

Contradictory Rulings Show Complexity Of Swaps Regulation

By **Jack Murphy, Peter Altman and James Benjamin** (November 20, 2025, 5:22 PM EST)

Gambling regulation has long been the responsibility of the states in the U.S., as opposed to the federal government. That may change with the rise of federally regulated prediction markets, which have gained popularity in parallel with the explosive growth of state-regulated online sports betting in recent years.

The last 10 months have seen a deluge of litigation in courts around the country involving the legality of prediction markets. The core issue in these cases is whether the Commodity Exchange Act preempts state gambling laws as applied to event contracts traded on contract markets regulated by the U.S. Commodity Futures Trading Commission.

Resolving this issue has proved challenging, as courts have applied divergent analyses and reached opposite conclusions — including, most notably, two decisions by the same judge in Nevada, who first ruled in favor of a prediction market and then, six months later, in a nearly identical case, reversed course and ruled against a different one.

Ultimately, the issue may reach the U.S. Supreme Court, and until there is clarity, the legality of sports betting on these platforms will remain uncertain.

Background on Prediction Markets and Event Contracts

Prediction markets, which exist around the world, are online platforms where people can bet on future events with a straightforward yes or no answer, such as election outcomes ("Will Democrats win a majority in the midterm elections?") or sports results ("Will Kansas City win the Super Bowl?").

These bets are often referred to as event contracts. Event contracts typically pay \$1 per contract for correct predictions and \$0 for incorrect predictions, with the outcome resolved according to preset rules and sources. Prior to the event, the price of a contract fluctuates between \$0.01 and \$0.99, based on supply and demand, and is generally understood to represent the odds of the event occurring. Participants trade with other traders, not the platform itself, while prediction market companies earn revenue through transaction fees.

Trading on prediction markets is surging, with global volume exceeding \$3.6 billion during the week of Nov. 10, primarily on Kalshi and Polymarket, and nearly tripling from September to November.[1]

The ranks of nationwide prediction markets available in the U.S. are set to grow. Polymarket, one of the largest global prediction markets, expects to formally launch in the U.S. in the coming weeks. FanDuel and DraftKings have also recently announced plans to operate their own U.S. prediction markets. On Oct. 28, Trump Media and Technology Group announced it would soon allow users to trade in prediction markets on Truth Social, through a partnership with Crypto.com.

In the U.S., prediction markets have pursued regulation by the CFTC at the federal level as opposed to regulation by the states, which have for many years regulated gambling businesses, including casinos and sportsbooks.

Prediction markets argue that event contracts are swaps under the CEA and subject to the CFTC's exclusive jurisdiction.[2] Per the CEA, swaps include "any agreement, contract, or transaction ... that provides for any ... payment ... that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence." [3]

For example, under the framework advanced by prediction markets, a bet on the winner of the Super Bowl is a contract that provides for a payment that is dependent on the occurrence of an event — i.e., one team beating the other. Sporting events have broad economic consequences — e.g., to the teams themselves, the leagues they play in and to the communities where the events take place — and therefore could be said to be swaps.

Under the CEA, swaps must be transacted on a CFTC-approved designated contract market.[4] To date, there are at least four companies operating prediction markets as DCMs, with more on the way.

The CFTC may have the authority to prohibit this type of betting on DCMs if it chooses to. CFTC Regulation 40.11 prohibits a registered entity from listing for trading any contract that relates to "gaming" or "an activity that is unlawful under any State or Federal Law," or any similar activity "that the Commission determines, by rule or regulation, to be contrary to the public interest."

The CFTC could, as a result, determine that sports betting is "gaming," a term that is not further defined under the CEA or regulations; is contrary to state law, if offered without a state license; or is otherwise contrary to the public interest, perhaps because state regulators have historically regulated gambling and are better equipped to do so.

Any such determination, however, would be subject to legal challenge by prediction markets.[5] So far, the CFTC has remained silent on whether a sports bet is a swap, thereby allowing DCMs to continue to offer betting on sports as well as other events.

Prediction markets have taken the CFTC's silence and run with it, arguing, in brief, that the CEA's grant of exclusive jurisdiction to the CFTC over swaps traded or executed on a DCM, combined with the CFTC's approval of DCMs that operate prediction markets, means that prediction markets need not comply with state gambling regulations.

In response, state gambling regulators have filed suit to prevent prediction markets from offering sports betting without state licenses, Native American tribes have filed suit to preserve their exclusive gaming rights, and prediction markets have filed suit to enjoin state regulators' enforcement of state laws.

The question of CEA preemption has led to conflicting decisions, highlighted by two decisions by the same federal judge in Nevada that reached opposite conclusions on identical salient facts.

KalshiEX LLC v. Hendrick

Kalshi, which operates a nationwide prediction market on a CFTC-designated DCM, filed suit in the U.S. District Court for the District of Nevada to enjoin the Nevada Gaming Control Board from pursuing criminal or civil enforcement against it for offering sports-based event contracts in Nevada.[6] In *KalshiEX LLC v. Hendrick*, the company argued that its contracts were legal under federal law and that Nevada gaming laws, which prohibit operating unlicensed sports betting, were preempted by the CEA.

In a ruling **handed down** on April 8, Chief Judge Andrew P. Gordon agreed with Kalshi and enjoined Nevada from pursuing enforcement against Kalshi for offering event contracts on a CFTC-registered exchange.

Judge Gordon observed that the CEA, which grants the CFTC exclusive jurisdiction over swaps traded on DCMs, "reflects congressional intent to occupy the field of regulating CFTC-designated exchanges and the transactions conducted on those exchanges." [7] The court did not consider whether Kalshi's event contracts met the definition of a swap, but instead held that if a contract is traded on a CFTC-designated exchange, then it is up to the CFTC to regulate it.

Post-Hendrick: New Jersey and Maryland Cases

A few weeks later, on April 28, the U.S. District Court for the District of New Jersey, following the same logic as Hendrick, similarly **held** in *Kalshi v. Flaherty* that the CEA preempted the New Jersey Division of Gaming Enforcement's application of state gaming laws to sports-based event contracts traded on Kalshi.[8]

On Aug. 1, however, the U.S. District Court for the District of Maryland in *Kalshi v. Martin* departed from Hendrick and Flaherty, and **declined** to enjoin the state from enforcing its gambling laws against Kalshi.[9] The court presumed without deciding that Kalshi's event contracts were swaps, but determined that the CEA did not clearly preempt state gambling laws.[10]

In *Martin*, the court reasoned that because "regulating gambling is at the core of the state's residual powers as a sovereign in our constitutional scheme," there was a presumption against federal preemption.[11] Finding the express language of the CEA ambiguous regarding preemption of state gambling laws, the court analyzed the history, drafting and purpose of the statute, and for several reasons determined that those factors did not support federal preemption.



Jack Murphy



Peter Altman



James Benjamin

Among other things, the court reasoned that because "states have strong interests in regulating gambling ... [i]t is highly unlikely that Congress would have overridden state gambling laws without at least some indication in the text and legislative history that it intended to do so."^[12]

Both Flaherty and Martin are currently on appeal before the U.S. Courts of Appeals for the Third and Fourth Circuits, respectively.

North American Derivatives Exchange Inc. v. Nevada

On Oct. 14, Judge Gordon addressed a second prediction market case in the District of Nevada, this time filed by North American Derivatives Exchange, which operates a nationwide prediction market on a CFTC-designated DCM doing business as Crypto.com.^[13]

The case was factually indistinguishable from Hendrick. But instead of following his prior decision, Judge Gordon **reversed** course and declined to enjoin Nevada regulators from enforcing state gambling laws in relation to Crypto.com.

This time, while noting again that the CFTC had exclusive jurisdiction over swaps traded on DCMs, Judge Gordon took a close look at the definition of a swap — a step he had not taken in Hendrick, and which no court had done before in the context of prediction markets.

The event contracts offered by Crypto.com were not swaps, he reasoned, because they turned on the outcome of an event, and not the occurrence of an event as the swap definition requires. As an example, the court reasoned that a contract on whether the Kentucky Derby would take place is a swap, but a contract on who will win the Kentucky Derby is not a swap because it is based on the outcome of the event and not its occurrence.

The court was also troubled by the idea of requiring that all sports betting be conducted on a DCM, given that casinos prominently operated sports betting both before and after the CEA granted the CFTC exclusive jurisdiction over swaps, and neither Congress nor the CFTC had ever suggested that a sports bet was a swap subject to CFTC oversight.

Crypto.com has appealed this decision to the U.S. Court of Appeals for the Ninth Circuit. In addition, the Nevada Gaming Control Board has sought to dissolve the injunction issued in Hendrick, based on Judge Gordon's later reversal in Crypto.com.

Implications

Judge Gordon's contradictory decisions — as well as the conflicting decisions in Flaherty and Martin — illustrate the complexities of adapting the existing CEA framework to the regulation of nationwide prediction markets.

The CEA's swap definition is exceedingly broad, and the CFTC's exclusive jurisdiction over swaps transacted on DCMs is clear under the statute. At the same time, conferring exclusive jurisdiction on the CFTC to regulate sports betting, along with a limitless number of other possible events, while divesting state regulators of their traditional authority to regulate gambling, would have far-reaching consequences.

As Judge Gordon observed in Crypto.com, Congress "does not ... hide elephants in mouseholes."^[14] Nationwide sports betting would appear to be an exceedingly large elephant.

Moreover, from a practical perspective, the CFTC is a relatively small federal agency, and the task of effective and efficient regulation of gambling businesses at the federal level would require resources, infrastructure and expertise that have developed over the course of decades at the state level.

In the prior administration, in the context of election prediction markets, the CFTC resisted becoming an "election cop" charged with preventing fraud and manipulation within the political system.^[15] Granting the CFTC authority over nationwide sports betting may likewise put the CFTC in a position of taking on broad regulatory responsibilities that it may not be equipped to handle, at least at present.

Prediction markets, states and other interested parties will need to wait for further clarity. In addition to the Nevada litigation and the Flaherty and Martin appeals, cases presenting similar issues are also pending in Massachusetts, Ohio, Wisconsin and New York federal courts. If a circuit split emerges, it is likely that the applicability of the swap framework to prediction markets, and potentially also the preemption issue, will ultimately be resolved by the Supreme Court.

Jack Murphy is senior counsel at Akin Gump Strauss Hauer & Feld LLP. He previously served as head of the CFTC's Digital Asset Task Force and as a senior trial attorney in its Division of Enforcement.

Peter Altman is a partner at Akin. He previously served as senior counsel at the Market Abuse Unit in the U.S. Securities and Exchange Commission's Division of Enforcement.

James Benjamin is a partner at Akin. He previously served as a federal prosecutor in the U.S. Attorney's Office in the Southern District of New York.

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[1] <https://dune.com/datadashboards/prediction-markets>; Lang, Hannah, "Prediction Market Volumes Nearly Double in October," Wall Street Journal (Oct. 28, 2025).

[2] 7 U.S.C. §2(a)(1)(A).

[3] 7 U.S.C. §1a(47)(A)(ii).

[4] 7 U.S.C. §2(e).

[5] See *KalshiEx LLC v. Commodity Futures Trading Commission*, No. 23-cv-3257, 2024 WL 4164694 (D.D.C. Sept. 12, 2024) (holding that the CFTC exceeded its statutory authority in prohibiting Kalshi from offering event contracts based on the outcome of U.S. elections).

[6] *KalshiEX LLC v. Hendrick* , No. 25-cv-00575, 2025 WL 1073495 (D. Nev. Apr. 9, 2025).

[7] *Id.* at *6.

[8] *KalshiEX, LLC v. Flaherty* , No. 25-cv-02152, 2025 WL 1218313 (D.N.J. Apr. 28, 2025).

[9] *KalshiEX LLC v. Martin* , No. 25-cv-1283, 2025 WL 2194908 (D. Md. Aug. 1, 2025).

[10] *Id.* at *6, 7.

[11] *Id.* at *6.

[12] *Id.* at *9.

[13] *North American Derivatives Exchange Inc. v. Nevada* , No. 25-cv-00978, 2025 WL 2916151 (Oct. 14, 2025).

[14] *Id.* at *10 (parenthetically quoting *Whitman v. Am. Trucking Ass'ns* , 531 U.S. 457, 468 (2001)).

[15] Statement of Chairman Rostin Behnam Regarding CFTC Order to Prohibit Kalshi Political Control Derivatives Contracts (Sept. 22, 2023), available at <https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement092223>; but see *KalshiEx LLC v. Commodity Futures Trading Commission* , No. 23-cv-3257, 2024 WL 4164694 (D.D.C. Sept. 12, 2024).