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IN THE
SUPREME COURT OF FLORIDA

ROBERT A. BUTTERWORTH,
ATTORNEY GENERAL OF THE
STATE OF FLORIDA,

Petitioner,

vs.

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

Respondents.

_____/

Case No. 82,287

District Court of Appeal,
5th District - No. 93-69

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PRELIMINARY STATEMENT

For purposes of this appeal, the following abbreviations will be used:

Abbreviation	Full Description
Attorney General	Petitioner, Robert A. Butterworth, the Attorney General of the State of Florida
National League	Respondents, The National League of Professional Baseball Clubs and William D. White, President of the National League
CIDs	Antitrust Civil Investigative Demands served upon the National League and White by the Office of the Attorney General
Consumer Federation	Consumer Federation of America and Sports Fans United
Morsani	Frank L. Morsani and Tampa Bay Baseball Group, Inc.

References to the trial court record on appeal will be designated in accordance with the Index to Appeal with page numbers preceded by "R." References to the record on appeal of the District Court of Appeal for the Fifth District of Florida will be designated in accordance with that court's Index with page numbers preceded by "DCA R." References to the briefs submitted to the Fifth District Court will be designated with page numbers preceded by an identification of the brief.

References to the Attorney General's initial Supreme Court brief will be designated with page numbers preceded by "Petitioner's Initial Brief." References to the brief submitted by amici Consumer Federation of America and Sports Fans United

will be designated with page numbers preceded by "Consumer Federation's Brief." References to the brief submitted by amici Frank L. Morsani and Tampa Bay Baseball Group, Inc. will be designated with page numbers preceded by "Morsani's Brief."

A short appendix is submitted herewith which contains excerpts from certain publicly filed documents. Exhibit A of the appendix contains portions of plaintiff's brief to the Supreme Court of the United States in Federal Baseball Club v. National League of Professional Baseball Clubs, 259 U.S. 200, 42 S. Ct. 465, 66 L. Ed. 898 (1922), a copy of which is in the record below, and exhibit B of the appendix contains a portion of the record on appeal to the Supreme Court in Corbett v. Chandler, 202 F.2d 428 (6th Cir.), aff'd sub nom. Toolson v. New York Yankees, Inc., 346 U.S. 356, 74 S. Ct. 78, 98 L. Ed. 64, reh'g denied, 346 U.S. 917, 74 S. Ct. 271, 98 L. Ed. 412 (1953). References to said documents will be to the page numbers of the documents themselves.

STATEMENT OF THE CASE AND FACTS

The Petitioner's Statement of the Case and Facts contains irrelevant and distorted references to the underlying events at issue; in addition, it is argumentative and prolix. Accordingly, Respondents offer the following substitute Statement of the Case and Facts.

On November 12, 1992, the Florida Attorney General's Office served on the National League of Professional Baseball Clubs and its President, William D. White, two antitrust civil investigative demands. (R. 87-93) The CIDs required the National League to produce documents and Mr. White to give oral sworn testimony concerning an alleged restraint of trade involving "the sale and purchase of the San Francisco Giants baseball franchise." Id.

The National League responded to the Attorney General's CIDs by serving and filing a petition in the Circuit Court of the Ninth Judicial Circuit in and for Osceola County, Florida, seeking to set aside the CIDs pursuant to section 542.28(5) of the Florida Statutes (Supp. 1993). (R. 83-93) In its memorandum of law in support of the petition and at a December 31, 1992 hearing before Judge Stroker, the National League set forth the proposition, inter alia, that the activity which the Attorney General seeks to investigate pursuant to the CIDs -- the sale and purchase of a baseball franchise -- is exempt from the application of the antitrust laws and therefore cannot give rise

to an antitrust violation. (R. 1-82, 126-61) Accordingly, the National League argued, the Attorney General was without authority to issue the CIDs in question. Id.[1]

In an order dated January 4, 1993, Judge Stroker granted the National League's petition to set aside the CIDs. (R. 167-70) Judge Stroker found that decisions concerning the ownership and location of professional baseball franchises were matters of league structure and clearly fell within baseball's exemption from the antitrust laws. (R. 169) Since baseball's decision to keep the Giants in San Francisco was exempt from the antitrust laws, Judge Stroker explained, "the necessary discussions, negotiations and associations leading to that decision" also constituted exempted business activity. (R. 169-70) Judge Stroker concluded that the Attorney General was without authority to investigate the sale and purchase of the San Francisco Giants baseball franchise and accordingly quashed and set aside the CIDs. (R. 170)

The Attorney General appealed from this decision by notice originally filed on January 7, 1993 and amended January 11, 1993. (R. 171-74) On August 13, 1993, the District Court of Appeal for the Fifth District unanimously affirmed Judge Stroker's decision and certified the question to this Court.

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[1] The National League's petition also raised a number of other objections to the CIDs which did not have to be decided in light of Judge Stroker's decision to quash the CIDs. The National League continues to preserve those objections.

(DCA R. 17-18) In turn, the Attorney General brought this appeal. (DCA R. 19-20)

On September 9, 1993, this court postponed its decision on jurisdiction and established the schedule pursuant to which Petitioner's and Respondents' briefs on the merits are to be served. (DCA R. 22) On October 19, 1993, this court granted Consumer Federation's and Morsani's motions for leave to file amicus curiae briefs.

SUMMARY OF ARGUMENT

Since the Supreme Court's decision in Federal Baseball Club v. National League of Professional Baseball Clubs, 259 U.S. 200, 42 S. Ct. 465, 66 L. Ed. 898 (1922), it has been settled that the business of baseball is exempt from the antitrust laws. In the 70 years since the Federal Baseball decision, the Supreme Court in Toolson v. New York Yankees, Inc., 346 U.S. 356, 74 S. Ct. 78, 98 L. Ed. 64, reh'g denied, 346 U.S. 917, 74 S. Ct. 271, 98 L. Ed. 412 (1953), and again in Flood v. Kuhn, 407 U.S. 258, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1972), confirmed the holding of Federal Baseball that the antitrust laws do not apply to the business of baseball. More particularly, these cases, as well as a number of other federal and state cases, have specifically recognized that the purchase, sale, admission to the league, and location of baseball franchises are central to the "business of baseball" and fall securely within the baseball exemption.

Petitioner has argued that the exemption cannot be invoked here either because the exemption is supposedly limited to baseball's "reserve clause," or because the exemption covers only those practices reduced to written rules and regulations. These arguments of the Attorney General are illogical, unsupported by the case law or other authority, and inconsistent with his prior admissions. Baseball's antitrust exemption applies to the business of baseball, and precedent does not

support the limitation of that exemption solely to the reserve clause or to conduct codified in written regulations.

Finally, it is apparent that when activities are exempt from the antitrust laws and therefore cannot give rise to a violation of those laws, the Florida Attorney General is not empowered to investigate. Because the CIDs served by the Attorney General upon the Respondents were issued as part of an investigation concerning the "sale and purchase of the San Francisco Giants baseball franchise" (R. 87-93) -- an area clearly exempt from the antitrust laws -- the CIDs were properly set aside and the judgment of the Fifth District Court of Appeal should be affirmed.

ARGUMENT

POINT I

DECISIONS ON THE SALE AND LOCATION OF BASEBALL FRANCHISES ARE EXEMPT FROM FEDERAL ANTITRUST LAW.

During the nearly one hundred years that baseball has developed and expanded, the United States Supreme Court has on at least six occasions, beginning in 1922, dealt explicitly with the question presented here -- whether baseball is subject to the federal antitrust laws.[2] Each time, the Court's conclusion has been the same: "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." Flood v. Kuhn, 407 U.S. 258, 285, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1972) (quoting Toolson v. New York Yankees, Inc., 346 U.S. 356, 357, 74 S. Ct. 78, 98 L. Ed. 64, reh'g denied, 346 U.S. 917, 74 S. Ct. 271, 98 L. Ed. 412 (1953)).

As this unbroken line of precedent continued, the Court increasingly noted the significant reliance and stare decisis considerations which grew out of its earlier decisions and provided the rationale for the later ones. It noted as well the

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[2] Flood v. Kuhn, 407 U.S. 258, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1972); Radovich v. National Federal League, 352 U.S. 445, 450-52, 77 S. Ct. 390, 1 L. Ed. 2d 456, reh'g denied, 353 U.S. 931, 77 S. Ct. 716, 1 L. Ed. 2d 724 (1957); United States v. International Boxing Club, 348 U.S. 236, 242, 75 S. Ct. 259, 99 L. Ed. 290 (1955); United States v. Shubert, 348 U.S. 222, 229-30, 75 S. Ct. 277, 99 L. Ed. 279 (1955); Toolson v. New York Yankees, Inc., 346 U.S. 356, 74 S. Ct. 78, 98 L. Ed. 64, reh'g denied, 346 U.S. 917, 74 S. Ct. 271, 98 L. Ed. 412 (1953); Federal Baseball Club v. National League of Professional Baseball Clubs, 259 U.S. 200, 42 S. Ct. 465, 66 L. Ed. 898 (1922).

spate of litigation that would likely ensue and the burden that would be placed upon baseball if the business practices that baseball had developed over time were suddenly exposed to antitrust attack. In 1957, the Supreme Court offered the following rationale for its continued adherence to Federal Baseball, 259 U.S. 200, 42 S. Ct. 465, 66 L. Ed. 898 (1922), the case which had originally established baseball's antitrust exemption:

> Vast efforts had gone into the development and organization of baseball since that [Federal Baseball] decision and enormous capital had been invested in reliance on its permanence. Congress had chosen to make no change. All this, combined with the flood of litigation that would follow its repudiation, the harassment that would ensue, and the retroactive effect of such a decision, led the Court to the practical result that it should sustain the unequivocal line of authority reaching over many years.

Radovich v. National Football League, 352 U.S. 445, 450-51, 77 S. Ct. 390, 1 L. Ed. 2d 456, reh'g denied, 353 U.S. 931, 77 S. Ct. 716, 1 L. Ed. 2d 724 (1957).

This line of cases reached its culmination in Flood, where the Supreme Court again reaffirmed baseball's antitrust exemption on the basis noted in Radovich. Flood also recognized the exemption as a considered accommodation to the special issues facing baseball, stating that the baseball exemption "rests on a recognition and an acceptance of baseball's unique characteristics and needs." 407 U.S. at 282.

The exemption created, confirmed, and reconfirmed by the Supreme Court is addressed, quite simply, to the business of

baseball: "In Federal Baseball [citation omitted] this Court held that the business of providing public baseball games for profit ... was not within the scope of the federal antitrust laws." Toolson, 346 U.S. at 356-57. Thirty years after Federal Baseball, the Toolson Court confirmed the business-wide nature of the exemption, on grounds of stare decisis, principally because "[t]he business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation." Toolson, 346 U.S. at 357. Finally, in Flood, without re-examining the issues, the Court "repeat[ed]" the basis for the exemption first set forth in Federal Baseball and reiterated in Toolson, that "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." Flood, 407 U.S. at 285.

Besides the three baseball decisions, three other Supreme Court decisions demonstrate that the exemption from the antitrust laws afforded to baseball by Federal Baseball and Toolson was intended to extend to the business of baseball, and not merely to one aspect of it. In United States v. Shubert, 348 U.S. 222, 75 S. Ct. 277, 99 L. Ed. 279 (1955), the Court explained that in Federal Baseball, the Court "was dealing with the business of baseball and nothing else." Shubert, 348 U.S. at 228. In United States v. International Boxing Club, 348 U.S. 236, 75 S. Ct. 259, 99 L. Ed. 290 (1955), the Court held that Toolson applied to the business of baseball and did not extend to

"other businesses merely because of the circumstances that they are also based on the performance of local exhibitions." International Boxing Club, 348 U.S. at 242. Finally, in its decision holding the antitrust laws applicable to the business of professional football, the Supreme Court made the scope of the baseball exemption quite clear, explaining that "we now specifically limit the rule there established [in Federal Baseball and Toolson] to the facts there involved, i.e., the business of organized professional baseball." Radovich, 352 U.S. at 451.

The lower courts have had no difficulty in understanding the breadth of the baseball exemption as set forth in this unbroken string of Supreme Court decisions. For example, in Charles O. Finley & Co. v. Kuhn, 569 F.2d 527 (7th Cir.), cert. denied, 439 U.S. 876, 99 S. Ct. 214, 58 L. Ed. 2d 190 (1978), the United States Court of Appeals for the Seventh Circuit held that baseball's antitrust exemption covered an alleged conspiracy to eliminate the Oakland franchise from baseball. In so holding, the court focused on and rejected the very argument presented by the Attorney General here, that the exemption is somehow limited to baseball's reserve clause or system -- a term used to describe the system by which teams retain rights to their players beyond the terms of the players' contracts:

> The Supreme Court has held three times that the "business of baseball" is exempt from federal antitrust laws . . . .
>
> Despite the two references in the Flood case to the reserve system, it appears clear from the entire opinions in the three baseball cases, as well as from Radovich, that the Supreme Court intended to exempt the business of baseball, not any particular facet of that business, from the federal antitrust laws.

Finley, 569 F.2d at 541.

Numerous courts have repeatedly applied the baseball exemption to various types of baseball business activities beyond the reserve clause. See Professional Baseball Schools & Clubs, Inc. v. Kuhn, No. 80-1274 Civ-T-H (M.D. Fla. Jan. 29, 1982), aff'd, 693 F.2d 1085 (11th Cir. 1982) (per curiam) (exemption covered, among other things, "player assignment system and franchise location system"); Portland Baseball Club, Inc. v. Kuhn, 368 F. Supp. 1004 (D. Or. 1971), aff'd, 491 F.2d 1101 (9th Cir. 1974) (per curiam) (exemption covered, among other things, league realignment and territorial rights); Salerno v. American League of Professional Baseball Clubs, 310 F. Supp. 729 (S.D.N.Y. 1969), aff'd, 429 F.2d 1003 (2d Cir. 1970) (per curiam) (exemption covered discharge of umpires), cert. denied, 400 U.S. 1001, 91 S. Ct. 462, 27 L. Ed. 2d 452 (1971); Portland Baseball Club v. Baltimore Baseball Club, Inc., 282 F.2d 680 (9th Cir. 1960); Charles O. Finley & Co. v. Kuhn, No. 76 Civ. 2358 (N.D. Ill. Sept. 7, 1976), aff'd, 569 F.2d 527 (7th Cir.), cert. denied, 439 U.S. 876, 99 S. Ct. 214, 58 L. Ed. 2d 190 (1978);

Moore v. National Ass'n of Professional Baseball Clubs, No. C78-351 (N.D. Ohio filed July 7, 1976) (exemption covered baseball's relations with umpires); State v. Milwaukee Braves, Inc., 31 Wis. 2d 699, 144 N.W.2d 1 (exemption covered relocation of franchise and league membership), cert. denied, 385 U.S. 990, 87 S. Ct. 598, 17 L. Ed. 2d 451 (1966), reh'g denied, 385 U.S. 1044, 87 S. Ct. 770, 17 L. Ed. 2d 689 (1967).

These cases demonstrate that the sale, purchase and location of baseball franchises are activities that are central to the business of baseball and fall squarely within baseball's exemption from the antitrust laws. State v. Milwaukee Braves, Inc., is particularly illuminating in this regard. There, the State of Wisconsin sought to prevent a National League franchise located in that state from moving to Atlanta, Georgia unless an expansion team was located in Milwaukee. After reviewing Federal Baseball and Toolson, the Wisconsin Supreme Court stated that:

> it does seem clear that 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. The type of decision involved in this case, in essence, whether to admit a new member in order to replace an existing member which desired to move to a new area, appears to be so much an incident of league operation as to fall within the exemption.

144 N.W.2d at 15.

The applicability of the antitrust exemption to franchise location decisions has been expressly recognized by at

least two federal courts as well. In Portland Baseball Club, Inc. v. Kuhn, 368 F. Supp. 1004 (D. Or. 1971), aff'd, 491 F.2d 1101 (9th Cir. 1974), a former minor league owner objected to a major league franchise being located in his territory. The court dismissed the antitrust claims, citing baseball's long established antitrust exemption as controlling. In Professional Baseball Schools & Clubs, Inc. v. Kuhn, 693 F.2d 1085, 1086 (11th Cir. 1982), the Eleventh Circuit affirmed the determination of Judge Hodges of the United States District Court for the Middle District of Florida that a federal antitrust challenge by a minor league franchise holder to, among other things, the "franchise location system" should be dismissed in view of baseball's antitrust exemption.

In this case, upon review of the relevant law, Judge Stroker reached the only conclusion consistent with these authorities -- that "the sale and purchase of the San Francisco Giants baseball franchise" was exempt from the federal antitrust laws. Specifically, Judge Stroker concluded:

> [I]t is the business of baseball which is exempt [from the antitrust laws]. The exemption protects business activities which are directly related to the unique needs and characteristics of professional baseball. One area of business activity which has clearly and consistently been considered exempt is the matter of the structure of the league. The composition of the leagues, that is, where professional baseball is played and with whom, is a fundamental consideration of professional baseball and at the heart of its business activity. Decisions concerning ownership and location of baseball franchises

clearly fall within the ambit of baseball's antitrust exemption.

(R. 169)

In this appeal from the Fifth District Court of Appeal's affirmance of Judge Stroker's decision, the Attorney General advances two principal arguments as to why the baseball exemption should not apply to the sale of a franchise. First, the Attorney General argues that the exemption is limited to activities involving the reserve clause. Second, and alternatively, the Attorney General argues that the exemption covers only those activities that are specifically authorized by an officially promulgated guideline, rule or regulation of baseball. Both arguments, as shown below, are without merit.

A. Baseball's Antitrust Exemption Cannot Be Construed As Limited To Activities Involving The Reserve Clause.

The Attorney General's argument that baseball's exemption is limited to the reserve system is insupportable. It is contradicted by the broad language of the several controlling Supreme Court decisions, the facts on which those decisions were based, an overwhelming body of case law, and the uniform views of Congressmen, responsible Justice Department officials and others that the business of baseball, not one particular aspect of it, is exempt from the antitrust laws.

1. The Supreme Court's broad language and the facts of the cases it decided demonstrate that the exemption is not limited to the reserve system.

The Supreme Court could hardly have been more explicit in defining the exemption in the broad manner it did. Not once but twice it has held that the authority of Federal Baseball remains intact insofar "as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." Flood, 407 U.S. at 285; Toolson, 346 U.S. at 357. Despite this broad language and its reiteration in several other Supreme Court cases (see pp. 8-11 supra), the Attorney General urges this court to reformulate these holdings and restrict them to the particular issues on which they were supposedly based. The Attorney General goes on to argue that the Supreme Court cases dealing with the baseball exemption, especially the seminal Federal Baseball case, concerned "purely and simply" the reserve clause, a point that the Attorney General contends "cannot be over-emphasized." (Petitioner's Initial Brief at 14-15). The Attorney General's "point," however, is flatly wrong.

The plaintiff in Federal Baseball was not a player, complaining of a conspiracy to restrict the avenues of his employment; rather the plaintiff was a club owner, the sole survivor of the competing Federal League, alleging that a conspiracy of the American and National League clubs had denied plaintiff's club the opportunity to compete. The plaintiff

contended that the Major League clubs had engaged in a conspiracy to "wreck and destroy" plaintiff's business and that of the Federal League through various allegedly wrongful actions. It was in response to the allegations of this conspiracy that the Supreme Court, speaking unanimously through Mr. Justice Holmes, first held that professional baseball is not within the scope of the federal antitrust laws.

The Attorney General's argument that the Federal Baseball suit was aimed at the reserve clause appears to be based on the discussion of the underlying facts by the Court of Appeals in the decision eventually reviewed by the Supreme Court. Federal Baseball v. National League, 269 F. 681 (D.C. Cir. 1920). But the Court of Appeals' discussion presented a sketchy and abbreviated picture of the case that was actually presented to the Supreme Court. Indeed, in its brief to the Supreme Court, the plaintiff in Federal Baseball rejected the Court of Appeals' discussion as one which "shuts out of view ... every substantial feature of the case:"

> It will be observed that the Court bases its decision upon a consideration of what the clubs in the two major leagues do with respect to the active players employed by them upon their respective teams. This shuts out of view, we submit with great deference to the Court of Appeals, every substantial feature of the case. By restricting its consideration to the facts recited in its opinion, its decision is made to depend upon a mere fragment of the case which gives no indication whatever of the almost endless ramifications of the stupendous system which defendants in error have erected for the control, not alone of the players upon the clubs of the two

> leagues mentioned in the opinion, but for the control of every business enterprise and of every professional player upon every club in every league in the whole United States.

Plaintiff's Brief in Federal Baseball at 169 (emphasis added) (Appendix Ex. A).[3] Plaintiff then proceeded to discuss the business restraints he was challenging, for example:

> When the Federal League decided to begin business, they were confronted by a situation where upon the one hand every baseball enterprise in the United States was forbidden to have any business relation of any kind or character with it or any of its constituent clubs. If the Federal League, for illustration, desired to negotiate with any other league in the United States looking to some arrangement for the use of its ball parks, or the exchange of players, no matter how satisfactory the arrangement might be to both leagues, and to all of their constituent clubs, no such arrangement could be made, because all these other leagues in the United States were at the time and had been since 1903 a part of ORGANIZED BASEBALL and that combination absolutely forbade all dealings of every kind with an independent organization. The monopoly was absolute from its inception and every conceivable device was then provided for perpetually maintaining its scope and power unimpaired.

Id. at 170-71.

It cannot be disputed that plaintiff in Federal Baseball was challenging a wide range of allegedly wrongful conduct as well as agreements between Major League clubs and disbanded Federal League clubs which had the effect of excluding plaintiff from league competition. Nor can it be disputed that

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[3] For the courts' convenience, excerpts from the plaintiff's brief in Federal Baseball are contained in the Appendix hereto.

this challenge was rejected by the Supreme Court in its entirety. Accordingly, it cannot be credibly maintained, as the Attorney General asserts, that the case was "purely and simply" about the reserve system.[4]

With respect to Toolson, the Attorney General again contends that only the reserve system was involved (Petitioner's Initial Brief at 15), and once again, he is wrong. Toolson was decided together with two companion cases, Kowalski v. Chandler, 202 F.2d 413 (6th Cir. 1953), and Corbett v. Chandler, 202 F.2d 428 (6th Cir. 1953). In Corbett, a case the Attorney General entirely ignores, the plaintiffs were, again, not players complaining of the reserve system but the owner of a minor league baseball club and the club itself. The complaint attacked not only the reserve clause but also various aspects of baseball's

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[4] Indeed, other courts and authorities who have analyzed this issue agree that Federal Baseball involved more than just the reserve system. For example, Chief Judge Fairchild in Finley observed "Federal Baseball Club of Baltimore v. National League, the case establishing the exemption, did not involve the reserve clause." 569 F.2d at 546 (Fairchild, C.J., concurring). See also State v. Milwaukee Braves, Inc., 144 N.W.2d at 13 (Federal Baseball "involved an aspect of control over participation in major league baseball closely related to the one now before us"); J. Weistart & C. Lowell, The Law of Sports, 5.02, at 497 (1979) ("facts of Federal Baseball itself would suggest that the exemption extends to matters such as league structure and the acquisition of franchises"); Professional Sports and the Law: A Study by the House Select Comm. on Professional Sports, 94th Cong., 2d Sess. 10 (1976) ("The tide turned in favor of baseball, however, in 1922 in a case that had nothing to do with the reserve clause [--] Federal Baseball....")

structure including the Major League Agreement which, according to plaintiffs, deprived the Pacific Coast League of Major League status, unreasonably restricted the number and location of Major League franchises and prevented Detroit from having two clubs. See Amended Complaint in Corbett v Chandler, Supreme Court Record on Appeal, at 14 (Appendix Ex. B). In a single consolidated opinion disposing of all three cases, the Supreme Court adopted the modern rationale for the exemption:

> In Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922), 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 .... Without re-examination of the underlying issues, the judgments below are affirmed on the authority of Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, supra, 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.

Toolson, 346 U.S. at 356-57. Thus all potential antitrust claims in the three consolidated cases -- from Toolson's reserve clause challenge to Corbett's complaint about league structure -- were rejected by virtue of an exemption described as covering the "business of baseball."

While it is true that Flood involved an antitrust challenge solely to baseball's reserve system, it is clear and it is significant that the Supreme Court did not confine its holding to that narrow aspect of baseball's business. In the last paragraph of its decision, it reiterated, verbatim, what it had said in Toolson, namely that "the business of baseball" is exempt from the antitrust laws:

> We repeat for this case what was said in Toolson:
>
> > "Without re-examination of the underlying issues, the [judgment] below [is] affirmed on the authority of Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, supra, 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."

Flood, 407 U.S. at 284 (quoting Toolson, 346 U.S. at 357).

Thus, using a broad but carefully chosen phrase, the Supreme Court has repeatedly confirmed that the business of baseball is exempt from the antitrust laws. It is hard to imagine how much clearer it could have been, and seldom, if ever, has precedent so squarely and uniquely controlled a case as here.[5] There can simply be no fair question that the Supreme

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[5] In light of the repeated affirmations of baseball's exemption by the Supreme Court, and the Court's explicit referral of the issue, on two occasions, to Congress, it is nothing short of astonishing that amicus Consumer Federation urges a reversal here so that years of work and millions of dollars may be spent investigating, litigating and creating a record to present to the Supreme Court on the chance that the Court may then consider changing its mind. The suggestion is not only presumptuous, it is improper. As the

Court understood and intended that the exemption it has repeatedly affirmed includes all constituent elements of the business of baseball. Certainly, as will be shown below, this has been the nearly universal understanding of the courts and legislators that have considered the question.

2. The federal courts have understood and interpreted baseball's exemption as a broad one.

Based on the clear language and facts of the three Supreme Court baseball decisions, every federal court of appeals that has dealt with baseball's antitrust exemption -- five panel discussions in four different circuits -- and nine federal district courts have rejected the proposition advanced by the Attorney General here. These courts have ruled that the business of baseball -- not merely its reserve system -- is exempt from the antitrust laws. See Finley, 569 F.2d at 541, and the other nine federal court decisions cited at pp. 12-13, supra.

In fact, two of the trial court opinions to which the Attorney General refers for his notion of a limited exemption actually support the position that activities beyond the reserve

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Supreme Court has instructed:

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriguez de Quijas v. Shearson/American Express Inc., 490 U.S. 477, 484-85, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989).

clause, specifically matters like this one relating to league structure, are exempt. In Postema v. National League of Professional Baseball Clubs, 799 F. Supp. 1475 (S.D.N.Y. 1992), rev'd in part on other grounds, 998 F.2d 60 (2d Cir. 1993), vacated, No. 91 Civ. 8507 (S.D.N.Y. Oct. 21, 1993), a case involving a minor league umpire's claims of discrimination in hiring, the court acknowledged that it was "clear that . . . the baseball exemption does immunize baseball from antitrust challenges to its league structure and to the reserve system . . . ." 799 F. Supp. at 1489. Similarly, in Henderson Broadcasting Corp. v. Houston Sports Ass'n, Inc., 541 F. Supp. 263 (S.D. Tex. 1982), the court determined that the baseball exemption did not apply to the issues before it because "[t]he issue in the case is not baseball but a distinct and separate industry, broadcasting." Id. at 271. The court specifically found that "[t]he league structure is obviously not implicated in the instant case" and "[t]he reserve clause and other 'unique characteristics and needs' of the game have no bearing at all on the questions presented." Id.

3. Congress and other interested parties have understood the exemption to be a broad one.

Congress, of course, has never acted to modify or remove baseball's antitrust exemption. As the Court observed in Flood: "Since Toolson more than 50 bills have been introduced in Congress relative to the applicability or non-applicability of

the antitrust laws to baseball," but none was passed.[6] 407 U.S. at 281. It was this Congressional refusal to disturb the exemption that helped persuade the Flood Court to leave the exemption intact:

> 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.

407 U.S. at 283-84. In the 21 years since Flood, Congress has continued to maintain its "positive inaction," thereby leaving the baseball antitrust exemption unchanged.[7]

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[6] See, e.g., Organized Professional Team Sports: Hearings on H.R. 5307, H.R. 5319, H.R. 5383, H.R. 6876, H.R. 6877, H.R. 8023 and H.R. 8214 Before the Subcomm. on Antitrust of the House Comm. on the Judiciary, 85th Cong., 1st Sess. (1957) (hereinafter "1957 Hearings"); Organized Professional Team Sports: Hearings on H.R. 10378 and S. 4070 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 85th Cong., 2d Sess. (1958); Organized Professional Team Sports: Hearings on S. 616 and S. 886 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 86th Cong., 1st Sess. (1959); Organized Professional Team Sports: Hearings on S. 3483 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 86th Cong., 2d Sess. (1960); Professional Sports Antitrust Bill: Hearings on S. 2391 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 88th Cong., 2d Sess. (1964); Professional Sports Antitrust Bill: Hearings on S. 950 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. (1965).

[7] Amicus Consumer Federation suggests that congressional inaction is an insufficient basis for inferring congressional intent, citing Patterson v. McLean Credit Union, 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989). To the contrary, the Supreme Court has, on several occasions since Patterson, invoked the doctrine that congressional inaction may be deemed acquiescence in judicial interpretation. See Ankenbrandt v. Richards, 112

But no one could maintain that this positive inaction is attributable to Congress' view that the exemption is narrow or limited to the reserve system. While there have been some in Congress who have questioned the wisdom of the exemption, on one point there has been complete unanimity -- the exemption applies to all aspects of the business of baseball. Thus, for example, in 1972, after the Flood decision, Congressman Frank Horton stated that the baseball "business and all aspects of baseball are immune from antitrust [laws] by virtue of the decision of the Supreme Court, which is, of course, the law of the land."[8] In the early 1980's, Congressman John Seiberling acknowledged that baseball had a "blanket exemption from the antitrust laws"[9] and

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S. Ct. 2206, 2213 fn. 5, 119 L. Ed. 2d 468 (1992); Evans v. U.S., 112 S. Ct. 1881, 1889-90, 119 L. Ed. 2d 57 (1992); Hilton v. South Carolina Public Railways Comm'n, 112 S. Ct. 560, 564, 116 L. Ed. 2d 560 (1991). Moreover, this is not a case, like the ones cited, where one must surmise inferentially that Congress is aware of a judicial doctrine and does not desire to disturb it. Here, Congress has considered and reconsidered baseball's exemption and, by "positive inaction," has allowed the precedents to stand. See Ankenbrant, 112 S. Ct. at 2213; Id. at 2219-20 (Blackmun, J., concurring).

[8] The Antitrust Laws and Organized Professional Team Sports Including Consideration of the Proposed Merger of the American and National Basketball Associations: Hearings on H.R. 1206, H.R. 2305, H.R. 10185, H.R. 11033 Before the Antitrust Subcomm. of the House Comm. on the Judiciary, 92nd Cong., 2d Sess. 164 (1972) (statement of Rep. Horton).

[9] See Antitrust Policy and Professional Sports: Oversight Hearings on H.R. 823, H.R. 3287 and H.R. 6467 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 97th Cong., 1st and 2d Sess. 463 (1982), (hereinafter "1981-82 House Hearings") (statement of Rep. Seiberling).

Senator Joseph Biden explained that baseball's activities in connection with team relocations are "totally exempt" from the antitrust laws.[10] In 1985, Senator Slade Gorton opened hearings concerning the relocation of professional sports franchises with a statement that baseball has a "total exemption from antitrust laws."[11] In addition, Congressman Charles Schumer noted, in 1989, that baseball shares a special compact with Congress which provides baseball with a "blanket exemption" from the antitrust laws.[12]

More recent statements made by members of Congress, including a number of members of the Senate Subcommittee on Antitrust, Monopolies, and Business Rights, further confirm this long-standing Congressional understanding of baseball's exemption. In introducing legislation to end baseball's exemption from the antitrust laws, Subcommittee Chairman Senator Howard Metzenbaum stated that baseball currently has a "blanket exemption" and therefore continues "to be totally exempt from the

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10 See Professional Sports Antitrust Immunity: Hearings on S. 2784 and S. 2821 Before the Senate Comm. on the Judiciary, 97th Cong., 2d. Sess. 230 (1982) (hereinafter "1982 Senate Hearings") (statement of Sen. Biden).

11 See Professional Sports Community Protection Act of 1985: Hearings on S.259 and S.287 Before the Senate Comm. on Commerce, Science and Transportation, 99th Cong., 1st Sess. 3 (1985) (hereinafter "1985 Hearings") (statement of Sen. Gorton).

12 See Sports Programming and Cable Television: Hearings on the Movement of Sports Programming onto Cable Television Before the Subcomm. on Antitrust, Monopolies and Business Rights of the Senate Comm. on the Judiciary, 101st Cong., 1st Sess. 18-19 (1989) (statement of Rep. Schumer).

antitrust laws."[13] The Senator has further acknowledged that baseball's owners have been able to "use[ ] their antitrust immunity as they see fit to either block or approve a franchise relocation."[14] Senator Strom Thurmond stated that baseball "enjoys the privilege of a complete exemption from the antitrust laws."[15] Perhaps most significantly, Senator Connie Mack has recognized that the baseball owners' actions in connection with the sale of the San Francisco Giants baseball franchise, the very matter here at issue, "are shielded by the exemption they, and they alone, enjoy."[16]

The understanding that baseball's antitrust exemption covers all of its activities is nearly universal. In 1976, for example, a Department of Justice official testified before the House Select Committee on Professional Sports as follows:

> [Congressman] Horton [Vice-chairman of the Committee]. It has been a matter of debate whether baseball's antitrust immunity extends to all aspects of baseball's operations or only to its player allocation system. What is the

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13 139 Cong. Rec. S2416-S1418 (daily ed. March 4, 1993) (statement of Sen. Metzenbaum).

14 Baseball's Antitrust Immunity: Hearings on the Validity of Major League Baseball's Exemption from the Antitrust Laws Before the Subcomm. on Antitrust, Monopolies, and Business Rights of the Senate Comm. on the Judiciary, 102nd Cong., 2d Sess. 151 (1992) (statement of Sen. Metzenbaum) (hereinafter "1992 Hearings").

15 1992 Hearings at 40 (statement of Sen. Thurmond).

16 139 Cong. Rec. S2422 (daily ed. March 4, 1993) (statement of Sen. Mack).

> Department's opinion as to the scope of baseball's antitrust immunity?
>
> [Joe] Sims [Deputy Assistant Atty Gen'l, Antitrust Division, Dep't of Justice]. I don't see any reason to believe that the exemption is limited in any particular way. Certainly at its origins there is no indication that Justice Holmes desired or thought that the exemption was only limited to a particular area. The rationale of his opinion goes to the entire scope of baseball's activities.
>
> * * *
>
> Mr. Horton . . . why hasn't your Department tested this question as to what is immune under that?
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> Mr. Sims. I think that is implicit in my earlier answer. I don't really see anything to test. There is nothing that I can think of, no rationale that I can think of, which would lead me to the conclusion that the exemption is limited. That being the case, there doesn't seem to be any reason to test it.[17]

This testimony merely confirmed the long held view of the Justice Department that baseball's antitrust exemption covered matters well beyond player relations -- "the internal structure of organized baseball -- with its restraints on players and teams

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[17] Inquiry into Professional Sports: Hearings Before the House Select Comm. on Professional Sports (Part 2), 94th Cong. 2d Sess. 299 (1976) (statement of Joe Sims, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice). (This testimony was taken on September 16, 1976, nine days after Judge McGarr's highly publicized ruling in Finley v. Kuhn, rejecting the argument first raised in that case that baseball's exemption was limited to the reserve system. Judge McGarr's ruling was, of course, affirmed by the Seventh Circuit. See Finley v. Kuhn, 569 F.2d 527 (7th Cir.), cert. denied, 439 U.S. 876, 99 S. Ct. 214, 58 L. Ed. 2d 190 (1978)).

and its apparent policy of keeping out newcomers -- is clearly exempt from the antitrust laws."[18]

Commentators have also widely recognized that baseball enjoys an exemption from the antitrust laws which is not limited to the reserve clause. See, e.g. Myron L. Dale & John Hunt, Antitrust Law and Baseball Franchises: Leaving Your Heart (and the Giants) in San Francisco, 20 N. Ky. L. Rev. 337 (1993) (Major League Baseball has an "absolute exemption" from the antitrust laws which allows it "to decide the number of its franchises, their locations and the ownership requirements without concern for interference from the antitrust laws."); Thane N. Rosenbaum, The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era, 41 U. Miami L. Rev. 729 (1987) (baseball has a "blanket immunity" from antitrust laws); H. Ward Classen, Three Strikes and You're Out: An Investigation of Professional Baseball's Antitrust Exemption, 21 Akron L. Rev. 369 (1988) ("Baseball has been completely exempted from antitrust legislation while [other sports] have received only partial exemptions.")

Even critics of baseball's exemption have not disputed that it covers the entirety of baseball's business. Marvin Miller, formerly Executive Director of the Major League Baseball Players Association, has testified that "[i]t is clear that if

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[18] 1957 Hearings at 37 (statement of Victor R. Hansen, Assistant Attorney General, Antitrust Division, U.S. Department of Justice).

baseball's privileged immunity from the antitrust laws were eliminated, many of baseball's business practices could be subject to antitrust attack."[19] Similarly, Donald Fehr, who succeeded Mr. Miller, has stated to Congress that baseball is free from antitrust restrictions as baseball has a "carte blanche" and "blanket" antitrust immunity.[20]

Not even amici Consumer Federation and Morsani contend that the baseball exemption is limited to the reserve clause. In this regard, Morsani acknowledges that the exemption applies to, among other things, activities aimed at preventing a non-member club from forcing its way into the major leagues, see Morsani's Brief at 10, 16, while Consumer Federation recognizes that the exemption immunizes activities, beyond player relations, which

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19 1981-82 House Hearings at 481 (prepared statement of Marvin J. Miller, Executive Director, Major League Baseball Players Association).

20 1982 Senate Hearings at 382, 390 (statements of Donald M. Fehr, General Counsel of the Major League Baseball Players Association); Professional Sports Team Community Protection Act: Hearings on S. 2505 Before the Senate Comm. on Commerce, Science and Transportation, 98th Cong., 2d Sess. 99, 101 (1984) (statements of Donald M. Fehr, Acting Executive Director and General Counsel, Major League Baseball Players Association); 1985 Hearings at 142-44 (prepared statement of Donald M. Fehr, Acting Executive Director and General Counsel, Major League Baseball Players Association).

relate to baseball's unique characteristics and needs.[21] See Consumer Federation's Brief, passim.

In short, it is with remarkable unanimity that Congressmen, enforcement officials, academics and others have expressed an understanding of Supreme Court precedent that conforms precisely to the words the Supreme Court used -- the business of baseball is exempt from the antitrust laws.

4. The sole support for the Attorney General's position, Piazza v. Major League Baseball, was wrongly decided and should not be followed.

In the face of overwhelming authority supportive of the exemption covering the "business of baseball," the Attorney General is forced to argue that all of the case authorities cited above are wrong, and all of the congressional testimony and expert commentary were misguided. Indeed, it is surprising that the Attorney General makes this argument at all, considering his failure to raise this argument as a principal point in his brief before the circuit court, see (R. 94-110), and his concession to that court that the exemption goes beyond the reserve clause:

> [C]learly, what happened at Scottsdale, Arizona [where the National League voted to reject the relocation of the Giants to Tampa Bay/St. Petersburg] is protected conduct.

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[21] We also note that contrary to the position he now takes for his client Consumer Federation, Professor Stephen F. Ross has previously acknowledged that baseball has a "general exemption from antitrust scrutiny." Stephen F. Ross, Monopoly Sports Leagues, 73 Minn. L. Rev. 643, 740 n.432 (1989).

* * * *

> They have every right to meet together and vote, but that's not what we're seeking to investigate here and that's not what we're seeking to challenge. If that's all it was, I would submit that they probably -- the exemption would be covered.

* * * *

> What happens is, is when you get into that room, wherever they happen to meet and decide to take a vote [on a franchise transaction], that activity is covered [by the exemption].

(R. 30, 31-32, 39 -- statements of Senior Assistant Attorney General Jerome W. Hoffman during December 31, 1992 oral argument before Judge Stroker).

The Attorney General's reversal of position, and his tilting at 70 years of judicial precedent and congressional history, is apparently prompted by the recent decision in Piazza v. Major League Baseball, CIV 92-7173 (U.S.D.C., E.D. Pa., August 4, 1993), which held that baseball's antitrust exemption was applicable solely to the reserve clause. Again reversing a position he took below -- that only Supreme Court decisions should be considered on the issue of baseball's exemption and that lower court decisions were irrelevant, see Attorney General's Initial Brief to the District Court of Appeal for the Fifth District of Florida at 18-19 -- the Attorney General

enthusiastically embraces Piazza, a case plainly out of step with years of federal jurisprudence.[22]

Simply put, the Piazza case was wrongly decided. Like the Attorney General, the court in Piazza misread Supreme Court authority, willfully ignored a large body of case law, and disregarded substantial legislative instruction. The case merits discussion however because the theory of the Piazza decision is somewhat different, though no less wrong, than that of the Attorney General.

In Piazza, Judge Padova appears to concede, unlike the Attorney General here, that at least until Flood, the antitrust exemption covered "the business of baseball" generally and was not limited to any particular facet of the business: "Between 1922 and 1972, Baseball's expansive view [of the exemption] may have been correct." Piazza at 39. The Piazza court then goes on to reason, on the basis of several references to the reserve

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[22] In arguing for the adoption of Piazza to the exclusion of all other lower court cases, the Attorney General ignores a number of federal circuit court decisions including Finley and the Eleventh Circuit's decision in Professional Baseball Schools & Clubs Inc. v. Kuhn, 693 F.2d 1085 (11th Cir. 1982), a case which applied the exemption to an aspect of the baseball business entirely unrelated to the reserve system. It is, however, axiomatic that within the body of federal case law, greater weight should be given to appellate decisions than trial court decisions. "In applying [a federal statute], the generally accepted rule is that a state supreme court will be guided by decisions of the highest federal courts in their interpretations of the various provisions." Cadieux v. Cadieux, 75 So. 2d 700, 702 (Fla. 1954). Piazza is entitled to less, not greater, weight than the several federal courts of appeals decisions involving baseball's antitrust exemption.

clause in the Flood decision, that the Flood Court was attempting to limit the precedential effect of Federal Baseball and Toolson to the reserve clause alone.

Nothing in the Supreme Court's Flood opinion supports an intention to limit its prior rulings. While the Flood case arose in the context of the reserve system, the Supreme Court nowhere stated that it intended to limit baseball's historical exemption to the reserve system. To the contrary, the Court explicitly and pointedly "repeated" its prior rulings in Toolson and Federal Baseball that the exemption applied to the "business of baseball." Flood, 407 U.S. at 285. Had the Supreme Court desired, as Judge Padova surmised, to make "clear that the Federal Baseball exemption is limited to the reserve clause," Piazza at 42, how much easier it would have been for the Supreme Court to say so in simple English, instead of leaving the message so oblique that 21 years, a dozen lower court decisions and numerous congressional hearings had to pass before Judge Padova alone could divine the supposed "clear" message.

* * *

The antitrust exemption has covered the "business of baseball" for over 70 years and contrary to the suggestion of amicus Consumer Federation, professional baseball has developed in countless ways in reliance on that exemption. For example, baseball's minor league system, a vast arrangement of clubs and agreements which brings professional baseball to all corners of

the country, has been allowed to develop free of antitrust concern because of the antitrust exemption.[23] More pertinently, baseball's franchise relocation policy, strongly favoring the retention of clubs by communities which support them, has also been rendered possible by the antitrust exemption. In contrast to the other professional sports, whose recent franchise relocations have been characterized by midnight moves, unseemly bidding by localities, and wrenching losses to supportive communities, baseball's franchises have been extremely stable. As Senator Boxer once testified:

> Stripping baseball of its antitrust exemption would undermine the foundation of franchise stability. It is not in the interest of major league baseball nor of the communities which support it to have teams constantly on the bidding block, stolen from one community after another.

1992 Hearings at 52 (prepared statement of Senator-elect Barbara Boxer).

However one regards the wisdom of the procedures and policies baseball has developed in reliance on the antitrust

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[23] "Repealing Baseball's antitrust exemption would seriously threaten the very existence of this entire minor league system because it would put at risk the unique relationship between the Major League and the minor leagues. Virtually every aspect of that relationship between the 28 Major League Clubs and the 177 National Association clubs is governed by the many agreements and rules incorporated into the Professional Baseball Agreement. These agreements and rules are necessary to enable the Major Leagues to use the independently-owned minor league teams as the bedrock of their player development system." Baseball's Antitrust Exemption: Hearing Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary, 103rd Cong., 1st Sess. 66 (1993) (prepared statement of Jimmie Lee Solomon, Director of Minor League Operations).

exemption, any change in the scope of that exemption certainly should not come by judicial fiat. As the Supreme Court stated in Flood:

> 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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> * * *
>
> And what the Court said in Federal Baseball in 1922 and what it said in Toolson in 1953, we say again here in 1972: the remedy, if any is indicated, is for congressional, and not judicial, action.

407 U.S. at 283-84.

In sum, it is clear that baseball's antitrust exemption extends to and has been repeatedly applied to matters other than the reserve system. This court should reject the unprecedented and unjustified limitation on baseball's exemption that the Attorney General now seeks, and affirm the decision below.[24]

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[24] Amicus Morsani directly addresses another issue presented in the certified question -- whether state antitrust law is applicable to the sale and location of baseball franchises. The Attorney General does not deal with this point at all, and for good reason -- all professional sports leagues, not just baseball, are immune from state antitrust regulation. Partee v. San Diego Chargers Football Co., 668 P.2d 674 (Cal. 1983), cert. denied, 466 U.S. 904, 104 S. Ct. 1678, 80 L. Ed. 2d 153 (1984); Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975). This principle derives from the ruling in Flood that because of the need for national uniformity and because of the potential burdens on interstate commerce imposed on sports leagues and clubs by a duty to comply with varying state regulation, the

B. The Conduct the Attorney General Seeks to Investigate Is Within the Business of Baseball.

The Attorney General also argues that the activity here at issue -- baseball's decision about which ownership group to admit and where the clubs should play -- is not within the business of baseball, even if that term goes beyond the reserve system. First, the Attorney General argues that the term "business of baseball" has never been precisely defined, although it is unclear how this argument helps him. Second, he asserts that for a business activity to be exempt as falling within the business of baseball, that activity must be specifically authorized by a rule or a writing. These arguments are specious.

1. The absence of a definitive interpretation of "the business of baseball" is irrelevant; franchise sales and location fall plainly within the term.

Although, to be sure, the Supreme Court has not had need to define the full contours of the term "the business of baseball," that term has been further invested with shape and meaning by numerous court decisions which make clear that franchise transfers and relocations fall within it. Moreover, it

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commerce clause of the constitution prohibits state antitrust regulation of baseball. Flood, 407 U.S. at 284. These same commerce clause considerations prevent states from interfering with decisions concerning the location or relocation of a professional sports franchise. See City of Oakland v. Oakland Raiders, 174 Cal. App. 3d 414, 220 Cal. Rptr. 153 (1 Dist. 1985), cert. denied, 478 U.S. 1007, 106 S. Ct. 3300, 92 L.Ed. 2d 714 (1986).

should be obvious that because of the unique interdependence of professional baseball teams, basic decisions about whom to play with and where are so fundamental to the business of baseball that any definition of the term would necessarily include them.

Indeed, the theoretical question of what specific activities may go beyond the term "the business of baseball" is without practical significance in this case. Wherever the outermost boundaries may be, it is crystal clear that decisions relating to the location and ownership of major league clubs are central to the game and included within the business of baseball. With the sole exception of Judge Padova, every court that has addressed this issue has found the phrase inclusive of at least league structure and related decisions. See cases cited at pp. 12-13, supra. As the Court of Appeals for the Eleventh Circuit observed while dismissing an antitrust claim challenging, inter alia, the franchise location system:

> Each of the activities appellant alleged as violative of the antitrust laws plainly concerns matters that are an integral part of the business of baseball.

Professional Baseball Schools, 693 F.2d at 1086.

Not only has the term "business of baseball" been construed broadly, its plain meaning is broad as well. In a related context, the Supreme Court was recently called upon to interpret the scope of the antitrust exemption for "the business of insurance" set forth in the McCarron-Ferguson Act. The Court

refused to give the term "business" a pinched meaning, noting that the phrase is most naturally read to refer to "mercantile transactions; buying and selling; and traffic." Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891, 2901 (1993). The Court thus held that term can only be defined by an activity-based criterion. The same sensible meaning must be given here to "the business of baseball," and no matter how narrowly the term is defined, it must include those activities related to league structure, such as determining whom to play with and where.

Judge Stroker recognized that baseball's exemption extends to the "unique needs and characteristics of professional baseball" and that "[o]ne area of business activity which has clearly and consistently been considered exempt is the matter of the structure of the league." (R. 169) In reaching this conclusion, Judge Stroker found that "where professional baseball is played and with whom, is a fundamental consideration of professional baseball and at the heart of its business activity." (R. 169) That decision was plainly correct.[25]

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[25] Although amici Morsani and Consumer Federation correctly concede that the "business of baseball" extends beyond activities relating to the reserve clause, see pp. 30-31, supra, they attempt to construct arbitrary and illogical distinctions between exempted baseball business activity and the matter at issue here. For example, Morsani contends that activities aimed at preventing a non-member club from forcing its way into the major leagues and, perhaps, activities connected with franchise relocations are protected by the exemption, but that the activity here -- a non-member group attempting to buy its way into the major leagues to relocate a club -- is somehow outside of the

2. Restricting the term "business of baseball" to specific written rules and regulations is senseless and without precedent.

The Attorney General's contention that the baseball antitrust exemption applies only to activities that are specifically authorized by an officially promulgated guideline, rule or regulation is a completely novel argument, devoid of any precedential basis, and presented by the Attorney General without the slightest effort to offer a rationale.

First, the Attorney General does not and cannot cite a single case which held, or even suggested, that the application of the exemption turns upon the presence or absence of a specific baseball "rule or regulation" authorizing the activity in question. Indeed, it appears that no court has even considered this issue, although it is clear that the exemption has been upheld even in the absence of a rule authorizing the activity in dispute. In Finley v. Kuhn, for example, the issue was whether

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exemption. See Morsani's Brief at 6-14. Similarly, Consumer Federation attempts to distinguish between player restrictions (acknowledged to be exempt) and franchise restrictions by suggesting that only the former affects baseball's unique need to insure the quality and integrity of on-field competition. See Consumer Federation's Brief at 21-22. Consumer Federation fails to take into account that this imperative of baseball also embraces the need to insure the capacity of clubs and their ownerships to field competitive teams at suitable locations and facilities and the desirability of fostering regional rivalries that will enhance the competitive product presented. Thus, restrictions concerning the sale, location and relocation of franchises are required by baseball's unique needs and characteristics.

Commissioner Kuhn could disapprove certain player assignments where the major league rules did not specifically authorize him to take such action under the circumstances presented. 569 F.2d at 532-40. The Seventh Circuit sustained the dismissal of plaintiff's antitrust claims without pause to consider the absence of a specific rule or regulation on the subject. See id. at 540-41.

Second, the Attorney General's legal construct apparently turns on the assumption that every aspect of the business of baseball has been reduced to a rule or regulation. But this is utterly fanciful. Is there any business or industry that has so neatly and completely codified its activities? Moreover, the Attorney General knows quite well that baseball has not attempted to write rules and regulations covering even every aspect of the franchise transfer process. In the very guidelines for control interest transfers which the Attorney General cites in his brief, see Petitioner's Initial Brief at 23, -- the Commissioner's February 11, 1988 bulletin -- then-Commissioner Ueberroth wrote:

> The foregoing items obviously do not deal with every circumstance which may be presented in a proposed control interest transfer. New situations may call for interpretations or actions not covered by these guidelines or the procedures set forth below. Such circumstances will be considered, therefore, as presented.

Significantly, though, the Commissioner's bulletin was promulgated to further one of baseball's most important and long-standing constitutional provisions -- the requirement of league approval for franchise transfers. It is this written "rule" which was the basis for the activities culminating in the league approval of the purchase of the Giants by the San Francisco investors.

Finally, the Attorney General's proposed limitation of the exemption would artificially separate certain acts covered by regulation from those activities which properly and reasonably must accompany those acts. For example, it makes no sense to exempt from antitrust scrutiny the vote of the clubs authorizing a transfer, but to open to antitrust attack the steps leading up to the vote. Similarly, it makes no sense to delineate a "formal process" of discussions at a meeting that is exempt and an "informal" process of gathering information in advance that is not. Again, Judge Stroker properly recognized that no such arbitrary distinction between exempt and non-exempt conduct could be drawn:

> [I]f baseball's decision to keep the Giants in San Francisco is exempt from the antitrust laws, then the necessary discussions, negotiations and associations leading to that decision must also be protected and exempted business activity.

(R. 169-70)

This court should reject the Attorney General's invitation to limit the scope of baseball's antitrust exemption by applying an unprecedented and unreasonable test which would exempt from the antitrust laws only activity which has been specifically authorized by baseball's guidelines, rules and regulations. The Attorney General's approach is an obvious departure from the Supreme Court's repeated pronouncements that the exemption covers the business of baseball. Judge Stroker's decision that the activities here at issue fall within that exemption was clearly correct and should be sustained.

POINT II

THE ACTIVITIES THE ATTORNEY GENERAL SEEKS TO INVESTIGATE ARE EXEMPT AND NOT WITHIN HIS POWER TO INVESTIGATE, AND NO FURTHER INVESTIGATION CAN CHANGE THIS FACT.

The Attorney General argues that quashing the CIDs was erroneous and premature because he should be entitled to investigate to determine whether the conduct to be investigated is inside or outside the exemption. (Petitioner's Initial Brief at 26). This position is untenable. It is clear now that any CID directed to the "sale and purchase of the San Francisco Giants baseball franchise" is part of an investigation of an exempt transaction, and therefore beyond the authority of the Attorney General. In this regard, Judge Stroker correctly held:

> The application of baseball's exemption to the antitrust laws in this area is clear and the Attorney General is without authority to investigate activity which is clearly exempt.

(R. 170)

This conclusion follows from the Florida Antitrust Act which authorizes the Attorney General to conduct a civil antitrust investigation. § 542.27(3), Fla. Stat. (Supp. 1993). Antitrust investigations are authorized by section 542.27(3) only when the Attorney General "suspects that a violation of this chapter or federal laws pertaining to restraints of trade is imminent, occurring, or has occurred." Id. Because, as Judge Stroker noted, the sale and location of baseball franchises are exempt from the antitrust laws, an antitrust law violation could

not have occurred here, and "[n]o further investigation or discovery will change this basic fact." (R. 170) Simply stated, there is nothing further for the Attorney General to investigate to determine whether or not the transaction falls within the exemption.

The cases the Attorney General relies on for its "prematurity" argument -- none of which involve either the Florida Antitrust Act or the baseball exemption -- do not support his position here. In none of those cases did a court find, as the Attorney General suggests, that a transaction exempt from antitrust enforcement was nevertheless the proper subject of an antitrust investigation. Instead, those cases recognized that investigations may continue where it is unclear whether the transaction at issue is exempt or where the court has determined that the cited exemption is not applicable.

For example in Associated Container Transp. (Australia) Ltd. v. United States, 705 F.2d 53, 59 (2d Cir. 1983), the court recognized that "a CID recipient may refuse to comply with any CID . . . 'if the activities at issue enjoy a clear exemption from the antitrust laws,'" but found that the availability of Noerr-Pennington immunity was unclear based on the facts in that case. In FTC v. Monahan, 832 F.2d 688, 689-90 (1st Cir. 1987), cert. denied, 485 U.S. 987, 108 S. Ct. 1289, 99 L. Ed. 2d 500 (1988), the First Circuit found that "state action immunity" might not apply because two necessary elements of such

immunity -- a clearly articulated state policy and active state supervision -- had not been shown to be present. Attorney Gen. of Texas v. Allstate Ins. Co., 687 S.W.2d 803 (Tex. Ct. App. 5th Dist. 1985), has even less relevance here. There, the court actually found the insurance exemption was not applicable because the exemption did not extend to boycotts, and the investigation was expressly undertaken to determine if an unlawful boycott had occurred. See id. at 806.

The CIDs at issue here state on their face that they relate to a transaction -- "the sale and purchase of the San Francisco Giants Baseball franchise" -- that has a clear exemption from the antitrust laws. The Attorney General argues that he cannot be certain that the transaction is an exempt one until he investigates the facts, but he does not say what facts would be pertinent in this regard. Earlier, he took the position that he should be able to investigate discussions between baseball officials and those outside the industry, because any such discussions would destroy the exemption. (R. 102-04) (Attorney General's Initial Brief to the District Court of Appeal for the Fifth District of Florida at 25-33) He has now abandoned that argument, presumably because the case on which it was based, and on which he heavily relied, was reversed by the United States Supreme Court. See Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891 (1993) (insurers which are exempt from antitrust regulation because they are regulated by state law do not lose

exemption by acting in concert with foreign unregulated insurers), reversing In re Insurance Antitrust Litig., 938 F.2d 1291 (9th Cir. 1991). Instead, the Attorney General is reduced to arguing that some of the discussions leading to the decision about the location of the Giants franchise may not have been "necessary" -- a reference to Judge Stroker's finding that as long as the decision about relocation is exempt, the "necessary discussions, negotiations and associations" would also be exempt. Petitioner's Initial Brief at 26-27. But clearly Judge Stroker meant by the term "necessary" such discussions as would naturally and "inevitably" flow from the proposed relocation of a franchise. See Webster's Ninth New Collegiate Dictionary 790 (Merriam-Webster 1989). No one could reasonably suggest that each activity and conversation concerning a relocation must be examined to determine whether it was "compelled" or "required" by circumstances and therefore exempt. Such distinctions have nothing to do with whether franchise sales and relocations are within the business of baseball and nothing in Judge Stroker's opinion can be read to support such an exercise.

Nor is the Attorney General completely ingenuous when he implies that there are insufficient facts available to him to determine whether the exemption applies. The National League's consideration of the various offers to purchase the Giant franchise was one of the most highly visible sport stories of 1992, generating daily press and broadcast media coverage as well

as extensive treatment in a full-length book. See Bob Andelman, Stadium for Rent: Tampa Bay's Quest for Major League Baseball (1993). In addition, hearings were conducted before a Senate Judiciary Subcommittee in December of 1992 and a House Judiciary Subcommittee in March of 1993 during which the circumstances surrounding the purchase and sale of the Giants were reviewed thoroughly. The Attorney General's description of the chronology of events (see R. 74-75, 94-96) makes plain that he had no trouble learning what occurred. As Deputy Attorney General Peter Antonacci has publicly said about this potential antitrust action: "From our point of view, this is not a fact-intensive kind of suit. . . These people either slimed St. Petersburg or they didn't." (R. 159) Under such circumstances, requiring the National League to undergo the expense and harassment of an "investigation" into a transaction as to which all relevant facts are already known cannot be justified, and the trial court was correct in quashing the CIDs.

Finally, Judge Stroker's decision to quash the CIDs was particularly appropriate because it appears that the Attorney General's purpose in serving the two CIDs in question here, as well as a wave of 35 CIDs on many other individuals and entities, was to harass baseball and thereby honor his pledge to make "the resources of [the Attorney General's] office" available to help St. Petersburg in its separate legal and political battles with

baseball. (R. 161) As the Attorney General admitted at the December 31, 1992 hearing before Judge Stroker:

> Now, [counsel for the National League] says that this is just a political game. Well, fine. You know, this whole thing is politics. . . . This is all politics, Your Honor.

(R. 48 -- statement of Senior Assistant Attorney General Jerome W. Hoffman). In light of the Attorney General's actions and statements in this regard, it is apparent that the Supreme Court was extraordinarily prescient 35 years ago when it warned in Radovich v. National Football League, 352 U.S. at 450-51, 77 S. Ct. at 393-94, 1 L. Ed. 2d at 460-61, that a "flood of litigation" and "harassment" would result if baseball's antitrust exemption were not maintained. The CIDs were correctly quashed.

CONCLUSION

This Court should affirm the decision of the lower court quashing the CIDs for all the foregoing reasons.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express delivery to: Robert A. Butterworth, Attorney General and Jerome W. Hoffman, Assistant Attorney General, Chief Antitrust Section, Department of Legal Affairs, 2020 Capitol Circle, Alexander Building, Suite 3906, Tallahassee, Florida 32301, and by first-class United States Mail to: Tony Cunningham, Esquire, Cunningham Law Group, P.A., 100 Ashley Dr., South, Suite 100, Tampa, Florida 33602 and Stephen F. Ross, University of Illinois College of Law, 504 E. Pennsylvania Avenue, Champaign, Illinois 61820, this 18th day of November, 1993.

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