No. 23-283

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,

Respondent.

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

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BRIEF OF *AMICUS CURIAE* OPEN MARKETS INSTITUTE IN SUPPORT OF PETITIONERS

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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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

INTEREST OF *AMICUS CURIAE*[1]

The Open Markets Institute (OMI) is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine fair competition and threaten liberty, democracy, and prosperity. OMI regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public.

SUMMARY OF ARGUMENT

Children's author Laura Numeroff wrote, "If you give a mouse a cookie . . . , he'll ask for a glass of milk. . . . And chances are, if he asks for a glass of milk, he's going to want a cookie to go with it." Laura Numeroff, If You Give a Mouse a Cookie (1985). A hundred years ago, this Court gave major league baseball (MLB) an antitrust exemption in *Fed. Baseball Club of Baltimore v. Nat'l League of Pro. Base Ball Clubs*, 259 U.S. 200 (1922). And—while now more elephant than mouse—MLB has been asking the courts for milk and cookies ever since. Although the Court's "purely state affairs" description of baseball games, and the then-

[1] In accordance with this Court's Rule 37.2, counsel for *amicus curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae*, their members, or their counsel have made a monetary contribution intended to fund the preparation or submission of this brief. All parties were notified about the intent of *amicus curiae* to file this brief as required by Rule 37.2.

prevailing judicial limitation on Congress's interstate commerce power, that the *Federal Baseball* decision relied on are long gone, MLB still invokes *Federal Baseball's* exemption to conduct its lucrative business affairs whenever it can. Here specifically, MLB has championed the exemption to immunize its decision to exploit minor league teams by reducing the number of MLB-affiliated teams and boycotting those non-affiliated teams struggling to exist—not to mention collectively fixing the wages and non-negotiable terms and conditions of employment that all minor league players must endure. If any other professional sport—indeed, any other industry not subject to sectoral regulation—operated this way, its cartel would have been broken up long ago, and its executives could have faced criminal prosecution and prison time. *Cf. Nat'l Collegiate Athletic Ass'n v. Alston* , 141 S. Ct. 2141, 2169 (2021) (Kavanaugh, J., concurring) ("The NCAA is not above the law.").

This Court should grant petitioners a writ of certiorari to review and end the slippery slope that *Federal Baseball* created. The baseball exemption from the antitrust laws is indefensible. It lacks support in statutory law and congressional intent and flouts the canons of construction that implied antitrust immunity and preemption of state law are disfavored. As the exemption's creator, this Court may appropriately overrule *Federal Baseball* and its progeny.

ARGUMENT

I. JUDGES AND COMMENTATORS HAVE CONSISTENTLY CRITICIZED BASEBALL'S ANTITRUST EXEMPTION

More than a century ago, the Supreme Court ruled that Congress could not regulate baseball under its commerce clause authority. In 1922, Justice Oliver Wendell Holmes stated for a unanimous Court: "The business is giving exhibitions of baseball, which are purely state affairs, . . . and the transport [of players and equipment between states] is a mere incident, not the essential thing." *Fed. Baseball Club of Baltimore v. Nat'l League of Pro. Base Ball Clubs*, 259 U.S. 200, 208-09 (1922).

Ever since, however, judges and commentators have tended to criticize baseball's antitrust exemptions. Revisiting the exemption in *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953), the Court gave the *Federal Baseball* decision only tepid approval by affirming per curiam "[w]ithout re-examination of the underlying issues . . . ." *Id.* at 357.

More recently, in *Flood v. Kuhn*, 407 U.S. 258 (1972), Justice Blackmun, writing for the Court's five-justice majority, said the exemption is "an aberration confined to baseball"—one that others had called "unrealistic, inconsistent, or illogical." *Id.* at 282 (quoting *Radovich v. Nat'l Football League*, 352 U.S. 445, 452 (1957)). Yet, Justice Blackmun and the majority did not eliminate the exemption. Justice Douglas, dissenting, was harsh: The baseball exemption was "a derelict in the stream of the law that we, its creator, should remove." *Flood*, 407 U.S. at 286 (Douglas, J., dissenting).

Indeed, in the Court's unanimous 2021 decision in *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021), Justice Gorsuch gave *Federal Baseball* an unmistakable back of the hand, writing that "this Court once dallied with something that looks a bit like an antitrust exemption for professional baseball. *Id.* at 2159 (cleaned up). Justice Gorsuch also repeated Justice Blackmun's recognition that baseball's exemption is "unrealistic and inconsistent and aberrational." *Id.* (cleaned up).

The Court's denial of any similar special dispensation to other professional sports in the century since *Federal Baseball* highlights that assessment. *E.g., Radovich*, 352 U.S. at 445 (football); *Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204 (1971) (basketball); *United States v. Int'l Boxing Club of N.Y.*, 348 U.S. 236 (1955) (boxing).

Barely a year after *Federal Baseball*, Justice Holmes—again writing for a unanimous Court—himself declined to extend the Court's earlier ruling to vaudeville performances. *Hart v. B.F. Keith Vaudeville Exch.*, 262 U.S. 271, 273-74 (1923). William Eskridge, a leading scholar on statutory interpretation, is not far off the mark in describing the *Flood* court's failure to overturn MLB's antitrust exemption as "almost comical." William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 Geo. L.J. 1361, 1381 (1988). *See also United States v. Shubert*, 348 U.S. 222 (1955) (declining to extend *Federal Baseball* to theatrical performances).

In many of these cases, several justices expressed bewilderment at *Federal Baseball's* "aberrational" treatment of MLB, compared to other professional sports:

- Dissenting in *International Boxing Club* and pointing out the inconsistency of granting baseball a special exemption while denying it to boxing, Justice Frankfurter wrote: "It would baffle the subtlest ingenuity to find a single differentiating factor between other sporting exhibitions, whether boxing or football or tennis, and baseball insofar as the conduct of the sport is relevant to the criteria or considerations by which the Sherman Law becomes applicable to a 'trade or commerce.'" 348 U.S. at 248 (Frankfurter, J., dissenting).

- Justice Minton, also dissenting in *International Boxing Club*, wrote that the players' interstate travel "held in the *Federal Baseball* case to be incident to the exhibition now becomes more important than the exhibition. This is as fine an example of the tail wagging the dog as can be conjured up." *Id.* at 251 (Minton, J. dissenting).

- A few years later, in writing for the majority in *Radovich* and denying professional football an antitrust exemption, Justice Clark described *Federal Baseball* as "at best of dubious validity . . . . If this ruling [declining antitrust immunity to pro football] is unrealistic, inconsistent, or illogical, it is sufficient to answer . . . were we considering the question of baseball for the first time upon a clean slate we would have no doubts." 352 U.S. at 450, 452.

- Meanwhile, Justice Frankfurter's *Radovich* dissent reprised his comment in *International Boxing Club*: "[T]he most conscientious probing of the text and the interstices of the Sherman Law fails to disclose that Congress, whose will we are enforcing excluded baseball—the conditions under which that sport is carried on—from the scope of the Sherman Law but included football. . . . I have yet to hear of any consideration that led this Court to hold that 'the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws.'" *Id.* at 455 (Frankfurter, J., dissenting) (quoting *Toolson*, 346 U.S. at 357).
- Dissenting in *Flood*, Justice Marshall described *Federal Baseball* and *Toolson* as "totally at odds with more recent and better reasoned cases. . . . Baseball players cannot be denied the benefits of competition merely because club owners view other economic interests as being more important, unless Congress says so." 407 U.S. at 290, 292 (Marshall, J., dissenting).

Among lower court federal and state judges, *Federal Baseball* has fared no better. Judge Jerome Frank called the case "an impotent zombi" [sic]. *Gardella v. Chandler,* 172 F.2d 402, 409 (2d Cir. 1949). Judge Learned Hand thought the expansion of radio and television broadcasting of baseball games sufficient to preclude dismissal based on *Federal*

Baseball. *Id.* at 407-08.[2] And Judge Henry Friendly similarly called *Federal Baseball* "not one of Mr. Justice Holmes' happiest days . . . . [W]e should not fall out of our chairs with surprise at the news that *Federal Baseball* and *Toolson* had been overruled. . . ." *Salerno v. Am. League of Pro. Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir. 1970); *see also Butterworth v. Nat'l League Pro. Baseball Clubs*, 644 So.2d 1021, 1026 (Fla. Sup. Ct. 1994) (Overton, J., concurring) ("why one professional sport would have a judicially created antitrust exemption, but others do not, is a question that defies legal logic and common sense."); *State v. Milwaukee Braves, Inc.*, 31 Wis.2d 699, 725 (1966) (Fairchild, J.) ("[I]t appears that organized baseball enjoys . . . an exemption from the federal antitrust laws which no other organized sport enjoys even where the structure and operation of the organization may be similar."); *id.* at 741-42 (Heffernan, Hallows, and Heilfuss, JJ., dissenting) ("We are not convinced that for baseball to be successful it must be unlawful. . . . We are unwilling to ascribe to our legal system the impotency that the representatives of baseball would confer upon it.").

Delivering the Supreme Court Historical Society's 2008 annual lecture, Justice Alito aptly captured the depth of criticism of *Federal Baseball*:

> Commentators have called it: "[b]aseball's most infamous opinion"; a "clearly wrong" decision based on a "curious and narrow

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[2] *Gardella* settled before the viability of *Federal Baseball* could be further tested on remand, however. *See* Stephen D. Guschov, *The Exemption of Baseball from Federal Antitrust Laws: A Legal History*, 23 Baseball Rsch. J. 69 (1994), https://sabr.org/research/article/the-exemption-of-baseball-from-federal-antitrust-laws-a-legal-history.

> misreading of the antitrust laws and/or [an] utter misunderstanding of the nature of the business of baseball"; a "remarkably myopic" decision, "almost willfully ignorant of the nature of [baseball]"; and a "simple and simplistic" decision that forms "a source of embarrassment for scholars of Holmes." One commentator speculated that the Court simply "exempted baseball from the antitrust laws because it was the national pastime."

Hon. Samuel A. Alito, Jr., *The Origin of the Baseball Antitrust Exemption:* Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 34 J. Sup. Ct. Hist. 183, 192 (2009) (footnotes omitted; alterations in original).

While baseball may be a national pastime, MLB's control over the minor leagues, unhindered by antitrust law, is a national disgrace. MLB and its clubs collude to cap minor league player salaries at poverty levels and to arbitrarily terminate the affiliation of minor league teams and rob many small towns of cherished local institutions. Ending the exemption that currently insulates MLB's pernicious restraints on minor league teams and their players from Sherman Act scrutiny would not destroy MLB. The MLB teams are independent and compete against each other on the field, as well as for players, managers, coaches, fans, and sponsorship support. Like all other professional sports and the NCAA, MLB's teams should be held legally capable of conspiring with each other in violation of the Sherman Act.

Thus born and grudgingly maintained, baseball's antitrust exemption is, by overwhelming consensus, a pariah. To assert that the exemption cries out for reconsideration is to belabor the obvious.

II. PERPETUATING BASEBALL'S ANTITRUST EXEMPTION ENABLES MLB TO EXPLOIT MINOR LEAGUE TEAMS, PLAYERS, AND LOCAL COMMUNITIES

A. What Happens in the Major Leagues Stays in the Major Leagues

The divergence between MLB and the minor leagues is stark. "Whether one examines the wages, working conditions, grievance procedure, or several other issues, minor league players have been left behind relative to their major league counterparts and even relative to the average working person in the country." Robert Pannullo, *The Struggle for Labor Equality in Minor League Baseball: Exploring Unionization,* 34 A.B.A. J. Lab. & Emp. L. 443, 453 (2020).

In the 1960s, MLB players built power through unionization. They formed the Major League Baseball Players Association and, through collective bargaining, obtained "an avenue through which [major league] players are able to address concerns regarding their financial security, workplace conditions, and more." *Id.* at 450. Major leaguers achieved "minimum salaries, an arbitration process for grievances, and unrestricted free agency for players." *Id.* By 1975, arbitration ending the reserve clause "reversed a century of baseball history and fundamentally changed the relationship between the owner and the player." Robert A. McCormick, *Baseball's Third Strike: The Triumph of Collective Bargaining in Baseball*, 35 Vand. L. Rev. 1131, 1157 (1982) (discussing *In re the Twelve Clubs*, 66 Lab. Arb. (BNA) 101 (1975)). The Curt Flood Act, which Congress enacted in 1998, further empowered major leaguers to sue the league and teams under the

antitrust laws "to the same extent" as "persons in any other professional sports . . . ." 15 U.S.C. § 26b. As beneficiaries of rivalry for their services and a strong labor union, major leaguers attained an average salary of $4.9 million at the start of the 2023 season.[3]

But the benefits that major league players have achieved do not trickle down to the minor league players, as MLB exploits the free rein of its antitrust exemption. It collectively rules over the minor leagues as if they were a colony. MLB exercises its power at the expense of players, minor league team owners, and the communities that back and sustain them.

Through collusion, MLB keeps minor league player salaries at poverty levels. Instead of permitting minor league teams to compete to attract and retain talent, MLB offers all minor leaguers a non-negotiable, standard seven-season contract. Uniform salaries are tied to the minor league level of competition, with players in triple-A receiving higher salaries than those in single-A. Despite the unionization of players in 2022 and a collective bargaining agreement earlier this years, minor leaguers' average salaries remain capped at poverty levels. For instance, "Triple-A salaries will increase from $17,500 to $35,800."[4] A

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[3] *Study Shows MLB Average Salary Up 11% YOY to $4.9 Million*, ESPN (Apr. 4, 2023), https://www.espn.com/mlb/story/_/id/36070487/study-shows-mlb-average-salary-11-yoy-49-million.

[4] J.J. Cooper, *MLB, Minor League Players Reach Deal on First MiLB CBA*, Baseball Am. (Mar. 29, 2023), https://www.baseballamerica.com/stories/mlb-minor-league-players-reach-deal-on-first-milb-cba/. *See also* Megan Young, *Three Strikes, You're Out: Examining The Baseball Trilogy and the Path to Removing Its Antitrust Exemption*, 82 Md. L. Rev. Online 194, 223 (2023) ("Throughout the history of baseball, minor league players have suffered more than any other group under the antitrust exemption.").

recent survey found that many minor league players struggle not only to find affordable housing for themselves and their families, but indeed, simply to purchase nutritious food. Predictably, many players take on second or third jobs just to subsist.[5] One former player estimated that, during his minor league tenure, he was "making about four bucks an hour." Brittany Ghiroli, *Cockroaches, Car Camping, Poverty Wages: Why Are Minor-Leaguers Living in Squalor?*, Athletic (Aug. 5, 2021), https://theathletic.com/2750280/2021/08/05/cockroaches-car-camping-poverty-wages-why-are-minor-leaguers-living-in-squalor/.

MLB also dominates minor league team owners and the cities and towns hosting these teams through the minor league "farm" system. And, as the petitioners allege, in 2020 MLB collectively terminated team affiliations with 40 minor league teams. *See* J.A. 6a-7a. The petitioners and some of the other expelled teams formally survive, but MLB has banished them from the top minor league system. Acting collectively, MLB decided that these expelled teams could no longer field players who could be promoted to the majors, nor compete against MLB's remaining minor league affiliates. Because of MLB's collective decision, the expelled teams suffered substantial loss of fan interest, ticket sales, and revenue opportunities generally.

The expelled teams were typically the only professional baseball team, and in some cases, the only professional sports team in their city or town. Many teams had strong local followings. Their games supported local businesses such as stadium vendors

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[5] *Left Stranded: How Major League Baseball Leaves Minor League Players Behind*, More Than Baseball (2022), https://www.morethanbaseball.org/issue-report.

and local print, radio, and television media and significantly increased local per capita income. Nola Agha, *The Economic Impact of Stadiums and Teams: The Case of Minor League Baseball*, 14 J. Sports Econ. 227, 249 (2013). Reduced attendance translated to reduced economic activity and a loss of local income, jobs, and tax revenues. Pet. 13. Thus, local communities themselves suffered significant harm.[6] Minor league baseball remains under MLB's thumb. Those least able to protect themselves MLB exploits the most.

B. MLB's Antitrust Exemption Sustains Patently Unreasonable Restraints

The Supreme Court has described collusion among rivals as "the supreme evil of antitrust." *Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). Therefore, but for its antitrust exemption, MLB's collectively-established restraints and other practices targeting minor league teams and its players would amount to input reductions, horizontal price-fixing, and group boycotts—conduct that the Sherman Act outlaws.

Specifically, MLB collectively reduced both the number of affiliated minor league teams and the number of players in MLB's farm system. In any other industry, this restraint would likely be per se illegal, either as a collusive input reduction in, or group boycott directed to, minor league teams and players. *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (collective "buying program" to reduce gasoline was a per se violation); *Klor's, Inc.*

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[6] Letter from Members of Congress to Commissioner Manfred (Nov. 19, 2019), https://trahan.house.gov/uploadedfiles/trahan_mckinleymlb_letter.pdf.

v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (collective refusal to deal by competitors was a per se violation). Even if market power needs to be shown, MLB could not plausibly dispute its domination of professional baseball. *Cf. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 111-12 (1984) (NCAA possessed market power in market for college football broadcasts, citing *International Boxing Club*, among other authorities); *Klor's*, 359 U.S. at 213 (since MLB's collective action "clearly has, by its nature and character, a monopolistic tendency[,] . . . it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy.") (cleaned up).

Major league teams have also collectively suppressed the salaries of minor league players as well as the terms and conditions of their employment—another per se violation absent MLB's antitrust exemption. As then-Judge Sotomayor wrote in a case concerning collusive sharing of compensation information among employers, "a horizontal conspiracy among buyers to stifle competition is as unlawful as one among sellers." *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001). *See also Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219 (1948) (price-fixing by purchasers was a per se violation).

The effects of MLB's practices, summarized above, are dire. Ending the exemption that currently insulates its restraints on minor league teams and their players from Sherman Act scrutiny will not destroy MLB. The MLB teams are independent and compete against each other not only on the field, but also as profit-making businesses. Like all other professional sports and the NCAA, MLB's teams

should be held legally capable of conspiring with each other in violation of the Sherman Act. *Cf. Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 191-92 (2010) (denying NFL teams antitrust immunity for collective product licensing).

III. WHATEVER FOUNDATION MLB'S ANTITRUST EXEMPTION MAY HAVE HAD IN 1922 HAS SINCE DISSOLVED

A. As the *Flood* Court Acknowledged, the Business of Baseball Has Constituted Interstate Commerce for a Long Time

In 1922, baseball was already a national business. Although baseball games were played at a particular place, teams of course traveled across state lines to play each other. *See Federal Baseball*, 259 U.S. at 208-09. Further, the national telegraph system transmitted game scores across state lines. An analogy to an industry that was prosecuted for antitrust violations in the early 20th century is instructive. Like tobacco smoking, baseball games were a local activity; but their supply—like that of cigars and cigarettes—was interstate activity. Stuart Banner, The Baseball Trust: A History of Baseball's Antitrust Exemption 83 (2013). And the government had broken up the American Tobacco Company in 1911. *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911).

Nonetheless, in conferring baseball's antitrust exemption, the *Federal Baseball* Court relied on its then-prevailing interpretation of Congress's limited constitutional power to regulate interstate commerce. Baseball games, Justice Holmes said, were simply local entertainment, and all the travel and

communications across state lines associated with offering games was "a mere incident, not the essential thing . . . . [P]ersonal effort, not related to production, is not a subject of commerce." *Federal Baseball*, 259 U.S. at 209. According to the Court, Congress simply lacked authority to pass legislation that regulated baseball.

Even in 1922, this analytic foundation for MLB's antitrust exemption was "at best of dubious validity." *Radovich*, 352 U.S. at 450. A year later, Justice Holmes, again writing for a unanimous Court, declined to extend *Federal Baseball* and reversed dismissal of an antitrust claim directed to local vaudeville performances. Despite their obvious similarity—both baseball and vaudeville involved interstate travel to perform local entertainment—the Court said there could be fact differences: "it may be that what in general is incidental, in some instances may rise to a magnitude that requires it to be considered independently." *Hart*, 262 U.S. 274. The Court remanded the case to give the plaintiffs an opportunity to show that vaudeville constituted interstate commerce. *Id.* at 273-74.

The Court itself adopted a more expansive reading of Congress's commerce clause powers in the 1930s and 1940s. *See, e.g.*, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States v. Darby*, 312 U.S. 100 (1941); *Wickard v. Filburn*, 317 U.S. 111 (1942). The Court jettisoned earlier distinctions like production and commerce and adopted a broader construction of the activities constituting interstate commerce subject to congressional authority. Meanwhile, baseball also had grown dramatically and become a major interstate business with lucrative radio and television contracts to broadcast games. Banner, *supra*, at 100. Accordingly, baseball

could not credibly disclaim the interstate character of its business.

Despite judicial expansion of the Congress's commerce clause powers and the dramatic growth of baseball as a business, the *Toolson* Court did not subject baseball to the antitrust laws. Instead, the *Toolson* majority re-affirmed *Federal Baseball* "so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." 346 U.S. at 357. MLB thus became the beneficiary of an implied legislative antitrust exemption. Years later, although the *Flood* majority declined to ignore reality—"[p]rofessional baseball . . . is engaged in interstate commerce," 407 U.S. at 282—it also doubled down on *Toolson's* belated implied immunity rationale. Justice Blackmun wrote: "If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court." *Id.* at 284.

B. Congress Has Not Exempted Baseball from the Antitrust Laws

The rationale that *Toolson* and *Flood* adopted to perpetuate MLB's exemption—that Congress implicitly intended to exempt baseball from federal antitrust law—runs headlong into not only the absence of any mention of congressional intent to provide an antitrust pass to baseball, but also this Court's strong hostility to implied immunity from the antitrust laws.

When Congress enacted the Sherman Act in 1890, by all accounts the drafters did not pay any special heed to baseball, or even think about the matter. *See Radovich*, 352 U.S. at 455 (Frankfurter, J., dissenting);

Banner, *supra*, at 120. Moreover, when Congress exempted activities or actors from the antitrust laws, it has spoken clearly and directly. For instance, in the Capper-Volstead Act, Congress authorized the formation of cooperatives among farmers and ranchers, which might otherwise run afoul of Section 1 of the Sherman Act, and Congress established a system of federal oversight for their activities. 7 U.S.C. §§ 291-92. Congress has never passed a comparable broad exemption for baseball but offered only a targeted exemption in the Sports Broadcasting Act for joint negotiations of radio and television contracts by teams in the four principal professional sports leagues, not simply professional baseball. 15 U.S.C. §§ 1291-95.

Similarly, the Curt Flood Act of 1998, 15 U.S.C. § 26b, did not legislatively ratify baseball's Court-created antitrust exemption. As part of the resolution to the season-ending strike of 1994, MLB and the Major League Baseball Players Association agreed to petition Congress to withdraw the exemption with respect to labor disputes involving major league players. Congress did so in the Curt Flood Act. But the Act's text and legislative debates demonstrate that Congress narrowly repealed the exemption without taking a position on the exemption as a whole or withdrawing it from the courts. One scholar concluded that, "aside from allowing major league baseball players to file lawsuits against MLB, Congress clearly intended for the [Curt Flood Act] to be read neutrally with regard to baseball's historic antitrust exemption in all other respects." Nathaniel Grow, *The Curiously Confounding Curt Flood Act*, 90 Tul. L. Rev. 859, 900 (2016). *See also* Curt Flood Act, Pub. L. No. 105-297, § 2, 112 Stat. 2824 (1998) (The Act's purpose provides that "major league baseball

players will have the same rights under the antitrust laws as do other professional athletes," while "mak[ing] it clear that the passage of this Act does not change the application of the antitrust laws in any other context or with respect to any other person or entity.").

Congressional inaction, such as that illustrated in the Curt Flood Act, is at best ambiguous. It often "lacks persuasive significance because it is indeterminate; several equally tenable inferences may be drawn from such inaction." *Halliburton v. Erica P. John Fund, Inc.*, 573 U.S. 258, 300 (2014) (Thomas, J., concurring) (cleaned up). In developing and advancing legislative agendas, the two houses of Congress and their committees cannot respond to every issue of public importance. Congressional inaction, even extended inaction, could be the product of members' focus on other priorities, a relevant committee chair having different views on a topic than a majority of committee's members, or an inability for the two houses to reach an agreement. William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 Mich. L. Rev. 67, 98-99 (1988). Thus, the Court has cautioned against interpreting congressional inaction as somehow validating judicial construction of statutory law: "[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling principle." *Helvering v. Hallock*, 309 U.S. 106, 121 (1940). *See also Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1747 (2020) (Gorsuch, J.) ("[S]peculation about why a later Congress declined to adopt new legislation offers a particularly dangerous basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt.") (cleaned up).

The baseball exemption eludes the fundamental importance of the federal antitrust laws and the corollary judicial reluctance to recognize implied immunities from these laws. The Sherman Act sweeps broadly and protects multiple classes of market participants, including consumers, competitors, and suppliers. *Mandeville Island Farms*, 334 U.S. at 236. Justice Black thus described the Act as "a comprehensive charter of economic liberty." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958), while Justice Marshall characterized the antitrust laws in general as "the Magna Carta of free enterprise." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). Because of the antitrust laws' foundational nature, even when Congress adopts a sectoral regulatory scheme, antitrust immunity "is not lightly implied." *California v. Fed. Power Comm'n*, 369 U.S. 482, 485 (1962). This canon "reflects the felt indispensable role of antitrust policy in the maintenance of a free economy. . . ." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348 (1963). *See also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation Of Legal Texts 327 (2012) ("The essence of the presumption against implied repeals is that if statutes are to be repealed, they should be repealed with some specificity.").

Accordingly, when challenged conduct *is* subject to sectoral regulation, the Court's test for implied antitrust immunity is one of "clear repugnancy." *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264, 274 (2007). The directive is clear: "When there are two acts upon the same subject, the rule is to give effect to both if possible." *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). *See also Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1973) ("Activities which come under the jurisdiction

of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws.").

The principles counseling against implied immunity from antitrust law apply with strongest force to MLB. Unlike, for example, electric power, natural gas, and marketing and trading securities, baseball is *not* subject to a comprehensive sectoral regulatory scheme, such as the Federal Power Act, the Natural Gas Act, or the Securities and Securities Exchange Acts. Baseball has no equivalent of the Federal Energy Regulatory Commission or the Securities and Exchange Commission. Therefore, there is no risk that MLB activity challenged as antitrust-constrained might be in tension with regulatory operations, obligations, or prohibitions.

C. Federal Preemption of State Antitrust Laws Is Also Strongly Disfavored

In addition to affirming *Toolson's* holding on federal antitrust law, the *Flood* Court extended the exemption's scope to preempt state antitrust claims as well. 407 U.S. at 284-85. This amounts to mischief compounding mischief. Extending baseball's judicially-created antitrust exemption to bar state antitrust squarely contradicts a core principle of federalism itself—the presumption *against* federal preemption of state law. *Flood's* extension further ignores the *specific* protection against federal preemption that state antitrust laws enjoy.

In considering federal preemption questions, a longstanding canon of construction reminds that: "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act *unless* that was the *clear* and *manifest* purpose of Congress." *Rice v. Santa Fe Elevator*

Corp., 331 U.S. 218, 230 (1947) (emphases added). *See also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Thus, the presumption against preemption and the "purpose of Congress" are the "two cornerstones" for preemption analysis. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (cleaned up).

And here, the *Federal Baseball* wrinkle reinforces the presumption against preemption. There is *no* federal statute whose congressional purpose this Court must assess—only this Court's own federal antitrust exemption and subsequent congressional inaction. In these circumstances, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546 (1985), is instructive:

> The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be.

Accordingly, "to give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1985) (quoting Laurence H. Tribe, American Constitutional Law § 6-25, p. 480 (2d ed. 1988) (cleaned up)).

These considerations alone establish that *Flood's* extension of antitrust immunity to state antitrust law is unjustified. However, equally important, the presumption against preemption applies with special force for state antitrust laws. By 1890, when the Sherman Act was passed, 21 States had enacted

either constitutional or statutory antitrust provisions, and several had both. Hans B. Thorelli, The Federal Antitrust Policy 155 (1955). State law enforcement against the trusts was ongoing. *See, e.g., id.* at 156-57, 259-65. Accordingly, "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies." *California v. ARC America Corp.*, 490 U.S. 93, 102 (1989). *See, e.g.*, *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 (1978) (declining to hold that the federal Robinson-Patman Act preempts a Maryland antitrust law on the marketing of gasoline).

Both federalism's respect for state law and the Sherman Act's congressional intent converge to avoid any state antitrust preemption. As the Court wrote in a unanimous decision: "The case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989). *See also Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 387-88 (2015) (disfavoring federal sector-specific regulation preemption of state laws of general application, such as antitrust law).

Just as its perfunctory creation of an implied immunity against federal antitrust law in *Federal Baseball* and its progeny, the Court erred in *Flood* in preempting state antitrust law. The Court pointed to no statutory language nor regulatory measure that would support preemption because there is none. The strong presumption against preempting state antitrust law accentuates the *Flood* Court's mistake in failing to apply the traditional presumption

against preemption of state antitrust laws to baseball.

CONCLUSION

Whether based on constitutional or statutory interpretation, "[s]tare decisis is not an inexorable command," but rather "a principle of policy." *Payne v. Tennessee*, 501 U. S. 808, 828 (1991) (cleaned up). This Court created baseball's antitrust exemption a century ago, and it should acknowledge the responsibility of that ownership, instead of again looking to Congress to undo the unjustified and unique dispensation baseball has received. Justice Holmes himself pointed the way: "[I]t is revolting to have no better reason for a rule of law than that it was so laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from the blind imitation of the past." Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897). Justice Marshall was correct in *Flood*: "[W]e must admit our error and correct it. We have done so before and we should do so again here." *Flood*, 407 U.S. at 293 (Marshall, J., dissenting).

The Sherman Act's existing analytics—per se, quick look, and rule of reason scrutiny—are sufficiently robust to address whatever need MLB teams may have to collaborate in some areas to ensure the business's success under conditions of competition. This Court should end the antitrust immunity milk and cookies that no other professional sport enjoys.

The Court should grant certiorari review.

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