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

Re: Comments related to the notice regarding Further Definition of "Swap" - Inclusions, Docket No. CFTC-2026-21377, 91 Fed. Reg. 66,022.

Dear Secretary Kirkpatrick,

Ohio, Kentucky, Maryland, Nevada, New Jersey, New York, Tennessee, Utah, 35 other States, and the District of Columbia submit this comment in response to the Commodity Futures Trading Commission's Notice of Proposed Rulemaking regarding the Commodity Exchange Act definition of "swap."

The States write to explain (1) why the CFTC lacks the statutory authority to redefine swaps in this way, (2) how the Proposed Rule, in its current form, suffers from other procedural and legal defects, (3) why the Proposed Rule is, in its current form, arbitrary and capricious under the Administrative Procedure Act, and (4) why the CFTC's interpretation of the CEA would violate constitutional doctrine. Given these statutory and constitutional infirmities, the CFTC should withdraw the Proposed Rule.

I. The CFTC lacks authority to regulate sports gambling as "swaps."

The Proposed Rule would expand the CEA's swap definition to cover all "event contracts, including those based on sports-, politics-, cultural-, and weather-related events." 91 Fed. Reg. 66,022, 66,023 (Oct. 19, 2026). The CFTC attempts to justify this expansion in two ways. It first claims that the CEA's definition of "swap" already covers sports gambling. *Id.* at 66,025–29. Alternatively, the CFTC invokes its joint rulemaking authority under 15 U.S.C. §8302(d)(1), which allows the CFTC "and the Securities and Exchange Commission, in consultation with the Board of Governors" to "further define the term[] 'swap.'" 91 Fed. Reg. at 66,024. And finally, the CFTC invokes 15 U.S.C. §8321(a)(2), and (b). *Id.* None supports the CFTC.

Neither the plain text of the CEA nor the power to further define "swap" stretches that far. *First,* the statute's plain text does not confer this power. Prediction markets and the CFTC have done poorly in courts around the country in making this argument. *See KalshiEX LLC v. Schuler*, 192 F.4th 664 (6th Cir. 2026); *KalshiEX LLC v. Assad*, 190 F.4th 1098 (9th Cir. 2026); *KalshiEX LLC v. Martin*, __ F.4th ___, 2026 WL 3544548, at *13–*16 (4th Cir. Nov. 18, 20260 (Thacker, J., op.); *KalshiEX LLC v. Bird*, No. 4:26-cv-00109, 2026 WL 2691009 (S.D. Iowa Sep. 8, 2026); *Coinbase Fin. Mkts., Inc. v. Tong*, ___ F.Supp. 3d ___, 2026 WL 2294602 (D. Conn. Aug. 10, 2026); *KalshiEX LLC v. Cafferelli*, ___ F.Supp. 3d ___, 2026 WL 2294589 (D. Conn. Aug. 10, 2026); *Coinbase Fin. Mkts., Inc. v. Nessel*, ___ F.Supp.3d ___, 2026 WL 2295184 (E.D. Mich. Aug. 7, 2026); *KalshiEX LLC v. Cox*, No. 2:26-cv-00151, 2026 WL 2241564 (D. Utah Aug. 4, 2026); *KalshiEX v. Williams*, No. 25-cv-8846, 2026 WL 2017466 (S.D.N.Y. July 13, 2026); *Ludlow Exch., LLC v. James*, No. 26-cv-06676-CM, 2026 WL 3408217 (S.D.N.Y. Nov. 10, 2026). *Second*, the CEA lacks the clear statement required under the federalism canon and major-questions doctrine to confer this massive regulatory authority. And *third*, even if the CFTC can "further define" swap, the CFTC's proposed definition goes beyond any reasonable interpretative bounds.[1]

A. The CEA's "swap" definition does not cover sports gambling.

First up, the CFTC claims that four CEA provisions include sports-gambling event contracts as "swaps." 91 Fed. Reg. at 66,024. None does so.

i. Sports gambling is not commonly understood by the commodities and derivatives trade as a "swap."

The CFTC first claims that sports-gambling event contracts are "swaps" because they are "commonly known to the trade as a swap." 7 U.S.C. §1a(47)(A)(iv); 91 Fed. Reg. at 66,025–26. "[T]he trade," the CFTC says, means "those who participate in the derivatives markets, including the CFTC, its registrants, and traders," and not a "broader group, such as the general public." 91 Fed. Reg. at 66,026. It then argues that "commonly known" does not mean "universally known." *Id.*

Off the bat, this statutory reading runs into problems. Swaps are commonly understood as derivative contracts where two parties exchange cash flows in the future. John C. Hull, *Options, Futures, and Other Derivatives* 148 (8th ed. 2012). Like other derivatives, swaps serve markets in several ways, including by serving as

[1] Because this proposed rule suffers from fatal flaws it should be withdrawn in its entirety. For avoidance of doubt, however, while this letter focuses on the arbitrary and capricious decision to include sports bets within the definition of swap, several of the signatories to this letter similarly object to the inclusion of politics, elections, weather, and culture contracts within the definition for the same reasons outlined here.

a mechanism to "hedg[e]" against "risks in the economy." *Id.* at 1. The CEA itself recognizes that the derivatives it regulates serve hedging and price-discovery purposes. *See* 7 U.S.C. §5(a); 7 U.S.C. §19(a)(2)(C). The CFTC's novel theory disregards these settled principles and is not supported by sources within the trade. Reference works—such as "lexicographic and scientific authorities, dictionaries, and other reliable information sources"—often supply the basis for trade meaning. *See Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). The CFTC does not identify any source that supports treating sports bets as swaps. In fact, after the definition of swap was added to the CEA in 2010, *no one* attempted to call sports bets swaps for 15 years.

Sports-gambling event contracts fall outside the common understanding of swap. Take one of the CFTC's core examples: an event contract on the New York Knicks to win the NBA Finals. This bet does not exchange cash flows or liabilities of financial instruments. It does not send price signals. People use sports bets as entertainment, not as signals that guide how they make choices relating to any underlying asset, benchmark, or index. Unlike markets that attract speculators among other market participants, sports-gambling event-contract markets start and end in speculation. That is because, generally, sports-gambling event contracts are not used to hedge against market risks. The CFTC tries to prove otherwise by pointing to anecdotal examples of businesses that use sports-gambling event contracts for hedging, such as a sports bar that bets on a Knicks win to hedge against a promise of free drinks. 91 Fed. Reg. at 66,029 n.97. But as the CFTC once noted, and as a court of appeals explained, such hedges are "too diffuse and unpredictable to correlate to direct and quantifiable changes in the price of commodities or other financial assets or instruments, limiting the[ir] hedging and price-basing utility." *Schuler*, 192 F.4th at 693 (quoting 89 Fed. Reg. 48,968, 48,981 (June 10, 2024)). A few "isolated examples" of hedging "are a far cry from establishing that sports-event contracts are inherently associated with a financial consequence or are commonly used to hedge risk and derive pricing information in any meaningful way." *Id.* at 690. And if the CFTC's best example of a sports-gambling event contract—a bet on a critical game (or series) involving one of the world's most valuable sports franchises in one of the world's biggest cities—does not count as a swap, then contracts on more *niche events* would not be commonly understood as swaps either. A sports-gambling event contract on how many free throws a Knicks bench player scores over the course of a regular season, or a "parlay" contract hinging on seven different players' stat lines in a single basketball game, falls well outside of the common understanding of a financial swap.

The CFTC's own concessions prove the point. As it readily admits in its simultaneously issued Interim Final Rule, "[t]he Commission is unaware of any trade usage or market belief that gambling products are considered swaps in the derivatives industry." 91 Fed. Reg. 65,969, 65,973 (Oct. 19, 2026). "To the contrary, DCMs"—designated contract markets—"and industry groups have repeatedly

emphasized to federal courts that gambling contracts are not swaps." *Id.* That fact does not change just because a DCM allows on-market sports bets. If no one understands a sports bet to be a swap, it does not magically become a swap just because it is moved to a DCM.

Tellingly, the CFTC has presented scant evidence to show that the finance industry, or the recreational gamblers that make up the vast majority of sports event-contracts traders, treat sports-gambling event contracts any differently from sports bets. And the CFTC ignores contrary evidence demonstrating that both it (up until now) and regulated entities and their market participants have understood these contracts as sports bets, not swaps. Starting with the Commission itself, the CFTC claims that for "decades" its "position has been that event contracts are derivatives subject to its jurisdiction." 91 Fed. Reg. at 66,026. At least with respect to sports-gambling event contracts, the CFTC's evidence does not support its claim.

To begin with, the CFTC overstates when it first recognized event contracts as regulable derivatives. The CFTC claims it first asserted regulatory authority over event contracts in a no-action letter in 1993. *Id.* at 66,026 n.47. But the CFTC did not claim authority to regulate event contracts in that letter. Instead, it said only that it would not recommend enforcement against a university's academic program where students practiced trading in a small-scale, non-profit futures marketplace. CFTC Staff Letter No. 93–66 (June 18, 1993), available at https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/93-66.pdf. The CFTC also cites a prior request for comment on event contracts. *See* 91 Fed. Reg. at 66,026 n.48; 73 Fed. Reg. 25,669 (May 7, 2008). But the CFTC did not assert regulatory authority over event contracts in that notice. Instead, it sought comments on "[w]hether event contracts are within the Commission's jurisdiction and if so, why (or why not)?" 73 Fed. Reg. at 25,670.

In any event, regulation over "event contracts" is beside the point. The relevant question is what counts as a "swap." CFTC authority over those products did not start until July 2010 when Congress enacted the Dodd-Frank Act. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §721, 124 Stat. 1376, 1658–72 (2010). The earliest CFTC-cited regulatory action asserting authority over event contracts as "swaps" came in a 2022 adjudication. *See* 91 Fed. Reg. at 66,026 n.50; CFTC, *Order Instituting Proceedings Pursuant to Section 6(c) and (d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions* (Jan. 3, 2022). The CFTC's historical account of event-contract regulation as "swaps" is paper thin. Again, the CFTC does not cite a single regulation or enforcement action over event contracts based on sports gambling. *See* 91 Fed. Reg. at 66,026 nn.46–52. So the CFTC has not "for decades" understood that sports-gambling event contracts are swaps.

Beyond overstating the evidence, the CFTC fails to address evidence that it has consistently understood that sports-gambling event contracts are not "swaps" under its regulatory authority. In 2024, the CFTC proposed an event-contracts rule, stating that it "is not a gaming regulator." 89 Fed. Reg. at 48,982–83. In doing so, the CFTC acknowledged that "gambling is overseen by state regulators with particular expertise, and governed by state gaming laws aimed at addressing particular risks and concerns associated with gambling." *Id.* at 48,982.

Prior CFTC Commissioners have echoed this sentiment. Former Chairman Gary Gensler, who chaired the CFTC during the drafting, passage, and implementation of the Dodd-Frank Act, has explained that no one at the CFTC thought Dodd-Frank extended to sports-gambling event contracts. Brief of Former CFTC Chairman Gary Gensler as *Amicus Curiae* at 5–6, *Flaherty v. KalshiEX, LLC*, No. 26-299 (Oct. 8, 2026) (petition for certiorari pending). And former CFTC Commissioner Dan Berkovitz said that, during his tenure, the CFTC thought sports-betting contracts did not have any "economic purpose" for the CFTC to regulate them under the CEA. David Huber, *Former CFTC Commissioner Doubts "Economic Purpose" of PM Sports Contracts*, Deadspin (June 22, 2026), perma.cc/3RTS-DV8Y. The CFTC has not addressed any of this contrary evidence, which undercuts any claim that it has long understood sports-gambling event contracts to be "swaps."

The CFTC further claims that "[m]arket participants have also overwhelmingly recognized that event contracts are swaps by complying with the CFTC's swap regulatory regime just as they do when listing, clearing, or trading other swaps." 91 Fed. Reg. at 66,026. The opposite is true. The Chicago Mercantile Exchange—a significant commodity exchange and certainly a key part of "the trade"—openly disagrees with the CFTC. Longstanding CME Group Chairman and CEO Terry Duffy, for instance, has said that "sports contracts are gambling, and should be regulated by the states," not the CFTC. Shanny Basar, *Congress Urged to Act on Prediction Markets*, Traders Magazine (Sept. 25, 2026), perma.cc/LUQ3-MFAA. The Proposed Rule's sparse evidence—letters and trading activity from long-standing exchanges and institutional traders—does not bolster its claim. *See* 91 Fed. Reg. at 66,026 nn.55–57. The CFTC suggests those sources show that market participants recognize sports-gambling event contracts as swaps. But these market participants recognize only that *some* event contracts are swaps, not that *sports-gambling* event contracts are swaps. They also recognized that "the majority of market participants on prediction markets are retail traders." Letter from Cboe Global Markets (May 5, 2026) at 5, available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=115665&SearchText=sexton.

Still, the CFTC says, since "DCMs have self-certified thousands of event contracts based on sports" in the last two years, those contracts must be commonly understood as swaps. 91 Fed. Reg. at 66,026. That argument is hard to take

seriously. And the logic proves too much. Under the CFTC's view, any kind of contract could become a swap so long as enough market participants self-certify those contracts. This would allow the CFTC to regulate anything—from casino-style gaming products to ordinary contracts for goods and services. And no one claims the CEA gives the CFTC that power.

More importantly, the CFTC's argument runs headlong into the statutory text. The CFTC equates "commonly known to the trade" to "currently asserted by some market participants." A small group of self-interested market participants hoping to avoid state gambling laws cannot unilaterally change the meaning of "swap" for the entire trade over the course of a couple years. Underscoring that, prediction markets themselves, like Kalshi, have previously recognized that "Congress did not want sports betting to be conducted on derivatives markets." Brief of Appellee KalshiEX LLC at 41, *KalshiEX LLC v. CFTC*, No. 24-5205 (D.C. Cir. Nov. 15, 2024).

In sum, swaps are commonly understood to the trade as derivative contracts for exchanging cash flows or liability and used for hedging economic risk and price discovery. Sports-gambling event contracts do not fit that bill, and "everyone … knows" that "sports event contracts are, in reality, sports bets." *Assad*, 190 F.4th at 1113. The CFTC has not shown otherwise. It overstates the history of its regulation of event contracts. It tries to turn an understanding that *some* event contracts are swaps into an understanding that *sports-gambling* event contracts are swaps. And it lends far too much weight to the self-interested self-certification of sports-gambling event contracts by prediction markets. Most of the courts that have addressed the issue have gotten it right: sports bets are not swaps.

ii. Sports-gambling event contracts are not dependent on the occurrence of an event associated with potential financial, economic, or commercial consequences.

The CFTC next says that sports-gambling event contracts are "swaps" because they are contracts "dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence." 7 U.S.C. §1a(47)(A)(ii); 91 Fed. Reg. at 66,027. In the CFTC's view, all sports events have potential financial consequences because "sponsors, advertisers, television networks, sports franchises, and local and national communities" have "financial interests [that] are directly affected by sporting event outcomes." 91 Fed. Reg. at 66,027. Courts have overwhelmingly rejected this argument.

For good reason: this reading cannot work. The CFTC claims revenue that sports teams, athletes, and nearby businesses can generate from the outcomes of games satisfies the economic-consequences requirement. 91 Fed. Reg. at 66,029. But none of that revenue stems from financial or economic interests associated with the game or in-game events. A New York restaurant may sell more food and beverages

when the Knicks win, but the games involve no financial instrument or interest with any relation to the profits and losses of that restaurant. The CFTC's attempt to assert that this connection is sufficient for sports events to be "associated with" potential financial consequences reads those words so broadly that they are rendered "'meaningless.'" *Schuler*, 192 F.4th at 686 (quoting *Chevron USA Inc. v. Plaquemines Parish*, 608 U.S. 1, 11 (2026)). To avoid that, "the CEA's 'associated with' language" must be read "to limit the statutory definition to only those events that are commonly understood to be intrinsically economic or otherwise generally associated with having financial significance." *Id.* That means events with only "attenuated, downstream financial effect" will not fit under the statutory definition. *Id. See also Assad*, 190 F.4th at 1115–16.

Commenting on a separate rule proposed by the CFTC, Ohio and another group of States have already made this same point. *See* Ohio Attorney General, *Comment Letter on Prediction Markets; Public Interest Determinations*, CFTC-2026-1189 (July 27, 2026), perma.cc/GC7L-AFRW. There, the States explained that "[s]ports bets (or sports events contracts) are not sufficiently connected to economic consequences" for sports-gambling event contracts to be "swaps." *Id.* at 14. The States also explained that the CFTC's interpretation is wrong because §1a(47)(A)(ii) distinguishes between an "occurrence" and "event." *Id.* at 14–15. Under the statute, swaps must depend on "events" not just "occurrences." *Id.* Because sports-gambling event contracts turn on "occurrences," not "events," they do not fall within this definition. *Id.*

On top of that, the CFTC's economic-consequences explanation now is inconsistent with its own interpretation of the same provision in its Interim Final Rule excluding certain contracts from the definition of "swap." *See* 91 Fed. Reg. 65,969 (Oct. 19, 2026). There, the CFTC says that "casino-style gambling products, including sports-wagering contracts entered into on a sportsbook and casino games, are not swaps and do not fall within the CFTC's jurisdiction," despite having all the same downstream financial interests—sponsors, advertisers, television networks, sports franchises—that the CFTC points to here. *Id.* at 65,971. The CFTC says traditional sports-gambling wagers are not swaps in the Interim Final Rule but then says that they would count as swaps under this Proposed Rule. That contradiction violates the rule that a statute must be read "as a symmetrical and coherent regulatory scheme," fitting "all parts into a[] harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quotations omitted). At the very least, the CFTC must "do more than enumerate factual differences," between these products; it must "explain the relevance of those differences to the purposes of the" CEA. *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965). Instead, the CFTC has treated these "functionally indistinguishable" products differently in contemporaneous rulemaking, rendering this Proposed Rule arbitrary and capricious. *See Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1260 (D.C. Cir. 1996).

iii. Sports-gambling event contracts do not qualify as binary options based on excluded commodities.

The CFTC also asserts regulatory authority over sports-gambling event contracts under the CEA's definition of "swaps" as binary options that are "based on the value of 1 or more … commodities." 91 Fed. Reg. at 66,027; 7 U.S.C. §1a(47)(A)(i). The agency argues that a sports event is an "excluded commodity"—defined to include "an occurrence, extent of an occurrence, or contingency" that is "beyond the control of the parties to the relevant contract, agreement, or transaction … and associated with a financial, commercial, or economic consequence." 91 Fed. Reg. at 66,027; 7 U.S.C. §1a(19)(iv). In the CFTC's view, all sports-gambling event contracts are swaps because they are "based on the value" of a "commodit[y]," namely a sports event. 91 Fed. Reg. at 66,027.

A threshold problem with this argument is that it depends on a sports event being an "excluded commodity" under §1a(19). Even if that is true, the CFTC's "exclusive jurisdiction" does not reach excluded commodities. The statutory text gives the CFTC exclusive jurisdiction over commodity futures contracts on designated contract markets. *See* 7 U.S.C. §2(a)(1)(A). "Given the subject matter of excluded commodities, that distinction makes sense." *KalshiEX, LLC v. Hendrick*, 817 F.Supp. 3d 1014, 1034 (D. Nev. 2025), *aff'd in part and remanded sub nom. Assad*, 190 F.4th 1098. Excluded commodities include "interest or exchange rates, currencies, securities, or macroeconomic indicators." *Id.* at 1033–34. *See* §1a(19)(i). The CFTC does not have exclusive jurisdiction over transactions involving those items, "[n]or does it have exclusive jurisdiction over the subject matter in the special rule related to excluded commodities, such as activity that is unlawful under federal or state law, terrorism, assassination, war, or gaming." *Hendrick*, 817 F.Supp. 3d at 1034. So, whether a sports event is an excluded commodity is neither here nor there—the CFTC lacks exclusive jurisdiction over them, leaving States free to regulate sports gambling.

But even if the CFTC did have such exclusive jurisdiction, sports-gambling event contracts are not excluded commodities. The CFTC's reading fails for one of the same reasons that sports-gambling event contracts are not swaps under §1a(47)(A)(ii): the settlement-determinative events in these contracts are not "associated with" economic consequences. Like a "swap," an "excluded commodity" must be an occurrence "associated with a financial, commercial, or economic consequence." 7 U.S.C. §1a(19)(iv)(II). As discussed above, the relevant events lack an inherent connection to any financial consequences. *See above* at 3–4. Without that connection, a sports event does not qualify as an "excluded commodity."

Moreover, the definition of "excluded commodity" is narrower than the definition of "swap," because it drops the word "potential." *Compare* §1a(19) *with* §1a(47)(A)(ii). Section 1a(19)(iv)(II) requires "a financial, commercial, or economic consequence," while §1a(47)(A)(ii) requires only "a potential financial, economic, or

commercial consequence." The absence of *potential* in otherwise identical language shows, by negative implication, that the consequences of excluded-commodity events must be *actual*. In other words, events need to have an even closer connection to financial consequences to qualify as "excluded commodities." Since sports events do not clear the lower hurdle of §1a(47)(A)(ii), they do not clear the higher hurdle of §1a(19).

This also matters because the CFTC requires the word "potential" to do a lot of work in its interpretation of §1a(47)(A)(ii). *See* 91 Fed. Reg. at 66,028–29. Without that word in the definition of "excluded commodity," the CFTC seemingly acknowledges that, to qualify an event as an "excluded commodity," it would need to "empirically verify" that the event has a financial, economic, or commercial consequence. *See id.* at 66,028–29. The Proposed Rule does none of that empirical work to tie sports events to financial consequences.

iv. Sports-gambling event contracts do not fall under the CEA's "combination" definition of swap.

The CFTC also claims that sports-gambling event contracts fit within the CEA's definition of "swap" as "any combination or permutation of, or option on, any agreement, contract, or transaction described in" §1a(47)(i)–(v). 91 Fed. Reg. at 66,024; 7 U.S.C. §1a(47)(A)(vi). This provision is not a separate source of regulatory authority but merely specifies that a swap is still a swap when it is combined with other swaps. Because sports-gambling event contracts do not fall under any of the individual definitions of "swap," their combinations do not either.

More problematic, the CFTC fails to analyze why this definition would fit any sports-gambling event contracts. The agency does nothing more than quote the statutory text and assert that "event contracts are implicated" by it. 91 Fed. Reg. at 66,024. An agency that "merely parrots the language of a statute without providing an account of how it reached its results" has not "adequately explained the basis for its decision." *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1405 (D.C. Cir. 1995). So even if some sports-gambling event contracts fall under any of the above-mentioned provisions (none do), the CFTC cannot claim, without further analysis, that combinations of those contracts are also swaps under this provision.

B. The major-questions doctrine and federalism canon require a clear statement that is not in the statute.

All the analysis so far assumes that the CFTC's authority to regulate sports gambling as "swaps" depends on divining the "best reading" of the statute. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024). But when agencies claim certain powers, courts look for clear statements, not just best readings. The CFTC's claim that it has the power to regulate sports gambling triggers two clear-statement rules: the major-questions doctrine and 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. *See West Virginia v. EPA*, 597 U.S. 697, 722–23 (2022); *Bond v. United States*, 572 U.S. 844, 857 (2014). Since the CFTC's theory does not clear normal statutory-interpretation hurdles, it also cannot overcome the higher clear-statement bar.

Sports gambling checks all the boxes for these rules. It implicates "billions of dollars" and affects "millions of people." *King v. Burwell*, 576 U.S. 473, 485 (2015); *see also* Doug Greenberg, *U.S. sports betting industry posts record $13.7B revenue for '24*, ESPN (Feb. 19, 2025), perma.cc/LJ7Y-DQG9. That falls well within the threshold for major-questions cases. *See Ala. Ass'n of Realtors v. Dep't Health and Human Servs.*, 594 U.S. 758, 764 (2021); *Nat'l Fed'n Indep. Bus. v. OSHA*, 595 U.S. 109, 122–26 (2022) (Gorsuch, J., concurring); *West Virginia*, 597 U.S. at 714. CFTC-regulated sports gambling would allow a single 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. The Supreme Court made this plain in *Murphy v. NCAA* when it observed that "Americans have never been of one mind about gambling" and that "[s]ports gambling … has long had strong opposition." 584 U.S. 453, 458, 460 (2018). "The legalization of sports gambling requires an important policy choice," and the Supreme Court's decision in *Murphy* left that policy choice to the States. *Id.* at 486. Plus, giving the CFTC power over sports gambling upsets state-federal relations. Clear-statement rules apply when the federal government "intrudes into an area that is the particular domain of state law" in such a way. *See Ala. Ass'n of Realtors*, 594 U.S. at 764.

Moving sports-gambling regulation to the CFTC would result 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). *See also West Virginia*, 597 U.S. at 723. 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). The CFTC must point to "clear congressional authorization" to regulate sports gambling as event contracts, but the "modest" definition of swap cannot bear the weight the CFTC places on it. *West Virginia*, 597 U.S. at 723 (quotations omitted). The CFTC lacks the clear statement required to radically alter its power over the national economy. *See id.* The most straightforward answer is that sports bets are not derivatives subject to the CFTC's jurisdiction. The CFTC should confirm as much in rulemaking and explain that States can continue to regulate, or prohibit, sports gambling.

C. The CFTC's delegated power to "further define" swap does not justify the Proposed Rule.

Besides relying on the statutory definition of "swap," the CFTC also claims authority to regulate sports gambling through its delegated power to "further define" (with the SEC and in consultation with the Federal Reserve Board) the term "swap." *See* 15 U.S.C. §8302(d)(1). But that provision does not give the CFTC the authority it claims. For one, the CFTC has not engaged with the SEC or the Federal Reserve Board as the statute requires. And even if it had, regulating sports-gambling event contracts goes beyond any permissible discretion Congress granted with the power to "further define" swaps.

i. The CFTC failed to follow the statutorily prescribed procedure for joint rulemaking.

As a threshold matter, the CFTC has no authority to act unilaterally under §8302(d)(1). The statute authorizes the CFTC and the SEC to act *jointly* in further defining "swap" and requires them to consult with the Federal Reserve Board when doing so. There is no evidence that the SEC had any involvement with the Proposed Rule. Nor is there evidence that the CFTC consulted with the Federal Reserve Board.

The CFTC and the SEC did not jointly issue the Proposed Rule. The preamble to the Proposed Rule says only that "the Commodity Futures Trading Commission … is proposing to further define the term 'swap' to explicitly include event contracts, including those based on sports- … related events." 91 Fed. Reg. at 66,022. The preamble does not describe any SEC involvement. *See id*. And only the Secretary of the CFTC signed the Proposed Rule. *Id.* at 66,033. The only reference to the SEC's supposed consent is a cursory footnote saying that the "SEC joins in proposing this rule in satisfaction of the statutory requirement in section 712(d)(1)." *Id.* at 66,025 n.38. That conclusory statement does not satisfy the statute. Indeed, it stands in sharp contrast to prior joint rulemaking by the CFTC and the SEC.

When the CFTC and the SEC have acted under §8302(d)(1), they authored a "joint final rule," with the Secretaries of both agencies signing off on it. 77 Fed. Reg. 48,208, 48,363 (Aug. 13, 2012). And the preamble extensively demonstrated that the SEC was involved. Among other things, the SEC participated in answering comments, including comments relating to the Securities Act and Exchange Act. *See id.* at 48,224. The SEC provided direct guidance on security-based swaps and how the new definition of "swaps" interacted with them. *Id.* at 48,227, 48,262, 48,291. The SEC also performed its own economic analysis, as required under the Exchange Act. *Id.* at 48,327–44. There is no evidence that the SEC was similarly involved in the Proposed Rule. That contrast is relevant because courts look to "history" of prior regulation under a statutory provision. *West Virginia*, 597 U.S. at 721 (quotation omitted). The clear departure from prior practice shows that the CFTC did not follow the statutory mandate requiring it to work with the SEC to "further define" "swap."

The Proposed Rule has the same deficiency with respect to the Federal Reserve Board. In a conclusory footnote, the CFTC stated that it "consulted with the Federal Reserve Board by sharing this Proposal." 91 Fed. Reg. at 66,023 n.3. But the Proposed Rule does not provide any description of the Federal Reserve's opinion on the rule, whether and how it believed the rule met the statutory decision-making criteria, or even how sports-gambling event contracts are legitimate financial instruments that could have any impact on United States monetary policy. The CFTC did not follow the prescribed statutory procedures for exercising authority to "further define" "swap."

ii. The CFTC's claimed authority to regulate sports-gambling event contracts goes beyond the bounds of the CEA's delegation of authority to define swaps.

Even if the Proposed Rule was a joint effort of the CFTC and the SEC (in consultation with the Federal Reserve Board), the delegated authority to "further define" "swap" does not allow the CFTC to regulate sports gambling. "[E]nabling legislation is generally not an open book to which the agency may add pages and change the plot line." *West Virginia*, 597 U.S. at 723 (quotation omitted, alteration accepted). Statutes still "fix[] the boundaries of the delegated authority," and agencies must "engage[] in reasoned decisionmaking within those boundaries." *Loper Bright*, 603 U.S. at 395 (alterations accepted, quotations omitted). An agency lacks statutory authority when its interpretation transgresses those boundaries. Regulating sports-gambling event contracts as swaps would go beyond the boundaries fixed by the CEA.

Delegated power comes with limits. For one, agencies cannot craft definitions that implicate issues of "deep economic and political significance" without a clear statement. *Id.* at 405 (quotation omitted). Instead, courts "expect[] Congress to delegate such authority expressly if at all" because "extraordinary grants of regulatory authority are rarely accomplished through modest words, vague terms, or subtle devices." *Id.* (alterations accepted, quotations omitted). Here, because both the federalism canon and major-questions doctrine are implicated, the CFTC's power to define "swap" is limited, and that power does not reach regulating sports gambling. *See above* at 10–11.

The CFTC's proposed expansive definition of swap also goes beyond any discretion the CEA delegates to the agency because it stretches the word "swap" beyond any recognizable bounds. As explained above (at 2–6), because sports-gambling event contracts do not function like derivatives, they are nowhere near the common trade understanding of "swap." They do not allow their parties to exchange cash flows or liabilities of financial instruments. They do not send price signals to any relevant parties. And they are not used for hedging against economic risk. No

reasonable interpreter can look at a sports bet and say it is a financial derivative that belongs on the Chicago Mercantile Exchange.

The contradiction in the CFTC's definition (*see above* at 8) further shows its unreasonableness. The CFTC acknowledges that traditional sports bets are not swaps, but its attempt to exempt them from its proposed expansive definition of "swaps" is not tied to any statutory text. *See* 91 Fed. Reg. at 65,971. An interpretation of a statute that creates an exception divorced from text is not reasonable. Nor is an interpretation that contradicts the agency's other contemporaneous rulemaking.

Even if the CFTC could overcome these infirmities, any rule that further defined "swap" would operate only prospectively. A statutory grant of rulemaking authority does not encompass the power to promulgate retroactive rules unless the statute says so expressly. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Section 8302(d)(1) does not allow retroactive application because Congress did not delegate authority to promulgate retroactive rules. In fact, the CEA contains only one provision allowing for "retroactive[]" rulemaking, *see* 7 U.S.C. §6(c)(1), raising the negative implication that no other rulemaking may be retroactive. So even if the Proposed Rule were valid with respect to sports-gambling event contracts, it would not apply to contracts made *before* the final rule becomes effective. This means that the States are free to regulate and bring enforcement actions against prediction markets for any sports-gambling event contracts they offered prior to this rule.

D. The CFTC's reliance on 15 U.S.C. §8321 does not support the Proposed Rule.

The CFTC points to two other provisions to justify its rulemaking. Under 15 U.S.C. §8321(a)(2), the CFTC may "adopt a rule to define" "any other term included in an amendment to the [CEA] made by this subtitle." But that cannot allow the CFTC to define "swap." After all, §8302(d)(1) is expressly about further defining swap. Extending §8321(a)(2) to cover "swap" would fly in the face of the longstanding principle that when two provisions touch the same topic, the specific controls the general. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). Congress provided a swap-specific provision, § 8302(d)(1), so that provision applies. And the CFTC itself has followed the more-specific provision in prior rulemaking.

The specific-over-the-general principle has particular force here because §8302(d) contains joint rulemaking and consultation requirements that the general provision does not. It makes little sense to think that Congress set out detailed requirements for rulemaking on this exact subject, yet the agency can evade them through the general provision.

Second, the CFTC says that 15 U.S.C. §8321(b) supports the Proposed Rule. That statute authorizes the CFTC to "adopt a rule to further define the term[] 'swap'" "[t]o include transactions and entities that have been structured to evade" the regulation of swap markets. But the Proposed Rule does the opposite. It seeks to define sports event contracts as swaps, even though prediction markets *already contend* they are swaps. And the CFTC is currently regulating them as swaps. This is the opposite of evasion. What is more, no one contends that sports bets have been structured to avoid the CEA. The statute does not justify the Proposed Rule.

II. Other procedural and legal defects undercut the Proposed Rule.

The CFTC does not have authority to promulgate this rule for two more reasons. *First,* the CFTC currently lacks the authority to issue any regulations due to lack of a quorum. *Second*, this rule cannot go into effect in the Sixth and Ninth Circuits because both courts have ruled that the CEA does not give the CFTC authority to regulate sports-gambling event contracts.

A. The CFTC lacks a quorum to engage in rulemaking.

Currently, the CFTC has only one commissioner, Chairman Michael S. Selig, and thus lacks the authority to issue any rule, including this one. The CEA gives "the Commission" the power to promulgate regulations, 7 U.S.C. §12a(5), and the Commission "shall be composed of five Commissioners," 7 U.S.C. §2(a)(2)(A).

The statute contemplates that the Commission must be made up of at least two members, and perhaps as many as four. It provides that "*A* vacancy in the Commission shall not impair the right of the remaining *Commissioners* to exercise all the powers of the Commission." 7 U.S.C. §2(a)(3) (emphasis added). In other words, while a single vacancy is not a problem, there must be multiple commissioners to constitute "the Commission" and exercise its powers. That is why the statute refers to "the remaining Commissioners" with the definite article "the" (rather than "any") and uses the plural "Commissioners."

A single commissioner does not qualify as "Commissioners." The CFTC needs a quorum of at least two, and perhaps as many as four, commissioners. The CFTC—as currently constituted—does not have a quorum. Chairman Selig does not have the authority to promulgate a rule until the President nominates and the Senate confirms additional commissioners. If the CFTC proceeds without a quorum in finalizing this Proposed Rule, it will act unlawfully and exceed its statutory authority. *See* 5 U.S.C. §706(2)(C).

B. The CFTC cannot override binding judicial interpretations.

Recent decisions by the Sixth and Ninth Circuits limit the possible geographic scope of the Proposed Rule, and pending appellate decisions may further limit that

scope. Although the Proposed Rule acknowledges these decisions, *see* 91 Fed. Reg. at 66,025, it fails to recognize or address how they limit the CFTC's regulatory authority. "[O]nce a court has interpreted the bounds of [an agency's] delegated authority," that agency "does not have the authority to overrule that interpretation." *United States v. Bricker*, 135 F.4th 427, 435 (6th Cir. 2025).

In both circuits, unanimous panels performed ordinary statutory interpretation in holding that the CFTC lacks authority to regulate sports gambling as swaps. *See Schuler*, 192 F.4th 664; *Assad*, 190 F.4th 1098. Both courts concluded that the CFTC's regulatory powers under the CEA unambiguously do not reach sports gambling. Thus, the Proposed Rule cannot have any application within the jurisdiction of those courts.

In addition to the legal issue, the CFTC has not addressed how a non-uniform policy of regulating sports-gambling event contracts in some parts of the country (States outside the Sixth and Ninth Circuits) but not in others (States in those circuits) would satisfy statutorily prescribed decision-making criteria and cost-benefit analysis. *See* 7 U.S.C. §19(a)(1). Failing to analyze how cost-effectiveness factors may change under these circumstances is arbitrary and capricious. *See Ohio v. EPA*, 603 U.S. 279, 293–294 (2024).

This problem is compounded by the fact that this precise issue remains pending in other federal courts of appeals and the Massachusetts Supreme Judicial Court. *See KalshiEX, LLC v. Williams*, No. 26-1835 (2d Cir.); *United States v. Wisconsin*, No. 26-2636 (7th Cir.); *KalshiEX, LLC v. Bird*, No. 26-2874 (8th Cir.); *KalshiEX, LLC v. Cox*, No. 26-4100 (10th Cir.); *Massachusetts v. KalshiEX, LLC*, No. SJC-13906 (Mass.). Depending on how those cases turn out, the Proposed Rule may be barred from application in much wider swaths of the country. In light of these pending cases, the CFTC has also not considered the alternative regulatory path of waiting for judicial precedent to settle on the issue before it seeks to assert its own interpretations of "swap." It appears the CFTC is attempting to *override* the courts. An agency cannot do that.

III. The Proposed Rule is otherwise arbitrary and capricious.

Beyond suffering from deficiencies in statutory authority and procedure, the Proposed Rule also fails to meet standards of reasoned decision-making in several ways. *First*, the CFTC failed to consider important aspects of the problem, including harms posed by sports gambling and pressures for casinos and sportsbooks to reorganize as prediction markets. *Second*, the CFTC has neither explained its change in position nor justified that change in light of wide reliance interests on its prior position. And *third*, the CFTC failed to consider the reasonable alternative of regulating *some* event contracts but not *sports-gambling* or *casino-gambling* event contracts.

A. The CFTC failed to consider important problems such as the public-safety concerns of problem gambling and how the Proposed Rule will exacerbate that problem.

Sports gambling poses serious harm to the States' citizens, and States have enacted extensive public-safety regulations to curb them. But the Proposed Rule seeks to federalize sports gambling and leave it unregulated with respect to public safety. That approach ignores an important problem, making the Proposed Rule arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Indeed, both the CEA and the logic of the Proposed Rule itself emphasize the significance of this problem. When promulgating any regulation under the CEA, the statute requires the CFTC to consider "protection of market participants and the public." 7 U.S.C. §19(a)(2)(A). The delegation of discretion to "further define" "swap" directs the CFTC and the SEC to determine whether a proposed definition is "necessary and appropriate, in the public interest, and for the protection of investors." 15 U.S.C. §8302(d)(2)(A). The Proposed Rule acknowledges the risks of gambling but does nothing to address the need to protect market participants from them. *See* 91 Fed. Reg. at 66,032.

State laws are necessary to protect citizens from the harm gambling poses. Gambling has grown exponentially in recent years. And the popularity of sports gambling in particular 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), perma.cc/K4XA-JQG9. While some use sports betting as mere entertainment, gambling is dangerous for many. Millions of Americans qualify as problem or pathological gamblers. *See* Nat'l Gambling Impact Study Comm'n, Final Report, 4-1 (June 1999), 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. "[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), perma.cc/FU4V-QGBW. 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.

To combat these harms, States have enacted several kinds of public-safety regulations. For example, some States prohibit online sports gambling entirely. *E.g.*, Wash. Rev. Code §9.46.240. Other States allow gambling but require proprietors to apply for a license and demonstrate their trustworthiness before being able to offer such services. *E.g.*, NRS 463.0129(1)(d); N.J. Stat. Ann. §§5:12A-10, -11, -13(a). Others limit gambling to those 21 and older, given the special dangers posed to young

people. *E.g.*, N.Y. Racing, Pari-Mutuel Wagering and Breeding Law §1367(1)(j), (1)(r)(x). Still others create voluntary-exclusion programs where casinos and sportsbooks must bar problem gamblers who opt in to the programs from gambling. *E.g.*, Ohio Rev. Code §3775.13(C)(1). All these laws, and others, drive home the real danger of unregulated gambling and the detailed regulatory schemes States have enacted to protect against that danger.

The CFTC brushes aside these concerns. The Proposed Rule does recognize that event contracts can pose risks of "loss-chasing behavior," "addictive potential," and "financial harm." 91 Fed. Reg. at 66,032. But it does not address the unique risks of sports-gambling event contracts. Of course, "awareness is not itself an explanation." *Ohio*, 603 U.S. at 295. The CFTC has not explained why the Proposed Rule is justified notwithstanding those harms. And it does not include any safety regulations to tackle this problem. Unlike many States' regulations, the Proposed Rule lacks any age limits for prediction-market gambling, self-exclusion programs, licensing or evaluations to determine if the exchange is trustworthy, or any other kind of protections for gamblers. With respect to public safety, the Proposed Rule leaves sports-gambling event contracts unregulated.

Two other problems further exacerbate this issue. *First,* the CFTC failed to address ample evidence that prediction markets actively target citizens vulnerable to problem gambling. For instance, many prediction markets allow 18-year-olds to gamble. *E.g.*, Kalshi Member Agreement, at VI , perma.cc/ZH3B-2G9P. Almost a quarter of Kalshi's users are under the age of 25, compared to just 7 percent 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), perma.cc/9UYC-8A26. But research shows that 18- to 20-year-olds are "significantly more likely to have chased their losses and bet more than they could afford in the past." Responsible Gambling Council, *Gambling & Young Adults*, perma.cc/Q4JL-XJRM. And prediction markets have targeted these 18- to 21-year olds. *See* Katherine Long et al., *"Is This Insider Information?" The Prediction Market Bets Driving a Campus Frenzy*, Wall Street Journal, (Mar. 5, 2026),perma.cc/E4QB-M7VH. By using predatory behavior to take advantage of this vulnerable population, prediction markets make the need for public-safety regulations all the more pressing.

A *second* exacerbating issue is that traditional sportsbooks and casinos will just reorganize their wagers to fall under the new definition of swap. The CFTC recognized this likelihood but did not address the significant ramifications it may have for public health and safety. *See* 91 Fed. Reg. at 66,032. The CFTC (although contradicting itself, *above* at 13–14) recognizes that the States and Tribes have a role in regulating gambling. 91 Fed. Reg. at 65,978. As just explained, States have used their regulatory authority to implement a number of public-safety regulations to protect citizens. Yet if all licensees are free to restructure as DCMs and wind down

their licenses, the States will lose any actual regulatory authority over gambling, and their safety regulations will cease to have any effect. Market pressures will push more and more sports gambling away from State regulation and towards unregulated prediction markets, simultaneously raising the risk of harm to the public.

There is already evidence of this. DraftKings operates a sportsbook that is licensed by several states, including Ohio. Yet it has launched its own prediction market that entirely replicates its licensed sportsbook, including in States that ban sports gambling. *See* Dana Williams, *DraftKings launches prediction platform in California despite sports betting ban*, NBC San Diego (Aug. 24, 2026), https://perma.cc/UVW4-7HG3; Tom Hauser, *US Supreme Court likely to decide prediction market future in Minnesota*, KSTP (Aug. 31, 2026), perma.cc/3EYM-W6US.

B. The CFTC disregarded the reliance interests of the States, the gaming industry, and the States' citizens.

In its 2024 proposed event-contracts rule, the CFTC clearly said that it "is not a gaming regulator" and acknowledged that it lacked the "statutory mandate" or "specialized experience" to regulate the "rapidly evolving field" of gambling. 89 Fed. Reg. at 48,982–83. The CFTC's position was that federal derivatives law is not "aimed at protecting against gambling-specific risks and concerns." *Id.* at 48,983. The CFTC now flips that position without acknowledging the substantial reliance interests on its prior abstention from regulating sports gambling—or gambling generally. The CFTC acted arbitrarily in doing so. Agencies must explain changes in position and 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." *Dep't of Homeland Sec. 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).

The CFTC's policy reached back much further than 2024, and is evident throughout several regulatory actions taken by the CFTC:

- 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 "swap" in the CEA should not be read to disrupt "customary business arrangements" that "historically have not been considered to involve swaps." 77 Fed. Reg. 48,208, 48,247 (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. 35,806, 35,816.

- In September 2025, the CFTC issued a staff advisory directed at platforms offering sports-gambling event contracts. CFTC Letter No. 25 36, Advisories (Sep. 30, 2025), perma.cc/YLH6-4GUF. The advisory warned that the CFTC had never "taken any official action to approve" the listing of such contracts. *Id.* at 2 n.4. It 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 CEA. *Id.* Those offering sports-gambling event contracts, the advisory thus cautioned, must be prepared for the possibility that state law will "result in termination" of such contracts. *Id.* at 2.

The Proposed Rule takes a 180-degree turn from the CFTC's longstanding position. The CFTC now asserts regulatory authority over all sports-gambling event contracts, turning itself not just into a commodities-and-derivatives regulator, but also a national sportsbook and gaming administrator. That the CFTC has not even acknowledged its changed position makes its decision arbitrary and capricious.

Additionally, the CFTC's policy change upends deep reliance interests by injecting uncertainty into the public's understanding of State gambling regulation. As just one example, state businesses and consumers have built an entire industry that relies on the infrastructure developed by States. These businesses comply with state regulations that serve their customers and the public good. As another example, consider how States take various approaches to ensure public confidence. Some States ban gambling altogether. Others ban gambling on college sports. Still others prohibit prop bets. And most States that legalize gambling rely on gambling revenue to contribute to residents' health, welfare, and safety. Finally, citizens rely on state licensing rules to know which entities are trustworthy, voluntary-exclusion lists for problem gamblers, protections for potential teenage gamblers, and many more state regulations to build confidence and trust in the system.

The CFTC does nothing—and says nothing—about how States, the Tribes, citizens, and businesses have relied on state regulatory schemes based on the CFTC's longstanding policy that it "is not a gaming regulator." States relied on that position for revenue and ensuring public safety. Citizen-consumers relied on state regulations to protect them from the harm of problem gambling. And State gambling businesses relied on that position to invest in licensing, advertising, and regulatory compliance. The CFTC's change in position pulls the rug out from under all three without any explanation.

C. The CFTC failed to consider the reasonable alternative of expanding the definition of swaps to include some event contracts but not sports and casino gambling.

The CFTC must consider reasonable alternatives in proposing a rule. It failed to consider one significant and workable alternative here: clarifying that the definition of "swap" covers event contracts inherently associated with a financial, economic, or commercial consequence, while exempting all recreational gambling-style contracts, including casino-style and sports-gambling event contracts, even those offered by prediction markets rather than sportsbooks.

Without any elaboration, the Proposed Rule states that the CFTC "has not identified any viable regulatory alternatives." 91 Fed. Reg. at 66,032. But from all the analysis above, one alternative is clear: do not extend the definition of swaps to cover any sports-gambling or casino-gambling event contracts. That definition would be in line with some of the evidence that the CFTC has previously contemplated regulating event contracts under the CEA, yet never *sports-gambling* event contracts. *See above* at 19–21. It would raise a more plausible claim of statutory authority, including by avoiding either the major-questions doctrine or federalism canon. *See above* at 10–11. And it would dodge a host of reasoned decision-making problems—internal contradictions, treating like cases differently, failure to consider important safety issues, and an unexplained change in position that discards reliance interests—that would make the action arbitrary and capricious. *See above* at 17–19.

This regulatory alternative only asks the agency to pare back the broader regulation it proposes here. That makes it modest, workable, and a clear alternative to the Proposed Rule. The failure to raise that alternative, let alone explain why it decided against it, is arbitrary and capricious.

IV. The CFTC's interpretation of the Commodity Exchange Act raises questions as to whether the statutory definition is guided by an "intelligible principle."

Finally, the CFTC's view that the Proposed Rule is consistent with the CEA and that the statute allows the CFTC to regulate sports gambling as "swaps," raises additional constitutional concerns that should be avoided. An agency's discretion must be guided by an "intelligible principle" discernible in the statutory text. *FCC v. Consumers' Rsch.*, 606 U.S. 656, 672–73 (2025). Here, however, the boundlessness of the CFTC's interpretation of "swap" raises rather than dissipates questions about the agency's authority.

First, as explained above (at 2–6), the CFTC's reading of the definition that a swap is any contract "commonly known to the trade as a swap," 7 U.S.C. §1a(47)(A)(iv), has no limiting principle. Its view boils down to the premise that if some DCMs list a certain type of contract on their exchanges enough times, that

contract becomes a swap. That principle has no connection to the statutory requirement that these contracts must become "commonly known" as swaps. It does not explain how action by some market participants demonstrates "common knowledge." It does not address how to deal with bad-faith agents who list such contracts in an attempt to avoid state regulation. And it defies common sense—any contract can become a swap regardless of how divorced it is from these principles.

Second, and again explained above (at 7–8), the CFTC's interpretation of the definition of swap as any contract "dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence," 7 U.S.C. §1a(47)(A)(ii), is also boundless. Under the CFTC's logic, any event with any potential economic consequences, however ancillary or remote, can qualify as the basis for a swap. But that interpretation means a swap can be a contract based on *any* event, particularly because the CFTC also says it need not "empirically verify" the connection between the event and the potential consequences. *See* 91 Fed. Reg. at 66,028–29. Any conjecture about an event's connection to money would suffice. That again reads the statute in a way that would, at a minimum, raise questions about whether the statute offers an intelligible principle to guide agency discretion.

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The Proposed Rule goes beyond the CFTC's statutory powers, violates other legal and procedural requirements imposed by the CEA, would otherwise be arbitrary and capricious in its current form, and interprets the CEA in a manner that raises questions about whether the statute offers an intelligible principle to guide agency rulemaking. The CFTC should start afresh with its rulemaking and clarify that sports-gambling event contracts are not "swaps" under the CEA and, therefore, not within the regulatory authority of the agency.

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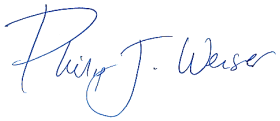
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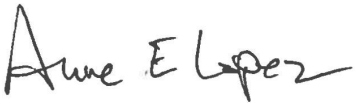
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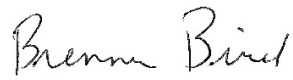
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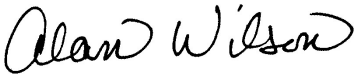
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Attorney General
State of North Carolina



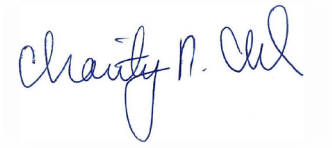
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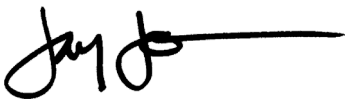
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