No. 23-283

In the Supreme Court of the United States

TRI-CITY VALLEYCATS, INC., ET AL.,

Petitioners,

v.

THE OFFICE OF THE COMMISSIONER OF BASEBALL,

Respondent.

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

BRIEF OF AMICI CURIAE SENATORS MIKE LEE AND MARCO RUBIO AND REPRESENTATIVES PAUL TONKO AND JOE COURTNEY IN SUPPORT OF PETITIONERS

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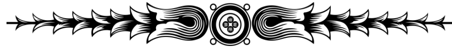

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici Curiae Senators Mike Lee and Marco Rubio and Representatives Paul Tonko and Joe Courtney submit this brief in support of Petitioners' Petition for a Writ of Certiorari. *Amici* are United States senators and representatives with varying committee assignments and political vantage points regarding antitrust policy. *Amici* took an oath to defend the Constitution and are committed to the separation of powers at its heart. To that end, *amici*, collectively and with their colleagues in Congress, are responsible for writing, repealing, and amending federal legislation setting antitrust policy for the United States. They hold unique perspectives on the substance of this matter—exemptions to the antitrust laws—as well as important views on the questions of Congressional intent regarding action and inaction that permeate the case law surrounding professional baseball's antitrust exemption. *Amici* have an interest in returning the antitrust laws to their full force as applied to the business of

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[1] Pursuant to this Court's Rule 37.2, all parties with counsel listed on the docket have consented to the filing of this brief. Counsel of record for all listed parties received notice at least 10 days prior to the due date of the *Amici Curiae's* intention to file this brief.

Pursuant to Rule 37.6, *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

professional baseball, as well as in ensuring that the judicial branch does not encroach upon Congress's exclusive exercise of the legislative function. *Amici* assert that a sound antitrust policy unencumbered by judicial overreach is essential to a free market and healthy economy.

Senator Mike Lee is the senior United States Senator from Utah, who has served since 2011, and is the Ranking Member on the Senate Judiciary Committee Competition Policy, Antitrust, and Consumer Rights Subcommittee.

Senator Marco Rubio is the senior United States Senator from Florida, who has served since 2011.

Representative Paul Tonko is a United States Congressman representing New York's 20th Congressional District, who has served since 2009.

Representative Joe Courtney is a United States Congressman representing Connecticut's 2nd Congressional District, who has served since 2007.

SUMMARY OF ARGUMENT

The Petition presented by Tri-City ValleyCats, Inc. and Oneonta Athletic Corporation asks the Court to overrule *Flood v. Kuhn*, 407 U.S. 258 (1972), and its predecessor cases, eliminating the common-law antitrust exemption created by the Court based on flawed reasoning for the business of professional baseball.

The judicially created antitrust exemption from the Sherman Act specific to Major League Baseball

amounts to the usurpation of Congressional authority. It was created by this Court in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922) and rests on three wrongly decided cases.

While the progeny of *Federal Baseball* recognized that the sport is indeed engaged in interstate commerce —eliminating the case's key holding—this Court has continued to maintain the antitrust exemption that relied upon that holding, asserting that Congress's lack of legislative response to the 1922 case was evidence that its wrongness had been legislatively approved. This fundamentally misapplies judicial power and misinterprets the legislative power. Congressional inaction is not a constitutionally cognizable exercise of the legislative power, let alone approval of a facially incorrect judicial decision. These failures have allowed a single sport to evade the antitrust laws and engage in anticompetitive behavior with impunity, weakening the strength of the antitrust laws and contravening the will of the people as expressed by their elected representatives.

Federal Baseball and the cases that followed, in addition to being wrong on the law, represent a usurpation of the legislative power vested by the Constitution in Congress alone. Although it retains the prerogative to do so, it is not incumbent upon Congress to fix the Court's mistakes. First and foremost, it is the Court's duty to fix its own mistakes. *Amici* ask the Court to avail itself of that opportunity here. Congress alone has the power to create exemptions to the antitrust laws. The Court should grant certiorari in this case to correct its error of judicial overstep based on a misinterpretation, reverse *Federal Baseball* and

its progeny, and remove the judicially-created antitrust exemption wrongly granted to professional baseball.

I. PROFESSIONAL BASEBALL'S ANTITRUST EXEMPTION IS LEGALLY UNSOUND AND VIOLATES THE SEPARATION OF POWERS.

The Court's usurpation of Congress's legislative power rests on three wrongly decided cases, each of which should be overturned.

A. *Federal Baseball* Misinterpreted the Commerce Clause.

In *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922), a member baseball club of the Federal League of Professional Base Ball alleged that the National League and American League had "conspired to monopolize the baseball business" and "destroyed the Federal League by buying up some of the constituent clubs and . . . inducing all those clubs except the plaintiff to leave their League." *Id.* at 207. The Court reasoned that "the essential thing" in its analysis of professional baseball was "giving exhibitions of base ball [sic]," and that travel and other commercial activity were "mere incident" to those games. *Id.* at 208–09. The Court held that because baseball games take place in only one state, the "conduct charged against the defendants w[as] not an interference with commerce among the States." *Id.* at 209. As a result, professional baseball could not be subject to the antitrust laws under which the case was brought.

The Court's holding in *Federal Baseball* is deeply flawed, and rests on a misinterpretation of both the business of baseball and the Commerce Clause. In his

dissent in *Toolson v. New York Yankees*, 346 U.S. 356 (1953), Justice Burton acknowledged this error and declined to join the majority opinion and enumerated the numerous ways that baseball is engaged in interstate trade and commerce: (1) "capital investments used in conducting competitions between teams constantly traveling between states," (2) "its receipts and expenditures of large sums transmitted between states," (3) "its numerous purchases of materials in interstate commerce," (4) "the attendance at its local exhibitions of large audiences often traveling across state lines," (5) "its radio and television activities which expand its audiences beyond state lines," (6) "its sponsorship of interstate advertising, and its highly organized 'farm system' of minor league baseball clubs," (7) the presence of restrictive contracts and understandings between individuals and among clubs or leagues playing for profit throughout the United States, and even in Canada, Mexico and Cuba. *Id.* at 357–58 (internal citations omitted). Ultimately, Justice Burton concluded that "it is a contradiction in terms to say that the defendants in the cases before us are not now engaged in interstate trade or commerce as those terms are used in the Constitution of the United States and in the Sherman Act." *Id.* at 357–58 (internal citations omitted). Agreeing with Justice Burton in *Flood v. Kuhn*, the Court held that "[p]rofessional baseball is a business and it is engaged in interstate commerce." 407 U.S. 258, 282 (1972).

While opinions as to the correct interpretation of the Commerce Clause vary widely, including among *amici* and their colleagues, its application to the business of baseball is not reasonably contestable, even under the strictest reading. For example, in Justice

Thomas's concurrence in *United States v. Lopez*, 514 U.S. 549 (1995), he assailed the modern interpretation of the Commerce Clause that grants Congress the power to "regulate not only 'Commerce . . . among the several States,' but also anything that has a 'substantial effect' on such commerce." *Id.* at 584 (Thomas, J., concurring) (internal citation omitted). Thomas argued for an interpretation and application of the Commerce Clause grounded in the understanding of the term "commerce" common at the time of the founding, drawing on its use "in contradistinction to productive activities such as manufacturing and agriculture." *Id.* at 585-89. By "commerce," Thomas contended, the framers meant the trade and transport of goods and services between and among the several states. *Id.* at 587 ("Agriculture and manufacturing involve the production of goods; commerce encompasses traffic in such articles.").

Justice Burton's assessment of the business of baseball in *Toolson*, *supra*, renders obvious the application of the Commerce Clause to professional baseball even under Justice Thomas's narrow framework in *Lopez*. It is the movement of a team from one state to another, to facilitate the meeting of interstate interests on the field that makes a professional baseball game. Without the opposing team traveling to the state in which a particular game is played, there would be no vehicle for the commercial benefits of professional baseball. Not only do teams travel, but millions of fans travel across state lines to cheer on their team in away stadiums.

Furthermore, even if *Federal Baseball's* conception of "commerce" in professional baseball was correct at the time (and it was not), it is irretrievably wrong

today. Professional baseball in the twenty-first century is a multi-billion-dollar international industry that entails the distribution and sale of billions of dollars of team-specific merchandise across the country and the world. Maury Brown, *MLB Sets New Revenue Record, Exceeding $10.8 Billion for 2022*, FORBES (Jan. 10, 2022) (In 2022, Major League Baseball had record-setting revenues of more than $10.8 billion).[2]

As of late-September 2023, the most-traveled team in Major League Baseball was the Oakland Athletics, which has traveled coast-to-coast to every corner of the United States for a total exceeding 51,527 miles. *2023 MLB Travel Schedule*, MLB Savant.[3] And even the least traveled team, the Milwaukee Brewers, racked up 25,426 miles crossing every state line many times over. *Id.* The Court in *Federal Baseball* asserted that "personal effort, not related to production, is not a subject of commerce." *Federal Baseball*, 259 U.S. at 209. Even taking this as true today, the production associated with professional baseball of today involves unending streams of merchandise and tickets, sold in stadiums and online, which follow fans across state borders. The games are broadcast in every state (and around the world) on television, radio, and the internet, and advertising dollars flow freely from fans' attention.

Major League Baseball teams also own or make significant investments in Minor League teams in

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[2] https://www.forbes.com/sites/maurybrown/2023/01/10/mlb-sets-new-revenue-record-exceeding-108-billion-for-2022/?sh=4742f3b077ee (last visited Sept. 28, 2023).

[3] https://baseballsavant.mlb.com/visuals/map?team=&year=2023 (last visited Sept. 28, 2023).

other states. For example, the Tampa Tarpons—which, until recently, were called the Tampa Yankees—are owned by the New York Yankees. Benjamin Hill, *With Tarpons, Tampa throws back to the future*, Minor League Baseball (Dec. 11, 2017).[4]

As the Court itself has observed, those engaged in the business of professional baseball are absolutely engaged in interstate commerce. The original justification for exempting professional baseball from the federal antitrust laws cited in *Federal Baseball* is indefensible, and that decision should be overturned.

B. *Toolson* Wrongly Inferred Legislative Assent from Legislative Silence.

Three decades after *Federal Baseball*, the Court compounded its errors and cemented the "baseball exemption" as it exists today in *Toolson v. New York Yankees*, 346 U.S. 356 (1953). The Court in *Toolson* reasoned that, because for thirty years "Congress has had the [*Federal Baseball*] ruling under consideration but has not seen fit to bring such business under these laws by legislation," that Congress had implicitly approved the exemption and deemed it the law of the land. *Id.* at 357. The Court went so far as to say that, in that interim, professional baseball "has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation," and "that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation." *Id.*

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[4] https://www.milb.com/news/tampa-yankees-look-to-the-past-change-name-to-tarpons-263154244

Similar to *Federal Baseball*, *Toolson* was wrongly decided—and arguably worse. *Toolson* states that *Federal Baseball* found "that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." *Id.* at 357. But that is incorrect; Justice Holmes's decision does not discuss Congressional intent with regard to the application of the antitrust laws at all. The Court simply ruled that the alleged conduct did not constitute interstate commerce under the meaning of the Commerce Clause. *Federal Baseball*, 259 U.S. at 209.

But more importantly, even if *Toolson* had properly relied on *Federal Baseball*, the Court should not have inferred Congressional support for its own judicially-created exemption from Congress not legislating to overturn the Court's initial overreach. For one, the *Toolson* Court's reasoning is inconsistent and flawed. It gave decisive weight to Congress's "inaction" during the thirty years between *Federal Baseball* and the case before it, while ignoring the thirty years between the passage of the Sherman Act in 1890 and the 1922 decision in *Federal Baseball*, during which time Congress made no legislation exempting professional baseball from the antitrust laws.

The Court's chief mistake in *Toolson* was to ignore the Presentment Clause. The Constitution provides a clear formula for properly exercising the legislative power: Congress must pass a bill through both the House and the Senate and must present it to the President. U.S. Const. art I., § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States."). The

Judiciary lacks the permission to equate Congressional inaction with legislative action. On the contrary, allowing the Court's initial error in *Federal Baseball* to stand on the basis of subsequent Congressional silence only encourages and excuses judicial policymaking, violating the separation of powers by usurping Congress's exclusive authority to legislate. *Qui tacet consentire videtur*[5] is not an accepted canon of statutory construction or judicial reasoning.

The Court's jurisprudence on this point is clear. "[W]ant of specific Congressional repudiations [does not] . . . serve as an implied instruction by Congress to [the Court] not to reconsider, in the light of new experience, . . . whether . . . [there is] dissonance of doctrine." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). There is good reason why courts should not infer Congressional intent when Congress has not acted. "To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities. . . . Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of [. . .] Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." *Id.* at 119–21. Assuming Congressional intent in the instance of inaction creates a dangerous game of speculation that courts should refrain from engaging in.

While it is true that Congress has partially overturned baseball's judicially-created antitrust exemption, such acts do not imply that Congress approves of the blanket exemption created out of whole cloth by the

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[5] "He who is silent seems to consent."

Court in *Toolson*. Rather, those were discrete instances where it was necessary to accomplish policy aims separate from those inherent in the antitrust laws.

After *Flood v. Kuhn* Petitioner Curtis Flood's loss at the Supreme Court, Congress passed the Curt Flood Act (CFA) of 1998 to ensure that "the conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to or affecting employment of major league baseball players to play baseball at the major league level are subject to the antitrust laws to the same extent such conduct, acts, practices, or agreements would be subject to the antitrust laws if engaged in by persons in any other professional sports business affecting interstate commerce." 15 U.S.C.A. § 26b(a). The statute clarifies, however, that "[N]o court shall rely on the enactment of this section as a basis for changing the application of the antitrust laws." 15 U.S.C.A. § 26b(b). The plain meaning of the statute fits with the bill's sponsor statement that, "whatever the law was before the enactment of this legislation, it is unchanged by the passage of the legislation." 144 Cong. Rec. 18, 175 (1998) (statement of Sen. Orrin Hatch). This law merely addressed labor disparities for MLB players; on all else it was silent. The Court is not permitted to read into that silence support for *or* opposition to anything else.

If anything, that Congress has only acted to *shrink* the scope of professional baseball's antitrust exemption should support an inference of disapproval rather than support. "If Congressional inaction" is the basis for the Court's basis for deciding this issue, it "should rely upon the fact that Congress has refused to enact bills broadly exempting professional sports from

antitrust regulation." *Flood v. Kuhn*, 407 U.S. at 287 (Douglas, J., dissenting). Furthermore, Congress has at times legislated statutory exemptions to the antitrust laws, which shows that Congress will act when it wants an exemption to apply. The Sports Broadcasting Act of 1961, for example, allows joint broadcasting agreements among major professional sports. 15 U.S.C. §§ 1291–96. Such an exemption evinces Congress's ability and intent to create an exemption when it so chooses. And although Congress has not yet overturned the antitrust exemption for Major League Baseball, its "unbroken silence . . . should not prevent [the Court] from correcting [its] own mistakes." *Id.* at 288 (Douglas, J., dissenting).

C. *Flood v. Kuhn* Misapplied *Stare Decisis.*

The errors of *Federal Baseball* and *Toolson* were given seeming permanence when the Court acknowledged but refused to correct its mistakes in *Flood v. Kuhn*. The *Flood* Court admitted that "[p]rofessional baseball is a business and it is engaged in interstate commerce." *Id.* at 282. Despite this obvious fact, it nonetheless opted simply to "adhere" to *Federal Baseball* and *Toolson*. *Id.* at 284. The Court accepted "baseball [as], in a very distinct sense, an exception and an anomaly," and called its predecessor cases "an aberration confined to baseball." *Id.* at 282. But because "the aberration is an established one," the Court accepted it as "an inconsistency and illogic of long standing," one that cannot be touched. *Id.* at 282–83.

Error does not lessen with age—especially errors that contravene our Constitutional order. The *Flood* Court's refusal to correct its mistakes in *Toolson* was a misapplication of *stare decisis*. "[S]tare decisis is a

principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). "We do not lightly overrule our prior constructions of federal statutes, but when our errors deny substantial federal rights, like the right to compete freely and effectively to the best of one's ability as guaranteed by the antitrust laws, we must admit our error and correct it. We have done so before and we should do so again here." *Flood*, 407 U.S. at 292–93 (Marshal, J., dissenting).

D. Professional Baseball's Judicially Created Antitrust Exemption Usurps Congress's Legislative Authority.

The combined effect of the Court's errors in *Federal Baseball* and its progeny has been the violation of the separation of powers where the court has usurped Congress's legislative authority. Article I of the Constitution vests all legislative power in Congress alone. U.S. Const. art I., § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."). The Court wrongly assumed this power for itself when it exempted the business of professional baseball from the federal antitrust laws and then, despite acknowledging the error of that decision, inferred Congressional assent to that usurpation from Congressional silence.

The Constitution and the Court's own precedents are clear: professional baseball is interstate commerce within the meaning of the Commerce Clause; the

Court is not empowered to infer legislative affirmation from Congressional inaction; and *stare decisis* does not require the Court to allow such glaring errors to persist. Failure by the Court to remedy this situation will only exacerbate the ongoing violation of the Constitution's separation of powers and Congress's legislative prerogative.

II. PROFESSIONAL BASEBALL'S ANTITRUST EXEMPTION IS INCONSISTENT WITH SOUND COMPETITION POLICY.

In addition to the above, the Court's baseball exemption is in direct conflict with the Court's long-held canon of interpretation that exemptions to the antitrust laws are to be narrowly construed. Beyond the general deference to the legislative branch that is proper in matters of policy, this also reflects the importance of the antitrust laws. In the same year it decided *Flood v. Kuhn*, the Court observed the antitrust laws are as "important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms," and likened "the Sherman Act in particular to the Magna Carta of free enterprise." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). The Court further reasoned that "the freedom guaranteed each and every business, no matter how small, is the freedom to compete and "[i]mplicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy." *Id.* at 610.

The *Topco* Court pointed to *United States v. Philadelphia National Bank*, 374 U.S. 321, 348 (1963), in which it had explained that "[i]t is settled law that 'immunity from the antitrust laws is not lightly implied.'" The *Philadelphia National Bank* Court

described this canon of construction as reflecting the "indispensable role of antitrust policy in the maintenance of a free economy." *Id.* Since then, the Supreme Court and lower courts have recognized that antitrust exemptions should be narrowly construed. *See Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973) ("[A] broad reading . . . would conflict with our frequently expressed view that exemptions from antitrust laws are strictly construed."); *Laumann v. Nat'l Hockey League*, 56 F.Supp.3d 280, 297 (S.D.N.Y. 2014) (noting that "[e]xceptions to the antitrust laws are to be construed narrowly").

Indeed, the Supreme Court has declined to apply antitrust exemptions to other major sports leagues, such as the NFL and NBA. *See Am. Needle Inc. v. Nat'l Football League*, 560 U.S. 183 (2010) (holding that the NFL's concerted action in licensing intellectual property is covered by the Sherman Act); *Haywood v. N.B.A.*, 401 U.S. 1204 (1971) (recognizing "[b]asketball . . . does not enjoy exemption from the antitrust laws"); *Radovich v. National Football League*, 352 U.S. 445 (1957) (holding that the "business of football comes within the scope of the Sherman Act"); *United States v. Int'l Boxing Club*, 348 U.S. 236 (1955) (declining to apply an antitrust exemption to boxing); *NCAA v. Alston*, 141 S.Ct. 2141 (2021) (holding the NCAA's rules limiting education-related compensation violated the Sherman Act). There is no reason for baseball to be held to a different standard than every other professional sports league. Baseball is materially similar to any other professional sports league and similarly affects interstate commerce.

In *United States v. Int'l Boxing Club of N.Y.,* the Court found that applying a broad antitrust exemption

to the professional sport of boxing "could not be granted without substantially repealing the antitrust laws." 348 U.S. at 244. In so holding, the Court relied upon a 1952 Report by the House Subcommittee on Monopoly Power entitled "Organized Baseball," in which the Subcommittee declared its opposition to four bills forbidding the application of the antitrust laws to "organized professional sports enterprises or to acts in the conduct of such enterprises." *Id.* 348 U.S. at 243 (quoting H.R. Rep. No. 2002, at 1). The report stated:

> The requested exemption would extend to all professional sports enterprises and to all acts in the conduct of such enterprises. The law would no longer require competition in any facet of business activity of any sport enterprise. Thus, the sale of radio and television rights, the management of stadia, the purchase and sale of advertising, the concession industry, and many other business activities, as well as the aspects of baseball which are solely related to the promotion of competition on the playing field, would be immune and untouchable. Such a broad exemption could not be granted without substantially repealing the antitrust laws.

H.R. Rep. No. 2002, at 230.

Both Congress and the Court appear to agree that a broad antitrust exemption as applied to Major League Baseball is inconsistent with longstanding antitrust policy. This case offers the Court an opportunity to correct the incongruity.

CONCLUSION

The original Commerce Clause justification for the "baseball exemption" has been repudiated by this Court, leaving it as an extreme outlier with respect to other sports and other antitrust exemptions. Although it retains the prerogative to do so, it is not incumbent upon Congress to fix the Court's mistakes. Ultimately, it is the Court's duty to do so itself. For the reasons stated in Petitioners' Petition for Writ of Certiorari and this *amici curiae* brief, this Court should grant the Petition for Writ of Certiorari to overturn *Flood v. Kuhn* and its predecessors, ensuring competition in the sport of baseball both on *and* off the field.

Respectfully submitted,

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