COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
No. SJC-13906
Appeals Court Case No. 2026-P-244

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,

v.

KALSHIEX LLC,
Defendant-Appellant.

ON REVIEW FROM A JUDGMENT OF
THE SUFFOLK SUPERIOR COURT

BRIEF OF *AMICI CURIAE* OF NEVADA, OHIO, 35 OTHER STATES, AND THE DISTRICT OF COLUMBIA SUPPORTING APPELLEE

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STATEMENT OF *AMICI* IDENTITY AND INTEREST

Amici consist of Nevada, Ohio, 35 other States, and the District of Columbia (collectively, "the *amici* States"). The *amici* States have traditionally regulated gambling, including sports betting. They are interested in this case because Kalshi's aggressive theory of preemption threatens the States' longstanding ability to protect their citizens in this area.

DECLARATION OF *AMICI CURIAE*

Under Appellate Rule 17(c)(5), the *amici* States declare as follows:

A. Massachusetts joined similar *amicus* briefs in comparable cases, but no party or party's counsel authored this brief in whole or in part.

B. No party or party's counsel, or any other person or entity other than the *amici* States, contributed money to fund the preparation or submission of this brief.

C. Neither the *amici* States nor their counsel has represented any party in this case or in another proceeding involving similar issues. Neither the *amici* States nor their counsel have represented a party in a proceeding or legal transaction that is specifically at issue in the present appeal. Many of the *amici* States, however, are involved in comparable litigation against Kalshi involving their own state gambling laws.

INTRODUCTION AND SUMMARY OF ARGUMENT

When Congress makes major changes to the law, it does not keep them a secret. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). This basic principle of statutory interpretation dooms Kalshi's case.

Begin with an overview. About a year ago, Kalshi began offering online sports betting on its platform. This activity caught the States' attention. The States have long regulated gambling, including sports betting. In some States, sports betting is illegal, while in other States, sports betting is allowed but comprehensively regulated. Kalshi nonetheless argues that it may ignore state gambling laws because of financial legislation Congress enacted in 2010. Back then, sports betting was illegal in all but a few States. But, according to Kalshi, Congress—as part of its response to the 2008 financial crisis—quietly preempted the States from regulating sports betting. In fact, as Kalshi would have it, this preemption was so subtle that nobody noticed for years, including the U.S. Supreme Court. *See Murphy v. NCAA*, 584 U.S. 453, 486 (2018).

If that sounds farfetched, that is because it is. Congress would have spoken far more clearly if it wanted to strip the States of their historic powers. To elaborate, this brief offers three points.

First, Kalshi's position runs afoul of binding clear-statement rules that inform how courts interpret federal law. *Below* 29–39. Under the federalism canon, Congress must speak clearly to shift this country's traditional balance of power. Congress, it follows, could not have removed the States' traditional authority over sports betting without mentioning the subject. Similarly, under the major-questions doctrine, Congress must speak clearly to give a federal agency unprecedented authority over significant topics. That doctrine also applies here, because Kalshi's position would give the Commodity Futures Trading Commission ("CFTC") an incredible amount of new power over a significant topic (sports betting). Kalshi's theory flunks both clear-statement rules. Kalshi does not identify clear language; it instead strains to uncover preemptive intent buried within subsections of subsections of complex derivatives-related statutes.

Second, the negative ramifications of Kalshi's position are another sure sign that Kalshi is wrong. *Below* 39–48. The States have considerable experience in regulating gambling, including sports betting. The CFTC has no comparable expertise in crafting policies to address sports betting. That makes it unlikely that Congress would have delegated such broad power to the CFTC in such an opaque manner.

Third, while the CFTC now supports Kalshi's theory, that does nothing to change the legal analysis here. *Below* 48–50. The CFTC has no special ability to interpret statutes about its authority. Rather, because the CFTC's position exalts its own power, the Court should be skeptical. Such skepticism is especially warranted because the CFTC's new position conflicts with more restrained views that the CFTC has previously offered.

At bottom, the unlikelihood of Kalshi's position signals its downfall. The *amici* States therefore submit this brief in support of Massachusetts.

STATEMENT OF THE FACTS AND CASE

Kalshi's argument rests on an unrealistic premise. The company submits that, when responding to the 2008 financial crisis, Congress quietly chose to make sweeping changes to this country's gambling laws. To understand why that is so unlikely, it helps to review this country's regulatory history—both as to gambling and as to derivatives markets.

I. The States have traditionally regulated gambling, including sports betting.

A. The regulation of gambling is "concededly within the police powers of a state." *Ah Sin v. Wittman*, 198 U.S. 500, 505–06 (1905). Indeed, the States have a lengthy history of regulation.

Gambling regulation traces back to before the Founding. On their way to the Americas, sailors on Columbus's ships played games of chance to pass the time. *See* George G. Fenich, *A Chronology of (Legal) Gaming in the U.S.*, 3 UNLV Gaming Rsch. & Rev. J. 65, 66 (1996). But, in the seventeenth century, settling communities began to outlaw such behavior. In 1638, the Puritans of Massachusetts enacted idleness laws that barred people from possessing cards, dice, or other gambling devices. *Id.* About fifty years later, the Quakers of Pennsylvania enacted a similar prohibition. *Id.* During the next century, colonies like New Hampshire and New Jersey took comparable steps. *Id.* Authorities in the Northwest Territory did, too. *Mills-Jennings of Ohio, Inc. v. Dep't of Liquor Control*, 70 Ohio St. 2d 95, 99 (1982).

After the Founding, opposition to gambling continued to build. For instance, shortly after Ohio entered the Union, its legislature made various forms of gambling illegal. *Id.* And the Ohio Constitution of 1851 expressly added prohibitions on lotteries. *Id.* Even in Nevada, perhaps the most gambling-friendly State in the Union, games of chance were prohibited by the territorial and early state legislatures. *See History of Gaming in Nevada*, Nevada Resort Association, perma.cc/M3FE-BUW2.

With these and other developments, "gambling was largely banned throughout the country" by the late 1800s. *Murphy*, 584 U.S. at 458.

But, in the twentieth century, many States loosened gambling prohibitions. *Id.* at 458–59. Nevada, for instance, first decriminalized certain forms of gambling in 1869. *History of Gaming in Nevada*, Nevada Resort Association, perma.cc/M3FE-BUW2. After a brief ban on gambling during the Progressive Movement, Nevada eventually legalized "wide-open" gambling in 1931, a move that soon gave rise to Nevada's booming casino industry. *Id.*; Robert D. Faiss & Gregory R. Gemignani, *Nevada Gaming Statutes: Their Evolution and History*, UNLV: The Center for Gaming Research Occasional Paper Series, at 1 (2011), http://digitalscholarship.unlv.edu/occ_papers/11.

Although Nevada was on the forefront, other States have also softened on gambling over time. Ohio, as one example, legalized bingo and state-conducted lotteries in the 1970s. *Mills-Jennings of Ohio*, 70 Ohio St. 2d at 101. And, about fifteen years ago, a slim majority of Ohio voters approved a constitutional amendment allowing for casino gaming. *See* Ohio Const. art. XV, §6(C). Today, forty-eight States permit some form of gambling. *See* Am. Gaming Ass'n, *State of the States 2025: The AGA Analysis*

of the Commercial Casino Industry, at 12–13 (May 2025), perma.cc/J27S-WLSB.

B. Recently, the country's attention has turned to sports betting. *See Murphy*, 584 U.S. at 460–61. Like other forms of gambling, sports betting was illegal throughout the States for much of this country's history. *See id.* at 458. That began to change in the mid-twentieth century. Nevada set the pace in this area, too: the Silver State began permitting some sports betting with the passage of the Gaming Control Act of 1949. *See* Jennifer Carleton et al., The Gambling Law Review 147 (Carl Rohsler ed. 2016), perma.cc/3BSY-UYMZ. Over the next few decades, three other States also legalized certain forms of sports betting. *See Murphy*, 584 U.S. at 462.

In the early 1990s, Congress tried to halt sports betting's continued growth. Through the Professional and Amateur Sports Protection Act, Congress purported to bar States from authorizing any additional sports betting. *Id.* at 461. In *Murphy*, however, the U.S. Supreme Court held that this barrier was unlawful. *Id.* at 458, 480. Thus, just eight years ago, the Court left the States "free to act" on the "controversial subject" of "sports gambling." *Id.* at 486.

The States have made different choices after *Murphy*. Eleven States have kept sports betting illegal. *See* Am. Gaming Ass'n, *State of the States 2025*, at 12–13. But most States have chosen legalization. Today, thirty-nine States, along with the District of Columbia, permit some form of sports betting. *Id.*

C. The increased legalization of gambling has not left gambling unregulated. Instead, the States' "authorization of legalized gambling" over the years "has almost always been accompanied by the establishment of a corresponding regulatory regime and structure." Nat'l Gambling Impact Study Comm'n, Final Report, 3-1 (June 1999), perma.cc/UF4R-2UXH. For example, Ohio has comprehensive statutory schemes regulating the gambling it authorizes. *See, e.g.*, Ohio Rev. Code chs. 3769 (horse racing), 3770 (lotteries), 3772 (casino gaming), 3774 (fantasy contests), 3775 (sports gaming). As does Nevada. *See, e.g.*, Nev. Rev. Stat. chs. 462 (lotteries and games), 463 (licensing and control of gaming), 463B (supervision of certain gaming establishments), 464 (pari-mutuel wagering), 465 (crimes and liabilities concerning gaming), 466 (horse racing).

II. In 2010, Congress amended the Commodity Exchange Act in the wake of the financial crisis.

A. State gambling regulation has long co-existed with federal regulation of derivatives markets. Before unpacking those federal regulations, it helps to review some financial terms. A "derivative" is a financial contract whose value depends on, and usually derives from, another more basic asset such as the value of a stock or the price of hogs. John C. Hull, *Options, Futures, and Other Derivatives*, 1 (8th ed. 2012). A "futures contract" is one type of derivative in which "an agreement between two parties to buy or sell an asset at a certain time in the future for a certain price." *Id.* at 7. Parties come together to trade such contracts on designated markets, sometimes called "exchanges." *Id.*

Swaps are another type of derivative in which two parties agree to exchange cash flows in the future. *Id.* at 148; *see also Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 373 (D.C. Cir. 2013). The "most common" swap is an interest-rate swap in which "a company agrees to pay cash flows equal to interest at a predetermined" rate over a number of years and, in return, receives interest at a floating rate over the same timeframe. Hull, *Options, Futures, and Other Derivatives*, 148. As another example, a "credit-default swap" mitigates the creditors' risk of a debtor defaulting.

To illustrate, "a company that supplies auto parts to General Motors and depends on payments from GM might purchase a credit default swap on a GM bond to hedge against the risk of a GM default." Rena S. Miller, *Derivatives Regulation and Legislation Through the 111th Congress*, Congressional Research Services, at 2 (Jan. 30, 2012).

B. With those terms established, move to the regulatory history. From as early as 1921, Congress authorized legislation regulating trades of certain derivatives in commodities markets. *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 360 (1982). In 1936, Congress enacted the Commodity Exchange Act to expand federal oversight to different commodities and to increase regulation over futures contracts. *Id.* at 362. Among other things, the Act authorized federal officials "to fix limits on the amount of permissible speculative trading in a futures contract." *Id.* at 363.

A few decades later, Congress created the Commodity Futures Trading Commission ("CFTC"). *Id.* at 365–66. It gave the CFTC "exclusive jurisdiction over commodity futures trading." *Id.* at 386. But lawmakers worried that some might overread the CFTC's jurisdiction. *Id.* at 386. Thus, Congress included two saving clauses, which protect the States'

"regulatory authorities" and "the jurisdiction" of state courts. 7 U.S.C. §2(a)(1)(A).

C. Until 2010, the CFTC lacked authority to regulate swaps. *United States v. Phillips*, 155 F.4th 102, 112 (2d Cir. 2025). That is likely because for many years, swaps were perceived as a narrow category of derivatives with little potential for mischief. In 1989, for instance, the CFTC issued guidance distinguishing unregulated "swap transactions" from regulated "futures contracts." *See* 54 Fed. Reg. 30694, 30694 (July 21, 1989). The Commission stressed that swaps were "predominantly" confined to "commercial and institutional participants." *Id.* at 30695. A swap, moreover, typically involved parties acting "in conjunction with" their "line of business." *Id.* at 30697. The CFTC further emphasized that unregulated swaps were not "marketed to the public." *Id.*

Without regulation, however, "[t]rading in swaps exploded in the early 2000s." *Phillips*, 155 F.4th at 113. And many blamed swaps for the 2008 financial crisis. *Id.* In particular, a congressionally authorized investigation found that credit-default swaps helped "fuel the housing bubble." Fin. Crisis Inquiry Comm'n, *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and*

Economic Crisis in the United States at xxiv (January 2011), perma.cc/C54L-RZVE.

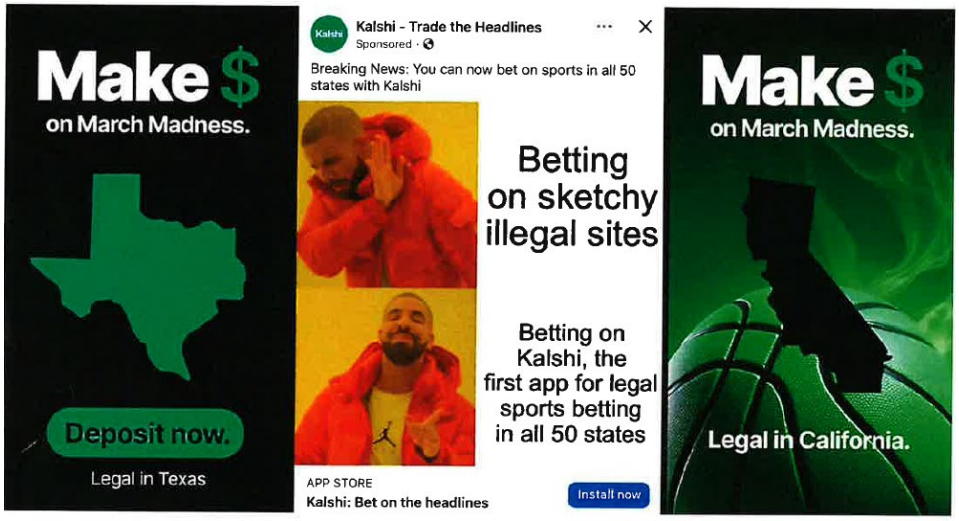
In response, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act. Pub. L. 111-203, 124 Stat. 1376 (2010). The Act extended the CFTC's jurisdiction to include "swaps." *See* 7 U.S.C. §2(a)(1)(A). The Act defined "swap" to include "any agreement, contract, or transaction … that provides for any purchase, sale, payment, or delivery … that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence." 7 U.S.C. §1a(47)(A). The Act further made it generally "unlawful for any person ... to enter into a swap unless the swap is entered into on" a CFTC-regulated contract market. 7 U.S.C. §2(e); *see also* 7 U.S.C. §1a(18). Thus, an ordinary consumer who wishes to trade in a "swap" must do so on a designated contract market.

III. Kalshi argues that Congress—in responding to the 2008 financial crisis—legalized sports betting nationwide.

Kalshi is a designated contract market that offers online "events contracts" to users. Contracts traded on Kalshi identify a future circumstance and allow users to bet on whether the circumstance will happen.

If users bet correctly, they are paid out. By this format, Kalshi boasts that users may "[t]rade on anything" regardless of state law. X Post, @Kalshi, perma.cc/X9YC-EHE7 (last accessed April 17, 2026).

Many "contracts" Kalshi lists are sports bets. *See* Dustin Gouker, *Ten Times Kalshi Said People Could Bet On Things*, Event Horizon (April 3, 2025) perma.cc/CWK2-TZCV. Kalshi has said so. Take, for instance, this ad from the 2025 March Madness tournament:



Id.

It takes only a quick trip to Kalshi's website to solidify the point. The website has an entire category dedicated to "sports" where users can make a variety of bets—ranging from who will win a game, to whether a team will cover a point spread, to how individual athletes will perform. *See generally* Kalshi Website, Sports, https://kalshi.com/sports/all-sports

(last accessed April 17, 2026). For example, a recent bet on Kalshi depended on whether the Boston Celtics would beat the Miami Heat by more than 7.5 points. Kalshi Website, Sports: Props, https://perma.cc/7JEE-AULU. Kalshi also offers parlays, which combine two or more wagers into a single bet. *See* Dustin Gouker, *Kalshi Rolls Out Same-Game Parlays For Monday Night Football Games*, Event Horizon (Sept. 30, 2025), perma.cc/V3M9-L59R.

To support its claim of legal nationwide sports betting, Kalshi relies on a novel theory. It argues that events contracts about sports are "swaps" within the CFTC's exclusive jurisdiction. Kalshi Br.39–40. Kalshi is now litigating this theory across the country.

Most courts have thus far "look[ed] askance at Kalshi's arguments." *Ky. Gambling Recovery LLC v. Kalshi Inc.*, 2026 WL 596107, at *6 (E.D. Ky. Mar. 3, 2026). For example, district courts in both Nevada and Ohio have rejected the premise that sports wagers qualify as swaps under federal law. *Kalshiex, LLC v. Hendrick*, No. 2:25-cv-00575, 2025 WL 3286282, at *3 (D. Nev. Nov. 24, 2025); *KalshiEX, LLC v. Schuler*, No. 2:25-cv-1165, 2026 WL 657004, at *4–*6 (S.D Ohio Mar. 9, 2026). "Kalshi's proposed reading," the Nevada district court emphasized, would

upend the "the traditional balance between state and federal regulation of gaming" without an "expressed congressional intent to do so"; all while leaving "no federal gaming regulator to replace the states' regulatory infrastructures." *Hendrick*, 2025 WL 3286282, at *8. The trial court here identified many additional reasons why statutory text does not signal the necessary preemptive intent. *Massachusetts v. KalshiEX, LLC*, No. 2584CV02525, 2026 Mass. Super. LEXIS 2, at *12–20 (Mass. Sup. Ct. Jan. 20, 2026); *accord KalshiEX LLC v. Martin*, 793 F. Supp. 3d 667, 675–86 (D. Md. 2025).

The Third Circuit's recent contrary holding stands as an outlier. *See KalshiEX, LLC v. Flaherty*, — F.4th —, 2026 WL 924004 (3d Cir. 2026). It fails to engage with the federalism canon or major-questions doctrine. It provides scant analysis as to whether sports bets are "swaps." And it rests on the premise that States have no traditional role in regulating interstate gambling. *Id.* at *5 n.4. That premise is odd because, historically, there has not been an interstate market for sports betting given that nearly all States outlawed the activity. *Murphy*, 584 U.S. at 458. And to the extent that States like Nevada have allowed sports betting, they have regulated gambling on games taking place in

other States. And regardless, States seek to regulate sports bets within their jurisdictions—not nationwide.

IV. The CFTC abruptly changes its stance on its own authority.

A final piece of background involves the CFTC. Since receiving authority over swaps in 2010, the CFTC has taken a constrained view of what fits within that category. For example, shortly after its jurisdiction increased, the CFTC promulgated a rule prohibiting designated contract markets from listing any contract "that involves, relates to, or references … gaming." 17 C.F.R. §40.11(a)(1). This prohibition, the CFTC explained, matched "Congress's intent to prevent gambling through the futures markets." 76 Fed. Reg. 44776, 44786 (July 27, 2011) (quotation omitted). The prohibition remains on the books today.

The CFTC exercised similar caution in later rulemakings. In 2012, as part of a rule jointly promulgated with the SEC, the CFTC refused to read the term "swaps" in a way that would disrupt "customary business arrangements" that "historically have not been considered to involve swaps." 77 Fed. Reg. 48208, 48247 (Aug. 13, 2012). Swaps, the CFTC explained, "involve risk-shifting arrangements with financial entities." *Id.* at 48248. Thus, the CFTC did not read the term "swaps" to capture

transactions or arrangements involving "personal or family activities" that ordinary "consumers" regularly engage in. *Id.* at 48247.

Two years ago, the CFTC proposed a rule that directly confronted the relationship between state-gambling regulation and federal-derivatives regulation. The CFTC acknowledged that "gambling is overseen by state regulators with particular expertise" and that federal-derivatives law is "not aimed at protecting against gambling-specific risks and concerns." 89 Fed. Reg. 48968, 48982–83 (June 10, 2024). The CFTC further disclaimed having the "statutory mandate" or "specialized experience" necessary to exercise jurisdiction over the "rapidly evolving field" of gambling. *Id.* at 48983.

Consistent with the above views, the CFTC was initially careful not to endorse sports betting via events contracts. Most notably, in September, the CFTC issued a staff advisory directed at platforms offering sports-related contracts. CFTC Letter No. 25-36, Advisories (Sept. 20, 2025), https://www.cftc.gov/PressRoom/PressReleases/9137-25. The advisory warned that the CFTC had never "taken any official action to approve" the listing of such contracts. *Id.* at 2 n.4. The advisory further explained that the CFTC "has not, to date, made a determination regarding

whether any such contracts involve an activity enumerated or prohibited under" the Commodity Exchange Act. *Id.* Those offering sports-related events contracts, the advisory thus cautioned, must be prepared for the possibility that state law will "result in termination" of such contracts. *Id.* at 2.

The CFTC changed its tune in recent months. At the end of last year, the Commission swore in a new Chairman. Fresh on the job, and without public input, the Chairman broadcast his view that all events contracts—including those about sports—are "swaps" within the CFTC's exclusive power. *See* Michael S. Selig, *States Encroach on Prediction Markets*, Wall Street Journal (Feb 16, 2026), https://web.archive.org/web/20260218182304/https://www.cftc.gov/PressRoom/SpeechesTestimony/seligstatement021726. The CFTC soon filed an amicus brief in the Ninth Circuit embracing that position. CFTC Amicus Br., *N. Am. Derivatives Exch. Inc. v. Nevada (Crypto)*, No. 25-7187 (9th Cir. Feb. 17, 2026), ECF 38.2. And the CFTC recently signaled its intent to propose new regulations on the topic. 91 Fed. Reg. 12516 (Mar. 16, 2026).

ARGUMENT

Under the Supremacy Clause, federal law is "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. So, when Congress acts within its enumerated powers, it may preempt state law. Such preemption can take different forms: federal statutes sometimes preempt state law expressly; other times they preempt by implication. *Kansas v. Garcia*, 589 U.S. 191, 202–03 (2020). But preemption always turns on the text of federal law. *Id.* at 202. And to give statutory text a "fair reading," courts must remain aware that "Congress legislates against the backdrop" of certain presumptions. *Bond v. United States*, 572 U.S. 844, 857 (2014) (quotation omitted).

In this case, two backdrop presumptions—the federalism canon and major-questions doctrine—render Kalshi's position untenable. And practical considerations reinforce the point.

I. When Congress makes major changes to the existing state of law, it does so clearly, not obscurely.

Congress, as the saying goes, does not "hide elephants in mouseholes." *Whitman*, 531 U.S. at 468. So when Congress seeks to change the "fundamental" nature of existing law, it does not use "vague terms or ancillary provisions." *Id.*

This no-elephants-in-mouseholes principle has several context-specific applications. For example, if Congress wishes to abrogate a government body's sovereign immunity, it "must use unmistakable language." *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*, 598 U.S. 339, 342 (2023). And "absent a clear statement from Congress," courts presume that federal statutes are inapplicable outside the United States. *Bond*, 572 U.S. at 857. These and other "clear-statement rules help courts act as faithful agents of the Constitution." *West Virginia v. EPA*, 597 U.S. 697, 736 (2022) (Gorsuch, J., concurring) (quotation omitted).

Two clear-statement rules prove critical here. Specifically, the federalism canon and major-questions doctrine both demonstrate why Kalshi's counterintuitive preemption theory should fail.

A. Kalshi's position violates the federalism canon.

Begin with the federalism canon, which stems from "basic principles of federalism." *Bond*, 572 U.S. at 859. The Constitution gives the federal government "only limited powers; the States and the people retain the remainder." *Id.* at 854; *see* U.S. Const. amend. X. That setup leaves the States with considerable police powers that they exercise for the public

good. *Bond*, 572 U.S. at 854. Congress, moreover, legislates against this default ordering of sovereign authority. *Id.* at 857–58. Against that "backdrop," any statute that displaces a significant amount of state power constitutes a major change. *See id.* at 857 (quotation omitted). And one expects Congress to speak clearly when making a major change. Thus, absent a "clear statement," courts should not assume that Congress intends "a significant change in the sensitive relation between" the federal and state governments in an area of "traditional state authority." *Id.* at 858–59 (quotation omitted). That ensures that Congress "has in fact faced, and intended to bring into issue, the critical matters involved." *Id.* at 858 (quotation omitted).

This federalism canon applies with particular force to preemption. Preemption necessarily triggers the "sensitive relation" between federal and state authority. *Id.* (quotation omitted). Courts thus need "to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers." *Id.* (quotation omitted). Courts, it follows, should be especially "reluctant to find" preemption in an area "traditionally governed by state law." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

The federalism canon applies with full force here. Given the many dangers of gambling (*below* 42–45), the regulation of gambling fits neatly "within the police powers of a State." *Ah Sin*, 198 U.S. at 505–06. It is thus no surprise that the States have a lengthy history of gambling regulation, including the regulation of sports betting. *Above* 14–18. And federal law historically has "defer[red] to, and even promote[d], differing gambling policies in different States." *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 187 (1999).

Applying the federalism canon, Kalshi's theory should fail unless Congress made a "clear statement" signaling that it intended "a significant change in the sensitive relation between" the federal and state governments as to gambling. *See Bond*, 572 U.S. at 858 (quotation omitted); *accord Ah Sin*, 198 U.S. at 505–06. Kalshi identifies no clear statement within federal law. Kalshi instead offers a roundabout preemption theory under which Congress—fifteen years ago, when sports betting was mostly illegal—supposedly made a subtle-but-drastic change to gambling laws by inserting the word "swap" into a pre-existing regulatory scheme aimed at financial regulation. *See* Kalshi Br.39–40; *above* 21–24.

Kalshi's position is much like proposed readings that have failed in past clear-statement cases. For instance, in 2000, the U.S. Supreme Court stopped a dramatic expansion of federal regulatory authority by refusing to read the word "drug"—in the context of the Food, Drug, and Cosmetic Act—to include tobacco. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000). And in *Bond*, the Supreme Court refused to read the term "chemical weapon" in an "improbably broad" and "boundless" way that would have reached "purely local crimes" and "intrude[d] on the police power of the States." 572 U.S. at 860. This Court should likewise refuse to read the term "swaps"—a term of art describing particular financial instruments used to hedge against economic risk—in an improbably broad and boundless way. The U.S. Supreme Court certainly has not employed such a reading: just a few years after the Dodd-Frank Act, the Court concluded that States are "free to act" as they wish on the "controversial subject" of "sports gambling." *Murphy*, 584 U.S. at 486. That would make little sense if, as Kalshi posits, the CFTC controls all sports gambling so long as it is structured as an "events contract."

If the text clearly signals anything here, it is the *lack* of any intent to preempt sports-betting regulations. The exclusive-jurisdiction provision

on which Kalshi so heavily relies includes not just one, but two saving clauses, both of which signal preservation of state authority. 7 U.S.C. §2(a)(1)(A). The statutory scheme also includes two express preemption clauses. 7 U.S.C. §16(e)(2), (h). One of those clauses preempts state laws about select forms of "gaming." §16(e)(2). But the "gaming" the clause covers does not extend to "sports-betting laws." *See Martin*, 793 F. Supp. 3d at 680–81. Thus, Congress's inclusion of a specific preemption provision tailored to other forms of gaming indicates a lack of preemptive intent as to sports betting. *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992).

In sum, Kalshi invites the Court to read an express-preemption clause into federal law where none exists. Because this is an area of traditional state authority, the Court should squarely reject that invitation.

B. Kalshi's position violates the major-questions doctrine.

Turn next to another clear-statement rule: the major-questions doctrine. The doctrine teaches that courts—when reading statutes empowering federal agencies—should employ "common sense as to the manner in which Congress would have been likely to delegate" power. *West Virginia*, 597 U.S. at 722–23 (alteration accepted, quotation omitted); *see*

also Learning Res., Inc. v. Trump, 146 S. Ct. 628, 639 (2026) (Roberts, C.J., op.) (discussing the need for context, common sense, and skepticism when the federal government claims "broad, expansive power on an uncertain statutory basis"). "Extraordinary grants of regulatory authority," the U.S. Supreme Court has explained, "are rarely accomplished through modest words, vague terms, or subtle devices." *West Virginia*, 597 U.S. at 723 (alteration accepted, quotation omitted).

The major-questions doctrine thus requires a clear statement whenever a federal agency claims broad and novel authority over matters of great economic and political significance. *See id.* at 721, 724. Courts should therefore tread cautiously when an agency "claim[s] to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority." *Id.* at 724 (alterations accepted, quotation omitted). Said differently, a "lack of historical precedent," "coupled with" a broad claim of federal authority, makes for "a telling indication" of federal overreach. *Learning Res., Inc.*, 146 S. Ct. at 641 (Roberts, C.J., op.) (quotation omitted).

This case implicates the major-questions doctrine. Sports betting is a politically and historically significant topic, on which "Americans have

never been of one mind." *Murphy*, 584 U.S. at 458. The practice has been illegal for much of this country's history, and it remains illegal in many States. Sports betting is also economically significant. The pastime has rapidly ballooned into a multi-billion-dollar industry, involving millions of Americans. *See, e.g.*, John Gramlich, *Americans increasingly see legal sports betting as a bad thing for society and sports*, Pew Research Center (Oct. 2, 2025), perma.cc/9WPS-4UYT; Brandon Gustafson, *2024: A year of growth for sports betting revenue*, CBS Sports (Mar. 28, 2025), https://tinyurl.com/yje8srnp; *cf. also King v. Burwell*, 576 U.S. 473, 485 (2015). Even setting aside other platforms, Kalshi reports wagering volumes of over $1 billion a month, 90% of which comes from sports betting in certain months. Lev Akabas, *Kalshi's Volume Has Been 90% Sports During Football Season*, Sportico (Oct. 3, 2025), perma.cc/X5WL-8LGM. Indeed, Kalshi recently reported over a billion dollars in trading on Super Bowl Sunday alone. Laya Neelakandan, *Kalshi says Super Bowl trading volume surpassed $1 billion*, CNBC (Feb. 10, 2026), https://perma.cc/PS9A-2K76.

Against this backdrop, Kalshi's position would grant the CFTC an incredible and unexpected amount of power. Again, Kalshi argues that

sports bets packaged as events contracts qualify as "swaps" for purposes of the CFTC's exclusive jurisdiction. *See* Kalshi Br.39–40; 7 U.S.C. §2(a)(1)(A).

An important textual consequence flows from Kalshi's position. If sports bets qualify as swaps within the CFTC's exclusive jurisdiction, then sports bets cannot be treated in any other fashion. Under the federal definition of swap, a swap is any type of "agreement, contract, or transaction" that satisfies certain conditions. 7 U.S.C. §1a(47)(A). If an agreement satisfies those conditions, federal law makes it generally "unlawful for any person" to enter into such an agreement except on a CFTC-regulated contract market. 7 U.S.C. §2(e). Thus, Kalshi is not simply arguing that sports betting *may* occur on designated contract markets. Kalshi's real argument is that sports betting *must* occur on those markets. It would follow that States authorizing sports betting via state-regulated processes—again, about forty States at present, *see above* 18—are all facilitating illegal activity under federal law.

If Congress truly meant to give the CFTC so much power, it would have spoken clearly. Kalshi, again, points to no such clear statement. *Above* 32. Instead, its attenuated theory of preemption relies on a

contextless brand of textualism that is "colorable" at best. *See West Virginia*, 597 U.S. at 722. And a merely colorable textual theory is not enough for such a major change. *Id.* at 722–23.

To hammer the point home, revisit the history. As Kalshi would have it, Congress preempted state gambling laws as part of its response to the 2008 financial crisis. *Above* 21–24. But that makes no historical sense. Nobody thought that "sports gambling gone wrong" caused the financial crisis. Sports betting was, after all, mostly illegal at that time. *See Murphy*, 584 U.S. at 458. Congress was instead responding to much different problems involving financial instruments like credit default swaps. *Above* 21–22. Thus, employing even an ounce of "common sense as to the manner in which Congress would have been likely to delegate" power, *see West Virginia*, 597 U.S. at 722–23 (quotation and alteration omitted), Kalshi's argument crumbles. Congress did not sneak sports-gambling preemption into the Dodd-Frank Act.

One additional point before moving on. The CFTC's new position aggrandizing its own power, *above* 28, further cements the major-questions doctrine's application. The CFTC has had jurisdiction over swaps for more than fifteen years. And it has had jurisdiction over other

derivatives for half a century. But, until recent months, the CFTC had never claimed that its jurisdiction was broad enough to override the States' authority over sports betting. In fact, just two years ago, the CFTC recognized that "gambling is overseen by state regulators" and that there is no "statutory mandate" to the contrary. 89 Fed. Reg. at 48982–83. Departing from its past restraint, the Commission now claims to have discovered, within fifteen-year-old statutory text, "an unheralded power" that would drastically expand its authority. *See West Virginia*, 597 U.S. at 724 (quotation omitted). That claim demands healthy skepticism.

II. Kalshi's position would leave sports betting largely unregulated and endanger the States' citizens.

Practical concerns make Kalshi's position even less likely. As a corollary to the major-questions doctrine, Congress is "especially unlikely" to delegate broad power to an agency that "has no expertise" crafting "policy" on a given subject. *King*, 576 U.S. at 486. This Court should thus be "especially" reluctant to transfer authority over sports betting from experienced state regulators to an inexperienced federal commission. *Id.*

A. States are experienced in regulating sports betting and its many potential harms.

1. States that allow sports betting comprehensively regulate that activity. For example, given the importance of gambling to Nevada's overall economy, the State strictly regulates all gambling activities to ensure the public's continued "confidence and trust." Nev. Rev. Stat. §463.0129(1) (outlining Nevada's public policy on gambling). A central part of Nevada's mission is ensuring that gaming proprietors are "controlled and assisted" so as to "protect the public health, safety, morals, good order and general welfare of the inhabitants of the State." *Id.*

Nevada's regulatory scheme thus offers gamblers many levels of protection. As a general protection, Nevada employs a rigorous licensing process that ensures any gambling entity undergoes an in-depth investigation before receiving a license. *See* Nev. Rev. Stat. §§463.170, 463.530, 463.5735; *see also below* 46–47. This process ensures that gambling is free from organized crime and other criminal elements.

Nevada's regulatory scheme also offers a variety of more specific protections. For instance, Nevada requires those that conduct gaming operations to conspicuously post information about resources for problem gamblers. Nev. Gaming Comm'n Reg. 5.170. Nevada law also includes

various safeguards to protect against improper betting practices, including improper wagers on sports. *See, e.g.*, Nev. Rev. Stat. §§465.092–.094; Nev. Gaming Comm'n Regs. 22.010(14), 22.060–.063, 22.080(1); *cf. also* Nev. Rev. Stat. §§463.362–.3668. Of note, Nevada prohibits sports wagers by game officials, owners, coaches, players, or other team staff. *See* Nev. Gaming Comm'n Reg. 22.1205. Further, Nevada requires that those facilitating sports betting report suspicious activity. Nev. Gaming Comm'n Reg. 22.121.

Consider also Ohio's recently adopted approach to sports gambling. Similar to Nevada, Ohio prohibits companies from offering sports betting without a license. Ohio Rev. Code §3775.03(A). A company must therefore establish that it can responsibly facilitate gambling. Ohio Rev. Code §3775.09(A)–(B). Relatedly, Ohio facilitates an exclusion program whereby people worried about their sports gambling habits may place themselves on a voluntary exclusion list. *See* Ohio Rev. Code §3775.02(B)(11). Sports gaming proprietors are then required to "employ commercially reasonable methods to prevent any person who is participating in the sports gaming voluntary exclusion program from engaging in sports gaming." Ohio Rev. Code §3775.13(C)(1).

2. Such regulations protect people and mitigate gambling risks. Gambling is entertaining for many, but it is dangerous for some. Millions of Americans qualify as problematic gamblers. Nat'l Gambling Impact Study Comm'n, Final Report, 4-1; Charita M. Goshay, *Ohio offers Voluntary Exclusion List for problem gamblers as calls to helpline rise*, Canton Repository (Sept. 2, 2024), perma.cc/BQY6-YBC3. And research has linked gambling to other risks, including substance abuse and psychological distress. *See* Randi Richardson, *Online gambling has fueled an industry boom*, NBC News (Oct. 24, 2024), perma.cc/XL7W-QS2L.

Some gamble to the point of financial ruin. *See* Kelly Kennedy, *'I didn't care who was playing': Has the legalization of sports betting impacted problem gambling in Ohio?*, Cleveland 19 News (July 18, 2024), perma.cc/JG9G-P7QT. Others place gambling over the health of loved ones. *See* Erin Gottsacker, *A statewide telehealth service is changing the game for Ohioans with gambling addictions*, The Ohio Newsroom (Nov. 18, 2024), perma.cc/E4ZU-U3MN. Still others gamble to the point of suicide. *See* Matt Stone, *Risk of Gambling Addiction Up 30%*, 21-WFMJ (Feb. 16, 2025), perma.cc/76KG-5ZGS.

These problems are on the rise. *See id.* A 2022 survey performed by the Ohio Casino Control Commission signaled that the prevalence of at risk/problem gamblers in the Buckeye State had nearly doubled in five years. *See Ohio Gambling Survey 2022*, Ohio Casino Control Commission, perma.cc/4GG3-SGQE (slide five of PowerPoint). As another data-point, calls to Ohio's gambling hotline were up 55% in 2023. Katie Mogg & Aria Bendix, *Gambling addiction hotlines say volume is up and callers are younger as online sports betting booms*, NBC News (April 5, 2024), https://tinyurl.com/mtjnna33.

Minors are particularly vulnerable, as online sports betting attracts a younger crowd. A recent New Jersey-based survey reflected that nearly one in every five people surveyed between the ages of 18 and 24 was at high risk of a gambling problem. *See* Lia Nower, et al., *The Prevalence of Online and Land-Based Gambling in New Jersey*, Rutgers University: Center for Gambling Studies, at 33 (2023), perma.cc/V3KH-BPHC. And research reflects that those who start gambling at a young age run a higher risk of problematic gambling. *See* Nat'l Gambling Impact Study Comm'n, Final Report, 4–12.

But Kalshi's position, if accepted, would effectively lower the gambling age in many States. According to Kalshi's membership agreement, the company's services are open to anyone of the age of majority in their State. Kalshi Member Agreement, at VI (February 16, 2026), https://kalshi.com/docs/kalshi-member-agreement.pdf. In many if not most States, the age of majority is eighteen. *See, e.g.*, Nev. Rev. Stat. §129.010; Ohio Rev. Code §3109.01. But many States have decided to limit gambling (or certain types of gambling) to those twenty-one or older. *E.g.*, Nev. Rev. Stat. §463.350; Ohio Rev. Code §3775.99(A). That discrepancy is no small matter. As just mentioned, those who begin gambling at a young age face a higher risk of long-term problems. That might be good for Kalshi, but it is bad for the States' citizens.

A final problem deserves emphasis. As several recent events illustrate, sports betting also risks the integrity of sporting events. The federal government recently indicted dozens of people—including current and former NBA players—alleging unlawful betting on professional basketball games. *U.S. Charges N.B.A. Coach and Players in Gambling Schemes*, The New York Times (Oct. 23, 2025), https://tinyurl.com/yux8k2nk. Last year, it took only a few pitches during

baseball games to spark controversy over prop bets in Ohio. *See* Ryan Morik, *Ohio governor calls for an end to player prop betting amid investigation into Guardians pitchers*, Fox Business (July 31, 2025), perma.cc/CA26-SA28. And two years ago, gamblers even threatened a coach of the Cleveland Cavaliers. Tom Withers, *Cavs coach Bickerstaff says he received threats from gamblers, feels sports betting 'gone too far'*, AP News (Mar. 20, 2024), perma.cc/4KR5-3F56.

B. Existing federal regulation is an insufficient substitute for the States' robust gaming regulations.

Federal regulation of the derivatives marketplace is not a cure-all when it comes to sports betting. Kalshi implies that the federal scheme for regulating designated contract markets should alleviate concerns. *See* Kalshi Br.30. But the CFTC's present regulatory requirements provide cold comfort for sports betting. Those requirements—often called the "core principles"—are outlined within the federal code. *See* 17 C.F.R. §§38.100–.1200. They cover topics like dispute resolution, 17 C.F.R. §38.750, conflicts of interest, 17 C.F.R. §38.850, and disciplinary procedures, 17 C.F.R. §38.700.

Although Kalshi is regulated in this sense, these regulations are geared toward different concerns. In the CFTC's own words, its

regulations "are focused on regulating financial instruments and markets, and do not include provisions aimed at protecting against gambling-specific risks and concerns, including customer protection concerns inherent to gambling." 89 Fed. Reg. at 48983. It follows that federal regulations do not replace the States' regulatory schemes, which are specifically designed to combat problems associated with gambling. Moreover, relying on federal regulation alone forces a one-size-fits-all regime, eliminating the States' ability to experiment with other approaches.

Take Nevada again. The State, after all, has nearly one hundred years' experience in regulating legalized gambling to respond to challenges unique to both the gambling industry and local Nevadan concern.

With that experience in mind, consider a gap that would result from a federal-only regime. Nevada has developed robust procedures for determining the suitability of any person involved in the gaming industry in Nevada. This suitability determination is a front-loaded process in which the person seeking a gaming approval bears the burden of showing the person is qualified to hold a license. Nev. Rev. Stat. §463.170(1). This burden entails satisfying the Nevada Gaming Commission that the person is a "person of good character, honesty and integrity"; that the

person's "prior activities, criminal record ..., reputation, habits and associations do not pose a threat to the public interest of [Nevada] or to the effective regulation and control of gaming"; and that the person is "[i]n all other respects qualified to be licensed or found suitable consistently with the declared policy of [Nevada]." Nev. Rev. Stat. §463.170(2). This burden extends to the person showing "adequate business probity, competence and experience, in gaming" and that the financing for the operation is both adequate and from a suitable source. Nev. Rev. Stat. §463.170(3). In this way, Nevada takes care to screen out potentially predatory, bad actors from its system of legalized gambling.

The Commodity Exchange Act offers no comparator to Nevada's suitability procedures. Worse still, designated contract markets like Kalshi may list new types of events contracts on their exchanges without pre-approval, simply by self-certifying to the CFTC that the new contract complies with federal law. *See* 7 U.S.C. §7a-2(c)(1). Such loose processes will allow individuals who would be unable to clear state-law hurdles to run de facto sportsbooks.

The takeaway is simple. Under Kalshi's theory, the various state-law safeguards discussed above would disappear. That, in turn, would create

a sizeable hole in the States' ability to protect their citizens from predatory practices and other problematic behavior.

III. The CFTC's recent position shift does not change the calculus, either legally or practically.

As discussed above (at 28), in recent months under new leadership, the CFTC has joined in lockstep with Kalshi's arguments. But that does nothing to change the legal analysis here. Nor does it lessen the *amici* States' practical concerns.

As a legal matter, the CFTC's new position on preemption deserves no special weight. This case, like almost all preemption cases, turns on statutory interpretation. *See above* 29. More precisely, the preemption analysis here depends on whether federal statutes about derivatives contain a clear statement removing the States' traditional authority over sports betting. The CFTC has "no special competence" to answer that statutory question about "the scope of" its own jurisdiction. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400–01 (2024). Rather, because the CFTC's fresh reading of federal statutes exalts its own authority, this case presents a scenario where "abdication in favor of the agency is *least* appropriate." *See id.* at 401.

The CFTC's new position also does not carry any "particular power to persuade." *See id.* at 402 (quotation omitted). The position was prepared for purposes of litigation, without input from the public or the States. The position is inconsistent with the CFTC's past guidance, including guidance offered much closer in time to the enactment of the relevant statutory text. *See above* 26–28. And the position does not arise from any special expertise as to sports betting. Considering these features, the CFTC's position is "inherently suspect." *See Wyeth v. Levine*, 555 U.S. 555, 577 (2009).

As a practical matter, the CFTC's new position offers no protection to the *amici* States' citizens. True, the CFTC recently signaled that new regulations may be coming. *See* 91 Fed. Reg. 12516. But the CFTC has not yet proposed regulations, so any final regulations are presumably years away. And it remains unclear whether the CFTC, after boldly claiming regulatory power, actually intends to tackle the gambling-related problems that arise from sports betting through events contracts. In the meantime, assuming no state involvement, actors like Kalshi go effectively unregulated. To say that Congress intended such a gap is a tall tale, to say the least.

*

Return, a final time, to first principles. One critical benefit of our constitutional structure is that the States act "as laboratories" of democracy, "devising solutions" to new and difficult problems. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015) (quotation omitted). That flexibility is a particularly good thing here since "Americans have never been of one mind about gambling." *Murphy*, 584 U.S. at 458. States are in the best position to implement innovative regulatory schemes responsive to particularized concerns that arise within their borders, thereby protecting the public and promoting confidence in the gaming industry. Nothing in federal law suggests, much less clearly states, that Congress has stripped the States of their traditional power over sports betting. This Court, it follows, should not do so.

CONCLUSION

The Court should affirm.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with all of the rules of court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure. The brief complies with the applicable length limit in Rule 20 because it contains 7,380 words in 14-point Century Schoolbook font (not including the portions of the brief excluded under Rule 20), as counted in Microsoft Word 365.

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2026, the foregoing was filed electronically with the Clerk of the Court by using the CM/ECF system, and that the CM/ECF system will accomplish service on all parties represented by counsel who are registered CM/ECF users.

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