The MLB's Sports Data Related Activities Should Be Subject to Antitrust Scrutiny: Why Potential Plaintiffs Will Not Strike Out to the Baseball Antitrust Exemption

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ABSTRACT: Lower courts have long struggled to interpret and apply the professional baseball antitrust exemption created by the Supreme Court. Some courts have interpreted the antitrust exemption broadly, and others have interpreted it very narrowly. Given the MLB's recent potentially anticompetitive behavior related to sports data, it could find itself facing an antitrust suit. This Note suggests that district courts should adopt a narrow interpretation of the baseball antitrust exemption and argues that even under the broadest interpretation of the baseball antitrust exemption, the actions of the MLB do not fall within the scope of the exemption. This Note also argues that the collection and distribution of sports data is an independent industry wholly collateral to the game of baseball and, therefore, outside the scope of the professional baseball antitrust exemption.

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I. INTRODUCTION

Since the Supreme Court's decisions in *Murphy v. National Collegiate Athletic Ass'n*, several states have legalized sports gambling.[1] As the number of states that allow sports betting increases, so does the demand for data from sportsbooks.[2] Sportsbooks, which are entities that accept wagers, gather data from different sources and use it to create bets that gamblers can bet on.[3] Leagues such as the National Basketball Association ("NBA") and Major League Baseball ("MLB") have jumped at the opportunity to increase their revenue by collecting and selling data to sportsbooks.[4]

Some of the actions taken by the NBA and MLB can be viewed as anticompetitive and in conflict with antitrust laws.[5] For instance, these leagues or companies licensed by the leagues collect and sell all the data instead of on a team-by-team basis.[6] In addition, the data collected and sold by these leagues or league-licensed companies has been termed "official" data, while data

1. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S.Ct. 1461, 1484–85 (2018); *see* Gregory J. Pelnar, *The Antitrust Perils of Sports Data for U.S. Sports Leagues*, COMPETITION POL'Y INT'L (Apr. 28, 2020), https://www.competitionpolicyinternational.com/the-antitrust-perils-of-sports-data-for-u-s-sports-leagues [https://perma.cc/V67X-GQJY].

2. Pelnar, *supra* note 1.

3. *Sportsbook*, LEXICO, https://www.lexico.com/en/definition/sportsbook [https://perma.cc/Y27C-Z3SY].

4. *See* Wayne Parry, *Leagues Finally Cash in on Sports Betting by Selling Data*, AP NEWS (Jan. 7, 2020), https://apnews.com/article/nj-state-wire-nv-state-wire-sports-betting-us-news-ap-top-news-2fc27b7c558ceddd8669fb03acc15e3d.

5. *See* Pelnar, *supra* note 1.

6. *See id.*

collected by third parties has been termed "unofficial" data, which lends additional credibility to these leagues to use their monopoly power to exclude competitors.[7] Some commentators have speculated that these actions taken by the NBA and MLB could result in an antitrust claim being brought against them.[8]

The MLB has long enjoyed an exemption from antitrust laws. The Supreme Court, in three cases, exempted "the business of baseball" from facing antitrust scrutiny.[9] However, the scope of this exemption is far from clear and lower courts have struggled with interpreting and applying it. This raises the question of whether the MLB's potentially anticompetitive collection and distribution of sports data falls within the scope of the exemption.

This Note argues that the MLB's actions and policies relating to sports data fall outside the scope of the professional baseball antitrust exemption. Part II of this Note first discusses the Sherman Antitrust Act, the creation of the baseball antitrust exemption, and how lower courts have interpreted the scope of the exemption differently. Part III of this Note defines and discusses data, the MLB's potential antitrust violations, and analyzes why lower courts have come to different conclusions about the scope of the baseball antitrust exemption. In Part IV, this Note suggests that lower courts should adopt a narrow interpretation of the baseball antitrust exemption and allow antitrust suits brought against the MLB for its data-related actions, because they fall outside the scope of the exemption.

II. THE CREATION OF THE BASEBALL ANTITRUST EXEMPTION AND ITS INCONSISTENT INTERPRETATION

The MLB's data-related actions fall outside the scope of the baseball antitrust exemption, because of the context in which the exemption was created and how lower courts have interpreted the exemption. This Part first discusses the history and purpose behind antitrust laws, Sections 1 and 2 of the Sherman Antitrust Act which are most relevant to this Note, and how antitrust jurisprudence resulted in the creation of the professional baseball exemption. This Part then explains the Supreme Court decisions that created

7. *See* Matt Rybaltowski, *Here's How Much 'Official' League Data Actually Costs*, SPORTSHANDLE (Mar. 12, 2019), https://sportshandle.com/sports-betting-official-data-cost [https://perma.cc/5RC8-KB6B].

8. *See infra* notes 110–14 and accompanying text.

9. *See* Fed. Baseball Club of Balt., Inc. v. Nat'l League of Pro. Baseball Clubs, 259 U.S. 200, 209 (1922) (creating the MLB antitrust exemption); Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 357 (1953) (per curiam) (upholding the MLB antitrust exemption and coining the term "the business of baseball"); Flood v. Kuhn, 407 U.S. 258, 285 (1972) (upholding the MLB antitrust exemption); *see also* NATHANIEL GROW, BASEBALL ON TRIAL: THE ORIGIN OF BASEBALL'S ANTITRUST EXEMPTION 1 (2014) ("The United States Supreme Court's 1922 decision in Federal Baseball Club of Baltimore, Inc. . . . held that the 'business of base ball' was not subject to the Sherman Antitrust Act . . . .").

the antitrust exemption. Finally, this Part considers how lower courts have struggled to interpret the proper meaning and scope of the baseball exemption.

A. AN OVERVIEW OF ANTITRUST

The United States implemented antitrust laws in the 1890s to deal with a type of "business organization[] called [a] trust."[10] These trusts were legal formations where corporations combined and acted uniformly, but technically remained separate entities.[11] "Each participating corporation retained its individual state charter, but all participants were subject to the control of the newly formed unincorporated entity that held their stock."[12] These types of formations allowed the pooled corporations to facilitate collusion and create a legally binding way to prevent price competition.[13] Trusts "controlled whole sections of the economy, like railroads, oil, steel, and sugar."[14] Trusts had monopoly power and the ability to control the price and supply of the product they provided.[15] This monopoly power and lack of competition from smaller firms resulted in high prices and a lack of choices for consumers, which "caused hardship and threatened . . . American prosperity."[16]

In order to encourage competition among firms, which leads to "lower prices, higher quality products and services, more choices, and greater innovation" for consumers,[17] Congress enacted the first antitrust laws in 1890, the Sherman Antitrust Act ("Sherman Act").[18] "The principle behind the [Sherman] Act was to stop the concentration of economic power, which many lawmakers thought could challenge democracy."[19] Today, antitrust laws play an important role in regulating competition.[20] There are several important

10. Eleanor M. Fox, *Against Goals*, 81 FORDHAM L. REV. 2157, 2157 (2013).

11. *See* ELEANOR M. FOX & DANIEL A. CRANE, CASES AND MATERIALS ON U.S. ANTITRUST IN GLOBAL CONTEXT 8 (Jesse H. Choper et al. eds., 4th ed. 2020).

12. *Id.*

13. *Antitrust Laws*, CFI, https://corporatefinanceinstitute.com/resources/knowledge/finance/antitrust-laws [https://perma.cc/B3Z6-R62P].

14. FED. TRADE COMM'N, FTC FACT SHEET: ANTITRUST LAWS: A BRIEF HISTORY 1, https://www.consumer.ftc.gov/sites/default/files/games/off-site/youarehere/pages/pdf/FTC-Competition_Antitrust-Laws.pdf [https://perma.cc/D5D3-P2LW].

15. *Id.*

16. *Id.*

17. *Guide to Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws [https://perma.cc/T2Q9-CAK7].

18. Brittany Van Roo, *One Trilogy that Should Go* Without *a Sequel: Why the Baseball Antitrust Exemption Should Be Repealed*, 21 MARQ. SPORTS L. REV. 381, 382 (2010).

19. Zachariah Foge, *American Oligarchy: How the Enfeebling of Antitrust Law Corrodes the Republic*, 12 J. BUS., ENTREPRENEURSHIP & L. 119, 125 (2019).

20. *See* FOX & CRANE, *supra* note 11, at 806.

antitrust laws,[21] but the two most relevant to this Note are Section 1 and Section 2 of the Sherman Act.

Section 1 of the Sherman Act focuses on restraints of trade in interstate commerce that lessen competition through some agreement or conspiracy.[22] The section reads "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[23] For plaintiffs to prevail on a Section 1 claim they must show that the defendant participated in concerted activity that restrained trade and impacted interstate commerce.[24]

Section 2 of the Sherman Act focuses on illegal attempts to form a monopoly, and monopolies already formed, as well as the anticompetitive conduct performed by these monopolies.[25] Section 2 reads "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty . . . ."[26] A corporation simply being large is not enough to violate Section 2.[27] However, a violation of Section 2 does occur when a corporation that legally attained monopoly power uses that power to leverage more monopoly power or restrain trade.[28]

Congress passed the Sherman Act to give courts the power to regulate restraints of trade and competition.[29] However, Congress gave little guidance as to how the courts should regulate anticompetitive behavior, so the courts were left to determine this on their own by evaluating each case individually.[30] Courts "appl[ied] reason and economic and civic principles" to create rules that governed restraints of trade.[31] This lack of guidance and system of case-by-case analysis is what led to the birth of Major League Baseball's historic antitrust exemption.

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21. *See* Kerry Gutknecht, *Apple and Amazon's Antitrust Antics: Two Wrongs Don't Make a Right, but Maybe They Should*, 22 COMMLAW CONSPECTUS J. COMMC'NS L. & TECH. POL'Y 160, 165 (2013) (discussing the implementation and purpose of different antitrust laws over time).

22. 15 U.S.C. § 1 (2018).

23. *Id.*

24. Mark C. Anderson, *Self-Regulation and League Rules Under the Sherman Act*, 30 CAP. U. L. REV. 125, 128 (2002).

25. 15 U.S.C. § 2 (2018).

26. *Id.*

27. *See* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 276 (1979) ("[A] large firm does not violate [Section] 2 simply by reaping the competitive rewards attributable to its efficient size . . . .").

28. *See id.*

29. *See* Fox, *supra* note 10, at 2157.

30. *See id.*

31. *See* Gutknecht, *supra* note 21, at 167.

B. BASEBALL'S ANTITRUST EXEMPTION

Major League Baseball's antitrust exemption was created in 1922 when the Supreme Court decided *Federal Baseball Club of Baltimore v. National League of Professional Base Ball Clubs*.[32] The decision was a product of its time, and is one that produced much criticism.[33] However, the Supreme Court revisited and affirmed the MLB antitrust exemption on two different occasions.[34] As a result, the MLB enjoys a vague antitrust exemption that covers the "business of baseball."[35] Since the last time the Supreme Court heard an MLB antitrust exemption case, the baseball antitrust exemption has been challenged numerous times and lower courts have interpreted the scope of the exemption in a variety of ways.[36] The remainder of this Section discusses the creation of the MLB's antitrust exemption and lower courts' interpretations of the scope of the exemption.

1. The Origins of the Baseball Antitrust Exemption

The MLB antitrust exemption was judicially created. The first case to create the baseball antitrust exemption involved a dispute between a Baltimore baseball team, which was a member of the Federal League of Professional Baseball Clubs, and defendants that were associated with an emerging professional baseball league.[37] The Baltimore baseball team claimed that the defendants violated the Sherman Act by conspiring to sabotage its "[l]eague by buying up some of the constituent clubs [in the same league] and in one way or another inducing all those clubs except the [Baltimore club] to leave their [l]eague."[38] In a unanimous decision, the Court held that the Sherman Act did not apply to professional baseball.[39] The Court reasoned the actual business of baseball is the playing of games, "which are purely state affairs."[40] The Court stated that even though teams, players, and even fans may cross states to play or watch an exhibition, the games happened within a state;

32. Fed. Baseball Club of Balt., Inc. v. Nat'l League of Pro. Baseball Clubs, 259 U.S. 200, 209 (1922).

33. *See* GROW, *supra* note 9, at 1.

34. *See* Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 357 (1953) (per curiam); Flood v. Kuhn, 407 U.S. 258, 285 (1972); *see also* GROW, *supra* note 9, at 1 (discussing the historical background of the baseball antitrust exemption).

35. *See Flood*, 407 U.S. at 285 (quoting *Toolson*, 346 U.S. at 357).

36. *See* Brett Smiley, *Antitrust Tripwires: Legal Expert Explains Sports Betting Data Issues*, SPORTSHANDLE (June 4, 2019), https://sportshandle.com/sports-betting-data-antitrust [https://perma.cc/PG3S-L83Y].

37. *Fed. Baseball Club of Balt. Inc.*, 259 U.S. at 207–08; *see also* GROW, *supra* note 9, at 1–3 (giving detailed background information about the circumstances that led to *Federal Baseball Club of Baltimore*).

38. *Fed. Baseball Club of Balt. Inc.*, 259 U.S. at 207.

39. *Id.* at 208–09.

40. *Id.* at 208.

therefore baseball was not interstate commerce and could not be subject to the antitrust laws.[41]

The next important case to further establish the MLB antitrust exemption was *Toolson v. New York Yankees, Inc.* In *Toolson*, the Supreme Court consolidated three cases, all of which involved players' challenges to the MLB reserve clause under the Sherman Act.[42] The "reserve clause" allowed professional baseball teams to limit their players' freedom to play for a different team by "bind[ing] players to one-year contract extensions at the sole discretion of the team."[43] In a decision that spanned the length of a single paragraph, the Court chose not to examine the issue of whether the reserve clause violated antitrust laws.[44] Instead it held that the business of baseball was not within the scope of the antitrust laws on the basis of *stare decisis*.[45] The Court reasoned that baseball had built its business under the impression that it was immune from liability under antitrust laws, and Congress was aware of the baseball antitrust exemption and chose to leave it alone.[46] The Court thought "that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation."[47]

The dissenting opinion in *Toolson*, written by Justice Burton, took issue with the Court's failure to recognize that baseball was involved in interstate commerce.[48] The dissent stated that given the nature of the MLB and the way it had grown into a big business that expanded across the nation and into other countries, it was contradictory to say baseball was not engaged in interstate commerce and therefore could avoid liability under antitrust laws.[49] The dissent pointed out that Congress had recognized that baseball was engaged in interstate commerce.[50] The dissent argued baseball should be

41. *Id.* at 208–09.

42. Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 356 (1953) (per curiam).

43. Luke Walker, Note, *American Baseball Player Reserve Clause Issues Resurrected in Korea*, 4 ARIZ. ST. SPORTS & ENT. L.J. 187, 188 (2014).

44. *Toolson*, 356 U.S. at 357.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 357–58 (Burton, J., dissenting).

49. *Id.* (It is inappropriate to say that baseball is not partaking in interstate commerce, "[i]n the light of organized baseball's well-known and widely distributed capital investments used in conducting competitions between teams constantly traveling between states, its receipts and expenditures of large sums transmitted between states, its numerous purchases of materials in interstate commerce, the attendance at its local exhibitions of large audiences often traveling across state lines, its radio and television activities which expand its audiences beyond state lines, its sponsorship of interstate advertising, and its highly organized 'farm system' of minor league baseball clubs, coupled with restrictive contracts and understandings between individuals and among clubs or leagues playing for profit throughout the United States, and even in Canada, Mexico and Cuba . . . .").

50. *Id.* at 358–59.

subject to antitrust laws, and that if it is to enjoy an exemption from antitrust laws, the exemption should be one granted by Congress and not the judiciary.[51]

Before the Supreme Court heard the final part of the baseball antitrust trilogy, they refused to extend the exception to football and solidified the exception as applying to only baseball. In *Radovich v. National Football League*, a football player brought an antitrust claim against the NFL after a contract dispute resulted in the player being blackballed from the league.[52] The NFL argued that because of the similarities between professional football and professional baseball, *Federal Baseball Club* and *Toolson* controlled, and the NFL should enjoy the same exemption from antitrust laws as professional baseball did.[53] The Court disagreed.[54] In holding that the business of professional football was engaged in interstate commerce and subject to the Sherman Act, the Court "specifically limit[ed] the rule . . . established [in *Toolson* and *Federal Baseball Club*] to the facts there involved, i.e., the business of organized professional baseball."[55]

The Supreme Court cemented the fact that baseball has at least some form of antitrust exemption in the final case of the baseball trilogy. *Flood v. Kuhn* was the result of another professional baseball player challenging the validity of MLB's reserve clause under antitrust laws.[56] In *Flood*, the Court stated that "[p]rofessional baseball is a business and it is engaged in interstate commerce."[57] The Court recognized that the antitrust exemption created in *Federal Baseball Club* and *Toolson* was "an anomaly" and "an aberration confined to baseball."[58] However, the Court adhered to stare decisis and repeated what it said in *Toolson*, that baseball is exempt from antitrust laws, and Congress should be the one to change this if they deem it necessary to do so.[59] The Court reasoned that the professional baseball antitrust exemption existed for 50 years, and Congress's failure to create legislation to undo the exemption was "positive inaction" which suggested that it did not disapprove of the exemption.[60]

Justice Douglas dissented, arguing that the Court's view of commerce had drastically changed since *Federal Baseball Club* was decided in 1922.[61] The

51. *Id.* at 364–65.

52. Radovich v. Nat'l Football League, 352 U.S. 445, 448–49 (1957).

53. *Id.* at 449–50.

54. *Id.* at 451–52.

55. *Id.* at 451. The Court noted that the decision to subject professional football to antitrust laws, but allow professional baseball to be exempt may seem "unrealistic, inconsistent, or illogical," and that if it had been deciding on if baseball was exempt at the time it decided *Radovich*, it "would have no doubts" that baseball was engaged in interstate commerce. *Id.* at 452.

56. Flood v. Kuhn, 407 U.S. 258, 264–65 (1972).

57. *Id.* at 282.

58. *Id.*

59. *Id.* at 285 (citing Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 357 (1953) (per curiam)).

60. *See id.* at 283–85.

61. *See id.* at 286 (Douglas, J., dissenting).

Justice stated that "[b]aseball [was] big business that is packaged with beer, with broadcasting, and with other industries."[62] Justice Douglas believed that congressional silence on the matter should not prevent the Court from correcting the mistake it made in 1922.[63]

Justice Marshall also dissented saying congressional inaction should not prevent the Court from overturning the poorly reasoned cases.[64] He pointed out that *Flood* presented a tough problem for the Court because the Court had to choose between adhering to *stare decisis* or overturning *Federal Baseball Club* and *Toolson* in favor of cases that were "more recent and better reasoned" but completely contrary to those cases.[65] Justice Marshall believed that the majority focused too much on legislative silence.[66] The Justice stated that "when [the Court's] errors deny substantial federal rights, like the right to compete freely and effectively to the best of one's ability as guaranteed by the antitrust laws, we must admit our error and correct it."[67]

2. Lower Courts Struggle with the Scope of the Exemption

The Supreme Court's decision in *Flood* cemented the fact that professional baseball enjoys some sort of antitrust exemption, but "[t]he continued viability and scope of the baseball exemption are far from clear."[68] The ambiguity regarding the scope of "business of baseball" has resulted in much litigation and different interpretations by lower courts. Some courts have interpreted the exemption to be a narrow one, while others have interpreted it to be broad.

In one of the first cases after the *Flood* decision, a district court in Texas decided to interpret the baseball antitrust exemption narrowly.[69] In *Henderson Broadcasting Corp. v. Houston Sports Ass'n*, a broadcasting company brought an antitrust suit against the owners of the Houston Astros and another broadcasting company.[70] The plaintiff broadcasting company claimed that the Houston Sports Association ("HSA") and the defendant broadcasting company conspired to drive it out of the market in order to increase advertising revenue and lessen competition.[71] The defendants claimed that broadcasting was central to the game of baseball, and therefore their actions fell within the antitrust exemption.[72]

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62. *Id.* at 287.

63. *Id.* at 288.

64. *See id.* at 292 (Marshall, J., dissenting) ("In Toolson the Court refused to act because Congress had been silent. But the Court may have read too much into this legislative inaction.").

65. *Id.* at 290.

66. *Id.* at 292.

67. *Id.* at 292–93.

68. Laumann v. Nat'l Hockey League, 56 F. Supp. 3d 280, 295 (S.D.N.Y. 2014).

69. Henderson Broad. Corp. v. Hous. Sports Ass'n, 541 F. Supp. 263, 271–72 (S.D. Tex. 1982).

70. *Id.* at 264.

71. *Id.*

72. *See id.* at 268.

The court disagreed with the defendants for three reasons: (1) the Supreme Court had indicated broadcasting was not essential to the business of baseball, (2) actions taken by Congress suggested that broadcasting was not within the scope of the extension, and (3) similar businesses that were "separate and distinct from baseball" were determined not to be within the scope of the exemption by other lower courts.[73] The court was of the opinion that broadcasting baseball games was "a distinct and separate industry," and allowing the baseball exemption to cover the defendants' actions would provide baseball with protection far beyond what is necessary.[74]

In *Postema v. National League of Professional Baseball Clubs*, a federal district court in the Southern District of New York drew the line for the baseball exemption narrowly, confining it to "league structure and its reserve system."[75] This case involved, among other things, an antitrust claim brought by a female umpire that professional baseball leagues conspired to keep her from progressing in her career and forced her out of umpiring.[76] The court decided that the appropriate interpretation of the baseball antitrust exemption was a narrow one[77] and that the plaintiffs claim in this case was viable because it fell outside the scope of the exemption.[78]

In *Piazza v. Major League Baseball*, a federal district court in Pennsylvania adopted an even narrower view of the baseball antitrust exemption.[79] In *Piazza*, plaintiffs attempting to acquire an MLB team brought an antitrust claim against the MLB and MLB team owners, claiming the defendants conspired to keep them from buying the team.[80] The court disagreed with the defendants' arguments that their actions were exempt. According to the court, the baseball antitrust exemption was confined to its reserve system.[81] Furthermore, *Federal Baseball*, *Toolson*, and *Flood* were only controlling precedent in cases that challenged the reserve clause.[82] Notably, the court differentiated between

73. *Id.* at 265.

74. *Id.* at 271 ("The reserve clause and other 'unique characteristics and needs' of the game have no bearing at all on the questions presented. To hold that a radio station contract to broadcast baseball games should be treated differently for antitrust law purposes than a station's contract to broadcast any other performance or event would be to extend and distort the specific baseball exemption, transform it into an umbrella to cover other activities and markets outside baseball and empower defendants radio station and 'network' to use that umbrella as a shield against the statutes validly enacted by Congress.").

75. Postema v. Nat'l League of Pro. Baseball Clubs, 799 F. Supp. 1475, 1489 (S.D.N.Y. 1992), *rev'd*, 998 F.2d 60 (2d Cir. 1993).

76. *Id.* at 1479–80.

77. *Id.* at 1489.

78. *Id.* ("Unlike the league structure or the reserve system, baseball's relations with non-players are not a unique characteristic or need of the game. Anti-competitive conduct toward umpires is not an essential part of baseball and in no way enhances its vitality or viability.").

79. *See* Piazza v. MLB, 831 F. Supp. 420, 438 (E.D. Pa. 1993).

80. *Id.* at 422–23.

81. *See id.* at 438.

82. *See id.*

anticompetitive actions relating to games and anticompetitive actions relating to ownership of teams.[83] The court believed that anticompetitive actions related to the buying and selling of teams were not protected by the antitrust exemption.[84]

Although a fair amount of lower courts have chosen to interpret the professional baseball antitrust exemption narrowly, the Eleventh Circuit has taken the view that baseball enjoys a broad antitrust exemption.[85] In *Major League Baseball v. Crist*, the MLB sought to use its antitrust exemption to prevent the Attorney General of Florida from conducting a civil investigation into the attempted relocation of MLB teams in Florida.[86] The court noted that "[t]he [baseball] exemption was founded upon a dubious premise, and it has been upheld in subsequent cases because of an equally dubious premise."[87] Nevertheless, the court stated that it was bound by *stare decisis* to hold that the narrow view of the exemption argued for by the defendant was inappropriate and that the contractual issues at hand fell within the scope of the exemption.[88]

In two more recent cases brought in the Southern District of New York, the courts came to two different conclusions regarding the scope of the baseball antitrust exemption. In a case involving broadcasting rights, a court interpreted the scope of the exemption narrowly, and held that contracts involving TV broadcasting games did not fall within the scope of the exemption.[89] However, two years later a court in the same district chose to interpret the scope of the exemption broadly.[90] The court held that the relationship between umpires and the MLB undoubtedly fell within the exemption.[91]

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83. *See id.* at 440.

84. *Id.* at 441 ("[A]lthough teams, as business entities engaged in exhibiting baseball games, are undoubtedly a unique necessity to the game, the transfer of ownership interests in such entities may not be so unique. Moreover, anticompetitive conduct toward those who seek to purchase existing teams has never been considered by any court to be an essential part of the exhibition of baseball games.").

85. Major League Baseball v. Crist, 331 F.3d 1177, 1189 (11th Cir. 2003).

86. *Id.* at 1179–81.

87. *Id.* at 1188 (footnote omitted).

88. *Id.* at 1189 ("[W]e do not fault the position taken by some courts, and the arguments proffered by the Attorney General, that the exemption should be extremely narrow. Even so, we believe that a good faith reading of Supreme Court precedent leaves us no choice but to reach the following conclusion[] . . . contraction is a matter that falls within the 'business of baseball' . . . .").

89. Laumann v. Nat'l Hockey League, 56 F. Supp.3d. 280, 297 (S.D.N.Y. 2014) ("Exceptions to the antitrust laws are to be construed narrowly. Moreover, the Supreme Court has expressly questioned the validity and logic of the baseball exemption and declined to extend it to other sports. I therefore decline to apply the exemption to a subject that is not central to the business of baseball, and that Congress did not intend to exempt—namely baseball's contracts for television broadcasting rights." (footnote omitted)).

90. Wyckoff v. Off. of the Comm'r of Baseball, 211 F.Supp.3d 615, 625–27 (S.D.N.Y. 2016).

91. *See id.* at 626–27 ("The employment relationship between baseball scouts and Franchises is central to the 'business of baseball.' Scouts play a critical role in directing talent to the Franchises, and the quality of the players is largely what determines success on the field as well as success in the 'business of baseball.'").

The Ninth Circuit also adopted a broad interpretation of the professional baseball antitrust exemption. In *San Jose v. Commissioner of Baseball*, the city of San Jose brought an antitrust claim against the MLB claiming that they were conspiring to prevent the Athletics from moving locations in order to preserve another Franchise's monopoly on an area.[92] The court held that although there may be some aspects of the game that fall outside of the exemption, the Supreme Court intended the exemption to be broad, and the relocation of teams falls within the exemption.[93]

III. POTENTIAL ANTITRUST VIOLATIONS AND THE DIFFERENT INTERPRETATIONS OF THE BASEBALL ANTITRUST EXEMPTION

Given the unpredictability of how lower courts will interpret the scope of the antitrust exemption, the MLB would likely argue that any potentially anticompetitive actions fall within the scope of the exemption. However, under both a narrow and broad interpretation of the exemption, this argument is likely to be unsuccessful. This Part begins by discussing the difference between "official" data and "unofficial" data and why the demand for data has spiked recently. This Part then explains the antitrust implications of sports leagues' recent activity relating to the collection and distribution of data, and their possible violations of Section 1 and Section 2 of the Sherman Act. This Part concludes by analyzing the ambiguity surrounding the baseball antitrust exemption and compares the decisions of courts that have interpreted the scope of the baseball antirust broadly verse courts who have interpreted it narrowly.

A. TYPES OF LEAGUE DATA AND WHY ITS DEMAND HAS INCREASED

To understand whether an antitrust claim brought against the MLB falls within the baseball antitrust exemption, it is important to understand the difference between "official" and "unofficial" data and why the demand for data has increased. Sports data can be defined and broken down into many different and detailed categories.[94] The type of data that is most relevant to this Note is data that is collected during sporting events, such as the score of

92. San Jose v. Off. of the Comm'r of Baseball, 776 F.3d 686, 688 (9th Cir. 2015).

93. *Id.* at 690–91 ("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." (quoting Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 541 (7th Cir. 1978))).

94. *See, e.g.*, Ryan M. Rodenberg, *Antitrust Standing after* Apple v. Pepper: *Application to the Sports Betting Data Market*, 64 ANTITRUST BULL. 584, 588–89 (2019) (breaking down the different types of data and discussing how each type differs from the other); Christian Frodl, *Commercialisation of Sports Data: Rights of Event Owners Over Information and Statistics Generated About Their Sports Event*, 26 MARQ. SPORTS L. REV. 55, 56–59 (2015) (breaking down sports data into three categories); Pelnar, *supra* note 1 (breaking down the different types of data and discussing different ways data can be categorized).

the game, amount of time left in the game, weather, attendance, amount of timeouts left, fouls, pitches, etc., which some refer to as "game state information."[95] This type of data is collected by leagues, but it is also easy for non-league parties to track and record this information as well.[96] Once this data is collected, whether by leagues or third parties, it is sold to sportsbooks.[97] Sportsbooks in turn use this data to create odds and bets, and it is especially useful for creating bets for games that are currently in progress.[98]

The distinction between "official" and "unofficial" league data is not a complicated one. A Tennessee statute defines official data as "data related to a sporting event obtained pursuant to an agreement with the relevant governing body of a sport or sports league, organization, or association . . . or an entity expressly authorized by such governing body to provide such information to licensees for purposes of live betting."[99] Thus, official data is data collected by sports leagues themselves or by firms that specialize in collecting and disseminating data that are authorized and approved by a league to do so.[100] Unofficial data is simply data used by sportsbooks for in-game betting that is not collected by a league or a league-certified company.[101] The main difference between official and unofficial data when used by a sportsbook is that official data is received faster, which allows them to generate odds for in-game betting quicker.[102] Another difference is that official data is always accurate, whereas unofficial data could be slightly off.[103] Although it is possible that unofficial data varies from official data, many opine "that there is little distinction between the official league data being used to create in-game probabilities and statistical information provided from [unofficial] sources," and the gap between the two is "becom[ing] less pronounced."[104]

In *Murphy v. National Collegiate Athletic Association*, the Supreme Court deemed that a federal ban that did not allow states to "legalize sports gambling" was unconstitutional, allowing individual states to decide whether

95. *See* Brett Smiley, *How 'Unofficial' Sports Betting Data May Be Better Than 'Official League Data'*, SPORTSHANDLE (June 5, 2019), https://sportshandle.com/unofficial-official-league-data [https://perma.cc/BR3Z-RQ22]; Pelnar, *supra* note 1 ("Event and performance data include the vast array of data collected during the conduct of a sporting event and includes both external circumstances about the event (e.g. weather, attendance) and data regarding game performance (e.g. points scored).").

96. Pelnar, *supra* note 1.

97. Rodenberg, *supra* note 94, at 589.

98. *See* Parry, *supra* note 4.

99. TENN. CODE ANN. § 4-51-302(17) (West 2021). Tennessee and Illinois are two states that implemented "data mandates" that require sportsbooks to purchase data from official data providers. Rodenberg, *supra* note 94, at 589; *see also* TENN. CODE ANN. § 4-51-316 (West 2021); 230 ILL. COMP. STAT. ANN. 45/25-60 (West 2021).

100. Rodenberg, *supra* note 94, at 589.

101. Rybaltowski, *supra* note 7.

102. *See* Smiley, *supra* note 95.

103. *See* Rybaltowski, supra note 7.

104. *Id.*

they would allow it.[105] Since the Court's decision in *Murphy*, 28 states and Washington, D.C. legalized and launched sports betting,[106] growing the demand for sports-related data.[107] The increase in gambling that has followed from the legalization of sports betting in a growing number of states has made sports leagues feel that they should have a say in the progression of sports gambling.[108] Sports leagues—the NBA and MLB in particular—have been trying to force sportsbooks to use official data only by signing deals with data companies to collect and disseminate data to sportsbooks,[109] asking for "integrity fees,"[110] and lobbying state legislatures and Congress.[111] Leagues argue that the use of official sports data is necessary to maintain the integrity of the sports.[112] Leagues maintain that their reputation could be damaged if different data resulted in inconsistent outcomes for sportsbooks.[113] However, many commentators have acknowledged that the actions by leagues to try to force sportsbooks to use official data could implicate antitrust laws.[114]

B. BRIEF ANTITRUST ANALYSIS

Leagues would gain pricing power if they were able to require sportsbooks to use official data. While data price trends have stayed steady since the legalization of sports gambling, leagues would gain pricing power if official data mandates were implemented in several states.[115] When sportsbooks have multiple options to choose from when buying sports data, the suppliers of the data must price it competitively, but a mandate requiring sportsbooks to buy

105. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1468 (2018) (holding that the Professional and Amateur Sports Protections Act, which prevented states from implementing sports betting, violated the Tenth Amendment of the Constitution).

106. *Interactive Map: Sports Betting in the U.S.*, AM. GAMING ASS'N (Jan. 11, 2022), https://www.americangaming.org/research/state-gaming-map [https://perma.cc/XJ6R-MMGD]. In four additional states, sports betting is legal but not yet offered to consumers. *Id.*

107. Pelnar, *supra* note 1.

108. Ethan Sanders & Aalok Sharma, *Who's on First? – The Fight Over Official Sports Data After* Murphy, JD SUPRA (Mar. 12, 2019), https://www.jdsupra.com/legalnews/who-s-on-first-the-fight-over-official-81726 [https://perma.cc/F9X4-ZXP8].

109. *See* Rybaltowski, *supra* note 7.

110. *See* Steve Ruddock, *Gaming Experts Agree: Leagues Can't Explain Why They Need Integrity Fees*, LEGAL SPORTS REP. (July 25, 2018), https://www.legalsportsreport.com/22190/nclgs-integrity-fees-skepticism [https://perma.cc/987S-ZFPP].

111. *See* Pelnar, *supra* note 1.

112. Rybaltowski, *supra* note 7.

113. *Id.*

114. *See* Marc Edelman, *Sports Data Policies Could Represent Next Big Antitrust Challenge for Pro Sports Leagues*, FORBES (June 10, 2019, 9:30 AM), https://www.forbes.com/sites/marcedelman/2019/06/10/sports-data-policies-could-provide-next-big-antitrust-challenge-for-pro-sports-leagues/#3f141e753284 [https://perma.cc/283MDTSP]; Rodenberg, *supra* note 94, at 590, 592; *see also generally* Pelnar, *supra* note 1 (discussing how the increased monetization of sports data implicates antitrust laws); Smiley, *supra* note 36.

115. *See* Rybaltowski, *supra* note 7.

from leagues would give the leagues "complete control over the price."[116] An executive from William Hill, a large sports betting company, testified to the State of New York Senate Racing, Gaming, and Wagering Committee that "[m]andating the use of 'official league data' just results in monopoly pricing power for the professional sports leagues."[117]

To prevent leagues from gaining this pricing power, and hurting sports data consumers, potential plaintiffs[118] could bring a claim under antitrust laws. Given the actions of the sports leagues, they are most likely to be charged under Section 1 or Section 2 of the Sherman Act.[119] "The recent practices of [sports leagues] to centralize 'ownership' of sports league data on the league (rather than team) level and then attempt to require their business partners to use only their data (and not [unofficial data]) raises . . . questions under both sections of the Sherman Act."[120]

1. Possible Section 1 Violations

There are several possible ways in which a sports league could violate Section 1. One way is if the league has the rights to sell the data collected at team games and prevents anyone else from selling it.[121] Because each team is its own entity separate from the league, a league's decision to collect and distribute data jointly and prevent teams from competing in the data market individually could give rise to a Section 1 claim. This behavior could be seen as an agreement between teams to restrict competition and raise prices.[122] That type of agreement presents a situation similar to the one presented to the Supreme Court in *American Needle v. NFL*.[123] In *American Needle*, the Supreme Court held that the NFL's policy treating the individual teams as a whole and allowing Reebok to be the sole provider of fanwear with official logos was a violation of Section 1 of the Sherman Act.[124] The similarities between *American Needle* and the scenario created when teams collect and sell

116. Ruddock, *supra* note 110.

117. *Testimony of Danielle Boyd, Head of Government Relations, William Hill U.S. Before the State of N.Y. S. Racing, Gaming, and Wagering Comm.* (May 8, 2019).

118. "Potential plaintiffs include sports data distributors and sports betting operators." Pelnar, *supra* note 1 at 4.

119. Pelnar, *supra* note 1.

120. Edelman, *supra* note 114.

121. *Id.*

122. *See* Smiley, *supra* note 36. ("Because the NBA is made up of 32 separate entity teams (and MLB, 30 entity teams), each league's policy to allocate team-specific rights collectively on a league-wide level may give rise to a potential antitrust violation under Section 1 of the Sherman Act, as it prevents individual teams from selling their data to individual gaming companies on a free market.").

123. Pelnar, *supra* note 1.

124. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 186 (2010); *see also* Pelnar, *supra* note 1 (discussing *American Needle* and how it relates to the scenario presented with sports leagues and sports data).

data at the league level would likely lead a court to view *American Needle* as controlling and hold that leagues have violated Section 1.[125] Forcing a sportsbook to buy directly from leagues is likely to increase their costs because, without competition from other data providers, leagues will have the power to set prices above a competitive level, since they would not have to worry about a competitor undercutting their prices.[126]

Another claim that could be brought by individual teams is for preventing them from profiting from their data.[127] Teams could claim they have the right to income earned off of collecting and selling data, and that centralizing the collection and distribution of data at the league level deprives them of this right.[128] Exclusive licenses with third parties to collect and sell data to sportsbook could also constitute a restraint of trade under Section 1 of the Sherman Act.[129]

One other possible claim that could be brought under Section 1 is a "huband-spoke [sic] conspiracy" with Sportradar,[130] at the center of the conspiracy.[131] "[A] hub-and-spoke conspiracy is a cartel in which a firm (the hub) organizes collusion (the rim of the wheel or the rim) among upstream or downstream firms (the spokes) through vertical restraints."[132] This type of cartel allows firms at the same level of the supply chain to act in coordination without expressly agreeing to do so.[133] Whether or not this claim is viable would likely require empirical analysis.[134]

2. Possible Section 2 Violations

Sports leagues' conduct with regards to sports data could potentially result in a violation of Section 2 of the Sherman Act. Although it is not illegal to have a monopoly, which sports leagues do over their games, it is a violation of Section 2 to use that monopoly power to try to gain or create a monopoly

125. *See* Pelnar, *supra* note 1.

126. *See* Edelman, *supra* note 114.

127. Pelnar, *supra* note 1.

128. *See id.* (comparing potential claims relating to data brought by a team to past antitrust claims where teams in different leagues prevailed against the league).

129. *See* Edelman, *supra* note 114.

130. Pelnar, *supra* note 1 ("[Sportradar] has about 90 percent of the U.S. sportsbook operator market, is partially owned by the NFL and three NBA owners . . . and according to its own website has exclusive distribution rights agreements with the NFL, NHL, MLB, and Nascar, and has a non-exclusive betting data distribution rights agreement with the NBA.").

131. *Id.*

132. Barak Orbach, *Hub-and-Spoke Conspiracies*, 15 ANTITRUST SOURCE 1, 1 (2016) (giving an in-depth explanation of hub-and-spoke conspiracies in antitrust); *see, e.g.*, Interstate Cir. v. United States, 306 U.S. 208, 216–19 (1939) (detailing the relationship and collusion between managers of movie theatres (the hub) and movie distributors (the spokes)).

133. *See* Orbach, *supra* note 132, at 1–3.

134. *See* Pelnar, *supra* note 1. Further empirical analysis is outside the scope of this Note.

in another market, or to perform other types of exclusionary conduct.[135] Some claims, such as challenging the practice of centralizing the collection and distribution of data, may not violate Section 1 but could "be found to violate Section 2 under a monopoly leveraging theory."[136]

There are several ways in which sports leagues could potentially violate Section 2 of the Sherman Act. Plaintiffs in a Section 2 claim are likely to claim that a league is using the monopoly it has over sports games to form a new monopoly in the sports data market.[137] Potential violations include "preventing third-parties from collecting data, degrading the usefulness of the third-party's data by requiring the use of official league data, or denying access to an 'essential facility . . . for offering in-game betting."[138] Actions that prevent the distribution of data by third parties who gather information on their own by watching events, either live or in person, present problems under Section 2.[139] The most likely plaintiff in this scenario would be a non-licensed company attempting to compete with leagues in the market for collecting and distributing data.[140] The problem with sports leagues being able to exclude non-licensed sports data companies is that it allows the licensed companies, even if they are non-exclusive licensees, to charge higher prices to consumers because they do not have to compete with third parties that may charge a lower price.[141]

To determine whether a league has violated Section 2 of the Sherman Act a court would have to apply an in depth rule of reason analysis.[142] Courts apply a rule of reason analysis when the alleged violation of antitrust laws is not per se illegal.[143] Rule of reason analysis requires courts to define the relevant product and geographic markets, determine the amount of market power the defendant has in the defined market, and weigh the anticompetitive

135. *See* Edelman, *supra* note 114.

136. Smiley, *supra* note 36.

137. Pelnar, *supra* note 1.

138. *Id.*

139. *See* Smiley, *supra* note 36.

140. Pelnar, *supra* note 1.

141. Smiley, *supra* note 36. "What a free market really needs is the opportunity for other companies, without restraint, to compete against the leagues and their licensed providers in the market to collect, organize, and resell game data." *Id.*

142. *See* Pelnar, *supra* note 1 (discussing all of the factors a court would consider when undergoing a rule of reason analysis to determine whether a league has violated Section 2 of the Sherman Act).

143. *See* Michael A. Carrier, *The Four-Step Rule of Reason*, 33 ANTITRUST 50, 50–51 (2019). "[C]ertain acts are considered so harmful to competition that they are almost always illegal. These include plain arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids. These acts are 'per se' violations of the Sherman Act [and] . . . no defense or justification is allowed." *The Antitrust Laws*, FED. TRADE COMM'N (emphasis omitted), https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/9KR9-Y3A4].

consequences of an action against its procompetitive rationales.[144] In this case, the product market would depend on what type of data is seen as substitutable or equivalent to official data, and the geographic market could be as small as a single state or as large as the United States or beyond.[145] Once the product and geographic market is defined, a court would determine how much market power the league has, and then weigh anticompetitive effects of the league's action against its procompetitive justifications.[146]

C. Determining the Scope of the Baseball Antitrust Exemption

The potential antitrust violations described above are not likely to be protected by the MLB's antitrust exemption. Although baseball does enjoy some type of antitrust exemption that encompasses the "business of baseball," the scope of this exemption is uncertain. There is "real ambiguity" as to what exactly the baseball antitrust exemption covers, and it is definitely uncertain whether it exempts the MLB's actions "in[] the realm of commercial business practices."[147] Indeed, even some cases that interpret the scope of the baseball antitrust exemption broadly acknowledge that the exemption is not all encompassing.[148] Because the MLB's policies relating to data are a commercial business practice, it is uncertain whether the league would be protected by the exemption if an antitrust claim was brought against it for these matters.[149] To determine whether the practices related to data fall outside the scope of the exemption, it is necessary to analyze the cases that have tried to interpret the scope of the exemption.

1. A Broad Interpretation of the Exemption

Several courts have interpreted the scope of the baseball antitrust exemption broadly. In *Wyckoff v. Office of the Commissioner of Baseball*, a court in the Southern District of New York chose to apply the baseball antitrust exemption broadly.[150] Stare decisis was the main reason the court adopted a broad interpretation of the exemption.[151] The court quoted language from *Toolson*, and indicated that there was no need to look into the issue at hand because Congress did not intend for baseball to be covered by antitrust laws.[152]

144. *Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, BONALAW, https://www.businessjustice.com/antitrust-standards-of-review-the-per-se-rule-of-reason-and-quic.html [https://perma.cc/4YD2-KUKD].

145. *See* Pelnar, *supra* note 1.

146. *See id.*

147. Smiley, *supra* note 36.

148. *See* Major League Baseball v. Crist, 331 F.3d 1177, 1186–87 (11th Cir. 2003); City of San Jose v. Off. of the Comm'r of Baseball, 776 F.3d 686, 690 (9th Cir. 2015).

149. Smiley, *supra* note 36.

150. Wyckoff v. Off. of the Comm'r of Baseball, 211 F. Supp. 3d 615, 625–26 (S.D.N.Y. 2016).

151. *Id.*

152. *Id.* (quoting Toolson v. New York Yankees, Inc., 346 U.S. 356, 357 (1953)).

The court also stated that it was bound by *Salerno v. American League of Professional Baseball Clubs*, a Second Circuit case that decided that antitrust laws did not apply to baseball before *Flood* was decided.[153] The *Wyckoff* court also reasoned that work done by scouts has an impact on the quality of baseball games, so it could not be considered to be outside the scope of the exemption.[154] The court stated that the exemption "is not limited solely to the players who appear on the field," and indicated that anything on or off the field that helps create better quality games falls within the scope.[155]

In *City of San Jose v. Office of the Commissioner of Baseball*, the Ninth Circuit also decided to interpret the baseball antitrust exemption broadly. In deciding the scope of the exemption was broad, the court focused on stare decisis and Congress's decision to leave the exemption alone.[156] With regard to stare decisis, the court noted that the first two cases the Supreme Court decided "intended to exempt the business of baseball, not any particular facet of that business," and *Flood v. Kuhn* did nothing to change the scope of this exemption.[157] When discussing Congress's decision not to legislate on the scope of the baseball exemption, the court focused on the fact that Congress did pass the Curt Flood Act, which ended the protection of baseball's reserve system from antitrust laws and chose not to remove anything else from the protection given to baseball by the exemption.[158] According to the court, the relocation of franchises fell squarely within the exemption, and reasoned that some actions taken by baseball teams and the league may not be protected by the antitrust exemption.[159] To be outside of the scope of the exemption the activities must be "wholly collateral to the public display of baseball games."[160]

The Eleventh Circuit also determined that the baseball antitrust exemption should be interpreted broadly, even though it was hesitant to do so. In holding that contraction was within the scope of the baseball exemption, the court reasoned that it was bound by Supreme Court precedent.[161] The court noted that the reasoning behind the exemption no longer made sense because what is considered commerce under the commerce clause and antitrust laws has changed significantly since the creation of the professional baseball antitrust exemption.[162] However, the court stated that only the Supreme

153. *Id.* at 626 (citing Salerno v. Am. League of Pro. Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970)).

154. *Id.*

155. *Id.* at 627.

156. City of San Jose v. Off. of the Comm'r of Baseball, 776 F.3d 686, 690 (9th Cir. 2015).

157. *Id.* (quoting Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 541 (7th Cir. 1978)).

158. *Id.* at 690–91.

159. *Id.*

160. *Id.* at 690.

161. Major League Baseball v. Crist, 331 F.3d 1177, 1188–89 (11th Cir. 2003).

162. *Id.* ("The exemption was founded upon a dubious premise, and it has been upheld in subsequent cases because of an equally dubious premise." (footnote omitted)).

Court or Congress had the power to eliminate or change the scope of the baseball antitrust exemption.[163]

2. A Narrow Interpretation of the Exemption

The ambiguity of the scope of the baseball antitrust exemption has also resulted in courts interpreting the scope narrowly. In holding that broadcasting agreements fell outside the scope of the exemption, a court in the Southern District of Texas interpreted the exemption narrowly.[164] The court read the three Supreme Court cases that created the exemption to "cover[] only those aspects of baseball, such as leagues, clubs[,] and players which are integral to the sport and not related activities which merely enhance its commercial success."[165] The court reasoned that the Supreme Court's decision not to apply an antitrust exemption to other sports leagues was evidence that the Court intended the scope of the exemption to be narrow.[166] The court also noted that Congress has done nothing to broaden "the exemption to cover other businesses related to baseball," and that Congress noted that a broad interpretation of the scope would frustrate the purpose of antitrust laws.[167] The southern district of Texas further reasoned that broadcasting agreements were not essential to the game of baseball and extending the antitrust exemption beyond issues that are special to baseball would give professional baseball the power to completely avoid antitrust laws.[168]

In *Postema v. National League of Professional Baseball Clubs*, the Southern District of New York interpreted the baseball antitrust exemption narrowly and held that the exemption did not apply to the employment agreements with umpires.[169] The court stated that the three Supreme Court baseball exemption cases did not provide much precedential value, because they only contemplated the exemption in the context of the league structure and the

163. *Id.* at 1189 ("It is up to the Supreme Court or Congress to overrule *Flood* outright, or perhaps devise a more cabined exemption. As an intermediate appellate court, we have no choice but to hold that the district court was correct in granting judgement in favor of the plaintiffs.").

164. Henderson Broad. Corp. v. Hous. Sports Ass'n, 541 F. Supp. 263, 265 (S.D. Tex. 1982).

165. *Id.*

166. *Id.* at 267 ("Additional evidence of the narrow scope of the Supreme Court's judicially-created baseball exemption is the court's consistent refusal to extend the exemption to other professional sports . . . .").

167. *Id.* at 269–70 ("In fact, [Congress] has recognized that professional organized sports are involved in extraneous business activities and expressed its judgment that an extension of the baseball exemption to other activities as well as to other sports would contravene the federal antitrust laws.").

168. *See id.* at 271 ("To hold that a radio station contract to broadcast baseball games should be treated differently for antitrust law purposes than a station's contract to broadcast any other performance or event would be to extend and distort the specific baseball exemption, transform it into an umbrella to cover other activities and markets outside baseball and empower [baseball] defendants . . . to use that umbrella as a shield against the statutes validly enacted by Congress.").

169. Postema v. Nat'l League of Pro. Baseball Clubs, 799 F. Supp. 1475, 1489 (S.D.N.Y. 1992).

reserve system.[170] The court also discounted the precedential value of *Salerno*,[171] because that case was decided before the last of the three Supreme Court baseball exemption cases which limited baseball's antitrust exemption to "baseball's unique characteristics and needs."[172] The court reasoned that the baseball exemption does not completely shield professional baseball from the antitrust laws, and that the exemption only applies to the reserve system and league structure.[173] The court believed that the league's relationships with non-players is "not a unique characteristic or need of the game" and indicated that only issues that "enhance[] [baseball's] vitality or viability" are within the scope of the exemption.[174]

In *Piazza v. Major League Baseball*, a court in the Eastern District of Pennsylvania determined that the scope of professional baseball's antitrust exemption should be interpreted narrowly by attacking the precedential value of the three Supreme Court baseball exemption cases.[175] The court reasoned that under the first two cases the scope of the exemption may have been a broad one, however, the Supreme Court in *Flood* eliminated all of the precedential value of the first two cases, and limited the scope of the exemption to baseball's reserve clause.[176] According to the Pennsylvania district court, the only "way to read *Flood*" was that the scope of the MLB antitrust exemption was limited to the reserve system.[177]

In another case in the Southern District of New York regarding broadcast rights, the court decided that the baseball antitrust exemption should be interpreted narrowly.[178] At the outset of its discussion of the baseball antitrust exemption, the court noted that "[t]he continued viability and scope of the

170. *Id.* at 1488 ("Because the *Federal Baseball*, *Toolson*, and *Flood* cases considered the baseball exemption in very limited contexts, *i.e.* with regard to baseball's reserve clause and to its league structure, those opinions give little guidance in determining the breadth of baseball's immunity to antitrust liability.").

171. *See supra* note 153 and accompanying text.

172. *Postema*, 799 F. Supp. at 1488 (quoting Flood v. Kuhn, 407 U.S. 258, 282 (1972)).

173. *Id.* at 1489.

174. *See id.*

175. Piazza v. Major League Baseball, 831 F. Supp 420, 436 (E.D. Pa. 1993).

176. *Id.* ("[I]n [*Flood v. Kuhn*], the Supreme Court made clear that the *Federal Baseball* exemption is limited to the reserve clause.").

177. *Id.* at 437–38 ("Applying these principles of *stare decisis* here, it becomes clear that, before *Flood*, lower courts were bound by both the *rule* of *Federal Baseball* and *Toolson* (that the business of baseball is not interstate commerce and thus not within the Sherman Act) and the *result* of those decisions (that baseball's reserve system is exempt from the antitrust laws) . . . . In *Flood*, the Supreme Court exercised its discretion to invalidate the *rule* of *Federal Baseball* and *Toolson*. Thus no rule from those cases binds the lower courts as a matter of *stare decisis*. The only aspect of *Federal Baseball* and *Toolson* that remains to be followed is the result or disposition based upon the facts there involved, which the Court in *Flood* determined to be the exemption of the reserve system from the antitrust laws." (footnote omitted)).

178. Laumann v. Nat'l Hockey League, 56 F. Supp. 3d 280, 297 (S.D.N.Y. 2014).

baseball exemption are far from clear."[179] The court reasoned that the Court's decision in *Flood* disregarded the holdings of the first two Supreme Court baseball exemption cases.[180] The court was of the opinion that the Supreme Court's specific discussion of the reserve system in *Flood* allows the scope of the exemption to be interpreted narrowly.[181] The *Laumann* court also adopted the stance taken by the court in *Henderson Broadcasting Corp. v. Houston Sports Association*, that "suits involving business enterprises . . . are related to but separate and distinct from baseball," and therefore the antitrust exemption does not apply.[182]

IV. ADOPTING A NARROW INTERPRETATION OF THE BASEBALL ANTITRUST EXEMPTION

Given the fact that much has changed since the Supreme Court decided *Federal Baseball Club of Baltimore*, the proper interpretation of the MLB's antitrust exemption is a narrow one. This Part suggests that district courts should adopt a narrow interpretation of the baseball antitrust exemption. It also argues that even under the broadest interpretation of the baseball antitrust exemption, data related activities are not within the exemption, and addresses potential counterarguments.

A. THE MLB'S ACTIONS RELATING TO DATA ARE NOT WITHIN THE SCOPE OF ITS ANTITRUST EXEMPTION

District courts should adopt a narrow interpretation of the baseball antitrust exemption. After analyzing decisions discussing the scope of the exemption, the exemption is not all encompassing.[183] Some courts have not hesitated to restrict the scope of the exemption to the baseball reserve system,[184] and others have limited the exemption only to those things that are integral to the game of baseball.[185] This is the proper interpretation. The Supreme

179. *Id.* at 295.

180. *Id.* at 295–96.

181. *Id.*

182. *Id.* at 296 (quoting Henderson Broad. Corp. v. Hous. Sports Ass'n, 541 F. Supp. 263, 265 (S.D. Tex. 1982)).

183. *See, e.g.*, Major League Baseball v. Crist, 331 F.3d 1177, 1186–89 (11th Cir. 2003) (interpreting the scope of the exemption broadly but discussing the need to interpret judicially created antitrust exemptions narrowly and problems that surround the baseball antitrust exemption).

184. *See, e.g.*, Piazza v. Major League Baseball, 831 F. Supp. 420, 438 (E.D. Pa. 1993) (reading Supreme Court precedent to limit the scope of the exemption to the reserve system).

185. *See, e.g.*, *Henderson Broad. Corp.*, 541 F. Supp. at 271 (determining that broadcasting was not unique to the game of baseball and that it was a different industry than baseball, so broadcasting rights fall outside the scope of the exemption); Postema v. Nat'l League of Pro. Baseball Clubs, 799 F. Supp. 1475, 1489 (S.D.N.Y. 1992), *rev'd*, 998 F.2d 60 (2d Cir. 1993) (determining that those things that are "not an essential part of baseball and in no way enhances its vitality or viability" fall outside of the scope of the exemption).

Court has noted that the exemption is an abnormality,[186] and some courts have acknowledged that the reasoning behind it no longer makes sense.[187] Even courts that interpret the scope of the antitrust exemption broadly note that it does not apply to activities "wholly collateral" to the game of baseball.[188] Furthermore courts are to interpret judicially made exemptions narrowly.[189]

Even under the broadest interpretation of the baseball antitrust exemption, the league's activity related to the collection and distribution of sports data does not fall within the scope of the exemption. Activity related to sports data is wholly collateral to the game of baseball because it does not directly impact league games or league structure. Therefore, where courts have found the exception applies is distinguishable from the issue here. For example, the location or relocation of teams impacts league structure,[190] or whether non-players, such as scouts and umpires, have been found to be broad enough to apply the exception.[191] However, industries such as broadcasting, which are a byproduct of the game, are not so unique and important to the game that they should fall within the scope of the exemption.[192] The distinction that can be made from these cases is that activities that directly impact the structure of the league or the actual baseball games are within the scope of the exemption; however, activities or industries that are a byproduct of the game or flow from the games are outside the scope of the exemption.

The collection and distribution of data is a byproduct of the game of baseball—even more so than the broadcasting of games. The key here is that any sportsbook's decision to use either "official" or "unofficial" data will in no way impact league structure or games. Some may argue that activities related to data impact the league because of the potential revenue that could come from selling data. However, the increase in revenue for the league is predicted to be very small compared to other sources of league revenue.[193] The collection and distribution of sports data, just like a game being broadcast on television

186. *See supra* text accompanying note 54–55.

187. *See supra* text accompanying note 160–62.

188. City of San Jose v. Off. Of the Comm'r of Baseball, 776 F.3d 686, 690 (9th Cir. 2015); *see also Crist*, 331 F.3d at 1183 (noting that the professional baseball antitrust exemption has not protected "dealings between professional baseball clubs and third parties").

189. *Crist*, 331 F.3d at 1186 ("[J]udge-made exemptions, no less than statutory exemptions, must be closely cabined."); *Piazza*, 831 F. Supp. at 438 (E.D. Pa. 1993) (citing Grp. Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979)); Laumann v. Nat'l Hockey League, 56 F. Supp. 3d 280, 297 (S.D.N.Y. 2014).

190. *City of San Jose*, 776 F.3d at 691–92.

191. *Compare* Wyckoff v. Off. Of the Comm'r of Baseball, 211 F. Supp. 3d 615, 626 (S.D.N.Y. 2016) (determining that league employment relations with scouts falls within the antitrust exemption), *with* Postema v. Nat'l League of Pro. Baseball Clubs, 799 F. Supp. 1475, 1489 (S.D.N.Y. 1992) (determining that league relations with umpires and non-players were not essential to the game of baseball, and therefore outside of the scope of the exemption).

192. *See* Henderson Broad. Corp. v. Hous. Sports Ass'n, 541 F. Supp. 263, 271–72 (S.D. Tex. 1982); *Laumann*, 56 F. Supp. 3d at 296–97.

193. *See* Pelnar, *supra* note 1.

or the radio, does not impact how games are played. Activity related to sports data would also be considered business practices where the league and teams are dealing with third parties,[194] which the Eleventh Circuit has noted typically falls outside the scope of the baseball antitrust exemption.[195] Furthermore, like broadcasting rights, it does not make sense to allow league activities to be subject to antitrust scrutiny in some professional sports leagues but protect professional baseball from that same scrutiny.[196]

Allowing third parties to collect data and sell it will not impact the integrity of baseball. Some baseball executives argued that limiting the right to collect and sell data to sportsbooks is necessary to protect baseball and its consumers.[197] However this argument fails when one considers that fans have been gambling on games for a long time, and this has yet to impact the integrity of baseball games. Although "official" data may be received by sportsbooks quicker and is always accurate, official data is not such a better product than "unofficial" data that it would impact the integrity of the game.[198] Furthermore, allowing the baseball antitrust exemption to extend to the collection and dissemination of sports data would extend the scope of the exemption beyond what was intended and provide too much protection for the MLB.[199]

V. CONCLUSION

The baseball antitrust exemption, which has been deemed an aberration and anomaly, has long troubled lower courts. Interpreting the scope of the exemption broadly does not make sense given the premise on which the exemption was created, and the way antitrust laws have changed since the creation of the exemption. Moving forward, district courts should adopt a narrow interpretation of the baseball antitrust exemption. Regardless, claims brought against the MLB for anticompetitive actions relating to sports data should be allowed because those actions are not within the scope of even the broadest interpretation of the exemption. Allowing the MLB to evade antitrust enforcement for these anticompetitive actions would extend the scope of the extension much farther than intended and frustrate the purpose of antitrust laws.

194. Smiley, *supra* note 36.

195. Major League Baseball v. Crist, 331 F.3d 1177, 1183 (11th Cir. 2003) (noting that the professional baseball antitrust exemption has not protected "dealings between professional baseball clubs and third parties").

196. *See Henderson*, 541 F.Supp. at 271; *see also* Smiley, *supra* note 36 (noting that it would be problematic if the NBA was found to violate antitrust laws and the MLB was not when they were engaged in the same activities).

197. *See* Rodenberg, *supra* note 94, at 591.

198. *See* Smiley, *supra* note 95.

199. *See Henderson*, 541 F.Supp. at 271.