

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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4	KALSHIEX, L.L.C.,	)	
5	Plaintiff,	)	Case No. 2:25-cv-0575-APG-BNW
6	vs.	)	Las Vegas, Nevada
7	KIRK D. HENDRICK, et al.,	)	APRIL 8, 2025
8	Defendant.	)	10:30 A.M.
9		)	Courtroom 6C
10		)	MOTION HEARING
		)	
		)	C E R T I F I E D C O P Y

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE ANDREW P. GORDON  
UNITED STATES DISTRICT JUDGE

COURT REPORTER: Judy K. Moore, CRR, RMR  
United States District Court  
333 Las Vegas Boulevard South, Room 1334  
Las Vegas, Nevada 89101  
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by computer-aided transcription.

UNITED STATES DISTRICT COURT  
Judy K. Moore, RMR, CRR

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LAS VEGAS, NEVADA; APRIL 8, 2025

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P R O C E E D I N G S

(Proceedings commenced at 10:45 a.m.)

COURTROOM ADMINISTRATOR: KalshiEX, L.L.C., versus  
Kirk D. Hendrick, et al., 2:25-civil-575-APG-BNW.

Counsel, please make your appearances, starting with  
plaintiffs.

MR. ROBERTS: Good morning, Your Honor. Lee  
Roberts, representing KalshiEX. With me here at counsel table  
is Richard Heaslip, who is in-house counsel for Kalshi and is  
here as the corporate representative. And with the Court's  
indulgence, I will let my co-counsel introduce himself. He is  
now admitted pro hac vice. And we'll start with Will.

MR. HAVEMANN: Good morning, Your Honor. Will  
Havemann on behalf of Kalshi, and I'm joined by my colleague  
Josh Sterling as well.

THE COURT: Good morning to all of you.

MS. WHELAN: Good morning, Your Honor. Jessica  
Whelan, Chief Deputy Solicitor General for the State of Nevada.  
With me is Sabrena Clinton, Senior Deputy Attorney General; and  
Darlene Caruso, Chief Deputy Attorney General.

THE COURT: Good morning to all of you.

This is the hearing I set on the plaintiff's motion  
for temporary restraining order and preliminary injunction.

1 First, let me note, we do have some people watching in on Zoom.  
2 I received a request from the public to participate by Zoom  
3 under our court rules. I've reviewed the application and  
4 allowed the person to watch. I've also received a request from  
5 the Attorney General's Office to allow some of their personnel  
6 to watch as well. They're parties, so they didn't have to file  
7 that separate request. So I've granted access by Zoom to those  
8 folks. Does either side have any objection to our -- to the  
9 folks watching on Zoom, we'll put it that way?

10 MR. HAVEMANN: No objection.

11 MS. WHELAN: No objection, Your Honor.

12 THE COURT: All right. Let me remind the folks that  
13 are Zooming in that you are not allowed to record any of these  
14 proceedings, either audio or visual. You are not allowed to  
15 take any screen shots or other reproductions of these  
16 proceedings. If you do, it would be in violation of the Court  
17 order, and you would subject yourself to all kinds of bad  
18 things, so please don't do that.

19 All right. Turning to the motions themselves, I  
20 have read the papers, including the reply that was filed either  
21 late last night or early this morning. I read it this morning  
22 before coming in. I don't need speechifying. I've read your  
23 papers. You don't need to repeat what's in there. Rather, I  
24 have lots of questions that I need answered.

25 So what I'm going to do is start in with Kalshi's

1 counsel and ask a bunch of questions and see where we go.

2 So, Mr. Havemann, is that how it's pronounced?

3 MR. HAVEMANN: Yes.

4 THE COURT: Come on up to the podium, if you would,  
5 and let me first make sure I understand a little bit of the  
6 background of how your client's business works and the  
7 regulatory scheme that you're saying applies.

8 So under 7 U.S.C. 2(a)(1)(A), the Commission, CFTC,  
9 has, in your opinion, exclusive jurisdiction with respect to  
10 agreements -- and I'm paraphrasing -- and transactions  
11 involving swaps or contracts of sale of a commodity for the  
12 future delivery of certain things that are traded on a  
13 registered exchange. So the exclusivity applies to swaps and  
14 commodities on a registered exchange, correct?

15 MR. HAVEMANN: That's correct.

16 THE COURT: So are sports contracts or election  
17 contracts swaps or commodities, or both?

18 MR. HAVEMANN: They are swaps, Your Honor. And I  
19 can point you to the statutory language that makes that clear.

20 THE COURT: Is that 7 U.S.C. 1a(47)(A)(ii)?

21 MR. HAVEMANN: That's right, Your Honor.

22 THE COURT: All right. Let's walk through that. So  
23 that statute defines a swap as any agreement that provides for  
24 any purchase, sale, payment, or delivery that is dependent on  
25 the occurrence, non-occurrence, or the extent of the occurrence

1 of an event or contingency associated with a potential  
2 financial, economic, or commercial consequence.

3 So how would a sports contract have a financial,  
4 economic, or commercial consequence?

5 MR. HAVEMANN: So I think the easiest way to answer  
6 that question is by an example. So Kalshi offered sports  
7 contracts on the Final 4 games and the Final last night. These  
8 are sporting events that have massive --

9 THE REPORTER: Can you step closer to the mic?

10 MR. HAVEMANN: Sure.

11 THE COURT: Our acoustics are real bad here.

12 MR. HAVEMANN: These are events that have massive  
13 financial consequences, not just for the schools at issue, but  
14 for sponsors, for the University community, for all sorts of  
15 stakeholders, tens of millions or hundreds of millions of  
16 dollars at stake in some cases, and all of the contracts that  
17 Kalshi offers, whether it be sports contracts, political event  
18 contracts or otherwise, fit that definition. So Kalshi is  
19 careful to offer contracts that have financial consequences in  
20 the real world rather than the sort of prop bets that you might  
21 see at a sportsbook or something like that.

22 THE COURT: Okay. Let's explore that a little bit  
23 because I want to make sure the -- in a sense, the exception  
24 doesn't swallow the rule. Or maybe that's the wrong  
25 phraseology, but the Final 4 clearly has economic impacts upon

1 the players, it has economic impacts on advertisers and the  
2 like. Wouldn't anything have some economic consequence, as  
3 long as two people are willing to put money on it? So why --  
4 what would not be a swap?

5 MR. HAVEMANN: So the answer is, it has economic  
6 consequences outside of the transaction at issue and so, of  
7 course, if someone puts a bet on, you know, the coin flip, for  
8 example, they would have economic consequences on the coin  
9 flip, but the coin flip would not have independent real-world  
10 consequences in the world at the start of a football game in  
11 the way that the winner of the Final 4 Men's Basketball or  
12 Women's Basketball Championship clearly has real-world  
13 financial consequences for the schools, the sponsors, et  
14 cetera. So that's how Kalshi draws the line.

15 I do want to make --

16 THE COURT: So the coin flip would not be a swap?

17 MR. HAVEMANN: That's correct.

18 THE COURT: Even though many, many people in Nevada  
19 bet on the results of the coin flip at the Superbowl? That has  
20 economic consequences.

21 MR. HAVEMANN: That's right, and I think that that  
22 helps distinguish, you know, sportsbooks and the sort of  
23 entities that the Board claims Kalshi is from Kalshi. That is,  
24 sportsbooks offer all sorts of bets on events within  
25 sporting -- occurrences within sporting events that at least,

1 in Kalshi's perspective, would not have independent  
2 consequences pursuant to Federal law and, therefore, would not  
3 properly be the basis for a swap.

4 And I want to step back and make sure that Your  
5 Honor understands our principle point, which is, the CFTC, of  
6 course, has authority to review all of these contracts, and it  
7 is the authority of the -- the CFTC could look at these  
8 contracts and say, you know, we don't think that they properly  
9 qualify as swaps because we don't think that sporting events  
10 have economic consequences, or any number of other reasons.  
11 And that's the job that Congress gave to the CFTC, not to 50  
12 individual States and the District of Columbia.

13 So our principle point is, there's a comprehensive  
14 regulatory scheme that Congress set up that allows the CFTC to  
15 both designate Kalshi and others as a contract market --

16 THE COURT: I get all that.

17 MR. HAVEMANN: -- and to exercise back-end review.

18 THE COURT: I get all that, believe me, but I want  
19 to focus in on swaps because what you're saying just now is  
20 that the CFTC can determine whether it's a swap, but you've  
21 just, I thought, described that Kalshi decides it's a swap or  
22 not because you're not taking wagers, contracts, on the coin  
23 flip because you think it's not a swap. Somebody else might  
24 think it is a swap.

25 And if I'm looking at the definition of a swap, in a



1 sense, anything could be a swap. If the coin flip of the  
2 Superbowl, hundreds of people bet money in Las Vegas at a  
3 casino on the coin flip, by statutory definition, that's a  
4 swap.

5 MR. HAVEMANN: I don't want to fight with Your  
6 Honor's premise. I mean, Kalshi has, I guess, taken a  
7 conservative view of what qualifies as a swap. It does not  
8 offer bets on things like the coin flip and the like for the  
9 reason that it is concerned about a suggestion that would not  
10 have --

11 THE COURT: Okay. So pause here -- pause here for a  
12 second. So Kalshi decides it's not going to bet -- take wagers  
13 or take contracts -- I'll use the terminology take contracts on  
14 the flip of the coin at the Superbowl because it's not a swap.  
15 If it does, then the Gaming Control Board could, in a sense,  
16 regulate you because it's no longer -- it's not a swap, so it  
17 doesn't fall under the statute?

18 MR. HAVEMANN: No, Your Honor, that's not our  
19 position. Our position is it's up to the CFTC to decide  
20 whether or not, you know, any contract has been placed online  
21 in a way that violates the statute, and the CFTC has all sorts  
22 of statutory mechanisms and regulatory mechanisms for  
23 correcting any problems. And that is clear from the statutory  
24 text, exclusive jurisdiction over these contracts --

25 THE COURT: Over swaps?

1 MR. HAVEMANN: Traded on designated contract  
2 markets.

3 THE COURT: Correct. But the interpretation, or the  
4 definition, of swap is statutory, and so who decides whether  
5 a -- the coin flip of the Superbowl falls within the statute?  
6 Is that CFTC's exclusive jurisdiction to determine whether the  
7 definition of swap is met?

8 MR. HAVEMANN: Yes.

9 THE COURT: Do Courts have a role in that?

10 MR. HAVEMANN: Certainly Courts have a role in it,  
11 and Federal Courts exercising review of any CFTC determination  
12 on the question could, of course, interpret the language of the  
13 statute, determining whether the CFTC was right or wrong to  
14 conclude that something was a swap. But the exclusive  
15 jurisdiction provision was designed to give the CFTC the  
16 discretion to determine this rather than 50 different States  
17 and the District of Columbia to decide, hey, I don't think this  
18 is a swap, or I think this is actually gaming, or I think it's  
19 actually a sportsbook. That's precisely what Congress did not  
20 want when making these amendments.

21 THE COURT: Again I get that argument. You don't  
22 have to -- I completely understand that. I'm just sort of  
23 focusing in on, if the coin flip of the Superbowl is or is not  
24 a swap and the CFTC has not said one way or the other what it  
25 is -- let me make sure I understand your argument. You propose

1 a contract to the CFTC, we're going to take a wager on the coin  
2 flip of the Superbowl, we're going to take contracts on the  
3 coin flip of the Superbowl, no one in any -- the Nevada Gaming  
4 Control Board cannot do anything about that unless the CFTC  
5 says, no, you can't?

6 MR. HAVEMANN: I'm not sure that's quite right. I  
7 think that States have some authority under the CEA. There's a  
8 provision that dictates or details what authority States have  
9 to enforce Federal law. And there's always the APA. So if a  
10 State believes that the CFTC has made the wrong decision with  
11 respect to permitting a particular contract or designating a  
12 particular contract market under the CEA, they may have  
13 opportunities under the APA to challenge agency action as  
14 arbitrary, capricious, or not in accordance with the law, but  
15 our submission is that, again, it's the job of the CFTC under  
16 the plain text of the statute that Congress enacted to make  
17 that determination with the sort of back-end judicial review  
18 that you would always expect from a Government agency  
19 determination.

20 THE COURT: Okay. So the Gaming Control Board  
21 decides it disagrees with the CFTC's decision on Kalshi's  
22 listing of elections or who's going to win the Texas Valero  
23 Open last week and so it can now challenge that under the APA  
24 because, as you just said, it disagrees with the CFTC's  
25 finding, so there is jurisdiction for the Gaming Control Board

1 to challenge that decision?

2 MR. HAVEMANN: But the key point is that that would  
3 be a challenge under Federal law to a decision of a Federal  
4 agency. It would not be the Board attempting to enforce State  
5 law against an entity that is a designated contract market  
6 because that is what is preempted.

7 THE COURT: Okay.

8 MR. HAVEMANN: And just to back out and broaden the  
9 scope of what we're looking at, the statute, as you noted, 7  
10 U.S.C. Section 2(a)(1), says that the Commission shall have  
11 exclusive jurisdiction with respect to these agreements, with  
12 respect to swaps, contracts for sale, on designated contract  
13 markets. So Congress is clear that with respect -- once the  
14 CFTC made the decision to designate a particular exchange as a  
15 contract market, that's what subjects the contracts on that  
16 exchange to the exclusive jurisdiction of the CFTC. If it's  
17 not designated as a contract market, then it is still left to  
18 the enforcement mechanisms of the different states.

19 That is the line that Congress drew in the 1974  
20 amendments between what would be subject to Federal authority  
21 and what would be subject to State authority. And I know Your  
22 Honor indicated that it read our reply, but I think that maybe  
23 a basic misunderstanding between us and the defendants in this  
24 case is, I think the defendants understand Kalshi to be arguing  
25 that the CEA preempts all State gaming laws, and that's not

1 correct.

2 THE COURT: You don't need to go there. I agree  
3 with you on that. I think their brief didn't address -- your  
4 reply picked up the comments I was going to make, frankly, so  
5 you're fine there.

6 But you said something that bothered me.

7 MR. HAVEMANN: I try not to do that, Your Honor, so  
8 I'd love the opportunity --

9 THE COURT: Bothered me in a good way. Let's put it  
10 that way. Raised a question for me, and I've lost my train of  
11 thought. Give me a second here and let me look at my  
12 transcript.

13 Awe. It's sort of a minor point, but you said once  
14 the CFTC makes a determination that this swap is, in a sense,  
15 permitted under the CEA, but really, that's not quite right.  
16 What happens is you self-certify, we're going forward with  
17 this, and if the CFTC doesn't say anything about it, then it's  
18 deemed to be okay?

19 MR. HAVEMANN: That's correct, yes. They have an  
20 opportunity to review at the back end, and if they choose not  
21 to exercise that review, that reflects a judgment, too.

22 THE COURT: And slightly contrary to what was said  
23 in the motion, it's not a ten-day review period; it's a 90-day  
24 review period, correct?

25 MR. HAVEMANN: I think -- I'm sorry if we were

1 unclear. I think they have ten days to decide whether to  
2 initiate review, and then once they initiate review, it's a  
3 90-day review period. I'll confirm with co-counsel, but I  
4 believe that's correct.

5 THE COURT: I won't split hairs with you, but my  
6 understanding reading the statute is that that 10-day review  
7 period applies to rules that are proposed. There's a 90-day  
8 provision that's set forth in 7 U.S.C. 7a-2(c)(5)(C)(iv) that  
9 gives 90 days once they commence their review proceeding.

10 MR. HAVEMANN: I will get clarity on that, yes.

11 THE COURT: And that's confirmed in 17 CFR 40.11(c).  
12 Regardless, you're not -- switching gears slightly, you're  
13 saying this -- you're not saying this is a commodity, correct?

14 MR. HAVEMANN: So I want to make sure that I am  
15 precise in my answer. I think one of the definitions of  
16 "commodity" in the CEA is as follows: It is -- one type of  
17 commodity is an occurrence, extent of an occurrence, or  
18 contingency that is beyond the control of the parties to the  
19 relevant contract, agreement, or transaction and associated  
20 with a financial, commercial, or economic consequence. That's  
21 7 U.S.C. 1a(19). And so I think that I want to make sure we  
22 preserve all arguments, and I think that there is certainly an  
23 argument that that qualifies as a commodity, but as I  
24 understand it, the easiest way to think about these contracts  
25 is as swaps.

1 THE COURT: Commodities defined in 7 U.S.C. 1a(9) --

2 MR. HAVEMANN: 19.

3 THE COURT: I'm sorry. 19. I've got 9 on my paper,  
4 but you're probably right. It means wheat, cotton, rice, et  
5 cetera. And setting aside the movie references, which I'm not  
6 quite sure why a motion picture box office, but whatever.

7 -- all services, rights, and interests in which contracts for  
8 future delivery are presently or in the future dealt in.

9 What does that mean in Kalshi's understanding?

10 MR. HAVEMANN: I'm sorry. I didn't follow the --

11 THE COURT: At the end of that definition, the word  
12 "commodity" means all services, rights, and interests, except  
13 motion picture box offices, in which contracts for future  
14 delivery are presently or in the future dealt in. That's the  
15 statutory language. I'm at a loss to understand what that  
16 means. It, in a sense, almost swallows the rule because it  
17 says a commodity is anything in which there's a contract for  
18 future delivery that exists now or might be dealt with in the  
19 future.

20 MR. HAVEMANN: I have not focused on that specific  
21 language. I have a lot of colleagues at the table who I'm sure  
22 will have a good answer to that question, but I don't want to  
23 get over my skis here, so why don't I confer with them, and  
24 when I get up on reply, I'd be happy to talk about that.

25 THE COURT: Well, I don't want to spend too much

1 time on it because it really just gets to whether or not,  
2 again, this falls within the definition of a swap or a  
3 commodity, so I'm going to set that aside temporarily.

4 We talked about the coin flip. Could you or your  
5 clients or me bet on the outcome of the D.C. Circuit Court of  
6 Appeals' decision on your client's appeal there?

7 MR. HAVEMANN: I don't -- I certainly don't believe  
8 that Kalshi has a contract on that, so --

9 THE COURT: But it could? There's certainly  
10 economic decision as a result, economic consequences. The  
11 purpose of a commodity, as you describe in your papers, is  
12 somebody wants to hedge their bets. In case corn futures drop,  
13 I want a protection on the back end.

14 Certainly Kalshi could want to hedge its bet that it  
15 loses in the D.C. Circuit, so it could, theoretically, create a  
16 market and buy and sell contracts on the results of its appeal  
17 of the D.C. Court of Appeals.

18 MR. HAVEMANN: Yeah. So the reason I'm hesitant to  
19 answer the question is just because I know that there are  
20 people within the company who sort of make these decisions and  
21 may have made decisions with respect to any particular example  
22 that you give, so I want to make sure that I'm giving Your  
23 Honor an answer that's consistent with my client's views. So,  
24 again, I'm happy to confer and answer that question when I get  
25 back up, but I think --



1 THE COURT: Not that they would, but from a legal  
2 standpoint, that would fall within the definition of a swap or  
3 a commodity, correct?

4 MR. HAVEMANN: I can see the argument that that  
5 would be true because as long as it, you know, has financial  
6 consequences, which often court cases will, so yes.

7 And, of course, there are protections that Kalshi  
8 offers. I mean, this gets to one of their arguments about the  
9 public interest, and they say, well, you know, when we regulate  
10 a sportsbook, we make sure that there's no self-dealing. I  
11 want to be clear, you know, to the extent the Court has  
12 questions about that, I'm happy to answer them, but with  
13 respect to basically everything that they lay out as a  
14 protection that they would provide if Kalshi were subject to  
15 State regulation, there are Federal analogs. So know your  
16 customer, anti-money laundering, making sure that there's no  
17 self dealing, all of that is already required by Kalshi and  
18 it's required by -- you know, the CEA imposes 23 core  
19 principles -- you know this from our briefing, but this is  
20 extensively regulated. So to the extent that the State is  
21 saying, you know, these are unregulated sportsbooks, that is  
22 simply not correct. They are heavily regulated by a Federal  
23 authority.

24 THE COURT: Let's focus on that, because you raised  
25 the issue. I noted that in your client's contracts for the

1 Final 4, who qualifies for the Final 4, there are rules that  
2 Kalshi sets up, including you can't engage in this market if  
3 you're a coach or a participant or an alum or something like  
4 that. But what I don't know is, what's the enforcement  
5 mechanism?

6 For instance, the Nevada Gaming Control Board has  
7 investigators, it goes out and looks for point shaving. They  
8 look at oddities in the sports betting, and that helps them  
9 identify when there's problems. And that's one of the great  
10 facilities and services that the Gaming Control Board provides  
11 to ensure legitimate betting. I see rules that Kalshi puts in  
12 place, but how does it monitor? How does it do anything to  
13 make sure those rules are followed and not broken?

14 MR. HAVEMANN: So I can give Your Honor a high-level  
15 answer, and then I think I can be able to give a more specific  
16 answer, but the high-level answer is that the CEA requires, so  
17 one of the core principles requires any designated contract  
18 market to have the ability to make sure that its rules are  
19 being followed. So Kalshi has compliance officers and the like  
20 that look into this very thing.

21 So if Your Honor needs a more specific answer, I'm  
22 happy to provide it, but the high-level answer is, as required  
23 by the CEA, one of, or I think actually more than one of, the  
24 core principles deal with precisely this issue, that is, making  
25 sure that designated contract markets have mechanisms in place

1 to make sure that their rules are complied with. And that's  
2 certainly true of Kalshi.

3 And that's why it's, frankly, quite difficult to  
4 obtain designation as a contract market. It is a very, very --  
5 it is a comprehensive and difficult-to-meet statutory scheme,  
6 and that's why it is so important to Kalshi that it maintain  
7 its designation under the CEA. And one of the things we note  
8 is, you know, part of our worry in this case is that if, you  
9 know, Nevada, let alone not just Nevada but many other States,  
10 can exercise authority over Kalshi and say, well, you know, we  
11 think that you're really a sportsbook and, therefore, we think  
12 you have to cease your operations in the state, that is really  
13 in conflict with core principles to which Kalshi is subject.

14 THE COURT: I get that. I get that. On that point,  
15 though, you say in your reply at Page 7 that preemption would  
16 simply prohibit Nevada from subjecting Kalshi to State laws  
17 that conflict with Federal law. But what about State laws that  
18 are complementary to the CEA? For instance, as we just talked  
19 about, the Nevada Gaming Control Board has rules and  
20 regulations to catch point shaving. They have investigators  
21 and things like that to catch cheats, which certainly furthers  
22 the purposes of the CEA and furthers the purposes that Kalshi  
23 would like to uphold. So is there room in the CEA and this  
24 regulatory scheme for Nevada gaming laws that complement CEA's  
25 purposes?

1 For instance, regulations that say, just like the  
2 Federal law, we need to see disclosures, we need to see  
3 enforcement, we're going to look at cheats and things like  
4 that?

5 MR. HAVEMANN: Yeah.

6 THE COURT: Or is that preempted completely, too?

7 MR. HAVEMANN: So the answer is it's preempted  
8 completely, and that derives from the language of the statute.  
9 It derives from that exclusive jurisdiction provision.

10 THE COURT: But it's not a conflict; it's a  
11 complement. It's a complementary law.

12 MR. HAVEMANN: Right. But, of course, there are two  
13 types of preemption at issue here. One is field preemption  
14 which preempts the field. It even preempts, you know, State  
15 regulation that is perceived to be complementary. And then  
16 there is conflict preemption which deals with actual conflicts.

17 So with respect to field preemption, it would be  
18 preempted even if it were correct that State law is  
19 complementary.

20 With conflict preemption, it is true that as a  
21 matter of -- as a theoretical matter, complementary State laws  
22 are not conflicted, but the problem here is that the scheme to  
23 which Nevada is threatening to subject Kalshi is not, in fact,  
24 complementary. Even if there are particular provisions that  
25 one could look at and say, well, I sort of think that's the

1 same as what the CFTC is trying to do, when you look at the  
2 scheme as a whole, the threat of criminal penalties, the threat  
3 of massive civil liability, the -- you know, all of the  
4 respects in which what they are requiring Kalshi to do would  
5 imperil Kalshi's Federal regulatory authority. All of that  
6 shows that there is an actual conflict here.

7 THE COURT: All right. Let me back up again  
8 factually and make sure I understand how your client operates.

9 Kalshi is a facilitator. It's the platform, the --  
10 well, it creates the markets, but let's say it's the platform  
11 that hosts these various markets for contracts. So it creates,  
12 I'm presuming -- it creates the question or the contract that  
13 someone is then going to buy or sell, correct?

14 So Kalshi says, we're going to create the question  
15 "Who's going to qualify for the Final 4?" That's a  
16 Kalshi-created question that, in a sense, sits on the platform,  
17 and then buyers and sellers come in and out of that?

18 MR. HAVEMANN: That is correct.

19 THE COURT: Who sets the initial price? The first  
20 person who comes in and says, I'll buy that for a dollar? Or  
21 somebody says, I'll sell that for a dollar? Or does Kalshi set  
22 the initial price?

23 MR. HAVEMANN: Kalshi does not set the initial  
24 price, and I don't know -- with respect to the initial price, I  
25 would want to confer with Mr. Heaslip, but I suspect that there

1 is sort of sufficient demand for a contract before it goes  
2 online so that there's a sense of what the contract -- starting  
3 contract price would be and then it fluctuates, depending on  
4 how facts on the ground play out, how traders view the  
5 contract.

6 THE COURT: Okay. So presume for a second it's like  
7 an auction. I'm going to auction the question of "Who's going  
8 to qualify for the Final 4? Is there an opening bid?" And  
9 somebody then -- that way -- because the point is Kalshi  
10 doesn't set the price?

11 MR. HAVEMANN: I -- yes, that is true. And I want  
12 to make sure I have a precise answer to Your Honor's question  
13 on the more specific point, but yes.

14 THE COURT: I appreciate it. But the point you've  
15 made in your papers is, that's why it's not the house like a  
16 sportsbook, because you're not setting the price that everybody  
17 has to to bid at, correct?

18 MR. HAVEMANN: Yes, that is correct.

19 THE COURT: How does Kalshi make its money on these  
20 contracts?

21 MR. HAVEMANN: It takes a small percentage fee of  
22 each, like other exchanges. So -- or like a stock change, it  
23 takes a small percentage fee of the contract price. And it  
24 does not benefit depending on someone winning or losing. And  
25 that is, again, one of the big differences between Kalshi and

1 the types of entities that I think the Board may be concerned  
2 with because, there, sportsbooks, or the house, they set a  
3 line, they set a line in a way that they believe is  
4 advantageous to them. They stand to benefit from setting the  
5 line in a particular way. The same incentives, the same  
6 opportunities for abuse, do not apply to Kalshi, and that is,  
7 in part, what justifies the very different regulatory treatment  
8 that the exchanges get --

9 THE COURT: Although sportsbooks in Nevada usually  
10 charge what's called a vig or a vigorish, whereby we'll take  
11 the money and try to get the bets on either side, so we  
12 ultimately at least prevail on the vig. That doesn't always  
13 work, so in a sense, there's a similarity there because we've  
14 got a commission, in a sense, on what's bet.

15 Regardless, if I pick the Vegas Golden Knights to  
16 win the Stanley Cup, that's a contract that's, say, on the  
17 market, and I say, yes, VGK is going to win the Stanley Cup and  
18 I succeed in that bet -- that contract, I apologize -- and it's  
19 \$100, who do I collect my \$100 from?

20 MR. HAVEMANN: From the counterparty. From your  
21 counterparty to the contract.

22 THE COURT: Does that money go through Kalshi to me,  
23 or is it I've gotta contact them and collect from them  
24 directly?

25 MR. HAVEMANN: This gets very technical. I know

1 that there is a clearinghouse that Kalshi uses. I know that  
2 that is subject to Federal regulation and Federal oversight and  
3 obligation, so I would need to again confer just to make  
4 sure -- I want to make sure I'm being very precise and not  
5 saying anything wrong --

6 THE COURT: Of course.

7 MR. HAVEMANN: -- but you collect from a  
8 counterparty. It may go through an intermediary. The  
9 intermediary itself is heavily Federally regulated. And then  
10 it comes to the person who prevails or who, you know --

11 THE COURT: So if I don't get paid, I send my  
12 kneecappers to the person who made the offer? The person  
13 that -- my counterparty on the wager, on the contract, is who I  
14 ultimately get my money from?

15 MR. HAVEMANN: Is who you ultimately get your money  
16 from, that's correct.

17 THE COURT: So that person is the person who, in a  
18 sense, sets the price of the contract, right? Because they  
19 say, I'll bet -- I'll contract for \$100, I'll take that  
20 contract, and so then they're my opposing counterparty?

21 MR. HAVEMANN: Yes. That's right.

22 THE COURT: In a sense, the other market participant  
23 is more like the house and the sportsbook because they're  
24 setting the price?

25 MR. HAVEMANN: That's right. And that creates the



1 different incentives that, you know, distinguish the way -- and  
2 I want to be careful to say because it distinguishes the way  
3 that Kalshi is regulated because, of course, it is heavily  
4 regulated, but it distinguishes it from --

5 THE COURT: Right. So that's why Kalshi is not the  
6 house, it's not the sportsbook. In a sense, the other market  
7 participant is the house or the sportsbook because they're  
8 setting the price. And they're not a regulated market  
9 participant like Kalshi is, so the Gaming Control Board could  
10 regulate the market participants because they're not regulated  
11 market participants, but they're like the house setting the  
12 price.

13 MR. HAVEMANN: I'm not sure. I want to make sure  
14 I'm understanding Your Honor's question.

15 THE COURT: Let me try to explain it better because  
16 I did a bad job.

17 Your argument in your papers is that the CFTC  
18 governs market -- governs those participants who are approved  
19 by the CFTC.

20 MR. HAVEMANN: Designated contract markets, that's  
21 right.

22 THE COURT: Yes. Okay. So the market  
23 participants -- Kalshi's an approved CFTC market participant.  
24 The people who are buying and selling the contracts are not  
25 CFTC approved or regulated, so they're subject to Gaming

1 Control Board regulation because they're not approved by CFTC.  
2 They're more like the house setting the bet price, so the  
3 Nevada Gaming Control Board can go and regulate the market  
4 participants because they fall outside of the CEA by  
5 definition?

6 MR. HAVEMANN: I'm not sure what authority the  
7 Gaming Control Board would have --

8 THE COURT: Because here's their authority: You say  
9 that the CFTC has exclusive jurisdiction over people, entities,  
10 whatever, that are approved by the CFTC. Mom and Pop, Joe and  
11 Fred dealing with contracts are not approved by the CFTC.  
12 They're the buyer and seller of the contracts. So they're not,  
13 by definition, subject to the exclusive jurisdiction of the  
14 CEA. So, therefore, because they are not registered with the  
15 CFTC, Gaming Control Board can regulate them.

16 MR. HAVEMANN: I think I follow Your Honor's  
17 question. I think -- and I want to be very precise in the  
18 answer. What the Gaming Control Board is trying to do here is  
19 to take Kalshi's contracts off the market. So that is a clear,  
20 in our view --

21 THE COURT: I get that. I'm going a little far --

22 MR. HAVEMANN: So to the extent it's regulating  
23 Kalshi, we think there's a serious problem here. If the Board  
24 thinks it has some other authority to not regulate Kalshi but  
25 to regulate others, I mean, I would still think that you would

1 have a big problem there because you'd just be sort of  
2 circumventing the plain language of the statute by saying,  
3 well, we're -- you know, I don't even know -- exactly know how  
4 they would do it because in order to regulate the market  
5 participants, I would think that you would have to regulate the  
6 exchange. But then you could have a fight about -- I mean, I  
7 can imagine arguments on both sides of that question --

8 THE COURT: Sure.

9 MR. HAVEMANN: -- but that is very different from  
10 what, you know, the Board sent a cease and desist letter to our  
11 client threatening criminal and civil liability to --

12 THE COURT: Let me stop you. I agree. I'm getting  
13 far afield here, but I'm trying to sort of understand the  
14 parameters of the argument you're making sort of with pushing  
15 the envelope on certain examples to test this exclusive  
16 jurisdiction argument. That's why I'm sort of playing around  
17 with it a little bit.

18 MR. HAVEMANN: Sure. And maybe one, if I may, one  
19 helpful articulation of the standard that we think applies  
20 comes from the 7th Circuit, which addressed an argument I think  
21 much like the one that the Board is making here. And what the  
22 7th Circuit said in addressing the very same statutory language  
23 we have here is, if a State law would directly affect trading  
24 on or the operation of a futures market, it is preempted. And  
25 that's from the *American Agriculture Movement* case from 1992.

1 And we think that that is right.

2 And so Courts have sort of -- you know, there's a  
3 line between what would directly affect trading on a market and  
4 what would not, and so Courts have found that if you're  
5 bringing a fiduciary breach claim against your broker maybe  
6 that's not preempted, but here, I think the -- I don't really  
7 see any argument that's not a direct regulation of the market  
8 itself.

9 THE COURT: Well, let's test that for a second. I  
10 don't disagree that's what the 7th Circuit said, but let's talk  
11 how broad that language goes, because if the State law would  
12 directly affect trading on the operation of your market, so  
13 your market is who wins the Final 4 -- and that's clearly  
14 within the CFTC is what you're arguing, that's one of your  
15 contracts -- sportsbooks here in Nevada take a whole bunch of  
16 bets on who makes the Final 4. The Nevada Gaming Control Board  
17 and Gaming Commission regulate all of that through sportsbooks.  
18 The competition between a sportsbook and your client's  
19 contracts on the Final 4 directly affect each other. So if you  
20 take that 7th Circuit language that anything that directly  
21 affects your operations would be barred or preempted, that  
22 would suggest that Nevada cannot regulate gaming, betting on  
23 the Final 4, because they're going to take away market  
24 participants from your market because people want to bet in a  
25 sportsbook. So where's the cutoff there?

1 MR. HAVEMANN: So that's certainly not our argument  
2 and that's not how Courts have interpreted the 7th Circuit's  
3 language, and I think it's a question of attenuation. So, you  
4 know, if what you're saying is there's a, you know, act on the  
5 part of a third-party that affects a third-party that affects  
6 the trading on a DCM, or designated contract market, maybe  
7 that's sufficiently attenuated from a State law that affects  
8 the designated contract market itself that a Court would say,  
9 it's not direct -- it does not directly regulate the DCM and,  
10 therefore, it's subject to regulation by a State, but I don't  
11 think the Court needs to touch any example like that to rule in  
12 our favor in this case because we are, I think, in the  
13 heartland of what the 7th Circuit's language clearly  
14 contemplates.

15 And I would add, it's not just the 7th Circuit's  
16 language; it's the D.C. Circuit's language, it's Judge  
17 Friendly's language in the 2nd Circuit --

18 THE COURT: Yeah, I read your brief.

19 MR. HAVEMANN: -- it's what the CFTC said in its  
20 D.C. Circuit brief just a few months ago about how State laws  
21 are preempted here, so --

22 THE COURT: But, again, you know, what's the breadth  
23 of that preemption? If you take that language on its face that  
24 you just read to me, the fact that Nevada gaming laws allow  
25 sportsbooks to operate, that's in direct competition with your

1 client's business. That's a direct effect on your client,  
2 because someone could bet on the Final 4 with a sportsbook or  
3 someone could place a contract offer on the same thing with  
4 your client. That's not attenuated three parties around;  
5 that's direct competition.

6 And so taking your argument to its next logical  
7 conclusion, there is no space for the Nevada gaming laws  
8 whatsoever if they compete with your client.

9 MR. HAVEMANN: So that's -- again, that's certainly  
10 not our argument. And I --

11 THE COURT: Where's the line drawn, then? What  
12 happens tomorrow when the gaming -- when somebody else tries to  
13 do something in that regard? You can't touch it?

14 MR. HAVEMANN: The question is whether it's direct,  
15 and I respectfully think, in response to your hypothetical, I  
16 would argue that that is not a direct regulation of the market  
17 itself. It's -- it directly -- it's an indirect regulation  
18 because you have an effect on one party, and the effect on that  
19 party affects the designated contract market.

20 And so I think that -- I mean, you know, you would  
21 have briefing and you would have arguments about whether the  
22 effect is direct or not, but for present purposes, I don't see  
23 any -- I did not see any argument in the State's opposition  
24 that this is not a direct effect. I don't -- I cannot come up  
25 with such an argument myself. And I think that -- so I think

1 that, you know, the Court can leave those hard questions to the  
2 side about where exactly the line is with respect to preemption  
3 because I think we are in the heartland of it.

4 And particularly -- I mean, I know the Court read  
5 our brief, so I don't want to recapitulate things that we've  
6 already said and you already know, but I do want to state for  
7 the record, we are here on a TRO and so the question is  
8 likelihood of success on the merits. We have clear statutory  
9 language. We have all this weight of authority. We have the  
10 purpose of the 1974 amendments. We have a conference report.  
11 We have all of these indicia of Congressional intent that  
12 suggest that Congress did not want States to do exactly what  
13 the Gaming Control Board is doing here.

14 And what we are asking this Court to do today is not  
15 to rule for us at the end of the day but to prevent the State  
16 from subjecting us to irreparable harm in the meantime. And I  
17 do want to emphasize that irreparable harm in the meantime.

18 THE COURT: You read my mind. I'm getting there  
19 right now. Let's talk about irreparable harm.

20 Why do you need an injunction against enforcement?  
21 Can't you just defend when -- and I'll use "when," not "if" --  
22 but when the State of Nevada comes after your client, can't you  
23 defend and simply say, these laws are preempted, Nevada Court  
24 is going to follow the law, presumably? Why do you need it now  
25 ahead of time?

1 MR. HAVEMANN: Because we are in an impossible  
2 choice in the meantime. And this is exactly what Justice  
3 Scalia noted for the Court in the *Morales* case that we cite in  
4 our opening memorandum and in our reply. It's a Hobson's  
5 choice, right? You either have to subject yourself to the risk  
6 of potentially massive liability if it turns out that a Court  
7 disagrees with you on the law, or you have to undergo all of  
8 the irreparable costs of compliance during the time it takes  
9 this Court to resolve the question and any appeal. And what  
10 Justice Scalia said for the Court in *Morales* is it is Hobson's  
11 choice. That is a classic case for injunctive relief, and  
12 there are many other cases that say the same.

13 And I'll note that the State says that, well, these  
14 are monetary harms and you can normally recoup monetary harms.  
15 The key point for present purposes is, this is an *Ex Parte*  
16 *Young* case, it's against State officials, so the availability  
17 of damages is far from clear and probably --

18 THE COURT: But isn't this a self-created harm? I  
19 mean, you -- your client put out these election contracts even  
20 after the CFTC took the appeal to the Court of Appeals, even  
21 after the CFTC said you shouldn't do it, so in a sense, you've  
22 created your own Hobson's choice. You've created your own  
23 harm.

24 MR. HAVEMANN: Oh, no, Your Honor. I mean, in any  
25 case in which a State law is, you know, alleged to be



1 preempted, presumably there is an entity that is violating the  
2 State law, and the question is, they're entitled -- the State  
3 law does not operate against them because Federal law operates  
4 on them, and what Kalshi is doing is entirely permissible under  
5 Federal law. And so it's not, you know, a self-inflicted  
6 injury because, you know, Kalshi, just like the Chicago  
7 Mercantile Exchange, just like every other designated contract  
8 market, had every reason to look at the statutory scheme that  
9 applied to them and think, we are entitled to offer these  
10 contracts as long as, you know, the CFTC says we are.

11 THE COURT: And it could have sought pre-approval  
12 from the CFTC under the statutes and avoided significant  
13 questions here. It can submit this for pre-approval, and it  
14 didn't.

15 MR. HAVEMANN: It can, but it does not have to. And  
16 the key -- but, you know, Your Honor referenced the political  
17 event contracts. I mean, the key point I would emphasize to  
18 Your Honor is that Kalshi prevailed. So, you know, talking  
19 about conflict preemption --

20 THE COURT: In one Court.

21 MR. HAVEMANN: -- we have a judgment from the  
22 Federal Court that says these contracts are permissible under  
23 Federal law.

24 THE COURT: And the CFTC's challenging that.

25 MR. HAVEMANN: And the CFTC is challenging that, but

1 we have a final judgment. But the point is that regardless of  
2 whether the CFTC prevails on appeal or not, the key point  
3 stands, which is that this is a job for the CFTC. This is a  
4 judgment that Congress gave to the CFTC. It is not a judgment  
5 that Congress wanted 50 States and the District of Columbia to  
6 be able to make because, in the view of the sponsor of the act,  
7 that would lead to total chaos. That was the point of the 1974  
8 amendments, to protect subjecting exchanges like Kalshi to 51  
9 different potentially conflicting regulatory schemes, which  
10 would be just untenable in practice.

11 THE COURT: All right. Let's focus a little more on  
12 the damages. You describe the geofencing, or the lack of the  
13 need to do it at this point. No doubt it's, I'm guessing,  
14 expensive to install geofencing, but I don't have any evidence  
15 in front of me that says it's so expensive that it would  
16 essentially run Kalshi out of business.

17 MR. HAVEMANN: There is evidence in the declaration  
18 that it would cost to the tune of tens of millions of dollars a  
19 year.

20 THE COURT: Right, but I don't know if your client's  
21 making billions or if it's making hundreds of millions or if  
22 it's making tens of millions, in which case then there is that.  
23 But it's one thing to say it costs X, but \$10 million to IBM is  
24 different than \$10 million to Joe's Taco Shop.

25 MR. HAVEMANN: So I can certainly represent to you

1 that this would be extraordinarily expensive for the company.  
2 And I can also point Your Honor to the -- it's the *Simula* case,  
3 which is actually cited in the defendants' opposition, which  
4 makes clear that irreparable harm does not require, you know,  
5 catastrophic out-of-business harm. The question is irreparable  
6 harm, and so the key point for these purposes is that this is  
7 tens of millions of dollars, it's months of negotiation that  
8 Kalshi could not get back even if it prevailed in this lawsuit.  
9 And that is all we need to show for purposes of irreparable  
10 harm.

11 And, of course, we show far more because, separate  
12 and apart from the significant monetary harm that Kalshi would  
13 suffer from trying to comply -- and, again, I emphasize trying  
14 to comply because it's not clear that it really could comply in  
15 the short-term or immediately as the Board requires. And in  
16 the meantime, of course, it is incurring potential liability.  
17 But separate and apart from the monetary harm, there are other  
18 harms that we identify in the declaration --

19 THE COURT: Yeah. You brought up the Robinhood  
20 deal. Again, why isn't that compensable? It's a monetary  
21 loss. You lose the Robinhood deal, you either sue Robinhood  
22 for improperly backing away from the deal, or there's some  
23 other monetary remedy. How is that irreparable harm?

24 MR. HAVEMANN: Because I'm not sure -- I want to be  
25 quite clear in my answer, but I'm not sure that there would be

1 a remedy against Robinhood. Robinhood may well have been  
2 within its rights to do this, but the reason it did it was  
3 because of the threat by Nevada and other states. And so we  
4 may not have a remedy against Robinhood. And the wrongdoer, in  
5 our view, or the person who caused this injury is the State,  
6 and we don't have a remedy against the State officials sued in  
7 their official capacity.

8 THE COURT: Okay. Switch gears. You state in your  
9 papers that you've got 10,000 Nevada users with millions  
10 invested, but I guess the question is, how many of those  
11 contracts are sports or election-related that the Government  
12 seeks -- that the Nevada Government seeks to stop you from  
13 doing?

14 MR. HAVEMANN: Well, I want to be very clear about  
15 the language of the cease and desist order. The language of  
16 the cease and desist order refers to all event contracts in  
17 Nevada, not just sports or elections.

18 THE COURT: Fair enough.

19 MR. HAVEMANN: So that's why the declaration is  
20 written that way, because, you know, we would want to take an  
21 abundance of caution. We have a letter from the State that  
22 says all of your contracts are unlawful, and so we take that  
23 very seriously.

24 THE COURT: So if you stopped all of the  
25 Nevada-based market participants, how many is that? How big of

1 a percentage of your client's business? Again, how is that  
2 irreparable in the sense what's the impact on your client's  
3 business? Is it a drop in the bucket? Is it a huge amount?

4 MR. HAVEMANN: Well, it's the same answer. It's  
5 irreparable in the sense that we can't get it back. And it is  
6 significant. It's not de minimis or anything like that. It is  
7 significant and it's irreparable in the sense that you can't  
8 get it back, and that's what the law requires. It does not  
9 require it to, you know, be so catastrophic that it puts the  
10 company out of business.

11 But I also note -- and this is also in the  
12 declaration -- that, you know, because these are contracts  
13 between counterparties, you have Nevada users who have open  
14 positions on the platform, and they are not necessarily, or  
15 even probably, in contracts with other people in Nevada, so  
16 this has spillover effects not just in Nevada but outside of  
17 Nevada. And no matter how we understand the Board's cease and  
18 desist letter, there would be harm to users.

19 THE COURT: Okay. What standing do you have to  
20 raise the harm to the users? That's their damage, not yours.  
21 They're the ones that lose the millions of dollars, not you.

22 MR. HAVEMANN: Oh. So for purposes of Article III  
23 standing, I mean, the State has not disputed our Article III  
24 standing here and so we are not relying --

25 THE COURT: I always have to look at it.

1 MR. HAVEMANN: -- we are not relying on harm to  
2 users for purposes of establishing standards --

3 THE COURT: It's in your papers, significantly.

4 MR. HAVEMANN: But not for purposes of establishing  
5 standing, Your Honor. And I want to be clear about that. For  
6 purposes of the equitable factors that this Court --

7 THE COURT: Let me pause you. I'm interrupting you.  
8 I apologize.

9 You refer in your papers to the damages that your  
10 market participants will suffer as if that's a damage that I  
11 should consider in irreparable harm, but you don't have  
12 standing to raise that damage because that's a harm to your  
13 investors. They're the ones that suffer the millions because  
14 they're the ones that make the -- make the contract wagers.  
15 You lose your vig, your commission.

16 MR. HAVEMANN: So we do not rely on harm to users  
17 for purposes of establishing standing, but it is entirely  
18 appropriate for this Court to consider harm, not just to  
19 Kalshi, but to third-parties in weighing the equitable factors  
20 that the Court considers in deciding whether to issue  
21 injunctive relief.

22 In *Stormans v. Selecky*, which is a case that we  
23 cite, I believe in our opening memorandum, it makes clear that  
24 you can consider harm to non-parties in evaluating especially  
25 the public interest, which is the last of the factors the Court

1 considers. And if complying, you know, because complying with  
2 the Board's demands here would impose substantial harm on  
3 third-parties, that is certainly appropriate for the Court to  
4 consider in evaluating injunctive relief.

5 THE COURT: Okay. You assert in your papers that  
6 Kalshi could lose its CFT designation as part of your  
7 irreparable harm, the core principles argument, but Kalshi has  
8 to show a likelihood of irreparable harm, not a mere  
9 possibility. So what evidence do you have that the CFTC is  
10 likely to pull your registration or designation as a result of  
11 the Nevada Gaming Authority's prohibiting you from taking  
12 Nevada-based wagers?

13 MR. HAVEMANN: Well, the... Of course, anytime a  
14 party comes to the Court seeking a TRO, it's because they are  
15 predicting future consequences, so in that sense, the harm has  
16 not occurred. We can't say for 100 percent certainty --

17 THE COURT: I get it. What's the likelihood that  
18 it's going to happen?

19 MR. HAVEMANN: But the likelihood is, if you look  
20 at the -- you know, the plain text of the core principles, the  
21 two that we focused on, but there are others, are you have to  
22 offer impartial access to your platform and you have to do --  
23 take best efforts to avoid market disruptions. And if Kalshi  
24 were to voluntarily comply with the State's demand while this  
25 case were litigated, they're -- you know, it is very difficult

1 to reconcile cutting off access to contracts, even open  
2 contracts, to members of one state with the obligation to  
3 make -- to offer impartial access and to avoid market  
4 disruptions because the market disruption from that would be  
5 significant.

6 THE COURT: Let me pause at the solution to that.  
7 Under the statute, you can seek pre-approval. And so you go to  
8 the CFTC and say, Nevada's not allowing us to take Nevada bets.  
9 We propose setting up this contract to exclude Nevada bets,  
10 wagers, acceptances on the contracts. CFTC blessed this, if  
11 you would, it's not our fault, we're trying to be across the  
12 board, open to everybody, but we're prohibited by State law, so  
13 bless this.

14 They bless it or they don't, but that absolves you  
15 from a problem of a core principle violation. Isn't that a  
16 solution to your problem so it's no longer irreparable harm.

17 MR. HAVEMANN: I don't think so, Your Honor, because  
18 that still leaves the problem of open positions.

19 THE COURT: The open positions, maybe, going  
20 forward. Okay.

21 MR. HAVEMANN: And going forward, I think there  
22 would be other issues with that. And if the Commission says  
23 no, the Commission says --

24 THE COURT: Then you don't do it.

25 MR. HAVEMANN: And then you incur the irreparable



1 harm of complying in the meantime. And all of this is so  
2 uncertain. I mean, all of this is so uncertain that this is  
3 really the point of coming to a Court and seeking a temporary  
4 restraining order is you have the certainty of massive  
5 financial harm, you have the risk of imperilling your CFTC  
6 designation, which would be catastrophic. It would be  
7 existential to Kalshi. You have the harm to users and you have  
8 the reputational risk. And the reputational risk is a  
9 certainty.

10 I mean, the analogy here is if the Chicago  
11 Mercantile Exchange said, hey, sorry, I know you have open  
12 contracts with us, but we are cutting them off in a particular  
13 state. That is unfathomable and that is what we are -- that is  
14 what the Board is contemplating here. And the next time a  
15 trader wants to place a position, are they really going to do  
16 it on a platform that is subject to that kind of volatility,  
17 that kind of uncertainty, not just in Nevada, but other states?  
18 And that is something that cannot be regained even if we  
19 prevail at the end of this lawsuit. And that is another  
20 independent irreparable harm.

21 THE COURT: Shifting gears, should I ask the CFTC to  
22 chime in on its position on preemption and the legality of  
23 sports-based contracts?

24 MR. HAVEMANN: We would welcome the CFTC's  
25 participation and feel confident that they would support us.

1 THE COURT: If I decide I need an evidentiary  
2 hearing on irreparable harm, how long -- think about this. You  
3 don't have to answer now. I'm going to throw this out to the  
4 other side, too, but how long would it take for you all to get  
5 ready for that?

6 MR. HAVEMANN: I'll think about that, Your Honor,  
7 and I can represent that we would do it as quickly as possible.

8 THE COURT: Okay. Let's turn to bond, as required  
9 by the rule. You say a de minimis bond, but I need to  
10 anticipate potential damages that could arise as a result of an  
11 improperly imposed restraining order. So what are the damages  
12 to the defendants if I improperly restrain it, in your mind,  
13 that would lead to a bond amount?

14 MR. HAVEMANN: I'm not sure I can represent the  
15 defendant's harm. I mean --

16 THE COURT: I'm just guessing, if you've got any  
17 thoughts. Here's the thought that came to me: The State of  
18 Nevada contends it's here to protect the Nevada public from  
19 illegal improper sports betting. Accepting that as true for a  
20 second for purposes of the bond amount, the injury would be to  
21 all Nevadans who invested in these allegedly illegal sports  
22 contracts. So that would suggest the bond amount would be  
23 equal to whatever contracts, wagers, bets, whatever you want to  
24 call them, that Kalshi accepts from Nevada people. Why is that  
25 not an appropriate bond amount?

1 MR. HAVEMANN: I'm not sure even the State would --  
2 or the Board would argue that the entire amount of --

3 THE COURT: They're probably going to now, but go  
4 ahead.

5 MR. HAVEMANN: Now that you've floated that  
6 proposition. They certainly didn't argue it in their  
7 opposition.

8 I don't know that it is a tenable argument to say  
9 that the full value of the contracts is the amount that the  
10 State would lose. And, remember, this is the monetary value  
11 that the State would lose in the event that an injunction is  
12 issued and they ultimately prevail. So I don't think that they  
13 stand to lose anything because their position is these  
14 contracts are unlawful.

15 So if they're claiming they're worried about, you  
16 know, missed tax revenue, they wouldn't get that tax revenue  
17 under their interpretation of the law because these contracts  
18 would not be permitted under law. So that is sort of the  
19 argument that I expected to see in the opposition and didn't.

20 So I don't know that they have really made any  
21 argument from which I could make a determination about what the  
22 appropriate bond is, and for that reason I don't think that a  
23 bond is necessary. And there are cases that say that in this  
24 sort of case it's not necessary for the Court to issue a bond,  
25 but if you do, I think a de minimis bond is appropriate. And,

1 of course, should the Court disagree or be persuaded, you know,  
2 we do not want the size of the bond to be the hold-up here and  
3 so we would do our -- obviously do our best to comply.

4 THE COURT: All right. Let me go beyond that and  
5 say -- or ask you, what do you see as the future to this case  
6 after today? If an injunction is entered or an injunction is  
7 denied and we have an evidentiary hearing, is this purely a  
8 legal question going forward? Do you see the need for an  
9 evidentiary trial? Is it just we'll do briefs later, cross  
10 briefs on summary judgment or something, or how do you see --

11 MR. HAVEMANN: I have given some thought to that  
12 question, Your Honor, but I would want to make sure that I  
13 confer with the client before I stake a position on that. But  
14 my high-level answer is, I think this is largely a legal  
15 question and I hope that it can be resolved promptly.

16 THE COURT: That was my initial thought, too.

17 All right, I've beaten up on you enough. Anything I  
18 didn't cover that you want to make sure I know? I'll call you  
19 back up for rebuttal because you get the last word, but  
20 anything else?

21 MR. HAVEMANN: No. Thank you very much, Your Honor.

22 THE COURT: Thank you for suffering my questions.

23 Well-done.

24 Ms. Whelan?

25 MS. WHELAN: Good morning, Your Honor.

1 THE COURT: Let me begin by asking if you agree that  
2 Kalshi's exchange is registered designated by the CFTC. You  
3 don't dispute that, correct?

4 MS. WHELAN: Correct.

5 THE COURT: And why doesn't the CFTC have exclusive  
6 jurisdiction over that exchange?

7 MS. WHELAN: Well, they do have exclusive  
8 jurisdiction over the exchange itself. Nevada does not want to  
9 come in and regulate the exchange. It wants to leave that to  
10 the Feds, believe me.

11 What Nevada wants to do is protect Nevada consumers  
12 and the perception of the gaming industry in Nevada, which as  
13 Your Honor knows, is one of the preeminent gaming industries in  
14 the country. So we're here to protect the integrity of the  
15 industry, we're here to protect Nevada consumers, and we're  
16 here to protect against the Federal Government's encroachment  
17 on the State's -- the State's police power, you know, the 10th  
18 Amendment traditional realm of regulation that the State itself  
19 reserves.

20 THE COURT: All well and good, but the argument made  
21 in the reply is -- their argument is that CFTC has exclusive  
22 jurisdiction over regulated registered markets like this and  
23 whatever they do. And you're trying to say, no, the preemption  
24 doesn't apply to the field of gaming. They're not arguing  
25 that. They're arguing that it's over regulated markets and if

1 that happens to intrude upon gaming, so be it, just like if it  
2 happens to intrude upon agriculture, some States' agriculture  
3 law or something like that, it still says the statute says  
4 exclusive jurisdiction. How do you get beyond the language in  
5 the statute that gives the CFTC exclusive jurisdiction?

6 MS. WHELAN: Well, I think that the two regimes can  
7 exist in a complementary fashion. And I understand the  
8 language of the statute, but then when you look at the CFTC's  
9 definition of what is a swap or what is an event-based contract  
10 or -- you know, that falls under there, we talk about the  
11 economic consequences.

12 And you had this colloquy with my friend on the  
13 other side. There are economic consequences to virtually  
14 everything, I would say even the coin flip. I would say a prop  
15 bet where, will Maxx Crosby have more than one and a half  
16 sacks, still economic consequences, for Mr. Crosby, for the  
17 Raiders who probably have a better record when Maxx Crosby has,  
18 you know, more than one and a half sacks and so forth. So I  
19 think you have to look at how -- you know, how much are we  
20 going to allow this preemption?

21 Kalshi argues that it is any State law that  
22 interferes is going to be preempted. The legislature is in  
23 session right now. Let's say they pass a law that 18 is no  
24 longer the age for contracting; it's 19. Is that law preempted  
25 by the Federal -- the Federal field preemption? And can

1 18-year-olds in Nevada enter into these contracts but not any  
2 other contract in Nevada?

3 It's a similar situation to that hypothetical where  
4 we have, in the state of Nevada, 21 is our age to gamble, to  
5 place bets, to place wagers, but 18 is the contracting age.  
6 And so you have 18, 19, and 20-year-olds in Nevada who are able  
7 to place bets, for lack of a better term, on Kalshi's exchange  
8 without regulation, without dispute resolution mechanisms and  
9 things of that nature.

10 THE COURT: I get the argument and I get the concern  
11 wholly and the purposes behind the Nevada gaming rules, and the  
12 purposes that the Gaming Control Board and Gaming Commission  
13 are trying to enforce are good ones, but I'm getting hung up on  
14 the express language of the statute that says the exclusive  
15 jurisdiction is vested in the CFTC. And I'm charged with  
16 following the express language of statutes unless they don't  
17 apply. And that's what I'm trying to figure out is, how does  
18 the exclusive jurisdiction not apply here when it says, over  
19 swaps, over commodities? It seems to give the CFTC  
20 jurisdiction to decide, is this a swap? And if it's a -- comes  
21 in under a regulated market participant, that's the way it  
22 works.

23 MS. WHELAN: Well, I think Kalshi itself in its  
24 motion mentioned that, you know, in field preemption, we really  
25 look at the intent of Congress. So the CEA was first passed in

1 1936, amended significantly in 1974. When you look at the  
2 landscape of what was happening in America in those two time  
3 periods, Nevada was the only State where gaming was legal, the  
4 only State where you could place sports bets, so it's hard to  
5 see how sports betting as a commodity was in the contemplation  
6 of Congress at the time it passed these statutes.

7           Since 2018, obviously, and the U.S. Supreme Court  
8 case that allowed States to legalize sports betting, 39  
9 jurisdictions -- or sorry -- 41 jurisdictions, 39 States and  
10 then Washington D.C. and Puerto Rico, have legalized sports  
11 betting. That means, though, that in 11 other State  
12 jurisdictions sports betting is not legal. And so to say that  
13 states can't come in and regulate gaming means that Kalshi can  
14 go to California, Alaska, places where sports betting is not  
15 legal, and allow de facto sports bets.

16           THE COURT: How do I deal with, though, the language  
17 in 7 U.S.C. 7a-2(c)(5)(C)(v) that says -- that's the gaming  
18 reference -- that the CFTC can review contracts and may or may  
19 not determine that contracts involving gaming are valid or not?  
20 That seems to be a direct Congressional delegation of the  
21 regulation of gaming under this kind of market to the CFTC.  
22 How do you get around that?

23           MS. WHELAN: Well, that's a permissive delegation.

24           THE COURT: Yeah. Well, it's a delegation that says  
25 they may determine whether it's good or not.



1 MS. WHELAN: Yes. And I think looking at the  
2 specifics in this case is really important here because  
3 Kalshi's Complaint alleges that it began offering these  
4 sports-related event contracts on January 29 -- or sorry --  
5 January 24, 2025. What was happening then? We had this  
6 massive transition in Federal Government from President Biden  
7 to President Trump. I suspect it's no coincidence that they  
8 waited until January 24 to offer these.

9 And then taking counsel at his word that there's a  
10 ten-day period for the CFTC to step in and say, we want to look  
11 at this or we don't, you know, that's during a time of massive  
12 upheaval in Washington. And so could this have just skirted  
13 under the radar? Possibly. But to say that if the CFTC misses  
14 that ten-day window to come in and regulate means that no State  
15 can come in and say, hey, this is contrary to our -- you know,  
16 our gaming laws, our long and storied gaming laws that protect  
17 the consumers and protect the integrity, it just -- it seems to  
18 be an absurd result.

19 THE COURT: So if the CFTC had said, yes, we're  
20 going to allow it in that ten-day period, or looked at it and  
21 said, yes, we're going to allow it, that would take away your  
22 jurisdiction, then?

23 MS. WHELAN: I don't think so. I'd have a harder  
24 case arguing this, but I think we'd still have the 10th  
25 Amendment argument that the CFTC is overstepping into a realm

1 that is traditionally regulated by the States and it's  
2 something that wasn't within the contemplation of Congress at  
3 the time.

4 And as you know, *Chevron deference* has fallen by the  
5 wayside with the *Loper Bright* opinion, and so this Court is the  
6 body that has to interpret the statute and determine what the  
7 statute means. And so there's no -- there's really no  
8 deference to CFTC.

9 THE COURT: So the statute that I just read said  
10 that the Commission may determine that such contracts are  
11 contrary to the public interest if they involve gaming, we  
12 talked about, or sub i, any activity that's unlawful under any  
13 Federal or State law, which suggests that they could look to  
14 Nevada law and say, we don't allow 18-year-olds to gamble on  
15 sports betting. But if the CFTC looks at that under its  
16 authority and says it's not contrary to the public interest,  
17 we're allowing it, isn't that a delegation by Congress to the  
18 CFTC to make that determination and therefore takes it away?  
19 Because, otherwise, if Nevada tries to say, no, you can't do  
20 that, now we've got a conflict.

21 MS. WHELAN: Sure. And that's a conflict preemption  
22 question that, you know, would make my job here today a little  
23 more difficult if --

24 THE COURT: That's where we're at. I mean, that's  
25 exactly where we're at, because although the CFTC didn't say,

1 we officially bless this, they haven't yet said, it's bad, and  
2 the way Congress wrote the statute, Kalshi just has to  
3 self-certify. So, in a sense, from a practical standpoint,  
4 that's the same thing. That's the grapple I've got.

5 MS. WHELAN: Certainly. And I will note that the  
6 CFTC has -- did initiate review of a different exchange. Now,  
7 I don't fully understand what happened there because it's not  
8 what's before us, but it's my understanding that the CFTC may  
9 have some concerns about it, and like my friend on the other  
10 side, I would welcome the CFTC to weigh in here, but I don't  
11 think it's necessary. And I want to explain why. Because I  
12 think Kalshi has set up a bit of a false dichotomy. They're  
13 saying we either have to comply with what the Board is saying  
14 and suffer all this harm or we have to violate Nevada law  
15 according to what the Board says and face the consequences.

16 There's a third option, though. They can apply for  
17 licensure with the NGCB. That's the avenue that the NGCB left  
18 open for them, and it's what numerous entities have done. Any  
19 entity -- FanDuel, DraftKings, MGM, they are all licensed with  
20 Nevada. They have submitted to the jurisdiction of Nevada.  
21 They offer sports betting in Nevada. And Kalshi could do the  
22 same. And there should be, really, no conflict between being  
23 regulated by a State entity and regulated on the exchange side  
24 by the CFTC. You look at other industries, semi-trucks, for  
25 example, are licensed by U.S. DOT and many States also have

1 licensing programs as well. So there's a way for these two  
2 regimes to exist in tandem that Kalshi has basically ignored,  
3 and they've set up the straw man argument that we're going to  
4 be very harmed. But they can avoid the harm simply by applying  
5 for licensure. No guarantee they'll meet the requirements,  
6 but --

7 THE COURT: Well, that's the rub is if they apply  
8 for licensing and say, we want to allow contracts on election  
9 outcomes, the Nevada Gaming Control Board and Gaming Commission  
10 are going to say, no way Jose, and so we're not going to grant  
11 you that license. The CFTC says, sure, go ahead, Nevada now  
12 says no, and we're back to square one with the conflict, aren't  
13 we?

14 MS. WHELAN: Well, respectfully, the CFTC said no  
15 and they're appealing the decision that said otherwise, but --  
16 so Nevada and the CFTC seem to be on the same page on that one.  
17 And, sure, we may end up here, but insofar as the sports  
18 betting side, certainly that's something that could be  
19 ameliorated.

20 THE COURT: Well, because you're going to say no to  
21 18 and 19-year-olds betting and CFTC says, go for it. So again  
22 we've got a conflict between Nevada and the Feds, so don't we  
23 still have that same problem, there's still a conflict here?

24 MS. WHELAN: There would still be a conflict with  
25 respect to the 18 through 20-year-olds, certainly.

1 THE COURT: And so you're going to deny the license,  
2 and so that doesn't really help us, that option, Door Number 3.  
3 Applying for a license doesn't get Kalshi anywhere because it  
4 seems to be preordained, not in a pejorative or derogatory  
5 sense, that you're not going to let them do what the CFTC  
6 allows them to do.

7 MS. WHELAN: Well, if they want to participate in  
8 the Nevada market, they can tailer their contracts to exclude  
9 18, 19 and 20-year-olds. I haven't seen any evidence about  
10 what percentage of their contracts is that age group on these  
11 two specific areas of contracts, so, you know, I can't speak to  
12 that.

13 THE COURT: Let me switch gears slightly. Just in  
14 the general sense of regulating gaming in Nevada, I'm often  
15 intrigued by how sports betting or election betting is  
16 different from the stock market. The Gaming Control Board, the  
17 Gaming Commission regulate betting on sports. It doesn't  
18 regulate betting on stocks, right? You don't regulate the Amex  
19 or the NASDAQ or the Chicago Mercantile, and yet they seem to  
20 be very similar. Someone can study stocks and say, I see  
21 trends, I see good profitability, just like someone could study  
22 the Raiders and say, Maxx Crosby is in for a career year, he's  
23 got his contract up, whatever it may be, and so similar  
24 studying, similar financial impacts on people, similar exposure  
25 to risks unforeseen or foreseen, like somebody tears an

1 Achilles or the President imposes tariffs. You don't and can't  
2 regulate stock exchange, but you can regulate the betting on  
3 sports and elections.

4 MS. WHELAN: Sure. Well, there's the statutory  
5 basis for that that our legislature have given us. I'm not  
6 aware, though, that there's any -- I'm trying to take this to  
7 its logical conclusion. If a local sportsbook started  
8 offering, you know, odds on will the Dow drop today or rise  
9 today, I think that that would be something that the NGCB could  
10 regulate.

11 THE COURT: So why allow sports betting but not  
12 election betting?

13 MS. WHELAN: So that's simply a -- I can't speak to  
14 the legislature's policy decisions, but it is NRS 293.830 that  
15 a bet or wager on elections is illegal. It's a gross  
16 misdemeanor under State law, and that's the elections  
17 provision, which is obviously governed by the Secretary of  
18 State. We also have NRS 463.0193, which is under the gaming  
19 provisions, that wagering on elections is essentially wagering  
20 on an *other event* and an entity that takes wagers on *other*  
21 *events* is deemed a sports pool. And so the Nevada gaming  
22 regulations say that election wagering by -- through sports  
23 pools is prohibited. And I imagine it is probably based on  
24 that --

25 THE COURT: So the legislature has decided as a

1 matter of public policy --

2 MS. WHELAN: Exactly.

3 THE COURT: -- we're not letting --

4 MS. WHELAN: Exactly.

5 THE COURT: Okay. I get it.

6 Switch gears again. When did the defendants first  
7 learn of Kalshi's conduct in this regard?

8 MS. WHELAN: I am not exactly sure. I can check  
9 with the client on that, but as I stated, it was January 24th  
10 that these contracts came about. I believe the letter that was  
11 sent was March 4th. So somewhere in that roughly six-week  
12 period.

13 THE COURT: And it gets to sort of the question of  
14 the urgency of the situation now and when did your client find  
15 out? When did they act? Did they sit on their hands for a  
16 while? You're now moving for a temporary restraining order, so  
17 obviously that factors into the request for injunctive relief.  
18 Kalshi offered sort of a standstill, don't come after us, we'll  
19 let the Court decide on a TRO, and your clients refused that.  
20 Why?

21 MS. WHELAN: My client didn't want to waive any of  
22 its rights, and it sees the urgency here in protecting Nevada  
23 consumers, especially -- I mean, we're in sort of NCAA, March  
24 Madness territory just ended last night, we've got Master's  
25 coming up, there's sporting events. There are no elections on

1 the horizon, fortunately, but, you know, we do see urgency and  
2 we didn't want to forego any of the rights should the situation  
3 become even more pressing, more dire than it already is.

4 THE COURT: So there wasn't a rush until Kalshi  
5 filed its motion?

6 MS. WHELAN: Well, prior to Kalshi filing its  
7 motion, the parties were attempting to work together and  
8 negotiate some sort of solution, and when that -- and when it  
9 became apparent that that was not going to work, they filed  
10 their motion and we determined it was appropriate to file a  
11 counter-motion in response.

12 THE COURT: If Kalshi is in violation, the  
13 defendants can still go after it --

14 MS. WHELAN: Certainly.

15 THE COURT: -- if I don't block it with a TRO.

16 I guess I'm trying to figure out, what's the  
17 difference in tomorrow versus next week versus next month, the  
18 need for speed to stop them right now when we haven't stopped  
19 them in the last six weeks or whenever your client found out  
20 about it.

21 MS. WHELAN: Sure. Well, I mean, one of the things  
22 that counsel has argued here today is the harm that would  
23 happen in -- for basically pressing pause on options that are  
24 outstanding right now, the contracts that have been entered and  
25 not yet closed out. And so the longer that it goes on without



1 resolution, one way or the other, the more Nevada consumers are  
2 going to enter into these contracts.

3 And we agree, there would be some level of harm. We  
4 don't feel it's irreparable harm, but there would be harm to  
5 Nevada consumers that have entered into these contracts if the  
6 contracts, you know, get pulled. We understand that. They  
7 have money invested in them. And we also think that there  
8 would be harm to the State in that circumstance because then  
9 those consumers who may feel that they've been unfairly treated  
10 or, hey, these contracts were illegal, how can I get my money  
11 back, they're going to be coming to the State for recourse.  
12 And so the longer that these contracts continue, the more  
13 consumers are involved, the more the potential harm to the  
14 State builds.

15 THE COURT: If the -- if Kalshi agrees,  
16 hypothetically, not to create any new contracts while this --  
17 these issues are being litigated, setting aside what's been  
18 done in the past, would your client agree not to press for  
19 prosecution right now so the Court's got time to weigh these  
20 arguments and make a final decision, at least stem the bleeding  
21 from your perspective, we're not going to have any contracts  
22 going forward, and they're not exposed to the risk going  
23 forward, but at least we've got our arms around the alleged  
24 damage?

25 MS. WHELAN: Certainly. You know, that's something

1 I would have to check with my client about. I think it's  
2 something they could potentially be open to, at least while  
3 this issue is being resolved in the very short-term, but I  
4 can't speak for my client at this moment without checking with  
5 them.

6 THE COURT: You argued in your papers that the Board  
7 only sent a cease and desist letter and so Kalshi has not shown  
8 that enforcement is imminent and, therefore, no irreparable  
9 harm. It seems to sort of fly in the face of, we're not  
10 agreeing to stay anything while you seek a TRO and, oh, by the  
11 way, we're going to seek a TRO. Doesn't that kind of  
12 contradict the notion that harm is not imminent? You're here  
13 right now trying to stop them from doing what they want to do.

14 MS. WHELAN: Sure. You know, certainly the threat  
15 of prosecution can constitute imminent harm, so I would agree,  
16 as things have developed, there is -- there is some threat of  
17 harm. Again, I don't think it's irreparable and I don't -- and  
18 I think that it's of Kalshi's own doing, as, you know, Your  
19 Honor's dialogue with counsel previously had gone into. They  
20 could have sought pre-approval and kind of stopped this at the  
21 get-go. Instead, they seemed to kind of take advantage of the  
22 political transition that was going on in Washington to try and  
23 self-certify these contracts and get them out in Nevada before  
24 really getting the approval that could have helped avoid some  
25 of these harms.

1 THE COURT: Let me go off the record for just one  
2 second.

3 (Off-the-record discussion.)

4 THE COURT: We're going to take a short five-minute  
5 break so my court reporter can loosen her fingers and put them  
6 in a bowl of ice or something. All right. Take a break for  
7 about five minutes. Thanks.

8 (Recess from 12:05 to 12:19 p.m.)

9 THE COURT: All right. Thank you, Ms. Whelan. Let  
10 me pick up with a question I asked Kalshi's counsel. Is there  
11 room here, should I invite the CFTC to come in and participate  
12 and ask them how they feel about preemption and sports betting  
13 and things like that?

14 MS. WHELAN: It certainly, I think, as I said  
15 before, we could do that. I don't think that it's necessary.  
16 It would be interesting to see where they weighed in. I know  
17 that we also have a lot of other States that are kind of tuning  
18 in and paying attention to what's happening here. I think it's  
19 Ohio, Illinois, and New Jersey have sent similar cease and  
20 desist letters to Kalshi on similar grounds as Nevada has, so,  
21 you know, I'm sure Your Honor is aware this is an issue that's  
22 going to affect other jurisdictions and people are paying  
23 attention. So the CFTC's input would certainly be welcome.

24 THE COURT: The CFTC stated in its brief before the  
25 D.C. Circuit that a CFTC-designated contract maker's contracts

1 can never be illegal under State law. How do you respond to  
2 that?

3 MS. WHELAN: I think that's an incredibly bold  
4 statement that perhaps wasn't completely thought out. I think  
5 that there are numerous times when a contract might be void for  
6 public policy under a State's law. One example was the  
7 hypothetical that I posited that if a State were to say that  
8 18-year-olds no longer have capacity to contract and an  
9 18-year-old entered into an events contract through Kalshi, I  
10 think there's no question that that contract would be void for  
11 public policy in that State. And I think it's a similar  
12 reasoning here under Nevada's gaming laws.

13 THE COURT: Let's turn to irreparable harm. You  
14 argue that the harms that Kalshi has identified are compensable  
15 with monetary damages. Kalshi points out there's an 11th  
16 Amendment bar to suing the State for money. Is there a  
17 financial remedy against the defendants if Kalshi has ended up  
18 losing millions of dollars? How do they recover that against  
19 your clients?

20 MS. WHELAN: Sure. So this raises a point that I  
21 was hoping to make regarding 11th Amendment immunity because --

22 THE COURT: Here's your chance.

23 MS. WHELAN: -- later this week the State will be  
24 filing its responsive pleading to the Complaint and we will be  
25 filing a motion to dismiss on multiple grounds, one of which

1 being 11th Amendment immunity against the State, the NGCB, and  
2 the NGC.

3 THE COURT: Say that again. Against the State --

4 MS. WHELAN: The State; the NGC, the Commission; and  
5 the NGCB. There are also various State law immunities that  
6 we'll be asserting on behalf of the individual members and  
7 Attorney General Ford, as well as a 12(b)(6) motion for failure  
8 to state a claim based on the fact that there really are no  
9 allegations in the Complaint talking about the participation of  
10 the individuals and AG Ford.

11 We've got some jurisdictional defects in that the  
12 State wasn't properly named pursuant to Nevada law. We also  
13 have a service issue that no dual service has been effected.  
14 So we have kind of multiple grounds on which we're going to be  
15 moving to dismiss. And I've previewed them to you and now  
16 opposing counsel, but that's going to be coming shortly.

17 So that doesn't leave, however, Kalshi without a  
18 remedy. If it wishes to seek monetary damages against the  
19 State, the State has waived sovereign immunity in State Court  
20 under certain circumstances, and it could certainly pursue that  
21 avenue of relief.

22 THE COURT: Is this one of those circumstances?

23 MS. WHELAN: I believe it is. I believe it is, yes.

24 THE COURT: Okay. So they could sue the defendants  
25 in State Court for monetary remedies if, in fact, they're able

1 to prevail on a claim?

2 MS. WHELAN: If they -- yeah, if they properly met  
3 the prerequisites for waiver of sovereign immunity in NRS  
4 Chapter 41, certainly.

5 THE COURT: My foggy brain reminds me there used to  
6 be a cap on damages against the State in certain cases.

7 MS. WHELAN: In tort cases.

8 THE COURT: Tort cases.

9 MS. WHELAN: Sure. Yeah.

10 THE COURT: Does that cap still exist under State  
11 law? Would it apply here?

12 MS. WHELAN: That cap does exist. I haven't  
13 honestly given thought to whether that cap applies. I don't  
14 think this is really a tort case. It would depend on what  
15 their allegations were. I can't really answer that at this  
16 time.

17 THE COURT: Okay. So there is still a cap on -- so  
18 if this is deemed a tort, as opposed to a contract-based claim,  
19 is the cap somewhere around 300 grand or something like that?

20 MS. WHELAN: Something like that, yeah.

21 THE COURT: So if they have millions of dollars of  
22 damages and are limited to 300,000, doesn't that make the  
23 remainder irreparable harm? Because it's not compensable.

24 MS. WHELAN: It wouldn't be compensable in full if  
25 it were that amount. I would just say that there's really no

1 evidence of what that amount is, short of the vague statement  
2 of tens of millions of dollars in a self-serving affidavit from  
3 one of, you know, Kalshi's officers or executives.

4 THE COURT: Presumably, all affidavits are  
5 self-serving, or they would never be submitted. That's my  
6 little bugaboo I often hear when I hear "self-serving  
7 affidavits." That's why we submit them.

8 MS. WHELAN: No argument here. However, an  
9 affidavit supported by evidence is going to be much more  
10 persuasive.

11 THE COURT: Much more to the point. Thank you. I  
12 agree with that.

13 All right. There is a discussion in the papers  
14 about geofencing. From a technical standpoint, you may or may  
15 not know the answer to this, but I don't know if these betting  
16 apps that we see, MGM Bets, whatever they are, do they have  
17 geofencing that preclude people from betting outside of the  
18 jurisdictions of Nevada, do you know?

19 MS. WHELAN: They do.

20 THE COURT: I'm getting a nod from your co-counsel.

21 MS. WHELAN: Yes. Yeah, they do. I'm not as  
22 familiar as Chief Caruso with the particulars, but I do know  
23 that it uses some combination of WiFi networks, IP addresses,  
24 and cell towers to triangulate your location to show that you  
25 are either within or outside the state of Nevada, and if you

1 are outside the state of Nevada, you can't place bets. It's  
2 technology that's readily available.

3 THE COURT: Okay.

4 MS. WHELAN: And I think the -- you know, the harm  
5 and burden in implementing that is probably a little  
6 exaggerated.

7 THE COURT: And that's what I'm getting to, I guess.  
8 Even assuming for sake of argument that it's expensive, as  
9 Kalshi claims, their argument is that we can't get that  
10 technology in place immediately; it's going to take some time  
11 and, therefore, we've got this irreparable harm because your  
12 clients are going to come after Kalshi even if they attempt to  
13 try and put up this geofencing.

14 MS. WHELAN: Yeah, it certainly would take some  
15 time. I know that Robinhood, which is a similar type of  
16 exchange to Kalshi, has implemented this type of technology, so  
17 it is certainly possible.

18 With respect to the expense, I guess I would say,  
19 you know, it either makes good business sense or it doesn't.  
20 You either have enough contract business in Nevada to make it  
21 worth your while to comply with this or you don't and you stop  
22 offering those contracts.

23 I do have an answer to you -- for you on the, you  
24 know, sort of temporary pause button suggestion. The State  
25 would be fine with a stay where Kalshi was not offering new



1 contracts. We would agree to not pursue criminal prosecution  
2 during the time -- for the short time that it would take Your  
3 Honor to make a decision in this case. We certainly couldn't  
4 agree to an indefinite sort of stay for the time it would take  
5 to get all the way through appeal, but we could agree to sort  
6 of a limited agreed time.

7 THE COURT: If they didn't offer new contracts in  
8 Nevada, you would withhold prosecution for past violations --

9 MS. WHELAN: Correct.

10 THE COURT: -- while this case litigates here in  
11 this Court, until we get a resolution?

12 MS. WHELAN: Yeah, to stop -- to just sort of, as  
13 Your Honor put it, stop the bleeding.

14 THE COURT: All right. I appreciate that. Thank  
15 you.

16 MS. WHELAN: I also have an answer to your question  
17 about why it took so long to send the cease and desist letter.  
18 That's because the Board was undertaking an investigation,  
19 collecting evidence, placing bets, trying to figure out the  
20 extent of Kalshi's offerings in Nevada. So there was some time  
21 taken for the Board's investigation before deciding to send the  
22 cease and desist letter.

23 THE COURT: Thank you for those responses. Kalshi  
24 argues that even if it can geofence around Nevada, doing so  
25 would put it in violation of the core principles of the CFTC

1 because they can't offer these contracts to everyone. They're  
2 now prohibited from servicing, in a sense, Nevada customers and  
3 that would force them to lose their designation by the CFTC  
4 because they're violating core principles and that's an  
5 irreparable harm. How do you respond to that?

6 MS. WHELAN: I think that's a pretty speculative  
7 harm that they're putting forward. I didn't see any support or  
8 evidence for that proposition. I think, again, as Your Honor  
9 suggested, they could go to the CFTC and say, listen, here's  
10 what we're dealing with. This is our proposed solution. Can  
11 you please pre-approve or bless this solution? And then  
12 depending on what the CFTC said would determine whether there  
13 actually was going to be some type of irreparable harm or not.

14 THE COURT: So if the CFTC says, no, our principles  
15 are, you have to make it available to everybody on an equal  
16 basis, now we have a conflict between what the CFTC says it has  
17 to do and Nevada prohibiting it from.

18 MS. WHELAN: Potentially, yeah. I can't see the  
19 CFTC going that route, but, again, without their participation,  
20 I just don't know.

21 THE COURT: Okay. Let me catch my notes up for a  
22 second.

23 Let's turn to the issue of the bond. You don't  
24 address that in your papers. If I grant Kalshi's motion, how  
25 much of a bond should they put up and why?

1 MS. WHELAN: I think it should be more than  
2 de minimis. We don't have kind of the evidence of the volume  
3 of contracts that they're doing in Nevada, so it's hard for me  
4 to give a number. I think that the most concrete loss that  
5 Nevada is suffering throughout all of this has to do with tax  
6 revenue.

7 So we're losing out on tax revenue on two fronts,  
8 first, the tax revenue that we would collect from Kalshi if it  
9 were a licensed sportsbook; and, second, the tax revenue we're  
10 missing out on from Nevada licensed sportsbooks due to the  
11 wagers that are not being placed there that are instead on  
12 Kalshi's exchange.

13 THE COURT: The competitors, in a sense?

14 MS. WHELAN: Exactly. And so, you know, that's  
15 actual harm that Nevada is suffering. If Kalshi were to apply  
16 for licensure and become licensed, then Nevada would have the  
17 benefit of that tax revenue. And, of course, I'd be remiss if  
18 I didn't mention what Your Honor stated, which was the injury  
19 to all Nevadans, that, you know, Nevadans are suffering from  
20 the lack of the disputes/resolution process; if Nevadans come  
21 back to the State and start seeking, you know, restitution or  
22 something for the harm that they've -- that they claim to have  
23 suffered. So it should be more than de minimis, definitely.

24 THE COURT: Conversely, if I grant your motion for  
25 an injunction, what should the bond be that I require the State

1 to put up?

2 MS. WHELAN: I think that would require Kalshi to --  
3 well, actually, I don't know, is the State required to put up a  
4 bond?

5 THE COURT: Federal Government is not under Federal  
6 Rules, but I don't know --

7 MS. WHELAN: Okay. So in State Court we wouldn't  
8 be, yeah.

9 I think Kalshi would have to present some type of  
10 evidence about the volume of contracts that they would be, you  
11 know, missing out on in the interim and we would have to argue  
12 against that, probably.

13 THE COURT: I don't know if you've had a chance to  
14 think about this, but if I -- I asked this question of counsel  
15 for Kalshi, but if I decide to have an evidentiary hearing,  
16 primarily on irreparable harm seems to be the factual issue  
17 that floats around, how much time would you need to prepare for  
18 that, what kind of discovery? What do you anticipate that  
19 hearing looks like?

20 MS. WHELAN: I'd probably have to give that some  
21 contemplation, talk with the client. We're obviously quite  
22 busy at the AG's Office at the moment, so I'd have to get back  
23 with the Court on that.

24 THE COURT: That's fair.

25 What do you see as the future of this case going

1 forward after today if I grant or deny an injunction? Is this  
2 purely a legal issue that needs to be resolved on briefs? Are  
3 there factual issues? Do I need to have discovery?

4 MS. WHELAN: I mean, I see it as largely a legal  
5 issue. I see it as an issue of statutory interpretation. The  
6 CEA gives the CFTC exclusive jurisdiction, but over what  
7 exactly? How far does that reach? What's the interplay of the  
8 10th Amendment and the Supremacy Clause, which is something  
9 Courts often grapple with? So I do see it as primarily a legal  
10 question.

11 THE COURT: For today's purposes, I'm required to  
12 sort of decide whether either side can show a likelihood of  
13 success on the merits, that legal issue. I'm loathe,  
14 L-O-A-T-H-E, as opposed to love, I'm loathe to make a final  
15 definitive ruling on these legal issues today beyond just  
16 likelihood of success because it is an emergency-type basis.  
17 You especially have had shortened time to respond, although  
18 Kalshi had a narrow time between the time it was -- felt it had  
19 to go forward and put a brief. So I think additional briefing  
20 on the legal issues would be helpful to me on a final  
21 resolution of the legal issues. And we can talk about that  
22 going forward a little bit. But I suppose that would -- you'd  
23 like that, to have some more time to really contemplate and put  
24 some legal arguments on paper?

25 MS. WHELAN: Yes. Absolutely, I think additional

1 time to really dig into the issues would be a benefit, given  
2 the importance of this issue.

3 THE COURT: I don't dispute that at all.

4 Let me see if you've answered all of my questions.

5 Are there additional things I haven't asked you  
6 about that I should have? Are there additional points you want  
7 to make that you haven't had a chance to yet, before I turn it  
8 back to Kalshi?

9 MS. WHELAN: I don't think so. I think we've  
10 covered it.

11 THE COURT: Thank you.

12 MS. WHELAN: All right. Thank you, Your Honor.

13 THE COURT: Mr. Havemann, you get the last word.

14 MR. HAVEMANN: Thank you, Your Honor.

15 THE COURT: Since this is your motion. Although  
16 there is a counter-motion, I'm going to give you the last word  
17 here.

18 MR. HAVEMANN: Thank you. So just a few  
19 clarifications --

20 THE COURT: Please.

21 MR. HAVEMANN: -- from my opening remarks. The  
22 first is, Your Honor asked about who sets the initial price of  
23 these contracts. Kalshi never sets the price, and there is no  
24 initial price. The contract goes live, and it's sort of the  
25 same as with a stock offering. There's offers and bids, and a

1 bid is accepted, and that's how parties enter into a contract.  
2 It's what someone is willing to pay and if they find a  
3 counterparty who's willing to enter into that deal.

4 THE COURT: So you -- Kalshi sets up "Duke's going  
5 to win the Final 4," and then parties decide, I'll bet 100  
6 against or I'll -- I'll have a contract for 100 or I'll have a  
7 contract against for a 100?

8 MR. HAVEMANN: That's right.

9 THE COURT: Okay. Thank you.

10 MR. HAVEMANN: With respect to your questions about,  
11 you know, who do you send the kneecapper after, there is a  
12 clearinghouse. These contracts are fully collateralized.  
13 There is a clearinghouse that holds the money during the  
14 pendency of the contract, and when the event occurs, the winner  
15 is paid out.

16 THE COURT: Okay. So it takes the money from one  
17 side of an agreement and disburses it back or to the next one?

18 MR. HAVEMANN: That's correct. So if I may, I'm  
19 happy to, of course, answer questions that came up in my  
20 friend's argument. I have a couple of points that I would like  
21 to raise.

22 THE COURT: Yeah, there was. And then I'll let you  
23 make your closing. Let me get my questions answered first.  
24 And before I do...

25 And let me pause and ask Ms. Whelan, though, because

1 I meant to ask you this: You had raised the issue about an  
2 upcoming motion and you mentioned there's a service problem.  
3 Kalshi points out in Footnote 1 to its reply that you accepted  
4 service on behalf of all the defendants on April 3rd and waived  
5 personal service of paper copies.

6 MS. WHELAN: Yes. So under NRS 41.031 sub 2, for  
7 whenever the State is sued, it must be -- the Complaint and  
8 summons must be served on both the Attorney General's Office in  
9 Carson City, as well as the named defendants. So I accepted  
10 service on behalf of the named defendants, but as of this  
11 morning, our Carson City office has not received -- has not  
12 been served on behalf of the Attorney General's Office.

13 THE COURT: So the waiver -- I haven't seen it, but  
14 whatever waiver you filed didn't completely waive all the  
15 service requirements; it was simply an acceptance on behalf of  
16 your clients, that portion of the statute?

17 MS. WHELAN: Correct. Yeah, our practice is that  
18 we -- if the client authorizes, we can accept service on behalf  
19 of the client, but typically we still require the service in  
20 Carson City.

21 THE COURT: Thank you.

22 Okay. I don't know if that clarified the point for  
23 you in Footnote 1. You don't have to agree or disagree right  
24 now, but you understand their position, at least?

25 MR. HAVEMANN: I understand the position, yes.



1 THE COURT: Thank you. Ms. Whelan raised the issue  
2 at the end here that, in a sense, CFTC can say, we're going to  
3 allow 18-year-olds to engage in sports betting and that's in  
4 direct violation of several States' public policy; or, more  
5 importantly, to your client's, I guess, taking it out of the  
6 sports betting, Nevada has a law that says, for instance -- or  
7 some States may say, if you're under the age of 21, you can't  
8 legally enter into contracts, but your contracts allow  
9 18-year-olds, so there's a conflict directly with the public  
10 policy of the State.

11 Is the answer "Too bad, so sad, that's what the CFTC  
12 says and that's the way it is"?

13 MR. HAVEMANN: The answer is, there is a conflict,  
14 and when there is a conflict between State law and Federal law,  
15 under the Supremacy Clause, Federal law wins out. So the CFTC  
16 authorizes positions to be placed by adults, so people 18 and  
17 over. And if a particular State says, no, I want it to be 21  
18 or 25 or 30, that is a conflict with the CFTC's scheme, and  
19 that is exactly what Congress sought to avoid when it subjected  
20 designated contract markets to the exclusive jurisdiction of  
21 the CFTC. It was designed to avoid a patchwork of regulation  
22 where contracts that were permissible in one State are  
23 impermissible in another State, different ages, different  
24 conflicting State laws that would make it impossible for these  
25 exchanges to operate a nationwide exchange, which is what

1 Congress intended.

2           So, you know, that gets to one of the points that I  
3 hoped to make to Your Honor in response, which is, you know,  
4 they indicated that Kalshi could avoid the harm by seeking a  
5 license from the State. And then I believe I heard her, Ms.  
6 Whelan, say that if we applied for a license from the State, it  
7 would be denied and it would be denied on the basis of what  
8 they perceive to be a conflict between Federal law and State  
9 law.

10           THE COURT: That was more my presumption, but yeah.  
11 You heard, yeah.

12           MR. HAVEMANN: Yes. In any event, I shouldn't put  
13 words in her mouth, but that is what I took from her answer,  
14 and that is a clean articulation of one of the respects in  
15 which the State regime here conflicts with the CFTC's authority  
16 in this case.

17           THE COURT: So the short answer to my question is,  
18 yes, "Too bad, so sad, that's the way it works with  
19 preemption"?

20           MR. HAVEMANN: That's the way that preemption works.

21           And I do want to emphasize, Your Honor started your  
22 colloquy with Ms. Whelan with the statutory text. You know, I  
23 did not hear a response to the plain text of the statute which  
24 gives exclusive jurisdiction to the CFTC with respect to  
25 accounts, agreements, and transactions involving swaps or

1 contracts of sale traded on a DCM. That's the language of the  
2 statute. I did not hear an articulation of how what the Board  
3 is attempting to do in this case does not squarely fall within  
4 the category of transactions, agreements, accounts that Federal  
5 law places in the authority -- with the authority of the CFTC.

6 I also heard Ms. Whelan say -- I think that this is  
7 a direct quote. I think I got it right. "It is hard to see  
8 how sports betting was contemplated by Congress," and that was  
9 a reason why she thought there might be some room for State law  
10 to co-exist with Federal law. I would just point Your Honor to  
11 the special rule which we outlined in our brief and which you  
12 can find at 7 section -- 7 U.S.C. Section 7a-2, and that is a  
13 special rule with respect to event contracts and it says --  
14 event contracts based on an occurrence or contingency, so  
15 exactly what we're talking about here, and one of the  
16 categories of cases that Congress said the CFTC can take a look  
17 at for compliance with the public interest is gaming.

18 So it is not correct that Congress didn't  
19 contemplate this. Congress contemplated it, and the answer  
20 that Congress gave was not to let 51 different States regulate  
21 this. It was to recognize that there are particular public  
22 policy concerns with respect to gaming contracts and allow the  
23 CFTC to make a decision based on its evaluation of the public  
24 interest and not subject these exchanges to the conflicting  
25 laws of 51 different States.

1 And so that -- and, you know, one of the respects in  
2 which -- this is in the Arizona case, this is in the 9th  
3 Circuit's *Valle Del Sol* case -- one of the ways that conflict  
4 preemption can arise is if Congress has left discretion to a  
5 particular Federal decisionmaker and a State imposes penalties  
6 that interfere with the exercise of that discretion, and that  
7 is exactly what we have here.

8 Congress gave discretion to the CFTC to make a  
9 public interest determination about whether certain types of  
10 event contracts comport with the public interest. And the  
11 CFTC, by not acting on these contracts, made that public policy  
12 decision, and it is not up to the States to interfere because  
13 they disagree with the CFTC's public policy judgments on that  
14 question. That is a question that Congress wanted the CFTC to  
15 answer, and it did.

16 I also want to emphasize, Ms. Whelan referred to NRS  
17 463.0193, which is the provision relating to sports pools, and  
18 she noted that sports pools under Nevada law mean the business  
19 of accepting wagers on sporting events or other events by a  
20 system or method of wagering. And she indicated the State's  
21 belief that, you know, the sporting event contracts were  
22 sporting events and that political events were *other events*.  
23 And if that's true and if the State's position is actually that  
24 *other events* encompass any other event, even not related to  
25 sports, then their argument about gaming and sportsbooks is

1 much, much, much broader than their briefing suggests because,  
2 really, what they're saying is that they have authority to  
3 regulate all event contracts, even though there is a  
4 comprehensive regulatory scheme, detailed statute after  
5 detailed statute, that specifies exactly how Congress wanted  
6 the CFTC to regulate event contracts. And if the State is --  
7 if Ms. Whelan is correct that this State law is not preempted,  
8 that would really be a radical, radical change from the way  
9 that Congress thought that event contracts should be regulated,  
10 and it has always been understood that these can be  
11 regulated -- that these are regulated by the CFTC, not 51  
12 different States. And so that is a much, much, much broader  
13 argument than I think we appreciated. And I do want to  
14 emphasize that point because I think that that gets to, really,  
15 the scope of what they are claiming the State has authority to  
16 do here.

17 THE COURT: Well, she did point out that Nevada has  
18 a specific statute that outlaws betting on elections, not just  
19 necessarily *other events*. Am I correct on that, Ms. Whelan?

20 MS. WHELAN: Yes, Your Honor. And to be clear, the  
21 NGCB is not and has never tried to take the position that we're  
22 going to prevent all contracts on Kalshi's exchanges. We are  
23 limiting it to sports-related and election-related.

24 THE COURT: That was my understanding as well, but I  
25 appreciate the clarification.

1 MR. HAVEMANN: I take that point and I take the  
2 clarification. That is clarification from counsel. The legal  
3 theory that they are pressing here is much broader than counsel  
4 indicates.

5 And with respect to political events, you know, the  
6 argument that the CFTC made in the District Court in D.C. and  
7 has made before the D.C. Circuit is precisely this argument,  
8 that they have authority to regulate political event contracts  
9 because in some States betting on political events is unlawful,  
10 and that is the argument that the District Court in D.C.  
11 rejected. So again you have a conflict between what Federal  
12 law permits as determined by final judgment of a Federal  
13 District Court in Washington D.C. and what they are saying the  
14 State has authority to do. That would present another direct  
15 conflict.

16 THE COURT: The D.C. Circuit -- obviously, we're  
17 waiting -- your client is waiting for a decision from the D.C.  
18 Circuit. That case only involves election contracts, correct?

19 MR. HAVEMANN: That case only involves -- is a  
20 challenge to the election contracts, not a challenge to sport  
21 event contracts, that's correct.

22 THE COURT: So in the event the D.C. Circuit says,  
23 we agree with the CFTC and overturn the District Court and  
24 we're not going to allow election-type contracts, I presume  
25 it's your client's intent to continue going forward on sports

1 contracts? Or are these so analogous that that's going to --  
2 I'm just trying to get a feel for how that's going to impact  
3 this case. I can sit and wait for a decision from the D.C.  
4 Circuit Court, but I don't know that it resolves the entire  
5 issue here.

6 MR. HAVEMANN: It's hard to imagine the D.C. Circuit  
7 saying anything that would bear on the provision of sport event  
8 contracts, and the CFTC did not challenge Kalshi's sport event  
9 contracts, so yes, my -- you know, we would have to cross that  
10 bridge if we came to it, and hopefully we don't come to it, but  
11 I assume that unless there was anything in the opinion to the  
12 contrary that, yes, our position would be the sport event  
13 contracts remain valid.

14 And I do want -- you know, now that the D.C. Circuit  
15 case has come up, I want to emphasize, you know, that is --  
16 obviously, Kalshi disagrees with the CFTC's position in that  
17 case, but that case exemplifies the way that this sort of  
18 question should get hashed out, that is, the CFTC comes in and  
19 says, I think that these contracts fall within one of the  
20 enumerated categories and that it's against the public  
21 interest, they make that determination, they hear from relevant  
22 parties, they hear input from the public, and then there's  
23 judicial review.

24 That is -- the question is, who decides? And the  
25 answer is, the CFTC decides with judicial review in Federal

1 Court. The answer is not 50 different States and the District  
2 of Columbia decide. That's a recipe for chaos.

3 THE COURT: I get that. And for purposes of this  
4 case, just so I can start to think about the future of this  
5 case, if the D.C. Circuit says, we're going to overturn the  
6 District Court and agree with the CFTC, then Kalshi would be  
7 prohibited from offering contracts on elections, correct?

8 MR. HAVEMANN: Subject to further review --

9 THE COURT: Of course.

10 MR. HAVEMANN: -- yes. You know, after all review  
11 is exhausted and assuming that was the final judgment, then  
12 yes. And that would be nationwide.

13 THE COURT: So that takes out that portion of this  
14 case, and then, here, we'd only be focusing on the  
15 sports-related contracts, correct?

16 MR. HAVEMANN: Yes, that is what would happen if the  
17 issue were still teed up before this Court. And, of course, my  
18 point is that the D.C. Circuit litigation sort of exemplifies  
19 how this sort of dispute should get hashed out and it shows  
20 that even with respect to sport event contracts, that's how  
21 this should play out, not in Federal Court for a TR0, trying to  
22 prevent many different States from subjecting my client to  
23 criminal penalties.

24 THE COURT: Don't take this the wrong way: You have  
25 sufficiently beaten that horse. I get it. I get it.



1 MR. HAVEMANN: So the last -- I'm happy to answer  
2 any other questions. The final thing I would say is just, you  
3 know, the Court is aware of the posture of this case. We're at  
4 a TRO. The question is not, as you indicated, whether we will  
5 ultimately succeed; it is whether we have shown a likelihood of  
6 success and irreparable harm and the public interest is in our  
7 favor.

8 I respectfully submit, the statutory language, it  
9 doesn't get much clearer than this. The precedent doesn't get  
10 much clearer than this. There is at least a likelihood of  
11 success, such that it would not be equitable to subject Kalshi  
12 to the truly extreme harm that it would suffer if it had to  
13 comply during the pendency of the litigation over this matter,  
14 so we urge the Court to grant the motion.

15 THE COURT: Thank you. Anything further?

16 MR. HAVEMANN: No. Thank you, Your Honor.

17 THE COURT: All right. Thank you. Let me go off  
18 the record for just a second.

19 (Off-the-record discussion.)

20 THE COURT: As the parties all know, the test for  
21 qualifying for preliminary injunction is the four factor test  
22 under *Winter vs. Natural Resources Defense Counsel*. The party  
23 must demonstrate a likelihood of success on the merits, a  
24 likelihood of irreparable harm, that the balance of hardships  
25 favors the movant, and an injunction is in the public interest.

1 Spoiler alert, I'm going to grant a limited  
2 injunction, minor limited injunction. First, Kalshi has shown  
3 a likelihood of success on the merits at this stage because  
4 under 7 U.S.C., Section 2(a)(1)(A), the CFTC has exclusive  
5 jurisdiction over accounts, agreements and the like involving  
6 swaps or contracts for the sale of a commodity. Kalshi is a  
7 CFTC-designated market under Section 7, and through that  
8 exclusive jurisdiction provision, Congress has occupied the  
9 field of regulating CFTC-designated markets like Kalshi's.  
10 It's not field preemption of gaming; it's field preemption of  
11 regulating CFTC-designated markets.

12 I agree with the 2nd Circuit which held that Section  
13 2(a)(1)'s *exclusive jurisdiction* language preempts the  
14 application of State law to CFTC-designated markets. That  
15 comes from the case of *Leist, L-E-I-S-T, vs. Simplot*,  
16 *S-I-M-P-L-O-T*, 638 F.2d 283 at 322, 2nd Circuit, 1980, affirmed  
17 by the U.S. Supreme Court later.

18 Similarly, the D.C. Circuit has recognized that  
19 Congress intended the CFTC to have exclusive jurisdiction,  
20 quote, with regard to the trading of futures on organized  
21 contract markets. That's *FTC vs. Ken Roberts Company*, 276 F.3d  
22 583 at 590.

23 The CFTC has also stated that, quote, Due to Federal  
24 preemption, event contracts never violate State law when they  
25 are traded on a DCM, closed quote, meaning that the

1 CFTC-designated market is what the DCM is referring to. That's  
2 from the *KalshiEX vs. U.S. Commodity Futures Trading*  
3 *Commission*, 2024 Westlaw 4512583 at Page 27. That's CFTC's  
4 brief to the Circuit Court of Appeals.

5 At least at this moment in time, Kalshi's sports and  
6 election contracts are legal under Federal law. That may  
7 change at least with regard to the election contracts,  
8 depending upon what the D.C. Circuit does in the pending  
9 appeal; or it could change if CFTC decides to do something  
10 about Kalshi's sports-based contracts, which seem to me still  
11 may be under the potential for review under the 90-day period  
12 of the relevant statute I cited to earlier, but I don't know.  
13 That's a fact beyond my purview right now, but that's a  
14 potential that CFTC could come back still and say, we're not  
15 going to allow it.

16 But at least as of right now in the short-term,  
17 Kalshi's contracts are legal under Federal law, State law is  
18 preempted, so Kalshi has shown a likelihood of success on the  
19 merits.

20 And because State law is preempted, the defendants  
21 here have not shown a likelihood of success on the merits of  
22 their motion, so I'm going to deny their counter-motion for an  
23 injunction that's filed at ECF Number 35.

24 With regard to likelihood of irreparable injury,  
25 Kalshi has presented enough evidence at this stage to show

1 that, at least in the short-term, there's evidence that it  
2 faces a Hobson's choice like the one the 9th Circuit found  
3 sufficient to support a likelihood of irreparable harm in the  
4 case of *American Trucking Associations vs. City of Los Angeles*,  
5 559 F.3d 1046 at 1057. Kalshi can choose to comply with  
6 Nevada's likely unconstitutional demand that it comply with  
7 Nevada gaming law and hope to recoup millions in damages,  
8 suffer harm to its good will and reputation, and potentially  
9 lose its CFTC designation; or it can keep going with what it  
10 believes to be lawful conduct and be prosecuted civilly and  
11 criminally in Nevada. Kalshi has presented credible evidence  
12 that even if it could implement geofencing at great expense, it  
13 could not do so immediately and thereby avoid prosecution. So,  
14 again, in the short-term, there seems to be irreparable harm in  
15 that regard.

16           It's unclear right now whether or not Kalshi could,  
17 in fact, recover its losses in State Court. They appear to be  
18 barred by the 11th Amendment monetary damages in this Court,  
19 but I'm not opining on whether or not it could recover and how  
20 much it could recover in State Court outside of the 11th  
21 Amendment. But that further suggests irreparable harm right  
22 now.

23           And although the defendants contend that no  
24 prosecution is imminent, the demand letter that was sent  
25 ordered that they -- Kalshi immediately cease and desist, gave

1 it a deadline to comply. The defendants refused to extend the  
2 briefing in this case, and now they've asked me to enjoin  
3 Kalshi from doing anything further. That creates a credible  
4 threat of imminent prosecution for a State law violation that  
5 appears to conflict with Federal law, and that can constitute  
6 irreparable harm under the case of *Valle Del Sol, Inc., vs.*  
7 *Whiting*, 732 F.3d 1006 at 1029.

8 Yes, Kalshi is, in some sense, proceeding at its own  
9 risk and creating its own harms. Things might turn out  
10 differently with the election contracts if the D.C. Circuit  
11 rules against it or if the CFTC takes actions on the sports  
12 contracts, but, again, right now I'm going to preserve the  
13 status quo, which is that these contracts are legal under  
14 Federal law, so requiring Kalshi to stop altogether and lose  
15 the good will or damage its reputation and to spend millions of  
16 dollars that may not be recoverable and potentially lose its  
17 designation as a CFTC-approved market, again, is enough for a  
18 short-term injunction, in my mind, based upon the irreparable  
19 harm it would face.

20 In terms of the balance of hardships, those tip in  
21 Kalshi's favor, given that it's facing substantial monetary  
22 expenditures, reputational damage, and civil or criminal  
23 prosecution based upon demands that defendants likely cannot  
24 make because they're preempted.

25 In contrast, the defendants are not facing much harm

1 in the short-term because I believe they're preempted, and if  
2 I'm wrong, the defendants can prosecute Kalshi later for  
3 conduct that turns out to be illegal if the defendants are  
4 correct. There doesn't appear to be a rush to do it  
5 immediately right now.

6 Finally, the public interest weighs in favor of a  
7 short-term injunction for the same reasons I talked about with  
8 the other factors. Congress designated the CFTC to have  
9 exclusive jurisdiction over Kalshi's conduct, and right now  
10 that's legal. Additionally, third-parties' contracts and  
11 investment expectations would be disrupted if Kalshi were  
12 forced to cease its existing contracts for Nevada-based users,  
13 and that may impact counterparties to those contracts who are  
14 neither in Nevada nor signed event contracts in Nevada.

15 So I'm going to grant the motion for an injunction.  
16 The defendants are hereby enjoined from enforcing preempted  
17 State laws against Kalshi. Specifically, the defendants may  
18 not pursue civil or criminal prosecutions against Kalshi for  
19 offering event-based contracts on a CFTC-designated market.  
20 Injunction takes effect immediately. I will issue a written  
21 order just so we don't have any confusion like occurred in D.C.  
22 over the last month or two. The injunction goes into effect  
23 now. The written order will confirm what I've said here.

24 I'm going to require Kalshi to post a bond in the  
25 amount of \$10,000 by noon Pacific Time tomorrow. If there's a

1 need to extend that deadline, you need to pick up the phone and  
2 call defense counsel and tell them, here's what we're doing,  
3 here's the problem we're facing, but we're in the process. See  
4 if the parties can reach an agreement on an extension of the  
5 bond deadline. If not, file a motion for an extension of the  
6 bond deadline.

7           If either side thinks that bond amount is too high  
8 or too low, they can file a motion properly supported to  
9 explain why the new number should be used. But, in my mind, at  
10 this point, \$10,000 seems to be not too oppressive to get in  
11 place pretty quick, and we can talk about adjusting that going  
12 forward.

13           The next question is, what happens next? We've  
14 talked a little bit about that. It seems like we might need an  
15 evidentiary hearing on a longer injunction. Now, I'm issuing a  
16 preliminary injunction, not a temporary restraining order, so  
17 the 14-day limit of a TRO doesn't apply. The parties have had  
18 notice, we've had a hearing, so I'm imposing an injunction that  
19 will go on until I modify it or wipe it out. So we don't have  
20 to do anything in the next two weeks.

21           But I know these are important issues for both  
22 sides, and we need to get some resolution to these interim  
23 issues. I also recognize that the briefing, while very good --  
24 thank you both, good briefing, great arguments today, by the  
25 way. This has been very helpful to illuminate me, so I

1 congratulate both counsel for your oral arguments and suffering  
2 my questions. They're meant for purposes. You may not see the  
3 purposes, but they work up here.

4 In any event, I want to give you opportunities to  
5 file some more detailed lengthy briefs, if you feel the need  
6 to, to address these legal issues before I make a final  
7 determination on the legal issues.

8 It seems to me that an evidentiary hearing might be  
9 worthwhile on the irreparable harm issue, like some of the  
10 issues I raised. What's the real impact financially if we keep  
11 out -- we geofence Nevada contracts? What's that compared to  
12 the overall financial viability of the company? One may argue  
13 that's irrelevant, as plaintiff's counsel has done. There are  
14 arguments that, yes, it does matter.

15 That may require some brief discovery on sort of how  
16 much money we have, Kalshi makes, what percentage are the  
17 Nevada entities compared -- or the Nevada participants compared  
18 to the overall value of the company, what other damages Kalshi  
19 would suffer, and potentially briefing on, are any of those  
20 damages recoverable in Nevada State Court? And does someone  
21 have to go to State Court to recover damages? How does that  
22 impact irreparable harm in a Federal Court? I don't know. It  
23 may or may not impact. It just kind of occurred to me as we're  
24 talking, if a party has to subject itself to State Court to  
25 recover damages that are unavailable in Federal Court, does



1 that still say they're recoverable and therefore compensable?  
2 Or do we just look at the Federal law as to whether or not it's  
3 compensable or not? I don't know.

4 Those are kind of the issues that are running around  
5 in my head going forward. I've thrown a lot at you. I don't  
6 expect an answer right now in terms of how much time and when  
7 we need to schedule things and what kind of briefing schedules.  
8 And you all have productive things to do besides just this  
9 case. So my inclination is to give you all some time to digest  
10 what I've done, think of it amongst yourselves, talk with each  
11 other about where we go from here and what's the best way for  
12 the Court to be available to help resolve the parties'  
13 decisions, or disputes.

14 Cases settle. Every case settles. Either the  
15 parties do it or I do it, or the jury does it. So if you can  
16 control the landing, it's better off if you all do it  
17 yourselves. If not, that's what we're here for. So let's go  
18 off the record for a second and talk scheduling.

19 (Off-the-record discussion.)

20 THE COURT: To bring the record current, I've had a  
21 discussion with the parties. I'm going to set a status check  
22 on this case for April 30, 2025, at 10:30 a.m. The parties,  
23 anyone, counsel may appear by Zoom to save travel expenses if  
24 they desire. Contact my courtroom administrator for the  
25 details for that. I will issue a minute order or put in the

1 minutes that the cash -- that the bond to be posted by Kalshi  
2 can be a cash bond as permitted under Rule 67-1.

3 Anything else I can address for the parties? From  
4 the plaintiff?

5 MR. HAVEMANN: Nothing for plaintiff, Your Honor.

6 THE COURT: From the defense?

7 MS. WHELAN: Nothing, Your Honor. Thank you.

8 THE COURT: Thank you all. Well-argued,  
9 well-briefed. Appreciate it. We're in recess.

10 (Proceedings concluded at 1:20 p.m.)

11 \* \* \*

12 COURT REPORTER'S CERTIFICATE

13 I, Judy K. Moore, Official Court Reporter, United States  
14 District Court, District of Nevada, Las Vegas, Nevada, do  
15 certify that pursuant to 28 U.S.C. § 753, the foregoing is a  
16 true, complete, and correct transcript of the proceedings had  
17 in connection with the above-entitled matter.

18

19 DATED: April 14, 2025

20

21 /s/ Judy K. Moore  
22 Judy K. Moore, CRR, RMR  
23 Official Court Reporter  
24 United States District Court  
25 District of Nevada