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 A REVIEW FROM A JUDGMENT OF
THE SUFFOLK SUPERIOR COURT

AMICUS BRIEF OF COMMODITY FUTURES TRADING COMMISSION, A FEDERAL GOVERNMENT AGENCY, IN SUPPORT OF APPELLANT AND IN SUPPORT OF REVERSAL

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April 24, 2026

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(A) in-house counsel for the Commodity Futures Trading Commission authored this brief in its entirety;

(B) Amicus Curiae is an agency of the federal government; no party, party's counsel, or any other person or entity, contributed money that was intended to fund the preparation or submission of the brief; and Amicus Curiae contributed only its ordinary operating expenses (e.g., employee salaries) to fund the preparation and submission of the brief; and

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INTEREST OF AMICUS CURIAE

The Commodity Futures Trading Commission ("CFTC" or "Commission") is the federal agency charged with administering and enforcing the Commodity Exchange Act ("CEA" or "Act"), 7 U.S.C. §§ 1-26. Congress created the CFTC in 1974 to establish a uniform national system for regulating futures trading after concluding that the existing patchwork of state-by-state regulation had critically impaired the development and functioning of national commodity derivatives markets. *See* H.R. Rep. No. 93-975, at 51 (1974); S. Rep. No. 93-1131, at 36 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5843, 5885. "[T]ransactions subject to [the CEA] are entered into regularly in interstate and international commerce and are affected with a national public interest," including in "liquid, fair, and financially secure trading facilities." 7 U.S.C. § 5.

Congress vested the CFTC with "exclusive jurisdiction" to regulate futures, options, and swaps traded on federally regulated exchanges, including the swaps at issue in this matter. 7 U.S.C. § 2(a)(1)(A). The CFTC's jurisdiction "supersedes State as well as Federal agencies" because commodity derivatives markets require nationally uniform rules governing the listing, trading, clearing, and settlement of financial instruments traded—and supervision of participants—in these markets to prevent fragmented oversight by differing regulatory regimes. *See* S. Rep. No. 93-1131 (1974), *reprinted in* 1974 U.S.C.C.A.N. at 5848.

The Commonwealth's views and the Superior Court's decision, if accepted, present a fundamental threat to Congress's reticulated regulatory scheme. As the U.S. Court of Appeals for the Third Circuit recently held, the event contracts at issue in this case fit comfortably within the CEA's definition of a "swap," and are therefore within the CFTC's "exclusive jurisdiction," preempting state laws as applied to these transactions and CFTC-regulated exchanges. *KalshiEX, LLC v. Flaherty*, No. 25-1922, 2026 WL 924004, at *3 (3d Cir. Apr. 6, 2026). States cannot invade the CFTC's exclusive jurisdiction by recasting swaps trading on DCMs as illegal gambling or wagering. The decision below is inconsistent with the text, structure, and history of the CEA and, if affirmed, would reintroduce precisely the regulatory fragmentation Congress deliberately displaced.

BACKGROUND

I. The Commodity Exchange Act provides the regulatory framework for commodity derivatives markets in the United States

Congress enacted the CEA to provide a comprehensive federal framework to govern transactions in United States commodity derivatives markets. A derivative is a financial instrument, the value of which depends on (*i.e.*, is derived from) the value of some underlying asset, index, or other measure. In general, market participants use derivatives to hedge risks or speculate on commodity price movements. The most common derivatives are "futures contracts" and "swaps." While derivatives markets are distinct from "cash" or "physical" markets in which

the assets themselves are bought and sold, the prices of those assets and derivatives are typically closely linked. If a price disparity arises, arbitrageurs will take advantage of the difference, and the gap disappears. In the ordinary course, these price movements contribute to "price discovery," the mechanism by which supply and demand set the price of a commodity.

A futures contract is a standardized agreement to purchase or sell a "commodity" at a future date for a price determined at the contract's inception. Although the CEA uses the term of art "contract[] of sale of a commodity for future delivery," most contracts are structured for financial settlement and are discharged by executing a contract that reverses the obligation to purchase or sell. *See, e.g.*, 7 U.S.C. § 2(a)(1)(A). Under the CEA, a futures contract must be traded on a designated contract market, or DCM, the statutory term for a registered derivatives exchange. 7 U.S.C. § 6(a). A swap includes a broad array of financial instruments, such as "event contracts." Swap transactions are also traded on CFTC-regulated DCMs.

Futures markets originated in the United States at transportation hubs for agricultural products like grain, butter, and eggs. Over time, exchanges began to offer contracts for other physical commodities like metals, oil, and gas, and later introduced cash-settled futures linked to less tangible measures like interest rates and price indices. While the range of underlying commodities has expanded (and

continues to do so) over time, the fundamental regulatory structure governing futures markets has remained consistent. Today there are 25 exchanges (DCMs) in the United States, including Kalshi.[1]

II. The development of federal regulation of U.S. futures and swaps markets

A. States attempt to regulate futures markets, driving federal regulations

By the mid-nineteenth century, exchanges in major commodity trading hubs like New York and Chicago had organized trading to facilitate price discovery (information exchange), risk management (hedging), and speculation.[2] But state regulators and courts often failed to distinguish between futures trading and "gambling" or "wagering," with many states even prohibiting futures trading as a form of gambling. *See, e.g., Irwin v. Williar*, 110 U.S. 499, 508-09 (1884) (describing futures contracts as "nothing more than a wager"); *see also Cothran v. Ellis*, 16 N.E. 646, 647 (Ill. 1888) (describing futures as "gambling in grain"); s*ee*

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[1] *See* CFTC, Designated Contracts Markets (DCMs), https://www.cftc.gov/IndustryOversight/IndustryFilings/TradingOrganizations?Status=Designated&Date_From=&Date_To=&Show_All=1.

[2] *See* CFTC, History of the CFTC, https://www.cftc.gov/About/HistoryoftheCFTC/history_precftc.html; *see also Regulating Transactions on Grain-Future Exchanges*, S. Rep. No. 67-871, at 3 (1922): "Transactions in grain futures are utilized by the public for speculation and by the grain trade for the purpose of eliminating or reducing, as far as practicable, the hazards in the merchandising of grain and its products and by-products due to price fluctuations. Public speculation helps to carry the risk for the producers, dealers, and millers who wish to hedge their cash grain transactions."

also Rumsey v. Berry, 65 Me. 570, 574 (1876) (finding futures contracts to be void as contrary to public policy); s*ee also* William W. Mansfield, *A Digest of the Statutes of Arkansas* § 1848 (U.M. Rose ed., 1884) (declaring that "[t]he buying or selling or otherwise dealing in what is known as futures . . . with a view to profit, is hereby declared to be gambling").

The Supreme Court and Congress acknowledged that futures markets served a valuable function. *See Bd. of Trade of Chi. v. Christie Grain & Stock Co.*, 198 U.S. 236, 247-48 (1905) (noting that a futures contract's "value [is] well known as a means of avoiding or mitigating catastrophes, equalizing prices and providing for periods of want."). And Congress ultimately centralized the oversight and regulation of futures trading on federally regulated contract markets. The first federal legislation designed to create a comprehensive federal regulatory framework for futures markets was the Future Trading Act of 1921, Pub. L. No. 67-66, 42 Stat. 187 (1921) ("21 Act"), followed by the Grain Futures Act of 1922, Pub. L. No. 67-331, 42 Stat. 998 (1922) ("22 Act"). In passing these laws, Congress recognized the importance of uniform federal regulation of futures markets, despite the necessary preemption of some state police powers. *Cf.* H.R. Rep. No. 67-1095, at 5 (1922) (Conf. Rep.) (objecting that the bill was "designed to . . . more or less eliminate some of the most important police powers of several sovereign States").

In 1973, after decades of regulatory uncertainty,[3] futures exchanges recommended that "federal policy . . . be uniform throughout the United States" and not "subject to the vagaries" of different obligations in "different jurisdictions." Review of Commodity Exch. Act and Discussion of Possible Change: Hearings Before the H. Comm. on Agric., 93d Cong., 1st Sess. 121 (1973). The very next year, Congress passed the Commodity Futures Trading Commission Act to provide that uniformity. Pub. L. 93-463, 88 Stat. 1389 (1974) ("74 Act").

B. Congress gave the CFTC "exclusive jurisdiction" over futures trading

The 74 Act established a unified, national regulatory structure by (1) establishing the CFTC, vesting in it the authority to administer the CEA, (2) expanding the scope of the CEA to cover "all commodities," and (3) expressly conferring on the CFTC "exclusive jurisdiction with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an 'option' . . .), and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated

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[3] *See*, *e.g.*, *Dickson v. Uhlmann Grain Co.*, 288 U.S. 188, 198-99 (1933) (rejecting "the contention that Congress occupied the field in respect to contracts for future delivery; and that necessarily all state legislation in any way dealing with that subject is superseded.")

. . . or any other board of trade, exchange, or market." 74 Act, Section 201(b), 88 Stat. at 1395 (codified at 7 U.S.C. § 2(a)(1)).

Preemption was an express goal of the 74 Act. Congress recognized the need for uniform nationwide regulation of futures and options markets because concurrent regulation by the states or other federal regulators such as the Securities and Exchange Commission could lead to "total chaos."[4] Potential limiting language was stricken from the statute "to assure that Federal preemption is complete." 120 Cong. Rec. S 30458, 30464 (daily ed. Sept. 9, 1974) (Statement of Sen. Curtis). All commodity futures markets were to be under the CFTC's exclusive jurisdiction. The 74 Act "preempt[ed] the field insofar as futures regulation is concerned" such that "if any substantive State law regulating futures trading was contrary to or inconsistent with Federal law, the Federal law would govern." H.R. Rep. No. 93-1383 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 5894, 5897.

C. Congress reinforced and clarified the CFTC's exclusive jurisdiction in subsequent amendments

Amendments to the CEA between 1978 and 2010 repeatedly reinforced and clarified the CFTC's exclusive jurisdiction over futures and options. In the Futures Trading Act of 1978 ("78 Act"), Congress preserved the CFTC's exclusive authority

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[4] See Commodity Futures Trading Act of 1974: Hearings Before the S. Comm. on Agric. & Forestry on S. 2485, S. 2578, S. 2837, H.R. 13113, 93d Cong., 2d Sess. 685 (1974) (statement of Sen. Clark).

over futures transactions on CFTC-regulated DCMs while clarifying the States' authority to bring actions for injunctive or monetary relief for specified violations of the CEA and to enforce their "general civil or criminal antifraud" statutes. *See* 78 Act, Pub. L. 95-405, § 15(7), 92 Stat. 865, 873 (1978).[5] Other proposals to carve off pieces of the CFTC's "exclusive" jurisdiction were rejected because "[t]he nature of the underlying commodity is not an adequate basis to divide regulatory authority." S. Rep. No. 95-850, at 111-12 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2087, 2110-11. That "a futures contract market does not fit into the traditional mold where there are both hedging and price-discovery functions should not be the determining factor in whether the contract is to be regulated by the CFTC." *Id*. Congress also reiterated its concern with "costly duplication and possible conflict of regulation or over-regulation" if parallel state regulatory schemes were permitted. *Id.*

The Futures Trading Act of 1982 (the "82 Act") further clarified the role of the States in pursuing illegal or fraudulent off-exchange transactions, while still recognizing "the CFTC['s] exclusive jurisdiction to regulate futures trading and enforce the provisions of the Act, thereby preempting any State regulatory laws." H.R. Rep. No. 97-565, at 44-45 & 102-03 (1982), *reprinted in* 1982 U.S.C.C.A.N.

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[5] This "Jurisdiction of the States" provision is now found in CEA Section 6d, 7 U.S.C. § 13a-2. The language of subsection (7) remains the same in the current version of the CEA.

3871, 3893-94 & 3951-52. For example, the 82 Act added language to permit the application of federal or state laws to *off-exchange* transactions or *unregistered* market participants. 82 Act, Pub. L. 97-444, § 229, 96 Stat. 2294, 2318 (1982). The broad preemption of other potentially applicable state or federal laws remained with respect to transactions *on* DCMs and market participants registered with the CFTC. *See* H.R. Rep. No. 97-565, at 44-45 & 102-103, 1982 U.S.C.C.A.N. at 3893-94, 3951-52. The Committee report "recogni[zed] . . . the somewhat esoteric nature of the commodity futures markets and the desire to have knowledgeable and uniform enforcement of the Act" and reiterating that "[t]he Committee . . . continues to support the idea of a single unified program of regulation and exclusive CFTC jurisdiction over exchange-traded futures."

In 1992, Congress began grappling with the advent of a new type of derivative financial product, swaps. In the Futures Trading Practices Act of 1992 ("92 Act"), Pub. L. 102-546, 106 Stat. 3590 (1992), Congress gave the CFTC authority to "exempt" certain off-exchange ("over-the-counter" or "OTC") swap transactions from the CEA's mandatory exchange trading regime for futures and options. The 92 Act added language to CEA Section 12(e), 7 U.S.C. 16(e), to preempt the application of state gambling and bucket shop laws as applied to OTC swap transactions. While the 82 Act had allowed the States authority to apply state and local laws to off-exchange transactions, the 92 Act limited this authority. The goal was to provide

"legal certainty under both the Act and state gaming and bucket shop laws for transactions covered by the terms of an exemption." H.R. Rep. No. 102-978, at 80 (1992) (Conf. Rep.), *reprinted in* 1992 U.S.C.C.A.N. 3179, 3212. And in 2000 with the passage of the Commodity Futures Modernization Act of 2000 ("CFMA"), Congress exempted or excluded swap certain transactions from the CEA's exchange trading requirements while preempting the application of state and local laws to those "excluded" swap transactions. Pub. L. No. 106-554, Appendix E & § 103, 114 Stat. 2763A-365, 2763A-377 (2000). The preemption of state and local laws as to on-exchange transactions remained as is, and the preemption of state and local laws as to off-exchange transactions (exempt or excluded swaps) was expanded.

D. Congress preempted state regulation of swaps in the Dodd Frank Act

In the wake of the 2008 financial crisis, Congress created a framework within the CEA for the on-exchange execution, clearing and reporting of vast portions of previously "OTC" swaps markets. In the 2010 Dodd-Frank Act, Congress expressly extended the CFTC's "exclusive jurisdiction" to encompass "transactions involving swaps."[6] The Dodd-Frank Act also added a new subsection, 2(d), that eliminated the concurrent jurisdiction of States as to off-exchange swap transactions. 7 U.S.C. § 2(d).

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[6] *See* Pub. L. No. 111-203, 124 Stat. 1376 (2010); 7 U.S.C. § 2(a)(1)(A).

SUMMARY OF THE ARGUMENT

Congress, through the Commodity Exchange Act, expressly preempted state laws to the extent those laws apply to CFTC-regulated markets. Kalshi, like other DCMs, lists swaps that are traded on their platform and which must comply with the complex regulatory scheme implemented by the CEA and CFTC regulations. Congress expressly granted the CFTC "exclusive jurisdiction" over contracts that are predicated on "the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence" as well as what are commonly referred to as "binary options"—that Kalshi's products, commonly referred to as event contracts, may be predicated on the occurrence, non-occurrence, or the extent of the occurrence of a particular subset of events, sports, elections, or weather, does not affect the CFTC's jurisdiction. 7 U.S.C. § 1a(47)(A)(ii). *Infra* at 24-30.

Because the CEA confers exclusive jurisdiction to the CFTC to regulate swap transactions on DCMs, and because Kalshi lists its event contracts on DCMs, the CFTC has exclusive jurisdiction over those transactions and state law is preempted as applied to those transactions. In response to decades of state efforts to regulate futures markets as gambling, Congress expressly preempted the application of state law to futures and swaps markets when it implemented the current regulatory scheme. But, even if Congress had not included language expressly preempting state

law, applications of state laws to regulate CFTC-regulated markets are implicitly preempted because complying with both the federal scheme and a patchwork of state regulations frustrates the intent of Congress. And nothing about Congress's decision to preempt state regulation of swaps markets does anything to diminish Massachusetts's or other States' traditional authority to regulate gambling that States have long regulated, just as the CFTC has long regulated derivatives markets. *Infra* at 30-42.

Congress's decision to preempt state laws as applied to CFTC-regulated markets makes practical sense, and the Superior Court's decision risks substantial market and regulatory disruption. *Infra* at 43-44.

This Court should reverse the decision below.

ARGUMENT

I. Event contracts traded on CFTC-regulated markets are swaps subject to the CFTC's exclusive jurisdiction.

A. The plain language of the CEA defines swaps to include event contracts, including event contracts where the underlying event involves sports

The Superior Court assumed without deciding that Kalshi's event contracts are swaps. Add. 82. That assumption was correct: 7 U.S.C. § 1a(47)(A)(i) defines the term "swap," in relevant part, to include "any agreement, contract, or transaction . . . that is a[n] . . . option of any kind that is for the purchase or sale, or based on the value, of 1 or more . . . quantitative measures, or other financial or economic interests

or property of any kind," and § 1a(47)(A)(ii) defines 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]

"[W]here [a] statute is clear and unambiguous, our inquiry into the Legislature's intent need go no further than the statute's plain and ordinary meaning." *Josh J. v. Commonwealth*, 478 Mass. 716, 719 (2018). Event contracts listed on DCMs are swaps under the plain meaning of the CEA. Event contracts, including sports event contracts, are settled based on the occurrence or non-occurrence of a specified future event, like the occurrence of a weather event or the outcome of an election or sporting event. And those occurrences are "associated with [] potential financial, economic, or commercial consequence[s]"—a storm affects shipping and crops; an election affects tax and spending policy; and a sporting event affects ticket and merchandise sales, advertising, brand endorsements, vendors, lodging businesses, and food and beverage services. *See KalshiEx*, 2026 WL 924004 at *3 (listing similar examples).

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[7] *See also* §§ 1a(47)(A)(iv) (including transactions "commonly known to the trade as swaps") and (vi) ("any combination or permutation of, or option on, any agreement, contract, or transaction described in any of clauses (i) through (v)").

The Commonwealth, it its brief, asserts that event contracts are not swaps as defined by 7 U.S.C. § 1a(47)(A)(ii) because they "hinge on [an] *outcome*" rather than an "event."[8] Commonwealth Br. 55. Nowhere in the "swap" definition did Congress draw a distinction between an "event" and "outcome." Nor does such thin, extra-textual parsing make sense. Under the plain text of the CEA, whether the Federal Reserve sets rates at a certain level, whether a storm hits at a particular time, or whether a certain team wins a sporting event are all "events" upon which a DCM could list a swap.

The Commonwealth urges that the definition of swap must be read "with the surrounding statutory context," Commonwealth Br. 56, but the Commonwealth ignores key textual indicia of Congress's intent to capture a broad swath of trading activity. When Congress has limited the Commission's jurisdiction over derivatives it has only done so by expressly embedding narrow exclusions in the statutory commodity definition itself (*i.e.*, onions and movie box office receipts).[9] As relevant here, Congress included specific, enumerated exclusions into the definition of swap

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[8] The Commonwealth does not address the definition of a swap as a binary option under 7 U.S.C. § 1a(47)(A)(i); *see also* 17 C.F.R. § 1.3. Event contracts also often fit this definition of "swap". *See* CFTC Futures Glossary, https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/CFTCGlossary/index.htm#B.

[9] *See* 7 U.S.C. § 1a(9).

in § 1a(47)(B), expressly circumscribing the Commission's jurisdiction.[10] And Congress included a catch-all provision to the swap definition for any "agreement, contract, or transaction that is, or in the future becomes, commonly known as a swap." 7 U.S.C. § 1a(47)(iv). Recognizing that the definition swept broadly, Congress delegated to the CFTC (and the Securities Exchange Commmission) the authority to "further define" what constitutes a swap, and the CFTC has exercised that authority. 15 U.S.C. § 8302(d)(1); Further Definition of "Swap", "Security-Based Swap", and "Security-Based Swap Agreement"; Mixed Swaps; Security Based-Swap Agreement Recordkeeping, 77 Fed. Reg. 48208, 48246 (Aug. 13, 2012) (excluding certain transactions from the definition); *KalshiEX*, 2026 WL 924004, at *3 (describing 15 U.S.C. § 8302(d)(1) as "useful" for concluding that "far-fetched scenarios" about the CEA's application are unlikely to eventuate).

Massachusetts asserts that the CFTC's definition of swap "leads to absurd results—because it is functionally limitless." Commonwealth Br. 57. But it is the Commonwealth's interpretation that is "functionally limitless"; excluding event contracts, including sports event contracts, from the definition of swap would logically also exclude many other event-based derivatives, including contracts tied

[10] 7 U.S.C. § 1a(47)(B) (excluding, for example, physically settled forward transactions, certain insurance and consumer arrangements, and other ordinary-course commercial agreements).

to weather, energy, and political outcome contracts, that have traded on CFTC-regulated exchanges for decades. [11]

The consequences of such a ruling would be immediate and substantial. States could characterize any derivative as prohibited gambling, thereby subjecting nationally (and internationally) traded swaps to a patchwork of state restrictions. This concern is not hypothetical. The Commonwealth would have DCMs obtain a license under the Commonwealth's Sports Wagering Law in order to offer contracts that are simultaneously regulated by the CFTC via a comprehensive scheme. And the logic of the superior Court's decision would equally permit Massachusetts to require DCMs to obtain a state license to offer any number of non-sports related contracts—that is the exact scenario Congress sought to avoid with the CEA. *See supra* at 18-19.

B. Sports event contracts are associated with potential financial, economic, and commercial consequences

Event contracts based on sports or elections also implicate "potential financial, economic, or commercial consequence[s]" under the CEA.[12] 7 U.S.C.

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[11] *See* Concept Release on the Appropriate Regulatory Treatment of Event Contracts, 73 Fed. Reg. 25669, 25671 (May 7, 2008).

[12] And, as noted above, even if the Court is unpersuaded that sports event contracts are "associated with potential financial, economic, or commercial consequence" in the § 1a(47)(A)(ii) definition of "swap," event contracts are nonetheless swaps under § 1a(47)(A)(i) because they are binary "options."

§ 1a(47)(A)(ii). As the Third Circuit has held, a sports event affects "numerous . . . stakeholders, including sponsors, advertisers, television networks, franchises, and local and national communities." *KalshiEX*, 2026 WL 924004, at *3. Broadly speaking, sporting events are economic enterprises that generate billions of dollars in economic activity and materially affect both regional and national markets. *See* Ryan Grandeau, *Securing the Best Odds: Why Congress Should Regulate Sports Gambling Based on Securities-Style Mandatory Disclosure*, 41 Cardozo L. Rev. 1229, 1247 (2020). Even so, the statutory definition only requires a "*potential* financial, economic, or commercial consequence." 7 U.S.C. § 1a(47)(A)(ii) (emphasis added); *see Alabama Power Co. v. Costle*, 636 F.2d 323, 353 (D.C. Cir. 1979) (recognizing that "potential . . . will always and inherently exceed actual"). And those potential consequences represent real economic risk, which is precisely the type of economic exposure that derivatives markets are designed to mitigate.[13]

The only difference between a sports event contract and the types of event contracts on the weather or corn production that have traded on DCMs for decades is the underlying event. But there is no textual basis to justify carving out some events and not others, and the Commonwealth offers no limiting principle to avoid

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[13] *See, e.g.,* KalshiEx's "February 2026 Sportsbook Hedging Rebate Program" filing with the CFTC, available on the CFTC's website at: https://www.cftc.gov/IndustryOversight/IndustryFilings/TradingOrganizationRules/59640.

undermining decades of well-regulated markets. Carving out sports and political event contracts from the CEA's definition of "swap," would destabilize those previously uncontroversial markets, potentially subjecting them to a patchwork of state gambling regulations. By contrast, adhering to the plain text of the CEA does nothing to limit Massachusetts's existing authority to regulate gambling. *See infra* at 42. The plain text reading of the CEA is the least disruptive to both federal futures regulation and the typical application of state gambling laws.

II. The CEA preempts the application of state gambling laws to swaps traded on CFTC-regulated markets

The Constitution's Supremacy Clause mandates that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. "[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (internal citation omitted); *see Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (under the Supremacy Clause, state laws that conflict with federal law are "without effect."); *Cipollone v. Liggett Grp., Inc*., 505 U.S. 504, 516 (1992) (same); *Time Warner Cable v. Doyle*, 66 F.3d 867, 874 (7th Cir. 1995) ("Congress, in the exercise of the legislative authority granted to it by the Constitution, may preempt

state law." (citation omitted)). "A federal law may preempt a state law expressly, impliedly through the doctrine of conflict preemption, or through the doctrine of field (also known as complete) preemption." *Boomer v. AT & T Corp.*, 309 F.3d 404, 417 (7th Cir. 2002).

After decades of amendment and refinement of the CEA, see *supra* at 18-22, Congress chose to expressly preempt any concurrent state regulation of the markets at issue in this case by conferring on the CFTC "exclusive jurisdiction" to regulate "transactions involving swaps" traded on CFTC-regulated DCMs. 7 U.S.C. § 2(a)(1)(A). Even without the "exclusive jurisdiction" provision, however, state gambling laws would be preempted as applied to DCMs because Congress intended to occupy the field of swap regulation, and any attempts by a State to regulate swaps would pose as an obstacle to the accomplishment of the purposes of the CEA. *See KalshiEX*, 2026 WL 924004, at *4-5.

A. The CEA expressly preempts state gambling laws as applied to swaps trading on CFTC-regulated DCMs

"When a federal law contains an express preemption clause, [courts] 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.'" *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 594 (2011) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)).

The CEA expressly vests the Commission with "exclusive jurisdiction," except as otherwise expressly provided by Congress, over all "accounts, agreements

. . . , and transactions involving swaps or contracts of sale of a commodity for future delivery." 7 U.S.C. § 2(a)(1)(A). On its face, that provision prevents States from regulating swap transactions that are regulated by the CFTC.

Preemption was the primary goal of the "exclusive jurisdiction" provision, which was included from the inception of the CFTC. *See*, *supra* at 18-19; CFTC Act: Hearings Before the S. Comm. on Agric. & Forestry on S. 2485, S. 2578, S. 2837, and H.R. 13113, 93d Cong., 2d Sess. 685 (1974) (statement of Sen. Clark) ("different State laws would just lead to total chaos, if that preemption didn't occur."). And, as financial derivatives markets developed and grew, Congress steadily expanded the CFTC's jurisdiction to include commodity swaps and event contracts. As particularly relevant here, Congress amended the CEA in 2010 to add "transactions involving swaps" to the CFTC's § 2(a)(1) exclusive jurisdiction. *See* Pub. L. No. 111-203, 124 Stat. 1376 (2010); 7 U.S.C. § 2(a)(1)(A). In the same legislation, Congress made clear that the CFTC has exclusive jurisdiction over event contracts by adding the "Special Rule," CEA § 5c(c)(5)(C) to the Act. *See* 7 U.S.C. § 7a-2(c)(5)(C). In § 5c(c)(5)(C), Congress granted the CFTC specific oversight and prohibitory authority over event contracts by providing that the CFTC "may determine" event contracts involving certain categories "are contrary to the public interest" and may not be listed on CFTC-regulated markets. 7 U.S.C. § 7a-2(c)(5)(C)(i)-(ii). By creating a specific public interest review process, Congress

clearly signaled that these contracts belong within the CFTC's exclusive regulatory purview, not the States'.

Massachusetts's arguments to the contrary are unavailing. First, the Commonwealth attempts to read the "exclusive jurisdiction" provision unduly narrowly to only "delineate [the] CFTC's regulatory turf vis-à-vis other federal agencies. Commonwealth Br. 30-31 (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 386 (1982)). But *Merrill Lynch* does not support that proposition. That case involved the question whether § 2(a)(1)(A) "preserve[d] the implied private remedy federal courts had recognized *under the CEA*." *Merrill Lynch*, 456 U.S. at 386 (emphasis added). If anything, the relevant takeaway from *Merrill Lynch* is that Congress intended the CEA to be comprehensive in its enforcement of the Act through both regulatory and private action. Further, the Court specifically noted that the legislative history demonstrated that the "purpose of the exclusive-jurisdiction provision . . . was to separate the functions of the Commission from those of the Securities and Exchange Commission and other regulatory agencies." *Id.* The legislative history demonstrates that those "other regulatory agencies" included state regulatory agencies. Congress intended that the Act "preempt[] the field insofar as futures regulation is concerned" such that "if any substantive State law regulating futures trading was contrary to or inconsistent with Federal law, the Federal law would govern." H.R. Rep. No. 93-1383 (1974) (Conf.

Rep.), *reprinted in* 1974 U.S.C.C.A.N. 5894, 5897; *see also* 120 Cong. Rec. S 30458, 30464 (daily ed. Sept. 9, 1974) (Statement of Sen. Curtis) (noting that potentially limiting language was stricken from the statute "to assure that Federal preemption is complete").

Second, the Commonwealth's argument that the "exclusive jurisdiction" provision "looks" different from other express preemption provisions, namely 7 U.S.C. §§ 16(e)(2), 16(h), and 27f(b), ignores the purposes of those provisions. Commonwealth Br. 31. As the Superior Court observed, see Add. 83-84, 7 U.S.C. § 16(e)(2), expressly states that the CEA shall "supersede and preempt the application of any State or local law that prohibits or regulates gaming or the operation of bucket shops" for certain transactions specified in that section. That language was added to the CEA in 1992 to clarify that state laws were preempted even as to certain off-exchange commodity derivatives transactions that (at that time) did not fall within the express preemption provision in Section 2(a)(1). *See* 1992 Act, Pub. L. No. 102-554, § 502, 106 Stat. 3590, 3629–3632 (codified as amended at 7 U.S.C. §§ 6(c), 16(e)(2)(A) (1992)). The goal was to clarify that state laws were preempted as applied to new categories of transactions which *at that time* did not otherwise fall under the "exclusive jurisdiction" provision in 7 U.S.C. § 2(a)(1), which was subsequently modified to include "swaps" in 2010.

The same is true of 7 U.S.C. § 27f(b): Congress enacted this section as part of the Legal Certainty for Bank Products Act of 2000 to preempt state laws as applied to "hybrid instruments," another instrument not covered by 7 U.S.C. § 2(a)(1). Pub. L. 106–554, § 1(a)(5) 114 Stat. 2763, 2763A–461 (2000). Finally, 7 U.S.C. § 16(h)—the final provision cited by the Commonwealth, Br. 31—was added in the 2010 Dodd-Frank Act to clarify that swaps and insurance are different products and therefore swaps "may not be regulated" as insurance "under the law of any State." Pub. L. 111-203, § 722, 124 Stat 1376, 1672 (2010). Neither of those provisions provides any insight into the meaning of 7 U.S.C. § 2(a)(1).

Congress, via 7 U.S.C. § 2(a)(1) vested the CFTC with "exclusive jurisdiction" to regulate derivatives that, as pertinent here, are "traded or executed on a [DCM]." Because Congress expressly preempted state regulation of the contracts at issue in this case, the Commonwealth may not apply its state gambling laws to those transactions, and the Superior Court's decision should be reversed.

B. The CEA was intended to, and does, occupy the field of regulating commodity derivatives exchanges

Where Congress has declared federal authority to be exclusive, state laws attempting to regulate the same subject matter must give way. *See Arizona v. United States*, 567 U.S. 387, 399 (2012); *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 163 (2016); *Duke Energy Trading & Mktg., L.L.C. v. Davis,* 267 F.3d 1042, 1057 (9th Cir. 2001); *see also Transcon. Gas Pipe Line Co. v. Pa. Env't Hearing Bd.*, 108

F.4th 144, 151-52 (3d Cir. 2024) (an "explicit statutory conferral of exclusive jurisdiction . . . withdraws any concurrent jurisdiction"), *Richardson v. Kruchko & Fries,* 966 F.2d 153, 158 (4th Cir. 1992) (state-law claims preempted where they fell within federal agency's "exclusive jurisdiction").

The inquiry does not turn on whether Congress anticipated every possible form of state interference; it turns on whether state law intrudes into a field Congress has reserved for federal regulation. Preemptive intent may be inferred "if the scope of the statute indicates that Congress intended federal law to occupy the legislative field." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008). Such is the case here. The CEA "grants the CFTC exclusive jurisdiction over 'swaps . . . traded or executed on a [DCM],' which include . . . sports-related event contracts." *KalshiEX*, 2026 WL 924004, at *4. When an instrument is trading on a CFTC-regulated market as a "swap" or "future," state gambling laws do not apply.

The Third Circuit is only the latest court to conclude that Congress "occupied the field" of regulation of event contracts traded on CFTC-regulated DCMs. *KalshiEX*, 2026 WL 924004, at *3. Courts have long held that CEA § 2(a)(1)(A)'s conferral of "exclusive jurisdiction" over futures and swaps traded on a DCM "preempts the application of state law." *Leist v. Simplot*, 638 F.2d 283, 322 (2d Cir. 1980); *see also Effex Cap., LLC v. Nat'l Futures Ass'n,* 933 F.3d 882, 894 (7th Cir. 2019) ("Precisely, preemption is appropriate '[w]hen application of state law would

directly affect trading on or the operation of a futures market.'" (quoting *Am. Agric. Movement, Inc v. Bd. of Trade of Chicago*, 977 F.2d 1147, 1156 (7th Cir. 1992), *abrogated on other grounds by Time Warner Cable v. Doyle*, 66 F.3d 867 (7th Cir. 1995))); *FTC v. Ken Roberts Co.*, 276 F.3d 583, 590 (D.C. Cir. 2001). Offering event contracts on a DCM cannot, in and of itself, be an activity that is unlawful under any state law. "Congress's intent was to provide the CFTC with exclusive jurisdiction to regulate commodities" and "[s]uch exclusive jurisdiction precludes states from exercising supplementary regulatory authority over commodity transactions." *Stuber v. Hill*, 170 F. Supp. 2d 1146, 1151 (D. Kan. 2001). [14]

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[14] *See also Chi. Mercantile Exch. v. SEC*, 883 F.2d 537, 544, 548 (7th Cir. 1989) (recognizing that the CFTC is "the sole lawful regulator" where "its jurisdiction is exclusive"--i.e., if the at-issue derivative falls within Section 2(a)(1)(A)'s reach); *Point Landing, Inc. v. Omni Cap. Int'l, Ltd.*, 795 F.2d 415, 422 (5th Cir. 1986), *aff'd sub nom*. *Omni Cap. Int'l, Ltd. v. Rudolf Wolff & Co*., 484 U.S. 97 (1987) (finding the CEA preempted private rights of action under securities laws because "[a]ny other result would frustrate the intent of Congress to preempt the field insofar as futures regulation is concerned."); *Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216, 232 (6th Cir. 1980), *aff'd*, 456 U.S. 353 (1982) ("[T]he thrust of the [CEA's exclusive-jurisdiction] provision was to ensure that regulatory bodies other than the CFTC would not interfere with the orderly development and enforcement of commodities regulation."); *Paine, Webber, Jackson & Curtis, Inc. v. Conaway*, 515 F. Supp. 202, 205-06 (N.D. Ala. 1981) (holding that the CEA preempted private plaintiff's counterclaim under Alabama gambling statute purporting to void all futures transactions in which delivery of the commodity is not intended); *Int'l Trading, Ltd. v. Bell*, 556 S.W.2d 420, 424 (1977) (holding that the "vesting of exclusive jurisdiction is a clear indication that Congress intended no regulation in this field except under the authority of the [A]ct"); *Texas v. Monex Int'l, Ltd*., 527 S.W.2d 804, 806 (Tex. Civ. App. 1975), *writ refused* (Dec. 17, 1975)

The very purpose of the 74 Act was to occupy the field of the regulation of derivatives traded on exchanges and Congress included the "exclusive jurisdiction" provision to "assure that Federal preemption is complete." 120 Cong. Rec. S. 30458, 30464 (daily ed. Sept. 9, 1974) (statement of Sen. Curtis). Because the event contracts at issue are swaps, they are subject to the CFTC's exclusive regulatory jurisdiction, and state laws as applied to those contracts are preempted.

C. State gambling laws, as applied to swaps traded on a DCM, conflict with federal law

State laws are pre-empted "to the extent of any conflict with a federal statute." *Hillman v. Maretta*, 569 U.S. 483, 490 (2013) (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000)). A state law may impermissibly conflict with federal law when compliance with both federal and state law is impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941). Where Congress makes "a single sovereign responsible for maintaining a comprehensive and unified system" of regulation, preempted state laws "detract[] from the 'integrated scheme of regulation' created by Congress." *Arizona v. United States,*

(holding the CEA preempted Texas securities laws over margined commodity transactions).

567 U.S. 387, 401-02 (2012) (quoting *Wisconsin Dept. of Industry v. Gould Inc*., 475 U.S. 282, 288-89 (1986)).

"[C]onflict preemption . . . prohibits [a state] from regulating sports-related event contracts on CFTC-licensed DCMs." *KalshiEX*, 2026 WL 924004, at *5. This is because it is both impossible for a DCM to comply with the CEA and state gambling laws as applied to those markets, and because attempting to do so would "stand as an obstacle" to Congress's intent expressed in the CEA. *Arizona*, 567 U.S. at 399.

Complying with both state gambling law and the CEA is impossible because, a DCM is required by federal law to provide "impartial access" to all eligible participants nationwide. 17 C.F.R. § 38.151(b). If a State bans a contract via its gambling laws, the DCM cannot fulfill its federal mandate to provide impartial national access. And state gambling laws also stand as an obstacle to federal regulation because those gambling laws often require local licensing, fees, and specific hardware (like localized servers). Applying state-by-state local requirements to national commodity exchanges would create the very "patchwork" that Congress set out to prevent. *See* H.R. Rep. No. 93-975, at 51 (1974); S. Rep. No. 93-1131, at 36 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5843, 5885.

The Commonwealth argues that, because a CFTC regulation restricts DCM's abilities to offer contracts "involving . . . gaming," then the CEA must not include

sports event contracts. Commonwealth Br. 53; 17 C.F.R. § 40.11. As an initial matter, the CFTC disagrees with the Commonwealth's interpretation of the CFTC's regulations. But even if the Commonwealth was correct that a CFTC regulation "declares that gaming-related event contracts are 'contrary to the public interest,'" then it does not logically follow that the regulation affects the statutory preemptive scope. The CFTC's conclusion that a swap may not be listed does not transform that transaction into something other than a swap. Rather, the prohibited transaction is still a swap and still under the CFTC's jurisdiction and the CEA's scope; a federal agency's regulation cannot shrink a statute's scope. *See Dixon v. United States*, 381 U.S. 68, 74-75 (1965). So, even if the Commonwealth was correct about what § 40.11 does, the CFTC would still have exclusive jurisdiction over these contracts and state law would still be preempted.

The presumption against preemption also does not apply here. The purpose of the exclusive jurisdictional provision in CEA § 2(a)(1)(A) is to provide national uniformity for derivatives trading and to prevent 50 different states from undermining this national regulatory structure by subjecting derivatives markets to a patchwork of state gambling laws. At the same time, the CEA does nothing to disrupt the Commonwealth's "core police power" to "regulat[e] sports wagering." Commonwealth Br. 35 (quoting *Abdow* v. *Attorney General*, 468 Mass. 478, 489 (2014)). As discussed above, the CEA in no way affects the Commonwealth's

existing regulatory authority over gambling. *See infra* at 42. And, indeed, that industry continues to grow apace.[15] The presumption against preemption cannot be a back door for a State to insert itself into markets that have been federally regulated for decades.

D. The "savings clause" in CEA § 2(a)(1)(A) preserves traditional state powers over state-regulated gambling but does not grant States the authority to regulate DCMs

The grant of "exclusive jurisdiction" in § 2(a)(1)(A) does not permit a state to define federally regulated derivatives transactions as illegal under state law, as Massachusetts attempts to do here. The Superior Court relied on the "savings clause" in § 2(a)(1)(A) to conclude Congress must not have intended to displace traditional police powers, such as gambling regulation. But that is precisely what Congress intended when those laws are applied to transactions under the CFTC's exclusive jurisdiction.

The Commonwealth asserts that Section 2(a)(1)(A) "preserves" its jurisdiction to regulate swaps traded on DCMs because that section provides that, "[e]xcept as hereinabove provided, nothing contained in this section shall (I)

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[15] *Compare* Mass. Gaming Comm'n, 2024 Annual Report 13 (reporting $584.17 million in adjusted gross sports wagering revenue and $116.69 million in sports wagering tax revenue) *with* Mass. Gaming Comm'n, 2023 Annual Report 13 (reporting $228.7 million in adjusted gross sports wagering revenue and $44.1 million in sports wagering tax revenue), https://massgaming.com/news-events/article-type/reports-publications/.

supersede or limit the jurisdiction at any time conferred . . . on . . . other regulatory authorities under the laws of the United States or of any State," or "(II) restrict . . . such other authorities from carrying out their duties and responsibilities in accordance with such laws." But the Commonwealth's argument elides the prefatory statement "[e]xcept as hereinabove provided"—the "hereinabove" states that "[t]he Commission shall have exclusive jurisdiction," subject to other specific limitations. 7 U.S.C. § 2(a)(1)(A).

The savings clause's actual purpose is to preserve other laws that would apply outside the field of "accounts, agreements . . . and transactions . . . traded or executed on a contract market." *See FTC v. Ken Roberts Co*., 276 F.3d 583, 591 (D.C. Cir. 2001) (observing that other agencies like the FTC "retain their jurisdiction over all matters beyond the confines" of "accounts, agreements, and transactions involving contracts of sale of a commodity for future delivery" (quoting CEA § 2(a)(1)(A))). For this reason, the CEA does nothing to preempt state laws regulating casino gambling or gambling on sports books, nor does it displace generally applicable state antifraud laws. The "savings clause" preserves traditional, non-conflicting state powers, but cannot be read to confer concurrent jurisdiction to regulate swaps on States. *See Hunter v. FERC*, 711 F.3d 155, 159 (D.C. Cir. 2013) ("To be clear, there are limits to what comes within CEA section 2(a)(1)(A)'s orbit, but once a scheme crosses the statute's event horizon, the CFTC has exclusive jurisdiction.").

III. Subjecting derivatives listed on CFTC-regulated DCMs to state regulation would have destabilizing economic effects.

If this Court holds that sports event contracts listed on CFTC-regulated DCMs do not qualify as swaps or are outside the CFTC's exclusive jurisdiction within the meaning of the statute, the consequences would not be confined to a single category of event contracts. The interpretation would redraw the statutory boundary Congress established to ensure a comprehensive federal oversight of derivatives markets, inviting the public to characterize an expanding universe of event contracts as beyond the CEA's reach. At least eight DCMs have collectively self-certified with the CFTC more than 3,000 event based contracts with the CFTC pursuant to CFTC Rule 17 C.F.R. § 40.2, with a notable increase in such filings during the last two years.[16] Importantly, the vast majority of these contracts are tied to non-sport outcomes involving measurable commodity indicators, including cryptocurrency price levels and related indices, GDP releases, benchmark interest-rate decisions, election outcomes, temperature forecasts, electricity usage, and the price movements of precious metals. *Id*. These event contracts rest on objectively measurable outcomes no less than sports event contracts. A finding excluding such contracts

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[16] *See* CFTC Designated Contact Market Products, *available at* https;//www.cftc.gov/IndustryOversight/Industry Filings/TradingOrganizationProducts?Organization=CM (last visited February 13, 2026).

from the definition of swap would therefore risk destabilizing the settled expectations upon which these markets depend, fostering uncertainty in an area where Congress sought uniformity and regulatory clarity. It could introduce the "chaos" Congress sought to prevent by providing the CFTC with exclusive jurisdiction over futures trading in 1974. Because even modest ambiguity in the scope of the CEA can move rapidly through interconnected financial markets, the CFTC respectfully requests that the Court not adopt a construction that could generate systemic consequences for CEA preemption far removed from the case at hand.

CONCLUSION

For the foregoing reasons, the CFTC respectfully submits that this Court should reverse and remand the judgment of the Superior Court.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Appellate Procedure Rules 17(c) and 20(a), the foregoing brief complies with the required type-volume limitations, in that it has 7,497 words, excluding cover, tables and signature block, as exempted by Appellate Procedure Rule 20(a)(2)(D).

This brief complies with the typeface requirements of Appellate Procedure Rule 20(a)(4)(B) because this brief was prepared in proportionally spaced typeface using Microsoft Word 365 and is set in 14-point sized Times New Roman type style.

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CERTIFICATE OF SERVICE

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