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February 16, 2023

The Honorable Richard J. Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Lindsey Graham
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Amy Klobuchar
Chair
Subcommittee on Competition Policy, Antitrust, and Consumer Rights
United States Senate
Washington, D.C. 20510

The Honorable Michael S. Lee
Ranking Member
Subcommittee on Competition Policy, Antitrust, and Consumer Rights
United States Senate
Washington, D.C. 20510

The Honorable Jim Jordan
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Jerrold Nadler
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Thomas Massie
Chairman
Subcommittee on Administrative State, Regulatory Reform, and Antitrust
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable David Cicilline
Ranking Member
Subcommittee on Administrative State, Regulatory Reform, and Antitrust
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

SUBJECT: Views of the American Bar Association Antitrust Law Section on Eliminating Baseball's Antitrust Exemption

Dear Senate and House Judiciary Committee and Subcommittee Chairs and Ranking Members:

On behalf of the Antitrust Law Section of the American Bar Association, I am pleased to submit these views on the elimination of the judicially created exemption from antitrust law enjoyed by Major League Baseball.

The views expressed herein are being presented on behalf of the Section of Antitrust Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,

Thomas F. Zych
Chair, Antitrust Law Section

VIEWS OF THE AMERICAN BAR ASSOCIATION ANTITRUST LAW SECTION ON ELIMINATING BASEBALL'S ANTITRUST EXEMPTION

February 16, 2023

The Antitrust Law Section of the American Bar Association (the Section) respectfully submits these views on the elimination of the judicially created exemption from antitrust law enjoyed by Major League Baseball.[1] Should members of Congress have questions about these views, the Section would be pleased to answer them and provide further assistance as appropriate.

The Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection, and data privacy as well as related aspects of economics. Section members, numbering over 7,600, come from all over the world, and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as jurists, academics, and law students.

Baseball's antitrust exemption is rooted in the 1922 *Federal Baseball* decision, in which the Supreme Court held that "giving exhibitions of base ball . . . would not be called trade or commerce" and that interstate travel by the teams was "a mere incident" to the exhibitions.[2] The Court then reasoned that the business of baseball was outside the reach of federal antitrust law because it was not in interstate commerce.

Both *Federal Baseball* holdings resonated with contemporaneous decisions,[3] but the reach of federal antitrust law extended much further by the time the Supreme Court revisited the application of antitrust law to professional baseball in 1953,[4] and by then, major league baseball was broadcast nationally on commercial television.[5] The Supreme Court, however, declined to reconsider the issue, declaring that "if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation."[6]

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[1] The Section offers no views on any particular legislation. The relevant bills introduced in the 117th Congress were the Competition in Professional Baseball Act, S. 1111 and H.R. 2511, and the Save American Baseball Act, S. 3833. Nor does the Section offer any views on the merits of any past, present, or future baseball antitrust litigation.

[2] Fed. Baseball Club of Baltimore, Inc. v. National League of Prof'l Baseball Clubs, 259 U.S. 200, 208–09 (1922).

[3] *See* Flood v. Kuhn, 407 U.S. 258, 286 (1972) (Douglas, J., dissenting) ("In 1922 the Court had a narrow, parochial view of commerce."); Samuel A. Alito Jr., *The Origin of the Baseball Antitrust Exception*, 34 J. SUP. CT. HIST. 183 (2009); Kevin McDonald, *Antitrust and Baseball: Stealing Holmes*, 23 J. SUP. CT. HIST. 89 (1998) (questioning the factual basis for the decision).

[4] *See* Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 229–39 (1948); United States v. South-Eastern Underwriters Assn., 322 U.S. 533, 539–61 (1944).

[5] *See* JAMES WALKER & ROBERT BELLAMY, A HISTORY OF BASEBALL ON TELEVISION ch. 3 (2008).

[6] Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 357 (1953); *see also* Radovich v. NFL, 352 U.S. 445, 449–52 (1957) (declining to extend *Federal Baseball* to professional football and adding that "the orderly way to eliminate error or discrimination, if any there be, is by legislation"); United States v. Int'l Boxing Club, 348 U.S. 236, 242–44 (1955) (limiting *Federal Baseball* to its facts and declaring that any broad exemption must come from Congress).

A half-century after rendering the *Federal Baseball* decision, the Supreme Court termed it an "anomaly" and an "aberration," acknowledging that: "Professional baseball is a business and it is engaged in interstate commerce."[7] But the Court, nevertheless, insisted that eliminating baseball's antitrust exemption was a job for Congress.[8] The Court reiterated that stance in 2021.[9]

In the Section's view, Congress should eliminate the anomalous *Federal Baseball* antitrust exemption. The Section is skeptical of exemptions from antitrust law, whether created judicially or by statute.[10] "[T]he policy unequivocally laid down by the [antitrust laws] is competition,"[11] and "[t]he heart of our national economic policy long has been faith in the value of competition."[12]

The Section does not believe that this is one of those rare situations in which Congress could reasonably make the choice to sacrifice competition and protect some other social interest.[13] The Major League Baseball teams need to cooperate on certain matters, including the minor leagues, but antitrust law permits needed cooperation absent the *Federal Baseball* exemption.[14] As a general matter, "the application of antitrust law to professional sports has proven workable."[15]

The Section is concerned about the consequences of eliminating the exemption retroactively. Retroactive application of antitrust law would encourage litigation over the past, potentially at the expense of mutually beneficial futures. Similarly, legislation eliminating the *Federal Baseball* exception should have an effective date after the date of enactment to allow for a transition period and avoid costly litigation. This would incentivize all parties to find solutions to common problems without resorting to costly antitrust litigation.

The implications of eliminating the exception are not completely clear because a century of litigation has not clearly drawn its boundaries. Some district court opinions from the 1990s

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[7] Flood v. Kuhn, 407 U.S. 258, 282 (1972); *see also* Brief for the United States as Amicus Curiae in Support of Neither Party at 10, Nostalgic Partners, LLC v. Office of the Commissioner of Baseball, No. 22-2859 (2d Cir. Jan. 30, 2023) ("More than a century since *Federal Baseball*, changed market realities are even more dramatic. Baseball is a multi-billion-dollar business in which games can be streamed 'from any computer, anywhere, at anytime.'").

[8] *Flood*, 407 U.S. at 283–85.

[9] NCAA v. Alston, 141 S. Ct. 2141, 2160 (2021).

[10] *See* Comments of the ABA Section of Antitrust Law on General Immunities and Exemptions in Response to Request for Public Comment by the Antitrust Modernization Commission (Nov. 30, 2005), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/at-comments/2005/11-05/general_immunities_comm.pdf.

[11] Northern Pac. Ry. Co. v. United States, 356 US 1, 4 (1958).

[12] Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951).

[13] Antitrust exemptions "should be granted rarely, and only where, and for so long as, a clear case has been made that the conduct in question would subject the actors to antitrust liability and is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general." ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATION 335 (2007), *available at* https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[14] *See* NCAA v. Alston, 141 S. Ct. 2141, 2155–57 (2021); American Needle, Inc. v. NFL, 560 U.S. 183, 202–04 (2010); Texaco Inc. v. Dagher, 547 U.S. 1, 5–6 (2006); Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1, 8–10 (1979); Bd. of Trade of Chicago v. United States, 246 U.S. 231, 238–39 (1918); Major League Baseball Properties v. Salvino, Inc., 542 F.3d 290, 334–41 (2d Cir. 2008) (Sotomayor, J., concurring).

[15] Brief for the United States, *supra* note 7, at 12.

construed the exception very narrowly,[16] but recent appellate decisions are to the contrary. The Ninth Circuit held that control over franchise relocation was exempt,[17] and the Seventh Circuit held that the exemption applied to the Cubs' conduct in a dispute with property owners abutting Wrigley Field.[18]

Eliminating the exemption should have no impact on disputes between Major League Baseball and major league players. The Curt Flood Act of 1998 eliminated the *Federal Baseball* exemption for conduct relating to employment of major league players.[19] By that time, however, the Major League Baseball Players Association was engaged in collective bargaining with the team owners, with the consequence that the "nonstatutory labor exemption" ousted antitrust law.

By statute, workers are shielded from antitrust law when they combine to achieve better pay and working conditions.[20] In addition, the courts have read federal labor law's "policy favoring free and private collective bargaining" to imply an even-broader exception from antitrust law "necessary to make the process work."[21] When a labor union elects to engage in multi-employer bargaining, as in professional sports, employers are protected by this implied exception when they also act in concert.[22]

The Commissioner of Baseball argues that the *Federal Baseball* exemption is needed to maintain uniform benefits and standards for minor league players.[23] The Commissioner has ample reason to believe both that the *Federal Baseball* exemption applies[24] and the nonstatutory labor exemption does not. But uniform benefits and standards could result from collective bargaining between the team owners and minor league players, and the nonstatutory exemption would apply if the minor league players formed a union that bargains with the owners, which appears likely.

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[16] Piazza v. Major League Baseball, 831 F. Supp. 420, 438, 440–41 (E.D. Pa. 1993) (holding that conduct related to franchise relocation was not exempt); Postema v. National League of Professional Baseball Clubs, 799 F. Supp. 1475, 1486–89 (S.D.N.Y. 1992) (holding that conduct related to the employment of umpires was not exempt).

[17] City of San Jose v. Office of the Comm'r of Baseball, 776 F.3d 686, 688–91 (9th Cir. 2015).

[18] Right Field Rooftops, LLC v. Chicago Cubs Baseball Club, LLC, 870 F.3d 682, 688–89 (7th Cir. 2017).

[19] Pub. L. 105–297, 112 Stat. 2824, codified at 15 U.S.C. § 26b.

[20] 15 U.S.C. § 17 ("Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help . . . ."); 29 U.S.C. § 31 ("No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy . . . .").

[21] Brown v. Pro Football, 518 U.S. 231, 235–37 (1996).

[22] *See id.* at 239–42 (1996); Clarett v. NFL, 369 F.3d 124, 134–38 (2d Cir. 2004) (Sotomayor, J.).

[23] Letter from Robert D. Manfred, Jr., Commissioner of Baseball to Senator Richard J. Durbin, Senator Charles E. Grassley, Senator Richard Blumenthal, and Senator Michael S. Lee (July 29, 2022), https://www.judiciary.senate.gov/imo/media/doc/Response%20to%20Senators%20Letter%20to%20Commissioner%20Manfred%20(07-29-22)%20FINAL.pdf.

[24] *See* Miranda v. Selig, 860 F.3d 1237, 1242 (9th Cir. 2017) ("the employment of minor league players is precisely the type of activity that falls within the antitrust exemption").