No. 14-1252

IN THE
# Supreme Court of the United States

CITY OF SAN JOSÉ, CITY OF SAN JOSÉ AS SUCCESSOR AGENCY TO THE REDEVELOPMENT AGENCY OF THE CITY OF SAN JOSÉ, AND THE SAN JOSÉ DIRIDON DEVELOPMENT AUTHORITY,
*Petitioners,*
v.

OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as Major League Baseball, and ALLAN HUBER "BUD" SELIG,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

For nearly a century, this Court has consistently held that the business of baseball is exempt from antitrust scrutiny. Petitioners seek the reversal of this unbroken chain of precedent, alleging that Respondents wrongfully prevented the Oakland Athletics baseball club from moving to San José. However, shortly after the Petition was filed, a state court concluded that the contract at the heart of Petitioners' antitrust claims is invalid under state and local law. Because the basis of Petitioners' claimed injury-in-fact has been declared void, Petitioners lack standing under Article III. If this Court were to conclude that it had jurisdiction over this appeal, despite these developments in California state court, the question presented would be as follows:

Whether, despite decades of Congressional acceptance of baseball's antitrust exemption, this Court should overrule *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs,* 259 U.S. 200 (1922); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); and *Flood v. Kuhn*, 407 U.S. 258 (1972).

## RULE 29.6 STATEMENT

The Office of the Commissioner of Baseball, which does business as Major League Baseball ("MLB"), is an unincorporated association. As such, it has no corporate parent, and no publicly held corporation owns 10% or more of MLB.

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## INTRODUCTION

San José asks for this Court's intervention on a question that has been firmly settled for decades, and one that it has no standing to raise.[1] More than 90 years ago, this Court held that the "business of baseball" is exempt from antitrust regulation. Again and again, this Court has looked to decades of Congress's positive inaction and ruled that any antitrust regulation of baseball must come from Congress, not from this Court. For its part, Congress has held dozens of hearings concerning federal antitrust scrutiny of baseball. As to one particular subject—certain labor issues—Congress accepted this Court's invitation and exercised its power to impose antitrust regulation. But as to the remainder of the business of baseball, including franchise relocation, Congress affirmatively chose not to disturb the exemption. Nor is there any recurring confusion or conflict among the lower courts on the exemption of baseball from antitrust law; indeed, every Circuit Court that has considered the question has consistently followed this Court's rulings and applied the exemption.

Recent developments in California state court also establish that San José has no Article III standing to pursue its claims against Major League Baseball. After the Ninth Circuit affirmed the dismissal of San José's claims, a California state court held in a separate lawsuit that San José's option agreement—for the potential sale of land for a new baseball stadium—is illegal under state and local law. The state court also enjoined San José from selling that land to the

[1] For convenience, the Petitioners will be referred to as San José and the Respondents will be referred to as Major League Baseball or MLB.

Athletics or to any other sports franchise. Because San José has long claimed that MLB obstructed that land deal and thereby caused it injury, this state-court ruling completely undermines San José's position that it has suffered any injury-in-fact as a result of MLB's actions. San José's lack of injury-in-fact not only deprives it of antitrust standing, but it also deprives it of standing under Article III. This Court would be obligated to confront such a jurisdictional issue—writing on a clean slate, given that no court below had the opportunity to consider it—prior to reaching the question presented.

Because San José fails to identify any issue meriting this Court's review, and because it does not have Article III or antitrust standing, the Petition should be denied.

## STATEMENT OF THE CASE

### A. The controversy litigated below.

The Oakland Athletics professional baseball club is a member of Major League Baseball, whose 30 member clubs have all agreed to be governed by the Major League Constitution and the rules adopted and promulgated by both MLB and its Commissioner. Pet. App. 19a. Under that league structure, each club plays its home games in an "operating territory" that is identified in the Major League Constitution. Pet. App. 2a. As the Ninth Circuit held below, the "designation of franchises to particular geographic territories is the league's basic organizing principle." Pet. App. 8a. The Athletics' operating territory consists of Alameda and Contra Costa Counties in California, and the Athletics currently play home games in the City of Oakland, which is within that territory. Pet. App. 19a–20a.

The Athletics have explored construction of a new ballpark in several locations. Pet. 21; 2 C.A. E.R. 4, 72–73, 86–87. Some of those locations, such as Fremont and Oakland, are within the Athletics' operating territory. The Athletics have also considered locations outside their territory, including San José. *Id.*; Pet. App. 20a; Pet. 21. Because San José is outside the Athletics' operating territory, a move there would require approval by the Commissioner and three-quarters of the Major League Baseball clubs. Pet. App. 19a.

The Athletics sought MLB's permission to relocate to San José in 2012.[2] On June 17, 2013, after thorough consideration, and in accordance with the Major League Rules, then-Commissioner Selig formally notified the Athletics' ownership that its proposal to relocate to San José was inadequate. 2 C.A. E.R. 6:12–14. Soon thereafter, San José filed this suit against MLB and Commissioner Selig, alleging that they had obstructed the Athletics' potential relocation to San José and interfered with San José's option agreement with the Athletics. San José asserted causes of action under the Sherman Antitrust Act, California's Cartwright Act, and California's Unfair Competition Law. 2 C.A. E.R. 95–103. San José also brought state-law claims for tortious interference with both contract and prospective economic advantage. 2 C.A. E.R. 59.

[2] In connection with an effort to move the Athletics, San José had acquired certain parcels of land and entered into an option agreement to potentially sell that land to the Athletics for a ballpark. As explained thoroughly below, *see infra* pp. 7–9, San José's land acquisition and option agreement violated both state and local law.

On October 11, 2013, the district court dismissed San José's federal and state antitrust claims, and its unfair-competition-law claim. Pet. App. 18a, 58a. As to the Sherman Act claims, the court followed binding Supreme Court precedent and held that "MLB's alleged interference with the A's relocation to San José is exempt from antitrust regulation." Pet. App. 41a. The district court also addressed MLB's alternative argument that San José lacked antitrust standing to pursue its claims because it had suffered no antitrust injury. Pet. App. 42a. The court held that, even if the antitrust exemption did not bar San José's claims, San José did not have antitrust standing to seek damages (and the court expressed doubts about San José's standing to seek injunctive relief). Pet. App. 43a–46a.[3]

The Ninth Circuit affirmed the district court's ruling. As the court of appeals held, baseball's antitrust exemption covers the "business of providing public baseball games for profit between clubs of professional baseball players." Pet. App. 7a (quoting *Toolson*, 346 U.S. at 357). The Ninth Circuit also found it "undisputed that restrictions on franchise relocation" fall under baseball's exemption. Pet. App. 8a. And "few, if any, issues are as central to a sports league's proper functioning as its rules regarding the geographic designation of franchises." Pet. App. 9a.

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[3] The district court also dismissed San José's state-law antitrust claim because it was precluded by the Commerce Clause, and it dismissed the unfair competition claim under an interpretation of state law. Pet. App. 46a–50a. After declining to retain supplemental jurisdiction over San José's tort claims, the district court dismissed them. Pet. App. 58a. San José has not sought this Court's review of the dismissal of its state-law claims. Pet. 22 n.3.

### B. Recent developments in California state court eliminate Petitioner's theory of injury.

San José's theory is that the Athletics would have exercised the option to purchase San José's land and would have ultimately moved to San José, ***but for*** MLB's rules governing the Athletics' relocation request. As MLB successfully demonstrated in the lower courts, this injury theory is inherently speculative and indirect, because it assumes no other obstacles to relocation.

After the filing of the Petition in this matter, San José's injury theory went from speculative to nonexistent. Specifically, on April 17, 2015, a California state court—after a mandamus hearing in a related lawsuit—issued a final order holding that San José's proposed land deal with the Athletics was illegal under multiple state and municipal laws. That court has now entered an injunction preventing the sale of the land in question. Resp. App. 16a. So even if this Court were to reverse the Ninth Circuit's decision, the state-court injunction would still block San José from selling its land to the Athletics.

First, some background on these related state lawsuits. San José does not have a stadium capable of hosting Major League Baseball games. 2 C.A. E.R. 134. Indeed, it does not even own all of the parcels of land needed to build a stadium. Although local law has long prohibited San José from using tax dollars to "participate in the building of a sports facility," *see* San José Muni. Code § 4.95.010, in 2005, San José used its redevelopment agency to begin purchasing land for a baseball stadium and to prepare environmental studies on the impact of a stadium project at that site. Resp. App. 3a–5a; Pet. 21.

The California legislature interrupted San José's plans in 2011, when it enacted a law that dissolved all redevelopment agencies and dictated how those agencies must dispose of assets. Resp. App. 6a–7a. In an attempt to circumvent this law, San José and its redevelopment agency "hurriedly formed a new joint powers authority" (which is one of the Petitioners here). Resp. App. 7a. San José transferred its parcels to the new joint-powers authority, which then entered into an option agreement with the Athletics to give the team the right to buy those parcels at some point in the next four years.[4] In 2011, a group called Stand for San Jose filed the first in a series of state-court lawsuits alleging that San José had violated state and local law in its effort to lure the Athletics to the city. *Stand For San Jose v. City of San Jose*, No. 1-11-CV-214196 (Cal. Super. Ct. filed Dec. 2, 2011), No. 1-13-CV-250372 (filed July 30, 2013); No. 34-2014-80001905 (filed Jul. 24, 2014); No. 1-14-CV-274088 (filed Dec. 4, 2014).

In the first of those cases, the California Superior Court has now held that San José illegally transferred the parcels in order to evade California state law and that San José's joint-powers authority therefore "never had good title to the property and could not enter into any valid contract concerning the property with anyone." Resp. App. 7a–9a. According to the state court, San José also violated a local ordinance that required the city to obtain voter approval before spending tax dollars on a stadium project. Resp. App. 14a–16a. Finally, the court ordered San José to "withdraw" the option

[4] During this litigation, the original option agreement expired, but San José and the Athletics entered into a new option agreement. *See* San José City Council Minutes § 4.2 (Nov. 4, 2014), *available at* http://perma.cc/C649-269A.

agreement and enjoined San José from "entering into any agreement conveying" property rights to the Athletics "or any professional sports franchise." Resp. App. 16a.

## REASONS FOR DENYING THE PETITION

### A. This Court cannot review the question presented without first resolving jurisdictional issues not addressed below.

The California Superior Court's conclusion that the option agreement was void *ab initio* means that San José lacks standing to pursue this appeal. "Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation." *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994). This Court must consider such jurisdictional issues prior to reaching the merits of the Petition. *Heckler v. Mathews*, 465 U.S. 728, 737 (1984).

#### 1. In light of the California Superior Court's decision, this Court will have to address San José's Article III standing.

San José has relied on its option agreement with the Athletics—an agreement to potentially sell city land for a new ballpark—as the basis for its claim that MLB caused injury to its "property."[5] In the court of appeals,

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[5] In San José's complaint, it cited MLB's "interference" with the option agreement (and the "purchase agreement" contemplated by the option agreement) to show damages and to show that it had suffered an "antitrust injury." 2 C.A. E.R. 90–91, 94–95. In the district court, San José argued that it was suing in its "proprietary capacity for direct injury" to the value of the land covered by the option agreement. 1 C.A. E.R. 102–03. San José argued that—unlike any other municipality that may desire a baseball team—it had antitrust standing to sue because of the option

San José articulated its injury theory as follows: "But for MLB's antitrust violations, the A's would have exercised the option and entered into a Purchase and Sale Agreement with the City of San José." S.J. C.A. Rep. Br. at 3. That option agreement has now been declared void as a matter of state and local law, and a state court has enjoined San José from selling the land for a stadium development.

As explained further below, the *Stand for San Jose* cases cast serious doubt on Petitioners' Article III standing. But setting aside the merits of that question, the ***existence*** of such a threshold question fundamentally complicates this Court's review. The state court in *Stand for San Jose* issued its ruling and injunction after San José filed its petition for certiorari, and long after the district court and the Ninth Circuit issued the opinions below. Therefore, if this Court were to grant certiorari, it would be forced to address complex jurisdictional issues for the first time and without any development by the courts below.

The various *Stand for San Jose* lawsuits are also very much in flux, and the landscape might well change over the course of this Court's review. The San José City Council has declared that it will appeal the recent injunction ruling.

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agreement. *Id.* at 106–07. At the Ninth Circuit, San José repeatedly emphasized that the option agreement was critical for antitrust standing. S.J. C.A. Op. Br. 16–17, 44–51; S.J. C.A. Rep. Br. 3, 20–21, 23–27. And San José told the Ninth Circuit that it would suffer irreparable harm if it did not obtain relief before the option agreement expired. S.J. C.A. Mtn. to Expedite 1, 3.

If this Court grants certiorari, the parties would need to "take pains to supplement the record" so that the Court can "address with as much precision as possible any question of standing that may be raised." *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988). And the parties would need to supplement the record continually as the state courts presiding over the various *Stand for San Jose* actions issue new orders. At a minimum, San José's Article III standing is questionable and raises issues that were not—and could not have been—addressed below. That alone is reason for this Court to deny certiorari.

**2. San José cannot establish Article III standing.**

If the Court were to consider the threshold question of San José's Article III standing, it would likely conclude that San José has no standing because San José cannot show that MLB caused any injury-in-fact, it cannot trace any theoretical injury to MLB, and it cannot show that the federal courts could provide redress. Thus, this case provides no vehicle to address the question presented.

"[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013) (internal quotation marks omitted). And "an actual controversy must be extant at all stages of review, not merely the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). "To establish Article III standing, an injury must be [1] concrete, particularized, and actual or imminent;

[2] fairly traceable to the challenged action; and [3] redressable by a favorable ruling." *Clapper*, 133 S. Ct. at 1147 (internal quotation marks omitted); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). San José cannot satisfy any of these constitutional requirements.

**a. San José cannot show an injury-in fact.**

San José cannot plausibly claim that MLB's refusal to allow relocation under its rules caused San José injury. In the courts below, San José claimed that this refusal prevented the city from selling its property under the option agreement, and therefore caused a direct injury to San José's "commercial interests" in that property. 1 C.A. E.R. 102–04. In particular, San José claimed that MLB's "alleged unlawful conduct—blocking relocation of the Athletics to San José—is the ***only obstacle*** to the Athletics' relocation, harming [San José.]" 1 C.A. E.R. 106 (emphasis added).

That claim was unfounded when made—indeed, the district court below held that San José's alleged injury was too speculative. Pet. App. 43a. But it has now been determined that San José purchased the land in violation of local law, then transferred the land in violation of state law, and is now enjoined from conveying any rights to that land to any sports franchise. Resp. App. 7a–9a, 16a. MLB's rules regarding franchise relocation are now irrelevant: San José cannot sell its land to the Athletics for a stadium because, as a matter of state and local law, it is forbidden from doing so.

The state court's ruling has the retroactive effect of eliminating any possible damages claims. As the state court held, San José ***never*** had legal authorization to purchase and assemble the land that it wants to sell, and the agency that entered the option agreement with the Athletics ***never*** held proper title. Resp. App. 7a, 9a. Therefore San José's proposed land deal was never legally authorized and never could have been consummated. In effect, the option agreement is void *ab initio*, and San José cannot recover antitrust damages related to contractual rights that were never valid.

Nor can San José argue that—if given time—it could correct its legal violations and establish some other injury, thus giving it standing for injunctive relief. "Allegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be certainly impending to constitute injury in fact." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (internal quotation marks omitted); *see also Lujan*, 504 U.S. at 564 n.2. Here, San José cannot show either a "certainly impending" injury, *Clapper*, 133 S. Ct. at 1147, or even a "realistic and impending threat" of injury, *Davis v. FEC*, 554 U.S. 724, 734–35 (2008). Like the plaintiff in *City of Los Angeles v. Lyons*, San José cannot show that a future injury is "real and immediate" enough to give it standing to seek an injunction. 461 U.S. 95, 101–02 (1983).

**b. San José cannot show an injury that is either traceable to MLB's conduct, or redressable by this Court.**

Even if San José could show a threatened injury-in-fact, given the state court's order invalidating the option agreement, it cannot show that such an injury is "fairly traceable" to MLB's process for franchise

relocations or its decision to disapprove the Athletics' relocation proposal. *Clapper*, 133 S. Ct. at 1148. In order to show that such an injury could be traced to MLB, San José would need to prove an impossibly attenuated chain of causation: (1) that it will submit its real-estate development plan to a public vote, (2) that the voters will approve, (3) that the Athletics will still be interested in moving to San José, (4) that San José will be able to obtain the additional parcels necessary for construction of a stadium, (5) that the Athletics will be able to secure construction financing, (6) that the Athletics will obtain environmental clearances, (7) that the Athletics will submit a bona-fide proposal for relocation to the Commissioner, *and* (8) that MLB will reject the Athletics' ***new*** proposal. *See* Pet. App. 43a; MLB C.A. Br. 51–52, 55–57. San José needs at least all of those speculative dominoes to fall before it can actually claim injury. And this Court has previously explained that it is "usual[ly] reluctan[t] to endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper*, 133 S. Ct. at 1150; *see also Lujan*, 504 U.S. at 561–62.

San José also cannot show that it is "likely" that its claimed "injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotation marks omitted). Even assuming for the sake of argument that San José succeeds in convincing this Court to reverse almost 100 years of precedent on the antitrust exemption, San José still could not sell its downtown property to the Athletics because a state court has enjoined such a sale. And given that there is no other stadium in San José capable of hosting Major League Baseball games, no order from this Court or any other court could redress San José's desire for a Major League club. Thus, San José asks this Court for a purely advisory opinion, which Article III forbids.

### 3. San José also lacks antitrust standing.

The Ninth Circuit saw no need to address San José's lack of antitrust standing because the antitrust exemption so clearly barred San José's claims. Pet. App. 12a n.5. But if this case were remanded, the courts below would need to address San José's lack of antitrust standing because it is an independent and alternative ground for dismissing this suit. This additional flaw in San José's case weighs heavily against granting the Petition. As this Court has made plain, it decides questions only "in the context of meaningful litigation. Its function in resolving conflicts . . . is judicial, not simply administrative or managerial. Resolution here of the [issue in conflict] can await a day when the issue is posed less abstractly." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

Even if San José established Article III standing, it would ***still*** lack antitrust standing to pursue its claims. *See, e.g.*, *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 529–45 (1983). As the district court below held, San José lacks standing to seek antitrust damages because its claimed injury has not occurred and is entirely speculative. Pet. App. 42a–43a. And, as noted above, that injury is even more speculative today, given the state court's order preventing San José from selling the land to the Athletics.

San José also lacks antitrust standing because it hasn't suffered an injury to its "business or property," it isn't a participant in the declared market of providing "major league men's professional baseball contests," its claimed injuries are too indirect and remote, and its claimed damages are duplicative and subject to

complex apportionment.[6] For its injunctive-relief claims, San José faces many of the same standing problems. MLB C.A. Br. 54–57.

### B. There is no material conflict in the lower courts.

San José contends that this Court must grant certiorari to resolve a lower-court conflict over the scope of the antitrust exemption. But there is no such conflict. Indeed, every federal court of appeals to address the scope of the antitrust exemption has held that it covers the entire "business of baseball," and not just the reserve system.[7] And several of those circuit

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[6] *See* MLB C.A. Br. 40–54 (citing, amongst others, *Cargill Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104 (1986); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983); *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); *Am. Ad Mgmt., Inc. v. Gen. Tel. Co.*, 190 F.3d 1051 (9th Cir. 1999)).

[7] CA1: *Triple-A Baseball Club Assocs. v. Ne. Baseball, Inc.*, 832 F.2d 214, 216 n.1 (1st Cir. 1987) (noting—in dictum—that baseball's antitrust exemption would exempt league decision on relocation of minor league club).

CA2: *Salerno v. Am. League of Prof'l Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir. 1970) (exempting MLB's relationship with umpires).

CA7: *Charles O. Finley & Co., Inc. v. Kuhn*, 569 F.2d 527, 541 (7th Cir.) (exempting Commissioner's veto of player trade), *cert. denied*, 439 U.S. 876 (1978).

CA9: Pet App. 7a (exempting MLB's process for franchise relocation); *Portland Baseball Club, Inc. v. Kuhn*, 491 F.2d 1101, 1103 (9th Cir. 1974) (*per curiam*) (exempting MLB's decision to locate major league club in minor league territory); *Portland Baseball Club, Inc. v. Baltimore Baseball Club, Inc.*, 282 F.2d 680 (9th Cir. 1960).

CA11: *Major League Baseball v. Crist*, 331 F.3d 1177, 1183 (11th Cir. 2003) (exempting MLB's process for franchise contraction); *Prof'l Baseball Sch. & Clubs, Inc. v. Kuhn*, 693 F.2d 1085,

courts have specifically held that franchise location issues—in both the major and minor leagues—are exempt. Pet App. 7a; *Portland Baseball Club, Inc. v. Kuhn*, 491 F.2d at 1103; *Crist*, 331 F.3d at 1183; *Prof'l Baseball Sch. & Clubs*, 693 F.2d at 1085–86.[8]

In the entire federal system, only one district court has ever held that the antitrust exemption is narrowly limited to the reserve clause. *Piazza v. Major League Baseball*, 831 F. Supp. 420, 435–38 (E.D. Pa. 1993). And in the 22 years since, every single federal court to consider the *Piazza* opinion has rejected both its reasoning and its conclusions.[9] In short, there is no "split" in the federal system.

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1085–86 (11th Cir. 1982) (exempting minor league "franchise location system").

[8] Many district courts have also held that relocation is exempt. *See* Pet. App. 41a; *Morsani v. Major League Baseball*, 79 F. Supp. 2d 1331, 1335 (M.D. Fla. 1999); *New Orleans Pelicans Baseball, Inc. v. Nat'l Ass'n of Prof'l Baseball Leagues, Inc.*, No. 93–523, 1994 WL 63114, at *9 (E.D. La. Mar. 1, 1994). As have several state supreme courts. *Minnesota Twins P'ship v. State ex rel. Hatch*, 592 N.W.2d 847, 856 (Minn. 1999); *Wisconsin v. Milwaukee Braves, Inc.*, 144 N.W.2d 1, 15 (Wisc.) *cert. denied*, 385 U.S. 990 (1966), *rehearing denied*, 385 U.S. 1044 (1967).

[9] *See, e.g., Major League Baseball v. Butterworth*, 181 F. Supp. 2d 1316, 1324 n.4 (N.D. Fla. 2001), *aff'd sub nom., Crist*, 331 F.3d 1177 (11th Cir. 2003); *McCoy v. Major League Baseball*, 911 F. Supp. 454, 457 (W.D. Wash. 1995); *New Orleans*, 1994 WL 631144, at *9; *Morsani*, 79 F. Supp. 2d at 1335 n.12. In addition, circuit courts, both before and after *Piazza*, have correctly rejected the same argument for narrowly construing the antitrust exemption. *See* Pet. App. 6a–10a; *Crist*, 331 F.3d at 1181; *Finley*, 569 F.2d at 541.

In the absence of a split among the circuits, San José argues that the Court should grant certiorari to resolve a "conflict" between the federal courts and the Florida Supreme Court. Pet. 33 (citing *Butterworth v. Nat'l League of Prof'l Baseball Clubs*, 644 So. 2d 1021, 1024–25 & n.7 (Fla. 1994)). But this Court need not correct an isolated state-court decision on an interpretation of federal law. In the 21 years since the Florida Supreme Court issued its *Butterworth* opinion, every federal court to consider it—and every state court outside of Florida to consider it—has held that the Florida Supreme Court misinterpreted federal law.[10]

*Butterworth*'s impact is particularly muted given that the Sherman and Clayton Acts grant exclusive jurisdiction to the federal courts, so *Butterworth* has no precedential effect on federal antitrust law. *See Gen. Inv. Co. v. Lake Shore & M.S. Ry. Co.*, 260 U.S. 261, 287 (1922). Indeed, *Butterworth* was hardly a typical antitrust case. The case arose out of the Florida Attorney General's issuance of investigative subpoenas related to the possibility that the San Francisco Giants might be purchased and moved to Tampa Bay. The Florida Supreme Court concluded that when the Florida Attorney General conducts an antitrust investigation, MLB may be forced to respond to civil-investigative demands. But *Butterworth*'s specific holding has not even had an ongoing effect in Florida. Seven years after *Butterworth*, when the Florida attorney general again attempted to serve such investigative demands, MLB invoked the exemption in federal court and obtained an injunction blocking the attorney general from proceeding against it. *Major League*

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[10] *Crist*, 331 F.3d at 1181 n.10; *Morsani*, 79 F. Supp. 2d at 1334 n.10; *McCoy*, 911 F. Supp. at 458; *Minnesota Twins*, 592 N.W.2d at 854 n.16, 856.

*Baseball v. Butterworth*, 181 F. Supp. 2d 1316, 1318 (N.D. Fla. 2001), *aff'd sub nom.*, *Major League Baseball v. Crist*, 331 F.3d 1177 (11th Cir. 2003).

In short, there is no real conflict in the lower courts. Even Professor Banner, one of the authors of San José's petition, agrees. As he wrote in his recent book, the "*Piazza* and *Butterworth* decisions rested on a not-very-plausible reading" of this Court's precedents and in "subsequent cases . . . courts have returned to the older view that the exemption covers the entire business of baseball, not just the reserve system." Stuart Banner, THE BASEBALL TRUST 244 (2013). San José cannot manufacture a "split" by citing decades-old opinions that have been uniformly rejected by every court to consider them.

### C. This Court has repeatedly held that only Congress can abolish the antitrust exemption, which it has not done.

For the last sixty years, this Court has reaffirmed baseball's antitrust exemption based on *stare decisis*, baseball's reliance interests, and the Court's express deference to Congress. *See Flood v. Kuhn*, 407 U.S. 258, 285 (1972); *Radovich v. Nat'l Football League*, 352 U.S. 445, 451–52 (1957); *United States v. Int'l Boxing Club*, 348 U.S. 236, 241–42 (1955); *United States v. Shubert*, 348 U.S. 222, 230 (1955) *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953). Now, San José asks the Court to reject all of those bases and to defy Congress.

### 1. Congress's "positive inaction" reflects support for the exemption and precludes this Court from overruling it.

Starting in 1953, this Court has consistently held that if the exemption were to be altered or curtailed, only Congress can do so. *Toolson*, 346 U.S. at 357; *see also Flood*, 407 U.S. at 283, 285; *Radovich*, 352 U.S. at 451; *Int'l Boxing*, 348 U.S. at 244; *Shubert*, 348 U.S. at 229–30. This Court recognized that Congress's deliberate decision not to repeal the exemption amounted to "something other than mere congressional silence and passivity," and instead constituted "positive inaction," reflecting that "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." *Flood*, 407 U.S. at 283–84, 285.

In response to this clear and unbroken line of Supreme Court precedent, San José argues that Congress somehow withdrew its support for the antitrust exemption when it enacted the Curt Flood Act. Pet. 29–30. The opposite is true.

The Curt Flood Act repealed the antitrust exemption for one issue only: disputes regarding Major League employment. 15 U.S.C. § 26b(a). Congress explicitly declined to repeal the exemption for any other aspect of the business of baseball, including "franchise expansion, location or relocation." 15 U.S.C. § 26b(b)(3). Several courts have interpreted that language as confirmation that Congress understood that the exemption applies to relocation, and that Congress wanted to keep it that way. *See, e.g.*, *Morsani*, 79 F. Supp. 2d at 1335 n.12 ("Congress explicitly preserved the exemption for all matters 'relating to or affecting franchise expansion, location or relocation'") (quoting 15 U.S.C. § 26a(b)(3)). Or, as the Ninth Circuit held below, "*Flood*'s congressional acquiescence rationale applies

with special force to franchise relocation." Pet. App. 9a. As Judge Kozinzki explained for the court:

> The exclusion of franchise relocation from the Curt Flood Act demonstrates that Congress (1) was aware of the possibility that the baseball exemption could apply to franchise relocation; (2) declined to alter the status quo with respect to relocation; and (3) had sufficient will to overturn the exemption in other areas.

Pet. App. 10a.

San José is inviting this Court to defy Congress. When Congress passed the Curt Flood Act in 1998, every federal court of appeals to consider the question had concluded that baseball's antitrust exemption applied to the entire "business of baseball," and not just the reserve system. *See supra* at 17 n.10. Against this backdrop, Congress specifically instructed that, "No court shall rely on the enactment of [this Act] as a basis for changing the application of the antitrust laws to any conduct, acts, practices, or agreements other than [Major League employment issues]." 15 U.S.C. § 26b(b). Thus, when San José asks this Court to interpret the Curt Flood Act as a ***retraction*** of congressional support for the antitrust exemption, it is asking this Court to do ***exactly*** what Congress forbade: to "rely on the enactment" of the Curt Flood Act to "chang[e] the application of the antitrust laws."

San José also claims that the Supreme Court "no longer accepts mere silence as evidence of Congress's intent." Pet. 30. Even if that is true in other circumstances, this Court has explained that Congress's repeated consideration of bills to repeal the antitrust exemption was "something other than mere congres-

sional silence and passivity"—it was "positive inaction." *Flood*, 407 U.S. at 283–84. The Court found it particularly relevant that, in the 19 years between its decisions in *Toolson* and *Flood*, "more than 50 bills [were] introduced in Congress relative to the applicability or nonapplicability of the antitrust laws to baseball." *Flood*, 407 U.S. at 281. Similarly, in the 42 years since *Flood*, Congress has held ***45 hearings*** on baseball's antitrust exemption. *See* Resp. App. 19a–24a.

When "legislative history reveals clear congressional awareness" of a judicially-created antitrust exemption, and then "Congress specifically address[es] this area"—while leaving the exemption "undisturbed"—this "lends powerful support to [the] continued viability" of the exemption. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 419 (1986); *see also* Pet. App. 9a–10a. Since 1953, this Court has consistently stated that only Congress can reverse the antitrust exemption, but Congress has not done so. Nothing San José has offered provides any reason for this Court to retract that commitment to the legislative branch.

### 2. MLB's reliance interests would be harmed by retroactive reversal of the antitrust exemption.

"Vast efforts ha[ve] gone into the development and organization of baseball" and "enormous capital ha[s] been invested in reliance on its permanence." *Radovich*, 352 U.S. at 450. MLB and its club owners made many of those investments with the knowledge that the clubs could coordinate without fear of facing a "flood of litigation" and "the harassment that would ensue." *Id.* at 450–51. Cumulatively, MLB and its club owners have invested billions of dollars in the industry: to purchase franchises, to maintain the minor leagues, to

train and develop amateur players, to market baseball worldwide, and to expand the distribution and broadcast of its games. Those investments were made under this Court's proclamation that the antitrust exemption would serve as an "umbrella over baseball." *Id.* at 450. Yet, in this very case, San José seeks to penalize MLB for relying on this Court's decisions, to the tune of ***billions*** of dollars in claimed damages. 2 C.A. E.R. 92–94.

San José argues—without any support—that "[t]he owners of baseball clubs can no longer claim a reliance interest in the antitrust exemption" because, according to San José, club owners relied on the exemption to protect their investment in ***only*** one aspect of baseball: the reserve system. Pet. 25–27. This argument is unmoored from any record facts. Indeed, the relevant passage in the Petition has no citations to the record at all, and simply asserts without support that MLB's reliance interests were confined to the reserve system. *See id.* There is nothing in the record to support the factual conclusion that the only reliance interests at stake concern the reserve clause. Indeed, the Petition itself devotes many pages to illustrating a variety of additional circumstances in which MLB has relied on the exemption. *See* Pet. 15–18. San José cannot rely on these examples to illustrate the supposedly overbroad scope of the exemption, and then simultaneously argue that those examples do not exist. And, as the court of appeals noted below, MLB relies on relocation rules "to ensure access to baseball games for a broad range of markets and to safeguard the profitability—and thus viability—of each ball club." Pet. App. 8a. The scope of MLB's reliance interests were

never raised below, and San José should not be permitted to invent a new dispute at this late stage, particularly when the Petition itself is internally inconsistent as to the existence of such a dispute.

### 3. This Court has already recognized that the exemption should be maintained as a matter of *stare decisis*.

San José is not the first party to ask the Court to reconsider its holding that the business of baseball is exempt from antitrust law unless and until Congress decides otherwise. This Court has already reexamined its prior decisions—twice—and concluded that the exemption is "fully entitled to the benefit of *stare decisis*." *Flood*, 407 U.S. at 282.

San José relies on the inapposite *State Oil Co. v. Khan*, and its progeny, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, to suggest that *stare decisis* is inapplicable because this is an antitrust case. Pet. 31 (citing 522 U.S. 3 (1997) and 551 U.S. 877 (2007)). In both *Khan* and *Leegin*, the Court overturned an old *per se* rule of illegality in favor of the more flexible rule of reason. Thus, in both of those cases, the Court loosened the regulation of antitrust law; it did not expand antitrust regulation to activity that was previously exempt. When this Court issues a decision that takes previously illegal conduct and makes it potentially legal, it does not raise the same *stare decisis* concerns as a decision that would eliminate an antitrust exemption and expose an entire industry to retroactive damages.

### D. This case presents a poor vehicle to review the question presented.

Even if this Court were interested in re-evaluating its precedent on the antitrust exemption, this case would not be an appropriate vehicle to do so.

#### 1. This case does not present the issues that San José argues justify certiorari.

San José argues that the Court should grant certiorari because the world has changed since the Court last reaffirmed the antitrust exemption. For example, San José argues that the exemption is now used "in a range of activities far wider than anyone could have contemplated in 1972," such as "broadcasting," "new media," "Internet streaming," "mobile device broadcasts," "fantasy games," and "interactive digital media." Pet. 2, 16, 17, 18, 32, 36. In effect, San José is trotting out a new version of the same argument that was made during the 1950s, 1960s, and 1970s—that this Court should reverse the exemption because of the increasing importance of radio and television. But the Court in *Flood* put these arguments to rest, noting that the "advent of radio and television, with their consequent increased coverage and additional revenues, has not occasioned an overruling of *Federal Baseball* and *Toolson*." 407 U.S. at 283. Similarly, the new technical innovations cited in the Petition do not undermine this Court's well-established precedent.

And despite San José's repeated references to new media and broadcasting, this case presents none of those issues. Instead, this case presents a dispute over MLB's rules for when and how a club can relocate—rules that are at the very core of the antitrust exemption. The Ninth Circuit held it "undisputed that restrictions on franchise relocation" fall within the

scope of the antitrust exemption. Pet. App. 8a. "The designation of franchises to particular geographic territories is the league's basic organizing principle. . . . [F]ew, if any issues are as central to a sports league's proper functioning." *Id.* at 8a–9a. So despite San José's invocation of "Internet streaming" and "mobile device broadcasts," this case does not provide a vehicle for the Court to evaluate whether the antitrust exemption covers anything other than baseball's relocation rules. The record is devoid of any reference to the technological changes that San José invokes to justify this Court's attention. Indeed, the conduct challenged in the Complaint has nothing to do with new technology, but rather with the "basic organizing principle" of club location and territories. *Id*. at 8a. San José is therefore asking this Court to make an abstract policy determination that has nothing to do with the actual dispute between the parties and was never addressed by any court below. But "[i]t has long been [this Court's] considered practice not to decide abstract, hypothetical or contingent questions." *Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945).

And relocation is an issue that has been before this Court before. San José claims that, when this Court decided *Flood* in 1972, "it was scarcely imaginable that MLB would use its antitrust exemption" in cases involving club relocation. Pet. 15. That assertion is demonstrably false, as the antitrust exemption was litigated in relocation disputes several times before 1972, including at the Supreme Court. In 1953, in *Toolson*, this Court affirmed the dismissal of allegations that MLB's restrictions on club operating territories were an antitrust violation. As one of the briefs to this Court explained, the plaintiff challenged MLB's agreement "that only certain cities shall constitute the circuits of

the Major Leagues; that the circuits established shall remain unchanged unless approved by a majority of the clubs in that league; and that the circuits of either Major League may not be changed without unanimous consent of the clubs of that league."[11] Then, in 1966, MLB asserted the exemption in a dispute over the relocation of the Milwaukee Braves. *Wisconsin v. Milwaukee Braves, Inc.*, 144 N.W.2d 1, 10 (Wisc.), *cert. denied*, 385 U.S. 990 (1966), *rehearing denied*, 385 U.S. 1044 (1967). And, in 1971, MLB asserted the exemption to dismiss antitrust claims over its decision to move a new major league club into the territory of an existing minor league franchise. *Portland Baseball Club, Inc. v. Kuhn*, 368 F. Supp. 1004, 1006 (D. Or. 1971). So in 1972, when the Supreme Court decided *Flood*, it was certainly "imaginable" that relocation decisions fell within the scope of the "business of baseball." Indeed, this Court's *Flood* opinion cites the *Milwaukee Braves* case twice, so this Court was fully aware that the antitrust exemption covered relocation issues.

In short, MLB's use of the antitrust exemption to defend relocation decisions is not some unexpected development that necessitates Supreme Court review. To the contrary, club operating territories and rules on relocation have always been at the heartland of the antitrust exemption, and this Court knew as much when it reaffirmed that antitrust exemption in both *Toolson* and *Flood*.

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[11] Petitioner's Br. at 5–9, *Toolson*, 346 U.S. 356 (1953) (No. 53-18), 1953 WL 78316, at *5–9.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 17, 2015

# APPENDIX

**APPENDIX A**

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

[FILED: Apr. 17, 2015]

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Case No. 1-11-CV-214196

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STAND FOR SAN JOSE; EILEEN HANNAN; MICHELLE BRENOT; ROBERT BROWN; KAREN SHIREY; FRED SHIREY; ROBERT SHIELDS,
*Petitioners,*

vs.

CITY OF SAN JOSE; CITY COUNCIL OF THE CITY OF SAN JOSE; REDEVELOPMENT AGENCY OF THE CITY OF SAN JOSE; DIRIDON DEVELOPMENT AUTHORITY; DOES 1 through 10, inclusive,
*Respondents.*

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ATHLETICS INVESTMENT GROUP, LLC; DOES 11 through 20, inclusive,
*Real Parties in Interest.*

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ORDER RE: MOTION TO DISMISS; PETITION FOR WRIT OF MANDAMUS (CEQA)

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The Motion to Dismiss the 2nd Amended Writ Petition by Respondents City of San Jose, City Council of The City of San Jose, the Redevelopment Agency of the City of San Jose (now defunct) and Diridon Development

Authority (collectively "Respondents" or "City") and the 2nd Amended Petition for Writ of Mandamus by Petitioners Stand For San Jose, Eileen Hannan, Michelle Brenot, Robert Brown, Karen Shirey, Fred Shirey, and Robert Shields ("Petitioners") came on for hearing before the Honorable Joseph H. Huber on January 16, 2015, at 9:00 a.m. in Department 21. The matter was submitted and the Court now issues its order.

It may be helpful to (relatively briefly) discuss the background of this dispute and the basis for the City's argument that this entire matter became moot in November 2014.

In 1988 San Jose Muni. Code Chap. 4.95 was added to the Muni. Code as a result of a voter initiative. Section 4.95.010 states in pertinent part that: "The City of San Jose may participate in the building of a sports facility using tax dollars only after obtaining a majority vote of the voters of the City of San Jose approving such expenditure." "Tax dollars" is defined for purposes of the section as including "without limitation, any commitment to fund, wholly or in part said facility with general fund monies, redevelopment fund monies, bonds, loans, special assessments or any other indebtedness guaranteed by city property, taxing authority or revenues." The term "participate" is not defined in the Chapter.

The City has been attempting to bring a Major League Baseball team to San Jose since at least 2004. See Administrative Record ("AR") at 4-5 (Copy of City Council Resolution No. 72344). Throughout this period the City was aware of and obligated to comply with Muni Code §4.95. In a Memo to the Mayor and Redevelopment Agency dated April 22, 2005 the City Attorney advised that §4.95 would require a public vote before the property was acquired "if the site were

acquired for a potential ballpark, without a legitimate alternative use such as housing," but that "[s]pending tax dollars to acquire real property from a willing seller does not require a vote of the people if the property is being acquired for potential housing and the future use of such property as a sports facility is speculative." See AR 5361-5362. The City Attorney did concede (as would seem obvious from the text of §4.95) that "one could argue that the drafters of the original initiative intended that 'participation in the building of a sports facility' should be defined broadly so as to ensure that the voters approved any expenditure of public funds even if such funds were merely for property acquisition." AR 5362.

From 2005 to 2008 the City (through the now defunct Redevelopment Agency) spent over $25 million in tax-increment funds to acquire the parcels collectively referred to by the parties as the Diridon Property to serve as the site for a baseball stadium. No public vote was held before these monies were spent pursuant to Muni Code §4.95.010 because the Agency made statements that the properties would or could be used for "mixed use development." See AR 3843-3848, 3852-53, 3879-3883, 3890.

It does not appear that a "Mixed use development" was the City's intended use for the property. The City acquired the property using redevelopment fund monies ("tax dollars" as defined in Muni. Code §4.95) for the purpose of it becoming the site for a baseball stadium. This was not a "speculative" future use or one of many equally plausible possibilities for the City; it was the City's motivation for acquiring the property.

In November 2005 the Redevelopment Agency (listed as the project applicant) paid for the preparation of an Initial Study for a major league baseball stadium. See AR 597-638. The transportation analysis for the initial study had been prepared even earlier in February 2005. A Notice of Preparation ("NOP") for a Draft EIR ("DEIR.") for a baseball stadium was issued on November 28, 2005. See AR 4942-4948. A Notice of Availability of the complete DEIR was issued on February 17, 2006. See AR 4951.

Even under the City's narrow interpretation of Muni Code §4.95.010 as being applicable only when "tax dollars" are spent in the service of building a sports facility by no later than November 2005 the City had arguably violated that section by spending "tax-dollars to begin acquiring the Diridon Property parcels and also by spending public funds to prepare an EIR for a (presumably privately owned) baseball stadium before obtaining a majority vote of the electorate. The fact that an EIR would have eventually been required under CEQA for a large sports facility project did not create an exception to the public vote requirement to allow the City to spend public funds on the EIR and associated studies. Private entities can and do pay for the preparation of whatever CEQA documents, including EIRs, may be necessary for private development projects on a regular basis.

The DEIR was revised and a "First Amendment" was issued in January 2007. See AR 2348. The final EIR ("FEIR") was not completed and adopted until February 28, 2007. See AR 6-7 (Resolution No. 08-009 of the City Planning Commission). This EIR was for a generic baseball stadium on the Diridon Property (with mixed-use development the "existing plan alter-

native.") A draft supplemental EIR ("SEIR") was prepared in February 2010 and then amended in May 2010. See AR 2758-3141 and 3142-3470. The SEIR analyzed a smaller stadium than the original EIR (36,000 seats versus 45,000) with a lower height and corrected purported errors in the traffic data. It also addressed greenhouse gases, options for more than one parking structure and the possible realignment of portions of city streets in the area. Both EIRS were criticized (at least by Petitioners) as inadequate and the City stated in 2010 that unspecified additional environmental review would take place once there was an actual project and that a public vote would be held prior to any decision to build a baseball stadium. See AR 4584, statement by then Mayor Chuck Reed that "[W]hen we have a project there will be additional environmental review at the project level . . ." AR 4584.

It appears that the City intended to put the stadium proposal on the ballot in 2010, thereby complying with Muni. Code §4.95.010, when the first of two complicating events occurred. At some point in 2010 Major League Baseball asked the City to delay a stadium vote. See AR at 4615, statement of then Mayor Chuck Reed at the August 3, 2010 City Council Meeting: "I'm no longer recommending that we go to the ballot in November. At the request of the Commissioner of Baseball that we give him some time to do his process, do his due diligence in the manner that he chooses, however slow and painful it may be for us, and because the Commissioner offered to help pay for a special election for a baseball matter, I though it was appropriate to—to not push it into the November election cycle at his request . . ." The City was under no obligation to agree to this request, and arguably should have given priority to its obligation to comply with Muni. Code

§4.95.010, but it did. This had the unfortunate unforeseen result of leaving the public vote issue unresolved when the second complicating event occurred, the State's elimination of redevelopment agencies.

The Governor announced his intention to dissolve redevelopment agencies in January 2011. Assembly Bill AB 26 was introduced in May 2011 and went into effect on June 29, 2011. Its provisions (including later amendments) are found in Health & Safety Code §§34161-34195.

Health & Safety Code §34163 states in pertinent part that "commencing on the effective date of this part, *an agency shall not have authority to, and shall not, do any of the following:* . . . (d) *Dispose of assets* by sale, long-term lease, gift, grant, exchange, transfer, assignment, or otherwise, for any purpose . . . (f) *Transfer, assign, vest or delegate any of its assets,* funds, rights, powers, ownership interests, or obligations *for any purpose to any entity, including, but not limited to, the community, the legislative body, another member of a joint powers authority, a trustee, a receiver, a partner entity, another agency, a nonprofit corporation, a contractual counterparty, a public body, a limited-equity housing cooperative, the state, a political subdivision of the state, the federal government, any private entity, or an individual or group of individuals.*" Court's emphasis.

Health & Safety Code §34167.5 states in pertinent part that the State Controller "shall review the activities of redevelopment agencies in the state to determine whether an asset transfer has occurred after January 1, 2011, between the city or county, or city and county that created a redevelopment agency or any other public agency, and the redevelopment agency. If such asset transfer did occur during that period and the government agency that received the

assets is not contractually committed to a third party for the expenditure or encumbrance of those assets, to the extent not prohibited by state and federal law, the Controller shall order the available assets to be returned to the redevelopment agency or, on or after October 1, 2011, to the successor agency . . . *The Legislature hereby finds that a transfer of assets by a redevelopment agency during the period covered by this section is deemed not to be in furtherance of the Community Redevelopment Law and is thereby unauthorized.*" Emphasis added. Essentially any asset transfer by a redevelopment agency after Jan. 1, 2011 was invalid as a matter of law.

The actions taken by the City in reaction to the dissolution process were an example of what the Legislature was trying to prevent. The City and the Redevelopment Agency hurriedly formed a new joint powers authority, the Diridon Development Authority ("DDA") on March 8, 2011. The Diridon Property parcels were transferred to the DDA at no cost. See AR 4815. The DDA then entered into an Option Agreement with Real Party Athletics Investment Group, LLC ("AIG," an entity that owns the Oakland Athletics professional baseball franchise) in October 2011. See AR 4826-4832 (a "draft" copy). The Recitals section of the Option confirms that the Diridon Property "was originally purchased by the Redevelopment Agency of the City of San Jose ('Agency') with the intent that the Property, along with other adjacent properties, be developed into a Major League Baseball park or alternatively a mixed use development with housing . . ." Because the transfer of the Diridon Property from the Redevelopment Agency to the DDA was invalid and illegal as a matter of law, the DDA never had good title to the property and could not enter into any valid contract concerning the property with anyone.

On November 8, 2011 the City Council approved the Option Agreement (AR 64-67) despite the illegality of the property transfer to the DDA, approved the 2010 SEIR without any further environmental review along with a statement of overriding considerations (AR 70-124, exhibits omitted) and issued a Notice of Determination (AR 1).

On April 20, 2012 the State Controller, pursuant to Health & Safety Code 34167.5, sent a letter to all public entities. See AR 10814. It stated in pertinent part that "If your city, county or agency, directly or indirectly, received any assets from a redevelopment agency after January 1, 2011, your city, county, or agency hereby is ordered to immediately reverse the transfer and return the applicable assets to the successor agency of the relevant redevelopment agency. This order applies to all assets, including but not limited to, real and personal property, cash funds accounts receivable, deeds of trust and mortgages, contract rights, and any rights to payment of any kind." The City ignored the order.

On March 21, 2013 the State Controller issued his report on asset transfers by the City's Redevelopment Agency (http://www.sco.ca.gov/Files-EO/S13RDA900_San_Jose.pdf ).

The report stated in pertinent part ("Finding 2," beginning on pg. 6) that "The RDA made unallowable asset transfers of $29,137,727 to the San Jose Diridon Development Authority (Authority), a joint powers authority made up of the City and the RDA. All of the property transfers occurred during the period of January 1, 2011 through January 31, 2012 and the assets were not contractually committed to a third party prior to June 28, 2011. In March 2011, the RDA transferred seven properties in the Diridon Area to the

Authority. To accomplish those transfers, a Joint Powers Agreement was entered into on March 8, 2011, between the City and the RDA, creating the Authority. The seven properties were subsequently transferred by quit claim deed on March 8, 2011. Pursuant to H&S Code section 34167.5, a redevelopment agency may not transfer assets to a city, county, city and county, or any other public agency after January 1, 2011. . . . The RDA transferred the properties to the Authority in March 2011. On November 8, 2011, the Authority committed those assets by entering into an agreement with a third party, Athletics Investment Group, LLC, after the effective date of the act. Because the Authority is under the control of the City and the asset was not contractually committed to a third party prior to June 28, 2011, the asset transfer is unallowable under H&S Code section 34167.5."

The "Order of the Controller" was that: "Based on H&S Code section 34167.5, the City is ordered to reverse the transfer of assets described in Schedule 2, in the amount of $29,137,727 and return them to the Successor Agency. The Successor Agency is directed to properly dispose of those assets in accordance with H&S Code sections 34177(d) and (e) and 34181(a)."

The DDA did transfer the Diridon Property to the Successor Agency for the Redevelopment Agency and they claimed to do so "subject to" the invalid 2011 Option Agreement. See AR 10898-10915. No City or DDA official could have reasonably believed that the 2011 Option Agreement was legal or valid, and a transfer of the Diridon Property "subject to" that option could not convey any validity to it.

The first writ petition in this eventually consolidated action was filed on December 2, 2011. The operative 2nd Amended Writ Petition was filed on March 11, 2014. It seeks "a writ of mandate and declaratory relief adjudging that Respondents' transfer of the Diridon Property was unauthorized, contrary to law, void and of no legal effect; setting aside Respondents' transfer of the Diridon Property to the extent it remains subject to the Option Agreement; ordering that Respondents transfer the entire fee interest exclusive of and not subject to the Option Agreement, as required under the Redevelopment Dissolution Law; and permanently enjoining Respondents from the sale of the Diridon Property pursuant to the Option Agreement." 2nd Amended Petition at 8.

The Petition states four causes of action. The first is for "Writ of Mandate-Violation of Mandatory Duty under Redevelopment Law," alleging in part that "Respondents have breached a mandatory duty to provide for the transfer and disposition of the Diridon Property without the encumbrance of the Option Agreement. The Successor Agency has a duty to sell the Diridon Property unencumbered by the Option Agreement while the Oversight Board has a continuing duty to direct the Successor Agency to terminate the Option Agreement because it is an unenforceable obligation." 2nd Amended Petition at 49. Petitioners ask in this cause of action that the original Option Agreement and the extension be found "invalid and unenforceable, and an injunction should be issued to prevent the sale and transfer of the Diridon to AIG under the Option Agreement." 2nd Amended Petition at 49.

The second cause of action is for "Writ of Mandate-Violation of Public Vote Requirement, San Jose Municipal Code §4.95." It alleges in pertinent part that "[b]ecause the Option Agreement commits the taxpayer-funded Diridon Property to exclusive use as a sports facility, including sale of the Property at a small fraction of its fair market value, a public vote was required before the Option Agreement could be approved. By re-transferring the Diridon Property still subject to the Option Agreement without a proper public vote, Respondents again failed to obey a mandatory duty required by law. The purported extension of the Option Agreement by the Successor Agency was also in violation of the public vote requirement." 2nd Amended Petition at 57. It also asks for the original "Option Agreement" to be "adjudged invalid" and an injunction issued to block any sale "pursuant to" the Option Agreement. 2nd Amended Petition at 53.

The third cause of action, "Violation of CEQA," alleges in pertinent part that "Respondents' actions and resolutions adopted on June 18, 2013 and August 13, 2013, fail to provide for any compliance with CEQA," and that "Respondents may not rely on the previous 2007 EIR and 2010 SEIR prepared for the Ballpark Project for any of the above-referenced actions because they are inadequate as a matter of law, as alleged in case No. 1-11-CV-214196." 2nd Amended Petition at 62 and 65.

The fourth cause of action is for "Violation of CCP §526a," the unauthorized and illegal expenditure of public funds. It alleges in pertinent part that "[i]n approving the Option Agreement . . . Respondents acted unlawfully and in violation of the Redevelopment Dissolution Law, San Jose Municipal Code §4.95, and CEQA . . . Accordingly, the Option Agreement for

the sale of the Diridon Property to AIG constitutes an unauthorized and illegal expenditure, use and transfer of the property. The approval of the Option Agreement, and the retransfer of the Diridon Property subject to that agreement, should be set aside and an injunction should be issued to prevent Respondents from carrying out, implementing or consummating the Option Agreement, or from otherwise selling or transferring the Diridon Property to AIG for the Ballpark Project." 2nd Amended Petition at 73-74.

On December 18, 2014 Respondents filed a Motion to Dismiss asserting that because the original (illegal and invalid) Option Agreement targeted by the Petition had expired on its own terms on or about November 8, 2014 and a new Option Agreement had been entered into between the City and Real Party AIG on November 4, 2014, this action was moot in its entirety.

The general principles for determining whether an issue is moot have been applied in CEQA cases. "California courts will decide only justiciable controversies. . . . [A] case that presents a true controversy at its inception becomes moot "if before decision it has, through act of the parties or other cause, occurring after the commencement of the action, lost that essential character."" *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal App 4th 1559, 1573, internal citations omitted. See also *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal Ann 4th 1538, 1547.

Respondent's Motion to Dismiss is GRANTED in part as follows.

As the 2011 Option Agreement has expired and a new Option has been entered into by the Successor Agency for the City of San Jose Redevelopment Agency (an entity that appears to have good title to the Diridon Property) and Real Party AIG, the 1st cause of action's request that the 2011 Option Agreement be found "invalid and unenforceable, and an injunction should be issued to prevent the sale and transfer of the Diridon to AIG under the Option Agreement" is clearly moot.

The 3rd cause of action is also now moot. Regardless of whether the 2007 and 2010 EIRs are inadequate it is undisputed that the City approved the new 2014 Option Agreement based in part on the assertion that the Option was not a "project" for CEQA purposes. However strongly Petitioners may disagree with that assertion (and however dubious it may prove to be[1]) the approval of the 2014 Option is a wholly new lead agency approval for purposes of CEQA separate from

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[1] Pub. Res. Code §21065 states that a "project" is defined as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: (a) An activity directly undertaken by any public agency. (b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies. (c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies." CEQA Guidelines §15378(a) adds, in pertinent part, that a "project" means "the whole of an action, which has a potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect change." It could be argued that any sale of the Diridon Property to AIG under the new Option Agreement would be an "activity" by the City that has the potential to result in the construction of a baseball stadium, a reasonably foreseeable direct or indirect physical change in the environment.

the approval challenged in the existing 3rd cause of action. Because the 2014 Option Agreement was considered to not be subject to CEQA the City has represented to the Court that the 2014 Option does not rely on the previous 2007 EIR and 2010 SEIR, meaning that the 3rd cause of action's allegations at 65 that those documents are inadequate and may not be relied upon are now moot. The Court notes that Petitioners have already filed another writ of mandate action, case no. 1-14-CV-274088, to challenge the City's more recent actions.

The motion to dismiss is DENIED as to the 2nd and 4th causes of action. "There are three discretionary exceptions to the rules regarding mootness allowing a court to review the merits of an issue: '(1) when the case presents an issue of broad public interest that is likely to recur; (2) when there may be a recurrence of the controversy between the parties; and (3) when a material question remains for the court's determination.'" *Santa Monica Baykeeper*, *supra*, at 1548, internal citations omitted. While these two causes of action also focus on the 2011 Option Agreement the Court finds that Petitioners' claims for violation of Muni. Code §4.95.010 and for violation of CCP §526a (to the extent it is based on the violation of §4.95.010) fall within the discretionary exceptions to mootness as they present an issue of broad public interest that is likely (if not certain) to recur between these same parties and also present a material question for the Court's determination: the proper interpretation of Muni. Code §4.95.010.

The correct interpretation of this measure is a question of law for the Court and the City's view is not entitled to any deference as it was enacted by voter initiative. In interpreting a voter initiative, a court applies the same principles that govern statutory construction. Thus, the court turns first to the language of the initiative, giving the words their ordinary meaning. The initiative's language must also be construed in the context of the statute as a whole and the initiative's overall scheme. Absent ambiguity, the court presumes that the voters intend the meaning apparent on the face of an initiative measure and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language. Where there is ambiguity in the language of the measure, ballot summaries and arguments may be considered when determining the voters' intent and understanding of a ballot measure. *Professional Engineers in California Government v. Kempton* (2007) 40 Cal. 4th 1016, 1037.

The City's view of §4.95.010 as only applying to the literal expenditure of "tax dollars" to assist in the construction of a sports facility is unreasonably narrow. "Participate" is obviously not synonymous with spending money and there are other ways to "use" tax dollars besides contributing them directly to construction of a facility, such as using them to buy real property and then offering the property to a sports franchise for less than full market value. The ordinary meaning of "participate" is quite broad: "1. To be active or involved in something; take part. 2. To share in something." *American Heritage Dictionary of the English Language*, Fifth Edition (2011 Houghton Mifflin Harcourt Publishing Company).

The use of such a broad term makes sense given the apparent intention of the voters that §4.95.010 require prior permission before any use can be made of "tax dollars" in pursuit of a sports facility. The City must ask the electorate for permission to proceed *before* it "participates" in the building of a sports facility "using tax dollars," in any way. This would clearly include the purchase of real property "using tax dollars" to assemble a site for a sport facility. The record in this case makes it very clear that this was the only use of the Diridon Property ever seriously considered by the City. The City is and has been in violation of Muni. Code §4.95.010 for several years and it does not appear that it will comply with its terms in the foreseeable future.

Muni Code §4.95.010 lacks any clear enforcement provision. However, given that its purpose is to bar the City from participating in plans to build a sports facility using tax dollars until permission to do so is granted by a majority of the voters, and given that offering the owner of a sports franchise (Real Party AIG) an option to purchase real property acquired using "tax dollars" as defined by §4.95.010 clearly constitutes participation, allowing the City's action to stand would render Muni Code §4.95.010 meaningless. Therefore the City is ordered to withdraw the 2014 Option Agreement and is enjoined from entering into any agreement conveying any rights to the Diridon Property to Real Party AIG or any other professional sports franchise until the issue is submitted to the voters as required by Muni. Code §4.95.010.

Dated: 4-17-15

/s/ Joseph H. Huber
Hon. Joseph H. Huber
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SANTA CLARA
191 N. First Street
San Jose, CA 95113-1090

[FILED: Apr. 17, 2015]

TO: FILE COPY

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RE: Stand For San Jose, Et Al Vs
City Of San Jose, Et Al

Case Nbr: 1-11-CV-214196

**PROOF OF SERVICE**

ORDER RE: MOTION TO DISMISS; PETITION FOR WRIT OF MANDAMUS (CEQA)

was delivered to the parties listed below in the above entitled case as set forth in the sworn declaration below.

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If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the court Administrator's office at (408) 882-2700, or use the Court's TDD line, (408) 882-2690 or the Voice/TDD California Relay Service, (800) 735-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown above, and by depositing the envelope with postage full prepaid, in the United States Mail at San, Jose, CA on 04/17/15. DAVID H. YAMASAKI, Chief Executive Officer/Clerk by Sylvia Roman, Deputy.

## APPENDIX B

Congressional Hearings on Baseball's Antitrust Exemption since 1972

1. *Professional Sports Blackouts: Hearing Before the H. Comm. on Interstate and Foreign Commerce, Subcomm. on Communications and Power*, 93rd Cong., 1st Sess. (1973).

2. *Rights of Professional Athletes: Hearing Before the H. Comm. on the Judiciary, Subcomm. on Monopolies and Commercial Law*, 94th Cong., 1st Sess. (1975).

3. *Professional Sports and the Law: Hearing Before the H. Comm. on Professional Sports*, 94th Cong., 2d Sess. (1976).

4. *Inquiry into Professional Sports: Hearing Before the H. Comm. on Professional Sports*, 94th Cong., 2d Sess. (1976).

5. *Inquiry into Professional Sports: Hearing Before the H. Comm. on Professional Sports*, 94th Cong., 2d Sess. (1976).

6. *Rights of Professional Athletes: Hearing Before the H. Comm. on the Judiciary, Subcomm. on Monopolies and Commercial Law*, 95th Cong., 1st Sess. (1977).

7. *Sports Anti-blackout Legislation: Hearing Before the H. Comm. on Interstate and Foreign Commerce, Subcomm. on Communications*, 95th Cong., 2d Sess. (1978).

8. *Sports Anti-blackout Legislation: Hearing Before the H. Comm. on Interstate and Foreign Commerce, Subcomm. on Communications and Power*, 96th Cong., 1st Sess. (1979).

9. *Antitrust Policy and Professional Sports: Hearing Before the H. Comm. on the Judiciary, Subcomm. on Monopolies and Commercial Law*, 97th Cong., 1st & 2d Sess. (1981).

10. *Antitrust Policy and Professional Sports: Hearing Before the H. Comm. on the Judiciary, Subcomm. on Monopolies and Commercial Law*, 97th Cong., 1st & 2d Sess. (1982).

*11. Professional Sports Antitrust Immunity: Hearing Before the Sen. Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982).

12. *Professional Sports Antitrust Immunity: Hearing Before the Sen. Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983).

13. *Professional Sports Team Community Protection Act: Hearing Before the H. Comm. on Energy and Commerce, Subcomm. on Commerce, Transportation, and Tourism*, 98th Cong., 2d Sess. (1984).

14. *Professional Sports Team Community Protection Act: Hearing Before the Sen. Comm. on Commerce, Science, and Transportation*, 98th Cong., 2d Sess. (1984).

15. *Professional Sports: Hearing Before the H. Comm. on Energy and Commerce, Subcomm. on Commerce, Transportation, and Tourism*, 99th Cong., 1st Sess. (1985).

16. *Professional Sports Antitrust Immunity: Hearing Before the Sen. Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985).

17. *Professional Sports Community Protection Act of 1985: Hearing Before the Sen. Comm. on Commerce, Science, and Transportation*, 99th Cong., 1st Sess. (1985).

18. *Professional Sports Antitrust Immunity: Hearing Before the Sen. Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986).

19. *Antitrust Implications of the Recent NFL Television Contract: Hearing Before the Sen. Comm. on the Judiciary, Subcomm. on Antitrust, Monopolies, and Business Rights*, 100th Cong., 1st Sess. (1987).

20. *Professional Sports Antitrust Immunity: Hearing Before the Sen. Comm. on the Judiciary, Subcomm. on Antitrust, Monopolies, and Business Rights*, 100th Cong., 2d Sess. (1988).

21. *Competitive Issues in the Cable Television Industry: Hearing Before the Sen. Comm. on the Judiciary, Subcomm. on Antitrust, Monopolies, and Business Rights*, 100th Cong., 2d Sess. (1988).

22. *Sports Programming and Cable Television: Hearing Before the Sen. Comm. on the Judiciary, Subcomm. on Antitrust, Monopolies, and Business Rights*, 101st Cong., 1st Sess. (1989).

23. *Competitive Problems in the Cable Television Industry: Hearing Before the Sen. Comm. on the Judiciary, Subcomm. on Antitrust, Monopolies, and Business Rights*, 101st Cong., 1st Sess. (1990).

24. *Cable Television Regulation (Part 2): Hearing Before the H. Comm. on Energy and Commerce, Subcomm. on Telecommunications and Finance*, 101st Cong., 2d Sess. (1990).

25. *Sports Programming and Cable Television: Hearing Before the Sen. Comm. on the Judiciary, Subcomm. on Antitrust, Monopolies, and Business Rights*, 101st Cong., 2d Sess. (1991).

26. *Prohibiting State-Sanctioned Sports Gambling: Hearing Before the Sen. Comm. on the Judiciary, Subcomm. on Patents, Copyrights, and Trademarks*, 102nd Cong., 1st Sess. (1991).

27. *Baseball's Antitrust Immunity: Hearing Before the Sen. Comm. on the Judiciary, Subcomm. on Antitrust, Monopolies, and Business Rights*, 102nd Cong., 2d Sess. (1992).

28. *Baseball's Antitrust Immunity: Hearing Before the H. Comm. on the Judiciary, Subcomm. on Economic and Commercial Law*, 103rd Cong., 1st Sess. (1993).

29. *Key Issues Confronting Minor League Baseball: Hearing Before the H. Comm. on Small Business*, 103rd Cong., 2d Sess. (1994).

30. *Baseball's Antitrust Exemption (Part 2): Hearing Before the H. Comm. on the Judiciary, Subcomm. on Economic and Commercial Law*, 103rd Cong., 2d Sess. (1994).

31. *Impact on Collective Bargaining of the Antitrust Exemption, Major League Play Ball Act of 1995: Hearing Before the H. Comm. on Education and Labor, Subcomm. on Labor-Management Relations*, 103rd Cong., 2d Sess. (1994).

32. *Professional Baseball Teams and the Anti-trust Laws: Hearing Before the Sen. Comm. on the Judiciary, Subcomm. on Antitrust, Monopolies, and Business Rights*, 103rd Cong., 2d Sess. (1994).

33. *The Court-Imposed Major League Baseball Antitrust Exemption: Hearing Before the Sen. Comm. on the Judiciary, Subcomm. on Antitrust, Business Rights, and Competition*, 104th Cong., 1st Sess. (1995).

34. *Antitrust Issues in Relocation of Professional Sports Franchises: Hearing Before the Sen. Comm. on the Judiciary, Subcomm. on Antitrust, Business Rights, and Competition*, 104th Cong., 1st Sess. (1995).

35. *The Court-Imposed Major League Baseball Antitrust Exemption: Hearing Before the Sen. Comm. on Antitrust, Business Rights, and Competition*, 104th Cong., 1st Sess. (1995).

36. *Professional Sports Franchise Relocation: Hearing Before the H. Comm. on the Judiciary*, 104th Cong., 2d Sess. (1996).

37. *Professional Sports: The Challenges Facing the Future of the Industry: Hearing Before the Sen. Comm. on the Judiciary*, 104th Cong., 2d Sess. (1996).

38. *Major League Baseball Reform Act of 1995: Hearing Before the Sen. Comm. on the Judiciary*, 104th Cong., 2d Sess. (1996).

39. *Major League Baseball Antitrust Reform: Hearing Before the Sen. Comm. on the Judiciary*, 105th Cong., 1st Sess. (1997).

40. *Stadium Financing and Franchise Relocation Act of 1999: Hearing Before the Sen. Comm. on the Judiciary*, 106th Cong., 1st Sess. (1999).

41. *Baseball's Revenue Gap: Pennant for Sale?: Hearing Before the Sen. Comm. on the Judiciary*, 106th Cong., 2d Sess. (2000).

42. *Fairness in Antitrust in National Sports (Fans) Act of 2001: Hearing Before the H. Comm. on the Judiciary*, 107th Cong., 1st Sess. (2001).

43. *The Application of Federal Antitrust Laws to Major League Baseball: Hearing Before the Sen. Comm. on the Judiciary*, 107th Cong., 2d Sess. (2002).

44. *Out at Home: Why Most Nats Fans Can't See Their Team on TV: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong., 2d Sess. (2006).

45. *Exclusive Sports Programming: Examining Competition and Consumer Choice: Hearing Before the Sen. Comm. on Commerce, Science and Transportation*, 110th Cong., 1st Sess. (2007).