No. 02-10333-C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MAJOR LEAGUE BASEBALL, an Unincorporated Association of Professional Baseball Clubs; ALLAN H. SELIG, individually and as Commissioner of Baseball; TAMPA BAY DEVIL RAYS, LTD., a Florida Limited Partnership; and FLORIDA MARLINS BASEBALL CLUB, L.L.C., a Delaware Limited Liability Company,
Plaintiffs/Appellees

v.

ROBERT A. BUTTERWORTH,
Florida Attorney General,
Defendant/Appellant.

On Appeal from the United States District Court
for the Northern District of Florida

BRIEF OF *AMICI CURIAE* CONSUMER FEDERATION OF AMERICA AND AMERICAN ANTITRUST INSTITUTE IN SUPPORT OF APPELLANT AND IN SUPPORT OF REVERSAL

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INTEREST OF *AMICI CURIAE*

The Consumer Federation of America (CFA), a non-profit corporation incorporated in 1968 in the State of New York, is a federation of more than 285 national, state, and local organizations, representing more than 30 million American consumers. The largest consumer advocacy organization in the United States, the CFA represents the viewpoints and interests of consumers before Congress, regulatory agencies, and the courts, including consumers' interests in significant sports law cases.[1]

The American Antitrust Institute (AAI) is an independent, not-for-profit organization dedicated to economic research, study of the antitrust laws, and public education. The AAI's mission is to increase the role of competition and to challenge the undue concentration of economic power. The AAI is governed by its three directors, who consult an Advisory Board of fifty-five prominent lawyers, law professors, economists, and business leaders.[2]

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[1] Cases where the CFA has been granted leave to appear as *amicus curiae* include Butterworth v. National League, 644 So. 2d 1021 (Fla. 1994) and Minnesota Twins Partnership v. State, 592 N.W.2d 847 (Minn. 1999).

[2] AAI's directors are its President, Albert H. Foer (an attorney and former government antitrust enforcer), Jonathan Cuneo (a practicing attorney), and Professor Robert Lande (a professor at the University of Baltimore Law School). The members of the Advisory Board serve in a consultative capacity and their

individual views may differ from the positions taken by the AAI. With one exception, no director or member of the Advisory Board of the AAI represents any party in this litigation. Patricia Conners, Chief of the Antitrust Section of the Florida Attorney General's Office, heads the Antitrust Task Force of the National Association of Attorneys General and is a member of the AAI Advisory Board. Ms. Conners had no role in the AAI's deliberations concerning the position to take in this case. The principal author of this brief, Professor Stephen Ross of the University of Illinois College of Law, is also a member of the AAI Advisory Board and has drafted a report for a task force created by AAI on sports antitrust issues. See Ross, Antitrust Options to Redress Anticompetitive Restraints and Monopolistic Practices by Professional Sports Leagues, 52 Case West. L. Rev. 133 (2001).

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 potential liability under federal and state antitrust laws. Of particular concern to consumers and fans is the restriction on the number and location of franchises, which provides individual owners with the ability to threaten relocations and thus extort tax subsidies from government officials in current markets. This restriction obviously harms the interests of consumers and taxpayers across the nation, and is being particularly felt by fans in Minnesota and Florida.

A scheme to buy out rivals for sums vastly exceeding market value, with the intent and effect of increasing monopoly profits through greater stadium subsidies, is not remotely a "unique characteristic and need" of baseball warranting exemption from the antitrust laws. The unique interdependence of sports leagues does not require the National and American Leagues to agree jointly to contract; rather, such a scheme is no different from any attempt by rivals to preserve existing territories and to prevent new entry into their market. See, e.g., United States v. Sealy, Inc., 388 U.S. 350 (1967).

ARGUMENT

BECAUSE A DETERMINATION AS TO WHETHER FLOOD v. KUHN SHOULD BE APPLIED IN THIS CASE IS A FACT-LADEN INQUIRY, THE ATTORNEY GENERAL SHOULD BE ABLE TO PROCEED WITH HIS INVESTIGATION.

A. The Attorney General may proceed with the investigation if there are any facts that might lead to a successful antitrust lawsuit.

Statutory authority for the Attorney General's investigation, Fla. Stat. § 542.28 (2001), is patterned after the federal Antitrust Civil Process Act, 15 U.S.C. §§ 1311-1314 (1994). Precedents under the federal statute make it clear that courts will enforce process unless the conduct under investigation "enjoys a *clear* exemption" from the antitrust laws. Associated Container Transp. (Australia), Ltd. v. United States, 705 F.2d 53, 59 (2d Cir. 1983) (emphasis added) (quoting from H. Rep. No. 94-1343, at 11 (1976)). Accord, FTC v. Monahan, 832 F.2d 688 (1st Cir. 1987). Like the exemption for government lobbying at issue in Associated Container and the exemption for state-imposed restraints in Monahan, the investigation here may proceed if it could lead to facts that demonstrate that the exemption is inapplicable to the Appellees' conduct. Indeed, even assuming *arguendo* that Flood v. Kuhn would immunize that conduct from antitrust liability – an assumption *amici* reject – 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 United States Supreme Court.

As was recognized in Flood itself – where the trial judge re-affirmed the exemption only after full discovery and trial – if the Attorney General's investigation should lead to an antitrust challenge to baseball's unprecedented contraction scheme, the proper course will be for the trial court to determine based on a full record whether "more harm than good" would come from applying the antitrust laws to the National Pastime. Cf. Radovich v. National Football League, 352 U.S. 445, 450 (1957). As demonstrated below, the likelihood of reconsideration is neither fanciful nor remote; rather, developments both in substantive antitrust doctrine and techniques of statutory interpretation suggest that the Supreme Court would reconsider Flood if given the opportunity.

B. The rationale underlying Flood v. Kuhn's re-affirmation of an antitrust exemption for baseball's "unique characteristics and needs" was specifically grounded in the facts and policy implications arising from that case, and does not apply here.

The district court below erred in determining that, regardless of any facts that might be developed during the Attorney General's investigation, the Supreme Court's decision in Flood v. Kuhn, 407 U.S. 258 (1972), clearly exempts baseball owners' contraction agreement from antitrust scrutiny. The lower court's decision was premised on three faulty conclusions: (1) that Flood is a decision "not based on any original antitrust analysis," slip op. at 38; (2) that Flood's rationale was that Congress had "considered the issue many times but had never changed the result: the business of baseball remained exempt," id. at 39; and (3) that "[n]othing of substance has changed" since Flood. Id.

Rather, a careful analysis of the Supreme Court's decisions about *stare decisis* – both in general and in Flood – demonstrate the contrary conclusion. Acknowledging that "baseball is a business ... engaged in interstate commerce," Flood, 407 U.S. at 282, the Supreme Court provided a new, superseding rationale for dismissing the plaintiff's challenge to the reserve clause. The Court made clear that its adherence to *stare decisis* was not based on arid formalities but rather "because of a recognition and

acceptance of baseball's unique characteristics and needs." Id. Determining whether baseball's proposed contraction is a "unique characteristic and need" of the sport is a fact-based inquiry. Even the trial judge presiding in Flood, operating under the broader Federal Baseball standard, allowed the plaintiff to proceed with discovery because Flood's argument that the exemption should be overruled raised "serious questions of a factual nature." Flood v. Kuhn, 312 F. Supp. 404, 406 (1970).

First, the notion that Flood did not involve antitrust analysis, slip op. at 39, cannot be squared with the position taken there by Major League Baseball. Baseball's counsel devoted ten pages of their brief to "the historical, competitive, and economic realities which make the reserve system a necessity." Brief for Respondents at 5-14, Flood v. Kuhn, No. 71-32 (O.T. 1971). They forcefully articulated the view – widely shared in the early 1970s – that competition for player talent ("free agency") was unworkable in professional sports leagues, and that the reserve system challenged by Flood was "a necessity." Id. In this case, *amici* simply ask that the Attorney General be able to develop facts surrounding "the historical, competitive, and economic realities" of baseball to determine whether a scheme to contract output is "necessary" to the National

Pastime.

Second, the fact that Congress had failed to overturn the exemption created by Federal Baseball Club v. National League of Prof'l Baseball Clubs, Inc., 259 U.S. 200 (1922), was not relevant to the Flood Court. What *was* decisive was Congress' "positive inaction," rather than "mere congressional silence and passivity." Flood, 407 U.S. at 283. That is, while Flood emphasized unequivocal legislative support for the reserve clause under attack in that case, there is no evidence of "positive inaction" that Congress has *ever* expressed toward the conduct that the Attorney General seeks to investigate.

In concluding that "Congress as yet has had no intention to subject *baseball's reserve system* to the reach of the antitrust statutes," Flood found this "to be something other than mere congressional silence and passivity." 407 U.S. at 248 (emphasis added). The Court then contrasted this conclusion with the one it had recently reached in Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235, 241-42 (1970), cautioning against taking congressional inaction as acceptance of a precedent.[3]

[3] See also Helvering v. Hallock, 309 U.S. 106, 121 (1940) (Frankfurter, J.) ("[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle"); Patterson v. McLean Credit Union, 491 U.S. 164, 176 n.1 (1989) (noting that it is "impossible to assert with any degree of

assurance" that congressional failure to act represents affirmative congressional approval of judicial precedent); Central Bank, N.A. v. First Interstate Bank, N.A., 511 U.S. 164, 186 (1994) (overturning precedent despite Congress' amendment of relevant statute on numerous occasions without questioning judicial interpretation).

Flood's rationale is clear: The Court believed that Congress shared its view that antitrust scrutiny should not apply *to the reserve clause*. Justice Blackmun focused on the idea that "more harm would be done in overruling Federal Base Ball than in upholding a ruling which at best was of dubious validity." Flood, 407 U.S. at 279 (quoting Radovich v. National Football League, 352 U.S. 445, 450 (1957)). He emphasized the trial judge's finding that even most of the plaintiff's witnesses conceded some form of a reserve clause was "a necessary element of the organization of baseball as a league sport." Id. at 268 (quoting 316 F. Supp. at 275). He noted that the principal congressional study of baseball and antitrust had concluded that a reserve clause was necessary for the sport. Id. at 272-73. He observed that a leading scholar had opined that baseball was a "unique enterprise" for which "unbridled competition ... would not be in the public interest." Id. at 274. And he pointedly quoted from Judge Moore's concurrence in the court below that "'[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) (emphasis added).

None of these points would have been relevant if the Court were simply applying *stare decisis* mechanically. And it is critical to recall that, in

1972, concerns about the workability of competition among baseball owners for players' services were well-founded, in that no professional sports league had engaged in such competition since the early part of the century, and many had attributed the failures of early leagues to precisely this sort of competition.[4]

Another concern that Justice Blackmun emphasized in Flood was reliance. "The Court has emphasized that since 1922 baseball ... has been allowed to develop and to expand unhindered by federal legislative action." Id. at 284. This, again, is a fact-based inquiry. The Respondent's Brief in Flood emphasized the investments that owners had made in player development and in the entire system of player control premised on the reserve system. Brief for Respondents, supra p. 6, at 32. What investments or reliance owners have in anticompetitive franchise relocation policies (other than the ability to make monopoly profits by exploiting taxpayers) is a proper subject for antitrust inquiry at this stage of the investigation.[5]

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[4] See Report of the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary, H.R. Rep. No. 82-2002, at 16-50 (1952).

[5] When, amid active public calls to reconsider the exemption, knowledgeable baseball executives spend a record-setting $700 million to purchase the Boston Red Sox, see Meg Vaillancourt & Gordon Edes, "Baseball Ok's Red Sox Sale: Henry

Gets Team after Charities' Funding Boosted," Boston Globe, Jan. 17, 2002, at Business A1, it is hard to justify a reliance interest. See also United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944) (overruling exemption for the many collaborative practices developed by the insurance industry in reliance on the holding of Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869) that insurance was not interstate commerce).

Finally, as detailed in Part D below, the district court erroneously concluded that nothing has changed since Flood was decided in 1972. Rather, the state of antitrust law, which was indeed critical to the judicial and congressional hostility toward applying the Sherman Act to the reserve clause, has changed significantly since then.

In sum, the District Court incorrectly accepted Appellees' emphasis on an overly broad reading of one paragraph at the conclusion of Flood, where the Court in turn quotes Toolson v. New York Yankees, 346 U.S. 356, 357 (1953) ("Congress had no intention of including the business of baseball within the scope of the federal antitrust laws"). Such a mechanistic reading ignores the specific context in which Justice Blackmun wrote the opinion for the Court in Flood, is contrary to the reasoning given by the Court, and should not be followed here.

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.

The Supreme Court has held that precedents are "not sacrosanct," Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989), and should be reconsidered when "the intervening development of the law" has "removed or weakened the conceptual underpinnings from the prior

decision," id. at 173, or when 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 Benjamin N. Cardozo, The Nature of the Judicial Process (1921)).[6] *Amici* contend that this is precisely what has occurred here. Substantive antitrust doctrine has evolved since 1972 in such a way as to permit the desirable aspects of baseball to continue to exist under antitrust scrutiny. At the same time, Major League Baseball's anticompetitive practices are clearly inconsistent with social welfare and do not reflect any unique characteristics or needs of the National Pastime.[7] Only an investigation can determine if the Attorney General can meet the Patterson standard.

[6] This doctrine was specifically applied to the Sherman Act in State Oil Co. v. Khan, 522 U.S. 3, 19 (1997), where the Court explained Flood as reflecting the Court's acceptance and recognition of baseball's unique characteristics and needs.

[7] Welfare harms of baseball's monopoly are catalogued in Stephen F. Ross, Monopoly Sports Leagues, 73 Minn. L. Rev. 643 (1989).

While Baseball's brief in Flood focused on "the historical, competitive, and economic realities" that justified maintenance of the exemption as consistent with social welfare, supra at p. 6, none of these concerns is implicated in the current investigation. In contrast to a restraint that had been in effect for "almost the entire history of organized baseball," Flood v. Kuhn, 316 F.Supp. 271, 273 (S.D.N.Y. 1970), baseball's contraction scheme is completely unprecedented. Indeed, for most of the history of organized baseball, expansion and relocation decisions were initially within the jurisdiction of each of baseball's two leagues (in some cases requiring consent after the decision had been made).[8] There is certainly no basis to conclude without any factual inquiry that baseball's ability to contract – especially by refusing to relocate a team to a lucrative market like the nation's capital – is in any way essential to our National Pastime.

D. Significant changes in the law and in the baseball industry demonstrate that the Attorney General should, at least, be able to investigate.

[8] See, e.g., Leonard K. Koppett, Koppett's Concise History of Major League Baseball 277-80 (1998) (describing American and National League's independent determination to expand in the late 1950s).

A key "underpinning" of Flood's unwillingness to apply the Sherman Act to baseball's reserve clause was the Court's concern that contemporary antitrust doctrines would condemn many arrangements among owners that are arguably essential to baseball.[9] Just three months before issuing its opinion in Flood, the Court decided United States v. Topco Assocs., Inc., 405 U.S. 596 (1972), condemning as *per se* illegal an agreement by members of a grocery store cooperative to allocate territories in the distribution of private label branded groceries. Read broadly, Topco suggested that, in 1972, application of the Sherman Act to baseball would result in the automatic condemnation of any form of a reserve clause, the elaborate and pro-competitive waiver scheme for assigning players to the minor leagues, the entire minor league baseball system, and a host of other rules.[10]

The Supreme Court has subsequently made clear, however, that virtually all agreements among sports league owners will be governed by the rule of reason. NCAA v. Board of Regents, 468 U.S. 85 (1984).

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[9] This argument is detailed in Stephen F. Ross, Reconsidering Flood v. Kuhn, 12 Miami J. Ent. & Sports L. 169 (1995).

[10] Significantly, Justice Blackmun, Flood's author, wrote a short concurrence in Topco suggest that the result was "anomalous" but a correct application of precedents. 405 U.S. at 613-14.

Specifically, NCAA 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 has made it clear that restrictions tailored to achieve that particular goal will be sustained. Id. at 117-19. Today, in contrast to 1972, the Court could readily overrule the baseball exemption confident that current antitrust doctrine would permit the desirable aspects of baseball to remain unscathed.[11]

E. Flood only extends to conduct that reflects baseball's "unique characteristics and needs."

Additional considerations lead to the conclusion that the Attorney General's investigation should be allowed to develop facts capable of persuading a court that the current contraction scheme is not a "unique characteristic and need" of baseball.

1. The principle of narrow construction of antitrust

[11] Compare 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"), with McNeil v. National Football League, 790 F. Supp. 871 (D. Minn. 1992) (Sherman Act permits restrictions on competition for player services that are reasonably necessary to maintain competitive balance within a sport).

exemptions applies with full force to baseball's exemption.

The Supreme Court has consistently held that federal antitrust exemptions are to be narrowly construed. As the Court explained in Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 398-99 (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."[12] Accordingly, there is a presumption against any exclusion from the antitrust laws.

[12] Significantly, 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 (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 Jonathan 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.[13]

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[13] 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

2. Lower court decisions have generally applied the exemption only to conduct that constitutes one of baseball's "unique characteristic and needs."

It is generally accepted that Flood does not cover all conceivable agreements in commerce to which baseball clubs may agree. Lower courts have found that the exemption did not apply to agreements between baseball clubs and stadium concessionaires, Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc., 676 F.2d 1291 (9th Cir. 1982), radio stations, Henderson Broad. Corp. v. Houston Sports Ass'n, Inc., 541 F. Supp. 263 (S. D. Tex. 1982), umpires, Postema v. National League of Prof'l Baseball Clubs, 799 F.Supp. 1475, 1488 (S.D.N.Y. 1972), *rev'd on other grounds*, 998 F.2d 60 (2d Cir. 1993), and, notably, franchise relocation and expansion, Piazza v. Major League Baseball, 831 F. Supp. 420 (E.D. Pa. 1993) and Butterworth v. National League, 644 So. 2d 1021 (Fla. 1994). The discussion of the exemption in Henderson is instructive.

> very small. ... 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.

William N. Eskridge, Interpreting Legislative Inaction, 87 Mich. L. Rev. 67, 106 (1988).

There, the court's rationale in finding Flood inapplicable was that the challenged conduct was "not central enough to the 'unique characteristics and needs' of baseball which the exemption was created to protect." 541 F. Supp. at 268-69. Accord, Postema, 799 F.Supp. at 1489. Tellingly, even Major League Baseball itself has recognized the limits of its exemption. In 1965, the Commissioner and his counsel agreed not to assert the exemption in regard to the proposed sale of the New York Yankees to CBS, recognizing that asserting the exemption would jeopardize the protection enjoyed by limiting the exemption to "essential sports activities." Hearings on S. 950 Before the Subcomm. On Antitrust and Monopoly of the Senate Comm. On the Judiciary, 89th Cong., 1st Sess. 159-61 (1965) (memorandum from Paul A. Porter, Esq.).

By contrast, virtually all of the post-Flood cases finding aspects of baseball exempt concerned features recognized as unique characteristics and needs of baseball – restraints on competition for players or agreements concerning the minor leagues. See, e.g., Professional Baseball Schools & Clubs, Inc. v. Kuhn, 693 F.2d 1085 (11th Cir. 1982) (challenge to minor league structure); Charles O. Finley & Co. v. Kuhn, 569 F.2d 527 (7th Cir.

1978) (challenge to Commissioner order regarding sale of player contracts); McCoy v. Major League Baseball, 911 F. Supp. 454 (W.D. Wash. 1995) (owners' negotiating strategy leading to 1994 strike); New Orleans Pelicans Baseball, Inc. v. National Ass'n of Prof'l Baseball Leagues, Inc., Civ. No. 93-253, 1994 U.S. Dist. LEXIS 21468 (E.D. La. Feb. 26, 1994) (challenge to minor league franchise location rules).[14] In any event, the very disagreement among lower courts as to Flood's scope is itself evidence that the exemption is not "clear" and thus, under the authorizing statute, the Attorney General should be allowed to proceed. Like the reserve system, and unlike expansion and franchise location issues, there has been legislative and judicial recognition that the institution of minor league baseball in small-town America and the near-exclusive reliance on minor league baseball for player development make it a unique characteristic of baseball.[15] Like the reserve system, and unlike expansion

[14] We concede that, in addition to the court below, two other courts have found exempt conduct not related to baseball's unique characteristics and needs: Morsani v. Major League Baseball, 79 F. Supp. 2d 1331 (M.D. Fla. 1999) and Minnesota Twins Partnership v. State, 592 N.W.2d 847 (Minn. 1999).

[15] The National Football League and the National Basketball Association rely primarily on college sports to develop players. Although National Hockey League clubs have farm systems, they are not as pervasive as those of minor league baseball and do not include an entire system of amateur junior hockey (subject to Canadian rather than American law) that plays a significant role in player development.

and franchise location issues, there is some evidence of a legislative preference for shielding the minors from antitrust scrutiny.[16]

Moreover, a significant minority of NHL players are developed in Europe.

[16] For example, in 1959, on a closely divided vote, the Senate rejected a proposal that would have limited the reserve clause exemption to 40 players (in order to permit the development of a nascent rival league led by legendary executive Branch Rickey). See Lionel S. Sobel, Professional Sports & the Law 45-

48 (1977). And, while Congress could not have been more explicit in enacting the Curt Flood Act that the statute was to have no effect on cases such as this one, we cannot overlook the reality that a significant reason for passing such a limited statute was the pure political clout of minor league baseball. See Gary R. Roberts, The Curt Flood Act: A Brief Appraisal of the Curt Flood Act of 1998 from the Minor League Perspective, 9 Marq. Sports L. J. 413 (1999). As is evidenced by the National Football League's lack of success in securing a similar exemption for their franchise relocation rules, no such unequivocal support for Major League Baseball franchise relocation – and certainly none for the unprecedented contraction under investigation here – is apparent.

To be sure, *amici* do not believe that the record of legislative support for minor league baseball, while concededly greater than legislative support for exemption of major league franchise issues, rises to the level of "positive inaction" that would justify a continued exemption under Flood. Rather, *amici* contend that the antitrust laws can be sensibly applied to minor league baseball, and that Flood should be entirely reconsidered. Indeed, like the reserve system as of 1972, whether the Sherman Act can be sensibly applied to minor league baseball is today uncertain, while the continued success of the other major sports leagues that are subject to antitrust scrutiny of franchise relocation clearly demonstrates that, in this regard, baseball is unlikely to be "damaged by statutory regulation." Cf. Flood, 407 U.S. at 268 n.9 (quoting 443 F.2d at 272). However, *amici* do not believe that there are minor league practices that would not pass muster under the rule of reason.

This Court's decision in Professional Baseball Schools does not preclude that conclusion. The Appellees would read the Court's language exempting agreements "integral to the business of baseball," 693 F.2d at 1086, to broadly cover anything a reviewing judge thinks is "integral." We note that "integral" is defined as "essential to completeness," Webster's Third New International Dictionary 376 (1986), and clearly an unprecedented contraction is not essential for baseball.

Moreover, such a broad reading would place Judge Godbold's two-paragraph opinion in unnecessary conflict with the reasoning of Henderson and Postema, where the courts defined the scope of the exemption in terms of baseball's unique characteristics and needs. A better reading of Professional Baseball Schools is that Judge Godbold did not intend to distinguish between conduct "integral to the business of baseball" and conduct that constituted baseball's unique characteristics and needs, especially because minor league baseball would be exempt under either standard. Thus, this precedent does not preclude this Court from limiting the scope of the exemption in a manner consistent with that intended by the Supreme Court in Flood and the results in most subsequent opinions.

3. Contraction is not a "unique characteristic and need."

Collusion to exploit greater stadium subsidies is not remotely a "unique characteristic and need of baseball." While Flood evinced the view that the unique interdependence of sports leagues requires some restriction on totally free competition for players to maintain the quality of the overall product, there is no unique reason to shield from modern antitrust scrutiny the agreement between the National and American Leagues to coordinate expansion and relocation plans in order to contract, so that remaining teams can threaten to relocate to lucrative open markets in order to extort tax subsidies from local taxpayers.

Depending on the facts developed in the investigation, a court applying the rule of reason might impose structural relief requiring the American and National Leagues to make independent franchise decisions, or require the leagues to develop a plan for objective and reasonable access to their monopoly joint venture, or might simply enjoin the specific contraction scheme at issue because of an intent and effect to enhance monopoly profits rather than to improve the quality of baseball.