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A legal primer on prediction markets: Part 1

Prediction markets and the question of Federal preemption of State gambling law

The question presented: Swap or bet

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This is the first paper in a three-part series examining the U.S. legal landscape for prediction markets. This installment addresses the threshold question of federal preemption. The second installment will examine the insider trading enforcement landscape, and the third will survey legislative and regulatory reform efforts.

Introduction

Prediction markets rest on a simple and powerful premise: The collective views of people with dispersed knowledge and a financial incentive to be correct will produce more accurate forecasts than any single expert, poll, or institution. A Federal Reserve Board working paper published in February 2026 lends empirical support to that premise, finding that Kalshi's macro markets matched or outperformed fed funds futures and professional forecasters on the federal funds rate, as well as the Bloomberg consensus on unemployment and Consumer Price Index (CPI) forecasts.[1] Researchers, investors, and media organizations have increasingly incorporated prediction market data as a forecasting input: Bloomberg terminals now carry it; CNN struck a partnership with Kalshi; and Yahoo Finance integrated Polymarket data into its offerings.[2]

The industry's rapid growth has collided with a fundamental legal question that is now the subject of an escalating court battle: Are event contracts federally regulated commodity derivatives or are they state-regulated bets? Might they be both? More precisely, are event contracts traded on federally licensed designated contract markets (DCMs), such as Kalshi and Polymarket US, "swaps" under the Commodity Exchange Act (CEA or the "Act") and therefore subject to the jurisdiction of the Commodity Futures Trading Commission (CFTC)? Or are they gambling products subject to the police power of the states? If they are swaps subject to CFTC jurisdiction, is such jurisdiction exclusive? That is, does CFTC jurisdiction over event contracts preempt state regulators from enforcing state gambling laws?

A potential vehicle for answering some or all of these questions has already been presented to the Supreme Court of the United States. In September 2026, New Jersey's attorney general and gaming regulator filed a certiorari petition seeking review of an April 2026 decision by a divided U.S. Court of Appeals for the Third Circuit panel—the first federal appellate ruling on the preemption question—holding that Kalshi was likely to succeed in showing that the CEA preempts state gambling laws as applied to sports contracts traded on CFTC-licensed DCMs.[3] Supreme Court review appears likely, whether through New Jersey's pending certiorari petition, the pending petitions Robinhood and Crypto.com have filed from the U.S. Court of Appeals for the Ninth Circuit, or a future petition based on what is now a federal circuit court split on the preemption question. In August and September 2026, panels of the U.S. Court of Appeals for the Sixth and Ninth Circuits ruled in favor of state gaming regulators, holding that Kalshi had not shown that the CEA preempts state gaming laws as applied to sports event contracts, thereby creating a direct conflict with the Third Circuit's ruling in favor of Kalshi. A decision on the preemption question is also pending in the U.S. Court of Appeals for the Fourth Circuit.

State courts have largely sided with the state regulators. While most of the litigation has involved state regulators and prediction market operators, the CFTC itself has filed suits against multiple state regulators asserting that its jurisdiction is exclusive and displaces state gambling laws.[4] Litigation developments over the summer and fall of 2026 have sharpened the conflict. The Ninth and Sixth Circuits each concluded that Kalshi was unlikely to succeed in showing that its sports event contracts are "swaps" within the meaning of the CEA.[5] The two

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[1] Anthony M. Diercks, Jared Dean Katz & Jonathan H. Wright, "Kalshi and the Rise of Macro Markets," Board of Governors of the Federal Reserve System, *Finance and Economics Discussion Series* No. 2026-010 (February 12, 2026).

[2] Pat Evans, "How 2025 Became the Year Prediction Markets Dominated US Gambling Industry News," *iGaming Business* (December 29, 2025); see also "Exclusive: CNN Strikes Prediction Data Partnership with Kalshi," Axios (December 2, 2025); "Polymarket Becomes Yahoo Finance's Exclusive Prediction Market Partner, Eyes Another Record Month," *The Block* (November 12, 2025).

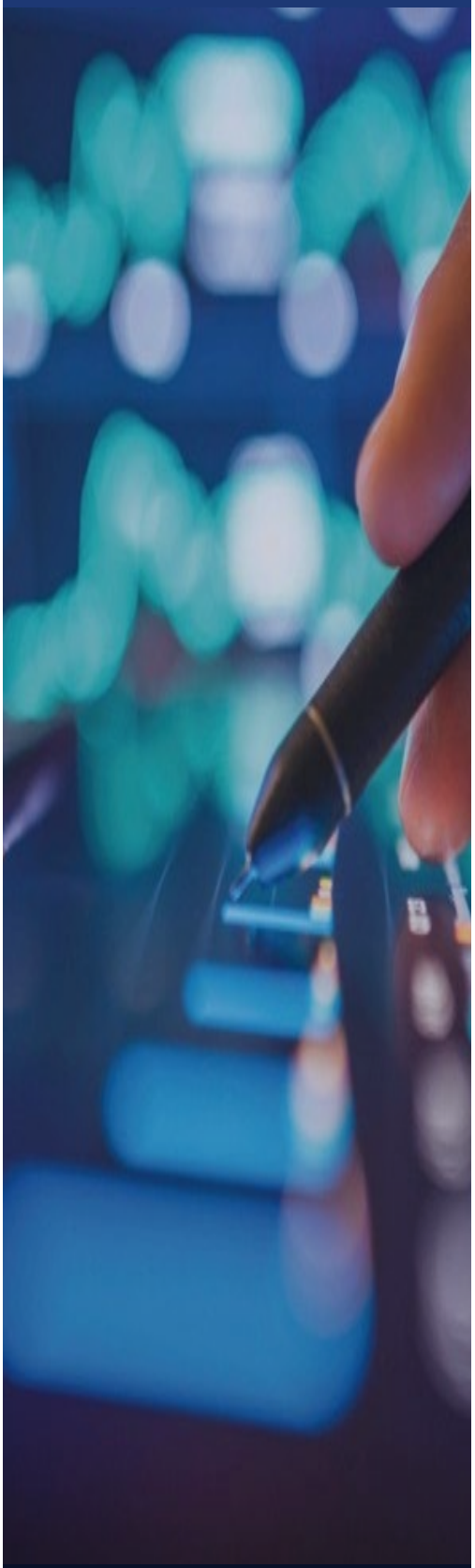
[3] "Petition for a Writ of Certiorari," *Flaherty v. KalshiEX LLC*, No. 26-299 (U.S. filed September 2, 2026).

[4] *See, e.g., Aislinn Keely, "CFTC Sues Ill., Conn., Ariz. Over Event Contract Enforcement," Law360 (April 2, 2026).*

[5] A recent CFTC Notice of Proposed Rulemaking, issued on October 9, 2026, would adopt a definition of "swap" that would explicitly include sports event contracts. *Further Definition of "Swap" – Inclusions* 1, 8, 11, CFTC RIN 3038-AF82 (Oct. 9, 2026), https://perma.cc/P76K-RJ58. This proposed definition was designed to

courts parted ways, however, on the question of whether a contract's status as a swap preempts state law. The Ninth Circuit held that the CEA expressly preempts state regulation of swaps traded on a DCM and occupies that field, so a contract's status as a swap would imply preemption. The Sixth Circuit held that, even if the contracts are swaps, the CEA neither expressly nor impliedly preempts Ohio or Tennessee gambling law.[6] A federal judge in the U.S. District Court for the Southern District of New York, assuming without deciding that the contracts are swaps, held that New York's gambling laws are not preempted. A federal judge in the U.S. District Court for the District of Utah entered what appears to be the first final merits judgment in the litigation wave, holding that Utah may enforce its gambling laws against sports event contracts traded on a DCM. And state attorneys general have opened new fronts within the U.S. Court of Appeals for the Second Circuit: New York sued Kalshi in July 2026 and Polymarket US in September 2026, and Connecticut sued Kalshi in August 2026, each alleging violations of state gambling law. The tension between these state enforcement actions, the CFTC's own federal lawsuits in these states seeking to bar state enforcement on preemption grounds, and the Southern District of New York opinion, now on appeal, will likely require the Second Circuit to speak on the preemption question soon. An early signal has already emerged: on November 3, 2026, the Second Circuit denied the motions of Kalshi and Coinbase for injunctions pending appeal, leaving New York and Connecticut free to enforce their gambling laws while the merits appeals proceed.

This Article, the first in a series of three, examines the CEA preemption question as the central legal issue confronting prediction markets and state gambling regulators today. Part I of this Article provides a regulatory overview: what prediction markets are, how the CEA and the CFTC regulate them, the scope of the agency's jurisdiction, and the economic stakes. Part II proposes a taxonomy for the swap-versus-gambling question, identifying three possible classifications and the policy implications of each. Part III maps the rapidly expanding federal and state court litigation over the core preemption question, including the circuit split that has now emerged. Part IV addresses proposed congressional legislation that could resolve the allocation of jurisdiction between the CFTC and the states. Assuming Supreme Court review of the CEA preemption question, Part V presents the likely principal arguments for both sides and considers what the high court's resolution might look like. Part VI offers a brief conclusion, and Part VII distills key takeaways for market participants, regulators, and legal practitioners.



address "widespread confusion" on whether sports event contracts are swaps. *Id.* at 11. But even if this CFTC definition was to formally take effect, under *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), courts would not necessarily need to defer to the agency's interpretation of the CEA.

[6] *See KalshiEX LLC v. Schuler*, Nos. 26-3196/26-5235, 2026 WL 2884087 (6th Cir. Sept. 25, 2026); *KalshiEX LLC v. Assad*, No. 25-7516, 2026 WL 2543846 (9th Cir. Aug. 28, 2026). On October 9, 2026, Kalshi filed a petition for rehearing and rehearing en banc.

I. A regulatory primer

A. The premise and the product

Prediction markets ask a deceptively simple question: If you had to wager money on an uncertain future event, what would you predict? The answer, aggregated across thousands of participants with different information sets and different stakes in the outcome, produces a probability estimate that may be more accurate than any single expert could provide. This is not merely a theoretical proposition. The recent Federal Reserve working paper found that Kalshi's macro markets consistently matched or outperformed the Bloomberg consensus on key economic indicators.[7] Prediction market data is now carried on Bloomberg terminals and integrated into the offerings of major news organizations.[8]

The economic literature on information aggregation through markets—pioneered by Friedrich Hayek's work on prices as signals and developed by Robin Hanson, Justin Wolfers, Eric Zitzewitz, and others—provides substantial theoretical support for these markets' forecasting function.[9] That literature also anticipated both of the problems that now dominate the regulatory conversation: the potential for participants with private, nonpublic information to extract systematic profits and the challenge of distinguishing trading in information-aggregating "event contracts" from conventional wagering.[10]

A prediction market event contract allows a market participant to place money on a particular outcome of an uncertain future event and receive a payout based on the accuracy of the chosen outcome. Prediction markets like Kalshi and Polymarket offer contracts on the outcome of future events across multiple categories, including politics, elections, weather, the economy, popular culture, and sporting events. The contracts typically reflect binary outcomes; traders are betting on whether a defined scenario occurs. An example taken from the CFTC's website describes the basic idea:

> [I]magine there's an event contract for "Will it rain tomorrow?" Traders can buy "yes" or "no" positions on the outcome of the event. The price of the contract at the time of purchase reflects the market's expectation of the outcome (say, 70 cents for "yes" and 30 cents for "no"). Traders who correctly predicted the outcome would receive the payout when the contract settles. Their profit is the difference between their initial investment and the payout. In this example, if you purchased a 70-cent "yes" position on a $1 "Will it rain tomorrow?" contract, and it rained the next day, you would earn a 30-cent profit when the contract settles. Traders who didn't predict correctly would lose their investment.[11]

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[7] Diercks et al., *supra* note 1 (finding that Kalshi's macro markets had a perfect forecasting record for the federal funds rate on the day before FOMC meetings since 2022, matched the Bloomberg consensus on unemployment and core CPI, and outperformed the Bloomberg consensus on headline CPI).

[8] Evans, *supra* note 2.

[9] *See* Friedrich A. Hayek, "The Use of Knowledge in Society," 35 *American Economic Review* 519 (1945); Robin Hanson, "Combinatorial Information Market Design," 5 *Information Systems Frontiers* 107 (2003); Justin Wolfers & Eric Zitzewitz, "Prediction Markets," 18 *Journal of Economic Perspectives* 107 (2004); see also Kenneth J. Arrow et al., "The Promise of Prediction Markets," 320 *Science* 877 (2008).

[10] *See, e.g.,* Wolfers & Zitzewitz, supra note 8, at 107, 118–19, 121; Robin Hanson, "Insider Trading and Prediction Markets," 4 *Journal of Law, Economics & Policy* 449 (2008); Tom W. Bell, "Gambling for the Good, Trading for the Future: The Legality of Markets in Science Claims," 5 *Chapman Law Review* 159 (2002); cf. Robin Hanson & Ryan Oprea, "A Manipulator Can Aid Prediction Market Accuracy," 76 *Economica* 304 (2009).

[11] CFTC, "Understanding Prediction Markets and Event Contracts" (last visited October 9, 2026).



The same concepts apply to contracts based on the results of the Academy Awards ("Will Leonardo DiCaprio Win Best Actor?") or sporting events ("Will the Los Angeles Dodgers Win the World Series?") and to all of the hundreds of event contracts offered by U.S. prediction markets on a daily basis.

B. The CEA and CFTC regulatory framework

Enacted in 1936, the CEA governs trading in commodity futures and other derivative contracts on commodities. Congress has amended the Act on several occasions to broaden its reach. In 1974, Congress expanded the statutory definition of commodity to include—in addition to enumerated agricultural commodities—"all services, rights, and interests" in which contracts for future delivery are dealt in. 7 U.S.C. § 1a(9). At the same time, Congress established the CFTC as a federal agency dedicated to regulating both (1) trading in commodity derivatives, and (2) the facilities on which such instruments trade.

In 2010, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Congress amended the CEA to add "swaps" to the categories of commodity-based contracts subject to the Act and to regulation by the CFTC. The CEA definition of "swap" is broad and includes any contract or transaction that provides for payment that is "dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence." 7 U.S.C. § 1a(47)(A)(ii). On its face, this definition could encompass prediction market event contracts (or at least some of them), although, as discussed in Part III, the Sixth and Ninth Circuits have relied on the phrase "associated with a potential financial, economic, or commercial consequence" to conclude that sports event contracts are likely not swaps. In response to "widespread confusion" on whether sports event contracts are swaps, the CFTC recently issued a Notice of Proposed Rulemaking that invoked its statutory authority to "further define" the term "swap" and defined swaps to explicitly include "event contracts, including those based on sports- … related events." *Further Definition of "Swap" – Inclusions* 1, 8, 11, CFTC RIN 3038-AF82 (Oct. 9, 2026), But even if this definition becomes legally effective, courts will not necessarily be obligated to give deference to the CFTC's interpretation of the CEA. *See Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

Dodd-Frank also amended the CEA to add a "special rule for review and approval of event contracts." 7 U.S.C. § 7a-2(c)(5)(C)(i), (ii). Similar to the swap definition, the event contract provision applies to contracts and transactions that are "based upon the occurrence, extent of an occurrence, or contingency," thereby lending further textual support to the argument that prediction market event contracts are governed by the CEA and subject to the jurisdiction of the CFTC.[12] As a policy matter, proponents of CEA jurisdiction—and CEA preemption—argue that the Act's intentionally broad definitions of "commodity" and "swap" were meant to capture exactly the kind of information-based and information-producing financial instrument embodied by an event contract on a prediction market. These proponents also argue that such contracts perform the same price discovery, risk transfer, and information-aggregation functions as traditional commodity futures.[13]

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[12] The event contract provision applies only to contracts or transactions in "excluded commodities." The definition of excluded commodity includes "an occurrence, extent of an occurrence, or contingency" that is "(I) beyond the control of the parties to the relevant contract, agreement, or transaction; and (II) associated with a financial, commercial, or economic consequence." 7 U.S.C. § 1a(19)(iv). Thus the definition of excluded commodity also lends support to the argument that prediction market event contracts are regulated by the CEA and the CFTC.

[13] *See* 7 U.S.C. § 1a(9); *KalshiEX LLC v. Commodity Futures Trading Comm'n*, No. 23-cv-3257 (JMC), 2024 WL 4164694 (D.D.C. Sept. 12, 2024); *KalshiEX LLC v. Commodity Futures Trading Comm'n*, No. 24-5205

C. CFTC regulation of designated contract markets

A large array of commodity derivatives, including swaps, futures, and options, currently trade on DCMs. The CFTC licenses and regulates DCMs—often referred to as "exchanges"—under a regime grounded in CEA § 5 (Designation of Boards of Trade as Contract Markets), CEA § 5c (Common Provisions Applicable to Registered Entities), and their implementing rules. A DCM may list a swap, futures contract, or other derivative by "self-certifying" compliance with CFTC requirements. *See* 7 U.S.C. § 7a-2; 17 C.F.R. pt. 40. Under self-certification, a contract listing becomes effective automatically unless the CFTC affirmatively intervenes.

DCMs are subject to "core principles" under CEA § 5(d), including obligations to maintain audit trails, conduct market surveillance, and enforce rules against insider trading, market manipulation, and other prohibited practices. The CFTC conducts periodic rule enforcement reviews of DCMs' market surveillance and compliance programs and has authority to impose sanctions on exchanges that fail to enforce their own rules. This "exchange-as-enforcer" architecture is not unique to commodity derivatives and DCMs. It is similar to the self-regulatory organization (SRO) framework long familiar in securities markets, where the various securities exchanges and the Financial Industry Regulatory Authority (FINRA), the private securities industry regulator, conduct front-line surveillance and rule enforcement under oversight of the SEC.

D. CFTC power to prohibit certain event contracts

Two features of the regulatory framework warrant specific emphasis because they bear directly on the preemption analysis. First, the CEA's "special rule for review and approval of event contracts" allows the CFTC to prohibit certain event contracts—including those involving "terrorism," "assassination," "war," "gaming," or "activity that is unlawful under any Federal or State law"—where the agency determines that such contracts are "contrary to the public interest." 7 U.S.C. § 7a-2(c)(5)(C)(i). The CEA thus expressly contemplates that event contracts may involve "gaming" or activity that is unlawful under state law and empowers (but does not require) the CFTC to prohibit such contracts. As discussed in Parts III and V, both sides draw competing inferences from this statutory provision.

Second, in 2011, the CFTC adopted a regulation, 17 C.F.R. § 40.11, implementing the CEA's special rule for event contracts. The regulation on its face prohibits DCMs from listing an event contract that "involves, relates to, or references terrorism, assassination, war, gaming, or an activity that is unlawful under any State or Federal law." Rule 40.11(c) separately permits the Commission to conduct a 90-day review of an event contract that a registered entity has certified or submitted for approval, to ask the registered entity to suspend listing during the review, and to approve or disapprove the contract. The agency has used these provisions against political event contracts, prohibiting Nadex's proposed election contracts in 2012 and Kalshi's congressional control contracts in 2023 (an order a federal district court vacated in 2024). The agency has also opened two Rule 40.11(c) reviews of sports contracts: ErisX's NFL contracts in December 2020, which ErisX withdrew one day before the review period ended, and two Nadex sports contracts in January 2025.[14] It has never issued an order approving or prohibiting a sports event contract, and there is no public record of a review of the Kalshi sports contracts that have been the principal

(D.C. Cir. Oct. 2, 2024) (order denying stay pending appeal), *appeal dismissed*, No. 24-5205 (D.C. Cir. May 7, 2025); "Event Contracts; Withdrawal of Proposed Regulatory Action," 91 Fed. Reg. 5,386 (Feb. 6, 2026).

[14] *See* "Prediction Markets; Public Interest Determinations," 91 *Federal Register* 35,806, 35,815–17 (proposed June 12, 2026) (to be codified at 17 C.F.R. pt. 40) (describing the 2012 Nadex order, the 2020 ErisX review and ErisX's withdrawal of its certification, the 2023 Kalshi order, and the 2024 vacatur); Press Release, "CFTC, *CFTC's Review of Nadex Sports Contract Submissions*," Release No. 9033-25 (Jan. 14, 2025).



subject of litigation. Hypothetically, the agency's inaction could be due to its view that the sports event contracts currently traded do not relate to any of the enumerated categories, but there appears to be no publicly available evidence for such a conclusion. As with the statutory special rule, both sides draw competing inferences from the CFTC's inaction under Rule 40.11.

That inaction may not persist. In June 2026, the CFTC proposed amendments to Rule 40.11 that would define "gaming," specify when an event contract "involves" an enumerated activity, and adopt a structured framework of public interest factors, including factors specific to sports event contracts.[15] The comment period closed on July 27, 2026, and a final rule could be issued in the coming months. Notably, the proposal itself asserts that the CEA "expressly preempts" state laws that attempt to regulate transactions on CFTC-registered exchanges, adding an on-the-record agency pronouncement to the preemption debate. Until the Commission acts, the availability of sports event contracts will continue to vary by state.

E. The scope—and limits—of the CFTC's "exclusive" jurisdiction

In carefully defining the jurisdiction of the CFTC, Section 2 of the CEA provides that, subject to certain exceptions, the agency shall have "exclusive jurisdiction" with respect to accounts, agreements, and transactions involving "swaps or [futures]" traded or executed on a DCM, a swap execution facility, or "any other board of trade, exchange, or market." 7 U.S.C. § 2(a)(1)(A). As discussed further in Parts III and V, the prediction markets' argument for CEA preemption rests heavily on the word "exclusive."

By the Act's own terms, however, the CFTC's exclusive jurisdiction does not reach every instrument that resembles a swap. The CEA definition of "swap" excludes any "security-based swap," 7 U.S.C. § 1a(47)(B)(x), which the SEC regulates; § 2(a)(1)(C) denies the CFTC jurisdiction over options on securities; § 2(a)(1)(D) addresses security futures, over which the CFTC and the SEC share jurisdiction; and § 2(a)(1)(G) preserves SEC jurisdiction over security-based swap agreements.[16] And the agency has recently acknowledged that this carve-out can encompass event contracts. In a March 2026 advance notice of proposed

[15] "Prediction Markets; Public Interest Determinations," 91 *Federal Register* 35,806 (proposed June 12, 2026) (to be codified at 17 C.F.R. pt. 40); *see also id.* at 35,808 & n.19 (asserting that the CEA "expressly preempts state laws that attempt to regulate the operation of, or transactions on, CFTC-registered exchanges").

[16] *See also* Securities Exchange Act of 1934 § 3(a)(68), 15 U.S.C. § 78c(a)(68) (defining "security-based swap").

rulemaking, the CFTC stated that, although event contracts listed on DCMs including sports contracts "are swaps or futures contracts subject to the jurisdiction of the CFTC," "other event contracts referencing events associated with potential financial, economic or commercial consequences may be security-based swaps or other instruments subject to the jurisdiction of the SEC."[17] Jay Clayton, the U.S. Attorney for the Southern District of New York, made a related point in February 2026, observing that a hypothetical contract paying out if a stock falls below a specified price looks like an out of the money put option and that no one would advise selling it as something other than a security.[18] This lack of jurisdictional exclusivity on the part of the CFTC may complicate the preemption analysis: The argument that the CEA completely displaces state regulation of event contracts may be less compelling given that the statute itself recognizes that the CFTC does not occupy the entire field of event contract regulation. In remarks on August 20, 2026, CFTC Chairman Michael S. Selig outlined a "Roadmap for American Prediction Markets" that includes the pending Rule 40.11 proposal, a separately proposed rule on reporting for fully collateralized event contracts, and expected amendments to Parts 38 and 40 of the CFTC's regulations addressing product governance, market design, consumer protection, and incentive programs.[19]

In addition, CEA § 2(a)(1)(A) includes two "savings clauses" that may be relevant to the preemption analysis. The first such clause provides that "[e]xcept as hereinabove provided, nothing contained in this section shall . . . supersede or limit the jurisdiction at any time conferred on the [SEC] or other regulatory authorities under the laws of the United States or of any State." As a purely textual matter, this provision would seem to preserve the jurisdiction of state "regulatory authorities." The second clause provides that "[n]othing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State." As discussed further in Parts III and V, these clauses may—or may not—provide support to the states' argument that the CEA does not preempt state regulation of event contracts.

F. The economic stakes

The economic stakes of the preemption question are substantial. Prediction markets in the United States have grown substantially in recent years, although court orders now restrict sports contracts in several states. In April 2026, combined global monthly trading volume on Kalshi and Polymarket was approximately $24 billion, a figure that includes Polymarket's offshore platform, which the CFTC does not regulate. Sports contracts have accounted for roughly 80% of Kalshi's volume since July 2024.[20] Polymarket's volume has at times exceeded that of Kalshi.[21] According to the CFTC, total 2025 trading volume across CFTC-registered prediction markets exceeded $25 billion.[22]

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[17] Prediction Markets, 91 *Federal Register* 12,516, 12,517 (Mar. 16, 2026),

[18] Jay Clayton, U.S. attorney for the Southern District of New York, "Keynote Q&A at the Securities Enforcement Forum New York 2026" (February 5, 2026).

[19] Michael S. Selig, Chairman, CFTC, Remarks at Innovation Advisory Committee Conference (Aug. 20, 2026).

[20] Pew Research Center, "Trading Volume on Prediction Markets Has Soared in Recent Months" (May 27, 2026),(analyzing data from The Block; figures include Polymarket's offshore platform).

[21] Evans, *supra* note 2; "Kalshi Surges Past Polymarket in Volume, Grabs Global Dominance," *The Block* (Sept. 18, 2025).

[22] "Prediction Markets," Public Interest Determinations, 91 *Federal Register* at 35,807.



The more traditional U.S. sports wagering industry, led by platforms like FanDuel, DraftKings, and Bet365, has also grown rapidly in the past decade. Since the Supreme Court ruled in 2018 that Congress could not prohibit states from legalizing gambling on sports, nearly 40 states now permit some form of sports wagering.[23] The traditional sportsbook industry generated gross gaming revenue of nearly $14 billion in 2024.[24] Commercial gaming of all kinds generated a record $15.91 billion in direct gaming tax revenue for state and local governments in 2024.[25]

Kalshi, Polymarket, and the CFTC have contended in court that the large and growing national prediction market industry should be subject to uniform regulation by a single national regulator. But as the states have argued, ruling that the CEA preempts state gambling law as applied to DCM-listed sports event contracts could substantially erode the market for traditional state-licensed sportsbooks and, with it, the consumer protection rules and public programs that state regulatory and taxation regimes provide.

G. The classification problem

The preemption problem is one of classification: whether a contract that pays out based on the outcome of an uncertain future event is best characterized as a federally regulated financial instrument or as a state-regulated bet. Parts II through V address this problem.

The information advantages inherent in a prediction market create a second, distinct legal problem: the use of material nonpublic information to trade on prediction markets. That problem and the potential enforcement regime developing around it is the subject of the second article in this series.

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[23] *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453 (2018); *see also* American Gaming Association, "Sports Event Contracts Are Offering Illegal Sports Betting Nationwide*"* (June 30, 2026), (reporting that "[i]n 39 states and Washington, D.C., voters and elected leaders have chosen to legalize and regulate sports betting").

[24] American Gaming Association, 2026 Commercial Gaming Revenue Tracker (2025), (reporting $13.71 billion in 2024 commercial sports betting revenue).

[25] *See* American Gaming Association, "State of the States 2025: The AGA Survey of the Commercial" *Casino Industry* (2025), (collecting state-by-state gaming tax revenue data).

II. The regulatory fault line: commodity derivative, gambling, or both?

At the center of the escalating litigation is a fundamental legal question: whether prediction market event contracts are commodity derivatives regulated by the CFTC, gambling products subject to state gaming law, or a hybrid of both, subject to both regimes. The answer determines not only which regulators have oversight and enforcement authority but whether prediction market platforms can legally operate at all in most U.S. states.

A. Potential classifications of event contracts

We see three possible classifications.

Classification 1: Pure federal commodity derivatives. Under this view, event contracts traded on CFTC-licensed DCMs are "swaps" under the CEA; the CFTC has exclusive jurisdiction over them; and state gambling law is preempted. This is the position of Kalshi and the other prediction markets and the position adopted by the Third Circuit majority and several federal district courts.

Classification 2: Pure state gambling. Under this view, event contracts—at least those resembling sportsbook wagers—satisfy the traditional three-element state law definition of gambling (consideration, chance, and prize) and therefore are subject to state gaming law exclusively, regardless of prior CFTC registration.[26] The CFTC's jurisdiction extends only to genuine swaps and other commodity derivatives, not to contracts that are fundamentally wagering products but are dressed in derivatives clothing. This position—urged by various state regulators and consistent with the Sixth and Ninth Circuits' conclusions that sports event contracts are likely not swaps, as well as the reasoning of several state trial courts—raises questions about how the affected prediction markets would transition from regulation by the CFTC to regulation by the states for those contracts deemed to be wagering products.

Classification 3: Hybrid regulation. Under this view, a platform's registration as a DCM subjects it to CEA compliance and CFTC regulation, but state gambling law is not preempted: The platform must obtain state licenses where required and comply with both the federal and relevant state regimes. This is the position of several federal and state courts. Its premise appears to be that dual compliance is possible—a platform's obligations and rights under state gaming law do not conflict with its obligations and rights under the CEA and CFTC rules. But that premise is called into question in states that flatly prohibit some or all gambling businesses; in those states a platform's federal right to conduct its business on a DCM, so long as it complies with federal law, would be in direct conflict with the state's prohibition on conducting that business.

[26] *See FCC v. Am. Broad. Co.*, 347 U.S. 284, 290 & n.8 (1954) (describing "the traditional tests of chance, prize, and consideration" in applying the federal lottery statute, 18 U.S.C. § 1304); I. Nelson Rose, *Gambling and the Law* (1986); Robert C. Hannum & Anthony N. Cabot, *Toward Legalization of Poker: The Skill vs. Chance Debate*, 13 UNLV Gaming Res. & Rev. J. 1 (2009); *see also* Complaint ¶ 107, *Commonwealth v. KalshiEX LLC*, No. 2584CV02525 (Mass. Super. Ct. Sept. 12, 2025), (alleging that users "stake real money (consideration)" for "a monetary return (a prize) if they correctly predict the outcome (chance)").



B. Variation in definitions of gambling

A complication that cuts across all three classifications—and that warrants particular attention—is that states do not define "gambling" uniformly. The traditional three-element test (consideration, chance, and prize) is widely cited but is applied differently across jurisdictions. States vary, for example, in how they evaluate the "chance" element: Some apply a "dominant factor" test, under which chance must predominate over skill for activity to qualify as gambling; others apply a "material element" test, asking only whether chance is a meaningful factor; and still others use an "any chance" standard under which any element of chance is sufficient.[27] States also vary in whether they recognize exemptions from the "gambling" label for "*bona fide* business transactions," securities, or commodities contracts and in the scope of those exemptions.[28]

The real-world consequences of this definitional variation are illustrated by daily fantasy sports contests, which most states permit but which officials in a handful of states have deemed illegal gambling (including the New York attorney general in 2015, before the legislature authorized the contests in 2016; the Texas attorney general in 2016; and the California attorney general in 2025), and by poker, which some courts have found to be predominantly a game of skill and others have treated as gambling. As relevant to prediction markets, the same event contract—purchased from the same platform by traders in different states—can in principle satisfy the gambling definition in some jurisdictions and fall outside it in others. As discussed further in Part V.B.iii, this definitional variation bears directly on the "patchwork" argument at the heart of the prediction markets' preemption theory.

C. The policy stakes

The policy stakes of the classification choice are significant. Classification 1 creates a unified federal regulatory regime with nationwide rules around DCMs and trading in swap contracts, but it eliminates the state-level consumer protection infrastructure around sportsbook wagering and other gambling. Classification 2 preserves state authority over gambling but seems to require prediction markets—or large

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[27] *See generally* Anthony N. Cabot, Glenn J. Light & Karl F. Rutledge, *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 L. Rev. 383, 390–94 (2009) (surveying predominance, material-element, any-chance, and gambling-instinct tests across U.S. jurisdictions and citing representative authorities); W.C. Bunting, *A Better Legal Definition of Gambling: With Applications to Synthetic Financial Instruments and Cryptocurrency*, 86 Alb. L. Rev. 257 (2023).

[28] *See, e.g.*, N.Y. Penal Law § 225.00(1) (defining "contest of chance" as a contest or game "in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein"); Colo. Rev. Stat. § 18-10-102(2)(b) (excluding "[b]ona fide business transactions which are valid under the law of contracts"); Wis. Stat. § 945.01(1)(a)1 (excluding "[c]ontracts for the purchase or sale at a future date of securities or other commodities"); *see also* Tex. Penal Code § 47.01(1)(A) (excluding from "bet" "contracts of indemnity or guaranty, or life, health, property, or accident insurance" but providing no general exclusion for business transactions or for securities or commodities contracts). New York's definition of gambling contains no comparable business transaction exclusion. *See* N.Y. Penal Law § 225.00(2). For a survey of daily fantasy sports regulation variation, see Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 Harv. J. Sports & Ent. L. 1 (2012); Tex. Att'y Gen. Op. No. KP-0057 (Jan. 19, 2016); Cal. Att'y Gen. Op. No. 23-1001 (July 3, 2025); *compare* Hannum & Cabot, *supra* note 25, at 1–2 (describing 2009 trial court rulings in Colorado, Pennsylvania, and South Carolina), *with Commonwealth v. Dent*, 992 A.2d 190 (Pa. Super. Ct. 2010).

swaths of those markets—to delist sports-related (and possibly other) event contracts from their DCMs or obtain state gaming licenses. It would also seem to require prediction markets to cease operating in states that flatly prohibit sports wagering businesses (or all gambling businesses) or whose gaming license requirements and ongoing obligations are too onerous and expensive. Classification 3 preserves both federal and state authority, at least as a general matter. It would require prediction markets to comply with both federal and state law in those states that permit state-licensed sports wagering or other gambling. But, as noted, it creates complications—and may be functionally similar to Classification 2—in states that flatly prohibit some or all gambling businesses.

How various federal and state courts have resolved the classification question is discussed in Part III. The legal arguments supporting each classification are discussed in more detail in Part V.

III. The litigation landscape

The preemption litigation now underway across federal and state courts raises two key analytical questions. The first is definitional: Do sports-related event contracts, or event contracts generally, qualify as "swaps" within the meaning of the CEA? The second is structural: Even if the contracts are swaps, does the CFTC's largely "exclusive" jurisdiction over swaps traded on DCMs preempt traditional state regulation of gambling? Courts that have sided with the prediction markets have concluded that the contracts are swaps and that state regulation is preempted. Courts that have sided with the states have either rejected the swap classification or, in several cases, found or assumed swap status but held that state regulation was not preempted.

A. Federal courts

The federal court decisions have generally come in suits by Kalshi seeking to enjoin state regulators, on CEA preemption grounds, from enforcing state gaming law. Most of those suits were filed in response to cease-and-desist letters or other threats of enforcement by state gaming regulators. The CFTC has separately filed its own actions against state regulators, seeking judicial declarations that the CEA preempts the application of state gaming law and, in at least one case, seeking to enjoin pending state proceedings against Kalshi.

Prediction market suits against state gaming regulators

New Jersey: District court enjoins state enforcement; affirmed by Third Circuit. In March 2025, the New Jersey Division of Gaming Enforcement sent Kalshi a cease-and-desist letter asserting that the platform's offerings of sports-related event contracts violated New Jersey's constitution and gambling law. Kalshi immediately sued the state regulator in New Jersey federal district court, seeking to enjoin the regulator from enforcing New Jersey state law. The district court granted Kalshi's motion for a preliminary injunction, finding, among other things, that Kalshi had shown a reasonable likelihood of prevailing on its preemption claims.

On April 6, 2026, a divided panel by the Third Circuit affirmed the district court's preliminary injunction, becoming the first federal court of appeals to address Kalshi's likelihood of success on the preemption question. *KalshiEX LLC v. Flaherty*, 172 F.4th 220 (3d Cir. 2026).[29] The majority opinion by Judge Porter,

[29] *See also* Johnny P. El Hachem, "Federal Appeals Court: CFTC Jurisdiction Over Sports Event Contracts Likely Exclusive" (Holland & Knight LLP, April 7, 2026).

joined by Chief Judge Chagares, agreed that the district court "properly defined the scope of field preemption as the regulation of trading on a DCM" (thereby rejecting New Jersey's framing of the field as "regulating all sports gambling"), concluded that Kalshi's sports contracts are "swaps" under the CEA definition, and held that both "field preemption" and "conflict preemption" independently bar state enforcement. The majority read the CEA's state law savings clauses narrowly, holding that they preserve state-court common law jurisdiction but not state regulatory authority over DCM trading. The CFTC's failure to invoke Rule 40.11 against Kalshi's sports contracts reinforced, in the majority's view, the conclusion that Kalshi's contracts were lawfully listed on a DCM.

Judge Roth dissented on each major point. She argued that the majority defined the field too narrowly, because DCM trading "is in fact better thought of as a subfield of futures trading," and that the majority "fail[ed] to adequately consider the presumption against preemption," which applies with special force in fields, like gambling, that the states have traditionally regulated. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). She contended that a literal reading of the CEA's swap definition would produce irrational consequences—including that all sports bets would be "swaps" and thus any off-DCM sports wager would be a felony, because "the trading of swaps outside DCMs is illegal under 7 U.S.C. § 2(e)." She observed that Kalshi's sports-related offerings are "virtually indistinguishable from the betting products available on online sportsbooks, such as DraftKings and FanDuel," *Flaherty*, 172 F.4th at 232 (Roth, J., dissenting), and characterized the platform's CFTC registration as "a performative sleight meant to obscure the reality that Kalshi's products are sports gambling."

Judge Roth also argued that the Supreme Court's 2018 decision in *Murphy v. NCAA*[30]—in which the Court held that a federal law barring states from legalizing sports betting unconstitutionally invaded state legislative authority—cut against a finding of preemption. She noted that after *Murphy* was decided, nearly 40 states exercised that authority by amending their laws to permit gambling on sporting events. She observed that Congress chose not to regulate sports gambling directly after *Murphy* (Congress did not, so states did), and she would have applied the presumption against preemption because the CEA reflects no "clear and manifest purpose" to displace the states' historic police powers over gambling. Judge Roth also raised a structural argument the majority did not fully address: CFTC Rule 40.11(a)(1) prohibits DCMs from listing contracts that involve "gaming," and the agency has never approved a sports event contract under that rule. Accordingly, if Kalshi's sports contracts are gaming contracts within the meaning of the rule, they cannot lawfully be listed on a DCM at all—a point that, if accepted, undermines rather than supports Kalshi's conflict preemption argument.



[30] *See Murphy*, 584 U.S. at 486.

Notably, a group of more than 30 states, led by Nevada and Ohio, had filed an amicus brief in the Third Circuit in support of the New Jersey regulator.[31] Rather than pursue en banc rehearing, the New Jersey regulator recently sought certiorari in the Supreme Court. This petition could well be the test case vehicle by which the Supreme Court decides the preemption question.

Nevada: District court declines to enjoin state enforcement; Ninth Circuit affirms in part. Shortly after receiving a cease-and-desist letter from the Nevada gaming regulators, Kalshi sued the regulators in March 2025 in Nevada federal district court, seeking to enjoin them from enforcing Nevada state law. Later, after receiving similar letters from the Nevada gaming regulators, Crypto.com (another prediction market operator) and Robinhood Derivatives (a brokerage firm that allowed customers to use their accounts to trade sports event contracts listed on Kalshi) sued the regulators in the same court, seeking similar injunctive relief.

The district judge initially granted Kalshi's motion for a preliminary injunction, writing in April 2025 that the CFTC had exclusive jurisdiction over contracts listed on a DCM and that Nevada state gaming law was therefore preempted. But that ruling did not survive, as the judge became convinced that his initial conclusions on preemption were not correct. In October 2025, the judge denied Crypto.com's motion for a preliminary injunction, holding that event contracts that turn on the outcomes of sporting events are not swaps and thus do not fall within the CFTC's jurisdiction. Then, in November 2025, on the motion of the Nevada gaming regulators, the judge dissolved the injunction in the Kalshi case, holding, among other things, that Kalshi was not likely to succeed in showing that its sports-related contracts are swaps.[32] Based on his reasoning in the Crypto.com case and his ultimate reasoning in the Kalshi case, the judge denied Robinhood's motion for a temporary restraining order and preliminary injunction. Notably, despite ruling against the prediction markets in each case, the judge, in his second Kalshi decision, wrote:

> The issues in this and similar cases are complex, novel, and evolving. Kalshi has raised serious questions about how to properly interpret the statutory language, to divine congressional intent, and to resolve the tension between what constitutes state-regulated gambling versus federally regulated derivatives.

This is an apt summary of the current state of the law.

Kalshi appealed the order dissolving its preliminary injunction, and Crypto.com and Robinhood appealed the denials of their motions. The Ninth Circuit heard consolidated oral arguments on those appeals on April 16, 2026. On August 28, 2026, in *KalshiEX LLC v. Assad*, the Ninth Circuit affirmed in part and remanded in part, holding that Kalshi "has not shown a likelihood that the CEA preempts state gaming regulations as applied to its sports event contracts."[33] The panel (Judge R. Nelson, joined by Judges Bade and Lee, with Judge Lee also concurring) accepted part of Kalshi's framework. It held that § 2(a)(1)(A) expressly preempts state regulation of swaps traded on a DCM and that the CEA occupies that field. But it concluded that Kalshi's sports event contracts were likely not swaps, relying on the statutory text and context, the major questions doctrine, and Rule 40.11(a), which it read as barring DCMs from listing gaming contracts until the Commission amends the rule. It remanded for the district court to

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[31] Brief of Amici Curiae Nevada, Ohio, and 32 Other States, the District of Columbia, and Northern Mariana Islands Supporting Appellants, *KalshiEX LLC v. Flaherty*, No. 25-1922 (3d Cir. June 17, 2025).

[32] *KalshiEX LLC v. Hendrick*, No. 2:25-cv-00575-APG-BNW, 2025 WL 3286282 (D. Nev. Nov. 24, 2025), *aff'd in part and remanded in part sub nom. KalshiEX LLC v. Assad*, No. 25-7516, 2026 WL 2543846 (9th Cir. Aug. 28, 2026).

[33] *Assad*, slip op. at 18.

consider Kalshi's election contracts, which the district court had not analyzed. The Crypto.com and Robinhood appeals were resolved the same day in memorandum dispositions that incorporate the *Assad* reasoning, and both companies have petitioned for certiorari. On November 4, 2026, the Ninth Circuit denied Kalshi's petitions for panel rehearing and rehearing en banc, with no judge calling for a vote on en[34]

Arizona: District court grants CFTC motion to temporarily enjoin state enforcement proceedings. After Arizona gaming regulators threatened Kalshi with enforcement action, Kalshi sued the state regulators in Arizona federal district court in March 2026 and moved to enjoin them, on CEA preemption grounds, from enforcing Arizona state gaming law. In response, Arizona filed a 20-count misdemeanor criminal information against Kalshi in Arizona state court, alleging that Kalshi was engaged in illegal gambling operations.[35] (This was the first criminal prosecution of a CFTC-registered prediction market operator in the United States.) Shortly thereafter, the CFTC also sued the Arizona authorities, seeking a declaration that the CEA preempts Arizona's enforcement of its gambling laws and an injunction against such enforcement. The federal court consolidated the Kalshi and CFTC actions.

In a pair of split rulings, in April 2026 the federal court denied Kalshi's motion but granted the CFTC's motion to temporarily enjoin Arizona from enforcing its gambling laws against Kalshi. The court concluded that the federal Anti-Injunction Act (AIA) prohibits the court from enjoining pending state court enforcement proceedings at the request of a private party like Kalshi. But the court also concluded that, based on Ninth Circuit and Supreme Court precedent, the AIA does not apply to injunctions issued at the request of the United States or a federal agency asserting federal interests. As to the substantive basis for enjoining Arizona's enforcement of its gambling laws, the court found the federal plaintiffs likely to show both that sports event contracts are swaps under the CEA and that Arizona's gambling laws are preempted as applied to them. On May 5, 2026, the court granted the CFTC's motion for a preliminary injunction and stayed further proceedings. After the Ninth Circuit decided *Assad* on August 28, 2026, Arizona asked the Ninth Circuit to vacate the injunction as to sports contracts, and the CFTC has asked that court to await a ruling on Kalshi's petition for rehearing en banc in *Assad*.

Maryland: District court declines to enjoin state enforcement; appeal pending before Fourth Circuit. Shortly after receiving a cease-and-desist letter from the Maryland gaming regulators in April 2025, Kalshi sued the regulators in Maryland federal district court, seeking to enjoin them from enforcing Maryland state law. In August 2025, the district court denied Kalshi's motion for a preliminary injunction.[36] Assuming without deciding that Kalshi's contracts qualify as swaps, the judge concluded that the CEA does not preempt Maryland's sports-wagering law. His analysis rested on three grounds: (1) The CEA's special rule for review and approval of event contracts explicitly contemplates the continuing operation of state law; (2) the CEA's state law savings clauses cut against a finding of field preemption; and (3) Kalshi had not demonstrated why obtaining a Maryland sports-wagering license and complying with the resulting obligations would conflict with Kalshi's obligations as a CFTC-licensed DCM. Under his analysis, the possibility that Kalshi could comply with both regimes defeats conflict preemption. The third point has

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[34] *Id.* at 10, 21, 34–36, 41, 44, 47; *N. Am. Derivatives Exch., Inc. v. Nevada*, No. 25-7187, 2026 WL 2546926 (9th Cir. Aug. 28, 2026) (mem.), *petition for cert. filed*, No. 26-344 (U.S. Sept. 11, 2026); *Robinhood Derivatives, LLC v. Dreitzer*, No. 25-7831, 2026 WL 2546925 (9th Cir. Aug. 28, 2026) (mem.), *petition for cert. filed*, No. 26-338 (U.S. Sept. 10, 2026); Petition for Rehearing and Rehearing En Banc, *Assad*, No. 25-7516 (9th Cir. Sept. 9, 2026), Dkt. No. 206.

[35] *See* "Arizona Files First Criminal Charges Against a Prediction Market," Morgan Lewis (Mar. 25, 2026), (reporting a criminal information with 20 misdemeanor counts filed in Maricopa County Superior Court on March 17, 2026).

[36] *KalshiEX LLC v. Martin*, 793 F. Supp. 3d 667 (D. Md. 2025), *appeal docketed*, No. 25-1892 (4th Cir. Aug. 6, 2025).

been cited by several courts in subsequent decisions. Finally, the judge applied the presumption against preemption, citing *Medtronic, Inc. v. Lohr*, in a field that the U.S. Court of Appeals for the Fourth Circuit has described as "at the core of the state's residual powers as a sovereign in our constitutional scheme."[37]



Kalshi appealed the district court's ruling, and the Fourth Circuit heard oral argument on May 7, 2026. A decision remains pending; press accounts of the argument differed on the panel's leanings.

Tennessee and Ohio: District courts split on whether to enjoin state enforcement; Sixth Circuit rejects preemption. Shortly after receiving cease-and-desist letters or other enforcement threats from gaming regulators in Tennessee and Ohio, Kalshi sued the respective regulators in federal district courts in those states, seeking to enjoin them from enforcing Tennessee and Ohio state gaming law. The two courts reached opposite conclusions in decisions rendered in February and March 2026.

The Tennessee court granted Kalshi's preliminary injunction motion as to the state official defendants, dismissed the Tennessee Sports Wagering Council on immunity grounds, and concluded that Kalshi's sports event contracts are likely swaps and that state law is likely preempted under principles of conflict preemption. On the latter issue, the court found Kalshi likely to prevail on an impossibility theory, because it could not see how Kalshi could provide the impartial access that CFTC rules require while meeting Tennessee's age and location restrictions, and it also found that Tennessee law likely stands as an obstacle to the CEA's objectives.[38]

The Ohio court denied Kalshi's preliminary injunction motion, holding that Kalshi had not clearly shown that its sports event contracts are swaps within the CFTC's exclusive jurisdiction and, in the alternative, that Kalshi had not shown field or conflict preemption even if they were swaps.[39] In its conflict analysis, the court noted that Rule 40.11 bars DCMs from listing contracts involving "gaming," which Kalshi had successfully argued in its election contract litigation "refers to playing games or playing games for stakes," and that a DCM "can certify, but cannot conclude, that the contract is lawful." The CFTC's inaction, the court said, "is not proof that the sports-event contracts are regulated by or permissible under the CEA." The court also cited a concrete consumer-protection gap: Ohio law requires participants on licensed sports-gambling platforms to be at least 21 years of age, while Kalshi's age requirement for participants on its platform is only 18.

The Tennessee gaming regulators and Kalshi appealed the respective decisions, and the Sixth Circuit consolidated the appeals. On April 24, 2026, a Sixth Circuit motions panel denied Kalshi's motion for an injunction pending appeal against enforcement of Ohio gaming law. The Sixth Circuit heard oral argument on the consolidated appeals on July 30, 2026. On September 25, 2026, the Sixth Circuit resolved the district court split by vacating the preliminary injunction in the Tennessee case and affirming the denial of a preliminary injunction in the Ohio case. In a unanimous opinion by Judge Gibbons, joined by Judges

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[37] *Medtronic*, 518 U.S. at 485 (presumption against preemption); *W. Va. Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 302 (4th Cir. 2009) (quoted language).

[38] *KalshiEX LLC v. Orgel*, No. 3:26-cv-00034, 2026 WL 474869, at *9–11 (M.D. Tenn. Feb. 19, 2026); *cf. United States v. Phillips*, 155 F.4th 102 (2d Cir. 2025) (affirming a commodities fraud conviction under 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1, prosecuted on an open market manipulation theory, involving a one touch barrier option that was undisputedly a "swap").

[39] *KalshiEX LLC v. Schuler*, No. 2:25-cv-01165-SDM-CMV (S.D. Ohio Mar. 9, 2026), *aff'd*, Nos. 26-3196/26-5235, 2026 WL 2884087 (6th Cir. Sept. 25, 2026).

Clay and Bloomekatz, the panel found that "Kalshi has not shown that its sports-event contracts satisfy the statutory definition of a 'swap' so as to fall within the scope of the CFTC's 'exclusive jurisdiction.'"[40] In the alternative, assuming the contracts are swaps, the court rejected each of Kalshi's preemption arguments, reading § 2(a)(1)(A) to displace only "direct enforcement and regulatory authority pertaining to the licensing and operation of DCMs," and holding that "the CEA neither expressly nor impliedly preempts Ohio's or Tennessee's gambling laws."[41]

Separately, the Ohio regulator has proposed a $5 million fine against Kalshi for unlicensed gaming, which Kalshi is challenging in Ohio state court.[42]

New York: District court declines to enjoin state enforcement; appeal pending before Second Circuit. In response to enforcement threats from the New York gaming regulators, Kalshi sued those regulators in New York federal district court (in the Southern District of New York) in October 2025, seeking to enjoin them from enforcing state gambling law. Briefing on Kalshi's request for injunctive relief was held in abeyance for a period of time because the state regulators had agreed not to initiate enforcement proceedings against Kalshi while the case was pending. On July 7, 2026, the district court denied Kalshi's motion, assuming without deciding that the contracts were swaps and holding that New York's gambling laws are not preempted by the CEA. The decision conflicts squarely with the Third Circuit's holding in *Flaherty*, and Kalshi has appealed to the Second Circuit.[43]

Utah: District court enters the first final merits judgment, rejecting preemption; Tenth Circuit denies injunction pending appeal. On August 4, 2026, the Utah federal district court entered what appears to be the first final merits judgment in the litigation wave, rejecting each of Kalshi's preemption theories and holding that Utah may enforce its gambling laws against sports event contracts traded on a DCM.[44] The ruling is particularly significant because Utah prohibits virtually all commercial gambling: unlike states with licensing regimes, Utah presents the sharpest possible conflict between a platform's asserted federal right to operate and a state's police power because there is no license the platform could obtain. Kalshi appealed to the U.S. Court of Appeals for the Tenth Circuit on August 5, 2026. On September 8, 2026, a Tenth Circuit motions panel denied its motion for an injunction pending appeal. As of now, the preemption question has been decided or is being considered by at least seven federal circuits.

Connecticut: Injunction denied. On August 10, 2026, the Connecticut federal district court denied the parallel motions of Kalshi and Coinbase for preliminary injunctions against the Connecticut regulators, joining the growing set of district courts that have declined to find preemption.[45]

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[40] *Schuler*, slip op. at 3.

[41] *Id.* at 3, 37.

[42] *See KalshiEX LLC v. Morrison*, No. 26 CV 006013 (Ohio Ct. Com. Pl., Franklin Cnty., filed June 29, 2026).

[43] *KalshiEX LLC v. Williams*, No. 1:25-cv-08846 (S.D.N.Y. July 7, 2026), *appeal docketed*, No. 26-1835 (2d Cir. July 8, 2026).

[44] *See KalshiEX LLC v. Cox*, No. 2:26-cv-00151 (D. Utah Aug. 4, 2026), *appeal docketed*, No. 26-4100 (10th Cir. Aug. 5, 2026); *KalshiEX LLC v. Cox*, No. 26-4100 (10th Cir. Sept. 8, 2026) (order denying injunction pending appeal).

[45] *KalshiEX LLC v. Cafferelli*, No. 3:25-cv-02016 (D. Conn. Aug. 10, 2026); *Coinbase Fin. Mkts., Inc. v. Tong*, No. 3:25-cv-02121 (D. Conn. Aug. 10, 2026).

Late October 2026: Three new platform suits against the states. The platforms opened additional federal fronts at the end of October 2026. On October 26, 2026, North American Derivatives Exchange, Inc., which operates as OG.com Prediction Markets, sued the Utah attorney general and three of his deputies in Utah federal district court, pleading express, field, and conflict preemption. The following day, Kalshi sued the Missouri attorney general, the Missouri Gaming Commission, and the Commission's executive director and members in Missouri federal district court on a single Supremacy Clause count, after a September 2026 cease-and-desist letter characterized its sports event contracts as unlicensed online sports wagering, and Polymarket's U.S. exchange sued the Louisiana attorney general and members of the Louisiana Gaming Control Board in Louisiana federal district court, pairing a preemption claim with a Commerce Clause claim directed at the Board's December 5, 2025, advisory notice. In Missouri and Louisiana the platform sued before the state had filed any enforcement action, which reflects a now settled preference for choosing a federal forum over defending in state court. Separately, on November 4, 2026, following a Ninth Circuit reversal in September 2026, the Northern District of California preliminarily enjoined Kalshi from offering sports event contracts on the lands of two California tribes, which appears to be the first such injunction tribes have obtained nationwide.

CFTC actions

After observing state gaming regulators and Kalshi in various litigations in federal and state court, the CFTC began filing its own actions. In addition to the Arizona action discussed above, the CFTC has filed federal court actions against state gaming and other authorities in a number of other states—including Connecticut, Illinois, New York, and Wisconsin—seeking declarations that state enforcement suits against CFTC-registered prediction-market platforms are preempted by federal law.[46] The campaign has since expanded to ten states (Arizona, Connecticut, Illinois, Kentucky, Minnesota, New Mexico, New York, Rhode Island, Utah, and Wisconsin), and the early returns are mixed. In Minnesota, the first state to make operating a prediction market a felony, a federal court granted the government's motion and preliminarily enjoined enforcement of the new law against CFTC-registered DCMs on July 27, 2026, days before its August 1, 2026, effective date. Two days later, a Wisconsin federal court denied the CFTC's motion for the same relief, concluding that the agency was unlikely to show that sports event contracts are swaps or that state law is preempted. The CFTC has appealed the Wisconsin ruling to the Seventh Circuit.[47] On October 2, 2026, a federal court in the Northern District of Illinois found Illinois's new licensing requirements for sports event contracts likely preempted and directed the parties to submit, by October 29, 2026, a proposed preliminary injunction in favor of Kalshi, Coinbase, and the CFTC against enforcement of Illinois law.[48] On October 26, 2026, the United States and the CFTC added Utah to the campaign, suing the State and its attorney general in Utah federal district court for a declaration that the CEA's grant of exclusive jurisdiction bars state investigation or enforcement against CFTC-regulated entities and for preliminary and permanent injunctive relief.

By bringing these declaratory judgment actions, the CFTC has become a litigant in its own right, in addition to filing amicus briefs supporting Kalshi in the Sixth and Second Circuits. Whether that positioning will materially strengthen the federal preemption argument at the federal circuit or Supreme Court level is unclear. As we address in Part V, under *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412–13 (2024), federal courts do not defer to agency interpretations of ambiguous statutes, though, under other Supreme Court precedent, they may still

[46] Keely, *supra* note 4; Press Release, CFTC, *CFTC* "Seeks to Enjoin Arizona Criminal and Civil Enforcement Against Prediction Markets," Release No. 9208-26 (Apr. 9, 2026), Press Release, CFTC, "CFTC Sues Kentucky to Prevent Violation of CFTC's Exclusive Jurisdiction," Release No. 9260-26 (June 23, 2026).

[47] *United States v. Minnesota*, No. 0:26-cv-02661 (D. Minn. July 27, 2026); *United States v. Wisconsin*, No. 2:26-cv-00749 (E.D. Wis. July 29, 2026), *appeal docketed*, No. 26-2636 (7th Cir. 2026).

[48] *See Coinbase Fin. Mkts., Inc. v. Raoul*, No. 1:25-cv-15406 (N.D. Ill. Oct. 2, 2026) (memorandum opinion and order).



accord appropriate respect to well-reasoned agency views. *See also Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).[49]

B. State courts

State attorneys general and gaming regulators in a number of states, including Arizona, Connecticut, Massachusetts, Michigan, Nevada, New York, and Washington, have filed state court enforcement actions against Kalshi, asserting in each case that Kalshi's offering of sports event contracts constitutes illegal, unlicensed gambling under state law. In each case the state regulator sought, among other relief, to enjoin Kalshi from offering sports event contracts in that state. As noted, Arizona also sought criminal penalties. In each case Kalshi has argued that the state enforcement action is preempted by the CEA. Courts have entered injunctions in four of them: Massachusetts (stayed pending appeal), Nevada, Washington, and Michigan.[50]

Massachusetts: Trial court preliminarily enjoins prediction market operations; order stayed; appeal pending before state's highest court. The Massachusetts Attorney General filed a state court suit against Kalshi in September 2025, thereby bringing the first state enforcement action against a prediction market operator. In January 2026, the state trial court preliminarily enjoined Kalshi from offering sports event contracts in the state, holding that the contracts function as sports wagers under Massachusetts law and rejecting Kalshi's preemption argument because the CEA does not foreclose coexistence with a state licensing regime.[51] The trial court found that Kalshi's sports event contracts were functionally equivalent to state-licensed sportsbooks, emphasized state law licensure protections (such as age verification, problem-gambling exclusion programs, taxation, and consumer protection) that Kalshi's platform bypasses, and concluded that CFTC regulation of commodity derivatives and state regulation of gambling can coexist.

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[49] A third front has opened in the federal courts: suits by Indian tribes contending that sports event contracts offered to persons located on tribal lands constitute class III gaming under the Indian Gaming Regulatory Act (IGRA) and therefore cannot be offered absent compact authority. The questions inherent in IGRA cases pit federal statutes against each other, rather than federal statutes against state law, and are thus beyond the scope of this Article. However, these cases will shape the practical reach of any eventual resolution of the preemption question. In the leading case, three California tribes sought to enjoin Kalshi and Robinhood from offering sports event contracts on their reservations. The California federal district court denied relief, reasoning in part that the Unlawful Internet Gambling Enforcement Act (UIGEA) excludes transactions on CEA-registered exchanges from its definition of a "bet or wager," but on September 16, 2026,the Ninth Circuit reversed the denial of a preliminary injunction on the IGRA claim, holding that the tribes are likely to succeed in showing that the contracts are class III gaming when entered on Indian lands and that neither UIGEA nor the CEA displaces IGRA, and remanded for the district court to weigh the remaining preliminary injunction factors. A Wisconsin federal court, by contrast, concluded in May 2026 that the Ho-Chunk Nation was likely to succeed on a similar IGRA claim, although it denied preliminary injunctive relief for lack of irreparable harm. *See Blue Lake Rancheria v. Kalshi Inc.*, No. 25-7504 (9th Cir. Sept. 16, 2026); *Ho-Chunk Nation v. Kalshi Inc.*, No. 3:25-cv-00698 (W.D. Wis. May 11, 2026) (opinion and order sustaining the Nation's IGRA claims and finding a likelihood of success on the merits, while denying preliminary injunctive relief for want of irreparable harm).

[50] In addition to actual enforcement actions, gaming regulators in a number of states have issued cease-and-desist letters to operators of prediction markets. *See* Mick Bransfield, "Summary of Legal Actions Involving Sports Event Contracts," MickBransfield.com (originally published Aug. 11, 2025, last updated Oct. 9, 2026).

[51] *Commonwealth v. KalshiEX LLC*, No. 2584CV02525-BLS1, 2026 WL 188019 (Mass. Super. Ct. Jan. 20, 2026), *stay granted*, No. 2026-J-0143 (Mass. App. Ct. Feb. 17, 2026), *transferred*, SJC-13906 (argued May 4, 2026).

Kalshi immediately appealed the trial court's preliminary injunction ruling, and an intermediate appellate court promptly stayed that ruling pending appeal. The Massachusetts Supreme Judicial Court (SJC) then took the case and heard oral argument on May 4, 2026. A decision remains pending. Notably, a coalition of thirty-seven states and the District of Columbia filed an amicus brief in the SJC supporting the Commonwealth, mirroring the multistate amicus effort in the Third Circuit.

Nevada: Trial court enjoins prediction market operations; contempt proceedings pending. The Nevada Gaming Control Board filed a state court enforcement action against Kalshi on February 17, 2026. Kalshi removed the case, and on March 12, 2026, the federal court remanded it. On March 20, 2026, the Nevada trial court issued a temporary restraining order (TRO) prohibiting Kalshi from offering sports, election, and entertainment contracts in the state for 14 days. In concluding that the CEA did not preempt state enforcement of its gaming law, the Nevada trial court applied much of the same reasoning as the Massachusetts trial court. Because TROs are not appealable under Nevada law, Kalshi was forced to temporarily stop offering those contracts in Nevada. The same court had entered a similar order against Polymarket in January 2026.[52] On April 3, 2026, the Nevada trial court announced that it would grant a preliminary injunction, and its written order, entered later that month, bars Kalshi from offering sports, election, and entertainment event contracts to persons located in Nevada. The Nevada Supreme Court declined to stay that order. The Nevada regulators have since initiated contempt proceedings, contending that Kalshi's geofencing measures have failed to keep Nevada residents off the platform.

Washington and Michigan: In March 2026, the attorneys general of both Washington State and Michigan filed enforcement actions against Kalshi, alleging that the company was operating an unlicensed sports gambling platform in violation of each state's law. The Washington complaint added an unfair trade practices claim and the Michigan complaint added a common law nuisance claim. Each action seeks to enjoin Kalshi from offering sports event contracts in the state. Both states have since obtained relief. On July 20, 2026, a Washington state court preliminarily enjoined Kalshi. An amended order entered August 12, 2026, barred persons located in Washington from trading contracts on sports, elections, politics, entertainment, culture, technology, science, and mention markets, while leaving commodities, climate, economics, and finance contracts available, and required IP and residency blocking by August 19, 2026, and third party geolocation by September 2, 2026. A Michigan state court entered a temporary restraining order on June 29, 2026, barring Kalshi from offering sports event contracts in the state. Washington and Michigan thus join Nevada among the jurisdictions in which courts have required a prediction market to cease or geofence operations; the comparable Massachusetts injunction remains stayed pending appeal.[53] On September 1, 2026, a Michigan court entered a preliminary injunction requiring Kalshi to maintain geolocation restrictions while the action proceeds and providing for sanctions of $500,000 for each day of noncompliance. Robinhood agreed in a court-approved stipulation to stop offering new sports contracts to Michigan customers by September 9, 2026, and to close remaining positions by October 9, 2026. On October 7, 2026, Coinbase Financial Markets agreed to halt new sports contracts in Michigan.[54]

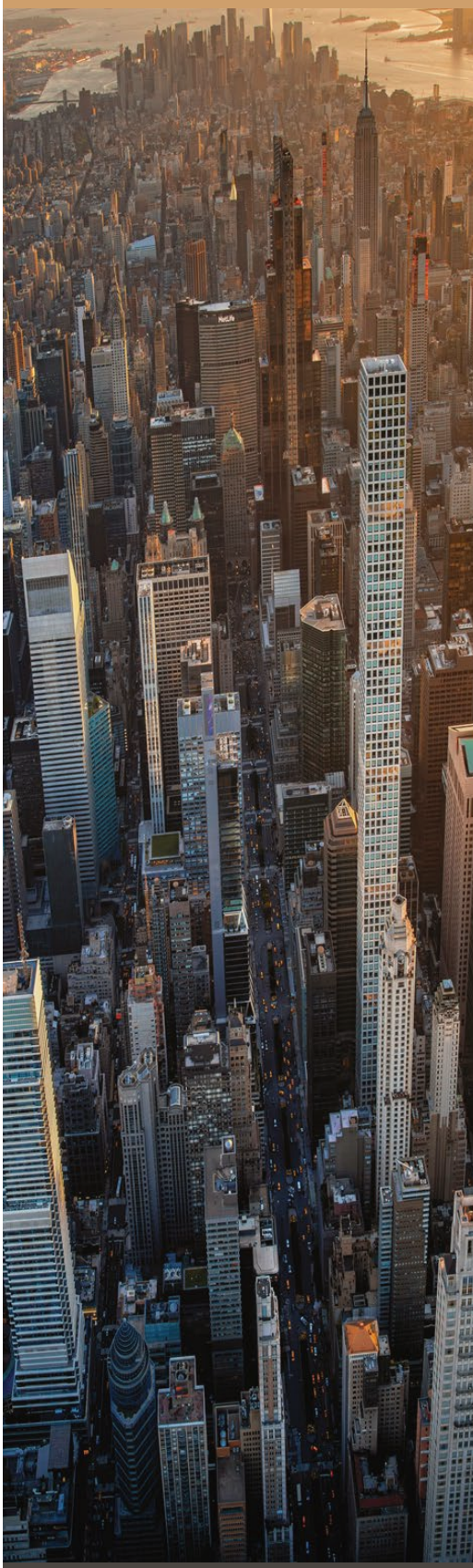
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[52] *State ex rel. Nev. Gaming Control Bd. v. KalshiEX LLC*, No. 26 OC 00050 1B (Nev. 1st Jud. Dist. Ct. Mar. 20, 2026); *see also* "Judge's Decision Temporarily Forces Polymarket Out of Nevada," Covers (Jan. 31, 2026).

[53] *Nessel v. KalshiEX LLC*, No. 26-1087-CZ (Mich. Cir. Ct., Ingham Cnty., June 29, 2026); Press Release, Wash. Att'y Gen., "Judge Orders Kalshi Cease Numerous Washington Operations" (Aug. 13, 2026).

[54] *See* "7 Reasons Why Michigan Judge Told Kalshi to Shutter Sports and Geofence," SBC Americas (Sept. 3, 2026),; Press Release, Mich. Gaming Control Bd., "Robinhood Agrees to Halt Sports-Related Event Contracts in Michigan amid Ongoing Litigation" (Sept 9, 2026), (linking Stipulation and

New York: In April 2026 the New York attorney general filed state court enforcement actions against Coinbase Financial Markets, Inc. and Gemini Titan, LLC, alleging that their prediction markets—including offerings of event contracts on sports, entertainment, and elections—constitute unlicensed gambling in violation of New York law and seeking to enjoin their prediction market operations in the state.[55] Gemini Titan is itself a CFTC designated contract market, and Coinbase Financial Markets is a CFTC-registered futures commission merchant that offers its customers contracts listed on Kalshi and other DCMs, so both proceedings may implicate the preemption questions addressed in this Article. In July and September 2026, New York's attorney general also sued Kalshi and Polymarket US, respectively.[56] Kalshi removed the case against it to federal court the same day, and Polymarket US both removed the case against it and filed its own federal suit against state officials. Removal alone is unlikely to bring the preemption question before a federal court for a decision. A federal preemption defense cannot support removal, *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987), and unless the CEA completely preempts the state claims, a doctrine the Supreme Court has applied to very few statutes, *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003), these cases are likely to return to state court, as Nevada's did in March 2026. Kalshi has also invoked the federal officer removal statute, 28 U.S.C. § 1442, in Connecticut and Michigan; the federal court in Michigan nonetheless remanded, and Kalshi's appeal of that remand order was held in abeyance pending the Sixth Circuit's decision in *Schuler*.



Order Concerning Enforcement, ECF No. 50 (Sept. 4, 2026)); Press Release, Mich. Gaming Control Bd., "Coinbase Agrees to Halt Sports-Related Event Contracts in Michigan" (Oct. 7, 2026).

[55] *See People v. Coinbase Fin. Mkts., Inc.*, Index No. 451604/2026 (N.Y. Sup. Ct., N.Y. Cnty. filed Apr. 21, 2026); *People v. Gemini Titan, LLC*, Index No. 451603/2026 (N.Y. Sup. Ct., N.Y. Cnty. filed Apr. 21, 2026). On April 21, 2026, New York Attorney General Letitia James filed verified petitions in New York Supreme Court against Coinbase Financial Markets, Inc. and Gemini Titan, LLC, alleging that their recently launched "prediction markets" constitute unlicensed gambling in violation of N.Y. Const. art. I, § 9; N.Y. Penal Law §§ 225.05, 225.10, 225.20; N.Y. Racing, Pari-Mutuel Wagering and Breeding Law §§ 1367(16)(a), 1367-a(2)(a), 1367-a(4)(b); and the federal Wire Act, 18 U.S.C. § 1084(a). Brought as special proceedings under Executive Law § 63(12), the petitions seek permanent injunctions barring the respondents from operating unlicensed gambling businesses in New York, an accounting of bets placed and amounts received, restitution, disgorgement, damages, statutory penalties (including treble gain under Penal Law § 80.10 and $100,000 per unauthorized offering of sports wagering under Racing Law § 1367(16)(a)), and related relief. Gemini Titan, LLC received DCM designation in December 2025, and Coinbase Financial Markets is a CFTC-registered futures commission merchant that offers contracts listed on Kalshi, so both proceedings may raise CEA preemption questions. *See also* Press Release, N.Y. Att'y Gen., *Attorney General James Sues Coinbase and Gemini for Running Illegal Gambling Platforms in New York* (Apr. 21, 2026).

[56] *See People v. KalshiEX LLC*, Index No. 453272/2026 (N.Y. Sup. Ct., N.Y. Cnty. filed July 31, 2026); *People v. QCX LLC (d/b/a Polymarket US)*, Index No. 454221/2026 (N.Y. Sup. Ct., N.Y. Cnty. filed Sept. 24, 2026).

Connecticut: New York is not the only state within the Second Circuit where gambling regulators are pursuing proactive enforcement actions. In December 2025, the Connecticut Department of Consumer Protection ordered Kalshi to cease and desist, and Kalshi responded by suing in federal court. On August 26, 2026, Connecticut's attorney general and Department of Consumer Protection initiated an enforcement action in Hartford Superior Court; the court denied ex parte relief the same day, and Kalshi has since removed the case.[57] The enforcement action alleges that Kalshi is in violation of state sports betting laws. Kalshi has appealed the denial of its own motion (No. 26-2239), and on September 3, 2026, the Second Circuit ordered that appeal heard in tandem with Kalshi's New York appeal (No. 26-1835) and a third appeal, No. 26-2297. Coinbase Financial Markets, which offers Kalshi-listed contracts to its customers, sought to enjoin Connecticut's enforcement in federal court; on August 10, 2026, the District of Connecticut denied a preliminary injunction, finding Coinbase unlikely to show either that the contracts are "swaps" or that Connecticut's gambling laws are preempted. Coinbase appealed and, on October 7, 2026, filed its opening brief arguing that the contracts are swaps within the CFTC's exclusive jurisdiction, that the CEA does not exclude a contract merely because its payout turns on a sporting result, and that exchange-traded contracts between counterparties on a CFTC-registered DCM differ in kind from bets placed against a sportsbook. *See* Brief for Plaintiff-Appellant, *Coinbase Fin. Mkts., Inc. v. Tong*, No. 26-2297 (2d Cir. Oct. 7, 2026). On November 3, 2026, the Second Circuit heard argument and denied the motions of Kalshi and Coinbase for injunctions pending appeal in all three tandem appeals, leaving New York and Connecticut free to enforce their gambling laws while the merits appeals proceed.

Utah: State civil enforcement and the second criminal prosecution of a prediction market operator. On October 20, 2026, the Utah attorney general filed a state court enforcement action against Kalshi and affiliated Susquehanna entities, alleging that Kalshi continued to offer sports event contracts in Utah after the federal district court rejected its preemption defense. On October 28, 2026, the attorney general followed with criminal charges, fourteen counts in all, against KalshiEX LLC and co-founders Tarek Mansour and Luana Lopes Lara. The charges consisted of one second-degree felony count of engaging in a pattern of unlawful activity, twelve third-degree felony counts of online gambling promotion, and one class A misdemeanor count of general gambling promotion. The charges were based on an investigation in which a state agent opened an account from a Utah internet protocol address in September 2026 and placed twelve sports wagers. This is the second criminal prosecution of a CFTC-registered prediction market operator, after Arizona, and the first to charge an operator's founders individually, which materially raises the stakes for executives of any platform that continues to list sports event contracts in a state treating them as gambling.

[57] *See* Press Release, Conn. Att'y Gen., "Connecticut Sues Kalshi to Stop Illegal, Unlicensed Sports Betting" (Aug. 26, 2026); Order, *Connecticut v. KalshiEX LLC*, No. HHD-CV26-6230345-S (Conn. Super. Ct. Aug. 26, 2026) (denying ex parte relief); Notice of Removal, *Connecticut v. KalshiEX LLC*, No. 3:26-cv-01382 (D. Conn. Aug. 26, 2026).

II. Legislative responses to the jurisdictional question

Congress has taken a keen interest in prediction markets, largely in response to public concern over insider trading and the litigation and debate over state versus federal regulation of sports event contracts. The proposal most consequential for the preemption question would confirm state, not federal, jurisdiction over sports contract trading. Separate legislative proposals addressing the permissible subject matter of event contracts and insider trading by government personnel are addressed in the later articles in this series.

In March 2026, Senators Adam Schiff (D-CA) and John Curtis (R-UT), joined by Senator Catherine Cortez Masto (D-NV), introduced the bipartisan Prediction Markets Are Gambling Act, S. 4160, 119th Cong. (2026), which would bar any registered entity, including a DCM, from listing or clearing any contract "relating to any sporting event or athletic competition or any casino-style game" and would thereby allow each state to regulate or prohibit trading in such contracts in that state. To accomplish those results, the bill would amend CEA § 5c(c) to prohibit registered entities from listing such contracts and would provide that nothing in the Act preempt state laws that regulate or prohibit them.[58]

If enacted, the legislation would appear to moot much of the widespread litigation over whether sports event contracts should be classified as gambling or as commodity derivatives. The legislation's prospects remain uncertain.

The states have not waited for Congress. In 2026, Minnesota became the first state to make it a felony to create, operate, or facilitate a prediction market within its borders, with exclusions for futures contracts on securities or commodities and for regulated insurance contracts. As discussed in Part III, a federal court preliminarily enjoined enforcement of the law against CFTC-registered DCMs days before its August 1, 2026, effective date, at the request of the CFTC and the Department of Justice. Additional state legislation is likely, and tribal leaders have urged Congress to add a sports prediction market prohibition to pending federal digital asset market structure legislation.

[58] S. 4160, 119th Cong. § 2 (as introduced, Mar. 23, 2026); H.R. 9856, 119th Cong. (2026) (House companion introduced July 22, 2026); Nic Puckrin, "Prediction Markets Caught Insider Traders in Real Time. Congress Wants to Shut Them Down Anyway," *Fortune* (Apr. 2, 2026), "New Bill Targets Sports prediction markets: What are they, and why could some be banned?," *The Hill* (Mar. 25, 2026).



III. The coming Supreme Court showdown

A clear circuit split now exists between the Third Circuit's decision affirming an injunction against New Jersey's enforcement efforts and the Sixth and Ninth Circuit decisions holding that Kalshi had not shown that the CEA preempts state law as applied to its sports contracts. Appeals pending in the Second, Fourth, Seventh, and Tenth Circuits could further widen that split. Motions panels in the Tenth and, on November 3, 2026, the Second Circuit have already denied Kalshi (and, in the Second Circuit, Coinbase) injunctions pending appeal.

Given this widening circuit split, the chances that the Supreme Court will agree to review one of the cases appear strong. The question of CEA preemption of state law in the context of prediction markets has been vigorously litigated in more than a dozen jurisdictions, has produced conflicting federal district court decisions, raises competing issues of federal supremacy and state police power, and has drawn in the CFTC, as a plaintiff against ten states and as an amicus supporting Kalshi, on one side and 39 states and the District of Columbia on the other. Moreover, resolution of the preemption question is critically important to both a large and growing industry and every state in the nation.

As discussed above, a vehicle for deciding the question may already be before the Court. On September 2, 2026, New Jersey's attorney general and chief gaming regulator filed a petition for a writ of certiorari seeking review of the Third Circuit's decision in favor of Kalshi. The petition explicitly presents the question of "[w]hether the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act preempted States from regulating sports bets that occur within their jurisdictions if those bets are offered on markets registered with the Commodity Futures Trading Commission."[59] The petition has drawn substantial *amicus* support. Between September 22, 2026, and October 8, 2026, briefs supporting certiorari were filed by a bipartisan coalition of 39 states and the District of Columbia, the American Gaming Association, the International Association of Gaming Regulators and the North American Gaming Regulators Association, the NFL, the National Council of Legislators from Gaming States, Stop Predatory Gambling, the Cabazon Band of Cahuilla Indians, and a group of 145 Indian tribes and tribal organizations. Two briefs bear directly on the statutory question: Former Senator Christopher Dodd, who chaired the Senate Banking Committee and sponsored the legislation that became the Dodd-Frank Act, and former CFTC and SEC Chair Gary Gensler, who oversaw the implementation of its swap rules, each argue that the statute was never intended to displace state gambling laws. The NFL's brief contends that sports event contracts are wagers rather than swaps, questions whether the CFTC has the resources to police game integrity, and frames the federalization of sports-betting regulation as a "major question" for the Court. *See* Brief of Former Senator Christopher J. Dodd as Amicus Curiae in Support of Petitioners, *Flaherty v. KalshiEX LLC*, No. 26-299 (U.S. Oct. 8, 2026); Brief of Former CFTC Chairman Gary Gensler as Amicus Curiae in Support of Petitioners, *Flaherty*, No. 26-299 (U.S. Oct. 8, 2026); Brief of Amicus Curiae National Football League in Support of Petitioners, *Flaherty*, No. 26-299 (U.S. Oct. 8, 2026). Kalshi's response is due November 9, 2026. Robinhood (No. 26-338) and Crypto.com (No. 26-344) have filed their own petitions from the Ninth Circuit; Robinhood's petition is conditional on the Court granting another petition that presents the same question.

The Supreme Court could also review a decision of a state's highest court. Under 28 U.S.C. § 1257(a), the Court may review "[f]inal judgments or decrees rendered by the highest court of a State" in which a federal right is "specially set up or claimed," as Kalshi has done with its preemption defense. Finality is the obstacle. The Massachusetts Supreme Judicial Court, which heard argument in *Commonwealth v. KalshiEX* on May 4, 2026, is reviewing a preliminary injunction, and an interlocutory ruling qualifies only if it fits one of the categories recognized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479–83 (1975).

[59] Petition for a Writ of Certiorari, *supra* note 3, at i.

A. The question presented

Assuming it accepts a case for review, whether that be New Jersey's recent petition seeking review of the Third Circuit's decision, the pending Robinhood and Crypto.com petitions, or a future petition challenging a decision by another circuit, the Supreme Court will face a seemingly narrow but extremely consequential question: Does the CEA, by granting the CFTC "exclusive jurisdiction" over most swaps and other instruments traded on designated contract markets, preempt state gaming laws as applied to event contracts generally—or sports event contracts in particular—traded on those markets? A threshold question, on which the Sixth and Ninth Circuits principally rested, is whether sports event contracts are swaps at all. The Court's analysis will require balancing the usual supremacy of federal law and the virtues of regulatory uniformity against the traditional police powers of the states over gambling.

Notably, the record of federal enforcement against trading abuses cuts in both directions. Kalshi will argue that the CFTC's sophisticated surveillance regime, combined with active federal enforcement, demonstrates that federal law provides the best protection against manipulation and insider trading. States will argue that documented incidents of trading on confidential information demonstrate that self-regulatory models are insufficient and that state gaming authorities—designed specifically to police information advantages in wagering contexts—bring experience and a consumer-protection infrastructure the CFTC lacks.

B. Kalshi's argument for federal preemption

i. The textual mandate of the CEA

Kalshi's argument begins with statutory text. Dodd-Frank amended the CEA to add "swaps" and to expand the CFTC's "exclusive jurisdiction" to encompass "accounts, agreements . . . and transactions involving swaps . . . traded or executed on a [DCM]." 7 U.S.C. § 2(a)(1)(A). Kalshi will argue that "exclusive" is a legal term of art that forecloses concurrent state jurisdiction. Consistent with the Third Circuit majority, Kalshi will argue that the savings clauses preserve state-court jurisdiction over common law actions but do not confer state regulatory authority over trading on DCMs. Kalshi will further contend that the statutory history corroborates this reading. The 1974 conference report explained that the CFTC's jurisdiction would "preempt the field insofar as futures regulation is concerned," H.R. Rep. No. 93-1383, at 35 (1974) (Conf. Rep.), and when the Senate deleted language that would have preserved state authority over futures trading, Senator Carl Curtis of Nebraska explained that the change was made "to assure that Federal preemption is complete," 120 Cong. Rec. 30,464 (1974) (statement of Sen. Curtis).

Kalshi will concede that the CFTC's jurisdiction is not fully exclusive (the SEC has jurisdiction over security-based swaps) but will argue that this jurisdictional carve-out is narrow and statutorily defined, has no application to sports-related event contracts, and says nothing about concurrent state regulatory authority. Put simply, the CFTC-SEC split is an allocation between two federal agencies, not between a federal agency and a state authority.

ii. Field preemption: the comprehensiveness of the federal scheme

In *Kansas v. Garcia*, 589 U.S. 191, 208 (2020), the Supreme Court confirmed that identifying the relevant "field" is a threshold step in a field preemption analysis, although it then rejected the field preemption claim before it, *id.* at 208–10. Following the Third Circuit's approach, Kalshi will argue that the relevant field is "trading on DCMs" (rather than "sports gambling") and that Congress has comprehensively regulated trading on DCMs since 1936. Through the CEA and CFTC regulations, Congress has subjected DCMs to strict licensing standards and rigorous oversight; required the Commission to act on applications for designation within 180 days; given the agency authority to investigate, regulate, and prohibit a broad universe of derivatives and transactions in derivatives; and granted the agency affirmative enforcement power over manipulation, insider trading, and disruptive trading. 7 U.S.C. §§ 6c(a)(4)–(5), 7, 7a-2, 8(a), 9(1), 9(3). The Supreme Court has recognized field preemption where a federal framework is "so pervasive . . . that Congress left no room for the States to supplement it." *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *see also Hines v. Davidowitz*, 312 U.S. 52, 66–67 (1941). Kalshi is likely to argue that the CEA's comprehensive regulation of commodity derivatives trading, stretching back nearly a century, fits within this line of authority.[60] Kalshi may point to recent CFTC actions against insider trading on prediction markets as examples of the regulatory scheme's comprehensive reach.[61]

iii. Conflict preemption and the patchwork problem

Kalshi will argue that conflict preemption applies because state regulation and enforcement actions—cease-and-desist letters, injunctions, criminal charges—directly conflict with Kalshi's asserted federal right to freely offer contracts on a CFTC-licensed DCM. This is especially true because Kalshi is subject to regulation and enforcement by numerous separate states. In the Third Circuit majority's words, this situation is "exactly the patchwork that Congress replaced wholecloth by creating the CFTC." *Flaherty*, 172 F.4th at 232.

Kalshi will also invoke the related doctrine of "obstacle preemption" under *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), arguing that individual-state enforcement efforts frustrate the CEA's purpose of bringing commodity derivatives trading under a uniform federal framework. Kalshi's obstacle preemption argument is strengthened by the fact that states do not agree on what constitutes "gambling" in the first place. In deciding whether a transaction involves gambling, the three-element test (discussed in Part II) is applied differently across jurisdictions: In some states, chance must be a "dominant factor"; in others, it need only be a "material element"; in others, "any chance" will do. Some states recognize exemptions for business or commodities transactions; others do not. Some states treat skill-based contests like "daily fantasy sports" as gambling; others do not. The practical consequence is that trading in the same event contract—on the same electronic platform and at the same price—can be lawful commerce in one state, unlicensed gambling in another, and a criminal offense in a third.

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[60] *See also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 356 (1982); *Am. Agric. Movement, Inc. v. Bd. of Trade of Chi.*, 977 F.2d 1147, 1157 (7th Cir. 1992); Michael S. Greve et al., "Preemption in the Rehnquist and Roberts Courts: An Empirical Analysis," 23 Sup. Ct. Econ. Rev. 353 (2015).

[61] For example, the CFTC recently entered a settled order on August 28, 2026, against Gabriel Perez, a former White House teleprompter operator, for trading presidential "mention market" event contracts with nonpublic information obtained through his work, ordering $107,539.02 in disgorgement and a $65,000 civil penalty and imposing a three year trading prohibition. *See* Press Release, CFTC, "CFTC Orders Gabriel Perez to Pay $172,000 for Insider Trading of Mention Market Event Contracts," Release No. 9289-26 (Aug. 28, 2026).



Kalshi will argue that this is precisely the jurisdictional "patchwork" Congress sought to eliminate by granting the CFTC exclusive jurisdiction over DCM trading and, accordingly, that conflict and obstacle preemption apply to CFTC-licensed prediction markets. In *Crosby*, for example, the "threat of frustrating federal statutory objectives" was enough to preempt a state statute, 530 U.S. at 366, although the objectives there concerned a calibrated federal sanctions regime in the foreign affairs field. A CFTC-licensed national marketplace cannot function if each state applies its own definition of gambling to the identical product.

Several federal and state courts have held that conflict preemption requires actual conflict and that compliance with a state sports-wagering licensing regime does not make compliance with CFTC rules physically impossible. These courts have noted that Kalshi has not identified any specific CFTC obligation that would be violated by obtaining the relevant state sports wagering license. That said, if a state—like Utah—prohibits all forms of gambling businesses and concludes that sports event contracts are gambling products, then Kalshi would contend that the state's prohibition on such contracts would directly conflict with its federal right to offer the contracts so long as it complies with the CEA and CFTC rules. That contention is no longer hypothetical: As discussed in Part III, the District of Utah has now rejected it on final judgment, teeing the question up for the Tenth Circuit.

iv. The CFTC's institutional competence

Kalshi will argue that the CFTC, not state gaming boards, possesses the regulatory architecture to police information-advantage abuses in prediction markets. The CFTC's Division of Enforcement has issued advisories, initiated surveillance programs, and maintained active enforcement capacity specifically designed for derivatives markets. The exchange-as-enforcer model—already producing documented enforcement actions—operates under CFTC authority and extends the SRO framework that has long functioned in securities markets. In Kalshi's framing, preemption does not eliminate consumer protection; it concentrates on the regulator best equipped to provide it.

v. Murphy v. NCAA supports preemption

Kalshi's response to the states' invocation of Murphy v. NCAA—also relied on by the Third Circuit dissent—is textual and structural. Murphy struck down the federal statute because it commanded states not to authorize sports gambling without itself regulating sports gambling—an anti-commandeering violation. The CEA operates categorically differently: It does not command any state to enact or repeal any law but regulates only private parties (DCMs and their customers) by making them subject to CFTC authority. Under Murphy's own logic, Congress may preempt state law in the course of regulating private actors. 584 U.S. at 477–79. That is standard Supremacy Clause preemption, not commandeering.

C. The states' argument against preemption

i. The presumption against preemption

The states' foundational argument is structural. Preemption analysis "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice*, 331 U.S. at 230. This presumption applies with "particular force" when Congress legislates in a field "traditionally occupied by the States." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008). Gambling regulation is such a field. *See Ah Sin v. Wittman*, 198 U.S. 500, 505–06 (1905); *Musgrave*, 553 F.3d at 302.

Drawing on New Jersey's framing and the Third Circuit dissent, the states will argue that the relevant field is the regulation of gambling, which the states have traditionally occupied, and that DCM trading is at most a subfield of futures trading that Congress chose not to occupy completely. The CEA's jurisdiction over DCM trading is not sufficient to reflect the "clear and manifest purpose" required to displace long-standing state regulation of gambling. Moreover, if Congress intended Dodd-Frank's addition of "swaps" to the CFTC's jurisdiction to preempt the entire body of state gambling law, it would have said so explicitly. It did not. Indeed, as the Third Circuit dissent documented, Congress's long-standing practice across federal gambling statutes, including the Wire Act, the Johnson Act, and the Gambling Ship Act, has been to include provisions that defer to or preserve state gambling law, and Congress has found that "the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders." 15 U.S.C. § 3001(a)(1).[62] Silence on preemption in, and after, Dodd-Frank cannot constitute the "clear and manifest" purpose required to displace a sovereign state's police power over wagering.

The states will also invoke *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 385 (2015), a field preemption case under the Natural Gas Act in which the Court stressed "the importance of considering the target at which the state law aims in determining whether that law is pre-empted." State gambling laws aim at wagering wherever it occurs and reach DCM trading only incidentally. The Sixth Circuit drew a similar line in construing § 2(a)(1)(A), reasoning that "ancillary regulations that only incidentally burden DCMs do not come within the provision's substantive scope." *Schuler*, slip op. at 37.

The legislative history of the special rule points in the same direction. In a July 2010 colloquy, Senator Lincoln explained that the Commission "needs the power to, and should, prevent derivatives contracts that are contrary to the public interest because they exist predominantly to enable gambling through supposed 'event contracts,'" and observed that "[i]t would be quite easy to construct an 'event contract' around sporting events such as the Super Bowl." 156 Cong. Rec. S5906–07 (daily ed. July 15, 2010).

[62] *See* 18 U.S.C. § 1084(c) (Wire Act creates no "immunity from criminal prosecution under any laws of any State"); *id.* § 1084(b) (exempting transmission of information assisting in the placing of bets on a sporting event or contest from a State or foreign country where such betting is legal into one where it is also legal); 15 U.S.C. § 1172(a) (Johnson Act inapplicable in States that enact exemptions); 18 U.S.C. §§ 1082(a), 1083(a) (Gambling Ship Act limited to vessels not within the jurisdiction of any State); 15 U.S.C. § 3001(a)(1) (finding that "the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders"); *see also Flaherty*, 172 F.4th at 234 & nn.15–19 (Roth, J., dissenting).

Kalshi will answer that the presumption has no role here. Where a statute "contains an express pre-emption clause," the Court does "not invoke any presumption against preemption" and instead focuses on the plain wording of the clause. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 125 (2016) (quoting *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 594 (2011)). The Ninth Circuit accepted that framing in *Assad* and declined to apply the presumption, while the Sixth Circuit applied it. The answer turns on whether the grant of "exclusive jurisdiction" in § 2(a)(1)(A) is an express preemption clause, as the CFTC's June 2026 proposal asserts.

ii. Functional equivalence

The states' most empirically powerful argument is functional equivalence. Kalshi's sports event contracts are indistinguishable—in economic substance, marketing, consumer profile, and risk profile—from the sports-betting products offered by DraftKings, FanDuel, and other state-licensed sportsbooks. The Third Circuit dissent opened with precisely this observation. Visiting Kalshi's platform for a Carolina Panthers versus Tampa Bay Buccaneers game, Judge Roth found she could bet on the game outcome, point spread, game props, and player props—the identical product array available on any state-licensed sportsbook. Judge Roth also noted that Kalshi's own marketing materials "routinely refer to its products as 'sports betting.'"

The states will argue that allowing DCM registration to convert functionally equivalent gambling products into federal derivatives instruments—immune from state gaming regulation—would permit regulatory arbitrage on a massive scale. Any traditional sportsbook could theoretically obtain DCM designation and escape state authority. Legal form should not take precedence over economic substance when the question is whether the states' long-standing regulation of gambling is impliedly preempted by a silent commodities statute.

The states will also confront Kalshi's patchwork argument directly. Variation among state definitions of gambling, they will argue, is not a defect to be cured by federal preemption; it is a feature of federalism. State police power over gambling has always produced definitional variation—some courts have found poker to be predominantly a game of skill and others treat it as gambling; daily fantasy sports is lawful in most states but prohibited in a handful; casino gaming is permitted in some jurisdictions and prohibited in others. That variation reflects legitimate, value-laden policy judgments that different states make about different forms of commercial activity within their borders. National sportsbook operators like DraftKings and FanDuel already navigated this patchwork successfully, tailoring their products and compliance programs to each state's specific rules and not offering their products in states that flatly prohibit all gambling. The states will argue that Kalshi can do the same—and that if the variation becomes genuinely unworkable, the constitutional remedy is congressional action (as the pending Prediction Markets Are Gambling Act would provide), not judicial displacement of state authority by implication. The clear-statement rule and the presumption against preemption exist precisely to prevent federal courts from resolving such federalism trade-offs without an explicit congressional directive.

iii. Loper Bright and the limits of agency deference

The states may argue that under *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the Supreme Court should ignore the views and litigation position of the CFTC on the critical preemption question. *Loper Bright* eliminated *Chevron* deference to agency interpretations of federal statutes, instead requiring federal courts to exercise "independent judgment" in construing them. *Id.* at 412. Although this principle has real bite in many cases, its application to preemption analysis is narrower than what may first appear.

First, the Supreme Court has said that it has "not deferred to an agency's conclusion that state law is pre-empted" and that the weight it gives an agency's explanation of how state law affects the federal scheme "depends on its thoroughness, consistency, and persuasiveness." *Wyeth v. Levine*, 555 U.S. 555, 576–77 (2009). The Court has applied *Chevron* to agency readings of statutory terms with preemptive effect, *Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 524–25 (2009), but *Loper Bright* now forecloses that route. For agency conclusions about preemption itself, *Loper Bright* therefore changes relatively little. Second, *Loper Bright* did not make agency views irrelevant. Courts interpret statutes "with due respect for the views of the Executive Branch," 603 U.S. at 403, and an agency's experience may give its interpretation "particular 'power to persuade, if lacking power to control.'" *Id.* at 402 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The weight owed depends on "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." *Skidmore*, 323 U.S. at 140. Thus, the CFTC's position on preemption arguably remains entitled to weight to the extent it reflects thorough and cogent analysis and is consistent with the agency's prior practice.

The states will argue, however, that the CFTC's recent advocacy for preemption represents at least some shift from its prior regulatory posture. In June 2024, the agency proposed a rule that would have defined "gaming" to include staking something of value on the outcome of a contest or game, including athletic contests, and would have barred DCMs from listing such contracts as contrary to the public interest. Event Contracts, 89 Fed. Reg. 48,968 (proposed June 10, 2024). The Commission withdrew the proposal in February 2026 and now asserts that the CEA expressly preempts state regulation of DCM trading.[63] This oscillation cuts against *Skidmore* deference.

In the end, the states' best use of *Loper Bright* is as a reinforcement of arguments that exist independent of agency deference—particularly the clear-statement rule and the presumption against preemption—rather than as a freestanding theory of its own.

iv. The CFTC's event contract review problem

The states will point to the CFTC's own regulatory framework as evidence against sweeping preemption. The CEA's "special rule for review and approval of event contracts," added in 2010 by Dodd-Frank, allows the CFTC to prohibit contracts involving "gaming" or "activity that is unlawful under any . . . State law" if the agency determines that such contracts are "contrary to the public interest." 7 U.S.C. § 7a-2(c)(5)(C)(i), (ii). The CFTC's implementing regulation, Rule 40.11, on its face prohibits DCMs from listing an event contract that involves "gaming" or "an activity that is unlawful under any State . . . law." Rule 40.11(c) separately permits the Commission to conduct a 90-day review of an event contract that a registered entity has certified or submitted for approval and to approve or disapprove it. Although the agency has not invoked these provisions to approve or prohibit any sports event contract (its only orders under them addressed political event contracts in 2012 and 2023, and its reviews of sports contracts in 2020 and 2025 did not result in an order), the existence of these provisions demonstrates that both Congress and the agency have contemplated that some event contracts would warrant additional scrutiny precisely because they may involve gaming or an activity unlawful under state law. The states will argue that a statute and regulatory framework that expressly contemplates the continuing relevance of state law cannot simultaneously be read to preempt it.

[63] Event Contracts; Withdrawal of Proposed Regulatory Action, 91 *Federal Register* at 5,386; "Prediction Markets," Public Interest Determinations, 91 *Federal Register* at 35,808 & n.19.

Indeed, in March 2026, the CFTC published an advance notice of proposed rulemaking and request for public comments regarding prediction markets, including particular types of event contracts.[64] Explicitly referencing the agency's statutory and regulatory powers to prohibit contracts that are contrary to the public interest, the notice poses several questions regarding the "unlawful under any . . . State law" and "gaming" categories, including whether "gaming" is "synonymous with, or more or less extensive than" the activities covered by state and federal gambling statutes, and whether a sports competition should be treated differently from an award competition in deciding what counts as gaming. The agency has since answered some of its own questions: The June 2026 proposed rule discussed in Part I.D would define "gaming" and "involve" and adopt public interest factors specific to sports contracts, while simultaneously asserting that the CEA expressly preempts state regulation of DCM trading.

Both the 2026 rulemaking activity and the CFTC's failure thus far to complete a public interest review of any sports event contract—including those that could be unlawful under state law—create significant regulatory uncertainty for both the states and the prediction markets. This uncertainty, reinforced by the references to state law in both the statute and the regulation, appears to undercut the claim, made by both Kalshi and the agency in litigation, that the CEA unambiguously and comprehensively preempts state law. Kalshi will argue that the CFTC's failure to prohibit any of its sports event contracts constitutes implicit approval and that such approval means that state law is no longer relevant.

v. The major questions doctrine

As a complement to the presumption against preemption, the states may invoke the "major questions doctrine," arguing that the CFTC's (and Kalshi's) claim that the CEA preempts state regulation of gambling is an issue of major economic and political significance that requires a clear statement of congressional intent. *See, e.g.*, *West Virginia v. EPA*, 597 U.S. 697 (2022); *Biden v. Nebraska*, 600 U.S. 477 (2023). But this argument faces an analytical tension. The relevant precedents apply the major questions doctrine primarily to police agency overreach—situations in which an agency claims novel regulatory authority without a clear congressional mandate. Preemption is ultimately a judicial question, not an agency question, which arguably puts the doctrine at a remove. The Ninth Circuit nonetheless invoked the doctrine in *Assad*, using it to construe the swap definition.

Even so, the same clear statement principle that animates the major questions doctrine supports the states' position. The CFTC is asserting that Dodd-Frank's expansion of its regulatory jurisdiction to include swaps—legislation aimed at the post-2008 financial crisis derivatives market—silently preempted the entire body of state gambling law as applied to prediction market platforms. The question of whether federal commodities law displaces state authority over gambling—which has existed for over a century—and displaces state authority over the large and growing sports wagering industry—which nearly forty states have been comprehensively regulating since *Murphy v. NCAA*—is certainly a weighty question. Indeed, it is precisely the type of matter of "economic and political significance" that the Court in *West Virginia v. EPA* said calls for a clear congressional statement. 597 U.S. at 721 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)). Congress did not enact a federal sports gambling regulatory regime in Dodd-Frank; it did not even mention sports wagering. Finding that Dodd-Frank silently preempted the state regulatory apparatus that emerged after *Murphy* would sit uneasily with the Court's observation that Congress "does not, one might say, hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), an observation that, even setting aside the formal major questions doctrine, captures the kind of implausible congressional intent the clear statement rule is designed to prevent.



[64] "Prediction Markets," 91 *Federal Register* at 12,521.

The states' best framing is not that the major questions doctrine formally applies to the preemption analysis but that the structural concerns that animate the doctrine—judicial skepticism toward claims of sweeping federal authority absent a clear statement of congressional intent—powerfully reinforce the presumption against preemption.

D. *Murphy v. NCAA*: the double-edged precedent

Murphy v. NCAA has emerged as an important precedent in this litigation. Both the Third Circuit majority and dissent cited it. Understanding why *Murphy* cuts both ways and how the Court might use it requires examining its structure.

Murphy arose from New Jersey's challenge to the Professional and Amateur Sports Protection Act (PASPA), which made it unlawful for states to "sponsor, operate, advertise, promote, license, or authorize" sports gambling schemes. In an opinion by Justice Alito, joined on this point by six other Justices, the Court held that PASPA's anti-authorization provision violates the anticommandeering rule. Justices Ginsburg and Sotomayor assumed that holding for argument's sake, and they and Justice Breyer would have preserved the rest of PASPA through severance, so the judgment was 6 to 3.[65] The Court made a pivotal conclusion: "Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own." 584 U.S. at 486.

The states' reading. The states will not use *Murphy* to make an anti-commandeering argument—the CEA does not command states to act or prohibit them from acting—but rather to demonstrate the historical relationship between Congress and state gambling law. *Murphy* reaffirmed a long tradition of federal deference to state gambling regulation, a tradition the Third Circuit dissent documented by reference to provisions of the Wire Act, the Gambling Ship Act, and other federal statutes addressing gambling that preserve or defer to state law. Read in light of that tradition, Congress's silence in Dodd-Frank on preemption of state gambling law is not a gap to be filled by implication but evidence that Congress did not intend to displace state regulation. The states' extensive post-*Murphy* legislative activity around sports gambling—nearly forty states enacted comprehensive regulatory and taxation frameworks, generating billions in revenue and sophisticated consumer-protection regimes—reinforces this conclusion. A ruling that Dodd-Frank's swaps jurisdiction had silently preempted all of that state activity while it was occurring would be a dramatic disruption that *Murphy*'s federalism values counsel against.

Kalshi's reading. Kalshi's response rests on a distinction *Murphy* itself drew. The Court struck down PASPA's prohibition on state authorization because that provision was a direct command to the States that conferred no federal rights on private actors and imposed no federal restrictions on them, and it then held that no other provision of PASPA could be severed. 584 U.S. at 480, 486. That mechanism—directing state legislatures without imposing obligations on private parties—is the anti-commandeering violation. The CEA operates categorically differently. It does not tell any state what its laws must or must not say; rather, it governs the conduct of private parties—including DCMs and their customers—and establishes a comprehensive regulatory regime for them. The preemption of state gambling law follows from the CEA's grant to the CFTC of exclusive jurisdiction over swaps trading on DCMs, including swaps that may involve gaming. That is ordinary Supremacy Clause preemption—Congress regulates private conduct through a federal scheme, and inconsistent state law is displaced. *Murphy* itself acknowledged this basic principle. 584 U.S. at 479.

[65] *Murphy*, 584 U.S. at 491 (Breyer, J., concurring in part and dissenting in part); *id*. at 493 (Ginsburg, J., dissenting).

E. CFTC-SEC jurisdictional divide revisited

As discussed in Part I.E, the CFTC's "exclusive jurisdiction" over event contracts is not exclusive. Under the express terms of the CEA, security-based swaps, options on securities, and security futures are carved out of the CFTC's exclusive jurisdiction and placed under the (sometimes concurrent) jurisdiction of the SEC. The CFTC has acknowledged that some prediction market event contracts may fall within this carve-out. Both sides may use this jurisdictional divide in their arguments to the Supreme Court.

The states will argue that the jurisdictional divide weakens Kalshi's claim that a single federal authority comprehensively regulates all event contracts. A premise on which field preemption depends—that Congress has created a complete and integrated federal regulatory scheme for prediction markets—is undermined to the extent federal jurisdiction is itself divided between two agencies. The states will also argue that the divide reinforces their clear statement arguments. A statute—*i.e.*, the CEA—that does not itself occupy the entire field of event contracts cannot readily be read to have displaced state law by implication.

Kalshi's response will be that the CFTC-SEC jurisdictional divide is an allocation between purely federal authorities that says nothing about whether state authorities have any role. It will also argue that the carve-outs for SEC jurisdiction over security-based derivatives do not undermine its preemption argument in any way because the CFTC's "exclusive jurisdiction" is expressly limited to instruments and transactions not carved out as subject to SEC jurisdiction. See 7 U.S.C. § 2(a)(1)(A), (C), (D), (G). Put another way, because Kalshi's sports event contracts are plainly subject to CFTC (and not SEC) jurisdiction, the CFTC's jurisdiction over those contracts is "exclusive" by the express terms of the CEA.

F. How the Court might resolve the case

In analyzing the central preemption question, the Court will likely need to grapple with a range of issues and arguments, including statutory interpretation, field preemption, conflict preemption, the presumption against preemption, deference to agency views, long-standing federal regulation of derivatives, long-standing state regulation of gambling, the relevance of *Murphy v. NCAA*, and the CFTC's power, so far unused for sports contracts, to prohibit gaming-related contracts. Resolution of these issues and arguments could be both complicated and difficult. There are reasonably strong arguments on both sides, and the case could well be decided by a slim majority of justices.

A related question is the scope of the Court's decision. Depending on the scope of the decision below and the questions presented, the Court could address CEA preemption solely in the context of sports event contracts or more broadly in the context of several types of event contracts. Assuming the Court addresses a broader group of contracts—for example, contracts relating to sports, economic results, elections, and weather—it could potentially reach different preemption results for different categories. Several analytical distinctions may drive such differentiation. If a majority of justices view sports contracts as functionally equivalent to sportsbook wagering, the Court could hold state law preempted for economic and weather contracts, which lack an established history of state gambling regulation, and not preempted for sports and election contracts, which states have long regulated. The Ninth Circuit's approach in *Assad* points toward that kind of result: The court accepted express and field preemption for genuine swaps on a DCM, including weather and interest rate swaps, concluded that sports contracts are likely outside the swap definition, and remanded the question of election contracts. On the other hand, if a majority endorses a robust and uniform view of CEA preemption, these distinctions would not matter and state law would be preempted across the board.

IV. Conclusion

The “swap or bet” question resists a single answer. As a matter of economic substance, Kalshi’s sports event contracts and the products offered by state-licensed sportsbooks are difficult to distinguish. As a matter of statutory text, the broad definition of “swap” arguably reaches many event contracts, although the Sixth and Ninth Circuits have concluded that sports event contracts likely fall outside it. The “exclusive jurisdiction” language creates a strong textual hook for federal preemption. As a matter of structural federalism and historical practice, Congress has consistently deferred to state gambling law, and the CEA says nothing about displacing such law.

The Third Circuit’s April 6, 2026, decision in *Flaherty* picked one path through this thicket: Define the regulated field narrowly (DCM trading); read the exclusive jurisdiction language broadly; and find that the federal regulatory regime impliedly displaces state law. Courts in other jurisdictions have picked a different path: Preserve room for coexisting state and federal regulation; apply the presumption against preemption; and read the CFTC’s “special rule” power to prohibit certain event contracts as acknowledging continuing state law relevance. Both paths are defensible on the current legal precedents. The Supreme Court will eventually have to choose or craft a third option that differentiates among contract categories. It could also resolve the case on the swap definition alone, the principal ground of the Sixth and Ninth Circuit decisions, without reaching the broader preemption theories.

In the meantime, the preemption issues now being litigated should not be considered static. Congress could intervene, through the Prediction Markets Are Gambling Act or otherwise, and effectively moot much of the current debate by removing sports event contracts from CFTC jurisdiction. Or the CFTC could finalize its June 2026 proposed amendments to Rule 40.11 and, under the CEA special rule, complete a public interest review and approval of sports and gaming event contracts, thereby strengthening the argument for CEA preemption. States could coordinate among themselves to harmonize their enforcement postures. Any of these developments could substantially alter the litigation landscape before the Supreme Court ever weighs in. Clarity is plainly needed; the Supreme Court is one possible source of it, but not the only one.



V. Key Takeaways

1. **The preemption question is central and unsettled:**
   The Third Circuit ruled for preemption, while the Sixth and Ninth Circuits rejected it on September 25, 2026, and August 28, 2026, respectively, chiefly because they concluded that sports event contracts are likely not swaps, creating a circuit split. A decision remains pending in the Fourth Circuit; Kalshi has asked the Ninth Circuit to rehear *Assad* en banc; appeals are pending in the Second, Seventh, and Tenth Circuits; and New Jersey's petition for certiorari is pending before the Supreme Court, along with petitions by Robinhood and Crypto.com from the Ninth Circuit.

2. **Insider trading enforcement has become evidence in the preemption debate:**
   Both sides are likely to cite the enforcement record: Kalshi and the CFTC point to active federal enforcement and DCM self-regulation as demonstrating the adequacy of the federal regime; states point to documented information-abuse incidents as evidence that federal oversight is insufficient and state consumer-protection infrastructure remains necessary. The empirical record is contested, not dispositive.

3. **Product categorization may drive differentiated outcomes:**
   Sports event contracts closely resemble traditional sportsbook wagering, and the long history of state regulation of sports wagering may cut against preemption. Election contracts have a comparable history, since most states restrict election betting. Contracts on economic indicators and weather have little history of state gambling regulation, and weather futures have traded on a CFTC regulated exchange since 1999, which may favor preemption for those categories.[66] Federal courts and the Supreme Court may reach different results for different categories.

4. **The Third Circuit's ruling is the most important judicial decision to date—but hardly the last word:**
   The *Flaherty* preliminary injunction runs only against the New Jersey officials named in the case, and the Third Circuit's opinion binds only courts within that circuit (New Jersey, Pennsylvania, Delaware, and the Virgin Islands). Neither protects Kalshi against enforcement by other states; indeed, on November 3, 2026, the Second Circuit declined to enjoin New York and Connecticut enforcement pending appeal. The Sixth and Ninth Circuits have already created a split, and pending decisions in the Second, Fourth, Seventh, and Tenth Circuits will shape its depth.

5. **State-by-state compliance remains necessary for now—and is complicated by definitional variation:**
   State enforcement actions remain pending in multiple jurisdictions notwithstanding the CFTC's offensive suits and the preliminary injunction affirmed in *Flaherty*. Nevada, Ohio, Massachusetts, Washington, Michigan, Arizona, New York, Connecticut, Minnesota, and Utah remain high-risk jurisdictions, and Arizona has brought the first criminal prosecution of a CFTC-registered prediction market operator.[67] Minnesota's statute is currently preliminarily enjoined as to CFTC-registered DCMs. Courts in Michigan and Washington have now ordered geofencing on pain of substantial daily sanctions. Compliance is

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[66] *See* Brenna Nelson, "Election Betting Is Banned in Most States. Will Prediction Markets Change That?," Nat'l Conf. of State Legislatures (Aug. 19, 2026), (reporting that "[t]hirty-two states have a statutory or constitutional restriction on betting on elections"); CME Grp., "Managing Climate Risk with CME Group Weather Futures and Options," (last visited Oct. 9, 2026) (reporting CFTC approval in 1999 of "the very first standardized weather futures contracts").

[67] Bransfield, *supra* note 49; *see also* sources cited *supra* note 34.

further complicated by the fact that states do not define gambling uniformly: They apply different tests for the "chance" element, recognize different exemptions for business transactions and commodities contracts, and classify skill-based contests inconsistently. The same event contract may satisfy one state's gambling definition and fall outside another's. Platforms should expect that a uniform compliance program will not suffice and should develop jurisdiction-specific risk assessments until the preemption question is definitively resolved.

6. **The CFTC's affirmative litigation is a significant—but not necessarily decisive—development:** By suing state gaming officials in multiple states, the CFTC has positioned itself as a litigation party. That positioning may or may not strengthen the federal preemption argument before the circuits or the Supreme Court: under *Loper Bright*, federal courts do not defer to agency statutory interpretations, though they may still accord *Skidmore* weight to well-reasoned agency views. The states will argue that the agency's shift since its June 2024 proposal reduces the weight its current position deserves.[68]

7. **Congressional action could moot large portions of the debate:** The bipartisan Prediction Markets Are Gambling Act, S. 4160, introduced in March 2026, would amend the CEA to bar DCMs from listing sports-related and casino-style event contracts and would preserve state authority over them. If enacted, the legislation would substantially narrow the preemption question and potentially obviate the need for Supreme Court review of CEA preemption for sports contracts.

Both the prediction markets and the states would benefit from greater legal clarity. That clarity could come from the U.S. Supreme Court, Congress, CFTC rulemaking, or coordinated state action. Practitioners advising clients in this space should plan for a multiyear period of legal uncertainty and should monitor all four channels.

[68] *See supra* Part V.C.iii.