

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 FORMER CFTC CHARMAIN
GARY GENSLE AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

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INTERESTS OF *AMICUS CURIAE*

Gary Gensler served as Commodity Futures Trading Commission (‘CFTC’) Chairman (2009 to 2014), as Securities and Exchange Commission (‘SEC’) Chair (2021 to 2025), as Under Secretary and Assistant Secretary of the Treasury (1997 to 2001), and as Senior Advisor to Senator Paul Sarbanes. *Amicus* is currently Professor of the Practice of Global Economics and Management and Professor of the Practice of Finance at the Massachusetts Institute of Technology Sloan School of Management and co-hosts the *Power and Consequences* podcast.¹

During his government service, *Amicus* worked with Congress twice in amending the Commodity Exchange Act (‘CEA’), through the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (‘Dodd-Frank’) and the Commodity Futures Modernization Act of 2000 (‘CFMA’). He led the CFTC in adopting 67 rules, orders, and guidance implementing Dodd-Frank. He also was directly involved in, as SEC Chair, directing the completion of multiple security-based swaps rules and as Senior Advisor to Senator Sarbanes, assisting in drafting the Sarbanes-Oxley Act of 2002. At Treasury, he coordinated the response to the 1998 collapse of hedge fund Long-Term Capital Management (with \$1.3

¹ Other than *Amicus* and his counsel, no party authored this brief in whole or in part or contributed money to the preparation or submission of this brief. Counsel for *Amicus* provided notice to counsel of record ten days prior to the due date as required by Rule 37.2.

trillion in derivatives exposures) and the drafting of the Gramm-Leach-Bliley Act ('GLBA') swaps provisions.

Prior to his public service, *Amicus* spent 18 years at the investment bank Goldman Sachs during which he oversaw fixed income, currency, and derivatives trading in Japan and later worldwide Controller and Treasury functions, including accounting, funding, and risk management for the firm's derivatives desks.

Amicus submits this brief to provide statutory context for Dodd-Frank and CFMA based on his involvement in their passage and implementation and to accurately describe the historical record of Executive Branch and Congressional colleagues who worked on Dodd-Frank, in particular the late Senate Majority Leader Harry Reid of Nevada.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus urges the Court to grant New Jersey's petition and resolve the question it presents.

This case boils down to the question of what, if anything, Congress did in Dodd-Frank with regard to sports betting. The Third Circuit majority found that *Kalshi* was likely to prevail on its argument that, by encompassing some event contracts within the statutory definition of swap, Congress also included sports-betting contracts within that definition and, as a result, displaced states' traditional police power to regulate gaming, including sports betting. Pet. App. 8a–15a. The Ninth and Sixth Circuits have come out the

other way, as have many district courts.² *See* Pet. 16–18 (describing circuit split); *id.* at 19 nn. 2–3 (collecting district court decisions).³ *See also* *KalshiEX, LLC v. Assad*, No. 25-7516, 2026 WL 2543846 (9th Cir. Aug. 28, 2026); *KalshiEX LLC v. Schuler*, No. 26-3196, 2026 WL 2884087 (6th Cir. Sept. 25, 2026).⁴

The answer—from *Amicus* as someone who was there—is that Congress did not transfer jurisdiction over sports betting from the States to the CFTC. When Congress amended the CEA through Dodd-Frank, it was addressing the causes of the recent financial crisis, not undoing federal policy against sports betting and displacing traditional state and tribal regulation. Congress did not include sports-betting contracts within the statutory definition of swap.

To put the argument in the plainest real-world terms: Senate Majority Leader Harry Reid of Nevada would never have consented to legislation displacing an activity so critical to his state’s economy and politics by permitting sports betting only under CFTC auspices. No one working on Dodd-Frank was

² The Tenth Circuit also denied Kalshi’s application for an injunction pending appeal from the District of Utah’s order denying Kalshi a preliminary injunction and granting summary judgment to Utah. Order at 1, *KalshiEX LLC v. Cox*, No. 26-4100, ECF 19 (10th Cir. Sept. 8, 2026).

³ Since the petition was filed, the Southern District of Iowa also ruled against Kalshi’s position. Order at 23, *KalshiEX LLC v. Bird*, No. 4:26-cv-0109, ECF 57 (S.D. Iowa Sept. 8, 2026).

⁴ *Amicus curiae* filed a brief in support of Ohio in the Sixth Circuit. *See Schuler*, 2026 WL 2884087, at *2, *14.

attempting to put a curve ball by the Senate Majority Leader to legalize a national sports-betting regime or preempt the Nevada Gaming Commission, a Commission Majority Leader Reid had chaired (1977–1981). He would not have allowed it. Nor did Congress do so.⁵

First, the text, history, purpose, and structure of federal commodity derivatives markets and laws show that sports-betting contracts are not swaps.

Since derivatives markets developed in the United States in the 1850s, the purpose of such markets has been to enable farmers, ranchers, and merchants—and later traders in other commercial interests—to hedge price risk. Fostering such hedging and price discovery functions has been at the heart of federal derivatives regulation for more than a century.

In the 1980s, a new form of over-the-counter (‘OTC’) derivatives developed for institutions to engage in customized bilateral hedging transactions, which became known as swaps because counterparties often exchanged—or swapped—a series of cash flows or exposures.

⁵ Robinhood has argued, in its conditional certiorari petition from the Ninth Circuit, that review may be premature in light of pending CFTC rulemaking. *See* Pet. for Writ of Cert. at 16, *Robinhood Derivatives, LLC v. Dreitzer*, No. 26-338 (filed Sept. 10, 2026). A change in the CFTC’s current regulation prohibiting exchanges from listing gaming contracts, though, would have no effect on the preemption question presented.

In the wake of the then-unregulated OTC derivatives market's contribution to the 2008 financial crisis, Congress and the Obama administration focused on establishing a regulatory regime for swaps (including certain event contracts incorporated in the definition of swap) in Dodd-Frank.

In so doing, Congress did not include sports-betting contracts within the statutory definition of swap. Such contracts do not fit the CEA's purpose or the statutory language defining swap, which focus on hedging economic risk. Sports bets are not designed for and are very rarely, if ever, entered into for the purpose of hedging. As the Sixth Circuit and Ninth Circuit concluded, the Third Circuit's reliance on downstream economic effects on sponsors, advertisers, television networks, and franchises stretches "associated with" too broadly, beyond its statutory context. *Schuler*, 2026 WL 2884087, at *15; *Assad*, 2026 WL 2543846, at *12.

Moreover, if Kalshi were correct that sports bets were swaps, then *all* off-exchange retail sports bets since October 2012—in every state—have been illegal because persons other than "eligible contract participants" ('ECPs')⁶ were prohibited from entering into off-exchange swaps under 7 U.S.C. § 2(e).

There was no mention of sports betting during the 54 times *Amicus* provided testimony to Congress as CFTC Chairman, nor did anyone involved in drafting

⁶ The ECP definition includes certain financial, commercial, and governmental entities and individuals with more than \$10 million in invested assets (\$5 million if hedging). 7 U.S.C. § 1a(18).

Dodd-Frank or in extensive implementing rulemaking speak of making the CFTC a national sports-betting regulator.

Second, Dodd-Frank’s “Special Rule,” by text and design, does not define sports bets as swaps. The Special Rule’s purpose was to give the CFTC authority to prohibit “agreements, contracts, or transactions” that involve “gaming,” unlawful activity, terrorism, war, or assassination from being listed on regulated markets.

The Ninth Circuit concluded from the Special Rule and its legislative history that “Congress did not want sports betting to be conducted on derivatives markets.” *Assad*, 2026 WL 2543846, at *14. The rule expressly applies to “agreements, contracts, transactions, *or* swaps” in excluded commodities, while its operative prohibition refers to “[n]o agreement, contract, or transaction” determined to be contrary to the public interest, without even using the term “swap.” 7 U.S.C. § 7a-2(c)(5)(C)(i)-(ii) (emphasis added).

As the Sixth Circuit held, the fact that the CFTC may prohibit gaming-related event contracts thus does not mean that those contracts are swaps. *Schuler*, 2026 WL 2884087, at *15.

Third, Dodd-Frank did not preempt state gaming laws. Whatever preemptive effect the CEA may have with respect to state regulation of swaps and derivatives markets, Congress did not use it to displace state gaming laws governing sports betting.

Nobody involved in Dodd-Frank’s passage called for preempting states or their gaming commissions’

authorities over sports betting. Congress knew how to expressly preempt state law when it wished to do so. The CFMA expressly preempted state gaming laws for specified transactions, 7 U.S.C. § 16(e)(2), but Congress did not amend that limited provision in Dodd-Frank to cover sports betting.

The Sixth Circuit held that “even assuming that Kalshi’s sports-event contracts are swaps . . . the CEA neither expressly nor impliedly preempts Ohio’s or Tennessee’s gambling laws.” *Schuler*, 2026 WL 2884087, at *1.

Fourth, common sense confirms that Congress did not make the CFTC the nation’s sports-betting regulator.

Preempting state and tribal sports-betting authorities would have upended the federal, state, and tribal statutory schemes then governing sports betting. The Professional and Amateur Sports Protection Act (‘PASPA’) generally prohibited States in 2010 from authorizing sports betting other than as grandfathered for Nevada casinos and a few state lotteries. 28 U.S.C. § 3702. The Interstate Wire Act of 1961 (‘Wire Act’) imposed restrictions on interstate transmissions involving sports wagers. 18 U.S.C. § 1084(a). And the Indian Gaming Regulatory Act of 1988 (‘IGRA’) established tribal gaming regulation and tribal-state compacts. 25 U.S.C. § 2710(d).

Yet none of the sophisticated parties involved in *Murphy v. NCAA*, 584 U.S. 453 (2018), claimed Congress had gutted that architecture eight years earlier by handing nationwide sports-betting oversight to the CFTC—thereby permitting under CFTC

authority the same activity that Congress had prohibited under PASPA. If sports bets were swaps, as discussed above, under Section 2(e) all off-exchange sports betting in casinos then allowed under PASPA and IGRA would have been illegal since 2012.

Further, Congress and the CFTC (at least until the past year) did not behave as though Congress had made such a fundamental change. No one suggested that casinos had to shut down their off-exchange sports-betting operations. Nor did the CFTC ask Congress for the staffing or appropriations to regulate sports-betting transactions after Dodd-Frank’s passage or after *Murphy*.

Congress does not make fundamental changes in the balance of state and federal power in isolated snippets of text. As the Court has said, Congress does not “hide elephants in mouseholes.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001). Preempting state authority over sports betting—an over \$165 billion per year industry—has major implications for states’ power to protect their residents.⁷ It is not the kind of thing Congress hides in a subpart of a definition. If Dodd-Frank had preempted the states and tribes on sports betting, it would have been one of the biggest stories about Dodd-Frank at the time. But nobody ever mentioned it.

⁷ See Milla Jovanovic, *US Sports Betting in 2025 Reaches Record Highs, Driven by New York and Illinois*, SportsHandle (Feb. 26, 2026), <https://perma.cc/6JW7-D6X8>.

ARGUMENT

I. THE CEA’S TEXT, HISTORY, PURPOSE, AND STRUCTURE DEMONSTRATE SPORTS-BETTING CONTRACTS ARE NOT SWAPS.

To best understand the swaps definition—text at the heart of this case—one must review the text, history, purpose, structure, and other language of the CEA and the changes Congress made in response to the 2008 financial crisis. The history matters because Kalshi’s argument would attribute to Congress a revolutionary change in sports-betting regulation that is nowhere apparent in the statute’s purpose, surrounding provisions, or contemporaneous understanding.

A. Federal Commodity Derivatives Regulation Prior to Dodd-Frank

U.S. derivatives markets developed in the 1850s as a way for farmers to get price certainty for their potential future crops and to benefit from prices established in a central market, rather than relying on competition for their crops among local merchants.

A “derivative” is a financial contract that derives its value from a “secondary source such as an underlying bond, currency, or commodity” or an underlying price or index. *Derivative*, Black’s Law Dictionary (12th ed. 2024); *Investment Co. Inst. v. CFTC*, 720 F.3d 370, 372 (D.C. Cir. 2013). Well-functioning derivatives markets are essential for end-

users seeking to hedge future price risk and focus on what they do best—efficiently producing goods and services for the economy.

Hedging requires counterparties, often speculators hoping to profit from market risks that others want to hedge. As Justice Holmes explained, “[s]peculation of this kind by competent men is the self-adjustment of society to the probable. Its value is well known as a means of avoiding or mitigating catastrophes, equalizing prices, and providing for periods of want.” *Board of Trade of City of Chicago v. Christie Grain & Stock Co.*, 198 U.S. 236, 247 (1905).

Fostering hedging and price discovery has been at the heart of federal derivatives regulation for more than a century. In 1922, Congress found commodity futures were “affected with a national public interest,” because they were used as “a basis for determining . . . prices” and for “hedging . . . against possible loss through fluctuations in price.” Grain Futures Act, Pub. L. No. 67-331, § 3, 42 Stat. 998, 999.

Those purposes carried into the CEA in 1936, Pub. L. No. 74-675, 49 Stat. 1491, and Congress’s creation of the CFTC in 1974. Pub. L. No. 93-463, 88 Stat. 1389. The CEA states that the transactions it covers are “affected with a national public interest by providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities.” 7 U.S.C. § 5(a). These findings and purpose are core to understanding Congress’s design for federal regulation of derivatives markets.

As amended in 1974, the CEA provided that all futures contracts were required to be traded on a designated contract market ('DCM') and gave the CFTC exclusive jurisdiction over accounts, agreements, and transactions involving such contracts, except for specified federal and state authorities.

In the early 1980s, a new form of derivatives contracts emerged as a way for institutions to engage in customized bilateral hedging transactions: swaps.⁸ To address questions about swaps' legal status, the Futures Trading Practices Act of 1992 authorized the CFTC to exempt "any agreement, contract, or transaction" from the CEA's requirements. Pub. L. No. 102-546, § 502, 106 Stat. 3590, 3629. The CFTC then exempted certain customized off-exchange swaps between institutional investors. 58 Fed. Reg. 5587, 5594 (Jan. 22, 1993).

In 2000, the CFMA statutorily excluded swap transactions in certain commodities between ECPs from CFTC regulation. *See* Pub. L. No. 106-554, app. E, §§ 103, 105(b), 114 Stat. 2763A-365, 377, 379. The CFMA also added a definition of "swap agreement" to the GLBA. *Id.* § 301, 114 Stat. 2763A-449 (adding GLBA § 206A). That amendment defined "swap agreement" to include, among other things, certain event contracts "associated with a potential financial, economic, or commercial consequence." *Id.* Congress included this language against a backdrop of the then-

⁸ *See* 54 Fed. Reg. 30694, 30695 (July 21, 1989) (describing swaps as "an agreement between two parties to exchange a series of cash flows").

emerging market for OTC weather derivatives used to hedge weather-related commercial risks, including hurricanes.⁹

Subsequently, in 2008, the CFTC issued a “Concept Release on the Appropriate Regulatory Treatment of Event Contracts” (‘2008 Concept Release’) to address whether “financial agreements that may primarily function as information aggregation vehicles” were within the CFTC’s jurisdiction. 73 Fed. Reg. 25669, 25670 (May 7, 2008). The word “swap” is nowhere to be found.

The CFTC recognized that most event contracts are not suited to the purposes of hedging and price discovery central to the CEA. The CFTC stated that event contracts “generally take the form of financial agreements linked to eventualities or measures that neither derive from, nor correlate with, market prices or broad economic or commercial measures.” 73 Fed. Reg. at 25670.

B. Dodd-Frank Was Aimed at the Causes of the Financial Crisis, Not Sports Betting

Trading in unregulated swaps boomed in the early 2000s, contributing to the 2008 financial crisis. See *United States v. Phillips*, 155 F.4th 102, 113 (2d Cir. 2025).

⁹ See Stephen Jewson et al., *Weather Derivative Valuation: The Meteorological, Statistical, Financial and Mathematical Foundations*, Cambridge University Press 1 (2005), <https://perma.cc/KR7H-2UVB>.

In the aftermath, Congress and the Executive Branch pursued reforms that culminated in Dodd-Frank. A key administration focus was reversing many CFMA exemptive provisions and establishing a regulatory regime for swaps. In May 2009, Treasury Secretary Timothy Geithner sent Senate Majority Leader Harry Reid recommendations “to enable the government to regulate the OTC derivatives markets[,]” to promote efficiency and transparency, lower systemic risk, prevent manipulation and fraud, and prevent inappropriate marketing to unsophisticated parties.¹⁰ As CFTC Chairman, *Amicus* repeatedly testified to Congress on the need for swaps markets reform, including clearing, exchange trading, transparency, dealer registration, and business-conduct rules. Off-exchange non-ECP swaps were to be prohibited.¹¹

In response, Congress passed comprehensive reforms in Dodd-Frank. *Phillips*, 155 F.4th at 113. As amended, the CEA has a six-prong swap definition. The third prong listed 22 types of agreements, contracts, or transactions commonly known as swaps—from interest rate swaps to commodity swaps. 7 U.S.C. § 1a(47)(A)(iii). As it had in GLBA, for legislative

¹⁰ See Letter from Timothy Geithner, Sec’y of the U.S. Treasury, to Senator Harry Reid (May 13, 2009), <https://perma.cc/QUG5-HTD4>. See also Dep’t of the Treasury, *A New Foundation: Rebuilding Financial Supervision and Regulation* 46–48 (June 17, 2009), <https://perma.cc/LVS6-6RCK>.

¹¹ See, e.g., Testimony of CFTC Chairman Gary Gensler Before the House Fin. Serv. Comm. (July 22, 2009), <https://www.cftc.gov/PressRoom/SpeechesTestimony/gensler-7>.

convenience, Congress also incorporated prongs for agreements not typically considered “swaps,” i.e., (1) price-related options (put, call, cap, floor, collar, or similar option), *id.* § 1a(47)(A)(i), and (2) a limited category of event contracts “associated with a potential financial, economic, or commercial consequence.” *Id.* § 1a(47)(A)(ii). In context, these prongs cover only options and event contracts that function like the traditional swaps listed in the third prong by facilitating commercial hedging.

Moreover, Dodd-Frank notably did not define swaps as a subset of futures, as the Third Circuit majority opinion suggests. Pet. App. 5a (“a new class of futures known as ‘swaps’”). Rather, while allowing ECPs to trade customized swaps OTC, Congress extended the off-exchange futures prohibition to swaps traded by non-ECPs. 7 U.S.C. § 2(e). Dodd-Frank also regulated swap dealers, mandated central clearing, and imposed reporting requirements on participants in the swaps market. *See Phillips*, 155 F.4th at 113.

Sports betting was not part of the 2008 financial crisis or the response to it.¹² Nowhere in the Executive Branch’s list of priorities, in *Amicus*’s 54 appearances before Congress, in any statement of a member of Congress, or in the text of Dodd-Frank was there any indication Congress sought to oust the states from sports-betting regulation.

¹² *See* Fin. Crisis Inquiry Comm’n, *The Financial Crisis Inquiry Report* (Jan. 2011), <https://perma.cc/B7VH-GTLV>.

C. Sports Bets Are Not Swaps

The Third Circuit’s literalist analysis treats the swap definition as if it includes sports betting, or at least sports bets listed on a DCM. Pet. App. 8a, 11a. That interpretation, though, is inconsistent with the purpose of the CEA, the statutory and historical context of the swap definition, and the contemporaneous regulatory understanding of the relationship between sports bets, event contracts, and swaps.

As discussed, the CEA’s purpose is to improve interstate commerce by facilitating hedging and price discovery. 7 U.S.C. § 5(a). Sports betting does not serve those purposes. Nor, at the time of Dodd-Frank, were sports bets “entered into regularly in interstate and international commerce.” *Id.*

When Congress used language for the CEA swap definition originally adopted in GLBA’s 2000 definition of “swap agreement,” it had no reason to think that language included sports bets. *See* Section I.B, *supra*.

Kalshi itself said as much in a brief submitted to the D.C. Circuit only a few months before it began self-certifying sports-betting contracts, conceding that “at least in general, contracts relating to games—again, activities conducted for diversion or amusement—are

unlikely to serve any ‘commercial or hedging interest.’”¹³

The downstream economic effects on sponsors, advertisers, television networks, and franchises relied upon by the Third Circuit are at best tenuously connected to hedges of commercial risks and stretch “associated with” too broadly beyond its statutory context. Each prong of Section 1a(47)(A) must be considered in relation to the other subparagraphs and the CEA’s history and purpose. That context is crucial, as it limits the inclusion of event contracts to those that hedge risks in a manner similar to traditional swaps. The Third Circuit’s literalist reading of the event-contract category in subparagraph (ii) is so broad that it would cover the entire list of swaps in subparagraph (iii), making that key prong superfluous.

As this Court recently observed, “[t]o be sure, in a literalist sense, ‘everything is related to everything else.’” *Chevron USA Inc. v. Plaquemines Par., Louisiana*, 608 U.S. 1, 11–12 (2026) (quoting *California Div. of Labor Standards Enft v. Dillingham Constr., N. A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring)). Likewise, many things can be associated with one another. “But, generally in statutory interpretation, ‘it is the ordinary, not literalist, meaning that is the better one.’” *Id.* at 12 (quoting *Rutledge v. Pharmaceutical Care Management Assn.*, 592 U.S. 80, 93 (2020) (Thomas, J., concurring)).

¹³ Appellee’s Br. at 45, *KalshiEX LLC v. CFTC*, No. 24-5205 (D.C. Cir. Nov. 15, 2024).

The Third Circuit’s reading leaves no limiting principle on the statutory language, other than whether the sports bet is listed on a DCM, which is no limit at all. The CEA swap definition does not depend on the venue in which it is entered into—on-exchange or off-exchange. In fact, the statutory structure expressly provides that swaps may trade off exchange (by ECPs).

Congress did not consider bets on outcomes of sporting events, how many points a player would score in a quarter, or sportsbook-style parlays to be swaps. These contracts do not have hedgers meeting speculators to lay off risk. *Cf. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 357–58 (1982).

More jarring, as noted, 7 U.S.C. § 2(e) makes it “unlawful” for any person (other than an ECP) to enter into swaps off of a DCM. If Congress swept sports betting into the swap definition, then *all* off-exchange retail sports bets since October 2012 have been illegal. *Schuler*, 2026 WL 2884087, at *14–*15. That is every sports wager placed in a casino, on an online sportsbook, or between two friends at a bar. This would include sports wagers in Nevada permitted by PASPA. *See Murphy*, 584 U.S. at 462.

Further, Congress specifically provided that the “house,” i.e., a party making markets in swaps—like a casino does if sports bets were to be considered swaps—may be regulated as a swap dealer. *See* 7 U.S.C. § 1a(49)(A). Despite over \$165 billion in sports-betting

handle in 2025,¹⁴ the CFTC has required no sportsbook, casino, or prediction-market maker to register as a swap dealer—even though their activity may exceed the \$8 billion registration threshold. *See* 83 Fed. Reg. 56666 (Nov. 13, 2018).

The regulatory history also significantly undercuts the Third Circuit’s broad reading. In the 2012 CFTC and SEC joint rulemakings further defining swaps and swap dealers, none of the comments received contained the word “sport,” “sports,” or “gamble,” suggested that swaps could be used for sports betting, or advocated to bring sports bets *within* the further definition of swap.¹⁵ *See* 77 Fed. Reg. 30596 (May 23, 2012); 77 Fed. Reg. 48208 (Aug. 13, 2012).

Surely, if a sports wager were considered a swap at the time, someone would have sought clarification in the further definition—especially as such wagers would, by operation of Dodd-Frank, have been required to be placed only on DCMs or limited to ECPs. *See* 7 U.S.C. § 2(e).

¹⁴ *See* note 7, *supra*.

¹⁵ *See also* Commodity Futures Trading Comm’n, *Comments for Proposed Rule 76 FR 29818*, https://comments.cftc.gov/publiccomments/CommentList.aspx?id=1032&ctl00_ctl00_cphContentMain_MainContent_gvCommentListChangePage=15. The word “gaming” appears only in reference to “gaming” the system, not gambling or betting.

II. THE SPECIAL RULE DOES NOT IMPLY THAT SPORTS BETS FALL WITHIN THE SWAPS DEFINITION.

Another source of statutory context is the Special Rule authorizing the CFTC to prohibit listing “agreements, contracts, transactions, or swaps in excluded commodities that are based upon the occurrence, extent of an occurrence, or contingency (other than a change in the price, rate, value, or levels of [certain commodities])” involving gaming, war, terrorism, assassination, and unlawful activity (explicitly including activities contrary to *state* law). 7 U.S.C. § 7a-2(c)(5)(C)(i). The CFTC may forbid any event contract, swap or not, if it involves one of the statutory categories.¹⁶

The Special Rule provision originated in an amendment proposed by Senate Majority Leader Harry Reid, Senator Chris Dodd, and Senator Blanche Lincoln on April 29, 2010. S. Amend. No. 3739 to S. 3217, 111th Cong., 2d Sess. (2010). A number of Senators wanted to ban certain agreements, contracts, or transactions, particularly those considered by the Defense Department’s Defense Advanced Research Projects Agency (‘DARPA’) in 2003,¹⁷ as well as certain

¹⁶ Further, DCMs can and do list contracts other than futures, options, and swaps, such as foreign-exchange transactions. *See, e.g.*, Chicago Mercantile Exchange, Chapter 13, <https://www.cmegroup.com/rulebook/CME/I/13.pdf>.

¹⁷ DARPA proposed a Policy Analysis Market that would trade event contracts based on Middle East political developments; opposition to markets for contracts involving assassination, terrorism and war was swift. *See* Carl Hulse,

types of event contracts addressed in the 2008 Concept Release, including those that are “the functional equivalent of gambling” and those “based on assassinations or terrorist activities.”¹⁸ 73 Fed. Reg. at 25673.

The text of the Special Rule makes clear that it applies to all “agreements, contracts, transactions, *or swaps* in excluded commodities,” not merely “swaps.” 7 U.S.C. § 7a-2(c)(5)(C)(i) (emphasis added). Nor does it define “agreements, contracts, or transactions” involving the list of activities as “swaps.” “Event contracts may consist of ‘agreements, contracts, transactions, or swaps.’ So just because the CFTC may prohibit gaming-related event contracts does not mean Kalshi’s sports-event contracts are necessarily swaps. They may be regulated instead because they are an ‘agreement[],’ ‘contract[],’ or ‘transaction[]’ that falls within the Special Rule’s reach.” *Schuler*, 2026 WL 2884087, at *15.

In addition, the title of the provision likewise distinguishes event contracts from swaps: “Special rule for review and approval of event contracts and swaps contracts.” 7 U.S.C. § 7a-2(c)(5)(C). The structure of the

Pentagon Prepares a Futures Market on Terror Attacks, New York Times (July 29, 2003), <https://www.nytimes.com/2003/07/29/us/threats-responses-plans-criticisms-pentagon-prepares-futures-market-terror.html>.

¹⁸ *Amicus*, as CFTC Chairman at the time, provided technical assistance in drafting the Special Rule and recalls discussions with Senate Majority Leader Reid’s office regarding the inclusion of “gaming” within the list of activities under the rule.

provision also addresses event contracts, *id.* § 7a-2(c)(5)(C)(i), separately from swaps, *id.* § 7a-2(c)(5)(C)(iii).

As the Ninth Circuit noted, “[t]he classic example [of a gaming contract] is a contract on the outcome of a sporting event; as the legislative history directly confirms, Congress did not want sports betting to be conducted on derivatives markets.” *KalshiEX, LLC v. Assad*, 2026 WL 2543846, at *14 (quoting Appellee’s Br. at 41, *KalshiEX LLC v. CFTC*, No. 24-5205 (D.C. Cir. Nov. 15, 2024)).

The only known reference to sports betting in the Dodd-Frank legislative history shows that key members of Congress expected the CFTC to forbid all sports betting on exchanges it regulated. Senator Lincoln explained, in a colloquy with Senator Dianne Feinstein, 156 Cong. Rec. S5906-S5907 (daily ed. July 15, 2010):

Chairman Dodd and I maintained this provision . . . to assure that the Commission has the power to prevent the creation of futures and swaps markets that would allow citizens to profit from devastating events and also prevent gambling through futures markets. . . .

The Commission needs the power to, and should, prevent derivatives contracts that are contrary to the public interest because they exist predominantly to enable gambling through supposed “event contracts.” It would be quite easy to construct an “event contract” around sporting events such as the Super

Bowl, the Kentucky Derby, and Masters Golf Tournament. These types of contracts would not serve any real commercial purpose. Rather, they would be used solely for gambling.

While *Amicus* was Chairman, the bipartisan CFTC used the power Congress granted it and unanimously finalized Rule 40.11 in July 2011, prohibiting listing contracts involving gaming, along with the other activities enumerated in the Special Rule. 76 Fed. Reg. 44776, 44799 (July 27, 2011). The only public comment that discussed gaming merely requested that the CFTC further define gaming so as to “avoid confusion” about the line between permissible speculation and “gaming-type activities.”¹⁹

Importantly, Rule 40.11(a) prohibits listing “any” contract involving gaming. 17 C.F.R. § 40.11(a). The purpose of CFTC review of an event contract under Rule 40.11(c) is simply to determine whether a particular contract involves a prohibited category, *i.e.*, whether it involves gaming, war, terrorism, assassination, or unlawful activity. *See* 76 Fed. Reg. at 44785. No contract-specific “public interest” determination is required because the CFTC already concluded in 2011 under its Special Rule authority that all event contracts within these categories are prohibited. Thus, if a contract involves gaming (or

¹⁹ *See* CME Group, Comment for Proposed Rule 75 FR 67282 at 6 (Jan. 3, 2011), <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26867&SearchText=>.

terrorism, war, assassination, or unlawful acts), that is the end of the matter.

None of this express condemnation of “gaming” is evidence that Congress thought *sports-betting contracts* were swaps. Neither the text of the Special Rule nor the Senate colloquy concerning event contracts supports the conclusion that Congress was defining those contracts as swaps.

III. NO ONE IN CONGRESS CALLED FOR PREEMPTING STATE GAMING LAWS, NOR DID DODD-FRANK DO SO.

The Third Circuit held that Congress impliedly preempted state laws regulating sports betting through the CEA. Pet. App. 9a–15a.

The Sixth Circuit rejected that reading, relying partly on Section 2(a)(1)(A)’s savings clauses preserving specified state authority and state-court jurisdiction, and holding that even assuming the contracts are swaps, the CEA neither expressly nor impliedly preempts Ohio’s or Tennessee’s gaming laws. *Schuler*, 2026 WL 2884087, at *1. The Ninth Circuit held that although Section 2(a)(1)(A) expressly preempts state regulation of swaps “traded or executed” on a DCM, there was no preemption here because Kalshi’s sports-event contracts are not swaps. *Assad*, 2026 WL 2543846, at *16–*17.

Sports betting was not part of the 2008 financial crisis or the response to it. Nor were there any calls after the financial crisis from Congress, or anywhere else, to preempt the traditional state police powers over gaming, undermine PASPA, and establish nationwide

sports betting solely under CFTC auspices. To the contrary, as discussed above in Section II, Congress gave the CFTC authority to ban DCMs from listing event contracts involving “gaming.”

If it had wanted to do so, Congress knew how to preempt state gaming and bucket shop laws. Just ten years earlier in the CFMA, Congress had done so in the case of an enumerated list of certain financial agreements, contracts, or transactions excluded by select CFMA provisions or exempted by the Commission under 7 U.S.C. Section 6(c). *See* CFMA § 117, 114 Stat. 2763A-402 (7 U.S.C. § 16(e)(2)). This provision was specifically included in the CFMA to ensure states did not regulate specific financial instruments that were being excluded from CFTC jurisdiction. In passing Dodd-Frank, Congress did not add to this enumerated preemption list any reference to contracts involving sports or gaming.

Other aspects of Dodd-Frank and its implementation confirm that Dodd-Frank did not make the CFTC the nation’s sports-betting regulator. Congress did not address the overlap between state and federal law—as it had in the CFMA for insurance. *See* 7 U.S.C. § 16(h). Further, though Dodd-Frank expressly amended the Securities Exchange Act of 1934 to preempt state regulation of security-based swaps, other than for hybrid instruments, it did nothing comparable about swaps in the CEA. *See* Dodd-Frank Act, Pub. L. No. 111-203, § 767, 124 Stat. 1799 (amending 15 U.S.C. § 78bb(a)); 7 U.S.C. § 27f(b).

The absence of any such provisions or discussion is especially telling. The Third Circuit’s holding on

preemption also leads to the unconstitutional result that private parties—just by listing a contract—or an Executive Branch agency—by mere assertion of jurisdiction—can exercise the governmental power to preempt state law. *See Fed. Commc’ns Comm’n v. Consumers’ Rsch.*, 606 U.S. 656, 672–73, 692 (2025); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

IV. KALSHI’S INTERPRETATION OF THE SWAPS DEFINITION AS COVERTLY BUT RADICALLY ALTERING SPORTS BETTING REGULATION DEFIES COMMON SENSE.

This Court has long disapproved of taking obscure statutory language out of context and reading it as delegating massive executive power—what Justice Scalia referred to as hiding elephants in mouseholes. *Whitman*, 531 U.S. at 468. *See also MCI v. AT&T*, 512 U.S. 218, 229 (1994); *FDA v. Brown & Williamson*, 529 U.S. 120, 160 (2000); *King v. Burwell*, 576 U.S. 473, 485–86 (2015); *Learning Resources, Inc. v. Trump*, 607 U.S. 229, 242–43 (2026) (plurality op.).

This canon of interpretation is a memorable expression reflecting common sense about how Congress works. It is an antidote to the kind of literalism reflected in the Third Circuit’s analysis. Applying it recognizes that Congress was focused on regulating the derivatives markets that contributed to the crisis—not sports betting.

Common sense means recognizing that if sports-betting contracts were swaps, then sports bets between non-ECPs could be traded only on CFTC-regulated exchanges under CEA Section 2(e). The Third Circuit

below failed to consider the perverse consequence of its ruling, which would render illegal all off-exchange sports betting, including the in-casino betting then allowed under PASPA and IGRA, since 2012.

Common sense includes understanding that if Congress had given the CFTC exclusive jurisdiction over sports betting, it would have been a massive upending of the then-existing federal, state, and tribal statutory schemes governing sports betting, including PASPA, the Wire Act, and IGRA.

Common sense is wondering how in the real world Congress could have enacted a law that preempted Nevada gaming regulation and prohibited in-casino sports betting without then-Senate Majority Leader Harry Reid (and former Nevada Gaming Commission Chairman) noticing or with his blessing. Senator Reid surely would have noticed. And Congress did no such thing.

Congress did not displace historical state police powers over sports betting through Dodd-Frank and give them to a small federal regulatory agency with no experience in gaming regulation. The CFTC, and *Amicus* as Chairman, did not think at the time it had become—nor did it seek appropriations to be—the nation’s sports-betting regulator. Nor did CFTC Chairman Giancarlo ask for such resources after this Court struck down PASPA’s federal prohibition on sports betting in 2018.²⁰

²⁰ See, e.g., Testimony of Chairman J. Christopher Giancarlo Before the Senate Committee on Appropriations Subcomm. on

As late as 2024, the CFTC recognized that it is “not a gaming regulator” and lacked “the statutory mandate [and] specialized experience appropriate to oversee” gambling operations. 89 Fed. Reg. 48968, 48982–83 (June 10, 2024).

The failure of Congress and the Executive Branch to take steps to appropriate funds as if the CFTC were the national sports betting regulator is telling. The silence of the legislative and post-enactment regulatory records is telling. The failure of the sophisticated lawyers representing New Jersey and the NCAA in *Murphy*, as well as the Solicitor General, to perceive that Dodd-Frank may have gutted PASPA eight years earlier is telling.

If a particular meaning now attributed to a statute can’t be seen for nearly fifteen years, it is hard to conclude that it is the ordinary public meaning, much less what Congress intended.

CONCLUSION

The Court should grant the petition.

Fin. Serv. and Gen. Gov. (May 8, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo71>.

Respectfully submitted,

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