No. 23-283

In The Supreme Court of the United States

TRI-CITY VALLEYCATS, INC. AND ONEONTA ATHLETIC CORPORATION,

Petitioners,

v.

THE OFFICE OF THE COMMISSIONER OF BASEBALL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS CURIAE BRIEF OF THE STATE OF CONNECTICUT AND SEVENTEEN OTHER STATES IN SUPPORT OF PETITIONERS

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INTEREST OF THE STATE AMICI[1]

The Amici states have powerful economic and sovereignty interests in this Court's reconsidering and overturning the antitrust exemption for the business of baseball.

Amici are the States of Connecticut, Arizona, Colorado, Indiana, Kansas, Louisiana, Minnesota, Montana, New Jersey, New Mexico, New York, Tennessee, Vermont, and West Virginia; the Commonwealths of Massachusetts, Pennsylvania, and Virginia; and the District of Columbia. Each has a long tradition of enforcing federal and state antitrust laws to protect consumers and promote fair competition. And each has deep experience with the ways professional sports —including major and minor league baseball—can strengthen state and local economies and communities. Amici know that professional sports teams and leagues can succeed as competitive businesses while subject to normal antitrust enforcement. After all, every other sport in our states does it.

This case shows how the baseball exemption threatens our sovereign prerogatives and makes it harder for us to build economies and communities.

In 2020, Major League Baseball (MLB) orchestrated a horizontal agreement among its thirty rival clubs to cut affiliated Minor League Baseball (MiLB) teams from 160 to 120, excluding the petitioners

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[1] Under Supreme Court Rule 37.2, amici curiae notified counsel of record of their intent to file this brief at least 10 days before the due date for the brief.

and thirty-eight other MiLB teams from MLB's new organizational plan. That contraction struck at the economic wellbeing of teams and communities in twenty-three states across the country.

But an affected State that wanted to challenge the contraction under its antitrust laws would have no ability to do so. States are preempted from exercising their historic police powers and enforcing their own antitrust laws by a century-old, judge-made federal exemption that covers the business of baseball other than MLB player employment. *Flood v. Kuhn*, 407 U.S. 258 (1972). Courts have repeatedly, if reluctantly, held that the baseball exemption bars states from any antitrust enforcement against the business of baseball. *See*, *e.g.*, *Major League Baseball v. Crist*, 331 F.3d 1177, 1188 (11th Cir. 2003). So the business of baseball has been singled out as the only sport immunized from federal and state antitrust scrutiny.

The exemption, applied to preempt Amici states, offends our sovereignty by impermissibly limiting our historic police powers, which include statutory and common law antitrust enforcement authorities that often predate the Sherman Act. Amici have a strong interest in protecting those historic powers against federal incursion—and especially against an anomalous judge-made preemption rule that states' elected Congressional representatives had no say in creating. The federalism canon precludes judges from handcuffing Amici like that in the face of Congressional silence. *See Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (requiring

an "unmistakably clear" Congressional command before preempting a core state power).

The infringement on our sovereignty goes to the heart of what we do to make our residents' lives better.

For example: petitioner Sea Unicorns used to be a "Single-A" MiLB team in Norwich, Connecticut. They were a hub of community and economic activity, bringing millions to Connecticut's economy; supporting hundreds of local jobs; and contributing to the state tax base.[2] The team drew thousands of residents together throughout each spring and summer to watch ascendant professional ballplayers.[3] But after contraction, the Sea Unicorns can no longer compete for MiLB professional baseball talent. Contraction hurt the Sea Unicorns' drawing power and reduced their economic impact.

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[2] *See* Jimmy Zanor, *Minor League Baseball: Connecticut Tigers Embrace History with New Team Logo: Norwich Sea Unicorns*, THE BULLETIN (Dec. 5, 2019), https://www.norwichbulletin.com/story/sports/2019/12/05/minor-league-baseball-connecticut-tigers/2139540007/ (noting that the team has "raised over 1.6 million dollars in monetary and charitable contributions to this community and the state" and "signed a 10 year lease" and is looking forward to a "bright future").

[3] *See* Claire Bessette, *Norwich Sea Unicorns Will Take the Field at Dodd Stadium in June*, THE DAY (Dec. 4, 2019), https://www.theday.com/local-news/20191204/norwich-sea-unicorns-will-take-the-field-at-dodd-stadium-in-june/# ("[M]ore than 700,000 fans have come to Dodd Stadium," which has "hosted hundreds of other events, including high school and college baseball games and tournaments, car shows and charitable events.").

The same thing happened in states across the country. But under the baseball exemption, neither Connecticut nor any other state, now and into the future, may enforce its antitrust laws to challenge baseball's anticompetitive conduct.

Amici urge this Court to grant the petition and reexamine the antiquated and harmful exemption that also effectively insulates the business of baseball from state antitrust enforcement.

SUMMARY OF THE ARGUMENT

Federal law cannot preempt historic state police-power prerogatives absent an unmistakably clear Congressional command. Antitrust enforcement is undisputedly a function of states' historic police powers. But Congress never spoke at all—much less clearly and unmistakably—to federal preemption of state antitrust enforcement against the business of baseball. This Court created the exemption and applied it against the states despite Congressional silence and the federalism canon. Since then, lower federal courts and state courts have applied the exemption to thwart state investigations into, and enforcement against, the business of baseball.

Inappropriate preemption is just one outgrowth of the flawed logic that underlies the mistaken antitrust exemption for the business of baseball. This Court should grant certiorari and end the aberrational exemption, which has become inextricably intertwined

with an incursion of federal judge-made law into a protected area of state sovereignty.

ARGUMENT

I. The Federalism Canon Bars Preemption of State Antitrust Enforcement Absent an Unmistakably Clear Congressional Command.

In our constitutional system of dual sovereignty, "Congress legislates against the backdrop of certain unexpressed presumptions . . . grounded in the relationship between the Federal Government and the States under our Constitution." *Bond v. United States*, 572 U.S. 844, 857-58 (2014) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)) (internal quotation marks omitted).

The federalism canon of interpretation is rooted in those core structural presumptions, which include the "well-established principle" that federal courts must "be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers." *Bond*, 572 U.S. at 858 (quoting *Gregory*, 501 U.S. at 460) (internal quotation marks omitted). The canon insists that, if Congress wishes to "alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)) (internal quotation marks omitted).

The federalism canon embodies the courts' expectation that Congress respects states' historic police powers: "[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)) (internal quotation marks omitted); *see also Hillsborough Cnty. v. Automated Med. Laby's, Inc.*, 471 U.S. 707, 716-18 (1985) (rejecting an attempt to preempt by inference as "inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence"); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Like other presumptions that armor our constitutional system of dual sovereignty, the "requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue," an intrusion on state authority before a court may conclude that Congress "effect[ed] a significant change" through "legislation affecting the federal balance." *United States v. Bass*, 404 U.S. 336, 349 (1971).

This Court has long recognized that antitrust enforcement is part of states' historic police powers. *Grenada Lumber Co. v. Mississippi*, 217 U.S. 433 (1910) (upholding state antitrust statute as an exercise of the state's police powers); *Nat'l Cotton Oil Co. v. Texas*, 197 U.S. 115 (1905) (same); *Smiley v. Kansas*, 196 U.S. 447 (1905) (same). State common law and statutory antitrust enforcement powers often predate their federal counterparts. By the time Congress enacted the Sherman Act, "21 States had already adopted their

own antitrust laws." *California v. ARC Am. Corp.*, 490 U.S. 93, 101 n.4 (1989); *see also* Charles S. Dameron, *Present at Antitrust's Creation: Consumer Welfare in the Sherman Act's State Statutory Forerunners*, 125 YALE L.J. 1072, 1077 (2016) ("Thirteen state antitrust statutes and five state constitutional antitrust provisions" were "adopted while Congress debated the Sherman Act between 1888 and 1890."). And state antitrust authority is even older than those Gilded Age statutes, which simply encoded "well-recognized principles of the common law." *ARC*, 490 U.S. at 101 n.4. So, as this Court suggested in *ARC*, the federalism canon's presumption against preemption applies to state antitrust laws. "Given the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain that [antitrust] is an area traditionally regulated by the States." *Id*. at 101.

II. Congress Never Overrode States' Historic Antitrust Powers to Regulate the Business of Baseball.

The baseball exemption "is entirely judge-made." *Crist*, 331 F.3d at 1185. So as the Eleventh Circuit summed it up twenty years ago, "one would be hard-pressed to find a clear statement from Congress in favor of [state] preemption." *Id.*

That's an understatement. It doesn't matter how hard you press: No statute makes it "unmistakably clear" that Congress meant to preempt states' historic

antitrust power to regulate anticompetitive baseball activity.

The Sherman Act had nothing to say about baseball. Congress never mentioned baseball in the antitrust context until 1998's Curt Flood Act—and then all it did was specify that MLB players' employment is subject to normal antitrust laws. 15 U.S.C. § 26b. The Flood Act was studiedly silent on all other aspects of the baseball exemption—though not because Congress tacitly approved. *See* Nathaniel Grow, *The Curiously Confounding Curt Flood Act*, 90 TUL. L. REV. 859, 859 (2016) ("Aside from allowing [MLB] players to file antitrust lawsuits against [MLB], the Flood Act was intended to remain neutral regarding the continued vitality and scope of baseball's exemption in all other respects, as Congress went to great lengths to emphasize throughout the legislative process."). And the whole point of a clear statement rule is to shut the door on an argument that silence or negative implication equals Congressional consent to preemption.

Preemption makes no sense in the antitrust context, where Congress never tried to occupy the field. Instead, Congress wanted federal cooperation with state enforcers. The Sherman Act was written in dialogue with state legislatures, in a collaborative burst of national energy to rein in the Gilded Age's anticompetitive monopolies and cartels. *See* Dameron, *supra*, at 1080 (describing the "legislative conversation between Congress and the states" showing "that Congress intended the federal and state antitrust laws to work together as part of a

cohesive national regulatory scheme"). Congress, as this Court has explained, wanted federal antitrust laws "to supplement, not displace, state antitrust remedies." *ARC*, 490 U.S. at 102 (citing 21 Cong. Rec. 2457 (1890) (remarks of Sen. Sherman)). That cooperative regime was reinforced by 1976's Hart-Scott-Rodino Antitrust Improvements Act, which empowered states to enforce antitrust law alongside the federal government. Pub. L. No. 94-435, 90 Stat. 1383; *see also* Philip J. Weiser, *The Enduring Promise of Antitrust*, 52 LOY. U. CHI. L.J. 1, 7 (2020) ("[T]he states are partners in antitrust enforcement, reflecting the cooperative federalism architecture adopted by Congress.").

Reflecting that cooperative approach, the entire thrust of this Court's antitrust jurisprudence—outside the anomalous context of baseball—shows that Congress never intended to preempt state antitrust enforcement. *ARC*, 490 U.S. at 102 ("Congress has not pre-empted the field of antitrust law."). Neither the language of the federal antitrust laws nor the history of their enactment indicates "any congressional purpose to deprive the states, either in whole or in part, of their long-recognized power to regulate combinations in restraint of trade." *Watson v. Buck*, 313 U.S. 387, 404 (1941); *see also Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 133-34 (1978) (the federal antitrust laws cannot be "construed as a congressional decision to pre-empt the power of the Maryland Legislature. . . .").

If any sovereign must give way in the antitrust context, it is the federal government. In *Parker v. Brown*, 317 U.S. 341 (1943), this Court recognized a

circumscribed immunity for state legislative and regulatory schemes from Sherman Act oversight—even if the same scheme, carried out by a private actor, would violate federal antitrust law. *Parker* emphasized that nothing in the Sherman Act's language or history "suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 350-51. Absent any explicit federal policy, federalism requires deference to the traditional state antitrust powers that protect and promote local economies. "[F]ederal antitrust laws," this Court later affirmed, "are subject to supersession by state regulatory programs." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632-33 (1992). Far from evidencing any intent to preempt state laws, then, the Sherman Act "embod[ies] . . . the federalism principle that the States possess a significant measure of sovereignty under our Constitution." *Cmty. Commc'ns Co. v. Boulder*, 455 U.S. 40, 53 (1982).

III. The *Flood* Court Imposed Preemption—and Lower Courts Have Applied It—Without Meaningfully Grappling with the Federalism Canon.

This Court has never held that Congress made any kind of statement, clear or otherwise, preempting state antitrust enforcement power over the business of baseball. The first two cases establishing and upholding the exemption never discuss state preemption at all. *Fed. Baseball Club, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922); *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953).

And *Flood* judicially imposed preemption without considering the federalism canon or the Court's own line of cases requiring proper deference to states' historic antitrust powers.

From the start, though, state prerogatives have been bound up in the mistaken logic of the baseball exemption. The exemption was born from the misconception that the "business [of] giving exhibitions of base ball" involved "purely state affairs." *Fed. Baseball*, 259 U.S. at 208. That premise was factually wrong even in 1922, when baseball was already a national business. *See* Roger I. Abrams, *The Curt Flood Act: Before the Flood: The History of Baseball's Antitrust Exemption*, 9 MARQ. SPORTS L.J. 307, 309 (1999).

But *Federal Baseball* had at least a theoretical upside from states' perspectives: It should have left states free to regulate baseball unrestrained by preemption, since the federal government cannot interfere in "purely state affairs."[4] *See Leisy v. Hardin*, 135 U.S. 100, 122-23 (1890); *Grenada Lumber*, 217 U.S. at 441.

That baseline proposition of federalism doesn't imply the inverse—that a national business is

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[4] It never did, though, since baseball caught enforcers in a neat game of pickle. *See State v. Milwaukee Braves, Inc.*, 144 N.W.2d 1, 23-24 (Wis. 1966) (Heffernan, Hallows, and Beilfuss, JJ., dissenting) ("Baseball has heretofore successfully evaded all control . . . successfully persuad[ing] the United States Supreme Court, that it was purely in intrastate commerce and therefore immune from federal regulation . . . while at the same time it asserts that it is in interstate commerce and therefore immune from state control.").

untouchable by state antitrust law. To the contrary: States have regularly enforced their antitrust laws against corporations and cartels whose business crosses state lines. *See*, *e.g.*, *ARC*, 490 U.S. at 101-02 (allowing states to enforce their antitrust laws, with broader remedial provisions than the federal equivalent, against a national price-fixing cartel). And even the anticompetitive, extraterritorial effect of a state antitrust statute is not alone enough to invalidate it. *Exxon*, 437 U.S. 117.

Still, fifty years after *Federal Baseball*, this Court mistakenly adopted exactly that inverse logic. *Flood* acknowledged that "[p]rofessional baseball is a business and it is engaged in interstate commerce." 407 U.S. at 282. It then pointed to stare decisis and Congress' "positive inaction"—a strange oxymoron—to rationalize retaining the baseball business exemption. *Id.* at 283-84.

But inaction and silence, however "positive," do not equal an "unmistakably clear" statement of intent to preempt "the historic police powers of the States." *Gregory*, 501 U.S. at 460; *Wyeth*, 555 U.S. at 565. *Flood* never discussed the federalism canon in holding for the first time that Congressional "inaction" preempted states from antitrust enforcement. Instead, it summarily disposed of state law antitrust claims without any real preemption analysis:

> The petitioner's argument as to the application of state antitrust laws deserves a word. [The district court] rejected the state law claims because state antitrust regulation

> would conflict with federal policy and because national "uniformity (is required) in any regulation of baseball and its reserve system." The Court of Appeals, in affirming, stated, "As the burden on interstate commerce outweighs the states' interests in regulating baseball's reserve system, the Commerce Clause precludes the application here of state antitrust law." As applied to organized baseball, and in the light of this Court's observations and holding in *Federal Baseball*, in *Toolson*, in *Shubert*, in *International Boxing*, and in *Radovich*, and despite baseball's allegedly inconsistent position taken in the past with respect to the application of state law, these statements adequately dispose of the state law claims.

407 U.S. at 284-85 (citations omitted). State sovereignty should not have been so easily dismissed. Preempting state powers that predated the Sherman Act deserved more than "a word." *See*, *e.g.*, Mary K. Braza, *Antitrust and Major League Baseball: The* MLB v. Crist *Antitrust Preemption Case*, 23 ENT. & SPORTS LAW 1, 18 (2005) ("Courts and commentators alike have struggled" with *Flood*'s summary treatment of preemption.).

Beyond ignoring the federalism canon, *Flood* also never engaged with *Parker*, which suggests that federal antitrust laws should yield to conflicting traditional state prerogatives—not the other way around. In *Parker*, this Court explained that the Sherman Act does not "restrain a state or its officers or agents from activities directed by its legislature." 317

U.S. at 350-51. At least absent a strong Congressional statement to the contrary, that rule should protect state antitrust regulators enforcing state antitrust legislation.

Perhaps more importantly, *Flood* adduced no evidence that Congress cared about—much less spoke clearly to—national uniformity in this or any other antitrust context. Instead, *Flood* appears to be the only case, and baseball the only industry, where this Court has held that federal antitrust law displaces state antitrust law. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 611 (7th Cir. 1997) ("Antitrust law, for example, with an isolated exception, *Flood v. Kuhn* . . . is a field in which Congress has not sought to replace state with federal law."); Alan J. Meese, *Antitrust Regulation and the Federal-State Balance: Restoring the Original Design*, 70 AM. U.L. REV. 75, 96 (2020) (citing baseball as the only instance where federal antitrust laws overrode their state equivalents). As we have seen, there is no Congressional statement or policy requiring preemption here. To the contrary: preempting state enforcement cuts against antitrust's underlying consumer protection and procompetitive policy goals. *See* John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 720 (1986) (*Flood* "took the unusual step of preempting a state's *pro*competitive antitrust law on the supervening authority of an *anti*competitive feature of Sherman Act jurisprudence: the judicially created baseball antitrust exemption.").

But *Flood*'s casually expressed and summarily justified pronouncement on the need for uniformity—

and its consequent sweeping preemption rule—has been adopted by the lower courts as a conclusive bar to state antitrust investigations and enforcement around the business of baseball. *See Crist*, 331 F.3d at 1185 (concluding that *Flood*'s summary language amounted to a holding that the Supremacy Clause barred state antitrust enforcement "even though the declaration that 'these statements adequately dispose of the state law claims' is far from the forceful language characteristic of most holdings"); *City of San Jose v. Off. of the Comm'r of Baseball*, 776 F.3d 686, 691 (9th Cir. 2015) ("*Flood* determined that state antitrust claims constitute an impermissible end run around the baseball exemption."); *Cangrejeros de Santurce Baseball Club, LLC v. Liga de Béisbol Profesional de P.R., Inc.*, No. 3:22-01341-WGY, 2023 U.S. Dist. LEXIS 111850, at *19 (D.P.R. June 27, 2023) (action dismissed based on the Supremacy Clause); *Minn. Twins P'ship v. State by Hatch*, 592 N.W.2d 847, 856 (Minn. 1999) (exempting the Twins baseball team from state and federal antitrust laws).

The lower courts have largely grounded their post-*Flood* holdings in conflict preemption and a concern for national antitrust uniformity, and not in the dormant Commerce Clause. The *Flood* Court did gesture towards the Commerce Clause as a possible justification for displacing state law. But the dormant Commerce Clause would not categorically bar state antitrust enforcement against the business of baseball. It would just require a full analysis of burdens and interests under *Pike v. Bruce Church, Inc.*, and its progeny. 397 U.S. 137

(1970). *Flood* never did that analysis, and it appears that no subsequent court has either. *See Crist*, 331 F.3d at 1186 (declining to engage in a *Pike* analysis "because our Supremacy Clause analysis disposes of the question at hand: federal law establishes a universal exemption in the name of uniformity"). And there is no reason to think that an evenhanded state antitrust enforcement action against the business of baseball would necessarily violate the dormant Commerce Clause—especially after this Court, in *Nat'l Pork Producers Council v. Ross*, confirmed that the Clause's "very core" is antidiscrimination and not supposed extra-territorial burdens. 143 S. Ct. 1142, 1153-54 (2023).

If Congress wants nationwide uniformity on the business of baseball, the federalism canon tells it how to get that: by clearly articulating an intent to displace state antitrust laws. *See Nat'l Pork Producers Council*, 143 S. Ct. at 1160-61 ("If pig husbandry really does imperatively demand a single uniform nationwide rule . . . they are free to petition Congress to intervene. . . . [T]hat body enjoys the power to adopt federal legislation that may preempt conflicting state laws."). Absent that clear statement, states must be able to exercise their police powers to promote competition and protect consumers. *Flood* feared the laboratories of democracy. Congress didn't, and the Constitution doesn't.

CONCLUSION

Flood v. Kuhn was wrongly decided for all the reasons petitioners detail. Among other things: It should not have preempted state antitrust laws in the name of a "uniformity" that Congress never sought. But now the judge-made exemption has become inextricably intertwined with an unconstitutional intrusion into state prerogatives. Along with petitioners' compelling arguments, that is yet another reason why this Court should grant certiorari to reexamine and overrule *Flood*.

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