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PROBING FOR HOLES IN THE 100-YEAR-OLD BASEBALL EXEMPTION: A NEW POST-*ALSTON* CHALLENGE

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INTRODUCTION

It is fitting that yet another challenge to baseball's long-derided exemption to antitrust law would be filed just a few months before its one-hundredth birthday.[1] In 1922, the Supreme Court of the United States in *Federal Baseball v. National League* held that professional baseball's business of "giving exhibitions of base ball [sic]" was "purely [a] state affair[]" and thus outside of the Sherman Antitrust Act's sole focus on interstate commerce.[2] On the basis of *stare decisis*, courts—including the Supreme Court itself—have for the past century repeatedly applied this antitrust exemption to baseball and refused to extend it to other sports and related industries.[3]

The latest attack against the baseball exemption comes from a group of minor league teams that were shut out of the 2021 restructuring of the Minor League Baseball affiliate system by Major League Baseball ("MLB").[4] In an effort to standardize the number of minor league affiliates per major league club and dispense with the teams with facilities seen by the major league clubs as less-than-desirable, MLB offered a proposal in 2019 to drop the total number of affiliated minor league clubs from 160 to 120.[5] Despite significant opposition to the plan by Minor

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1. *See* Complaint, Nostalgia Partners v. Off. of the Comm'r of Baseball, No. 21-cv-10876 (S.D.N.Y. filed Dec. 20, 2021).

2. Federal Baseball v. Nat'l League, 259 U.S. 200, 208-09 (1922). *See also* United States v. Shubert, 348 U. S. 222, 230-32 (1955) (holding that the baseball exemption does not apply to the production of theatrical attractions and operating theaters while declining to overturn the exemption's applicability to baseball); United States v. Int'l Boxing Club, 348 U. S. 236, 242 (1955) (holding that the baseball exemption does not apply to professional boxing while declining to overturn the exemption's applicability to baseball); Radovich v. Nat'l Football League, 352 U. S. 445, 450-52 (1957) (holding that the baseball exemption does not apply to professional football while declining to overturn the exemption's applicability to baseball).

3. *See* Toolson v. N.Y. Yankees, 346 U.S. 356, 357 (1953) (holding *per curiam* that the baseball exemption must continue, as the baseball business "has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation"); Flood v. Kuhn, 407 U.S. 258, 282-85 (1972) (holding that while the business of baseball is squarely within the bounds of interstate commerce, its antitrust exemption must continue as "since 1922 baseball, with full and continuing congressional awareness, has been allowed to develop and to expand unhindered by federal legislative action.").

4. Complaint at 1, *Nostalgia Partners*, *supra* note 1.

5. J.J. Cooper, *MLB Proposal Would Eliminate 42 Minor League Teams*, BASEBALL AMERICA (Oct. 18, 2019), https://www.baseballamerica.com/stories/mlb-floats-proposal-that-would-eliminate-42-

League Baseball, its clubs, and various political figures,[6] the plan was implemented in late-2020, spurred by MLB's takeover of minor league operations and the significant losses to minor league revenue after the 2020 season was cancelled due to the COVID-19 pandemic.[7]

Many of the 43 teams left without affiliation agreements following the plan's implementation either joined MLB's new Draft League (comprised of draft-eligible players)[8] or joined new or existing independent leagues.[9] While many of those clubs opted to accept their fates, the Staten Island Yankees, a team among those forced to fold,[10] sued MLB and its former

minor-league-teams/. At the same time, MLB added three clubs that were previously with independent leagues: the Somerset Patriots and the Sugar Land Skeeters of the Atlantic League and the St. Paul Saints of the Northern League. Greg Tufaro, *Yankees Officially Announce Somerset Patriots as Double-A Affiliate*, BRIDGEWATER COURIER NEWS (Nov. 7, 2020, 6:21 PM), https://www.mycentraljersey.com/story/sports/2020/11/07/yankees-officially-announce-somerset-patriots-double-affiliate/6203705002/; Chandler Rome & David Barron, *Sugar Land Skeeters to Become Astros' AAA Team*, HOUSTON CHRONICLE (Nov. 16, 2020, 8:16 AM), https://www.houstonchronicle.com/texas-sports-nation/astros/article/Sugar-Land-Skeeters-to-become-Astros-AAA-team-15732133.php; Jeff Wald, *St. Paul Saints to Become Twins' Triple-A Affiliate in 2021*, FOX9 KMSP (Dec. 9, 2020, 5:28 PM), https://www.fox9.com/sports/st-paul-saints-to-become-twins-triple-a-affiliate-in-2021.

6. *See, e.g.*, Claire Bessette, *Congressmen Urge Major League Baseball to Scrap 'Radical' Minor League Overhaul*, THE DAY (Nov. 20, 2019, 9:57 AM), https://www.theday.com/local-news/20191119/congressmen-urge-major-league-baseball-to-scrap-radical-minor-league-overhaul.

7. *See* Kevin Reichard, *Details of MLB Takeover of MiLB Emerge*, BALLPARK DIGEST (Nov. 2, 2020), https://ballparkdigest.com/2020/11/02/details-of-mlb-takeover-of-milb-emerge/. *See* James Wagner, *Minor League Baseball's Opposition to Overhaul Softens in Pandemic*, N.Y. TIMES (May 12, 2020), https://www.nytimes.com/2020/05/12/sports/baseball/minor-leagues-mlb-takeover.html.

8. Steve Melewski, *Taking a Closer Look at the MLB Draft League*, MASN SPORTS (Jan. 18, 2021, 8:28 AM), https://www.masnsports.com/steve-melewski/2021/01/taking-a-closer-look-at-the-mlb-draft-league.html.

9. Mark Singelais, *Tri-City ValleyCats Join Frontier League for 2021 Season*, TIMES-UNION (Jan. 7, 2021, 9:09 PM), https://www.timesunion.com/sports/article/Tri-City-ValleyCats-join-Frontier-League-for-2021-15852540.php. A few other teams, including the Burlington Bees, joined the existing Prospect League, a collegiate summer league. *See, e.g.*, Matt Levins, *BASEBALL: Burlington Bees Join the Prospect League*, THE HAWK EYE (Jan. 13, 2021, 10:58 AM), https://www.thehawkeye.com/story/sports/2021/01/13/baseball-burlington-bees-join-prospect-league/4154812001/. Eight teams in the Pacific Northwest—including the author's adored Boise Hawks—remained in the previously-affiliated Pioneer League, which was designated a "partner" league by MLB. Sam Dykstra, *Pioneer League Becoming MLB 'Partner League'*, MILB.COM (Nov. 30, 2020), https://www.milb.com/boise/news/pioneer-league-becoming-mlb-partner-league. While the clubs in the Pioneer League are independent of any MLB club affiliation, the "partner league" designation had MLB agree to funding the league's initial expenses, provide scouting technology to the eight ballparks, and create a procedure for player transfer to MLB organizations. *Id.* It is also likely that the "partner league" designation also included indemnification agreements, though this is purely speculation on the part of the author based in part on the fact that the teams invited to keep their affiliation agreements were required to sign indemnification and non-disclosure agreements before they could even review the new Professional Development License agreement. Evan Drellich, *Angry Minor League Owners Weigh Fight with MLB*, THE ATHLETIC (Dec. 10, 2020), https://theathletic.com/2253333/2020/12/10/minor-league-owners-weigh-mlb-fight/.

10. Ken Davidoff, *Staten Island Yankees Fold, File $20M Suit Against MLB, Big-League Club*, N.Y. POST (Dec. 3, 2020, 5:12 PM), https://nypost.com/2020/12/03/staten-island-yankees-fold-sue-mlb-ny-yankees/. Also among those forced to fold were the Lancaster JetHawks, Lowell Spinners, and Jackson

parent club (the New York Yankees) for breach of contract, promissory estoppel, and tortious interference with contractual relations.[11] The Staten Island Yankees were then joined in January 2021 by the Tri-City ValleyCats, who—employing the same attorneys—sued MLB and the Houston Astros (its former parent club) on similar legal theories.[12] One year later, these two clubs—now joined by the ownership groups of the Norwich Sea Unicorns and the Salem-Keizer Volcanos—have decided to attack MLB on a different front: through antitrust litigation and another perhaps quixotic quest to overturn baseball's antitrust exemption.[13]

The plaintiffs and their lawyers are clearly aware of the challenges facing their antitrust claims. On a podcast appearance shortly after the complaint was filed, one of the plaintiffs' attorneys explained that he knew the district and appellate courts would almost certainly dismiss the complaint and the key issue at hand was whether the Supreme Court will grant certiorari.[14] At the same time, however, the plaintiffs argued in their complaints (1) but for the antitrust exemption, MLB's actions would "warrant *per se* condemnation," and (2) they have "objectively good reasons to believe that the Supreme Court would no longer apply the 'unrealistic,' 'inconsistent,' and 'aberration[al]' baseball antitrust

Generals—the last of whom had a lease with the city that voided if the team could not maintain an MLB affiliation. *See* Bill Shaikin, *In Lancaster, MLB Promised Baseball. The City Might Prefer an Amphitheater*, LOS ANGELES TIMES (Mar. 10, 2021, 3:37 PM), https://www.latimes.com/sports/story/2021-03-10/lancaster-minor-league-jethawks-rob-manfred-pecos-league; Alana Melanson, *Team Gone, but Costs Remain for LeLacheur Park*, LOWELL SUN (Aug. 29, 2021), https://www.lowellsun.com/2021/08/29/team-gone-but-costs-remain-for-lelacheur-park/; Adam Friedman, *Jackson Generals Not Invited to Join the New Minor League Baseball, Future is Uncertain*, JACKSON SUN (Dec. 9, 2020), https://www.jacksonsun.com/story/news/local/2020/12/09/jackson-generals-werent-invited-join-new-minor-league-baseball/6503932002/.

11. Davidoff, *supra* note 10.

12. Daniel Kaplan, *Astros, MLB Sued Over Minor League Realignment by Tri-City ValleyCats*, THE ATHLETIC (Jan. 15, 2021), https://theathletic.com/2325569/2021/01/15/astros-mlb-sued-over-minor-league-realignment-by-tri-city-valleycats/. These lawsuits have found some success thus far. While six of the ValleyCats' ten claims were dismissed in August 2021 and the seven of the Staten Island Yankees' eight claims were similarly dismissed in September 2021, the remaining claims were allowed to proceed through discovery. Michael McCann, *Minor League Club Scores Win in Contraction Lawsuit*, SPORTICO (Sep. 7, 2021), https://www.sportico.com/law/analysis/2021/mlb-restructuring-minor-league-1234638666/ (discussing the court's ruling in the ValleyCats litigation); Daniel Kaplan, *Yankees Fail to Dismiss Lawsuit Over Ending Affiliation with Staten Island Minor League Team*, THE ATHLETIC (Sep. 10, 2021), https://theathletic.com/2817863/2021/09/10/yankees-fail-to-dismiss-lawsuit-over-ending-affiliation-with-staten-island-minor-league-team/. Discovery has already led to some interesting revelations, including emails relaying drama between the minor league and major league clubs over the big-league Yankees' apparent distain for the minor-league Yankees' notorious "Staten Island Pizza Rats" rebranding during the 2018 season. Rich Calder, *Yankees Were 'Embarrassed' by Staten Island Team's Pizza Rat Promotion*, N.Y. POST (Jan. 1, 2022, 9:00 AM), https://nypost.com/2022/01/01/yankees-embarrassed-by-pizza-rat-promotion/.

13. *See* Complaint, *Nostalgia Partners*, *supra* note 1.

14. Mike Lawson, *The Baseball Exemption: Timing is Everything*, CONDUCT DETRIMENTAL (Dec. 23, 2021), https://www.conductdetrimental.com/post/the-baseball-exemption-timing-is-everything.

exemption if presented with a proper case for reconsidering it."[15] Legal commentators, however, have resoundingly disagreed, with one colorfully declaring that "[a] federal judge would dismiss this in five minutes."[16]

Importantly, the *Nostalgia Partners* litigation raises some interesting points which, combined with occasional deviations of interpretation throughout the antitrust exemption's lifespan, could represent a small crack in the exemption's veneer. While these arguments are not necessarily novel by themselves, when joined with the Supreme Court's recent decision refusing the National Collegiate Athletic Association's ("NCAA") efforts for similar antitrust immunity,[17] they represent arguably the most compelling threat to the baseball antitrust exemption in nearly two decades.

Regardless of the plaintiffs' arguments' merits, the renewed effort to overturn the baseball antitrust exemption so near *Federal Baseball*'s one-hundredth birthday provides an excellent opportunity for a retrospective on the history of the baseball exemption and its current standing. Despite constant scholarly critique[18] and judicial condemnation,[19] the baseball

15. Complaint, *Nostalgia Partners*, *supra* note 1, at 3-4.

16. Daniel Kaplan, *Four Former Minor-League Affiliates Become the Latest Legal Challengers to MLB's Antitrust Exemption*, THE ATHLETIC (Dec. 20, 2021), https://theathletic.com/3027965/2021/12/20/four-former-minor-league-affiliates-become-the-latest-legal-challengers-to-mlbs-antitrust-exemption/ (quoting lawyer Chris Deubert).

17. NCAA v. Alston, 141 S. Ct. 2141 (2021).

18. *See, e.g.*, Richard B. Blackwell, Note, *Baseball's Antitrust Exemption and the Reserve System: Reappraisal of an Anachronism*, 12 WM. & MARY L. REV. 859 (1971); Edmund P. Edmonds, *Over Forty Years in the On-Deck Circle: Congress and the Baseball Antitrust Exemption*, 19 T. MARSHALL L. REV. 627, 660 (1994) (arguing the baseball exemption is "a judicial aberration without justification."); *see also* Connie Mack & Richard M. Blau, *The Need for Fair Play: Repealing the Federal Baseball Antitrust Exemption*, 45 FLA. L. REV. 201 (1993) (a scholarly article co-authored by a sitting U.S. Senator from Florida (Mack) calling for a statutory repeal of baseball's antitrust exemption); *but see* Gary R. Roberts, *The Case for Baseball's Special Antitrust Immunity*, 4 J. SPORTS ECON. 302, 302 (2003) (arguing that the baseball exemption "is in the public interest"); Nathaniel Grow, *In Defense of Baseball's Antitrust Exemption*, 49 AM. BUS. L.J. 211, 215 (2012) (challenging "the prevailing scholarly consensus opposing baseball's historic exemption from antitrust law on policy grounds" while arguing that baseball is not different than other sports in spite of the exemption and that the threat of revoking the exemption has allowed Congress to wield substantial power over MLB).

19. *See, e.g.*, Gardella v. Chandler, 172 F.2d 402, 409 (2d Cir. 1949) (Frank, J., concurring) (deeming *Federal Baseball* "an impotent zombi" [sic] worthy of repeal); Salerno v. American League of Prof. Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970) ("We freely acknowledge our belief that Federal Baseball was not one of Mr. Justice Holmes' happiest days, that the rationale of Toolson is extremely dubious and that, to use the Supreme Court's own adjectives, the distinction between baseball and other professional sports is 'unrealistic,' 'inconsistent' and 'illogical.'") Notably, such critique has even included Supreme Court justices. *See* Radovich v. National Football League, 352 U.S. 445, 450 (1957) (noting that the Court's continuation of the baseball exemption in *Toolson v. N.Y. Yankees* was in spite of *Federal Baseball*'s "dubious validity"); Flood v. Kuhn, 407 U.S. 258, 286 (1972) (Douglas, J., dissenting) (deeming *Federal Baseball* as a "a derelict in the stream of the law"); *Id*. at 290 (Marshall, J., dissenting) (arguing that *Federal Baseball* and *Toolson* "are totally at odds with more recent and better reasoned cases"); *Alston*, 141 S. Ct. at 2159 (noting the Court's acknowledgement of "criticisms of [*Federal*

antitrust exemption has endured over two dozen attacks through litigation over the past century.[20] This endurance has not come without its share of bumps in the road, however, as litigators—and even the occasional judge[21]—have worked against the grain in search of room to defeat or narrow baseball's antitrust immunity against the overwhelming snowball effect of the exemption's enduring *stare decisis*. With the Supreme Court's *Alston* decision representing yet another attempt by another sports league to secure a baseball-like antitrust exemption,[22] it is worth discussing whether the Court's reasoning unanimously rejecting those arguments could perhaps portend a shifting attitude towards baseball's antitrust immunity as well.

Part I of this Article provides a brief history of the baseball antitrust exemption, focusing on previous attempts by litigators, judges, and scholars to limit or constrict the exemption's current near-absolute effect. Part II then details the links between the baseball antitrust exemption and the Supreme Court's recent holding in *NCAA v. Alston*, arguing that the Court's treatment and analysis of the NCAA's claims to antitrust immunity in *Alston* could similarly apply to MLB in *Nostalgia Partners*. Part III then provides a realistic look at the likelihood of those chances, explaining the differences between the baseball antitrust exemption's history and the contextual circumstances of *Alston* that would more likely

Baseball] as 'unrealistic' and 'inconsistent' and 'aberration[al]'"); Justice John Paul Stevens, Keynote Address at the Sports Lawyers Association 41st Annual Conference Luncheon, at 14 (May 15, 2015), *available at* https://www.supremecourt.gov/publicinfo/speeches/JPS_SportsLawyersAssociation_05-15-15.pdf (arguing "that it simply makes no sense to treat organized baseball differently from other professional sports under the antitrust laws"); Justice 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, 193 (2009) (noting that the *Federal Baseball* decision "has been pilloried pretty consistently in the legal literature since at least the 1940s.").

20. *See* Sam C. Ehrlich & Ryan M. Rodenberg, *Tracking the Evolution of Stare Decisis*, 60 U. LOUISVILLE L. REV. 57, 85 (2021) (finding 26 cases as part of the "*Federal Baseball* citation network" as having applied antitrust law to legal issues involving professional baseball).

21. *See* Piazza v. Major League Baseball, 831 F. Supp. 420, 435-38 (E.D. Pa. 1993) (holding that the baseball exemption is limited to the reserve clause); Butterworth v. Nat. League, 644 So. 2d 1021, 1023-25 (Fla. 1994) (adopting the reasoning of *Piazza*); Minnesota Twins P'ship v. State by Humphrey, 1998-1 Trade Cases (CCH) ¶ 72, 136 (Minn. Dist. 1998), *reversed*, Minnesota Twins P'ship v. State, 592 N.W. 2d 847 (Minn. 1999), *cert. denied*, Hatch v. Minn. Twins, 528 U.S. 1013 (1999) (same); Morsani v. Major League Baseball, 663 So. 2d 653, 657 (Fla. Ct. App. 1995) (reversing a trial court's dismissal of an antitrust claim against MLB, noting that "[t]he trial judge below did not have the benefit of the Florida Supreme Court's decision which . . . held that federal and state antitrust laws applied to decisions involving sales and locations of baseball franchises, and that the antitrust exemption for baseball extended only to the reserve system"); Laumann v. National Hockey League, 56 F. Supp. 3d 280, 291-97 (S.D.N.Y. 2014) (holding that the baseball exemption does not apply to baseball's television broadcasting contracts as "a subject that is not central to the business of baseball, and that Congress did not intend to exempt.").

22. *Alston*, 141 S. Ct. at 2159 ("To be sure, this Court once dallied with something that looks a bit like an antitrust exemption for professional baseball . . . But this Court has refused to extend Federal Baseball's reasoning to other sports leagues—and has even acknowledged criticisms of the decision as 'unrealistic' and 'inconsistent' and 'aberration[al].'").

doom *Nostalgia Partners*' chances before they start.

I. A BRIEF HISTORY OF CHALLENGES TO THE BASEBALL ANTITRUST EXEMPTION

Baseball's antitrust exemption remains one of the most controversial quirks of law generally and as it relates to sports specifically.[23] The baseball antitrust exemption was established in *Federal Baseball v. National League*,[24] a 1922 Supreme Court decision which held that professional baseball, as a business of "giving exhibitions of base ball [sic]" involves "purely state affairs" and thus cannot be held to the requirements of the Sherman Antitrust Act.[25] As the Sherman Act—a federal law passed through the Constitution's Commerce Clause—applies to "trade or commerce among the several States[] or with foreign nations,"[26] after the *Federal Baseball* ruling, federal courts could not regulate the professional baseball industry for cartels, collusion, or monopolies as they could with other industries.[27]

Not long after *Federal Baseball* was decided, some lower court judges began criticizing the decision as improper. In 1949, Judge Jerome Frank of the Second Circuit argued in a concurrence that recent Supreme Court decisions expanding the scope of the Commerce Clause had "completely destroyed the vitality" of *Federal Baseball*, and therefore, the court had cause to ignore *Federal Baseball* to find that the reserve clause binding players to teams indefinitely should be deemed "within the prohibitions of the Sherman Act."[28]

In the 1950s, the Supreme Court heard two cases by other sports leagues arguing that they should be given the same exemption.[29] On both occasions, however, the Court refused to grant the other sports leagues

23. *See, e.g.*, Grow, *supra* note 18, at 212 (noting that scholars have "derided [the exemption] as 'inexplicable and indefensible,' 'illogical,' 'irrational,' and 'anachronistic'" while other scholars have "gone even further" and described the exemption as "a 'judicial embarrassment' and an "archaic reminder[] of judicial decision making at its arthritic worst,' as well as a 'grotesque legal anomaly' and an 'arrogant testament to stubborn ignorance'") (citations omitted).

24. 259 U.S. 200 (1922).

25. *Id*. at 208-09. *See* Sherman Antitrust Act, 15 U.S.C. § 1-2 (1890). *See also generally* NATHANIEL GROW, BASEBALL ON TRIAL: THE ORIGIN OF BASEBALL'S ANTITRUST EXEMPTION (2014) (detailing the origins of the baseball exemption through a detailed analysis of the factors that led to the *Federal Baseball* decision and arguing that despite historical criticism, the *Federal Baseball* decision was in fact correct for its time).

26. 15 U.S.C. § 1.

27. *See* Gardella v. Chandler, 172 F.2d 402, 405-406 (2d Cir. 1949) (discussing the limited power of the Sherman Act in light of the *Federal Baseball* decision).

28. *Id*. at 410 (Frank, J., concurring).

29. U.S. v. International Boxing Club, 348 U.S. 236 (1955); Radovich v. National Football League, 352 U.S. 445 (1957).

similar deference. The Supreme Court in *United States v. International Boxing Club* reversed a lower court ruling that the business of boxing clubs were exempt from the Sherman Act under *Federal Baseball*, finding that the Court in *Federal Baseball* had ruled merely that baseball was exempt, not "all businesses based on professional sports."[30] Similarly, in *Radovich v. National Football League* (*NFL*), the Court found that "the volume of interstate business involved in organized professional football places it within the provisions of the [Sherman] Act" and held professional football outside of the scope of the baseball antitrust exemption while striking down an NFL rule that bound players to their teams.

At the same time, there were a few judicial deviations from *Federal Baseball* within the baseball antitrust exemption's first half-century of existence. In 1946, the Second Circuit in *Gardella v. Chandler*[31] ruled that MLB's actions banning a former New York Giants player who broke his contract to play in Mexico must be held within of the scope of the Sherman Act despite *Federal Baseball* precedent, ordering a full trial on the merits.[32] This decision was made with some unease by the three ruling judges, who, in an unusual move, each filed opinions expressing their thoughts on the course of action, with the dissenting judge writing first.

In his dissenting opinion, Judge Harrie B. Chase identified the then-recent explosion of commercial influence in professional baseball, including the fact that the clubs had recently begun to "sell for valuable consideration the right to broadcast play-by-play descriptions of the games over the radio and thus across state lines"—an observation that clearly implicated interstate commercial aspects of professional baseball.[33] While Judge Chase noted the recent trend of decisions "show a wide reach of Congressional power under the Commerce Clause when Congress chooses to exert it," he wrote that *Federal Baseball* itself "has never been expressly overuled [sic]" and felt that it had not been overruled "by necessary implications" by the cases expanding the Commerce Clause."[34]

Conversely (and colorfully), Judge Jerome Frank, in his concurring opinion, wrote that the Supreme Court's expansion of the Commerce Clause had "left [*Federal Baseball*] but an impotent zombi [sic]," and while he wrote that they should not attempt to completely overrule it, he felt that the current case could be distinguished from *Federal Baseball*

30. *Id*. at 242-43.
31. 172 F.2d 402 (2d Cir. 1949).
32. *Id*. at 405 (Chase, J., dissenting).
33. *Id*. at 404 (Chase, J., dissenting).
34. *Id*. at 404-05 (Chase, J., dissenting).

due to the reserve clause's "shockingly repugnant" characteristics.[35] In a third, more-rationed approach, Chief Judge Learned Hand wrote that, in his view, it was clear that based both on the expansion of the commercial aspects of professional baseball and the expansion of the Commerce Clause that MLB's actions concerned interstate commerce.[36] However, he felt that the Court should not pass any judgment on the legality of the reserve clause until after a full trial.[37]

What is important about these three opinions is none of the three judges on the panel felt that *Federal Baseball* was still good law—they merely disagreed as to how exactly the court should handle that reality in the instant case. Judge Chase in dissent felt that *Federal Baseball* must still operate as precedent until the Supreme Court explicitly overturns it.[38] Chief Judge Hand and Judge Frank, on the other hand, wrote that *Federal Baseball* could either be treated as overruled *sub silentio*[39] or simply distinguished based on differing facts,[40] respectively.

Unfortunately, *Gardella* never reached a full trial or received a definitive decision on the legality of the reserve clause, as MLB settled with Gardella and the other Mexican League defectors shortly thereafter.[41] While the Second Circuit had another opportunity later in 1949 to revisit the issue, Judge Hand had since somewhat retreated from his previous position against *Federal Baseball*'s viability.[42] He wrote instead for a unanimous panel holding that while the court should follow *Gardella*, the court should still affirm the district court's order denying a preliminary injunction—they were "not prepared to say that . . . the 'reserve clause' violates the Anti-Trust Acts," thereby paradoxically

35. *Id*. at 408-09 (Frank, J., concurring).

36. *Id*. at 407-08 (Hand, C.J., concurring).

37. *Id*. (Hand, C.J., concurring).

38. *Id*. at 405 (Chase, J., dissenting) (arguing "there is no actual decision so incompatible with that in *Federal Base Ball Club v. National League* . . . as to displace the latter by mere weight of its authority.").

39. *Id*. at 408 (Hand, C.J., concurring) ("[W]e are wasting our time over the Baseball case[,] for it was overruled *sub silentio*.").

40. *Id*. at 408-09 (Frank, J., concurring) (writing that while "it seems best that this court should not [] hold" that the baseball exemption has been completely overturned, "there is no longer occasion for applying these earlier cases beyond their exact facts.").

41. Ron Briley, *Danny Gardella and Baseball's Reserve Clause: A Working-Class Stiff Blacklisted in Cold War America*, 19 NINE: J. BASEBALL HIST. & CULTURE 52, 63-64 (2010).

42. Martin v. National League, 174 F.2d 917, 918 (2d Cir. 1949). This panel consisted of the same judges who had decided *Gardella* with one notable exception: Judge Chase, the dissenter in *Gardella*, had been replaced by Judge Swan. The turnaround from *Gardella* by Judge Frank was not altogether unsurprising (despite the fact that he referred to *Federal Baseball* as an "impotent zombi[e]"), as he did write in a footnote in *Gardella* that his conclusion on *Federal Baseball*'s lack of continued viability was reached "somewhat hesitantly" as "the Supreme Court has never explicitly overruled the *Federal Baseball Club* case." *Gardella*, 172 F.2d at 409 n.1 (Frank, J., concurring).

following both *Gardella* and *Federal Baseball*.[43]

And either way, the Supreme Court would shortly thereafter put to rest the Second Circuit's deviations in the 1956 opinion *Toolson v. New York Yankees*,[44] which held in a single-paragraph, *per curiam* opinion that the baseball exemption must be maintained on the basis that "Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect."[45] With that in mind, the Supreme Court reasoned, baseball had "been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation," and thus any changes to that status should be made by legislation, rather than by court ruling.[46]

While *Federal Baseball*'s rationale or continued viability could continue to be debated, *Toolson* nonetheless represented a firmer statement by the Supreme Court that the baseball antitrust exemption should be left intact. *Toolson* would be relied on several times within the next few decades, including by the Second Circuit in *Salerno v. American League*,[47] a case involving a dispute between the league and two umpires who had attempted to form a union.[48] The Second Circuit would continue its tradition of strongly critiquing the baseball exemption, writing that "*Federal Baseball* was not one of Mr. Justice Holmes' happiest days, that the rationale of *Toolson* is extremely dubious and that, to use the Supreme Court's own adjectives, the distinction between baseball and other professional sports is 'unrealistic,' 'inconsistent' and 'illogical.'"[49] However, the panel acknowledged that they were bound by *Toolson*'s continuation of the exemption, noting that "the Supreme Court should retain the exclusive privilege of overruling its own decisions."[50]

Two years after *Salerno*, the Supreme Court affirmed the baseball antitrust exemption's continued viability in *Flood v. Kuhn*.[51] The manner by which the Court in *Flood* affirmed the exemption, however, created significant turmoil over the next several decades. In fact, this turmoil started in some ways with the *Flood* opinion itself, which in affirming the baseball exemption, did so in a way that in the eyes of some later courts left more questions than answers. The reason for this confusion is partially because *Flood*—unlike *Toolson* before it—spent ample time in

43. *Martin*, 174 F.2d at 918.
44. 346 U.S. 356 (1953).
45. *Id*. at 357.
46. *Id*.
47. 429 F.2d 1003 (2d Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971).
48. *Id*. at 1004.
49. *Id*. at 1005 (quoting Radovich v. National Football League, 352 U.S. 445, 452 (1957)).
50. *Id*.
51. 407 U.S. 258, 284-85 (1972).

its majority opinion citing previous authority, including not only *Federal Baseball* and *Toolson*, but also other lower court decisions like *Martin*, *Salerno*, and even *Gardella*.[52]

Interestingly, in mentioning *Gardella*, *Flood* did not make an explicit judgment as to the merits of *Gardella*'s holding; it instead cited *Gardella* merely as a counterexample to the idea that most cases challenging the baseball exemption had been unsuccessful.[53] In a strange way, however, the *Flood* opinion would in some ways ultimately mirror the reasoning of *Gardella*'s panel. Justice Blackmun's majority opinion held that it was now "appropriate" to say that "[p]rofessional baseball is a business and it is engaged in interstate commerce": a prime foundational takeaway from the *Gardella* majority.[54] Still, *Flood* did not take the step that *Gardella* took in distinguishing or overturning *Federal Baseball*, instead finding "the aberration" of *Federal Baseball* was "an established one, and one that has been recognized not only in *Federal Baseball* and *Toolson*, but in *Shubert*, *International Boxing*, and *Radovich*, as well, a total of five consecutive cases in this Court."[55] As such, *Flood* mirrored *Toolson* by retaining the baseball exemption on the grounds of *stare decisis* but differed substantially from *Toolson* by taking away the factual foundations of *Federal Baseball*.

This distinction would become important in subsequent baseball antitrust exemption litigation because later cases tried to significantly narrow the scope of the exemption's effect. These attempts started soon after *Flood* in the 1978 Seventh Circuit case *Finley v. Kuhn*.[56] While *Finley*'s citation of *Federal Baseball*, *Toolson*, and *Flood*—along with the exemption in general—was positive, the Seventh Circuit majority briefly addressed the plaintiff's argument that "any exemption which professional baseball might enjoy from federal antitrust laws applies only to the reserve system" due to Justice Blackmun's specific pinpoint of the reserve clause throughout the *Flood* opinion.[57] The court dismissed this argument, writing that:

> Despite the two references in the *Flood* case to the reserve system, it appears clear from the entire opinions in the three baseball cases . . . that

52. *Id*. at 272.

53. *Id*.

54. *Id*. at 282. *Gardella*, 172 at 407-08 (Hand, C.J., concurring) (arguing that baseball's "relation to broadcasting and television" means that it engages in interstate commerce); *Id*. at 412 (Frank, J., concurring) ("I conclude, then, that here there is substantial interstate commerce of a sort not considered by the Court in the *Federal Baseball* case."). Judge Chase's dissent would disagree with this notion, writing that the plaintiff's "services, or ability to work, are not subjects of trade or commerce within the anti-trust acts." *Id*. at 406 (Chase, J., dissenting).

55. *Flood*, 407 U.S. at 282.

56. 569 F.2d 527 (7th Cir. 1978), *cert. denied*, 439 U.S. 876 (1978).

57. *Id*. at 540.

> the Supreme Court intended to exempt the business of baseball, not any particular facet of that business, from the federal antitrust laws.[58]

Within this passage, the Seventh Circuit also included a footnote observing that the baseball exemption "does not apply wholesale to all cases which may have some attenuated relation to the business of baseball."[59] To support this contention, the court cited *Twin City Sportservice v. Finley*,[60] a case that involved an antitrust dispute between an MLB club and a concessionaire but did not cite any baseball exemption case or even discuss it at all.[61]

The *Finley* court ultimately felt that the facts of *Twin City Sportservice* were distinguishable from those in in the instant case and thus upheld the baseball exemption's applicability.[62] But just a few years later, *Twin City Sportservice* would be joined by another case that completely disregarded the baseball exemption and *Federal Baseball* despite being a baseball antitrust case. This case, *Fleer v. Topps Chewing Gum*,[63] found that the MLB Players Association's exclusive licensing agreements with Topps for the use of player images on baseball cards was not an unreasonable restraint of trade, without relying on the baseball exemption in defense.[64]

Twin City Sportservice and *Fleer* would then collectively help lead to the first successful challenge to the then-boundless scope of the baseball exemption since *Toolson*: *Henderson Broadcasting v. Houston Sports*.[65] *Henderson Broadcasting* involved a dispute between a radio broadcast company and the Houston Astros after the Astros cancelled their broadcasting agreement with the radio broadcast company in favor of a new exclusive deal with another broadcaster.[66] Predictably, the Astros relied exclusively on the baseball exemption in their motion to dismiss the antitrust claims.[67]

However, the Southern District of Texas found that the baseball exemption did not apply.[68] Amazingly, this decision was based on a comparison between *Flood* and *Gardella*. The court argued that since "[t]he question of the effect of broadcasting on the baseball exemption was left unresolved because *Gardella* was settled without further

58. *Id*. at 541.

59. *Id*. at 541 n. 51.

60. *Id*.

61. Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F. 2d 1264, 1268-70 (9th Cir. 1975).

62. *Finley*, 569 F.2d at 540-41.

63. 658 F.2d 139 (3d Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982).

64. *Id*.

65. Henderson Broadcasting Corp. v. Houston Sports Ass'n., 541 F. Supp. 263 (S.D. Tex. 1982).

66. *Id*. at 264.

67. *Id*. at 264-65.

68. *Id*. at 265-69.

proceedings," the Supreme Court's "consistent refusal to extend the exemption to other professional sports, in part because of the interstate broadcasting of the sports" was "evidence of the narrow scope of the Supreme Court's judicially created baseball exemption."[69] Disputing the notion that *Flood*—through its reliance on Congressional inaction—preserved the baseball exemption wholesale, the court found that Congress "clearly ha[d] not extended the exemption to cover other businesses related to baseball." Rather, Congress "ha[d] recognized that professional organized sports are involved in extraneous business activities and expressed its judgment that an extension of the baseball exemption to other activities as well as to other sports would contravene the federal antitrust laws."[70]

This analysis rested on Congress's passage of the Sports Broadcasting Act of 1961 ("SBA"), which had provided to the various professional sports—including baseball—an exemption to the antitrust laws for any collective sale of broadcast rights of the league's member clubs.[71] Noting the SBA's inclusion of baseball within its scope, the Southern District of Texas argued that "Congress ha[d], contrary to the court's observations in *Flood v. Kuhn*, focused on the question of exemption of the television broadcast of sports from the antitrust laws and ha[d] legislated with regard to baseball no differently than it ha[d] with regard to football, basketball and hockey."[72] Since Congress had only exempted over-the-air television broadcasting in this matter and not radio broadcasting, the *Henderson Broadcasting* court held that "there is no reason to believe Congress intended to exempt radio broadcasting of baseball from those laws."[73]

However, the *Henderson Broadcasting* court went further than simply carving out a hole for radio broadcasting. Citing *Finley*'s notion that the exemption "does not apply wholesale to all cases which may have some attenuated relation with the business of baseball," and the two baseball antitrust cases that did not discuss the exemption, *Twin City Sportservice* and *Fleer*, the court disagreed with MLB's vision of unlimited antitrust immunity.[74] Instead, it held that "[t]he baseball exemption arose and has been applied by the courts solely in disputes between players and team owners or a league" and that "in antitrust actions involving contracts

69. *Id*. at 267-68.

70. *Id*. at 269.

71. *Id*. *See also* 15 U.S.C. § 1291, overruling United States v. National Football League, 196 F. Supp. 445 (E.D. Pa. 1961); Chicago Pro. Sports Ltd. P'ship v. National Basketball Ass'n, 961 F.2d 667, 670-72 (7th Cir. 1992) (explaining the scope and limitations of the antitrust exemption created by the SBA).

72. *Henderson Broadcasting*, 541 F. Supp. at 269.

73. *Id*. at 269-70.

74. *Id*. at 270 (citing Charles O. Finley & Co. Inc., v. Kuhn, 569 F.2d 527, 541 n.5 (7th Cir. 1978) (internal quotation omitted)).

between baseball teams or players on the one hand, and non-exempt business enterprises on the other, no court has granted a dismissal on the ground that baseball is somehow implicated."[75]

The *Henderson Broadcasting* litigation continued several years after that opinion, but its holding rejecting the baseball exemption's coverage of baseball broadcasting rights appears to have never been appealed or otherwise addressed by the district court or the Fifth Circuit on appeal.[76] Throughout the 1990s, however, this narrow view of the baseball exemption would be echoed and even extended in a few other notable cases.

The first of these cases, *Postema v. National League of Professional Baseball Clubs*,[77] involved a female National League umpire claiming that, while working as an umpire in the minor leagues, she was subject to continuous sexual harassment and ultimately fired as an umpire because of her gender in violation of New York state law prohibiting illegal restraints of trade.[78] On the antitrust claim—a relatively minor part of the lawsuit compared to the plaintiffs' Title VII and equivalent state law gender discrimination claims—the National League claimed that the baseball exemption fully exempted their conduct from New York state antitrust scrutiny.[79] However, the Southern District of New York did not accept this argument, holding instead that the baseball exemption was narrowly tailored in a way that did not include league-umpire relations.[80]

Using *Flood*, the *Postema* court articulated a new rule defining the baseball exemption's scope: if, according to *Flood*, the baseball exemption "rests on a recognition and acceptance of baseball's unique characteristics and needs," then "conduct not touching on those characteristics or needs" might not be exempt from liability.[81] The court's rationale was premised on a strict review of the facts of *Federal Baseball*, *Toolson*, and *Flood*, finding that the Supreme Court "ha[d] not

75. *Id*.

76. See Henderson Broadcasting Corp. v. Houston Sports Ass'n, 647 F. Supp. 292, 297 (S.D. Tex. 1986) (granting the defendants' motions to dismiss the plaintiff's per se antitrust claims while denying the defendants' motions for summary judgment on the overall claims on the grounds that additional evidence beyond expert witness testimony as to market share is necessary to sustain a Sherman Act § 1 or § 2 analysis); Henderson Broadcasting Corp. v. Houston Sports Ass'n, 659 F. Supp. 109, 111-112 (S.D. Tex. 1987) (finding the defendants did not have the monopoly power to sustain a § 2 claim and that there was no sustainable breach of contract claim, thereby dismissing the lawsuit.). Neither of those two opinions brought back the baseball exemption defense levied by the Astros. To the author's knowledge based on examination of the docket and keyword searches, the case was never heard by—nor even appealed to—the Fifth Circuit Court of Appeals.

77. 799 F. Supp. 1475 (S.D.N.Y. 1992), *rev'd on other grounds*, 998 F.2d 60 (2d Cir. 1993).

78. *Id*. at 1478-80.

79. *Id*. at 1486.

80. *Id*. at 1489.

81. *Id*. at 1488 (quoting Flood v. Kuhn, 407 U.S. 258, 282 (1972)).

specifically determined whether the exemption applies to baseball's conduct outside the domain of league structure and player relations."[82] The *Postema* court then cited *Henderson Broadcasting* and three cases that did not mention the baseball exemption (*Fleer*, *Twin City Sportservice*, and a third, *Nishimura v. Dolan*)[83] as examples where courts either explicitly or implicitly found that the baseball exemption did not apply to certain conduct outside of activity deemed particularly responsive to "baseball's unique characteristics."[84] Defining its rule for the baseball exemption's scope, the court then wrote that its role in this case was to "determine whether baseball's employment relations with its umpires are 'central enough to baseball to be encompassed in the baseball exemption.'"[85]

All of these cases led to one important judicial breakthrough in the fight to narrow the baseball exemption: the 1992 decision by Judge John Padova of the Eastern District of Pennsylvania in *Piazza v. MLB*.[86] *Piazza* was a challenge filed by a group of businessmen looking to purchase the San Francisco Giants and move them to Florida but were denied the right to do so by MLB.[87] While the plaintiffs in *Piazza* acknowledged that

82. *Id*.

83. 599 F. Supp. 484 (E.D.N.Y. 1984) (holding that allegations that the defendant acted to obtain exclusive cable broadcast rights to several New York-based sports teams—including the MLB Yankees and Mets—was not enough to sustain a viable antitrust claim).

84. *Postema*, 799 F. Supp. at 1488-89 (quoting Flood v. Kuhn, 443 F.2d 264, 282 (2d Cir. 1971)).

85. *Id*. (citing Henderson Broadcasting Corp. v. Houston Sports Ass'n., 541 F. Supp 263, 265 (S.D. Tex. 1982)).

86. 831 F. Supp. 420 (E.D. Pa. 1993). Judge Padova is mentioned specifically here because this would amazingly not be the last time that he would make an against-the-grain finding that caused turmoil within a sports league. Judge Padova would pen a set of decisions nearly 30 years later declaring that a group of college athletes could proceed with their lawsuit against their schools and the National Collegiate Athletic Association (NCAA) based on the theory that there is an employment relationship between intercollegiate athletes—including those not in so-called revenue sports—their schools, and the NCAA. Johnson v. NCAA, No. 19-cv-05230, 2021 WL 3771810 (E.D. Pa. Aug. 25, 2021) (finding that the athlete-plaintiffs' complaint plausibly alleges that they were employees of their attended schools); Johnson v. NCAA, No. 19-cv-05230, 2021 WL 4306022 (E.D. Pa. Sep. 22, 2021) (finding that the athlete-plaintiffs' complaint plausibly alleges that the NCAA's relationship with college athletes rises to the level of joint employer status). The enduring impact of this decision remains to be seen, as Judge Padova granted the attended schools' motion to appeal, sending to the Third Circuit the question of "[w]hether NCAA Division I student athletes can be employees of the colleges and universities they attend for purposes of the Fair Labor Standards Act solely by virtue of their participation in interscholastic athletics." Johnson v. NCAA, No. 19-cv-05230, 2021 WL 6125095 at *1 (E.D. Pa. Dec. 28, 2021).

87. *Piazza*, 831 F. Supp. at 422-23. At the time this opinion was filed, lead plaintiff Vincent Piazza's son, Mike, was wrapping up his first full season in MLB with the Los Angeles Dodgers. *See* Mark T. Gould, *Baseball's Antitrust Exemption: The Pitch Gets Closer and Closer*, 5 SETON HALL J. SPORT L. 273, 283 n. 38 (1995); Minnesota P'ship v. State, 592 NW 2d 847, 855 n. 17 (Minn. 1999); NICK FRIEDMAN, BASEBALL SUPERSTARS: MIKE PIAZZA 45-46 (2007). The younger Piazza would win the National League Rookie of the Year, providing a strong start to his career with the Dodgers, Florida Marlins (briefly), New York Mets, San Diego Padres, and Oakland Athletics that would eventually lead to his induction into the Baseball Hall of Fame. *See* Anthony McCarron, *Mike Piazza Documentary Shows Progression from Minor-Leaguer Who Almost Quit the Game to Mets Star*, N.Y. DAILY NEWS (Jul. 13,

Federal Baseball, *Toolson*, and *Flood* "recognize some form of exemption from antitrust liability related to the game of baseball," they argued that "the exemption either does not apply in this case, cannot be applied as a matter of law to the facts of this case, or should no longer be recognized at all."[88] In sum, as Judge Padova noted, the plaintiffs argued that the exemption was confined to the specific circumstances of the reserve clause while MLB "argue[d] that the exemption applies to the 'business of baseball' generally, not to one particular facet of the game."[89]

According to Judge Padova, MLB's "expansive view" of the baseball exemption had been correct—but the scope of the baseball exemption had been fundamentally and severely limited by the *Flood* decision.[90] While Judge Padova did not dispute that *Flood* was binding precedent, he argued that *Flood*—by "stripp[ing] from *Federal Baseball* and *Toolson* any precedential value those cases may have had beyond the particular facts there involved, i.e., the reserve clause"—had implicitly overturned those two cases and retained the scope of the exemption only to the specific and narrow context that *Flood* was deciding.[91] As such, he found *Federal Baseball* and *Toolson* to no longer be binding precedent, and the baseball exemption could thus not be applied to the present, non-reserve clause facts.

Judge Padova did entertain MLB's argument of a "different reading of *Flood*," which he noted relied primarily on *Finley v. Kuhn*.[92] However, he argued that the Seventh Circuit—and MLB by implication—simply read *Flood* incorrectly.[93] *Finley v. Kuhn*, according to Judge Padova, had inaccurately applied the doctrine of *stare decisis* by failing to consider that Flood merely created "result *stare decisis*" rather than "rule *stare decisis*."[94] Judge Padova argued that in *Flood*, "the Supreme Court exercised its discretion to invalidate the *rule* of *Federal Baseball* and *Toolson*," and as such "no rule from those cases binds the lower courts as a matter of *stare decisis*."[95] As such, *Federal Baseball* and *Toolson* no longer needed to be followed; only *Flood* and its specific findings regarding the exemption's applicability on the *reserve clause specifically* defined the scope of the exemption.[96]

2016), https://www.nydailynews.com/sports/baseball/mets/piazza-doc-takes-viewer-almost-quitter-mets-star-article-1.2709764.

88. *Piazza*, 831 F. Supp. at 433.
89. *Id*. at 435.
90. *Id*. at 435-36.
91. *Id*.
92. *Id*. at 436-37.
93. *Id*.
94. *Id*. at 438.
95. *Id*.
96. *Id*.

Judge Padova then turned to other case law—including *Postema*—that had "defined the exempted market (characterized as the 'business of baseball') as that which is central to the 'unique characteristics and needs' of baseball."[97] While Judge Padova agreed with the reasoning of these cases generally, he felt that they could be distinguished.[98] None of these cases had "analyzed or applied the expansive view of the baseball exemption to the market for ownership issues in existing baseball teams," and therefore they were useful only to inform the prior analysis of the exemption.[99] Since he felt that these ownership issues were "not central to the unique characteristics and needs of exhibiting baseball games," Judge Padova felt his decision conformed with prior case law and provided a narrower reading of the baseball exemption post-*Flood*.[100]

Not every court agreed with *Piazza*'s interpretation of baseball exemption case law, even in the years closely following the decision. In *New Orleans Pelicans Baseball v. National Leagues*[101]—another case involving the potential relocation of a team, though this time in the minor leagues—the Eastern District of Louisiana agreed with the defendants' arguments "assert[ing] that *Piazza* is out of step with years of federal jurisprudence and is nothing more than a wrongly decided case."[102] Similarly, in *McCoy v. MLB*,[103] the Western District of Washington took a different view of the scope of the exemption as articulated in *Toolson* and *Flood*, writing that *Flood* had "repeated" *Toolson*'s statement of the scope of the baseball exemption as the entirety of "the business of baseball."[104] The *McCoy* court disagreed with the *Piazza* reasoning, writing that it had ignored *Flood*'s closing paragraph which had "broadly state[d] its holding" that 'Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.'"[105]

However, one year after *Piazza*, the Florida Supreme Court adopted the exceedingly narrow view of the baseball exemption in *Butterworth v.*

97. *Id*. at 440 (quoting Postema v. National League of Pro. Baseball Clubs, 799 F. Supp. 1475, 1488 (S.D.N.Y. 1992)).

98. *Id*. at 440-41.

99. *Id*.

100. *Id*. It should be noted that following this decision MLB moved for an interlocutory appeal on the question of whether the baseball exemption is limited to the reserve clause. *See* Piazza v. MLB, 836 F. Supp. 269 (E.D. Pa. 1993). Judge Padova rejected this motion and denied leave for MLB to appeal, writing that while "[t]he nature and extent of Baseball's antitrust exemption may be a controlling issue of law" that had "substantial ground for difference of opinion," the grant of an appeal would risk substantial delay and the prospect of "multiple trials with multiple appeals." *Id*. at 271-73.

101. New Orleans Pelicans Basketball, Inc. v. National Ass'n of Pro. Baseball Leagues, Inc. No. 93-253, 1994 WL 631144 (E.D. La. Mar. 1, 1994).

102. *Id*. at *8-9.

103. 911 F. Supp. 454 (W.D. Wash. 1995).

104. *Id*. at 457 (quoting Flood v. Kuhn, 407 U.S. 258, 285 (1972) (emphasis removed)).

105. *Id*. (quoting *Flood*, 407 U.S. at 285).

National League,[106] a case involving Florida Attorney General Robert Butterworth's investigation of antitrust issues surrounding the same proposed sale and move of the Giants as in *Piazza*. The lower courts ruled in favor of MLB, quashing the investigation on the ground that the baseball exemption preempted such investigations.[107] However, the Florida Supreme Court evidently found *Piazza*'s rationale convincing, calling the opinion "a thorough analysis of what this rejection of the analytical underpinnings of *Federal Baseball* means to the precedential value of *Federal Baseball* and *Toolson*."[108] The Florida Supreme Court found that while there was "no question that *Piazza* is against the great weight of federal cases regarding the scope of the exemption," none of the other cases had "engaged in such a comprehensive analysis of *Flood* and its implications."[109] Instead, the court found, these cases had "simply state[d] that baseball is exempt and cite[d] to one or more of the baseball trilogy without any discussion at all."[110]

But the divergence created by *Piazza* and *Butterworth* would not last long. In 1998, Congress passed the Curt Flood Act, a revision of the Sherman Act that purported to limit the scope of the baseball exemption.[111] But instead of overturning the baseball exemption in its entirety, the Curt Flood Act merely repealed the baseball antitrust exemption in relation to disputes "directly relating to or affecting employment of major league baseball players to play baseball at the major league level,"[112] while keeping the exemption for all other cases involving the business of baseball, including franchise ownership and relocation issues, minor league baseball player employment issues, the marketing and sale of professional baseball products, and the exploitation of intellectual property rights.[113]

As Professor Grow noted in 2016, the Curt Flood Act was peculiar in its "opposite structure" compared to other pieces of legislation.[114] Grow observed that while most bills "devote the bulk of their text to setting forth whatever policy change the law is intended to achieve . . . of the 1,002 words of the Curt Flood Act, 73 describe what the legislation does; the

106. Butterworth v. National League of Pro. Baseball Clubs, 644 So. 2d 1021 (Fla. 1994).

107. *Id*. at 1022.

108. *Id*. at 1024.

109. *Id*. at 1025 (citing Portland Baseball Club, Inc. v. Kuhn, 491 F.2d 1101, 1103 (9th Cir. 1974); Pro. Baseball Schs. & Clubs, Inc. v. Kuhn, 693 F.2d 1085, 1086 (11th Cir. 1982)).

110. *Id*.

111. 15 U.S.C. § 26b (2012).

112. 15 U.S.C. § 26b(a).

113. 15 U.S.C. § 26b(b)(1-6).

114. Nathaniel Grow, *The Curiously Confounding Curt Flood Act*, 90 TUL. L. REV. 859, 860 (2016).

other 929 words discuss what the Act does *not* do."[115] Grow wrote that most scholars, and even some judges, have noted that contrary to Congress's goal of limiting the exemption through the Curt Flood Act, the Curt Flood Act actually "either explicitly codified the rest of baseball's exemption or, at a minimum, reflected congressional acquiescence in broad-based antitrust immunity for the sport."[116] It can even be argued, according to Grow, that Congress actually *strengthened* the exemption by codifying several topic areas where the baseball exemption still applied while including a broad 'catch-all' provision stating that the Curt Flood Act does not "create, permit or imply a cause of action" for "any conduct, acts, practices, or agreements of persons not in the business of organized professional major league baseball."[117] All of this was despite Congress's assertions that the Curt Flood Act would "bring[] the rule of antitrust law to baseball."[118]

Drawing a similar conclusion, Professor Edmonds argued that the Curt Flood Act in fact had *no* positive effect.[119] While the Curt Flood Act

115. *Id*.

116. *Id*. at 861; *Id*. at 861 n. 10.

117. 15 U.S.C. § 26b; § 26b(6). Based on the Flood Act's arguable expansion of the baseball exemption, it could be said that one of the only cases limiting the scope of the baseball exemption, Twin City Sportservice v. Finley, 512 F.2d 1264 (9th Cir. 1975), is now either an anomaly or would be decided differently if it were heard again today. In *Twin City Sportservice*, the Ninth Circuit did not even consider the baseball exemption in ruling that the Oakland Athletics' antitrust counterclaim against stadium concessionaires had properly identified illegal anti-competitive effects. *Id*. at 1275. *Twin City Sportservice* was later distinguished on two separate occasions (both after the passage of the Flood Act): in City of San Jose v. Off. of the Comm'r of Baseball, 776 F. 3d 686, 690 (9th Cir. 2015), where the Ninth Circuit held that only activities that are "wholly collateral to the public display of baseball games" are untouched by the baseball exemption; and in Right Field Rooftops v. Chicago Cubs, 87 F. Supp. 3d 874, 885 (N.D. Ill. 2015), *aff'd*, 870 F. 3d 682 (7th Cir. 2017), where a district court within the Seventh Circuit's jurisdiction followed the *San Jose* rule and found that selling tickets to watch Chicago Cubs games from nearby building rooftops was "central to the 'public display of baseball games.'" Of note, it has not seemed to matter to the courts that the baseball organization in *Twin City Sportservice* was the plaintiff (by means of a counterclaim) instead of the alleged violator of antitrust law; in fact *San Jose* merely cited *Twin City Sportservice* to stand for the proposition that "[not] all antitrust suits that touch on the baseball industry are barred." *City of San Jose*, 776 F. 3d at 690. *See also* Finley v. Kuhn, 569 F.2d 527, 541 n. 51 (7th Cir. 1978) (citing *Twin City Sportservice* in noting that "[w]e recognize that this exemption does not apply wholesale to all cases which may have some attenuated relation to the business of baseball."). Indeed, the Texas-based district court cited *Twin City Sportservice* in *Henderson Broadcasting* to defend not applying the baseball exemption to an antitrust claim by a broadcast company against the owners of MLB's Houston Astros, arguing that "[i]f the contract of a concessionaire, whose programs, advertising and food are part of the spectators' experience of the baseball game, is not covered by the baseball exemption, then neither should the broadcasting contract which provides transmission of merely an aural version of the game across the airwaves." Henderson Broadcasting Corp. v. Houston Sports Ass'n, 541 F. Supp. 263, 270 (S.D. Tex. 1982). In present day, it is difficult to find much difference in "central[ity]" to baseball between selling tickets to watch baseball games and selling broadcasting rights or concessions to fans at baseball games. *Id*.; *Twin City Sportservice*, 512 F.2d at 1275; *Right Field Rooftops*, 87 F. Supp. 3d at 885.

118. Nathaniel Grow, *Reevaluating the Curt Flood Act of 1998*, 87 NEB. L. REV. 747, 748 (2009).

119. Edmund P. Edmonds, *The Curt Flood Act of 1998: A Hollow Gesture After All These Years?*, 9 MARQ. SPORTS L.J. 315, 317 (1999).

allowed baseball players to "join basketball and football players in their ability potentially to wage antitrust war against management," the nonstatutory labor exemption, which exempts collectively bargained terms from antitrust scrutiny, had been strengthened enough where "the nonstatutory labor law exemption will nearly always trump a complaint predicated upon antitrust grounds."[120] Edmonds's argument is buoyed by the Curt Flood Act's clause holding that the Act shall not "be construed to affect the application to organized professional baseball of the nonstatutory labor exemption from the antitrust laws."[121]

These arguments have largely been confirmed by baseball antitrust exemption case law since the Curt Flood Act's passage. Failed attacks on the exemption since 1998 have included opinions that referred directly to the Curt Flood Act as having "explicitly preserved the [baseball] exemption."[122] Using this baseball-friendly interpretation of the Curt Flood Act as guidance, the majority of the more recent baseball exemption opinions have remained faithful to a broad interpretation of the baseball exemption without so much as a second thought.[123]

For example, in *City of San Jose v. Office of the Commissioner of Baseball*,[124] a unanimous Ninth Circuit panel wrote that the exemption covers anything involving "the business of providing public baseball games for profit between clubs of professional baseball players."[125] Similarly, the Second Circuit in *Wyckoff v. Office of the Commissioner of Baseball*[126] declined to "adopt a narrower reading of baseball's antitrust exemption" due to "the binding precedent from the Supreme Court and from this Circuit, and the limited exception created by Congress in the [Curt Flood Act]."[127] Finally, while the Seventh Circuit in *Right Field Rooftops v. Chicago Cubs*[128] acknowledged that "[the] exemption does not apply wholesale to all cases which may have some attenuated relation to the business of baseball," even the activity of blocking apartment rooftop views of Wrigley Field with signage was "part and parcel of the 'business of providing public baseball games for profit' that *Federal*

120. *Id*.

121. 15 U.S.C. § 26b(d)(4).

122. Morsani v. Major League Baseball, 79 F. Supp. 2d 1331, 1335 n. 12 (M.D. Fla. 1999).

123. *But see* Laumann v. National Hockey League, 56 F. Supp. 3d 280, 292-94 (S.D.N.Y. 2014) (holding that the 'blacking out' of team games from nationwide broadcasting packages within a specific home territory to promote local broadcasting deals was not covered by the baseball exemption, finding instead that Congress explicitly held game broadcast rights to be actionable under antitrust laws by another statute granting a limited antitrust exemption to sports teams—the Sports Broadcasting Act of 1961.) The potential opening created by *Laumann* is discussed *infra* notes 151-162 and accompanying text.

124. 776 F. 3d 686 (9th Cir. 2015).

125. *Id*. at 690 (quoting Toolson v. New York Yankees, 346 U.S. 356, 357 (1953)).

126. 705 Fed. Appx. 26 (2d Cir. 2017).

127. *Id*. at 29.

128. 870 F. 3d 682 (7th Cir. 2017).

Baseball and its progeny exempted from antitrust law."[129] None of these cases cited *Piazza*, *Butterworth*, or any other case that had previously limited the scope of the exemption. Despite petitions for certiorari being filed in each of these cases, the Supreme Court refused to revisit their previous holdings on each occasion.[130]

II. COULD *ALSTON* PORTEND A NEW ATTITUDE ON THE BASEBALL EXEMPTION'S CONTINUED VIABILITY?

A. Alston, Circuit Splits, and the post-Flood Act Baseball Exemption

Of course, each of the opportunities that the Supreme Court has had to revisit the baseball antitrust exemption came before its summer 2020 holding in *NCAA v. Alston*.[131] In *Alston*, the Supreme Court was faced with a question similar to the one it faced in *Toolson* and *Flood*: whether it should continue granting judicial deference to a sports league (in this case the NCAA) on grounds that had not been extended to any other sports league.[132] Just as MLB has relied on *Federal Baseball*'s *stare decisis* as having birthed the baseball exemption, the NCAA relied in *Alston* on language from the Supreme Court's holding in the 1984 case *NCAA v. Board of Regents*,[133] which noted the NCAA's "critical role in the maintenance of a revered tradition of amateurism in college sports" and thus called for courts to grant them "ample latitude to play that role."[134]

Leading up to the Supreme Court's *Alston* review, several courts had treated the *Board of Regents* decision to grant the NCAA "ample latitude" in a way that one group of scholars deemed a "quasi-exemption" from antitrust exposure—not granting total antitrust immunity, but certainly granting immunity on key issues related to the NCAA's vision of

129. *Id*. at 689.

130. *See* City of San Jose v. Off. of the Comm'r of Baseball, 136 S. Ct. 36 (2015); Wyckoff v. Off. of the Comm'r of Baseball, 138 S. Ct. 2621 (2018); Right Field Rooftops v. Chicago Cubs, 138 S. Ct. 2621 (2018) (each denying certiorari). *See also* Miranda v. Selig, 138 S.Ct. 507 (2017) (also denying certiorari following an appeal from the Ninth Circuit by a group of minor league baseball players alleging wage fixing by MLB and its clubs).

131. 141 S. Ct. 2141, 2159 (2021)

132. *See* Petition for Writ of Certiorari at 19, *Alston*, 141 S. Ct. 2141 (2020) (No. 20-512) (framing the issue by distinguishing the Ninth Circuit holding under appeal from those in other circuits that "properly read this Court's precedent to mean that NCAA rules designed to prevent student-athletes from being paid to play receive deference under the rule of reason and should be upheld without trial and fact intensive analysis.").

133. National Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85 (1984).

134. *Id*. at 120. *See also Alston*, 141 S. Ct. at 2157-58 (discussing this language and the NCAA's reliance on it to argue against "any rule of reason review in this suit."). Ironically, the NCAA actually *lost* in *Board of Regents*, as the Court found that their output restrictions of television broadcast rights in college football "has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life." *Board of Regents*, 468 U.S. at 120.

amateurism.[135] The most blatant example of this was by the Seventh Circuit, which cited the *Board of Regents* language to hold that:

> [W]hen an NCAA bylaw is clearly meant to maintain the "revered tradition of amateurism in college sports" or the "preservation of the student-athlete in higher education," the bylaw will be presumed to be procompetitive, since we must give the NCAA "ample latitude" to play that role."[136]

In this regard, for the next 37 years the *Board of Regents* language compelled judges to grant the NCAA an exceedingly wide degree of "ample latitude" to a level far exceeding even the baseball exemption's wide scope. Indeed, leading up to *Alston*, the *Board of Regents* "ample latitude" language had spread beyond antitrust law, insulating the NCAA and its stakeholders by granting them a surprisingly wide degree of latitude in a wide variety of different legal theories, including in:

- Claims of age discrimination;[137]
- Claims that certain NCAA rules are arbitrary and capricious;[138]
- Disputes on the extent of states' powers to dictate how the NCAA "enforces its rules and regulates the integrity of its product;"[139]

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135. Thomas A. Baker III et al., *Debunking the NCAA's Myth That Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis*, 85 TENN. L. REV. 661, 673 (2018).

136. Agnew v. national Collegiate Athletic Ass'n, 683 F.3d 328, 342-43 (7th Cir. 2012). *See also* Brief for Professor Sam C. Ehrlich as Amicus Curiae, *Alston*, 141 S. Ct. 2141 (2020) (Nos. 20-512; 20-520), 2020 WL 6802302 at *9-20 (discussing the *Agnew* language and other similar language as having granted implied immunity to the NCAA from antitrust law).

137. Butts v. National Collegiate Athletic Ass'n, 751 F.2d 609, 612-13 (3d Cir. 1984) (affirming a denial of a preliminary injunction in a case involving a student-athlete's claim that an NCAA bylaw counting each year of participation in high school sports after turning 20 years old as a year of eligibility was age discrimination, stating that the NCAA's interests in "thwart[ing] 'professionalism' in college sports" are strong enough to support denying the injunction).

138. Bloom v. National Collegiate Athletic Ass'n, 93 P.3d 621, 626 (Colo. Ct. App. 2004) (noting the Supreme Court's recognition in *Board of Regents* of the NCAA "as 'the guardian of an important American tradition,' namely, amateurism in intercollegiate athletics" in finding that a football student-athlete who was suspended for receiving money in relation to his corresponding career as a professional skier and model failed to prove that the NCAA was acting in an arbitrary or capricious manner in promulgating and enforcing its amateurism bylaws). *See also* Hispanic College Fund v. National Collegiate Athletic Ass'n, 826 N.E.2d 652, 656-57 (Ind. Ct. App. 2005) (citing *Board of Regents*'s discussion of the NCAA as a voluntary organization in finding that an arbitrary and capricious challenge to an NCAA rule requiring organizations sponsoring preseason football games to apply for exemptions was nonreviewable because the plaintiff voluntarily joined the NCAA).

139. National Collegiate Athletic Ass'n v. Miller, 10 F. 3d 633, 638-39 (9th Cir. 1993) (affirming a district court opinion finding that a Nevada statute imposing procedural due process requirements on the NCAA was a violation of the dormant commerce clause, as the district court's finding that "in order for the NCAA to accomplish its goals, the 'enforcement procedures must be applied even-handedly and uniformly on a national basis'" is not only correct, but is consistent with the Supreme Court's statement in *Board of Regents* "that the integrity of the NCAA's product cannot be preserved 'except by mutual agreement; if an institution adopted [its own athlete eligibility regulations] unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed'") (quoting National Collegiate Athletic Ass'n v. Miller, 795 F. Supp. 1476, 1484 (D. Nev. 1992); *Board of Regents*, 468 U.S. at 102).

- Calculations of tort damages for college athlete plaintiffs;[140]
- Determinations of the profitability of university sports as necessary for elements of state tort claims;[141]
- Attacks on the NCAA's non-profit status for the purpose of exemption from state property taxes;[142] and
- Claims that college athletes should be considered employees of their schools under federal wage and hour law.[143]

A large part of the argument by the NCAA (and this author as *amicus curiae*) that the Supreme Court grant certiorari in *Alston* was that the Ninth Circuit's unwillingness to grant such extreme deference created a circuit split with the Seventh Circuit.[144] While the Supreme Court did not directly address this circuit split in its decision, the effect of its holding

140. Marcantonio v. Dudzinski, 155 F. Supp. 3d 619, 635 n. 16 (W.D. Va. 2015) (applying the Supreme Court's discussion of amateurism in *Board of Regents* as means to justify a conclusion that "college athletic scholarships and participation in collegiate athletics are not cognizable property interests" and cannot be considered a "pecuniary business interest" for the purposes of calculating tort damages.) Interestingly, in that same footnote the Western District of Virginia also sharply disagreed with the Ninth Circuit's labeling of *Board of Regents*'s discussion of amateurism rules as mere *dicta* in O'Bannon v. National Collegiate Athletic Ass'n, 802 F. 3d 1049, 1062-63 (9th Cir. 2015), stating that "[w]hile somewhat vogue to characterize that language as dictum, . . . that view is incorrect" since "the statement in *Board of Regents* was necessary to the Supreme Court's analysis and resulting conclusion that NCAA rules should not be subjected to per se antitrust scrutiny." *Marcantonio*, 155 F. Supp. 3d at 635 n. 16. One wonders if this decision might be decided differently now that the Supreme Court itself has declared the language in question to be dicta. *See infra* note 145 and accompanying text.

141. Williams v. Smith, Nos. 27-CV-09-16611, 27-CV-07-22194, 2010 Minn. Dist. LEXIS 115, at *17-18 (Minn. Dist. Ct. Mar. 8, 2010) (noting the statements in *Board of Regents*, other cases, and scholarly works as evidence that "[t]he NCAA and member schools earn significant revenues from their basketball programs" to find that the first factor of a negligent misrepresentation claim against governmental organizations under Minnesota law—"whether government derives a profit from the function"—weighs in favor of a finding that an intercollegiate basketball program is a proprietary operation and thus can be sued under that claim).

142. Nat'l Collegiate Realty Corp. v. Board of County Comm'rs, 236 Kan. 394, 401-03 (Kan. 1984) (discussing the Supreme Court's then-recent findings in *Board of Regents* to determine whether the NCAA and its real estate holding company subsidiary should be considered an "educational institution" for the purposes of a Kansas state tax exemption for educational institutions).

143. Berger v. National Collegiate Athletic Ass'n, 843 F. 3d 285, 292 (7th Cir. 2016) (finding that the Supreme Court's articulation of "a revered tradition of amateurism in college sports" serves also to "define[] the economic reality of the relationship between student athletes and their schools" thus necessitating a finding that student-athletes are not employees of their schools). *See also* Dawson v. National Collegiate Athletic Ass'n, 250 F. Supp. 3d 401, 407-08 (N.D. Cal. 2017), *aff'd on other grounds,* 932 F. 3d 905 (9th Cir. 2019) (rejecting the plaintiff's attempts to use the Ninth Circuit's characterization of the relationship between the NCAA and student athletes in *O'Bannon v. NCAA,* 802 F. 3d 1049, 1074 (9th Cir. 2015), as 'labor for in-kind compensation' which suffices to establish an employment relationship under [the] FLSA," and instead writing that "[t]o the contrary, the [*O'Bannon*] decision notes the Supreme Court's own description of the college football market as 'a particular brand of football' that draws from 'an academic tradition'").

144. Petition for Writ of Certiorari, *supra* note 132, at 16 ("The decision below thus entrenches an acknowledged circuit conflict on the important and recurring issue of how the rule of reason applies to NCAA eligibility rules"); Brief for Professor Sam C. Ehrlich as Amicus Curiae, *supra* note 136, at 6 ("The presently appealed case should be heard by this Court to correct that circuit split and reaffirm this Court's longstanding heavy presumption against implicit exemptions' to the antitrust laws.").

sided with the Ninth Circuit, finding the *Board of Regents* "ample latitude" language to be dicta.[145] And while the specific effect of the Supreme Court's *Alston* mandate was narrow—merely affirming the district court's injunction forbidding the NCAA from capping universities from "offer[ing] enhanced education-related benefits"— the broader effect of adopting the Ninth Circuit's reasoning will almost certainly have much broader implications in years to come: including removing the *Board of Regents* "quasi-exemption" from the NCAA's arsenal.[146]

One could conceivably apply the reasoning of *Alston* in rejecting the NCAA's "quasi-exemption" to the baseball exemption. The Supreme Court's opportunity to revisit and reshape the NCAA's purported "quasi-exemption" grew from a circuit split between the Seventh and Ninth Circuits regarding how to interpret the Supreme Court's directive in *Board of Regents* and the degree of "ample latitude" that should be granted to the NCAA when faced with challenges to their amateurism rules. *Piazza* and *Butterworth* present a similar disagreement regarding courts' interpretation of the baseball exemption, even though these two cases alone do not rise to the level of the clear circuit split that existed before *Alston*. The narrower, reserve clause-focused reading of the baseball exemption adopted by the Eastern District of Pennsylvania and Florida Supreme Court in *Piazza* and *Butterworth*, respectively, exists as an alternative interpretation to *Flood* similar to the Ninth Circuit's reading in *Board of Regents*, which did not find wider NCAA antitrust immunity.

While most judges have interpreted the Curt Flood Act as having wiped away *Piazza* and *Butterworth*, not all courts have agreed. After the Curt Flood Act's passage, two district court opinions carried on *Piazza*'s and

145. *Alston*, 141 S. Ct. at 2157-58. *See also Alston*, 141 S. Ct. at 2167 (Kavanaugh, J., concurring) (removing all doubt to this question by noting that the unanimous majority opinion "makes clear that the decades-old 'stray comments' about college sports and amateurism made in [*Board of Regents*] were dicta and have no bearing on whether the NCAA's current compensation rules are lawful.").

146. Baker et al., *supra* note 135, at 673. *See also*, *e.g.*, Sam C. Ehrlich, *The NCAA's Massive Loss in Alston, Explained*, EXTRA POINTS (June 22, 2021), https://perma.cc/BLL5-38DS (explaining the impact of the Supreme Court declaring the *Board of Regents* "ample latitude" language to be dicta in Alston). This prophesy has already borne fruit in the fields of employment and labor law. A Pennsylvania district court has cited *Alston*'s as having "rejected the NCAA's argument that Board of Regents 'expressly approved its limits on student-athlete compensation—and [that] this approval forecloses any meaningful review of those limits today'" to justify a holding that college athletes can be deemed employees under federal wage and hour law. Johnson v. National Collegiate Athletic Ass'n, No. 19-cv-05230, 2021 WL 3771810, at *18 (E.D. Pa. Aug. 25, 2021). One month later, the general council National Labor Relations Board cited *Alston* in a memo arguing that private school college athletes should be allowed unionization rights under the National Labor Relations Act, writing that the Supreme Court in *Alston* had "recognized that amateurism in college sports has changed significantly in recent decades and rejected the notion that NCAA compensation restrictions are 'forevermore' lawful." N.L.R.B. Guidance Mem. 21-08 at 5 (Sept. 29, 2021), available at https://www.nlrb.gov/guidance/memos-research/general-counsel-memos. *See also* Sam C. Ehrlich, *A Three-Tiered Circuit Split: Why the Supreme Court Was Right to Hear NCAA v. Alston*, J. LEGAL ASPECTS OF SPORT (forthcoming 2022) (manuscript at 43 n.248) (discussing the "enormous ramifications on the landscape of college sports" delivered by the *Alston* holding).

Butterworth's legacy, albeit to a much smaller and less impressive magnitude.

The first of these decisions involved a spin-off of the *Butterworth* litigation.[147] There, the Northern District of Florida in a footnote disagreed with MLB that the Curt Flood Act "constitute[d] an endorsement by Congress of the exemption of the business of baseball," instead "tak[ing] Congress at its word [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' player issues."[148] As such, the court decided to "resolve this case without reliance on the Curt Flood Act as affecting the outcome one way or the other."[149] Within those guidelines, the court still held that "the business of baseball is exempt [as] the exemption was well established long prior to adoption of the Curt Flood Act and certainly was not *repealed* by that Act."[150]

While that first district court decision did not stray too far from the rest of the baseball exemption jurisprudence—only rejecting the idea that the Curt Flood Act had strengthened the exemption—the second district court diverted itself from that line of case law to a greater extent. *Laumann v. National Hockey League*[151] involved an antitrust challenge by a group of hockey and baseball fans of the leagues' blackout rules for internet-based broadcasts of games.[152] In the opinion, which largely mirrored the holding of another challenge to the placement of broadcast rights disputes within the baseball exemption's scope, *Henderson Broadcasting v. Houston Baseball,*[153] the Southern District of New York found that the 'blacking out' of team games from nationwide broadcasting packages

147. Major League Baseball v. Butterworth, 181 F. Supp. 2d 1316 (N.D. Fla. 2001), *aff'd*, Major League Baseball v. Crist, 331 F. 3d 1177 (11th Cir. 2003).

148. *Id*. at 1331 n. 16 (quoting 15 U.S.C. § 27a(b)).

149. *Id*.

150. *Id*.

151. 56 F. Supp. 3d 280 (S.D.N.Y. 2014). This case has a strange procedural history, particularly in relation to the parties: the NHL, not MLB, was the sole defendant in *Laumann*, but MLB (through the Office of the Commissioner of Baseball) was a defendant in the related *Garber v. Office of the Commissioner of Baseball*, a case that was decided alongside *Laumann* by the court but, at the same time, specifically *not* consolidated into the same case. *See* Order at 2, Laumann v. NHL, 56 F. Supp. 3d 280 (S.D.N.Y. 2012) (Nos. 12-cv-1817; 12-cv-3704), ECF No. 82 (noting that "the *Laumann* and *Garber* actions are not consolidated" despite the parties jointly filing briefs and a motion to dismiss). Despite this, the cited *Laumann* opinion—rather than any opinions captioned in the *Garber* litigation—is the only opinion in either case to discuss the baseball exemption's applicability on the merits. *But see* Garber v. Off. of the Comm'r of Baseball, 120 F. Supp. 3d 334, 337-38 (S.D.N.Y. 2014) (denying MLB's individual motion for leave to file an interlocutory appeal on the grounds that there is no "substantial ground for difference of opinion" on the scope of the baseball exemption and that the prior ruling denying application of the baseball exemption is not "contrary to existing law").

152. *Laumann*, 56 F.Supp.3d at 285-86.

153. 541 F. Supp. 263 (S.D. Tex. 1982). *See supra* notes 65-75 and accompanying text.

within a specific home territory to promote local broadcasting deals was explicitly actionable under antitrust laws due to the SBA's inclusion of baseball within its language.[154] According to the court, "the language and structure of the SBA suggests that, as of 1961, Congress understood sports broadcasting agreements to fall *outside* the baseball exemption" since the inclusion of baseball within the scope of this Act "would be meaningless if all baseball broadcasting agreements were already covered by the common law exemption."[155]

Moreover, the *Laumann* court explicitly rejected MLB's attempt to "argue that the Curt Flood Act reveals a congressional consensus that sports broadcasting agreements are covered by the baseball exemption," rejecting the use of a Congressional Budget Office cost estimate that had suggested the Act would "retain the antitrust exemption for a variety of topics, including . . . 'broadcast rights.'"[156] To this end, the court wrote that it would be "a tenuous inference that Congress considered broadcasting exempt simply because 'sales of the entertainment product of organized professional baseball' and 'licensing of intellectual property rights' were included in a long list of topics that would remain unchanged by the Act."[157]

The *Laumann* court's holding in this specific circumstance plainly creates what can only be termed as an extremely narrow gap within the overall scope of the exemption, especially because the litigation would settle before trial.[158] However, the court's reading that the Curt Flood Act "did not alter the applicability of the antitrust laws" for anything other than the "employment of major league baseball players" could pointedly

154. *Laumann*, 56 F. Supp. 3d at 292-94. The "nationwide broadcasting packages" referred to in the context of *Laumann* are the MLB.tv and MLB Extra Innings packages, which exclude in-market games to 'avoid diverting viewers from local RSNs that produce the live game feeds that form the OOM packages.'" *Id*. at 288. The effect of this limitation is vast and has been repeatedly criticized as overbroad; in fact, one study found that due to the often broad drawing of home markets, some regions have up to six teams "blacked out," which causes consumers in that area to have as much as 35 percent of all MLB games in a given season "blacked out" due to these restrictions. Jeremy Frank (@MLBRandomStats), Twitter (Apr. 20, 2019 11:40 AM), https://twitter.com/MLBRandomStats/status/1119627015160848384. *See also, e.g.*, Benjamin Burroughs & Adam Rugg, *Extending the Broadcast: Streaming Culture and the Problems of Digital Geographies*, 58 J. BROADCASTING & ELEC. MEDIA 365, 369-70 (2014) (explaining blackout rules and how those rules have led to an increase in digital piracy of sports broadcasts); John A. Fortunato, *Sports Leagues' Game Exposure Policies: Economic and Legal Complexities,* 3 J. GLOBAL SPORT MGMT. 1 (2019) (discussing the sports league broadcasting business model and several cases where broadcast blackouts have been challenged under antitrust law).

155. *Laumann*, 56 F. Supp. 3d at 295.

156. *Id*. at 296.

157. *Id*. at 297 (quoting 15 U.S.C. § 26b(b)-(b)(3)).

158. *See* William F. Saldutti IV, Note, *Blocking Home: Major League Baseball Settles Blackout Restriction Case; However, a Collision with Antitrust Laws in Still Inevitable*, 24 JEFFREY S. MOORAD SPORTS L. J. 49 (2017) (discussing the effect of *Laumann* post-settlement but arguing that the combination of *Laumann*'s judicial findings and settlement terms still leaves an opening for future antitrust litigation challenging MLB's still-surviving blackout policies).

narrow the rule, because that interpretation of the Act would leave intact any case law decided before the Act's passage that held any of baseball's actions as unexempted, including *Piazza* and *Butterworth*.[159]

Such a positioning of the Curt Flood Act has had powerful supporters. In a 2015 keynote address at the Sports Lawyers Association's annual conference, former Supreme Court Justice John Paul Stevens argued that the Act was "abundantly clear," explaining that "it simply makes no sense to treat organized baseball differently than other professional sports under the antitrust laws" and criticized the exemption's application to the then-recently decided *City of San Jose* case.[160] However, Justice Stevens went a step further, expressing that not only did the Curt Flood Act leave in place prior deviations but that it actually "*overruled* the Supreme Court decision in [*Flood*]" by rejecting the *stare decisis* rationale in *Flood* and *Toolson*.[161]

Furthermore, no less of an authority than former MLB commissioner Bud Selig expressed similar reservations about the continued viability of *Laumann*'s rejection of the Curt Flood Act's broader scope in a law review article with Marquette University Law School professor Matthew Mitten. Selig and Mitten wrote that "*Laumann*'s narrow construction of baseball's antitrust exemption . . . may inhibit MLB and its clubs from making procompetitive business decisions necessary to maintain on-field competitive balance or that otherwise are consistent with consumer welfare."[162] Although *Laumann* settled before trial, Selig and Mitten argued that the court's pre-settlement ruling still limits the scope of the exemption.[163]

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159. *Laumann*, 56 F. Supp. 3d at 294.

160. Justice John Paul Stevens, *supra* note 19, at 14.

161. *Id*. at 13. Unfortunately for baseball exemption critics, Justice Stevens never had a chance to rule on a baseball exemption case during his tenure on the Court, which began in 1975—just one year after *Flood*—and ended with his retirement in 2010. *See* Linda Greenhouse, *Supreme Court Justice John Paul Stevens, Who Led Liberal Wing, Dies at 99*, N.Y. TIMES (Jul. 16, 2019), https://www.nytimes.com/2019/07/16/us/john-paul-stevens-dead.html.

162. Allan H. Selig & Matthew J. Mitten, *Baseball Jurisprudence: Its Effects on America's Pastime and Other Professional Sports Leagues*, 50 ARIZ. ST. L.J. 1171, 1187-89 (2019).

163. *Id*. at 1189. At the same time, the continued power of the *Laumann* precedent does come with some questions. In an April 2019 letter to MLB commissioner Rob Manfred requesting the production of documents related to MLB's potential purchase of local broadcasting stations from the Walt Disney Company, Rep. Elijah Cummings (D-MD) stated that the potential purchase "raises significant questions about the antitrust exemption that professional baseball has enjoyed for nearly a century" as MLB's potential expansion into broadcasting "could increase the risk of anticompetitive conduct that harms American consumers and, in tum, baseball itself." Letter from Rep. Elijah Cummings, Chairman, House Committee on Oversight and Reform, to Rob Manfred, Commissioner, Major League Baseball (Apr. 11, 2019), at 1-2, *available at* https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-04-11.EEC%20RK%20to%20Manfred-MLB.pdf. While Cummings discussed *Laumann* in his letter, he dismissed its impact, noting that the case eventually settled. *Id*. at 2. Cummings's threat of imposing "additional limits on the league's antitrust exemption" in this letter perhaps signifies that Cummings felt that the *Laumann* opinion and its narrow carveout into the baseball exemption for

As such, the Supreme Court could conceivably have grounds to declare (1) *Piazza* and *Butterworth*'s much more limited interpretation was the correct reading of *Flood*; and (2) the Curt Flood Act, by merely leaving the non-labor-related portions of the baseball exemption 'as is', did not overrule *Piazza* and *Butterworth*'s alternate interpretation.

B. Shifting "Market Realities": From College Sports to Professional Baseball

The *Nostalgia Partners* plaintiffs certainly have looked to *Alston* as their guide in their quest for Supreme Court review and revision of the baseball exemption. In their complaint, the plaintiffs argued that the Supreme Court in *Alston* "signaled its willingness to reconsider the application and scope of the baseball exemption recognized in *Federal Baseball*" due to the unanimous Court's decision that "sports leagues are subject to the Sherman Antitrust Act like every other business."[164]

As the plaintiffs pointed out, the Court did address the baseball exemption in the *Alston* majority opinion, citing it as an example of when the Court "once dallied with something that looks like an antitrust exemption for professional baseball."[165] However, the Court noted that it "has refused to extend *Federal Baseball*'s reasoning to other sports leagues and has even acknowledged criticisms of the decision as 'unrealistic' and 'inconsistent' and 'aberration[al].'"[166] According to the *Nostalgia Partners* plaintiffs, this signals "objectively good reasons to believe that the Supreme Court would no longer apply the 'unrealistic' and 'inconsistent' and 'aberration[al]' baseball antitrust exemption if presented with a proper case for reconsidering it."[167]

Directly addressing the *Piazza* deviation in their complaint, the plaintiffs made an express comparison between their litigation and *Alston*, where *Federal Baseball*, *Toolson*, and *Flood* mirror *Board of Regents* as "decades-old rulings articulating . . . special treatment" that the Court "would not adhere to" because "the factual predicates do not apply."[168] An important point to this complaint is the Supreme Court's comment in *Alston* noting "little doubt that the market realities [of college sports] have changed significantly since [*Board of Regents*]" and how those changes

broadcasting rights was disposed after the settlement, though the citation of *Laumann* by the Southern District of New York in a later case may indicate that it is still good law. *Id*. at 2. *See, e.g.*, Wyckoff v. Off. of the Comm'r of Baseball, 211 F. Supp. 3d 615, 624-25 (S.D.N.Y. 2016) (citing *Laumann* as an in-district case that "concluded that *Flood* narrowed the scope of the baseball exemption").

164. Complaint, *Nostalgia Partners*, *supra* note 1, at 3.

165. *Id*. at 4 (quoting NCAA v. Alston, 141 S. Ct. 2141, 2159 (2021)).

166. *Id*. (quoting *Alston*, 141 S. Ct. at 2159) (internal citations omitted)).

167. *Id*.

168. *Id*. at 28.

bely a changed approach "[g]iven the sensitivity of antitrust analysis to market realities."[169] Implicitly comparing the two markets, the *Nostalgia Partners* complaint wrote that baseball had also experienced significant growth and change and that "[w]hatever argument there was at the time of *Flood* to adhere to such an exemption for player restrictions under principles of *stare decisis* in 1984, there is no basis to apply such principles to an unrelated restraint on competition in a different market."[170]

There is indeed little question that the market realities of professional baseball have shifted significantly since *Flood* in similar fashion to how the market realities in college sports have shifted since *Board of Regents*. As evidence of the changed market realities of college sports since 1984, the Supreme Court in *Alston* pointed to two shifts: first, the NCAA having "dramatically increased amounts and kinds of benefits schools may provide to student-athletes"; and second, the NCAA having substantially increased revenues, where Division I football and basketball jumped from $922 million and $41 million respectively in 1985 to a combined $13.5 billion in 2016.[171]

In similar fashion, professional baseball has also seen increased benefits afforded to its athletes and drastically increased revenues since *Flood*. An example of the former comes directly from *Flood* itself, as *Flood* was a challenge to baseball's reserve clause, a contractual provision which confined players to the club that had them under contract and gave clubs the ability to renew that contract unilaterally.[172] Inclusion of this clause within players' contracts became standard practice within a matter of years after professional baseball's founding. By the 1890s, every player's contract included such a clause, and MLB instituted rules requiring uniform contracts—and thus uniform use of the reserve clause—by the time of the *Flood* challenge.[173] The effect of this collusion was substantial. Rodenberg and Lovich noted that "from the 1900s through the 1960s, [MLB] player salaries realized little appreciation in

169. *Alston*, 141 S. Ct. at 2158.

170. Complaint, *Nostalgia Partners*, *supra* note 1, at 29.

171. *Alston*, 141 S. Ct. at 2158.

172. Flood v. Kuhn, 407 U.S. 258, 259 n.1 (1972). *See also* Robert A. McCormick, *Baseball's Third Strike: The Triumph of College Bargaining in Professional Baseball*, 35 VAND. L. REV. 1131, 1136-38 (1982) (describing the reserve clause and its justifications).

173. *See* Ryan M. Rodenberg & Justin M. Lovich, *Reverse Collusion*, 4 HARV. J. SPORTS & ENT. 191, 195 (2013). As Rodenberg and Lovich note, the reserve clause was created during a period of immense instability in professional baseball during the late 1800s; teams were created, moved between cities, and dissolved within just a few years' span, and players within the labor market were unrestricted and free to "contract jump" between teams at a moment's notice whenever another team would offer more money or a better overall deal. *Id*. at 194-95. The reserve clause was instituted in order to quell this instability. *Id.*

real dollars, while club owners became increasingly wealthy."[174]

While players' antitrust challenges to the reserve clause failed in both *Toolson* and *Flood*, antitrust law was not the only weapon in the players' arsenal. At the time of *Flood*, there was a movement both in practice and scholarship that within the context of labor rights, antitrust law could, and perhaps should, be seen as subservient to the growing field of labor law.[175] However, the players union—the Major League Baseball Players Association (MLBPA)—was still nascent in the few years immediately preceding and following *Flood*, having just been formed and approved by the National Labor Relations Board (NLRB) in 1969 after other failed and delayed attempts. The players union's first work stoppage came just a few months before the Supreme Court released its *Flood* decision.[176]

Despite MLB's unwillingness to eliminate the reserve clause through collective bargaining, three years after *Flood*, the players finally found victory through favorable contract interpretation in labor arbitration. In 1975, star pitchers Andy Messersmith of the Atlanta Braves and Dave McNally of the Montreal Expos filed for grievance arbitration against the clubs claiming that the clubs' insistence on including and enforcing the reserve clause in their contracts was illegal collusion under the MLB collective bargaining agreement and that the reserve clause's actual legal effect only allowed clubs to renew the contract for one additional year.[177] Shockingly—and despite around seven decades of the clause's prior effect as evidence to the contrary—appointed arbitrator Peter Seitz agreed, ruling that while contract law did not prevent parties from creating perpetual contracts, such terms that granted perpetual renewal must be expressly drafted and could not be implied.[178] As such, Seitz ruled that Messersmith and McNally were free agents and were thus free to

174. *Id*. (citing ANDREW ZIMBALIST, BASEBALL AND BILLIONS: A PROBING LOOK INSIDE THE BIG BUSINESS OF OUR NATIONAL PASTIME 4-7 (2d ed. 1994)).

175. *See, e.g.*, Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE LAW J. 1, 6-7 (1971) (arguing that the then-ongoing *Flood* litigation was "a case of the right teams playing the wrong game in the wrong arena," as the proper question "is no longer whether professional sports are entitled to a special exemption from the antitrust laws where their employment relationships are involved, but whether unions of professional athletes are entitled to special help from the courts and Congress in bargaining with their employers.").

176. McCormick, *supra* note 172, at 1151-53. *Federal Baseball* had served as a barrier to unionization as well as antitrust during the MLBPA's first attempts at gaining NLRB approval; a 1946 decision by the labor board had held that the player's union could be afforded no protection under the National Labor Relations Act based on *Federal Baseball*'s holding that professional baseball was not interstate commerce. *Id*. at 1152. This decision was indirectly reversed in 1969 when the NLRB approved the MLBPA's collective bargaining status. *Id*. *See* American League of Pro. Baseball Clubs, 180 N.L.R.B. 190 (1969).

177. McCormick, *supra* note 172, at 1155. *See also* Roger Abrams, *Arbitrator Seitz Sets the Players Free*, BASEBALL RESEARCH J. (Fall 2009), https://sabr.org/journal/article/arbitrator-seitz-sets-the-players-free/.

178. McCormick, *supra* note 172, at 1155-56.

negotiate with whatever team or teams they chose.[179]

MLB strongly objected to this decision; indeed, MLB commissioner Bowie Kuhn quickly dismissed Seitz as an arbitrator, saying that he had "visions of the Emancipation Proclamation dancing in his eyes."[180] However, both a district court and the Eighth Circuit found that Seitz acted within the bounds of his jurisdiction, as defined by the collective bargaining agreement, thus rejecting MLB's challenge.[181] MLB was left with the only option of engaging with the MLBPA in collective bargaining to try and renew the reserve clause as previously constructed, an offer which the MLBPA—now invigorated with a massive amount of bargaining leverage—would predictably reject.[182] This led to a player strike that cost baseball some of the 1981 and 1982 seasons and, eventually, a ratified collective bargaining agreement in 1982 that contained a reserve clause—but only for a player's first few years in the big leagues.[183]

The implementation of free agency led to an explosion in player salaries in the next few decades and immense power and leverage for the MLBPA in future collective bargaining negotiations with MLB. The average MLB player salary soared quickly once free agency began, jumping from $29,303 in 1970 to $185,000 in 1981.[184] This rapid ascension reached its peak (so far) in 2017 at $4.45 million before dipping for three consecutive years to $4.17 million in 2021.[185]

This rapid increase in baseball player compensation since the Supreme Court's last review of the baseball exemption could be seen as parallel to the rapid increase in college athlete compensation cited by the Supreme Court in *Alston* to show "that the market realities [in the sport] ha[d] changed significantly" since *Board of Regents*.[186] Similarly, baseball's revenue sharply increased as well. The league's total television revenue

179. *Id*.

180. Abrams, *supra* note 177.

181. *See generally* Kansas City Royals v. MLBPA, 532 F.2d 615 (8th Cir. 1976).

182. McCormick, *supra* note 172, at 1158.

183. *See generally* Abrams, *supra* note 177. The system created by the 1982 collective bargaining agreement preserves the reserve clause for a player's first six years, though after two-plus years the player is entitled to raises each year determined through neutral arbitration based on his performance up to that point. *Id.* This system has been kept in place as-is through the 2021 MLB season, though it has been discussed as a potential point of modification in the forthcoming new collective bargaining agreement. *See, e.g.*, Roland Blum, *MLB Lockout Talks to Resume with Union Counteroffer*, NBC CHICAGO (Jan. 21, 2022), https://www.nbcchicago.com/news/sports/mlb-lockout-talks-to-resume-with-union-counteroffer/2733095/.

184. Paul D. Staudohar & Edward M. Smith, *The Impact of Free Agency on Baseball Salaries*, 13 COMPENSATION REV. 46, 48 (1981).

185. *Average MLB Salary at $4.17 Million, Down 4.8% from 2019*, ESPN.COM (Apr. 16, 2021), https://www.espn.com/mlb/story/_/id/31270164/average-mlb-salary-417-million-48-2019.

186. NCAA v. Alston, 141 S. Ct. 2141, 2158 (2021).

at the time of the *Flood* decision in 1972 was, adjusted for inflation to 2022 dollars using the Consumer Price Index, approximately $274 million.[187] Since then, television revenue in MLB has been split between local and national deals, where local deals were estimated at a combined $2.1 billion in 2020[188] with an additional $1.7 billion per year between their national television deals with ESPN, Turner Broadcasting, and Fox Sports.[189] These facts suggest similar circumstances to those presented in *Alston* that could lead the Supreme Court to—based on "the sensitivity of antitrust analysis to market realities"—revisit the baseball exemption in the near future.[190]

III. WHERE THE *ALSTON-NOSTALGIA PARTNERS* COMPARISON BREAKS DOWN

Unfortunately for those who wish to see the baseball exemption overturned—including the *Nostalgia Partners* plaintiffs—there are several strong differences between the current state of the baseball exemption and the circumstances leading up to *Alston* that would discount many of the facts offered above. While the merits of the plaintiffs' case are certainly compelling, but for the baseball exemption, it seems like a tremendous reach to assume that *Alston* signaled the Supreme Court's willingness to finally abandon the baseball exemption after one hundred years of leaving it be.

Even if one were to point to the radically different makeup of the Court since it last debated the baseball exemption fifty years ago in *Flood*, most of the current members of the Court have had several opportunities to revisit the baseball exemption. Chief Justice Roberts and Justices Thomas, Alito, Sotomayor, and Kagan were all on the Court when *City of San Jose*—another case dealing with franchise ownership and relocation—was denied certiorari in 2015.[191] Justice Gorsuch, who personally cited *Federal Baseball* as an example of "distinguished"

187. Michael J. Haupert, *The Economic History of Major League Baseball*, ECON. HISTORY ASSOC. (2007), https://eh.net/encyclopedia/the-economic-history-of-major-league-baseball/. The cited article has MLB's total television revenue at $41.09 million in 1972 dollars, translating to $176 million in 2002 dollars (the adjusted value used in the article). *Id*. This value was calculated in 2022 dollars using the CPI Inflation Calculator located at https://www.in2013dollars.com/, which had been last updated on January 12, 2022.

188. Craig Edwards, *Let's Update the Estimated Local TV Revenue for MLB Teams*, FANGRAPHS (Apr. 16, 2020), https://blogs.fangraphs.com/lets-update-the-estimated-local-tv-revenue-for-mlb-teams/.

189. Craig Edwards, *MLB Isn't Losing TV Revenues Yet*, FANGRAPHS (Mar. 30, 2020), https://blogs.fangraphs.com/mlb-isnt-losing-tv-revenues-yet/.

190. *Alston*, 141 S. Ct. at 2158.

191. City of San Jose v. Off. of the Comm'r of Baseball, 136 S. Ct. 36 (2015) (denying certiorari). While Justice Thomas would have been on the Court at the time of a *Piazza* or *Butterworth* appeal, neither case had a petition for certiorari filed.

precedent that the Court has "chosen to retain the holding itself" despite "long since rejecting the reasoning" in a concurrence while with the Tenth Circuit,[192] joined the Court in time for its denial of certiorari in the minor league baseball salary case *Miranda v. Selig* as well as the twin denial of certiorari in *Wyckoff v. Office of the Commissioner of Baseball* and *Right Field Rooftops*.[193] Justice Kavanaugh, Justice Barrett, and the newly-confirmed Justice Jackson have yet to have a baseball exemption-related petition for certiorari cross their desk.[194]

A much more critical difference, however, is simply the general status of the judicial precedent that the *Nostalgia Partners* plaintiffs seek to overturn. In *Alston*, the circumstances surrounding the infamous "ample latitude" language from *Board of Regents* found to be mere dicta made it easy for the Supreme Court to declare it as such. In fact, the lower courts' opinions in *Alston* were largely premised on the Ninth Circuit's rejection of the *Board of Regents* "ample latitude" language in the previous *O'Bannon v. NCAA*,[195] where the court wrote that "[t]he Court's long encomium to amateurism, though impressive-sounding, was . . . dicta" as

192. Direct Marketing Ass'n v. Brohl, 814 F.3d 1129, 1150 (10th Cir. 2016) (Gorsuch, J., concurring). Indeed, within this same aside Justice Gorsuch wrote that "Congress has since codified baseball's special exemption," citing the Curt Flood Act as Congressional approval and endorsement. *Id*. While it is of course possible that Justice Gorsuch could be convinced otherwise upon closer analysis (or even has already sine changed his mind), this writing certainly suggests until proven otherwise that he would not be receptive to the arguments advanced by the plaintiffs.

193. Miranda v. Selig, 138 S. Ct. 507 (2017); Wyckoff v. Off. of the Comm'r of Baseball, 138 S. Ct. 2621 (2018); Right Field Rooftops v. Chicago Cubs, 138 S. Ct. 2621 (2018) (all denying certiorari).

194. Of note, however, Justice Kavanaugh might be the justice best suited to advocate for review and rule in favor of a narrowly defined exemption. On the former point, Justice Kavanaugh is well-known to be a sports fan, and some have speculated that this could lead to greater interest in sports-related cases from the Court while he is on the bench. *See* Kimberly Strawbridge Robinson & Jordan S. Rubin, *Kavanaugh's Sports Fandom Shines in Athlete-Centered Opinion*, BLOOMBERG LAW (Jun. 23, 2021), https://news.bloomberglaw.com/us-law-week/kavanaughs-sports-fandom-shines-in-athlete-centered-opinion. On the latter point, Justice Kavanaugh's passionate *Alston* concurrence against the NCAA's claim to antitrust immunity would be exactly the energy challengers to the baseball exemption would need to have a chance at the baseball exemption similarly being overturned or narrowed. *See* NCAA v. Alston, 141 S. Ct. 2141, 2167-69 (2021) (Kavanaugh, J., concurring). At the same time, however, Justice Kavanaugh's fervent rebuttal of the NCAA's arguments in his *Alston* concurrence were couched entirely within a clear distaste of the "textbook antitrust problem" of "price-fixing labor" and "the NCAA's decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated." *Id*. (Kavanaugh, J., concurring). Such a moral dispute would not apply in *Nostalgia Partners*, as the plaintiffs are minor league team owners, not players. Perhaps Justice Kavanaugh would advocate for the Court's hearing of a case like *Miranda v. Selig*, 860 F.3d 1237 (9th Cir. 2017)—a case involving price-fixed minor league baseball players—but *Nostalgia Partners* is not that case. And while there has been another recently-filed case that does involve minor league compensation, that case does not directly seek to overturn or narrow *Federal Baseball* through differing interpretations of *Flood* but instead claims that the baseball exemption generally and the Curt Flood Act specifically are "unconstitutional as a violation of minor leaguers' constitutional right to equal protection of the laws," which is a very different conversation. *See* Complaint at 22-23, Concepcion v. Off. of the Comm'r of Baseball, No. 22-cv-01017 (D.P.R. Jan. 11, 2022).

195. 802 F. 3d 1049 (9th Cir. 2015).

compensation rules like those challenged in *O'Bannon* (and *Alston*) "were not before the Court."[196] Rather than dealing with anything concerning college athlete compensation, *Board of Regents* concerned a challenge to the NCAA's stranglehold on its schools' television broadcast rights, and the NCAA *lost* this case.[197] The Court in *Regents* mentioned the NCAA's amateur character only twice: first, in finding that the challenged television plan did not "fit into the same mold" as those rules defining "the eligibility of the participants,"[198] and second, in writing the now-infamous concluding plea for the NCAA to be granted "ample latitude" to play its "critical role in the maintenance of a revered tradition of amateurism in college sports"—even while finding that the rule in the instant case was "hardly consistent with this role."[199]

Piazza presents a similar baseball exemption-focused argument that could have been made in *Nostalgia Partners*: since *Flood* only addressed the reserve clause, any language within its opinion that purported to expand the exemption beyond those facts would be dicta, since—to paraphrase *O'Bannon*—the exemption's application to the business of baseball outside of labor relations "w[as] not before the Court."[200] But the context of *Flood* makes this is a much weaker claim to dicta treatment than the argument in front of the Ninth Circuit in *O'Bannon* and the Supreme Court in *Alston*. The NCAA's claim to antitrust immunity in *Alston* was based on "stray comments" made by the Court in a totally unrelated case,[201] and *Alston* stood as the first attempt by the Court to clarify those comments.[202] By contrast, the question faced by the Court in *Flood* was whether to retain a significantly more well-established exemption forged through two prior Supreme Court holdings and targeted

196. *Id*. at 1063.

197. *See generally* NCAA v. Board of Regents, 468 U.S. 85 (1984) (finding that the NCAA's television plan restricting broadcasts to one game per week unreasonably restrained output in violation of Section 1 of the Sherman Act).

198. *Id*. at 117-120.

199. *Id*. at 120. An interesting note for the purposes of this Article is that the author of the *Board of Regents* majority opinion—and as such the quoted plea for judicial deference to NCAA actions—was Justice John Paul Stevens, who, as noted earlier, is very much on record as being staunchly against baseball's antitrust exemption and in line with more narrow reads of the *Flood* decision and Curt Flood Act. *See supra* notes 160-161 and accompanying text.

200. *O'Bannon*, 802 F. 3d at 1063.

201. NCAA v. Alston, 141 S. Ct. 2141, 2158 (2021).

202. The Supreme Court had previously rejected petitions for certiorari in several NCAA antitrust amateurism cases prior to *Alston*, but its simple disinterest in hearing a case before *Alston* cannot be compared to its affirmative decisions in *Federal Baseball* and *Toolson* to affirmatively establish and confirm baseball's special treatment. *See, e.g.*, Banks v. NCAA, 508 U.S. 908 (1993); Smith v. NCAA, 119 S.Ct. 170 (1998) (each denying certiorari). In fact, the Supreme Court's more recent inaction leading up to *Alston* could also be seen as forecasting its eventual anti-NCAA decision, as it had denied certiorari to the NCAA in their appeal of the unfavorable *O'Bannon*. NCAA v. O'Bannon, 137 S. Ct. 277 (2015) (denying certiorari).

legislation.[203] And, outside of the baseball exemption trilogy, the Supreme Court has commented on and affirmed its existence several times in declining to extend it to other sports and related activities—including *Alston* itself.[204]

To this end, *Alston* and other cases which declined to extend the baseball exemption to other sports only serve to strengthen the baseball exemption *even more*. For instance, while *Nostalgia Partners* seeks to position *Alston*'s mention of the baseball exemption as the Court having "signaled its willingness to reconsider the application and scope of the baseball exemption recognized in *Federal Baseball*,"[205] that reading of *Alston* is almost certainly not what *Alston* majority opinion author Justice Gorsuch had in mind.[206] A better read of the applicable *Alston* language is that rather than "signal[ing] [the Court's] willingness" to reconsider the baseball exemption, Justice Gorsuch was instead adding *Alston* to the chorus of cases that have acknowledged the baseball exemption's interminable but anomalous positioning, declining to overturn it but also declining to extend similar immunity to other sports. Justice Gorsuch's specific language seemingly confirms this, as he never actually criticized *Federal Baseball* as bad legal doctrine; rather, he simply distinguished *Alston* from it on the basis that "this Court has already recognized that the NCAA itself is subject to the Sherman Act"—while noting—as many have before him—that treating baseball differently is "'unrealistic' and 'inconsistent' and 'aberration[al].'"[207]

CONCLUSION

If nothing else, the latest challenge to the baseball exemption is intriguing. The legal avenue proposed towards limiting or even eliminating the now century-old judicial anomaly does well to combine

203. Federal Baseball v. National League, 259 U.S. 200 (1922); Toolson v. N.Y. Yankees, 346 U.S. 356 (1953); Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat. 2824 (1998) (codified as amended at 15 U.S.C. § 26b (2012)).

204. United States v. Shubert, 348 U.S. 222 (1955) (holding that the baseball exemption does not apply to the production of theatrical attractions and operating theaters while declining to overturn the exemption's applicability to baseball); United States v. International Boxing Club, 348 U. S. 236 (1955) (holding that the baseball exemption does not apply to professional boxing while declining to overturn the exemption's applicability to baseball); Radovich v. National Football League, 352 U. S. 445 (1957) (holding that the baseball exemption does not apply to professional football while declining to overturn the exemption's applicability to baseball).

205. Complaint, *Nostalgia Partners*, *supra* note 1, at 3. *See supra* notes 165-167 and accompanying text.

206. Especially when recalling that Justice Gorsuch wrote of *Federal Baseball*'s "distinguished" nature while on the Tenth Circuit. Direct Marketing Association v. Brohl, 814 F. 3d 1129, 1150 (10th Cir. 2016) (Gorsuch, J., concurring). *See supra* note **Error! Bookmark not defined.** and accompanying text.

207. NCAA v. Alston, 141 S. Ct. 2141, 2159 (2021).

old cracks in the exemption's armor with the rationale that much more recently led to another sports league's claim to similar immunity being shut down utterly and completely.

However, when faced with a hurdle as well-established yet irrationally-preserved as the baseball exemption, intriguing is almost certainly not enough. Fascinating comparisons exist between the *Alston* decision and any potential new challenge to the baseball exemption, but the fact remains that the baseball exemption has endured similar attacks in its one-hundred-year history. Moreover, despite strong arguments made by scholars,[208] district court judges,[209] and even the late Justice Stevens[210] that the Curt Flood Act was not intended to codify the baseball exemption, recent precedent has firmly established the contrary without disruption by the Supreme Court.[211]

As *Alston* demonstrates, there is undoubtedly room for the Supreme Court to reverse itself based on the shifting "market realities" of professional baseball since *Federal Baseball* in 1922—and even since *Flood* in 1972.[212] But there is simply no evidence that the Court will do so. After all, the Court noted similar shifting market realities in *Flood*, and yet still left the exemption intact due to Congress's "positive inaction" in regard to limiting or removing the exemption themselves.[213] To that end, nothing has changed. So, as we celebrate *Federal Baseball*'s one-hundredth birthday in 2022, absent what can only be deemed shocking circumstances, we can only assume that the next one hundred years will feature similar special treatment for baseball under the antitrust laws—regardless of *Alston* and of that special treatment's well-noted "'unrealistic' and 'inconsistent' and 'aberration[al]'" nature.[214]

208. *See*, *e.g.*, Grow, *supra* note 114; Marianne McGettigan, *The Curt Flood Act of 1998: The Players' Perspective*, 9 MARQ. SPORTS L. J. 379 (1999).

209. *See*, *e.g.*, Major League Baseball v. Butterworth, 181 F. Supp. 2d 1316 (N.D. Fla. 2001); Laumann v. National Hockey League, 56 F.Supp.3d 280, 296-97 (S.D.N.Y. 2014). *See also supra* notes 147-159 and accompanying text.

210. *See* Stevens, *supra* note 160. *See also supra* notes 160-161 and accompanying text.

211. Despite several opportunities to do so. *See supra* notes 191-194 and accompanying text.

212. *Alston*, 141 S. Ct. at 2158.

213. Flood v. Kuhn, 407 U.S. 258, 282-85 (1972).

214. *Alston*, 141 S. Ct. at 2159.