House Rules:
Applying State Consumer Protection Laws to Prediction Markets While Hedging Against Federal Regulation

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Comments on the Advance Notice of Proposed Rulemaking Regarding Prediction Markets,
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I submit this comment in my individual capacity. The views expressed are my own and do not represent the views of my school, employer or any affiliated organization.

Abstract

Prediction markets have arrived at a legal crossroads. By classifying their event contracts as federally regulated derivatives, these platforms have positioned themselves within a regulatory framework designed for institutional commodity trading—not mass-market speculation. The result is a growing enforcement gap exposing retail participants to risks long associated with gaming. This convergence has sparked a high-stakes jurisdictional dispute between the CFTC and states.

This Article does not take a position on whether event contracts are wagers or derivatives. Instead, this Article argues that the prevailing debate asks the wrong question. The more fundamental inquiry is not what these platforms should be called, but what harms they create and who bears responsibility for addressing them. This Article argues that states bear primary responsibility for addressing those harms.

Through an analysis of accessibility to high-risk users, misleading advertising, and vulnerabilities in market integrity, this Article demonstrates that prediction markets generate the types of harms addressed by states' Unfair, Deceptive, or Abusive Acts or Practices (UDAP) regimes. Drawing on the presumption against preemption, the CEA's Savings clause, and over a century of state authority over gaming and consumer protection, this Article demonstrates that federal commodities regulation governs market structure, while state law governs market conduct. These are not competing frameworks. They are complementary ones.

By reframing the inquiry from classification to harm, this Article offers a framework in which federal and state oversight function as parallel, mutually reinforcing systems. In doing so, it preserves both the uniformity of national markets and the states' enduring role as primary protectors of public welfare in evolving financial environments.

Thesis

Even if event contracts fall within the Commodity Exchange Act's exclusive jurisdiction, prediction markets remain subject to state consumer protection and police-power laws governing public health, market integrity, and harmful conduct.

I. INTRODUCTION

Imagine walking into a New York City bodega where everything on the shelves is free. Sounds like a fever dream, right? For a New York minute, something close to that actually existed. When prediction market platform Kalshi announced it was offering New Yorkers free groceries, its rival, Polymarket, responded by opening the doors to its own free grocery store.[1] The pop-ups were more than just marketing stunts—they were literal displays of what these platforms promote: "Free markets open to everyone!"

But there was a catch, because there always is.

Kalshi's promotion was limited to fifty dollars' worth of groceries, while Polymarket's store closed after just three days. The competing guerrilla marketing campaigns made perfect sense to anyone following the recent rise of prediction markets. In these markets, participants can take positions on elections, award shows, economic indicators, and, of course, sports. Companies like Kalshi and Polymarket have effectively gamified derivatives trading, transforming finance into something that increasingly feels like gambling. And as these prediction markets have expanded, both federal and state regulators have been forced to confront a challenging question: when speculation on real-world events resemble gaming,[2] who has the legal authority to regulate it?

Prediction markets are not the first marketplace to test the boundaries of what state laws can regulate. Courts and regulators have readily confronted markets that attempt to avoid regulation through formal classification, especially when those markets raise concerns related to

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[1] Bryan Metzger & Henry Chandonnet, *Kalshi and Polymarket Opened Free Grocery Stores in NYC in a Wild Marketing Battle*, Bus. Insider (Feb. 3, 2026), https://www.businessinsider.com/polymarket-kalshi-free-grocery-store-marketing-stunt-nyc-2026-2.

[2] This Article uses "gaming" rather than "gambling" throughout. Although the terms are often used interchangeably, "gaming" better reflects the modern landscape of these markets and aligns with the terminology adopted by regulators and industry participants. This choice is stylistic and intentional.

fairness, consumer protection, and public welfare. However, courts have been cautious about upsetting the balance between federal and state authority in this emerging arena.

This Article does not attempt to resolve whether event contracts should be properly classified as wagers or derivatives. Rather, it explores the extent state police powers may still apply to a platform that is federally regulated as a derivatives exchange. The explosive growth of these platforms, coupled with ongoing federal litigation and legislative uncertainty, highlights the need to define the limits of federal preemption. This Article argues that *even if* prediction markets fall within the exclusive jurisdiction of federal commodities regulation, state consumer protection and police-power laws remain an independent and necessary safeguard.

II. EVENT CONTRACTS AND THE RISE OF PREDICTION MARKETS

A. Defining Event Contracts

An event contract "is a derivative[3] contract whose payoff is based on a specified event, occurrence, or value."[4] Event contracts are financial instruments whose value depends on whether a specific event occurs. Event contracts are not new. They have existed in academic and experimental settings but have only recently entered the public consciousness as their popularity has grown.[5] They are typically structured as binary contracts, either paying out a fixed amount if the event occurs or paying nothing if it does not. Recently proposed legislation illustrates how event contracts operate:

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[3] A derivative is a financial instrument that derives its value from the performance of an underlying asset, index, or event, at a designated point in time, rather than from the instrument itself. *See* Rena S. Miller, Cong. Rsch. Serv., R48451, *Introduction to Derivatives and the Commodity Futures Trading Commission* (Mar. 13, 2025). Notably, the Commodity Exchange Act does not provide a single definition of "derivative," instead regulating the field through discrete categories such as futures, options, and swaps. *See also* 7 U.S.C. § 1(a).

[4] "An event contract . . . is a derivative contract whose payoff is based on a specified event, occurrence, or value." *See Contracts & Products: Event Contracts*, Commodity Futures Trading Comm'n, https://www.cftc.gov/IndustryOversight/ContractsProducts/index.htm.

[5] Suzy Khimm, *Three Economists Built the Model That Paved the Way for Kalshi and Polymarket*, NBC News (last updated Feb. 13, 2026), https://www.nbcnews.com/news/us-news/3-economists-built-model-paved-way-kalshi-polymarket-rcna257094.

> [A] trader who buys a "Yes" contract may receive a payout of $1 if the underlying event occurs before the contract's expiration date, but nothing if the event does not occur before that date. Conversely, a trader who purchases a "No" contract may receive a payout of $1 if the underlying event does not occur before the contract's expiration date, but nothing if the event does occur before that date. . . . [A] "Yes" contract that pays $1 if an event occurs and trades at $0.60 is commonly viewed as suggesting that the market believes there is a 60% chance that the event will occur.[6]

Traders buy or sell contracts based on their expectations about an event's outcome, with prices reflecting those views through continuous movement. In practice, the price of a contract reflects the market's implied probability of the event occurring. By trading on information rather than merely speculating, prediction market proponents claim these participants are performing a foundational function of capital markets: aggregating dispersed information to produce accurate, real-time forecasts.[7]

B. Prediction Markets as Exchanges

These contracts are primarily traded on platforms known as "Prediction Markets." Prediction markets facilitate the buying and selling of event contracts by providing the infrastructure where prices are set, updated, and ultimately resolved based on the outcome of underlying events.[8] They operate as centralized exchanges where participants can take positions on the outcomes of events and adjust those positions as new information becomes available. Because contract prices update continuously as new information enters the market, price swings are a defining feature of these exchanges. Prediction markets were originally imagined facilitating continuous trading or market pricing tied to specific, real-world outcomes—in other words, they offer live speculation.[9]

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[6] Jay B. Sykes, Cong. Rsch. Serv., LSB11406, *Prediction Markets and Insider Trading Law* (Apr. 3, 2026).
[7] Erik Snowberg et al., *Prediction Markets for Economic Forecasting*, Nat'l Bureau of Econ. Rsch., Working Paper No. 18222, 1, 6-13 (2012).
[8] *Advance Notice of Proposed Rulemaking on Prediction Markets*, 91 Fed. Reg. 12,516 (proposed Mar. 16, 2026).
[9] Justin Wolfers & Eric Zitzewitz, *Prediction Markets*, 18 J. Econ. Persp. 107, 126 (Spring 2004).

Unlike traditional derivatives markets, which are often limited to institutional participants and standardized assets, prediction markets purport to offer much greater accessibility. Participation is not limited to professional traders because pricing is generally not a barrier to entry, as event contracts are typically priced at just one dollar.[10] This accessibility has greatly expanded the pool of investors and increased trading activity,[11] echoing the early promise of start-ups that sought to disrupt industries typified by limited access and regulatory barriers.

Its popularity may be attributed, in part, to the fact that the mechanics of event contracts closely resemble gaming. Very roughly, in both cases, participants stake capital on the occurrence of an uncertain event and receive a payout only if their prediction proves correct. Coupled with broad participation, live price movement, and event-based outcomes revolving around the popular zeitgeist of the moment, event contracts have raised legitimate concerns about whether these platforms expose users to risks commonly associated with gaming.[12]

III. RISKY BETS: HARMS ARISING FROM PREDICTION MARKETS

The harms emerging from prediction markets are already under regulatory scrutiny and currently being contended in litigation.[13] These harms take several forms, most prominently,

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[10] "This statement does not require that all individuals in a market be rational, as long as the marginal trade in the market is motivated by rational traders." Wolfers & Zitzewitz maintain that prediction markets are especially popular for not only their practical value but also because there is an element of "fun." *See Id*. at 108.

[11] "Markets related to the New York City Election drew the most engagement in October 2025, receiving over USD 150 million in volume . . . By February 28, 2026, Polymarket set a new, single-day volume record of USD 425 million—surpassing the prior high from Election Day 2024. The single-day record was driven almost entirely by Iran-related markets resolving simultaneously." *See How Prediction Markets Scaled to $21B in Monthly Volume in 2026*, TRM Labs (Mar. 27, 2026), https://www.trmlabs.com/resources/blog/how-prediction-markets-scaled-to-usd-21b-in-monthly-volume-in-2026.

[12] The National Council on Problem Gambling is a national nonprofit organization seeking to limit gambling-related harm. Based on its belief that engaging with prediction markets is "functionally gambling," they have urged all prediction market operators serving U.S. consumers to include the National Problem Gambling Helpline. *See Calling on Prediction Market Operators to Promote 988 and the National Problem Gambling Helpline*, Nat'l Council on Problem Gambling (Feb. 9, 2026), https://www.ncpgambling.org/news/calling-prediction-market-operators-to-promote-helpline.

[13] An ongoing list of legal suits against prediction market operators, maintained by Action Network, a sports betting website. *See* Steven Petrella, *Tracking Prediction Market Lawsuits*, Action Network (last updated Apr. 9, 2026), https://www.actionnetwork.com/education/tracking-prediction-market-lawsuits.

access to high-risk users, misleading and predatory marketing, and gaps in market integrity and consumer protection enforcement. Unlike traditional financial markets ("TradFi"), where retail investors face informational disadvantages compared to more sophisticated market participants,[14] these platforms are designed for "mass-market speculation"[15]—exposing new users (who may not fully grasp the risks associated with participation or who may be vulnerable) to compulsive, harmful behavior.

Predictions markets of today have grown far beyond financial hedging exercises in economic theory by embracing subversive marketing tactics and transforming trading into an interactive experience at a time when access to mobile funds is instantaneous and literally within every consumer's pockets. This gamified form of mass-market speculation subjects users to a range of well-recognized risks that have long justified regulatory intervention. These risks include:

A. Accessibility to High-Risk Individuals

Unlike licensed sportsbooks which are required by state gaming laws to prohibit bettors under 21 years old, these platforms allow unrestricted access to anyone over 18 years old.[16] While Kalshi touts *Responsible Trading* tools to assist legal traders under 21, those tools are not mandatory across all platforms, unlike legal sports betting.[17] Furthermore, Kalshi offers interested

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[14] "The Proposing Release prompted an outpouring of public comment . . . Many felt that selective disclosure was indistinguishable from insider trading in its effect on the market and investors, and expressed surprise that existing law did not already prohibit this practice." *See Selective Disclosure and Insider Trading*, 65 Fed. Reg. 51,716, 51,717 (Aug. 24, 2000).

[15] Massachusetts Attorney General Andrea Joy Campbell alleged "[f]rom its inception, Kalshi has promoted itself as a novel 'financial exchange' through which people could 'trade in the domain of every day.' In reality, Kalshi was designed from the outset to appeal to mass-market speculation." *See* Complaint at 11, *Commonwealth v. KalshiEX LLC*, No. 2584CVQ1525 (Mass. Super. Ct., Suffolk Cnty. 2025).

[16] *Young Adults*, Kalshi, https://kalshi.com/youngadults.

[17] While Kalshi highlights "Built-In Safeguards," this is not the industry norm. Compared to a licensed gaming operators, like DraftKings, Responsible Gaming safeguards are required under all state gaming licenses. *See Id*. *See also Safer Play Tools*, DraftKings Responsible Gaming, https://rg.draftkings.com/resources/safer-play-tools.

users the ability to sign up for "demo accounts" utilizing mock funds—all without required age verification.[18]

If that wasn't concerning enough, consider the fact that these platforms employ "design mechanisms drawn from gambling psychology . . . emphasizing reward while obscuring risk.[19] The introduction of "User Profiles" builds upon the platforms' social gaming dynamic stack which already includes public leaderboards, "winning" badges, and real-time ticker tapes[20] that mirror psychological loops "known to trigger compulsive engagement loops."[21] Gambling addicts and minors are extremely susceptible to these design elements, with scientific studies showing that underage gaming increases the odds of addiction.[22]

By operating outside of state gaming regulations, prediction markets are not subject to the same mandatory safeguards, such as self-exclusion lists, cooling-off periods, and deposit limits, imposed on licensed gaming operations. Such measures are designed to prevent at-risk individuals (particularly gambling addicts) from continuing to participate without restriction. This unrestricted access therefore increases the risk of developing "gambling disorder," the first clinically defined behavioral addiction.[23]

Most surprisingly, Kalshi has not shied from this unsavory depiction. In fact, they've fully leaned into it, describing itself as "kind of addicting."[24]

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[18] *How Do I Set Up and Use a Kalshi Demo Account?*, Kalshi Help Ctr. (Mar. 24, 2026), https://help.kalshi.com/en/articles/13823775-how-do-i-set-up-and-use-a-kalshi-demo-account.
[19] *Commonwealth v. KalshiEX LLC*, *supra* note 15, at 15.
[20] *Id*. at 17–20.
[21] *Id*. at 18–19.
[22] Scientific studies have explored the dangers of early onset gaming in minors, finding a direct correlation between developing a gambling disorder the earlier they are exposed to gaming. *See* Nerilee Hing et al., *Adolescents Who Play and Spend Money in Simulated Gambling Games Are at Heightened Risk of Gambling Problems*, 19 Int'l J. Env't Res. & Pub. Health 10,652 (2022); *See also* Ardeshir S. Rahman et al., *The Relationship Between Age of Gambling Onset and Adolescent Problematic Gambling Severity*, 46 J. Psychiatric Rsch. 675 (2012).
[23] Emily Sohn, *How Gambling Affects the Brain and Who Is Most Vulnerable to Addiction*, 54 Monitor on Psych. 62 (July 2023), https://www.apa.org/monitor/2023/07/how-gambling-affects-the-brain.
[24] Pl.'s Ex Parte Application for Immediate Temporary Restraining Order & Mot. for Preliminary Inj. at 12, *Nev. ex rel. Nev. Gaming Control Bd. v. KalshiEX, LLC*, No. 26OC000050-B (Nev. Dist. Ct. Feb. 17, 2023).

B. False or Misleading Advertising

Platforms have repeatedly promoted their event contracts using gaming-oriented language while seeking to "avoid the legal and financial consequences" associated with gaming regulation.[25] Kalshi, for example, has marketed itself as "The First Nationwide Legal Sports Betting Platform," offering legal sports betting in all 50 states,[26] yet it is not licensed by any state gaming regulator.[27] Coinbase[28] and Gemini[29] have also invoked their status as federally registered exchanges to market themselves as legitimate gaming operators to unsuspecting consumers. As a result, states have independently initiated claims against these platforms for advertising "illegal gambling services."[30]

In addition to misleading consumers, these platforms deploy aggressive financial inducements and prize pools mirroring the promotional tactics used by traditional sportsbooks to drive adoption and sustain engagement.[31] For example, Coinbase offered a "$1,000,000 Bitcoin prize pool,"[32] while Gemini used social media to entice prospective users with pay-to-play promotional credits.[33] These marketing strategies echo the "bonus fraud" schemes levied against daily fantasy sports (DFS) operators, like DraftKings and FanDuel, whose own deposit-matching schemes were alleged to deceive users into paying thousands in additional fees.[34] Of course,

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[25] Verified Petition at 3, *People ex rel. James v. Coinbase Fin. Mkts., Inc.*, Index No. 451604/2026 (N.Y. Sup. Ct. Apr. 21, 2026).
[26] Complaint at 54, *Blue Lake Rancheria v. Kalshi Inc.*, No. 1:25-cv-06162 (N.D. Cal. July 22, 2025).
[27] Court order dissolving TRO granted against NV for Kalshi. *See* Order Granting Motion to Dissolve Preliminary Injunction, *KalshiEX LLC v. Hendrick*, No. 2:25-cv-00575-APG-BNW, slip op. at 1 (D. Nev. Nov. 24, 2025). *See also Nev. Gaming Control Bd. v. KalshiEX, LLC*, *supra* note 24.
[28] *People ex rel. James v. Coinbase Fin. Mkts., Inc.*, *supra* note 25, at 2–3.
[29] Verified Petition at 2–3, *People ex rel. James v. Gemini Titan, LLC*, Index No. 451603/2026 (N.Y. Sup. Ct. Apr. 21, 2026).
[30] Complaint at 19, *United States v. Connecticut*, No. 3:26-cv-00498 (D. Conn. Apr. 2, 2026).
[31] *People ex rel. James v. Coinbase Fin. Mkts., Inc.*, *supra* note 25, at 9–10.; *See also People ex rel. James v. Gemini Titan, LLC*, *supra* note 29, at 10–11.
[32] *People ex rel. James v. Coinbase Fin. Mkts., Inc.*, *supra* note 25, at 10.
[33] *People ex rel. James v. Gemini Titan, LLC*, *supra* note 29, at 10.
[34] The Panel on Multidistrict Litigation held multiple actions involving allegations of improper or illegal conduct by the nation's two largest operators of online daily fantasy sports contests (FanDuel & DraftKings) were appropriate

these platforms are not free; they charge fees on each transaction—fees that have been compared "to a casino's rake."[35] Such practices not only misrepresent the legality of prediction markets, but they also raise serious concerns regarding the integrity and fairness of such markets.

C. Market Misconduct

Market integrity is compromised when trading environments permit the use of nonpublic information or other practices that undermine fair and transparent price formation.[36] Because prediction markets revolve around the trading of information, rather than an underlying asset like conventional commodities, they lack robust integrity guardrails native to traditional exchanges. Take for instance, the arrest of a U.S. soldier who allegedly earned more than $400,000 on Polymarket using classified information of the capture of Venezuelan leader Nicolás Maduro.[37] Similarly, concerns that politicians may exploit nonpublic information have prompted lawmakers to propose bills to restrict their participation on such platforms.[38]

This reliance on unregulated information leaves prediction markets acutely susceptible to information asymmetry and manipulation. Prices influenced by social media, private polling, and insider information produce extreme price swings that are both difficult to detect and prevent. These risks are especially pronounced in election contracts.[39] Although Kalshi has publicly announced that it forbids trades by certain "prohibited individuals" (such as political candidates

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for centralization because the actions involved common questions of fact. Ordered transfer of multiple actions to the District of Massachusetts. *See In re Daily Fantasy Sports Mktg. & Sales Pracs. Litig.*, 158 F. Supp. 3d 1375, 1377 (J.P.M.L. 2016).

[35] Summons at 2, *State of Wisconsin v. Kalshi, Inc.*, No. 30703 (Wis. Cir. Ct. Dane Cnty. Apr. 23, 2026).

[36] *Insider Trading Whistleblower Alert*, Commodity Futures Trading Comm'n, https://www.whistleblower.gov/whistleblower-alerts/Insider_Trading_WBO_Alert.htm.

[37] Press Release, U.S. Dep't of Just., *U.S. Soldier Charged with Using Classified Information to Profit from Prediction Market Bets* (Apr. 23, 2026), https://www.justice.gov/opa/pr/us-soldier-charged-using-classified-information-profit-prediction-market-bets.

[38] A proposed amendment to Chapter 131 of Title 5 of the U.S. Code barring covered individuals from participating in prediction market trading. *See* H.R. 8076, 119th Cong. (2026), https://www.congress.gov/bill/119th-congress/house-bill/8076/text.

[39] *KalshiEX LLC v. Commodity Futures Trading Comm'n*, 119 F.4th 58, 64–66 (D.C. Cir. 2024).

or campaign staffers),[40] its prohibitions have not been uniformly adopted across competitors.[41] Consequently, individuals restricted on one platform may still participate on others. By tolerating such a brazen display of cross-platform hedging, prediction markets leave sizeable openings for bad actors to unfairly profit at the expense of less informed participants.[42]

Applying this logic to event contracts based on sports outcomes, improper monetary gains may extend to the underlying events themselves, creating incentives for participants to manipulate real-world outcomes *for profit*. This risk is not merely analogous to match-fixing in the traditional sense—*it is match-fixing*.[43] As prediction markets shift from probability indicators to consequential decision-making tools, "it is worth noting that the incentives to manipulate a contract rise with its use in decision making."[44] When contract prices influence the outcomes they purport to predict, the already shaky line between informed trading and manipulated result collapses entirely.

By design, these exchanges channel structural advantages into the hands of well-resourced traders while exposing a far greater number of the public to risks they cannot

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[40] Appellant's Brief at 19–20, *KalshiEX LLC v. Commodity Futures Trading Comm'n*, No. 24-5205 (D.C. Cir. Oct. 16, 2025).

[41] A source confirming that the U.S. Army soldier charged with improperly using nonpublic information surrounding the capture of Nicolas Maduro was blocked from opening an account on Kalshi but not Polymarket. *See* Douglas Gillison & Anirban Sen, *U.S. Soldier Charged with Maduro Bets Was Blocked from Opening Account on Kalshi, Source Says*, Reuters (last updated Apr. 26, 2026), https://www.reuters.com/business/finance/us-soldier-charged-with-maduro-bets-was-blocked-opening-account-kalshi-source-2026-04-24/.

[42] Multiple sources detailing instances of insider trading. *See Political Insider Trading Enforcement Update*, Kalshi News, https://news.kalshi.com/p/kalshi-political-insider-trading-enforcement-update; *See also* Gregory Svirnovskiy, *From Iran to Paris Weather: Alleged Prediction Market Violations Start Stacking Up*, Politico (Apr. 24, 2026), https://www.politico.com/news/2026/04/24/prediction-market-insider-trading-violations-00890570; *See also* Bobby Allyn, *Israel Accuses Two of Using Military Secrets to Place Polymarket Bets*, NPR (Feb. 12, 2026), https://www.npr.org/2026/02/12/nx-s1-5712801/polymarket-bets-traders-israel-military.

[43] Brooklyn Law School Professor Jodi Balsam defines match-fixing as "an intentional arrangement, act or omission aimed at improper alteration of the result or the course of a sports competition in order to remove all or part of the unpredictable nature of the aforementioned sports competition with a view to obtaining an undue advantage for oneself or for others. A competition "fix" may be motivated by financial gain, e.g., enabling a winning bet, or by sporting advantage, e.g., manipulating to affect seeding in a tournament or to guarantee advancement." *See* Jodi Balsam, *Criminalizing Match-Fixing as America Legalized Sports Gambling*, 31 Marq. Sports L. Rev. 1, 4 (Fall 2020).

[44] Wolfers & Zitzewitz, *supra* note 9, at 124 n. 8.

reasonably identify or avoid. These conditions do not just invite abuse. They are structured to produce it, exposing unknowing participants to substantial harm. This regulatory blind spot, exacerbated by statements made by executives suggesting a tolerance for insider-driven trading[45] and class action lawsuits alleging Kalshi refused to pay consumers through a "death carveout,"[46] shows that these platforms are not yet mature enough to ensure a fair and equitable marketplace.

IV. HOUSE RULES: PROTECTING CONSUMERS WITH STATE UDAP LAWS

Filling that blind spot are Unfair, Deceptive, or Abusive Acts or Practices (UDAP) laws.[47] These laws are designed to prohibit dishonest and anticompetitive business conduct. They address precisely the types of harms identified above, though they are not limited to just those. States have long relied on UDAP laws to regulate conduct across industries, targeting the harmful effects of the conduct rather than the conduct itself.

As Luke Herrine explains in *The Folklore of Unfairness*, UDAP laws were rooted in the common law tradition of "fair dealing."[48] Early constructions of "unfairness" were not conceived around economic principles but grounded in moral terms that sought to enforce baseline notions of "fairness" in an exchange. This broad interpretation of unfairness would be narrowed by the Federal Trade Commission (FTC) in its 1980 Policy Statement on Unfairness[49] which realigned UDAP enforcement around free market principles, "consumer sovereignty," and, except in

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[45] Kalshi CEO was quoted as saying "that insider trading on its platform is 'fair game' and simply 'part of the risk in the market.'" *See Nev. Gaming Control Bd. v. KalshiEX, LLC*, *supra* note 24, at 9. In a November 2025 *60 Minutes* interview, Polymarket founder Shayne Coplan said that people having an edge on the market is "a good thing" and a "socially useful" aspect of prediction markets. *60 Minutes: Polymarket CEO Says His Prediction Market is "The Most Accurate Thing We Have as Mankind Right Now."*, YouTube (CBS News) (Nov. 30, 2025), https://youtu.be/ZA5bY4K9XPs?si=E6VIiguAW0ugL4fc&t=381.

[46] Class Action Complaint at 2–3, *Risch v. KalshiEX LLC*, No. 2:26-cv-02390 (C.D. Cal. Mar. 5, 2026); Class Action Complaint at 1–2, *Golan v. KalshiEX LLC*, No. 1:26-cv-02394 (S.D.N.Y. Mar. 24, 2026).

[47] Expanded later to also include abusive practices ("UDAAP"). *See* 12 U.S.C. § 5531.

[48] Luke Herrine, *The Folklore of Unfairness*, 96 N.Y.U. L. Rev. 431, 447–448 (2021).

[49] In 1980, the FTC defined unfair practices as those causing substantial, unavoidable consumer injury not outweighed by countervailing benefits. *See FTC Policy Statement on Unfairness*, Fed. Trade Comm'n (Dec. 17, 1980), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness.

egregious cases, limiting intervention.[50] Critics argued that this shift toward deregulation was the result of a corporate-funded backlash against expanding consumer protections.[51]

Despite this outside influence, UDAP laws—particularly those adopted by the states (nicknamed "Little FTC Acts")—have remained intentionally broad.[52] Congress would further expand this scope through the Dodd-Frank Act (Dodd-Frank) by adding the concept of "abusive" practices and conferring primary enforcement authority over consumer financial protection to the Consumer Financial Protection Bureau (CFPB).[53] Under Dodd-Frank, an act or practice is defined as "unfair" when it: (1) causes or is likely to cause substantial injury, (2) is not reasonably avoidable by consumers, and (3) is not outweighed by countervailing benefits.[54] An "abusive" act or practice occurs when a "covered person or service provider" takes unreasonable advantage of consumers' lack of understanding or inability to protect their own interests.[55]

Courts have held that injury under UDAP laws need not be purely economic, reflecting how courts adapt to evolving markets yielding nontraditional forms of injury.[56] In recent cases, even an invasion of privacy has been held to constitute actionable harm.[57] This development reflects a broader recognition that disclosure-based models are inadequate in complex, data-driven markets where consumers are generally under-qualified to evaluate privacy risks.[58] In response,

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[50] Consumer sovereignty rests on the premise that, "[i]n a 'perfectly competitive' market, consumers will be able both to choose the best option for themselves in the short term and to guide the direction of business innovation toward even better options in the longer term." This ideal would in turn limit intervention because consumers would be able to influence the marketplace through their purchasing power. *See* Luke Herrine, *Unfairness, Reconstructed*, 42 Yale J. On Reg. 95, 112 (Winter 2025).
[51] *Folklore of Unfairness*, *supra* note 48, at 491–492.
[52] Am. Bar Ass'n, *State Consumer Protection Law* ch. 1.A (2022).
[53] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1031, 124 Stat. 1376, 2005–06 (2010) (codified at 12 U.S.C. § 5531).
[54] 12 U.S.C. § 5531(c).
[55] 12 U.S.C. § 5531(d).
[56] *Unfairness, Reconstructed*, *supra* note 50, at 167–168.
[57] *FTC v. Kochava, Inc.*, 715 F. Supp. 3d 1319, 1322 (D. Idaho 2024).
[58] Former FTC Chair Lina Khan and Director of Consumer Protection Samuel Levine argued that the traditional "notice-and-choice" model is inadequate to police complex, data-driven markets, where consumers are often ill-equipped to evaluate risk. They emphasized that increasingly sophisticated design features can obscure those risks,

federal and state agencies have imposed substantial limits on deceptive conduct, prohibiting manipulative design features known to exploit cognitive biases and undermine consumer autonomy.[59] In the context of fringe finance, for example, the CFPB exercised its UDAP authority to promulgate the Payday Rule aimed at high-cost lending practices.[60] This intervention was justified not only by the financial injury imposed onto borrowers, but by the predatory structure of the short-term loan market itself—one that systematically traps consumers in cycles of debt.[61] Under this expansive view, consumer protection aims to not only facilitate informed choice, but to prevent businesses from dominating consumers through deliberate market design and information asymmetry.[62]

Modern UDAP enforcement therefore deploys a flexible, effects-based framework that empowers regulators to address harmful conduct that may evade, or attempt to evade, more strictly defined regulatory schemes.[63] Public enforcers, namely the FTC, CFPB, and state attorneys general, have exercised their authority using varied strategies, from high-volume actions targeting smaller actors to coordinated, multi-agency efforts against major offenders.[64] While individual state enforcers more frequently "favored generally stated prohibitions" on future misconduct, federal regulators are much more likely to impose compliance obligations, such as employee training and consumer service requirements.[65] Thus, UDAP enforcement has proven to be both

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preventing consumers from understanding what they assent to in privacy disclosures. *See* Lina M. Khan et al., *After Notice and Choice: Reinvigorating "Unfairness" to Rein in Data Abuses*, 77 Stan. L. Rev. 1375, 1400 (June 2025).

[59] Similarly, in digital markets, regulators have targeted design features, aptly named "dark patterns," that manipulate consumer behavior through interface design, default settings, and feedback mechanisms—exploiting what scholars describe as consumers' "cognitive frailties." *Id*. at 1423–1430.

[60] Brooklyn Law School Professor Vijay Raghavan argues that consumer law focuses too much on efficiency and not enough on fairness. He points to the short-term loan market as a prime example, where regulators often decline to intervene even when the market, by design, imposes higher costs on vulnerable consumers, because the terms appeared rational. *See* Vijay Raghavan, *Consumer Law's Equity Gap*, 22 Utah L. Rev. 511, 547-549 (2022).

[61] *Id*. at 561 n. 325.

[62] *Unfairness, Reconstructed*, *supra* note 50, at 162–164.

[63] Prentiss Cox et al., *Strategies of Public UDAP Enforcement*, 55 Harv. J. on Legis. 37, 45 (2018).

[64] *Id*. at 98-99.

[65] *Id*. at 72.

effective and adaptive across a wide range of markets, regularly adjusting to new practices and innovations unique to those industries. "In recent years, however, federal and state agencies have increasingly relied on UDAP laws to obtain results that are not supported by other statutory or regulatory provisions."[66]

This reliance on UDAP protections has been applied to the harms identified in prediction markets by several states. Like in short-term loan markets, harms arising out of prediction markets are not unintentional—they are built into the foundation of the business model. The same elements that justified intervention there are present here as well—thus, the same inquiry applies.

Under the legal standards established in Dodd-Frank, and incorporated by the states, conduct is "unfair" when it causes substantial injury that consumers cannot reasonably avoid and that is not outweighed by countervailing benefits. Applied to prediction markets, we find:

(1) The injuries are substantial. As documented in active litigation, these platforms expose minors, problem gamblers, and financially unsophisticated users to compulsive engagement loops, significant financial losses, and addictive design features clinically associated with gambling disorder, the first behavioral addiction recognized by the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition.[67]

(2) These injuries are not reasonably avoidable. Gamified interfaces, demo accounts offered without age verification, and cross-platform participation undermine any meaningful attempt to self-exclude or opt out.

(3) And, the forecasting function these platforms tout as their true underlying benefit does not outweigh the significant harm to retail participants. The value of accurate pricing

[66] Jeffrey P. Naimon & Kirk D. Jensen, *The UDAP-ification of Consumer Financial Services Law*, 128 Banking L.J. § 2011-1.03 (2011).
[67] *See* Sohn, *supra* note 23.

> to a competitive, free market depends on informed and willing participants—not on a majority population of traders drawn in by dark patterns, misled by false advertising, and outmatched by insiders with access to nonpublic information.

These platforms also engage in "deceptive" practices that mislead the public about what participation will actually cost them. By marketing themselves as "Sports Betting Platforms Legal in All 50 States" while not holding a single state gaming license, these platforms are likely to deceive any reasonable consumer. Financial incentives promising "free money" compound that deception through transaction fees obscured by prize pools and promotional credits, social gaming elements that drive compulsive engagement, and a structure that pulls users back in before they fully understand what participation is costing them.

Finally, the case for "abusive" conduct is even more straightforward. A covered person acts abusively when it takes unreasonable advantage of consumers' lack of understanding or inability to protect their own interests. Prediction markets have shown that they do precisely that. By deploying design features drawn from gambling psychology, burying transaction costs behind promotional credits, and marketing to consumers who cannot reasonably evaluate the legal or financial risks of participation, these platforms systematically exploit the information imbalance and behavioral vulnerabilities of their users. Where insiders profit using nonpublic information and exchanges retain the discretionary right to deny payouts, these platforms are not just taking advantage of market conditions—they are engineering them. These are markets that are not only corrupted but are also unfairly dominating the buyer-seller relationship.

Under this framework, it does not matter whether a prediction market calls itself a derivatives exchange, a forecasting tool, or a free market open to everyone. What matters in the application of state UDAP laws is whether the alleged conduct produces the types of harms these

statutes were designed to address. In this sense, states' UDAP authority serve as legal safeguards necessary to ensuring that evolving market structures do not evade oversight simply by adopting new labels.

V. THE HIGH STAKES OF CLASSIFICATION

Prediction markets have grown rapidly, attracting users and significant capital.[68] The stakes are now sky high and the predominant legal debate has revolved around classification. Advocates argue that, despite its resemblance to gaming, event contracts are legally distinct financial instruments that fall within the *exclusive* scope of federal commodities regulation rather than state gaming laws. On the other side of the betting table, critics point to gaps in existing regulatory frameworks as a key driver for prediction markets' rapid growth.

If classified as financial derivatives, these instruments fall under federal regulation and are subject to uniform oversight by a single federal regulator. By contrast, if they are treated as wagers, they would be subject to the full tapestry of state gaming laws. Leading platforms have therefore framed their offerings as derivatives, thereby circumventing the much stricter, more fragmented state regulatory regimes governing gaming.

By operating under a unified federal framework rather than navigating "a patchwork of state regulation,"[69] these platforms neither limit interstate participation nor liquidity. Limiting trading activity to the confines of state lines (if classified as gaming under state gaming laws)

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[68] Recent investment activity underscores the rapid institutionalization of prediction markets, with major financial actors committing significant capital and industry leaders launching dedicated venture funds to expand the sector. *See NYSE-Parent Intercontinental Exchange Invests $600 Million in Polymarket*, Reuters (last updated Mar. 27, 2026), https://www.reuters.com/business/nyse-parent-intercontinental-exchange-invests-600-million-polymarket-2026-03-27/; *See also* Marina Temkin, *Despite Bitter Rivalry, Kalshi and Polymarket CEOs Back $35M Prediction Markets VC Fund*, TechCrunch (Mar. 23, 2026), https://techcrunch.com/2026/03/23/despite-bitter-rivalry-kalshi-polymarket-ceos-back-35m-predictions-markets-vc-fund/.

[69] On April 2, 2026, the CFTC filed suit against Arizona seeking to enjoin the State's criminal prosecution of Kalshi. *See Arizona v. KalshiEX LLC*, No. CR 2026-173-001 (Ariz. Super. Ct. Mar. 16, 2026); *See also* Complaint at 13, *United States v. State of Arizona* (D. Ariz. Apr. 2, 2026).

would undermine both their scale and their core function as "free exchanges," because the success of prediction markets is largely predicated on broad participation and substantial volume to generate meaningful pricing information.[70]

This deliberate classification choice suggests a regulatory arbitrage play that has begun to reshape the regulatory landscape and trigger a wave of legal actions across multiple jurisdictions. With billions in potential revenue and consumer capital at stake,[71] prediction markets have gone all in on the view that federal regulation is the better play.

Classification, however, is the wrong question to ask. The more fundamental question is not what these platforms should be called, but who bears responsibility for addressing the harms they create. By allowing these harms to thrive "under the guise" [72] of a financial derivative, the current system creates an enforcement gap that *only* the states can fill. In this undefined space, state laws targeting the harmful consequences of a business are not "an obstacle to" federal goals,[73] but independent and necessary safeguards required to protect the public health and welfare.

VI. FEDERAL COMMODITIES REGULATION AND THE LIMITS OF PREEMPTION

Classification alone does not fully resolve the question of regulatory authority. That analysis begins with first understanding the breadth of the Commodity Exchange Act ("CEA")[74] and the principles of federal preemption—before asking whether that should be understood to

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[70] Complaint for Permanent Injunction and Declaratory Relief at 8, *KalshiEX LLC v. Williams*, No. 1:25-cv-08846 (S.D.N.Y. Oct. 27, 2025). In a discussion on the history of futures markets, the court found that "[t]he liquidity of a futures contract, upon which hedging depends, is directly related to the amount of speculation that takes place." *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 358 (1982).

[71] Recent reports suggest that leading prediction market platforms are attracting massive valuations, with Kalshi reportedly reaching $22 billion and both Kalshi and Polymarket targeting valuations near $20 billion, underscoring the rapid growth and financialization of the sector. *See* Yuliya Chernova, *Kalshi Cinches $22 Billion Valuation in Ongoing Round*, Wall St. J. (Mar. 19, 2026), https://www.wsj.com/articles/kalshi-cinches-22-billion-valuation-in-ongoing-round-194007ac (last visited Apr. 29, 2026); *See also* Kate Clark & Kevin T. Dugan, *Kalshi and Polymarket Are Each Eyeing Roughly $20 Billion Valuations*, Wall St. J. (last updated Mar. 7, 2026), https://www.wsj.com/finance/kalshi-and-polymarket-are-each-eyeing-roughly-20-billion-valuations-d7b9c5d8.

[72] *Wade v. United States*, 33 App. D.C. 29, 34 (1909).

[73] Memorandum Opinion at 27, *KalshiEX LLC v. Martin*, No. 1:25-cv-01283-ABA (D. Md. filed Aug. 1, 2025).

[74] *See* Commodity Exchange Act, 7 U.S.C. § 1 et seq.

exclude traditional exercises of state police powers. While the CEA provides an extensive regulatory framework for derivatives, the Act does not fully address consumer behavior risks, deceptive practices, or other public welfare concerns.

A. The Commodity Exchange Act and CFTC Authority

The Commodity Exchange Act was enacted to promote "fair practice[s] and honest dealings on commodity exchanges."[75] The Act establishes the federal framework governing derivatives markets, regulating the trading of commodity futures, and granting regulatory authority to the Commodity Futures Trading Commission ("CFTC").[76] Under this framework, the CFTC exercises "exclusive jurisdiction"[77] over swaps,[78] futures contracts,[79] as well as options on those contracts, by overseeing trading activity, certifying exchanges, and enforcing compliance among registered platforms.[80]

In carrying out its authority, the CFTC regulates futures markets through entities known as Designated Contract Markets ("DCMs").[81] DCMs are registered exchanges (or "boards of trade") that operate under the CFTC's oversight. They may permit participation to "all types of traders, including retail customers."[82] DCMs may list new contracts either by self-certifying that the contract complies with the CEA and applicable regulations or by seeking approval directly from the CFTC.[83]

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[75] 2 Linda L. Schlueter, *Punitive Damages* § 21.7(B) (Matthew Bender, 8th. Ed. 2026).
[76] Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389 (1974).
[77] 7 U.S.C. § 2(a)(1)(A).
[78] A "swap" is broadly defined under federal law to include agreements based on the value of an underlying asset, rate, or event, including financial and non-financial contingencies. *See* 7 U.S.C. § 1(a)(47). The scope of swaps expanded significantly under the Dodd-Frank Act, which brought previously unregulated over-the-counter derivatives within the CFTC's regulatory framework.
[79] Futures contracts are standardized agreements to buy or sell a commodity or financial instrument at a predetermined price on a future date, traded on regulated exchanges. Not explicitly defined. *See supra* note 74.
[80] Robert N. Rapp, *Blue Sky Regulation*, Ch. 1, § 19.01 (Matthew Bender 2026).
[81] *See Contracts & Products*, *supra* note 4.
[82] *Blue Sky Regulation*, *supra* note 80.
[83] *See Contracts & Products*, *supra* note 4.

When self-certifying, exchanges bear the brunt of responsibility for ensuring that listed contracts are fully compliant with statutory and regulatory requirements. While the CFTC's oversight includes "market surveillance, rule enforcement reviews, reviews of contract terms, dialogue with the regulated entities, and enforcement actions,"[84] it relies heavily on registered exchanges to police themselves. This arrangement exposes a regulatory approach[85] that not only affords DCMs significant freedom to innovate but also leaves the market operating in a regulatory landscape looking very much like the "wild, wild west."

B. The Preemption Play

Federal preemption defines the extent to which federal law displaces state authority. Under the Supremacy Clause, federal law may displace state law where Congress has expressed a clear intent to do so—whether "explicitly stated in the statute's language or implicitly contained in its structure and purpose."[86] Preemption generally arises in three forms: express preemption, field preemption, and conflict preemption.[87]

Express preemption occurs where Congress explicitly defines the extent to which state law is displaced.[88] Field preemption applies where federal regulation is "so pervasive" that it occupies an entire regulatory field, leaving no room for state involvement.[89] Conflict preemption arises where compliance with both federal and state law is impossible,[90] or where state law stands as an obstacle to accomplishing federal objectives.[91]

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[84] *Id*.
[85] "The modern unfairness standard thus enacts the enduring American ideal of free enterprise . . . [and] promote[s] the idea that markets are self-correcting so long as regulators do not get in the way of the "free choices" of consumers." *Folklore of Unfairness*, *supra* note 48, at 436.
[86] *See Fid. Fed. Sav. & Loan Assn. v de la Cuesta,* 458 US 141, 153 (1982) (*mortgage regulation (CA)*).
[87] *See English v. Gen. Elec. Co.,* 496 U.S. 72, 78-80 (1990) (*nuclear safety (SC)*).
[88] *See Cipollone v. Liggett Grp.*, 505 U.S. 504, 517 (1992) (*tobacco labeling (NJ)*).
[89] *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947) (*grain warehouses (IL)*).
[90] *See Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) (*produce marketing (CA)*).
[91] *See Hines v. Davidowitz*, 312 U.S. 52, 66-68 (1941) (*alien registration (PA)*).

In applying these preemption principles, courts begin with the presumption that Congress did not intend to displace state authority, particularly in areas traditionally governed by the states.[92] As established in *Medtronic, Inc. v. Lohr*, the Supreme Court assumes that Congress does not "cavalierly pre-empt state-law causes of action" in fields traditionally occupied by the states.[93] Courts have consistently held that the presumption against preemption is at its "zenith" when federal law encroaches upon these core state functions.[94] This presumption is especially strong where state law regulates matters of public welfare,[95] consumer protection,[96] or other exercises of the states' police powers.[97]

Applying these principles to prediction markets, the relevant question has shifted to whether federal commodities regulation does indeed express a clear congressional intent necessary to displace state law.

VII. FEDERAL EXCLUSIVITY IS NO SURE BET

Federal commodities regulation under the CEA is comprehensive, but it is not limitless. Although the Act grants the CFTC "exclusive jurisdiction"[98] to regulate derivates, that authority is best understood as extending to market structure and trading activity—not *all* matters flowing from participation in derivatives markets. Absent a clear statement of congressional intent to displace all forms of state law, courts have reached differing interpretations as to whether the CEA supplants or leaves room for traditional exercises of state police powers.

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[92] *Supra* note 89, at 230.
[93] *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (*medical devices (FL)*).
[94] *Casino Ventures v. Stewart*, 183 F.3d 307, 310 (4th Cir. 1999).
[95] *Supra* note 93, at 485.
[96] *See Conte & Co. v. Stephan*, 713 F. Supp. 1382, 1385-1386 (D. Kan. 1989) (*unsolicited mailing (KS)*).
[97] *See N.Y. Pet Welfare Ass'n v. City of N.Y.*, 850 F.3d 79, 86 (2d Cir. 2017) (*pet shops (NY)*).
[98] *Supra* note 77.

Reading the CEA narrowly, consistent with the Supreme Court's instruction in *Altria Group, Inc. v. Good* that courts should "accept the reading that disfavors preemption,"[99] Section 2(a)(1)(A) of the CEA contains a clause stating that nothing in that section shall "supersede or limit the jurisdiction" of other regulatory authorities under state law,[100] nor shall it "supersede or limit the jurisdiction conferred on courts of . . . any State."[101] On its face, this language preserves an avenue for states to exercise their police powers. Yet the scope of that authority remains contested in litigation.

Courts confronted with this question have generally declined to read the CEA as displacing state law entirely. In *Mallen v. Merrill Lynch Futures, Inc.*, the district court examined the CEA's "savings clause." There, the court held that the Act "does not preempt state common law causes of action by creating an exclusive remedy"[102] in a case where an investor alleged violations of the CEA alongside state common law claims for fraud, negligence, and breach of fiduciary duty. By examining Section 12(e) and Section 22 of the Futures Trading Act of 1982,[103] the court reasoned that the CEA's limited list of non-preempted actions was not exhaustive, and that its "exclusive remedy" provision applies only to federal claims under the Act and does not displace independent causes of action arising under state law.

Later, another district court reaffirmed these limits by also examining Section 12(e)—now codified at 7 U.S.C. § 16(e). In *Stuber v. Hill*, the court held that the "CFTC's exclusive jurisdiction

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[99] *See Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (*tobacco advertising (ME)*).
[100] Grants the CFTC exclusive jurisdiction over accounts, agreements, and transactions involving commodity contracts, futures, and other specified derivatives traded on designated markets. *See* 7 U.S.C. § 2 (a)(1)(A)(I).
[101] Clarifies that the CFTC's exclusive jurisdiction does not supersede or limit the jurisdiction of other federal or state regulators except as expressly provided—referred to as the Savings clause. *See* 7 U.S.C. § 2 (a)(1)(A)(II).
[102] *Mallen v. Merrill Lynch Futures, Inc.*, 623 F. Supp. 203, 205 (N.D. Ga. 1985).
[103] Section 16(e) preserves the jurisdiction of state and federal courts and clarifies that the CEA does not preempt certain state law claims, including those based on fraud. Section 25 creates a private right of action allowing individuals to sue for damages resulting from violations of the CEA.7 U.S.C. §§ 16(e), 25. Legislative history of the 1982 amendments to CEA indicating Congress's intent to preserve state-law remedies. *See* H.R. 5447, 97th Cong. 26, 30 (1982).

. . . is limited by 7 U.S.C. § 16(e) . . . the legislative history indicates that . . . Congress intended for states to take a more active enforcement role in prosecuting commodities fraud."[104] By examining the legislative history, the court extracted Congressional intent "to enhance the authority of the States in protecting the public against persons engaging in unlawful off-exchange transactions not authorized by the Act."[105] The House Report goes further, "This amendment, . . . will enable the Commission to call upon the assistance of other law enforcement bodies in order to foster a coordinated and effective program to detect and prosecute those who engage in unlawful conduct."[106] This regulatory scheme therefore leaves a gap for state law—traditionally tasked with protecting its citizens' interests—to comfortably operate alongside federal oversight.

Platforms counter that the CEA's grant of "exclusive jurisdiction" to the CFTC is absolute. In a growing number of motions against state gaming regulators,[107] Kalshi, specifically, contends that Section 2(a)(1)(A) is limited by the phrase "[e]xcept as hereinabove provided." Its argument is once a contract is certified as a derivative and traded on a designated market, the CFTC assumes full authority. Although the second sentence "preserves the Securities and Exchange Commission and states' regulatory authority over exchanges or transactions that are not covered by the CFTC's exclusive jurisdiction," the platforms argue that that authority is only applicable to non-certified derivates or "swaps".[108] In the platforms' view, allowing states to regulate these markets under the guise of public welfare would subject exchanges to "a patchwork of 51 different—and potentially

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[104] *Stuber v. Hill*, 170 F. Supp. 2d 1146, 1151 (D. Kan. 2001).
[105] *Id.* at 1152. *See also* H.R. REP. No. 97-565, pt. I at 32 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3881.
[106] *Id*.
[107] Opinion, *KalshiEX LLC v. Flaherty*, No. 2:25-cv-02152-ESK-MJS (D.N.J. Apr. 28, 2025); Order, *N. Am. Derivatives Exch., Inc. v. Nev. ex rel. Nev. Gaming Control Bd.*, No. 2:25-cv-00978-APG-BNW, 2025 WL 2916151 *1 (D. Nev. Oct. 14, 2025).
[108] *N. Am. Derivatives Exch., Inc. v. Nev. Gaming Control Bd.*, *supra* note 107, at *16-17.

conflicting—state laws," resulting in the "total chaos" Congress specifically intended to avoid by creating a uniform federal regime.[109]

Federal courts in New Jersey and Nevada have accepted this view in decisions granting Kalshi temporary stays against state gaming regulators.[110] However, courts have failed to reach a consensus on the preemption question. For example, the Court of Appeals for the Ninth Circuit would reverse in favor of the Nevada Gaming Board upon further review,[111] while the Third Circuit Court of Appeals endorsed Kalshi's reading of the CEA in *KalshiEX v. Flaherty* by a 2-1 ruling.[112] But the Third Circuit's decision should not be understood as a final endorsement of Kalshi's claims. The court there considered only whether Kalshi "demonstrated a reasonable chance of success on its argument" to justify a temporary restraining order and *not* whether Kalshi's event contracts constitute gaming or swaps.[113]

Following a change in leadership, the CFTC has now aligned itself with Kalshi's position, arguing that the CEA definition of a "swap" is intentionally broad, encompassing "any agreement, contract, or transaction . . . that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency."[114] According to the Commission, sports and election contracts are not wagers, but derivatives reflecting market-based risk.[115] Because Kalshi operates as a federally registered DCM, their certification triggers the CFTC's "exclusive jurisdiction" under Section 2(a)(1)(A); which the Commission says "supersedes the SEC and state regulatory

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[109] *Williams*, *supra* note 70, at 2.
[110] *Flaherty*, *supra* note 107; Motion for Stay Pending Appeal, *KalshiEX LLC v. Hendrick*, No. 25-7516 (9th Cir. Dec. 17, 2025).
[111] *Hendrick*, *supra* note 27.
[112] *Flaherty*, *supra* note 107.
[113] *Id*. at 1–2.
[114] *United States v. State of Arizona*, *supra* note 69, at 11.
[115] Complaint for Declaratory and Injunctive Relief at 3, *United States v. Illinois*, No. 1:26-cv-03659 (N.D. Ill. filed Apr. 2, 2026).

authorities' jurisdiction."[116] Consistent with this interpretation, the CFTC has asserted, in an earlier appellate briefing (against Kalshi no less) that "due to federal preemption, event contracts never violate state law when they are traded on a DCM."[117]

Yet, this argument reads federal exclusivity too broadly and blurs the line between regulating markets and regulating conduct. Recent developments in administrative law have also redefined the limits of the CFTC's position. With the Supreme Court's rejection of Chevron deference[118] in *Loper Bright Enterprises v. Raimondo*, courts no longer defer to agency interpretations of ambiguous statutes.[119] This shift underscores the absolute need for a clear statement of congressional intent before traditional state police powers can be displaced and weakens any reliance on agency interpretation to expand the reach of federal preemption. As a result, the CFTC's interpretation of its self-asserted "exclusive jurisdiction" must be determined by the text of the CEA itself—not by the agency's own declaration of its authority.

Furthermore, "[t]he only federal law . . . that touches on gaming is the Dodd-Frank Act's 'special rule' for event contracts (Special Rule),[120] which gives the CFTC the authority to prohibit event contracts involving gaming."[121] The CFTC has exercised its authority to prohibit certain categories of event contracts before—most notably on April 2, 2012, when it issued an order prohibiting the listing of political event contracts by the North American Derivatives Exchange

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[116] Complaint for Declaratory and Injunctive Relief at 2–3, *United States v. Connecticut*, No. 3:26-cv-00498 (D. Conn. filed Apr. 2, 2026).
[117] *KalshiEX LLC v. CFTC*, *supra* note 40, at 27.
[118] The Supreme Court held that courts must defer to an agency's reasonable interpretation of an ambiguous statute that the agency within its authority. *Chevron, U.S.A., Inc. v. NRDC, Inc.,* 467 U.S. 837 (1984).
[119] The Supreme Court overruled *Chevron* deference, holding that courts, not agencies, must independently interpret statutes, rather than deferring to an agency's reasonable interpretation of ambiguous law. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024).
[120] *See* Special Rule, 7 U.S.C.S. § 7a-2(c)(5)(C).
[121] *Flaherty*, *supra* note 107, at 11.

("Nadex").[122] That action remains highly relevant today because it demonstrates that the CFTC can deny event contracts that fall within specific, enumerated categories Congress has expressly identified as contrary to public interest (such as war, assassination, and gaming).[123] In doing so, the CFTC outlined the regulatory boundaries that platforms are now invoking to claim sanctuary under the CEA's exclusive jurisdiction.[124]

The CFTC has retained primary authority to regulate commodities markets and trading, while states have long retained primary authority over the regulation of gaming and other forms of high-risk or exploitative conduct. Though a state may pass "laws for the protection of life, liberty, health, or property within its borders . . . [i]t may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce."[125] This limitation does not expressly displace state police powers. Rather, it preserves states' constitutionally granted authority to regulate harmful conduct, so long as they do not interfere with interstate commerce. Notwithstanding the CEA's broad grant of federal authority, the Act must be read as a whole, and nothing in its text clearly and inarguably displaces traditional state police powers to regulate harm. Thus, even if the CEA occupies the entire field of derivatives, its text and legislative history leave room for state law to apply.

VIII. THE TRUMP CARD: STATE POLICE POWERS

The limits of federal exclusivity are most obvious where state law has traditionally governed: consumer protection, fraud prevention, and the regulation of vice-related conduct. Even

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[122] *Order Prohibiting the Listing or Trading of Certain Political Event Contracts*, CFTC (Apr. 2, 2012), https://www.cftc.gov/sites/default/files/idc/groups/public/@rulesandproducts/documents/ifdocs/nadexorder040212.pdf.
[123] *See* Agency Rule, 17 C.F.R. §§ 40.11 (a)(1-2); *See also* Special Rule, 7 U.S.C. §§ 7a-2(c)(5)(C).
[124] KalshiEX LLC, *Submission of Political Event Contracts for CFTC Review* (June 12, 2023), https://www.cftc.gov/sites/default/files/filings/ptc/23/06/ptc0612232836.pdf; Press Release, CFTC, *CFTC Issues Order Prohibiting Listing of Certain Event Contracts* (Apr. 6, 2022), https://www.cftc.gov/PressRoom/PressReleases/8478-22.
[125] *Railroad Company v. Husen*, 95 U.S. 465, 472 (1877) (*livestock control (MO)*).

if event contracts fall exclusively within the CEA's regulatory framework, its classification as a "swap" or "derivative" does not suddenly strip states of their authority to address the harms they pose to those participating in these markets. Thus, state police powers have been upheld as a necessary safeguard and *not* an obstacle for federal regulation to overcome.

The federal government's regulation of a specific financial instrument does not operate as a license to ignore the historic police powers of the states.[126] In our system of dual sovereignty, the states have possessed the primary responsibility to protect the "health, welfare, safety, and morals of their citizens."[127] In *L'Hote v. New Orleans*, a case challenging a municipal ordinance regulating prostitution, the Supreme Court held that federal law does not preempt state or local police powers in areas of health, safety, and public morals. The Supreme Court recognized that "those vocations which minister to and feed upon human weaknesses, appetites and passions" fall within "the scope of what is known as the police power" because "[t]hey affect directly the public health and morals."[128]

It is undeniable that gaming has endured a rich history within the United States.[129] From colony-sponsored lotteries to bingo halls on tribal lands and a World Series perverted by organized crime, no vice has enjoyed the unrelenting push and pull of states flexing their police powers quite like gaming. "For a great many years past gambling has been . . . regarded as a vice

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[126] *N. Am. Derivatives Exch., Inc. v. Nev. Gaming Control Bd.*, *supra* note 107, at 15–16.
[127] *Casino Ventures v. Stewart*, *supra* note 94, at 310.
[128] *L'Hote v. New Orleans*, 177 U.S. 587, 596 (1900).
[129] "Ben Franklin, John Hancock, and George Washington all prominently sponsored the use of lotteries for public works projects . . . Some of the nation's earliest and most prestigious universities—including Harvard, Yale, Columbia, Dartmouth, Princeton, and William and Mary—were built from lottery proceeds . . . . To carry on the war against England, $10 million was severely needed and because the national legislative body lacked the power to tax, a national lottery was created . . . . In other words, local governments could not find a more simple means of obtaining the money that they needed. One could argue that playing the lottery became a civic responsibility." *See* Anthony N. Cabot et al., *Alex Rodriguez, A Monkey and The Game of Scrabble: The Hazard of Using Illogic to define the Legality of Games of Mixed Skill and Chance*, 57 Drake Law Review 383, 386 (Winter 2009).

to be prevented and suppressed in the interest of the public morals and the public welfare. The power of the State to enact laws to suppress gambling cannot be doubted."[130]

A. Established History of State Regulation of Gaming

Nowhere is state authority more deeply rooted than in the regulation of gaming. For over a century, the Supreme Court has recognized that the "suppression of gambling is concededly within the police powers of a state."[131] In cases where gaming regulation and federal law touched upon the same issue, courts have held that gaming is indeed within the sovereignty of the states.

In *Casino Ventures v. Stewart*, the Fourth Circuit Court of Appeals rejected the claim that amendments to the Johnson Act in 1992 permitted gambling cruises from South Carolina ports, thereby preempting state gaming laws.[132] In its opinion, the court emphasized that Congress did not intend to supersede state regulatory authority over gaming in state territorial waters through changes to the Johnson Act.[133] Instead, under 15 U.S.C. § 1175(b)(2)(A), the Act explicitly allows states to prohibit gaming devices on "cruises to nowhere" if the state enacts such a law.[134] As a result, the court held that a federal law touching upon the subject of gaming was designed to "act in aid, not in derogation, of state regulatory authority."[135]

Later, in *Artichoke Joe's California Grand Casino v. Norton*, the Ninth Circuit Court of Appeals reasserted that gaming regulation lies at the very "heart of the state's police power."[136] The court upheld a state constitutional amendment granting Indian tribes exclusive rights to offer casino-style card games as consistent with the Indian Gaming Regulatory Act ("IGRA") (again,

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[130] *Marvin v. Trout*, 199 U.S. 212, 224 (1905) (*bucket shops (KS)*).
[131] The Supreme Court upheld a San Francisco anti-gambling ordinance, rejecting the plaintiff's claim that it was discriminatorily enforced against Chinese residents. *See Ah Sin v. Wittman*, 198 U.S. 500, 505-06 (1905).
[132] *Casino Ventures v. Stewart*, *supra* note 94, at 309.
[133] *Id.* at 311.
[134] *Id.*
[135] *Id.*
[136] *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 737 (9th Cir. 2003).

another federal law).[137] The court reasoned that gaming unquestionably falls within a class of "vice activities" that states have traditionally governed to protect public morals.[138]

Finally, the landmark decision in *Murphy v. NCAA* effectively kicked down the doors to legalized sports betting by returning regulatory authority to the states and overturning the Professional and Amateur Sports Protection Act of 1992 ("PASPA").[139] The Supreme Court emphasized that "Americans have never been of one mind about gambling"[140] and that each state must remain "free to act on its own" absent a clear federal mandate saying otherwise.[141] Today, 39 states, along with Washington, D.C., and Puerto Rico, have legalized sports betting.[142] Not because it somehow shed its label as a vice, but because states have always held the right to decide for themselves whether or not to legalize sports betting. This authority represents a core aspect of state sovereignty: the power to regulate not just gaming but, more fundamentally, the power to regulate social and economic risks within their jurisdiction.

B. Recognize The Game, Not the Name

That power is independent of whether a particular activity is formally classified as gaming. Courts have consistently recognized states' regulatory authority over gaming does not turn on what or how an activity is labeled, but on the conduct and harms that activity produces.

Judge Roth in the sole dissenting opinion in *KalshiEX, LLC v. Flaherty*, opined, "[i]t is difficult, however, to take Kalshi's argument at face value when its marketing materials . . . routinely refer to its products as 'sports betting.'"[143] When a prediction market's offerings "look

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[137] *Id.* at 731.
[138] *Id.* at 740.
[139] *Murphy v. NCAA*, 584 U.S. 453, 486 (2018).
[140] *Id.* at 459.
[141] *Id.* at 486.
[142] Map of all 50 states and the District of Columbia noting which states and districts have legalized any form of gaming, such as lotteries, casinos, iGaming, and sports betting. *See State of Play Map*, Am. Gaming Ass'n, https://www.americangaming.org/research/state-of-play-map/ (last visited Apr. 29, 2026).
[143] Judge Roth was the sole dissenting opinion. *See Flaherty*, *supra* note 107, at 6 (Dissent).

like gambling, talk like gambling, and call themselves gambling,"[144] they fall squarely within the state's domain.

In *Gift Surplus, LLC v. North Carolina*, the court explained that it must "inquire, not into the name, but into the game, however skillfully disguised," emphasizing that its analysis focuses on the nature of the activity regardless of any other characterization.[145] Similar reasoning appears in *United States v. Masino*, where the use of "charities as a cover" did not insulate an illegal bingo operation from Florida's state gaming laws.[146] In a case involving the electronic purchase and delivery of out-of-state lottery products, the court in *Pic-A-State Pa. v. Pennsylvania* upheld Pennsylvania's Act 8 of 1993 as lawful.[147] The retailers in that case argued that the state statute violated the dormant Commerce Clause[148] and was preempted by the Violent Crime Control and Law Enforcement Act of 1994.[149] The court, however, held that Act 8 operated in concert with federal law and that it was never Congress's intent to "preclude all state legislation" in this field.[150] Since the 1994 Crime Control Act "expressly authorizes interstate compacts," the court reasonably inferred that Congress intended to supplement, and not preempt, state-level gaming regulations.[151]

This rationale extends beyond gaming. In *Conte & Co. v. Stephan*, the court rejected a junk mailer's preemption challenge to Kansas's consumer protection enforcement, explaining that while federal law governed the mode of communication, the U.S. postal service, the state was

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[144] *Id.* at 8 (Dissent).
[145] *Gift Surplus, LLC v. State ex rel. Cooper*, 380 N.C. 1, 3 (2022).
[146] *United States v. Masino*, Nos. 18-15019, 19-13335, 2021 U.S. App. LEXIS 22615, at *9 (11th Cir. Jul. 30, 2021).
[147] *Pic-A-State Pa. v. Pa., Dep't of Revenue*, 42 F.3d 175, 176 (3d Cir. 1994).
[148] The Commerce Clause authorizes Congress to regulate interstate commerce and activities that substantially affect it. *See* U.S. Const. art. I, § 8, cl. 3.
[149] As part of the federal criminal code, Congress prohibits the use of the mail to send or deliver materials related to lotteries, gift enterprises, or similar schemes of chance, subject to statutory exceptions. *See* 18 U.S.C. § 1301 (1994).
[150] *Supra* note 147, at 179.
[151] *Id.*

"not powerless to prevent respondent from using unfair trade practices within its borders."[152] The court admitted that although both state and federal law overlapped in some non *de minimis* ways, "each law is intended for and serves different purposes."[153] The court further elaborated that the federal law focused on the "mailing of materials," whereas the state law focused on defending against the "underlying deceptive marketing."[154]

The same logic can be applied to prediction markets: even if federal law governs the commodities market structure and integrity under the CEA, that authority does not fully extinguish states' authority to protect public welfare from specific harms that arise *if* the laws are intended to serve different purposes.

Gaming exists in an arena where there is no "inherently national system" of regulation.[155] Adding to that, "the CFTC admits it is not a gaming regulator" and lacks the specialized knowledge or mechanisms to oversee the social risks of conduct so far, legally indistinguishable from wagering.[156] Federal oversight is therefore, self-admittedly, ill-equipped to manage nationwide gaming, leaving the states as chief torchbearers protecting the public from the not-so unique harms of prediction-based speculation—or, as the platforms are fighting to call it, forecasting tools.

Prediction markets have proven that operating under a federal derivatives label provides no categorical immunity from litigation. At the same time, states have raised legitimate concerns regarding the loss of regulatory control—particularly the authority to impose licensing requirements, conduct integrity audits, and capture tax revenues. As a result, these exchanges are

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[152] *Conte & Co. v. Stephan*, *supra* note 96, at 1386.
[153] *Id.* at 1387.
[154] *Id.* at 1384.
[155] *Flynt v. Bonta*, 131 F.4th 918, 932 (9th Cir. 2025).
[156] *Hendrick*, *supra* note 27, at 20 n. 7.

being attacked from multiple angles, and the debate has become muddled by the growing stakes of classification. No longer should the debate be concentrated around distinguishing between swaps and wagers. Instead, it should revolve around identifying the harms.

IX. CONCLUSION

For a moment, the Bucket Shop felt like the future of finance. Anyone could walk in, place a bet on the rise or fall of a stock, and walk out believing they had participated in the free market.

But there was a catch, because there always is.

These "shops" did not trade in securities; they traded on price movements structured to give the appearance of legitimate market participation while exposing customers to the very harms states had long sought to prevent: the very same type of harms discussed in Section III. In response, states enacted sweeping prohibitions, treating bucket shops not as financial innovation, but as a form of organized gaming and fraud. As one court observed, "laws look to the substance and not to the form" to uncover the underlying harms they seek to prevent.[157]

Yet even as states moved to suppress these schemes, the underlying demand for speculation did not disappear. Organized exchanges grew, futures markets were legitimized, and what began as largely unregulated, and often outlawed, speculation matured into a national commodities trading market. Congress eventually stepped in—not to displace state regulatory authority entirely, but to impose structure on an increasingly complex market. The Commodity Exchange Act reflected a growing recognition that certain trades required uniform federal oversight.

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[157] The D.C. Circuit Court of Appeals, the same court that upheld the District Court's decision that first legitimized Kalshi's political contracts, once held, "[t]he scheme is nothing less than the receipt and making of bets on an uncertain event; namely, the probable rise or fall of the market prices of the things pretended to be bought or sold. Betting and wagering of this kind constitutes gaming in the ordinary sense of the word, notwithstanding it may be carried on under the guise of trade contracts. The law looks to the substance, and not the form, in determining the true character of such transactions." *See Wade v. United States*, *supra* note 72, at 34. *See also* Appellant's Brief, *KalshiEX LLC v. Commodity Futures Trading Comm'n* (2025), *supra* note 40. *See also KalshiEX LLC v. Commodity Futures Trading Comm'n* (2024), *supra* note 39.

But that recognition was never meant to be absolute. As the Supreme Court made clear in *Champion v. Ames*, Congress may act to suppress harmful market practices, but such authority exists alongside—not in place of—states' enduring power to protect public welfare.[158] The power of Congress to regulate commerce among the states, the Supreme Court explained, cannot be extended to general police powers as it would "defeat the operation of the Tenth Amendment."[159] State intervention has long been justified by the need to protect the public from harmful schemes that "cannot be distinguished in their nature" from gaming.[160]

History shows that financial innovation does not eliminate risk; it simply repackages it. Whether in the form of cryptocurrency exchanges prone to collapse, mortgage-backed securities leading up to the 2008 financial crisis, or Ponzi schemes perpetrated by Bernie Madoff and others, markets have repeatedly demonstrated that federal law alone cannot prevent harm.

Prediction markets are just the latest in this trend. Like the Bucket Shops before them, they promise open access and the allure of turning a hunch into profit. And like those earlier markets, they raise all-too-familiar concerns about fairness, transparency, and market manipulation.

This Article does not resolve whether event contracts are wagers or derivatives. It does not need to. Because, as history has shown, states retain an Ace up their sleeves.

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[158] "The power of the State to impose restraints and burdens on persons and property in conservation and promotion of the public health, good order and prosperity is a power originally and always belonging to the States, not surrendered by them to the General Government nor directly restrained by the Constitution of the United States, and essentially exclusive." *See Lottery Case*, 188 U.S. 321, 364-65 (1903).

[159] *Id*.

[160] The Supreme Court compared insurance policies as analogous to wagering, and while insurance may be broadly regulated at the federal level, it is not considered insterstate commerce—like gaming. "A lottery ticket, in all its aspects, is of the same nature as an insurance policy, which represents an analogous form of wagering contract. Both forms of contract depend upon chance and uncertain events, and in principle cannot be distinguished in their nature." By holding that lottery tickets were not subject to Congress's authority granted under the Commerce Clause, the Supreme Court reasoned that "[l]otteries, wherever found, are not interstate commerce, but at most interstate wagering, such as insurance and other forms of speculation or gambling. It is true that lotteries, which were once popular and extensively engaged in, have gradually fallen into disrepute and have become the subject of prohibition by most of the States. But the gradual prohibition of lotteries under state police powers did not make them interstate commerce, or diminish the power of the respective States to permit, regulate or prohibit them." *See Id*. at 327–328.