

No. 26-299

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IN THE  
**Supreme Court of the United States**

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MARY JO FLAHERTY AND JENNIFER DAVENPORT,  
*Petitioners,*

v.

KALSHIEX, LLC,  
*Respondent.*

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**On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit**

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**BRIEF OF *AMICI CURIAE* STOP PREDATORY  
GAMBLING, THE ASSOCIATION OF  
AMERICAN PHYSICIANS AND SURGEONS,  
AND TEXANS AGAINST GAMBLING  
IN SUPPORT OF PETITIONERS**

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October 7, 2026

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## INTERESTS OF *AMICI CURIAE*<sup>1</sup>

*Amicus curiae* Stop Predatory Gambling (“SPG”) is a nonprofit, nonpartisan national organization that for decades has advocated for improving the lives of the American people by exposing the harms from state-sanctioned gambling. In 2008 it held a much-acclaimed conference at the National Harbor in Maryland which featured predatory gambling opponents including Taylor Branch, a Pulitzer Prize-winning biographer of the Rev. Martin Luther King Jr. and historian of the civil rights movement, and Bishop John R. Schol, who at the time was the head of the Baltimore/Washington United Methodist Conference. Stop Predatory Gambling led a remarkably diverse political and religious coalition in an *amicus* brief filed in the landmark case of *Murphy v. NCAA*, and SPG’s *amicus* brief was cited favorably by the Supreme Court majority opinion. 584 U.S. 453, 460 n.16 (2018).

*Amicus curiae* Association of American Physicians and Surgeons (AAPS) is a national nonprofit membership organization founded in 1943, and its motto is “all for the patient.” Members of AAPS have testified at many state legislative committee hearings on health and medical issues concerning the American public, and AAPS has filed many *amicus curiae* briefs in this and other appellate courts. AAPS members see

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<sup>1</sup> *Amici* provided timely notice of their intention to file this brief to counsel of record for all parties pursuant to Rule 37.2. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund its preparation or submission. No person other than *amici*, their members, or their counsel made such a monetary contribution.

first-hand the harm being caused by the growing pandemic of commercialized gambling.

*Amicus curiae* Texans Against Gambling is a group of volunteers devoted to preventing the expansion of gambling. Founded in 1988 as Texans Who Care, Texans Against Gambling operates as a registered assumed name of this nonprofit Texas corporation. Texans Against Gambling strives to improve lives by freeing Texans and others from the lower standard of living, exploitation, and fraud that commercialized gambling spreads.

*Amici* have a direct interest in opposing the override of many state constitutions, laws and regulations that prohibit or limit commercialized gambling, as Respondent KalshiEX, LLC (“Kalshi”) is doing. *Amici* thereby have a strong interest in this Petition for Writ of Certiorari.

### SUMMARY OF ARGUMENT

The worsening national crisis of online sports gambling is obvious from its pervasive advertising. The former U.S. Surgeon General Jerome Adams, in office from 2017 to 2021, recently confirmed the problem:

***Sports betting is the new opioid crisis.*** Our kids – especially our boys – are getting exposed and hooked early. ***And it’s ruining lives as surely as us turning a blind eye to prescription opioids did.***

Brian Pempus, *Ex-U.S. Surgeon General Calls Sports Betting 'New Opioid Crisis'*, GamblingHarm.org (Aug. 24, 2026) (emphasis added).<sup>2</sup>

Dr. Adams observed that gambling is “the addiction most likely to lead to suicide.” *Id.* In his speech at the University of Missouri-Kansas City in March, Dr. Adams observed that “[t]wo to 4 million Americans may experience gambling disorder in their lifetime with links to additional mental health harms.” Julia Walker, *UMKC School of Medicine Marks 20 Years of the Shannon Lectureship with Former U.S. Surgeon General Jerome Adams, M.D.*, UMKC Today (Mar. 4, 2026).<sup>3</sup> An estimated 52% of men aged 18-49 have an active online sportsbook account, and 46% of men report that they actually place wagers. St. Bonaventure Univ., *Siena/SBU Survey: Over Half of Men 18–49 Have Sportsbook Accounts* (Apr. 13, 2026).<sup>4</sup> Every gambler adversely affects an average of five other people. See Matthew Browne, Catherine Tulloch & Mitchell D. Woodbright, *From ‘Six Others’ to Edge*

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<sup>2</sup> <https://gamblingharm.org/former-us-surgeon-general-jerome-adams-sports-betting-opioid-crisis/> (viewed Sept. 5, 2026). Brian Pempus is a former managing editor of sports betting at *Forbes* magazine having over fifteen years of experience reporting on or working in the gambling industry. His online website is superb independent journalism for “news, analysis, help, and resources for problem gambling and consumer protection.”

<sup>3</sup> <https://tinyurl.com/2s35wc5c> (viewed Oct. 4, 2026).

<sup>4</sup> <https://www.sbu.edu/news/news-items/2026/06/24/siena-sbu-survey--over-half-of-men-18-49-have-sportsbook-accounts> (viewed Sept. 6, 2026).

*Conservation: A Network Reconciliation of Gambling Harm to Others*, J. Gambling Stud. (June 17, 2026).<sup>5</sup>

This addiction crisis may seem inconsequential to a non-gambler. But the advertisements nearly everywhere for sports gambling reflect its ubiquitous presence today, and its adverse impact on society adds up. At least one contemporaneous historian observed that a gambling problem in Rome contributed to the fall of the Roman Empire. Fourth-century historian Ammianus Marcellinus condemned Rome’s extensive gambling and obsession with spectator sports, and concluded “[t]hese and similar things prevent anything memorable or serious from being done in Rome.” Ammianus Marcellinus, *Res Gestae* 14.6.26 (John C. Rolfe trans., Harvard Univ. Press 1935).<sup>6</sup>

Respondent KalshiEX, LLC (“Kalshi”) pours fuel on this fire. It brazenly circumvents state regulations and prohibitions in order to promote the equivalent of sports gambling on everyone’s handheld cell phone, by reinterpreting an old statute that cannot plausibly be read to federalize sports gambling. The major questions doctrine flatly precludes Kalshi’s interpretation as the Ninth Circuit unanimously held, but the divided Third Circuit ignored. *Compare KalshiEX, LLC v. Assad*, No. 25-7516, 2026 U.S. App. LEXIS 26395, at \*46-\*47 (9th Cir. Aug. 28, 2026) *with KalshiEX, LLC v. Flaherty*, 172 F.4th 220 (3d Cir. 2026). At a minimum, the Petition should be granted to resolve this and other circuit splits on this issue.

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<sup>5</sup> <https://doi.org/10.1007/s10899-026-10521-3> (viewed Sept. 6, 2026).

<sup>6</sup> <https://penelope.uchicago.edu/Thayer/E/Roman/Texts/Ammian/14%2A.html> (viewed Sept. 13, 2026).

This Court should add the following issue to the Question Presented. This national pandemic of sports gambling exists because of a flawed severability analysis in *Murphy v. NCAA*, 584 U.S. 453 (2018). A subsection of Section 2(a) of the Professional and Amateur Sports Protection Act (PASPA), codified at 28 U.S.C. § 3702(2), prohibits commercialized gambling pursuant to state law, and it was “not the provision challenged by petitioners” in *Murphy*. 584 U.S. at 480. But the *Murphy* majority invalidated it as non-severable from an unconstitutional provision. Four Justices in *Murphy* criticized this severability analysis, legal scholars have critiqued flaws in it, and the reasoning in this Court’s subsequent decisions is against it. *Stare decisis* does not protect this aspect of the *Murphy* decision because petitioners there lacked Article III standing to challenge Section 3702(2).

No one credibly doubts that Section 3702(2) is within the authority of Congress, and it has never been repealed. When Section 3702(2) is given its plain meaning to prohibit commercialized sports gambling, this case at bar becomes easy to resolve. Congress did not grant authority to the Commodity Futures Trading Commission (CFTC) to allow what Congress prohibits. The briefing on the severability of Section 3702(2) was admittedly inadequate in *Murphy*, because that provision was not part of that case. But Section 3702(2) is intrinsically part of this case, and a question about it should be formally added to the Question Presented here. Congress has definitively spoken against sports gambling.

The Petition should be granted due to the immense national importance and the circuit split. This Court should add the severability of Section 3702(2) to the

Question Presented to benefit from full briefing on this issue, briefing that was lacking in *Murphy*.

## **ARGUMENT**

### **I. The Immense Harm Caused by Sports Gambling and the Circuit Split Warrant Granting the Petition.**

Sports gambling, which Kalshi is promoting and selling nationwide, is immensely harmful to individuals and to the integrity of sports. Former U.S. Senator and basketball star Bill Bradley was prophetic when he stated after *Murphy v. NCAA* that “I think the game will be corrupted” by sports gambling. “NFHS ‘concerned’ about Supreme Court decision on sports betting” (May 17, 2018).<sup>7</sup> He added, “Do you really want to go to your son’s high school basketball or football game and see people in the crowd who are betting, who are not rooting for your child to win or lose, but are betting on a spread?” *Id.* The national importance of this issue justifies granting certiorari.

In addition, a stark circuit split exists between the Third Circuit decision at issue here, and the Ninth and Sixth Circuits that subsequently ruled the other way, which further requires granting the Petition.

#### **A. The Worsening Pandemic of Sports Gambling Is Extremely Harmful to Individuals and to the Integrity of Sports.**

Since this Court’s decision in *Murphy v. NCAA*, annual legal sports wagering in the United States has grown approximately 25-fold, from \$6.61 billion in

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<sup>7</sup> <https://www.highschoolot.com/story/nfhs-concerned-about-supreme-court-decision-on-sports-betting/17561561/> (viewed Oct. 5, 2026).

2018 to \$163 billion in 2025. See Covers, *Sports Betting Revenue—US Betting Handle*, tbl. “Historical Year-by-Year Data.”<sup>8</sup> See also Keyrock & Dune, *Prediction Markets: The Next Frontier of Financial Markets* (Dec. 2025) (reporting that sports accounted for approximately 85% of Kalshi’s 2025 notional volume and 39% of Polymarket’s).<sup>9</sup>

Gambling afflicts not just the addict, but many around him. “On average, affected others estimated that a mean of 5.07 other people were negatively affected by this person’s gambling.” GambleAware, *Annual GB Treatment and Support Survey 2022: Exploring the Prevalence, Barriers and Facilitators to Accessing Treatment and Support for Gambling Harms in Great Britain* 67 (2023).<sup>10</sup> See also Belinda C. Goodwin, Matthew Browne, Matthew Rockloff & Judy Rose, *A Typical Problem Gambler Affects Six Others*, 17 Int’l Gambling Stud. 276, 276–89 (2017) (identifying close family members, including spouses and children, among those most often affected by a gambler).<sup>11</sup>

States are besieged with an online gambling crisis today, and yet the Third Circuit decision below says there is nothing they can do to stop gambling on

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<sup>8</sup> <https://www.covers.com/betting/betting-revenue-tracker> (viewed Oct. 4, 2026).

<sup>9</sup> <https://dune.com/prediction-markets-report> (viewed Oct. 4, 2026).

<sup>10</sup>

[https://www.gambleaware.org/media/rirj24pk/gambleaware\\_2023\\_treatment-and-support\\_report\\_final\\_0.pdf](https://www.gambleaware.org/media/rirj24pk/gambleaware_2023_treatment-and-support_report_final_0.pdf) (viewed Sept. 13, 2026).

<sup>11</sup> <https://doi.org/10.1080/14459795.2017.1331252> (viewed Sept. 13, 2026).

prediction markets like Kalshi's. "People in Illinois lost more than \$7.7 billion gambling last year." Casey Toner & Maggie Dougherty, *Addicted to Gambling in Illinois: 'Someone Has Decided They Can Make Money Off You'*, Capitol News Ill. (June 24, 2026).<sup>12</sup>

Roughly 30 years ago, Associate Professor Howard Shaffer of the Division on Addictions at Harvard Medical School observed that "[g]ambling is an addictive behavior, make no mistake about it. ... Gambling has all the properties of a psychoactive substance, and ... changes the neurochemistry of the brain." John W. Kindt, *The Failure to Regulate the Gambling Industry Effectively: Incentives for Perpetual Non-Compliance*, 27 S. Ill. U. L. J. 219, 223 (2003).<sup>13</sup> The rate of suicide among gamblers is estimated to be 15 times the rate in the general population.<sup>14</sup>

The significant physical health problems resulting from gambling include "hypertension, sleep deprivation, cardiovascular disease, and peptic ulcer disease."<sup>15</sup> Psychiatric harm includes exacerbation and initiation of major depressive episodes, anxiety disorders, or substance use disorders, and intense

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<sup>12</sup> <https://tinyurl.com/msas9tbz> (viewed Oct. 4, 2026).

<sup>13</sup> Quoting Ford Turner, *Neurochemicals Blamed for Compulsive Gambling*, 8 Compulsive Gambling 1 (Winter 1995-96) (citing an article in the *Beacon-News* (Springfield, Mass.), May 10, 1995).

<sup>14</sup> World Health Organization, *Gambling* (Dec. 2, 2024) <https://www.who.int/news-room/fact-sheets/detail/gambling> (viewed Oct. 4, 2026).

<sup>15</sup> T.W. Fong, *The biopsychosocial consequences of pathological gambling*, 2 Psychiatry (Edgmont) 22-30 (2005).

shame, deceptive conduct, and rash decision-making.<sup>16</sup> Pathological gambling has also been linked to Parkinson’s disease, frontotemporal dementia, and amyotrophic lateral sclerosis.<sup>17</sup>

The *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (“DSM-5”), the standard used by U.S. mental health professionals, began classifying gambling addiction as an addictive disorder in 2013. Gambling addiction is the first and only behavioral addiction defined in the clinical section of *DSM-5*.<sup>18</sup> Like most other addictions, gambling requires increased participation over time to attain the same level of satisfaction, and withdrawal discomfort typically arises in those who attempt to overcome this addiction.<sup>19</sup> The ICD-10-CM, which is the International Classification of Diseases, Tenth Revision, Clinical Modification, is used for medical diagnoses and includes a code Z72.6 for “gambling and betting” disorders.<sup>20</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> E.T. Ozel-Kizil, *A case of frontotemporal dementia with amyotrophic lateral sclerosis presenting with pathological gambling*, 9 J. Clin. Neurol. 133-137 (2013) <https://pmc.ncbi.nlm.nih.gov/articles/PMC3633192/> (viewed Oct. 4, 2026).

<sup>18</sup> See E. Sohn, *How gambling affects the brain and who is most vulnerable to addiction*, American Psychological Association (July 1, 2023). <https://tinyurl.com/4dpyw7f7> (viewed Oct. 4, 2026).

<sup>19</sup> See *id.*

<sup>20</sup> ICD10Data.com, *Gambling and betting*, 2027 ICD-10-CM Diagnosis Code Z72.6, <https://tinyurl.com/y5kr8x8p> (viewed Oct. 4, 2026).

Gambling by those under age 21 (“underage gambling”) is typically prohibited by states, *see, e.g.*, Nev. Rev. Stat. § 463.350; Md. Code Ann., Crim. Law § 10-136; Md. Code Regs. 36.10.13.44; N.J.S.A. 5:12-119 (under-21 gambling is punishable by a fine of not less than \$500 and not more than \$1,000), yet Kalshi allows gambling by 18-year-olds as criticized by the Michigan state court below. Purchases of alcohol and cigarettes by those under 21 are banned in every state, and the state bans on gambling by teenagers and 20-year-olds are medically justified. “It is well established that the brain undergoes a ‘rewiring’ process that is not complete until approximately 25 years of age.” Mariam Arain, *Maturation of the adolescent brain*, 9 Neuropsychiatr. Dis. Treat. 449, 449 (Apr. 3, 2013).<sup>21</sup> “The adolescent brain is structurally and functionally vulnerable to environmental stress, risky behavior ....” *Id.* at 458-59.

In recently granting a preliminary injunction against Kalshi, a Michigan state court spoke with remarkable clarity:

Michigan and its most vulnerable citizens are suffering and will continue to suffer immediate and irreparable harm absent relief from being exploited by Kalshi’s sports betting operation masquerading as an investment opportunity. First, Michigan’s legalized gaming industry requires those who wish to place wagers to be 21 years of age or older. Kalshi, however, allows people to place wagers beginning at age 18. If Kalshi is allowed to continue

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<https://pmc.ncbi.nlm.nih.gov/articles/PMC3621648/pdf/ndt-9-449.pdf> (viewed Oct. 4, 2026).

to offer sports wagers, the potential irreparable harm on Michigan's youth would be profound. Second, Kalshi takes advantage of serious mental health issues without providing the protections that Michigan's regulatory structure was designed to do.

*People of the State of Michigan / Michigan Gaming Control Board v. KalshiEX, LLC*, Ingham County Circuit Court (30th Judicial Circuit), Case No. 26-1087-CZ (Hon. Rosemarie E. Aquilina), at 2 (Sept. 1, 2026).

Shortly after Abraham Lincoln took office as an Illinois legislator, he voted in favor of a bill to expand the ban on gambling in that state, such that HB 187 passed by a 36-7 vote on February 7, 1835. See *A Bill Further to Prevent Gaming in This State*, H.B. 187, 9th Gen. Assemb., 1st Sess. (Ill. 1835), *Papers of Abraham Lincoln Digital Library*.<sup>22</sup> Lincoln was also known to be personally opposed to gambling, and to refrain from participating in the card-playing common then among attorneys. One biographer wrote about how Lincoln persuaded a clerk to stop chasing his losses, which is central to gambling addiction:

Young Greene was, like most of the young men in New Salem[, Illinois], addicted to petty gambling. He once related how Lincoln induced him to quit the habit. Abe said to him one day:

“Billy, you ought to stop gambling with Estep.”  
Billy made a lame excuse:

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<sup>22</sup> <https://papersofabrahamlincoln.org/documents/D251506> (viewed Sept. 6, 2026).

“I’m ninety cents behind, and I can’t quit until I win it back.”

“I’ll help you get that back,” urged Lincoln, “if you’ll promise me you won’t gamble any more.”

The youth reflected a moment and made the required promise.

Wayne Whipple, *The Story of Young Abraham Lincoln* 122 (1915).<sup>23</sup> See also William H. Herndon & Jesse W. Weik, *Herndon’s Life of Lincoln* 283 (1889) (an account by Lincoln’s law partner explaining that although some local lawyers indulged in petty gambling, “Lincoln, Davis, and a few local wits would spend the evening in Davis’s room, talking politics, wisdom, and fun”).<sup>24</sup>

Supreme Court Justice Brandeis, like President Lincoln, was strongly opposed to gambling. He commented that life insurance “should not be used ... as a means of gambling on the misfortunes of others.” Louis D. Brandeis, *Business—A Profession* 116 (1914). Yet many bets allowed by Kalshi do relate to the misfortunes of others, such as gambling on whether a military action will occur.

Meanwhile, sports gambling has undermined the integrity of games. Major League Baseball successfully kept gambling from destroying the game for more than a century after the devastating scandal of the 1919

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<sup>23</sup> <https://classic-literature.net/wayne-whipple-1856-1942/the-story-of-young-abraham-lincoln/> (viewed Sept. 6, 2026).

<sup>24</sup> <https://libsysdigi.library.illinois.edu/OCA/Books2012-05/herndonslifeoflinc00hern/herndonslifeoflinc00hern.pdf> (viewed Sept. 6, 2026).

World Series, but now gambling is back with a vengeance due to prop bets and parlays on prediction markets like Kalshi's. A two-time American League Reliever of the Year and three-time All-Star, Emmanuel Clase of the Cleveland Guardians, is being prosecuted in federal court on accusations of having thrown suspicious pitches for the benefit of gamblers in at least 48 games over a two-year span. David Purdum, *Guardians' Clase allegedly rigged pitches in 48 games, document says*, ESPN (Feb. 5, 2026).<sup>25</sup> He was in the fourth season of a five-year contract worth \$20 million, illustrating (if there is validity to the charges) that even highly paid professional athletes can be influenced by gambling. His teammate Luis Ortiz is also charged.

The *New York Times* reported that:

Sports-betting charges are becoming a regular occurrence. Last Thursday, the Eastern District of Pennsylvania unsealed indictments against 20 college basketball players at 17 schools, accusing the players as well as gamblers of engaging in point shaving during games.

The N.C.A.A. does not allow its athletes to bet on sports, nor does it allow sponsorships from gambling companies. But ***gambling is so pervasive in sports that those rules may not matter.***

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[https://www.espn.com/mlb/story/\\_/id/47842376/guardians-clase-allegedly-rigged-pitches-48-games-document-says](https://www.espn.com/mlb/story/_/id/47842376/guardians-clase-allegedly-rigged-pitches-48-games-document-says) (viewed Oct. 4, 2026).

Tania Ganguli, *Sports-Betting Scandals Are Ubiquitous. Whether Fans Will Care Is an Open Question*, *The New York Times* (Jan. 21, 2026) (emphasis added).

Polling shows that gambling is undermining trust by the public in the integrity of professional sports. A poll conducted by Sacred Heart University in conjunction with GreatBlue Research found that the sports gambling scandals have weakened the trust in the integrity of NBA games by 79% of active bettors, and “many believe concerns extend beyond one league.” Chumani Heard, *Sacred Heart poll shows sports betting scandals hurt trust in pro sports*, *Fairfield County News* (Mar. 4, 2026).<sup>26</sup>

**B. The Petition Should Be Granted to  
Resolve the Circuit Split as to the Major  
Questions Doctrine.**

A circuit split exists between the Third Circuit decision below and recent decisions by the Ninth and Sixth Circuits. The Petition explains the stark circuit split between the Third and Ninth Circuits. *See also KalshiEX LLC v. Schuler*, Nos. 26-3196/5235, 2026 U.S. App. LEXIS 29542 (6th Cir. Sep. 25, 2026).

*Amici* focus on the decision by the Third Circuit not to apply the major questions doctrine, while the Ninth Circuit expressly applied it correctly to resolve this dispute. The Petition should be granted to confirm that the major questions doctrine precludes Kalshi’s novel interpretation of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

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<sup>26</sup> <https://tinyurl.com/2kfdphsf> (viewed Oct. 4, 2026).

Overreach by a federal agency, in this case the CFTC, to vastly expand its own jurisdiction is not new, and this Court has repeatedly rejected analogous attempts by other agencies under the major questions doctrine. *See, e.g., Biden v. Nebraska*, 600 U.S. 477, 502-03 (2023) (The “eviction moratorium implemented by the Centers for Disease Control and Prevention triggered analysis under the major questions doctrine.”); *West Virginia v. EPA*, 597 U.S. 697, 724 (2022) (while quoting Justice Kagan, the majority opinion emphasized that “we ‘typically greet’ assertions of ‘extravagant statutory power over the national economy’ with ‘skepticism’”) (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

The Ninth Circuit correctly applied that doctrine to rule against Kalshi, and this Court should grant the Petition to address this. The Ninth Circuit held that:

The Dodd-Frank Wall Street Reform Act cannot be read as a direct (or indirect) regulation of sports gambling, and the CFTC is not a national gambling regulator. No one suggested it was until over a decade after the law was passed.

*KalshiEX, LLC v. Assad*, No. 25-7516, 2026 U.S. App. LEXIS 26395, at \*45 (9th Cir. Aug. 28, 2026). Kalshi’s attempt to reinterpret this statute runs afoul of the major questions doctrine because it would transfer longstanding, vast authority from states to the federal government without an explicit congressional mandate. *Id.* at \*46-\*47.

The silence of the Third Circuit as to this doctrine is striking, and warrants granting the Petition. *See, e.g., Pereira v. Sessions*, 585 U.S. 198, 208–09 & n.4

(2018) (resolving a conflict between circuit courts declining or applying *Chevron*).

**II. The Court Should Grant Certiorari with This Additional Question: Whether the Severability Analysis in *Murphy v. NCAA* Correctly Struck 28 U.S.C. § 3702(2).**

PASPA Section 3702(2) makes it unlawful for “a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,” wagers on sports as broadly defined. The *Murphy* decision invalidated this provision, not based on the Constitution, but rather on a much-criticized non-severability analysis that did not benefit from complete briefing, and which did not fully consider the immensely harmful consequences. “[I]t behooves us” to reconsider in the future the severability analysis in *Murphy*, and now is the time to do so. *Murphy*, 584 U.S. at 491 (Thomas, J., concurring). The torrent of online sports gambling has flowed not from the Court’s invalidation of Section 3702(1) on constitutional grounds but from its invalidation of Section 3702(2) by finding non-severability. *See also* David Gambacorta and William Bender, *Gambling’s ground zero*, Philadelphia Inquirer (Oct. 4, 2026) (describing a worsening pandemic of online gambling that began with the *Murphy* decision in 2018).

A high-tech casino is now in every teenager and young adult’s pocket: the cell phone with its immediate access to online sports gambling at any time of day or night, while in school, while driving, or instead of sleeping. Technological advances since 2018 make invalidation of the congressional ban on commercialized gambling – through a flawed severability analysis – ripe for reconsideration. *See*

*South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 184 (2018) (“Though *Quill* was wrong on its own terms when it was decided in 1992, since then the Internet revolution has made its earlier error all the more egregious and harmful.”); *see also State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (unanimously overruling an antitrust precedent by “recognizing and adapting to changed circumstances and the lessons of accumulated experience”).

“I don’t think I could ever have anticipated that [sports betting] would be in everybody’s pocket,” declared former New Jersey Governor Chris Christie, who was the lead plaintiff in *Murphy v. NCAA* until his term as governor expired. Brian Pempus, ‘Godfather’ of Sports Betting Calls Industry ‘A Little Bit Disturbing’, GamblingHarm.org (Sept. 7, 2026).<sup>27</sup> “That’s a little bit disturbing to me, to tell you the truth, the proliferation of it,” Christie added. *Id.*

It’s been quite a “proliferation” indeed, to put it mildly. As one of many illustrations of this crisis:

Legal online sportsbooks won more than \$16 billion from bettors in 2025, and the legal industry appears to have helped normalize the offshore market alongside it. ***Americans are losing record sums gambling on sports.***

*Id.* (emphasis added).

To put this in perspective, in 2025 Americans spent more than twice as much on sports gambling as they spent on movies, recorded and live music, books, and

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<sup>27</sup> <https://gamblingharm.org/godfather-of-sports-betting-calls-industry-a-little-bit-disturbing/> (viewed Sept. 7, 2026).

museums combined. See Catherina Gioino, *Gambling Becomes America's Favorite Pastime as Americans Spend More on Sports Bets than Movies, Arts, Museums, and Music Combined*, *Fortune* (July 26, 2026) (last year Americans spent \$166 billion on sports gambling, compared with a total of \$70 billion on books, movies, music and museums combined).<sup>28</sup>

The invalidation of the congressional ban on commercialized sports gambling in PASPA is germane to this case because Kalshi argues, in essence, that Congress allows its equivalent of sports gambling under federal law. The *Murphy* decision on non-severability has become an enormous problem now due to technological advances. It is undeserving of *stare decisis* today for multiple reasons: it was not sought by petitioners in *Murphy*; it has been undermined by the reasoning of this Court in subsequent decisions; and legal scholars oppose the analysis in *Murphy* itself.

If Section 3702(2) is valid today, and no one doubts its stand-alone constitutionality, then it would prohibit Kalshi's sports-event contracts as sports-wagering schemes to the extent they are "pursuant to the law or compact of a governmental entity." 28 U.S.C. § 3702(2). This Court should add this to the Question Presented and, if necessary, appoint an *amicus curiae* to brief it. See, e.g., *United States v. Windsor*, 570 U.S. 744, 755–56 (2013) (appointing Professor Vicki Jackson as *amicus curiae* to argue that the Court lacked jurisdiction, when all parties felt jurisdiction existed); *Nat'l Fed'n of Indep. Bus. v.*

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<sup>28</sup> <https://fortune.com/2026/07/26/gambling-america-pastime-spend-sports-bets-movies-arts-museums-music/> (viewed Sept. 13, 2026).

*Sebelius*, 567 U.S. 519, 543–44 (2012) (appointing H. Bartow Farr III to brief and argue in support of the Eleventh Circuit’s decision on the specific issue of severability); *Dickerson v. United States*, 530 U.S. 428, 441 n.7 (2000) (appointing Professor Paul G. Cassell as *amicus curiae* to defend the constitutionality of 18 U.S.C. § 3501, because no party argued in favor of its constitutionality).

**A. *Stare Decisis* Does Not Apply to *Murphy*’s Non-Severability Holding, Because Section 3702(2) Was Not Properly Before the Court.**

“Congress can regulate sports gambling directly,” this Court held in *Murphy*, and the PASPA prohibited sports gambling. 584 U.S. at 486. Yet in a non-severability holding that has not stood the test of time, the *Murphy* majority invalidated that prohibition. This should be reconsidered in the case at bar.

*Stare decisis* does not attach to advisory opinions, which the non-severability analysis in the *Murphy* majority was. The Court observed that Section 3702(2) “does restrict private conduct,” and “that is not the provision challenged by petitioners.” *Murphy*, 584 U.S. at 480. Standing was lacking to challenge it. “Hypothetical jurisdiction produces nothing more than a hypothetical judgment – which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101 (1998) (citing *Muskrat v. United States*, 219 U.S. 346, 362 (1911), and *Hayburn’s Case*, 2 Dall. 409 (1792)).

Counsel for the Respondent NCAA in *Murphy*, Paul Clement, explained at oral argument that “the parties

haven't had to brief" the enforceability of Section 3702(2) "because this really hasn't been a 3702 case." *Murphy*, Tr. of Oral Arg. 44. Representing the United States, the Deputy Solicitor General, Jeffrey Wall, opposed invalidating Section 3702(2) and observed "that's just not the way statutory interpretation and severability normally work." Transcript of Oral Argument at 66, *Murphy v. NCAA*, Nos. 16-476 & 16-477 (Dec. 4, 2017).

The consequences of invalidating Section 3702(2) in *Murphy* were never considered, which illustrates an Achilles' heel of some types of originalists. "Wary of being charged with 'results oriented' decision-making, they are allergic to any evaluation of results. That is a mistake." Samuel A. Alito Jr., *Even Originalists Make Mistakes*, Wall St. J. (Oct. 3, 2026).

That mistake is evident here, as a sports gambling pandemic comparable to the opioid crisis sweeps the Nation, due to the advisory portion of the divided opinion in *Murphy*. Before further harm is inflicted on individuals, on sports, and on our Nation, that mistake should be corrected here.

The severability analysis in *Murphy* has not stood the test of time. Subsequent decisions by this Court are contrary to the reasoning in *Murphy*, and legal scholars have identified multiple flaws in it. *Stare decisis* is inapplicable, or only weakly applicable, because the severability issue was not raised by the petitioners in *Murphy*, was not fully briefed by the parties, and was not supported by Article III standing.

**B. The Non-Severability Analysis in *Murphy* Was Persuasively Criticized by Justice Thomas There, and His Criticism Has Been Adopted in Subsequent Decisions.**

Justice Thomas wrote in concurrence in *Murphy* that “in a future case, we should take another look at our severability precedents. Those precedents appear to be in tension with traditional limits on judicial authority.” *Murphy*, 584 U.S. at 487-88 (Thomas, J., concurring). This Court has done that, and its reasoning in subsequent decisions negates the flawed severability analysis in *Murphy*. That tension should be resolved in this case at bar, because Kalshi’s conduct should be enjoined under Section 3702(2) of the PASPA.

Justice Thomas elaborated in his *Murphy* concurrence that “the severability doctrine often requires courts to weigh in on statutory provisions that no party has standing to challenge, bringing courts dangerously close to issuing advisory opinions.” *Id.* at 490 (Thomas, J., concurring). Justice Thomas explained further:

True, the plaintiff had standing to challenge the unconstitutional part of the statute. But the severability doctrine comes into play only *after* the court has resolved that issue—typically the only live controversy between the parties. In every other context, a plaintiff must demonstrate standing for each part of the statute that he wants to challenge. The severability doctrine is thus an unexplained exception to the normal rules of standing, as well as the separation-of-powers principles that those rules protect.

*Id.* at 491 (Thomas, J., concurring, citations omitted).

Subsequent decisions by this Court have followed Justice Thomas’s severability analysis, rather than that of the *Murphy* majority. This left the invalidation of Section 3702(2) in *Murphy* as a very harmful anomaly, untethered to any justifiable basis and out of step with subsequent holdings.

In *Barr v. AAPC*, the plurality decision by Justice Kavanaugh, as joined by Chief Justice Roberts and Justice Alito, is contrary to the severability analysis by the *Murphy* majority. Speculation about hypothetical congressional intent is inappropriate, and “[t]he Court’s cases have instead developed a strong presumption of severability.” *Barr v. Am. Ass’n of Political Consultants*, 591 U.S. 610, 625 (2020) (plurality opinion). The central reasoning of the *Murphy* majority was based on what *Barr* flatly rejected. *Compare Murphy*, 584 U.S. at 486 (“we do not think that Congress would want”) *with Barr*, 591 U.S. at 625 (“this formulation often leads to an analytical dead end ... because courts are not well equipped to imaginatively reconstruct a prior Congress’s hypothetical intent”). The *Barr* plurality expressly relied on Justice Thomas’s concurrence in *Murphy*: “plaintiffs who successfully challenge one provision of a law may lack standing to challenge other provisions of that law.” *Id.* at 627.

Similarly, in *Seila Law v. CFPB*, the Chief Justice wrote for a plurality including Justices Kavanaugh and Alito that “Congress would prefer that we use a scalpel rather than a bulldozer in curing the constitutional defect we identify today.” 591 U.S. 197, 237 (2020) (plurality opinion). While the statute at issue there had an express severability clause, Chief

Justice Roberts’ observation rings true in the context of sports gambling, and supports reconsidering the severability analysis in *Murphy*.

“[W]e try to limit the solution to the problem.” *United States v. Arthrex, Inc.*, 594 U.S. 1, 23 (2021) (plurality opinion) (quoting *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328 (2006)). In *Arthrex*, this Court invoked the “normal rule that partial, rather than facial, invalidation is the required course.” *Id.* at 24 (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985)). Justice Gorsuch joined Justice Thomas’s criticism of severability doctrine in *Seila Law*, and subsequently invoked Justice Thomas’s *Murphy* concurrence in *Arthrex*. See also *Collins v. Yellen*, 594 U.S. 220, 280 n.35 (2021) (Gorsuch, J., concurring in part) (“[T]his Court lacks the ‘editorial freedom’ to pick and choose among options like these, for doing so would usurp Congress’s legislative authority.”) (quoting Justice Thomas’s opinion in *Seila Law*, cleaned up).

Applying the foregoing precedents to the *Murphy* severability analysis requires overruling it.

### **C. Legal Scholars Widely Reject the Severability Analysis in *Murphy*.**

Although legal scholars of course do not have the last word, their arguments can merit this Court taking a second look when such scholars have unanimously criticized a previously announced legal approach. Such is the case for the severability analysis in *Murphy*, which struck down Section 3702(2) despite petitioners not challenging it, and over multiple dissents.

Renowned law Professor Richard Fallon has criticized the *Murphy* majority’s counterfactual

congressional-intent analysis, and explained that subsequent opinions in *Barr* and *Seila Law* expose its weaknesses. See Richard H. Fallon, Jr., *Facial Challenges, Saving Constructions, and Statutory Severability*, 99 Tex. L. Rev. 215 (2020).<sup>29</sup> “If the Supreme Court is prepared to reject the formula that ties severability to counterfactual congressional intent, this will be a major step in the right direction,” Professor Fallon argued. *Id.* at 275.

Professor Fallon persuasively explained that decisions subsequent to *Murphy* have moved away from its approach:

some of the same Justices who joined the Court majority in *Murphy* rejected speculations about the intentions and attitudes of members of Congress in voting for legislation and about what they would have done if apprised that an issue would subsequently arise.

*Id.* at 224 (footnote and citations omitted).<sup>30</sup> Professor Fallon pointed out that “[u]nder textualist principles of statutory interpretation, the law is defined by what Congress enacted, not by what it wanted or would have wanted to achieve.” *Id.*

Others have also independently criticized *Murphy* in law review articles. See, e.g., Michael K. Fagan, *Murphy v. NCAA: Wrongly Decided by the Supreme*

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<sup>29</sup> <https://texaslawreview.org/facial-challenges-saving-constructions-and-statutory-severability> (viewed Oct. 4, 2026).

<sup>30</sup> <https://texaslawreview.org/wp-content/uploads/2020/12/Fallon.Printer.pdf> (viewed Oct. 4, 2026).

*Court (And Here's Why)*, 2021 U. Ill. L. Rev. 1649;<sup>31</sup> *The Supreme Court, 2017 Term—Leading Cases, Murphy v. National Collegiate Athletic Association*, 132 Harv. L. Rev. 387, 393 (2018) (“The *Murphy* majority departed from this presumption [of severability] and every part of the framework”).<sup>32</sup>

**D. A Stand-Alone Section 3702(2) Makes Sense, and Is Not Incoherent.**

As Justice Kavanaugh wrote for a Court plurality in *Barr*, it would be unusual for a statutory provision to be stricken for non-severability, as typically provisions can survive independently; “it is fairly unusual for the remainder of a law not to be operative.” *Barr*, 591 U.S. at 628 (plurality opinion). The dissents in *Murphy* explained Section 3702(2) can and should survive on its own.

Yet the heart of non-severability analysis in *Murphy* was its finding that “the prohibition of private conduct under §3702(2) ceases to implement any coherent federal policy.” 584 U.S. at 484. In fact, a strong federal policy against sports gambling has existed for more than a half-century. See Wire Act of 1961, Pub. L. No. 87-216, § 2, 75 Stat. 491, 491–92 (1961) (codified at 18 U.S.C. § 1084) (criminalizing use of interstate communications by a bookie to transmit a sports wager).

The *Murphy* non-severability analysis mistakenly found that “[u]nder §3702(2), private conduct violates

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<sup>31</sup> <https://illinoislawreview.org/wp-content/uploads/2021/10/Fagan.pdf> (viewed Oct. 4, 2026).

<sup>32</sup> [https://harvardlawreview.org/wp-content/uploads/2018/11/387-396\\_Online.pdf](https://harvardlawreview.org/wp-content/uploads/2018/11/387-396_Online.pdf) (viewed Oct. 4, 2026).

federal law *only* if it is permitted by state law,” and then called that a “strange rule” that could not survive. 584 U.S. at 484 (emphasis added). But the “only” is fiction. It appears nowhere in Section 3702, and is not implied by it. The reasoning of the *Murphy* majority depends entirely on inferring an exclusivity to the PASPA that is not there.

As Justice Breyer explained in dissent:

Congress might have seen subsection (2) as a backup, called into play if subsection (1)’s requirements, directed to the States, turned out to be unconstitutional—which, of course, is just what has happened.

*Murphy*, 584 U.S. at 492 (Breyer, J., concurring in part and dissenting in part).

Justice Ginsburg fully rebuts the hypothetical paradox imagined by the *Murphy* majority:

In lieu of a flat ban, PASPA prohibits third parties from operating sports-gambling schemes only if state law permits them to do so. If a state ban is in place, of course, there is no need for a federal proscription.

*Id.* at 494 n.2 (Ginsburg, J., joined by Breyer and Sotomayor, JJ., dissenting).

Kalshi and other commercial purveyors of sports gambling lack the political accountability that state government has, which would provide a check against predatory practices. So it makes perfect sense for Congress to have separately prohibited private commercialized gambling on sports, and this Court should use this case to address *Murphy*’s severability analysis that invalidated the commercial ban.

**CONCLUSION**

The Petition should be granted with an addition to the Question Presented to reconsider the validity of Section 3702(2) of the PASPA.

Respectfully submitted,

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Dated: October 7, 2026