April 30, 2026

Mr. Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, D.C. 20581

Re: Prediction Markets, Advance Notice of Proposed Rulemaking, 91 Fed. Reg. 12516 (Mar. 16, 2026) RIN 3038–AF65

Lexicon Labs ("Lexicon," or "we") welcomes the opportunity to respond to the Commodity Futures Trading Commission's ("CFTC," or the "Commission") request for comment on the proposed rulemaking concerning prediction markets.

Lexicon's mission is to make law legible. We operate our website at https://www.lexiconlabs.com and have been an active participant in the courts, including submission of multiple amicus briefs, most recently before the United States Court of Appeals for the Third Circuit in *KalshiEX LLC v. Flaherty*, No. 25-1922 (3d Cir. 2025).[1] Lexicon also publishes two blogs: Full Court Press ("FCP"), available at https://www.fullcourtpress.io, which is dedicated to exploring the legal implications of financial definitions; and Finance 2027 ("F27"), available at https://www.finance2027.com, which seeks to build consensus on financial definitions.

Lexicon commends the Commission for inviting public comment on this important rulemaking and is pleased to share its views. Our central position is that prediction markets raise three interrelated questions–what we refer to as the **3P Framework** (this comment is organized accordingly):

Question 1 - Preemption: Is sports a commodity, or, alternatively, are sport event contracts swaps?
Question 2 - Permissibility: Are sports event contracts permissible under the relevant statutes?
Question 3 - Parallelism: Can federal and state authority overlap with respect to futures trading?

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[1] The amicus brief in *KalshiEX LLC v. Flaherty* was filed by New Finance Institute, which subsequently underwent a corporate name change to Lexicon Labs, Inc. in 2025.

I. Preemption

Lexicon largely agrees with the Commission's position regarding event contracts: The CFTC has exclusive jurisdiction over them. To situate that conclusion within the broader 3P framework, a few observations on the historical development of preemption are warranted:

A. Identifying the Birth of Preemption

Within the industry, there is disagreement about when the CFTC's exclusive jurisdiction over event contracts began. Some place the origin in 2010, pointing to the Dodd-Frank Act's comprehensive amendments to the Commodity Exchange Act ("CEA," or the "Act"). At the other end of the spectrum, some argue that exclusive jurisdiction dates back to 1974, when Congress enacted the Commodity Futures Trading Commission Act ("The CFTC Act"). The Commission itself hinted at this view in its complaint against the state of Wisconsin, noting: "With the passage of the CFTC Act of 1974… Congress expanded the scope of the CEA to cover 'all commodities.'"[2]

Lexicon's position lies between these poles. We view the **Commodity Futures Modernization Act of 2000 ("CFMA")** as the point at which *all* commodities–including those resolving on non-traditional or "exotic" underlying commodities such as sports outcomes– came within the CFTC's regulatory perimeter. The CFTC Act was a watershed moment, marking the shift from agricultural to financial commodities,[3] but it did not fully contemplate event contracts tied to outcomes like sports. The CFMA, by contrast, introduced the "excluded commodity" category and the "financial, commercial, or economic consequence" language–both of which are essential to understanding why sports outcomes fall within the CEA.

The strongest historical evidence that the Commission understood sports outcomes to be commodities appears in a footnote in the 2004 HedgeStreet Designation Memorandum:

> "HedgeStreet has stated, however, that it intends to list only contracts that have a legitimate economic purpose and does not intend to list for trading contracts based on terrorist activity or gambling activities, such as the outcome of sporting events."[4]

The Commission would not have made this observation unless it believed that sports outcomes were, by that point, **excluded commodities**, and therefore **commodities** under the Act.

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[2] Compl. ¶ 45 , *United States v. Wisconsin*, No. 2:26-cv-00749, ECF No. 1 (E.D. Wis. Apr. 28, 2026).

[3] "For the first time, the CEA would apply to all U.S. futures exchanges and to the full range of commodities that were or could be traded for future delivery thereon, including many commodities that did not fall under the enumerated agricultural category—for example, coffee, sugar, cocoa, metals and energy products, as well as interest rates, currencies, and other financial commodities." 75 Fed. Reg. 65586, 65587 (Oct. 26, 2010**)** *Agricultural Commodity Definition, Notice of Proposed Rulemaking* RIN 3038–AD23.

[4] Memorandum from Staff of the Commodity Futures Trading Commission re: Application of HedgeStreet, Inc. for Designation as a Contract Market (Feb. 10, 2004).

This understanding fits within the broader statutory arc. Congress centralized futures regulation in 1974 by extending the CEA to all commodities traded for future delivery. In 2000, the CFMA expanded the definition of "commodity" to include event-based contracts–any event with "financial, commercial, or economic consequence"–and brought such contracts within the CFTC's exclusive jurisdiction. When Congress amended the CEA through the Dodd-Frank Act of 2010, it reaffirmed this broad commodity definition and the CFTC's exclusive jurisdiction, aligned the definitions of "swap" and "excluded commodity," and closed several jurisdictional loopholes that had allowed derivatives activity to escape federal oversight.[5] Importantly, Congress did not seek to nationalize sports gambling through the futures markets; rather, it sought to clarify jurisdictional boundaries and ensure that all derivatives markets, traditional and event-based, operated within a unified federal framework.

B. Defining The Field

The preemption inquiry largely turns on **field preemption**, which "occurs when federal law occupies a regulatory 'field' of regulation 'so comprehensively that it has left no room for supplementary state legislation.'"[6,7] Defining the field is therefore the threshold step. As the Ninth Circuit explained: "The first step in determining whether [state regulation within the same field will necessarily interfere with the federal regulatory scheme] is to delineate the pertinent regulatory field." *Nat'l Fed'n of the Blind v. United Airlines, Inc.*, 813 F.3d 718, 734 (9th Cir. 2016).

Courts addressing prediction market disputes have emphasized the same threshold requirement. In Ohio, the district court stated: "To examine the extent of the CEA's field preemption, the Court must first define the field in which the CEA has preemptive effect."[8] During oral argument in *KalshiEX LLC v. Flaherty*, the Third Circuit was even more direct: "What is the field?"[9]

The proposed answers run the gamut. One view is that the relevant "field" is **sports gambling**, or gambling more broadly. Kalshi has generally advanced the view that the field is **futures trading on a designated contract market ("DCM")**; during oral argument, Kalshi's counsel stated: "The field that Congress has preempted is the field of regulating trading on federally designated contract markets."[10] New Jersey, by contrast, argued: "[W]e don't think there is a field."[11] The Commission's

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[5] Alper Ozgit, Excluded Commodities, Swaps, and the Ross–Russ Parallel, *Full Court Press* (Jan. 20, 2026), available at https://www.fullcourtpress.io/p/excluded-commodities-swaps-and-the

[6] *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 479 (2018).

[7] *Id.*, at 477 ("Our cases have identified three different types of preemption—'conflict,' 'express,' and 'field,' … but all of them work in the same way."). See also *Nat'l Fed'n of the Blind v. United Airlines Inc.*, 813 F.3d 718, 724 (9th Cir. 2016) ("Regardless of the type of preemption involved — express, field, or conflict — '[t]he purpose of Congress is the ultimate touchstone of pre-emption analysis.'"). Thus, the boundaries between these categories are not rigid and often overlap in practice.

[8] *KalshiEX LLC v. Schuler*, No. 2:25-cv-1165, ECF No. 69, at 15 (S.D. Ohio Mar. 9, 2026).

[9] Oral Argument Tr. at 14, *KalshiEX LLC v. Flaherty*, No. 25-1922 (3d Cir. Sept. 10, 2025), ECF No. 83.

[10] Oral Argument Tr. at 20, *KalshiEX LLC v. Flaherty*, No. 25-1922 (3d Cir. Sept. 10, 2025), ECF No. 83.

[11] Oral Argument Tr. at 14, *KalshiEX LLC v. Flaherty*, No. 25-1922 (3d Cir. Sept. 10, 2025), ECF No. 83.

own view aligns with Congress's understanding at the time: "The CFTC Act of 1974 'preempt[ed] the field insofar as futures regulation is concerned…'"[12]

The last interpretation is correct. A field must exist for the analysis to proceed. Defining the field as "sports gambling" is circular; it defines the field by reference to the very activity whose characterization is in dispute. Defining the field as "DCM trading" is too narrow and inconsistent with the statute, which regulates **futures trading broadly**, not merely exchange-traded activity. As discussed in Section I.A, *supra*, Congress has long treated futures trading as a unified regulatory field, and the CEA's structure reflects that breadth. The proper field is **futures trading**, not sports gambling.

C. The Savings Clause

Some argue that the CEA's savings clause demonstrates that Congress did not intend to preempt the field. This argument often blends two distinct concepts: (1) defining the field, and (2) determining whether the savings clause preserves certain state-law causes of action. These are separate inquiries.[13] We disagree with the view that the field is sports gambling; the second inquiry warrants scrutiny but ultimately does not alter the preemption analysis.

The savings clause preserves certain state-law fraud. As this Sixth Circuit observed in *Am. Agric. Movement,* the clause "preserve[s] in the futures trading context at least some state law causes of action."[14] That is correct. Congress did not intend to eliminate all state involvement in matters that merely *touch* futures trading. Fraud, contract disputes and other general-law claims remain available.

But this does not mean Congress left room for states to regulate **what counts as a futures contract** or to characterize futures contracts as "gambling" under state law. That is the key distinction. During oral argument in the Third Circuit, the Court pressed this point: If "the CEA does not preempt some state common law fraud claims… how then can field preemption occur?"[15] Kalshi responded by narrowing the field to "trading on a DCM," arguing that fraud claims do not regulate that field. They had the correct idea of delineating contract characterization from broad trading activity but they have taken it too far, by limiting the venue; their reframing improperly collapses the jurisdictional question into the parallelism question. As Kalshi's counsel put it: "The

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[12] Compl. ¶ 46, United States v. New York, No. 1:26-cv-3404, ECF No. 1 (S.D.N.Y. Apr. 24, 2026).

[13] One practitioner interpreted a recent opinion (*KalshiEX LLC v. Schuler*, No. 26-3196 (6th Cir. Apr. 24, 2026) to mean the former: "The Court repeatedly characterized the relevant field for preemption purposes as 'sports gambling,' not 'futures trading.'" Available at https://www.linkedin.com/feed/update/urn:li:share:7454025671330414593/. We read the opinion differently. The court seems to justify its conclusion primarily based on a savings clause analysis ("To start, the presence of a savings clause usually signals that Congress does not mean to preempt the field."). *KalshiEX LLC v. Schuler*, No. 26-3196, slip op. at 10 (6th Cir. Apr. 24, 2026). It did not take an explicit position on how the field itself is defined. In fact, the Court seems to take the position that the relevant field is futures trading: "'Congress did not intend to preempt the field of futures trading.'" *Id.*, at 10.

[14] *Am. Agric. Movement, Inc. v. Bd. of Trade of the City of Chi.*, 977 F.2d 1147, 1155 (7th Cir. 1992). It appears that the Seventh Circuit viewed "futures trading" more broadly than the Sixth Circuit.

[15] Oral Argument Tr. at 24, *KalshiEX LLC v. Flaherty*, No. 25-1922 (3d Cir. Sept. 10, 2025), ECF No. 83.

key… is in how to define the preempted field… Because the field that is preempted is not, all derivatives transactions or not everything that touches a derivatives transaction, the field is instead the regulation of trading on a DCM… [W]hen you are applying a state law fraud claim to fraud that happens to happen, that happens to happen on a DCM, then you're not really regulating futures trading on a DCM, you're regulating fraud that happens to happen there."[16]

The correct view lies between these positions and is reflected in the Commission's own complaint. States retain authority over general-law claims, but **they do not have authority to classify futures transactions as gambling or to regulate the permissibility of futures contracts under state gaming laws.** As discussed in Section I.A, *supra*, Congress foreclosed that possibility with the CFTC Act of 1974. That authority rests with the CFTC.

Kalshi, and at times even the Commission, have blurred this distinction by redefining the field from"futures trading" (correct) to "futures trading on a DCM" (incorrect). This shift conflates field preemption with parallelism, an issue addressed in Section III, *infra*.

D. Presumption Against Preemption and Police Powers

States have had success advancing a presumption against preemption, often by invoking their historical authority to regulate gambling under their police powers. But this argument suffers from two fundamental flaws: It provides no limiting principle, and it rests on a mischaracterization of the historical record.

The first problem is the absence of a limiting principle. If states have jurisdiction over "sports," why would that jurisdiction not extend to elections, weather or any other contingent event? The fact that sports event contracts are the issue currently before the courts cannot supply the limiting principle. Courts routinely look to the broader implications of their decisions, and here the implications are clear: Once states assert jurisdiction over one category of event contracts, there is no natural stopping point. Recent developments confirm this. The Arizona criminal complaint included counts involving election outcomes.[17] A proposed bill in Minnesota grouped sports outcomes, political outcomes and natural disasters together.[18] Once states treat event outcomes as within their regulatory domain, the category expands without constraint–precisely the outcome Congress sought to prevent when it enacted the CFTC Act of 1974.

The second flaw is the misuse of the claim that "states have historically regulated gambling under their police powers." That statement is accurate only with respect to casino-style games of chance. It does not resolve the limiting-principle problem, because a state can simply label election trading as "gambling" and assert jurisdiction immediately. But the characterization of a product as gambling or

[16] Oral Argument Tr. at 24-25, *KalshiEX LLC v. Flaherty*, No. 25-1922 (3d Cir. Sept. 10, 2025), ECF No. 83.

[17] https://www.azag.gov/press-release/attorney-general-mayes-charges-kalshi-illegal-gambling-operation-election-wagering

[18] https://www.revisor.mn.gov/bills/94/2026/0/SF/4511/versions/0/

not is a permissibility question, not a jurisdictional one. Nothing in the CEA supports the idea that states may determine the character of a futures contract by relabeling it as gambling.

The historical argument also collapses under scrutiny. It relies on an ambiguous definition of "gambling" and ignores the critical distinction between gambling games and gambling through futures markets. A recent amicus brief filed by 37 states and the District of Columbia[19] illustrates the problem. In a section titled "The States have traditionally regulated gambling, including sports betting,"[20] the *amici* cite example after example involving games of chance: *Ah Sin* (cards and dice), Puritan prohibitions on cards and dice, Nevada's early restrictions on games of chance, Ohio's regulation of bingo and lotteries, and the legalization of casino gaming. None of these examples involve claims on contingent events or futures-style contracts. The brief *assumes* its conclusion, that sports gambling is equivalent to casino-style gambling, without acknowledging that sports wagering is a claim on a contingent event. States have regulated those too,[21] but only until federal preemption took hold, gradually, through the expansion of the definition of "commodity" beginning with the Grain Futures Act of 1922, continuing through the CFMA of 2000, and reaffirmed in Dodd-Frank.

The amici even undermine their own argument by noting that "*just eight years ago*" the Supreme Court left states "free to act" on sports gambling (emphasis added).[22] Setting aside that this is not an accurate reading of *Murphy* (see, Section III.C, *infra*), it raises an obvious question: If states have "historically" regulated sports gambling, how can that history be only eight years long?[23]

The police-powers argument fails for similar reasons. It is true that states have long exercised police powers to protect the health and safety of their citizens.[24] But the Supreme Court has emphasized that "[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern."[25] Casino gambling fits that model. At a roulette table, the gamblers and the dealer are physically present. The game occurs on the casino floor. Nothing outside the casino floor matters.

Event-contract trading is nothing like that. The trader does not know the counterparty or their location. The underlying event may occur thousands of miles away. The data may be stored in the cloud. If casino gaming is "local farm-to-table," event contracts are the cold chain, crossing state lines at every stage. State police powers are neither adequate nor necessary for this type of transaction; and Congress understood this. Beginning in 1974, Congress placed the oversight of

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[19] Brief of Amici Curiae States, *Commonwealth of Mass. v. KalshiEX LLC* (Mass. Apr. 24, 2026), available at https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/2026-4-24_Kalshi/MA-v-Kalshi-Amicus-Brief.pdf
[20] *Id.*, at 14-18.
[21] *See*, e.g., N.Y. Penal Law § 225.00(2) (McKinney): "Gambling." A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.
[22] *Id.*, at 17.
[23] It is true that Nevada has regulated bets on single-game outcomes for much longer, but that's hardly a historic trend that can be generalized. Quite the contrary: It's the exception that proves the rule.
[24] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996).
[25] *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985).

futures trading squarely within the federal domain (considering both agricultural and financial commodities of the time), and through subsequent expansions–most notably the CFMA in 2000–brought event-based contracts within that jurisdiction. Congress refined this framework further in 2010 by reaffirming the broad commodity definition and the CFTC's exclusive jurisdiction, aligning the definitions of "swap" and "excluded commodity."

II. Permissibility

We've established that the federal government has jurisdiction. That leaves two questions that must be answered. Can these contracts trade on DCMs? Can they trade off-exchange in parallel? This section on permissibility addresses the first question; Section III on parallelism, *infra*, answers the second, and does so independent from the outcome here.

A. The False Binary

Commentary on prediction markets often frames the issue as a choice between **state** and **federal** regulation of sports gambling:

> "The Wall Street regulator argues his agency, the Commodity Futures Trading Commission, should be the sole watchdog for buzzy prediction market upstarts like Kalshi and Polymarket U.S. given that they are federally regulated financial exchanges. Yet his many opponents counter that they are, at heart, gambling companies that should fall under state regulations."[26]

With that framing, legality is presumed. The only question is which sovereign–federal or state–has jurisdiction. The active docket largely mirrors this view: in nearly 70 cases across the nation, the primary dispute is jurisdiction.

In Lexicon's view, this is a false binary. Preemption is certainly important, but it is only the first in a set of three closely interrelated inquiries. Once the permissibility inquiry is carved out and taken seriously, a number of problems arise for sports event contracts.

B. The Wire Act

The Wire Act provides:[27]

> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to

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[26] Declan Harty, 'Cowboy': Michael Selig, a Top Trump Wall Street Regulator, Comes Out Swinging, Politico (Apr. 12, 2026), available at https://www.politico.com/news/2026/04/12/michael-selig-prediction-markets-00865239

[27] 18 U.S.C. § 1084.

> receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

On its face, the Wire Act poses a direct problem for operators offering sports event contracts. The statute contains **no exemption** for commodity futures transactions, no carve-out for financial activity and no language suggesting that a transaction ceases to be a "bet or wager" simply because it is intermediated through an exchange. Recent enforcement posture reflects this view: New York has taken the position that multiple industry participants violate the Wire Act,[28] and the federal government–along with the Commission–has responded by suing the state.[29]

History also reinforces this point. A quarter century ago, Jay Cohen, co-founder and former CEO of World Sports Exchange, was prosecuted and imprisoned under the Wire Act for offering what he called "sports futures."[30] Venue aside–World Sports Exchange was not a CFTC-regulated exchange–the products it offered were **functionally indistinguishable** from the sports-event contracts available on various DCMs today. The uneven enforcement of the statute since then does not change its scope. It strongly suggests that, unless Congress repeals or amends the Wire Act, the trading of sports event contracts falls squarely within its prohibition.

C. The Evolution of the CEA

Futures trading in the United States has followed a long arc bound by a single, persistent thread: **Separating legitimate risk management from gambling.**

Congress's earliest efforts were explicit about this goal. Senator Capper, sponsor of the Grain Futures Act of 1922, framed this issue starkly:[31]

> For years previous to the present crisis in the agricultural industry the men frequently referred to by orators as the "backbone of the Nation" have averaged barely more than a decent living by working their wives and children as well as themselves, and have realized no return for their capital. The real job we have on our hands is to find out how farming can be made as safely profitable as any other American occupation. ...The one vital industry on which the Nation's welfare and prosperity depend, must have its chance to live and prosper if the rest of us expect to, and if it is to have this chance, the grain gambler must go. 61 CONG. REC. 4768 (1921)

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[28] *See*, e.g., Pet. ¶ 12, *New York v. Coinbase Fin. Mkts., Inc.*, No. 451604/2026 (N.Y. Sup. Ct. Apr. 21, 2026).

[29] Commodity Futures Trading Comm'n, CFTC Sues New York Over Prediction Markets Amid Ongoing Efforts to Preserve Jurisdiction, Press Release No. 9218-26 (Apr. 24, 2026), available at https://www.cftc.gov/PressRoom/PressReleases/9218-26

[30] *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001). *See also*, Pet. for Cert., *Cohen v. United States*, No. 01-1234 (U.S. filed Feb. 22, 2002).

[31] Johnson, *The Commodity Futures Trading Commission Act: Selected Challenges to Agriculture*, 1976 U. Ill. L.F. 509, 513 n.10.

If the position overstated the dangers of speculation, Congress corrected course in the next iteration. The Commodity Exchange Act of 1936 recognized that speculation–properly managed–served a legitimate economic function: "... Congress now referred to speculators as 'that class of citizens who have a fondness, and perhaps some aptitude, for speculative investment in commodities and who like to test their judgment concerning values and price trends by occasional and moderate speculation therein.' H.R. REP. No. 421, 74th Cong., 1st Sess. 3 (1935)."[32]

The terminology ("speculative investment") may have been imprecise, but the principle was sound: Hedgers require counterparties, and speculators provide liquidity and absorb risk. What remained missing, however, was a clear statutory standard for distinguishing socially useful futures trading from prohibited gambling.

That guidance arrived with the CFTC Act. Congress introduced the concept of an economic purpose test, under which a futures contract was permissible if it served a commercial hedging function or provided a basis for pricing. Although the Senate ultimately softened the requirement to a flexible standard of 'not contrary to the public interest,' "the House's economic purpose test" remained "a relevant consideration. S. REP. No. 1131, 93d Cong., 2d Sess., 36 (1974)."[33]

Section 5(g) operationalized this test.[34] For decades, it provided the Commission with a statutory anchor for determining which contracts belonged on futures exchanges and which were, in substance, wagers. Congress later repealed § 5(g) in the Commodity Futures Modernization Act of 2000, leaving the CFTC without explicit statutory guidance. In that vacuum, the Commission did what prudent regulators do: It applied its judgment, guided by the same economic-purpose principles that had animated the statute since 1974.

In the wake of the 2008 financial crisis, Congress signaled its intent to restore the economic purpose framework.[35] Notably, all three examples memorialized in the legislative record involved **sports-event contracts**, underscoring how central that category has been in defining the boundary between permissible futures trading and prohibited gambling.

The CFTC continued to rely on the economic purpose as its North Star, including in its denial of Kalshi's proposed election contracts. **That approach was consistent with decades of Commission practice.** Inexplicably, during litigation, the agency abruptly reversed course, disavowing its own authority. The District Court ultimately accepted that position, allowing election contracts to proceed. In the aftermath, sports event contracts began to be self-certified in rapid

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[32] *Id.* at 514 n.15.
[33] *Id.* at 523 n.38.
[34] Commodity Exchange Act § 5(g), 7 U.S.C. § 7(g) (1976).
[35] 156 Cong. Rec. S5906–07 (daily ed. July 15, 2010) (statements of Sens. Dianne Feinstein and Blanche Lincoln), available at https://www.congress.gov/111/crec/2010/07/15/CREC-2010-07-15-senate.pdf

succession. The Commission initiated a review of the first such submission[36] but never completed it, and it declined to initiate reviews of the subsequent submissions.

The Commission then described its own historical positions–and even those of its registered entities–as "*obstacles*" to its new approach:[37]

- Prior Commission orders issued to designated contract markets (DCMs) pursuant to regulation 40.11 and related Commission interpretations;
- Event contract rulemakings;
- Federal court opinions, including that "gaming involves games";
- The CFTC's legal arguments and litigating positions;
- CFTC-registered entities' legal arguments that sports event contracts constitute "gaming" and are therefore prohibited under the Commodity Exchange Act;
- Staff interpretations, other guidance, and current practices on event contracts;
- Existing law and regulation applicable to DCMs and futures commission merchants (FCMs);
- CFTC examinations, enforcement actions and investigations;
- Constitutional considerations; and
- Federalism, tribal sovereignty and state-regulatory issues.

Lexicon vehemently disagrees with the Commission's characterization. These considerations were not "obstacles"; they were the legal landscape. The Commission's reframing appears less grounded in principled statutory interpretation and more in shifting political priorities. In that respect, its actions (or lack of them) can be fairly described as arbitrary and capricious.

D. Laws vs. Policy

Is the permissibility of sports event contracts a legal question? Or is it a policy question?

Several practitioners have taken the position that it is primarily a policy matter. Schwartz, for example, writes:

> "The central issue in most of these cases is not whether DCMs should be allowed to offer contracts based on sports events. That is a policy question ill suited to judicial resolution. The *legal* question is whether the CEA preempts state gaming laws in the context of exchange-traded sports event contracts."[38]

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[36] Commodity Futures Trading Commission, *CFTC's Review of Nadex Sports Contract Submissions*, Press Release No. 9033-25 (Jan. 14, 2025), https://www.cftc.gov/PressRoom/PressReleases/9033-25

[37] Commodity Futures Trading Commission, *CFTC Announces Prediction Markets Roundtable*, Press Release No. 9046-25 (Feb. 5, 2025), https://www.cftc.gov/PressRoom/PressReleases/9046-25

[38] Robert A. Schwartz, *Federal Preemption in Sports Prediction Market Litigation: This Shouldn't Be a Jump Ball*, Futures & Derivatives L. Rep. (Mar. 2026), at 1, https://www.morganlewis.com/-/media/files/publication/outside-publication/article/2026/federal-preemption-in-sports-prediction-market-litigation-this-shouldnt-be-a-jump-ball-futures-and-derivatives-law-report.pdf

And later adds:

> Congress has given the CFTC ample authority to prevent DCMs from listing contracts it finds problematic. The dismay here is in large part due to the fact that the CFTC has not done so for sports event contracts. That is a policy dispute to be settled by policymakers.[39]

Lexicon has a different, contrarian view. **Permissibility is as much a legal question as preemption.** The fact that the Commission has discretionary authority does *not* mean that its choices are insulated from law. Discretion must be exercised within the bounds of the policy Congress has already codified. When the Commission's actions diverge from that statutory framework, the resulting questions are *legal*–not merely policy–questions under the Administrative Procedure Act, the Wire Act and the Commodity Exchange Act itself.

CFTC Chair Michael Selig recently stated that the Commission is not a "merit regulator."[40] That newfound stance is difficult to reconcile with both the longstanding history of futures regulation and the Commission's own litigation statements, including its acknowledgment that "To build and maintain a thriving derivatives industry that is distinct from the gambling business has been the work of 175 years, and it's important."[41]

The problem is not that policy preferences can't shift. Policy shifts are permissible, even after prolonged periods of contrary practice. The problem is that **Congress has already translated the public's policy preference into law**, and those laws point in a single direction. For a century, Congress has enacted and reaffirmed statutes designed to keep gambling–including sports gambling–out of the futures markets. These statutes operate in concert with each other. The repeal of PASPA removed one component of that framework, but it did not disturb the others. Two federal statutes remain, and they continue to prohibit sports gambling in forms relevant to sports event contracts.

If America wants to adopt a different policy, one that reverses a century of legislative posture, it must do so through established democratic means. Agencies simply cannot effectuate that reversal through inaction, reinterpretation or litigation positions that contradict congressional intent.

Lexicon therefore urges the Commission to resolve all public-interest related questions in this rulemaking through the lens Congress has already provided. That includes, at minimum, initiating and completing reviews of all sports event contracts that have been self-certified by industry participants.

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[39] *Id.* at 3. Another practitioner took a similar position. Elie Mishory, *There is a difference between a question whose answer has major consequences and a question that is actually hard* (LinkedIn, 2026), https://www.linkedin.com/feed/update/urn:li:activity:7447019260989579264/

[40] *New CFTC Chairman Michael Selig on How to Regulate Prediction Markets*, **Odd Lots** (podcast), https://pod.wave.co/podcast/odd-lots/new-cftc-chairman-michael-selig-on-how-to-regulate-prediction-markets

[41] *KalshiEx LLC v. Commodity Futures Trading Commission*, No. 24-5205 (D.C. Cir. argued Jan. 17, 2025), oral argument at 0:38–0:47, https://www.courtlistener.com/audio/96284/kalshiex-llc-v-cftc/

III. Parallelism

The overarching question is: **Do the states play any role in this?**

They do, as established above (see Section I, *supra*). But the critical, –and for the industry, perhaps the most consequential question–is different: **Can states regulate futures trading?**

Lexicon believes the statute answers this question unequivocally: State-regulated sports betting constitutes **illegal off-exchange swap trading**, expressly prohibited by the CEA. This conclusion does not depend on the outcome of a permissibility-focused inquiry; it follows directly from the structure and operation of the Act. This conclusion carries significant implications for an industry that generated $157 billion in annual revenue in 2025.[42]

A. Growing Evidence

Lexicon is not alone with this view: A growing coalition of courts, a former CFTC commissioner, practitioners, and *even the CFTC itself* converge on the same conclusion. A representative sample follows:

- **Massachusetts Superior Court:**

"Under the CEA, only federally regulated exchanges can offer event contracts."[43]

- **United States District Court for the Middle District of Tennessee:**

"Under the CEA, only exchanges regulated by the CFTC—known as designated contract markets ("DCMs")—can offer event contracts."[44]

- **United States District Court for the Northern District of Illinois:**

"Any binary options contracts offered in the United States must be traded on one of three registered boards of trade…"[45]

- **Brian Quintenz, former CFTC Commissioner:**

"All events are commodities, which means all contracts on future events are commodity futures contracts, which means all future event contracts need to be traded on a regulated and registered

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[42] https://bookies.com/news/nationwide-sports-betting-handle-2025-record
[43] *Commonwealth v. KalshiEX LLC*, No. 2584CV02525, slip op. at 4 (Mass. Super. Ct. Jan. 20, 2026).
[44] *KalshiEX LLC v. Orgel*, No. 3:25-cv-00034, slip op. at 5 (M.D. Tenn. Feb. 19, 2026).
[45] *Commodity Futures Trading Comm'n v. Yukom Commc'ns Ltd.*, No. 1:19-cv-05416, at 3 (N.D. Ill. Sept. 30, 2021) (explaining that binary options must be traded on a CFTC-regulated exchange).

futures exchange. But if the Commission deems any event contract that involves one of the enumerated activities to be contrary to the public interest, that contract is banned from trading on any registered futures exchange. The contract cannot trade anywhere else either since it is still a commodity futures contract and, if traded off of an exchange would be illegal."[46]

- **The State of New Jersey:**

"[S]waps have to be traded on CFTC regulated exchanges on a designated contract market, and it's, in fact, a federal crime to trade them outside of those scenarios, and so what we have here is a definition by Kalshi that would essentially make all casinos and sportsbooks currently federal felons."[47]

- **Nevada Resort Association:**

"Kalshi's preemption argument could even result in a bizarre result that the CFTC has authority over some types of state sports betting, not currently traded on a CFTC exchange. The CEA gives the CFTC exclusive jurisdiction over '[1] accounts, agreements . . . , and transactions involving [2] swaps or contracts of sale of a commodity for future delivery . . . traded or executed on [3] a contract market designated pursuant to section 7 of this title or a swap execution facility pursuant to section 7b–3 of this title or any other board of trade, exchange, or market.' 7 U.S.C. § 2(a)(1)(A). Moreover, the CEA correspondingly prohibits 'accounts, agreements . . . , and transactions involving swaps or contracts of sale of a commodity for future delivery' *unless they take place on CFTC-regulated exchange*s. 7 U.S.C. § 2(e) makes it generally unlawful to 'enter into a swap unless the swap is entered into on, or subject to the rules of, a board of trade designated as a contract market under section 7 of this title,' and 7 U.S.C. § 6d(a)(1) 'prohibits anyone from soliciting or accepting orders for swaps or options contracts if they are not registered with the CFTC as a futures commission merchant.' *CFTC v. Yukom Commc'ns Ltd.*, No. 19-cv-5416, 2021 WL 4477874, at *1 (N.D. Ill. Sept. 30, 2021). To the extent that the sports bets offered by Kalshi are considered to be swaps and so the CFTC has exclusive jurisdiction over such swaps, then this could even require other types of sports bets to be only offered on a CFTC exchange."[48]

- **The State of Connecticut:**

"If [sports event] contracts are swaps, so are sportsbooks' offerings, with all the absurd and unworkable consequences that that would entail."[49]

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[46] Brian D. Quintenz, Statement of Commissioner Brian D. Quintenz on ErisX RSBIX NFL Contracts and Certain Event Contracts (Mar. 25, 2021), available at https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement032521

[47] Oral Argument Tr. at 6, *KalshiEX LLC v. Flaherty*, No. 25-1922 (3d Cir. Sept. 10, 2025), ECF No. 83.

[48] Nev. Resort Ass'n's Emergency Mot. to Intervene at 12, *KalshiEX LLC v. Lombardo*, No. 2:25-cv-00575, ECF No. 57 (D. Nev. May 14, 2025).

[49] Defs.' Opp'n to Mot. for Prelim. Inj. at 7, *Coinbase Fin. Mkts., Inc. v. Tong*, No. 3:25-cv-02121, ECF No. 44 (D. Conn. Jan. 9, 2026).

- **The State of Nevada:**

"[Nevada's counsel, Nicole Saharsky] pressed on Section 2(e) of the CEA, which makes it unlawful for non-eligible-contract-participants to enter into swaps off a DCM. Her point was if Kalshi's definition of "swap" is correct, then all in-person sportsbook betting at Caesars is already illegal under federal law, because those transactions are happening off-DCM with retail customers."[50]

- **John Lothian, Executive Chairman at John J. Lothian & Company, Inc.:**

"**The Retail Trader Violation (CEA Section 2(e)):** If prediction market contracts are classified as swaps, retail participants (who are non-Eligible Contract Participants or non-ECPs) may only legally trade them on a Designated Contract Market (DCM). Trading these products on non-DCM platforms, such as offshore or decentralized exchanges, constitutes a violation of federal law under CEA Section 2(e)."[51]

"**The Sportsbook Illegality:** The same logic implies that the functionally equivalent products offered by state-licensed sportsbooks are also swaps. Since state-licensed sportsbooks are not DCMs and deal with non-ECP customers, these transactions may violate federal law, creating a situation where the CEA's field preemption could render state-authorized sports gambling potentially illegal."[52]

- **The CFTC:**

"The CEA requires that, subject to certain exemptions or exceptions, commodity derivative transactions must be conducted on exchanges designated by, or registered with, the CFTC. For example, trading of commodity futures contracts must be conducted on a board of trade designated by the CFTC as a contract market or a registered foreign board of trade (see 7 U.S.C. § 6 and 17 C.F.R. § 48.3); no person may operate a facility for the trading or processing of swaps unless the facility is registered as a swap execution facility or designated as a contract market (see 7 U.S.C. § 7b-3(a) and 17 C.F.R. § 37.3); commodity options must likewise be conducted on a board of trade designated as a contract market (see 7 U.S.C. § 6c(b) and 17 C.F.R. § 32.2)."[53]

And:

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[50] Valerie Cross, Ninth Circuit Debates Gaming vs. Swaps Divide in Nevada v. Kalshi Hearing, *DeFiRate* (Apr. 16, 2026), available at https://defirate.com/news/ninth-circuit-debates-cftc-rules-nevada-vs-prediction-markets-hearing/
[51] John J. Lothian, Comment to Post on "Square Pegs in Round Holes" (Apr. 2026), LinkedIn, available at https://www.linkedin.com/posts/johnjlothian_square-pegs-in-round-holes-why-prediction-activity-7449514677518352385-QWAc/
[52] *Id.* (another comment).
[53] Compl. ¶ 31, *United States v. New York*, No. 1:26-cv-3404, ECF No. 1 (S.D.N.Y. Apr. 24, 2026).

"According to the order, such event market contracts, each of which is composed of a pair of binary options, constitute swaps under the CFTC's jurisdiction, and therefore can only be offered on a registered exchange in accordance with the CEA and CFTC regulations."[54]

The pattern is clear. These authorities are not imagining an absurd result; they are simply applying the statute as written. There is a longstanding federal policy against off-exchange trading.[55] The circumstances leading to the 2008 financial crisis reinforced that policy. Dodd-Frank broadened the definition of "swap," and made off-exchange swaps generally unlawful for both the marketplaces and participants. While the statute contains limited exemptions, none apply to sports bets.

B. The Co-Existence Position

One might wonder why, despite this growing consensus described above, off-exchange swap trading that resolves on sports events continues. Part of the answer is that the industry has been somewhat successful in advancing the narrative that sports event contracts are fundamentally different from sports bets: The former are said to be peer-to-peer contracts, while the latter involve the bettor taking the opposite side of the house.

Industry realities do not support either characterization. Not all trades on Kalshi are peer-to-peer.[56] And peer-to-peer sports betting exchanges have existed for decades; no one seriously argued that Betfair was not sports gambling or that it could legally operate in the United States. At the World Sports Exchange, traditional bets and "sports futures" traded side-by-side, and the exchange did not treat them differently.[57]

For most consumers, the differences are either immaterial or indistinguishable. In a recent Congressional hearing, one lawmaker illustrated this point by holding up two betting lines for a baseball game and asking Chairman Selig: "Can you identify which betting line is from a regulated major sportsbook and which one is from an event contract from a prediction market?"[58]

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[54] Commodity Futures Trading Comm'n, CFTC Orders Event-Based Binary Options Markets Operator to Pay $1.4 Million Penalty, Press Release No. 8478-22 (Jan. 3, 2022), available at https://www.cftc.gov/PressRoom/PressReleases/8478-22

[55] *See*, e.g., William L. Stein, The Exchange-Trading Requirement of the Commodity Exchange Act After the 1974 Amendments, *41 Vand. L. Rev.* 473 (1988).

[56] Dan Bernstein & Eben Novy-Williams, Kalshi's Trading Arm Muddles "Peer-to-Peer" Claims, *Sportico* (Sept. 11, 2025), available at https://www.sportico.com/business/sports-betting/2025/kalshi-trading-exchange-peer-house-1234870465/

[57] "You can place ordinary straight wagers, play our dynamic futures market or the new and exciting real-time interactive wagering markets." World Sports Exchange, Homepage (Jan. 22, 1998), Internet Archive (Wayback Machine), archived at https://web.archive.org/web/19980122194149/http://wsex.com/frames/main2.html

[58] Dustin Gouker, The Five Most Interesting Moments From Thursday's Congress Hearing on the CFTC, *Event Horizon* (Apr. 17, 2026), available at https://nexteventhorizon.substack.com/p/the-five-most-interesting-moments-congress-hearing-cftc

Courts generally see through these labels and have little difficulty concluding that the products, from the customer's viewpoint, are identical.[59] Yet even then, the courts have been reluctant to acknowledge that the statutory definition of "swap," combined with the functional equivalence of the products, leads to the conclusion that state-sponsored sports betting is unlawful off-exchange swap trading. We believe there are several reasons for this.

First, some arguments rely on "cherry-picking" citations from the statute that conveniently omit material language. One example appears in the Commission's own proposed rulemaking:

> See Id., which expressly extends the CFTC's "exclusive jurisdiction" to encompass "transactions involving swaps or contracts of sale of a commodity for future delivery . . . traded or executed on a contract market designated pursuant to [CEA section 5, 7 U.S.C. 7] . . . ."

The problem is that the omitted language is fatal to the sports betting industry. The full statutory text provides:[60]

> The Commission shall have exclusive jurisdiction … with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and transactions involving swaps or contracts of sale of a commodity for future delivery (including significant price discovery contracts), traded or executed on a contract market designated pursuant to section 7 of this title *or a swap execution facility pursuant to section 7b–3 of this title* or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 23 of this title. (emphasis added)

The term "swap execution facility" is defined broadly:[61]

> The term "swap execution facility" means a trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility, that— (A) facilitates the execution of swaps between persons; and (B) is not a designated contract market.

To date, the courts have not seriously engaged with the off-exchange swap-trading issue. The Third Circuit briefly acknowledged it before setting it aside: "We need not address the parties' extra-textual

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[59] "[B]ased on Kalshi's description of its operations, although there may be differences under the hood between trading on Kalshi and placing a bet with a licensed sportsbook, for any sports-betting enthusiast unfamiliar with the CEA, it appears to the court that a user would find Kalshi's offerings similar, if not identical, to a sportsbook." *KalshiEX LLC v. Orgel*, No. 3:25-cv-00034, slip op. at 10-11 (M.D. Tenn. Feb. 19, 2026).
[60] 7 U.S.C. § 2(a)(1)(A).
[61] 7 U.S.C. § 1a(50).

arguments related to whether the Act preempts all state gambling regulation, because Kalshi does not argue that the Act preempts all state gambling regulation."[62]

Second, the Commission's longstanding inaction on state-regulated sports gambling has created a litigation dynamic in which most states are not incentivized to argue federal preemption. Doing so, combined with the off-exchange swap trading restrictions, could invalidate their existing sports-gambling licensing regimes overnight. Even when states do raise the argument, as New Jersey did before the Third Circuit, they often attempt to turn it into an advantage by emphasizing the supposed absurdity of the result. The argument goes: Federal preemption cannot be correct because it would imply long-standing illegality, an outcome difficult for most courts and practitioners to accept.

But such is the result when Congress grants a single agency broad statutory authority, and that agency simply chooses not to enforce the law in a politically sensitive area. Over time, the agency's inaction creates the appearance of legality, and new participants penetrate the industry, now via the federal regime, relying on that appearance. This has resulted in complex litigation in courts across the nation.

The Commission is not at liberty to enforce some parts of the statute and ignore others. If the CFTC has exclusive jurisdiction over all event contracts, including those resolving on sports outcomes–and it does–then it has to faithfully enforce all the relevant statutes. If it doesn't, then other consequences must follow. Under *Loper Bright*, the proper response is not to deny the Commission's jurisdiction, but to enforce the statute as written.

Perhaps wary of the implications of combining federal preemption with the CEA's off-exchange trading prohibitions–namely, the illegality of state-regulated sports gambling–prediction market participants, and at times the Commission itself, have advanced a reading of the statute under which federal and state regimes can co-exist, and the same product can trade on-exchange and off-exchange. The statute simply does not allow it, but courts have set it aside regardless. Many at the district court level channeled their off-exchange trading concerns into the jurisdictional question, and ruled for the states. The Third Circuit realized, correctly, that these are separate inquiries, but was content with resolving preemption without engaging with the parallelism question.[63] Neither approach is consistent with the statute.

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[62] *KalshiEX LLC v. Flaherty*, No. 25-1922, slip op. at 10 n.2 (3d Cir. Apr. 6, 2026).

[63] If the issue reaches the Supreme Court, as many expect, it becomes critical how broadly the Court will frame the question. In the event the preemption question is the only issue resolved by the Supreme Court, and permissibility is not addressed, or resolved in favor of the prediction markets, the parallelism issue remains open, it's not difficult to predict what happens next. Under that scenario, prediction markets can be expected to litigate the issue on the basis that no swap trading can happen off-exchange. Similarly, it's not difficult to predict how the courts will resolve that issue, multiple courts already opined on it (see Section III.A, *supra*).

Chairman Selig was correct when he stated: "This question of the applicability of the law… It's black letter, it's in our statute."[64] But, the same black-letter law also makes off-exchange swap trading illegal, notwithstanding his arguments to the contrary.[65] The Commission's current position is in direct conflict with the position the agency has taken in litigation, as well as with the views of a former commissioner, multiple courts and industry practitioners. It is difficult to characterize the Commission's actions as anything other than arbitrary and capricious.

C. *Murphy* is Incomplete, Not Incorrect

In *Murphy*, Justice Alito famously wrote:[66]

> The legalization of sports gambling requires an important policy choice, but the choice is not ours to make. Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own.

The industry has generally interpreted *Murphy*–and this passage in particular–as having "paved the way" for states to legalize sports gambling. In reality, the Supreme Court did no such thing. *Murphy* held one thing: Congress cannot commandeer state legislatures. It did not legalize sports gambling or bless state wagering regimes. It did not convert illegal contracts into legal ones. It did not dismantle federal gambling laws (other than PASPA). And, critically, it did not address the CEA.

Murphy was a narrow constitutional incision, not a regulatory overhaul. It was not incorrect; it was incomplete. States rushed in anyway—not to ask whether sports gambling was legal under existing federal law (what incentive would they have to do that?), but to monetize it. The primary federal obstacle was the CFTC, which declined to use the authority Congress had granted to it. Now that the Commission is taking a similar approach with respect to entities it directly regulates, states are contesting the result, overlooking that they themselves have long benefited from the same inaction, at the expense of the American public.

Conclusion

Our summary: The 3P framework is paramount: Preemption, permissibility, and parallelism; all three must be evaluated in conjunction. A result grounded in only one of them is incomplete and malformed. On those three fronts, our conclusions are:

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[64] CNBC, Interview with CFTC Chairman Michael Selig (Apr. 6, 2026), available at https://www.cnbc.com/video/2026/04/06/watch-cnbcas-full-interview-with-cftc-chairman-michael-selig.html (at 3:30–3:34).
[65] Alper Ozgit, The CFTC Is Losing the Prediction Markets Narrative, *Full Court Press* (Mar. 6, 2026), available at https://www.fullcourtpress.io/p/the-cftc-is-losing-the-prediction-markets-narrative
[66] *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 486 (2018).

- Federal law preempts state gambling laws.
- Sports event contracts violate federal law[67]:
    - They are impermissible under the CEA because of the "gaming" prong; and
    - They also face an additional illegality hurdle under the Wire Act.
- State-regulated sportsbooks are offering unlawful off-exchange swap trading.

Sports gambling is an important policy decision, but the policy choice has *already* been made, it's simply not being enforced. The Wire Act criminalizes interstate sports gambling and contains no exemption for futures trading. PASPA, now repealed, continued that tradition through a different mechanism. And when Congress enacted the Dodd-Frank Act, it spoke clearly about the federal treatment of swaps, including those that could function as sports wagers.

Whether Americans want widespread sports gambling is a separate question. In a recent poll, only 7% of U.S. adults agreed that the expansion of sports betting has been good for society.[68] But that empirical point only underscores the larger principle: If sports gambling is to be authorized, that decision must come from Congress–not from shifting enforcement priorities, or narrow judicial outcomes that don't fully address the underlying statutory framework. Only Congress can make that choice in a manner consistent with the structure of our democratic Republic, which marks its 250th this year. Only through that process can accountability be assigned and maintained.

Anything short of that is a loss for the American consumer and for democratic governance.

We thank the Commission for requesting public comment on its proposed rulemaking.

Alper Ozgit
Co-founder/CEO, Lexicon Labs

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[67] Many other event contracts, like mention markets, are also impermissible but sports event contracts are the most consequential, and potentially the only ones the Supreme Court will evaluate.
[68] Pew Research Center, Americans Increasingly See Legal Sports Betting as a Bad Thing for Society and Sports (Oct. 2, 2025), available at
https://www.pewresearch.org/short-reads/2025/10/02/americans-increasingly-see-legal-sports-betting-as-a-bad-thing-for-society-and-sports/