IN THE SUPREME COURT OF FLORIDA

ROBERT A. BUTTERWORTH, Attorney General of the State of Florida,

Petitioner,

v. CASE NO. AC93-69

THE NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS and WILLIAM D. WHITE, as President,

Respondents.
_____/

DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL FOR THE FIFTH DISTRICT OF FLORIDA

BRIEF OF CONSUMER FEDERATION OF AMERICA AND SPORTS FANS UNITED AS AMICI CURIAE

STEPHEN F. ROSS
UNIVERSITY OF ILLINOIS
COLLEGE OF LAW
504 E. PENNSYLVANIA AVENUE
CHAMPAIGN, IL 61820
(217) 333-2502

COUNSEL FOR AMICI CURIAE
CONSUMER FEDERATION OF AMERICA
AND SPORTS FANS UNITED

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases, cont'd **Page**

Legislative Materials

INTEREST OF AMICI CURIAE

The Consumer Federation of America, a non-profit corporation incorporated in 1968 in the State of New York, is a federation of more than 240 national, state, and local organizations,[1] representing more than 30 million American consumers. The largest consumer advocacy organization in the United States, amicus represents the viewpoints and interests of consumers before Congress, regulatory agencies, and the courts.

Sports Fans United is a recently organized grass-roots organization of fans headquartered in New York City. The organization was created to serve as a "watchdog" organization monitoring the policies and practices of the sports establishment. In addition to providing members benefits such as discounts for sports-related purchases, amicus operates a separate charitable organization to provide free tickets and transportation to sporting events for inner city youths, and has engaged in lobbying and the federal, state, and local level on behalf of sports fans.

Amici believe that a host of practices agreed to by Major League Baseball owners harm consumers and taxpayers, and that the owners' ability to implement these practices would be significantly limited were they subject to liability under

---

[1] The organizations that comprise the Consumer Federation of America include a number of national associations with a substantial number of Florida members, such as the American Association of Retired Persons and Consumers Union (publisher of Consumer Reports), as well as locally-based groups such as Consumer Fraud Watch of Tallahassee and the Florida Public Interest Research Group.

federal antitrust laws. Of particular concern to consumers and fans are the restrictions that baseball owners impose on expansion and franchise relocation. Consumers and taxpayers all across the country have been, and continue to be, victimized by the artificial restriction on franchises, a restriction that, by the candid admission of Baseball's former commissioner, is imposed in order to maintain Tampa Bay as a "baseball asset,"[2] a lucrative open market available for future expansion if and when baseball owners see fit. This restriction, of course, obviously harms the interests of Tampa Bay fans. Of equal importance for amici, as national organizations, taxpayers in a number of metropolitan areas -- most recently Chicago, San Francisco and Cleveland -- have made concessions to baseball owners in order to forestall these owners' threats to relocate their franchises to Tampa or other lucrative markets that would have franchises absent the owners' artificial restrictions.

SUMMARY OF ARGUMENT

The Attorney General would clearly have authority to conduct an investigation concerning the National League's refusal to allow the sale and transfer of the San Francisco Giants to Tampa Bay absent the U.S. Supreme Court's decision in Flood v. Kuhn, 407 U.S. 258, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1972).

---

[2] See Baseball Antitrust Immunity, Hearing Before the Subcomm. on Antitrust, Monopolies and Business Rights, Senate Comm. on the Judiciary, 102d Cong., 2d Sess. 33 [Serial No. J-102-90] (1992) (testimony of Francis Vincent).

Respondents persuaded the courts below that this decision immunizes them from any investigation scrutinizing their actions under the antitrust laws. Their argument misapprehends the nature of a federal statutory precedent such as Flood and misreads the breadth of the Flood decision.

In this brief, amici present two alternative arguments. First, we note that the U.S. Supreme Court has developed standards for determining when it will reconsider statutory precedents. Applying these standards to the National League's conduct makes it clear that the factual record that the Attorney General seeks to develop is critically important to the Court in determining whether it will reconsider a statutory precedent like Flood, and that the Flood case is ripe for judicial reconsideration. Thus, the Attorney General should be permitted to continue his investigation in order to develop a factual record to support a complaint against the National League under the antitrust laws; even if lower federal courts may be obliged to dismiss the complaint, a sufficiently well-developed record is likely to persuade the U.S. Supreme Court to overrule Flood v. Kuhn.

Alternatively, we argue that because Flood v. Kuhn does not exempt from antitrust scrutiny all activities engaged in by baseball owners, the investigation should be permitted. The scope of the exemption should be tied to the rationale adopted in Flood. That is, Flood should be construed to immunize only the reserve clause and, perhaps, other agreements that relate to

baseball's "unique characteristics and needs." We submit that none of the concerns central to the Court's opinion in Flood -- baseball's unique characteristics, evidence of congressional intent, or concerns about retroactivity -- indicate that an artificial restriction on franchise expansion and relocation should be similarly protected. Such a conclusion is compelled, we suggest, by the venerable principle that antitrust exemptions must be narrowly construed.

ARGUMENT

I. BECAUSE SUBSEQUENT PRECEDENTS SUGGEST THAT THE UNITED STATES SUPREME COURT WOULD RECONSIDER FLOOD v. KUHN, THE ATTORNEY GENERAL SHOULD BE ALLOWED TO INVESTIGATE MAJOR LEAGUE BASEBALL IN ORDER TO DEVELOP FACTS SUFFICIENT TO PERSUADE THE COURT TO DO SO.

A. Florida statutes confer upon the Attorney General broad authority to investigate any conduct that might lead to a successful parens patriae suit under the Clayton Act.

The initial brief of the Petitioner sets forth a cogent argument demonstrating that the Circuit Court erred as a matter of law in quashing the CIDs where, as here, a possibility existed that the investigation would identify conduct that a federal court would find to be non-exempt under the Sherman Act. In the interest of brevity, amici incorporate by reference the Petitioner's argument.

B. Antitrust enforcement would be significantly hindered if government investigators could not use compulsory process to develop facts necessary to challenge outmoded exemptions.

In Paul v. Virginia, 75 U.S. (8 Wall.) 168, 19 L. Ed. 357 (1869), the U.S. Supreme Court held that the sale of insurance by an out-of-state company did not constitute interstate commerce. Thus, subsequently adopted federal antitrust laws -- which prohibit restraints of trade in interstate commerce -- were not considered applicable to the insurance industry. Seventy-five years later, the Court overruled Paul in United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944). The case came to the Supreme Court on appeal from a demurrer to an indictment for criminal price fixing brought by federal prosecutors. Id. at 536. Under the logic of the courts below in this proceeding, the grand jury in South-Eastern Underwriters should never have been permitted to receive evidence and indict the defendants because under existing precedents their conduct was immune from antitrust liability.

Similarly, in 1895, the Court held that manufacturing was not commerce, and that the Sherman Act did not thus prohibit the defendant's acquisition of every sugar manufacturing plant in Philadelphia. United States v. E.C. Knight Co., 156 U.S. 1, 15 S. Ct. 249, 39 L. Ed. 325 (1895). In 1948, the Court explicitly overruled Knight in a civil case, Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 68 S. Ct. 996, 92 L.

Ed. 1328 (1948), which involved price fixing by sugar refiners. Under the Circuit Court's logic in this case, a government investigation into blatantly anticompetitive conduct by sugar manufacturers would have been halted in its incipiency because of the outmoded Knight precedent; yet, when the opportunity arose, the Supreme Court declined to be bound by its prior ruling.

The Circuit Court's decision in this case thus severely hamstrings the Florida Attorney General's ability to use compulsory process to enforce the antitrust laws. The history of judicial reconsideration of antitrust exemptions, when combined with the broad investigatory authority conferred upon the Florida Attorney General, demonstrates that this Court should allow Petitioner's investigation to proceed.

C. Current standards used by the U.S. Supreme Court in determining whether to reconsider statutory precedents make clear that the relevant inquiry is fact-laden.

In Patterson v. McLean Credit Union, 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989), the U.S. Supreme Court set out the standard to be used in overruling a statutory precedent such as Flood. Writing for the Court, Justice Kennedy noted that stare decisis is very important and that those seeking to overturn precedent must show "special justification," but that precedents are "not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been

established." Id. at 172. Patterson set forth three special considerations that would justify overruling an earlier decision. The "primary reason" for overruling precedent, Justice Kennedy noted, is because "the intervening development of the law" has "removed or weakened the conceptual underpinnings from the prior decision." Id. at 173. As we contend in the following section, this is precisely what has occurred in the antitrust area, which has evolved in such a way as to permit the desirable aspects of baseball to continue to exist under antitrust scrutiny.

A second justification for overturning a statutory precedent is that the precedent "becomes outdated and after being 'tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare.'" Id. at 174 (quoting Cardozo, The Nature of the Judicial Process). Whether or not, in the context of today's social problems, it offends the Court's "sense of justice" for baseball owners to use their monopoly power to suppress potential rivals, monopsonize the player market, and exploit localities, Major League Baseball's monopoly is nevertheless clearly inconsistent with social welfare. Allowed to freely collude and monopolize, baseball owners have cost taxpayers millions of dollars in stadium subsidies, deprived millions of fans in "have-not" cities of major league franchises, adopted player restraints that result in less competitive pennant races, permitted rampant incompetence by management not checked by forces of competition, and forced fans to pay for cablecasts of games they used to be able to view for free. See Ross,

Monopoly Sports Leagues, 73 Minn. L. Rev. 643 (1989). There is no reason to think that the adverse consequences of baseball's monopoly will not continue to be felt by fans across the contry.

In effect, the U.S. Supreme Court has told Attorney General Butterworth that, in order to persuade it to reconsider Flood v. Kuhn, he must present facts to show that the precedent has adverse social welfare effects. Notwithstanding legal niceties, if the conduct of baseball owners over the past 21 years had protected the public interest, then reconsideration might not be advisable, even if clearly justified from the perspective of abstract legal analysis. On the other hand, if the owners have continuously exercised their monopoly power to the detriment of fans and taxpayers, then reconsideration may be appropriate even if the Respondents' counsel can fashion plausible abstract arguments for maintaining the precedent.

Thus, the Attorney General must be allowed to develop the factual record upon which to ask the Court to overturn Flood v. Kuhn.

D. The Flood precedent is ripe for judicial reconsideration.

In Flood, the U.S. Supreme Court made it clear that baseball's exemption is an anomaly that has no basis in sound antitrust doctrine. Rather, Justice Blackmun identified two important considerations to support his conclusion that continuing the exemption was necessary in "recognition of

baseball's unique characteristics and needs." Flood v. Kuhn, 407 U.S. at 283 (1972). Neither consideration is present today.

First, the Court was convinced that the reserve clause,[3] the restraint at issue in Flood, was essential for the continued integrity of the game. For example, Justice Blackmun cited one author's conclusion that Justice Holmes' decision in Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, Inc., 259 U.S. 200, 42 S. Ct. 465, 66 L. Ed. 898 (1922) (holding that the baseball industry was not part of interstate commerce and thus not subject to the Sherman Act) had "saved baseball," Flood, Id. at 271 n.10. Blackmun also quoted from a House subcommittee report, which concluded that a reserve clause was necessary. Id. at 272. Another telling point in the opinion is the quotation from the concurring opinion of Judge Moore in the court of appeals -- "'[i]f baseball is to be damaged by statutory regulation, let the congressman face his constituents the next November...'" Id. at 269 n.9 (quoting 443 F.2d at 272). Blackmun also emphasized Judge Cooper's finding at trial that every witness at trial except Curt Flood testified that some form of a reserve clause was desirable. Id. at 268 (quoting 316 F. Supp. at 275-76).

Of course, the overwhelming evidence, today, after almost two decades of experience with free agency, demonstrates that

---

[3] The reserve system challenged in Flood included an agreement among all baseball owners to use a uniform player contract that confined the player to the club that had him under contract and gave the club the right to renew annually the contract on a unilateral basis. 407 U.S. at 259 n.1.

ending the reserve clause destroyed neither baseball nor its integrity. Indeed, academic studies have shown that the reserve clause actually hurt competitive balance in baseball, by any measurement other than owners' profitability. See, e.g., Ross, Monopoly Sports Leagues, supra, at 671-84 (citing own research and numerous other studies).

Second, in 1972 the Court had reason to believe that contemporary antitrust doctrines would condemn many arrangements among owners that are arguably essential to baseball. Just three months before issuing its opinion in Flood, the Court decided United States v. Topco Associates, Inc., 405 U.S. 596, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972). Topco held that an agreement to allocate territories by a cooperative of small grocery stores seeking to develop a private label brand was per se illegal. Although the district court had found that the territorial agreement was essential to the defendant's efforts to compete successfully against market leaders such as Safeway, A&P, and Kroger, Topco held that all agreements among competitors to allocate territories were conclusively presumed to be unreasonable under the Sherman Act, without regard to their actual market impact. Topco could fairly have been read to suggest that, in 1972, applying the antitrust laws to baseball would automatically have prohibited any form of a reserve clause, as well as the elaborate waiver system for minor leagues, player development contracts with minor leagues, and a host of other rules. Significantly, Justice Blackmun wrote a short concurrence

in Topco, suggesting that the result was "anomalous" because its effect was to "stultify Topco members' competition with the great and larger chains," but conceding that it was a correct application of precedents concerning the per se rule. Id. at 613-14.[4]

Today, Topco's broad language supporting blanket condemnation of restraints among joint ventures is no longer followed. The Supreme Court has made it clear that virtually all agreements among sports league owners will be governed by the rule of reason. NCAA v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984). The Court has recognized that some agreement among rivals is necessary for professional sports leagues to exist at all, and instructed the courts to consider the justifications proffered by the leagues in determining the reasonableness of a challenged restraint. Specifically, the Court recognized the legitimacy of one justification that sports leagues frequently make to defend their restraints -- the need to preserve competitive balance on the playing field -- and restrictions tailored to achieve that goal will be sustained. Id. at 117-19. More generally, the antitrust laws today, as interpreted by the Court, permit sports leagues to enter into agreements that are necessary to offer their unique product in the marketplace. Broadcast Music Inc. v. Columbia

---

[4] See also Flood, 407 U.S. at 274, where Justice Blackmun noted that a distinguished scholar had argued in a prior case, Toolson v. New York Yankees, Inc., 346 U.S. 356, 74 S. Ct. 78, 98 L. Ed. 64 (1953), that "unbridled competition as applied to baseball would not be in the public interest."

Broadcasting System, 441 U.S. 1, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979). Thus, amici's argument for subjecting baseball to antitrust scrutiny stands in sharp contrast to the attitude of those who, in the context of the antitrust laws that prevailed as of 1972 and earlier, nonetheless advocated that baseball be subject to the Sherman Act. See Gardella v. Chandler, 172 F.2d 402, 415 (2d Cir. 1949)(Frank, J.) (even if reserve clause was essential to baseball's existence, "the public pleasure does not authorize the courts to condone illegality"). Today, the Court could easily overrule the baseball exemption confident that current antitrust doctrine will permit the desirable aspects of baseball to remain unscathed.

Moreover, a critical underpinning of the Flood decision was the notion that Congress, by "positive inaction," 407 U.S. at 283, signalled that the Court should not reconsider baseball's exemption. Likewise, in his separate opinion in Patterson, Justice Brennan argued that Congress' failure to amend the relevant civil rights statutes demonstrated congressional acquiescence in the Court's precedents, rendering judicial reconsideration inappropriate. 491 U.S. at 200-05. The majority rejected that position, squarely holding that congressional inaction was an insufficient basis for inferring congressional intent. Id. at 175 n.1.[5] Presaging the Court's holding in

[5] In Hilton v. South Carolina Public Railways Comm'n, 112 S. Ct. 560, 116 L. Ed. 2d 560 (1991), Justice Kennedy's majority opinion noted in passing that "weight" should be accorded to congressional inaction concerning the 30 year-old precedent at issue in that case. However, Hilton went on to emphasize that

Patterson, Professor William Eskridge has noted that "Congress' failure to modify the illogical exclusion of baseball, and only baseball, from the antitrust laws might be the result of any combination of reasons." Rather than positively approving either Federal Baseball or Flood, Congress may not have acted to overrule them because of (1) legislative apathy, (2) disapproval of the decisions coupled with an inability to reach consensus on the appropriate solution, (3) disapproval of the decisions coupled with an inability to pass legislation due to procedural roadblocks (such as committee opposition, filibusters, and the like); or (4) disapproval of the decisions coupled with a judgment that other legislative matters are more pressing. Eskridge, Overruling Statutory Precedents, 76 Geo. L.J. 1361, 1404-05 (1988). Thus, Patterson appears to restore as a federal interpretive practice the teaching of Justice Frankfurter: "we walk on quicksand when we try to find in the absence of

---

stare decisis has "added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision." Id. at 564. The prior precedent in that case applied the Federal Employees Liability Act to state-owned railroads, and Hilton noted that worker's compensation laws in many states expressly excluded railroad workers from coverage based on the assumption that those workers were covered under federal law. Because Justice Kennedy, the author of both Patterson and Hilton, relied on Patterson's stare decisis jurisprudence in Hilton but made no attempt to reconcile this passing reference to congressional inaction with his clear rejection of Justice Brennan's argument in Patterson that such inaction was a reliable indicator of congressional intent, we submit that the only fair reading of this case is that inaction is not sufficient to justify adhering to precedent in the face of significant reliance. For an explanation why baseball owners cannot make a similar argument that future their reliance on expansion and relocation decisions are based upon Flood, see pp. 24-25 below.

corrective legislation a controlling legal principle." Helvering v. Hallock, 309 U.S. 106, 119-21 (1940).

In sum, the Florida Attorney General seeks to investigate facts surrounding what he believes to be yet another abuse of monopoly power by Major League Baseball owners. Even assuming arguendo that Flood v. Kuhn would immunize that conduct from antitrust liability, the Attorney General should be given the opportunity to develop the factual basis for a well-pleaded complaint necessary to present the issue for reconsideration to the Supreme Court. The likelihood of reconsideration is neither fanciful nor remote; rather, developments both in substantive antitrust doctrine and techniques of statutory interpretation suggest that the Court would reconsider Flood if given the opportunity.

II. FLOOD v. KUHN GRANTED MAJOR LEAGUE BASEBALL OWNERS A LIMITED EXEMPTION FROM ANTITRUST SCRUTINY THAT DOES NOT INCLUDE THE TURN-OF-THE-CENTURY AGREEMENT BETWEEN THE NATIONAL AND AMERICAN LEAGUES THAT RESTRICTS EXPANSION AND RELOCATION DECISIONS WITH THE PURPOSE AND EFFECT OF INFLATING FRANCHISE FEES AND OBTAINING TAX SUBSIDIES FROM PUBLIC STADIUM AUTHORITIES.

For the reasons described above, even if Flood v. Kuhn is read broadly to encompass all anticompetitive restraints among baseball owners, the Circuit Court erred in blocking the investigation of the National League's refusal to permit Tampa Bay investors to purchase and relocate the San Francisco Giants. Alternatively, amici contend that a careful analysis of Flood's reasoning, combined with the long-standing rule that antitrust exemptions are to be narrowly construed, suggests that the

Court's opinion should not be read so broadly. Rather, that opinion should be read to immunize only what the Court perceived to be Baseball's "unique characteristics and needs." 407 U.S. at 282. Whatever that concept means today, Flood clearly does not cover the monopolistic abuse of taxpayers in the market for stadium rentals that is the target of the Florida Attorney General's investigation.

Amici contend that this investigation, if allowed to proceed, will demonstrate that the American and National Leagues have conspired to artificially restrict expansion and prevent Tampa Bay from obtaining a Major League Baseball franchise. This conspiracy not only injures Floridians but also taxpayers throughout the United States, for one of the principal purposes of the restriction is to give all Major League Baseball owners a credible threat to move their teams to a lucrative market like Tampa Bay unless their home areas provide generous tax subsidies. Especially in light of the venerable principle that antitrust exemptions are to be narrowly construed, we submit that Flood v. Kuhn does not exempt collusion between the National and American League owners concerning expansion and relocation.

A. The principle of narrow construction of antitrust exemptions applies with full force to baseball's exemption.

The U.S. Supreme Court has consistently held that federal antitrust exemptions are to be narrowly construed. As the Court

explained in City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 398-99 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1977), the federal antitrust laws have established an "overarching and fundamental" policy that "a regime of competition" is the "fundamental principle governing commerce in this country." Accordingly, there is a presumption against any exclusion from the antitrust laws. It is important to note that Lafayette, like this case, involved a judicially created exemption (the question in that case was whether the exemption for state-directed restraints created by Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1942), extended to city-directed restraints).

This canon of construction not only reflects the strong national policy in favor of competition; it also reflects the reality of the legislative process that the beneficiaries of laws of general applicability -- such as the Sherman Act -- are likely to be less well-organized and less able to participate in the legislative process than are the beneficiaries of special exemptions. See Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 Colum. L. Rev. 223, 238, 251-56 (1986). This rationale has particular application here. As Professor Eskridge explains:

> Baseball owners were well-organized and would have lobbied hard against any effort to take away their exemption .... [They] fit the classic public choice pattern -- small, homogenous, and wealthy -- as the groups most likely to organize. Those hurt by baseball's exemption -- the millions who bought overpriced tickets each year and watched the sport on television -- were unlikely to organize because they were generally ignorant of their injury and because individual stakes were very small. Even baseball

> players, a smaller and discrete group harmed by the antitrust exemption (the reserve clause), were not politically organized until after 1966 [and after 1970, when they were better organized, they were able to eliminate the reserve clause through arbitration]. Consequently, ... [t]here was no pressure on legislators to help consumers and ballplayers; because they were not well-organized, they were effectively marginalized in the political process.

Interpreting Legislative Inaction, 87 Mich. L. Rev. 67, 106 (1988) (footnote omitted and summarized in bracket).

B. The American and National Leagues have harmed competition and consumers by colluding with each other concerning expansion and relocation decisions.

For the sake of convenience, amici have like most others, referred to "Major League Baseball." Legally, there is no such entity. Rather, that term is "commonly used to described the operations of the American League and the National League."[6]

The American and National Leagues, formerly in competition with each other, ended their economic rivalry at the turn of the century with the signing of a "peace agreement." Among the current provisions reflecting the lack of economic rivalry between the two leagues is a rule requiring each league to secure the consent of the other before expanding.[7] In the most recent

---

[6] Memorandum in Support of Defendants' Motion to Dismiss the Complaint, Piazza v. Major League Baseball, et al., Civ. Act. No. 92-CV-7173 (E.D.Pa.), at 2.

[7] This provision is now incorporated into Major League Rule 1(c)(5).

expansion, for example, the National League added franchises in Miami and Denver. Each expansion franchise paid nearly $100 million in order to obtain the franchise and associated privileges; some of this money was shared with American League owners.

Because each league cannot expand without the other's consent, the owners have collectively decided to preserve Tampa Bay as an open, lucrative market.[8] This policy could only be implemented through collusion. If the leagues made their own decisions independently, they would be eagerly vying to secure the favor of St. Petersburg and obtain a lease on the Suncoast Dome.[9]

---

[8] As former Commissioner Vincent explained to Senator Bob Graham, although he had authorized Tampa Bay investors to discuss acquisition of the Giants with Giants' owner Bob Lurie, the actual relocation of the team to Tampa Bay was by no means a foregone conclusion because, even if the National League owners agreed, Vincent was "more doubtful about whether the American League owners would concur." Baseball Antitrust Immunity hearings, supra, at 22.

[9] Because inter-league collusion concerning expansion and relocation has been the hallmark of baseball for almost the entire century, the best illustration of this point comes from football. In 1960, the National and American Football Leagues were not colluding concerning expansion, and both sought to establish franchises in Houston, perceived as a lucrative market. The AFL franchisee, Oilers' owner Bud Adams, secured a five-year lease on an existing stadium, and thus the franchise for his league, by promising to spend $150,000 of his own funds to expand seating capacity. Houston Post, Oct. 30, 1959, §5, at 2 col.3. In contrast, 27 years later Adams faced no competition from a rival league (the two leagues having merged with congressional approval in 1966), and he used the lucrative Jacksonville market as leverage to secure public financing of an additional expansion of the Astrodome, new skyboxes, and more favorable lease conditions. Deford, "This Bud's Not for You," Sports Illustrated, Nov. 2, 1987, at 70.

The conspiracy to deny Tampa Bay a franchise obviously harms Floridians. The agreement harms taxpayers elsewhere as well. The availability of a lucrative market like Tampa Bay gives all other owners a credible threat to move to Florida, unless their current hosts provide generous tax subsidies. For example, the Chicago White Sox made numerous public statements about moving to Florida in order to persuade Illinois taxpayers to provide $150 million in funding for their new ball park, in which they play at considerably below-market rates.[10] Indeed, the controversy at issue here arose after baseball executives signalled that the San Francisco Giants could consider relocating to Tampa because California voters had consistently rejected tax subsidies for a new stadium. See Baseball Antitrust Immunity, Hearing Before the Subcomm. on Antitrust, Monopolies and Business Rights, Senate Comm. on the Judiciary, 102d Cong., 2d Sess. 22 (1992) (testimony of former Commissioner Vincent). It is this conspiracy to unreasonably restrain trade, amici submit, that would be the focus of potential litigation by the Florida Attorney General.

---

[10] See, e.g., Kass & Egler, "Sox Will Stay if Legislature OKs Proposal," Chicago Tribune, May 12, 1988, Part I, p.1.

C. Flood v. Kuhn does not exempt from antitrust scrutiny the collusion between National and American League owners concerning expansion and relocation.

Baseball may have enjoyed complete immunity from antitrust scrutiny between 1922 and 1972, based on the holding in Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, Inc., 259 U.S. 200, 42 S. Ct. 465, 66 L. Ed. 898 (1922), that baseball was not part of interstate commerce. However, in Flood v. Kuhn the U.S. Supreme Court made it clear that "baseball is a business ... engaged in interstate commerce." 407 U.S. at 282.

Flood provided a new, superseding rationale for dismissing the plaintiff's challenge to the reserve clause. First, Justice Blackmun explained that, although baseball's antitrust exemption was "an exception and an anomaly," it was "an aberration that has been with us for half a century," and was entitled to the benefit of stare decisis because of "a recognition and acceptance of baseball's unique characteristics and needs." Id. Second, the Court emphasized that "since 1922 baseball, with full and continuing congressional awareness, has been allowed to develop and to expand unhindered by federal legislative action." Accordingly, Blackmun observed that "Congress as yet has had no intention to subject baseball's reserve system to the reach of the antitrust statutes." Id. at 283 (emphasis added). He thus concluded that Congress "has clearly evinced a desire not to

disapprove" of Federal Baseball. Third, he expressed concern about "the confusion and the retroactivity problems that inevitably would result with a judicial overturning of Federal Baseball." Id.

A careful analysis of Flood's rationale demonstrates that the Court's concerns are inapplicable to the conduct sought to be investigated in this case. First, the baseball owners' practice of artificially restricting franchise expansion and relocation is not unique among professional sports leagues -- or among cartels generally, for that matter. Nor have baseball owners ever made the case that the National Pastime "needs" to charge huge fees for expansion franchises or to give owners the ability to leverage below-market rents and tax subsidies from their current locales, by depriving lucrative markets like Tampa Bay of major league franchises.

Compare the different antitrust issues raised by the agreement underlying the reserve clause challenged in Flood and the agreement concerning expansion and relocation at issue in this case. Generally, an agreement among employers not to compete for the services of their rivals' employees would violate the Sherman Act. Although baseball owners were, no doubt, significantly motivated to maintain the reserve clause in order to exploit their collective bargaining power vis-a-vis players, they did have a plausible business justification for their conduct. As Flood recognized, the unique interdependence of sports leagues requires some restriction on totally free

competition in order to maintain the quality of the overall product. In contrast, the expansion and relocation restrictions at issue here -- the agreement between the National and American Leagues to preserve Tampa Bay as a "baseball asset" in order to inflate franchise fees and permit continued exploitation of taxpayers elsewhere -- are no different from any attempt by rivals to preserve existing territories and prevent new entry into their market.[11] See, e.g., United States v. Sealy, Inc., 388 U.S. 350, 87 S. Ct. 1847, 18 L. Ed. 2d 1238 (1967) (restrictions on entry into established "territories" imposed by joint venture of mattress manufacturers using same trademark).

Second, there is no comparable evidence of congressional support for immunizing franchise relocation decisions from antitrust scrutiny. The Flood opinion itself refers to

---

[11] The conduct sought to be investigated by the Attorney General is thus quite different from situations like the National Hockey League's rejection of a proposal by a potential owner to purchase the St. Louis Blues and relocate them in Saskatoon, Saskatchewan. An antitrust challenge to the NHL's decision was unsuccessful. Ralston Purina Co. v. National Hockey League, No. 83-1264-C(3) (E.D.Mo.), was settled after trial began; although there is no official judgment, news reports indicated that the former owner received an amount owed by the NHL from the proceeds of the sale and no more. See Bryant, "Blues, NHL Lawsuit Settled," United Press International, June 27, 1985 (NEXIS file). Here, amici contend that the most significant antitrust violation relating to the Giants' sale was the inter-league agreement between the American and National Leagues. If the American League could have expanded into Tampa Bay without securing the consent of, or sharing the proceeds of a franchise fee with, the National League, the National League would have had no incentive to preserve Tampa Bay as a "baseball asset." Thus, the Respondents' probable reaction to the proposal by Tampa Bay investors to purchase the Giants would have either been to approve the sale or to disapprove it and grant an expansion franchise to Tampa Bay instead.

congressional intent vis-a-vis "baseball's reserve system." 407 U.S. at 283. Indeed, the principal evidence of congressional endorsement of the reserve clause relied upon in Flood was the Report of the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary, H.R. Rep. No. 2002, 82d Cong., 2d Sess. (1952) [hereafter "1952 Report"]. See Flood, 407 U.S. at 272. That report, in addition to endorsing "some sort of reserve clause," 1952 Report, at 229, rejected the idea of completely immunizing baseball from the Sherman Act, expressly citing restrictions on the relocation of baseball franchises as one area where immunity would be inappropriate. Id. at 230. In addition, after extensive hearings, Congress has refused fervent pleas by the National Football League to exempt its relocation decisions from the Sherman Act.[12]

Third, the retroactivity problems about which Justice Blackmun expressed concern in Flood -- in conjunction with his preference for a legislative solution -- can only be taken to refer to restraints like the reserve clause. Even with the four-year statute of limitations contained in § 4B of the Clayton Act, 15 U.S.C. 15B, awarding treble damages to players injured by the reserve clause could easily have been deemed a severe and unfair financial burden to impose on owners who relied on the immunity to continue the practice of imposing the clause, and apportioning those damages would have been enormously complex. Moreover, as

---

[12] Many of these proposals are summarized in Note, Keeping the Home Team at Home, 74 Calif. L. Rev. 1329 (1986).

Justice Blackmun emphasized, the trial judge found that virtually no one thought that the reserve clause should be completely eliminated, 407 U.S. at 267, and fashioning a reasonable restraint would be a difficult task for an equity court -- hence his preference for a legislative remedy. In contrast, an injunction prohibiting the National and American Leagues from conspiring with each other regarding franchise location and expansion would be easily administrable and prospective in nature, allowing market forces to determine which locations are best suited for major league franchises.

Finally, whatever merit there may have been for baseball owners' claims that they had detrimentally relied on their exemption in developing the rules and organization of baseball based upon the reserve clause,[13] the owners cannot plausibly claim any legitimate reliance interest to justify antitrust

---

[13] In hindsight, of course, we can see that Flood's concerns on this score were unfounded. Three years after Flood, Major League Baseball players achieved the same relief that Curt Flood sought under the Sherman Act in a grievance arbitration, the Messersmith case, which interpreted the standard player contract. The arbitrator held that owners could not restrict competition among teams for a player's services at the expiration of the player's existing contract obligations with his current club. Twelve Clubs Comprising Nat'l League of Professional Baseball Clubs v. Major League Baseball Players Ass'n, 66 Lab. Arb. (BNA) 101 (Dec. 23, 1975). Baseball owners and the players' union responded by reaching a collective bargaining agreement -- which would, were baseball subject to the Sherman Act, exempt restrictions on players from antitrust scrutiny under the labor exemption, see McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir. 1979) -- and baseball attendance rose significantly in the immediately following seasons. Ross, 73 Minn. L. Rev. at 676 (citing data).

immunity for franchise expansion and relocation decisions.[14] While it was arguable that baseball owners had structured contracts with both major and minor league players on the assumption that the reserve clause would continue to operate, it is difficult to see how owners would have behaved any differently if, for example, they had been informed in 1983 that ten years later they would lose their exemption for franchise expansion and relocation restrictions. The appropriate relief to give to the Florida Attorney General -- giving Tampa Bay an opportunity to compete on the merits for a major league franchise -- would be entirely prospective. The principal agreement amici believe to be illegal under the Sherman Act -- inter-league collusion concerning expansion and relocation -- would also be struck down on a prospective basis. Moreover, unlike Hilton, no existing statutes would need to be modified if this Court recognized that Flood is limited to the reserve clause.[15]

---

[14] Some owners who recently purchased their teams might suffer because the purchase price was based on the expectation of receiving continued monopoly profits from baseball's special antitrust immunity. On policy grounds, it is difficult to see that such an expectation should be entitled to judicial cognizance. As a matter of precedent, the insurance companies' expectation of continued antitrust immunity that was upset in South-Eastern Underwriters and the similar expectation of sugar manufacturers in Mandeville Farms, see Part I(b) above, was surely greater than that of new major league owners.

[15] In one area, other professional sports leagues have persuaded Congress that strict application of the Sherman Act is not in the public interest -- package sales of television rights. However, the limited exemption provided for these sales has already been written to apply to baseball. See 15 U.S.C. § 1291.

In short, the Florida Attorney General does not seek to investigate anticompetitive activity surrounding the exhibition of baseball games, but instead activity in the market for the leasing of stadia. This conduct, which harms even taxpayers who are not baseball fans but who are persuaded that a major league franchise is important to the economics or social psychology of their locality, is not the "business of baseball." Rather, the anticompetitive conduct here is akin to the separate concession market in Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc., 676 F.2d 1291 (9th Cir.), cert. denied, 459 U.S. 1009, 103 S. Ct. 364, 74 L. Ed. 2d 400 (1982), or the separate radio market in Henderson Broadcasting Corp. v. Houston Sports Ass'n, Inc., 541 F. Supp. 263 (S. D. Tex. 1952), both of which were recognized as not within the scope of Flood's exemption.[16]

Amici concede that language in Charles O. Finley, Inc. v. Kuhn, 569 F. 2d 527 (7th Cir.), cert. denied, 439 U.S. 876, 99 S. Ct. 214, 58 L. Ed. 2d 190 (1978) ("Finley"), suggests that Flood should not be read as narrowly. In exempting from antitrust scrutiny the Commissioner's disapproval of a major cash sale of three star players by the owner of the Oakland Athletics, the court wrote that Flood did not simply exempt certain aspects of

---

[16] As Henderson noted, 541 F.Supp. at 269, the House subcommittee report relied on by Justice Blackmun in Flood distinguished the "sale of radio and television rights, management of stadia, purchase and sale of advertising, the concession industry, and many other business activities" from "the aspects of baseball which are solely related to the promotion of competition on the playing field." 1952 Report, supra, at 230.

baseball from the Sherman Act. Id. at 541. Although, as we discuss below, the result may have been correct, the broad language and peremptory analysis employed in that opinion should not, with respect, be followed by this Court.

First, Finley WAS a reserve clause case. Commissioner Kuhn vetoed the sale precisely because of the effect that it would have on competition among owners for player talent, especially at a time when baseball owners were implementing a new labor agreement that significantly modified the reserve clause. Thus, the Commissioner's decision directly related to baseball's "unique characteristics and needs" recognized in Flood. Second, Finley's one-paragraph analysis of the scope of the baseball exemption does not explain why Flood should apply to expansion or relocation decisions. As noted above, the structure and reasoning of Flood make clear that Justice Blackmun believed that the reserve clause must be exempted from the Sherman Act because of its essential role in promoting the National Pastime. In this light, Finley's failure to discuss why inter-league collusion concerning franchise expansion and relocation is similarly essential, an understandable omission because it was not relevant to the result of the case, renders its language inapplicable here.

D. The Circuit Court erred in concluding that any matter relating to baseball's "structure" is exempt under Flood.

The Circuit Court expressly reasoned that franchise relocation and expansion decisions fell within the scope of baseball's exemption because they related to the "structure of the league." (R.169). Although the court correctly recognized that Flood limited the exemption to "business activities which are directly related to the unique needs and characteristics of professional baseball," (R.169), the court then held, with no explanation, that the structure of the league fit within this category of exempt activities. For the reasons stated above, there is no basis for concluding that such matters are inherently exempt; unlike the reserve clause, the way in which the National and American Leagues are structured -- or more specifically, the aspect of that structure that allows collusion concerning expansion and relocation -- do not relate to the sport's unique characteristics and needs, do not enjoy any indicia of congressional support, and do not pose significant problems concerning reliance, retroactivity, or remedy.

Although several other lower court opinions do refer to "league structure" as a matter within the scope of Flood's exemption,[17] judicial support for this notion can be traced to the decision of the Wisconsin Supreme Court in State v. Milwaukee Braves, Inc., 31 Wis. 2d 699, 144 N.W.2d 1, cert. denied, 385

[17] See cases discussed in note 19 below.

U.S. 990, 87 S. Ct. 598, 17 L. Ed. 2d 451 (1966), which held that the application of Wisconsin's antitrust statute to Major League Baseball's decision to approve the relocation of the Braves from Milwaukee to Atlanta would unconstitutionally interfere with interstate commerce.[18] In a four-to-three decision, the majority wrote that although baseball's exemption

> does not cover every type of business activity to which a baseball club or league might be a party and does not protect clubs or leagues from application of the federal acts to activities which are not incidental to the maintenance of league structure, ... the exemption at least covers the agreements and rules which provide for the structure of the organization and the decisions which are necessary steps in maintaining it."

Id. 144 N.W.2d at 15. We submit that a holding by this Court that the federal antitrust laws apply to franchise expansion and relocation decisions would be clearly distinguishable from the Wisconsin Supreme Court's holding concerning the applicability of state antitrust laws, and the reasoning in Braves is not inconsistent with a finding of potential antitrust liability in this case.[19]

---

[18] In Braves, the state sought highly regulatory injunctive relief enjoining the relocation of the Braves to Atlanta until another team was awarded to Milwaukee. Amici take no position on the constitutionality of granting less restrictive relief that the Florida Attorney General might seek under Florida law in this case.

[19] Several other lower court decisions have referred to "league structure" as an area covered by Flood's exemption. In Henderson, the court wrote that "broadcasting is not part of the sport in the way in which players, umpires, the league structure and the reserve system are," 541 F. Supp. at 269. Although the court did not explain the meaning of the term "league structure," it took note of the distinction drawn in a House committee report between "aspects of baseball which are solely related to the promotion of competition on the playing field" and "management of

As other courts have recognized, the Commerce Clause imposes significant limits on the ability of state antitrust laws to reach conduct by professional sports leagues, even when the Sherman Act is fully applicable to these leagues. Partee v. San Diego Chargers Football Co., 34 Cal. 3d 378, 668 P. 2d 674 (1983), cert. denied, 466 U.S. 904, 104 S. Ct. 1678, 80 L. Ed. 2d 153 (1984). When considering the appropriateness of applying state antitrust laws, decisions about expansion and relocation are similar to decisions about competition for player talent -- professional sports league rules must be uniform. Thus, if Wisconsin antitrust law applied to either the reserve clause or league structure, it would effectively govern all of baseball, contrary to the constitutional principle prohibiting significant extra-territorial effects of state regulation of commerce. Braves' holding that application of Wisconsin antitrust law would be inconsistent with Federal Baseball, therefore, has little relevance to this Court's inquiry concerning the scope of Flood

---

stadia." Id., citing 1952 Report, supra, at 230. Postema v. National League of Professional Baseball Clubs, 799 F.Supp. 1475, 1488 (S.D.N.Y. 1972), rev'd on other grounds, 998 F.2d 60 (2d Cir. 1993) (no right to jury trial on civil rights claims), also suggested that league structure, in contrast to the employment of umpires, is included within the antitrust exemption, but the court merely cited Braves and Henderson to that effect. Similarly, Piazza v. Major League Baseball, Civ. 92-7173 (E.D.Pa. Aug. 4, 1993) (attached as an appendix to Petitioner's Initial Brief), citing these precedents, suggested that league structure might be immune. Piazza concluded that Flood does not apply to a conspiracy to prevent two individuals from purchasing the Giants franchise. The same reasoning results in the conclusion that Flood does not apply to inter-league collusion concerning expansion and relocation, even if such collusion could be fairly characterized as "league structure."

under the Sherman Act. Just because all agreements among owners requiring uniform rules may be similarly treated (i.e., exempted) under state antitrust law does not mean that these agreements have similar characteristics under federal law.

Because Braves preceded Flood, the Wisconsin court did not, of course, discuss whether franchise relocation was part of baseball's "unique characteristics and needs," which we submit must be the focus of this Court's inquiry. Even the justices in the majority in Braves were divided between those who thought that Congress' failure to overrule Federal Baseball indicated an intent to continue to exempt league structure its and those who believed that the requirement of uniformity precluded any state regulation of such matters. 144 N.W.2d at 18. Nothing in the Wisconsin court's opinion is inconsistent with the fundamental argument amici set forth in this Part -- that none of the reasons which led the U.S. Supreme Court in Flood to exempt the reserve clause from antitrust scrutiny apply to the conduct sought to be investigated in this case.

Consistent with the federal courts' venerable canon that antitrust exemptions are to be narrowly construed, Flood v. Kuhn should not be construed to extend to collusion among baseball owners that has the effect of artificially restricting the number and location of franchise, and that is designed to inflate franchise fees and provide individual owners with leverage to

extort tax subsidies out of their current municipalities with threats to relocate. Narrow construction compels a limitation on the exemption's scope to the purpose for which it was created. In this case, Flood created an exemption to protect baseball's reserve clause; a restraint which the Supreme Court viewed as an essential element in maintaining the prosperity of our National Pastime. Just as the U.S. Supreme Court has properly declined to extend the exemption to other professional sports, and lower federal courts have properly declined to extend the exemption to activity by baseball owners in markets not "solely related to competition on the playing field," 1952 Report, supra at 230, this Court should decline to read Flood as sanctioning the continued exploitation of millions of sports fans and taxpayers in Florida and throughout the country.

CONCLUSION

For the reasons stated above, the Consumer Federation of America and Sports Fans United pray that this Court answer the certified question in the negative, and reverse and remand the decision of the District Court of Appeal with instructions to grant the Attorney General's Cross-Motion to Compel Compliance.

Respectfully submitted,

STEPHEN F. ROSS
D.C. Bar #366920
(Motion for leave to appear as foreign attorney pending)

University of Illinois College of Law
504 E. Pennsylvania Avenue
Champaign, Illinois 61820
217/ 333-0931

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing BRIEF OF CONSUMER FEDERATION OF AMERICA AND SPORTS FANS UNITED AS AMICI CURIAE was sent, via first-class United States Mail, to

Gregory A. Presnell, Esq.
Akerman, Senterfitt & Eidson, P.A.
17th Floor, Firstate Tower
255 South Orange Avenue
P.O. Box 231, Orlando, FL 32802

Robert Kheel, Esq.
Willkie Farr & Gallagher
One Citicorp Center
153 East 53rd Street
New York, NY 10022

Jerome Hoffman, Esq.
Department of Legal Affairs
Antitrust Section
PL-01, The Capitol
Tallahassee, FL 32399-1050

on this 4th day of October, 1993.

Stephen F. Ross