

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

CERTIFICATION OF ACCURACY

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

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

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UNITED STATES THIRD CIRCUIT
COURT OF APPEALS NEW YORK

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In the Matter of:

KALSHIEX, LLC,

Main Case No.

APPELLEE

25-1922

V.

MARY JO FLAHERTY, ET AL.,

APPELLANTS

- - - - -x

United States Third Circuit Court of Appeals

September 10, 2025

9:30 AM

B E F O R E:

HON. CHIEF JUDGE MICHAEL A. CHAGARES

CIRCUIT JUDGE DAVID J. PORTER

CIRCUIT JUDGE JANE RICHARDS ROTH

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

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

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

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

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

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

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.

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*

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

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.

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

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

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 horrors 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.

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

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.

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

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

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.

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

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

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

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?

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.

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

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

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

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

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.

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

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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C E R T I F I C A T I O N

I, Becky Kleiner, certify that the foregoing transcript is a true and accurate record of the proceedings.

Becky Kleiner

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Date: September 16, 2025

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<p>ways 32:19,22 we've 11:8 15:13 32:6 website 23:3 went 26:16 willfully 28:25 william 3:8 win 15:1 22:25 winning 10:5 29:12 wire 9:7 witnesses 19:16 woefully 33:4 wondering 24:21 word 6:1 words 7:6 work 15:12 works 28:20 29:4 world 10:8 21:13 22:16 23:17 29:8 worry 28:18 29:3 wrong 24:22 wyeth 5:18 11:13,17</p>	<p style="text-align: center;">y</p> <p>yeah 4:16 7:4 7:13 22:13 23:5 24:16 years 6:13 11:8 18:25 27:25 york 1:3 3:5</p>
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<p>x 1:4,12 4:24 4:25</p>	

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.

DISCLAIMER: THE FOREGOING CIVIL PROCEDURE RULES ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY. THE ABOVE RULES ARE CURRENT AS OF APRIL 1, 2019. PLEASE REFER TO THE APPLICABLE STATE RULES OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.

VERITEXT LEGAL SOLUTIONS

COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

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in encrypted form and are transmitted in an encrypted fashion to authenticated parties who are permitted to access the material. Our data is hosted in a Tier 4 SSAE 16 certified facility.

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Inquiries about Veritext Legal Solutions' confidentiality and security policies and practices should be directed to Veritext's Client Services Associates indicated on the cover of this document or at www.veritext.com.

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