Nos. 20-512, 20-520

IN THE
Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *Petitioner*,
v.
SHAWNE ALSTON, ET AL., *Respondents*.

AMERICAN ATHLETIC CONFERENCE, ET AL., *Petitioners*,
v.
SHAWNE ALSTON, ET AL., *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* ADVOCATES FOR MINOR LEAGUERS IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Advocates for Minor Leaguers is a nonprofit organization formed with the mission of advancing the common welfare of Minor League Baseball players and educating the broader public as to the challenges those workers face. As such, it has witnessed the devastating impact this Court's decision in *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953), has had on hundreds of thousands of American workers employed as Minor League Baseball players. This Court's decision has deprived those workers of one of the pillars of workplace dignity—the opportunity to shop between employers for better treatment and higher wages. Advocates for Minor Leaguers seeks to help the Court avoid a decision in this case that will have similar consequences for college athletes.

SUMMARY OF ARGUMENT

In a series of three cases, this Court exempted Major League Baseball (MLB) from the nation's antitrust laws. *See Federal Baseball v. National League*, 259 U.S. 200 (1922); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *Flood v. Kuhn*, 407 U.S. 258 (1972). In *Federal Baseball*, the Court held that in 1922, baseball did not involve interstate commerce and thus was not subject to federal regulation under the Sherman Act. 259 U.S. at 208-09. Thirty-one years later, there was no dispute that the business of baseball did, in fact, occur in interstate commerce.

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[1] The parties have filed with the Clerk blanket consents to the filing of amicus briefs. No party's counsel authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Nevertheless, in *Toolson*, the Court reaffirmed that Major League Baseball was not subject to the antitrust laws, choosing not to "reexamine[] . . . the underlying issues," "on the authority of *Federal Baseball*." 346 U.S. at 357. Another nineteen years later, the Court once again reaffirmed the baseball exemption in *Flood*. 407 U.S. at 282 ("Even though others might regard [the exemption] as 'unrealistic, inconsistent, or illogical,' the aberration is an established one . . . 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." (quoting *Radovich v. NFL*, 352 U.S. 445, 452 (1957))). Although MLB's antitrust exemption has been consistently derided for decades, this Court has not revisited the issue since 1972.

In 1998, Congress provided relief to Major League Baseball players by passing the Curt Flood Act, which provides that the business of "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."15 U.S.C. § 26b. But the Curt Flood Act does not apply to Minor League Baseball players (Minor Leaguers), who remain subject to this Court's baseball exemption.

Hundreds of thousands of American workers have been employed as Minor Leaguers since *Toolson*. The antitrust exemption carved out for their employers by this Court has had disastrous consequences for those workers. Indeed, MLB and its thirty teams have taken full advantage of their permission to engage in anticompetitive practices to suppress Minor Leaguer pay. Even while MLB clubs have reaped record profits on the backs of players developed through their "farm systems," the clubs have openly colluded on Minor League salaries, resulting in most players being paid *between $4,000 and $14,000 per year*. The clubs have

also colluded on a form contract, requiring all Minor Leaguers to sign a Uniform Player Contract (UPC) that restricts each player's freedom of movement for seven years. Minor Leaguers are some of the worst-paid and most immobile workers in the United States. Simply put, MLB and its teams have openly operated as a cartel: a cartel that was legalized by this Court's decisions.

The oft-derided baseball exemption is not before the Court today. But the Court is at a crossroads much like the one it confronted in *Toolson*. The Court is asked to enshrine a judge-made exemption from the antitrust laws for a group of thousands of workers based on an anachronistic understanding of their workplace. In *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984), the Court suggested in dicta that the NCAA is permitted "ample latitude" to impose amateurism rules under the antitrust laws. But that statement was based on the premise that college "athletes must not be paid, must be required to attend class, and the like." *Id.* at 102. In the thirty-seven years since *Board of Regents*, it has become clear that college athletics is big business, and that NCAA athletes today are quite often paid in one form or another. *See* Respondents Br. 5-9. Yet Petitioners ask this Court for continued deference under—if not an outright exemption from—the federal antitrust laws. NCAA Br. 17.

The Court may someday have an opportunity to revisit the baseball exemption. Today, *Amicus Curiae* simply urges the Court to avoid repeating the mistake it made in *Toolson*. The baseball exemption is "an aberration confined to baseball," *Flood*, 407 U.S. at 282, and it should stay that way.

ARGUMENT

I. This Case is Like *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953)

A. The Baseball Cases: *Federal Baseball* and *Toolson*

In *Federal Baseball v. National League*, 259 U.S. 200 (1922), the Court was faced with a question regarding the application of the Sherman Act to the baseball industry in a case having nothing to do with players' rights. The question was whether the American and National Leagues of major league baseball, along with their clubs and others, violated the antitrust laws by conspiring to destroy a competitor league. *Id.* at 207. The Court held that Major League Baseball was not subject to the Sherman Act based on its determination that baseball was a local affair that did not involve interstate commerce. *Id.* at 208 ("[T]he business is giving exhibitions of base ball, which are purely state affairs.").

Federal Baseball "has been pilloried pretty consistently in the legal literature since at least the 1940s," although it was probably "'scorned principally for things that were not in the opinion, but later added by *Toolson* and *Flood*.'"[2] Indeed, thirty-one years after *Federal Baseball*, in *Toolson*, 346 U.S. 356, the Court confronted a question regarding the application of the antitrust laws to baseball in a case that *did* concern players' rights. The question was whether Major

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[2] Samuel A. Alito, Jr., *The Origin of the Baseball Antitrust Exemption*, 38 THE BASEBALL RESEARCH J. 86, 87 (Fall 2009) (*available* at https://sabr.org/journal/article/alito-the-origin-of-the-baseball-antitrust-exemption/) (last accessed March 8, 2021) (quoting Kevin McDonald, *Antitrust and Baseball: Stealing Holmes*, 1998 J. SUP. CT. HIST. 89, 122 (1998)).

League Baseball violated the antitrust laws by deeming a player ineligible to play after he refused a trade from one team to another. *Toolson v. New York Yankees*, 101 F. Supp. 93, 93 (S.D. Cal. 1951). In the three-plus decades between *Federal Baseball* and *Toolson*, the factual premise of *Federal Baseball*—that baseball was not within interstate commerce—had eroded as the business of baseball flourished. *See Toolson*, 346 U.S. at 357-58 (Burton, J., dissenting) ("In the light of organized baseball's well-known and widely distributed capital investments used in conducting competitions between teams constantly traveling between states, [as well as] its receipts and expenditures of large sums transmitted between states, . . . it is a contradiction in terms to say that the defendants . . . are not now engaged in interstate trade or commerce."). Nevertheless, in a per curiam opinion, the Court decided, "[w]ithout reexamination of the underlying issues," "on the authority of *Federal Baseball*," that Major League Baseball was not subject to the antitrust laws. *Toolson*, 346 U.S. at 357.

In short, in *Toolson*, the Court applied an outdated legal rule established in a different context to the core issue of players' rights, ignoring that the factual premise for that rule had eroded. History has not treated the *Toolson* decision—or its progeny in *Flood*—kindly. *See, e.g., Flood v. Kuhn*, 407 U.S. 258, 288 n.1 (1972) (Douglas, J., dissenting) ("While I joined the Court's opinion in *Toolson* . . . I have lived to regret it; and I would now correct what I believe to be its fundamental error.").[3]

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[3] *See also, e.g.*, Stuart Banner, The Baseball Trust: A History of Baseball's Antitrust Exemption at xi (2013) ("Scarcely anyone believes that baseball's exemption makes any sense."); William

B. The College Sports Cases: *Board of Regents* and *Alston*

In *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984), the Court was faced with an antitrust case that had nothing to do with players' rights. The question was whether the NCAA's television plan, which limited the number of games that any school could televise and prohibited schools from selling the rights to televise their games outside the plan, violated the antitrust laws. *Id.* at 94. Although the Court struck down the plan in question as anticompetitive, it stated in dicta that the NCAA should be given "ample latitude" under the antitrust laws to foster the "revered tradition of amateurism in college sports." *Id.*

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 & Michael 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 an end to the 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"); Hon. Connie Mack & Richard M. Blau, *The Need for Fair Play: Repealing the Federal Baseball Antitrust Exemption*, 45 FLA. L. REV. 201 (1993); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 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").

at 120. The Court reached this conclusion based on a factual observation, that—at that time—college athletics was a distinct product, where "athletes must not be paid, must be required to attend class, and the like." *Id.* at 101-02.

Thirty-seven years later, the Court is now faced with an antitrust case that *does* have to do with players' rights. Specifically, the question is whether NCAA eligibility rules restricting athlete compensation violate the antitrust laws. NCAA Br. (i). Just as the factual predicate of *Federal Baseball* had eroded by the time this Court decided *Toolson*, in the three-plus decades since *Board of Regents*, it has become increasingly clear that college sports is big business, and that today's NCAA athletes are quite often paid in one form or another. *See* Respondents Br. 5 ("Top-tier college basketball and football today are a far cry from the versions that existed in the 1980s, when this Court decided *Board of Regents*. Today, these sports generate billions of dollars in annual revenue for Petitioners."); *id.* at 6-7 ("As revenues have grown, so too have the demands on student-athletes. On average, athletes in these sports spend thirty-five to forty hours each week on team activities."); *id.* at 7 ("[Athletes] are often forced to miss class, to neglect their studies, and to forego courses whose schedules conflict with the sports in which they participate." (internal citation omitted)); *id.* at 8-9 ("NCAA rules have increasingly *allowed* [certain] kinds of compensation . . . . Currently, student-athletes may receive tens of thousands of dollars in compensation above full cost-of-attendance scholarships—compensation that is often unrelated to academics but overtly connected to athletic performance.").

Nevertheless, Petitioners ask the Court to reaffirm its statement from *Board of Regents* that the NCAA must be given "ample latitude" to impose amateurism rules. Specifically, Petitioners request that any

antitrust challenge to the NCAA's amateurism rules be "reviewed deferentially and upheld without detailed analysis." NCAA Br. 17.

Put differently, Petitioners ask the Court to do exactly what it did in *Toolson*: reassert—and expand upon—a principle set forth in a prior case and ignore that the factual premise for it has eroded over time. The Court should heed the lesson of *Toolson* and reject that request.

II. *Toolson* Has Had Disastrous Consequences for Hundreds of Thousands of American Workers

The baseball exemption may be a legal "aberration," *Flood*, 407 U.S. at 282, but it has had real and profound costs for the hundreds of thousands of American workers who have suffered because of it.

To be clear, the impact of the exemption on Major League players has been substantially mitigated. Thirteen years after *Toolson*, Major League players formed the Major League Baseball Players Association, *Flood*, 407 U.S. at 262, in order to counter the bargaining power of MLB's owners and their clubs. Subsequently, in 1998, President Clinton signed the Curt Flood Act, Pub. L. No. 105–297, which declared transactions "relating to or affecting employment of major league baseball players . . . subject to the antitrust laws." 15 U.S.C. § 26b(a).

Minor Leaguers—deterred by the extraordinary power MLB and its clubs have to deny their narrow path to the big leagues—have never formed a union. And they were excluded from the protections of the Curt Flood Act. As a consequence, MLB and its clubs have for decades expressly and openly colluded to suppress the wages of Minor Leaguers.

The collusion begins with the Minor League Uniform Player Contract (UPC) that all players must sign. Representatives for Minor Leaguers played no

part in the drafting process of the UPC, and Minor Leaguers cannot alter its terms. The Commissioner's Office reviews every Minor Leaguer's contract to ensure that it does not deviate from the UPC in any way.[4]

The UPC provides an MLB team with the exclusive right to a Minor Leaguer's employment services for seven seasons. A player can be traded or terminated for any reason, and players are forbidden from playing for another professional team—even one outside the United States—without their team's consent.

The UPC requires all first-year players to earn the same salary, which was set at $290 per week in 2020.[5] Salaries beyond the first year are not much better for most players. And while that sounds bad, the reality is worse. Minor Leaguers are only paid during the Minor League season, which usually lasts from April until Labor Day. Indeed, the UPC explicitly obligates players to "perform professional services on a calendar year basis, regardless of the fact that salary payments are to be made only during the actual championship playing season." This means that each spring, Minor League players must report to Spring Training, where they work seven days per week for an entire month without pay. Other uncompensated periods of work each year include the winter "offseason," during which Minor League players are contractually required to perform services but are not paid to do so.

The bottom line? *The average annual salary of a Minor League baseball player falls between $4,000 and*

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[4] The Major League Rules, which contain the UPC and which codify the collusive agreements, can be found publicly at https://registration.mlbpa.org/pdf/MajorLeagueRules.pdf.

[5] *See* Bill Baer, *MLB to raise minor league salaries for 2021 season*, NBC Sports (Feb. 16, 2020), https://mlb.nbcsports.com/2020/02/16/mlb-to-raise-minor-league-salaries-for-2021-season/.

$14,000,[6] placing many players below the federal poverty level.

The human toll of this system goes well beyond the numbers. *See* Emily Waldon, *'I can't afford to play this game': Minor-leaguers open up about the realities of their pay, and its impact on their lives*, The Athletic (Mar. 15, 2019), ("I lived in an apartment with five other guys. That's the norm. You get a two-bedroom and you pack as many people as possible in to make it at least halfway feasible for people."); *id.* ("We're going out and we're buying $800 beater cars, packing eight people into them, getting pulled over by the police, because they can see that people are, like, sitting on each other's laps, grown men trying to get to and from the field.").

The absurd mistreatment of Minor Leaguers has occurred against the backdrop of rising profits across baseball, due in large part to the continuation of the changes that occurred between *Federal Baseball* and *Toolson*, when baseball transformed into a booming, interconnected industry. From 1975 to 2019, the value of MLB's teams increased nearly 9,000%. Yet over that same period, Minor League salaries increased roughly 75%, failing to even keep pace with inflation.

Of course, absent MLB's antitrust exemption, the situation would be drastically different. MLB owners would not be permitted to engage in anticompetitive practices with respect to Minor League Baseball players. Instead, Minor Leaguers would be able to shop between clubs for the best available contract. This would drive wages up and improve working conditions, which would enable players to support their families and participate in our national economy on the same

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[6] This is *after* the recent increase in Minor League salaries. *See* Baer, *supra* note 5.

terms as workers in every other industry. Because of *Toolson*, Minor Leaguers can do none of these things.

Amicus Curiae believes it is incumbent upon the Court to revisit MLB's antitrust exemption and remains hopeful that the Court will do so. Even were that to happen tomorrow, however, *Toolson* would be partly to blame for the extreme mistreatment of hundreds of thousands of American workers.

III. The Court Need Not Reprise *Toolson*

This Court ignored reality in *Toolson* and the consequences were devastating. The Court is not compelled to repeat that mistake here.

As Respondents aptly put it, "[t]here is nothing in *Board of Regents* indicating that the Court intended its comments about amateurism to function as a binding legal doctrine . . . no matter how much the factual circumstances have changed." Respondents Br. 29. The Court's suggestion that the NCAA is permitted "ample latitude" to impose amateurism rules under the antitrust laws was plainly dicta. *Board of* R*egents*, 468 U.S. at 120. But the Court would not be bound to it even were it a holding. Indeed, it is well understood that a court need not adhere to a prior holding where the factual circumstances underlying that holding have changed. *See, e.g., Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854-55 (1992) (plurality opinion) ("[T]he rule of *stare decisis* is not an inexorable command. . . . Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations. . . . [F]or example, we may ask . . . whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." (internal citations omitted)).

* * *

By 1953, it was readily apparent that baseball was interstate commerce subject to federal regulation. Yet the Court closed its eyes to that reality. Over the past seven decades, hundreds of thousands of Minor League baseball players have suffered as a result.

Today, it is readily apparent that college athletics is big business and should be subjected to antitrust scrutiny. If the Court closes its eyes to that reality, college athletes may spend the next seven decades like Minor League Baseball players: exploited and abused, with this Court partly to blame.

CONCLUSION

The Court should learn from its mistake in *Toolson* and deny Petitioners their requested relief.

Respectfully submitted,

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