No. 25-7516

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KALSHIEX, LLC,
Plaintiff-Appellant,

v.

KIRK D. HENDRICK, ET AL.,
Defendants-Appellees,

and

NEVADA RESORT ASSOCIATION,
Intervenor Defendants-Appellees.

Appeal from the United States District Court
for the District of Nevada
No. 2:25-cv-00575-APG

BRIEF OF THE INDIAN GAMING ASSOCIATION, NATIONAL CONGRESS OF AMERICAN INDIANS, UNITED SOUTH AND EASTERN TRIBES SOVEREIGNTY PROTECTION FUND, ARIZONA INDIAN GAMING ASSOCIATION, CALIFORNIA NATIONS INDIAN GAMING ASSOCIATION, MINNESOTA INDIAN GAMING ASSOCIATION, OKLAHOMA INDIAN GAMING ASSOCIATION, WASHINGTON INDIAN GAMING ASSOCIATION, NATIONAL TRIBAL GAMING COMMISSIONERS AND REGULATORS, NATIVE AMERICAN FINANCE OFFICERS ASSOCIATION, TRIBAL ALLIANCE OF SOVEREIGN INDIAN NATIONS, SAN MANUEL GAMING AND HOSPITALITY AUTHORITY, AND 24 FEDERALLY RECOGNIZED INDIAN TRIBES AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Regulations

Other Authorities

IDENTITY AND INTERESTS OF AMICI

The Indian Gaming Association ("IGA"), National Congress of American Indians ("NCAI"), United South and Eastern Tribes Sovereignty Protection Fund ("USET SPF"), Arizona Indian Gaming Association ("AIGA"), California Nations Indian Gaming Association ("CNIGA"), Minnesota Indian Gaming Association ("MIGA"), Oklahoma Indian Gaming Association ("OIGA"), Washington Indian Gaming Association ("WIGA"), National Tribal Gaming Commissioners and Regulators ("NTGCR"), Native American Finance Officers Association ("NAFOA"), Tribal Alliance of Sovereign Indian Nations ("TASIN"), San Manuel Gaming and Hospitality Authority ("SMGHA") (collectively, "Amici Tribal Organizations"), and 24 federally recognized Indian tribes ("Amici Tribes")[1]

[1] The Amici Tribes include: Agua Caliente Band of Cahuilla Indians; Cher-Ae Heights Indian Community of the Trinidad Rancheria; The Choctaw Nation of Oklahoma; Elk Valley Rancheria; Enterprise Rancheria of Maidu Indians of California; Karuk Tribe; Kickapoo Traditional Tribe of Texas; Lytton Rancheria; Mashantucket Pequot Tribal Nation; Mescalero Apache Tribe; Mohegan Tribe of Indians of Connecticut; Morongo Band of Mission Indians; Pechanga Band of Indians; Pueblo of Acoma; Pueblo of Sandia; Rincon Band of Luiseño Mission Indians; San Pasqual Band of Diegueno Mission Indians of California; Santa Ynez Band of Chumash Mission Indians; Seminole Tribe of Florida; Spokane Tribe of the Spokane Reservation; Sycuan Band of the Kumeyaay Nation; Table Mountain Rancheria; Tunica-Biloxi Indian Tribe; and Yuhaaviatam of San Manuel Nation.

(collectively, "Tribal Amici") respectfully submit this brief in support of Defendants-Appellees.[2]

As further described in the Tribal Amici's Motion for Leave, the Amici Tribal Organizations advocate on behalf of tribal government interests. The Amici Tribes are 24 federally recognized Indian tribes, each of which are separate and distinct tribal government with the sovereign authority to conduct and regulate gaming activities on its Indian lands. 25 U.S.C. § 2703(5). Together, all the Tribal Amici all have a shared, strong interest in this case because of its potential to significantly impact their or their member tribes' sovereign rights regarding gaming on Indian lands, as well as Indian gaming and tribal governmental revenue as a whole.

INTRODUCTION

KalshiEX, LLC ("Kalshi") comes before this Court and asks it to wholly abandon the national policy of state and tribal sports-betting regulation and to turn decades of federal law on its head. The Court should not be persuaded to do so,

[2] Counsel for the Defendants-Appellees and Intervenor Defendant-Appellee have consented to the filing of this brief. Counsel for the Plaintiff-Appellant has indicated that it is not opposed. No person (including a party or party's counsel) other than Tribal Amici and their counsel contributed money to fund the preparation and submission of this brief.

and should therefore affirm the lower court's decision dissolving the preliminary injunction.

America's history is replete with prospectors taking resources from Indian lands without permission from Tribes. But Congress put a stop to that practice long ago. Yet Kalshi would have this court believe that, without so much as a whisper of legislative intent, Congress gave it permission to enter Indian lands and siphon gaming revenues away from tribes over such tribes' objections. Congress did no such thing.

When Congress adopted the Indian Gaming Regulatory Act ("IGRA"), it sought to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). IGRA has been incredibly successful on that front.[3] Since IGRA's passage in 1988, tribes across the United States have lifted entire generations out of poverty through tribal gaming. Gaming revenue supports thousands of jobs in hundreds of communities, and provides critical funding to tribal, state, and local governments through revenue-sharing agreements, taxes, and economic stimulus. *See Michigan v. Bay Mills Indian*

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[3] *See, e.g.*, National Indian Gaming Commission, FY 2023 Gross Gaming Revenue Report 4–5 (Jul. 2024), available at https://www.nigc.gov/wp-content/uploads/2025/02/GGR23_Final.pdf.

Cmty., 572 U.S. 782, 810 (2014) (Sotomayor, J., concurring) ("[T]ribal gaming operations cannot be understood as mere profit-making ventures that are wholly separate from the Tribes' core governmental functions."). For tribes, gaming is not a "commercial" endeavor, but an existential one.

Tribes have primary jurisdiction over their lands and activities occurring thereon. Tribes, like states, also have a strong sovereign interest in determining what gaming activities may take place on their lands. Thus, tribal jurisdiction extends to gaming, which has long been recognized by the Supreme Court. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 218–22 (1987); 25 U.S.C. § 2701(5). In 1988, Congress enacted IGRA "to provide a statutory basis for the regulation of gaming by an Indian tribe … to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operators and players…." 25 U.S.C. § 2702(2).

Kalshi asks this court to subvert this longstanding and comprehensive regulatory regime. The consequences of Kalshi's arguments are difficult to overstate. Its reading of the Commodity Exchange Act ("CEA") would amount to a *sub silentio* reversal of congressional policy and Supreme court precedent; nullify existing tribal-state gaming compacts and regulatory frameworks; allow Kalshi to siphon gaming revenues from tribal and state governments; and diminish tribal self-determination.

Accordingly, this Court should affirm the lower court's decision to dissolve the preliminary injunction.

ARGUMENT

I. Congress Did Not Impliedly Repeal IGRA.

A. IGRA's Structure

In IGRA, Congress explicitly stated that no class III gaming can occur on "Indian lands" unless it is authorized by the tribal government and is in a state that permits such gaming. 25 U.S.C. § 2710(d). Class III gaming—including sports betting—is authorized on Indian lands only where tribes and states have entered into a compact or procedures prescribed by the Secretary of the Interior to regulate that gaming. 25 U.S.C. §§ 2710(d)(1), 2710(d)(7)(B)(vii); *see also* 25 C.F.R. § 502.4(c). The Secretary of the Interior must review and approve these agreements in order for them to take effect, and for lawful class III gaming to occur on tribal lands. 25 U.S.C. § 2710(d)(8). These core provisions have remained unchanged since 1988.

Under this regime, regulation of class III gaming on Indian lands is shared between three sovereign governments: tribes, states, and the federal government. Congress carefully crafted this comprehensive statutory regime to advance clearly articulated policy goals to: (1) "promot[e] tribal economic development, self-sufficiency, and strong tribal governments"; (2) "provide a statutory basis for regulation" that protects tribes' ability to be the primary beneficiary of gaming on their lands; and (3) create a federal regulatory agency to adopt federal standards and protect tribal gaming as a means of generating tribal revenue. 25 U.S.C. § 2702. Congress made it abundantly clear that tribes—not private entities—must benefit from any gaming conducted on their Indian lands. *See* 25 U.S.C. § 2710(b)(2)(A), (d)(2)(A). For many tribal governments, gaming is not merely a "commercial" endeavor; rather, it is essential to their self-determination. *See Chicken Ranch Rancheria of Me-Wuk Indians v. California*, 42 F.4th 1024, 1032 (9th Cir. 2022) ("Class III gaming is not only a source of substantial revenue for tribes, but *the lifeblood on which many tribes ha[ve] come to rely*." (internal quotation marks and citations omitted) (emphasis added)).

B. Congress Did Not Repeal IGRA or Prohibit Tribes from Conducting Sports Wagering When It Enacted the CEA's Definition of a "Swap" in 2010.

Kalshi does not assert that its conduct complies with IGRA. In fact, Kalshi has made no attempt to ensure that its sports-wagering activities on Indian lands across the country comply with IGRA. Instead, Kalshi argues that Congress's definition of a single term—"swaps"—within a statute whose entire purpose is to address the risk, discovery, and dissemination of commodity prices, 7 U.S.C.

§ 5(a)–(b), effectively repealed core provisions of IGRA. *See* Pl.-Appellant Br. at 27–28, ECF No. 20.1 ("Kalshi's sports and election contracts are traded on a [Designated Contract Market ('DCM')], which necessarily denies jurisdiction to other regulators." (internal quotation marks omitted)). Under this theory, Congress silently stripped away tribes' and states' longstanding authority over sports betting[4] (and potentially other kinds of class III gaming) while allowing for-profit companies like Kalshi to run internet casinos pursuant to their own private oversight.

What's more, if sports-betting contracts are "swaps" subject to the exclusive jurisdiction of the CFTC, as Kalshi maintains, then all off-market sports betting—

[4] Kalshi also suggests that its sports-event contracts are not gaming because there is no betting against the "house." Pl.-Appellant Br. at 19, ECF No. 20.1. Not so. A "house" is not a necessary element of gaming. For example, pari-mutuel wagering—a type of betting system where all bets or wagers are pooled and players bet against each other rather than a "house"—is considered gaming. *See, e.g.*, NRS § 464.005(8) ("Pari-mutuel system of wagering means any system whereby wagers with respect to the outcome of a race, sporting event or other event are placed in a wagering pool conducted by a person licensed or otherwise permitted to do so under state law, and in which the participants are wagering with each other and not against that person."). Additionally, IGRA regulations define class II gaming to include, among other things, nonbanking card games that are necessarily played without a "house." 25 C.F.R. § 502.3(c). Further, even if sports betting requires a "house" (it does not), Kalshi's subsidiary, "Kalshi Trading," sets bet prices, holds the opposite side to its customers on trades, and effectively acts as the "house." *See* Pl. Br. Supp. Prelim. Inj. Ex 3 at 3, *KalshiEX LLC v. Schuler*, No. 2:25-cv-1165-SDM-CMV (S.D. Ohio Oct. 7, 2025), Dkt. No. 11-3.

including sports betting conducted by tribes under IGRA—is prohibited by the CEA. With one inapplicable exception, the CEA prohibits off-market swaps. *See* 7 U.S.C. § 2(e). Consequently, if all sports-betting contracts are swaps, "then all sports betting must be done on a DCM." *N. Am. Derivatives Exch., Inc. v. Nevada Gaming Control Bd.* (*Crypto.com*), No. 2:25-cv-00978, 2025 WL 2916151, at *9 (D. Nev. Oct. 14, 2025), *appeal filed*, No. 25-7187 (9th Cir. Nov. 13, 2025).

Kalshi's argument thus does double violence. On one hand, by permitting Kalshi to offer sports betting on tribal land, its argument sweeps aside Congress's recognition that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands …." 25 U.S.C. § 2701(5). On the other hand, it prohibits tribes from offering sports betting that IGRA plainly authorizes. *See* 25 C.F.R. § 502.4(c).

Moreover, if Kalshi's position is adopted, the reach of this definition would extend beyond sports betting to encompass other forms of gaming because, as the lower court correctly held, Kalshi's preemption argument depends on embracing an interpretation of "swap" that has "no limiting principle." 1-ER-13; *see* *Crypto.com*, 2025 WL 2916151, at *9. Kalshi's definition of "an event or contingency associated with a potential financial, economic, or commercial consequence" is so broad that it necessarily includes betting on other casino games or class III gaming. This means that virtually all gaming activity across the country would be illegal unless offered on a DCM. The irony of this result is that the gaming conducted pursuant to tribal-state gaming compacts or state law provides significantly more consumer protection than the unregulated sports betting offered by Kalshi, which allows users as young as 18 years old to engage in practically limitless betting with few, if any, guardrails.[5]

Further, if the CEA governs Kalshi's sports-betting contracts (and potentially other forms of gaming) on Indian lands, then Congress must have intended to repeal other key provisions of IGRA that expressly grant regulatory authority over such activity to tribes, states, the National Indian Gaming Commission, the Department of the Interior, and the Department of Justice. *See* 25

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[5] This lack of responsible gaming measures and consumer protections, which are required by legal gaming operations, is dangerous and contrary to the public interest. Josh Sterling (a former CFTC employee and the lawyer representing Kalshi) has dismissed such responsible gaming concerns, stating: "People are adults, and they're allowed to spend their money however they want it, and if they lose their shirt, that's on them." Jessica Welman, *Kalshi's lawyer goes hard at state-regulated gambling*, SBCAmericas, (Jul. 11, 2025), https://sbcamericas.com/2025/07/11/kalshi-nclgs-sports-contract-debate/?amp. Additionally, an apparent (and, if true, flagrant) incident of insider trading involving an event contract on Polymarket—one of Kalshi's sports-betting contract competitors—even prompted a lawmaker to rush forward with legislation to address the CEA's absence of consumer protections for this type of misconduct. *See* Alex Keeney, *Do prediction markets have an insider trading problem?*, Politico (Jan. 6, 2026), https://www.politico.com/newsletters/politico-nightly/2026/01/06/do-prediction-markets-have-an-insider-trading-problem-00713365.

U.S.C. §§ 2701(5), 2710(d); 18 U.S.C. § 1166(d). Congress also must have intended to completely override the entire purpose and function of IGRA, which is to recognize tribal sovereignty to conduct and regulate gaming activity that occurs on Indian lands. *See* 25 U.S.C. § 2701(5). No amount of judicial gymnastics can turn the insertion of the term "swap" in the CEA into such a radical transformation of IGRA.

This Court should therefore reject Kalshi's boundless interpretation of a "swap" and give effect to both statutes by excluding sports-betting contracts, such as Kalshi's, from the CEA's definition of "swap" as the lower court did. *See* 1-ER-13. Such an interpretation, in any case, is more faithful to the CEA's statutory language and legislative intent. *See* 156 Cong. Rec. S5907 (daily ed. Jul. 15, 2010) (statement of Sen. Lincoln) ("It would be quite easy to construct an 'event contract' around sporting events such as the Super Bowl, the Kentucky Derby, and Masters Golf Tournament. These types of contracts would not serve any real commercial purpose. Rather, they would be used solely for gambling.").

C. Kalshi's Theory Does Not Meet the Standard for Implied Repeals.

Kalshi's preemption argument, which relies on its overly broad interpretation of "swap," must be rejected because it would manufacture an implied repeal of IGRA where none exists. Kalshi cannot meet the heavy burden of proving Congress intended to repeal IGRA because there is a reasonable interpretation of the CEA that gives full effect to both statutes: the CEA's definition of "swap"—and thus the CFTC's jurisdiction over such transactions—simply does not extend to Kalshi's sports bets.

Both the Supreme Court and Ninth Circuit apply the "strong presumption that repeals by implication are disfavored and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 510 (2018) (citation modified and internal quotation marks omitted); *see also Shoshone-Bannock Tribes of Fort Hall Rsrv. v. U.S. Dep't of the Interior*, 153 F.4th 748, 759 (9th Cir. 2025) ("Although a later-enacted statute 'can sometimes operate to amend or even repeal an earlier statutory provision … , repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest.'" (quoting *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007)). Congress's intent to repeal must be "clear and manifest." *Epic Sys.*, 584 U.S. at 510. "Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Id.* at 515 (internal quotation marks omitted).

Here, IGRA and the CEA can easily be harmonized by reading the CEA to exclude sports betting, consistent with longstanding CFTC regulations.

1. *Kalshi's sports-betting contracts are not "swaps."*

As relevant here, the CEA defines "swaps" as "any agreement, contract, or transaction … that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence." 7 U.S.C. § 1a(47)(A)(ii). Kalshi's sports-betting contracts simply do not fall under this definition and Congress therefore could not have intended to repeal IGRA.[6]

First, Kalshi's sports-event contracts are not dependent on the *occurrence, nonoccurrence, or extent of the occurrence* of a sports event—i.e., whether the sports event occurs—but rather on the outcome of the sports event (or parts thereof)—i.e., which team wins or who scores a touchdown. The court below held that sports bets are not swaps for precisely this reason. 1-ER-6–7; *see also Crypto.com*, 2025 WL 2916151, at *1, 7–9; *Robinhood Derivatives, LLC v. Dreitzer*, No. 2:25-cv-1541, 2025 WL 3283308, at *1 (D. Nev. Nov. 25, 2025).

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[6] Kalshi also argues that its preemption argument applies even if its sports-betting contracts are not swaps because they involve "excluded commodities." Pl.-Appellant Br. at 46, ECF No. 20.1. But for the same reasons discussed herein, Kalshi's sports-betting contracts likewise fail to meet the definition of "excluded commodities," which is more restrictive than the definition of "swap" in that it requires an "*associated* … financial, commercial, or economic consequence." *See* 7 U.S.C. § 1a(19).

Second, there is no "financial, commercial, or economic consequence" associated with Kalshi's sports-betting contracts. Aside from whether the purchaser of a sports-betting contracts wins or loses their bet, Kalshi's sports-betting contracts have no direct financial consequences for the purchaser. To constitute a swap, the lower court properly held that the underlying event itself "must be inherently associated with a potential financial consequence." 1-ER-15. "[E]xternalities like whether people bet on the event or the contingency, or whether the event's occurrence or nonoccurrence causes downstream financial consequences, are not sufficient." 1-ER-14. Sports-betting contracts do not satisfy this requirement and therefore do not qualify as swaps.

2. *Congress did not manifest clear intent to repeal IGRA or to make the CFTC the nation's sole gaming regulator.*

Congress did not repeal IGRA and grant the CFTC the exclusive authority to regulate nationwide sports betting. In fact, Congress expressed the opposite intent and went out of its way to prevent event-contract markets from being used as a means to conduct a gambling business. *See* 156 Cong. Rec. S5906-07 (daily ed. Jul. 15, 2010) (colloquy between Sens. Feinstein and Lincoln). To that end, Congress enacted the "Special rule" authorizing the CFTC to "determine that such agreements, contracts, or transactions are contrary to the public interest" and to *disallow* any "gaming" activity on DCMs at all. *See* 7 U.S.C. § 7a-2(c)(5)(C)(i)–

(ii). The CFTC acted consistently with Congress's intent by promulgating its blanket prohibition of event contracts involving gaming. 17 C.F.R. § 40.11(a)(1). The CFTC explained that its "prohibition of certain 'gaming' contracts is consistent with Congress's intent to 'prevent gambling through the futures markets' and to 'protect the public interest from gaming and other events contracts.'" Provisions Common to Registered Entities, 76 Fed. Reg.44776, 44786 (Jul. 27, 2011) (footnotes omitted). Thus, the CFTC recognized that the Special Rule reinforced Congress's existing policy *against* sports betting.

Kalshi even acknowledged this fact in a brief filed with the D.C. Circuit 14 months ago (and mere weeks before launching its nationwide sports betting app). *See* Appellee Br. at 41, *KalshiEX LLC v. CFTC*, No. 24-5205 (D.C. Cir. Nov. 15, 2024) ("An event or contract thus involves 'gaming' if it is contingent on a game or game-related event. The classic example is a contract on the outcome of a sporting event; as the legislative history directly confirms, ***Congress did not want sports betting to be conducted on derivatives markets***." (emphasis added)). The Special Rule and the CFTC's regulations undermine any claim that Congress intended to repeal IGRA and legalize sports betting. That the CEA and IGRA overlap here is due only to Kalshi's backdoor attempt to evade comprehensive gaming regulations.[7]

[7] Under Kalshi's theory, simply calling a sports wager a "swap"—regardless of whether it is actually a valid "swap"—and listing it for trade on a DCM automatically grants the CFTC exclusive jurisdiction, to the detriment of all other regulatory authorities. *See* Pl.-Appellant Br. at 40–45, ECF No. 20.1. What, then, would prevent Kalshi from calling "contracts" on other traditional forms of gaming, like roulette and lotteries, "swaps" and subjecting them to the exclusive jurisdiction of the CFTC? According to Kalshi, CFTC inaction—despite banning "gaming" contracts via 17 C.F.R. § 40.11(a)(1)—is all that is required to bless contracts blatantly designed for no other purpose than to enable gambling.

Kalshi's theory would likewise strip this Court of its own jurisdiction to interpret what constitutes a "swap." Kalshi argues that such determination is exclusively up to the CFTC and would only be judicially reviewable pursuant to an Administrative Procedures Act challenge. Pl.-Appellant Br. at 44, ECF No. 20.1; *see also* Pl.'s Resp. in Opp. to Emergency Mot. to Dissolve Prelim. Inj. at 7, *Hendrick*, No. 2:25-cv-00575 (Oct. 31, 2025), ECF No. 183. But, as the lower court properly held,

> Concluding that a defense to Kalshi's preemption argument must be brought solely through the APA puts the cart before the horse. To decide if something falls within the CFTC's jurisdiction to potentially preempt state law, courts must interpret the CEA because the CEA specifically defines that jurisdiction. Additionally, Congress, through the CEA, defined what is a swap, and nothing in the CEA gives the CFTC the exclusive power to interpret the statutory language defining words like "swap."

1-ER-10.

Furthermore, only Kalshi (a private company with a direct financial interest in offering sports betting free from regulation), not Congress or the CFTC, claims that the CEA's definition of "swap" displaces tribal, state, and federal regulation of sports betting. The text and legislative history of the 2010 CEA amendments, as well as subsequent CFTC actions, confirm that the CFTC was not established to regulate sports betting, let alone assume the role of the nation's sole sports-betting regulator. Ultimately, Kalshi's attempt to foist authority onto the CFTC (which the CFTC does not claim for itself) indicates that Kalshi is wrong about the meaning of "swap." *See* Event Contracts, 89 Fed. Reg. 48968, 48982–83 (June 10, 2024) ("The [CFTC] is not a gaming regulator … and the [CFTC] does not believe that it has the statutory mandate nor specialized experience appropriate to oversee [gambling], or that Congress intended for the [CFTC] to exercise its jurisdiction or expend its resources in this manner.").

Contrary to what Kalshi argues, ECF No. 20.1 at 32, the CFTC's own actions confirm that it has not asserted authority to regulate sports betting. In a recent advisory letter, the CFTC clarified it has not "taken any official action to approve the listing for trading of sports-related event contracts on any DCM." CTFC Staff Letter No. 25-36 at 2 n.4 (Sep. 30, 2025). In this advisory letter, the CFTC noted that "at least one federal district court has found that the [CEA] does not preempt the application of State gambling, wagering, and gaming laws to sports-related event contracts listed and traded on a CFTC-registered trading venue," and it advised DCMs to ensure customers "understand the possible effects should State regulatory actions … result in termination of sports-related event contract[s]." *Id.* at 2 & n.3. Kalshi's arguments thus stand in sharp contrast to the CFTC's own unwillingness to regulate sports betting. The Court should reject Kalshi's efforts to expand the CFTC's jurisdiction to a vast new area of regulation.

3. *The Indian Canons of Construction require this Court to resolve any ambiguity in favor of tribes.*

Even if there were ambiguity as to whether Congress intended to repeal IGRA when it amended the CEA in 2010 (there is not), the Indian Canons of Construction require courts to resolve statutory ambiguities in favor of tribes. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."); *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 729 (9th Cir. 2003). Federal courts have consistently applied these canons over a half-century to ensure that later-enacted statutes of general applicability cannot repeal earlier-enacted legislation specifically designed to advance the United States' special relationship with tribes, without a clear statement from Congress. *See, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 550–51

(1974); *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142, 1159–60 (9th Cir. 2020); *Shoshone-Bannock Tribes*, 153 F.4th at 765.

This Court should therefore reject Kalshi's preemption argument requiring an implied repeal of IGRA.

D. IGRA Regulates Online Gaming on Tribes' Indian Lands-Including Kalshi's Sports-Betting Contracts.

Kalshi has tried to avoid the implied repeal of IGRA required by its preemption arguments by asserting that IGRA "does not authorize tribes to regulate gaming available over the internet" and is therefore inapplicable to its sports-betting activity. *See* Appellant Br. at 55, *KalshiEX LLC v. Martin*, No. 25-1892 (4th Cir. Oct. 15, 2025), ECF No. 16; *see also* Pl.'s Resp. in Opp. to Emergency Mot. to Dissolve Prelim. Inj. at 17, *Hendrick*, No. 2:25-cv-00575 (Oct. 31, 2025), ECF No. 183. But the issue isn't whether tribes can regulate Kalshi's sports betting on Indian lands (they can). Rather, it is whether Congress set up a regulatory system that is incompatible with IGRA. And Kalshi's theory means that it can offer sports betting to people physically located on Indian lands contrary to tribal prohibitions, just as it does in states notwithstanding state law prohibitions.

Ironically, in arguing that IGRA does not authorize tribes to regulate online gaming, Kalshi cited *West Flagler Associates, Ltd. v. Haaland*, which held that IGRA allows states and tribes to allocate jurisdiction over the regulation of internet gaming conducted by a tribe throughout the state, including on its Indian lands. Brief of Appellant at 55, *Martin*, No. 25-1892; *see W. Flagler Assocs., Ltd. v. Haaland*, 71 F.4th 1059, 1061–62, 1066 (D.C. Cir. 2023), *cert denied*, 144 S. Ct. 2671 (2024). IGRA's implementing regulations also expressly state that tribes can regulate online gaming pursuant to the terms of their IGRA compacts. *See* 25 C.F.R. § 293.26.

Kalshi also argued below that the Unlawful Internet Gaming Enforcement Act ("UIGEA"), not tribal-state IGRA agreements or state gaming law, solely governs the online gaming aspect of its sports-betting contracts, and UIGEA excludes DCM transactions from its definition of "bet or wager." Pl.'s Resp. in Opp. to Emergency Mot. to Dissolve Prelim. Inj. at 17, *Hendrick*, No. 2:25-cv-00575 (Oct. 31, 2025), ECF No. 183. By claiming that Congress's exclusion of DCM transactions from the definition of "bet or wager" in 31 U.S.C. § 5362 is "entitled to great weight" as an example of Congress's intent to preempt all state (and tribal) gaming laws via the CEA, Kalshi implies that UIGEA also somehow preempts IGRA and all tribal-state IGRA agreements. *Id.* But this ignores UIGEA's own language that "[n]o provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States." 31 U.S.C. § 5361(b). UIGEA "prevents using the internet to circumvent existing state and federal gambling laws, but it does not create any additional substantive prohibitions." *California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960, 965 (9th Cir. 2018).

II. The Major Questions Doctrine Forecloses Kalshi's Theory.

In 2010, federal law—namely, the Professional and Amateur Sports Protection Act ("PASPA")—prohibited sports betting nationwide. Kalshi's position thus requires interpreting the CEA not only to eradicate state and federal gaming laws by preemption or implied repeal, but also to reverse the federal policy that at the time prohibited sports betting—turning it instead into a nationwide authorization of such betting under the sole jurisdiction of the CFTC.[8] Whether Congress did so is a major question.

Under the Major Questions Doctrine, courts have "reason to hesitate before concluding that Congress meant to confer" agency authority in cases where the agency has asserted a "breadth" of authority over matters of "economic and political significance." *West Virginia v. EPA*, 597 U.S. 697, 721 (2022) (internal quotation marks omitted). In such cases, considering "both separation of powers

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[8] Kalshi's sports-betting contracts also violate other federal laws, including the Wire Act, 18 U.S.C. § 1084, the Illegal Gambling Business Act, 18 U.S.C. § 1955, and the Travel Act, 18 U.S.C. § 1952(a). If Congress authorized sports betting via the CEA in 2010, then it also effectively limited the scope of these federal laws, in addition to PASPA.

principles and a practical understanding of legislative intent," there must be "clear congressional authorization." *Id.* at 723 (internal quotation marks omitted). Further, "Congress [does not] typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme." *Id.* (quoting *MCI Telecommunications Corp. v. Am. Telephone & Telegraph Co.*, 512 U.S. 218, 229 (1994)).

In effect, Kalshi contends that the 2010 CEA amendments displaced state and tribal gaming regulations, nullified all tribal-state gaming compacts, legalized sports betting nationwide, and placed sports betting under the exclusive regulatory jurisdiction of the CFTC, all at a time when federal law broadly prohibited sports betting. This is unquestionably a "radical" and "fundamental" overhaul to both PASPA and IGRA, and certainly raises concerns of "economic and political significance." *Id.* at 721. This Court therefore has significant "reason to hesitate" and should require "clear congressional authorization" before even considering Kalshi's preemption argument. *Id.* at 721, 724.

First, Congress must be clear when it "alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001). Here, gaming regulation, and even sports-betting regulation specifically, has been understood to be within traditional state power. *See Murphy v. NCAA*, 584 U.S. 453, 474, 481–

85 (2018) (holding that PASPA prohibited states from authorizing sports betting and therefore violated the anticommandeering rule, which specifically protects state sovereignty for matters over which states traditionally regulate, such as gaming and sports betting, against unlawful acts from Congress demanding states act in particular ways); *see also Artichoke Joe's*, 353 F.3d at 737 ("The circuits that have given significant attention to equal protection challenges to state gambling laws have, by and large, held 'the regulation of gambling lies at the heart of the state's police power.'" (quoting *Helton v. Hunt*, 330 F.3d 242, 246 (4th Cir. 2003))). As the Supreme Court noted in *Murphy*, Congress has long structured federal criminal law to "respect the policy choices of the people of each State on the controversial issue of gambling." 584 U.S. at 484; *see, e.g.*, 18 U.S.C. §§ 1084, 1166, 1952, 1953, 1955 (incorporating state gambling prohibitions); *Chicken Ranch*, 42 F.4th at 1032 (explaining that IGRA "strike[s] a delicate balance" between tribal and state sovereignty over gaming). And even when Congress chose to prohibit sports betting nationally through PASPA, it did so *through* state regulation, rather than by directly regulating private actors. *See Murphy*, 584 U.S. at 484–85.

Similarly, courts have long recognized tribes' inherent sovereign authority to regulate gaming on their lands. *See Cabazon*, 480 U.S. at 207–14. Though IGRA imposes limited restrictions on this authority, IGRA still broadly advances tribes' "exclusive right to regulate [and offer] gaming activity" (including sports betting) on their Indian lands as a means of promoting tribal economic development and self-determination. *See* 25 U.S.C. §§ 2701(5), 2702(2); *W. Flagler*, 71 F.4th at 1062–63. And later-enacted statutes of general applicability—like the CEA—cannot repeal earlier-enacted legislation that is specifically designed to advance the United States' special relationship with tribes—such as IGRA—without a clear statement from Congress. *See, e.g.*, *Mancari*, 417 U.S. at 550–51.

Accordingly, because regulating gaming (including sports betting) has long been a traditional state (and tribal) power, Kalshi must show clear congressional language overturning federal policy. But it cannot because no such language exists. Rather, the CEA actually *reinforces* the federal policy in favor of state gambling regulation by disclaiming preemption of state gaming laws. *See* 7 U.S.C. § 16(e). And nothing in the definition of "swap" indicates that Congress meant to overturn the entire field of sports-betting regulation or Indian gaming.

Second, sports betting has a "unique place in American history and society," and therefore its own "political history." *See FDA v. Brown & Williamson*, 529 U.S. 120, 159–60 (2000), *superseded by statute* 21 U.S.C. § 387 *et seq*. Given this social and political history, at the time of the 2010 CEA amendments, Congress had already "for better or for worse, … created a distinct regulatory scheme" for sports betting—namely, PASPA. *Id.* The conflict between Kalshi's argument that the CEA's 2010 amendments authorized sports betting nationwide and the existence of PASPA's nationwide sports-betting prohibition in 2010 therefore indicates that Congress could not have intended to regulate sports betting in the way that Kalshi now claims. "Given this history and the breadth of the authority that [Kalshi] has asserted [the CFTC has]," this Court should not defer to Kalshi's "expansive construction" of the CEA. *Id.* at 160.

The Supreme Court eliminated PASPA as a barrier to sports betting in 2018 when it held PASPA unconstitutional. *See Murphy*, 584 U.S. at 486. And since then, several states have established regulatory schemes for sports betting under their traditional police powers. But that has no bearing on whether Congress's CEA amendments in 2010 had the effect of obliterating PASPA (and IGRA), and the state laws on which it relied. Kalshi's position that Congress legalized sports betting in 2010 would have certainly come as a surprise to the Supreme Court and litigants in *Murphy*—none of whom seemed to think that the state prohibition at issue had actually been preempted years earlier.

In holding PASPA unconstitutional, the Supreme Court made no suggestion that Congress had already preempted all state gaming laws eight years earlier. *Murphy*, 584 U.S. at 479–80. To the contrary, the majority opinion concluded with an observation utterly incompatible with Kalshi's contention: "The legalization of sports gambling requires an important policy choice, but the choice is not ours to make. Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own." *Id.* at 486. In other words, Kalshi's deregulatory elephant was hidden in a statutory mousehole far too small for the Supreme Court to notice when deciding whether sports betting would be legal.

Ignoring history, context, and common sense, Kalshi presents an alternate reality in which a statutory scheme whose scope is limited to addressing the risk, discovery, and dissemination of commodity pricing information, *see* 7 U.S.C. § 5(a)–(b), exclusively governs nationwide sports betting, including that occurring on Indian lands. Kalshi therefore creates a world where Congress repealed the comprehensive regulatory scheme set forth in IGRA, similar structures set up by state law, all tribal-state gaming compacts, and the federal policy requiring states to prohibit sports betting, as codified in PASPA. And Kalshi incredibly argues all of this happened without even a whisper of legislative intent.

Kalshi's revisionist history cannot withstand even the slightest scrutiny. As the lower court aptly stated, "It 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 in 2010." 1-ER-21 (footnote omitted).

III. Kalshi's Preemption Argument Would Violate the Private Nondelegation Doctrine.

Kalshi's preemption argument turns on the extraordinary claim that Congress delegated the power to preempt state law to an interested private party simply by self-certifying its own sports-betting contracts and listing them on its exchange. The private non-delegation doctrine, however, guards against precisely the type of unchecked, privately exercised powers upon which Kalshi relies. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

While the Supreme Court upholds congressional delegations of power to federal agencies with an intelligible principle, it applies a different standard when those delegations are to private entities. "[A] law … violates the private nondelegation doctrine when it allows non-government entities to govern." *FCC v. Consumers' Rsch.*, 606 U.S. 656, 697 (2025). Recently the Supreme Court found that the permissibility of a private delegation depends on whether the agency retains oversight and ultimate decision-making authority over the private entity's actions. *Id.* at 693. There, the Court upheld the delegation to a private entity, but only because it merely played "an advisory role" and the final decision-making authority rested with the agency. *Id.*

In contrast, the CEA's self-certification provisions empower Kalshi—a private, for-profit entity—to oversee its own sports-betting enterprise, yet simultaneously fail to provide any mechanism for advance public comment, mandatory agency oversight, or standards by which the CFTC may implement its discretion. *See* Farewell Address of Commissioner Kristin N. Johnson, CFTC (Sep. 3, 2025), https://www.cftc.gov/PressRoom/SpeechesTestimony/opajohnson25 (warning that the CFTC has "too few guardrails and too little visibility into the prediction market landscape").

Further, even according to Kalshi, its self-certification is not merely advisory. Rather, it has the force of law and CFTC inaction is sufficient to trigger preemption. *See* Pl.-Appellant Br. at 27–28, ECF No. 20.1. "The result of this regulatory scheme is that [Kalshi] can, without any [CFTC] review of its decision on the merits, effectively decide" to engage in sports betting free from tribal and state regulation. *See Alpine Sec. Corp. v. Fin. Indus. Regul. Auth.*, 121 F.4th 1314, 1328 (D.C. Cir. 2024). Consequently, construing the CEA to attribute legal effect on state law via Kalshi's self-certification would be unconstitutional—a construction that must be avoided. *See United States v. Metcalf*, 156 F.4th 871, 881–82 (9th Cir. 2025) ("Constitutional avoidance applies 'when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction[,]' [and] directs that 'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems.' The canon suggests that 'courts should construe ambiguous statutes to avoid the need even to address serious questions about their constitutionality.'" (internal citations omitted)).

Moreover, Kalshi has a financial interest in self-certifying its sports-betting contracts, regardless of such certifications' verity. And Kalshi's financial interest in offering lucrative and unregulated nationwide sports betting is directly adverse to the sovereign and economic interests of the State of Nevada, Amici Tribes, other states, and businesses offering sports betting across the country. The effects of Kalshi's self-certification go even further; in Kalshi's view, it can block tribes and states from regulating that which has long been within their sovereign authority to regulate simply by listing sports-betting contracts on its exchange. "This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." *Carter Coal*, 298 U.S. at 311.

CONCLUSION

For the foregoing reasons, the Tribal Amici respectfully request that the Court affirm the lower court's decision.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2026, a copy of the foregoing was filed with the Clerk of Court via this Court's electronic filing Appellate Case Management System, which will provide notice and service on all counsel of record for all parties.

Dated: January 30, 2026

/s/ Joseph H. Webster
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 25-7516

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 34. Disclosure Statement under FRAP 26.1 and Circuit Rule 26.1-1

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Signature /s/ Joseph H. Webster **Date** 1/30/2026

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Tribal Amici Include:

The Indian Gaming Association ("IGA"), National Congress of American Indians ("NCAI"), United South and Eastern Tribes Sovereignty Protection Fund ("USET SPF"), Arizona Indian Gaming Association ("AIGA"), California Nations Indian Gaming Association ("CNIGA"), Minnesota Indian Gaming Association ("MIGA"), Oklahoma Indian Gaming Association ("OIGA"), Washington Indian Gaming Association ("WIGA"), National Tribal Gaming Commissioners and Regulators ("NTGCR"), Native American Finance Officers Association ("NAFOA"), Tribal Alliance of Sovereign Indian Nations ("TASIN"), San Manuel Gaming and Hospitality Authority ("SMGHA"), Agua Caliente Band of Cahuilla Indians; Cher-Ae Heights Indian Community of the Trinidad Rancheria; The Choctaw Nation of Oklahoma; Elk Valley Rancheria; Enterprise Rancheria of Maidu Indians of California; Karuk Tribe; Kickapoo Traditional Tribe of Texas; Lytton Rancheria; Mashantucket Pequot Tribal Nation; Mescalero Apache Tribe; Mohegan Tribe of Indians of Connecticut; Morongo Band of Mission Indians; Pechanga Band of Indians; Pueblo of Acoma; Pueblo of Sandia; Rincon Band of Luiseño Mission Indians; San Pasqual Band of Diegueno Mission Indians of California; Santa Ynez Band of Chumash Mission Indians; Seminole Tribe of Florida; Spokane Tribe of the Spokane Reservation; Sycuan Band of the Kumeyaay Nation; Table Mountain Rancheria; Tunica-Biloxi Indian Tribe; and Yuhaaviatam of San Manuel Nation.