, at 110-11.

Two years later, this Court reaffirmed *Federal Baseball* in *Toolson*. The Court began by summarizing *Federal Baseball* as holding "that the business of providing public baseball games for profit between clubs of professional baseball players was not within

the scope of the federal antitrust laws." 346 U.S. at 357. The Court then noted that Congress, despite its close attention to the issue, had not taken any action to upset *Federal Baseball*: "Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation." *Id.* Based on that history, the Court concluded "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." *Id.* Baseball had grown up outside the scope of the antitrust laws, and the Court made clear it would remain there unless and until Congress said otherwise: "We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation." *Id.*

The Court reached the same result again 20 years later in *Flood v. Kuhn*, 407 U.S. 258 (1972), an antitrust lawsuit filed by Curt Flood, an outfielder who refused to play for the Philadelphia Phillies after being traded by the St. Louis Cardinals. *Id.* at 265-66. The Court recounted *Federal Baseball* and *Toolson*, as well as three intervening cases recognizing the business of baseball is exempt from federal antitrust laws. *Id.* at 269-82. The Court also noted that, since *Toolson*, "more than 50 bills have been introduced in Congress" regarding the applicability or non-applicability of antitrust laws to various sports—most of which would have extended baseball's status to other sports instead of eliminating baseball's exemption, and none of which had been enacted. *Id.* at 281-82. In light of that history and baseball's

reliance interests, the Court was "loath … to overturn [*Federal Baseball* and *Toolson*] judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and … has clearly evinced a desire not to disapprove them legislatively." *Id.* at 283-84. Once again, the Court made clear any change must come from Congress: "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." *Id.* at 285.

Congress ultimately did take action, but only in a narrow and targeted fashion. In 1998, Congress enacted the Curt Flood Act, 15 U.S.C. §26b, which eliminated one and only one aspect of baseball's antitrust exemption: It permitted major league players to file antitrust suits regarding the conditions of their employment "to the same extent such conduct … would be subject to the antitrust laws if engaged in by persons in any other professional sports business." 15 U.S.C. §26b(a). In other words, the Act supersedes *Federal Baseball* only with respect to lawsuits filed by major league baseball players regarding their employment. Congress expressly disclaimed any broader intent: "This section does not … apply the antitrust laws to … any conduct, acts, practices, or agreements that do not directly relate to or affect employment of major league baseball players to play baseball at the major league level, including but not limited to … the marketing or sales of the entertainment product of organized professional baseball." 15 U.S.C. §26b(b)(3).

B. Factual Background

Each year, the Chicago Cubs spend millions of dollars exhibiting professional baseball games at Wrigley Field. Like other professional baseball teams, the Cubs try to recoup those costs by (among other things) selling tickets to spectators who want to watch live Cubs games. Unlike at other stadiums, however, spectators at Wrigley Field have sometimes watched the Cubs play from *outside* the stadium, sitting on the rooftops of buildings across the street from the outfield bleachers along Sheffield and Waveland Avenues. Pet.App.2. Over time, the owners of those rooftops succeeded in converting this quaint custom into a lucrative business, charging customers as much as $300 to watch live Cubs games from their rooftops and generating tens of millions of dollars each year. The rooftops did not seek or obtain the Cubs' permission to sell tickets to watch the games the Cubs paid to exhibit; nor did they contribute to field maintenance or free-agent salaries or pay the Cubs any royalty in exchange for the millions of dollars in profit they made from the Cubs' product. *See* Pet.App.2-3.

The Cubs began exploring ways to stop the rooftops from exploiting their valuable product. In December 2002, the Cubs sued 13 rooftops, including petitioners, under the Lanham Act and various common law doctrines for misappropriating and unjustly profiting from the Cubs' property. Pet.App.3; *see Chi. Nat'l League Ball Club, Inc. v. Skybox on Waveland*, No. 02-cv-9105 (N.D. Ill. 2002). The Cubs sought an injunction to stop the rooftops from selling tickets to view live baseball games played at Wrigley Field, as well as a share of the rooftops' past profits.

Before the 2004 baseball season began, the Cubs entered into a settlement agreement with the rooftops. Pet.App.3. The Cubs agreed to dismiss their suit and forgo any claim to past damages in exchange for a 17% royalty on the rooftops' gross revenue for the next 20 years. Pet.App.3. Most of the settlement agreement was devoted to setting the parameters of the parties' new economic relationship. The agreement also contemplated, however, that the Cubs might expand Wrigley Field—including in ways that might block the rooftops' views into the stadium. Pet.App.3-5. For example, the agreement stated that "[n]othing in this Agreement limits the Cubs' right to seek approval of the right to expand Wrigley Field," Pet.App.4, and "[a]ny expansion of Wrigley Field approved by governmental authorities shall not be a violation of this Agreement," Pet.App.5.

According to petitioners, the Cubs acquired ownership interests in some, but not all, of the rooftop businesses about five years later. Pet.App.5. The Cubs also began investigating ways to preserve, restore, and expand Wrigley Field—not only to improve the fan experience, but also to create revenue to recruit the best possible players. The Cubs ultimately settled on a multi-faceted plan that included expanding the property line by approximately 15 feet on both Sheffield and Waveland Avenues; relocating and reconstructing the stadium's exterior walls; and expanding the outfield bleachers to include new seats, a new "fan deck," expanded concessions, new signs and video scoreboards, and new lighting systems. Pet.App.6.

After numerous meetings and public hearings between 2011 and 2013, the Chicago Plan Commission, Chicago City Council, Commission on Chicago Landmarks, and National Park Service all approved the Cubs' integrated expansion plan—including a video scoreboard in the right-field bleachers. Pet.App.6. The Cubs began construction in September 2014. Pet.App.8. The approved bleacher expansion increased the property's footprint by moving the outfield walls and pushing the property line back 15 feet on both Sheffield and Waveland Avenues; increased the bleachers' seating capacity by several hundred; and, because of the video scoreboards, increased the bleachers' height by approximately 40 feet. Pet.App.8.

C. Proceedings Below

In January 2015, petitioners sued the Cubs to halt the expansion, seeking damages and injunctive relief for alleged violations of federal antitrust law, breach of the earlier settlement agreement, and other claims arising from purportedly disparaging statements the Cubs' chairman made about the rooftops. Pet.App.8. The antitrust claim advanced the novel theory that by purchasing several of the rooftops and allegedly pressuring other rooftop owners to sell, the Cubs were trying to "monopolize" the market for watching live Cubs games. *See* Pet.App.8.

Petitioners moved for a temporary restraining order and preliminary injunction. The Cubs opposed the motions for interim relief and moved to dismiss the complaint. Pet.App.8. The district court denied the TRO motion in February, denied the PI motion in April, and dismissed the complaint in September.

Pet.App.8. It dismissed petitioners' monopolization claim for three independent reasons: (1) Major League Baseball's antitrust exemption, which encompasses the "business of baseball," applies to the sale of tickets to watch baseball games; (2) petitioners failed to allege a plausible relevant market; and (3) antitrust law would not bar the Cubs from monopolizing the distribution of their own product even if it applied. Pet.App.27-31. The court also dismissed petitioners' other claims. Pet.App.32-41.

The Seventh Circuit affirmed. It began by noting that this Court had "exempted the business of baseball from federal antitrust laws almost a century ago." Pet.App.11 (citing *Fed. Baseball*, 259 U.S. 200). The court then recounted the next two cases in the trilogy—*Toolson* and *Flood*—and described the Curt Flood Act, observing that petitioners "cannot … plausibly contend that [the Act's] carve-out applies to the Cubs' conduct." Pet.App.11-12. Petitioners had argued the conduct they alleged was outside the scope of the antitrust exemption because the conduct "do[es] not concern the rules and restrictions related to baseball itself," but the court rejected that limitation on the antitrust exemption as "not supported by case law." Pet.App.12. Instead, the court held, the exemption applies to the entire "business of baseball." Pet.App.12. And because the Cubs' conduct with respect to the sale of tickets to watch live Cubs games "is part and parcel of the business of providing public baseball games for profit," the court affirmed the district court's judgment. Pet.App.12.[2] The court also

[2] Because it determined that the antitrust claims were properly dismissed under baseball's antitrust exemption, the court did not

affirmed the dismissal of the breach-of-contract and non-disparagement claims. Pet.App.13-21.

REASONS FOR DENYING THE PETITION

There is no disagreement among the circuits about the scope of baseball's antitrust exemption. Even setting aside that Wrigley Field is the only major league baseball stadium at which fans can buy tickets to watch from neighboring rooftops—meaning the first question presented will not arise elsewhere—the four circuits discussed in the petition are all in agreement about the scope of baseball's antitrust exemption. All four have emphasized the exemption's breadth, held that it covers the entire "business of baseball," and concluded that the conduct they confronted was well within the exemption. Because all four courts found the conduct before them to be comfortably within the exemption, none of them had occasion to define the outer limits of the antitrust exemption, much less create a circuit split concerning the contours of those boundaries. Indeed, underscoring the point, a companion petition filed in one of the very cases petitioners cite in support of their purported circuit split readily concedes no split exists. *See* Pet. for Certiorari at 9, *Wyckoff v. Office of the Comm'r of Baseball*, No. 17-1079 (U.S. Jan. 29, 2018).

Not only is there no circuit split about the scope of baseball's antitrust exemption; the conduct alleged here falls comfortably within it. Whatever the outer

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address the district court's alternative rulings that petitioners failed to allege a plausible relevant market and the Cubs could not be held liable for monopolizing distribution of their own product. *See* Pet.App.13 n.3.

limits of the "business of baseball," selling tickets to watch live baseball games is near the epicenter. Indeed, at the time of *Federal Baseball*, long before television rights and jersey sales, ticket sales comprised essentially all of the "business of baseball." The conduct alleged to be anticompetitive here—conduct allegedly aimed at "monopolizing" ticket sales to watch live Cubs games—is conduct at the very core of the business of baseball, and therefore at the very core of baseball's antitrust exemption.

Perhaps recognizing that baseball's antitrust exemption easily encompasses the conduct at issue here, petitioners ask this Court to "abolish" the exemption entirely. But this Court has rejected such entreaties before, and the arguments for overruling a century-old statutory rule have grown only weaker since *Toolson* and *Flood*, which both held that any change to the exemption must be made by Congress. Not only have there been 45 more years of reliance since *Flood*, but Congress took action after *Flood* and eliminated just one narrow sliver of the exemption, expressly disclaiming any intent to change the law in any other respect. Changing course at this late juncture would disregard not only bedrock principles of *stare decisis* but also Congress' clear intent.

In all events, this case would a poor vehicle to reconsider *Federal Baseball*, as petitioners' claims would fail even without the exemption. As the district court correctly held, petitioners' novel effort to take the Cubs to task for improperly monopolizing the market in Cubs' games failed to allege a plausible relevant market and failed to allege any anticompetitive conduct.

I. There Is No Circuit Split About The Scope Of Baseball's Antitrust Exemption.

Petitioners promise a circuit split "between the Ninth and Eleventh Circuits, on the one hand, and the Second and Seventh Circuits, on the other." Pet.22. Petitioners do not deliver. As the companion *Wyckoff* petition concedes, each of those circuits agrees that the entire "business of baseball" is exempt from antitrust scrutiny. While petitioners here perceive that two of those circuits have taken a narrower view of the exemption than the other two, that baseless effort to manufacture a circuit split is belied by the cases—not to mention the *Wyckoff* petition. None of the four circuits has even purported to define the outer limits of the antitrust exemption, much less disagreed with the others about what those limits might be. None of them had any reason to do so, as all four found that the conduct at issue was "obviously" part of the "business of baseball" and well within the scope of the exemption. Because there is nothing even resembling a circuit split, certiorari is unwarranted.

The first case in the supposed circuit split is *Major League Baseball v. Crist*, 331 F.3d 1177 (11th Cir. 2003). That case considered whether the League's (later-abandoned) decision to eliminate two teams was subject to antitrust scrutiny. The Eleventh Circuit began by recognizing that "[t]he 'business of baseball' is exempt from the federal antitrust laws." *Id.* at 1183 (citing, *e.g.*, *Fed. Baseball*, 259 U.S. 200). It then had no trouble concluding "the decision to contract [*i.e.*, reduce the size of the league] is obviously part of the 'business of baseball'; the number of clubs, and their organization into leagues for the purpose of playing

scheduled games, are basic elements of the production of major league baseball games." *Id.* Confirming that the question was not particularly close, the court explained that it was "difficult to conceive of a decision more integral to the business of major league baseball than the number of clubs that will be allowed to compete." *Id.* And because "the applicability of baseball's exemption [was] so apparent," the court did not opine on a standard for deciding whether particular conduct was part of the "business of baseball"; it simply found that the decision to contract was surely covered. *Id.*

The next case petitioners cite is *City of San Jose v. Office of the Commissioner of Baseball*, 776 F.3d 686 (9th Cir.), *cert denied*, 136 S. Ct. 36 (2015), which rejected an antitrust challenge to restrictions on franchise relocation. Petitioners cite this case as purportedly taking a narrow view of the antitrust exemption, but it actually rejected the plaintiffs' efforts to limit the exemption to conduct "related to 'baseball's unique characteristics and needs.'" *Id.* at 689. Instead, the Ninth Circuit confirmed the exemption applies broadly "to the entire 'business of providing public baseball games for profit between clubs of professional baseball players.'" *Id.* at 690 (quoting *Toolson*, 346 U.S. at 357). While recognizing the exemption might not apply to "activities … that are wholly collateral to the public display of baseball games," the Ninth Circuit had no doubt that "MLB's franchise relocation policies are in the heartland" of the exemption. *Id.* at 690-91.

Petitioners assert the courts in *Crist* and *San Jose* "limited the exemption to matters concerning the

structural and organizational issues and necessary control and coordination by MLB." Pet.22. Neither court did any such thing, and neither opinion contains any such language. *See infra* Part II. In fact, while petitioners here contend *Crist* and *San Jose* construed the exemption narrowly, the petitioners in *Wyckoff* lament those same two cases as construing the exemption "expansively." *Wyckoff* Pet.9. Even co-petitioners do not perceive any circuit split.

Supposedly on the other side of the split is *Wyckoff* itself, an unpublished *per curiam* opinion holding that the Leagues' conduct with respect to baseball scouts falls within "baseball's long-recognized exemption from antitrust regulation." *Wyckoff v. Office of Comm'r of Baseball*, 705 F. App'x 26, 28 (2d Cir. 2017). After citing a prior case holding that "claims brought by professional baseball umpires against the American League" were blocked by the antitrust exemption, the Second Circuit held that scouts are likewise "involved in the business of baseball." *Id.* at 29. Because "professional baseball scouts are involved in the business of baseball, … the complained-of conduct fails to state a claim for which relief can be granted." *Id.* Like the Ninth and Eleventh Circuits before it, the Second Circuit defined the antitrust exemption as covering the entire "business of baseball," and it made no effort to define the outer limits of the exemption. It was clear enough that baseball scouts—whose job is to assess how baseball players will perform in baseball games—are part of the "business of baseball."

Finally, the Seventh Circuit's decision below—like the decisions from the other three circuits—holds

that baseball's antitrust exemption applies to "the business of providing public baseball games for profit." Pet.App.12. It then reaches the obvious conclusion that selling tickets to watch Cubs games "is part and parcel of the 'business of providing public baseball games for profit.'" *Id.* (quoting *Toolson*, 346 U.S. at 357). In so holding, the court rejected petitioners' attempt to cabin the exemption to "rules and restrictions related to baseball," finding the proposed limitation "not supported by case law." *Id.*; *see supra* Part II. While the court acknowledged that the exemption might "not apply wholesale to all cases which may have some attenuated relation to the business of baseball," *id.*, it readily concluded that the exemption does apply to the "business of providing public baseball games for profit"—and that selling tickets to watch live baseball games "exemplifies" that business. Pet.App.22.

In sum, the four circuits involved in petitioners' promised circuit split all agree that the exemption covers the entire "business of baseball," and all four found that the conduct they confronted was well within the (friendly) confines of that exemption. Nothing about any of the cases is in conflict with any of the others. Indeed, proving the point, the *Wyckoff* petitioners do not even bother to claim a circuit split, instead acknowledging that the four cases are consistent with each other and that "the vast majority of lower courts have held that the exemption … extends more broadly to the 'business of baseball.'" *Wyckoff* Pet.9.

Petitioners thus are left arguing certiorari is warranted because a 1993 district court decision ruled

the antitrust exemption is limited to baseball's erstwhile "reserve" system.[3] *See* Pet.18 (citing *Piazza v. Major League Baseball*, 831 F. Supp. 420 (E.D. Pa. 1993)). But while *Piazza* did say that, the decision actually underscores the lack of any circuit split, as every federal court to consider *Piazza* in the ensuing 26 years has rejected both its reasoning and its conclusion. *See, e.g.*, *City of San Jose v. Office of Comm'r of Baseball*, No. 13-02787, 2013 WL 5609346, at *10 (N.D. Cal. Oct. 11, 2013) ("The court disagrees with … *Piazza*."); *Crist*, 331 F.3d at 1181 n.10 ("[T]he district court forcefully destroyed the notion that the antitrust exemption should be narrowly cabined to the reserve system."); *McCoy v. Major League Baseball*, 911 F. Supp. 454, 457 (W.D. Wash. 1995) ("This Court rejects the reasoning and results of *Piazza*."). Indeed, since *Piazza*, federal courts at every level have uniformly embraced the view "that the exemption covers the entire business of baseball." Banner, *supra*, at 244. Because lower courts agree the entire "business of baseball" is exempt from antitrust scrutiny, and because there is no meaningful disagreement about what that phrase means, there is no division among the lower courts for this Court to resolve.

II. The Decision Below Is Correct, As This Case Plainly Involves The "Business Of Baseball."

A. The Seventh Circuit correctly concluded, with little difficulty, that petitioners' two antitrust claims

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[3] In the era before free agency, a "reserve clause" included in major-league player contracts gave the team that first signed a player exclusive rights to his services in future seasons. *See Flood*, 407 U.S. at 259 n.1.

come squarely within the antitrust exemption covering the "business of baseball." Both claims relate to selling tickets to watch baseball players play live baseball games—activity at the very core of the "business of baseball." Count I alleges attempted monopolization of the market for tickets to watch live Cubs games at Wrigley Field, both from inside the stadium and from the neighborhood rooftops; Count II alleges the same, limited to the market for rooftop tickets. Both counts, in other words, allege improper conduct related to the Cubs' sales of tickets to watch live Cubs games—quite literally the "business of baseball." Indeed, at the time of *Federal Baseball*, "the industry's revenue … derived almost entirely from selling tickets to local exhibitions of baseball." Grow, *supra*, at 219-20. There is thus no serious question about whether the conduct alleged here falls within baseball's antitrust exemption. It plainly does.

B. Petitioners strain to avoid this conclusion by trying to redefine the scope of baseball's antitrust exemption. Despite the unbroken line of precedent holding that the exemption extends to the entire "business of baseball," petitioners contend it applies only to "matters relating to the structure and organization of [Major League Baseball]." Pet.24. This proposed "structure and organization" limitation has no basis in this Court's cases or the history of the antitrust exemption; it is just the latest effort by petitioners to manufacture a definition of the "business of baseball" that excludes selling tickets to watch live baseball games.

Indeed, the first sign petitioners' "structure and organization" limitation is unfounded is that it is

actually the third different limitation they have proffered during this litigation. In the district court, petitioners argued that the antitrust exemption covered only the "unique characteristics and needs" of baseball. Resp. In Opp. To Mot. To Dismiss at 6 (N.D. Ill. Mar. 2, 2015), ECF 41. The district court rejected that limitation, correctly recognizing "that the exemption applies to the 'business of baseball' in general, not solely those aspects related to baseball's unique characteristics and needs." Pet.App.28. Petitioners tried out a different formulation in the court of appeals, arguing that the exemption covers only "rules and restrictions related to baseball itself." Br. of Appellant 46. The Seventh Circuit rejected that proposal too, holding the "suggested 'rules and restrictions' litmus test is not supported by case law." Pet.App.12.

Petitioners now embrace the "structure and organization" limitation, but this limitation does not appear in *Federal Baseball*, *Toolson*, or *Flood*, or in *San Jose*, *Wyckoff*, *Crist*, or in any other federal appellate case. Petitioners appear to have taken it from *State v. Milwaukee Braves, Inc.*, 144 N.W.2d 1 (Wis. 1966), *see* Pet.13-14, which does not even claim to establish any such limitation. The *Milwaukee* case considered state-law antitrust claims filed in connection with the Braves' move from Milwaukee to Atlanta. The state supreme court rejected those claims on preemption grounds, holding that state antitrust laws "cannot … be applied to concerted action by the defendants." *Milwaukee*, 144 N.W.2d at 18. Along the way, the court "venture[d] to guess" that baseball's antitrust exemption would "not cover every type of business activity to which a baseball club or

league might be a party," but held that "the exemption *at least* covers the agreements and rules which provide for the structure of the organization and the decisions which are necessary steps in maintaining it." *Id.* at 15 (emphasis added). Petitioners' proffered limitation on the federal antitrust exemption thus comes from dictum—a self-described "guess"—about the floor of the exemption rather than its outer limits, in a 50-year-old state-court opinion that found the relocation conduct at issue to be "clear[ly]" within the exemption. *Id.*

Petitioners argue that *Crist*, *San Jose*, and a bevy of district court and state cases are "consistent" with the *Milwaukee* dictum. Pet.14-15. That is a stretch, to put it mildly. *San Jose*, for example, does not even mention *Milwaukee*, much less its "structure and organization" dictum. 776 F.3d 686. The other cited cases are much the same. In fact, only one of those cases even mentions *Milwaukee*, and not for its "structure and organization" dictum, but only by way of noting its conclusion that "the business of professional baseball is exempt from federal antitrust laws." *Minn. Twins P'ship v. State ex rel. Hatch*, 592 N.W.2d 847, 856 (Minn. 1999).

C. At various points, petitioners suggest the antitrust exemption recognized in *Federal Baseball*, *Toolson*, and *Flood* was limited to baseball's "reserve" system. *See* Pet.23, 27, 31-34. The *Wyckoff* petitioners press the same argument more fervently, claiming that "in *Federal Baseball* and the only other baseball antitrust cases this Court has decided, the sole aspect of the business challenged was baseball's 'reserve system.'" *Wyckoff* Pet.1.

That argument has been made before, and it is "simply not true." *Major League Baseball v. Butterworth*, 181 F. Supp. 2d 1316, 1324 (N.D. Fla. 2001). While the reserve clause was one aspect of the challenge in *Federal Baseball*, the BaltFeds "also alleged that the major leagues violated the Sherman Act in other ways," including through the settlement with the seven other Federal League teams and by enforcing certain territorial restrictions. Grow, *supra*, at 227; *see id.* at 137, 155. The *Federal Baseball* opinion itself leaves no doubt the Court considered issues beyond the reserve clause: The opinion never even uses the phrase "reserve clause"; it describes the complaint as alleging "defendants destroyed the Federal League by buying up some of the constituent clubs and in one way or another inducing all those clubs except the plaintiff to leave their League." *Fed. Baseball*, 259 U.S. at 207. Indeed, the Court found it "unnecessary" to list every challenged aspect of the baseball business because the *entire* baseball business was exempt. *Id.* ("It is alleged that these defendants conspired to monopolize the base ball business, the means adopted being set forth with a detail which, in the view that we take, it is unnecessary to repeat.").

Toolson likewise addressed more than the reserve clause. The plaintiffs in *Toolson* and its two companion cases challenged not just the reserve system, but also restrictions on territories for Major League and Minor League clubs, restrictions on club debt, rules governing broadcasting rights, rules governing exhibition games with banned players, and various aspects of uniform player contracts. *See* Br. for Petitioner at 5-9, *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953). The majority opinion never once

mentioned the reserve clause and broadly held that "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." *Toolson*, 346 U.S. at 357. As one court has observed in rejecting an identical reserve-clause-only argument, "[i]t is impossible to glean from *Toolson* any inkling that the applicability of the antitrust laws to baseball turned on whether the issue was the reserve clause." *Butterworth*, 181 F. Supp. 2d at 1325.

Finally, while *Flood* itself concerned only the reserve clause, nothing in the Court's opinion purported to narrow the broad antitrust exemption it had previously established and Congress had chosen not to disturb. To the contrary, the Court in *Flood* expressly "adhere[d] once again to *Federal Baseball* and *Toolson*," which "held the business of baseball"—not just the reserve clause—"outside the scope of the Act." 407 U.S. at 279, 284 (quoting *Radovich v. Nat'l Football League*, 352 U.S. 445, 452 (1957)). The Court concluded its opinion by quoting *Toolson*'s holding in full, without any suggestion that it was silently narrowing *Toolson*'s scope: "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." *Id.* at 285.

In sum, the antitrust exemption has never been limited to just the reserve clause, to just the "structure and organization" of baseball, or to any of the other formulations petitioners have devised in this litigation. The exemption instead covers the entire "business of baseball"—which, of course, includes conduct surrounding the sale of tickets to watch live baseball games. This case thus does not present any

serious question about the contours of the antitrust exemption for the business of baseball.

III. There Is No Reason For This Court To Reconsider A Century-Old Statutory Holding That It Has Twice Reaffirmed.

Petitioners alternatively ask this Court to "abolish" the antitrust exemption entirely. Pet.22. But on five separate occasions over the past 65 years, this Court has reaffirmed the vitality of the exemption and made abundantly clear that any change to the exemption must be made by Congress. *See Flood*, 407 U.S. at 285 ("[T]he remedy, if any is indicated, is for congressional, and not judicial, action."); *Radovich*, 352 U.S. at 451 ("As long as the Congress continues to acquiesce we should adhere to … the interpretation of the Act made in those cases."); *United States v. Int'l Boxing Club*, 348 U.S. 236, 244 (1955) ("Their remedy, if they are entitled to one, lies in further resort to Congress, as we have already stated."); *United States v. Shubert*, 348 U.S. 222, 230 (1955) ("If the *Toolson* holding is to be expanded—or contracted—the appropriate remedy lies with Congress."); *Toolson*, 346 U.S. at 357 ("We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation."). This Court has since denied multiple petitions asking to overrule *Federal Baseball*, including as recently as four months ago. *See Miranda v. Selig*, 138 S. Ct. 507 (2017), *reh'g denied*, 138 S. Ct. 1045 (2018); *City of San Jose v. Office of the Comm'r of Baseball*, 136 S. Ct. 36 (2015).

Petitioners' various arguments for reconsidering the exemption either were rejected in the above-

mentioned cases or lack support in this Court's *stare decisis* jurisprudence (or both). Petitioners first argue that the Court's five previous reaffirmations should not control because they "relied heavily on Congress's acquiescence," and such reliance is out of fashion. Pet.32-33. Therefore, the argument goes, the cases can be disregarded as relics of a bygone era in which legislative inaction carried more force than it does under modern jurisprudence. *Id.* There are at least two fatal problems with that argument.

First, the petitioner in *Flood* said the same thing to no avail. There, just like here, the petitioner argued that "[r]ecent decisions have reinvigorated the salutary rule that courts should not regard congressional inaction … as legislative ratification." Br. for Petitioner at 29, *Flood v. Kuhn*, 407 U.S. 258 (1972). This Court rejected that argument, holding that Congress' close attention to the issue and deliberate decision to not disturb the long-standing exemption was "something other than mere congressional silence," and was instead "positive inaction" reflecting that "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." *Flood*, 407 U.S. at 283-85; *cf. Kimbrough v. United States*, 552 U.S. 85, 106 (2007) (congressional inaction probative when Congress "fail[s] to act on a proposed amendment ... in a high-profile area in which it had previously exercised … authority"). Second, although the Court has been skeptical of using congressional acquiescence in some contexts, it has continued to emphasize that the force of *stare decisis* is at its zenith in statutory cases and that Congress' failure to revisit an issue after a decision of this Court is a powerful reason to

leave precedent undisturbed. *See, e.g.*, *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409-10 (2015).

Petitioners next argue that Congress, by passing the Curt Flood Act, "disclaimed any acquiescence" in the antitrust exemption. Pet.30-31. The exact opposite is true: Congress explicitly stated that the Act leaves this Court's exemption jurisprudence in place in all respects other than major-league player employment: "No court shall rely on the enactment of [this Act] as a basis for changing the application of the antitrust laws to any conduct … other than [major-league player employment]." 15 U.S.C. §26b(b). Indeed, the Act makes clear that it does not "permit" any cause of action challenging "any conduct … that do[es] not directly relate to or affect employment of major league baseball players," including any cause of action challenging conduct related to the "sales of the entertainment product of organized professional baseball." *Id.* Congress' explicit exclusion of ticket sales from the Act's targeted modification of the exemption "demonstrates that Congress (1) was aware of the possibility that the baseball exemption could apply to [ticket-selling activity]" and "(2) declined to alter the status quo with respect to [ticket-selling activity]." *San Jose*, 776 F.3d at 691. Congress' decision to leave the exemption largely undisturbed "lends powerful support" to the exemption's "continued viability." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 419 (1986). The case for congressional acquiescence is thus "far

stronger" now than it was at the time of *Toolson* and *Flood*. *San Jose*, 776 F.3d at 691.[4]

Petitioners next argue this Court can disregard *Federal Baseball* because "*stare decisis* has less force with respect to antitrust cases." Pet.34 (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)). But this Court has already rejected that argument with respect to *Federal Baseball*, concluding in both *Toolson* and *Flood* that *Federal Baseball* is "fully entitled to the benefit of *stare decisis*." *Flood*, 407 U.S. at 282. Moreover, while this Court has recognized a special need to move from per se rules to more nuanced analysis when it comes to certain (principally vertical) *restraints* on trade, when it comes to *exemptions* to the antitrust law, petitioners can point to no case that has deviated from the general rule that *stare decisis* considerations are at their zenith in statutory cases. That is hardly surprising given the enormous reliance interests generated by recognition of an exemption from the antitrust laws; by comparison, *reducing* the scope of potential liability by moving away from per se rules has little, if any, effect on reliance interests. Moreover, *stare decisis* considerations have added weight where, as here, Congress "has spurned

[4] Petitioners argue that the Curt Flood Act, by eliminating the exemption for major-league player employment, "removed the underlying reason" for the antitrust exemption. Pet.31-32. As already discussed, however, the antitrust exemption has never been limited to the reserve system. Moreover, Congress' express instruction that the Act not alter the law in other respects reflects its understanding that the reserve system was not the only reason for the antitrust exemption.

multiple opportunities to reverse" the precedent in question. *Kimble*, 135 S. Ct. at 2409-10.

Petitioners argue baseball's antitrust exemption is unnecessary because the sport's organization and structure would likely be approved under the rule of reason. Pet.34-36. As an initial matter, petitioners' belief that the antitrust exemption does not make much of a difference cuts *against* overruling precedent, not in favor of it. *See, e.g.*, *California v. Acevedo*, 500 U.S. 565, 579 (1991) (overruling a case may be permissible if it has "led to anomalous results."). In all events, this Court has heard and rejected this argument too. In *Flood*, the petitioner argued that "the game could be just as successful" without an antitrust exemption, as "the other professional sports were all subject to the antitrust laws, and they were doing just fine." Banner, *supra*, at 198. The Court rejected that argument, noting that baseball has developed since 1922 in reliance on an antitrust exemption (unlike the other sports), and that in light of those reliance interests and Congress' "clearly evinced … desire not to disapprove" of the exemption, adherence to *stare decisis* outweighed any "inconsistency" with the other sports. *Flood*, 407 U.S. at 283-84. "[T]he remedy, if any is indicated, is for congressional, and not judicial, action." *Id.* at 285.

Finally, it bears emphasis that one judicial development since *Flood* actually counsels even more strongly in favor of leaving any overruling of the baseball exemption to Congress. At the time this Court decided *Flood*, its retroactivity jurisprudence gave it flexibility to cushion the impact on legitimate reliance interests by limiting the extent to which its

decision would apply retroactively to parties not before the Court. *See Chevron Oil Co. v. Huson*, 404 U.S. 97, 107 (1971); *United States v. Estate of Donnelly*, 397 U.S. 286, 295 (1970). The Court has since made clear a judicial decision, even one overturning a prior precedent, is fully retroactive. *James M. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991) (plurality opinion) ("[W]hen the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata."); *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993) (same). Thus, a decision to eliminate the baseball exemption in this case would now necessarily disturb reliance interests in a manner that was less clear when the Court relied on such reliance interests in *Flood*. Congress, by contrast, can change the law prospectively only, yet another reason petitioners' arguments are properly directed at Congress, rather than this Court.

IV. Even If There Were No Antitrust Exemption, Petitioners' Claims Would Fail.

Even if this Court were interested in reconsidering its repeated decisions not to reconsider *Federal Baseball*, this case would be a poor vehicle in which to do so because petitioners' claims would fail even without the baseball exemption. Although the court of appeals did not address the question, the district court correctly dismissed petitioners' antitrust claims on two independent grounds: (1) petitioners improperly alleged a single-brand product market; and (2) there is nothing anticompetitive about the

Cubs' alleged effort to monopolize the distribution of their own product. Pet.App.30-31.

A. Petitioners Did Not Allege a Plausible Relevant Market.

A plaintiff bringing a monopolization claim must define the relevant market; "[w]ithout a definition of that market there is no way to measure [a defendant's] ability to lessen or destroy competition." *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965). But a plaintiff may not just describe some exceptionally narrow market and then allege that the defendant has monopolized it; rather, a relevant product market is objectively determined by "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *see United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956) ("Th[e] market is composed of products that have reasonable interchangeability."). The market for cellophane, for example, includes not just cellophane itself but also other "flexible packaging materials" that are reasonably interchangeable with cellophane. *E. I. du Pont*, 351 U.S. at 400. While defining the market can sometimes be a "fact-intensive inquiry," dismissal under Rule 12(b)(6) is appropriate when the plaintiff improperly "attempts to limit a product market to a single brand, franchise, institution, or comparable entity that competes with potential substitutes." *Todd v. Exxon Corp.*, 275 F.3d 191, 199-200 (2d Cir. 2001) (Sotomayor, J.).

Petitioners' putative market definitions fail because they consist of only a single product brand—

namely, Cubs games at Wrigley Field. Absent "rare circumstances, a single brand of a product or service can[not] constitute a relevant market for antitrust purposes." *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 418 (5th Cir. 2010).[5] The reason for this rule is straightforward: A single-brand product market does not include—as it must—the various "interchangeable substitute products" that compete with the product at issue. *Id.*; *see, e.g.*, *PSKS*, 615 F.3d at 418; *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063-64 (9th Cir. 2001) (UCLA women's soccer not a relevant market); *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 86 (2d Cir. 2000) (Yale College not a relevant market). If markets could consist of a single product brand, then every company would be deemed a monopolist of its own product, and antitrust liability would be unbounded. *See E. I. du Pont*, 351 U.S. at 394 ("illegal monopoly does not exist merely because the product said to be monopolized differs from others").

Petitioners' proposed market definition fails to include the many "reasonably interchangeable" alternatives to watching live Cubs games. The Cubs are not even the only professional baseball team in Chicago, much less the only professional sports team, and they are certainly not the only form of entertainment. Customers in search of entertainment

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[5] The "rare circumstances" in which courts have accepted a single-brand market are "situations in which consumers are 'locked in' to a specific brand by the nature of the product," or by tying arrangements. *PSKS*, 615 F.3d at 418; *see, e.g.*, *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992) (market for service of and parts for Kodak equipment).

thus have many options other than watching the Cubs play baseball live at Wrigley Field, including watching the Cubs on television or attending live sporting events featuring the White Sox, Bears, Bulls, Sky, Blackhawks, Fire, or Red Stars—not to mention the hundreds of collegiate and amateur teams competing in dozens of different sports across the city. For purposes of defining the relevant market, "viewing a live Cubs game is not so unique that there is no substitute." Pet.App.30.

To be sure, fans develop loyalties that might cause them to prefer one team's games to another team's games, and the Cubs have a particularly strong and loyal fan base. But the fact that consumers might prefer one product to its reasonably interchangeable alternatives does not convert that product into a viable single-brand market: "A consumer might choose to purchase a certain product because the manufacturer has spent time and energy differentiating his or her creation from the panoply of products in the market, but at base, Pepsi is one of many sodas, and NBC is just another television network." *Glob. Disc. Travel Servs., LLC v. Trans World Airlines, Inc.*, 960 F. Supp. 701, 705 (S.D.N.Y. 1997) (Sotomayor, J.). Thus, as the district court held, "a single brand product like producing live-action Cubs games cannot be a relevant market." Pet.App.30.

B. Petitioners Did Not Allege Any Anticompetitive Conduct.

The district court correctly dismissed petitioners' claims "for the additional reason that antitrust laws cannot limit how the Cubs distribute their own product, specifically live baseball games." Pet.App.31.

A defendant "cannot monopolize its own product unless there is proof that the product has no economic substitutes." *Id.*; *see Elliott v. United Ctr.*, 126 F.3d 1003, 1005 (7th Cir. 1997) ("[W]e have explicitly rejected the proposition that a firm can be said to have monopoly power in its own product."). That is because "vertical integration, as such without more, cannot be held violative of the Sherman Act." *United States v. Columbia Steel Co.*, 334 U.S. 495, 525 (1948). Accordingly, "a manufacturer may normally control the distribution of its own products" without running afoul of antitrust law. *Trixler Brokerage Co. v. Ralston Purina Co.*, 505 F.2d 1045, 1051 (9th Cir. 1974).

One of the Cubs' products is the public display of baseball games, and part of the "distribution" of that product is selling tickets to watch those games live. There is nothing inherently anticompetitive about the Cubs taking over the distribution of their own product by purchasing rooftop properties that provide a live view of Wrigley Field or by building a scoreboard that adds to the in-stadium experience and prevents others from appropriating the Cubs' property. That type of action moves the Cubs closer to the model of every other Major League Baseball team and, far from being anticompetitive, leads to "lower costs for [the Cubs] and create[s] efficiencies" in the sale and marketing of Cubs tickets. *Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 990 (D.C. Cir. 2013) (Kavanaugh, J., concurring). Thus, petitioners' allegation the Cubs attempted to corner the market for sales of its own product is insufficient to state a claim for monopolization. As the district court correctly recognized, "the Cubs are not limited by the antitrust laws with respect to what they do with and how they

distribute their own product." *Right Field Rooftops, LLC v. Chi. Baseball Holdings, LLC*, 87 F. Supp. 3d 874, 888 (N.D. Ill. 2015). Federal antitrust law, even if it applied here, would not obligate the Cubs to provide petitioners with a clear view of Wrigley Field.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

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