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Ninth Circuit Rejects Prediction Markets' Claim That Sports Event Contracts Are "Swaps" Under the Commodity Exchange Act

EXECUTIVE SUMMARY

On August 28, 2026, the United States Court of Appeals for the Ninth Circuit issued its long-awaited decision in *KalshiEx, LLC v. Assad*, No. 25-7516, holding that **sports event contracts offered on prediction market exchanges are not "swaps" under the Commodity Exchange Act ("CEA")** and, accordingly, are **not subject to the exclusive jurisdiction of the Commodity Futures Trading Commission ("CFTC")**. The decision affirms the authority of state gambling regulators to regulate these products under state law.

The three-judge panel rejected each of the arguments advanced by KalshiEx LLC ("Kalshi") and the CFTC that sports event contracts qualify as "swaps" or "futures or options in excluded commodities" under the CEA. Judge Kenneth K. Lee filed a concurrence addressing the scope of the CFTC's "Special Rule" authority.

Critically, this decision **creates a direct circuit split** with the Third Circuit's April 2026 decision in *KalshiEx, LLC v. Flaherty*, 172 F.4th 220 (3d Cir. 2026), which reached the opposite conclusion. The deepening split, combined with pending appeals around the country, makes Supreme Court review increasingly likely.

BACKGROUND

Kalshi operates a CFTC-licensed designated contract market ("DCM") offering binary "event contracts" that pay out based on real-world outcomes. Its expansion into contracts tied to sporting events brought the company into conflict with state gambling regulators.

In March 2025, Nevada's Gaming Control Board ("NGCB") sent Kalshi a cease-and-desist letter, prompting Kalshi to seek an injunction against the NGCB in federal court, arguing its contracts are "swaps" subject to exclusive CFTC jurisdiction—preempting state gambling laws. After initially finding that the CEA gave the CFTC exclusive authority over "swaps", the U.S. District Court for the District of Nevada subsequently ruled against Kalshi, finding that sports event contracts are not "swaps" and, therefore, the CFTC did not have exclusive jurisdiction and the CEA did not preempt state gaming laws. Kalshi appealed to the Ninth Circuit.

THE NINTH CIRCUIT'S HOLDINGS

1. **Courts Have Authority to Interpret the CEA.** The Ninth Circuit first addressed whether the question of what constitutes a "swap" under the CEA is committed to the exclusive determination of the CFTC. The Court held that it is not. Courts retain the authority to interpret the CEA, and Kalshi's argument that the CFTC alone can define the scope of its own jurisdiction was rejected.

2. **No Presumption Against Preemption.** The Court also held that the "presumption against preemption" sometimes applied in cases involving traditional areas of state regulation does not control the analysis in the case of Kalshi and certain of its products. The Ninth Circuit maintains that the express preemption provision of the CEA provides its own textual boundaries, and the inquiry turns on statutory interpretation rather than presumptions.

3. **The CEA Preempts State Regulation of Swaps on a DCM.** Interestingly the Ninth Circuit also concluded that Section 2 of the CEA does preempt state regulation of products that are "swaps" when those swaps are "traded or executed" on a DCM. This holding focused the dispositive question on whether a given product qualifies as a "swap" in the first instance—because if it does, under the Ninth Circuit's analysis state regulation is preempted. In this manner, the Ninth Circuit took a similar approach as the Third Circuit but ultimately reached a different conclusion as to the critical issue of the case, i.e., whether sports event contracts offered by Kalshi are "swaps" under the CEA.

4. **Sports Event Contracts Are Not "Swaps."** The central holding of the decision is that sports event contracts do not satisfy the statutory definition of "swap" under the CEA. The CEA defines a "swap" in relevant part as an "agreement, contract, or transaction … that is dependent on the occurrence, nonoccurrence, or the extent of an occurrence of an event … associated with a potential financial, economic, or commercial consequence." The Court found that sports event contracts fail this definition for multiple independent reasons:

   - An "event" is not the same as the "outcome" of an event.
   - There is no meaningful distinction between "sports bets" and "sports event contracts."
   - Sports event contracts do not serve the risk-transfer function of swaps.
   - Kalshi's interpretation would make any commercial transaction a "swap."
   - "Associated with a potential financial, economic, or commercial consequence" requires a direct nexus between the underlying event and the economic consequence to the contract participants.
   - The CFTC's "Special Rule" does not authorize sports event contracts by CFTC inaction.
   - Extending CFTC authority over sports event contracts would constitute an extraordinary expansion of federal regulatory power.

5. **Sports Event Contracts Are Not Futures or Options in "Excluded Commodities."** The Court separately held that sports event contracts do not qualify as futures or options in "excluded commodities" under the CEA, because they are not "associated with a financial, commercial, or economic consequence" as required by the statute. In the eyes of the Ninth Circuit, this closes an alternative pathway by which Kalshi might have sought CFTC jurisdiction.

JUDGE LEE'S CONCURRENCE

Judge Lee joined the majority opinion in full but wrote separately to address the scope of the "Special Rule" in 7 U.S.C. § 7a-2(c)(5)(C). This provision, enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, reserves authority to the CFTC to determine that certain categories of event contracts, specifically those involving terrorism, assassination, war, gaming, or activity unlawful under state or federal law, are "contrary to the public interest" and therefore may not be listed on a DCM.

Judge Lee's concurrence suggests that the Special Rule might leave open the possibility that some sports-related event contracts could be permissible if the CFTC affirmatively determines that they are not contrary to the public interest. However, this observation must be understood in proper context.

It is Judge Lee's view that the Special Rule operates as a **reservation of authority**—it empowers the CFTC to reject categories of contracts that would *otherwise* qualify as swaps under the CEA. It does **not** provide an independent basis for the CFTC to treat a contract as a "swap" merely because the CFTC has declined to invoke the Special Rule. In other words, a contract must first satisfy the statutory definition of "swap" before the Special Rule has any operative effect. The CFTC's decision not to prohibit a contract under the Special Rule does not, by itself, establish that the contract is a permissible swap under the terms of the CEA.

To illustrate: imagine a contract in which a counterparty agrees to swap the risk that a foreign head of state will be assassinated—an event that would have clear economic consequences for a company with operations in that country. Such a contract might meet the definition of a "swap," but the CFTC could invoke the Special Rule to prohibit its listing on a DCM because it involves assassination. The reservation of authority works in one direction only: it provides an additional basis for the CFTC to *restrict* otherwise-qualifying swaps, not to expand the definition of "swap" to encompass products that do not satisfy the statutory definition in the first instance.

THE CIRCUIT SPLIT: NINTH CIRCUIT VS. THIRD CIRCUIT

The Ninth Circuit's decision directly conflicts with the Third Circuit's 2–1 decision in *KalshiEx, LLC v. Flaherty*, 172 F.4th 220 (3d Cir. 2026), which held that sports event contracts traded as "swaps" on a DCM *are* subject to CFTC jurisdiction and that the CEA preempts state gambling laws. The direct conflict is expected to ultimately proceed to the Supreme Court of the United States ("SCOTUS"), perhaps as soon as its next session. If SCOTUS were to address the conflict, it will surely have wide ranging impact upon market participants not only in the traditional state regulated sports gaming space, but to other market participants including DCMs.

Key Areas of Disagreement

Definition of "event." The Third Circuit held that the term "event" in the swap definition could encompass the outcome of a sporting event, reasoning that such outcomes could be "joined or connected" with financial, economic, or commercial consequences to stakeholders such as sponsors, advertisers, television networks, team franchises, and local communities. The Ninth Circuit squarely rejected this interpretation, holding that an "event" (such as a game being played) is distinct from the "outcome" of that event (such as which team wins).

The "absurd results" problem. The Ninth Circuit identified the logical consequence of the Third Circuit's broad reading: if sports event contracts are swaps, then so too are bingo games, ping-pong tournaments, and any number of commonplace activities with arguable downstream economic effects. The Third Circuit acknowledged this concern but concluded that the CFTC could address it by declining to allow such contracts or by further refining the definition of "swap" through rulemaking.

"Associated with" financial consequences. The Third Circuit adopted a broad reading of this statutory language, finding it satisfied by the attenuated economic effects that sporting events have on advertisers, broadcasters, and local economies. The Ninth Circuit held that such indirect, downstream consequences are insufficient and the statute requires a direct and immediate financial consequence to the parties.

The Special Rule and self-certification. The Third Circuit held that once Kalshi self-certified its sports event contracts for trading on its DCM, those contracts remain presumptively legal until the CFTC determines they are contrary to the public interest under the Special Rule. The Ninth Circuit rejected this reasoning, holding that the Special Rule is a reservation of authority to restrict otherwise-qualifying swaps—not a mechanism by which the absence of CFTC action transforms a non-swap into a swap.

Preemption. The Third Circuit found that the CEA preempts state gambling laws that affect the field of swap transactions and that allowing states to enforce gambling laws against DCM-listed products would create an impermissible conflict with CFTC regulation. The Ninth Circuit's rejection of sports event contracts as "swaps" renders the question moot. Because sports event contracts are not swaps, states retain their traditional regulatory authority.

PENDING LITIGATION AND THE PATH TO THE SUPREME COURT

The confirmed circuit split between the Third and Ninth Circuits significantly increases the likelihood that the SCOTUS will grant certiorari to resolve this question. The State of New Jersey has already indicated its intent to petition SCOTUS for review of the *Flaherty* decision; New Jersey filed a motion for extension of time on June 30, 2026, and the deadline for filing its certiorari petition was extended to early September 2026. Kalshi has likewise stated that it intends to seek further review of the *Assad* decision.

The same fundamental questions are being litigated across the country in the Second, Fourth, Sixth, and Ninth Circuits (a separate case arising from Arizona remains pending).

PRACTICAL IMPLICATIONS

For the Gaming and Hospitality Industry. The Ninth Circuit's decision is a significant victory for state gaming regulators and the regulated gaming industry. By holding that sports event contracts are not "swaps," the Court preserves the decades-long authority of state regulators to oversee and regulate wagering on sporting events. The decision is binding across the Ninth Circuit, which includes California (the nation's largest market without legal sportsbooks), as well as Nevada, Arizona, Oregon, Washington, and other key jurisdictions.

For the Banking and Finance Sector. The decision has important ramifications for financial institutions, clearinghouses, and fintech companies engaged with prediction markets or derivatives trading. Financial institutions providing banking services, custody, or clearing for prediction market operators should evaluate the regulatory status of the products being traded in light of the circuit split.

For Prediction Market Operators. Prediction market operators face a fragmented regulatory landscape. In states within the Third Circuit (New Jersey, Pennsylvania, Delaware, and the U.S. Virgin Islands), the Flaherty decision provides a basis for arguing that sports event contracts are federally regulated swaps beyond the reach of state gambling laws. In states within the Ninth Circuit, the Assad decision means that state gambling laws apply in full force.

For more information or assistance, please contact Dennis M.P. Ehling, Louise Bowes Marencik, Stephen D. Schrier, Michael P. Trainor, or another member of Blank Rome's Gaming industry group.

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