

Gaming



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New Jersey Seeks Supreme Court Review of Kalshi Decision ... and One Additional Argument That May Come into Play

On September 2, 2026, the State of New Jersey and the New Jersey Division of Gaming Enforcement (“DGE”)—the New Jersey agency tasked with regulating gambling in the state (collectively “New Jersey”)—filed their long-anticipated Petition for Writ of Certiorari (the “Petition”), asking the Supreme Court of the United States (“SCOTUS”) to review and reverse the judgment of the Third Circuit Court of Appeals in *KalshiEX, LLC v. Flaherty*, 172 F.4th 220 (3rd Cir. 2026) (“*Flaherty*”), upholding an injunction barring New Jersey and the DGE from enforcing New Jersey gambling laws against KalshiEx LLC (“Kalshi”) and other prediction market operators. The filing comes just days after the Ninth Circuit’s decision in *Kalshi v. Assad*, ___ F.4th ___, 2026 WL 2543846 (9th Cir. Aug. 28, 2026) (“*Assad*”), which directly and repeatedly disagreed with the “conclusion, interpretation, and methodology” of the Third Circuit’s *Flaherty* decision. The filing sets the stage for what could be one of the most consequential gaming law

decisions in decades and also potentially leaves open additional arguments that do not appear to have been raised in the Petition.

New Jersey’s Petition frames a single, cleanly presented question:

“Whether the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act preempted States from regulating sports bets that occur within their jurisdictions if those bets are offered on markets registered with the Commodity Futures Trading Commission [“CFTC”].”

At its core, the question is whether Congress silently federalized the multi-billion-dollar sports betting industry via a single word— “swap”—in the 2010 Dodd-Frank legislation that was enacted to regulate financial derivatives in the wake of the 2008 financial crisis.

In support of its Petition, New Jersey put forth a number of arguments attacking the Third Circuit’s holdings in *Flaherty*, while quoting liberally from the Ninth Circuit’s *Assad* decision, including:

- Kalshi seeks to federalize the multi-billion-dollar sports betting industry at the expense of every state sports gaming law, “upend[ing] ... decades of careful regulation of gambling based on broad definitions of the words used in a Wall Street Reform Bill” defining “swaps,” presuming that Congress “hid an elephant in a mousehole” in the Dodd-Frank Act.
- Dodd-Frank defines “swaps” (in relevant part) as, “any agreement, contract, or transaction” that, among other things, “provides for any purchase, sale, payment, or delivery” that “is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence.” 7 U.S.C. §1a(47)(A)(ii). But the *outcome* of an event (including “whether the Dodgers win the World Series, or how many touchdowns Fernando Mendoza might throw in a game, or how many points by” (*quoting Assad*, 2026 WL 2543846, at *9)) is not an “event,” and such outcomes of sporting events are not “themselves ‘associated with’ financial consequences as the Act uses the phrase.” *Citing Assad*, 2026 WL 2543846, at *9-12 and criticizing *Flaherty*, 172 F.4th at 227-28 (recognizing that the definition of “swap” so interpreted could have “bingo games [and] ping-pong matches” fall under CFTC authority, but concluding that CFTC could “further define swaps” to address that concern).
- Since sports betting played no role in the 2008 financial crisis that led to the passage of Dodd-Frank, and since at the time most states were largely prohibited from legalizing sports betting under the Professional and Amateur Sports Protection Act (“PASPA”, which was subsequently struck down by SCOTUS in *Murphy v. NCAA*, 584 U.S. 453, 486 (2018)), it is “unlikely that these financial reforms [enacted in Dodd-Frank] had anything to do with sports gambling.”
- If Kalshi and the Commodity Futures Trading Commission (“CFTC”) are correct that, under Dodd-Frank, sports wagers can be traded as “swaps” on CFTC-regulated designated contract markets (“DCMs”), then state-licensed sports books have been violating Dodd-Frank since 2018, when SCOTUS held that that “each State is free to act on its own” in regulating sports betting in *Murphy*. If the definition of “swap” is broad enough to cover what looks like a sports wager, then Dodd-Frank’s mandate that all swaps must be traded on DCMs that are exclusively regulated by the CFTC means that sports wagers executed on state-regulated sports books violate that mandate.
- The CFTC’s jurisdiction to regulate “swap” transactions is exclusive of other *federal* agencies, not state gambling laws and regulators. The legislative history of the Commodity Exchange Act (“CEA”) shows that Congress intended for states to retain their respective regulatory authorities over transactions that violate state laws.
- The Third and Ninth Circuits are irrevocably split on this legal question, and numerous other courts have fractured on the issue: counting at least 20 decisions in federal district courts and state courts, “with the vast majority rejecting the Third Circuit’s approach ... and sid[ing] with the States, the Ninth Circuit,” and the dissent by Judge Roth in the *Flaherty* decision.
- “Because ‘Americans have never been of one mind about gambling,’ our federalist system allows States to make different choices on this matter. ... So this Court and Congress both ‘respect the policy choices of the people of each State on the controversial issue of gambling.’” (*Quoting Murphy*, 584 U.S. at 486.) Thus, allowing the CFTC to prohibit states from preventing Kalshi and other prediction market operators offering wagering on sports a DCM in their states upsets that balance and

traditional state policy powers and policy choices as to whether and to what extent to allow gambling in their states. Forty-four states and hundreds of Indian tribes have come out against the Kalshi and CFTC position on this question.

In its Petition, New Jersey made clear the stark conflicts between the Third Circuit’s *Flaherty* decision and the Ninth Circuit’s *Assad* decision on this central legal question. With similar cases pending in the Second, Fourth, and Sixth Circuits (and a separate case arising from Arizona also pending in the Ninth Circuit), more decisions on one side or the other of this conflict are likely to come soon.

There is also one additional point that might be raised as this process continues, either in an amicus brief or otherwise: The *Flaherty* decision appears to agree with Kalshi and CFTC that *the CFTC*, not Congress, is the proper arbiter of whether state gambling laws should be preempted. The majority in *Flaherty* expressly held that the “Special Rule” written into the Commodity Exchange Act by Dodd-Frank (7 U.S.C. § 7a-2(c)(5)(C)(i)) allows *the CFTC* to decide whether sport event related contracts should be prohibited on a DCM as “contrary to the public interest” because they involve “gambling.” 172 F.4th at 227. If this approach is upheld, as a practical matter, whether or not sports event related contracts will be prohibited on a DCM as “contrary to the public interest” will likely depend not on Congressional action or even intent, but upon administrative – and possibly political – preference of the CFTC’s leadership. It will be interesting to see how SCOTUS views this and all other issues in this action given its apparent support for State authority in *Murphy*. Make no doubt, this case will surely be a closely monitored beyond traditional market participants given the wider impact it may have on the ever-evolving balance of powers between the states, the federal government and the agencies within.

For more information or assistance, please contact **Dennis M.P. Ehling**, **Louise Bowes Marencik**, **Stephen D. Schrier**, **Michael P. Trainor**, or another member of Blank Rome’s **Gaming** industry group.

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