No. 23-283

IN THE

Supreme Court of the United States

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

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

BRIEF OF *AMICI CURIAE* ANTITRUST, BUSINESS, AND SPORTS LAW PROFESSORS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*

Amici are professors and widely published experts in the fields of antitrust, business, and sports law.[1] (A list of signatories is included in the Appendix.) They share a common interest in effective competition policy in sports business and labor markets. Their interest in this case is to ensure that the law develops in a way that serves the public interest by promoting competition, eliminating the confusion surrounding the application of antitrust law to various aspects of baseball's business, and providing clarity to stakeholders—including teams, owners, players, and fans. *Amici* respectfully request that this Court grant a writ of certiorari to revisit and clarify the scope of baseball's historic antitrust exemption.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since this Court first recognized an antitrust exemption for baseball in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922), it has led to nothing but a morass of confusion. Lower courts have struggled to define the scope of the exemption. And when Congress attempted to clear up the issue in 1998, it only added to the confusion. This Court should grant certiorari to decide whether there is

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[1] No person other than *amici curiae* or their counsel authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission. On October 12, 2023, *amici* provided notice to counsel of record for all parties that they intended to file this brief.

still a justification for the baseball exemption and, if so, to clarify its scope. Without that guidance, courts and stakeholders will continue to presume that numerous anticompetitive practices by Major League Baseball (MLB) are forever insulated from review. This uncertainty is detrimental to the interests of the sport, which has metastasized to a multi-billion-dollar industry that impacts owners, players, employees, municipalities, and fans.

1. The lack of clarity surrounding what activity is encompassed within baseball's antitrust exemption has resulted in widely different rulings among lower courts. Some courts treat the baseball exemption as broad enough to encompass virtually any aspect that can be reasonably connected to the "business of baseball," while other courts confine the exemption to the now-defunct reserve clause. Adding to the confusion, MLB and its subsidiaries have strategically chosen to assert the exemption as a defense only in select cases. The result is an inconsistent patchwork of law.

2. Congress has only sown more confusion. The Curt Flood Act of 1998 is a largely circular bill that swings and misses on many of the important questions about the scope of baseball's historic antitrust exemption, leaving courts and litigants to their own devices to determine the statute's meaning. This has led to further splits among the circuits about how, if at all, federal antitrust law applies to organized professional baseball.

3. This case is the perfect vehicle to decide the continuing validity of the baseball exemption and clarify its scope—including whether it results in a

per se exemption from all antitrust laws. MLB is currently engaged in at least seven arguably anticompetitive practices that may fail antitrust scrutiny if not for the exemption. And recent lower court decisions confirm that, if left unchecked, the exemption could be held to extend even beyond professional baseball. MLB and its owners, players, employees, and fans would all benefit from this Court's clarification on whether baseball is *per se* exempt from antitrust laws or whether there is room to challenge anticompetitive practices of MLB.

ARGUMENT

I. COURTS HAVE INTERPRETED THE "BUSINESS OF BASEBALL" TO ENCOMPASS WIDELY DIFFERENT THINGS.

This case is far more than a public policy debate about the historically iconoclastic treatment of organized baseball under federal antitrust laws. There is a *bona fide* split among lower courts on what constitutes the "business of baseball" and whether it is exempt from antitrust law.

Several courts have confined the exemption to the now-defunct "reserve clause" at issue in *Federal Baseball* and its progeny. *See, e.g.*, *Piazza v. Major League Baseball*, 831 F. Supp. 420, 436 (E.D. Pa. 1993); *Butterworth v. Nat'l League of Pro. Baseball Clubs*, 644 So. 2d 1021, 1025 (Fla. 1994). The courts that have taken this narrow approach recognize that the only issue before this Court in its exemption decisions was the reserve clause regarding players' contracts, not every ancillary endeavor baseball

touches. *See Piazza*, 831 F. Supp. at 436; *see also Laumann v. Nat'l Hockey League*, 56 F. Supp. 3d 280, 295-97 (S.D.N.Y. 2014) (acknowledging the "reserve clause" origins of the exemption and refusing to extend it to baseball broadcasting).

Most courts that have addressed the issue, however, have reached the opposite conclusion, holding that other conduct beyond the "reserve clause," such as franchise relocation, is within the "heartland" of baseball-related activities and therefore exempt from antitrust scrutiny. *See, e.g., City of San Jose v. Off. of the Comm'r of Baseball*, 776 F.3d 686, 691-92 (9th Cir. 2015). Courts that have taken this broad, nearly *per se* approach have extended the baseball exemption to the entire "business of baseball," without any clear lines on exactly what "business" that entails. *See, e.g.*, *Miranda v. Selig*, 860 F.3d 1237 (9th Cir. 2017); *City of San Jose*, 776 F.3d at 690; *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 541 (7th Cir. 1978).

Some courts have attempted to forge a path between extremes, through the adoption of a "unique characteristics and needs" standard. *See, e.g.*, *Postema v. Nat'l League of Pro. Baseball Clubs*, 799 F. Supp. 1475, 1487 (S.D.N.Y. 1992), *rev'd on other grounds*, 998 F.2d 60 (2d Cir. 1993); *Pro. Baseball Schs. & Clubs, Inc. v. Kuhn*, 693 F.2d 1085, 1086 (11th Cir. 1982). This middle-ground approach has the benefit of limiting the exemption to the "integral" or "central" parts of baseball's business. *Pro. Baseball*, 693 F.2d at 1086; *see also Postema*, 799 F. Supp. at 1489 (umpire employment relations claims "are not preempted" by baseball's antitrust

exemption). But it, too, has been criticized as a misreading of the Court's exemption decisions. *See* 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, 600-601 (2010). And there is little rhyme or reason to the lines being drawn by courts.

The result of these approaches is a patchwork of law around the country—one that leaves plaintiffs flailing wildly in their attempts to guess what anticompetitive conduct they can reasonably challenge and what conduct is "exempt."

Moreover, in the absence of this Court's guidance, MLB has exacerbated the problem. Over the past 50 years, it has used the baseball exemption as both a sword and a shield, selectively wielding it only in situations where it is unlikely to be limited by a court. *See generally*, Samuel G. Mann, *In Name Only: How Major League Baseball's Reliance on Its Antitrust Exemption Is Hurting the Game*, 54 WM. & MARY L. REV. 587, 600-601 (2012) (Note). For example, in *Major League Baseball Properties, Inc. v. Salvino*, 542 F.3d 290, 294 (2d Cir. 2008), a case where MLB's licensing arm negotiated to set prices for licensees selling authorized merchandise, the organization, an MLB subsidiary, did not assert the exemption—perhaps confident in its abilities to defend the restraint on the competitive merits and, at the same time, fearing the court's strong rebuke if it raised the baseball exemption. *See* Mann, *supra*, at 601.

MLB's ability to selectively unsheathe the exemption when necessary, but hide it when there is a risk a court may find too attenuated a connection to apply it, results from a lack of clarity about what comprises the "business of baseball." The "anomal[ous]" and "aberration[al]" aspects of the exemption are thus even worse than they seem, because baseball is able to selectively wield it. *See Flood v. Kuhn*, 407 U.S. 258, 282 (1972). By calling on the exemption only when it is advantageous to do so, MLB faces little chance of a court restricting its use or limiting its application.

II. THE CURT FLOOD ACT HAS RAISED MORE QUESTIONS THAN ANSWERS ABOUT THE CONTOURS OF THE BASEBALL EXEMPTION.

Rather than codify or clarify the exemption, Congress has only added to the confusion. The Curt Flood Act of 1998 emanated out of the baseball work stoppage in 1994 and was intended to put baseball on equal footing with the other major professional sports leagues, with respect to labor-related antitrust. But after three years, the legislation was, at most, circular, and provided no clarity on anything other than players' challenges. *See* Marc Edelman & John T. Holden, *Baseball's Anticompetitive Antitrust Exemption*, BOSTON COLL. L. REV. (Forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4565178.

The only conduct the Act described was conduct "relating to or affecting employment of [MLB] players to play baseball at the major league level."

15 U.S.C. § 26b(a). The Curt Flood Act was also self-limiting, stating 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 conduct, acts, practices or agreements other than those set forth in subsection (a)." 15 U.S.C. § 26b(b). Congress left all other questions about the applicability of antitrust law to existing precedent, which was essentially a judicial grab-bag of holdings.

In the years since the Curt Flood Act, courts have struggled to understand what Congress enacted. Some courts construed the Act as codifying baseball's immunity in all "nonlabor respects." Nathaniel Grow, *The Curiously Confounding Curt Flood Act*, 90 TUL. L. REV. 859, 889 (2016); *see, e.g.*, *Morsani v. Major League Baseball*, 79 F. Supp. 2d 1331, 1335 n.12 (M.D. Fla. 1999) (concluding that "Congress explicitly preserved the exemption for all matters 'relating to or affecting franchise expansion, location or relocation, [and] franchise ownership issues, including ownership transfers"). Other courts construed the Act as "congressional acquiescence" in all nonlabor aspects of the exemption. *City of San Jose*, 776 F.3d at 690-91 (applying the exemption to franchise relocations based on the "congressional acquiescence rationale").

But these decisions are based largely on public policy and legislative history, rather than a strict reading of the statute's text. *See* Grow, *supra*, 90 TUL. L. REV. at 892-94. A handful of courts have adopted a neutral interpretation of the Act, holding that it "did not alter the applicability of the antitrust

laws to 'any conduct, acts, practices, or agreements other than … employment of [MLB] players." *Laumann*, 56 F. Supp. 3d at 294; *see also Major League Baseball v. Butterworth*, 181 F. Supp. 2d 1316, 1331 n.16 (N.D. Fla. 2001) (holding that, "[p]roperly construed," the Curt Flood Act does not affect the scope of baseball's antitrust exemption).

These decisions confirm that the Curt Flood Act was, at best, a hollow gesture. Instead of providing clarity, Congress punctuated an already-divided application of baseball's antitrust exemption and provides further reason to grant certiorari.

III. THIS CASE IS THE PERFECT VEHICLE TO CLARIFY WHETHER MLB IS ENTITLED TO A *PER SE* EXEMPTION.

MLB and other organized professional baseball leagues engage in a wide range of collective behaviors that might be found to illegally restrain trade if they are reviewed on their competitive merits and not simply deemed exempt from all antitrust scrutiny. This particular case involves the contracting of 40 minor league baseball teams in one of the country's largest metropolitan markets, in what can only be described as a horizontal agreement amongst rival teams to shut out competition. *See* Pet'n at 11-14, 34-35. The challenged conduct falls squarely within the "business of baseball" and, if not for the exemption, would almost certainly violate federal antitrust law. *See FTC v. Sup. Ct. Trial Laws. Ass'n*, 493 U.S. 411, 422 (1990). This Court should grant certiorari to decide, once and for all, whether the baseball

exemption still exists and, if so, whether it extends to the entire "business of baseball."

But this Court should also grant certiorari because MLB is currently engaged in numerous anticompetitive practices that go beyond this case and touch on the legal and economic rights of just about every stakeholder involved with our national pastime. Without this Court's guidance, it is unclear whether any of these current restraints pass antitrust scrutiny.

Territorial restraints. MLB has long maintained territorial restraints that limit the free movement of baseball teams from smaller markets to larger markets.[2] Based on these exclusive territory restraints, there are just two MLB teams that play home games in the greater New York City metropolitan area—the New York Yankees and New York Mets—despite the area's population of nearly twenty million people and its past history of financially sustaining *three* MLB teams. By contrast, five of MLB's midwestern teams—the Pittsburgh Pirates, the Cincinnati Reds, the Kansas City Royals, the Cleveland Guardians, and the Milwaukee Brewers—each play in metropolitan areas with populations of less than 2.5 million people. *See* Edelman & Holden, *supra*, at *31.

In a free market, MLB owners who play in smaller markets might seek to move into larger markets. But if the baseball exemption

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[2] *See* Major League Constitution, Art. VIII, Sec. 8 ("Operating Territories"), https://tinyurl.com/4rp2kxsm (last visited Oct. 19, 2023).

automatically protects MLB's geographic allocation of home territories, as precedent currently suggests, MLB owners that struggle to earn big-market revenues are unlikely to attempt to move into territories designated exclusively for their rivals. More than a few small-market teams have claimed the inability to compete on-the-field because they lose money on an annual basis due to their assigned territories.[3] A rejection of the *per se* exemption would provide important guidance to small-market teams about whether they may reasonably bring an antitrust challenge to the league's exclusive territory arrangement and seek a more desirable home territory.

Contraction of teams. MLB has also in the past threatened to buy out and eliminate two small-market teams, which would have reduced the number of teams in the league from thirty to twenty-eight (a practice called "contraction"). *See* Murray Chass, *Baseball; Selig Offers His Forecast for the Game*, N.Y. TIMES at 1 (Nov. 28, 2001) (quoting MLB Commissioner Bud Selig as saying "[w]e will contract"). If MLB had contracted two MLB teams as it had planned to do, it not only would have failed to address the issue of demand for baseball teams in underserved large-market cities like New York, but,

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[3] *See, e.g.,* Angelina Martin, *Fisher Claims A's Not Profitable, will Lose $40 M This Year*, NBC Sports (Aug. 23, 2023), https://tinyurl.com/fc5h4vx5 (describing Oakland Athletics' owner's desire to move team to a larger market); Dayn Perry, *Rays Still Pushing for Two-City Plan with Montreal*, CBS Sports (Sept. 28, 2021), https://tinyurl.com/ykukpva5 (explaining Tampa Bay Rays' owner's desire to expand team's designated territory).

even more troublingly, it would have reduced the total output of baseball games available for consumers throughout the United States. It also would have reduced the number of jobs available to MLB players, managers, umpires, and staff. *See* Marc Edelman, *Can Antitrust Law Save the Minnesota Twins*? *Why Commissioner Selig's Contraction Plan Was Never a Sure Deal*, 10 SPORTS LAW. J. 45, 64-65 (2003) (hereinafter "EDELMAN, CONTRACTION") (discussing the product and labor market harms of contraction).

Typically, when members of a joint venture seek to reduce the range of competitors or number of jobs in an industry, they have violated Section 1 of the Sherman Act. *See, e.g., Fashion Originators Guild of Am. v. FTC*, 312 U.S. 457, 465 (1941) (discussing the anticompetitive effect of a guild passing a rule that would limit the range of competition). However, much as with MLB's territorial restraints, MLB owners have defended their contraction plans by hiding behind the exemption. *See* EDELMAN, CONTRACTION at 65-66 (noting uncertainty as to whether baseball's historic antitrust exemption would preempt an antitrust challenge to league contraction); John T. Wolohan, *Major League Baseball Contraction and Antitrust Law*, 10 VILLANOVA SPORTS & ENT. L. J. 5, 6 (2003) (acknowledging that "[d]espite the postponement of baseball's contraction plans, the application of federal and state antitrust laws to future contractions remains an issue"). In doing so, the well-being of communities of baseball consumers ranging from individual fans to entire municipalities are compromised.

Trademarks. MLB teams collectively control the licensing and merchandising related to all 30 MLB team trademarks and maintain exclusive arrangements for third parties to license team marks for particular business categories. For example, MLB's licensing arm, Major League Baseball Properties, recently signed an exclusive agreement with Fanatics, Inc., that grants Fanatics the exclusive right to manufacture MLB trading cards using MLB team marks.[4]

Typically, when a sports league collectivizes the rights to use individual team marks on branded apparel, it represents a form of concerted action subject to antitrust scrutiny. *See Am. Needle, Inc. v. NFL*, 560 U.S. 183, 186 (2010) ("We conclude that the NFL's licensing activities constitute concerted action that … must be judged under the Rule of Reason"). Because MLB owners claim to be exempt from antitrust laws, however, they will likely continue to engage in collective, exclusive, and anticompetitive licensing practices that may drive certain non-licensees out of business. If this Court were to reject the baseball exemption or at least a *per se* application of it, MLB teams might no longer be able to maintain exclusive league-wide licensing arrangements that limit competition.

Sports league data. Much as MLB teams collectively license trademark rights, MLB teams also collectivize the accumulated and aggregated

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[4] *See* Dan Hajducky, *Fanatics Strike Deal to Become Exclusive Licensee for MLB Cards*, ESPN.com (Aug. 19, 2021), https://tinyurl.com/2dj2zvv5.

statistics from individual baseball games and offer them for sale in packages that include data for all thirty MLB teams bundled together.[5]

Under this arrangement, a prospective purchaser cannot buy data from a single MLB team; they must purchase the entire, bundled set. Such exclusive bundling and tying arrangements would typically run afoul of federal antitrust laws, unless they fall within a broad, *per se* exemption. *See* Marc Edelman & John Holden, *Monopolizing Sports Data*, 63 WM. & MARY L. REV. 69, 128 (2021) ("[I]t is possible—but probably not likely—that a court would find the practice of MLB teams selling rights to league data exclusively on a central league level also to be beyond the scope of the Sherman Act").

Broadcast rights. MLB teams collectively and exclusively license rights to broadcast MLB games on a league-wide basis. Although MLB's granting of collective, exclusive rights to "sponsored telecasting" is undoubtedly exempt from antitrust scrutiny under the Sports Broadcasting Act of 1961, 15 U.S.C. §§ 1291-95, other exclusive broadcasting arrangements adopted by MLB teams—such as exclusive rights to broadcast games on cable networks or over-the-top streaming platforms like Apple TV—present a more dubious case. *See Chicago Pro. Sports Ltd. P'ship v. Nat'l Basketball*

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[5] *See Official League Data*, LEGAL SPORTS REPORT, https://tinyurl.com/47phxd25 (last visited Oct. 19, 2023) (discussing third-party collection and licensing of sports league data on behalf of leagues overall); Wayne Parry, *Leagues Finally Cash in on Sports Betting by Selling Data*, AP NEWS (Jan. 7, 2020), https://tinyurl.com/2nmyzx7t.

Ass'n, 961 F.2d 667, 671 (7th Cir. 1992) (explaining that "the Sports Broadcasting Act applies only when the league has 'transferred' a right to 'sponsored telecasting'" and that "[s]pecial interest laws" such as the Sports Broadcasting Act "do not have 'spirits,' and it is inappropriate to extend them to achieve more [than] the objective the lobbyists wanted") (internal quotations omitted).

Nevertheless, even where the Sports Broadcasting Act fails to insulate league-wide broadcast licensing agreements from antitrust scrutiny, MLB teams, on occasion, have attempted to raise a broader defense to their collective and exclusive broadcast policies based on baseball's historic antitrust exemption. *See, e.g., Laumann*, 56 F. Supp. 3d at 295 ("The MLB Defendants argue that the territorial broadcasting restrictions at issue here fall under the [baseball] exemption ...."). This Court's guidance as to the scope of the exemption may provide insight to MLB teams about whether their current practice of collectively selling broadcast rights to outlets beyond "sponsored telecasting" is subject to antitrust scrutiny.

Boycotts. There is a long and troubled history of MLB teams collectively boycotting employees from working in the league for all kinds of disturbing reasons, ranging from the color of their skin to having provided services to a team in a rival league based in Mexico. *See, e.g.*, *Gardella v. Chandler*, 172 F.2d 402 (2d. Cir. 1949).[6] Just about the only thing

[6] *See also African-American players banned*, MLB.com, https://tinyurl.com/5n6zhp46 (last visited Oct. 19, 2023).

that is clear is that *players* may bring challenges for anticompetitive practices in labor markets. *See* 15 U.S.C. § 26b(a). It is not clear, however, whether MLB enjoys antitrust exemption for concertedly boycotting other non-player personnel, including team managers, coaches, staff, and umpires.

Until the Court rejects a *per se* exemption, the threat of group boycott from MLB will continue to have a chilling effect on non-player personnel and may even discourage highly procompetitive behavior, such as accepting employment opportunities in rival leagues.

Rival professional leagues. For the first time since the late 1960s and early 1970s, there are emerging meaningful efforts to create rival professional leagues in organized sports.[7] Although MLB has not faced the *bona fide* threat of rivalry since at least 1959, when Branch Rickey proposed establishing the Continental League, emerging trends of foreign investment and private equity could transform what was once a seemingly impossible threat of new competition into one that is merely unlikely (but possible).[8]

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[7] *See* Joel Beall, *Why a Potential Rival League Could Ultimately Benefit the PGA Tour*, GOLF DIGEST (Jan. 21, 2020), https://tinyurl.com/46kmc339 (discussing launch of LIV golf).

[8] *See* Jessica Golden & Dominic Chu, *Saudi-Backed LIV Golf Envisions Franchises in Future, Executive Says*, CNBC (Ju1. 29, 2022), https://tinyurl.com/3wwm7efn (explaining the financing of LIV Golf by "Saudi Arabia's Private Investment Fund"); AnnaMaria Andriotis, *Goldman's Pitch to Rich Clients: Hey, Buy a Piece of This Sports Team!*, WALL STREET JOURNAL (Sept. 15, 2023), https://tinyurl.com/bdec3bsf (discussing

In the past, MLB had responded to the emergence of new potential competitor leagues in the most anticompetitive way imaginable—by buying out the rival leagues and disbanding their teams. *See Federal Baseball*, 259 U.S. at 207. But if the buyout of existing rivals is no longer deemed exempt, this approach would not be possible.

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Beyond MLB's current, arguably anticompetitive practices, there is also a question whether the baseball exemption could apply to ventures unassociated with MLB. *See Cangrejeros de Santurce Baseball Club v. Liga de Beisbol Profesional de Puerto Rico, Inc.*, Civ. Act. No. 3:22-01341-WGY (D.P.R. Jun. 27, 2023), at *2-*3. At least one district court has recently held that baseball's historic antitrust exemption extends to the concerted conduct of baseball teams in the "top-tier professional baseball league in Puerto Rico." *Id.* at *16. In doing so, the court found a range of anticompetitive restraints by the teams of the Puerto Rican baseball league to be beyond scrutiny under federal antitrust law. *Id.* at *2-3. The same reasoning, if left unchecked, may allow for other forms of baseball—such as NCAA Division-I college baseball—to try to claim the benefit of the exemption.

The Court must step in to clarify the scope of the baseball exemption and prevent lower courts from

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Goldman Sachs's new division to allow wealthy individuals to invest in professional sports teams through equity and debt deals).

allowing it to creep into new areas that even the broadest reading of this Court's precedent would not permit.[9] Indeed, it is critically important the Court act now because all of this, of course, comes at the expense of local communities and fans, who are the "real losers" of organized baseball's anticompetitive behavior. *See* 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. SUPREME CT. HISTORY 183, 193 (2009).

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[9] Hon. John Paul Stevens (Ret.), SPORTS LAWS. ASS'N, 41ST ANNUAL CONF. LUNCHEON (May 15, 2015), available at https://www.supremecourt.gov/publicinfo/speeches/JPS_SportsLawyersAssociation_05-15-15.pdf (noting that the Court's exemption cases "dealt only with the reserve clause" and that there was no reason to "exempt[] any other aspects of the baseball business from the antitrust laws").

CONCLUSION

For the reasons above, this Court should grant certiorari.

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