No. ____

IN THE
Supreme Court of the United States

JORDAN WYCKOFF AND DARWIN COX, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

OFFICE OF THE COMMISSIONER OF BASEBALL, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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January 29, 2018

QUESTION PRESENTED

In a Sherman Act challenge to Major League Baseball's "reserve system"—giving a team exclusive, career-long rights to a player—this Court held that the business of baseball is not engaged in interstate commerce and thus not subject to antitrust laws. *Federal Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Players*, 259 U.S. 200 (1922). Fifty years later, the Court rejected that rationale, holding that "[p]rofessional baseball … is engaged in interstate commerce"; the Court nevertheless preserved baseball's "reserve system … exemption from the federal antitrust laws" on *stare decisis* grounds. *Flood v. Kuhn*, 407 U.S. 258, 282 (1972). Twenty-five years later, Congress abolished the reserve system's antitrust exemption with enactment of the Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat. 2824 (Oct. 27, 1998) (codified at 15 U.S.C. § 26b). Since *Federal Baseball*, this Court has never examined the scope of the exemption.

Despite this Court's repudiation of the interstate commerce rationale for the "exemption" and Congress's abolition of the very facet of the business of baseball—the reserve system—that led to its creation and perpetuation, lower courts continue to construe the exemption broadly. And they do so in spite of this Court's precedents requiring antitrust exemptions to be construed narrowly. In this case, the Second Circuit broadly interpreted the exemption to immunize respondents from a Sherman Act challenge to their anti-poaching employment practices of talent scouts. The question presented is:

Whether the antitrust "exemption" this Court recognized for baseball's reserve system extends to Major League Baseball's employment practices for non-players like baseball scouts?

PARTIES TO THE PROCEEDINGS

Petitioners Jordan Wyckoff and Darwin Cox were plaintiffs/appellees in proceedings below.

The following respondents were defendants/appellees in proceedings below:

Office of the Commissioner of Baseball;

Allan H. Selig;

Robert D. Manfred, Jr.;

Kansas City Royals Baseball Corp;

Miami Marlins, L.P.;

San Francisco Baseball Associates L.L.C.;

Boston Red Sox Baseball Club L.P.;

Angels Baseball L.P.;

Chicago White Sox Ltd.;

St. Louis Cardinals, L.L.C.;

Colorado Rockies Baseball Club, Ltd.;

The Baseball Club of Seattle, L.L.P.;

The Cincinnati Reds, L.L.C.;

Houston Baseball Partners L.L.C.;

Athletics Investment Group, L.L.C.;

Rogers Blue Jays Baseball Partnership;

Cleveland Indians Baseball Co., L.P.;

Cleveland Indians Baseball Co., Inc.;

Padres L.P.;

San Diego Padres Baseball Club, L.P.;

Minnesota Twins, L.L.C.;

Washington Nationals Baseball Club, L.L.C.;

Detroit Tigers, Inc.;

Los Angeles Dodgers L.L.C.;
Los Angeles Dodgers Holding Company L.L.C.;
Sterling Mets L.P.;
Atlanta National League Baseball Club, Inc.;
AZPB L.P.;
Baltimore Orioles, Inc.;
Baltimore Orioles Limited Partnership;
The Phillies;
Pittsburgh Associates, L.P.;
Tampa Bay Rays Baseball Ltd.;
Rangers Baseball Express, L.L.C.;
Rangers Baseball, L.L.C.;
Chicago Cubs Baseball Club, L.L.C.;
Milwaukee Brewers Baseball Club, Inc.;
Milwaukee Brewers Baseball Club, L.P.; and
The New York Yankees Partnership.

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INTRODUCTION

In an opinion written by Justice Holmes, this Court held in 1922 that "exhibitions of base ball … are purely state affairs" not subject to the Sherman Act. *Federal Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Players*, 259 U.S. 200, 208 (1922). Many have viewed *Federal Baseball* as "not one of Mr. Justice Holmes' happiest days,"[1] and the opinion "has been pilloried pretty consistently in the legal literature since at least the 1940s."[2] But 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." *See Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *Flood v. Kuhn*, 407 U.S. 258 (1972). That now-defunct system gave a team transferable, career-long, exclusive rights to any player who signed with the team.

Fifty years later, this Court repudiated *Federal Baseball*'s rationale, holding that professional baseball is engaged in interstate commerce. *Flood*, 407 U.S. at 282. The Court nevertheless affirmed what it called an antitrust "exemption" for baseball's reserve system on *stare decisis* grounds. *Id.* Twenty-six years after that, Congress abolished the exemption with respect to the reserve system.[3] Nevertheless, many lower courts have applied the exemption broadly to every facet of the business of baseball, even though this Court's precedents require antitrust exemptions to be construed narrowly.

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[1] *Salerno v. Am. League of Prof'l Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir. 1970) (Friendly, J.).

[2] Samuel A. Alito, Jr., *The Origin of the Baseball Antitrust Exemption*, 34 J. SUP. CT. HIST. 183, 192 (2009) (available at http://sabr.org/research/alito-origin-baseball-antitrust-exemption).

[3] Pet. App. at 43a (Curt Flood Act of 1998, Pub. L. 105-297, 112 Stat 2824 (October 27, 1998) (codified at 15 U.S.C. § 26b)).

Few any longer defend baseball's antitrust exemption on the merits. Yet lower courts say that any narrowing of the exemption lies exclusively within the province of either this Court or Congress. In turn, this Court said in *Toolson* and *Flood* that the fate of the exemption lies not with the courts but with Congress. And in 1998 when Congress abolished the centerpiece of the exemption—the reserve system—it left whatever may remain of the exemption for the courts to sort out. The stalemate is not the result of a lack of consensus about the right course forward. The question is simply *who* will undo, or at least cabin, the exemption: the judiciary or Congress?

As the Court has recognized, "Congress intended § 1 [of the Sherman Act] to give courts the ability to develop governing principles of law in the common-law tradition." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 905 (2007) (internal citations omitted). *Stare decisis* is thus "not as significant" when the issue involves "the scope of the Sherman Act" because it is "a common-law statute." *Id.* at 899. Congress expects "courts to give shape" to the Act. *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Like the case overruled in *Khan*, *Federal Baseball* "has been widely criticized since its inception," and with "the views underlying it hav[ing] been eroded by this Court's precedent, there is not much of that decision to salvage." *Id.* at 21. Which is precisely why the decision should not be extended into areas previously never considered by the courts.

While lower courts perhaps should have "given shape" to the baseball exemption in the common-law tradition, most have not, and there is no reason to expect they will at this late date. Like the Second Circuit below, most lower courts believe they are bound to honor baseball's antitrust exemption in virtually any context Major League Baseball (MLB) asserts it. Circuit courts and Congress have looked to this Court for

guidance, not surprisingly given that this Court created and then twice reaffirmed the exemption.

Not only is this Court best suited to address the scope of the baseball exemption, this case, because of its distinctive fact pattern, is an excellent vehicle for that review. It presents a simple question: does the exemption extend broadly to the entire business of baseball, including the market for scouts, lower-level employees who perform their jobs far from major league stadiums? Or is it more limited? It also presents the Court with an opportunity to consider whether *Federal Baseball*, *Toolson* and *Flood* should finally be overruled.

This Court itself has long been critical of *Federal Baseball*, having described it as "a ruling which at best was of dubious validity." *Radovich v. Nat'l Football League*, 352 U.S. 445, 450 (1957). Two Members of the Court dubbed it a "derelict in the stream of law." *Flood*, 407 U.S. at 286 (Douglas, J., dissenting, joined by Brennan, J.). Judge Frank called it an "impotent zombi." *Gardella v. Chandler*, 172 F.2d 402, 409 (2d Cir. 1949). But it may be that *Federal Baseball* was "scorned principally for things that were not in the opinion, but later added by *Toolson* and *Flood*."[4]

As Justice Holmes eloquently put it twenty-five years before he authored *Federal Baseball*:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Oliver Wendell Holmes, Jr., *The Path of the Law,* 10 HARV. L. REV. 457, 469 (1897). Those words describe *Federal Baseball* (or at least the *Toolson* and *Flood* interpretations of it) presciently. The grounds

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[4] Alito, *supra*, note 2, at 193.

for baseball's exemption have long vanished, and the Court should grant review.

OPINIONS BELOW

The summary order of the court of appeals (Pet. App. 1a) is available at 705 F. App'x 26. The opinion of the district court (Pet. App. 7a) is available at 211 F. Supp. 3d 615.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals entered its judgment on August 31, 2017, and Justice Ginsburg granted a timely motion to extend the time for filing this petition to January 29, 2018.

STATUTORY PROVISIONS INVOLVED

The Sherman Antitrust Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. …

The Curt Flood Act of 1998, 15 U.S.C. § 26b, is reproduced at Pet. App. 43a.

STATEMENT

A. Baseball's Horizontal Agreement to Suppress Competition for Scouting Services

Petitioners are two former Major League Baseball scouts. Jordan Wyckoff worked as a scout for the Kansas City Royals, and Darwin Cox worked for the Colorado Rockies. Respondents are the Office of the Commissioner of Baseball, MLB's thirty team franchises, and its former and current commissioners. Respondents operate under uniform rules that give MLB the power to implement and enforce collusive agreements.

Like other scouts, petitioners Wyckoff and Cox evaluated players' skills while attending high school, college, and minor league games. After scouts evaluate players, front office personnel decide which players to pursue. Scouts are not involved in staging professional baseball games and do not perform any in-game activities. Their work is often performed hundreds, and sometimes even thousands, of miles away from major league stadiums.

Petitioners allege that respondents have suppressed the wages of scouts through a three-part horizontal conspiracy: (1) an agreement between teams not to recruit, poach, or cold-call scouts already employed by another team; (2) an agreement forbidding an already-employed scout from discussing employment opportunities with another team without first receiving permission from his employer; and (3) an agreement to offset compensation paid to scouts fired by one team but then hired by another team. In a competitive labor market, each team would compete for scouts and lateral hiring would occur unimpeded, as with employees in any other industry. Instead, a scout is usually stuck in his job until his team decides to get rid of him. This stifling of competition has led to suppressed wages.

B. Baseball's Antitrust "Exemption"

In a challenge to "restrictions by contract that prevented the plaintiff from getting players to break their bargains" with their teams—the reserve system—this Court held in 1922 that "exhibitions of base ball … are purely state affairs," and thus that the business of baseball is not engaged in interstate commerce and not subject to the Sherman Act. *Federal Baseball*, 259 U.S. at 208-09.

The years that followed saw a seismic shift in the Court's interstate commerce jurisprudence. By 1949, the Second Circuit reversed the dismissal of an antitrust case against the Commissioner of Baseball and the major leagues. Judges Learned Hand and Jerome

Frank concluded that professional baseball *is* "engaged in interstate commerce." *Gardella*, 172 F.2d at 408. Judge Frank wrote, "No one can treat as frivolous the argument that the Supreme Court's recent decisions have completely destroyed the vitality of *Federal Baseball* …, and have left that case but an impotent zombi." *Id*. at 408-09. *Federal Baseball* was not an obstacle because there was "no longer occasion for applying" it beyond its "exact facts." *Id*. at 409.

Less than five years later, however, in a renewed challenge to baseball's reserve system, this Court in a one-paragraph, per curiam opinion reaffirmed *Federal Baseball* "so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." *Toolson* 346 U.S. at 357. But as Justices Burton and Reed pointed out in dissent, "Congress … 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." *Id*. at 364.

The Court's third and most recent consideration of what had by then become known as "baseball's exemption" came in yet another challenge to the reserve system. In *Flood*, the Court repudiated *Federal Baseball*'s central tenet, explicitly holding that "[p]rofessional baseball is a business and it is engaged in interstate commerce." 407 U.S. at 282. The Court nevertheless "adhere[d] once again to *Federal Baseball* and *Toolson* and to their application to professional baseball." *Id*. at 284. The Court also explicitly recognized the rule as an "exemption" for the first time: "With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball." *Id*. at 282. The Court's reason for adhering

to its precedents was that "the aberration is an established one … that has been with us now for half a century." *Id*. "We continue to be loath … to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long …." *Id*. at 283-84.

Justices Douglas and Brennan dissented. "*Federal Baseball* … is a derelict in the stream of the law that we, its creator, should remove. Only a romantic view of a rather dismal business account over the last 50 years would keep that derelict in midstream." *Id*. at 286 (Douglas, J., dissenting). Since *Flood*, the Court's baseball jurisprudence has continued to be the subject of considerable scholarly criticism.[5]

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[5] *See, e.g.*, STUART BANNER, THE BASEBALL TRUST: A HISTORY OF BASEBALL'S ANTITRUST EXEMPTION xi (2013) ("Scarcely anyone believes that baseball's exemption makes any sense"); WILLIAM N. ESKRIDGE, JR., ET AL., LEGISLATION AND STATUTORY INTERPRETATION 287 (2d ed. 2006) ("All but the most devoted baseball fans have trouble swallowing Justice Blackmun's *Flood* opinion"); ROGER I. ABRAMS, LEGAL BASES: BASEBALL AND THE LAW 66-67 (1998) (calling *Flood* an "embarrassment" that relies on "sentimentalism and awkward judicial formalism"); Stephen F. Ross & Michal James, Jr., *A Strategic Legal Challenge to the Unforeseen Anticompetitive and Racially Discriminatory Effects of Baseball's North American Draft*, 115 COLUM. L. REV. SIDEBAR 127, 146-48 (2015) ("The case for overruling *Flood* is strong"); Mitchell Nathanson, *The Irrelevance of Baseball's Antitrust Exemption: A Historical Review*, 58 RUTGERS L. REV. 1 (2005) (deeming the exemption "hopelessly murky"); Morgen A. Sullivan, *"A Derelict in the Stream of the Law": Overruling Baseball's Antitrust Exemption*, 48 DUKE L.J. 1265, 1293 (1999) (calling for end to exemption); Roger I. Abrams, *Before the Flood: The History of Baseball's Antitrust Exemption*, 9 MARQ. SPORTS L.J. 307, 310 (1999) (calling *Flood* "a judicial embarrassment"); Stephen F. Ross, *Reconsidering Flood v. Kuhn*, 12 U. MIAMI ENT. & SPORTS L. REV. 169, 179-80 (1995); Connie Mack & Richard M. Blau, *The Need for Fair Play: Repealing the Federal Baseball Antitrust Exemption*, 45 FLA. L. REV. 201, 214 (1993); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J.

Twenty-six years later, Congress enacted the Curt Flood Act of 1998, abolishing the exemption of the reserve system. Pet. App. at 43a (Pub. L. 105-297, 112 Stat 2824 (October 27, 1998) (codified at 15 U.S.C. § 26b (1998))). The Act made MLB's employment of "major league baseball players … subject to the antitrust laws to the same extent … engaged in by persons in any other professional sports business affecting interstate commerce." 15 U.S.C. § 26b(a). As discussed later (*see infra* at 10-11), however, Congress did not intend the Flood Act to be interpreted as an indication of its views about the continued vitality or extent of the baseball exemption. The Act thus instructs courts not to "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)." *Id*. § 26b(b).

C. Proceedings Below

Respondents moved to dismiss the lawsuit, contending that baseball's antitrust exemption bars petitioners' claims. Agreeing that all of baseball's business dealings are exempt from the Sherman Act, the district court dismissed the case. For the same reason, the Second Circuit affirmed.

1361, 1381, 1406-07 (1988) (deeming *Flood*'s approach "almost comical" and "insanity" and calling for the "cancellation of the exemption by the Court that blunderingly created it").

REASONS FOR GRANTING THE PETITION

I. Lower Courts and Congress Have Left Clarification of the Baseball Exemption to This Court.

What makes the issue presented worthy of this Court's attention is not so much the split among lower courts on the scope of the exemption, but rather a united chorus of lower courts deploring the exemption in one breath but then applying it expansively in the next. The court below, for example, noted the "heavy criticism" of the rule, but concluded it was "bound by [this Court's] precedent" to apply the exemption broadly to bar the scouts' claims in this case. Pet. App. at 4a-5a. The Ninth Circuit recently called the exemption "one of federal law's most enduring anomalies," but ultimately concluded it was bound to apply it to a franchise relocation issue. *City of San Jose v. Office of the Comm'r of Baseball*, 776 F.3d 686, 687 (9th Cir. 2015). After observing that "[t]he exemption was founded upon a dubious premise, and it has been upheld in subsequent cases because of an equally dubious premise," the Eleventh Circuit nevertheless held that "[i]t is up to the Supreme Court or Congress to overrule *Flood* outright, or perhaps devise a more cabined exemption." *Major League Baseball v. Crist*, 331 F.3d 1177, 1188-89 (11th Cir. 2003).

Even though "[t]he scope of this exemption … has been the subject of extensive litigation over the years," "the vast majority of lower courts have held that the exemption created by the U.S. Supreme Court extends more broadly to the 'business of baseball.'" *Id.* at 1179, 1181 n.10; *cf. Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 541 (7th Cir. 1978) ("the Supreme Court intended to exempt the business of baseball, not any particular facet of that business").

But as the Florida Supreme Court noted in a case involving the Florida attorney general's antitrust investigation of the National League's activities, "none

of the other cases have engaged in ... a comprehensive analysis of *Flood* and its implications." *Butterworth v. Nat'l League of Prof'l Baseball Clubs*, 644 So.2d 1021, 1025 (Fla. 1994). "In fact, many of the cases simply state that baseball is exempt and cite to one or more of the baseball trilogy without any discussion at all." *Id.* The court construed the exemption narrowly and permitted the attorney general's investigation to go forward. Ironically, it was in MLB'S subsequent federal court challenge to the probe that the Eleventh Circuit relied on the exemption to shut down the investigation, while purporting not to construe the exemption broadly. *Crist*, 331 F.3d at 1186.

At this late date, it is beyond doubt that any clarification or narrowing of baseball's antitrust exemption will only come from this Court. While lower courts have not been reticent in their criticisms of the baseball exemption, most have treated even limiting constructions of it as the prerogative of this Court alone.

Not only is clarification of the exemption very unlikely to come from further percolation of the issue in the lower courts, it is even less likely to come from Congress. It took that body seventy-six years (and twenty-five after *Flood*) just to abolish the judicially-created antitrust exemption of baseball's reserve system. Even then, it was not an act of legislative courage; it passed the Curt Flood Act at the joint request of MLB and the Players' Association. And Congress made clear it was leaving consideration of all other aspects of the exemption for the courts to decide.

As noted earlier, the purpose of the Flood Act was limited to ensuring "that major league baseball players are covered under the antitrust laws." Pub. L. No. 105-297, § 2, 112 Stat. 2824 (Oct. 27, 1998). "As the bill expressly provides, it is not intended to affect the applicability or inapplicability of the antitrust laws in any other manner or context." S. REP. 105-118, at 2 (1997). Senator Hatch (the bill's sponsor) explained:

> [The Act] is absolutely neutral with respect to the state of the antitrust laws between all entities and in all circumstances other than in the area of employment as between major league owners and players. Whatever the law was the day before this bill passes in those other areas it will continue to be after the bill passes. Let me emphasize that the bill affects no pending or decided cases except to the extent a court would consider exempting major league clubs from the antitrust laws in their dealings with major league players.

144 CONG. REC. S9496 (July 30, 1998). He added that in antitrust cases involving subjects the Act explicitly did not disturb (*see* 15 U.S.C. § 26b(b)), courts should not "use the enactment of this Act to glean congressional intent as to the validity or lack thereof of such actions." *Id.* at S9497.

Senator Hatch specifically confirmed the Act was "intended to have no effect"[6] on three cases in particular: *Butterworth*, *Piazza v. Major League Baseball*, 831 F. Supp. 420 (E.D. Pa. 1993); and *Minnesota Twins Partnership v. Minnesota*, No. 62-CX-98-568, 1998 WL 35261131 (Minn. Dist. Ct. April 20, 1998). Senator Leahy agreed, pointing out that "[t]he bill has no impact on the recent decisions in federal and state courts in Florida, Pennsylvania and Minnesota concerning baseball's status under the antitrust laws." 144 CONG. REC. S9621 (July 31, 1998).

Those three cases were notable for being among the few that have held the baseball exemption has limits.[7]

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[6] 144 CONG. REC. S9621 (July 31, 1998).

[7] The *Minnesota Twins* case involved a challenge to the Minnesota attorney general's antitrust investigation of a potential relocation of the Twins to North Carolina. Although the state trial court had permitted the investigation to go forward, the Minnesota Supreme Court later reversed. *Minnesota Twins P'ship v. Minn. ex rel. Hatch*, 592 N.W.2d 847, 849 (Minn. 1999).

Piazza involved MLB's blocking of the San Francisco Giants' move to Tampa Bay. In a detailed analysis, the court noted that *Federal Baseball*, *Toolson*, and *Flood* all concerned challenges to baseball's reserve system. 831 F. Supp. at 435-36. It concluded that the Court's repeated references in *Flood* to the reserve system signaled that the exemption "is limited to the reserve clause." *Id.* at 436. The court also held that this Court's explicit holding that baseball *is* engaged in interstate commerce "stripped from *Federal Baseball* and *Toolson* any precedential value those cases may have had beyond the particular facts there involved, *i.e.,* the reserve clause." *Id.* In *Butterworth* (discussed above), the Florida supreme court agreed with and adopted *Piazza*'s analysis. *See also Morsani v. Major League Baseball*, 663 So. 2d 653, 657 (Fla. Dist. Ct. App. 1995) (baseball exemption limited to reserve system).

Only a few other courts have attempted to impose limits on the exemption. As noted earlier, Judges Learned Hand and Jerome Frank concluded in 1949 that professional baseball teams *are* "engaged in interstate commerce." *Gardella*, 172 F.2d at 408. Judge Frank was of the opinion that there was "no longer occasion for applying" *Federal Baseball* beyond its "exact facts." *Id.* at 409. *Gardella* later settled and has had no influence since.

It was over thirty years before another court rejected an expansive view of the exemption. *Henderson Broadcasting Corp. v. Houston Sports Ass'n, Inc.*, 541 F. Supp. 263 (S.D. Tex. 1982). *Henderson* involved an antitrust challenge to a grant of exclusive radio broadcast rights for Houston Astros games. Ruling on a motion to dismiss, the court held that radio broadcasting was not part of the unique needs of the industry, so it was outside the exemption. *Id.* at 268-69. The court determined that it "should leave the aberration as it finds it, on the narrow ground of stare decisis." *Id.* at 269.

The Southern District of New York has taken a similar approach. *Postema v. National League of Professional Baseball Clubs*, 799 F. Supp. 1475 (S.D.N.Y. 1992),[8] involved a minor league umpire's claim that MLB franchises had conspired to deny her a promotion. *Id.* at 1478-80. The court noted that *Federal Baseball*, *Toolson*, and *Flood* all "considered the baseball exemption in very limited contexts," so they provide "little guidance" on the scope of the exemption, and the court went on to hold the exemption "does not provide baseball with blanket immunity." *Id.* at 1488-89. "Unlike the league structure or the reserve system, baseball's relations with non-players are not a unique characteristic or need of the game. Anti-competitive conduct toward umpires is not an essential part of baseball and in no way enhances its vitality or viability." *Id.* at 1489.

That court followed the same approach in an antitrust challenge to baseball's (and hockey's) broadcasting restrictions. *Laumann v. Nat'l Hockey League*, 56 F. Supp. 3d 280 (S.D.N.Y. 2014). Following *Henderson* and *Postema*, the court held that MLB's broadcasting restraints fell outside the antitrust exemption. Agreeing that *Toolson* had limited its holding to the facts of *Federal Baseball*, the court thought it would "be strange to read *Toolson* to expand *Federal Baseball*'s holding to territorial broadcasting restrictions *sub silentio*." *Id.* at 295. The court also agreed that *Flood*'s repeated references to the reserve system permitted a narrower view of baseball's exemption. *Id.* at 295-96. Given that exemptions should be construed narrowly, the court "decline[d] to apply the exemption

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[8] A separate part of the *Postema* ruling, concerning the availability of a jury trial and damages under the Civil Rights Act of 1991, was reversed in an interlocutory appeal. *Postema v. Nat'l League of Prof'l Baseball Clubs*, 998 F.2d 60 (2d Cir. 1993). The court of appeals did not address the district court's antitrust exemption ruling.

to a subject that is not central to the business of baseball." *Id.* at 297.

II. The Decision Below Conflicts with This Court's Precedents Requiring Antitrust Exemptions to Be Narrowly Construed.

The Second Circuit's "refus[al] … to adopt a narrower reading of baseball's antitrust exemption," conflicts with well-established precedents of this Court. Pet. App. at 5a. Even at the time the Court decided *Flood*, it was settled that "[i]mplied antitrust immunities … are disfavored, and any exemptions from the antitrust laws are to be strictly construed." *S. Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 67-68 (1985). "These 'canon[s] of construction ... reflec[t] the felt indispensable role of antitrust policy in the maintenance of a free economy.'" *Id*. (quoting *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 348 (1963)); *see also Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979) ("It is well settled that exemptions from the antitrust laws are to be narrowly construed") (citing *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973) ("exemptions from antitrust laws are strictly construed")).

This rule may explain why the Court in *Flood* repeatedly described the exemption narrowly in terms of baseball's reserve system. 407 U.S. at 259, 274, 281-83 ("the Court is asked specifically to rule that professional baseball's reserve system is within the reach of the federal antitrust laws"; "the reserve system was not subject to existing federal antitrust laws"; "the reserve system's exemption"; "reserve system enjoying exemption from the federal antitrust laws"; "Congress as yet has had no intention to subject baseball's reserve system to the reach of the antitrust statutes").

A rule of strict construction is not the sole reason for a narrow view of baseball's exemption. In addition, this Court has itself long recognized the baseball exemption is "of dubious validity," *Radovich*, 352 U.S. at

450, and in *Flood*, an "anomaly" and "aberration." Given that history, coupled with *Flood*'s overruling of the interstate commerce underpinning of the exemption; given the congressional abolition of the exemption with respect to the very feature of the business (the reserve system) that produced the exemption in the first place; and given the imperative to construe antitrust exemptions narrowly, there is no justification for the Second Circuit's *extension* of the exemption to cover the scouting market, an aspect of the business never before addressed in any case (and that did not even exist when the exemption was first recognized). The enlargement of an exemption with such "wobbly, moth-eaten foundations"[9] is thus all the more irreconcilable with this Court's precedents requiring strict construction of antitrust exemptions.

III. The Scope of Baseball's Exemption Is an Important Question.

One reason the Court should grant review is to eliminate one way or the other the litigation-spawning uncertainty that has existed for decades, particularly since *Flood*. MLB has incrementally sought to expand the scope of its exemption far beyond any aspect of the "business of baseball" this Court ever considered. In the past few years alone, MLB and its owners have asserted the exemption as a justification for anti-competitive restraints in television broadcasting,[10] franchise relocation,[11] minor league players' wages,[12] and in suppressing compensation for scouts. Even if it is correct that this "Court intended to exempt the busi-

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[9] *See Khan*, 522 U.S. at 20.

[10] *Laumann*, 56 F. Supp. 3d at 295.

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

[12] *Miranda v. Selig*, 860 F.3d 1237 (9th Cir. 2017).

ness of baseball, not any particular facet of that business, from the federal antitrust laws,"[13] this Court's unequivocal adoption of that view would go a long way toward ending continual disputes over the scope of baseball's antitrust immunity. In the first half of this Term alone, this petition is only one of three seeking the Court's review of the exemption.[14]

Conversely, "save for the club owners who benefit from the rule," any cabining of or "[t]he death of the business-of-baseball exemption would likely be met with considerable fanfare." *Crist*, 331 F.3d at 1188. Skirmishes over the exemption's scope would come to an end completely if the *Federal Baseball*/*Toolson*/*Flood* trilogy were overruled or simply confined to their facts. Regardless of its ultimate resolution, the scope of the exemption is an issue of longstanding importance warranting this Court's review.

IV. The Court Should Grant This Petition and the *Right Field Rooftops* Petition Because Both Cases Present Distinctive Fact Patterns Under the Exemption.

The Second Circuit's decision below and the Seventh Circuit's decision in *Right Field Rooftops, LLC v. Chicago Cubs Baseball Club, LLC*, 870 F.3d 682 (7th Cir. 2017), should be reviewed together. Both cases present distinctive contexts for a long-overdue examination of the scope of baseball's antitrust exemption. Both are particularly good vehicles because they present fact patterns unlike those of any previous cases. This case involves low-level employees who perform their work far away from "exhibitions" of professional

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[13] *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 541 (7th Cir. 1978).

[14] *Miranda v. Selig*, No. 17-453, *cert. denied* 138 S. Ct. 507 (2017) (petition for rehearing pending); *Right Field Rooftops, LLC v. Chicago Cubs Baseball Club, LLC*, No. __ (petition filed Jan. 26, 2018).

baseball. *Right Field Rooftops*, on the other hand, involves the Sherman Act claims of owners of rooftop venues outside Wrigley Field who have challenged the Cubs' business practices as anticompetitive and monopolistic. *See* No. __ (petition filed Jan. 26, 2018).

To ensure similar treatment of similar cases, if the Court grants review in one but not both cases, it should hold the other petition pending a merits decision because a GVR may be appropriate. *Lawrence ex rel. Lawrence v. Chater,* 516 U.S. 163, 166 (1996) (per curiam) ("We have GVR'd in light of a wide range of developments, including our own decisions"); *see, e.g.*, *Sanders v. Jones*, No. 17-263, 2018 WL 311292 (U.S. Jan. 8, 2018); *Simmons Sporting Goods, Inc. v. Lawson*, 138 S. Ct. 237 (2017); *Lacaze v. Louisiana*, 138 S. Ct. 60 (2017).

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, if the Court grants review only in *Right Field Rooftops*, it should hold this petition and dispose of it in a manner consistent with its ruling in *Right Field Rooftops*.

Respectfully submitted,

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Counsel for Petitioners

January 29, 2018

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED AUGUST 31, 2017

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

16-3795-cv

JORDAN WYCKOFF, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, DARWIN COX,

Plaintiffs-Appellants,

v.

OFFICE OF THE COMMISSIONER OF BASEBALL, AN UNINCORPORATED ASSOCIATION DOING BUSINESS AS MAJOR LEAGUE BASEBALL, ALLAN H. SELIG, ROBERT D. MANFRED, JR., KANSAS CITY ROYALS BASEBALL CORP, MIAMI MARLINS, L.P., SAN FRANCISCO BASEBALL ASSOCIATES LLC, BOSTON RED SOX BASEBALL CLUB L.P., ANGELS BASEBALL LP, CHICAGO WHITE SOX LTD., ST. LOUIS CARDINALS, LLC, COLORADO ROCKIES BASEBALL CLUB, LTD., THE BASEBALL CLUB OF SEATTLE, LLLP, THE CINCINNATI REDS, LLC, HOUSTON BASEBALL PARTNERS LLC, ATHLETICS INVESTMENT GROUP, LLC, ROGERS BLUE JAYS BASEBALL PARTNERSHIP, CLEVELAND INDIANS BASEBALL CO., L.P, CLEVELAND INDIANS BASEBALL CO., INC., PADRES L.P., SAN DIEGO

Appendix A

PADRES BASEBALL CLUB, L.P., MINNESOTA TWINS, LLC, WASHINGTON NATIONALS BASEBALL CLUB, LLC, DETROIT TIGERS, INC., LOS ANGELES DODGERS LLC, LOS ANGELES DODGERS HOLDING COMPANY LLC, STERLING METS L.P., ATLANTA NATIONAL LEAGUE BASEBALL CLUB, INC., AZPB L.P., BALTIMORE ORIOLES, INC., BALTIMORE ORIOLES LIMITED PARTNERSHIP, THE PHILLIES, PITTSBURGH ASSOCIATES, L.P., TAMPA BAY RAYS BASEBALL LTD., RANGERS BASEBALL EXPRESS, LLC, RANGERS BASEBALL, LLC, CHICAGO CUBS BASEBALL CLUB, LLC, MILWAUKEE BREWERS BASEBALL CLUB, INC., MILWAUKEE BREWERS BASEBALL CLUB, L.P., NEW YORK YANKEES P'SHIP,

Defendants-Appellees.[1]

August 31, 2017, Decided

Present: ROSEMARY S. POOLER,
GERARD E. LYNCH,
Circuit Judges.

BRIAN M. COGAN,[2]
District Judge.

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1. The Clerk of Court is respectfully directed to amend the caption as above.

2. Judge Brian M. Cogan, United States District Court for the Eastern District of New York, sitting by designation.

Appendix A

Appeal from the United States District Court for the Southern District of New York (Gardephe, *J.*).

SUMMARY ORDER

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED**.

Plaintiffs-Appellants Jordan Wyckoff, individually and on behalf of other professional baseball scouts, and Darwin Cox (collectively, "Plaintiffs"), appeal from the November 3, 2016 judgment of the United States District Court for the Southern District of New York (Gardephe, *J.*). That judgment dismissed Plaintiffs' purported class action suit alleging violations of the Sherman Act, New York's Donnelly Act, and the Fair Labor Standards Act by the Office of the Commissioner of Baseball, doing business as Major League Baseball, its current and former Commissioner, and its 30 professional baseball clubs (the "Franchises") (collectively, "Defendants"). We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

Plaintiffs argue primarily that Defendants conspired to decrease competition in the labor market for professional baseball scouts in violation of the Sherman Act and New York's Donnelly Act. Moreover, they argue that the district court erred by ignoring factual allegations indicating that the professional baseball scouts' claims fall outside professional baseball's long-recognized exemption from

antitrust regulation. We disagree and affirm the district court's decision.

This Court reviews a district court's dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) de novo. *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 99-100 (2d Cir. 2015). When reviewing the dismissal of a complaint for failure to state a claim, this Court accepts as true the factual allegations in the complaint and draws all reasonable inferences in plaintiff's favor. *See Adelson v. Harris*, 774 F.3d 803, 807 (2d Cir. 2014).

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. Since 1922, however, the Supreme Court has recognized a judicially created exemption from antitrust regulation for the business of baseball. *See Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208-09, 42 S. Ct. 465, 66 L. Ed. 898, 20 Ohio L. Rep. 211 (1922). Despite heavy criticism, the Supreme Court has repeatedly affirmed baseball's antitrust exemption. *See Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357, 74 S. Ct. 78, 98 L. Ed. 64 (1953) (per curiam) ("[T]he business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws."); *Flood v. Kuhn*, 407 U.S. 258, 282, 284, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1972) (recognizing that baseball's antitrust exemption was an established "aberration" and "adher[ing] once again to *Federal Baseball* and *Toolson* and to their application to professional baseball"). Our Court has applied this

precedent to exempt from antitrust regulation certain claims brought by professional baseball umpires against the American League. *See Salerno v. Am. League of Prof'l Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir. 1970) (Friendly, *J.*) ("[P]rofessional baseball is not subject to the antitrust laws.").

In 1998, Congress passed the Curt Flood Act, which created an exception to baseball's antitrust exemption for major league baseball players. *See* 15 U.S.C. § 26b. The Act clearly stated that this exception applied only to major league baseball players and not to others "employed in the business of organized professional baseball." *Id.* § 26b(b)(5).

In light of the binding precedent from the Supreme Court and from this Circuit, and the limited exception created by Congress in the Curt Flood Act, we refuse Plaintiffs' invitation to adopt a narrower reading of baseball's antitrust exemption here. Because we are bound by that precedent, we hold that Defendants' conduct in this case is insulated from antitrust scrutiny.

Plaintiffs' own allegations foreclose their argument that they are not involved in the business of baseball. The complaint states that professional baseball scouts "assess baseball players and project the players' abilities to perform at the major league level, and they present that information to the Franchises." App'x at 41 ¶ 93. Plaintiffs acknowledge that this information is "important and valuable to the Franchises," because it "guide[s] the Franchises' decisions on how to rank players to

be acquired" through free agency, the amateur draft, and other player acquisition means. App'x at 41 ¶¶ 95-96. Plaintiffs further acknowledge that because the Franchises "place importance on the acquisition and development of baseball players, . . . a scout who is good at evaluating baseball players has great value." App'x at 48 ¶ 127. Based on Plaintiffs' allegations, the district court properly concluded that professional baseball scouts are involved in the business of baseball and, therefore, that the complained-of conduct fails to state a claim for which relief can be granted under existing precedent.

We have considered the remainder of Plaintiffs' arguments and find them to be without merit. Accordingly, the judgment of the district court hereby is AFFIRMED.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

/s/

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED NOVEMBER 3, 2016

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

15 CIVIL 5186 (PGG)

JORDAN WYCKOFF, INDIVIDUALLY AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED, AND DARWIN COX,

Plaintiffs,

-against-

OFFICE OF THE COMMISSIONER OF BASEBALL, AN UNINCORPORATED ASSOCIATION DOING BUSINESS AS MAJOR LEAGUE BASEBALL; ALLAN H. SELIG; ROBERT D. MANFRED, JR.; KANSAS CITY ROYALS BASEBALL CORP.; MIAMI MARLINS, L.P.; SAN FRANCISCO BASEBALL ASSOCIATES LLC: BOSTON RED SOX BASEBALL CLUB L.P.; ANGELS BASEBALL LP; CHICAGO WHITE SOX LTD.; ST. LOUIS CARDINALS, LLC; COLORADO ROCKIES BASEBALL CLUB, LTD.; THE BASEBALL CLUB OF SEATTLE, LLLP; THE CINCINNATI REDS, LLC, HOUSTON BASEBALL PARTNERS LLC; ATHLETICS INVESTMENT GROUP, LLC; ROGERS BLUE JAYS BASEBALL PARTNERSHIP; CLEVELAND INDIANS BASEBALL CO., L.P., CLEVELAND INDIANS

Appendix B

BASEBALL CO., INC., PADRES L.P., SAN DIEGO PADRES BASEBALL CLUB, L.P.; MINNESOTA TWINS, LLC; WASHINGTON NATIONALS BASEBALL CLUB, LLC; DETROIT TIGERS, INC.; LOS ANGELS DODGERS LLC; LOS ANGELS DODGERS HOLDING COMPANY LLC; STERLING METS L.P.; ATLANTA NATIONAL LEAGUE BASEBALL CLUB, INC.; AZPB L.P.; BALTIMORE ORIOLES, INC., BALTIMORE ORIOLES, L.P.; THE PHILLIES; PITTSBURGH ASSOCIATES, L.P.; NEW YORK YANKEES P'SHIP; TAMPA BAY RAYS BASEBALL LTD.;

Defendants.

JUDGMENT

Whereas, on September 29, 2016 this Court having issued a Memorandum Opinion and Order granting Defendants' motion to dismiss Plaintiffs' Sherman Act and Donnelly Act claims, and dismissing Plaintiff Wyckoff's claims under the Fair Labor Standards Act as to all Defendants other than the Kansas City Royals; on October 13, 2016, the Court having endorsed the parties Joint Stipulation dismissing Mr. Wyckoffs remaining claims - the FLSA claims against the Kansas City Royals, pursuant to 41(a)(1), by letter dated October 26, 2016, Mr. Wyckoff having requested that the Court enter judgment in this matter as provided by Fed. R. Civ. P. 58, and the matter having come before the Honorable Paul G Gardephe, United States District Judge, and the Court, on November 1, 2016, having rendered its Order directing the Clerk of Court to enter judgment, it is,

Appendix B

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum Opinion and Order dated September 29, 2016, Endorsed Joint Stipulation dated October 13, 2016 and the Court's Memo-Endorsed Order dated October 28, 2016, Defendants' motion to dismiss Plaintiffs' Sherman Act and Donnelly Act claims is granted; Plaintiff Wyckoff's claims under the Fair Labor Standards Act are dismissed as to all Defendants other than the Kansas City Royals; the parties stipulate pursuant to 41(a)(l) that Mr. Wyckoff's remaining claims - the FLSA claims against the Kansas City Royals - are dismissed, and the dismissal is with prejudice unless the Court's Dismissal Order is reversed on appeal; in the event that the Court's Dismissal Order is reversed on appeal, the parties agree that Mr. Wyckoff's individual FLSA claims against Defendant Kansas City Royals Baseball Corp. shall be deemed to have been tolled from July 2, 2015, the date of his originally filed Complaint.

Dated: New York, New York
November 3, 2016

/s/_____
Ruby J. Krajick
Clerk of the Court

/s/_____
Deputy Clerk

APPENDIX C — STIPULATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED OCTOBER 14, 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CASE NO. 1:15-cv-5186-PGG

JORDAN WYCKOFF, *et al.*, INDIVIDUALLY AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED,

Plaintiffs,

vs.

OFFICE OF THE COMMISSIONER OF BASEBALL, AN UNINCORPORATED ASSOCIATION DOING BUSINESS AS MAJOR LEAGUE BASEBALL, *et al.*;

Defendants.

CLASS ACTION

JOINT STIPULATION DISMISSING REMAINING CLAIMS PURSUANT TO RULE 41(A)

IT IS HEREBY STIPULATED between Plaintiffs and Defendants as follows:

Whereas, Plaintlffs filed the operative Second Amended Complaint on October 20, 2015, Dkt. 109, which included antitrust claims under the Sherman Act and

Donnelly Act and wage-and-hour claims under the Fair Labor Standards Act ("FLSA").

Whereas, Defendants moved to dismiss the antitrust claims. Dkt. 120.

Whereas, the Court granted Defendants' motion to dismiss on September 29, 2016 (the "Dismissal Order"), which dismissed Plaintiffs' antitrust claims, and plaintiff Jordan Wyckoffs Fl.SA claims against all Defendants other than the Kansas City Royals Baseball Corp. ("Kansas City Royals"). Dkt. 131

Whereas, Plaintiffs seek to immediately appeal the Court's dismissal of Plaintiffs' antitrust claims.

Therefore, the parties stipulate pursuant to Rule of Civil Procedure 41(a)(1) that Mr. Wyckoff's remaining claims—the FLSA claims against the Kansas City Royals—shall be dismissed, and that the dismissal will be with prejudice unless the Court's Dismissal Order is reversed on appeal. In the event that the Court's Dismissal Order is reversed on appeal, the parties agree that Mr. Wyckoff's individual FLSA claims against Defendant Kansas City Royals Baseball Corp. shall be deemed to have been tolled from July 2, 2015, the date of his originally filed Complaint.

Dated: October 11, 2016

SO ORDERED:

/s/_____
U.S.D.J.

APPENDIX D — MEMORANDUM OPINION & ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED SEPTEMBER 29, 2016

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

15 Civ. 5186 (PGG)

JORDAN WYCKOFF, INDIVIDUALLY AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED, AND DARWIN COX,

Plaintiffs,

- against –

OFFICE OF THE COMMISSIONER OF BASEBALL, AN UNINCORPORATED ASSOCIATION DOING BUSINESS AS MAJOR LEAGUE BASEBALL; ALLAN H. SELIG; ROBERT D. MANFRED, JR.; KANSAS CITY ROYALS BASEBALL CORP.; MIAMI MARLINS, L.P.; SAN FRANCISCO BASEBALL ASSOCIATES LLC; BOSTON RED SOX BASEBALL CLUB L.P.; ANGELS BASEBALL LP; CHICAGO WHITE SOX LTD.; ST. LOUIS CARDINALS, LLC; COLORADO ROCKIES BASEBALL CLUB, LTD.; THE BASEBALL CLUB OF SEATTLE, LLLP; THE CINCINNATI REDS, LLC; HOUSTON BASEBALL PARTNERS LLC; ATHLETICS INVESTMENT GROUP, LLC; ROGERS BLUE JAYS BASEBALL PARTNERSHIP; CLEVELAND INDIANS BASEBALL CO., L.P.; CLEVELAND INDIANS

Appendix D

BASEBALL CO., INC.; PADRES L.P.; SAN DIEGO PADRES BASEBALL CLUB, L.P.; MINNESOTA TWINS, LLC; WASHINGTON NATIONALS BASEBALL CLUB, LLC; DETROIT TIGERS, INC.; LOS ANGELES DODGERS LLC; LOS ANGELES DODGERS HOLDING COMPANY LLC; STERLING METS L.P.; ATLANTA NATIONAL LEAGUE BASEBALL CLUB, INC.; AZPB L.P.; BALTIMORE ORIOLES, INC.; BALTIMORE ORIOLES, L.P.; THE PHILLIES; PITTSBURGH ASSOCIATES, L.P.; NEW YORK YANKEES P'SHIP; TAMPA BAY RAYS BASEBALL LTD.; RANGERS BASEBALL EXPRESS, LLC; RANGERS BASEBALL, LLC; CHICAGO CUBS BASEBALL CLUB, LLC; MILWAUKEE BREWERS BASEBALL CLUB, INC.; MILWAUKEE BREWERS BASEBALL CLUB, L.P.;

Defendants.

September 29, 2016, Decided
September 29, 2016, Filed

MEMORANDUM OPINION & ORDER

PAUL G. GARDEPHE, U.S.D.J.:

This is a class action suit for antitrust and wage-and-hour violations brought by professional baseball scouts against the current and former Commissioner of Major League Baseball, the Office of the Commissioner, and the clubs that comprise Major League Baseball. Defendants have moved to dismiss the antitrust claims on the grounds

that they fall within the baseball exemption to antitrust regulation. Defendants have also moved to dismiss the wage-and-hour claims — except those brought by Plaintiff Jordan Wyckoff against the Office of the Commissioner, the two individual defendants, and the Kansas City Royals — on standing grounds.

BACKGROUND

I. FACTS

The Second Amended Complaint alleges that the Office of the Commissioner of Baseball — doing business as "Major League Baseball" or the "MLB" — is an unincorporated association comprised of thirty professional baseball clubs (the "Franchises"). (Second Am. Cmplt. ("SAC") (Dkt. No. 109) at ¶ 20) Major League Baseball operates pursuant to the Major League Constitution, an agreement between the franchise teams. (*Id.* at ¶ 83) Major League Baseball is a large and lucrative organization: in 2014, MLB's annual revenue was approximately $9 billion, and more than 75 million baseball fans paid to attend games. (*Id.* at ¶¶ 77-78)

A. The Role of Professional Baseball Scouts

Each baseball club ("Franchise") employs baseball scouts who observe baseball players across the United States and internationally for the purpose of identifying new talent and assisting the Franchises in making hiring decisions:

Appendix D

> [Scouts] attend baseball games (including, for example, high school games, college games, minor league games, and major league games) and watch players to rate their skills in a variety of categories such as fielding, hitting for power and average, and running. Scouts also record players' pitching and/or hitting mechanics and develop comprehensive evaluations and projections of players' abilities. Depending on the type of scout, a scout might evaluate either amateur players, professional players, or both. But regardless, the basic job duties of the scout are similar. They assess baseball players and project the players' abilities to perform at the major league level, and they present that information to the Franchises.

(*Id.* at ¶ 93)

Players are evaluated on a numeric scale, with 20 being the lowest and 80 the highest. (*Id.* at ¶ 94) A score of 50 indicates that a player is performing at a major league level for the category being graded. (*Id.*) To evaluate players, scouts are required to travel domestically and internationally, and at certain times of the year they work long hours. (*Id.* at ¶¶ 97-98)

Defendants employ "well over one thousand scouts" and "control all or virtually all of the market for the purchase of baseball scouting services." (*Id.* at ¶¶ 92, 125-26) The information that scouts provide about players "guide[s] the Franchises' decisions on how to rank players

to be acquired." (*Id.* at ¶ 95) Because Defendants "place importance on the acquisition and development of baseball players, . . . a scout who is good at evaluating baseball players has great value." (*Id.* at ¶ 127)

Scouts do not make final decisions about whether to sign players or how much to pay them, however. (*Id.* at ¶ 95) Accordingly, Plaintiffs argue that "[a]lthough the information (and skills required to present good information) are important and valuable to the Franchises, the information provided by scouts is not directly related to the business of baseball or any revenue stream received by the Franchises or MLB." (*Id.* at ¶ 96)

B. The Uniform Employee Contract

A scout's employment relationship with a Franchise is governed by a form contract — the "Uniform Employee Contract" — "prescribed by the Commissioner." (*Id.* at ¶ 100) The Uniform Employee Contract is used for a variety of employees — not just scouts — and incorporates the Major League Rules and the Major League Constitution. (*Id.*) Under the Uniform Employee Contract, MLB and the Commissioner of Baseball have "'broad powers of control and discipline'" over the employment relationship. (*Id.*) The employment contracts issued to scouts typically provide for a one year term. (*Id.* at 1102)

The standard Uniform Employee Contract contains a "Loyalty" provision, which provides that scouts will

a. "serve [the employing Franchise] diligently and faithfully, and . . . observe and comply with all rules and regulations of [the employing Franchise] and the Commissioner."

b. "maintain the confidentiality of all confidential information, including but not limited to scouting information acquired during the [scout's] employment [under the Scout Contract], and . . . preserve such information for the exclusive benefit of [the employing Franchise]."

(*Id.* at ¶105) When under contract with a Franchise, scouts are prohibited from providing scouting services to other Franchises. (*Id.*)

Major League Rule ("MLR") 3(k) — which is incorporated by reference in all scouts' employment contracts — states:

> [t]o preserve discipline and competition, and to prevent the enticement of players, coaches, managers, and umpires, there shall be no negotiations or dealings respecting employment, either present or prospective, between any player, coach or manager and any Major or Minor League Club other than the Club with which the player is under contract, or acceptance of terms, or by which the player is reserved or which has the player on its Negotiation List, or between any umpire and any baseball employer with which the umpire is

> under contract, or acceptance of terms, unless the Club or baseball employer with which the person is connected shall have, in writing, expressly authorized such negotiations or dealings prior to their commencement.

(*Id.* at ¶ 116) Although MLR 3(k) does not mention scouts, Defendants apply this rule to scouts. (*Id.* at ¶ 117) Accordingly, a scout working under a one-year employment contract with a Franchise is generally prohibited from talking with any other Franchise until after that contract expires, unless the scout receives approval from his Franchise employer. (*Id.* at ¶¶ 118-19) Plaintiffs allege that "[t]he Franchises have a tacit agreement not to permit such discussions unless the scout is being considered for a promotion." (*Id.* at ¶ 119) Accordingly, this tacit agreement among the Franchises prevents scouts from making "a horizontal move in a similar capacity." (*Id.*) Moreover, because scouting positions are not posted openly, scouts do not generally request permission to pursue opportunities with other Franchises. (*Id.* at ¶ 121) Similarly, a Franchise seeking to hire a scout must wait until that scout is no longer under contract to initiate contact. (*Id.* at ¶ 118)

The Franchises will sometimes enter into agreements that are even more restrictive than the Uniform Employment Agreement and MLR 3(k). For example, in 2014, when the San Diego Padres hired a former Texas Rangers executive as their general manager, the Padres agreed that their new general manager "would not poach any employees from the Rangers absent certain pre-designated exceptions." (*Id.* at ¶ 120) Plaintiffs also

allege that Defendants have agreed to "maintain baseline compensation levels" for various employee categories, such as junior scouts, which keeps compensation artificially low. (*Id.* at ¶¶ 138-39)

C. The Offset Policy

In December 2002, the Labor Relations Unit of the Office of the Commissioner notified Franchise owners and employees, including scouts, of a new policy, referred to as the "Offset Policy." (*Id.* at ¶ 108) The Offset Policy is triggered when a scout is dismissed by a Franchise and hired by another Franchise during the term of the scout's one-year employment contract with the original employer. (*Id.*) Under the standard scout contract, a scout may be terminated upon ten days' notice, but the Franchise must pay the scout's salary for the full one-year term of the employment contract. (*Id.* at ¶ 107) The Offset Policy requires that where a scout is re-hired while being paid under an earlier employment contract, the hiring Franchise must obtain that earlier contract from the scout. (*Id.* at ¶ 108) "The amount of any compensation due to the scout [under the original contract] is then reduced by the amount paid to the scout by the hiring Franchise." (*Id.*)

The Offset Policy also requires that the scout and the hiring Franchise negotiate the scout's compensation in good faith. (*Id.* at ¶ 109) A dismissing Franchise may object that a hiring Franchise is offering unreasonably low compensation, in which case

MLB will investigate and determine whether the scout is being paid a "reasonable" rate based on:

a. the scout's experience, past accomplishments, and compensation history;

b. the scout's compensation with the dismissing Franchise;

c. compensation normally paid by the hiring Franchise to employees of similar experience and accomplishments in the position for which the employee was hired;

d. compensation paid by other Franchises to employees in similar positions to the one for which the employee was hired;

e. background of the negotiations between the employee and the hiring Franchise; and

f. any other pertinent considerations.

(*Id.*) Where the Commissioner determines that the compensation paid by the hiring Franchise is too low, the Commissioner may direct the hiring Franchise to re-contract at a fair and reasonable level of compensation. (*Id.* at ¶ 110) Plaintiffs allege that the Offset Policy is a disincentive for Franchises to hire a dismissed scout. (*Id.* at ¶ 112) They argue that, "[a]bsent [the] Offset Policy, dismissed scouts could more easily negotiate agreements with new Franchises and receive higher compensation

including both wages owed by the dismissing Franchise and the hiring Franchise." (*Id.* at ¶ 111)

D. Plaintiffs' Employment with MLB

Plaintiffs Jordan Wyckoff and Darwin Cox are former Major League Baseball scouts. (*Id.* at ¶¶ 18-19) Plaintiff Wyckoff signed a Uniform Employee Contract with the Kansas City Royals on October 31, 2012. (*Id.* at ¶ 145) That contract expired on October 31, 2013. (*Id.*) Wyckoff was responsible for scouting players in the Northeast United States. (*Id.* at ¶ 146) He worked throughout the year, but his busiest period was between January and June. (*Id.* at ¶ 148) Wyckoff traveled to a number of states to attend practices, games, and showcases, and he "often worked in excess of forty hours per week." (*Id.* at ¶¶ 148-49) Wyckoff was paid a salary of only $15,000 per year, however, and he did not receive any overtime compensation. (*Id.* at ¶¶ 147, 149)

When Wyckoff's contract expired in October 2013, it was not renewed. (*Id.* at ¶ 156) At that point, there were "very few" scouting positions available with other Franchises, because the other Franchises had already completed most of their hiring. (*Id.*) Accordingly, Wyckoff was not able to secure a scouting position with another Franchise. (*Id.*)

Plaintiff Cox worked as a Scouting Supervisor for the Colorado Rockies for twenty years, from 1991 to 2011. (*Id.* at ¶ 159) He was assigned to North Texas, Oklahoma, and Kansas, and his salary in 2011 was $63,500. (*Id.* at

¶¶ 160-61) His contract was not renewed after it expired in 2011. (*Id.* at ¶ 163)

II. PROCEDURAL HISTORY

Plaintiff Wyckoff filed this action on behalf of himself and a class of MLB scouts on July 2, 2015. The Complaint asserts antitrust violations under the Sherman Act and New York's Donnelly Act, and minimum wage, overtime, and recordkeeping violations under the Fair Labor Standards Act ("FLSA"). (Dkt. No. 43) Wyckoff filed an Amended Complaint on September 22, 2015 (Dkt. No. 101), and a Second Amended Complaint on October 20, 2015. Darwin Cox is added as a plaintiff in the SAC. (Dkt. No. 109)

Defendants have moved to dismiss Plaintiffs' antitrust claims and all FLSA claims against Franchises other than the Kansas City Royals, Wyckoff's former employer. (Dkt. No. 120)

DISCUSSION

I. LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "In considering a motion to dismiss . . . the court is to accept

as true all facts alleged in the complaint," *Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 237 (2d Cir. 2007) (citing *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 87 (2d Cir. 2002)), and must "draw all reasonable inferences in favor of the plaintiff." *Id.* (citing *Fernandez v. Chertoff*, 471 F.3d 45, 51 (2d Cir. 2006)).

A complaint is inadequately pled "if it tenders 'naked assertion[s]' devoid of 'further factual enhancement,'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557), and does not provide factual allegations sufficient "to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Port Dock & Stone Corp. v. Oldcastle Northeast, Inc.*, 507 F.3d 117, 121 (2d Cir. 2007) (citing *Twombly*, 550 U.S. at 555).

II. SHERMAN ACT CLAIMS

A. Applicable Law

Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce[.]" "[S]tating a claim under Section 1 of the Sherman Act 'requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made.'" *Meyer v. Kalanick*, 15 Civ. 9796, 174 F. Supp. 3d 817, 2016 U.S. Dist. LEXIS 43944, 2016 WL 1266801, at *1 (S.D.N.Y. Mar. 31, 2016) (quoting *Twombly*, 550 U.S. at 556).

Since 1922, however, federal courts have recognized an exemption from antitrust regulation for the business of baseball. *See Fed. Baseball Club of Balt, v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208-09, 42 S. Ct. 465, 66 L. Ed. 898, 20 Ohio L. Rep. 211 (1922). In *Federal Baseball*, plaintiffs challenged the National League and American League's practice of buying clubs in smaller leagues and "inducing all those clubs . . . to leave their League." *Id.* at 207. Plaintiffs claimed that this practice was anti-competitive and violated the Sherman Act. *Id.* Justice Holmes, writing for a unanimous court, rejected this argument, holding that "giving exhibitions of base[]ball" was a "purely state affair []" not subject to regulation by the federal government. *Id.* at 208. The Supreme Court reaffirmed this decision in *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357, 74 S. Ct. 78, 98 L. Ed. 64 (1953) (*per curiam*), in which MLB players challenged the "enforcement of the standard 'reserve clause' in their contracts[,] pursuant to nationwide agreements among the [MLB] defendants." *Toolson*, 346 U.S. at 362 (Burton, J., dissenting). In a one-paragraph *per curiam* opinion, the Court declined to "re-examin[e] . . . the underlying issues" of *Federal Baseball* and placed the onus for clarifying that professional baseball was subject to antitrust regulation squarely on Congress's doorstep. *Id.* 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.").

The Second Circuit addressed the baseball exemption in 1970, in *Salerno v. American League of Professional Baseball Clubs*, 429 F.2d 1003 (2d Cir. 1970) (Friendly, J.). In *Salerno*, umpires brought claims against the American

League for antitrust violations, claiming that they had been fired in retaliation for attempting to organize umpires into a collective bargaining unit. *Salerno*, 429 F.2d at 1004. The Second Circuit held that the umpires' claim was barred by the baseball exemption. *Id.* at 1004-05. While the Second Circuit "acknowledge[d] . . . that *Federal Baseball* was not one of Mr. Justice Holmes' happiest days," and that "the rationale of *Toolson* is extremely dubious," the court concluded that it was bound by the exemption defined in those cases.[1] *Id.* at 1005.

The baseball exemption returned to the Supreme Court in 1972, in *Flood v. Kuhn*, 407 U.S. 258, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1972). Curt Flood had been a star player for the St. Louis Cardinals until he was traded to the Philadelphia Phillies in 1969. *Flood*, 407 U.S. at 264-65. Flood had not been consulted about the trade, and he brought an antitrust claim challenging MLB's reserve system, under which a player is contracted to play with a certain team and that team holds the unilateral right to reassign the player's contract to another team if it so chooses.[2] *Id.* at 265. The Court reviewed the history

1. Judge Friendly presciently observed that "[w]hile we should not fall out of our chairs with surprise at the news that *Federal Baseball* and *Toolson* had been overruled, we are not at all certain that the Court is ready to give them a happy despatch." *Salerno*, 429 F.2d at 1005.

2. The essence of the reserve system is "the confinement of the player to the club that has him under contract; the assignability of the player's contract; and the ability of the club annually to renew the contract unilaterally, subject to a stated minimum." *Flood*, 407 U.S. at 259 n.1.

of antitrust regulation as applied to professional sports in the years since *Federal Baseball* and concluded that the baseball exemption from the antitrust laws is "an exception and an anomaly," and that "*Federal Baseball* and *Toolson* have become an aberration confined to baseball." *Id.* at 282.

The Court noted, however, that that

> aberration is an established one, and one that has been recognized not only in *Federal Baseball* and *Toolson*, but in . . . a total of five consecutive cases in this Court. It is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis*, and one that has survived the Court's expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball's unique characteristics and needs.

Id.

The Court further noted that

> since 1922[,] baseball, with full and continuing congressional awareness has been allowed to develop and to expand unhindered by federal legislative action. Remedial legislation has been introduced repeatedly in Congress but none has ever been enacted. The Court, accordingly, has concluded that Congress as yet has had no

> intention to subject baseball's reserve system to the reach of the antitrust statutes."

Id. at 283.

Although concluding that "[p]rofessional baseball is a business [that] is engaged in interstate commerce" (*id.* at 282) — contrary to Justice Holmes' ruling in *Federal Baseball* that professional baseball games are "purely state affairs," *Federal Baseball* 259 U.S. at 208 — the Court rejected Flood's antitrust claims and reaffirmed the antitrust exemption for baseball set forth in *Federal Baseball* and confirmed in *Toolson*:

> We continue to be loath, 50 years after *Federal Baseball* and almost two decades after *Toolson*, to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.
>
> Accordingly, we adhere once again to *Federal Baseball* and *Toolson* and to their application to professional baseball. . . . If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court.

Id. at 283-84.

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In 1998, Congress passed the Curt Flood Act, which creates an exception to baseball's exemption from the antitrust laws for major league baseball players. 15 U.S.C. § 26b (2002). Subsection (a) of the Act provides that

> the conduct, acts, practices, or agreements of persons in the business of organized 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, 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. §26b(a).

Other provisions in the Curt Flood Act make explicit that the exception embodied in the Act applies only to major league baseball players, and not to others "employed in the business of organized professional baseball":

> 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) of this section. This section does not create, permit or imply a cause of action by which to challenge under the antitrust laws, or otherwise 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
>
> (1) any conduct, acts, practices, or agreements of persons engaging in, conducting or participating in the business of organized professional baseball relating to or affecting employment to play baseball at the minor league level, any organized professional baseball amateur or first-year player draft, or any reserve clause as applied to minor league players . . . [or]
>
> . . .
>
> (5) the relationship between persons in the business of organized professional baseball and umpires or other persons who are employed in the business of organized professional baseball by such persons. . . .

15 U.S.C. § 26b(b). The Act further provides that "[o]nly a major league baseball player has standing to sue under this section." 15 U.S.C. § 26b(c).

B. Post-*Flood v. Kuhn* Treatment of the Baseball Exemption

Since *Flood v. Kuhn*, lower courts have disagreed about the scope of the baseball exemption. Some courts have interpreted the exemption broadly, finding that it

encompasses the entire "business of baseball, not any particular facet of that business, from the federal antitrust laws." *See, e.g., Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 541 (7th Cir. 1978) (finding that the baseball exemption barred antitrust challenge to Commissioner's rejection of certain player trades as "not in the best interests of baseball"). Under these decisions, the only activities that are subject to antitrust liability are those that are "wholly collateral to the public display of baseball games[.]" *City of San Jose v. Office of the Commissioner of Baseball*, 776 F.3d 686, 690 (9th Cir. 2015) (applying the baseball exemption to antitrust challenge to franchise relocation). Other courts have concluded that the baseball antitrust exemption is "limited to the reserve clause" that was challenged in *Flood*. *See Piazza v. Major League Baseball*, 831 F. Supp. 420, 438, 440-41 (E.D.Pa. 1993) (antitrust exemption is limited to baseball's reserve system; exemption did not require dismissal of plaintiffs' antitrust claim challenging MLB's rejection of plaintiffs' effort to purchase and relocate the San Francisco Giants to Tampa); *see also Butterworth v. Nat'l League of Prof. Baseball Clubs*, 644 So. 2d 1021,1023-24 (Fla. 1994) (following *Piazza* and finding that franchise relocation determinations are not exempt from antitrust regulation).

Citing *Postema v. National League of Professional Baseball Clubs*, 799 F. Supp. 1475, 1488 (S.D.N.Y. 1992), *rev'd on other grounds*, 998 F.2d 60 (2d Cir. 1993), Plaintiffs here argue that baseball's antitrust exemption applies only to claims challenging (1) the reserve system or (2) "league structure." (Pltf. Opp. Br. (Dkt. No. 123) at 12-17)

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In *Postema*, a female umpire sued the American and National Professional Baseball Leagues, alleging discrimination in violation of Title VII and the New York State Human Rights Law, and common law restraint of trade. *Postema*, 799 F. Supp. at 1478-90. Defendants moved to dismiss plaintiff's restraint of trade claims, "arguing that the[se] claims are preempted by baseball's exemption to antitrust law." *Id.* at 1486.

In considering the motion to dismiss, the court noted that any application of *Federal Baseball, Toolson*, and *Flood* must take account of the context in which they arose:

> 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.

(*Id.* at 1488 (citing *Flood*, 407 U.S. at 282).

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After reviewing a number of decisions in which the antitrust laws had been applied to garden-variety commercial agreements between baseball entities and third parties (*see id.* at 1488-89), the court concluded that baseball does not enjoy blanket immunity from the application of those laws, and that "baseball may be subject to antitrust liability for conduct unrelated to the reserve system or to league structure":

> It is thus clear that although the baseball exemption does immunize baseball from antitrust challenges to its league structure and its reserve system, the exemption does not provide baseball with blanket immunity for anti-competitive behavior in every context in which it operates. The Court must therefore determine whether baseball's employment relations with its umpires are "central enough to baseball to be encompassed in the baseball exemption."

(*Id.*) (quoting *Henderson Broadcasting Corp. v. Houston Sports Ass'n*, 541 F. Supp. 263, 265 (S.D. Tex. 1982) (finding that exemption did not immunize owner of Houston Astros from suit brought by a radio station; "broadcasting is not central enough to baseball to be encompassed in the baseball exemption").

The *Postema* court went on to deny the baseball defendants' motion to dismiss, finding that they had "not shown any reason why the baseball exemption should apply to baseball's employment relations with its umpires":

> Unlike the league structure or the reserve system, baseball's relations with non-players are not a unique characteristic or need of the game. Anti-competitive conduct toward umpires is not an essential part of baseball and in no way enhances its vitality or viability.
>
> Accordingly, because the baseball exemption does not encompass umpire employment relations, application of New York's common law of restraint of trade presents no conflict with the baseball exemption, and Plaintiff's claims are not preempted.

(*Id.* at 1489)

One other court in this District has concluded that *Flood* narrowed the scope of the baseball exemption. In *Laumann v. National Hockey League*, 56 F. Supp. 3d 280 (S.D.N.Y. 2014), plaintiffs brought antitrust challenges against, *inter alia*, the National Hockey League, MLB, several professional baseball and hockey clubs, broadcasters, and distributors concerning the broadcasting of professional baseball and hockey games, alleging that a territorial broadcasting system agreement entered into by defendants violated Sections 1 and 2 of the Sherman Act. *Laumann*, 56 F. Supp. 3d at 285. The baseball defendants moved for summary judgment, arguing that plaintiffs' antitrust claims against them were barred by the baseball exemption. *Id.* at 286.

The *Laumann* court denied defendants' motion, stating that "[t]he continued viability and scope of the baseball exemption are far from clear." *Id.* at 295. The court asserted that "*Flood* replaced *Federal Baseball*'s and *Toolson*'s holdings based on interstate commerce with a limited holding based only on *stare decisis* and inferred congressional intent." *Id.* Relying on *Henderson Broadcasting Corp.*, 541 F. Supp. at 265, the *Laumann* court found that the exemption did not apply to MLB's contracts for broadcasting rights, because that "subject . . . is not central to the business of baseball." *Id.* at 296-97.[3]

C. Analysis

Plaintiffs argue that this Court should interpret the baseball exemption to encompass only "league structure and player contracts (related to the reserve system)," because the cases that have applied the baseball exemption to bar an antitrust claim since *Flood* involve only claims in one of those two categories. (Pltf. Opp. Br. (Dkt. No. 123) at 12-13)

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3. The *Laumann* court also relied on the Sports Broadcasting Act ("SBA"), 15 U.S.C. § 1291, "which created an antitrust exemption for certain types of professional sports broadcasting agreements, particularly league-wide contracts for over-the-air broadcasts." *Laumann*, 56 F. Supp. 3d at 293. The court found that Congress's passage of this statute in 1961 indicates that "Congress understood sports broadcasting agreements to fall *outside* the baseball exemption. The provision of the SBA granting limited immunity to a narrow category of broadcasting agreements would be meaningless if all baseball broadcasting agreements were already covered by the common law exemption." *Id.* at 295 (emphasis in original).

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As an initial matter, the premise for Plaintiffs' argument is incorrect. In *Right Field Rooftops, LLC v. Chicago Baseball Holdings, LLC*, 87 F. Supp. 3d 874, 881-82, 884-85 (N.D. Ill. 2015), for example, the Northern District of Illinois applied the baseball exemption to allegedly anti-competitive activity that does not fall within either of Plaintiffs' two categories. In that case, the court denied plaintiffs' application for a preliminary injunction on the grounds that the baseball exemption barred a challenge to the Chicago Cubs' alleged agreement with others to sell tickets to watch Cubs games from rooftops overlooking Wrigley Field. *Id.* at 884-85. In denying plaintiff's application, the court concluded that the leading Supreme Court cases broadly exempt the "business of baseball" - not discrete aspects of that business - from antitrust regulation. *Id.*

In any event, this Court is not persuaded that *Flood* announces a narrowing of the holdings in *Federal Baseball* and *Toolson*. To the contrary, the message of *Flood* is that any "judicial overturning of *Federal Baseball*" would lead to such "confusion and . . . retroactivity problems" that, "if any change is to be made, it [should] come by legislative action." *Flood*, 407 U.S. at 283. The *Flood* court also goes out of its way to emphasize that it has not modified the holdings in *Federal Baseball* and *Toolson*:

> . . . we adhere once again to *Federal Baseball* and *Toolson* and to their application to professional baseball.
>
> . . . .

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> We repeat for this case what was said in *Toolson*:
>
> "Without re-examination of the underlying issues, the (judgment) below (is) affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, supra*, so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws."

Id. at 284-85 (quoting *Toolson*, 346 U.S. at 357). Given the *Flood* court's treatment of *Federal Baseball* and *Toolson*, it cannot be credibly argued that *Flood* announces a significant narrowing of the earlier decisions.

As the Ninth Circuit has explained,

> *Flood*'s stare decisis and congressional acquiescence rationales suggest the Court intended the exemption to have the same scope as the exemption established in *Federal Baseball* and *Toolson*. After all, it would make little sense for *Flood* to have contracted (or expanded) the exemption from the one established in the cases in which Congress acquiesced and which generated reliance interests. And *Federal Baseball* and *Toolson* clearly extend the baseball exemption to the entire "business of providing public baseball games for profit between clubs of professional baseball players."

City of San Jose, 776 F.3d at 690. This Court finds this reasoning fully persuasive.

Separate and apart from Supreme Court jurisprudence, this Court is bound, of course, by the Second Circuit's determination that *Federal Baseball* and *Toolson* hold that "professional baseball is not subject to the antitrust laws." *Salerno*, 429 F.2d at 1005. Nothing in *Flood* suggests that that broad pronouncement may now be safely ignored by lower courts.

Finally, even if *Flood* could somehow be read as narrowing the broad language of *Federal Baseball* and *Toolson*, the instant case requires no fine analysis to determine whether the activity in question is central to the "business of baseball" or, rather, is "'incidental . . .' to the business of baseball," *Right Field Rooftops, LLC*, 87 F. Supp. 3d at 885, and "wholly collateral to the public display of baseball games." *City of San Jose*, 776 F.3d at 690.

The employment relationship between baseball scouts and Franchises is central to the "business of baseball." Scouts play a critical role in directing talent to the Franchises, and the quality of the players is largely what determines success on the field as well as success in the "business of baseball." Because scouts' work has a direct and critical effect on the selection of players who will participate in the games that the public will watch, their role cannot be characterized as "wholly collateral" or "incidental" to the business of professional baseball.

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Plaintiffs' allegations in the Second Amended Complaint confirm all of these points. In the SAC, Plaintiffs allege that their jobs have "great value" because of the "importance" that the Franchises place "on the acquisition and development of baseball players." (SAC (Dkt. No. 109) at ¶ 127) According to the SAC, scouts are the primary mechanism by which professional baseball teams acquire information about potential players and evaluate their skills in order to make hiring decisions. (*See id.* at ¶¶ 94-95, 127) Scouts thus play a crucial role in determining which teams will acquire which players. And according to the SAC, scouts' expertise is unique to the field of professional baseball. Indeed, Plaintiffs allege that their expertise and work is so extraordinarily unique to the field of professional baseball that the MLB controls "virtually all" scout employment, and comparable positions do not exist internationally or in the context of college baseball. (*Id.* at ¶¶ 125-26) In sum, it is clear from the allegations of the SAC that scouts' identification and targeting of particular players greatly influences the Franchises' decisions about which players to hire and what team to field. Their duties - and the Franchises' employment relationships with these critical components of the highly competitive player acquisition effort - are thus an integral part of the "business of baseball." *See Charles O. Finley & Co.*, 569 F.2d at 534-35, 541 (barring antitrust challenge to Commissioner's authority to reject player trades; "the Supreme Court intended to exempt the business of baseball, not any particular facet of that business, from the federal antitrust laws"); *Miranda v. Selig*, Case No. 14-cv-05349-HSG, 2015 U.S. Dist. LEXIS 122311, 2015 WL 5357854, at *2 (N.D.Ca. Sept. 14, 2015)

(finding that "restrictions on the pay and mobility of minor league baseball players" fall within the baseball exemption, "which applies broadly to the 'business of providing public baseball games for profit between clubs of professional baseball players'").

While Plaintiffs argue that scouts - in performing their duties - frequently attend amateur practices and games, and that scouts are not "on-field personnel" during professional baseball games (Pltf. Opp. Br. (Dkt. No. 123) at 19-22), these points are irrelevant. The "business of baseball" is not limited solely to the players who appear on the field. Moreover, as Plaintiffs allege in the SAC, scouts' evaluations from amateur events "guide" Franchises' hiring decisions. (SAC (Dkt. No. 109) at ¶ 95) Like spring training, scouts' attendance at amateur events is an off-field action that serves to improve the quality of Franchise games, which is why professional baseball teams pay scouts to attend such events and identify promising players.

For all of these reasons, Defendants' motion to dismiss Plaintiffs' Sherman Act claims will be granted.

III. STATE LAW ANTITRUST CLAIMS

Plaintiffs have also alleged claims under the Donnelly Act, New York's antitrust statute. "Baseball is an exception to the normal rule that 'federal antitrust laws [] supplement, not displace, state antitrust remedies.'" *City of San Jose*, 776 F.3d at 691 (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 102, 109 S. Ct. 1661, 104 L. Ed.

2d 86 (1989)). The "normal rule" does not apply because the baseball exemption does more than create a "gap" in federal antitrust regulations; it "establishes a universal exemption in the name of uniformity," thus preempting any contrary state regulation. *Major League Baseball v. Crist*, 331 F.3d 1177, 1186 (11th Cir. 2003); *see also Flood*, 407 U.S. at 284 (affirming lower court decision finding that "'state antitrust regulation would conflict with federal policy'" and rejecting state law antitrust claim).

Accordingly, Defendants' motion to dismiss Plaintiffs' state law antitrust claims will be granted.

IV. WAGE-AND-HOUR CLAIMS

Defendants have moved to dismiss Plaintiff Wyckoff's wage and hour claims against all Franchise Defendants other than the Kansas City Royals.[4] Plaintiffs do not address Defendants' legal arguments, but instead state that "Wyckoff brings his FLSA claims only against MLB and the Kansas City Royals[.]" (Pltf. Opp. Br. (Dkt. No. 123) at 27)

"In a proposed class action, 'the named class plaintiffs must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" *McCall v. Chesapeake*

4. Plaintiff Cox has not brought a wage-and-hour claim against the Colorado Rockies, his former employer, or against any other Franchise Defendant.

Energy Corp., 817 F. Supp. 2d 307, 313 (S.D.N.Y. 2011) (quoting *Central States Southeast & Southwest Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 199 (2d Cir. 2005)). Here, the SAC does not allege that Wyckoff — the only plaintiff who brings a claim under the FLSA — was personally injured by any Franchise Defendant other than the Kansas City Royals. Accordingly, Wyckoff may not pursue FLSA claims against other Franchise Defendants. Nor may FLSA claims against Franchise Defendants other than the Kansas City Royals be maintained on behalf of as-yet-unidentified class members. "'That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'"" *Lewis v. Casey*, 518 U.S. 343, 357, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996) (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 40 n.20, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976)).

Accordingly, the SAC's FLSA claims will be dismissed, except as to the Kansas City Royals.

CONCLUSION

Defendants' motion to dismiss Plaintiffs' Sherman Act and Donnelly Act claims is granted. Plaintiff Wyckoff's claims under the Fair Labor Standards Act are dismissed as to all Defendants other than the Kansas City Royals. The Clerk of the Court is directed to terminate the motions (Dkt. Nos. 120, 127).

It is further ORDERED that there will be a conference in this matter on **October 27, 2016 at 11:00 a.m.** The parties are directed to file a proposed Case Management Plan and Scheduling Order with this Court by **October 20, 2016**.

Dated: New York, New York
September 29, 2016

SO ORDERED.

/s/ Paul G. Gardephe
Paul G. Gardephe
United States District Judge

APPENDIX E — BASEBALL—ANTITRUST CURT FLOOD ACT PUBLIC LAW, DATED OCTOBER 27, 1998

PL 105-297, October 27, 1998, 112 Stat 2824

UNITED STATES PUBLIC LAWS
105th Congress - Second Session
Convening January 27, 1998

Additions and Deletions are not identified in this database.
Vetoed provisions within tabular material are not displayed.

PL 105-297 (S 53)
October 27, 1998
BASEBALL—ANTITRUST

An Act to require the general application of the antitrust laws to major league baseball, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

<<15 USCA § 1 NOTE>>

SECTION 1. SHORT TITLE.

This Act may be cited as the "Curt Flood Act of 1998".

<<15 USCA § 27a NOTE>>

SEC. 2. PURPOSE.

It is the purpose of this legislation to state that major league baseball players are covered under the antitrust

laws (i.e., that major league baseball players will have the same rights under the antitrust laws as do other professional athletes, e.g., football and basketball players), along with a provision that makes it clear that the 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.

<<15 USCA § 27a NOTE>>

SEC. 3. APPLICATION OF THE ANTITRUST LAWS TO PROFESSIONAL MAJOR LEAGUE BASEBALL.

The Clayton Act (15 U.S.C. 12 et seq.) is amended by adding at the end the following new section:

27 "SEC. 27. (a) Subject to subsections (b) through (d), 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.

"(b) 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). This section does not create, permit or imply a cause of action by which

to challenge under the antitrust laws, or otherwise 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--

"(1) any conduct, acts, practices, or agreements of persons engaging in, conducting or participating in the business of organized professional baseball relating to or affecting employment to play baseball at the minor league level, any organized professional baseball amateur or first-year player draft, or any reserve clause as applied to minor league players;

"(2) the agreement between organized professional major league baseball teams and the teams of the National Association of Professional Baseball Leagues, commonly known as the 'Professional Baseball Agreement', the relationship between organized professional major league baseball and organized professional minor league baseball, or any other matter relating to organized professional baseball's minor leagues;

"(3) any conduct, acts, practices, or agreements of persons engaging in, conducting or participating in the business of organized professional baseball relating to or affecting franchise expansion, location or relocation, franchise ownership issues, including ownership transfers, the relationship between the Office of the Commissioner and franchise owners, the marketing or sales of the entertainment product of organized professional baseball

and the licensing of intellectual property rights owned or held by organized professional baseball teams individually or collectively;

"(4) any conduct, acts, practices, or agreements protected by Public Law 87-331 (15 U.S.C. 1291 et seq.) (commonly known as the 'Sports Broadcasting Act of 1961');

"(5) the relationship between persons in the business of organized professional baseball and umpires or other individuals who are employed in the business of organized professional baseball by such persons; or

"(6) any conduct, acts, practices, or agreements of persons not in the business of organized professional major league baseball.

"(c) Only a major league baseball player has standing to sue under this section. For the purposes of this section, a major league baseball player is--

"(1) a person who is a party to a major league player's contract, or is playing baseball at the major league level; or

"(2) a person who was a party to a major league player's contract or playing baseball at the major league level at the time of the injury that is the subject of the complaint; or

"(3) a person who has been a party to a major league player's contract or who has played baseball at the

major league level, and who claims he has been injured in his efforts to secure a subsequent major league player's contract by an alleged violation of the antitrust laws: Provided however, That for the purposes of this paragraph, the alleged antitrust violation shall not include any conduct, acts, practices, or agreements of persons in the business of organized professional baseball relating to or affecting employment to play baseball at the minor league level, including any organized professional baseball amateur or first-year player draft, or any reserve clause as applied to minor league players; or

"(4) a person who was a party to a major league player's contract or who was playing baseball at the major league level at the conclusion of the last full championship season immediately preceding the expiration of the last collective bargaining agreement between persons in the business of organized professional major league baseball and the exclusive collective bargaining representative of major league baseball players.

"(d)(1) As used in this section, 'person' means any entity, including an individual, partnership, corporation, trust or unincorporated association or any combination or association thereof. As used in this section, the National Association of Professional Baseball Leagues, its member leagues and the clubs of those leagues, are not "in the business of organized professional major league baseball".

"(2) In cases involving conduct, acts, practices, or agreements that directly relate to or affect both employment of major league baseball players to play

baseball at the major league level and also relate to or affect any other aspect of organized professional baseball, including but not limited to employment to play baseball at the minor league level and the other areas set forth in subsection (b), only those components, portions or aspects of such conduct, acts, practices, or agreements that directly relate to or affect employment of major league players to play baseball at the major league level may be challenged under subsection (a) and then only to the extent that they directly relate to or affect employment of major league baseball players to play baseball at the major league level.

"(3) As used in subsection (a), interpretation of the term 'directly' shall not be governed by any interpretation of section 151 et seq. of title 29, United States Code (as amended).

"(4) Nothing in this section shall be construed to affect the application to organized professional baseball of the nonstatutory labor exemption from the antitrust laws.

"(5) The scope of the conduct, acts, practices, or agreements covered by subsection (b) shall not be strictly or narrowly construed.".

Approved October 27, 1997

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