

# MAJOR LEAGUE BASEBALL IS EXEMPT FROM THE ANTITRUST LAWS – LIKE IT OR NOT: THE “UNREALISTIC,” “INCONSISTENT,” AND “ILLOGICAL” ANTITRUST EXEMPTION FOR BASEBALL THAT JUST WON’T GO AWAY.

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The Athletics baseball team has been located in Oakland, California for many years. Several years ago, the A’s decided they would like to move their franchise to San Jose, which they anticipate would be a more profitable location. San Jose responded that it would also like to have the A’s relocate to their city. In 2009, the A’s asked Major League Baseball (MLB) for permission to move its franchise from Oakland to San Jose, but the league essentially shelved the request by sending it to a committee. San Jose then sued MLB, claiming that the refusal of its relocation request was an agreement among MLB team owners to preserve the San Francisco Giants’ monopoly in violation of the federal and state antitrust laws.

On October 11, 2013, Judge Ronald Whyte of the Northern District of California ruled that under longstanding United States Supreme Court precedent, “MLB’s alleged interference with the A’s relocation to San Jose is exempt from antitrust regulation.”<sup>2</sup> San Jose appealed to the Ninth Circuit Court of Appeals, arguing that the Court should overrule MLB’s historic exemption from the antitrust laws, which the Supreme Court itself has acknowledged may be described as “unrealistic, inconsistent, [and] illogical.”<sup>3</sup> On January 15, 2015 Judge Alex Kozinski issued the opinion of the Court affirming the District Court’s decision and refusing to limit or overturn baseball’s antitrust exemption.<sup>4</sup>

Baseball is the only national sport that is exempt from the antitrust laws. That anomalous exemption has existed for 92 years and withstood numerous court and Congressional challenges. So how did the judicially-created baseball antitrust exemption—which is widely acknowledged to be bad law—become the law-of-the-land? This exemption is a study in how judicial and legislative events transpire to freeze into the law a rule that is not only “illogical” but if considered afresh on a clean slate would never exist. As will be discussed in more detail below, the exemption was created in 1922 when the Supreme Court first held that baseball was not subject to the federal antitrust laws because it was not involved in interstate commerce. Over the years, the federal courts and the public adopted the view, without supporting legal analysis, that baseball was generally exempt from the antitrust laws, regardless of whether it was engaged in interstate commerce. Since 1953, the Supreme Court has considered this issue several

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2 *City of San Jose v. Office of the Comm’r of Baseball (San Jose v. MLB (Dist. Ct.))*, No. C-13-02787 RMW, 2013 WL 5609346, at \*11 (N.D. Cal., Oct. 11, 2013).

3 *See Radovich v. Nat’l Football League*, 352 U.S. 445, 451-52 (1957).

4 *See City of San Jose v. Office of the Comm’r of Baseball (San Jose v. MLB (9th Cir.))*, No. 14-15139, 2015 WL 178358 (9th Cir. Jan. 15, 2015).

times and explicitly refused to overturn baseball's exemption from federal antitrust laws on the grounds that Congress has not seen fit to do so, stating repeatedly that baseball's exemption can only be altered through legislation. Then, in 1998, Congress set baseball's antitrust exemption in stone by passing the Curt Flood Act, which revoked baseball's antitrust exemption with respect to employment issues, but explicitly maintained it for all other issues. Stated differently, Congress affirmatively carved out employment issues from baseball's antitrust exemption, but otherwise left "the business of baseball" exempt from federal antitrust laws.

Because of the Supreme Court's insistence that any change to baseball's antitrust exemption had to come from Congress, and because Congress expressly declined to make any change except with respect to employment issues, the federal courts, including the Supreme Court, must now defer to Congress's determination that baseball should continue to be exempt from antitrust laws. Regardless of how criticized it may be, if this exemption is to be changed, Congress will have to do the changing.

## **I. MLB'S FIRST BASE HIT – THE SUPREME COURT CONCLUDED THAT BASEBALL IS NOT SUBJECT TO FEDERAL ANTITRUST LAWS BECAUSE BASEBALL IS NOT IN INTERSTATE COMMERCE.**

Baseball's exemption from federal antitrust laws was created by the Supreme Court in 1922 in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Base Ball Clubs*.<sup>5</sup> In *Federal Baseball Club*, the issue was whether the league structure and the "reserve system," which restricted players' freedom to change teams,<sup>6</sup> violated federal antitrust laws.<sup>7</sup> Justice Holmes, writing for the Court, concluded that the antitrust laws did not apply to the business of baseball because the baseball teams were not involved in interstate commerce, even though they traveled from state to state to play the game.<sup>8</sup> He wrote:

The business is giving exhibitions of base ball, which are purely state affairs. It is true that in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business. . . . That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place.<sup>9</sup>

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5 259 U.S. 200 (1922).

6 "The 'reserve clause' was a provision in baseball contracts that prevented players from signing with other clubs, even after their contracts had expired, without the express consent of the club they played for." *San Jose v. MLB (9th Cir.)*, 2015 WL 178358, at \*2 n.4.

7 *Federal Baseball Club*, 259 U.S. at 207.

8 *Id.* at 208-09.

9 *Id.*

Thus, the Court held that “the restrictions by contract that prevented the plaintiff from getting players to break their bargains and the other conduct charged against the defendants were not an interference with commerce among the States.”<sup>10</sup>

*Federal Baseball Club’s* ruling was the origin of baseball’s antitrust exemption, but—importantly—that exemption was rooted in the Supreme Court’s conclusion that the business of baseball was a “purely state affair[]” that did not constitute interstate commerce. But baseball’s exemption would not stay tethered to those roots.

## II. MLB STEALS SECOND – THE SUPREME COURT HOLDS BASEBALL IS OUTSIDE THE SCOPE OF FEDERAL ANTITRUST LAWS, WITHOUT CONSIDERING WHETHER IT OPERATES IN INTERSTATE COMMERCE.

The Supreme Court did not consider *Federal Baseball Club* again until thirty years later in *Toolson v. New York Yankees, Inc.*<sup>11</sup> There, the only issue before the Court was the reserve clause, but in an opinion that totaled only the following one-paragraph, the Court went beyond the narrow issue before it to hold that baseball was generally exempt from the antitrust laws:

In [*Federal Baseball Club*], this Court held that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws. Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation. Without re-examination of the underlying issues, the judgments below are affirmed on the authority of [*Federal Baseball Club*], so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.<sup>12</sup>

The Court’s truncated opinion thus seemed to apply two rationales for maintaining the baseball exemption: (1) the baseball industry’s reliance on the exemption since 1922, and (2) Congress’s failure to enact legislation to overturn *Federal Baseball Club*. And while *Federal Baseball Club* narrowly held that baseball was not engaged in interstate commerce, the *Toolson* court interpreted the case far more broadly as “determin[ing] that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.”<sup>13</sup>

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10 *Id.* at 209.

11 346 U.S. 356 (1953).

12 *Id.* at 356-57.

13 *Id.* at 357.

In his dissent in *Toolson*, Justice Burton pointed out the per curium majority opinion's dramatic overstatement of the *Federal Baseball Club* decision, arguing that that decision only held that professional baseball was not engaged in interstate commerce in 1922:

Whatever may have been the situation when the *Federal Baseball Club* case was decided in 1922, I am not able to join today's decision which, in effect, announces that organized baseball, in 1953, still is not engaged in interstate trade or commerce.

. . . .

In the *Federal Baseball Club* case the Court did not state that even if the activities of organized baseball amounted to interstate trade or commerce those activities were exempt from the Sherman Act. The Court acted on its determination that the activities before it did not amount to interstate commerce.<sup>14</sup>

The *Toolson* dissent also correctly stated that Congress had not enacted an express exemption of professional baseball from federal antitrust laws.<sup>15</sup>

Notwithstanding the Court's narrow holding in *Federal Baseball Club* (as pointed out by the *Toolson* dissent), the judiciary as well as the public embraced the view that baseball was generally exempt from the antitrust laws.

### **III. MLB SCORES – THE SUPREME COURT REPEATEDLY AFFIRMS BASEBALL'S ANTITRUST EXEMPTION AND STATES THAT CONGRESS IS THE ONLY ENTITY THAT CAN OVERTURN IT.**

Following *Toolson*, in considering whether other types of sport or leisure were also exempt from federal antitrust laws under the same reasoning as baseball, the Supreme Court repeatedly refused to extend baseball's antitrust exemption to other sports or productions and limited the exemption to the "business of baseball."

In *United States v. Shubert*,<sup>16</sup> the Court held that baseball's antitrust exemption would not extend to theatre productions and commented on its prior ruling in *Toolson* as follows:

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14 *Id.* at 357, 360 (Burton, J., dissenting).

15 *Id.* at 364.

16 348 U.S. 222 (1955).

In *Toolson*, where the issue was the same as in *Federal Baseball*, the Court was confronted with a unique combination of circumstances. For over 30 years there had stood a decision of this Court specifically fixing the status of the baseball business under the antitrust laws and more particularly the validity of the so-called “reserve clause.” During this period, in reliance on the *Federal Baseball* precedent, the baseball business had grown and developed. . . . And Congress, although it had actively considered the ruling, had not seen fit to reject it by amendatory legislation. . . . “[W]ithout re-examination of the underlying issues,” the [*Toolson*] Court adhered to *Federal Baseball* “so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.” . . . In short, *Toolson* was a narrow application of the rule of *stare decisis*.

. . . . if the *Toolson* holding is to be expanded—or contracted—the appropriate remedy lies with Congress.<sup>17</sup>

Similarly, in *United States v. International Boxing Club of New York*,<sup>18</sup> the companion case to *Shubert*, the Court concluded that baseball’s antitrust exemption had been upheld in *Toolson* as a matter of *stare decisis* and thus could not justify extending the exemption to professional boxing.<sup>19</sup> The Court stated that Congress had considered legislation that would change the application of antitrust laws to organized professional sports but had “left intact the then-existing coverage of the antitrust laws.”<sup>20</sup>

In *Radovich v. National Football League*<sup>21</sup> the Court reviewed its prior baseball-exemption cases and held that football was subject to the antitrust laws but baseball was not.<sup>22</sup> In doing so, the Court recognized the “dubious validity” of the exemption for baseball but left it in place:

In *Toolson* we continued to hold the umbrella over baseball that was placed there some 31 years earlier by *Federal Baseball*. The Court did this because it was concluded that more harm would be done in overruling *Federal Baseball* than in upholding a ruling which at best was of dubious validity. Vast efforts had gone into the development and organization of baseball since that decision and enormous capital had been invested in reliance on its permanence. Congress had chosen to make no change. . . .

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17 *Id.* at 229–30 (citations omitted).

18 348 U.S. 236 (1955).

19 *Id.* at 243.

20 *Id.* at 242–44.

21 352 U.S. 445 (1957).

22 *Id.* at 450–52.

The Court was careful to restrict *Toolson*'s coverage to baseball, following the judgment of *Federal Baseball* only so far as it "determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." . . . "In short, *Toolson* was a narrow application of the rule of *stare decisis*." And again, in *International Boxing Club*, it added, "*Toolson* neither overruled *Federal Baseball* nor necessarily reaffirmed all that was said in *Federal Baseball*. \* \* \* *Toolson* is not authority for exempting other businesses merely because of the circumstance that they are also based on the performance of local exhibitions." <sup>23</sup>

The *Radovich Court* expressly held that the exemption applied only to baseball while recognizing that this discriminatory ruling may be "unrealistic, inconsistent, or illogical":

[B]ut since *Toolson* and *Federal Baseball* are still cited as controlling authority in antitrust actions involving other fields of business, we now specifically limit the rule there established to the facts there involved, i.e., the business of organized professional baseball. . . .

If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer, aside from the distinctions between the businesses, that were we considering the question of baseball for the first time upon a clean slate we would have no doubts. But *Federal Baseball* held the business of baseball outside the scope of the Act. No other business claiming the coverage of those cases has such an adjudication. We, therefore, conclude that the orderly way to eliminate error or discrimination, if any there be, is by legislation and not by court decision.<sup>24</sup>

In 1972, the Court revisited baseball's antitrust exemption in *Flood v. Kuhn*.<sup>25</sup> In *Flood*, the issue was, once again, whether the reserve clause in the contracts between baseball teams and players violated federal antitrust laws.<sup>26</sup> The majority opinion, by Justice Blackmun, overturned *Federal Baseball Club's* conclusion that baseball was not in interstate commerce, holding "[p]rofessional baseball is a business and it is engaged in interstate commerce."<sup>27</sup> Despite rejecting the interstate-commerce-based reason for *Federal Baseball Club's* conclusion that federal antitrust laws did not apply to baseball, the *Flood Court* nonetheless reaffirmed baseball's exemption on grounds that Congress's inaction for "half a century" following *Federal Baseball Club* indicated Congress' intent for baseball to remain exempt from the antitrust laws.<sup>28</sup> The Court stated:

We continue to be loath, 50 years after *Federal Baseball* and almost two decades after *Toolson*, to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.

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23 *Id.* (citations omitted).

24 *Id.* at 451-52.

25 *Id.* 258 (1972).

26 *Id.* at 285.

27 *Id.* at 282.

28 *Id.* at 282-83.

If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court. If we were to act otherwise, we would be withdrawing from the conclusion as to congressional intent made in *Toolson* and from the concerns as to retrospectivity therein expressed. Under these circumstances, there is merit in consistency even though some might claim that beneath that consistency is a layer of inconsistency.<sup>29</sup>

The Court concluded that while baseball's antitrust exemption was an "aberration," it was well-established in the Court's case law and should only be overturned by Congress.<sup>30</sup>

Justices Douglas, Brennan, and Marshall dissented, arguing that the Court should correct the error it created and overrule *Federal Baseball Club* and *Toolson*, with Justice Douglas writing:

This Court's decision in [*Federal Baseball Club*], made in 1922, is a derelict in the stream of the law that we, its creator, should remove. Only a romantic view of a rather dismal business account over the last 50 years would keep that derelict in midstream.

. . . .

There can be no doubt 'that were we considering the question of baseball for the first time upon a clean slate' we would hold it to be subject to federal antitrust regulation. The unbroken silence of Congress should not prevent us from correcting our own mistakes.<sup>31</sup>

Thus, even though the entire Supreme Court was expressing—at a minimum—serious misgivings concerning the lack of any true legal justification for the baseball antitrust exemption, following the *Flood* case, the court-made law-of-the-land remained—baseball was exempt from the antitrust laws.

#### **IV. MLB HITS A HOMERUN – CONGRESS CONSIDERS BASEBALL'S ANTITRUST EXEMPTION AND ONLY OVERTURNS IT WITH RESPECT TO EMPLOYMENT ISSUES.**

In the 1998 Curt Flood Act,<sup>32</sup> Congress ratified the judicially created antitrust exemption for baseball. While Congress stated in the Curt Flood Act that federal antitrust laws would apply to MLB players and league employment issues, importantly, Congress expressly stated that it was not changing any other aspect of federal antitrust law's application to baseball. The Curt Flood Act states, in relevant part:

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29 *Id.* at 283-84.

30 *Id.* at 282.

31 *Id.* at 286-88 (Douglas, J., dissenting) (quoting *Radovich v. Nat'l Football League*, 352 U.S. 445, 452 (1957) (footnotes omitted)).

32 15 U.S.C. § 26b.

## SEC. 2 PURPOSE

It is the purpose of this legislation to state that major league baseball players are covered under the antitrust laws (i.e., that major league baseball players will have the same rights under the antitrust laws as do other professional athletes, e.g., football and basketball players), along with a provision that makes it clear that ***the passage of this Act does not change the application of the antitrust laws in any other context*** or with respect to any other person or entity.

## SEC. 3 APPLICATION OF THE ANTITRUST LAWS TO PROFESSIONAL MAJOR LEAGUE BASEBALL

. . . .

(b) No court shall rely on the enactment of this section as a basis for changing the application of the antitrust laws to any conduct, acts, practices, or agreements other than those set forth in subsection (a). ***This section does not create, permit or imply a cause of action by which to challenge under the antitrust laws***, or otherwise apply the antitrust laws to, any conduct, acts, practices, or agreements that do not directly relate to or affect employment of major league baseball players to play baseball at the major league level, ***including but not limited to.***—

. . . .

(3) ***any conduct, acts, practices, or agreements of persons engaging in, conducting or participating in the business of organized professional baseball relating to or affecting franchise expansion, location or relocation, franchise ownership issues***, including ownership transfers, the relationship between the Office of the Commissioner and franchise owners, the marketing or sales of the entertainment product of organized professional baseball and the licensing of intellectual property rights owned or held by organized professional baseball teams individually or collectively. . . .<sup>33</sup>

Thus, in enacting the Curt Flood Act, Congress considered baseball's antitrust exemption and enacted a statute providing that it should only be reversed with respect to employment issues. As the District Court ruled in the *San Jose v. MLB* case, "despite the opportunity to do so, Congress chose not to alter the scope of the exemption with respect to any issues other than those 'directly relating to or affecting employment of major league baseball players.'"<sup>34</sup> The Ninth Circuit agreed, concluding that the Flood Act "withdrew baseball's antitrust exemption with respect to the reserve clause and other labor issues, but explicitly *maintained* it for franchise relocation."<sup>35</sup> As the court explained:

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33 Curt Flood Act of 1998, Pub. L. 105-297, 112 Stat. 2824 (1998) (codified as 15 U.S.C. § 26b) (emphasis added).

34 *San Jose v. MLB (Dist. Ct.)*, No. C-13-02787 RMW, 2013 WL 5609346, at \*10 (N.D. Cal., Oct. 11, 2013) (citation omitted).

35 *San Jose v. MLB (9th Cir.)*, No. 14-15139, 2015 WL 178358, at \*4 (9th Cir. Jan. 15, 2015) (emphasis added).



[W]hen Congress specifically legislates in a field and explicitly exempts an issue from that legislation, our ability to infer congressional intent to leave that issue undisturbed is at its apex. . . . The exclusion of franchise relocation from the Curt Flood Act demonstrates that Congress (1) was aware of the possibility that the baseball exemption could apply to franchise relocation; (2) declined to alter the status quo with respect to relocation; and (3) had sufficient will to overturn the exemption in other areas.<sup>36</sup>

While some might argue that employment issues—such as the reserve system—were the only exemption from the antitrust laws that baseball enjoyed prior to the Curt Flood Act, the Supreme Court’s case law before the Act involved antitrust challenges to more than just employment issues, and the Court broadly characterized baseball’s exemption. Indeed, *Federal Baseball Club* raised an antitrust challenge to league structure, not just the reserve system.<sup>37</sup> *Toolson* included challenges to territorial restrictions and league structure, not just to the reserve system,<sup>38</sup> and the *Toolson* Court said it was reaffirming *Federal Baseball Club*’s decision that “Congress had no intention of including **the business of baseball** within the scope of the federal antitrust laws.”<sup>39</sup> The subsequent cases discussed above quoted *Toolson*’s “business of baseball” language.<sup>40</sup> And no Supreme Court case held that baseball’s antitrust exemption was limited to reserve clause issues. Further, in *San Jose v. MLB* the Ninth Circuit expressly rejected San Jose’s argument that the exemption was restricted to the reserve clause, concluding that the exemption extends to the baseball industry as a whole.<sup>41</sup>

Congress is presumed to know the state of the case law when it legislates.<sup>42</sup> Further, the legislative history of the Curt Flood Act indicates that Congress affirmatively believed that baseball’s antitrust exemption extended to more than just employment issues because the supporters of the bill described the bill as **partially** overriding baseball’s exemption. One of the Act’s co-sponsors, Senator Moynihan stated, “This bill is designed to be a **partial** repeal of major league baseball’s antitrust exemption. It would leave the exemption in place as it pertains to . . . the ability of major league baseball to control the relocation of franchises.”<sup>43</sup> Moreover, if Congress believed that employment issues were the only issues covered by the baseball antitrust exemption, then it would

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36 *Id.*

37 *See Federal Baseball Club of Baltimore v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200, 207 (1922).

38 *See San Jose v. MLB (Dist. Ct.)*, 2013 WL 5609346, at \*7 n.12 (“Similarly, *Toolson* also addressed certain territorial restrictions and issues of league structure.”).

39 *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953) (emphasis added).

40 *United States v. Shubert*, 348 U.S. 222, 230 (1955); *United States v. Int’l Boxing Club of N.Y.*, 348 U.S. 236, 242 (1955); *Radovich v. Nat’l Football League*, 352 U.S. 445, 451–52 (1957).

41 *San Jose v. MLB (9th Cir.)*, No. 14-15139, 2015 WL 178358, at \*2-4 (9th Cir. Jan. 15, 2015).

42 *See, e.g., Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708, 720 (9th Cir. 2010) (“[W]e must presume that Congress is aware of past judicial interpretations and practices when it legislates . . . .”) (internal quotation marks omitted).

43 143 CONG. REC. S379-01 (DAILY ED. JAN. 21, 1997).

have had no need to so carefully state that antitrust law concerning all other baseball issues was not being changed.<sup>44</sup>

Thus, by enacting the Curt Flood Act, Congress affirmatively left in place the broad antitrust exemption for “the business of baseball,” with the narrow exception of employment issues. In other words, Congress could no longer be accused of silence or inaction; Congress acted to bring baseball’s employment issues under federal antitrust law and had expressly left in place the remainder of the judicially created exemption for “the business of baseball.”

## V. MLB’S GRAND SLAM – BASEBALL IS ALSO EXEMPT FROM STATE ANTITRUST CLAIMS

Baseball’s antitrust exemption is even more anomalous because for baseball, unlike other industries, the federal antitrust laws trump state antitrust laws. As the Ninth Circuit explained in *San Jose v. MLB*, “Baseball is an exception to the normal rule that ‘federal antitrust laws [] supplement, not displace, state antitrust remedies.’ . . . [T]he [Supreme] Court in *Flood* determined that state antitrust claims constitute an impermissible end run around the baseball exemption.”<sup>45</sup> As the Ninth Circuit recognized, ordinarily, federal antitrust laws do not replace state antitrust laws. But in *Flood*, the Supreme Court affirmed the dismissal of the state claims that were related to the federal antitrust claims on the basis that “national uniformity is required in any regulation of baseball” such that “the Commerce Clause precludes the application here of state antitrust law.”<sup>46</sup> Thus, baseball is exceptional not only because it is exempt from federal antitrust laws, but also because that federal exemption is deemed to make baseball exempt from state antitrust laws.

## VI. THE GAME IS NOW OVER FOR THE COURTS – ONLY CONGRESS CAN END BASEBALL’S ANTITRUST EXEMPTION.

Starting with its 1953 decision in *Toolson*, the Supreme Court has consistently criticized but refused to overturn its previously created exemption for baseball from federal antitrust laws, stating that Congress has not seen fit to do so and that any changes to baseball’s exemption should be by legislation. In *Toolson*, the Court said, “Congress has had the [*Federal Baseball Club*] ruling under consideration but has not seen fit to bring [the baseball] business under these [antitrust] laws . . . . We think that if there are evils in this field which now warrant application to it of the antitrust laws ***it should be by legislation.***”<sup>47</sup> Similarly, the *Radovich* Court stated, “We, therefore, conclude that the orderly way to eliminate error or discrimination [from baseball’s exemption], if any there

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44 See 15 U.S.C. § 26b(b) (“This section does not create, permit or imply a cause of action by which to challenge under the antitrust laws, or otherwise apply the antitrust laws to . . . (3) any conduct, acts, practices, or agreements of persons engaging in, conducting or participating in the business of organized professional baseball relating to or affecting franchise expansion, location or relocation, franchise ownership issues . . .”).

45 *San Jose v. MLB (9th Cir.)*, 2015 WL 178358, at \*4.

46 *Flood v. Kuhn*, 407 U.S. 258, 284–85 (1972) (internal quotation marks and alterations omitted).

47 *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953) (emphasis added).

be, **is by legislation and not by court decision.**<sup>48</sup> In *Shubert*, the Court again stated, “If the *Toolson* holding [that the business of baseball is exempt from federal antitrust laws] is to be expanded—or contracted—the **appropriate remedy lies with Congress.**”<sup>49</sup> The *International Boxing Club* Court noted that that Congress had considered legislation affecting the application of antitrust laws to organized professional sports but had “left intact the then-existing coverage of the antitrust laws.”<sup>50</sup> And most recently, in *Flood*, the Court said, “**Congress, by its positive inaction, has allowed [the baseball exemption] decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.** . . . If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that **is to be remedied by the Congress and not by this Court.**”<sup>51</sup>

Although the Supreme Court originally had the power to change the law as to the exemption it had created, the Court did not do so and repeatedly stated that Congress was the only entity that could undo the judicially-created antitrust exemption for baseball. Accordingly, when Congress stated in the Curt Flood Act that it was **not** changing the antitrust law, except as to baseball employment issues, Congress cemented the court created antitrust exemption, regardless of its legal soundness, for the remainder of “the business of baseball.”<sup>52</sup> As the Ninth Circuit recognized in *San Jose v. MLB*, Congress did not merely remain silent; Congress explicitly stated in the Curt Flood Act that it was changing the then current antitrust law **only** with respect to employment issues and was leaving the remainder of the exemption in place. In other words, even though it is “unrealistic, inconsistent, [and] illogical,” the law-of-the-land is that baseball is exempt from the antitrust laws until Congress changes it. Ironically, no one disputes that the exemption lacks legal justification. Nonetheless, as a result of Congress’ enactment of the Curt Flood Act, the Supreme Court has now **lost the power** to correct its own mistake.

Thus, to the extent that people or entities such as San Jose contend that baseball should not be immune from antitrust suits, they must appeal to Congress, not the courts, to change the law. For this reason, San Jose’s anticipated appeal of the Ninth Circuit’s ruling in *San Jose v. MLB* to the Supreme Court is undoubtedly doomed to strike out.

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48 *Radovich v. Nat’l Football League*, 352 U.S. 445, 452 (1957) (emphasis added).

49 *United States v. Shubert*, 348 U.S. 222, 230 (emphasis added) (internal quotation marks omitted).

50 *United States v. Int’l Boxing Club of N.Y.*, 348 U.S. 236, 243–33 (1955).

51 *Flood v. Kuhn*, 407 U.S. 258, 283–84 (1972) (emphasis added).

52 The City of San Jose and some commentators have argued that because the Curt Flood Act did not expressly create an antitrust exemption for all non-labor aspects of the business of baseball, the Supreme Court still has the power to abrogate baseball’s antitrust exemption. See Philip L. Gregory & Donald J. Polden, *The Baseball Exemption: An Anomaly Whose Time Has Run*, 24 COMPETITION (2015). This argument ignores the six prior Supreme Court decisions since 1953 that have asserted that only Congress can modify baseball’s antitrust exemption, as well as Congress’s express statement in the Curt Flood Act that it was only changing baseball’s existing antitrust exemption to apply the antitrust laws to employment/labor issues.