No. 17-1079

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

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

Respondents say the Court's baseball antitrust trilogy—*Federal Baseball*, *Toolson*, and *Flood*—decisively settled all questions about the continued vitality and scope of baseball's antitrust exemption, so the question presented here is unworthy of review. But *Toolson* was a one-paragraph *per curiam* decided "on the authority of *Federal Baseball*" "[w]ithout re-examination of the underlying issues."[1] And *Flood* explicitly repudiated *Federal Baseball*'s holding that Major League Baseball is not engaged in interstate commerce.[2] The improbability that *that* trilogy conclusively settled anything is rendered wholly untenable by Congress's enactment of the Curt Flood Act of 1998.[3]

With passage of the Flood Act, Congress abolished the judicially-created exemption with respect to the sole aspect of baseball this Court has ever discussed: the reserve system.[4] The congressional abolition of

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[1] *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953); *see also Federal Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Players*, 259 U.S. 200 (1922).

[2] *Flood v. Kuhn*, 407 U.S. 258, 282 (1972) ("Professional baseball is a business and it is engaged in interstate commerce."); *see also id.* at 290 (1972) (Marshall, J., dissenting) ("we are torn between the principle of stare decisis and the knowledge that the decisions in *Federal Baseball* … and *Toolson* … are totally at odds with more recent and better reasoned cases").

[3] Pub. L. No. 105-297, 112 Stat. 2824 (Oct. 27, 1998) (codified at 15 U.S.C. § 26b)

[4] While respondents dispute the focus of the trilogy was baseball's reserve system, in the opening sentence of *Flood*, the Court wrote, "For the third time in 50 years the Court is asked specifically to rule that professional baseball's *reserve system* is within the reach of the federal antitrust laws." 407 U.S. at 259 (emphasis added). *See also* Brief in Opposition at 21, *Right Field Rooftops, LLC v. Chicago Cubs Baseball Club, LLC*, No. 17-1074 (U.S. Jan. 26, 2018) (respondent Chicago Cubs, also a respondent in this case, conceding that the monopoly claim in *Federal Base-*

the crown jewel of the exemption thus naturally raises the question whether anything remains of the exemption, and if so, what? That question warrants the Court's review.

Respondents say, however, that by not repealing any other potential application of the exemption, Congress tacitly *approved* application of the exemption with respect to every other facet of the business of baseball. Indeed, they go so far as to say that Congress's "positive inaction" "*precludes* this Court from overturning" the exemption as it pertains to any other facet of the business. Opp. at 12.

First, the degree to which a "positive inaction" theory of interpretation retains any currency with the Court is, if anything, itself an open question worthy of review.[5] This Court has even noted that *Flood* is inconsistent with more recent decisions that hold "these arguments deserve little weight in the interpretive process."[6] But even if congressional silence during the fifty-year span between *Federal Baseball* and *Flood* is fairly characterized as "positive inaction," respondents offer no justification for treating the Flood Act as an instance of "positive inaction."

And doing so would be in direct conflict with an express provision of the Flood Act *prohibiting* courts

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ball was based on the reserve clause); *Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Baltimore*, 269 F. 681, 684 (D.C. Cir. 1920) (leagues accused of monopolizing baseball "principally through what is called the 'reserve clause' and ineligible list features of certain agreements").

[5] "'[C]ongressional inaction lacks persuasive significance' in most circumstances." *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015 (2017) (quoting *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("'several equally tenable inferences' may be drawn from such inaction"))).

[6] *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (quoted in *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001)).

from attempting to divine *any* congressional intent from the Act, except for overturning the reserve clause exemption for major league players.[7] Respondents cite those portions of the Flood Act (at 13-14) for the proposition that Congress effectively enacted an exemption for all those facets of the business it did not intend to affect one way or the other. Of course, if *that* is what Congress had intended, it could have said so expressly; it did not. The bill's chief sponsor, Senator Hatch, explained "that a bill that ought to be rather simple to write goes to such lengths to emphasize its neutrality."[8] And "[w]ith the exception of the express statutory exemption in the area of television rights recognized in paragraph (d)(4), each of the areas set forth depend upon judicial interpretation of the law."[9]

Respondents inconsistently argue that Congress both expressly enacted exemptions and that it implicitly, through "positive inaction," approved existing exemptions. In fact, Congress did neither. It left whatever may remain of the exemption for the courts—ultimately this Court—to work out.

Conspicuously absent among the reasons Respondents advance for denying certiorari is any justification of the exemption in its own right. Respondents do not take issue with the vast body of scholarly and judicial criticism of baseball's exemption and the trilogy of cases that produced it. Instead, they maintain they have made "enormous capital" investments "in reliance on" the exemption's "permanence." Opp. at 17 (quoting *Radovich v. Nat'l Football League*, 352 U.S. 445, 450 (1957)).

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[7] *See* 15 U.S.C. § 26b(b) (forbidding courts from using the Act as a basis for "changing the application of antitrust laws to any conduct, acts, practices, or agreements other than those set forth in subsection (a)").

[8] 144 CONG. REC. S9496 (July 30, 1998) (statement of Sen. Hatch).

[9] *Id.* at S9497.

But whatever past reliance respondents may have placed on the existence of the exemption is no reason for the Court to decline consideration of whether the exemption should survive into the future. Nor is it any reason to forego review of respondents' claim that its antitrust exemption is a sprawling one extending to every conceivable facet of the business of baseball, from interstate relocation of teams, state antitrust investigations, employment of minor league players, the purchase of real estate outside Wrigley Field, to the employment of baseball scouts.

Finally, respondent's contention that this is a poor vehicle for addressing the continued vitality or scope of the exemption is unfounded. If the exemption extends to every facet of the business as respondents contend, then it would not matter from which part of the business a challenge to the exemption arose; it would lose. On the other hand, if the exemption has not survived or is to be cabined to the major league players' (now defunct) reserve clause, the source of the challenge to the exemption would again not matter.

This case is the ideal vehicle to resolve the question presented. The legal issue is cleanly presented and dispositive of the case. In contrast to *Right Field Rooftops*,[10] the district court granted respondents' motion to dismiss solely on the ground that baseball's exemption required dismissal, without reaching any other issues. The Court should therefore grant both petitions, or grant the petition in *Wyckoff* and hold the petition in *Right Field Rooftops* pending resolution of this case.

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[10] Petition for Writ of Certiorari, *Right Field Rooftops, LLC v. Chicago Cubs Baseball Club, LLC*, No. 17-1074 (U.S. Jan. 26, 2018).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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