April 21, 2026

Commodity Futures Trading Commission
c/o Christopher Kirkpatrick
Secretary of the Commission
Three Lafayette Centre
1155 21st Street NW,
Washington, DC 20581

VIA CFTC Comments Portal

Re: Comment of George Washington University Law Students in Support of CFTC Waiting for Clearer Statutory Authority from Congress and Allowing States to Continue Regulating Betting on Prediction Markets, 91 FR 12516, RIN 3038–AF65

Dear Mr. Kirkpatrick:

We are two third-year law students in the Spring 2026 cohort of the Administrative Law, Issues, and Appeals (ALIA) Clinic, a division of the Jacob Burns Community Legal Clinics at The George Washington University Law School.[1] This comment is in response to the Commission's Advanced Notice of Proposed Rulemaking (ANPRM) requesting comments on how the agency should regulate prediction markets and what factors it should consider in doing so.[2] We write in our individual capacities to oppose the CFTC regulation of prediction markets under the Commodity Exchange Act (CEA). Specifically, we offer this comment to the Commission regarding its regulatory authority over prediction market contracts (hereinafter "event contracts"[3]) and raise concerns related to the federal-state balance of gambling regulations.

I. Introduction

This comment recommends that the Commission forbear from entering into the regulatory space of prediction markets until it receives express statutory authority to do so from Congress. If the Commission proceeds with regulating prediction markets under its existing statutory authority, we think that a federal court would likely hold that the agency exceeded its statutory authority and potentially its constitutional authority under federalism principles in so doing. We first argue that the CEA does not provide the Commission with exclusive jurisdiction over select transactions that prediction markets offer nor does Section 5c(c) enable the Commission to prohibit such transactions, and regardless, the Commission should wait for appellate resolution over its jurisdictional authority before engaging in further rulemaking. Second, Congress, in the CEA, did

[1] This comment does not represent the institutional position of the George Washington University, any business unit within the university, or any faculty member.
[2] Prediction Markets, 91 Fed. Reg. 12516.
[3] Although this comment will use the term "event contracts," as the Commission notes in its ANPRM, the term is not one defined "in the CEA or the CFTC's regulations thereunder." *Id.*

not intend to delegate preemptive authority to the Commission over longstanding state gambling laws. Thus, the Commission must seek the answers to the questions in its ANPRM from Congress.

II. Recommendations

A. The Commission Likely Lacks Exclusive Jurisdiction Over Certain Categories of Event Contracts or Authority to Regulate Such Contracts Under CEA Section 5c(c)(5)(C)

If the Commission intends to promulgate regulations on event contracts offered by designated contract markets (DCMs), it is unlikely to be successful in regulating certain popular categories of event contracts, such as contracts reliant on the outcome of sporting events (hereinafter "sports contracts") under CEA section 5c(c)(5)(C).

Although the "Special Rule" of CEA section 5c(c)(5)(C) authorizes the Commission to prohibit event contracts contrary to the public interest, it requires the Commission to classify such event contracts as falling under swaps or contracts in excluded commodities,[4] legal positions that have been subject to skepticism by courts across the country.[5] If the Commission asserts that event contracts fall within their exclusive jurisdiction by classifying them as swaps or futures, it would risk improperly preempting state regulators from doing what they have done for centuries: regulate gambling. Should the Commission successfully treat certain categories like sports contracts or contracts associated with gambling as swaps or futures, it would supplant state authorities without the statutory reservoir to substitute them.

i. The Commission Likely Does Not Have Exclusive Jurisdiction to Regulate Many Event Contracts Because They Are Neither Swaps nor Futures

The Commission has "exclusive jurisdiction" over agreements and transactions "involving swaps," "contracts of sale of a commodity for future delivery," (hereinafter "futures") or "options."[6] It is under this exclusive jurisdiction that the Commission may promulgate regulations regulating these contracts. If the Commission seeks to regulate event contracts, it will be substantially limited unless those contracts fall inside one of these three jurisdictional groupings.

This section argues that many categories of event contracts, such as those dependent on sports, culture, or elections, likely fall outside the definition of "swap" or "futures."[7]

1. Many Popular Contracts are unlikely to be Swaps

The ANPRM asserts that "event contracts can fall within multiple subsections of the CEA's definition of 'swap,'" defined under section 1a(47)(A)(ii) as "any agreement, contract, or transaction . . . that provides for any purchase, sale, payment, or delivery . . . that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency

[4] 7 U.S.C.§ 7a-2(c).
[5] *See, e.g.*, KalshiEX, LLC v. Hendrick, No. 2:25-CV-00575-APG-BNW, 2025 WL 3286282, at *11 (D. Nev. Nov. 24, 2025) (finding sports contracts are neither swaps nor in excluded commodities).
[6] 7 U.S.C.§ 2(a).
[7] The ANPRM does not ask about "options" under § 2(a) or § 1a(36).

associated with a potential financial, economic, or commercial consequence."[8] Swaps can also be defined as any agreement "that is a put, call, cap, floor, collar, or similar option of any kind that is for the purchase or sale, or based on the value, of 1 or more interest or other rates . . . or other financial or economic interests or property of any kind."[9] In pending litigation, the commission has affirmatively advocated that the event contracts generally, and sports contracts specifically, fall under the definition of "swap," particularly under section 1a(47)(a)(ii).[10]

If the Commission classifies event contracts as swaps, it would necessarily find each contract is dependent on an event "associated with a potential financial, economic, or commercial consequence." If the Commission intends to bring a diversity of event contracts under its regulatory ambit, the most natural position is to take an expansive view that downstream economic consequences of an event are sufficient to be "associated with a potential financial, economic, or commercial consequence."[11] For example, if the event is a sports outcome, a downstream consequence is "hotels likely adjust[ing] pricing models," and that is sufficient to find the sports outcome is "associated with a potential financial, economic, or commercial consequence."[12] However, given the current field of judicial findings, ordinary canons of statutory interpretation, and the legislative history, many event contracts are likely not swaps and the Commission should refrain from advancing that proposition in rulemaking, at least until the question is sufficiently resolved at the appellate level.

a. Courts are Split and Actively Resolving Whether Certain Classes of Event Contracts Are Swaps

Whether event contracts—and specifically sports contracts—are swaps under the CEA is a question that has already been subject to division in jurisdictions across the country. Most courts that have confronted the question focus on one provision of the definition of swap under section 1a(47)(a)(ii), specifically, whether sports outcomes are "associated with a potential financial, economic, or commercial consequence."[13]

Recently on the appellate level, the Third Circuit concluded in a split decision in *KalshiEX, LLC v. Flaherty* that sports contracts were swaps because the "[t]he analysis need not go further" than a plain reading of the text, and thus "[t]he outcome of a sports event certainly can be associated with a potential financial, economic, or commercial consequence."[14] However, as Judge Roth's dissent pointed out, "the question of whether sports-event contracts are swaps is a thorny issue with the potential to radically upend the legal landscape governing the gambling industry, and [she

[8] 7 U.S.C. § 1a(47)(a)(ii); *accord* Prediction Markets, 91 Fed. Reg. 12516.
[9] 7 U.S.C. § 1a(47)(a)(ii).
[10] Brief of the CFTC as Amicus Curiae Supporting Appellant at 20, North American Derivatives Exchange, Inc. v. State of Nevada, No. 25-7187 (9th Cir. Feb.17, 2026), https://assets.law360news.com/2442000/2442633/cftc%20brief.pdf.
[11] Hereinafter, this will be referred to as the "downstream consequences" interpretation. The Commission has seemingly advanced this position in ongoing litigation. *See* Amicus Brief of the CFTC at 20.
[12] *Id.*
[13] *E.g.*, KalshiEX, LLC v. Schuler, No. 2:25-CV-1165, 2026 WL 657004, at *4 (S.D. Ohio Mar. 9, 2026).
[14] No. 25-1922, 2026 WL 924004, at *3 (3d Cir. Apr. 6, 2026).

is] not convinced the Majority's analysis does this issue justice."[15] Other circuits have yet to weigh in, though similar appeals have been docketed in the Fourth, Sixth, and Ninth Circuits.[16]

At the district court level, the split is more pronounced. The Middle District of Tennessee held similarly to the Third Circuit that sports contracts are swaps, because it adopted the downstream consequences interpretation, finding that sporting events can have "financial consequences, even if not right away."[17] On the other hand, the Southern District of Ohio, District of Nevada, and the Northern District of Ohio all found that sports contracts are likely not swaps; these courts generally turned to the overall statutory scheme and imposed limiting principles on how attenuated the financial consequences of an event could be to qualify as a swap.[18] Given that appellate resolution is pending on several of the jurisdictional questions the Commission inquires about, the Commission should refrain from advancing rulemaking until these jurisdictional questions are settled law.

b. The Downstream Consequences Interpretation is Disfavored by Canons of Statutory Interpretation

The current leading decision—the Third Circuit in *Flaherty*—relies on a plain reading of the swap definition to find that sports outcomes are "associated with a potential financial, economic, or commercial consequence" because many sports games affect numerous stakeholders, "including sponsors, advertisers, television networks, franchises, and local and national communities."[19] Indeed, though it ultimately found sports contracts are not swaps, the Southern District of Ohio has viewed this interpretation as being plausible.[20] Extending this interpretation to apply to other types of event contracts, such as congressional races,[21] would be a logical application given that elections themselves involve downstream economic consequences, such as disbursements from fundraising.[22]

However, even if an interpretation is plausible, it does not make it legally sufficient. After the Court overruled *Chevron* deference in *Loper Bright Enters. v. Raimondo*,[23] agency interpretations

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[15] *Id.* at *8 (Roth, J., dissenting).
[16] KalshiEX LLC v. Martin, 793 F. Supp. 3d 667 (D. Md. 2025), *appeal docketed*, No. 25-1892 (4th Cir. Aug. 6, 2025); KalshiEX, LLC v. Schuler, No. 2:25-CV-1165, 2026 WL 657004 (S.D. Ohio Mar. 9, 2026), *appeal docketed*, No. 26-3196 (6th Cir. Mar. 11, 2026); KalshiEX, LLC v. Hendrick, No. 2:25-CV-00575-APG-BNW, 2025 WL 3286282, at *1 (D. Nev. Nov. 24, 2025), *appeal docketed sub nom*, KalshiEX, LLC v. Assad, No. 25-7516 (9th Cir. Nov. 28, 2025).
[17] Kalshiex LLC v. Orgel, No. 3:26-CV-00034, 2026 WL 474869, at *8 (M.D. Tenn. Feb. 19, 2026).
[18] KalshiEX, LLC v. Schuler, No. 2:25-CV-1165, 2026 WL 657004, at *4 (S.D. Ohio Mar. 9, 2026); N. Am. Derivatives Exch., Inc. v. Nevada, No. 2:25-CV-00978-APG-BNW, 2025 WL 2916151, at *9 (D. Nev. Oct. 14, 2025); KalshiEX, LLC v. Hendrick, No. 2:25-CV-00575-APG-BNW, 2025 WL 3286282, at *9 (D. Nev. Nov. 24, 2025); Ohio Gambling Recovery, LLC v. Kalshi, Inc., No. 4:25-CV-1573, 2026 WL 865788, at *6 (N.D. Ohio Mar. 30, 2026).
[19] *Flaherty*, 2026 WL 924004, at *3.
[20] *Schuler*, 2026 WL 657004, at *6 (such an "interpretation[] of the CEA [is] textually permissible"); *accord Flaherty*, 2026 WL 924004, at *3 ("[a] plain reading of the Act's text suggests that Kalshi's sports-event contracts fit comfortably within the statutory definition.") (quoting Roth, J., dissenting).
[21] *Elections Odds & Predictions*, KALSHI, https://kalshi.com/tag/elections (last visited Apr. 10, 2026).
[22] *Jon Ossoff For Senate*, FEC, https://www.fec.gov/data/candidate/S8GA00180/ (last visited Apr. 10, 2026) (recording disbursements of $22 million for Jon Ossoff's campaign for Senate); *see Georgia Senate Winner?*, KALSHI, https://kalshi.com/markets/senatega/georgia-senate-race/senatega-26 (last visited Apr. 10, 2026).
[23] 603 U.S. 369, 378 (2024).

still receive some weight,[24] but courts must independently interpret the statute. Thus, the downstream consequences interpretation is unlikely to survive legal scrutiny because canons of statutory interpretation weigh against such a reading, even if the plain text might support it, and thus the Commission should not advance such an interpretation.

As a general principle, "a statute's meaning does not always turn solely on the broadest imaginable definitions of its component words. Linguistic and statutory context also matter."[25] Viewed in light of the overall statutory scheme, the clause likely does not provide sufficiently broad authority over events with only downstream economic consequences, under the canons of *noscitur a sociis* and the absurdity canon.

Under the canon of *noscitur a sociis*, courts "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'"[26] Here, the clause is surrounded by neighbors that offer alternative definitions for swap, each unambiguously relying on financial or economic indices. Subsection (i) states that a swap can be any agreement, contract, or transaction "option for the purchase or sale, or based on the value, of 1 or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind."[27] Subsection (iii) discusses how a swap can be a contract that "provides on an executory basis for the exchange, on a fixed or contingent basis, of 1 or more payments based on the value or level of 1 or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind," that transfers risk of future "change in any such value or level" without transferring an ownership interest in an asset.[28] Subsection (iii) further enumerates a list of examples of swaps, including an equity index swap, an equity swap, a debt swap, a credit swap, a metal swap, an energy swap, an agricultural swap, and a commodity swap.[29]

These neighboring provisions and examples all share more than a mere tenuous connection to something "financial, economic, or commercial"; each relies on some inherent connection to a financial, economic, or commercial indicator. These provisions do not contemplate possible downstream consequences that might have a semblance of "financial, economic, or commercial" character; the definitions and examples themselves offer such character under an ordinary meaning.

In contrast, an expansive view of subsection (ii) that allows for wholly downstream consequences would render it "the odd man out"; of the alternative definitions and the enumerated list of included examples, it would be the only "permission slip[] to involve" traditional state police power.[30] At least two district courts have agreed that the neighboring provisions are inconsistent with the expansive view and that the more likely reading is that the "event or contingency must be

[24] *See* Skidmore v. Swift & Co., 323 U.S. 134 (1944).
[25] Epic Sys. Corp. v. Lewis, 584 U.S. 497, 523 (2018) (internal quotation marks and citation omitted); *accord Schuler*, 2026 WL 657004, at *4; *Hendrick*, 2025 WL 3286282, at *9.
[26] Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995).
[27] 7 U.S.C. § 1a(47)(A)(i).
[28] 7 U.S.C. § 1a(47)(A)(iii).
[29] *Id*.
[30] Learning Res., Inc. v. Trump, 146 S. Ct. 628, 676 (2026) (Kagan, J., concurring); *see supra* Part II-B.

inherently associated with a potential financial consequence, not just that the event or contingency may have some potential downstream financial consequence."[31]

Similarly, the downstream consequences interpretation carries the potential for absurd results. Under the absurdity canon, "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."[32] First, and most prominently, the downstream consequences interpretation is potentially unbounded. At some level, virtually all event contracts could have downstream consequences that are "financial, economic, or commercial" in nature. For example, a contract on who might be on the cover of the next Madden NFL title[33] carries the consequences of purchasing likeness rights, and the potential downstream consequences of sales of the game based on the popularity of the cover player. A contract on attendance at the Met Gala[34] comes with the potential downstream consequence of promotion of celebrities' designers' apparel and the consequence of ticket prices.[35] Absent a limiting principle, creative articulations of downstream consequences logically sweep "virtually every kind of wager that could exist" under the definition of swap.[36]

Second, and more troubling, is that the expansive view of swaps would suddenly criminalize any sportsbooks operating sports betting outside regulation as a DCM. 7 U.S.C. section 2(e) declares it "unlawful for any person . . . to enter into a swap unless the swap is entered into on" a DCM.[37] Several courts have noted this absurdity of an expansive view of swaps.[38] Given the weight of these interpretive canons, the plain text alone will likely be insufficient to support the downstream consequences interpretation as other courts weigh in on the question. Rather, the more likely interpretation is that the event must be inherently associated with a potential financial, economic, or commercial consequence, as this is more consistent with the congressional intent in amending the CEA.

c. The Downstream Consequences Interpretation is Disfavored by the Legislative History

Given the necessary implication of the downstream consequences interpretation, it would have been unlikely for Congress to have proscribed local sports betting when it amended the CEA. Congress gave the Commission jurisdiction over swaps in 2010, after the mortgage crisis of 2008, by passing the Dodd-Frank Act,[39] which was a "direct and comprehensive response to the financial crisis that nearly crippled the U.S. economy beginning in 2008."[40] As the legislative history

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[31] *E.g.*, *Hendrick*, No. WL 3286282, at *7; *Schuler*, 2026 WL 657004, at *5.
[32] Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 57 (2012).
[33] *Who Will Be on the Cover of Madden NFL 27?*, KALSHI, https://kalshi.com/markets/kxmediacovermadden/who-will-be-on-the-cover-of-madden/kxmediacovermadden-27 (last visited Apr. 20, 2026).
[34] *Who Will Attend The Met Gala?*, KALSHI, https://kalshi.com/markets/kxmetgala/who-will-attend-the-met-gala/kxmetgala (last visited Apr. 20, 2026).
[35] *See* Lilian Raji, *The Met Gala's $552 Million Haul: How 3 Brands Won Fashion's Biggest Night*, FORBES (May 27, 2025), https://www.forbes.com/sites/lilianraji/2025/05/27/the-met-galas-552m-haul-how-3-brands-won-fashions-biggest-night/.
[36] *Flaherty*, 2026 WL 924004, at *8 (Roth, J., dissenting).
[37] 7 U.S.C. § 2(e).
[38] *Schuler*, 2026 WL 657004, at *6; *Hendrick*, 2025 WL 3286282, at *6; *Flaherty*, 2026 WL 924004, at *8 (Roth, J., dissenting).
[39] Dodd-Frank Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010).
[40] S. Rep. 111-176, 2, 29-30 (Apr. 30, 2010).

indicates, "a major contributor to the financial crisis was the unregulated over-the-counter ("OTC") derivatives market," which were excluded from conventional Commission oversight.[41] These OTC derivatives constituted 59 percent of all derivatives by 2008.[42] Institutional traders, such as Bear Stearns and Lehman, hid their overleveraging through OTC derivatives, including credit swaps.[43] This overleveraging in OTC derivatives led to a liquidity crisis that caused a run when these institutional traders came to collect funds.[44]

The solution to this liquidity problem in OTC derivatives was to give the Commission jurisdiction over swaps such that "un-cleared swaps will be subject to margin requirements, swap dealers and major swap participants will be subject to capital requirements, and all trades will be reported so that regulators can monitor risks in this vast, complex market."[45]

This legislative history suggests that Congress intended to ensure market stability and avoid liquidity crises caused by overleverage by large, institutional traders, not small-scale events contracts or sports contracts marketed to retail bettors.[46] The types of swaps that contributed to the liquidity crisis, including credit swaps and currency swaps,[47] had an inherent association with "financial, economic, or commercial" consequences. Nowhere in the legislative history does it suggest that Congress intended to include conventional betting to occur within the ambit of the Commission's regulatory oversight. The downstream consequences interpretation is thus an expansive view that goes far beyond the problem Congress aimed to solve in passing the Dodd-Frank Act.

Given the interpretive canons and the legislative history weigh against an expansive view of "swaps," the Commission should wait for appellate resolution until it promulgates any regulations based on this interpretation.

2. Event Contracts are Unlikely to Be in Excluded Commodities

The Commission has additionally inquired whether event contracts are in excluded commodities.[48] "Excluded commodity,"[49] as defined by section 1a(19)(iv) is "an occurrence, extent of an occurrence, or contingency . . . that is beyond the control of the parties to the relevant contract, agreement, or transaction; and associated with a financial, commercial, or economic consequence."[50] For nearly the same reason as why event contracts are unlikely to be swaps, they are also unlikely to be in excluded commodities. First, the definition of excluded commodities contains similar language to the definition of swap often scrutinized by courts: it requires an "occurrence, extent of an occurrence, or contingency" that is "associated with a financial,

[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.* at 32.
[46] *See Flaherty*, 2026 WL 924004, at *8 (Roth, J., dissenting) (noting that Kalshi markets its sports contracts as sports betting to a general consumer audience).
[47] *Id.* at 30.
[48] Prediction Markets, 91 Fed. Reg. 12516.
[49] CFTC Letter No. 26-08, Prediction Markets Advisory (Mar. 12, 2026).
[50] 7 U.S.C. § 1a(19)(iv).

commercial, or economic consequence."[51] The narrower definition of the "consequence" clause under excluded commodities lacks the word "potential," making it less viable to classify event contracts as being in excluded commodities.[52] Thus, if downstream consequences of an event are not "potential" economic consequences, neither will they be economic consequences. In fact, at least one court has found that "an event contract that does not satisfy the swap definition's requirement for a potential financial consequence also does not fit within the excluded commodity definition."[53]

3. Event Contracts are unlikely to be Futures

It is unlikely that the Commission will be able to properly characterize many event contracts as being futures either. No statute or regulation defines "futures" beyond the grant of jurisdiction under section 2(a) to "contracts of sale of commodities for future delivery."[54] Section 1a(9) defines commodities narrowly as including distinct products such as "wheat, cotton, rice, corn" and "all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt in."[55] Under a plain reading, many classes of event contracts, such as sports contracts, do not involve the tangible types of commodities listed in section 1a(9).[56]

Nor is it likely that contract for future delivery can be in an excluded commodity under section 1a(19). Section 2(a) only defines futures "contracts of sale of *commodities* for future delivery."[57] "Commodity" itself is defined under section 1a(9).[58] Yet "excluded commodity" falls under section 1a(19).[59] Were "excluded commodities" intended to count as a "commodity" for future delivery under 2(a), the drafters would have included the "excluded commodities" category under the definition of futures proffered in section 2(a). In fact, one court found that the proposition that a future could be in excluded commodities was "not logical."[60] Given many categories of event contracts are likely neither swaps nor futures, the Commission does not have exclusive jurisdiction over these transactions and should refrain from asserting exclusive jurisdiction.

ii. Authority to Regulate Sports Contracts Under CEA 5c(c) is Unlikely

The most powerful regulatory power the Commission holds over registered DCMs is the power to prohibit DCMs from offering contracts "contrary to the public interest."[61] However, if the Commission intends on invoking CEA section 5c(c) on certain event contracts, it will likely be unable to, because it requires, at minimum, the finding that the contract is "in excluded

[51] *Compare* 7 U.S.C. § 1a(47) *with* § 1a(19).
[52] In its amicus to the Ninth Circuit, the Commission signaled that the word "potential" in the definition of swap was load bearing on its assertion that downstream consequences could be counted. Brief of the CFTC as Amicus Curiae Supporting Appellant at 20.
[53] *Hendrick*, 2025 WL 3286282, at *10 n.9.
[54] 7 U.S.C. § 2(a)
[55] 7 U.S.C. § 1a(9).
[56] *See Hendrick*, 2025 WL 3286282, at *12.
[57] 7 U.S.C. § 2(a) (emphasis added).
[58] 7 U.S.C. § 1a(9).
[59] 7 U.S.C. § 1a(19).
[60] *Id.* at *11 (finding "occurrences, extents of occurrences, or contingencies that are beyond the control of the parties to the relevant contract and associated with a financial consequence" cannot be sold for future delivery).
[61] 7 U.S.C. § 7a-2(c)(5)(C).

commodities" or a swap in excluded commodities.[62] For the reasons discussed *supra*, it is unlikely that the Commission will be able to meet this burden because many classes of event contracts, such as sports contracts, are not swaps nor in excluded commodities. If the Commission is unable to invoke section 5c(c), it should refrain from promulgating regulations under other, less powerful authorities, which might preempt more comprehensive state policing powers over traditional state functions.[63]

B. The Commission Should Pause Regulation of Prediction Markets Because Such Regulation Provokes Federalism Concerns

CFTC rulemaking on prediction markets under the CEA provokes federalism concerns because the enabling transactions constitute gambling, a field of law historically regulated by the states.[64] If the Commission attempts to regulate event contracts, it will risk field preempting state gaming commissions. Whether section 2(a)(1)'s grant of exclusive jurisdiction over swaps, futures, and options field preempts state regulation of those instruments is not a settled question and has divided federal courts across the country.[65]

Additionally, even if asserting that sporting event contracts are swaps does not raise field preemption concerns, should the Commission attempt to promulgate regulations to regulate these types of contracts, it would unnecessarily risk conflict preemption. Conflict preemption exists where "compliance with both federal and state regulations is a physical impossibility . . . or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[66] Like field preemption, courts are split.[67]

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[62] 7 U.S.C. § 7a-2(c)(5)(C).

[63] *See Orgel*, 2026 WL 474869, at *9 (finding regulation promulgated under DCM Core Principles ensuring impartial access conflict preempted state regulation).

64 Even though there are several pending suits litigating this very issue, it remains the truth. *See* Aislinn Keely, CFTC Sues Ill., Conn., Ariz. Over Event Contract Enforcement, LAW360 (April 2, 2026, 7:09 PM EDT), https://www.law360.com/articles/2461190/cftc-sues-ill-conn-ariz-over-event-contract-enforcement; Alex Lawson, Prediction Markets Tumbling Toward Supreme Court, Law360 (April 7, 2026, 8:30 PM EDT), https://www.law360.com/articles/2443240/prediction-markets-tumbling-toward-supreme-court; Robinwood Derivatives, LLC, v. Tina Griffin, No. 3:26-cv-5311 (filed Mar. 30, 2026).

[65] For example, the Third Circuit in *Flaherty* ruled that "the [CEA] preempts state laws that directly interfere with swaps traded on DCMs" because "the CFTC has exclusive jurisdiction." *Flaherty*, 2026 WL 924004, at *2. A Nevada district court first ruled that the CFTC's "exclusive jurisdiction" over swaps field preempted state regulation, only to dissolve its earlier order because it no longer found it likely that sports contracts were swaps. *Hendrick*, 2025 WL 1073495, at *6 ("Even if section 2's plain and unambiguous language does not amount to express preemption, it reflects congressional intent to occupy the field of regulating CFTC-designated exchanges and the transactions conducted on those exchanges."), *order dissolved*, No. 2:25-CV-00575-APG-BNW, 2025 WL 3286282 (D. Nev. Nov. 24, 2025).

[66] Hillsborough Cnty., Fla. v. Automated Med. Lab'ys, Inc., 471 U.S. 707, 713 (1985) (omissions added).

[67] The Third Circuit found conflict preemption because the CEA creates "a comprehensive regulatory structure to oversee the volatile and esoteric futures trading complex[,]" and New Jersey gambling laws "[stood] as an obstacle to those objectives." *Flaherty*, 2026 WL 924004, at *5 (quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 356 (1982)). A district court in Tennessee found conflict preemption where the state law requirement that "bettors be at least 21 years old and 'physically located in' Tennessee" conflicted with the requirement of "impartial access" to markets under 17 C.F.R. § 38.151(b). *Orgel*, 2026 WL 474869, at *9. Conversely, the district court of Maryland found no conflict preemption where state gaming laws were viewed as complementary to the CEA. KalshiEX LLC v. Martin, 793 F. Supp. 3d 667, 685 (D. Md. 2025).

Under principles of federalism, the Commission must respect state police powers and await instructions from Congress.

i. The Principle of Federalism

The principle of federalism, the balance of power between the federal governments and the states, is one of the oldest American debates. On one hand, the Federalists sought a centralized, national government, spearheaded by an executive.[68] On the other, the Anti-Federalists sought a decentralized states-based government.[69] James Madison, assuming the role of the great compromiser, formulated a federal government that balances the needs of uniform centralization with the democratic accountability that smaller, state governments offered.[70] Madison's codification of this balance is the United States Constitution. He wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[71] Although written more than two centuries ago, Madison's compromise remains the penultimate consideration, in the balance between state and federal governance.

Applying this principle to the balance of federal-state regulation, the Supreme Court has held that Congress must provide a clear statement when it intends to create preemptive federal authority in an area law that states have traditionally regulated.[72] Thus, there is a "presumption against the pre-emption of state police power regulations."[73] Under this applied principle, the Commission must allow the states to continue regulating prediction markets under their longstanding authority to regulate gambling.

ii. Trading on prediction markets is gambling.

Prediction markets fall under the definitional and applied meanings of gambling. The definition of gambling is "the practice or activity of betting: the practice of risking money or other stakes in a game or bet."[74] Identically, "[a] prediction market is a platform where people can bet on the outcome of future events."[75] A commonly-made attempt to distinguish prediction markets is to

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[68] *See* GREGORY E. MAGGS & PETER J. SMITH, CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH 563-64 (West Academic, 6th ed. 2023).
[69] *Id.*
[70] THE FEDERALIST NO. 45 (James Madison).
[71] *Id.*; *see also* New York, v. United States, 505 U.S. 144, 181-82 (1992).
[72] *See, e.g.*, United States v. Bass, 404 U.S. 336, 349 (1971); *see also* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (allowing federal preemption of an area of law traditionally regulated by states when the "federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.")
[73] Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 518 (1992); *see also* Rice, 331 U.S. at 230.
[74] *Gambling*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/gambling (last visited Mar. 29, 2026).
[75] *What is a Prediction Market?*, POLYMARKET, https://help.polymarket.com/en/articles/13364272-what-is-a-prediction-market (last visited Apr. 9, 2026); *see also* Katelyn Peters, *Prediction Markets Explained: Types, Uses, and Real-World Examples*, INVESTOPEDIA (updated Jan. 27, 2026), https://www.investopedia.com/terms/p/prediction-market.asp.

analyze their operational structure: there is no "house" to bet against with prediction markets.[76] But compared with the definition of gambling, this is irrelevant. No matter the role of the intermediary, there is an exchange of money based on the outcome of a bet. Therefore, prediction market bets fall within the definition of gambling.

Likewise, prediction markets are consistent with the applied meaning of gambling via the theory of gamblification.[77] Under this theory, platforms engaged in gamblification utilize features "designed to trigger stereotyped, cue-induced behaviors that are insensitive to outcome value and associated with dopamine rushes and decision-making shortcuts—push users, particularly those with lower statistical literacy, into cycles of excessive participation, impulsive decisions, and escalating risks."[78] Prediction markets do just that: "[b]y leveraging psychological triggers such as instant gratification, social validation, and FOMO, prediction platforms encourage compulsive engagement, where frequent reward mechanisms—such as celebratory pop-ups and leaderboard rankings—make it easy for users to become over-involved."[79] Therefore, betting on prediction markets constitutes gambling.

iii. States have a history and tradition of regulating gambling as a state police power.

Gambling has been regulated in America since as far back as the Puritan settlements.[80] While lotteries were sometimes used to fund public efforts, the Second Great Awakening inspired a crackdown on gambling.[81] This led to *states* outright banning and restricting gambling since the early-19th century.[82] Federal gambling laws interfered very little with state laws, focusing mainly on Native American reservations and the interstate commerce components of gambling activities.[83]

Today, almost every state has an agency dedicated to regulating gambling,[84] and every state has subsequent regulations. For example, every state in the U.S. sets a minimum age at which its

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[76] Complaint, Robinhood Derivatives LLC v. Griffin, No. 3:26-cv-05311, at *11 (W.D. Wash. Mar 30, 2026); *Kalshi CEO Draws Distinction Between Prediction Markets and Sportsbooks*, SPORTS BUS. J. (Apr. 8, 2026), https://www.sportsbusinessjournal.com/Articles/2026/04/08/kalshi-ceo-draws-distinction-between-prediction-markets-and-sportsbooks/?publicationSource=newsletters&issue=69d6aacac2aa6f59ce30c6d3&utm_source=sbj&utm_medium=email&utm_campaign=edition_closingbell.

[77] Nizan Geslevich Packin, *Why Prediction Markets Look Like Finance but Behave Like Gambling*, FORBES (Mar. 16, 2026), https://www.forbes.com/sites/nizangpackin/2026/03/16/why-prediction-markets-look-like-finance-but-behave-like-gambling/ (citing Sharon Rabinovitz & Nizan G. Packin*, All Bets Are On: Addiction, Prediction, Regulation, and the Future of Financial Gambling*, 36 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 90 (2025)).

[78] Sharon Rabinovitz & Nizan G. Packin*, All Bets Are On: Addiction, Prediction, Regulation, and the Future of Financial Gambling*, 36 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 90, 141–42 (2025).

[79] *Id.* at 142.

[80] George G. Fenich, *A Chronology of (Legal) Gaming in the U.S.*, 3 UNLV GAMING RSCH. & REVIEW J. 65, 67 (2012).

[81] *Id.* at 67; *A Comprehensive Guide to the History of U.S. Gambling Culture*, HEALDSBURG TRIB. (March 25, 2024), https://www.healdsburgtribune.com/us-gambling-culture-history/.

[82] *Id.*

[83] *See, e.g.*, 15 U.S.C. §§ 1171-78; 18 U.S.C §§ 1084, 1952; 25 U.S.C §§ 2701-21.

[84] *State and Province Gaming Regulatory Agencies*, N. AM. GAMING REGULATORS ASS'N, https://www.nagra.org/State-and-Province-Gaming-Regulatory-Agencies (last visited Apr. 9, 2026).

citizens may gamble based on the type of gambling and imposes penalties for violations.[85] Moreover, as Judge Roth states in her *KalshiEx* dissent, "Courts have noted that gambling is a potentially harmful 'vice activity,' which states may regulate under their police powers to promote the 'welfare, safety, and morals' of their citizens."[86] Thus, as a result of this longstanding history and tradition of state regulation of gambling in the United States, there is a presumption of state police powers that may only be overcome by expressly stated or field preemption by Congress.[87]

iv. Congress Delegated No Authority to the Commission to Regulate Prediction Markets.

There is no congressional delegation of authority to the Commission to regulate prediction markets. This is because, as proven, the CEA does not provide the Commission exclusive jurisdiction over prediction market contracts and there is no other statutory hook within the CEA that could preempt use of state gambling laws.[88] Furthermore, the event contracts section is likely not preemptive of state governance. This section of the CEA was originally written in 2010.[89] In 2010, the age of smart phones was just beginning with the introduction of iPhone 4.[90] Legislatures likely had no idea that within fifteen years, 91% of Americans would have a super computer in their back-pocket at all times, let alone have the ability to bet money on whether a lost American pilot would be rescued in Iran.[91] This lack of congressional delegation of authority to regulate prediction markets—and thus preempting state gaming commissions—is further evidenced by the numerous efforts in both houses to expand the CEA to allow the Commission to regulate prediction markets.[92] Because, Congress did not delegate authority to the Commission to regulate prediction markets, the Commission should allow the states to continue regulating prediction markets as gambling.

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[85] *Compare Gambling Age by State 2026*, WORLD POPULATION REVIEW, https://worldpopulationreview.com/state-rankings/gambling-age-by-state (last visited Mar. 29, 2026), *with What Age Can I Gamble?*, U.S.A. LEGAL BETTING (updated June 12, 2015), https://www.usalegalbetting.com/betting-guides/what-age-can-i-gamble/; *see also What Happens If You Get Caught Gambling Under 18?*, LEGALCLARITY (July 12, 2025), https://legalclarity.org/what-happens-if-you-get-caught-gambling-under-18/.

[86] *Flaherty*, 2026 WL 924004, at *8 (Roth, J., dissenting). For a list of cases that find gambling is a state police power, *see id.* n.12.

[87] *Bass*, 404 U.S. at 349; *Rice*, 331 U.S. at 230; *Cipollone*, 505 U.S. at 518.

[88] 7 U.S.C § 7a-2(c)(5)(C)(i).

[89] *Id.*

[90] Chad Berndtson, *The 10 Coolest Smartphones of 2010*, CRN: CHANNEL CO. (Dec. 21, 2010), https://www.crn.com/slide-shows/mobility/228800652/the-10-coolest-smartphones-of-2010?page=1.

[91] *Mobile Fact Sheet*, PEW RSCH. CTR., https://www.pewresearch.org/internet/fact-sheet/mobile/ (last visited Apr. 9, 2026); Ramon Antonio Vargas, *Polymarket Criticized Over 'Disgusting' Bets on Fate of Pilots on US Jet Shot by Iran*, GUARDIAN (Apr. 6, 2026), https://www.theguardian.com/us-news/2026/apr/06/polymarket-criticized-bets-us-jet-shot-by-iran.

[92] *See, e.g.*, Prediction Market RISK Act, H.R. 8148, 119th Cong. (2026); Prediction Markets Security and Integrity Act of 2026, S.4060, 119th Cong. (2026); Public Integrity in Financial Prediction Markets Act of 2026, S.4188, 119th Cong. (2026); Public Integrity in Financial Prediction Markets Act of 2026, H.R.7004, 119th Cong. (2026); Prediction Markets Are Gambling Act, S.4160, 119th Cong. (2026); End Prediction Market Corruption Act. S.4017, 119th Cong. (2026).

III. Conclusion

For the above statutory and policy reasons, the Commission should abstain from regulation of prediction markets if and until Congress passes responsive legislation and preserve state police powers over gambling.

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