No. _____

In The
Supreme Court of the United States

RIGHT FIELD ROOFTOPS, LLC, d/b/a Skybox on Sheffield; RIGHT FIELD PROPERTIES, LLC; 3633 ROOFTOP MANAGEMENT, LLC, d/b/a Lakeview Baseball Club; and ROOFTOP ACQUISITION, LLC,

Petitioners,

v.

CHICAGO BASEBALL HOLDINGS, LLC; CHICAGO CUBS BASEBALL CLUB, LLC; WRIGLEY FIELD HOLDINGS, LLC; and THOMAS S. RICKETTS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a monopolization or attempted monopolization of rooftop businesses by the owner of a neighboring baseball franchise is exempted from the Sherman Antitrust Act as "the business of professional baseball."

Whether this Court's decision in *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922) and its progeny that "the business of professional baseball" is exempted from the Sherman Antitrust Act and all antitrust laws should be reversed.

LIST OF PARTIES

The parties are set forth fully in the caption of the case on the cover page.

CORPORATE DISCLOSURE STATEMENT

Petitioners are Right Field Rooftops, LLC, d/b/a Skybox on Sheffield; Right Field Properties, LLC; 3633 Rooftop Management, LLC, d/b/a Lakeview Baseball Club; and Rooftop Acquisition, LLC. There are no parent corporations or publicly held companies owning 10% or more of any Petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Right Field Rooftops, LLC d/b/a Skybox on Sheffield; Right Field Properties, LLC; 3633 Rooftop Management, LLC d/b/a Lakeview Baseball Club; and Rooftop Acquisition, LLC (collectively, the "Plaintiff Rooftops" or "Petitioners"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 870 F.3d 682 (2017). App. 1. The denial of a rehearing is reported at 2017 U.S. App. LEXIS 20335 (7th Cir. Oct. 17, 2017). App. 59. The opinion of the United States District Court for the Northern District of Illinois dismissing the case with prejudice is reported at 136 F. Supp. 3d 911 (N.D. Ill. 2015). App. 24. The District Court's denial of Petitioners' motion to amend their complaint and to amend the judgment is reported at 2016 U.S. Dist. LEXIS 117809 (N.D. Ill. Sept. 1, 2016). App. 42.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on September 1, 2017, and rehearing en banc was denied on October 17, 2017. An application for an extension of

time within which to file this petition for certiorari until and including January 29, 2018 was presented to Justice Kagan and was granted on January 4, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1-2, are reproduced at App. 61-62. The Curt Flood Act of 1998, 15 U.S.C. § 26b, is reproduced at App. 63.

STATEMENT OF THE CASE

I. Facts Giving Rise to Petitioners' Lawsuit

Wrigley Field is one of Chicago's best-known landmarks, familiar even to non-baseball fans as the Friendly Confines of Chicago's National League Baseball Club, the Cubs. For many, an image of Wrigley Field includes not only the ball park itself, but the surrounding residential neighborhood, Lakeview. Like various other Chicago neighborhoods, Lakeview's traditional architecture includes numerous 3-story buildings (called "3-flats") with rooftops on which people can gather for recreation. Sheffield and Waveland Avenues, which border Wrigley Field, contain a number of these buildings, and the sight of fans watching from the rooftops has been a familiar sight since Wrigley Field first opened in 1914, frequently referenced by broadcasters like Harry Caray and still mentioned during coverage

of Cubs games today. This close relationship between Wrigley Field and the neighborhood in which it is situated provides much of the charm and warmth which even non Cubs fans – sometimes even White Sox or Cardinals fans – will acknowledge attaches to the setting in which the Cubs play.

During both the 1929 and the 2016 World Series, the rooftops surrounding Wrigley Field were packed with spectators. By the time of the 1938 World Series, these spectators were paying for the privilege, as a market for views from these rooftops (the "Rooftop Market") was already in existence. Entrepreneurial owners of the Sheffield and Waveland rooftop buildings sold space, and later food and beverages and other entertainment, on the rooftops during Wrigley Field events. These businesses are referred to herein as "Rooftop Businesses." Chicago officially recognized the Rooftop Businesses with an ordinance and license in 1998, but they, like the Rooftop Market, have existed in some form since at least the 1930s.

When this lawsuit was filed in 2015, sixteen Rooftop Businesses were licensed, including Petitioners. Until the events complained of in this lawsuit, which began with the purchase of the Cubs and Wrigley Field by Ricketts-owned entities[1] in 2009 (*see* App. 5, 22, 48-49), all of the Rooftop Businesses were independently

[1] Respondent Thomas S. Ricketts and Northside Entertainment Holdings, LLC, which Petitioners sought to add as an additional defendant in their Amended Complaint, are referred to herein as "Ricketts," and the Respondents collectively as "Respondents."

owned. None were owned or controlled by the Cubs or any Cubs' owner.

Although today Wrigley Field may seem inseparable from the Cubs, during the long period in which the Rooftop Market has existed many other events have been held in Wrigley Field. From 1921 through 1970, Wrigley Field was the home of the Chicago Bears football team. Up to and including the present, it also has been the setting of numerous other events throughout the years, including Big 10 football games, hockey games, high school baseball games, and many musical events. The Rooftop Businesses operate on these days in addition to the dates on which Cubs home games are held.

After purchasing control of the Cubs and of Wrigley Field, Ricketts decided that it would be economically advantageous to control the Rooftop Market, either because the Rooftop Businesses were in competition with Wrigley Field – as Ricketts and the Cubs' prior owner, the Tribune Company, had complained – or, more likely, because the Rooftop Market was independently valuable and provided a good business opportunity. After unsuccessfully proposing a group acquisition of all of the Rooftop Businesses, Ricketts purchased an interest in one and sought, as an owner of a Rooftop Business, to convince the other Rooftop Businesses to set minimum ticket prices. That did not succeed, and subsequently, Ricketts and the other Respondents employed anticompetitive means to force the owners of the independent Rooftop Businesses to sell. This attempted monopolization scheme not only

posed a significant and realistic threat of success, but it has largely succeeded and the threat continues. Ricketts now owns or controls most of the Rooftop Businesses, and has used his control of Wrigley Field to block the views from the two Plaintiff Rooftops in order to put them out of business. Respondents referred to this as "the death blow."

Petitioners sued under Section 2 of the Sherman Act, alleging two alternative antitrust counts. Count I alleged that the Rooftop Businesses were part of one broad market with Wrigley Field and the Cubs, as Respondents themselves have asserted in the past, while Count II alleged that the Rooftop Market is distinct from Wrigley Field and the Cubs. Amended Count II clarified that it was directed only against Ricketts and not the Cubs, as the Cubs were not and would not be the owner of any Rooftop Businesses. Which of the two alternative market definitions is correct is a fact question.

The District Court dismissed the antitrust claims with prejudice (along with the entire Complaint), ruling that the claims failed as a matter of law because they concerned the business of professional baseball, which is exempt from the antitrust laws. It also ruled that the Plaintiff Rooftops could not allege a plausible relevant market, because the sole competitor in the market was the Cubs (even though Count II did not allege that the Cubs were a competitor at all), and because the Cubs had a complete right to control the distribution of their own product. The District Court further denied a motion to amend the Complaint,

although it did allow evidence of the purchase of additional Rooftop Businesses by Ricketts. On appeal, the United States Court of Appeals for the Seventh Circuit did not address the other antitrust rulings, but held only that Counts I and II fell within the scope of the professional baseball's antitrust exemption, and therefore affirmed the District Court's Rule 12(b)(6) dismissal with prejudice.

II. Professional Baseball's Antitrust Exemption

Professional baseball's antitrust exemption is an accident of timing, an "anomaly" and "aberration" existing only because the question of the Sherman Act's applicability to professional baseball first reached this Court in 1922, when the definition of "interstate commerce" was substantially more limited. Using that narrower definition, this Court held that professional baseball was not in interstate commerce, that "exhibitions of baseball" were "purely state affairs." *Fed. Baseball Club, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208 (1922). *See also* Samuel A. Alito, Jr., *The Origin of the Baseball Antitrust Exemption*, 34(2) J. SUP. CT. HIST. 183 (2009); STUART BANNER, THE BASEBALL TRUST: A HISTORY OF BASEBALL'S ANTITRUST EXEMPTION 81-89 (Oxford University Press 2014) (2013). Under this ruling, Congress was constitutionally prohibited from passing a law regulating professional baseball. *Federal Baseball* did not, however, prohibit the application of state antitrust laws to these "purely state affairs."

Following *Federal Baseball*, the Court began to interpret interstate commerce more broadly. Thus, even before the Court again took up this question, Congress anticipated that it might, and considered the application of antitrust to professional sports. As explained in *United States v. Int'l Boxing Club*, 348 U.S. 236 (1955), in 1951 Congress rejected four bills that would have exempted professional sports (including baseball) from the antitrust laws in a variety of ways, including in "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." *Id.* at 243-44. With respect to baseball specifically, a House subcommittee held hearings to consider whether legislation should be enacted to exempt baseball from the antitrust laws. It did not recommend any such legislation. While the members of the subcommittee agreed that baseball should be permitted to keep the reserve clause, none supported exempting baseball in its entirety. *Banner, supra*, at 109-10. As quoted in *State v. Milwaukee Braves, Inc*, the subcommittee issued a report crystalizing the conflict at issue:

> [B]aseball is a unique industry. Of necessity, the several clubs in each league must act as partners as well as competitors. The history of baseball has demonstrated that cooperation in many of the details of the operation of the baseball business is essential to the maintenance of honest and vigorous competition to

> the playing field. For this reason organized baseball has adopted a system of rules and regulations that would be entirely inappropriate in an ordinary industry.

144 N.W.2d 1, 10 (Wis. 1966) (quoting H.R. REP. NO. 2002, at 229 (1952)). Such a conflict existed with any professional sport involving a league with competing teams, as various courts soon noted. *See, e.g.*, *United States v. Nat'l Football League*, 116 F. Supp. 319, 323 (E.D. Pa. 1953).

In 1953, the question of the relationship between professional baseball and the Sherman Act again reached this Court, in *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953). *Toolson* specifically addressed the reserve system. A player had challenged, under the Sherman Act, Major League Baseball's ("MLB") determination that because he would not report to and play for the team to which he had been assigned, he was entirely ineligible to play professional baseball. *See Toolson v. New York Yankees, Inc.*, 101 F. Supp. 93 (S.D. Cal. 1952). The majority in *Toolson* did not address the interstate commerce issue again, but simply stated, in a one-paragraph decision, that in the years since *Federal Baseball* in 1922, Congress had not chosen to enact a law bringing professional baseball under provision of the federal antitrust laws. Thus, because professional baseball had developed in reliance on the ruling that the antitrust laws did not apply, it would not be proper for the Court to subject it to the antitrust laws absent Congressional action. *Toolson*, 346 U.S. at 357.

Of course, Congress also had not chosen to enact legislation exempting baseball, and, unless *Federal Baseball* were overruled, this Court's holding was that the Constitution did not give Congress power to regulate baseball. Nor did Congress have any reason to interpret *Federal Baseball*'s holding as limited merely to baseball and not other, analogous sports. As noted by the dissent: "Congress . . . has enacted no express exemption of organized baseball from the Sherman Act, and no court has demonstrated the existence of an implied exemption from that Act of any sport that is so highly organized as to amount to an interstate monopoly or which restrains interstate trade or commerce." *Toolson*, 346 U.S. at 364 (Burton, J., dissenting).

Shortly after deciding *Toolson*, this Court considered whether other similarly-situated "live presentation of local exhibitions" also should be exempted from the Sherman Act, something that normally would follow from the holding in *Federal Baseball*. The first question presented, in *United States v. Shubert*, 348 U.S. 222 (1955), was whether *Federal Baseball* and *Toolson* applied to traveling theater attractions. The Court held that they did not, on the basis that those cases dealt with professional baseball and nothing else. *Id.* at 228-30. The Court explained that *Toolson* had been based on the fact that professional baseball had developed for 30 years in reliance on the ruling that federal antitrust laws did not apply. Thus, it was not willing to apply the Sherman Act retroactively, but the Court-created exemption would not apply to other

matters that were not the specific subject of the prior ruling. *Id*.

This Court reiterated the point in *Int'l Boxing Club*, 348 U.S. 236, also rejecting the proposition that *Toolson* and *Federal Baseball* applied to other professional athletics. Instead, those cases no longer reached any conduct beyond that which was the subject of the *Federal Baseball* decision. *Id.* at 242. Because "no court had ever held that the boxing business was not subject to the antitrust laws," it did not have an exemption. *Id.* at 242-43. Significantly, the Court rejected the notion that Congress had intended generally to grant professional sports immunity from the antitrust laws, and cited the four bills that had failed in 1951 as support. *Id.* at 243-44. These bills would have applied to baseball as well. *Id.*

In 1957, the Court took up *Radovich v. NFL*, 352 U.S. 445 (1957), which presented an issue essentially identical to that in *Toolson*, the National Football League's ("NFL") version of the reserve clause. *Id.* at 448-49. The NFL argued that like professional baseball it had relied on the ruling in *Federal Baseball*, and thus under the rule of stare decisis, *Federal Baseball* and *Toolson* applied to it as well. *Id.* at 449. This Court rejected that argument, explaining that *Toolson* had failed to disturb the specific holding in *Federal Baseball* only because "it was concluded that more harm would be done in overruling *Federal Baseball* than in upholding a ruling which at best was of dubious validity." *Id.* at 450. That was because of the "[v]ast

efforts" which had "gone into the development and organization of baseball . . . in reliance on its permanence." *Id*. The potential harm of applying the new decision retroactively compelled the result, although if the question were addressed with a clean slate it certainly would be decided the other way. *Id.* at 451-52. Therefore, the decision would be given only the narrowest precedential value. Rather than continuing to apply the rule in *Federal Baseball*, that case's holding would be limited only to "the business of baseball," because in no other area could there be the same concern about unfair retroactivity and surprise. On that basis, and not any claimed distinction between football and baseball, the exemption would apply to the latter, but not the former. *Id*. The dissent maintained that this distinction was not tenable. *Id.* at 456 (Harlan, J., dissenting).

The next time, and last to date, that this Court considered the baseball exemption was in 1972, more than 45 years ago, in *Flood v. Kuhn*, 407 U.S. 258 (1972). This case acknowledged that the situation of professional baseball was "an aberration," as well as "an exception and an anomaly." *Id.* at 282. It further noted that the basis for the decision – no interstate commerce – had been vitiated by the "expanding concept of interstate commerce" and thus did not apply to other professional sports which had not been the subject of rulings that predated this change in the interpretation of the Commerce Clause. While the majority decision referenced "unique characteristics and needs" that applied to professional baseball, the sole difference from other sports leagues identified was the

existence of the 1922 *Federal Baseball* decision. *Id.* at 282-83. The majority noted that with respect to the reserve system in particular, Congress had indicated more willingness to extend the exemption to the reserve system in other sports than to apply the Sherman Act to baseball's reserve system. *Id*. The Court again held, however, that this special status would be limited to baseball, because only baseball had been the subject of the rulings in *Federal Baseball* and *Toolson*.

Despite this focus on reliance, *Flood* did not limit its holding to the federal antitrust laws, the subject of the prior rulings. For the first time, the Court held that professional baseball's antitrust exemption, which had begun as a ruling that Congress lacked the power to regulate professional baseball, extended to and eliminated the power of states to regulate baseball. *Id.* at 284-85.

III. Lower Courts Disagree on the Scope of the Exemption

In applying the antitrust exemption, a crucial question faced by lower courts has been the scope of the exemption, or what this Court meant by "the business of professional baseball." As explained in *Postema v. Nat'l League of Prof'l Baseball Clubs*, 799 F. Supp. 1475, 1488 (S.D.N.Y. 1992), *rev'd on other grounds*, 998 F.2d 60 (2d Cir. 1993) (citing *Flood*, 407 U.S. at 282):

> Because the *Federal Baseball*, *Toolson*, and *Flood* cases considered the baseball exemption

> in very limited contexts, *i.e.*, with regard to baseball's reserve clause and to its league structure, those opinions give little guidance in determining the breadth of baseball's immunity to antitrust liability. The Court has not specifically determined whether the exemption applies to baseball's conduct outside the domain of league structure and player relations. However, the Flood Court stated that the immunity "rests on a recognition and acceptance of baseball's unique characteristics and needs," suggesting that baseball might not be exempt from liability for conduct not touching on those characteristics or needs.

See also Minn. Twins P'ship v. State, 592 N.W.2d 847, 854 (Minn. 1999) ("the *Flood* opinion is not clear about the extent of the conduct that is exempt from antitrust laws").

Most of the lower court cases that have interpreted the baseball antitrust exemption have done so in the context of questions about MLB's right to control decisions regarding franchise location or other matters central to league structure and organization. In doing so, there are three main lines of cases.

The oldest line of cases, and the majority, began even before *Flood* with *Milwaukee Braves*, 144 N.W.2d 1. This case concerned an effort by the State of Wisconsin to enjoin under state antitrust laws MLB's transfer of the Milwaukee Braves to Atlanta. *Id.* at 2-3. In interpreting the exemption applied, the Wisconsin Supreme Court noted that without it, it was likely that

the very structure and organization of MLB would be in violation of the antitrust laws. *Id.* at 8. Yet the business model of professional baseball and other professional sports necessarily required some degree of cooperation among the teams and between the teams and the league. *Id.* at 10-11. In holding that the exemption applied to MLB's right to control the location of its teams, the court explained that its interpretation was not that the exemption would apply broadly to anything to do with the subject matter of professional baseball, but simply that the rationale behind *Toolson* indicated that the exemption must apply to "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.

Several other courts have agreed. For example, in *Major League Baseball v. Crist*, 331 F.3d 1177, 1183-84 (11th Cir. 2003), the Eleventh Circuit distinguished questions central to baseball's league structure, where the exemption would apply, from other cases, such as those dealing with the relationship between baseball teams and third parties, where it would not. The court explained: "[T]he antitrust exemption has not been held to immunize the dealings between professional baseball clubs and third parties." *Crist*, 331 F.2d at 1183. Instead, "antitrust exemptions must be strictly construed" and the exemption should not be read broadly, but treated as the "aberration" it is. *Id.* at 1186-87.

The recent Ninth Circuit case, *City of San Jose v. Comm'r of Baseball*, 776 F.3d 686, 690 (9th Cir.), *cert.*

denied, 136 S. Ct. 36 (2015), is consistent. In that case, the court explained that an exemption applying to the "business of providing public baseball games for profit between clubs of professional baseball players" would necessarily extend to the basic organization principle of the location of the league's teams, to ensure access to a broad range of markets and safeguard the viability of each team. *Id.* at 689-90. It does not apply broadly to all cases involving the subject matter of baseball or simply "touch[ing] on the baseball industry." *Id.* at 690. Nor does it immunize teams or MLB from antitrust suit should they engage in "activities . . . wholly collateral to the public display of baseball games." *Id.* Several other courts considering whether the exemption applied to franchise location have decided similarly, although not all have given detailed reasons for their holdings. *See, e.g.*, *New Orleans Pelicans Baseball, Inc. v. Nat'l Ass'n of Prof'l Baseball Leagues, Inc.*, Civ. Action No. 93-253 Sec. F, 1994 WL 631144 (E.D. La. Mar. 2, 1994) (considering claims arising from effort to relocate minor league team); *Minnesota Twins*, 592 N.W.2d at 855-56 (holding exemption applies to the sale and relocation of a team, because that is an integral part of the business of professional baseball); *Prof'l Baseball Sch. & Clubs, Inc. v. Kuhn*, 693 F.2d 1085 (11th Cir. 1982) (holding that exemption precluded case challenging rules relating to franchise location and governing teams member team could play against); *Portland Baseball Club, Inc. v. Kuhn*, 491 F.2d 1101, 1103 (9th Cir. 1974) (rejecting antitrust claim related to alleged injury due to expansion of MLB to Seattle and San Diego).

The Seventh Circuit's decision in *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527 (7th Cir. 1978), also appears to be within this line of cases. *Finley* dealt with the assignment of player contracts, similar to the subject matter of *Toolson* and *Flood*. The plaintiff argued that those cases did not apply, because the matter at hand did not directly deal with the reserve system, but the Seventh Circuit stated that the exemption reached the entire "business of baseball, not any particular facet of that business." *Id.* at 541. While the court did not attempt to define in detailed fashion what the "business of baseball" referred to, it recognized that "this exemption does not apply wholesale to all cases which may have some attenuated relation to the business of baseball." *Id.* at 541 n. 51. Moreover, both the Seventh Circuit in *Finley* and the Ninth Circuit in *San Jose* identified the facts underlying *Twin City Sportserve, Inc. v. Charles O. Finley & Co.*, 365 F. Supp. 235 (N.D. Cal. 1972), *rev'd on other grounds*, 512 F.2d 1264 (9th Cir. 1975), as an example of when the exemption would not apply. *Twin City Sportserve* concerned antitrust claims arising out of the sale of concession services during baseball games in baseball parks. *Id.*

Other District Courts have also provided examples of business activity by MLB or an MLB club which were not protected by the "business of baseball" exemption. In *Henderson Broad. Corp. v. Houston Sports Assoc.*, 541 F. Supp. 263, 264, 269-71 (S.D. Tex. 1982), claims against the owner of the Houston Astros and others for allegedly violating the Sherman Act in

connection with agreements for the broadcast of Astros baseball games were held not to be within the exemption, because they did not affect league structure or matters integral to baseball, but only related activities that enhanced its commercial success. *Id.* at 265. The *Postema* court agreed with this reasoning, holding that the exemption did not reach antitrust claims arising out of a dispute between the league and a female umpire, because baseball's employment relationships with non-player employees did not concern baseball's "unique characteristics and needs" and thus was not sufficiently central to baseball to be encompassed in the exemption. *Postema*, 799 F. Supp. at 1488-89. "Anti-competitive conduct toward umpires is not an essential part of baseball and in no way enhances its vitality or viability." *Id.* at 1489. Although *Postema* was contrary to an earlier Second Circuit case, *Salerno v. Am. League of Prof'l Baseball Clubs*, 429 F.2d 1003 (2d Cir. 1970), it distinguished *Salerno* as having been decided before *Flood* clarified the basis for the exemption's continuing existence. *Postema*, 799 F. Supp. at 1489. Still other cases have considered the same types of questions and found that antitrust claims could be brought without even discussing baseball's antitrust exemption. *See, e.g.*, *Topps Chewing Gum v. Fleer Corp.*, 799 F.2d 851 (2d Cir. 1986) (no discussion of exemption with respect to claims involving contracts between baseball card companies and players association); *Nishimura v. Dolan*, 599 F. Supp. 484 (E.D.N.Y. 1984) (no discussion of exemption with respect to broadcasting of New York Yankees and New York Mets by competing cable systems).

A second line of cases began with *Piazza v. Major League Baseball*, 831 F. Supp. 420, 435-36 (E.D. Pa. 1992), in which the court held that after *Flood* the precedential value of *Federal Baseball* and *Toolson* was restricted to the particular facts there involved, specifically the reserve clause. In support of this conclusion, it noted that *Flood* itself identified the issue in such limited terms, stating "[f]or the third time in 50 years the Court is asked *specifically* to rule that professional baseball's *reserve system* is within the reach of the antitrust laws." *Id.* at 436 (emphasis in original) (quoting *Flood*, 407 U.S. at 259). The *Piazza* court further explained: "Having entirely undercut the precedential value of the *reasoning* of *Federal Baseball*, the Court next set out to justify the continued precedential value of the *result* of that decision." *Id.* at 436 (emphasis in original). The Florida Supreme Court agreed with the analysis in *Piazza*. *Butterworth v. Nat'l League of Prof'l Baseball Clubs*, 644 So. 2d 1021, 1024 (Fla. 1994).

A few recent decisions indicate that a new and conflicting line of cases may be developing, which would interpret the exemption much more broadly than either of the other two. One such example is the Seventh Circuit decision that Petitioners are seeking to appeal. In that case, the court held that the attempted monopolization by the owner of the Cubs of the Rooftops Businesses adjoining Wrigley Field would be immunized from liability by baseball's antitrust exemption, simply because the Cubs and Wrigley Field were involved. *See Right Field Rooftops, LLC v.*

Chi. Cubs Baseball Club, LLC, 870 F.3d 682, 689 (7th Cir. 2017), App. 12-13. This was the case even if, as was alleged in Count II, the Rooftop Businesses and the Cubs were not in competition with each other. *Id.* The Seventh Circuit further held that it made no difference that the facts at issue did not concern the rules and restrictions related to baseball itself, *i.e.*, the nature of the league and its organization and structure, and instead that efforts by the owner of a baseball club to monopolize a related business market could be considered "the business of providing public baseball games for profit." *Id.* Indeed, the District Court decision it affirmed had specifically held that "both the Supreme Court and the Seventh Circuit have taken a broad reading of the baseball exemption." *Right Field Rooftops, LLC v. Chi. Baseball Holdings, LLC*, 87 F. Supp. 2d 874, 885 (N.D. Ill. 2015), App. 28.

Another recent case where the courts have taken a broader view of the exemption than courts typically have in the past is *Wyckoff v. Office of the Comm'r of Baseball*, 211 F. Supp. 3d 615 (S.D.N.Y. 2016), *aff'd*, 2017 U.S. App. LEXIS 16728 (2d Cir. Aug. 31, 2017). The *Wyckoff* court relied on *Right Field Rooftops*, 87 F. Supp. 3d at 881-82, 884-85, in holding that the exemption was not limited to league structure and player contracts, but applied more broadly, including to claims relating to the relationship between MLB and baseball scouts, contrary to the analogous *Postema* case. *Id.* at 625. Unlike the line of cases which have focused on whether the types of agreements or coordination challenged constitutes the same type of agreement and

coordination central to the organization of the league and relationship between MLB and its teams, *i.e.*, the "unique characteristics and needs" of baseball, in both *Wyckoff* and *Right Field Rooftops*, the courts focused simply on whether the challenged conduct was beneficial to the particular teams involved. *Wyckoff*, 211 F. Supp. 3d at 626-27, *aff'd*, 2017 U.S. App. LEXIS 16728, at *4; *Right Field Rooftops*, 870 F.3d at 689, App. 12-13. Thus, the lower courts are divided as to how to apply the antitrust exemption recognized in *Flood* and *Toolson*.

IV. The Curt Flood Act

The development of this new line of cases that would interpret the exemption broadly is not based on any Congressional action. In 1998, Congress did legislate with respect to the exemption in a limited respect, passing the Curt Flood Act (the "Act"), 15 U.S.C. § 26b, App. 62-67. The Act ended the longstanding antitrust exemption that had applied to the employment of major league players but did not change the law with respect to any other matter. Instead, it provides:

> 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).

15 U.S.C. § 26b(b), App. 63. Congress thus intended specifically that the Act be neutral with respect to the application or existence of baseball's exemption in all

other areas. Public Law 105-297 explains: "[T]he passage of this Act does not change the application of the antitrust laws in any other context or with respect to any other person or entity." Curt Flood Act of 1998, Pub. L. No. 105-297, § 2, 112 Stat. 2824 (1998), App. 62.

Before voting, both the House and Senate discussed this very issue. For example, during a colloquy during the Senate debate which was officially taken into account and placed into the record during the House debate, Senator Wellstone asked Senator Hatch to clarify whether the new statute would affect an antitrust case then pending against the Minnesota Twins, in which the scope of the exemption was an issue, and stated:

> I also note that several lower courts have recently found that baseball currently enjoys only a narrow exemption from antitrust laws and that this exemption applies only to the reserve system. . . . It is my understanding that [the Senate bill that became the Curt Flood Act] will have no effect on the courts' ultimate resolution of the scope of the antitrust exemption. . . .

144 Cong. Rec. H. 9942, 9945 (daily ed. Oct. 7, 1998) (statement by Sen. Wellstone). Senator Hatch responded that that was correct, and other Senators agreed, and referred to the recent decisions in *Piazza* and *Butterworth*, which had analyzed the exemption as applying only to the reserve system, and no other matters. *Id.*

REASONS FOR GRANTING THE WRIT

Lower courts are divided as to how to apply professional baseball's antitrust exemption, and the most recent cases demonstrate that a circuit split now exists between the Ninth and Eleventh Circuits, on the one hand, and the Second and Seventh Circuits, on the other. In the former line of cases, courts have limited the exemption to matters concerning the structural and organizational issues and necessary control and coordination by MLB. The recent decisions by the Second and Seventh Circuits have applied the exemption much more broadly and interpret "professional baseball" to refer broadly to anything related to the game of baseball, when played by MLB teams. In particular, they have interpreted "the business of professional baseball" to mean anything which may promote the profitability of a baseball team, its owners, or MLB. This new and expansive interpretation allows for the application of the exemption well beyond that intended by the *Flood* and *Toolson* decisions, and is contrary to the rule that "antitrust exemptions must be strictly construed." *Crist*, 331 F.2d at 1186-87. Thus, this Court should resolve the conflict and clarify that the exemption should be narrowly construed and does not apply to matters unrelated to the internal structure and organization of MLB.

In the alternative, this Court should abolish the exemption entirely. An antitrust exemption for professional baseball no longer serves any remaining purpose. In *Toolson* and *Flood*, this Court's reason for creating the exemption was that professional baseball

had relied on the exemption in developing its structure and organization and that the Sherman Act should not be applied retroactively to conduct previously allowed. In particular, this referred to the reserve system, the issue in both *Toolson* and *Flood*. The Court's reliance on stare decisis in *Flood*, but not in *Radovich* and other similar cases, follows only if in *Flood* the Court intended to limit its holding to baseball's reserve system. Thus, now that Congress has legislated that the antitrust laws do apply to matters arising out of the employment of major league baseball players, the exemption is moot, and should have no further effect.

Moreover, even if the exemption were intended to apply more broadly than to the reserve system, no reason remains for the continued existence of a baseball antitrust exemption. Any reliance interest is gone. The reserve system no longer exists, baseball has changed greatly since 1953, or even 1972, and the success of other professional sports leagues, such as the NFL, have made it clear that no exemption is necessary for a professional sports league to be able to effectively cooperate with its member teams and create effective league organization and structure. Most significantly, the rule of reason, as it has developed, adequately protects the interests of MLB in maintaining some coordination without the need for an anomalous Court-created exemption from the antitrust laws for one single sporting league. MLB's continued use of the exemption today, as *Right Field Rooftops* demonstrates, is not to preserve the essential coordination

needed to operate a league made up of competitive teams, or any structural development that occurred in reliance on *Federal Baseball*. Instead, it is to allow MLB and the baseball owners to expand the advantage conveyed by the exemption into new areas not part of professional baseball in 1953 or 1972, contrary to the intent by this Court in *Flood* that the exemption be strictly limited to restraints that had developed in reliance on *Federal Baseball* and *Toolson*.

I. This Court Should Resolve the Conflict and Hold that Baseball's Antitrust Exemption Applies Only to Matters Relating to the Structure and Organization of MLB.

Petitioners' claims concern independent businesses in a separate, longstanding Rooftop Market that has existed in some form since the 1930s. MLB has no involvement with the Rooftop Businesses or Market, and neither did the Cubs or their various owners until now. The Rooftop Market is not an intrinsic part of professional baseball. MLB has never issued rules regarding Rooftop Businesses, and there is nothing that would give it the right to do so. Nor did the Cubs or their owners create the Rooftop Businesses. The business model of the Rooftop Businesses does not even depend on the presence of the Cubs, or any MLB team, in Wrigley Field. Although today Wrigley Field is almost inextricably associated with the Cubs, other teams have played there, and if the Cubs had not made Wrigley Field their home, another team surely would have.

Indeed, it has only been a few years since the Cubs were threatening to move. Despite this, the Seventh Circuit held that the attempted monopolization of this separate market was within the meaning of "the business of professional baseball" and thus within the exemption created by this Court.

The Seventh Circuit held that the conduct complained of by Petitioners was within the scope of the baseball exemption because "attempting to set a minimum ticket price [for the Rooftop Businesses], purchasing rooftops, threatening to block [independently-owned] rooftops with signage [in order to put them out of business], and beginning construction at Wrigley Field" was "part and parcel of the business of providing public baseball games for profit." *Right Field Rooftops*, 870 F.3d at 689, App. 12. The court further held that the Rooftop Market itself was part of the "business of professional baseball" because "the most significant portion of the Rooftops' current business is to sell views of Cubs games." *Id.* App. 13. The Seventh Circuit's analysis here would jettison the structural and league-based element of the exemption entirely, and rely on a much broader interpretation of "the business of professional baseball." This new interpretation is inconsistent with *Flood* and *Toolson*. The narrow exemption recognized by the Court makes sense only if it is limited to the protection of baseball's inherent nature and structure. Nothing about Ricketts' attempt to monopolize the Rooftops Market has any connection with those legitimate concerns which, through an accident of timing, gave rise to the narrow baseball exemption.

Flood and *Toolson*, as well as many of the cases relying on them, including *Crist* and *San Jose*, as well as *Postema*, *Milwaukee Braves*, *Henderson Broadcasting*, and *Twin City Sportserve*, discussed the reasons to create an exemption for baseball. It was not because baseball deserved a special status or Congress had chosen to privilege baseball. Instead, baseball was "unique" because professional baseball teams were not just competitors, but also part of a single league which might need to agree upon common rules and coordination in order to exist or effectively compete. *See Flood*, 407 U.S. at 272-73, 275, 282-83; *Milwaukee Braves*, 144 N.W.2d at 10-11. This contradictory nature, making teams both competitors and part of an overarching entity with a common interest, was what constituted "the business of professional baseball." When the Seventh Circuit ignored this and defined the relevant business as "providing public baseball games for profit" without reference to the remainder of the *Toolson* quotation, "*between clubs* of professional baseball players," it removed the most crucial element: that professional baseball inherently required cooperation between competing teams, and thus posed a potential conflict with the Sherman Act's prohibition on restraint of trade in its very structure. *See Toolson*, 346 U.S. at 357 (emphasis added).

Of course, the same could be said of other professional sports leagues, and Congress itself appears to have considered baseball indistinguishable from other sports in most respects. But again, this Court did not choose to treat baseball differently, and extend an

exemption only to baseball because it thought baseball just happened to deserve a more advantageous status. Instead, this Court repeatedly explained that the exemption would be so limited because MLB, unlike other sports, had been the subject of the *Federal Baseball* decision, and developed its very structure – specifically, the reserve system – with an assurance given by the Court that it was not in violation of the law. *See, e.g.*, *Flood*, 407 U.S. at 275 ("a decision of this Court specifically fix[ed] the status of the baseball business and more particularly the validity of the so-called 'reserve clause'"). In *Flood*, *Radovich*, and *Toolson*, this Court further explained that avoiding the retroactive application of the antitrust laws after this prior approval of baseball's structure and organization was its concern, and nothing more. *Flood*, 407 U.S. at 273-75, 282-83; *Radovich*, 352 U.S. at 451 ("*Toolson* was a narrow application of the rule of stare decisis"); *Toolson*, 346 U.S. at 357.

Therefore, by "the business of providing public baseball games for profit between clubs of professional baseball players," the Court was not referring to baseball as a sport, as opposed to football or boxing, but precisely the business and structural aspects of MLB that developed in reliance on *Federal Baseball*. Nothing in this Court's opinions suggests that the intent was to refer generally to everything about MLB or its member teams, or all subsequent business ventures they might become involved in. Nor do they suggest any basis to treat baseball, in this more general sense, differently from football or other sports, as opposed to

merely baseball's specific structure and organization. Certainly nothing in this Court's prior decisions supports a holding that claims could be brought against a professional football owner, but not a professional baseball owner, for attempting to monopolize related markets that had always previously been competitive.

The exemption also has never previously been held to apply merely because claims relate to the viewing of a baseball game in some manner, as the *Right Field Rooftops* decision states. 870 F.3d at 689, App. 13. Even before any Respondent had any involvement, the Rooftop Businesses profited from selling views into Wrigley Field, yet certainly they were not protected by the antitrust exemption for professional baseball. Prior to the first Ricketts' purchase of a Rooftop Business, a conspiracy to fix prices among the various Rooftop Businesses would have been an obvious violation of Section 1 of the Sherman Act, and no logical reason exists why that would have changed merely because some of the Rooftop Businesses are now owned by entities that also own the Cubs. The same logic applies here: if an attempted monopolization of the Rooftop Market by anyone other than Ricketts or the Cubs would be an antitrust violation, that same conduct should not be immune merely because it is the Cubs and their owners who are sued. To hold otherwise creates a direct conflict with *San Jose*'s and *Crist*'s acknowledgement that the exemption does not make MLB or a member team immune from antitrust suit. *San Jose*, 776 F.3d at 690; *Crist*, 331 F.2d at 1183.

Those cases further explained that the exemption does not apply to claims between baseball teams and third parties, such as the *Right Field Rooftops* case. *Id.*

Again, then, the Seventh Circuit's holding in *Right Field Rooftops* represents a broad expansion of the exemption, contrary to the majority interpretation adopted by courts following *Flood* and *Toolson*, and to the rationale underlying those cases. "[A]ttempting to set a minimum ticket price [for the Rooftop Business], purchasing rooftops [to monopolize a separate market], threatening to block rooftops with signage [if they did not sell to the Cubs], and beginning construction at Wrigley Field [for the purpose of blocking non-selling rooftops]," have nothing to do with the relationship between MLB and the Cubs or anything implicitly approved by *Flood* or *Toolson* or *Federal Baseball*.

This expansive interpretation of the exemption adopted by the Seventh Circuit, further conflicts with this Court's holdings that immunity from the antitrust laws will not be lightly implied and must be strictly construed. *See, e.g.*, *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979); *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 348-54 (1963); *see also Crist*, 331 F.3d at 1186-87; *Radovich*, 352 U.S. at 451 ("*Toolson* was a narrow application of the rule of stare decisis"). Yet, the *Right Field Rooftops* case has already been cited by the District Court for the Southern District of New York in support of the *Wyckoff* decision, 211 F. Supp. 3d at 625, and unchecked risks a broad expansion of this judicially-created exception to

federal and state law antitrust claims which from its exemption was an "anomaly" and "aberration" created only as an accident of timing and to avoid retroactive liability.

This new, broad understanding of "the business of professional baseball" would permit MLB or individual baseball owners to claim immunity for every commercial enterprise they own or enter into. Baseball's antitrust exemption, which originally existed only to protect conduct that MLB had already taken by 1953 in reliance on *Federal Baseball*, should continue to be narrowly applied, if at all. If this Court does not step in, and the Seventh Circuit approach is permitted and adopted by other courts, such as the Second Circuit and others, it threatens instead to become a basis for MLB's monopoly power to grow and for baseball owners to use their exemption from the antitrust law as a sword in order to expand into and monopolize markets that were not part of professional baseball when this Court last ruled, in 1972.

II. Baseball's Antitrust Exemption Should Be Abolished Because It No Longer Serves Any Legitimate Purpose.

An alternative to resolving the conflict between the circuits as to the scope of the exemption is abolishing it entirely. Subsequent Court holdings have made clear that Congressional acquiescence should not be implied from inaction, especially in antitrust cases, and Congress disclaimed any acquiescence or intent in

the Curt Flood Act. Even more significantly, antitrust law has developed so that the underlying reasons for the exemption no longer exist, and the specific concerns about retroactive liability that led this Court to create the exemption have long been resolved. For all of these reasons, baseball's antitrust exemption no longer serves any purpose but to give baseball a special status never intended by Congress and which is ripe for abuse.

First, by specifically eliminating the reserve system from the exemption, Congress removed the underlying reason for it. Whatever the scope of the exemption, it was created and upheld unquestionably to protect the reserve system and MLB from retroactive liability based on that system. *See, e.g.*, *Toolson*, 346 U.S. 357 ("[t]he present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable"); *Radovich*, 352 U.S. at 452 ("no other business claiming the coverage of those cases has had such an adjudication"). The Court sought to defer to new Congressional legislation, because that would not pose the same retroactivity problem. *See Flood*, 407 U.S. 283 ("The Court has expressed concern about the confusion and the retroactivity problems that inevitably would result with a judicial overturning of *Federal Baseball*. It has voiced a preference that if any change is to be made, it come by legislative action that, by its nature is only prospective in operation."); *Radovich*, 352 U.S. at 452 ("The whole scope of congressional action would be known long in advance and effective dates for the legislation could be set in

the future without the injustice of retroactivity and surprise which might follow court action."). In deciding to extend the exemption to state antitrust laws, the Court similarly noted the need to preempt state law with respect to *the reserve system*. *Id.* at 284. Those concerns have now been resolved.

As explained in *Piazza*, 831 F. Supp. at 438-39, the Court even applied a form of stare decisis that is highly unusual in the American system: result stare decisis. Typically, stare decisis applies to the rule established by a decision, not merely the result. Thus, under the doctrine of stare decisis, *Federal Baseball* normally would have applied to the NFL and not merely MLB, unless some relevant distinction between the two could be established. But following *Federal Baseball*, the Court held that only the result would apply, calling it an "aberration" and limiting stare decisis to professional baseball. *Flood*, 407 U.S. at 282-83. Because the Court's concern was so narrowly focused on the reserve system and retroactive liability, the basis for this "aberration" ceased to exist when the Curt Flood Act became law in 1998. No reliance interest or concern about retroactivity is left.

Second, even apart from the underlying reason for the exemption, the law giving rise to its theoretical justification has changed. Both *Flood* and *Toolson* relied heavily on Congress's acquiescence in the exemption. *Toolson*'s reliance was inconsistent with *Federal Baseball*'s holding that Congress did not have authority to regulate, because professional baseball was not in

interstate commerce. But in any event the reliance on Congressional acquiescence is contrary to the subsequent development of the law. As explained in *Cent. Bank, N.A. v. First Interest Bank, N.A.*, 511 U.S. 164, 186 (1994), that Congress fails to legislate following a court decision cannot be relied on to mean that Congress acquiesces in that decision. Many reasons may exist for the inaction. *Id.* at 187. *Accord Alexander v. Sandoval*, 532 U.S. 275, 292 (2001). While this Court has held that reliance on congressional acquiescence may sometimes be appropriate when there is evidence that Congress considered and rejected the "precise issue" before the Court, absent such overwhelming evidence the Court should not "replace the plain text and original understanding of a statute." *Rapanos v. United States*, 547 U.S. 715, 750 (2006). Thus, reliance on Congressional inaction over the plain text of the Sherman Act, which clearly contains no exemption for professional baseball, no longer supports the continued existence of a baseball exemption.

In 1998, Congress itself made clear that it was not acquiescing. With respect to the actual subject of *Toolson* and *Flood*, the reserve system, Congress determined that the antitrust laws did apply. 15 U.S.C § 26b(a). With respect to any other matters to which the exemption may apply – and Congress made clear that it did not know if there would be any – Congress left the question to the Court, and took no position. 15 U.S.C. § 26b(b). If some rationale remains for professional baseball's antitrust exemption, it is not Congressional intent.

Subsequent cases also have undercut *Toolson*'s and *Flood*'s reliance on stare decisis, by holding that stare decisis has less force with respect to antitrust cases, because "there is a competing interest . . . in recognizing and adapting to changed circumstances and the lessons of accumulated experience." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). That rule applies strongly here, as the interpretation of the Sherman Act has changed so as to no longer pose the specific threat that the Court was concerned about at the time those earlier decisions were decided. When *Flood* was decided, all horizontal restraints, including agreements between the various professional baseball teams that made up MLB, were considered per se violations of the Sherman Act and that required that they be declared illegal on their face, without consideration of possible pro-competitive effects of the restraints at issue. *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 606-10 (1972). This Court, and other courts, reasonably expressed concern that in applying the Sherman Act to professional baseball, they would not be able to consider the pro-competitive effect of those rules. For example, in *Milwaukee Braves*, 144 N.W.2d at 8, the court opined that absent the exemption, the very structure and organization of MLB would be in violation of the antitrust laws. *Id.* at 8.

Exempting MLB from the antitrust laws is no longer necessary to protect its structure or allow it to operate effectively. Not only has the reserve system, the essential element of its structure that was at issue in *Toolson* and *Flood*, ceased to exist with respect to

major league players, but the success of other professional sports leagues without the exemption demonstrates that there is no inherent conflict between the need of professional baseball teams to operate both as competitors and as parts of one coherent league. In large part, this is due to the development of antitrust law in connection with questions considered regarding these other leagues and, in particular, the development of case law establishing that the rule of reason, and not per se liability, will apply to claims brought in such a context. *See, e.g.*, *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 100-01 (1984) (holding that rule of reason and not per se analysis would apply to NCAA because "this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all"). With a rule of reason analysis available for the types of horizontal restraints at issue in *Flood*, *Toolson*, and other cases dealing with MLB's structure and the relationship between the member teams, the specific reasons for the exemption vanish – the need to balance baseball's organizational and structural requirements with the fact the teams are independent competitors could be dealt with precisely as they have been with other professional and amateur sports. *See, e.g., Sullivan v. NFL*, 34 F.3d 1091, 1097 (1st Cir. 1994); *U.S. Football League v. Nat'l Football League*, 842 F.3d 1335, 1372 (2d Cir. 1988). Nothing today justifies treating MLB as a special case.

Indeed, the ability of courts to apply the Sherman Act and yet still balance the concerns about the league's ability to survive and compete and competition between

the member teams illustrates precisely why continuing to uphold *Federal Baseball* and its progeny based on stare decisis is no longer warranted. That antitrust law is expected to develop, as it did here, in response to the courts addressing new questions or incorporating a growing understanding of certain kinds of restraints mandates against a strict enforcement of stare decisis in antitrust cases. As this Court explained in *State Oil*, "the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress 'expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.'" 522 U.S. at 20-21, *quoting Nat'l Soc. of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978). *Accord Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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