

**COMMONWEALTH OF MASSACHUSETTS**

**SUPREME JUDICIAL COURT**

**SJC-13906**

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**COMMONWEALTH OF MASSACHUSETTS,**  
Plaintiff/Appellee,

v.

**KALSHIEX, LLC,**  
Defendant/Appellant.

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ON APPEAL FROM AN ORDER  
OF THE SUFFOLK SUPERIOR COURT

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**BRIEF OF *AMICUS CURIAE* STOP PREDATORY GAMBLING  
IN SUPPORT OF THE COMMONWEALTH OF MASSACHUSETTS  
SEEKING TO AFFIRM THE PRELIMINARY INJUNCTION**

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Joshua Garick, Esq. (BBO #674603)  
LAW OFFICES OF JOSHUA N. GARICK, P.C.  
34 Salem Street, Suite 202  
Reading, Massachusetts 01867  
Phone: (617) 600-7520  
E-Mail: Joshua@GarickLaw.com

*Attorney for Amicus Curiae  
Stop Predatory Gambling*

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Massachusetts Supreme Judicial Court Rule 1:21, *Amicus Curiae* Stop Predatory Gambling hereby certifies that it is a nonprofit organization, which does not have any parent corporations and no publicly held corporation owns 10% or more of its stock.

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## INTERESTS OF *AMICUS CURIAE*

*Amicus curiae* Stop Predatory Gambling (“SPG”) is a nonprofit, nonpartisan national organization that for decades has advocated for improving the lives of the American people by exposing the harms from state-sanctioned gambling. In 2008 it held a much-acclaimed conference at the National Harbor in Maryland which featured predatory gambling opponents including Taylor Branch, a Pulitzer Prize-winning biographer of the Rev. Martin Luther King Jr. and historian of the civil rights movement, and Bishop John R. Schol, who at the time was the head of the Baltimore/Washington United Methodist Conference. Stop Predatory Gambling led a remarkably diverse coalition, which included the Center for Popular Democracy, the Islamic Society of North America, Public Good Law Center, Public Health Advocacy Institute, United for a Fair Economy, Louisiana Baptist Convention, and the Lutheran Church – Missouri Synod, in an amicus brief filed in the landmark case of Murphy v. NCAA, and their amicus brief was cited favorably by the Supreme Court majority opinion. 584 U.S. 453, 460 n.16 (2018).

*Amicus* has a direct interest in opposing the override of many state constitutions, laws and regulations that prohibit or limit commercialized gambling, as sought by Defendant-Appellant KalshiEX LLC (“Kalshi”) in this lawsuit.

## DECLARATION

Neither party, nor any party's counsel, aided in preparing this brief, either in whole or in part. Neither party nor any party's counsel, or any other person or entity, other than the *amici curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of the brief. SPG's counsel has not represented any party to the present appeal in another proceeding involving similar issues, and SPG was not a party nor did its counsel represent a party in any proceeding or legal transaction that is at issue in the present appeal.

## SUMMARY OF ARGUMENT

The preliminary injunction that entered below correctly upholds the essential role of Massachusetts to regulate gambling activities within its borders. Massachusetts and every state have this traditional police power, which is necessary to protect the public against harm from predatory gambling. The argument by KalshiEX LLC ("Kalshi") for federal preemption of gambling activities would amount to the removal of necessary guardrails protecting residents of this Commonwealth against exploitation by commercialized, internet-based gambling. The harms that would follow are irreversible. Unlawful gambling causes real, often severe, harm to the health and economic well-being of its many victims, it fuels addiction, it corrupts college programs and their student athletes, and it presents a public health crisis that demands regulation. [pp. 12-28]

Prop bets are not “swaps” under the jurisdiction of the Commodity Futures Trading Commission (“CFTC”), and sports gambling products for consumer entertainment (and addiction) have traditionally been activities regulated or prohibited by states. Our two largest states, California and Texas, completely ban sports gambling, as do nearly a dozen states on both sides of the political spectrum. Massachusetts prohibits some types of sports gambling, while allowing others. Kalshi should not be allowed to circumvent Massachusetts’ authority to regulate sports gambling by furthering an argument that finds no support in the history of the CFTC’s delegation of authority and its enabling legislation. [pp. 29-34]

This Court should follow the wisdom of two renowned jurists from Massachusetts, Oliver Wendell Holmes, Jr., and Louis Brandeis, whose jurisprudence relating to regulatory federalism favors deference to the state’s fundamental police powers over the harms caused by federal preemption. [pp. 34-36]

## **ARGUMENT**

### **I. Because Gaming is Harmful to the Public, the Commonwealth has an Interest in Exercising its Fundamental Police Powers to Regulate it**

The decision below correctly upholds the essential role of Massachusetts, “in service of the public health,” to regulate gambling activities within its borders.

Commonwealth vs. KalshiEX, LLC, No. 2584CV02525, 2026 Mass. Super.

LEXIS 2, at \*19 (Jan. 20, 2026). The decision below observed that “states have

historically regulated local gambling through their police powers,” and properly left this role intact against Kalshi’s attempt to bypass it entirely. *Id.* at \*11 n.2. The harms resulting from improvident federal preemption of traditional police powers possessed by the Commonwealth will be explored in the sections that follow.

**A. The Personal Harm Caused by Commercialized Gambling Weighs Strongly in Favor of the Preliminary Injunction**

“Once confined mostly to casinos concentrated in Las Vegas and Atlantic City, access to gambling has expanded dramatically, including among children.” E. Sohn, “How Gambling Affects the Brain and Who is Most Vulnerable to Addiction,” American Psychological Association (July 1, 2023) (hereinafter, “*APA*”).<sup>1</sup> This causes increasing immense personal harm to individuals, for whom there is a strong public interest for Massachusetts to protect.

In the first comprehensive effort to evaluate the impact of gambling on individual health in Great Britain, university researchers reported in February 2026 that the harm from gambling to well-being and health utility (quality of life) is “comparable to those experiencing the highest levels of harm driven by cocaine and alcohol use, as well as those with health conditions including depression and opiate dependence.” Alan Williams, “Gambling Impacts People’s Quality of Life as Severely as Chronic Medical Conditions, Alcohol and Illegal Drugs,” *Medical*

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<sup>1</sup> <https://www.apa.org/monitor/2023/07/how-gambling-affects-the-brain> (viewed April 8, 2026).

*Xpress* (Feb. 7, 2026).<sup>2</sup> In other words, gambling is just as harmful as drug abuse, and of course no one would insist that a federal agency like the CFTC retains exclusive jurisdiction over combatting the trafficking in illegal drugs such that states would not even be allowed to try to limit the detrimental impact on public health. “The research found that experiencing gambling harm can result in a 16% reduction in a person’s ability to carry out everyday tasks.” *Id.* They discovered that “tools currently used to identify ‘problem gambling’ *underestimate the full extent of harm* it causes to individuals and those close to them.” *Id.* (emphasis added).

This is “a public health crisis in the making,” as wagering by Americans on sports has exploded from less than \$5 billion annually in 2018 to \$150 billion in 2024. Isaac Rose-Berman, “The Rise of Sports Betting is a Growing Public Health Crisis,” *STAT* (Nov. 11, 2025).<sup>3</sup> Sports betting has skyrocketed further with the advent of wagering through event contracts as offered primarily by Kalshi on prediction markets, in bypass of state regulations. The strong interest in sports and the ease of gambling over the ubiquitous cell phone is a potent combination:

Today 90% of bets are placed on phones, not at casinos or racetracks. More than half are live bets, placed while games are in progress. Open any betting app and you’ll find hundreds of

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<sup>2</sup> <https://medicalxpress.com/news/2026-02-gambling-impacts-people-quality-life.html> (viewed Mar. 6, 2026).

<sup>3</sup> <https://www.statnews.com/2025/11/11/sports-betting-apps-public-health-crisis/> (viewed Mar. 6, 2026).

options per game: not just who wins but whether the next pitch will be a ball or a strike, whether Shohei Ohtani will get a home run *and* five strikeouts, whether LeBron James will score 30 points. You don't need to drive anywhere, get cash from an ATM, or even get out of bed. It has never been easier to gamble.

Id.

This devastating impact is being felt by the American public, which is turning against allowing sports gambling and states must remain able to react quickly through its regulatory authority to this sentiment and need. The esteemed Pew Research Center reports that as of last fall:

43% of U.S. adults say the fact that sports betting is now legal in much of the country is a bad thing for society. That's up from 34% in 2022. And 40% of adults now say it's a bad thing for sports, up from 33%.

John Gramlich, "Americans Increasingly See Legal Sports Betting as a Bad Thing for Society and Sports," *Pew Research Center* (Oct. 2, 2025).<sup>4</sup>

The American Psychiatric Association reported last year that:

over a quarter of American adults (28%) have a daily habit of gambling online. . . . Nine percent of adults reported online gambling for upwards of four hours daily, with 2% of individuals indicating they regularly gamble for over 10 hours a day. Like online shopping, scrolling social media, or playing app-based games, online gambling can become a problematic behavior.

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<sup>4</sup> <https://www.pewresearch.org/short-reads/2025/10/02/americans-increasingly-see-legal-sports-betting-as-a-bad-thing-for-society-and-sports/> (viewed Mar. 6, 2026).

American Psychiatric Association, “More Than a Quarter of Americans Gamble Online Daily, But Frequent Gamblers Likely to Self-Impose Breaks” (Mar. 17, 2025).<sup>5</sup>

“Gambling is an addictive behavior, make no mistake about it. . . . Gambling has all the properties of a psychoactive substance, and . . . changes the neurochemistry of the brain.” John W. Kindt, “The Failure to Regulate the Gambling Industry Effectively: Incentives for Perpetual Non-Compliance,” 27 S. Ill. U. L. J. 221, 223 (2003) (quoting Associate Professor Howard Shaffer of the Division on Addictions at Harvard Medical School).<sup>6</sup> The rate of suicide among gamblers is estimated to be 15 times the rate in the general population.<sup>7</sup> Psychiatric harm from gambling includes exacerbation and initiation of major depressive episodes, anxiety disorders, or substance use disorders, and intense shame, deceptive conduct, and rash decision-making.<sup>8</sup> Pathological gambling has also been linked to Parkinson’s disease, frontotemporal dementia, and amyotrophic

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<sup>5</sup> <https://www.psychiatry.org/news-room/news-releases/more-than-a-quarter-of-americans-gamble-online-dai> (viewed Mar. 6, 2026).

<sup>6</sup> Quoting Ford Turner, “Neurochemicals Blamed for Compulsive Gambling,” 8 *Compulsive Gambling* 1 (Winter 1995-96) (citing an article in the *Beacon-News* (Springfield, Mass.) May 10, 1995).

<sup>7</sup> World Health Organization, “Gambling” (Dec. 2, 2024) <https://www.who.int/news-room/fact-sheets/detail/gambling> (viewed Mar. 7, 2026).

<sup>8</sup> *Id.*

lateral sclerosis.<sup>9</sup> More familiar harm includes “hypertension, sleep deprivation, cardiovascular disease, and peptic ulcer disease.”<sup>10</sup>

The *Diagnostic and Statistical Manual of Mental Disorders Fifth Edition* (“DSM-5”), the standard used by U.S. mental health professionals, began classifying gambling as an addictive disorder in 2013, and it is the first and only behavioral addiction defined in the clinical section of *DSM-5*.<sup>11</sup> Similarly, the World Health Organization posts prominently on its website that:

- Gambling can threaten health, leading to increased incidence of mental illness and suicide. It can drive poverty by diverting household spending from essential goods and services.
- Gambling harms also include relationship breakdown, family violence, financial distress, stigma, income-generating crimes (theft, fraud), neglect of children, and erosion of civil institutions via corruption and corporate political activity. Gambling is also a common way to launder money obtained through illegal activities.

World Health Organization, *Gambling* (December 2, 2024).<sup>12</sup>

Given these harms, Massachusetts wisely prohibits online sports gambling by those under 21 years old, while Kalshi welcomes such wagers. *Compare* G. L.

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<sup>9</sup> E.T. Ozel-Kizil, “A Case of Frontotemporal Dementia with Amyotrophic Lateral Sclerosis Presenting with Pathological Gambling,” 9 *J Clin Neurol* 133-137 (2013) <https://pmc.ncbi.nlm.nih.gov/articles/PMC3633192/> (viewed Mar. 7, 2026).

<sup>10</sup> T.W. Fong, “The Biopsychosocial Consequences of Pathological Gambling,” 2 *Psychiatry* (Edgmont) 22-30 (2005).

<sup>11</sup> See *APA*, cited *supra*.

<sup>12</sup> <https://www.who.int/news-room/fact-sheets/detail/gambling> (viewed April 7, 2026).

c. 23N, § 13 (“An operator shall not accept: (i) a wager from a person who is less than 21 years of age . . .”) *with* Brian Pempus, “Ohio Fines Kalshi Record \$5M For Allegedly Preying On Teens,” *GamblingHarm.org* (Apr. 14, 2026).<sup>13</sup> Alcohol and cigarette purchases are banned in every state by those under 21, and state bans of gambling by teenagers and 20-year-olds is medically justified. “In fact, there are characteristic developmental changes that almost all adolescents experience during their transition from childhood to adulthood. It is well established that the brain undergoes a ‘rewiring’ process that is not complete until approximately 25 years of age.” Mariam Arain, “Maturation of the Adolescent Brain,” 9 *Neuropsychiatr Dis Treat.* 449, 449 (Apr. 3, 2013).<sup>14</sup> The immaturity of teenagers for smoking and drinking likewise applies to gambling, as the prefrontal cortex is responsible for decision-making, planning, problem-solving, and controlling impulses and is not fully developed until age 25. “The adolescent brain is structurally and functionally vulnerable to environmental stress, risky behavior . . . .” *Id.* at 458-49. Even the American Gaming Association encourages a minimum age limit of 21 years old for

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<sup>13</sup> <https://gamblingharm.org/ohio-fines-kalshi-record-5m-for-allegedly-preying-on-teens/> (viewed Apr. 15, 2026).

<sup>14</sup> <https://pmc.ncbi.nlm.nih.gov/articles/PMC3621648/pdf/ndt-9-449.pdf> (viewed Mar. 7, 2026).

gambling,<sup>15</sup> even though more profits for its corporate members could be obtained by accepting wagers from impulsive younger patrons.

Commercialized gambling has long been regulated by states and local governments, including Massachusetts, which have the necessary police power to enforce beneficial guardrails. For example, exploiting teenage impulses by addicting them to wagering is one of many aspects of commercialized gambling which is properly prohibited and policed at the state level. As Massachusetts explains on one of its official websites:

- By the time they get to high school, 60-80% of students reported that they gambled at least once in the past 12 months
- Teens who gamble are more likely to use illegal drugs
- Among all addictions, gambling is linked to the highest suicide rate

Mass.gov, “Teens gambling. It’s a risk.”<sup>16</sup>

The public interest in protecting against this harm from gambling is a decisive legal factor in affirming the preliminary injunction allowed below. See, e.g., Commonwealth v. Mass. CRINC, 392 Mass. 79, 89-90 (1984) (the

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<sup>15</sup> American Gaming Association, “New Updates to AGA Responsible Marketing Code for Sports Wagering Prohibit “Risk Free,” Enhance College-Aged Protections” (Mar. 28, 2023) <https://www.americangaming.org/new-updates-to-aga-responsible-marketing-code-for-sports-wagering-prohibit-risk-free-enhance-college-aged-protections/> (viewed Mar. 7, 2026).

<sup>16</sup> <https://www.mass.gov/info-details/teens-gambling-its-a-risk> (viewed April 8, 2026).

Commonwealth is not required to demonstrate irreparable harm when the movant's activities may adversely affect the public interest); Brookline v. Goldstein, 388 Mass. 443, 447 (1983). The preliminary injunction allows Massachusetts to properly protect its teenagers and adults against Kalshi's predatory product and should therefore be affirmed.

**B. The Worsening Pandemic of Sports Gambling Reinforces the Need to Affirm the Preliminary Injunction**

This Court can and should take judicial notice that the national pandemic of sports gambling is rapidly worsening, even during the relatively short pendency of this lawsuit and appeal. Injunctions that affect the public can be affirmed on the basis that overturning this preliminary injunction would be akin to pouring fuel on a fire, in this case the conflagration harming many with sports gambling.

Sports gambling expert Brian Pempus recently reported that:

Problem gambling involving online sports betting appears to have reached unprecedented levels, according to a leading annual survey released today. The American Sport Fanship Survey, now in its third year, shows a dramatic worsening in user-reported behavior compared to 2025. . . . It appears more Americans are experiencing sports betting harm than ever before. More than a quarter (27%) of Americans have an active online sports betting account, the survey found.

Brian Pempus, “Record Levels Of Problem Sports Gambling, U.S. Survey Shows,” *GamblingHarm.org* (Apr. 13, 2026).<sup>17</sup> A total of 26% of respondents to this Siena University poll admit that their gambling losses even cause them financial issues. Id.

Kalshi argues that Massachusetts’ tax revenues from sports gambling are increasing, and thus it has nothing legitimate to complain about. (Kalshi Br. 37, 64) But Massachusetts’ interest in this is not limited to only its tax revenues. Massachusetts’ interest extends to protecting the health and well-being of its residents, many of who are increasingly drowning in debt due to predatory sports gambling. On this basis, the regulatory authority of Massachusetts over Kalshi’s products should be fully affirmed.

### **C. Massachusetts has Authority to Protect its College Sports Programs Against Corruption by Unlawful Gambling**

Massachusetts protects the integrity of its many college sports programs by banning prop bets on college athletes. As Jordan Maynard, Chair of the Massachusetts Gaming Commission, recently explained in the *Boston Globe*:

Prop wagers on individual collegiate athletes are illegal in Massachusetts.

When the Commonwealth implemented legal sports wagering, the Legislature authorized betting on Division 1 college sports (with certain restrictions), but the law and regulations adopted by

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<sup>17</sup> <https://gamblingharm.org/record-levels-of-problem-sports-gambling-us-survey-shows/> (viewed Apr. 15, 2026).

the Massachusetts Gaming Commission explicitly prohibit bets on the performance of individual college athletes. This prohibition helps protect consumers and, as importantly, student-athletes.

Jordan Maynard, “Bettors Beware: In-Game Wagers on Collegiate Athletes are Illegal in Mass.,” *Boston Globe* A8 (Mar. 17, 2026). Experts consider prop bets to be the most addictive form of sports gambling, and have an overwhelming tendency to cause corruption of college players. The NCAA seeks to prohibit them entirely. “Former Massachusetts governor Charlie Baker, now president of the NCAA, has called for a ban on prop bets in college sports. In Massachusetts . . . prop bets on college athletes are already prohibited . . . .” Joey Flechas, “Rise in Prop Bets Sets Off Alarms on Gambling Addiction: Scandals Could Compromise Leagues’ Integrity,” *Boston Globe* A1 (Nov. 13, 2025). Massachusetts has a strong public interest in protecting the integrity of its college sports programs, of which there are many in the Commonwealth, against corruption by Kalshi’s unlimited promotion of prop bets on college athletes. Cf. RAI373 ¶ 40 (quoting a legislator’s comment on a bill: “[w]e do protect the college athletes by prohibiting prop bets, betting on individual athletic performance”); RAI376 ¶ 56 (proof of prop bets offered by Kalshi). A “prop bet” (or “microbet”) is a wager on a particularized performance by a player in a game, such as how many free throws he misses, which are easily manipulable without necessarily changing the outcome of the

match. RAI366 ¶ 19. A “parlay” (or “combo”) strings prop bets together for a larger payout if all of the “legs” of the sequence happen as hoped.

Prop bets and parlays have become the “backbone” of sports gambling:

The prop bet is not just a piece of the economy of legal sports betting. It has become ***the backbone of the most popular, and profitable, wagers*** – the single most efficient means of turning a sports fan into a profit engine for betting companies . . . .

In Illinois, [during September 2025], more than 55% of online sports betting revenue came from parlays.

Robert O’Connell and Jared Diamond, “For Sportsbooks, Prop Bets Remain Serious Moneymakers,” *The Wall Street Journal* A14 (Nov. 17, 2025) (emphasis added) [hereinafter, “*Prop Bets, WSJ*”]. As wagers on individual performances within a game, prop bets on college athletes are scandals waiting to happen, and which have repeatedly occurred. Yet Kalshi omits any mention of this “backbone” of sports gambling in its entire brief here, despite how it has become a significant portion of its revenue. See, e.g., Daniel O’Boyle, “Kalshi Parlays Break Records, Make More Money Than Non-Sports Markets, After Robinhood Launch,” *InGame* (Jan, 30, 2026) (“Robinhood’s launch of Kalshi parlays has helped turn them into a serious part of Kalshi’s business, with combo bets making more money in fees for the exchange last Sunday than non-sports events have ever made in a single day”).

University of Tennessee men’s basketball head coach Rick Barnes sparked debate with his following comment this past season about errant passes during a turnover-plagued victory by his team:

Some of the passes that we throw, I don’t know what to say other than sometimes I wonder if my guys are betting on games. I shouldn’t say that. Erase that. I’m just wondering what’s happening because I know we’re too good of players to do that . . . I apologize, I shouldn’t have said that.

Brian Pempus, “Tennessee Basketball Coach Says Players Could Be Betting On Games,” *GamblingHarm.org* (Feb. 1, 2026).<sup>18</sup> With his speedy retraction, it is possible that he was not entirely serious with his comment, but there is growing recognition that the problem of sports gambling is severely undermining the integrity of college basketball, as observed by expert Brian Pempus:

- Barnes’ comments come amid declining public opinion of legal sports betting.
- The NCAA has been lobbying for state bans on college player props.
- Prediction markets [including Kalshi], which could be home to rampant insider trading, have launched props.
- Nearly half of NCAA basketball players have received abuse from bettors.

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<sup>18</sup> <https://gamblingharm.org/tennessee-basketball-coach-players-betting-on-games/> (viewed April 9, 2026). Brian Pempus, a former managing editor of sports betting at *Forbes* with over fifteen years of experience working in the gambling industry, founded gamblingharm.org “to raise awareness of gambling related harm and consumer protection.” His website is a superb independent resource for “news, analysis, help, and resources for problem gambling and consumer protection.”

- A recent study found that 21% of bettors admit to verbal abuse.

Id.

Former two-term Massachusetts Governor Charlie Baker, now the president of the NCAA, called out for help from state regulators and others to curb this corruption of college basketball by sports gambling:

The Association has and will continue to aggressively pursue sports betting violations in college athletics using a layered integrity monitoring program that covers over 22,000 contests, but we still need the remaining states, regulators and gaming companies to eliminate threats to integrity - such as collegiate prop bets - to better protect athletes and leagues from integrity risks and predatory bettors.

NCAA, “NCAA President Baker Issues Statement Regarding Sports Betting Indictments in College Athletics, Calls on Remaining States to Ban Risky Bets,” *Media Center* (Jan. 15, 2026).<sup>19</sup>

The sweeping federal indictment in January in Philadelphia based on sports gambling on college basketball implicated many colleges nationwide, and yet not a single school in college-rich Massachusetts was accused of being involved in this wrongdoing. See Tom Winter, *et al.*, “26 People Charged in Connection with Alleged Basketball Game Fixing,” *NBC News* (Jan. 15, 2026) (listing the many

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<sup>19</sup> <https://www.ncaa.org/news/2026/1/15/media-center-ncaa-president-baker-issues-statement-regarding-sports-betting-indictments-in-college-athletics-calls-on-remaining-states-to-ban-risky-bets.aspx> (viewed April 9, 2026).

colleges).<sup>20</sup> Massachusetts’ regulatory protections of its college sports programs against corruption by sports gambling has evidently been more successful than other states. Kalshi’s argument that Massachusetts should not be allowed to ban Kalshi’s sports gambling, which entails prop bets and wagering by Massachusetts residents on Massachusetts college teams, is unsupported and unjustified.

In a letter by the NCAA to Kalshi last year, the NCAA stated:

Many State legislators and gaming authorities have agreed with the NCAA’s stance that prop betting markets heighten the risk of integrity and harassment concerns. Is Kalshi committed to forbidding similar predictive markets on their platforms (i.e. markets based on part of a competition or individual competitor as opposed to the entire team/competition)?

Letter from Scott Bearby, NCAA Senior Vice President and Chief Legal Officer to Rick Heaslip, Kalshi General Counsel and Chief Regulatory Officer (October 30, 2025).<sup>21</sup> Kalshi’s unsatisfactory response indicated that it would not limit sports gambling any more than “required by our status as a federally licensed financial exchange,” which is nothing at all. Shwetha Surendran, “NCAA Sends Concerns Over ‘Integrity’ to Prediction Market Kalshi,” *ESPN* (Nov 3, 2025).<sup>22</sup> The CFTC

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<sup>20</sup> <https://www.nbcnews.com/sports/sports-gambling/20-charged-basketball-game-fixing-scandal-rcna254197> (viewed April 9, 2026).

<sup>21</sup> [https://resources.sbcamericas.com/sbcamericas/2025/11/Kalshi-Letter\\_103025.pdf](https://resources.sbcamericas.com/sbcamericas/2025/11/Kalshi-Letter_103025.pdf) (viewed April 9, 2026).

<sup>22</sup> [https://www.espn.com/college-sports/story/\\_/id/46838301/ncaa-sends-concerns-integrity-prediction-market-kalshi](https://www.espn.com/college-sports/story/_/id/46838301/ncaa-sends-concerns-integrity-prediction-market-kalshi) (viewed Apr. 15, 2026).

does not ban the particularly harmful aspects of sports gambling on college sports, and there is no basis for expecting that it will. The CFTC does not protect against corruption of Massachusetts college sports programs, but the Commonwealth can, and has a strong interest in doing so.

Recently Senior Judge Jane Roth of the U.S. Court of Appeals for the Third Circuit explained why state regulation is necessary:

When I went on the Kalshi page for the Carolina Panthers vs. Tampa Bay Buccaneers football game scheduled for January 3, 2026, I could have bet on . . . whether former Tampa Bay wide receiver Mike Evans would score a touchdown (player props). These offerings are virtually indistinguishable from the betting products available on online sportsbooks, such as DraftKings and FanDuel. While online sportsbooks are regulated by states such as New Jersey, Kalshi asserts that it is outside the bounds of state regulation because it does not offer gambling products.

Instead, Kalshi contends its offered sports-event contracts are swaps, subject to the exclusive jurisdiction of the CFTC. . . . I see Kalshi's actions as a performative sleight meant to obscure the reality that Kalshi's products are sports gambling. Because Kalshi is facilitating gambling, it can be subjected to state regulation.

KalshiEX, LLC v. Flaherty, No. 25-1922, 2026 U.S. App. LEXIS 9948, at \*20 (3d Cir. Apr. 6, 2026) (Roth, J., dissenting, footnotes omitted).

Barely six months ago, as of September 2025, Kalshi was merely a small player in the gambling world, “generating the equivalent of 4% to 6% of regulated markets handle.” Katherine Hamilton, “Kalshi's Competitiveness Still Limited

Despite Parlay Debut – Analysis,” *Dow Jones Newswires* (Sept. 30, 2025). But when Kalshi introduced on Sept. 30, 2025, its new parlay product, which Kalshi promoted as “build your combo [parlay]” for NFL games, the stock value of the two leading sportsbooks companies immediately dropped by 11% each. *Id.* These sportsbooks companies, DraftKings and FanDuel parent Flutter Entertainment, are subject to regulation by Massachusetts and other states, while Kalshi bypasses these state regulations without justification.

Less than four months later, “[p]rediction market volume on Kalshi hit an all-time high on Sunday as NFL’s Super Bowl drove a surge in betting interest. . . . ***Nearly 20% of Kalshi’s volume yesterday was on parlays.***”<sup>23</sup> Unregulated parlays are a gold mine for Kalshi as it circumvents state regulation, but these parlays, which are based on prop bets, undermine the integrity of college sports. Massachusetts has a strong public interest in preventing Kalshi’s products from corrupting Massachusetts’ college sports programs, and the preliminary injunction should be affirmed on this additional ground.

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<sup>23</sup> “Kalshi Prediction Market Volume Hits Record Amid Surge in Super Bowl Bets, BofA Says,” *MT Newswires* (Feb. 9, 2026) (emphasis added).

## II. Kalshi's Prop Bets Are Not "Swaps"

"When it waddles like a duck, quacks like a duck, swims like a duck, and looks like a duck, it is quite likely to be a duck." United States v. Flores, 888 F.3d 537, 545 (1st Cir. 2018). Such is the case for Kalshi's event contracts on sports: they waddle, quack, swim, and look like sports gambling, and not like "swaps" as defined by the amended Commodity Exchange Act, 7 U.S.C. § 1a(47)(A).

The lower court held against Kalshi even "assum[ing] without deciding that Kalshi's event contracts are swaps." Commonwealth vs. KalshiEX, LLC 2026 Mass. Super. LEXIS 2, at \*13. The lower court held that, even when viewed as swaps, Kalshi's product must still comply with Massachusetts law because:

Nothing in the 2010 legislative history of the CEA suggests that *any* member of Congress envisioned or intended that predictive market "swaps" would include the sports event contracts offered by Kalshi, or intended CFTC authority over swaps to displace state police power to regulate gaming.

Id. at \*17-18 (emphasis omitted).

This Court can go further than the Superior Court. This Court can affirm on the additional ground that Kalshi's event contracts on sports are not, in fact, swaps at all. Swaps are financial instruments used by sophisticated experts at banks and similar companies to hedge against legitimate underlying economic risks, such as exposure to interest rate or currency fluctuations. See generally Commodity

Futures Trading Commission, *2015 Agency Financial Report* (Jan. 2016). Swaps are not for entertainment purposes and are not addictive endeavors to obtain a surge in dopamine for personal pleasure.

Another federal district court explained this issue thoughtfully as follows:

Futures, swaps and other derivatives markets are essential means for commercial and financial risk mitigation and transfer. These markets allow the risks of variable production costs, such as the price of raw materials, energy, foreign currency and interest rates, to be transferred from those who cannot afford them to those who can.

Commodity Futures Trading Comm'n v. McDonnell, 287 F. Supp. 3d 213, 250 (E.D.N.Y. 2018). This goal of swaps is wholly unlike the consumer entertainment and addictive qualities of Kalshi's sports event contracts. Indeed, the extension of the jurisdiction of the CFTC over swaps in the Dodd-Frank Act of 2010 was in response to the financial crisis and Great Recession of 2008, to provide financial stability rather than to promote sports gambling.

Kalshi argues that the CFTC is currently asserting exclusive jurisdiction over Kalshi's sports event contracts, but a federal agency does not properly expand its own authority without judicial review. See Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024) ("Chevron is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires.") (citing Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984)). Moreover, it is noteworthy that in the CFTC's initial rule

defining the scope of swaps after the enactment of the Dodd-Frank Act in 2010, the CFTC excluded consumer transactions and made no mention of products offered for the entertainment of consumers or households. See 77 FR 48207, 48318 (Aug. 13, 2012) (“The Commissions are stating that certain customary consumer and commercial transactions that have not previously been considered swaps or security-based swaps do not fall within the statutory definitions of those terms.”). It is implausible that a sports event contract offered for entertainment value to the public, or to exploit an addiction, is within the scope of a financial swap over which the CFTC has exclusive jurisdiction.

A federal district judge in Nevada recently and persuasively rejected Kalshi’s arguments that its sporting event contracts constitute swaps:

[Kalshi’s] sports-related contracts are . . . based on the outcome of sports events or are based on things that take place during an event (such as a coin flip) but that are not events or contingencies themselves within the CEA’s meaning. Additionally, although a sports game might be inherently associated with a potential financial consequence (people pay to attend), discrete moments or acts during a sports game like a coin flip or whether there is a fumble are not inherently associated with potential financial, economic, or commercial consequences within the CEA’s meaning.

KalshiEX, LLC v. Hendrick, No. 2:25-cv-00575-APG-BNW, 2025 U.S. Dist. LEXIS 234246, at \*30-31 (D. Nev. Nov. 24, 2025).

Citing U.S. Supreme Court precedent, Hendrick observed that “Congress defined ‘swap’ broadly, but a ‘statute’s meaning does not always turn solely on the

broadest imaginable definitions of its component words.” Id. at \*31 (quoting Epic Systems Corp. v. Lewis, 584 U.S. 497, 523 (2018) (cleaned up); see also Marinello v. United States, 584 U.S. 1, 7-9 (2018) (statutory words must be construed in context while avoiding implausible interpretations). The Court insightfully reasoned that:

[I]f everything a person can conceive of happening is an event or contingency, and if every downstream economic consequence someone can conjure up makes that event or contingency associated with a potential financial, commercial, or economic consequence, the words lose all meaning or render superfluous the rest of the swap definition.

KalshiEX, LLC v. Hendrick, 2025 U.S. Dist. LEXIS 234246, at \*31. At the same time, Hendrick rejected Kalshi’s argument that its sports gambling products constituted swaps because it:

does not comport with what Congress was trying to achieve when it added swaps to the CEA. Congress was bringing risky financial products out of the shadows that had threatened the stability of the entire U.S. financial sector, and which had catastrophic ripple effects on the U.S. and world economies during the financial crisis of 2007-2008. Congress was not enabling nationwide gambling on CFTC-designated exchanges.

Id., at \*32. The Hendrick Court concluded that “[i]t is absurd to think that Congress intended for DCMs to turn into nationwide gambling venues on every topic under the sun to the exclusion of state regulation and with no comparable federal regulator without ever mentioning that was the goal when Congress added swaps to the CEA . . . .” Id.

Courts should “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Congress did not expressly grant exclusive authority to the CFTC over Kalshi’s products, and thus Kalshi’s argument to bypass state authority on this matter of such tremendous economic significance must fail. See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160-61 (2000) (O’Connor, J., writing for the majority) (“As in MCI, we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”) (citing MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218 (1994)). Congress has never transferred vast regulatory authority over gambling from Massachusetts and other states to the CFTC, not even in a cryptic manner found to be insufficient in Brown & Williamson Tobacco.

State authority over gambling is older than the U.S. Constitution itself. Lotteries frequently were used in colonial-era America to finance public works projects such as paving streets, constructing wharves, and building churches. In the 18th century, lotteries were used to finance construction of buildings at Harvard and Yale, under state regulatory authority. National Gambling Impact Study Commission, “Gambling in the United States,” 2-1.<sup>24</sup>

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<sup>24</sup> <https://govinfo.library.unt.edu/ngisc/reports/2.pdf> (viewed Apr. 15, 2026).

It is pure fiction for anyone to pretend that prop bets, parlays, and wagers on the outcome of a game constitute “swaps” similar to contracts that have traditionally been within its exclusive jurisdiction. Swaps have a beneficial economic value as hedges of economic risk, while gambling does not. The availability of swaps facilitates increased investment in a commodity or activity, while the availability of sports event contracts facilitates nothing but harm.

The MLB, the NBA, and NFL have all acted to sharply limit or prohibit prop bets:

Leagues have taken measures to limit prop bets. In the wake of the spot-fixing scandal, MLB said it had worked with sportsbooks to cap the amount of money someone could wager on an individual pitch and to exclude those bets from parlays. The NBA had worked with sportsbooks to remove easily manipulable offerings such as missed free throws or turnovers even before federal indictments alleged that Rozier and other league figures had fed information to gamblers. This week, the NFL circulated a memo to teams explaining prohibited wager categories, such as a play that could be determined by one person alone (a quarterback throwing an incompleting on his first pass, for example).

*Prop Bets, WSJ, supra.* The record here is adequate to allow this Court to easily reject the notion that prop bets constitute swaps. RAI366 ¶ 19; RAI373 ¶ 40.

### **III. Justices Oliver Wendell Holmes, Jr., and Louis Brandeis Would Affirm the Injunction Given the Issues of Regulatory Federalism at Stake Here**

Much ink has been spilled over whether the CEA preempts a state’s right to use its police powers to regulate unlawful gaming within its borders. *Amicus*

adopts the thorough and well-reasoned arguments furthered in the Commonwealth's brief of the appellee, only to add this final thought. Justice Oliver Wendell Holmes, Jr., the former Chief Justice of this Court before serving on the U.S. Supreme Court, and Justice Brandeis would affirm the preliminary injunction.<sup>25</sup> Justice Holmes famously wrote in favor of allowing state regulation by dissenting in Lochner v. New York, 198 U.S. 45 (1905) (Holmes, J., dissenting). Justice Holmes explained that:

It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. *A more modern one is the prohibition of lotteries.*

Lochner, 198 U.S. at 75 (Holmes, J., dissenting, emphasis added). It is clear from Justice Holmes' dissent in Lochner, which was ultimately vindicated, that he fully deferred to the authority of states to regulate, and even prohibit, gambling in the form of lotteries. Justice Holmes' oft-quoted aphorism that "a page of history is worth a volume of logic" applies with particular force to this issue of gambling,

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<sup>25</sup> Justice Brandeis, also professionally from Massachusetts, later quipped about Justice Holmes, "Of course you must also remember that when Holmes writes, he doesn't give a fellow a chance – he shoots so quickly." David S. Bogen, "The Free Speech Metamorphosis of Mr. Justice Holmes," 11 Hofstra L. Rev. 97, 170 n.407 (1982) (quoting *Conversation between Felix Frankfurter and Louis Brandeis in the Frankfurter Papers* at 23 (Aug. 8, 1921) (available in the manuscript room of the Harvard Law School Library and at the *Hofstra Law Review*)).

where all of history is on the side of Massachusetts here. N.Y. Tr. Co. v. Eisner, 256 U.S. 345, 349 (1921). Kalshi’s imaginative arguments cannot withstand a page of history about this issue.

Justice Brandeis likewise preferred to side with state regulatory authority. In his famous dissent establishing the principle of “laboratories of democracy” in state regulation, Justice Brandeis wrote:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting, footnote omitted).

## CONCLUSION

Heeding the wisdom of Justices Holmes and Brandeis is the prudent course here, rather than unleash an unregulated scourge of predatory gambling, and the

evils that come with it, upon this Commonwealth. The preliminary injunction ordered in the decision below should be fully affirmed.

Respectfully Submitted,

*/s/ Joshua N. Garick*

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Joshua N. Garick (BBO#674603)  
LAW OFFICES OF JOSHUA N. GARICK, P.C.  
34 Salem Street, Suite 202  
Reading, Massachusetts 01867  
Phone: (617) 600-7520  
Joshua@GarickLaw.com

*Attorney for Amicus Curiae  
Stop Predatory Gambling*

Dated: April 23, 2026

### **CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: M.R.A.P. 16(a)(6) (pertinent findings or memorandum of decision); M.R.A.P. 16(e) (references to the record); M.R.A.P. 16(f) (reproduction of statutes, rules, regulations); M.R.A.P. 16(h) (length of brief); M.R.A.P. 20 (form of briefs, appendices and other papers). This brief contains 6,229 words and was written using Microsoft Word 365, Version 2604, using Times New Roman 14-point font.

*/s/ Joshua N. Garick*  
\_\_\_\_\_  
Joshua N. Garick

Dated: April 23, 2026

## CERTIFICATE OF SERVICE

I, Joshua N. Garick, Esq., counsel for *Amicus Curiae* Stop Predatory Gambling, do hereby certify that on April 23, 2026, I caused the foregoing to be served upon counsel for the parties via e-mail.

### *Counsel for KalshiEX LLC:*

Thaddeus A. Heuer (theuer@foleyhoag.com)  
Kristyn DeFilipp (kbuncedefilipp@foleyhoag.com)  
Beth Neitzel (bneitzel@foleyhoag.com)  
Caroline Holliday (cholliday@foleyhoag.com)  
Foley Hoag LLP  
155 Seaport Boulevard  
Boston, MA 02210

Grant R. Mainland (gmainland@milbank.com)  
Andrew L. Porter (aporter@milbank.com)  
Nicole D. Valente (nvalente@milbank.com)  
Davis Campbell (Dcampbell@milbank.com)  
Milbank, LLP  
55 Hudson Yards  
New York, NY 10001

Joshua B. Sterling (jsterling@milbank.com)  
William E. Havemann (whavemann@milbank.com)  
Samantha K. Ilagan (silagan@milbank.com)  
Milbank, LLP  
1101 New York Ave, NW  
Washington, DC 20005

### *Counsel for Commonwealth of Massachusetts:*

M. Patrick Moore (pat.moore@mass.gov)  
Jared Rinehimer (jared.rinehimer@mass.gov)  
Gerard J. Cedrone (gerard.cedrone@mass.gov)  
Louisa Castrucci (louisa.castrucci@mass.gov)  
Alda Chan (alda.chan@mass.gov)  
Frances Cohen (frances.cohen@mass.gov)  
Joshua R. Edlin (joshua.edlin@mass.gov)

Commonwealth of Massachusetts  
Office of the Attorney General  
One Ashburton Place  
Boston, MA 02108

Signed under the pains and penalties of perjury this 23rd day of April, 2026.

*/s/ Joshua N. Garick*  
Joshua N. Garick

Dated: April 23, 2026