UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 25-1922

KALSHIEX LLC,
Plaintiff-Appellee,

v.

MARY JO FLAHERTY AND MATTHEW J. PLATKIN
Defendant-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 1:25-CV-02152

<u>CERTIFICATION OF ACCURACY</u>

I, Liza B. Fleming, am Liaison Counsel with regard to the preparation and filing of the transcript of the oral argument held on September 10, 2025, in the above-captioned matter. I certify that the transcript attached hereto is accurate, with all counsel having had an opportunity to review and to make corrections prior to this filing.

Dated: September 24, 2025

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 2    UNITED STATES THIRD CIRCUIT

 3    COURT OF APPEALS NEW YORK

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 6    In the Matter of:

 7    KALSHIEX, LLC,                        Main Case No.

 8           APPELLEE                         25-1922

 9    V.

10    MARY JO FLAHERTY, ET AL.,

11            APPELLANTS

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14            United States Third Circuit Court of Appeals

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17            September 10, 2025

18            9:30 AM

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20    B E F O R E:

21    HON. CHIEF JUDGE MICHAEL A. CHAGARES

22    CIRCUIT JUDGE DAVID J. PORTER

23    CIRCUIT JUDGE JANE RICHARDS ROTH

24    U.S. THIRD CIRCUIT COURT OF APPEALS

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1   P R O C E E D I N G S

2   JUDGE CHAGARES: And this case is Kalshiex (sic). I

3   may have pronounced -- mispronounced that, versus Flaherty,

4   Number 25-1922. So we'll hear from appellant's counsel, and

5   you may proceed.

6   MR. EHRLICH: Thank you, Your Honor. Stephen Ehrlich,

7   on behalf of appellants, I'd like to reserve three minutes for

8   rebuttal.

9   JUDGE CHAGARES: That will be granted.

10   MR. EHRLICH: Thank you. For three --

11   JUDGE CHAGARES: How do you pronounce the -- the --

12   how do you pronounce your client's name here?

13   MR. EHRLICH: For appellants, we're from the State,

14   Your Honor.

15   JUDGE CHAGARES: Oh, shoot. So sorry. Yes, yes,

16   yeah. You must know by now how the other side pronounces their

17   name.

18   MR. EHRLICH: I actually don't. I thought it was

19   Kalshi.

20   MR. HAVEMANN: That's right.

21   JUDGE CHAGARES: Kalshi.

22   MR. EHRLICH: Kalshi.

23   JUDGE CHAGARES: All right. Good. Okay. Good.

24   Sorry. Kalshi X, right? All right. Do you go with just

25   Kalshi, or do you go with the whole thing with the X at the

                                                          Page 5

1   end?

2   MR. HAVEMANN: Kalshi [cal-she] is great.

3   JUDGE CHAGARES: All right. Will do. Thank you.

4   Great.

5   MR. EHRLICH: Easier to say.

6   JUDGE CHAGARES: Okay. All right. We'll do. Thank

7   you. I'm so sorry. You may proceed.

8   MR. EHRLICH: Thank you, Your Honor. For three

9   independently sufficient reasons, any one of which is enough to

10   rule for the State, this Court should reverse the decision

11   below. First, what Kalshi offers is not a swap, so it falls

12   outside the Commodity Exchange Act in the first place.

13   Second, there can't be preemption here because

14   Congress specifically declined to preempt the type of state

15   gambling laws at issue here while preempting others, and

16   Congress has time and again affirmed the state's regulation of

17   gambling within their borders, a choice that the Supreme

18   Court's decision in Wyeth makes clear is incompatible with

19   preemption.

20   And third, the standard preemption analysis express,

21   field, and conflict also do not get Kalshi to preemption. For

22   any or all of those reasons this Court should reverse.

23   I'd like to start with the Commodity Exchange Act's

24   definition of swaps, and quite simply, Your Honor, the Congress

25   did not intend a massive sea change in gambling regulation when

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 1    it inserted the word swap into the Commodities Exchange Act in

 2    2010 as part of the Dodd-Frank reforms.  The reason this is

 3    such a massive sea change is because swaps have to be traded on

 4    CFTC regulated exchanges on a designated contract market, and

 5    it's, in fact, a federal crime to trade them outside of those

 6    scenarios, and so what we have here is a definition by Kalshi

 7    that would essentially make all casinos and sportsbooks

 8    currently federal felons.  We think that's certainly not what

 9    Congress was trying to do.  We don't think that's what the

10    Supreme Court in Murphy was envisioning when they struck down

11    PASPA and said, we're leaving this for the states to regulate.

12    They didn't mean we're leaving it to the CFTC, and that was

13    only seven years ago.  They expected this to be something that

14    the states regulate, and I think what the -- part of the issue

15    here --

16            JUDGE CHAGARES:  Let's jump into this now.

17            MR. EHRLICH:  Uh-huh.

18            JUDGE CHAGARES:  We're -- because we don't have all

19    that much time.  So I -- it seems that that the definition of

20    swaps is actually quite broad, and I understand you point out

21    some things that seem undesirable to your side, but I mean, for

22    instance, I noticed in your brief, you -- I don't know if

23    there's a suggestion on a limitation, but you suggest something

24    should be inherently financial, economic, whatever, but that's

25    not in the statute.  Are we obliged to, to apply what the
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1   elected branches have gotten us here, and to the extent any fix

2   is necessary, and we're not saying it is, isn't that for the

3   elected branches to deal with and not us?

4   MR. EHRLICH: Yeah. So I think a few responses to

5   that, Your Honor. I think we are both looking at the text. So

6   on our side we're looking at the words especially associated

7   with and so associated with -- joined or connected to. We give

8   the example in our brief, you know, lung cancer is associated

9   with smoking.

10   JUDGE CHAGARES: Well it's not only that, it's

11   associated with a potential financial, economic or commercial

12   consequence. I mean that that's -- that's pretty broad.

13   MR. EHRLICH: Yeah, I agree it's broad, and it's

14   because Congress was trying to sweep in various things as part

15   of the Dodd-Frank reforms they couldn't foresee exactly what

16   would become a swap, but it's not unlimited. I think this is

17   similar to the sort of --

18   JUDGE CHAGARES: Well, that's true. Maybe they didn't

19   foresee this. It's a very interesting business model, but --

20   but and maybe they didn't foresee it, but again, isn't that for

21   the elected branches to deal with?

22   MR. EHRLICH: Well I -- it is, but I think what

23   they've done here is not what Kalshi has said they've done, and

24   the reason we know that we have the associated with language,

25   as I pointed out, you know, in our example, in our brief. Lung

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 1   cancer is associated with smoking.  Things can rise and fall

 2   together.

 3            JUDGE CHAGARES:  Right.

 4            MR. EHRLICH:  And we have the context of the statute

 5   itself.  So the other clauses, the other subclauses were

 6   focused on Subclause 2.  That's mainly what the parties have

 7   been arguing about.

 8            JUDGE CHAGARES:  Yes.

 9            MR. EHRLICH:  But the other subclauses are all about

10   financial -- link to a financial instrument or measure, and

11   that's what we would say applies here too, if something is

12   associated with something, when it has a link to the financial

13   instrument or measure, and so we used inherently financial as

14   is sort of the shorthand, but that's really --

15            JUDGE CHAGARES:  Oh, that's limiting though.

16            MR. EHRLICH:  Well, it is limiting, and I think the

17   reason it's limiting is because we have the rare case where

18   three critical statutory interpretation rules cut our way,

19   which is we have a clear statement rule that Congress doesn't

20   lightly change the power between federal and state government.

21   This is something that state governments have regulated

22   forever, and I would point the Court to the states' amicus

23   brief from a broad coalition of states who goes in depth on

24   that.  We have the major questions doctrine, which is that, you

25   know, Congress doesn't lightly give agencies vast economic and
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1   political power without a clear statement, and we have the fact

2   that Congress doesn't lightly repeal its own statutes, and

3   Congress has time and time again, every time it passed a

4   federal gambling law accommodated and accepted state law, and

5   that's what we think they were doing here. They didn't do

6   anything to upend that there. We require a clear statement for

7   Congress to do that. I mean, this would -- the Wire Act's

8   prohibition on interstate gambling wouldn't make any sense if

9   everything was legal through the CFTC.

10   At the time this was enacted in 2010, PASPA was making

11 sports betting largely illegal. That apparently was for

12 nothing. The Supreme Court's decision in Murphy apparently did

13 nothing because everything was legal through the CFTC. So we

14 have those three clear statements.

15   JUDGE PORTER: Why do you -- why do you say nothing

16 and everything? I mean, we're talking about transactions only

17 on the DCM's, right? Not all sports gambling.

18   MR. EHRLICH: Well, we are, but the problem is with

19 the structure is the Commodity Exchange Act prohibits trading

20 of swaps specifically. We're talking about swaps that the

21 parties are arguing about. Those are not allowed to be traded

22 off DCM. It's a federal crime to be traded outside designated

23 exchange markets, and so as we say in our briefs, if they're

24 funneled essentially to the CFTC. So there can't be any -- if

25 Kalshi is right -- and their definition we would say is

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 1   limitless, but if they're right about this, then everything
 2   that counts as a swap and in our view, is pretty much
 3   everything, would have to be regulated by the CFTC.  We don't
 4   think that's what Congress is doing.  We see this in their
 5   examples they use.  They talk about the Eagles winning the
 6   Super Bowl and things like that, but when you look at the
 7   article, the reason that generated revenue is because they held
 8   a parade and things like that, and same thing with the World
 9   Cup.  There's greater international appeal.  We think that's
10   too attenuated.  This is why Congress meant to link it to a
11   financial measurement or -- or instrument, and that's what they
12   were doing here, and that's what the clear statement rules are
13   pointing to.
14           JUDGE PORTER:  There's no examples of sports betting
15   that are not swaps?
16           MR. EHRLICH:  Well, I -- we give some examples that
17   could be game, like, essentially gaming adjacent that are --
18   that could be swaps and therefore would trigger the special
19   rule.  So things around gaming.  So the revenue of the
20   Pittsburgh Steelers, for example, we think is linked to a
21   financial measurement, the revenue, and so it would be a swap,
22   it would fall into the special rule and up to the CFTC to
23   exclude it, but things about the sports game itself, probably
24   not.  We can't envision anything that would be a swap in that
25   scenario.
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1   And I think this -- the, as I said, the clear

2   statement rules that I was discussing all point that way, and

3   they feed into our preemption arguments as well. We talk about

4   first the presumption against preemption. This is again

5   something that states have long regulated. It's within our

6   police powers. We have great controls on all of these things

7   around gambling. It's a strongly regulated environment, and

8   again, we've regulated this for hundreds of years.

9   On top of that, we have the congressional acceptance

10   of state gambling laws in nearly every decade since the 1940s.

11   Congress has repeatedly accepted and incorporated state

12   gambling laws into its statutes, and the Supreme Court tells us

13   in Wyeth, when that happens, when Congress is aware of a state

14   scheme, aware of state laws, and nonetheless does not do

15   anything with it, that's a pretty strong indication that

16   there's no preemption, and that's exactly what we have here.

17   What the Supreme Court also says in Wyeth, by the way,

18   is Congress surely would have enacted an express preemption

19   provision if this is something they wanted to do, and they did

20   that here, but not for the transactions that are at issue in

21   our case, not for sports outcome contracts, and certainly not

22   in a way that would allow the federal government to make all

23   casinos in New Jersey felons. So we have them enacting an

24   express preemption provisions for certain gaming laws, not the

25   ones at issue here. The Supreme Court tells us in Cipollone

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 1    that that's a very strong indication that there should be no
 2    preemption, and then on top of that, we have the savings
 3    clauses that we talk about in our briefs, that they're not
 4    divesting federal and state courts of jurisdiction over the
 5    usual claims in those courts.
 6            And lastly, we have the special rule which
 7    incorporates state law in one of the things that the CFTC looks
 8    at when they're excluding things, and so when you pile all of
 9    those things on top of each other, especially Congress's
10    explicit preemption of certain things, certain state gaming
11    laws, but not the gaming laws at issue here, and the fact that
12    they've repeatedly accepted state gambling laws.  There just
13    cannot possibly be a way where Congress preempted especially
14    the field, but really, any preemption in this area, and then --
15            JUDGE CHAGARES:  There's a lot of discussion in the
16    briefs as well about conflict preemption, as well.
17            MR. EHRLICH:  Yes.  And we agree -- excuse me, Your
18    Honor.
19            JUDGE CHAGARES:  Sure.
20            MR. EHRLICH:  We agree that conflict preemption is
21    something that can apply in the appropriate case, and it just
22    doesn't apply here because federal law is prohibiting the same
23    thing as -- as state law, and in those circumstances, there's
24    almost never going to be conflict preemption.  I mean, Kalshi
25    itself admits, and we quote this in page forty-nine of our
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 1   opening briefs, their D.C. Circuit brief, where they say

 2   Congress did not want sports betting to be conducted on

 3   derivative markets.  We agree, and Congress said that

 4   essentially in the special rule, it gave some discretion to the

 5   CFTC.  The CFTC has an implementing regulation, it says the

 6   company shall not list.  So what they're doing is illegal under

 7   federal law.  It's illegal under our state law, and there's not

 8   going to be a conflict in that circumstance.  I will say they

 9   can do what they want as long as they get a license in New

10   Jersey, that's all they have to do is comply with our New

11   Jersey --

12        JUDGE CHAGARES:  Well, but there are other conflicts,

13   too.  I mean, you have to be over 18 in New Jersey.  It can't

14   deal with collegiate betting in any -- in any way and other

15   things too, but go ahead.

16        MR. EHRLICH:  Certain collegiate games.  But, yes.

17        JUDGE CHAGARES:  It's in the Constitution.

18        MR. EHRLICH:  Correct.  Exactly, Your Honor, and they

19   have to comply with those things for New Jersey residents, but

20   again, this is something that companies deal with all the time

21   is parallel -- parallel federal and state regulations.  We

22   quote examples at page 52 of our brief, but antitrust laws,

23   security laws, you know, anti-discrimination laws, companies

24   deal with parallel regulations all the time, and we don't see

25   those things that Your Honor pointed out as, as conflicts here.
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1 Again, they shouldn't be trading these on DCMS at all, and so

2 the fact that they're allowed to do it, subject to some

3 restrictions under our law, doesn't create a conflict here, and

4 so for that reason, we would say there's certainly no conflict.

5 I think the parties agree that conflict preemption could apply.

6 I think a lot of the arguments revolve around field preemption.

7 It's just that in this case, in the sports gambling case where

8 Congress has repeatedly --

9   JUDGE CHAGARES: What is a field anyway, if it's field

10 preemption?

11   MR. EHRLICH: Sorry, Your Honor?

12   JUDGE CHAGARES: What is the field?

13   MR. EHRLICH: Well, I think you'd have to ask Kalshi

14 that. I mean, we don't think there is a field. I think they

15 would say all trading on designated contracts markets, which

16 is -- I think we would say clearly not true. I think the

17 Seventh Circuit in the American Agriculture case --

18   JUDGE CHAGARES: Right, right.

19   MR. ERLICH: -- that both parties cite, says not field

20 preemption, so I don't know the answer to that, but that's why

21 we say there's no field preemption.

22   JUDGE CHAGARES: All right. Do you have anything,

23 Judge Porter?

24   JUDGE PORTER: Well, just given the posture of the

25 case on the preliminary injunction on the first prong, you

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 1   know, they don't have to show that they're likely to win,

 2   right?  Just that they -- just that they have a significantly

 3   better than negligible argument, are you saying that the -- the

 4   position is not significantly better than negligible?

 5         MR. EHRLICH:  Well, I guess I would say two things.  I

 6   don't think we think that's the standard, and we quote a

 7   contrary case in our briefs for likelihood of success, but I

 8   also don't think it matters.  I mean, it's a -- it's a pure

 9   question of law in our view.  Here, which would be de novo

10   regardless, and on a de novo review, the idea that Congress

11   inserted swaps to -- to put all gambling, make all casinos

12   felons and then preempted all state law would just not work,

13   for all the reasons that we've been talking about, and so I

14   think under any standard you would apply, it just, it wouldn't

15   meet it.

16         JUDGE CHAGARES:  Great.  Judge Roth, do you have

17   anything else?

18         JUDGE ROTH:  I have nothing further.  Thank you.

19         JUDGE CHAGARES:  Okay.  Great.  Thank you.  We'll get

20   you on rebuttal and we'll hear from the appellee now.

21         You may proceed.

22         MR. HAVEMANN:  Good morning, Your Honors, may it

23   please the Court.  Will Havemann, on behalf of Kalshi.  The

24   District Court correctly held that Congress's decision to vest

25   the CFTC with, remember the statutory language, exclusive
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1   jurisdiction over trading on designated contract markets

2   clearly preempts Defendants' efforts to regulate trading on

3   Kalshi, which is a designated contract market. We think this

4   case can begin and end for some of the reasons I think both

5   Judge Porter and Chief Judge Chagares, you're noting with

6   opposing counsel, can begin and end with the plain statutory

7   text.

8   And if I may begin where my colleague began, which is

9   on the definition of swap. I understand his real argument to

10   be, swaps have to be traded on exchange, and because they have

11   to be traded on exchange, everything's a felony under Kalshi's

12   view, and I want to be very clear, that is not our position,

13   and that is not what we believe the statute requires, for

14   reasons that defendants themselves point out in their brief.

15   What Section 2A of the Commodity Exchange Act does, is

16   it provides exclusive jurisdiction to the CFTC over on exchange

17   transactions, and then it has a savings clause, the savings

18   clause that my colleague referred to that says, except as

19   hereinabove provided by the grant of exclusive jurisdiction

20   over on exchange trading. The language that Congress used is

21   nothing contained in this section shall supersede or limit the

22   jurisdiction of regulatory authorities under the laws of any

23   state, or restrict state authorities from carrying out their

24   duties and responsibilities in accordance with such laws.

25   So that savings clause makes clear that nothing else

1   in section two, which includes the requirement that they

2   referred to that, that swaps have to be traded on exchange,

3   limits states from subjecting sportsbooks or gambling casinos,

4   or -- I'm not sure exactly what the scope of their argument is,

5   but nothing about the rest of section two limits states from

6   subjecting sportsbooks to their own state authority and Chief

7   Judge Chagares, you know, they as you noted, they made the

8   argument that, well, these don't fall within the statutory

9   definition of a swap, and as you noted, I mean, the definition

10   that Congress used in Dodd-Frank is quite broad. It is any

11   event associated with potential financial, economic, or

12   commercial consequences --

13   JUDGE PORTER: Let me ask you a question similar to

14   what I asked your friend. What kinds of sports betting are

15   available off the designated -- outside the designated contract

16   markets?

17   MR. HAVEMANN: Sports bets offered by sportsbooks in

18   New Jersey and around the country are permissible and they're

19   regulated by state law, and if they do not occur on DCMs, they

20   may be regulated under state law. That we think is the clear

21   import of the CEA and the Dodd-Frank Amendments, and that is

22   certainly our position here. So the parade of horribles about

23   every, you know, casino or every sports book being a felon, if

24   the District Court's injunction is affirmed, just simply does

25   not obtain.

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1   Now, they -- I -- I think I want to emphasize what I

2   understand to be the breadth of defendant's arguments here,

3   because, of course, you know, the context in which we are here

4   is with respect to sports event contracts, but the argument

5   that they make in their brief is quite a bit broader than that.

6   Their view is that they get to regulate anything they deem to

7   be gaming, even if/or gambling, even if it happens on a

8   designated contract market, and let's just look to how New

9   Jersey defines gambling. New Jersey defines gambling to mean

10   staking, or risking something of value upon the outcome of a

11   future contingent event.

12   So if they are right that they can regulate anything

13   they understand to be gaming, even if it happens on a DCM, even

14   if it happens on a federally regulated, subject to the

15   exclusive jurisdiction of the CFTC, then that certainly means

16   they can regulate every event contract, contrary to the clear

17   intent of Congress and Dodd-Frank to put event contracts within

18   the jurisdiction of the CFTC, and it may well mean they could

19   regulate every futures contract, because, of course, futures

20   can be understood to be placing a thing of value on a future

21   event. The rise of price in gold, the rise in price in an

22   underlying commodity.

23   And if that sounds familiar to the Court, it's because

24   states tried to do this. They tried to do this between 100 and

25   150 years ago, when many states developed their gambling

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1   statutes specifically to target futures trading, which they

2   understood to be gambling.

3   And we cite an important case from the Illinois

4   Supreme Court in our brief, where the Illinois Supreme Court

5   says, you know, dealing in futures to be settled according to

6   the fluctuations of the market is void for contrary to public

7   policy, is a crime, this species of gambling has become

8   emphatically and preeminently the national sin.

9   That's what -- that's how the Supreme Court of

10 Illinois understood futures trading in 1888, and so it is

11 absolutely not correct, as defendants say, to say that Congress

12 wouldn't have had in mind when it granted exclusive

13 jurisdiction to the CFTC over futures trading after

14 experimenting with decades of concurrent state and federal

15 regulation, after recognizing, after holding hearings, after

16 hearing from witnesses, after revising the prior version of the

17 statute to grant exclusive jurisdiction to the CFTC. After one

18 senator noted on the floor, that that allowing states to

19 regulate this themselves would lead to total chaos. They

20 absolutely would have had in mind, would have been front and

21 center in Congress's mind, that one of the things that they

22 were doing when they granted the CFTC jurisdiction was

23 preempting state law in the narrow application --

24   JUDGE PORTER: So you --

25   MR. HAVEMANN: -- of trading on DCMs.

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1   JUDGE PORTER: In the brief, you invoked field

2 preemption and conflict preemption, what's the -- what's the

3 scope of the field that you're arguing?

4   MR. HAVEMANN: The field that Congress has preempted

5 is the field of regulating trading on federally designated

6 contract markets, and we think that that's actually --

7 although, the Seventh Circuit couched its decision in conflict

8 preemption terms, I mean, we cite a case that says, you know,

9 these categories are not rigidly distinct. We understand the

10 Seventh Circuit case.

11   JUDGE CHAGARES: But see, you've -- you've argued

12 alternatively, which do you think is the appropriate, more

13 appropriate analysis, conflict or field?

14   MR. HAVEMANN: We certainly think both, but you know,

15 the District Court ruled on field preemption.

16   JUDGE CHAGARES: Yes.

17   MR. HAVEMANN: We think that's absolutely right. We

18   can -- we think that the Court can affirm on that basis,

19   and we just think that if there's any doubt on that

20   question, if there's any doubt about the, you know, the

21   nature of the field or anything else, if you look to

22   conflict preemption, it's equally clear for the reason

23   that the Seventh Circuit again, noted in the American

24   Agriculture case, what the Seventh Circuit said is a state

25   law that would directly affect trading on or the operation

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1          of a futures market is preempted.  So whether you think

2          about that in terms of conflict preemption or whether you

3          think about it in terms of field preemption, we think that

4          you sort of get to the same result, and there are a bunch

5          of specific respects in which we think that there is a

6          conflict that we'd be happy to go into.

7              Just -- I mean, I think that my colleague noted at the

8    end of his argument that all Kalshi needs to do is get a

9    license in New Jersey.  I want to be very clear that it would

10   be impossible for Kalshi to get license in New Jersey, because

11   one of the things that New Jersey requires for people to get a

12   license is to accept what they call bets.  So if we're in a

13   world where we're subject to state regulation, if we're

14   offering bets, then we have to accept bets only from people in

15   the State of New Jersey.

16              And how is a nationwide exchange subject to impartial

17   access requirements imposed by the CFTC, upon which our CFTC

18   designation depends.  How could we accept bets only from people

19   within New Jersey?  And again, it's not just New Jersey.  So if

20   New Jersey is right about whether their state licensing regime

21   can apply here, then you have 49 other states and the District

22   of Columbia that can impose overlapping, conflicting, redundant

23   requirements on a DCM, and if you look to what Congress did in

24   1974, this is exactly the result that Congress wanted to avoid

25   when it subjected these exchanges to the exclusive jurisdiction
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1    of the CFTC.  The chaos that Congress wanted to avoid when

2    it -- when it created the exclusive jurisdiction provision and

3    created the CFTC.

4             JUDGE CHAGARES:  What are some kinds of sports betting

5    that would not fall within your definition of swap?

6             MR. HAVEMANN:  I think that there are probably certain

7    player props that would not have, you know, sufficient economic

8    consequences to fit within the definition.

9             JUDGE CHAGARES:  But like if Judge Porter challenged

10   me to ping pong, which he would destroy me, but that you could

11   vote -- but the clerks might be interested in voting on that

12   one.  Go with him, he'd beat me.

13            MR. HAVEMANN:  Yeah, I think, Your Honor, if it's --

14   if it's a game between two, two people without extrinsic

15   consequences.  So it may be very consequential to you both, but

16   not sort of financial extrinsic consequences in the world, then

17   I think they sort of say, well, a raffle or a bet on a, a

18   little league game or the like, and nothing of the sort would

19   be a swap.

20            JUDGE CHAGARES:  Well, it does have to impact

21   economics, right?

22            MR. HAVEMANN:  Right.

23            JUDGE CHAGARES:  Okay.  So that wouldn't.  I mean, you

24   pointed out the Super Bowl.  All right.  That's going to have

25   the Eagles win the Super Bowl or the Steelers, for that matter.
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1   You know, and then that's going to impact folks economically,

2   but just how granular do you need to get? I mean I've seen

3   your -- the website, and you know there's a lot of really very

4   specific things.

5   MR. HAVEMANN: Yeah, I -- so I think that Congress, as

6   you noted, Chief Judge, used a broad definition, but that

7   definition does not encompass everything. It still has to have

8   potential financial consequences. I'm sure that there is a de

9   minimis, you know, respect in which it may, even if you put

10   money on a bet or something like that, that's not what Congress

11   has in mind.

12   It also has to be outside of the control of the

13   parties. So that's another limitation, and then there's a

14   whole list of exclusions from that definition, and then they

15   give the CFTC authority to -- to create further exclusions,

16   which the CFTC has done, and it has done in a way, by the way,

17   that would probably even if you thought we were in a world

18   where the CFTC has authority over off exchange transactions,

19   they've probably exempted all of this stuff anyway.

20   But the key statutory sort of distinction that

21   Congress has drawn since 1974 is, if it's on exchange, it's

22   subject to the CFTC'S jurisdiction. If it's off exchange, the

23   states can regulate it, and that is a sensible result, we

24   think, and it is certainly, you know, they invoke the absurdity

25   canon, and it's certainly nothing like the sort of evidence

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1   that they would have to show to overcome the clear statutory

2   text.

3   And the one final point on that that I would just make

4   is if the Court harbors any doubt about this, I mean, there are

5   a number of other sort of things that you can look to to dispel

6   that doubt, and one is the special rule itself. The special

7   rule, which is how Congress wanted the CFTC to address certain

8   kinds of event contracts that Congress recognized, you know,

9   deserve closer scrutiny is to have the CFTC subject those

10   contracts to review and to give the CFTC the authority to make

11   a public interest call with respect to those contracts, and

12   right there in the text of the special rule is gaming. So

13   if -- even if, you know, they certainly can't point to anything

14   in the statute that would allow them to sort of atextually

15   exclude gaming contracts, and the opposite is true.

16   JUDGE PORTER: Yeah, I'm good.

17   JUDGE CHAGARES: Back to field preemption, and -- and

18   let me talk about that just for a minute. It seems that you

19   agree with your friends on the other side, that the -- that the

20   CEA does not preempt some state common law fraud claims. I'm

21   just wondering, can -- can -- how then can field preemption

22   occur? I maybe I have it wrong. Doesn't Congress have to have

23   left no room at all for state regulation?

24   MR. HAVEMANN: So that the key, Your Honor, is in how

25   to define the preempted field. So because the field that is

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 1   preempted is not, all derivatives transactions or not

 2   everything that touches a derivatives transaction, the field is

 3   instead the regulation of trading on a DCM, and I think that

 4   what courts immediately recognized and then there were

 5   subsequent amendments to the CEA that codified that

 6   recognition, is that when you are applying a state law fraud

 7   claim to fraud that happens to happen, that happens to happen

 8   on a DCM, then you're not really regulating futures trading on

 9   a DCM, you're regulating fraud that happens to happen there.

10   It's not a direct regulation, and that's what courts -- that's

11   how courts interpreted the CEA right from the beginning, right

12   from 1974 when it added the exclusive jurisdiction provision.

13   And then Congress codified that, in subsequent amendments to

14   the CEA, like where it provided certain authority to states,

15   including the authority, of course, to bring state common law

16   claims under their fraud laws when it enacted Section 16 in

17   1983, which refers to state common law fraud -- common law

18   fraud actions.

19            JUDGE PORTER:  When I asked you for examples of kinds

20   of sports betting that -- that aren't included within a swap, I

21   guess I really only heard you say, kind of, player props.  So I

22   guess I can understand -- I'm not saying you need to apologize

23   for this.  If it's preempted, it's preempted, but I can

24   understand why New Jersey thinks, man, you've sort of taken

25   everything that we're accustomed to regulating.  Does that sort
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1   of makes sense?

2   MR. HAVEMANN: I certainly understand their argument,

3   but again, the key difference is we're not preventing them from

4   regulating state sportsbooks. What we're preventing them from

5   regulating is conduct that states have not, since 1974,

6   regulated, which is trades on a DCM, and there's lots of other

7   things that a state may well view as being gambling within the

8   broad definition of gambling that many states, including New

9   Jersey, have, that I don't think -- I do not believe it's

10   subject to reasonable dispute, that even though a state may

11   think it falls within their gambling statute, if it's on the

12   DCM, it's off limits for the state, and the same thing is true

13   here.

14   And we think that that is a sensible result, and it's

15   a result that's commanded by the text of the CEA, by the

16   history of the CEA, by the, you know, deliberation that went

17   into the decision to grant the commodity -- the CFTC, exclusive

18   jurisdiction over trading on designated contract markets while

19   leaving it up to the states.

20   JUDGE CHAGARES: Your friend mentioned a couple of

21   other congressional acts. I think one was -- he didn't say it

22   specifically, but it was in the brief, Indian Gaming Regulatory

23   Act, and the other one, Unlawful Internet Gambling Enforcement

24   Act and that, that supported his position. Maybe you could

25   just reply to that?

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 1            MR. HAVEMANN:  Sure.  So I'll take each in turn.

 2            JUDGE CHAGARES:  Okay.

 3            MR. HAVEMANN:  As to IGRA, the Indian Gaming

 4    Regulatory Act --

 5            JUDGE CHAGARES:  Right.

 6            MR. HAVEMANN:  -- many of the other statutes they

 7    refer to, none of those statutes -- they do broadly turn on

 8    state law, but none of them suggest that states have the

 9    authority to regulate gaming, in the specific application here,

10    which is in the application of trading on designated contract

11    markets, and they don't define, bet or wager --

12            JUDGE CHAGARES:  They refer to bet or wager, right?

13    Yes.

14            MR. HAVEMANN:   They refer, but they don't define.

15            JUDGE CHAGARES:  Okay.

16            MR. HAVEMANN:  The one statute, Chief Judge Chagares,

17    that does define, bet, or wager, is the UIGEA, which is the

18    second statute you referred to, and that statute expressly

19    carves out from the definition of bet or wager, a trade that

20    happens on a federally designated contract market, because, of

21    course, Congress has always understood that if it's on a

22    designated contract market since 1974, it's not up to states to

23    regulate it.  It's up to the CFTC to regulate it, and as

24    defendants themselves note, the UIGEA was enacted just four

25    years before Dodd-Frank.
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1   So Dodd-Frank, you know, happens in the wake of the

2   UIGEA, and the wake of Congress's recognition that this sort of

3   conduct, even though broadly, you know, primarily, of course,

4   it is still true that states primarily have the authority to

5   regulate gaming, just not in the narrow application here.

6   JUDGE CHAGARES: All right. Thank you.

7   MR. HAVEMANN: Thank you.

8   JUDGE CHAGARES: Do you have anything else, Judge

9   Porter? Judge Roth, do you have anything else?

10   JUDGE ROTH: Nothing further. Thank you.

11   JUDGE CHAGARES: Okay. Thank you. Thank you,

12   counsel, we'll hear rebuttal.

13   MR. EHRLICH: Thank you, Your Honor.

14   JUDGE CHAGARES: Sure.

15   MR. EHRLICH: I'd like to make five hopefully fairly

16   brief points, two on swap and three on preemption.

17   First on swap, I think, again, we heard from the other

18   side. Don't worry. Nothing to see here. CFTC is just

19   controlling what's on their designated contract markets. I've

20   never heard an explanation of how that works with the statute.

21   Section 2E makes it illegal for persons to trade swaps outside

22   of designated contract markets. Section 6D(a) talks about how

23   companies have to register in order to accept swaps. So our

24   casinos are not registered, for example, and then 13A makes it

25   a crime to trade -- to willfully violate the Commodity Exchange

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 1   Act.
 2           I have no idea what they're talking about when they
 3   say don't worry, this can only be limited to designated
 4   contract markets, that's not how the statute works.  On their
 5   point for limiting principles on their view, I don't see any
 6   limiting principles.  The ones that they've pointed to
 7   themselves are atexual.  The idea that it has to have
 8   consequences out in the real world is true for literally
 9   everything.  As we point out in our brief and the attenuated
10   examples they give, they don't even reference sporting events
11   that themselves are doing something immediately economic.  It's
12   talking about a winning Super Bowl equals a parade equals
13   financial consequences, and there's no end to that, and I think
14   when you -- you see that on their platform now, now they're
15   putting on prop bets that are examples of a player catches a
16   certain number of passes, or the teams score a certain number
17   of points.  I mean, if they're saying those things are linked
18   to potential financial, economic or commercial consequences, I
19   have no idea what the limiting principle is.
20           There's no limit on it being beyond the control of the
21   parties, by the way, that's in the definition of excluded
22   commodity, not under the definition of swap.  So that would
23   come into play later in the process.  So that's not a limiting
24   principle, and then we talk about de minimis that's also made
25   up, so I just think there's no actual limit on what -- on what
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1    they would cover with their definition.

2            And second, on the -- on the swap point, I again heard

3    no answer to there's a text here.  Congress could have been

4    clearer, either way.  They could have said swaps are clearly

5    sports bets are in or sports bets are out, but they didn't say

6    that, and so we have to use the canons of statutory

7    construction to figure out what the text means.  No answer to

8    the three clear statement rules that clearly point in our favor

9    on this: major questions, not altering the balance, and implied

10   repeal, and I would point that out for Your Honors.

11           On preemption -- and I see my time is running short.

12   On exclusive jurisdiction, we point this out in our brief, but

13   exclusive jurisdiction was meant to separate the jurisdiction

14   of the federal agencies.  It wanted to give exclusive

15   jurisdiction to the CFTC, and there's nothing that there's --

16   if you do an actual field preemption analysis, there's no --

17           JUDGE CHAGARES:  Okay.  We'll give you a little more

18   time.

19           MR. EHRLICH:  Okay.

20           JUDGE CHAGARES:  It's okay. Go ahead.

21           MR. EHRLICH:  Okay.  Thank you, Your Honor.

22           So I'll slow down a little bit then.

23           JUDGE CHAGARES:  Okay.

24           MR. EHRLICH:  Exclusive jurisdiction was meant to

25   separate out the jurisdiction from the CFTC and other federal
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1 agencies. It was not meant to preempt the field. Again, the

2 Seventh Circuit said this in the American Agriculture case.

3 And as we point out in our brief, really, if you're looking at

4 a single statutory provision that's supposed to do some

5 preemption, that's an express preemption argument. They're not

6 arguing express preemption. Nobody has ever argued express

7 preemption here, and we have this Court in Farina rejecting

8 field preemption where an agency in that case, the FCC had

9 exclusive authority to do something.

10   So it's not unprecedented, and when you look at the

11 legislative history for this, you have, you know, legislators

12 saying what we're really concerned about is field preemption,

13 the language they use in the conference report that both

14 parties cite is substantive state laws that are contrary to or

15 inconsistent with federal law are preempted. That's classic

16 conflict preemption.

17   And so I think for those reasons, we would say no

18 field preemption here, and I mentioned the lack of a

19 comprehensive scheme. They don't even try to do that sort of

20 classic field preemption analysis. This is not like, in-air

21 flight operations, or nuclear power plants or anything like

22 that. There's no comprehensive scheme. Kansas versus Garcia

23 tells us these are rare cases of field preemption. This is not

24 one of them.

25   And then lastly, Your Honor, I would just say I guess

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 1   two subsidiary points, but footnote 10, in our brief, we

 2   addressed their point that they can't take bets outside of New

 3   Jersey.  Our laws are limited to New Jersey because we can't

 4   regulate outside of New Jersey.  We're not saying you can only

 5   accept bets in New Jersey.  That's not what our statute means.

 6   We've never taken that position.  So that's --

 7               JUDGE CHAGARES:  Wait, your statute doesn't say you

 8   have to physically be in New Jersey to make a bet?

 9               MR. EHRLICH:  No, no.  For New Jersey residents, you

10   have to comply with our laws, but I think their point was where

11   our laws are restricting them to only accepting bets in New

12   Jersey, and that's not what it's doing.  They if they can

13   accept bets outside of New Jersey, in compliance with other

14   state and federal law.

15               JUDGE PORTER:  I thought they were saying, we can't

16   tell if some bettor is in New Jersey or not.

17               MR. EHRLICH:  Well, maybe they're saying that, I

18   didn't take them to be saying that, but if they are, I mean,

19   there's ways to deal with that.  There's geolocation

20   technology.  There's a company called Sporttrade that does

21   exactly what Kalshi is doing in New Jersey, right now and has a

22   New Jersey gaming license, so there's ways to deal with those

23   sorts of things.  It's certainly not an obstacle or an

24   impossibility when, as I said, federal law prohibits what

25   they're doing and state law prohibits, too.
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1   And the last thing I'll just say for Your Honors, this

2 would, as the amicus briefs point out, and I pointed out in my

3 opening with Congress not intending this to be the result. The

4 CFTC does not regulate gaming. They are woefully inadequate to

5 regulate gaming, and we see this in the -- in the CFTC's own

6 notices in the Federal Register, and I would point Your Honors

7 to 89 Fed Reg 48982, where they said the Commodity Exchange Act

8 and the Commission regulations are focused on regulating

9 financial instruments and markets, and do not include

10 provisions aimed at protecting against gambling specific risks

11 and concerns, including customer protection concerns inherent

12 in gaming.

13   So this would be a massive sea change in how to

14 regulate gaming. Again, if they're correct, all of it has to

15 be on a CFTC regulated exchange and would preempt all state

16 laws. Our case is narrow, it's just about sports. It's not

17 about anything else, but even in that this is a massive

18 billions and billions of dollar industry that they're upending

19 with the -- with their theories here. So with that, I

20 appreciate the Court's indulgence in letting me go over time,

21 and we would ask that the Court reverse.

22   JUDGE CHAGARES: Thank you, thank you, thank you,

23 counsel. We'd ask that the that the parties order a transcript

24 and split the cost of that, of this particular oral argument.

25 We're going to take this case under advisement. It's an

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                                                        Page 34

 1    interesting case, really well litigated, and thank you,

 2    counsel, for your excellent briefing and arguments here today.

 3    And with that, we'll ask the --

 4         (Whereupon these proceedings were concluded at 10:07 AM.)

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 2                   C E R T I F I C A T I O N
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New York Code

Civil Practice Law and Rules

Article 31 Disclosure, Section 3116

(a) Signing. The deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed. No changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination.

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CERTIFICATION OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on September 24, 2025.

I hereby certify that I caused three copies of the foregoing to be sent via Overnight mail to the Clerk's Office of the United States Court of Appeals for the Third Circuit at 21400 United States Courthouse, 601 Market Street, Philadelphia, PA 19106-1790.

/s/ Liza B. Fleming
Liza B. Fleming
Deputy Attorney General

Dated: September 24, 2025