No. 26-299

IN THE

Supreme Court of the United States

MARY JO FLAHERTY, INTERIM DIRECTOR, NEW JERSEY DIVISION OF GAMING ENFORCEMENT, *et al.*,

Petitioners,

v.

KALSHIEX, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICUS CURIAE* THE NATIONAL COUNCIL OF LEGISLATORS FROM GAMING STATES IN SUPPORT OF PETITIONERS

MARC H. ELLINGER
ELLINGER BELL
308 East High Street,
Suite 300
Jefferson City, MO 65101
(573) 750-4100
ellinger@ellingerlaw.com

MARC W. DUNBAR
Counsel of Record
WILLIAM D. HALL, III
JONES WALKER, LLP
106 East College Avenue,
Suite 1200
Tallahassee, FL 32301
(850) 214-5100
mdunbar@joneswalker.com
whall@joneswalker.com

Counsel for Amicus Curiae

396772

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CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Amicus Curiae, the National Council of Legislators from Gaming States ("NCLGS") certifies that it has no parent or publicly held company owning more than 10% of its stock.

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INTERESTS OF AMICUS CURIAE[1]

NCLGS is an organization of state lawmakers focused on the regulation of gaming and related issues. This would include the development of legal and regulatory framework around lotteries, casinos, sports betting, and related activities. NCGLS members are often the legislators who either chair or are assigned to the legislative committees that regulate and/or oversee gaming-related matters in their respective states. In light of that, NCGLS works to educate state legislators on gaming-related issues. Additionally, NCLGS works closely with local and tribal officials regarding these matters.

NCLGS' mission is not inherently pro- or anti-gaming. Rather, NCLGS' focus is on the development and implementation of best state-level practices and policies regarding gaming regulation and legislation.

SUMMARY OF THE ARGUMENT

Congress, through both its actions and inactions, has deferred the regulation of gambling to the states. Following from this deference, states such as those NCLGS' members represent have enacted laws fitting the policy choices and needs of their respective constituents. This is especially evident in the area of sports gambling post-*Murphy v. NCAA*, 584 U.S. 453 (2018).

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1. Pursuant to this Court's Rule 37, NCLGS states that no counsel for any party authored this brief in whole or in part, and no person or entity other than NCLGS made a monetary contribution to the preparation or submission of the brief. Further, counsel of record for all parties received timely notice of the intention to file this brief.

However, the decision below endangers this clear tradition and policy of state gambling regulation. If the regulation of Respondent KalshiEx, LLC's ("Kalshi") self-described "sports betting" activities is wholly preempted by federal law, then this would call into question many state laws, regulations, and negotiated tribal gaming compacts. Accordingly, this Court should grant the Petition for Writ of Certiorari filed by the Petitioners in this matter on September 2, 2026 ("Petition") to provide clarity and to ensure that the states' gaming regulation authority is recognized and maintained.

ARGUMENT

I. States are the traditional and intended regulators of gambling activities.

This Court has recognized that, although "Congress can regulate sports gambling directly," states may step forward if Congress elects "not to do so." *Murphy*, 584 U.S. at 486. One explanation for why Congress as not passed such federal regulations is that "Americans have never been of one mind about gambling." *Id*. at 458. Accordingly, Congress' actions, and inactions, in this area have been interpreted as "respect[ing] the policy choices of the people of each State" as to this "controversial" issue. *Id.* at 484.

The importance of state gaming regulation goes beyond just questions of preference, however. A state has "paramount interest in the health, welfare, safety, and morals of its citizens." *Helton v. Hunt*, 330 F. 3d 242, 246 (4th Cir. 2003) *cert. denied*, 540 U.S. 967 (2003) (internal citation omitted). As activities such as "lotteries, betting, poker, and other games of chance touch all of the above aspects of the quality of life of state citizens," the regulation of such activity "lies at the heart of the state's police power." *Id.*; *see also Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F. 3d 712, 737 (9th Cir. 2003) *and Gulfstream Park Racing Ass'n v. Tampa Bay Downs, Inc.*, 399 F. 3d 1276, 1278 (11th Cir. 2005). Recently in a related case, the Ninth Circuit expressly recognized this "historical regulation of gambling by states" and referred to it as a "power traditionally exercised by the States and Tribes." *KalshiEx v. Assad*, __ F. 4th __, 2026 U.S. App. LEXIS 26395, *46 (9th Cir. Aug. 28, 2026).

In recognition of these differing policy positions and this established welfare interest Congress has deferred to the states on gaming regulation in a significant and unique manner. In 15 U.S.C. § 3001(a)(1) ("Interstate Horseracing Act"), Congress expressly found and stated that "states should have the primary responsibility for determining what forms of gambling may legally take place within their borders." In certain circumstances, Congress has gone so far as to permit states to "change the content" of "federal law" by exempting its citizens from such federal gambling-related prohibitions. *Casino Ventures v. Stewart*, 183 F. 3d 307, 311 (4th Cir. 1999) *discussing* 15 U.S.C. § 1172(a). Further, states are congressionally authorized and directed to negotiate with tribal governments in their jurisdictions for the purpose of establishing gaming compacts that grant tribes certain agreed allowances and exclusivities in that space. 25 U.S.C. § 2710(d)(3)(C).

This deference reflects that Congress has sought to not just allow, but "even promote…differing gambling policies in different States." *Greater New Orleans Broad. Assn'n* *v. United States*, 527 U.S. 173, 187 (1999). Effectuating this state-driven policy, gambling regulations and restrictions have been enshrined as part of several state constitutions. *See e.g.* Fla. Const., art. X, § 23 & 30; Kan. Const., art. 15, § 3-3d; Mo. Const., art. III, § 39(g). Other states have chosen to affirmatively prohibit gambling in all forms. *See* Utah Const. art. VI, § 27; Haw. Rev. Stat. § 712-1220 to 712-1232.

Following *Murphy,* several states exercised their authority in this area and built regulatory schemes around newly-permitted sports gambling activities. *See e.g.* 230 Ill. Comp. Stat. 45/25 (Illinois Sports Wagering Act), La. Stat. Ann. § 27:601 (Louisiana Sports Wagering Act), Mass. Gen. Laws ch. 23N (Massachusetts Sports Wagering Act), Mo. Const. art. III, §39(g) (Missouri voter approved amendment). This legislation not only specifies where and how such bets can be placed, but also imposes prohibitions seeking to protect the integrity of sporting events in light of this new activity. *See e.g.* Tenn. Code Ann. § 4-49-112(8)-(9) (prohibiting athletes, umpires, and others from placing bets on sporting events); N.J. Rev. Stat. § 5:12A-10 (defining, in pertinent part, a "prohibited sports event" as one that takes place in the state or in which an in-state collegiate institution is participating).

Additionally, wholesale or partial exclusivity in the area of sports gambling has been used as a negotiation and deal point for several tribal compacts. *See e.g.* Fla. Stat. § 285.710(13)(b)(7), Florida Statutes (granting the Seminole Tribe of Florida the exclusive right to conduct sports betting activities), Conn. Gen. Stat § 12-852 (permitting the state to issue licenses for sports wagering to the Mashantucket Pequot Tribe and the Mohegan Tribe of Indians of Connecticut), Wash. Rev. Code § 9.46.0364 (permitting sports wagering in Washington only as part of a tribal compact). In exchange for such exclusivity, tribal governments agreed to make substantial payments and provide other valuable consideration to the states they contracted with. *See e.g.* Mary Ellen Klaus, *DeSantis signs gaming compact with Seminole Tribe, opening Florida to sports betting,* (April 23, 2021) https://tinyurl.com/cfzpssuf (reporting that the Seminole Tribe of Florida agreed to pay "the state a minimum of $500 million in annual payments, an amount that escalates as its market and profits expand.")

II. The Petition should be granted so that this state-level regulation of gambling can be confirmed and preserved.

Petitioner correctly recognizes this history and system of state regulation, as well as the threat that the Third Circuit's decision below poses to it. Whether Kalshi may offer a service marketed as "sports betting[2]" in all 50 states and absent any state regulation goes "to the heart of the States' police power." Petition, p. 20. Further, Kalshi's position and the Third Circuit's interpretation would vitiate state's "policy choices regarding sports gambling and impose[ ] a one-size-fits-all rule for sports gambling across the Nation." *Id.*, p. 21. This would fly in the face of the clear tradition and policy of state-level gambling regulation, as recognized in *Murphy* and as effectuated through the state and federal laws and compacts cited herein.

2. *See* Petition, p. 12, 15 (internal citations omitted).

Wherefore, NCLGS urges this Court to grant the Petition and ensure the long-standing, state-level regulation of gaming is considered, preserved, and enforced as to all sports betting activities. This is especially necessary in light of the Ninth Circuit's recent *Assad* decision, which clearly and directly contradicts the decision below. *Assad* correctly found it to be "implausible" that Congress would preempt gaming regulation at the state level using broad and "expansive" terms in a "Wall Street reform bill." 2026 U.S. App. LEXIS 26395, *31, 47. This conclusion was especially evident in light of the "states' long-understood authority in this area." *Id.* at *48 *citing Flynt v. Bonta*, 131 F. 4th 918, 932 (9th Cir. 2025).

Although NCLGS agrees with the Petitioner that the Ninth Circuit's determination of this issue was correct, definitive clarity as to how and whether NCLGS members can create/enforce laws and regulations by wielding their states' traditional police powers is essential to their constituents' welfare. This split between the Third and Ninth Circuits crystallizes the necessity of this Court granting the Petition and clarifying the status of state and federal law as it relates to gambling regulation.

Rendering states powerless to regulate a product marketed as "sports betting," would cause NCLGS' members' states substantial harm and confusion. If Kalshi's self-described "sports betting" activities are deemed beyond state regulation, then casinos, pari-mutuel operators, and other heavily regulated entities are certain to amend their business and products to seek the same status. Entire state regulatory regimes surrounding this vice activity will have to be reconsidered in light of any preemption found in this area.

Further, several negotiated tribal compacts will be called into question and potentially put into breach. States such as Connecticut and Florida were given the clear message from *Murphy* that they had the authority to recognize and regulate sports gambling. They did so by authorizing their tribal partners to conduct this activity in exchange for substantial consideration. However, if Kalshi is able to offer its "sports betting" activities in every state, then it is at best unclear whether such tribes can receive the exclusivity they contracted for. This could result in states losing substantial revenue and other benefits obtained through tribal compacts.

Additionally, sports betting laws and regulations that NCLGS' members have crafted and passed post-*Murphy* will face newfound scrutiny. The majority below concluded that portions of the Dodd-Frank Act of 2010 serve to preempt the field of "swaps" in which Kalshi operates. However, this Court considered the Professional and Amateur Sports Protection Act in *Murphy* in 2017 and concluded that, at that time, Congress had not uniformly forbidden sport gambling or otherwise rendered it a wholly federal issue. 584 U.S. at 461. After *Murphy* was issued, several states legislated accordingly to permit sports gambling in their states and build regulatory regimes around that activity. However, the majority below appears to have concluded that Congress *had* as of that time regulated activities that were or could be marketing as "sports gambling," even going so far as to preempt state action in that area. Such preemption would have occurred seven years pre-*Murphy*. If the court below was correct on this point, then all states that have subsequently permitted sports gambling will be obligated to re-evaluate their related state laws and regulations to ensure that they are not preempted or otherwise violative of federal law.

CONCLUSION

Petitioners are correct that, "for more than a century, the States have been the primary regulators of gambling in this country." *Petition*, p. 1. In recognition of that clear tradition and Congress's actions and inactions effectuating it, this Court should grant the Petition to ensure that NCLGS' members' states, and all others that choose to either regulate or forbid gambling within their jurisdictions, can operate with clarity to protect the welfare of their citizens.

Respectfully submitted,

Marc H. Ellinger
Ellinger Bell
308 East High Street,
Suite 300
Jefferson City, MO 65101
(573) 750-4100
ellinger@ellingerlaw.com

Marc W. Dunbar
Counsel of Record
William D. Hall, III
Jones Walker, LLP
106 East College Avenue,
Suite 1200
Tallahassee, FL 32301
(850) 214-5100
mdunbar@joneswalker.com
whall@joneswalker.com

Counsel for Amicus Curiae