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July 27, 2026

Christopher Kirkpatrick
Secretary, Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

Re: Comments related to the notice regarding Prediction Markets; Public Interest Determinations, RIN 3038-AF65, Docket No. CFTC-2026-1189, 91 Fed. Reg. 35806.

Dear Secretary Kirkpatrick,

Ohio, Kentucky, Maryland, Nevada, New Jersey, New York, Tennessee, Utah, and 36 other States submit this comment in response to the Commodity Futures Trading Commission's Notice of Proposed Rulemaking regarding potential regulation of event contracts and prediction markets. 91 Fed. Reg. 35806 (June 12, 2026). The States write to explain (1) why the CFTC lacks statutory authority for its Proposed Rule, and (2) how the Proposed Rule would be, in its current form, arbitrary and capricious under the Administrative Procedure Act, and (3) why the Proposed Rule would further violate the constitutional nondelegation doctrine if permitted by the Commodity Exchange Act. Given the infirmities with the Proposed Rule, the CFTC should reconsider and draft a new rule consistent with the Commodity Exchange Act and the Constitution.

I. The Proposed Rule exceeds the CFTC's statutory authority.

"Administrative agencies are creatures of statute" that "possess only the authority that Congress has provided." *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 595 U.S. 109, 117 (2022) (per curiam). And since "[a]gencies have only those powers given to them by Congress," they cannot write rules that conflict with what lawmakers have delegated. *West Virginia v. EPA*, 597 U.S. 697, 723 (2022). If agencies do so, courts will "hold unlawful and set aside" the agency's action. 5 U.S.C. §706(2)(A)–(C).

The CFTC in the Proposed Rule goes well beyond its statutory authority. The rule would drastically expand federal regulatory authority in an area of major economic and political consequence that States have traditionally regulated. And no clear statutory text from the Commodity Exchange Act (CEA) provides the CFTC such authority. So it violates both the major-questions doctrine and the federalism canon. Even without those textual canons, the Proposed Rule clashes with the CEA's plain text, structure, and purpose. Sports bets are not swaps, futures, or other derivatives, so the CFTC lacks statutory authority to regulate them. Sports bets serve no hedging, price-discovery, or other financial purpose consistent with financial derivatives, so they are not the type of instrument Congress envisioned would fall within the statute's reach. 7 U.S.C. §5. And the Special Rule provides no statutory basis for the CFTC to anoint itself as the Nation's sole gambling czar. 7 U.S.C. §7a-2(c)(5)(C). The Proposed Rule conflicts with the Commodity Exchange Act's plain text and goes beyond the CFTC's statutory authority.

a. The Proposed Rule would dramatically expand federal authority in an area traditionally regulated by States, violating clear-statement rules.

States have long regulated gambling—including sports bets. The federal government has not. It has instead played a more limited role. That uncontroversial—and uncontested—fact supplies the starting point in understanding the sweeping changes that would be ushered in by the CFTC's Proposed Rule. After all, federal agencies usually cannot upend the traditional federal-state balance of power. *Sackett v. EPA*, 598 U.S. 651, 679 (2023). Only Congress can do that—and only when it speaks with unmistakable language. *Ala. Ass'n of Realtors v. DHHS*, 594 U.S. 758, 764 (2021); *Bond v. United States*, 572 U.S. 844, 857 (2014).

The Proposed Rule (despite the CFTC's longstanding position to the contrary) takes a sledgehammer to the States' historic power, giving the CFTC a virtual veto over state policies. It attempts to sweep away carefully crafted state gambling frameworks so that only the CFTC may decide—from coast to coast—what gambling will be permitted, where it will take place, and how it will operate.

The Proposed Rule's own text proves the point. As the CFTC puts it, state law must be "supersede[d]" because "commodity derivatives markets require nationally uniform rules governing the listing, trading, clearing, settlement, surveillance, and enforcement of financial instruments traded in these markets." 91 Fed. Reg. 35806, 35808. The CFTC asserts that the Commodity Exchange Act "expressly preempts" state law with respect to things like sports bets. *See id.* Such "[p]reemption of state law [is] necessary," the CFTC says, "because, for decades, states had attempted to apply state gambling laws to derivatives trading." *Id.* at 35808 n.24. The Proposed Rule leaves no doubt: "state laws are preempted by the CEA as applied to event contracts traded on CFTC-registered entities." *Id.* at 35822.

Such major changes must come with clear statutory text because only unmistakable language can upend the traditional federal–state balance of power. The CEA lacks such a statement.

i. States have long regulated gambling while the federal government focused on derivatives.

To understand why the CFTC's position undermines the States' historic police powers, begin with the history.

1. The regulation of gambling is "concededly within the police powers of a state." *Ah Sin v. Wittman*, 198 U.S. 500, 505–06 (1905). Indeed, the States have a long history of gambling regulation, which traces back to before the Founding. On their way to the Americas, sailors on Columbus's ships played games of chance to pass the time. *See* George G. Fenich, A Chronology of (Legal) Gaming in the U.S., 3 UNLV Gaming Rsch. & Rev. J. 65, 66 (1996), https://perma.cc/QY6T-A4U9. But settling communities eventually outlawed such behavior. In 1638, the Puritans of Massachusetts enacted idleness laws that barred people from possessing cards, dice, or other gambling devices. *Id.* About fifty years later, the Quakers of Pennsylvania enacted a similar prohibition. *Id.* During the next century, colonies like New Hampshire and New Jersey took comparable steps. *Id.* Authorities in the Northwest Territories did, too. *Mills-Jennings of Ohio, Inc. v. Dep't of Liquor Control*, 70 Ohio St. 2d 95, 99 (1982). After the Founding, opposition to gambling continued to build. For instance, shortly after Ohio entered the Union, its legislature made various forms of gambling illegal. *Id.* And the Ohio Constitution of 1851 expressly added prohibitions on lotteries. *Id.* New Jersey, as another illustration, similarly exercised its police power to outlaw the purchase and sale of lottery tickets in 1844, N.J. Const. of 1844, art. IV, §7, ¶2, and banned all gambling by constitutional amendment in 1897. *Murphy v. NCAA*, 584 U.S. 453, 458 (2018). With these and other developments, "gambling was largely banned throughout the country" by the late 1800s. *Id.*

But in the twentieth century, many States loosened gambling prohibitions. *Id.* at 458–59. Nevada legalized casino gambling in 1931. *See* Jennifer Carelton et al., Chapter 14: Nevada, in The Gambling Law Review 147 (Carl Rohsler ed. 2016), perma.cc/3BSY-UYMZ (Carleton). And in 1976, New Jersey residents voted to amend the New Jersey Constitution and allow gambling within Atlantic City. *Murphy*, 584 U.S. at 459; N.J. Const. art. IV, §7, ¶2(D). The following year, the New Jersey Legislature implemented that constitutional amendment by enacting the Casino Control Act, N.J. Stat. Ann. §§5:12-1 to -233, which regulates casinos within Atlantic City. Ohio, for its part, legalized bingo and state-conducted lotteries in the 1970s. *Mills-Jennings of Ohio*, 70 Ohio St. 2d at 101. And, about fifteen years ago, a slim majority of Ohio voters approved a constitutional amendment allowing casino gaming. *See* Ohio Const. art. XV, §6(C). Today, forty-eight States permit some form of gambling. *See* Am. Gaming Ass'n, *State of the States 2025: The AGA Analysis of the Commercial Casino Industry*, at 12–13 (May 2025), perma.cc/J27S-WLSB.

2. Recently, the country's attention has turned to sports betting. *See Murphy*, 584 U.S. at 460–61. Like other forms of gambling, sports betting was illegal throughout the States for much of this country's history. *See id.* at 458. That began to change in the mid-twentieth century. Nevada began permitting some sports betting in 1949. *See* Carleton, *supra* at 147. Over the next few decades, other States, including Delaware and Oregon, also legalized certain forms of sports betting. Bill Bradley, *The Professional and Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474*, 2 S. Hall J. Sport L. 5, 9 (1992). In the early 1990s, Congress tried to halt sports betting's continued growth. Through the Professional and Amateur Sports Protection Act (PASPA), Congress purported to bar States from authorizing any additional sports betting. *Murphy*, 584 at 461. In *Murphy*, however, the Supreme Court held that this barrier was unconstitutional. *Id.* at 458, 486. Thus, just eight years ago, the Supreme Court determined that "Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act" as it wishes on the "controversial subject" of "sports gambling." *Id.* at 486.

The States have made different choices after *Murphy*. Eleven States—Alabama, Alaska, California, Georgia, Hawaii, Idaho, Minnesota, Oklahoma, South Carolina, Texas, and Utah—have kept sports betting illegal. *See* Am. Gaming Ass'n, *State of the States 2025*, at 12–13. Washington State has also prohibited sports betting except on tribal lands. Wash. Rev. Code §9.46.037. But most States have chosen legalization. Today, thirty-eight States, along with the District of Columbia, permit some form of sports betting.

3. The increased legalization of gambling has not left gambling unregulated. Instead, the States' "authorization of legalized gambling" over the years "has almost always been accompanied by the establishment of a corresponding regulatory regime and structure." The Nat'l Gambling Impact Study Comm'n, *Final Report*, at 3-1 (June 1999), perma.cc/UF4R-2UXH. For example, Ohio has comprehensive statutory schemes regulating the gambling it authorizes. *See, e.g.*, Ohio Rev. Code §§3769.01–.28 (horse racing), 3770.01–.99 (lotteries), 3772.01–.99 (casino gaming), 3774.01–.09 (fantasy contests), 3775.01–.99 (sports gaming). As does New Jersey. *See, e.g.*, N.J. Stat. Ann. §§5:5-22 to -206 (horse racing); 5:8-1 to -131 (games of chance); 5:9-1 to -25 (lotteries); 5:12-1 to -233 (casino gaming); 5:12A-10 to -19 (sports gaming).

These States make policy decisions related to gambling to promote the public welfare based on local judgments. That includes things like licensing, consumer protections, advertising regulations, problem-gambler limits, tax rates, and more. Different States can make different choices to match the needs and desires of their citizens. Ohio can require one licensing scheme, while New Jersey offers a different one. Taxes in Tennessee might differ from those in Nevada. State-level gaming commissions have experience dealing with and implementing these policy decisions. And state regulation of gambling "has been highly effective for consumers, states, tribes and the legal gaming industry." *NCSL Urges Congress to Address Unregulated Sports Betting via Prediction Markets*, Nat'l Conf. of State Legislatures (Jan. 29, 2026), https://perma.cc/FSU6-9SBH. Still others ban sports betting altogether. *See* Am. Gaming Ass'n, State of the States 2025, at 12–13.

4. Take New Jersey as an example. Like many States, New Jersey's laws offer many levels of protections to gamblers. Those protections include a robust licensing requirement, which protects the integrity of the industry and protects against influence from organized crime or other criminal elements. *See* N.J. Stat. Ann. §§5:12A-10, -11, -13(a). Further, New Jersey strictly regulates all gambling activities to ensure the public's continued "confidence and trust." N.J. Stat. Ann. §5:12-1(b)(6) (outlining New Jersey's public policy on gambling). A central part of New Jersey's mission is ensuring that the gaming industry is "controlled and fostered" so as to "provid[e] a substantial contribution to the general welfare, health and prosperity of the State and its inhabitants." *Id.* at (b)(1).

To that end, New Jersey requires those who conduct gaming operations to conspicuously post information about resources for problem gamblers. N.J. Stat. Ann. §5:12A-13(a)(11); N.J. Admin. Code §§13:69N-1.8(g), 13:69O-1.2(b). New Jersey law also includes various safeguards to protect against improper betting practices, including improper wagers on sports. *See, e.g.*, N.J. Stat. Ann. §§5:12A-10 to -11; N.J. Admin. Code §§13:69N-1.6 to -1.12. Of particular note, New Jersey prohibits sports wagers by referees, owners, coaches, players, or other team staff. *See* N.J. Stat. Ann. §5:12A-11(f). To protect the integrity of college sports, the State even—by constitutional amendment—prohibits wagers on college sports events taking place in New Jersey or in which a New Jersey college team participates. N.J. Const. art. IV, §7, ¶2(D). And New Jersey requires that those facilitating sports betting report suspicious activity. *See* N.J. Stat. Ann. §5:12A-11(i). Beyond that, New Jersey requires licensed operators to verify age before any wagering can occur and upholds a 21+ minimum-age standard. *See* N.J. Stat. Ann. §5:12-119.

Similar to New Jersey, Ohio prohibits companies from offering sports betting without a license. Ohio Rev. Code §3775.03(A). A company must establish that it can responsibly facilitate such gambling. *See* Ohio Rev. Code §3775.09(A)–(B). Along related lines, Ohio facilitates an exclusion program whereby people worried about their sports gambling habits may place themselves on a voluntary exclusion list. *See*

Ohio Rev. Code §3775.02(B)(11). To enforce that list, sports gaming proprietors are required to "employ commercially reasonable methods to prevent any person who is participating in the sports gaming voluntary exclusion program from engaging in sports gaming." Ohio Rev. Code §3775.13(C)(1). Tennessee has similar requirements and prohibitions. *See* Tenn. Code Ann. §§ 4-49-117 (license requirement), -119 (exclusion list licensee requirements).

As set out in Nevada's statutes, "public confidence and trust can only be maintained by strict regulation of all persons, locations, practices, associations and activities related" to the operation of gaming in Nevada. NRS 463.0129(1)(c). Therefore, all entities that conduct gaming in Nevada must "be licensed, controlled and assisted to protect the public health, safety, morals, good order and general welfare of the inhabitants of" Nevada. NRS 463.0129(1)(d). Additionally, Nevada upholds its strict regulation of gaming by requiring its patrons to be 21 years of age (NRS 463.350); by providing a patron dispute process (NRS 463.362, *et seq.)*; by prohibiting wagers placed on an event by owners, coaches, players, and officials (Nev. Gam'g Comm'n Reg. 22.1205); by taxing gross gaming revenue (NRS 463.370, *et seq.*); by requiring a rigorous investigation and licensing process for all applicants, which examines, among many other items, criminal record, associations, and financing (NRS 463.170); and by requiring reporting concerning potential match fixing or point shaving to Nevada regulatory authorities (Nev. Gam'g Comm'n Reg. 22.121). Nevada law also protects those suffering from problem gaming by requiring, among other measures, that gaming licensees let patrons set deposit limits, and "conspicuously display" information about responsible-gaming resources. Nev. Gam'g Comm. Reg. 5.225(18)(a)-(b).

New York also protects citizens through carefully tailored laws and regulations. New York regulations contain numerous consumer protections, implementing detailed measures for responsible gaming, age verification, and problem gambling prevention. For example, for those under the age of 21, New York prohibits sports betting. N.Y. Racing, Pari-Mutuel Wagering and Breeding Law §1367(1)(j), (1)(r)(x). Even advertisements that depict a person under 21 engaged in gambling activities can be unlawful, *id.* §1363(2)(c), as can promoting or advertising sports wagering on college campuses, 9 NYCRR §5329.37(e)(4).

5. While the States have long regulated gambling, the federal government has regulated financial derivatives. A "derivative" is a financial instrument the value of which depends on another more basic asset or commodity, such as the price of stocks or the cost of hogs. John C. Hull, *Options, Futures, and Other Derivatives*, 1 (8th ed. 2012). Parties use derivatives to "hedg[e]" against "risks in the economy." *Id.* A "futures contract" involves "an agreement between two parties to buy or sell an asset at a certain time in the future for a certain price." *Id.* at 7. Similarly, an "option" gives its holder the choice to buy or sell an asset by a certain date at a certain price. *Id.* Derivatives such as futures and options are traded on organized markets, often called exchanges. *Id.* at 2, 7.

The federal government has regulated financial derivatives since 1921. Initially, federal regulation focused on grain futures and set requirements for "designated contract markets" to protect against "disseminating misleading information and manipulating prices." *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 361–62 (1982). Then, in 1936, Congress increased the scope of federal regulation through the CEA, which expanded federal coverage to other agricultural commodities and set new rules against fraud on designated contract markets. *Id.* at 362. In 1974, Congress again increased federal regulation over derivative markets. It expanded federal oversight to cover non-agricultural commodities. *See id.* at 365 & n.29. And it created the CFTC to "separate the functions of the [CFTC] from those of the Securities and Exchange Commission and other regulatory agencies" and "consolidate federal regulation of commodity futures trading in" one agency. *Id.* at 365–66, 386–87. Congress gave the CFTC "exclusive jurisdiction" over agreements and transactions "involving … contracts of sale of a commodity for future delivery … traded or executed on a [designated] contract market." 7 U.S.C. §2(a). Concerned that some might overread the CFTC's power, Congress included two saving clauses in the exclusive-jurisdiction provision. The first says that "[e]xcept as … provided" within the provision, the CEA does not "limit the jurisdiction" of "regulatory authorities under the laws … of any State." §2(a)(1)(A). The second says that "[n]othing in the" provision "shall supersede or limit the jurisdiction conferred on courts of … any State." *Id.*

Congress has modified the CEA over the years. The CEA includes express preemption clauses, which block some state regulations in certain confined scenarios. *See* §16(e)(2), (h). Congress also introduced the term "excluded commodity" to address intangible commodities. *See* §1a(19)(iv). In 2000, Congress provided that the "transactions" subject to the CEA provide a "means for managing and assuming price risks, discovering prices, or disseminating pricing information." §5(a). And in 2010, through the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress expanded the CFTC's exclusive jurisdiction over certain "swaps." §2(a); §1a(47). Swaps are agreements between two parties to exchange financial obligations, such as obligations on interest payments, foreign currencies, or commodity prices, to hedge risk. *Thrifty Oil Co. v. Bank of Am. Nat'l Tr. & Sav. Ass'n*, 322 F.3d 1039, 1042–43 (9th Cir. 2003). The purpose of these amendments was to illuminate "previously dark markets in the complex derivative instruments at the heart of the [2008 financial] crisis." *Inv. Co. Inst. v. CFTC*, 891 F. Supp. 2d 162, 174 (D.D.C. 2012) (quotation omitted).

But nothing in the CEA has ever said that it covers sports gambling. As *Murphy* recognized, that role has always been left to States.

ii. The Proposed Rule violates the major questions doctrine and the federalism canon.

With that background in mind, turn to binding clear-statement rules: the major-questions doctrine and the federalism canon. Both rules require Congress to supply clear statements before handing agencies like the CFTC novel and sweeping power over issues typically left to States. *Bond v. United States*, 572 U.S. 844, 857 (2014); *West Virginia v. EPA*, 597 U.S. 697, 722–23 (2022). As explained above, sports gambling has long been a major political and economic topic regulated by States. *Murphy*, 584 U.S. at 459–60, 486. Under the major-questions doctrine, courts remain skeptical when an agency claims "broad, expansive power on an uncertain statutory basis." *Learning Res., Inc. v. Trump*, 607 U.S. 229, 242 (2026) (Robert, C.J., op.). And under the federalism canon, Congress must provide a "clear statement" to find "a significant change in the sensitive relation between" the federal and state governments in area of "traditional state authority." *Bond*, 572 U.S. at 858–59.

Sports betting checks all the clear-statement boxes. It implicates "billions of dollars" and affects "millions of people." *King v. Burwell*, 576 U.S. 473, 485 (2015); Doug Greenberg, *U.S. sports betting industry posts record $13.7B revenue for '24*, ESPN (Feb. 19, 2025), https://perma.cc/LJ7Y-DQG9 ("legal sportsbooks took nearly $150 billion worth of bets" in 2024). That falls well within the threshold for major-questions cases. *See NFIB v. OSHA*, 595 U.S. 109, 119 (2022); *Ala. Ass'n of Realtors v. DHHS*, 594 U.S. 758, 764 (2021); *West Virginia*, 597 U.S. at 714 ("billions of dollars"). CFTC-regulated sports betting would allow a federal agency to take control of a "significant portion of the American economy." *West Virginia*, 597 U.S. at 722 (quotation omitted).

Sports betting also raises important political issues. As the Supreme Court has recognized "Americans have never been of one mind about gambling," and "[s]ports gambling … has long had strong opposition." *Murphy*, 584 U.S. at 458, 460. Congress even tried to stop States from legalizing sports gambling, but the Supreme Court ruled the law unconstitutional. *See id.* And in doing so, the Court noted that "[t]he legalization of sports gambling requires an important policy choice." *Id.* at 486. *Murphy* makes plain what everyone already knows: sports gambling is a major political topic. Plus, giving the CFTC power over sports gambling upsets state-federal relations. The major-questions doctrine applies when the federal government "intrudes into an area that is the particular domain of state law" in such a way. *Ala. Ass'n of Realtors*, 594 U.S. at 764

Congress does not use "vague terms or ancillary provisions" to make such fundamental changes. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). "[I]t does not, one might say, hide elephants in mouseholes." *Id.* Nor does it smuggle away the States' power through obscure statutory definitions. But that is precisely what would occur if the CFTC took control of sports betting. Recall that Congress amended the CEA in response to the financial crisis. But Congress did not, in Dodd-Frank, legalize sports betting nationwide and crown the CFTC as the nation's gambling czar.

Indeed, the CFTC chairman at the time Congress passed Dodd-Frank "never once ever heard a member of Congress or their staffs suggest that the law they were writing, acting upon, and voting on was for our little agency, the CFTC, to have oversight over sports betting." Grant Mitchell, *Former CFTC Chair Talks Prediction Markets: "Betting On Sports is Gaming,"* COVERS (Apr. 15, 2026), https://perma.cc/MR7S-WVX8 (quoting former CFTC Chair Gary Gensler). As Gensler said in a later *amicus curiae* brief: "Nowhere in the Executive Branch's list of priorities, in *Amicus's* 54 appearances before Congress, in any statement of a member of Congress, or in the text of Dodd-Frank was there any indication Congress sought to revise sports betting regulation," especially because "Senate Majority Leader Harry Reid of Nevada would never have consented to or passively accepted legislation displacing an activity so critical to his state's economy and politics." *Former CFTC Chairman Gary Gensler's Brief as Amicus Curiae in Support of Defendants-Appellees*, p. 15, *KalshiEX LLC v. Schuler, et al.*, Case No. 26-3196 (6th Cir. 2026).

And no one thought otherwise. Indeed, eight years *after* Dodd-Frank, the Supreme Court held that States remained "free to act" on sports gambling. *Murphy*, 584 U.S. at 486. That is because Dodd-Frank was not about regulating sports bets. In fact, at the time of Dodd-Frank, sports gambling was illegal in nearly every State but Nevada. *Id.* at 462. So nothing in the CEA—not the definition of swap, or future, or commodity, or excluded commodity—covers sports betting. If it did, Congress would have said so clearly before calling into question four-dozen States' laws prohibiting unlicensed sports betting, upending traditional powers of States, and legalizing sports bets nationwide. Yet no one—not the States, not Congress, not the Supreme Court, and not even the CFTC itself—noticed.

Put simply, the "modest" CEA language cannot bear the weight placed upon it. It lacks the clear statement required to radically alter an agency's power over the national economy. *West Virginia*, 597 U.S. at 723. And moving sports-gambling regulation to the CFTC results in a "significant change in the sensitive relation between" the federal and state governments, thus triggering the federalism canon and major-questions doctrine. *Bond*, 572 U.S. at 858–59 (quotation omitted). A more straightforward answer solves this problem: sports bets are not derivatives subject to the CFTC's jurisdiction. Thus, States can continue to regulate sports wagering, while providing protections for their citizens.

iii. If the CEA permits the Proposed Rule, the CEA would implicitly repeal federal law.

Yet one more clear-statement rule cuts against the Proposed Rule here: the rule against implied repeals. That rule imposes on courts a "duty to interpret Congress's statutes as a harmonious whole." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 502 (2018). Courts thus employ a strong presumption against implied repeals. *Id.* at 510.

The CFTC's Proposed Rule would impliedly repeal both the Wire Act and the Indian Gaming Regulatory Act. The Wire Act of 1961 prohibits the interstate transmission of (1) "bets or wagers" and of (2) "information assisting in the placing of bets or wagers" that are "on any sporting event or contest." 18 U.S.C. §1084(a). The Act contains a safe harbor, but it does not allow the transmission of sports wagers themselves, even if such wagers are legal in both states; in such circumstances it only allows the transmission of information assisting the placing of the wagers. *See United States v. Lyons*, 740 F.3d 702, 713 (1st Cir. 2014); *United States v. Cohen*, 260 F.3d 68, 75 (2d Cir. 2001).

The Wire Act was considered on the heels of one of the nation's worst fixing scandals involving college basketball games. As the five sports leagues (NCAA, NBA, NFL, NHL, MLB) told Congress in 2009: "Nearly 50 years ago, Attorney General Robert Kennedy proposed legislation that criminalized interstate sports wagering. Enacted as the 1961 Wire Act, this unambiguous ban has been the bedrock of federal sports betting policy." Ryan Rodenberg, *The Wire Act of 1961: When the Internet Met the 'Bedrock' Federal Sports Betting Law*, SPORTSHANDLE (Mar. 2, 2018), https://perma.cc/VEB8-XZZY.

Thus, federal law prohibited both interstate sports wagering through the Wire Act and prohibited the States from further legalizing sports betting through PASPA at the time Dodd-Frank was enacted. *Murphy*, 584 U.S. at 461. There is no reason to think Congress wanted Dodd-Frank to repeal these prohibitions. After all, Dodd-Frank targeted the 2008 Financial Crisis, not sports betting and gambling. Congress did not impliedly repeal the Wire Act and PASPA and legalize sports wagering when it enacted a statute aimed at curbing the causes of the 2008 Financial Crisis. But, under the CFTC's Proposed Rule, that is what Congress did. That makes no sense. The result of *Murphy* is not that the CFTC is the nation's sole gaming regulator, but rather that interstate sports wagers are still prohibited under the Wire Act and states may again choose to regulate sports betting. Along similar lines, the Indian Gaming Regulatory Act gives Tribes the "exclusive right" to decide their policies with respect to Indian gaming activity on Indian lands. *See* 25 U.S.C. §2701(5). But if the CFTC truly calls the shots, that right vanishes as to sports betting too.

b. The CEA does not grant the CFTC power to regulate sports betting.

Clear-statement rules aside, the CEA's text provides no statutory hook for the Proposed Rule. Sports bets are not financial derivatives, and the CEA does not preempt state law. So the CFTC cannot regulate sports bets under the CEA.

i. Sports bets are not financial derivatives.

The CFTC regulates financial derivatives such as certain swaps and futures contracts. The Proposed Rule notes that event contracts listed on contract markets designated by the CFTC ("designated contract markets" or "DCMs") can be either swaps or futures. 91 Fed. Reg. at 35808. But sports bets are not financial derivatives at all.

No hedging or price-discovery. To see why, start with the basics. Derivatives are financial instruments that can be used for price discovery or to hedge against economic risks. *See* Hull, *Derivatives*, 1. The CEA embraces that notion. It says that the "transactions subject to" its terms are those that provide "a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading." §5(a). And it directs the CFTC to, before promulgating regulations, consider (among other things) "price discovery," and "sound risk management practices." §19(a)(2). So contracts offered on a DCM—futures, options, swaps, or otherwise—are largely meant to serve the purposes offered by derivatives: hedging and price discovery. Sports event contracts do no such thing. They are not financial derivatives. They are not swaps. They are simply bets. In fact, sports wagering always has been for entertainment, and to cast such activity as a financial consideration or instrument—or even an investment—is not only wrong, it is dangerous.

The Proposed Rule expands the CFTC's power well beyond the purposes of §5 and the scope of traditional derivatives. Instead of asking whether event contracts provide hedging or price-information purposes, the Proposed Rule says sports bets serve general *informational purposes* to the market, including the likelihood that a certain team wins. But that is not what the CEA contemplates or what derivatives look like.

Consider how the Proposed Rule describes the role played by event contracts, including sports bets as purported "event contracts." It says that event contracts "provide economically useful or otherwise meaningful information and are a source of responsible financial innovation." 91 Fed. Reg. at 35807. They "function as information aggregation vehicles because event contract prices reflect the market participants' aggregate beliefs regarding whether the events will occur." *Id.* at 35829 (quotation omitted). So an event contract, the Proposed Rule says, is used "to reflect informed market sentiment." *Id.* at 35831. The Proposed Rule thus "considers the economic, financial, and commercial significance of prediction market pricing as an input into economic decision-making—including how aggregated market sentiment may inform commercial planning, resource allocation, and assessments of economic conditions." *Id.* at 35845. All it takes is any "information aggregation utility" for an event contract to be a derivative. *Id.* at 35848–49. Indeed, the Proposed Rule recognizes that event contracts may be based on "input variables to broader economic models" and are "not solely direct hedges." *Id.* at 35848. And "aggregated prices on sports outcomes can inform *downstream* decisions by sponsors, broadcasters, advertisers, or local businesses, even absent a one-for-one hedge." *Id.* The Proposed Rule says that "so long as there is a sufficient volume of event contracts about an underlying event or issue, they can serve as price discovery tools by indicating what the market or the general public thinks about the underlying events or issues." *Id.* at 35830. The Proposed Rule fails to define what constitutes a "sufficient volume" of event contracts to satisfy this test.

These alleged features of event contracts do not make them derivatives. The CEA—through §5 or elsewhere—does not include "market sentiment" or other informational purposes, inputs for economic models, aggregation of "sufficient" event contracts, or other economic information as the proper basis of derivatives or in the CFTC's jurisdiction at all. Financial instruments subject to CFTC jurisdiction are limited. Recall that the CEA applies to derivatives that "manag[e] … price risks, discover[] prices, or disseminat[e] pricing information." 7 U.S.C. §5(a). Instruments that do not serve those purposes are simply not derivatives at all. The CEA does not consider "downstream" effects of "aggregated prices" of sports games. Sports bets serve no hedging purpose or price-information gathering role. So they cannot fall within the CEA's reach, and the Proposed Rule thus goes beyond the CFTC's statutory authority. At the very least, the CFTC's failure to consider whether sports bets serve hedging or price-discovery functions would render the rule, as it stands, arbitrary and capricious in violation of the APA.

It is difficult to ascertain what market underlies sports wagers to begin with. What, for example, is the derivatives market for LeBron James rebounds? Sports events are readily subject to manipulation when gambling is involved, having seen their fair share of betting scandals. In studying college football and basketball, historian Albert J. Figone finds that game rigging has been pervasive throughout most of sports' history. ALBERT J. FIGONE, CHEATING THE SPREAD: GAMBLERS, POINT SHAVERS, AND GAME FIXERS IN COLLEGE FOOTBALL AND BASKETBALL xi–xv (2012). Recently, dozens of people—including current and former NBA players—were allegedly involved in illegal bets on professional basketball games. Santul Nerkar et al., *U.S. Charges N.B.A. Coach and Players in Gambling Schemes*, The New York Times (Oct. 23, 2025), https://perma.cc/D9SU-7BVU; *see also* Chloe Atkins, et al., *Former NBA players Malik Beasley, Ed Davis indicted in gambling probe*, NBC News (June 29, 2026), https://perma.cc/CLH3-KBWY. Baseball has seen controversy, too. A pitcher allegedly manipulated his pitches to win certain bets. *See* Ryan Morik, *Ohio governor calls for an end to player prop betting amid investigation into Guardians pitchers*, Fox Business (July 31, 2025), perma.cc/CA26-SA28. Before that, gamblers even threatened a coach of the Cleveland Cavaliers. *See* Tom Withers, *Cavs coach Bickerstaff says he received threats from gamblers, feels sports betting "gone too far,"* AP News (Mar. 20, 2024), perma.cc/4KR5-3F56. The CFTC in the Proposed rule tacitly acknowledges this manipulation problem. *See* 91 Fed. Reg at 35837 n.256. Sports wagers are categorically different than the derivatives markets covered by the CEA.

Not swaps. Moreover, sports bets do not fall within the definitions of derivatives traded on DCMs: swaps or futures. *See* 91 Fed. Reg. at 35808. The CEA contains six different parts to the "swap" definition. 7 U.S.C. §1a(47)(A). Sports bets meet none of those definitions. But the second is most directly at issue:

> [T]he term "swap" means any agreement, contract, or transaction … (ii) that provides for any purchase, sale, payment, or delivery (other than a dividend on an equity security) 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.

§1a(47)(A)(ii). Contracts must satisfy two conditions to be swaps under this definition. They must depend on the occurrence of something that is "associated with a potential financial, economic, or commercial consequence." *Id.* And the occurrence must be significant enough to be classified as "an event." *Id.* Sports bets contemplated by the Proposed Rule satisfy neither condition.

1. *Economic consequences*. "Swaps" must turn on the "occurrence" of an "event" "associated with" potential economic consequences. The critical statutory phrase is "associated with." §1a(47)(A)(ii). To "associate" means to naturally "connect" or "join" things together. Webster's New World Dictionary 83 (3rd College ed. 1988). The statutory definition thus refers to events that bear a close or inherent relationship to potential economic consequences.

The term "associated with" is often used interchangeably with "related to." *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992); *see also Chevron USA Inc. v. Plaquemines Par.*, 146 S. Ct. 1052, 1061 (2026). And because "the good textualist is not a literalist," *id.* (quotation omitted), courts cannot read "associated with" to be so broad as to be "meaningless," *id.* at 1060. After all, "everything" is associated with "everything else" in some loose sense. *Id.* at 1060–61 (quotation omitted). But that is not what Congress meant in the CEA. Instead, the more natural reading requires "a connection that is not tenuous, remote, or peripheral," but a "close relationship between" the purposed event and the potential economic consequences. *Id.* at 1061 (quotation omitted).

Sports bets (or sports events contracts) are not sufficiently connected to economic consequences. A game's final score is not an economic device people use for price discovery or to hedge against economic risk. *Contra* §5(a). The Proposed Rule barely even attempts to show sufficient economic consequences from sports bets. And nowhere in the Proposed Rule does the CFTC even *attempt* to explain how multi-leg parlays or obscure "prop" bets are associated with sufficient economic consequences. Nobody outside the sports-betting world uses such arbitrary sports bets (like whether Lebron James will score more than 20 points on Tuesday, or whether Ohio State and Michigan will combine for more than 50.5 points) to protect against financial risks. There is no meaningful economic consequence to those occurrences alone. Yet, those types of bets routinely appear on DCMs today. But because these lack any economic consequences, the CFTC's Proposed Rule should bar such contracts from DCMs.

2. *Outcomes, not events*. Next up in the statute: "event." Not everything counts as an event, as shown by the statute's use of both "occurrence" and "event." *See Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 86 (2017) (when Congress uses different words in a statute they presumably have distinct meanings). "[O]ccurrence is the general word for anything that happens or takes place." Webster's New World Dictionary 937 (3rd College ed. 1988). An "event" is also "an occurrence," but one of greater "relative significance." *Id.* Thus, an event is "a noteworthy occurrence." Webster's Third New International Dictionary 788 (2002). The word "event" therefore limits the word "occurrence." That makes sense: if swaps could be about anything that happens (no matter how unimportant), swaps would cease to be meaningful financial instruments. *Contra* §5(a).

In effect, the statutory definition forces readers to distinguish between things that happen (occurrences) and things that are particularly noteworthy (events). Such line drawing is simple for sports. When people discuss a sporting event, they are ordinarily referring to "a particular contest" (like a baseball game), not to isolated occurrences within the contest (like each pitch or run scored). *See* Webster's New World Dictionary 471 (3rd College ed. 1988).

The statutory definition does not say that "swaps" capture the occurrence of an "outcome." "Outcome" has a more specific meaning than the word "event." It normally refers to a "result" that "comes out of or follows an activity." Webster's Third New International Dictionary 1601 (2002). For a contract to be a swap, the contract's payment must depend on whether that identified "event" itself occurs. §1a(47)(A)(ii). A contract that takes as a given that an event is going to occur, and instead depends on the outcome of the event, does not satisfy the definition. In common usage, people do not ordinarily refer to Kentucky beating Tennessee by more than 10.5 points as an "event." And they certainly do not refer to hitting on every leg of a multi-pronged parlay as an "event."

The CFTC in the Proposed Rule does nothing to grapple with the difference between occurrence and event—and at times seems to treat the terms as interchangeable. *E.g.*, 91 Fed. Reg. at 35807 n.1; *id.* at 35821. But Congress uses different terms for a reason, and the definition of "swap" requires the occurrence of an event—not just an "occurrence." The CFTC in the Proposed Rule does not engage in any analysis on this distinction, and instead improperly ignores that the plain text requires more than an everyday occurrence. It requires an "event." And sports bets are based on *outcomes*, not events, so they are not swaps.

Not futures contracts. Nor is a sports bet a contract for future delivery of a commodity or commodity futures contracts covered by the CEA. A "contract of sale of a commodity for future delivery" is an agreement to sell "a commodity" that can be delivered, and "commodity" covers only "goods," "articles," "services, rights, and interests … in which contracts for future delivery are presently or in the future dealt in." 7 U.S.C. §1a(9). This tracks the CEA's core concern, which was regulating "[f]utures trading"—"purchases and sales of contracts for delivery at some future date of certain *quantities of specified commodities* at fixed prices." S. Rep. 93-1131, 1974 U.S.C.C.A.N. 5843, 5856 (1974) (emphasis added); *see, e.g.*, *Futures Contract*, Black's Law Dictionary (12th ed. 2024) ("An agreement to buy or sell a standardized *asset* (such as a commodity, stock, or foreign currency) at a fixed price at a future time, usu. during a particular time of a month." (emphasis added)). The outcome of a sports game is not a "good," "article," "service," "right," or "interest" that can be "delivered" by a contract. It is not a futures contract.

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In sum, sports bets are placed for recreation or entertainment, not as financial derivatives. The CFTC did not conduct the proper statutory analysis. It instead assumes that because the Special Rule refers to "gaming" and "event contracts," sports bets can be regulated by the CFTC. That is wrong. The CFTC lacks jurisdiction over sports bets because they are not financial derivatives.

ii. The Commodity Exchange Act does not preempt state law.

Even if sports bets were somehow "swaps" or "futures," the CEA does not preempt state law. The Proposed Rule says otherwise, but it is wrong. *See* 91 Fed. Reg. at 35808 & n.19, n.24; *id.* at 35822. Section 2(a)(1)'s "exclusive jurisdiction" language was meant to separate functions of the CFTC from the Securities and Exchange Commission and other regulatory agencies. *Curran*, 456 U.S. at 386. It was not meant to preempt "a patchwork of 50 state regulations" or States' long-ago equating of futures trading with gambling, and legislative history cited by the Proposed Rule simply does not say otherwise. *See* 91 Fed. Reg, at 35808 & n.24; Kevin T. Van Wart, *Preemption and the Commodity Exchange Act*, 58 Chi.-Kent L. Rev. 657, 671, 673, 676–77 (1982) (explaining that States' commodity futures regulation was "almost nonexistent" when Congress created the CFTC in 1974 other than recent application of securities laws). Simply put, "Congress did not intend to preempt the field of futures trading" through §2. *Am. Ag. Mov't, Inc. v. Bd. of Trade of City of Chi.*, 977 F.2d 1147, 1155 (7th Cir. 1992). And no case, to the States' knowledge, has ever held that the CEA *expressly* preempts all state law. For good reason: the text of §2 "would represent an unusual express-preemption provision." *KalshiEX LLC v. Schuler*, 2026 WL 1295806, at *4 (6th Cir. 2026).

Congress speaks more directly through the "typical" express-preemption provision. *Id.* (discussing examples); *see also* 30 U.S.C. §1254(a), (g) (conferring "exclusive jurisdiction" to an agency but then separately "preempt[ing]" state law). That is especially so here where the CEA contains two saving clauses preserving state regulatory authority, 7 U.S.C. §2(a)(1)(A), and express preemption clauses for other financial instruments not relevant here, *id.* §16(e)(2), (h); §27f(b). Congress knew how to expressly preempt state law. It failed to do so in §2(a).

Yet, the CFTC assumes that the CEA preempts state gambling law and that the CFTC can pick and choose what contracts may be traded. But, as explained above, States have historically regulated gambling. The CFTC cannot push aside that historic power and claim for itself the authority to regulate gambling through swaps or futures, even if sports bets could qualify as either. As written, the Proposed Rule fails to appreciate the statutory text and the proper preemption analysis.

c. **The CFTC misinterprets the Special Rule and fails to consider important factors rendering its Rule, as proposed, arbitrary and capricious.**

The Proposed Rule further hinges on a strained interpretation of the Special Rule governing event contracts. 7 U.S.C. §7a-2(c)(5). The CFTC's Proposed Rule is inconsistent with the Special Rule's text. That statutory provision serves as a limitation to ensure that otherwise-unlawful event contracts are not traded on DCMs. Yet, the CFTC's Proposed Rule would turn the Special Rule into an affirmative grant of power to issue rulemaking, bringing sports bets within the CFTC's jurisdiction.

But Congress itself recognized at the time it added the Special Rule that the CEA does not allow sports gambling on contract markets. In a colloquy between Senators Lincoln and Feinstein, Senator Lincoln—the author of the Special Rule—noted that the CEA should not allow "gambling through supposed 'event contracts,'" including "gaming contract[s]," which are, as Senator Feinstein put it, "used predominantly by speculators or participants not having a commercial or hedging interest." *See* 156 Cong. Rec. S5902, S5906–07 (daily ed. July 15, 2010). Senator Lincoln then explicitly pointed to the Special Rule's public interest role in preventing sports gambling on "the Super Bowl, the Kentucky Derby, and Masters Golf Tournament," which "would not serve any real commercial purpose" and "would be used solely for gambling." *Id.*

As Congress recognized, the Special Rule was in place to *prevent* sports bets from occurring on DCMs. Yet, the Proposed Rule uses the Special Rule to affirmatively allow sports bets. And to do so, the Proposed Rule mangles the Special Rule's text.

The Special Rule's full text is:

> In connection with the listing of agreements, contracts, transactions, or swaps in excluded commodities that are based upon the occurrence, extent of an occurrence, or contingency (other than a change in the price, rate, value, or levels of a commodity described in section 1a(2)(i) of this title), by a designated contract market or swap execution facility, the Commission may determine that such agreements, contracts, or transactions are contrary to the public interest if the agreements, contracts, or transactions involve—
>
> **(I)** activity that is unlawful under any Federal or State law;
> **(II)** terrorism;
> **(III)** assassination;

(IV) war;
(V) gaming; or
(VI) other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest.

7 U.S.C. §7a-2(c)(5)(C)(i).

The Proposed Rule interprets three distinct parts of the statutory text: "involve," "gaming," and "public interest." The CFTC's interpretation of each exceeds statutory authority and would, in its current form, otherwise be arbitrary and capricious.

"Involve." The CFTC in the Proposed Rule says event contracts "involve an activity if their settlement is determined by an occurrence, extent of an occurrence, or contingency *in the activity*." 91 Fed. Reg. at 35818 (emphasis added); *id.* at 35821; *id.* at 35846; *id.* at 35859. In other words, "it is the underlying activity that is the subject of 'involve.'" *Id.* at 35821. So the "inquiry" for whether an event contract "involves" an enumerated activity, the CFTC says, "focuse[s] on the event underlying the contract"—not the contract as a whole. *Id.* at 35822. And the "settlement-determining occurrence" must itself involve the enumerated activities. *Id.* at 35824.

That tortured reading of "involve" runs counter to plain statutory text. The statute says that the Special Rule applies when the *agreement* involves the enumerated activity—not that *occurrence* involves the enumerated activity. The text is straightforward: the Special Rule applies when the "agreements … *involve* … gaming" or other listed activities. 7 U.S.C. §7a-2(c)(5)(C). Yet, the Proposed Rule requires the *occurrence* itself to "involve" an enumerated activity, a reading entirely divorced from the text. The CFTC further contends that "[a]n interpretation that treats 'involve' as applying to the event contract itself (as distinct from the underlying occurrence) would render 'based upon' superfluous." 91 Fed. Reg. at 35821.

That reading is backwards. Analyzing an event contract under the Special Rule includes at least two steps. First, the agreement must be "based upon" a particular "occurrence." The Special Rule does not describe or say what the "occurrence" must entail. If an agreement is "based upon" an "occurrence," the Special Rule then asks whether the agreement *also* "involve[s]" certain enumerated activities (such as war or gaming). But nothing in the Special Rule says the occurrence itself must involve the enumerated activities. The Proposed Rule collapses this statutory text and would exclude contracts from the Special Rule if the "settlement-determining occurrence" does not involve an enumerated activity.

The CFTC's own examples underscore the problem with the CFTC's interpretation. Under the Proposed Rule, an event contract does not "involve" unlawful activity so long as the "settlement-determining occurrence is the entry of a judgment of conviction by the court," as opposed to the act of committing a crime itself. 91 Fed. Reg. at 35823. So an event contract asking whether Person X will be murdered "involves" unlawful activity covered by the Special Rule, but an event contract asking whether someone will be *convicted* of murdering Person X does *not* "involve" unlawful activity. *Id.* That approach is inconsistent with the Special Rule's text, which requires only that contracts "involve" enumerated activities. The Proposed Rule—without explanation—makes up a new requirement that contracts *settle* on the occurrence of the enumerated activities. There is simply nothing in the text—and no explanation in the Proposed Rule—supporting the CFTC's view that a contract does not "involve" such activity when "the event contract's settlement is determined by" something other "than by the underlying conduct itself." 91 Fed. Reg. at 35823.

Finally, the CFTC's "settlement-determining event" test is arbitrary, as the CFTC fails to adequately consider alternatives or explain how its definition serves the CEA's purposes. Instead, the CFTC's previous position that only the *agreement* must generally involve gaming is the correct interpretation.

"Gaming" is gambling. "The Proposal defines gaming as "any activity that: (i) one or more participants typically engage in for purposes of recreation or to entertain others; (ii) is governed by rules; and (iii) includes measurable occurrences or outcomes that depend on the participants' luck, skill, or athletic ability during the activity." 91 Fed. Reg. at 35818. The Proposed Rule further explains that "gaming" "does not include all activities that constitute the staking of money on a contingency, but rather only such activities that are games—*i.e.*, have a recreational or entertainment purpose." *Id.* at 35822 n.182. "Gaming is the game itself—the activity that occurs." *Id.* at 35825. So, the CFTC concludes, "the definition of gaming in §40.11 should be limited to activities that are games." *Id.* at 35826.

In creating that definition, the CFTC ignored the common understanding of the word "gaming," overlooked the plain meaning, and took a view of the word to permit sports betting and other gambling contracts on DCMs. The Proposed Rule "derived th[e] definition from dictionary definitions of the term 'game'" to "capture the activities that are games in common parlance." *Id.* at 35825. But there is no reason to limit "gaming" to only games—as opposed to the ordinary definition of gaming.

And there is no doubt about the common definition of gaming: across statutes, dictionaries, and other sources, gaming is *gambling*. In Ohio, "sports gaming" "means the business of accepting wagers on sporting events." Ohio Rev. Code §3775.01(O)(1). Other States use similar definitions. *See* Md. Code, State Gov't § 9-1E-01(j) ("the business of accepting wagers on any sporting event by any system or method of wagering"); N.J. Stat. Ann. §5:12-22. In federal statutes, "gaming activity" means gambling activity. *E.g., Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 785–86 (2014) (discussing the Indian Gaming Regulatory Act); *id.* at 792 ("the gaming activity is the gambling"). The Wire Act appears in Title 18, Chapter 50 ("Gambling") of the United States Code, which provides that a "gambling establishment" is "any common gaming or gambling establishment operated for the purpose of gaming or gambling, including accepting, recording, or registering bets." 18 U.S.C. §1081. The Wire Act itself, in prohibiting interstate transmission of bets or wagers "or information assisting in the placing of bets or wagers on any sporting event or contest" also references the transmission or receipt of "gambling information." *Id.* §1084(d). Similarly, the Indian Gaming Regulatory Act, divides gambling into three classes, each of which is referred to as "gaming." 25 U.S.C. § 2703(6)-(8) (defining Class I gaming as "social games solely for prizes of minimal value or traditional forms of Indian gaming", Class II gaming as bingo and certain card games, and Class III gaming as "all forms of gaming that are not Class I or Class II."). Finally, the Unlawful Internet *Gambling* Act defines a "bet or wager" as "the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a *game* subject to chance." 31 U.S.C. § 5362(1)(A) (emphasis added). When Congress has spoken about "gambling," the term has been synonymous with "gaming." Dictionaries say the same thing. *See Gambling*, Black's Law Dictionary (12th ed. 2024) (explaining that "gambling" is "[a]lso termed gaming."); "Gaming," Dictionary.com https://perma.cc/QL87-DA26 (defining "gaming" as "gambling"); Webster's New World Dictionary 554 (3rd College ed. 1988) (defining gaming as "the act or practice of gambling").

For more than a century, authorities have recognized that "'[g]aming' and 'gambling' mean substantially the same thing." *Hayes v. Palmer*, 21 App. D.C. 450, 458 (D.C. 1903). That includes the CFTC itself. In a prior rulemaking, the CFTC "recognize[d] … that the terms 'gaming' and 'gambling' are used interchangeably in common usage and dictionary definitions." 89 Fed. Reg. 48968, 48975 (June 10, 2024). As the Proposed Rule notes, in prior CFTC orders, the CFTC "reasoned that the term 'gaming'" was "equated with the term 'gambling'" or that "'gaming' means gambling." 91 Fed. Reg. at 35816. And even in the Proposed Rule, the CFTC refers to state-regulated gambling operations like sportsbooks as "gaming" companies that offer "sports gambling." *Id.* at 35807 n.6

For another example, take the CEA itself. Under §16(e)(2), some state "gaming" laws are preempted. If "gaming" means only "activities that are games," then §16(e)(2) covers only laws about games—not gambling. *Dept. of Rev. of Ore. v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994) ("identical words used in different parts of the same act are intended to have the same meaning"). Yet, the CFTC has argued in recent litigation that §16(e)(2) "preempt[s] the application of *state gambling* … laws as applied to OTC swap transactions." *See* CFTC Amicus Br., *Massachusetts v. KalshiEx LLC*, No. SJC-13906 at 21 (Mass. Apr. 24, 2026) (emphasis added); *see also* CFTC Amicus Br., *N. Am. Derivatives Exch., Inc. v. Nevada*, No. 25-7187, Dkt. No. 37.2 at 12 (9th Cir. Feb. 17, 2026) (arguing that §16(e)(2)'s "gaming" language was intended "to preempt the application of *state gambling* … laws as applied to OTC derivatives (swap) transactions" (emphasis added)). According to the CFTC, then, "gaming" as used in the CEA can *sometimes* mean gambling—but only when that reading supports the CFTC's position.

Summed up, all authorities support the same conclusion: gaming means gambling. The Proposed Rule botches this ordinary meaning. In doing so, the Proposed Rule intentionally permits sports betting on prediction markets. For example, the Proposed Rule says that bets about who wins the Most Valuable Player or Cy Young awards are not "gaming" even though they turn on player performance. 91 Fed. Reg. at 35826. But that contract is pure gambling and thus covered by "gaming" contemplated by the Special Rule. Thus, the CFTC's rewriting of the statute exceeds the CFTC's authority. And at the very least, the CFTC's failure to consider other definitions of gambling or explain the distinctions drawn between "games" and non-games would be arbitrary and capricious.

"Public interest." The Special Rule covers agreements that "are contrary to the public interest." 7 U.S.C. §7a-2(c)(5)(C)(i). Although part of the Proposed Rule uses public-interest factors identified by statute such as hedging, price discovery, and price information in §5, *see* 91 Fed. Reg. at 35859 (listing factors in proposed §40.11(a)(5)), the CFTC has also identified atextual factors in proposed §40.11(a)(6), *see* 91 Fed. Reg. at 35860.

The CFTC is explicit that it believes it can create public-interest factors from outside the CEA's text. The Proposed Rule says that the CEA's text "is not the Commission's exclusive consideration." 91 Fed. Reg. at 35828. "Neither CEA section 3 nor the Special Rule," the CFTC asserts, "*limits* the Commission's ability to consider additional public-interest factors beyond" the statute's text. *Id.*

The CFTC apparently believes that the "public interest" standard allows it to reach beyond the four corners of the CEA. But that runs headlong into how courts treat statutes giving agencies power to regulate in the "public interest." As the Supreme Court recently explained, "we have long held that the words 'public interest' in a regulatory statute do not encompass the general public welfare but rather take meaning from the purposes of the regulatory legislation." *FCC v. Consumers' Rsch.*, 606 U.S. 656, 690 (2025) (quotation omitted). In statutory text, "public interest" is not "a mere general reference to public welfare without any standard to guide determinations." *NBC v. United States*, 319 U.S. 190, 226 (1943). Of course, as with any statutory text, the meaning of "public interest" must be discerned not "in isolation but instead" from "statutory contexts." *Consumers' Rsch.*, 606 U.S. at 684.

The upshot is that the Special Rule's "public interest" determination must be drawn from statutory text, context, and purposes. The CEA supplies what is needed. Section 5 provides general public-interest factors (e.g., hedging and price discovery), 7 U.S.C. §5, while the Special Rule's enumerated categories provide specific contexts in which other public-interest factors may be applied. For example, contracts involving "war" would consider include war-related public-interest factors. And for contracts involving "gaming," the CFTC can look to gambling-related factors.

But the Proposed Rule omits many statutory considerations and makes up others. For example, even though §5 gives specific public interests such as hedging, the Proposed Rule says "it is not necessary to demonstrate that event contracts have a reasonable potential for a hedging or pricing function to avoid a finding that the event contracts are contrary to the public interest." 91 Fed. Reg. at 35829. The CFTC further says that "whether event contracts can be used directly for hedging is of limited importance in the public interest determination." *Id.* at 35830. And even "if a small group of event contracts *do not appear to convey any meaningful information*, the Commission would still consider whether the event contracts convey meaningful information when combined with or *compared to other event contracts*." *Id.* at 35831 (emphases added). This aggregation rule has no basis in statutory text or basic principles of derivatives. The CFTC says event contracts will be against the public interest only when they "lack the potential to inform *any* economic, commercial or financial decisions." *Id.* at 35830 (emphasis added). So long as there is some possible and attenuated connection to economic decisions, the CFTC says, they serve the public interest. *Id.*

This approach throws §5 out the window (by discarding enumerated considerations like hedging and price discovery) and creates an aggregation principle found nowhere in the text. And the factors in proposed §40.11(a)(6), *see* 91 Fed. Reg. at 35860, have little connection to the statute. For example, proposed §40.11(a)(6)(iii)(A)(1) considers "aggregate outcome" as a positive factor. 91 Fed. Reg. at 35860. If an agreement turns on the "aggregate outcome" of multiple "win–loss results," "point differentials," game outcomes, or various other bets, the CFTC would weigh that fact in favor of the contract (that is, the contract is *not* against the public interest). *Id.* But no statutory text supports this factor—it is simply pulled from the air with no "standard to guide [the] determination[]." *NBC*, 319 U.S. at 226. So too for many of the proposed factors, such as "individual statistical performance," which the CFTC would view as *in favor of* the public interest. *Id.* The CFTC has, on its own admission, strayed from the statutory text, 91 Fed. Reg. at 35828 (the CFTC can consider factors "beyond" the text)—and it shows. But the public interest analysis *must* derive from the CEA. The Proposed Rule does not.

In the gaming context, these atextual considerations result in public interest factors with no rational basis. For example, the Proposed Rule attempts to distinguish between games of skill and luck based on the latter's lack of informational value for forecasting. *See* 91 Fed. Reg. at 35835. In so doing, the Commission appears to indicate that traditional casino games like poker, which involves elements of both, may not be against the public interest. This distinction has no basis in law. Importantly, the whole distinction is based on information aggregation considerations that, as noted above (at 22), do not appear anywhere in §5 or the rest of the CEA. Moreover, the Proposed Rule fails to consider many of the negative consequences or harms associated with gambling—including gambling addiction, teenage gambling, and ensuring confidence in gambling businesses. *See* Below at 24–28 (discussing harms). Those are the types of public-interest factors associated with gaming—harms that States routinely address through state law. The CFTC utterly ignores them by claiming that "gaming" does not mean "gambling." But it does, so the CFTC must consider many of the harms associated with gambling and the CFTC's lack of expertise in regulating gambling in its rulemaking. And that is precisely what the CFTC did when it proposed an event contracts rule in 2024. 89 Fed. Reg. 48968, 48982–83.

But this Proposed Rule treats statutory text as an afterthought. And the public interest inquiry disregards statutory text, context, and purpose, thus exceeding the CFTC's authority. The public-interest factors are also arbitrary and capricious because the CFTC failed to consider large aspects of the problems related to gambling or consider alternative public-interest factors.

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At every turn in the Proposed Rule, the CFTC exceeds its statutory authority, fails to consider important aspects of the issue, or otherwise falls short of reasoned decisionmaking. Yet, for even more reasons explained below, the CFTC's proposed rulemaking, if finalized, is arbitrary and capricious.

II. As proposed, this Rule is otherwise arbitrary and capricious.

"Federal administrative agencies are required to engage in reasoned decisionmaking." *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (quotation omitted). So whenever they issue rules, agencies must "give adequate reasons for [their] decisions." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016). This adequate-reasons requirement is otherwise known as arbitrary-and-capricious review under the Administrative Procedure Act. *Id.*; 5 U.S.C. §706(2)(A). Agencies flunk the APA's arbitrary-and-capricious standard when, among other things, they (1) fail to consider relevant factors, (2) rely on factors Congress did not intend, (3) fail to consider an important aspect of the problem, (4) offer an explanation for a decision that runs counter to evidence before the agency, or (5) adopt an implausible result that "could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicles Man'fs Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). To survive arbitrary-and-capricious review, then, an agency must articulate "a rational connection between the facts found and the choice made." *Ohio v. EPA*, 603 U.S. 279, 292 (2024) (quotation omitted).

The CFTC's rule, if finalized as is, would fall short of these standards. The Proposed Rule ignores the effects of nationalized legal gambling, overlooks the effects on States and their citizens, does not adequately consider costs, and ignores entirely reliance interests despite a clear change in position. That is arbitrary and capricious.

a. The CFTC has not considered the Rule's effect on States, their citizens, and businesses.

As explained above (at 3–6), the States historically regulated gambling and sports betting, something the Supreme Court recently reaffirmed. *Murphy,* 584 U.S. at 486. States take a variety of approaches to regulate gambling. Above at 4–6. Those laws provide clarity to businesses and protect state citizens. But the CFTC's Proposed Rule threatens these protections, undermines state laws, and harms the well-being of businesses and citizens.

Harms to the States' citizens. Under the Proposed Rule, one thing is clear: the CFTC failed to consider State regulation of sports gambling and gambling-related risks. For tens of millions of citizens in States where most forms of gambling are illegal, the Proposed Rule injects confusion by suggesting that those citizens will now have unfettered access to precisely the same bets the States have sought to stop. And in many other States where gambling is regulated, the Proposed Rule injects confusion by suggesting that gambling will be made easier to access, with no protections for those at risk. For example, many States limit gambling to those 21 and older. The Proposed Rule does not address age limits and would allow 18-year-olds to gamble on prediction markets.

State laws are necessary to protect these citizens. Gambling has grown exponentially in recent years. And the popularity of sports gambling has exploded, resulting in almost $150 billion wagered in 2024 alone. Brandon Gustafson, *2024: A year of growth for sports betting revenue,* CBS Sports (Mar. 28, 2025), https://perma.cc/K4XA-JQG9. While some use sports betting as mere entertainment, gambling is dangerous for many. Millions of Americans qualify as problematic or pathological gamblers. *See* National Gambling Impact Study Commission Final Report, *Chapter 4: Problem and Pathological Gambling*, 4-1 (1999), https://perma.cc/NDE6-GRQK; Charita M. Goshay, *Ohio offers Voluntary Exclusion List for problem gamblers as calls to helpline rise*, Canton Repository (Sept. 2, 2024), perma.cc/BQY6-YBC3. And research has linked gambling to many other problems—substance abuse and psychological distress, to name two. *See* Randi Richardson, *Online gambling has fueled an industry boom that threatens public health, commission finds*, NBC News (Oct. 24, 2024), perma.cc/XL7W-QS2L.

So the States have a strong interest in addressing gambling to protect individuals within their borders. And States have done so for more than 200 years. Yet, today, the gambling threat has grown, given the existence of prediction markets offering sports bets. Even the United States military has taken note. As reported on the U.S. Army's website, "[a]s access to online betting and new, unregulated prediction markets grows" the "quiet threat" of gambling "poses a direct risk to the financial stability, mental health, and overall readiness of the force—prompting the Department of War to take a closer look." Douglas Holl, *Betting your future: Is gambling a threat to your career and well-being?* U.S. Army (Apr. 13, 2026), https://perma.cc/W8SB-U9EZ. If States cannot guard against the gambling threat from prediction markets, State citizens face serious dangers.

Consider the breadth of gambling addiction. "[G]ambling disorder could affect … 8.9% of the adults and 16.3% of the adolescents who gamble using sports betting products." Heather Wardle et al., *The Lancet Public Health Comm'n on Gambling*, 9 Lancet Pub. Health Comm'ns e950, e951 (Nov. 2024), https://perma.cc/FU4V-QGBW. "Gambling disorder is described alongside substance use disorders in both the Diagnostic and Statistical Manual of Mental Disorders, fifth edition (DSM 5), and the International Classification of Diseases, eleventh revision (ICD 11)." World Health Org., *Gambling Fact Sheet* (Dec. 2, 2024), https://perma.cc/69AC-5KT5. And "[g]ambling disorder severely impacts the affected individual's daily life and is considered to be a major public health issue" that "may be a risk factor for suicidal behavior." Adonay Kidane et al., *Suicide and attempted suicide in gambling disorder—results from a nationwide case-control study* (Mar. 31, 2025), https://perma.cc/ZLP8-DNG. As the Lancet explains, "children and young people" "face an elevated risk of gambling harms." Wardle et al., *The Lancet Public Health Comm'n on Gambling* at e954. "The effect is especially potent among sports fans." *Id.* And "in-play betting" makes sports betting a potential "high-speed, continuous form of betting, which is likely to be associated with increased risk of harms." *Id.* at e960. Easy access to gambling without state regulation will only cause more harm.

The effects can be disastrous. One recent study found that "increased online sports betting substitutes for risky investments," and that "sports betting significantly reduces net deposits to brokerage accounts." Scott R. Baker et al., *Gambling Away Stability: Sports Betting's Impact on Vulnerable Households* at 2 (Oct. 21, 2024), https://perma.cc/4SF5-VGZH. Sports gambling also correlates with increased "consumption in complementary entertainment-related categories … likely reflecting spillovers from increased sports betting." *Id.* And these factors "lead[] to more financial instability as households run-up credit card balances and more frequently overdraw their bank accounts." *Id.* at 2–3. Indeed, "[s]ports bettors are more than twice as likely as non-bettors to have overdrawn their bank account, and those issues are more pronounced among financially constrained households." Weston Blasi, *Here are all the ways sports gambling is hurting bettors' finances*, MarketWatch (Nov. 5, 2024), https://perma.cc/D8B6-966N. In sum, "online sports betting … can exacerbate financial difficulties faced by constrained households." Baker et al., *Gambling Away Stability* at 3. And excess gambling is often correlated with an increased risk of things like suicide, divorce, and homelessness. The National Gambling Impact Study Commission, Final Report, *Chapter 7: Gambling's Impacts on People and Places*, 7-24–28 (1999), https://perma.cc/BC2P-CQC4.

This is no abstract problem. Real people gamble to the point of financial ruin. *See* Kelly Kennedy, *'I didn't care who was playing': Has the legalization of sports betting impacted problem gambling in Ohio?*, Cleveland 19 News (July 18, 2024), https://perma.cc/JG9G-P7QT. Others place gambling over the health of loved ones. *See* Erin Gottsacker, *A statewide telehealth service is changing the game for Ohioans with gambling addictions*, The Ohio Newsroom (Nov. 18, 2024), perma.cc/E4ZU-U3MN. Still others gamble to the point of contemplating suicide. *See* Matt Stone, *Risk of Gambling Addiction Up 30%* (Feb. 16, 2025), https://perma.cc/76KG-5ZGS.

A 2022 survey performed by the Ohio Casino Control Commission signaled that the prevalence of at-risk/problem gamblers in the Buckeye State had nearly quadrupled over the last decade. *See Ohio Gambling Survey 2022*, Ohio Casino Control Commission, perma.cc/4GG3-SGQE (slide five of PowerPoint). As another datapoint, calls to Ohio's gambling hotline were up 55% in 2023—the first year of legal sports betting in the State. Katie Mogg & Aria Bendix, *Gambling addiction hotlines say volume is up and callers are younger as online sports betting booms*, NBC News (April 5, 2024), https://perma.cc/8KY4-U3MR. Minors are particularly vulnerable, as online sports betting attracts a younger crowd. A recent New Jersey-based survey reflected that nearly one in every five people surveyed between the ages of 18 and 24 was at high risk of a gambling problem. *See* Lia Nower et al., *The*

Prevalence of Online and Land-Based Gambling in New Jersey, Rutgers University: Center for Gambling Studies, at 33 (2023), perma.cc/V3KH-BPHC. And research reflects that those who start gambling at a young age "run a much higher lifetime risk of developing a gambling problem." *See* National Gambling Impact Study Commission, Final Report at 4-12. Many States protect younger citizens by banning sports betting for anyone younger than 21. *See, e.g.*, N.J. Stat. Ann. §5:12A-11(e); Ohio Rev. Code §3775.99(A)(2). But prediction-market gambling allows 18-year-olds to gamble. *E.g.*, Kalshi Member Agreement (Nov. 4, 2025), https://perma.cc/ZH3B-2G9P. This is no small matter. Individuals who begin gambling at a young age face a higher risk of long-term problems.

Indeed, prediction markets actively target vulnerable 18-year-olds, who are more susceptible to addictive behavior and adverse outcomes. *See* Katherine Long et al., *Is This Insider Information? The Prediction Market Bets Driving a Campus Frenzy*, Wall Street Journal, (Mar. 5, 2026), https://perma.cc/E4QB-M7VH; *see also* Responsible Gambling Counsel, *Gambling & Young Adults*, https://perma.cc/Q4JL-XJRM (finding that players 18–20 years old are "significantly more likely to have chased their losses and bet more than they could afford in the past"). As a result, sportsbooks that follow state regulations have older patrons, less susceptible to irresponsible gambling, compared to the age of those betting on sports prediction markets. A recent report from Citizens Bank found that almost a quarter of Kalshi's users are under the age of 25, compared to just 7% for sportsbooks that follow state regulations. *See* Jordan Bender, *Prediction Markets vs. Sports Betting; Market Dynamics, ROI by Cohorts, and Competitive Implications*, Citizens Bank Industry update (Mar. 23, 2026), https://perma.cc/9UYC-8A26.

These gambling harms are exacerbated by the fact that some prediction markets appear to be designed for a handful of professional traders to take advantage of most traders. As the Wall Street Journal recently uncovered, just 0.1 percent of accounts on Polymarket obtain 67 percent of the profits while more than 70 percent of users lose money, with the least successful 10 percent losing an average of $4,000 each. Neil Mehta et al., *Why Almost Everyone Loses—Except a Few Sharks—on Prediction Markets*, Wall Street Journal (May 3, 2026), https://perma.cc/4NZ4-HLW5. Similarly, Kalshi acknowledges that there are 2.9 unprofitable users for each profitable one. Some professional traders acknowledge that the "easiest money is going to be in sports [wagering]" because it attracts gambling addicts, in addition to acknowledging that "a large number of casual traders just bet 'yes' on what they hope will happen," and the presence of "long shot bias" where bettors overvalue unlikely events because they are driven by excitement. *Id.; see also* Pat Akey et al., *Who Wins and Who Loses In Prediction Markets? Evidence from Polymarket* (June 12 2026), https://tinyurl.com/yr68z4sz. These findings suggest that prediction markets are not governed by underlying market fundamentals, but rather thrive on market failures, in particular information asymmetries exploited by subsidized professional traders who prey on most traders' cognitive biases and propensity for gambling addiction. These for-profit prediction markets are a new form of casino used primarily for a few to manipulate others—the type of harms squarely within States' historic police powers to regulate gambling.

The Proposed Rule does not address these potential harms *at all*. It does not consider them public-interest factors or elsewhere even mention these issues. But all understand that the Proposed Rule will lead to more bets on sports. Yet, the CFTC has ignored the effects of unleashing gambling on citizens without the protection of state law. And that poses real problems and risks for States and their citizens. It is an important aspect of the problem related to the Proposed Rule, so failure to consider this issue is arbitrary and capricious. *Motor Vehicles Man'fs Ass'n*, 463 U.S. at 43.

Harms to States. An unlawful agency regulation infringes on the States' sovereign interests in regulating their citizens and businesses. *See Ohio*, 603 U.S.at 291. And when regulatory agencies interfere with State enforcement of state laws, they necessarily experience harm. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers).

If the CFTC's proposed definition of what constitutes a swap or futures contract is so boundless as to include what is plainly sports betting, then all types of gambling would be considered swaps or futures contracts that must be traded on DCMs. 7 U.S.C. §§2(e), 6(a). The States disagree with the CFTC's statutory reading, but nonetheless, the CFTC in the Proposed Rule would allow prediction markets to host gaming contracts on DCMs. To the extent the Proposed Rule would attempt to prevent States from enforcing their own laws, it imposes direct harm on States.[1] And, as explained in the previous section, those state laws are critical to protecting state citizens. The CFTC cannot ignore this aspect of the problem, and its failure to address this issue in the Proposed Rule is also arbitrary and capricious.

As equally troubling is the CFTC's treatment in the Proposed Rule of traditional casino-style gaming. The CFTC's definition of gaming would subject all casino-style contracts to the CFTC's public interest analysis, rather than enforcing an outright ban, and would extend to all games of chance, skill, and mixed. While recognizing that games like roulette are pure games of chance and thus, there is no

[1] As explained above, the CEA does not authorize the CFTC to push aside the States' historic power and claim for itself the authority to regulate gambling through swaps or futures. *See* § I.b.ii. So, to the extent the CFTC purports to do so through the Proposed Rule, it exceeds its statutory authority.

ability for hedging or price discovery, the Proposed Rule asserts only that the CFTC "would be more likely" to prohibit those contracts as gaming. 91 Fed. Reg. at 35831. However, offering casino-style gaming without a license is against state law, so the very game itself is illegal and the Proposed Rule would substitute the CFTC's judgment in place of State criminal prohibitions against illegal gambling. Further, the Proposed Rule seeks to make the CFTC the nation's poker regulator, because poker can be affected by a participants' skill, which makes poker "less likely [to] be viewed as involving a game." *Id.* at 35835. Nothing in the CEA grants the CFTC any authority to even make this decision as to whether contracts on traditional casino-style gaming are permissible, and its attempt in the Proposed Rule to leave open the possibility of prediction markets offering these markets is a continued threat against the States' historic oversight of gambling.

b. The CFTC has not articulated any relevant difference between sports bets and sports event contracts.

The CFTC says States can still regulate sports betting because traditional sports wagers will be traded off DCMs. But the CFTC in the Proposed Rule offers no reason why that is; nor does it draw any reasonable distinction between sportsbooks and event contracts on DCMs. That is because there is none. And the CFTC's attempted distinction fails to draw any reasonable line. The CFTC claims that the "market structure" of prediction markets "is inapposite to that of legalized sports gambling" because "the gaming company typically controls and adjusts the gambling odds." 91 Fed. Reg. at 35807 n.6.

But that attempted distinction is irrelevant here. Any common features, and any differences that do exist, are meaningless to the CEA's definitions of swap and future, or the common understanding of derivatives. Nothing about the definitions or ordinary understanding turns on who "controls and adjusts the gambling odds." The relevant definition of swap captures "any agreement, contract, or transaction" that meets certain requirements. §1a(47)(A). And none of those requirements focus on the specific parties to, or structure of, the transaction. *See id.* Whether a sportsbook participates in its sports bets is simply irrelevant.

And if sports bets are swaps or futures, all sports bets *must* be traded on a DCM. §§2(e), 6(a). So regulatory clarity is critical—for regulated parties, for sportsbooks, for prediction markets, and for States. Yet, the CFTC's Proposed Rule would create confusion as to the legality of sports bets when a State prohibits or restricts such activity. Those offering sports bets need to know and understand what the stakes are and what laws they must follow.

By offering almost no explanation for why traditional sports bets will fall outside of the CEA's reach, the CFTC has utterly ignored a major aspect of the problem. Who will regulate—under what laws, what rules, with what consequences at stake—is drastically important for businesses in the States. And the CFTC's Proposed Rule gives no reasoned analysis.

c. The CFTC has not provided a reasoned explanation for its change in position or considered the significant reliance interests.

Black-letter administrative law requires agencies to explain changes in position. And if agencies do so, they must also analyze any reliance interests affected by the change. "When an agency changes course," the Supreme Court has said, "it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *DHS v. Regents of the Univ. of Calif.*, 591 U.S. 1, 30 (2020) (quotation omitted). To "ignore such matters" is to act arbitrarily. *Id.* (quotation omitted). So an agency must explain its change and analyze any potential reliance interests. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016). In no event can an agency "g[i]ve almost no reasons at all" when "serious reliance interests [are] at stake." *Id.* at 224. "It would be arbitrary or capricious to ignore" reliance interests affected by a policy change. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). It is "particularly dubious" when agencies often change positions. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)

The CFTC's Proposed Rule is an exercise of regulatory whiplash. The CFTC moves from banning all gaming contracts to a full-on embrace of sports bets on DCMs. Gaming contracts under the current Rule 40.11—including sports bets—have been banned for 15 years. But now the CFTC no longer believes that the Special Rule "provide[s] that event contracts involving Enumerated Activities are contrary to the public interest *per se*." 91 Fed. Reg. at 35811.

This policy change upends deep reliance interests by injecting uncertainty into the public's understanding of State gambling regulation. For just one example, state businesses and consumers rely on state law. They have built an entire industry relying on the infrastructure developed by States. That way, these businesses comply with state regulations that serve their customers and the public good. For another, consider States that take various approaches to ensure public confidence in sports gambling. Some States ban gambling. Others ban gambling on college sports. Still others prohibit prop bets. And most that legalize gambling rely on gambling revenue to contribute to residents' health, welfare, and safety. Finally, state residents rely on these state laws including: state licensing rules to know what entities are trustworthy; voluntary exclusion lists for problem gamblers; protections for potential teenage gamblers; and many more regulations to build confidence and trust in the state-regulated system. Yet, the CFTC does nothing—and says nothing—to address these concerns and purports to override state regulations by rule. That approach is arbitrary and capricious by failing to consider major aspects of the issue.

These reliance interests built up over many years as the CFTC maintained that gambling-transactions could not take place on DCMs. For example:

- Most notably, in 2011, the CFTC adopted Rule 40.11, which barred DCMs from listing any contract involving gaming. 17 C.F.R. §40.11.

- In 2012, the CFTC acknowledged that the meaning of "swap" in the CEA should not be read in a way that would disrupt "customary business arrangements" that "historically have not been considered to involve swaps." 77 Fed. Reg. 48208, 48247 (Aug. 13, 2012). Swaps, according to the CFTC, "involve risk-shifting arrangements with financial entities." *Id.* at 48248. So "swaps" did not include transactions over "personal or family activities" that ordinary "consumers" regularly partake in. *Id.* at 48247.

- In 2021, the CFTC determined that contracts offered by ErisX based on National Football League games may involve gaming and violate Rule 40.11. 91 Fed. Reg. at 35816.

- In its 2024 proposed event-contracts rule, the CFTC recognized that States have "particular expertise" addressing the "risks and concerns associated with gambling," including sports betting. 89 Fed. Reg. 48968, 48982–83 (June 10, 2024).

- In that same 2024 proposal, the CFTC acknowledged that it lacked the "statutory mandate" or "specialized experience" to regulate the "rapidly evolving field" of gambling and that federal derivatives law is not "aimed at protecting against gambling-specific risks and concerns." *Id.*

- In September 2025, the CFTC issued a staff advisory directed at platforms offering sports-related event contracts. CFTC Letter No. 25 36, Advisories (Sept. 30, 2025), https://tinyurl.com/4767zhwa. The advisory warned that the CFTC had never "taken any official action to approve" the listing of such contracts. *Id.* at 2 n.4. The advisory further explained that the CFTC "has not, to date, made a determination regarding whether any such contracts involve an activity enumerated or prohibited under" the Commodity Exchange Act. *Id.* Those offering sports-related events contracts, the advisory thus cautioned, must be prepared for the possibility that state law will "result in the termination" of such contracts. *Id.* at 2.

- The CFTC previously defined "gaming" as "synonymous with gambling—that is, the practice or activity of betting without any limitation of what is being bet on." 91 Fed. Reg. at 35824 (quoting *KalshiEX LLC v. CFTC*, No. 23-3257, 2024 W 416494, at *8 (D.D.C. Sept. 12, 2024).

The CFTC abruptly changed its tune late last year. Its new Chairman, without public input or comment, stated that all event contracts—including those about sports—are within the CFTC's exclusive power. *See, e.g.,* Michael S. Selig, States Encroach on Prediction Markets, Wall Street Journal (Feb 16, 2026), https://perma.cc/4LAH-NG2V. One day later, the CFTC filed an amicus brief embracing that same position. *See* CFTC Amicus Br., *N. Am. Derivatives Exchange, Inc. v. Nevada*, No. 25-7187, Dkt. No. 37.2 (9th Cir. Feb. 17, 2026).

So even before it began the rulemaking process, the CFTC had reached its conclusion that sports bets are swaps subject to CFTC's control. This departs radically from the CFTC's prior positions. For more than 15 years, the CFTC has taken a different approach. Just after Dodd-Frank passed in 2010, the bipartisan CFTC adopted unanimously Rule 40.11. 17 C.F.R. §40.11; 91 Fed. Reg. at 35814–15. "Rule 40.11(a)(1) provides that a registered entity shall not list for trading" any agreement "based upon an excluded commodity" that "involves, relates to, or references terrorism, assassination, war, gaming, or an activity that is unlawful under any State or Federal law." 91 Fed. Reg. at 35815. The beginning of 40.11(a) even says "*Prohibition*." Thus, the current Rule 40.11 bans contracts that relate to gambling—including sports bets.

In conducting the 2011 §40.11 rulemaking, the CFTC understood that "its prohibition of certain 'gaming' contracts [was] consistent with Congress's intent to 'prevent gambling through the futures markets' and to 'protect the public interest form gaming and other events contracts.'" 76 Fed. Reg. 44776, 44785 (quoting 156 Cong. Rec. S5902, S5906 (daily ed. July 15, 2010)). In short, the CFTC has long viewed the Special Rule and 40.11 as a way to keep gaming contracts off DCMs. That 2011 rulemaking made the public interest determination on a categorical basis that any agreement that involves an enumerated category is prohibited. As then-Chair Gensler has stated, "Rule 40.11(a) prohibits listing 'any' contract involving gaming," and "the CFTC already concluded in 2011 that all event contracts within these categories are not in the public interest. Thus, if a contract involves gaming, that is the end of the matter." Gensler Amicus at 27.[2]

That position, as noted above, has built up many reliance interests. That makes sense. The Supreme Court in *Murphy* left States "free to act" on sports gambling. 584 U.S. at 486. States have since made different choices. And those legislative choices reflect the States' reasoned judgment. As the Proposed Rule itself acknowledges, "[l]egislative bodies generally bar or prohibit activity that they recognize as causing, or posing, public harm." 91 Fed. Reg. at 35834, 35868. Just so. And States, localities, businesses, employees, customers, gaming operators, sportsbooks, consumers, and citizens have ordered their affairs around these state laws developed in the context of the CFTC banning gaming contracts on DCMs.

The CFTC has long understood that States are best positioned to regulate gambling. But today, the CFTC has changed course at breakneck speed. The Proposed Rule does not even acknowledge—let alone analyze—all the reliance interests at play. Yet, the Supreme Court has held that agencies changing position are "required to assess whether there [are] reliance interest, determine whether they [are] significant, and weigh any such interest against competing policy concerns." *Regents of the Univ. of Calif.*, 591 U.S. at 33. The Proposed Rule utterly fails to do so.

III. If the CEA permits the Proposed Rule, the statute violates the nondelegation doctrine.

Finally, if the Proposed Rule is consistent with the CEA and the statute allows the CFTC to regulate sports gambling, preempt state law, and reinterpret the Special Rule divorced from statutory text, then the statute violates the nondelegation doctrine. That test requires that Congress provide an "intelligible principle" that guides an agency's discretion. *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 472–73 (2001). But no such principle has guided the CFTC in this rulemaking.

On the CFTC's interpretation of the statute, it can do *anything* to implement the Special Rule, including developing factors divorced from the CEA's text. *See* above at 21–23; 91 Fed. Reg. at 35828–30. And in doing so, the CFTC believes it can preempt state law by determining that sports gambling can legally occur on a DCM.

[2] The CFTC in the Proposed Rule contends that the Special Rule does not allow the CFTC bar all contracts involving an enumerated activity. This assertion, alleged to be grounded in plain meaning, is again atextual. 91 Fed. Reg. at 35817. Nothing in the full text of the Special Rule prevents the CFTC from categorically prohibiting contracts involving the enumerated activities..

But only Congress makes law, and a statute that delegates "core legislative power" to an agency to preempt state law raises constitutional problems. *Cf. Monsanto v. Durnell*, 609 U.S. ---, 2026 WL 1825691, at *14 (2026) (Thomas, J., concurring). Statutes must provide principles to limit agency discretion. And on the CFTC's reading of the CEA, no such principle exists; the CFTC instead has freewheeling power to craft rules from whole cloth. That reading would violate the nondelegation doctrine.

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The Proposed Rule goes beyond the CFTC's statutory powers, is in tension with the Constitution, and would otherwise be arbitrary and capricious in its current form. The CFTC should start afresh with its rulemaking and clarify that sports bets and gambling cannot be traded on DCMs but are instead subject to state law, which is not preempted by the CEA.[3]

Yours,

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[3] The CFTC might not be presently capable of generating final agency action, since the five-member agency currently has only one commissioner. Dustin Gouker, *Are We Really Regulating Sports Betting With Just One CFTC Commissioner?*, Event Horizon (June 22, 2026), https://perma.cc/VGM3-TU84. Although the CEA has an unusual vacancy provision ("[a] vacancy … shall not impair the right of the remaining Commissioners to exercise all the powers of the Commission[,]"), the statute seemingly requires *multiple* remaining "Commissioner*s*" for the CFTC to function. 7 U.S.C. §2(a)(3) (emphasis added).

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