No. 23-

In the Supreme Court of the United States

TRI-CITY VALLEYCATS, INC. AND ONEONTA ATHLETIC CORPORATION, PETITIONERS

v.

THE OFFICE OF THE COMMISSIONER OF BASEBALL

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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QUESTION PRESENTED

Whether this Court should overrule *Flood* v. *Kuhn*, 407 U.S. 258 (1972), and its predecessors and revoke the century-old, common-law antitrust immunity for the business of baseball.

CORPORATE DISCLOSURE STATEMENT

Tri-City ValleyCats, Inc. has no parent corporation and no publicly held company owns 10% or more of its shares. Oneonta Athletic Corporation d/b/a/ The Norwich Sea Unicorns is wholly owned by Oneonta Tigers LLC. Oneonta Tigers LLC has no parent corporation and no publicly held company owns 10% or more of its shares.

RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

Nostalgic Partners, LLC v. *The Office of the Commissioner of Baseball*, No. 21-cv-10876 (Oct. 26, 2022)

United States Court of Appeals (2d Cir.):

Nostalgic Partners, LLC v. *The Office of the Commissioner of Baseball*, No. 22-2859 (June 20, 2023)

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This Court should revisit and correct what may be its longest-lived mistake: the common-law "baseball exemption" to antitrust enforcement.

Unlike every other sports league, and virtually every other business, professional baseball enjoys an "aberrational" and judicially-created immunity from the antitrust laws. *NCAA* v. *Alston*, 141 S. Ct. 2141, 2159 (2021) (alteration adopted). Major League Baseball—the largest professional baseball association—and its independently-owned teams may thus engage in anticompetitive conduct, to the detriment of consumers and the public. They openly carry on their businesses in ways that "would be flatly illegal in almost any other industry in America." *Id.* at 2167 (Kavanaugh, J., concurring). They are free to conspire to raise prices, inflate their

earnings with monopoly rents, or (as they did here) enter into a horizontal agreement to reduce output and boycott other businesses.

There is no democratic consensus for this immunity: Congress never enacted a law exempting professional baseball from the Sherman Act. Nor, as the United States observed in this case, is there any policy rationale supporting the exemption. This Court never determined that all restraints of trade in the business of baseball are "reasonable" or procompetitive. Instead, the Court granted baseball antitrust immunity in 1922 on grounds everyone agrees are inapplicable today—and then mistakenly continued that immunity in two grievously wrong decisions.

First, in *Federal Baseball* v. *National League*, 259 U.S. 200 (1922), the Court, applying its then-prevailing understanding of interstate commerce, held that baseball was an *intra*state affair, not covered by the Sherman Act. Regardless whether *Federal Baseball* was correct at the time, it has no force today: its factual and legal underpinnings disappeared long ago. The Court supplied a new rationale for the exemption in *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953) (per curiam), where it held that Congress did not want baseball to be subject to the antitrust laws—though Congress itself has never said anything of the kind. Then, in *Flood* v. *Kuhn*, 407 U.S. 258 (1972), the Court again reaffirmed *Federal Baseball* on *stare decisis* grounds, even as it acknowledged that *Federal Baseball*'s reasoning was unsustainable.

From these inauspicious beginnings, the baseball exemption has metastasized into a sweeping immunity that permits MLB to engage in brazenly anticompetitive behavior. Antitrust immunities are supposed to be

construed narrowly. *Flood*, *Toolson*, and *Federal Baseball* all dealt with a discrete restraint on player contracts, known as the "reserve clause," which bound a player to his team, even after his contract with the team expired. But loose language in *Flood* and *Toolson* suggested that not just the reserve clause but the entire "business of baseball" was exempt from antitrust scrutiny. This has created a split in the lower courts: A handful of courts have interpreted the exemption narrowly to cover only the reserve clause—which no longer exists for major league players. But most courts have extended the exemption to the entire "business of baseball." So, even after the demise of the reserve clause, the exemption survives, unmoored from statutory text or policy.

Outside MLB, the baseball exemption has practically no supporters. Judges, scholars, and Members of this Court have pilloried the exemption for decades. And in the years after *Toolson*, this Court refused to exempt other league sports from antitrust enforcement—not based on any principled distinction, but rather on an admission that baseball's special treatment was "unrealistic, inconsistent, [and] illogical." *Radovich* v. *NFL*, 352 U.S. 445, 452 (1957). Recently, a unanimous Court in *Alston* echoed these criticisms. 141 S. Ct. at 2159 ("[T]his Court once dallied with something that looks a bit like an antitrust exemption for professional baseball"). There have been dozens of cases and hundreds of law review articles on the exemption, and nearly all of them reach the same conclusion: "Scarcely anyone believes that baseball's exemption makes any sense." Stuart Banner, The Baseball Trust: A History of Baseball's Antitrust Exemption, at xi (2013).

MLB, the richest and most powerful organization in baseball, overtly exploits the exemption to rake in monopoly rents at the public's expense. This case represents the zenith of that anticompetitive abuse. In 2020, MLB orchestrated a horizontal agreement amongst its rival teams to exclude forty minor league teams from the market for major league affiliations—the market in which major and minor league teams affiliate with one another for mutual benefit. No longer able to compete for those commercial affiliations, the excluded minor league teams, including petitioners, lost substantial enterprise value or collapsed. MLB's conduct devastated dozens of small businesses and harmed the local economies and communities in which those businesses operate. Cf. Samuel A. Alito, Jr., *The Origin of the Baseball Antitrust Exemption*, 38 Baseball Rsch. J. 86, 92 (Fall 2009) (noting that the "irony" of *Federal Baseball* is that "the real losers in the case were local people").

Stare decisis should not stand in the way of correcting the Court's error. This Court does not interpret the Sherman Act as it does other statutes, by elucidating the meaning of statutory text. Rather, it "give[s] shape to the [Act's] broad mandate by drawing on common-law tradition." *Nat'l Soc'y of Pro. Eng'rs* v. *United States*, 435 U.S. 679, 688 (1978). And common law evolves. Accordingly, "[t]his Court has viewed *stare decisis* as having less-than-usual force in cases involving the Sherman Act." *Kimble* v. *Marvel Ent.*, 576 U.S. 446, 461 (2015). If the baseball antitrust exemption ever stood on solid premises, they disappeared shortly after *Federal Baseball* came down in 1922. Yet the exemption just celebrated its hundredth birthday. Continuing it even longer would not serve any of the broader policy goals of *stare decisis*, such as fairness, stability, and legitimacy.

This case is the ideal vehicle to revisit the baseball exemption. But for the exemption, petitioners would have been allowed to challenge MLB's naked horizontal agreement to restrain competition. Instead, MLB remains immune from any antitrust scrutiny. Having destroyed forty businesses in one fell swoop, MLB will only be further emboldened if the Court denies review here. The Court should grant the petition and, at long last, welcome America's pastime into America's free enterprise system.

OPINIONS BELOW

The opinion of the court of appeals (Pet.App.1a-4a) is unreported but available at 2023 WL 4072836. The opinion of the district court (Pet.App.5a-20a) is published at 637 F. Supp. 3d 45.

JURISDICTION

The Second Circuit entered judgment on June 20, 2023. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Antitrust Act, 15 U.S.C. 1, provides in relevant 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."

STATEMENT

A. The Sherman Act and Professional Sports

1. The Sherman Antitrust Act is "the Magna Carta of free enterprise." *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). "The statutory policy of the Act is one of competition and it precludes inquiry into the question whether competition is good or bad." *Alston*,

141 S. Ct. at 2159 (internal quotation marks omitted). Section 1 of the Act applies broadly to "every" contract, combination, or conspiracy, and to "[e]very person" who violates its terms. 15 U.S.C. 1, 2. It is "comprehensive" and "protect[s] all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms, Inc.* v. *Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948).

There is a "heavy presumption" that Congress did not intend to exempt specific businesses or industries from the Act's coverage. *Goldfarb* v. *Va. State Bar*, 421 U.S. 773, 787 (1975). And the Court does not lightly assume that other statutes displace the Act by implication. *United States* v. *Nat'l Ass'n of Sec. Dealers*, 422 U.S. 694, 719-20 (1975). Congress may exempt businesses or industries by statute, but it must do so "clear[ly]." *Nat'l Gerimedical Hosp. & Gerontology Ctr.* v. *Blue Cross of Kansas City*, 452 U.S. 378, 388-89 (1981). This Court's "precedents consistently hold that exemptions from the antitrust laws must be construed narrowly." *Union Lab. Life Ins. Co.* v. *Pireno*, 458 U.S. 119, 126 (1982).

2. Just as it covers businesses generally, Section 1 applies to professional and collegiate sports. Though league sports may require "some agreement among rivals—on things like how many players may be on the field or the time allotted for play," the Sherman Act's "policy of competition" does not allow competing sporting businesses to conspire to suppress competition whenever it suits them. *Alston*, 141 S. Ct. at 2147, 2156.

For example, this Court held that the NCAA's restriction on televising college football games—a horizontal restraint on price and output—was unreasonable. *NCAA* v. *Bd. of Regents of Univ. of Okla.*, 468 U.S. 85,

120 (1984). Similarly, when football teams banded together to jointly license their intellectual property, the Court held they were subject to Section 1 claims, like any cartel. *Am. Needle, Inc.* v. *NFL*, 560 U.S. 183 (2010). And universities, this Court concluded, may not engage in "admitted horizontal price fixing" by limiting educational benefits offered to student-athletes. *Alston*, 141 S. Ct. at 2154.

As the government observed in this case, the application of the Sherman Act to sports leagues has proven "workable." Gov't C.A. Br. 12. Yet, despite the strong presumptions against exemption and the Sherman Act's application to sports leagues generally, the Court has carved out a common-law antitrust immunity for one sport alone: baseball.

B. Baseball's Aberrational Exemption from the Antitrust Laws

1. The story begins a century ago with a lawsuit challenging a labor conspiracy between teams in two baseball leagues. *Nat'l League of Pro. Baseball Clubs* v. *Fed. Baseball Club of Balt.*, 269 F. 681, 682-83 (D.C. Cir. 1920). The leagues agreed that every team would include a "reserve clause" in player contracts, preventing players from signing with other teams even after their current contract had expired. *Id.* at 683, 687. Any player who violated the reserve clause was blacklisted from the leagues. *Ibid.*

Writing for the Court, Justice Holmes concluded that the "exhibition" of baseball games was a wholly intrastate affair that did not involve interstate commerce—even though teams crossed state lines to compete and earn revenues. *Fed. Baseball*, 259 U.S. at 208-09. Without an interstate component to the claims, the Sherman Act did not apply so the case was dismissed. *Ibid.*

Federal Baseball did not purport to "exempt" the business of baseball from antitrust scrutiny in perpetuity, nor did it find that Congress intended to do so. Its holding was based on the market realities of the time. And, as this Court recently emphasized, "[j]udges must be open to reconsideration and modification of [antitrust] decrees in light of changing market realities." *Alston*, 141 S. Ct. at 2163.

After *Federal Baseball*, the underlying facts and law both changed quickly—and changed a lot. With the advent of interstate broadcasting and television markets, the business of baseball grew rapidly and plainly encompassed interstate commerce. And during the same period, this Court gave the Commerce Clause a broader reach. See, *e.g.*, *Wickard* v. *Filburn*, 317 U.S. 111 (1942). With its factual and legal props knocked out from under it, by the late 1940s *Federal Baseball* stood on nothing at all. Lower courts held that these developments warranted the (re)application of the Sherman Act to baseball. See *Gardella* v. *Chandler*, 172 F.2d 402, 407-08 (2d Cir. 1949) (opinion of Hand, J.); *id.* at 409 (opinion of Frank, J.).

2. This Court disagreed in *Toolson*, the decision that instituted the "baseball exemption" as it is understood today. *Toolson* upheld *Federal Baseball* "[w]ithout reexamination of the underlying issues." 346 U.S. at 357. But without examining the issues decided in *Federal Baseball*, the Court retroactively inserted new ones. *Toolson* reimagined *Federal Baseball*'s interstate commerce rationale as a "determin[ation] that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." *Ibid.* Where the Court purported to find this congressional intention is unclear—but it assuredly was not in the Sherman Act,

which applies broadly to "every person" (MLB included) who violates its terms, 15 U.S.C. 1, 2, and which "precludes inquiry into the question whether competition is good or bad," *Alston*, 141 S. Ct. at 2159 (citation omitted).

In *Toolson*'s wake, other sports and exhibitions sought similar exemptions. But the Court repeatedly refused to immunize them, no matter how similar to baseball. See *Radovich*, 352 U.S. at 446-48 (football); *United States* v. *Int'l Boxing Club of N.Y., Inc.*, 348 U.S. 236, 242 (1955) (boxing); *United States* v. *Shubert*, 348 U.S. 222, 227-28 (1955) (theater attractions). In doing so, the Court acknowledged that its special treatment of baseball was "inconsistent" and "illogical." *Radovich*, 352 U.S. at 452.

3. Twenty years after *Toolson*, the Court revisited the exemption in *Flood*, yet another challenge to baseball's reserve system, and saved the erroneous exemption again.

After an ode to "The Game" and its "celebrated" players, 407 U.S. at 260-64, Justice Blackmun's opinion for Court stated the obvious: "Professional baseball is a business and it is engaged in interstate commerce," *id.* at 282. Nonetheless, *Flood* adhered to *Federal Baseball* and *Toolson*.

First, in the Court's view, baseball had "unique characteristics and needs" that the reserve system served. *Id.* at 282. Accordingly, the Court sought to protect professional baseball from the harm it supposedly would suffer if the reserve system were subject to antitrust attack. *Id.* at 282-83. This policy-based carve-out from the Sherman Act—competition is good, just not for baseball—turned out to be completely misguided. The reserve system for major league players was scrapped just

a few years after *Flood*, and professional baseball carried on just fine. See *Kansas City Royals Baseball Corp.* v. *Major League Baseball Players Ass'n*, 532 F.2d 615, 617 (8th Cir. 1976) (upholding arbitration decision that reserve clause was unenforceable).

Second, while recognizing that the exemption was an "anomaly"—and "'unrealistic, inconsistent, or illogical'"—the Court declared that the exemption had been "established" and was thus "fully entitled to the benefit of *stare decisis*." *Flood*, 407 U.S. at 282 (quoting *Radovich*, 352 U.S. at 452). Congress had been aware of the Court's decisions rejecting antitrust challenges to the reserve system, but had never enacted remedial legislation. *Id.* at 283-84. The Court surmised that Congress's "inaction" evinced a "desire" to keep the exemption in place. *Ibid*. This theory of congressional action-by-inaction has since been discredited. See, *e.g.*, *State Oil Co.* v. *Khan*, 522 U.S. 3, 19 (1997).

Loose language in *Toolson* and *Flood* also gave the exemption an exceedingly broad scope—the opposite of the narrow construction antitrust exemptions are supposed to receive. While *Flood* stated that baseball's "*reserve system* enjoy[ed] exemption from the federal antitrust laws," it elsewhere commented that "'Congress had no intention of including *the business of baseball* within the scope of' those laws. 407 U.S. at 285 (quoting *Toolson*, 346 U.S. at 357) (emphases added). It is this latter statement that continues to shield MLB from antitrust scrutiny in all its business streams—even after the reserve system for major league players was eliminated.

Over the last fifty years, lower courts around the country have interpreted *Flood* as broadly exempting the business of baseball from antitrust scrutiny. Thus,

courts routinely dismiss plausible federal and state antitrust claims against MLB—claims unrelated to the reserve clause—because of the exemption. See, *e.g.*, *Wyckoff* v. *Off. of Comm'r of Baseball*, 705 F. App'x 26 (2d Cir. 2017); *Charles O. Finley & Co.* v. *Kuhn*, 569 F.2d 527, 541 (7th Cir. 1978); *Portland Baseball Club, Inc.* v. *Kuhn*, 491 F.2d 1101, 1103 (9th Cir. 1974). In short, MLB remains "above the law." *Alston*, 141 S. Ct. at 2168 (Kavanaugh, J., concurring). It continues to exploit the exemption and enrich itself through conduct that would be illegal in almost any other industry.

This petition is case in point.

C. MLB's Takeover of Minor League Affiliations and Exclusion of Petitioners from the Market

1. Baseball may be the national pastime, but MLB is "big business." Gov't C.A. Br. 2. It is comprised of thirty independent franchises, worth $2.32 billion on average. Mike Axisa, *Yankees, Dodgers top Forbes' list of most valuable MLB teams; all 30 clubs valued at or above $1 billion*, CBS Sports (Mar. 23, 2023).[1] MLB's rival teams compete with one another not just on the field but off it—for profits, players, coaches, ticket sales, sponsorships, vendors, workers, and advertisers, among other things.

As particularly relevant here, MLB clubs also competed for affiliations with minor league clubs. C.A.J.A.29. These commercial relationships benefited both sides to the agreement. On one side, minor league clubs helped develop recruits and rehabilitate injured players for the MLB club, freeing MLB clubs from the

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[1] https://www.cbssports.com/mlb/news/yankees-dodgers-top-forbes-list-of-most-valuable-mlb-teams-all-30-clubs-valued-at-or-above-1-billion/.

expense of running their own farm systems. The minor league club also paid MLB 8% of its ticket sales. In return, the MLB club assisted its affiliated minor league club in obtaining and paying players and coaches, and helped with marketing efforts and financial commitments. C.A.J.A.19-20.

The market for affiliations operated like any other market. Over time, the number of minor league affiliates expanded and contracted and expanded again. C.A.J.A.19-21. In a competitive market, each MLB club could choose how many affiliates it would have, and would compete against its rivals to affiliate with the best minor league teams. The minor league clubs, in turn, would compete for the best affiliations.

Competition in this market, like any market, would produce the optimal output of professional baseball. And competition here, as elsewhere, would benefit consumers and the public—in this case, fans and small-town economies. C.A.J.A.27, 32; Gov't C.A. Br. 2-3. Affiliated minor league clubs provide affordable professional baseball games to local communities, often in markets without a big-league team. Affiliations also promote economic development and tourism in those often-rural markets. C.A.J.A.27, 32.

2. After more than a hundred years dealing with an independent minor league system, MLB decided it had enough of competition. It tightened its grip over the sport in 2020 by taking over the previously independent minor league. Thanks to *Flood*, MLB had all the tools it needed to do so—concentrated economic power and antitrust immunity.

Unrestrained by the Sherman Act, MLB orchestrated and implemented a naked horizontal agreement

amongst its 30 rival clubs to restrict the output of affiliations with minor league teams. C.A.J.A.101. MLB and its clubs agreed to a "new system" that fixed the number at four minor league affiliations per MLB club—no more, no less. C.A.J.A.101-02. MLB also handpicked minor league clubs that could remain—favoring those owned by MLB insiders and politicians, which would best serve MLB's interest in controlling the minor league system and extracting profits for itself. C.A.J.A.10-11, 21-25, 38.

After the dust settled, 40 minor league clubs lost their affiliations and their ability to compete for new ones. C.A.J.A.10. Petitioners Tri-City Valleycats and the Oneonta Athletic Corporation d/b/a The Norwich Sea Unicorns were among the minor league teams placed on MLB's do-not-call list. MLB's naked, horizontal restriction on output eliminated the competitive market for affiliations and severely damaged petitioners, which had been successful organizations. C.A.J.A.10, 14-15, 33.

Fans, sponsors, and communities also suffered. The ValleyCats, for example, provided Troy, New York with approximately $55 million annually in beneficial economic impact and supported 763 local jobs. C.A.J.A.27. And the Unicorns have drawn more than 700,000 fans over the last decade and raised more than $1.6 million for local charities. C.A.J.A.15. Without MLB affiliations, the economic benefits petitioners can provide to their communities have been diminished or eliminated.

D. Proceedings Below

1. After being ousted from the market for affiliations, petitioners filed this antitrust lawsuit in the Southern District of New York. They alleged that MLB and its clubs orchestrated a "horizontal agreement … to

eliminate their affiliation with … 40 [minor league] teams," and boycott petitioners. C.A.J.A.9-10.

MLB moved to dismiss on three grounds: (1) lack of antitrust standing, (2) failure to plead a Sherman Act violation, and (3) baseball's antitrust exemption. C.A.J.A 42. The United States filed a Statement of Interest, arguing that the baseball exemption "does not rest on any substantive policy interests that justify" shielding MLB's anticompetitive conduct. C.A.J.A.175.

The district court rejected MLB's first two arguments, concluding that petitioners alleged plausible antitrust injury and stated a Section 1 claim. Pet.App. 8a-13a. But it held, as petitioners acknowledged, that MLB's exemption "shield[ed]" it from suit. Pet.App.6a.

2. Petitioners appealed to the Second Circuit, again acknowledging the court was required to affirm in light of circuit law applying the exemption. Pet'rs C.A. Br. 3; *Wyckoff*, 705 F. App'x 26; *Salerno* v. *Am. League of Pro. Baseball Clubs*, 429 F.2d 1003 (2d Cir. 1970) (Friendly, J.). The United States filed an amicus brief, highlighting the importance of MLB affiliations to "communities across America." Gov't C.A. Br. 2-3. It stressed that the baseball exemption was of "dubious validity" and does not "reconcile competing legal authorities or substantive policy goals." *Id.* at 7, 10.

The Second Circuit affirmed on the ground that the baseball exemption "presently immunize[s] MLB against" petitioners' claims and that it "must continue to apply Supreme Court precedent unless and until it is overruled by the Supreme Court." Pet.App.4a (cleaned up).

REASONS FOR GRANTING THE PETITION

1. The baseball exemption is a matter of national importance, worthy of this Court's reconsideration. It allows baseball, a multi-billion dollar industry, to restrain competition in markets around the country, harming dozens of local economies, thousands of workers, and millions of fans. MLB's conduct should be subject to the flexible, market-specific rule-of-reason analysis applicable to other sports leagues and businesses.

The exemption also subverts the federal-state balance. Without any statement (much less a clear one) from Congress, the common-law exemption preempts all state antitrust law, preventing state enforcers from protecting citizens from MLB's violations.

2. The exemption also sows confusion in the lower courts, warranting this Court's attention. Divorced from statutory text and without any policy rationale or guidance from this Court, the exemption has no guardrails or limiting principles. Lower courts struggle to apply this Court's precedent, and have developed muddled exemption doctrines.

This problem will only get worse as professional baseball expands into new markets. Lower courts have recently extended the exemption to other (non-MLB) baseball leagues, raising new questions about the exemption's outermost reaches, including its potential application to collegiate baseball after *Alston*.

3. The baseball exemption is not entitled to *stare decisis* effect. First, the Sherman Act is a common-law statute for which *stare decisis* "ha[s] less-than-usual force." *Kimble*, 576 U.S. at 461. The Court has "therefore felt relatively free … to reverse [mistaken] antitrust precedents." *Ibid.* The exemption's longevity is no reason to leave it in place. It only underscores how far out

of step the exemption is with market realities and economic understandings today.

Second, adhering to *Flood* does not serve the broader goals of *stare decisis*. An "aberrational" rule that benefits one gigantic organization does not promote fairness, uniformity, or legitimacy. And the factual predicate—MLB's reliance on the reserve clause—no longer exists. The reasoning underlying the exemption has also been eroded by intervening decisions and events, including decades of experience after *Flood* showing that application of the antitrust laws to league sports is workable.

4. This case is an ideal vehicle for revisiting the exemption. Petitioners' complaint would have survived MLB's motion to dismiss but for the exemption. And the harms MLB caused with its naked horizontal agreement extend beyond petitioners' businesses to the local communities that depended on them. Without this Court's intervention, MLB will continue to amass even more wealth and power that it takes from the hide of its counterparties, consumers, and the public.

I. The Baseball Exemption Is a Matter of Exceptional and National Importance

A. MLB is a Multi-billion Dollar Business, with License To Restrain Competition in Markets Around the Country

1. "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise." *Topco*, 405 U.S. at 610. They are supposed to "guarantee[ ]" to "each and every business, no matter how small, … the freedom to compete." *Ibid.* They represent a "fundamental national economic policy." *Carnation Co.* v. *Pac. Westbound Conf.*, 383 U.S. 213, 218 (1966).

MLB's exemption from *all* antitrust laws, federal and state, violates these core tenets. MLB's conduct is *never* subject to the reasonableness analysis intended to distinguish procompetitive restraints from harmful ones. *Alston*, 141 S. Ct. at 2160. MLB decides for itself whether and how much to restrain trade, and never needs to justify its conduct. This subverts the text, original intent, and decades of application of the antitrust laws.

Only baseball has this court-created license to opt out of competition. And baseball doesn't need it. Like every other sport, MLB would not be "trapped by antitrust law." *Am. Needle*, 560 U.S. at 202. This Court has long recognized that league sports need leeway for some horizontal coordination. *Alston*, 141 S. Ct. at 2156. The question is whether the conduct is "reasonable." *Bd. of Regents*, 468 U.S. at 98. In each case, the plaintiff would have the initial burden to prove that MLB's restraint is anticompetitive, and MLB would then have the opportunity to justify the restraint as procompetitive in the particular market at issue. *Id.* at 112-13. Replacing this regime with a blanket immunity for baseball (and no other sport) does not "reconcile competing legal authorities or substantive policy goals." Gov't C.A. Br. 10.

2. The exemption's effects reach far and wide. MLB is a multi-billion dollar organization. It has 30 different franchises in major cities around the country (and Canada), each worth billions. These organizations participate in numerous different product and geographic markets. Their conduct affects MLB's 12,000 full-time employees;[2] hundreds of businesses (and their employees)

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[2] *Workforce Diversity*, Major League Baseball, https://www.mlb.com/diversity-and-inclusion/workforce-diversity (last visited Sept. 14, 2023).

who contract with MLB and its teams; and hundreds of cities, small towns, and local economies. The rule immunizing all this conduct from federal and state antitrust enforcement raises issues of national importance.

Minor League Affiliations. The market at issue in this case includes all of MLB's 30 franchises, and (before 2020) at least 160 minor league franchises. Competition in that market affected not only those 190+ businesses and their employees, but the local economies in which they operated. C.A.J.A.21. The exemption's effects on this market alone warrant this Court's intervention.

This case is also a prime example of the harm the exemption causes. Petitioners were once successful organizations that served their communities and provided affordable, live professional baseball where it was otherwise unavailable. They thrived by competing in an open market to affiliate with MLB teams. But MLB took over the market, decided the number of participants, and dictated which minor league teams would be in or out. C.A.J.A.10-11, 21-25, 38. In implementing this horizontal conspiracy to reduce output, MLB caused each of the petitioners' enterprise value to decline precipitously. C.A.J.A.26. This conduct had substantial downstream effects: petitioners can no longer provide the same benefits to their employees and communities. C.A.J.A.27.

Labor. MLB's conduct affects multiple national and local labor markets, including the market for 5,500 minor league players.[3] But its conduct goes untested, as MLB repeatedly invokes the exemption to ward off claims that it suppresses the wages and mobility of minor league players. See, *e.g.*, *Miranda* v. *Selig*, 860 F.3d 1237 (9th Cir. 2017); *Charles O. Finley*, 569 F.2d 527.

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[3] *About*, Major League Baseball Players Ass'n. https://www.mlbplayers.com/about (Last visited Sept. 14, 2023).

Just this year, minor league players alleged that MLB (and its clubs) conspired to fix their wages; but, before those claims could reach the merits, they were dismissed under the exemption. *Concepcion* v. *Off. of Comm'r of Baseball*, 2023 WL 4110155, at *10 (D.P.R. May 31, 2023), *report and recommendation adopted*, 2023 WL 4109788 (D.P.R. June 21, 2023), *appeal filed*, No. 23-1558 (1st Cir. July 18, 2023).

MLB and its clubs also employ thousands of full-time personnel, and their anti-competitive conduct vis-à-vis these employees likewise goes untested. When scouts alleged that MLB and its clubs conspired to suppress their salary and wages, their claims never made it past first base. See *Wyckoff*, 705 F. App'x 26; see also *Salerno*, 429 F.2d 1003 (Friendly, J.) (umpires). Health and analytics professionals might be next. See Evan Drellich & Ken Rosenthal, *MLB Intends to Curb Team Spending on Tech; Staffing Limits also Discussed, Officials Say*, The Athletic (June 13, 2023).[4]

Franchise Relocation. Every city and state covets professional sports franchises, which can stimulate the regional economy, create jobs, and kindle local pride. In a competitive environment, cities and states would be free compete for MLB franchises.

But MLB invokes its exemption to prevent or promote franchise relocation, depending on its own needs—not the needs of the market. See *City of San Jose* v. *Off. of the Comm'r of Baseball*, 776 F.3d 686 (9th Cir. 2015); *MLB* v. *Crist*, 331 F.3d 1177 (11th Cir. 2003); *Pro. Baseball Sch. & Clubs, Inc.* v. *Kuhn*, 693 F.2d 1085 (11th Cir. 1982); *Minn. Twins P'ship* v. *State ex rel. Hatch*, 592 N.W.2d 847 (Minn. 1999); cf. *New Orleans Pelicans*

[4] https://theathletic.com/4608077/2023/06/13/mlb-team-spending-technology-player-development/.

Baseball, Inc. v. *Nat'l Ass'n of Pro. Baseball Leagues, Inc.*, 1994 WL 631144 (E.D. La. Mar. 1, 1994). This year, MLB leveraged its exemption "to subsidize … the relocation of the Oakland A's" and "take crucial revenue, and a cultural staple, from the East Bay." Letter from Rep. Barbara Lee to Robert Manfred (June 5, 2023).[5]

These relocation policies create an artificial scarcity, depriving smaller markets of clubs that might succeed in a competitive environment. Stephen F. Ross, *Antitrust Options to Redress Anticompetitive Restraints and Monopolistic Practices by Professional Sports Leagues*, 52 Case W. Res. L. Rev. 133, 135-36 (2001). This scarcity also deprives big market consumers of additional clubs that would exist under normal market conditions. *Id.* at 136; see also Stephen F. Ross, *Monopoly Sports Leagues*, 73 Minn. L. Rev. 643, 656-66 (1989).

B. The Exemption Prevents States from Protecting Their Citizens from Anticompetitive Harms

This Court should also grant the petition to restore the proper federal-state balance that the exemption upended. Without any preemption analysis, *Flood* extended the common-law exemption to state antitrust claims. 407 U.S. at 284-85. Lower courts have followed that holding—reluctantly. *Crist*, 331 F.3d at 1185; *Wyckoff*, 211 F. Supp. 3d at 627.

This Court ordinarily presumes that Congress does not intend to displace the "historical police powers of the States," *unless* it is "the clear and manifest purpose of Congress." *Wyeth* v. *Levine*, 555 U.S. 555, 565 (2009). This "clear statement" rule is critical to preserving our

[5] https://lee.house.gov/imo/media/doc/MLB%20Letter.pdf.

system of dual sovereignty, as well as the "numerous advantages" that system affords the People. *Gregory* v. *Ashcroft*, 501 U.S. 452, 458, 461 (1991).

When Congress enacted the Sherman Act in 1890, it did so against a tradition of state remedies for monopolies and unfair business practices. Congress neither expressly preempted those laws nor evinced an intention to do so. See *California* v. *ARC Am. Corp.*, 490 U.S. 93, 101 (1989). Just the opposite: Federal antitrust law was meant to *supplement* state remedies. *Id.* at 102; 21 Cong. Rec. 2457 (1890) (statement of Sen. John Sherman).

Nonetheless, the Court held in *Flood* that the judge-made baseball exemption preempts all contrary state law. 407 U.S. at 284-85. It does so without approval from Congress, express or implied. See *Crist*, 331 F.3d at 1185 ("[O]ne would be hard-pressed to find a clear statement from Congress in favor of preemption").

II. The Exemption Sows Confusion in Lower Courts

1. This Court's intervention is also needed because the exemption, "a recurring source of litigation," C.A.J.A.178, is "[h]ardly a model of clarity," *Crist*, 331 F.3d at 1185; Gov't C.A. Br. 7.

For starters, the exemption is divorced from any statutory text that could anchor a court's analysis. Beyond that, *Toolson* and *Flood* gave no guidance as to the reach of the exemption. Rather, they stoked confusion by alternating discussion between the reserve clause and the "businesses of baseball." *Supra* pp.10-11. And the Court never explained what comprises that "business," or whether it meant *every* time that MLB engaged in a commercial transaction it is exempt from antitrust en-

forcement. There is no statutory text or any other authority a court could look to in order to answer this question.

Courts grappling with the exemption have generally landed on one of three methodologies. First, the majority of courts—and most circuit courts that have addressed the issue—have extended the exemption to the "business of baseball, not any particular facet of that business." *Charles O. Finley*, 569 F.2d at 541.[6] But, even then, courts struggle to locate where the business of baseball begins and ends, some recognizing that it cannot "apply wholesale to all cases which may have some attenuated relation to the business of baseball." *Charles O. Finley*, 569 F.2d at 541 n.51.

Second, a handful of courts have applied the exemption narrowly, as limited to the reserve clause, based on the facts that were before this Court in its exemption decisions. See *Piazza* v. *Major League Baseball*, 831 F. Supp. 420, 437 (E.D. Pa. 1993); *Butterworth* v. *Nat'l League of Pro. Baseball Clubs*, 644 So. 2d 1021, 1025 (Fla. 1994). Third, some courts have tried to reconcile these competing positions and attempted to discern the "integral" or "central" parts of the business, *Pro. Baseball Schs. & Clubs, Inc.* v. *Kuhn*, 693 F.2d 1085, 1086 (11th Cir. 1982), or its "unique characteristics and needs," *Postema* v. *Nat'l League of Pro. Baseball Clubs*, 799 F. Supp. 1475, 1489 (S.D.N.Y. 1992), *rev'd on other grounds*, 998 F.2d 60 (2d Cir. 1993). These courts recognize that *Federal Baseball* and its progeny—even if not

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[6] See also *Wyckoff*, 705 F. App'x at 29; *Miranda*, 860 F.3d at 1240; *Right Field Rooftops, LLC* v. *Chi. Cubs Baseball Club, LLC*, 870 F.3d 682, 688 (7th Cir. 2017); *City of San Jose*, 776 F.3d at 690; *Salerno*, 429 F.2d at 1005 (Friendly, J.).

limited to the reserve clause—must have some limiting principle. *Id.* at 1489.

Although neither of these latter two approaches is the prevailing view, they underscore that the exemption is unmoored from any statutory text and can "become whatever the reviewing court says it is." Joseph J. McMahon, Jr. & John P. Rossi, *A History and Analysis of Baseball's Three Antitrust Exemptions*, 2 Vill. Sports & Ent. L.F. 213, 243 (1995).

2. Fifty years after *Flood*, these problems still persist. The exemption has not put to rest antitrust litigation against baseball, in part because of the murky distinctions that courts have created, and in part because MLB continues to injure consumers and competitors. See, *e.g.*, Nathaniel Grow, *Defining the "Business of Baseball": A Proposed Framework for Determining the Scope of Professional Baseball's Antitrust Exemption*, 44 U.C. Davis L. Rev. 557, 563 (2010) ("MLB regularly finds itself embroiled in antitrust disputes.").

Nor will the confusion subside on its own. MLB is a growing and changing business. *Supra* pp.17-20. It increasingly exerts economic influence in different markets, and will continue to adapt and react to changes in the economy. For example, MLB reportedly relies on local media for nearly a quarter of its team revenues. But as the regional sports network model struggles, MLB is beginning to take ownership of teams' local broadcasting rights, which could set MLB up to have complete control over league broadcasting.[7]

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[7] Susan Lingeswaran, *Deal focus: MLB takes control of Diamondbacks broadcasts from DSG*, Sportcal. (July 25, 2023), https://www.sportcal.com/features/deal-focus-mlb-takes-control-of-diamondbacks-broadcasts-from-dsg/?cf-view.

A recent case from the District of Puerto Rico raises new questions. The court held the exemption barred antitrust claims brought against a "professional baseball venture NOT associated with Major League Baseball," as long as the league is in the "business of providing public baseball games for profit." *Cangrejeros de Santurce Baseball Club, LLC* v. *Liga de Beisbol Profesional de P.R., Inc.*, No. 22-cv-1341, 2023 WL 4195663, at *1, *5 (D.P.R. June 27, 2023) (quoting *Toolson*, 346 U.S. at 357), *appeal filed*, No. 23-1589 (1st Cir. Aug. 7, 2023). Not only does this decision expand the previously understood limits of the exemption, it may run headlong into *Alston*, where this Court held the NCAA is not "immun[e] from the normal operation of the antitrust laws." 141 S. Ct. at 2147, 2159. But, without the Court's further intervention, *NCAA baseball* might have the last laugh. Like professional baseball, college baseball is a profit-making enterprise—a business—so the NCAA could invoke antitrust immunity under *Flood*, stifling the hopes of college baseball players and inviting follow-on litigation.[8]

III. *Stare Decisis* Does Not Prevent the Court from Revisiting and Overruling *Flood* and *Toolson*

A. *Flood* and *Toolson* Are Entitled to Weak *Stare Decisis*

1. *Stare decisis* cannot save the exemption. The level of *stare decisis* afforded to a precedent turns on the nature of the challenged decision. See *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1412 (2020) (Kavanaugh, J., concurring in part). Some statutory interpretation decisions command stronger *stare decisis* effect than do constitutional

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[8] There is litigation pending in federal court regarding the salary of collegiate baseball coaches. See *Smart* v. *NCAA*, No. 22-cv-02125 (E.D. Cal.).

decisions because, in the former, "the legislative power is implicated, and Congress remains free to alter what [the Court] has done." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-73 (1989). But antitrust decisions are the opposite: the Court has afforded much weaker *stare decisis* effect to cases, like this one, involving the Sherman Act.

As the Court has recognized, "Congress … intended that law's reference to 'restraint of trade' to have changing content, and authorized courts to oversee the term's dynamic potential." *Kimble*, 576 U.S. at 461 (internal quotation marks omitted). The Court has "therefore felt relatively free to revise [its] legal analysis as economic understanding evolves and … to reverse antitrust precedents that misperceived a practice's competitive consequences." *Ibid.*

For example, in *Khan* this Court overruled a thirty-year-old precedent subjecting vertical maximum price fixing to per se condemnation under the Sherman Act. The Court explained that, while it is generally "reluctan[t]" to overrule statutory decisions, in the antitrust context "there is a competing interest" to adapt to changing economic circumstances. 522 U.S. at 20. Further, the presumption that Congress will fix statutory errors "has less force with respect to the Sherman Act in light of the accepted view that Congress expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." *Ibid.* (internal quotation marks omitted). Accordingly, the Court reconsiders antitrust decisions "when the theoretical underpinnings of those decisions are called into serious question." *Id.* at 21.

Similarly, in *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877 (2007), the Court reiterated

that "*[s]tare decisis* is not as significant [when] the issue before [it] is the scope of the Sherman Act." *Id.* at 899. There, the Court overruled a 100-year-old decision because "respected authorities in the economics literature" and intervening decisions undermined that prior case. *Id.* at 900.

2. These decisions establish that the Court is free to revisit the baseball exemption, as articulated by *Toolson* and *Flood*.

First, the economic understanding that underlay those decisions has changed. *Flood* relied on a lower court finding that "some form of reserve on players is a necessary element of the organization of baseball as a league sport." 407 U.S. at 267. That turned out to be dead wrong—the reserve clause was eliminated shortly after *Flood*, and MLB shrugged it off. There is also fifty years of additional evidence showing the antitrust laws can workably be applied to every other league sport, none of which has buckled under from ruinous competition.

The exemption's age is no reason to preserve it. In overturning 100- and 30-year-old cases, *Leegin* and *Khan* rejected the notion that longevity is a reason to let Sherman Act precedent stand. Indeed, longevity often weighs *against* antitrust *stare decisis* insofar as antiquated judicial rules may fail to reflect contemporary market realities. That principle holds true here: The business of baseball looks markedly different than it did in 1922 (*Federal Baseball*) or even 1972 (*Flood*). MLB is far more profitable and has a much broader reach in interstate markets today. *Supra* pp.17-20. And the reserve system *Flood* relied on as the factual predicate for *stare decisis* was eliminated long ago for major league

players. See *Kansas City Royals Baseball*, 532 F.2d at 617.

Second, as in *Khan* and *Leegin*, there is a "considerable body of scholarship," *Khan*, 522 U.S. at 15, detailing the harms the exemption causes, as well as its lack of legal or economic foundations. See, *e.g.*, Morgen A. Sullivan, *"A Derelict in the Stream of the Law": Overruling Baseball's Antitrust Exemption*, 48 Duke L.J. 1265, 1294 & n.163 (1999) (collecting sources describing the "negative legal and economic consequences that have resulted from the exemption"). The government too has explained in this case that the exemption serves no policy purpose. Gov't C.A. Br. 10. Under *Khan* and *Leegin*, these are ample reasons to revisit the exemption.

Last, *Khan* and *Leegin* foreclose any argument that congressional inaction is a reason for the Court to leave the exemption undisturbed. As the Court explained in *Khan*, it "infer[s] little meaning from the fact that Congress has not reacted legislatively" to its prior antitrust precedents. 522 U.S. at 19. That was true in *Khan* even though there had been "various legislative" proposals to deal with the vertical price-fixing issue before the Court. *Ibid.* Indeed, *Khan* rejected *Flood* as persuasive on this very point, noting that *Flood* was an "aberration," and ignored its theory of congressional inaction. *Ibid.* While *Khan* had no reason to "overrule" the exemption, as it was not at issue, the Court clearly repudiated *Flood*'s rationale—removing yet another barrier to this Court revisiting *Flood* today.[9]

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[9] Outside the antitrust context too, this Court has rejected the theory of congressional inaction, saying it "deserves very little weight in the interpretive process." *Alexander* v. *Sandoval*, 532 U.S. 275, 292 (2001); see also *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990) (Blackmun, J.) ("Congressional inaction lacks

4. MLB has argued that the Curt Flood Act of 1998 evinced congressional intent to "preserve" or "endorse" the exemption. Resp. C.A. Br. 21-27. Not so. The CFA provided only that major league players can sue MLB for antitrust violations. It did not preserve or endorse the exemption in any way.

Congress's limited intent is clear in the statutory text. Subsection (a) of the CFA provides that activities relating to major league players "are subject to the antitrust laws to the same extent" as conduct in "other professional sports business affecting interstate commerce." 15 U.S.C. 26b(a). Subsections (b)-(d) then clarify the narrow scope of subsection (a)—i.e., that it addresses the antitrust laws only with respect to major league players.

For all other matters, the CFA explicitly changes nothing. It states that "[n]o court shall rely on the enactment of this section as a basis for changing the application of the antitrust laws" to any other conduct. *Id.* 26b(b). No change means no change—no codification, no endorsement.

The plain text is bolstered by the legislative history, which shows that Congress did not want the CFA to do anything more than resolve a narrow dispute between MLB and its players. See, *e.g.*, S. Rep. No. 105-118, at 6

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persuasive significance because several equally tenable inferences may be drawn from such inaction") (cleaned up). A majority of the current Justices of this Court has expressed the same view. See *Consumer Elecs. Ass'n* v. *FCC*, 347 F.3d 291, 299 n.4 (D.C. Cir. 2003) (Roberts, J.); *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 299-300 (2014) (Thomas, J., concurring); *Tex. Dep't of Hous. & Cmty. Affs.* v. *Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 570-71 (2015) (Alito, J., dissenting); *DePierre* v. *United States*, 564 U.S. 70, 87 n.13 (2011) (Sotomayor, J.); *Gadelhak* v. *AT&T Servs., Inc.*, 950 F.3d 458, 467 (7th Cir. 2020) (Barrett, J.).

(1997) (Senate committee report noting that "the passage of this bill does not affect the applicability or non-applicability of the antitrust laws in any other context beyond that specified in subsection 27(a)"). The Act's legislative sponsors noted that "whatever the law was before the enactment of this legislation, it is unchanged by the passage of the legislation." 144 Cong. Rec. 18,175 (1998) (statement of Sen. Orin Hatch); see also *id.* at 18,459 (explaining that the CFA was "intended to have no effect other than to clarify the status of major league players under the antitrust laws").

Congress can "take[ ] no governmental action except by legislation." *Rapanos* v. *United States*, 547 U.S. 715, 750 (2006). And "until Congress says otherwise, the only law it has asked [this Court] to enforce is the Sherman Act," *Alston*, 141 S. Ct. at 2160, which, by its plain terms, applies to "[e]very person," 15 U.S.C. 1, 2, including MLB. "That law is predicated on one assumption alone—competition is the best method of allocating resources in the Nation's economy." *Alston*, 141 S. Ct. at 2160 (cleaned up).

B. The *Stare Decisis* Factors Weigh Heavily in Favor of Revisiting the Exemption

While *Flood* and *Toolson* are entitled to little, if any, precedential value at the outset, the "three broad considerations" of *stare decisis*, see *Ramos*, 140 S. Ct. at 1414-15 (Kavanaugh, J., concurring in part), also weigh in favor of granting the petition. *Flood* and *Toolson* were (1) "not just wrong but grievously [and] egregiously wrong"; (2) the decisions have caused "significant negative jurisprudential [and] real-world consequences"; and (3) overruling them would not "unduly upset reliance interests." *Ibid.*

1. *Flood* and *Toolson* Were Egregiously Wrong, and Have Been Eroded By Later Decisions

a. For almost a century, the baseball exemption has been derided by scholars, judges, and Members of this Court. See Samuel A. Alito, Jr., *supra* (collecting criticisms). Jurists have called *Federal Baseball* "not one of Mr. Justice Holmes' happiest days," *Salerno*, 429 F.2d at 1005 (Friendly, J.), and an "impotent zombi[e]," *Gardella*, 172 F. 2d at 408-09 (Frank, J., concurring). Scholars have referred to *Federal Baseball* as "[b]aseball's most infamous opinion." Eldon L. Ham, *Aside the Aside: The True Precedent of Baseball in Law*, 13 Marq. Sports L. Rev. 213, 215 (2003).

But even if *Federal Baseball* were defensible in its day (cf. Samuel A. Alito, Jr., *supra*, at 2), *Toolson* and *Flood* were not—especially after the Court began interpreting interstate commerce more broadly and baseball amplified its interstate activities. Moreover, although *Toolson* invoked *stare decisis*, it did not grapple with any of the factors or values that the doctrine is supposed to preserve. Its anemic, one-page decision was "virtually unreasoned," *District of Columbia* v. *Heller*, 554 U.S. 570, 623-24 & n.24 (2008), and not worthy of *stare decisis*.

Flood was no stronger. Justice Blackmun's lengthy ode to baseball suggested that the decision was not based in law but "in the proclivities of individual[s]." *Vasquez* v. *Hillery*, 474 U.S. 254, 265-266 (1986). And in grounding the decision on baseball's "unique" needs, *Flood* did not explain why baseball—as a business—was different from any other league. 407 U.S. at 282. This special treatment violates a foundational principle of *stare decisis*—that "like cases should generally be

treated alike." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1623 (2018).

And *Flood*, like *Toolson*, accepted uncritically that the exemption was entitled to *stare decisis*, without examining any of the relevant factors or policies. Instead, the Court circumvented a rigorous *stare decisis* analysis by again invoking a now-discredited theory of congressional inaction. See *supra* p.10.

For these reasons, and others, renowned scholars have called the exemption "almost comical." William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 Geo L.J. 1361, 1381 (1988). And an "embarrassment." Roger I. Abrams, Legal Bases: Baseball and the Law 66-67 (1998). The response from the bench has not been much kinder. Justice Douglas, who joined *Toolson*, "lived to regret it" and would have "correct[ed] what [he] believe[d] to be its fundamental error." *Flood*, 407 U.S. at 286 n.1 (Douglas, J., dissenting).

Beyond that, a unanimous Court recently distanced itself from the exemption. It suggested that *Toolson* and *Flood* "dallied with something that looks a bit like an antitrust exemption," *Alston*, 141 S. Ct. at 2159. The Court also echoed its earlier criticism that the exemption is "unrealistic[,] inconsistent, and aberrational." *Ibid*. (cleaned up). Because the exemption has frequently been "questioned by Members of the Court in later decisions," *Payne* v. *Tennessee*, 501 U.S. 808, 829-30 (1991), *stare decisis* has little if any force.

b. Not only were the exemption decisions wrong on their own terms—as almost everyone agrees—they have been "eroded" by later decisions, *United States* v. *Gaudin*, 515 U.S. 506, 521 (1995), further weakening what little claim to *stare decisis* they may have had.

First, as noted above, *Flood* and *Toolson*'s antiquated views of *stare decisis* and congressional inaction cannot be squared with *Leegin* or *Khan* (in the antitrust context), or with the Court's other cases questioning the congressional inaction doctrine generally. *Supra* p.27 & n.9.

Second, the exemption contravenes the Court's cases holding that implied exemptions from the antitrust laws are highly disfavored, and that Congress must speak clearly to immunize businesses or industries from antitrust enforcement. *Supra* p.6. Again, Congress never enacted a law—much less a clear one—repealing the Sherman Act for baseball.

Third, the exemption conflicts with this Court's cases guarding federalism principles and holding that Congress must speak clearly to alter the federal-state balance. *Supra* p.20-21.

Fourth, baseball's blanket immunity is incompatible with this Court's post-*Flood* decisions presuming that most business conduct and all other sports leagues should be measured by the case- and fact-specific "rule of reason," rather than receive across-the-board per se treatment. See *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977); *FTC* v. *Ind. Fed'n of Dentists*, 476 U.S. 447 (1986); *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1 (1979). The exemption creates a one-size-fits-all rule for an entire industry, when the touchstone of modern antitrust law is reasonableness.

2. The Exemption Has Detrimental Consequences

As discussed (*supra* pp.21-24), the baseball exemption has proven unworkable: it "has created confusion among the lower courts that have sought to understand and apply" it. *Seminole Tribe* v. *Florida*, 517 U.S. 44, 64 (1996). *Flood* plainly failed to "enunciate [a] judicially

discernible and manageable standard." *Vieth* v. *Jubelirer*, 541 U.S. 267, 306 (2004). The lower courts have developed a muddled doctrine that makes the exemption "whatever the reviewing court says it is." McMahon, Jr. &. Rossi, *supra*, at 243. And these problems will only get worse as MLB grows and expands into new markets. *Supra* pp.17-20.

Moreover, the exemption causes real-world problems beyond just those presented here. MLB is huge and getting bigger. *Supra* pp.17-20. Billions of dollars of commerce are affected by MLB's anticompetitive restraints. The blanket immunity has proven harmful to fans, players, businesses, and cities around the country.

3. MLB Has No Legitimate Reliance Interests in Its Immunity

Stare decisis accommodates only "*legitimate* reliance interest[s]." *United States* v. *Ross*, 456 U.S. 798, 824 (1982) (emphasis added). MLB doesn't have any. This Court has held that *stare decisis* is at its apex when "when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision." *Hilton* v. *S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). That does not describe baseball's immunity. As one Court aptly explained, "[t]he death of the business-of-baseball exemption would likely be met with considerable fanfare, save for the club owners who benefit from the rule." *Crist*, 331 F.3d at 1188.

Moreover, removing the exemption would not detract from MLB's lawful activities; it would only put MLB on the same footing with every other sports league and business. And the other leagues have thrived. This Court denied the NFL immunity 60 years ago, see *Radovich*, 352 U.S. at 452, and the NFL has overtaken baseball as the single-most profitable sports league in

the world, at over $16 billion in annual revenue.[10] It is not too much to ask MLB to play by the same rules as everyone else. Gov't C.A. Br. 11.

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Stare decisis is meant to promote "the evenhanded, predictable, and consistent development of legal principles," fostering "reliance on judicial decisions," and contributing "to the actual and perceived integrity of the judicial process." *Payne*, 501 U.S. at 827. None of these goals is served by maintaining an aberrational exemption that applies to a single sports league, whose business is not substantially distinguishable from others.

IV. This Case Is the Perfect Vehicle for Revisiting the Exemption

This case is the ideal vehicle for revisiting *Flood* and *Toolson*. The exemption's validity is squarely presented. If not for MLB's antitrust immunity, petitioners' claims would have survived MLB's motion to dismiss, and petitioners would be able to challenge MLB's conduct as unreasonable. And, as petitioners acknowledged below, they fall squarely within the "business of baseball," so they are plainly covered by the exemption as interpreted by a majority of lower courts (including the Second Circuit). *Supra* p.22. The Second Circuit affirmed dismissal based on the exemption alone.

Moreover, MLB's conduct in this case is far-reaching and harmed dozens of business and local markets. The market for affiliations was once comprised of all 30 MLB teams and more than 160 minor league teams from cities and towns around the country. Competition in that

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[10] Megh Nadar, *10 Most Profitable Sports Leagues in The World*, Sports Unfold (Aug. 18, 2023), https://www.sportsunfold.com/10-most-profitable-sports-leagues-in-the-world/.

market led to millions of dollars in commercial exchanges and even greater downstream effects for local economies, minor league players, and local workers.

But MLB brazenly shut forty teams out of the market—by imposing a horizontal agreement amongst its rival teams to reduce the number affiliations and to boycott petitioners. That is a "classic" restraint of trade in violation of Section 1. See *FTC* v. *Superior Ct. Trial Laws. Ass'n*, 493 U.S. 411, 422 (1990). If the Court does not grant review here, it will signal to MLB that there is no antitrust violation too obvious or too harmful. MLB will continue exploit its undeserved immunity to the detriment of everyone else.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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SEPTEMBER 2023

APPENDIX

APPENDIX TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of June, two thousand twenty-three.

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PRESENT:

BARRINGTON D. PARKER, MICHAEL H. PARK, ALISON J. NATHAN, *Circuit Judges.*

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No. 22-2859

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NOSTALGIC PARTNERS, LLC, DBA THE STATEN ISLAND YANKEES, ONEONTA ATHLETIC CORPORATION, DBA THE NORWICH SEA UNICORNS, TRI-CITY VALLEYCATS, INC.,

Plaintiffs-Appellants,

v.

THE OFFICE OF THE COMMISSIONER OF BASEBALL, AN UNINCORPORATED ASSOCIATION DBA MAJOR LEAGUE BASEBALL,

Defendant-Appellee.[*]

FOR PLAINTIFFS-APPELLANTS:

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FOR DEFENDANT-APPELLEE:

JEFFREY B. WALL, Sullivan & Cromwell LLP, Washington, DC (John L. Hardiman, Benjamin R. Walker, Jacob G. Singer, Sullivan & Cromwell LLP, New York, NY; Morgan L. Ratner, Sullivan & Cromwell LLP, Washington, DC, *on the brief*)

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

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[*] The Clerk of Court is respectfully directed to amend the caption accordingly.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

Appellants, businesses operating as the Staten Island Yankees, Norwich Sea Unicorns, and Tri-City ValleyCats, were Minor League Baseball teams affiliated with Major League Baseball ("MLB") teams. MLB reorganized the minor leagues in 2020, including by eliminating Appellants' affiliations with major-league teams. Appellants sued MLB, alleging that the reorganization constituted a "contract, combination[,] . . . or conspiracy, in restraint of trade or commerce among the several States," in violation of Section 1 of the Sherman Act. 15 U.S.C. § 1. The district court (Carter, *J.*) granted MLB's motion to dismiss, holding that "MLB's antitrust exemption[] . . . shields MLB from [Appellants'] lawsuit." Special App'x at 2. We assume the parties' familiarity with the facts, the procedural posture, and the issues on appeal.

In 1922, the Supreme Court held that "'exhibitions' of 'base ball' d[o] not implicate the Sherman Act because they d[o] not involve interstate trade or commerce." *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2159 (2021) (quoting *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Pro. Baseball Clubs*, 259 U.S. 200, 208-09 (1922)). This case created "something . . . like an antitrust exemption for professional baseball," *id.*, such that "professional baseball is not subject to the antitrust laws," *Salerno v. Am. League of Pro. Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir. 1970) (Friendly, *J.*); *see also Flood v. Kuhn*, 407 U.S. 258, 282-85 (1972) (declining to overrule baseball's "exemption from the federal antitrust laws"); *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953) (same). Appellants concede that "these precedents

. . . presently immunize MLB" against their claims. Appellants' Br. at 37. And we must continue to apply Supreme Court precedent unless and until it is overruled by the Supreme Court. *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). We need go no further.[2]

For the foregoing reasons, the judgment of the district court is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

/s/ Catherine O'Hagan

[2] Although the parties agree that the baseball exemption disposes of this case, they urge us to opine on other, non-dispositive issues. We decline their invitations. *Cf. United States v. Schultz*, 333 F.3d 393, 407 & n.8 (2d Cir. 2003) (describing "[t]he dangers inherent in a court's reaching out to decide issues not essential to the outcome of the case before it").

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21-cv-10876 (ALC)

NOSTALGIC PARTNERS, LLC, D/B/A THE STATEN ISLAND YANKEES; ONEONTA ATHLETIC CORPORATION, D/B/A THE NORWICH SEA UNICORNS; SPORTS ENTERPRISES, INC., D/B/A SALEM-KEIZER VOLCANOES; TRI-CITY VALLEYCATS, INC.,

Plaintiffs,

-against-

THE OFFICE OF THE COMMISSIONER OF BASEBALL, AN UNINCORPORATED ASSOCIATION D/B/A MAJOR LEAGUE BASEBALL

Defendant.

OPINION GRANTING MOTION TO DISMISS

ANDREW L. CARTER, JR., District Judge:

Four Minor League Baseball ("MiLB") teams allege that Defendant, Major League Baseball ("MLB"), violated Section 1 of the Sherman Act by orchestrating a horizontal agreement among its 30 MLB Clubs to exclude Plaintiffs and 36 other MiLB teams from MLB's new Professional Development League.

Defendant moves to dismiss on three grounds: 1) Plaintiffs lack antitrust standing; 2) Plaintiffs fail to state an antitrust violation; 3) MLB's antitrust exemption bars Plaintiffs' claim. I find that the

plaintiffs have established antitrust standing and have adequately pleaded an antitrust violation. MLB's antitrust exemption, which has existed since 1903, is a different skein of yarn.

Although Congress chipped away at the exemption in 1998, the exemption—as modified—has been consistently upheld by courts, including the Second Circuit. Plaintiffs believe that the Supreme Court is poised to knock out the exemption, like a boxer waiting to launch a left hook after her opponent tosses out a torpid jab. It's possible. But until the Supreme Court or Congress takes action, the exemption survives; it shields MLB from Plaintiffs' lawsuit.

BACKGROUND

Major league baseball teams compete against each other for the best players and for opportunities to win the World Series. They also compete against each other for revenue. In this competitive milieu, major league clubs work closely with their minor league affiliates. New players start in the minor leagues, and major league teams send injured stars to the minors to rehab injuries. The prospect of seeing future or rehabilitating major leaguers helps minor league teams fill stands and sell merchandise. Cooperation between major league teams and their minor league affiliates benefits fans, allowing them the opportunity to see more professional baseball games in more communities. Complaint ¶ 54.

From 1903 until 2020, the relationship between MLB Clubs and MiLB teams was governed by the Professional Baseball Agreement ("PBA"), a contract between MLB and the National Association of Professional Baseball Leagues, an organization of minor leagues and minor league clubs. Compl. ¶49-60. Under

the PBA, while major league clubs paid all of the payroll costs for players, managers, and trainers, minor league teams paid 8 percent of ticket sales to their major league counterparts. Individual MLB Clubs and MiLB teams were all separately owned and economically distinct franchises with the exception of 25 MiLB teams that are owned by their affiliate MLB Club. Compl. ¶¶ 2, 13. Unfettered, each team would be able to choose as few or as many minor league affiliates as they wished. But the PBA prevented MLB Clubs from having more than six MiLB affiliates. This system resulted in 30 MLB Clubs with 160 affiliates, out of a possible 180. Compl. ¶53-55.

In September 2020, MLB allowed the PBA to expire and announced a new organizational plan—the Professional Development League ("PDL"). Under the PDL, MLB contracts directly with MiLB teams through PDL license agreements instead of contracting with the National Association. The new plan reduced the number of MiLB leagues from six to four and limited MLB Clubs to a maximum of four affiliates, thereby reducing the total number of MiLB affiliations. Compl. ¶60. Plaintiffs are among the 40 minor league teams who lost their affiliations.

PROCEDURAL HISTORY

On December 20, 2021, Plaintiffs filed the complaint. Defendants filed the motion to dismiss on April 22, 2022; Plaintiffs opposed on May 27. On June 15, the United States filed a statement of interest. Defendants filed a reply on June 17. The reply also addressed the statement of interest filed by the United States. Plaintiffs submitted a response to the statement of interest on July 1. The motion is fully briefed.

DISCUSSION

1) PLAINTIFFS HAVE ESTABLISHED ANTITRUST STANDING.

For antitrust standing, a private plaintiff must plausibly allege (a) antitrust injury and (b) that it is an efficient enforcer of the antitrust laws. *Gatt* at 76.

A) ANTITRUST INJURY

"[The Second Circuit's] jurisprudence culminating in *Gatt Communications, Inc. v PMC Associates, LLC* established a three-part test for determining whether the plaintiff has alleged an antitrust injury: "(1) the court must identify the practice complained of and the reasons such a practice is or might be anticompetitive; (2) the court must identify the actual injury the plaintiff alleges. . . [which] requires us to look to the ways in which the plaintiff claims it is in a worse position as a consequence of the defendant's conduct; and (3) the court compares the anticompetitive effect of the specific practice at issue to the actual injury the plaintiff alleges." *IQ Dental Supply, Inc. v. Henry Schein, Inc.*, 924 F. 3d 57 at 62-63 (2d Cir. 2019) (internal quotations and citations omitted).

i) STEP 1

At step 1, the plaintiffs must allege that the Defendants have engaged in unlawful anticompetitive conduct. *Port Dock and Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117, 122 (2d Cir. 2007). "The bar for such a showing is a low one." *IQ* at 63. As stated below, Plaintiffs sufficiently allege unlawful anticompetitive conduct by the Defendants, claiming that Defendant orchestrated a plan to reduce minor league affiliations, resulting in an actual adverse effect on competition in the market for minor league affiliations.

ii) STEP 2

At step 2, a court must "look to the ways in which the plaintiff claims it is a worse position as a consequence of the defendant's conduct." *Gatt Communs., Inc., v PMC Assocs., L.L.C.*, 711 F.3d 68, at 76. (internal citation and quotation omitted). Defendant's anticompetitive actions resulted in Plaintiffs losing their affiliations. Without their affiliations, ousted teams cannot attract top talent and are barred from playing against affiliated MILD teams, which Plaintiffs argue "effectively destroy[s]" them. Compl. ¶ 1. This is sufficient.

iii) STEP 3

At step 3, the plaintiffs "must demonstrate that the Defendant's anticompetitive conduct caused its actual injury." *IQ* at 64-65. Plaintiffs are prevented from competing for affiliation with any of the 30 major league teams; therefore, the actual injury flows from the defendant's cap on affiliations.

But Defendant claims that Plaintiffs were previously involved in a scheme that they now claim is anticompetitive.[1] Defendant claims that "harm caused by expulsion from an allegedly anticompetitive agreement is not the type of injury that the antitrust laws were designed to remedy." Def Mot p. 13-14. According to Defendants, this bars Plaintiffs' claim. This is incorrect.

"A party that participated in or even benefited from a restrictive arrangement is not prevented from suing under the antitrust laws." Plaintiff Opp. p.14. The

[1] Plaintiffs have clarified that their claim is that, regardless of how they entered into the market, their injury stems from being prevented from *currently* competing for affiliations with major league teams.

Second Circuit has held that "regardless of how [plaintiff] entered the market, once [plaintiff] was in the market it had a right to do business in a market undistorted by unlawful anticompetitive conduct." *IQ Dental Supply*, 924 F. 3d at 64. In *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, the Second Circuit held that even a "cartel member has antitrust standing to challenge the cartel to which it belongs, to the extent that the member can demonstrate antitrust injury." 857 F.2d 55, 67-68 (2d Cir. 1988). Plaintiff Opp. p 14

Defendants further claim that the Second Circuit's holding in *Gatt* precludes a finding that Plaintiffs have antitrust standing. That cricket won't sing.

a) FACTS OF GATT

Gatt sold commercial land and mobile radios in New York State. Vertex manufactured and distributed radios. Gatt and Vertex entered into an agreement enabling Gatt to serve as a licensed dealer of Vertex radios. This agreement was subject to termination by either party without cause. PMC, the defendant, also a dealer of Vertex radios, served as Vertex's sales representative in New York. Vertex told Gatt that PMC would orchestrate and support Gatt's efforts to sell Vertex radios. Several New York City and New York State agencies purchased large quantities of Vertex radios by soliciting bids from Vertex dealers. *Gatt* 71-72.

PMC, Gatt, and others launched a bid-rigging scheme. PMC would decide ahead of time which dealer would win bids by encouraging other dealers in the scheme to refrain from submitting bids or submit inflated bids. Every dealer would get a share of bids. The plaintiff participated in this scheme and won

some bids, but the plaintiff didn't like the value or number of bids that it won. As a result, the plaintiff decided to break ranks and submit a bid for a sale of Vertex radios to the Transit Authority even though PMC warned them not to bid on the project. Plaintiff won the bid, angering the defendant. Defendant convinced Vertex to terminate the license agreement with Gatt. *Gatt* 72-73.

ANALYSIS OF GATT

The Circuit held that the plaintiff lacked antitrust injury because its injury—termination of a license agreement—did not flow from what made the bid-rigging scheme unlawful. The harm that flowed from the bid-rigging scheme was artificially inflated prices for the government purchasers, not harm to competition between dealers. The plaintiff was not injured by the inflated prices. *Gatt* at 79.

It is not enough for a plaintiff to suffer injury in an anticompetitive environment; an unlawful, anticompetitive act must cause the injury. In *Gatt*, the plaintiff and defendants created the illusion of competition by having competing bids submitted to government agencies, but the winner was predetermined. While expelling Plaintiff from the bid-rigging scheme reduced the number of conspirators, it didn't reduce the number of competitors, since the competitors were competitors in name only.

Moreover, the bid rigging scheme affected only one brand of commercially available radios. This didn't take place in a stand-alone, unique market, like professional baseball. ("Gatt has alleged a conspiracy involving only one brand of commercial land mobile radios and has not pleaded that the brand constitutes a stand-alone market." *Gatt* at 77.). Even if Defendant

terminated the license to retaliate against Plaintiff and to continue perpetuating the bid rigging scheme, the anticompetitive act—assuming it was in fact anticompetitive—was the orchestrating of the bid-rigging scheme, not the termination of Plaintiff's license agreement. The anticompetitive act harmed the purchasers, not the Plaintiff.

Here, the anticompetitive act serves to reduce competition between rivals by preventing plaintiffs from competing with each other for affiliations and preventing MLB clubs from competing with each other to affiliate with more minor league teams. The plaintiffs' injury—their inability to compete for affiliations with major league teams—is directly linked to the anticompetitive act.

B) EFFICIENT ENFORCER TEST

The efficient enforcer analysis requires an examination of the following four factors:

> "(1) The directness or indirectness of the asserted injury; (2) the existence of an identifiable class of persons whose self interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3) the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries." *Gatt* at 78, citing *Paycom Billing Servs. v. MasterCard Int'l, Inc*., 467 F.3d 283 at 290-91 (2d. Cir. 2006).

The Defendant claims in a footnote, that plaintiffs are not efficient enforcers, relying again on a misinterpretation of *Gatt.* Def. motion p. 16-17 note 10. As stated above, the plaintiffs have suffered direct injuries

as a result of the anticompetitive agreement, as a result, they are in the class of persons whose self interest has motivated them to vindicate the public interest. The injury is not speculative, and there should be no great difficulty apportioning damages among direct and indirect victims. Plaintiffs satisfy the requirements of the efficient enforcer analysis.

2) PLAINTIFFS HAVE SUFFICIENTLY PLEADED AN ANTITRUST CLAIM. UNDER SECTION 1 OF THE SHERMAN ACT.

To state a Section 1 Sherman Act claim, a plaintiff must plausibly allege an agreement between two or more entities that amounts to an unreasonable restraint of trade. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible if "it allows the court to draw the reasonable inference" that an unlawful agreement occurred. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

A) AGREEMENT TO RESTRAIN TRADE

The "central evil addressed by Sherman Act § 1 is the "elimin[ation of] competition that would otherwise exist." *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 195 (2010). The threshold question in § 1 cases is whether there was an agreement with effects on competition at all. *Twombly*, 550 U.S. at 553 (the critical question is whether the "conduct [restraining trade] stem[s] from independent decision or from an agreement, tacit or express"). Such an agreement must "join together separate decision makers" with "separate economic interests" to constitute the type of concerted action the Sherman Act seeks to prohibit. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 {1984). But "a conclusory allegation of agreement" is insufficient. *Twombly*, 550 U.S. at 557.

To allege the existence of an agreement at the motion to dismiss stage, a plaintiff may show direct evidence, such as "a recorded phone call in which two competitors agreed to fix prices at a certain level." *Mayor And City Council of Balt. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013). In the absence of direct evidence, a plaintiff must present circumstantial facts to support the inference of an agreement such as a common motive to conspire or "evidence of conduct that goes against the individual economic self-interest of the alleged conspirators." *Id.* In *NCAA v. Board of Regents*, 468 U.S. 85 (1984), the Court held that a television plan among NCAA college football teams constituted a horizontal agreement that restricted trade. The plan put a limit on the number of games for which a team could sell television broadcasting rights, thereby limiting output of broadcasting contracts and televised college football. *Id.* at 94. Despite rejecting the petitioner's characterization of the agreement as a boycott, the Court agreed that the plan was evidence of "an agreement among competitors on the way in which they will compete with one another." *Id.* at 99. This finding was supported by evidence that if it were not for the artificial limit imposed by the plan, competition between teams would yield a greater number of broadcasting contracts and televised football. *Id.* at 108.

Here, Plaintiffs point to MLB's widely publicized reorganization plan as direct evidence of an agreement among competitors to restrict output of Club affiliations. Compl. ¶ 60. Like in *Board of Regents*, Plaintiffs successfully allege that a competitive market without the agreement would have produced a greater number

of affiliations, as shown by the greater output under the PBA.[2]

B) UNREASONABLE RESTRAINT OF TRADE

If a plaintiff makes a plausible allegation of an agreement to restrain trade, they must then allege that the restraint of trade is unreasonable per se, under the rule of reason, or under an abbreviated rule of reason—the "quick look" test. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

i) Per Se Rule

"Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct." *Bd. of Regents*, 468 U.S. at 100. Courts apply this test only in circumstances when they have had sufficient experience that allows them to "predict with confidence that [the agreement] would be invalidated in all or almost all instances." *NCAA v. Alston*, 141 S. Ct. 2141, 2156 (2021).

Price and output restrictions "are the paradigmatic examples of restraints of trade that the Sherman Act" seeks to prohibit, so they tend to be condemned as illegal per se in most contexts. *Bd. of Regents*, 468 U.S. at 107-08. Group boycotts can also be subject to the per se rule if they have no plausible procompetitive justifications. *Nw. Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co*., 472 U.S. 284, 295 (1985).

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[2] MLB objects to 'Plaintiffs' characterization of the plan as a boycott, a legal conclusion that "[carries] no weight on a motion to dismiss." Def. Mot. at 20. At this stage, establishing a boycott is inconsequential since Plaintiffs have advanced a well-pleaded allegation of an agreement to restrain trade in some way. *Twombly,* 550 U.S. at 553.

But certain industries and entities require a more thorough inquiry even if the alleged agreement is plainly anticompetitive. *Eng'rs*, 435 U.S. at 692. The Supreme Court has said that it would be "inappropriate" to apply the per se rule to agreements within sports leagues because "a certain degree of cooperation" between competitors is often essential "if the product is to be available at all." *Bd. of Regents*, 468 U.S. at 101; *Am. Needle*, 560 U.S. at 188. Application of the per se rule in cases involving sports leagues—including this one—is inappropriate since it would not allow a subsequent consideration of procompetitive justifications.

ii) ABBREVIATED RULE OF REASON—"QUICK LOOK" REVIEW

The rule of reason analysis seeks to determine whether the challenged practice is, on balance, pro- or anti-competitive. *Eng'rs*, 435 U.S. at 692. Certain conduct like price or output restrictions may allow for an abbreviated rule of reason analysis—the "quick look" review—without a need to identify the relevant market. *Bd. of Regents*, 468 U.S. at 109. Courts will evaluate conduct under a "quick look" review when a full rule of reason analysis is unnecessary to show that any procompetitive benefit does not outweigh the anticompetitive effects. *Id.* Under this level of review, a plaintiff is only required to allege an actual adverse effect on competition without identifying the relevant market. *Id.*

In the present case, Plaintiffs call for a quick look review due to MLB's alleged constraints on the output of affiliations. However, a quick look review without addressing the relevant market would be insufficient to evaluate the effects on competition from changes to MLB and MiLB's complex relationship. As in *Alston*,

this "dispute presents complex questions requiring more than a blink to answer." *Alston*, 141 S. Ct. at 2157.

iii) FULL RULE OF REASON ANALYSIS

At the motion to dismiss stage, the full rule of reason inquiry only requires the plaintiff to "identify the relevant market affected by the challenged conduct and allege an actual adverse effect on competition in the identified market." *Watkins v. Smith*, No. 12cv4635, 2012 U.S. Dist. LEXIS 165762, 2012 WL 5868395, at *7 (S.D.N.Y. Nov. 19, 2012), *aff'd*, 561 F. App'x 46 (2d Cir. 2014). In cases involving sports leagues, the most difficult factual inquiry can be the definition of a relevant market. *Bd. of Regents v. Nat'l Collegiate Athletic Asso.*, 546 F. Supp. 1276, 1296 (W.D. Okla. 1982) ("Because we cannot know what the characteristics of the industry would be in a free market situation, the definition of a relevant market necessarily involves some guesswork."). A plaintiff must "allege a proposed relevant market that . . . encompasses all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor." *Emigra Grp., LLC v. Fragomen, Del Rey, Bernsen & Loewy, LLP*, 612 F. Supp. 2d 330, 359 (S.D.N.Y. 2009) (the "outer boundaries [of a market] are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.").

In cases involving NCAA college football teams and NFL teams, the Supreme Court found that the markets for broadcasting rights, intellectual property licenses, and even student-athlete labor constituted relevant markets for purposes of evaluating potential antitrust violations. *Bd. of Regents*, 468 U.S. 85; *Am. Needle*, 560 U.S. 183; *Alston*, 141 S. Ct. 2141. Consequently, the Court determined that because there are no other

products that would be reasonable substitutes for televised college football, NFL merchandise, or Division I talent, the relevant market was limited to the products in question. *Bd. of Regents*, 468 U.S. at 111.

Plaintiffs allege that the relevant market affected by MLB's conduct is the market for MiLB affiliations. Compl. ¶ 87. Plaintiffs allege that there are no reasonable substitutes for MiLB affiliations, explaining that non-affiliated MiLB teams cannot reach the same pool of talent, sponsors, or fans, particularly because they are barred from playing against affiliated MiLB teams. Just as the NCAA and NFL have complete control over the market for college and professional football in the United States, MLB has complete control over the market for baseball. Plaintiff's narrowly defined market is appropriate.

Addressing the second portion of the full rule of reason analysis—at the motion to dismiss stage—I find that the Plaintiffs have pleaded sufficient facts to show an actual adverse effect on competition in the identified market. Although professional baseball's prior regime instituted a cap on affiliations, the current lack of variety concerning the number of minor league affiliates for each club buttresses Plaintiff's claim that MLB has reduced competition in the market. Whether a major league club has the highest or lowest revenue, whether the team started in the 1870s or in 1998, whether a team's home fans refer to groups of people as y'all, you all, or yinz, whether they prefer thin crust or deep dish pizza, whether they crave abalone or chicken fried steak, whether the team constantly contends or sporadically succeeds, each major league team has exactly four minor league affiliates.

3) BASEBALL'S ANTITRUST EXEMPTION BARS THE LAWSUIT.

Section 1 of the Sherman Act forbids "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. Section 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).

In *Federal Baseball*, the Court held that "'giving exhibitions of base[]ball" was a "purely state affair[]" not subject to regulation by the federal government." *Wyckoff v. Office of the Comm'r of Baseball*, 211 F. Supp. 3d 615 at 621 (S.D.N.Y. September 29, 2016) (internal citations and quotations omitted). The Supreme Court reaffirmed the exemption in *Toolson*. "[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." *Toolson v New York Yankees, Inc.*, 346 U.S. 356, 357, 74 S. Ct. 78, 98 L. Ed. 64 (1953).

In *Flood v. Kuhn*, the Supreme Court recognized that professional baseball is engaged in interstate commerce, but reaffirmed the antitrust exemption. *Flood v. Kuhn*, 407 U.S. 258, 282-84, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1972). The Court recognized that the exemption was long standing and should be remedied by "Congress and not this Court." *Id.* at 284.[3] In

[3] In 1998, Congress passed an act, deciding that the antitrust exemption would not apply to "conduct, acts, practices or agreements...directly relating to or affecting employment of major league baseball players to play at the major league level."

Wycoff, the Second Circuit, analyzing baseball's antitrust exemption, affirmed dismissal of claims brought by baseball scouts, finding that the claims fell within the "business of baseball." *Wycoff*, 705 F. App'x at 29.

Here, the United States has filed a statement of interest, urging the Court to scrutinize baseball's exemption narrowly. Even analyzing the exemption narrowly, the exemption is wide enough to encompass the claims here. As Plaintiffs concede, *Wycoff's* interpretation of baseball's exemption forecloses their case since minor league affiliations are central to the business of baseball. Plaintiff's Opp. p. 8. Baseball's antitrust exemption will not brook this lawsuit; the case is dismissed.

CONCLUSION

For the reasons stated above, the complaint is dismissed. The Clerk of Court is directed to close this case.

SO ORDERED.

Dated: October 26, 2022
New York, New York

/s/ Andrew L. Carter Jr
ANDREW L. CARTER, JR.
United States District Judge

26(b)(a). This exception to baseball's exemption is not relevant to this case.