JAMESTOWN S'KLALLAM TRIBE
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Via email to: publicroundtables@CFTC.gov

February 21, 2025

Caroline Pham, Acting Chairperson
Commodity Futures Trading Commission
Three Lafayette Centre
Washington, DC 20581

Re: Prediction Markets Roundtable: Jamestown S'Klallam Tribe's Comments Regarding Sports-Related Events Contracts

Dear Chairperson Pham:

On behalf of the Jamestown S'Klallam Tribe, I write in response to the Commodity Futures Trading Commission's ("CFTC") Release Number 9046-25 inviting the public to submit feedback and suggestions in advance of the Prediction Markets Roundtable concerning sports-related event contracts ("Sports Contracts").

The Jamestown S'Klallam Tribe is committed to preserving and enhancing our historical and cultural identity as a strong, proud, and self-reliant community, while protecting and sustaining Tribal sovereignty, our inherent Self-Governance authority, our homelands, and our Treaty rights. JKT Gaming, Inc., doing business as 7 Cedars Casino & Resort Properties, is a critical driver of economic activity and plays a key role for our Tribe generating revenue that we invest back into our community. Tribal gaming revenue is used to supplement the lack of Federal funding for critical government programs and services for our citizens and community members like healthcare, public safety, and social services, as well as provide funding for infrastructure, create jobs, and promote economic development. Severe and chronic Federal funding shortages for Tribal programs coupled with the lack of Tribal tax parity with state and local governments, effectively suppresses our ability to provide critical services to our citizens and community members. Tribal Self-Determination is the cornerstone by which Tribal governments are a significant part of the national economy. Our Tribal Gaming and business operations have a critical role generating revenue that helps to supplement our government operations.

The Jamestown S'Klallam Tribe strongly urges the CFTC to make it clear that Sports Contracts are prohibited from being listed or made available for clearing or trading. The listing and trading of Sports Contracts is directly contrary to the public interest for various reasons. Importantly, allowing Sports Contracts to be listed and traded would decimate the value of the bargained-for-exchange made between tribes

and states in their gaming compacts, which generates vital revenue that supports both tribal and state governments and their citizens. Additionally, allowing Sports Contracts to be listed and traded would interfere with the sovereign right of tribes and states to exercise their police power to regulate gaming within their respective territories—a right long recognized by courts throughout the United States. Lastly, allowing Sports Contracts to be listed and traded would undermine the regulations and measures currently implemented by tribes and states to protect consumers and prevent criminal activity. To protect the public interest, therefore, it is crucial that the CFTC prohibit the listing and trading of Sports Contracts.

I. Authorizing Sports Contracts Would Be Contrary to the Public Interest

Allowing Sports Contracts to be listed or traded is not in the public interest and poses substantial policy concerns. First, allowing Sports Contracts to be listed and traded would depreciate the value of tribes' bargained-for exclusivity to offer sports betting pursuant to compacts under the Indian Gaming Regulatory Act ("IGRA"), which in turn would threaten important government revenue that provides funding to both tribal and state governments. Second, allowing Sports Contracts to be listed and traded would interfere with and undermine tribal and state sovereignty. Third, unlike regulated sports betting conducted pursuant to tribal and state laws, Sports Contracts do not operate under robust regulations that address consumer protection and prevent criminal activity. As such, the CFTC should prohibit the listing and trading of Sports Contracts.

A. Authorizing Sports Contracts Would Threaten Tribes' Bargained-For Benefits and Vital Revenue from Gaming

Tribes are sovereign nations with primary jurisdiction over their lands and citizens, and as such, they maintain the power to establish laws, regulate activities, and manage resources without interference (to a certain extent) from state or federal governments. In 1987, the Supreme Court recognized Tribes' inherent sovereign right to offer gaming on Tribal lands. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). In 1988, IGRA was enacted to facilitate government-to-government relationships between tribes and states with respect to gaming regulation. 25 U.S.C. § 2701 *et seq*. During IGRA compact negotiations, tribes have negotiated for substantial exclusivity to offer certain types of Class III gaming, including sports betting. This exclusivity is a bargained-for benefit, often resulting from years of government-to-government negotiations between sovereigns.

Additionally, the sports betting conducted pursuant to IGRA compacts or in accordance with state gaming regulations afford both tribes and states substantial revenue streams that fund important government services. However, Sports Contracts diminish the market share for regulated sports betting, which reduces revenues for tribal and state governments. For tribes, this revenue funds essential tribal government services, which directly benefits the lives of their tribal citizens. This revenue is critical for tribal governments because they oftentimes do not have access to revenue sources

typically available to sovereign governments, such as taxes or unimpeded land and natural resource development. For states, in addition to receiving revenue under IGRA compacts, the tax revenue from sports betting is significant. For example, in states that have legalized sports betting, at least $1.8 billion in tax was collected in fiscal year 2023. *See* Adam Hoffer, *Bets on Legal Sports Markets Pay Off Big for States, Sportsbooks, and Consumers*, Tax Foundation (Dec. 10, 2024) (accessible here). States generally impose high tax rates on sports betting operators to fund state programs to regulate and mitigate impacts of gaming. *See id.*; Adam Hoffer, *Online Sports Betting Taxes by State, 2024*, Tax Foundation (Sept. 17, 2024) (accessible here).

By encroaching on the sports betting market, Sports Contracts infringe upon tribes' bargained-for exclusivity, diminish the value of government-to-government agreements, and threaten the critically needed revenue that funds important government services for both tribes and states.

B. Authorizing Sports Contracts Would Undermine Tribal and State Sovereignty

As noted above, tribes are sovereign nations with the exclusive right to regulate activities, including gaming, within their territories. This right is inherent by virtue of tribes' sovereignty. *Cabazon*, 480 U.S. at 207, 219–22. When IGRA was enacted, it expressly codified this "exclusive right [for tribes] to regulate gaming activity on Indian lands," *id.* § 2702, subject to limited exceptions. This includes "sports betting." 25 C.F.R. § 502.4. Indeed, many tribes offer sports betting pursuant to Tribal-State Class III gaming compacts ("IGRA compacts"), oftentimes exclusively. *See e.g.*, 2021 Seminole Compact, Part III.F(5) (defining term "Covered Games" to include sports betting) (accessible here); Third Amendment to the Lac Courte Oreilles Band of Lake Superior Chippewa Indians and the State of Wisconsin Gaming Compact of 1991, at 1–2, 6–8 (Sept. 14, 2022) (permitting the tribe to, among other things, offer retail sports betting on lands within its reservation under amendments to its IGRA compact) (accessible here);[1] Shoal Water Bay Indian Tribe and the State of Washington Class III Gaming Compact, Appendix S: Sports Wagering, §§ 3.1, 3.3, 4 (Sept. 15, 2021) (permitting the tribe to offer mobile and retail sports wagering within its reservation under its IGRA compact) (accessible here); Tribal / State Compact between the Mississippi Band of Choctaw Indians and the State of Mississippi, § 4.21 (Jan. 29, 1993) ("'Sports pool' means the business of accepting wagers on sporting events by any system or method of wagering other than the system known as the pari-mutuel

[1] *See also Press Release: Gov. Evers, Lac Courte Oreilles Band of Lake Superior Chippewa Indians Sign Compact Amendment Permitting Event Wagering*, Office of the Governor, State of Wisconsin (Aug. 5, 2022) ("The [IGRA compact] amendment permits the [Lac Courte Oreilles Band of Lake Superior Chippewa Indians] to offer sports betting and other forms of event wagering at its existing Sevenwinds Casino . . . .") (accessible here).

method of wagering; provided, however, that such wagers shall be allowable under this Compact only if such wagers are allowed on non-Tribal lands under the laws of the State.") (accessible here).[2]

As for states, gaming regulation has been recognized at the heart of the police powers guaranteed by the Tenth Amendment of the United States Constitution. *See, e.g., Ah Sin v. Wittman*, 198 U.S. 500, 505–06 (1905) ("The suppression of gambling is concededly within the police powers of a state . . . ." (citing *Booth v. Illinois*, 184 U.S. 425, 429 (1902))); *see also WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 302 (4th Cir. 2009). An essential component of tribal and state sovereignty is the ability to enact laws for the benefit and protection of their citizens. This includes gaming laws. Congress has even affirmed tribal and state preemptive regulatory authority over sports betting; various federal statutes prohibit certain gaming activities and conduct when such is proscribed by tribal or state law, including the Wire Act, the Illegal Gambling Business Act, and the Unlawful Internet Gambling Enforcement Act. *See* 18 U.S.C. §§ 1084, 1955; 31 U.S.C. §§ 5362(10)(A), 5363.

Thus, allowing the nationwide listing and trading of Sports Contracts would impermissibly infringe on tribal and state sovereignty, undermine current tribal and state regulatory schemes, and run afoul of federalism principles enshrined in the Constitution.

C. Authorizing Sports Contracts Would Vitiate Regulations that Protect Consumers and Prevent Criminal Activity

Lastly, despite sharing all the hallmarks of gaming, and indeed qualifying as "gaming" (as discussed more below), Sports Contracts do not provide the same public health and consumer safety measures as lawful, regulated gaming operations. As a result, companies and registered exchanges offering Sports Contracts do not offer the kind of regulatory safeguards that tribes and states currently do pursuant to their gaming regulations. In the jurisdictions that permit sports betting, there are stringent consumer protection regulations in place. For example, Know Your Customer ("KYC") and anti-money laundering ("AML") laws are commonplace,[3] as are protections and laws concerning age verification, access restrictions, identity theft, match-fixing, and problem gambling.[4] Thus, while potentially facilitating many of the negative

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[2] *See also* 13 Miss. Admin. Code Pt. 9, R. 2.1(b) (permitting sports betting within the State of Mississippi (citing Miss. Code Ann. §§ 75-76-89 and 75-76-63)) (accessible here).

[3] *See Best Practices for Anti-Money Laundering Compliance*, AMERICAN GAMING ASS'N (2022) (accessible here).

[4] *See e.g.*, Mich. Admin. Code § 432.776; N.J. Admin. Code § 13:69O-1.2; Nev. Gam. Reg. § 5.170.

externalities associated with sports betting, Sports Contracts require nothing in the way of protection or mitigation of such. This is clearly contrary to the public interest.

Accordingly, allowing Sports Contracts to be traded on a national exchange would create a federal loophole to tribal and state sports betting regulations, effectively preempting a whole swath of laws enacted by sovereign governments seeking to protect the health, welfare, and safety of their citizens. This is clearly contrary to the public interest.

II. The CFTC Should Prohibit the Listing and Trading of Nationwide Sports Contracts

A. Sports Contracts Constitute "Class III Gaming" under IGRA and Otherwise Constitute Sports Betting

Sports Contracts necessarily constitute "Class III gaming" under IGRA because they constitute "sports betting." In 1988, Congress enacted IGRA "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). Under IGRA, Indian gaming is "not only 'a source of substantial revenue' for tribes, but the lifeblood on 'which many tribes ha[ve] come to rely.'" *Chicken Ranch Rancheria of Me-Wuk Indians v. California*, 42 F.4th 1024, 1032 (9th Cir. 2022) (quoting *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1097, 1099–1100 (9th Cir. 2003)). In fact, Indian gaming has become the most successful economic development initiative ever for Indian Country, lifting many tribes out of poverty and providing them with critical funding for education, healthcare, infrastructure, and cultural preservation.

Pursuant to section 2710(d)(3)(A) of IGRA, Indian tribes and states are authorized to negotiate compacts to regulate "Class III gaming" on a government-to-government basis. Class III gaming includes various casino games, such as slot machines and banked card games, and, importantly here, sports betting. 25 C.F.R. § 502.4. While neither IGRA nor its implementing regulations expressly define "sports betting," the term is generally understood to mean "staking or risking . . . something of value upon the outcome of . . . a sporting event . . . upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome." 31 U.S.C. § 5362(1)(A) (definition of "bet or wager" under the Unlawful Internet Gambling Enforcement Act). In turn, the term "sporting event" may entail a variety of factors surrounding sports competitions. For example, New Jersey defines "sports event" to mean not only the sport game itself, but "any portion thereof." N.J. Stat. § 5:12A-10; *see also id.* (defining "sports book" as "the business of accepting wagers on any sports event by any system or method of wagering, including but not limited to single-game bets, teaser bets, parlays, over-under, moneyline, pools, exchange wagering, in-game wagering, in-play bets, proposition bets, and straight bets.").

Here, that is precisely what Sports Contracts purport to do. An event contract is one that is for a commodity "based upon the occurrence, extent of an occurrence, or contingency [of an event] . . . by a designated contract market or swap execution facility . . . ." 7 U.S.C. § 7a-2(c)(5)(C)(i). As such, a *sports* event contract is one that is based upon the occurrence or outcome of a sporting event, or any part thereof—meaning, Sports Contracts are contracts with a value dependent upon the outcome of certain sporting events, *i.e.*, sports betting.

B. The CFTC Lacks Jurisdiction to Authorize Sports Contracts that Are Otherwise Prohibited by State Law

The Commodity Exchange Act ("CEA") gives the CFTC the "exclusive jurisdiction" over certain agreements and transactions "involving swaps or contracts of sale of a commodity for future delivery . . . ." 7 U.S.C. § 2(a)(1)(A); *see also KalshiEX LLC v. CFTC*, No. 23-3257, 2024 WL 4164694, *2 (D.D.C. Sept. 12, 2024). Commodities covered by the CEA include certain tangible goods, such as wheat, corn, or cotton, 7 U.S.C. § 1a(9), as well as what is deemed an "excluded commodity," meaning (among other things) "an occurrence, extent of an occurrence, or contingency . . . that is . . . associated with a financial, commercial, or economic consequence," *id.* § 1a(19)(iv). Sports Contracts—contracts concerning the outcome of certain sporting events or parts thereof—are governed as such an "excluded commodity." However, as explained below, Sports Contracts do not qualify as "excluded commodities" and are therefore entirely outside the bounds of the CFTC's jurisdiction. As such, Sports Contracts are strictly governed by tribal and state gaming laws.

Specifically, an "excluded commodity" means:

> (i) an interest rate, exchange rate, currency, security, security index, credit risk or measure, debt or equity instrument, index, or measure of inflation, or other macroeconomic index or measure;
>
> (ii) any other rate, differential, index, or measure of economic or commercial risk, return, or value that is--
>
> > (I) not based in substantial part on the value of a narrow group of commodities not described in clause (i); or
> >
> > (II) based solely on one or more commodities that have no cash market;
>
> (iii) any economic or commercial index based on prices, rates, values, or levels that are not within the control of any party to the relevant contract, agreement, or transaction; or

> (iv) an occurrence, extent of an occurrence, or contingency (other than a change in the price, rate, value, or level of a commodity not described in clause (i)) that is--
>
> > (I) beyond the control of the parties to the relevant contract, agreement, or transaction; and
> >
> > (II) associated with a financial, commercial, or economic consequence.

7 U.S.C. § 1a(19). Clauses (i)–(iii) directly concern traditionally "financial" matters, including financial values, instruments, indices, measurements, and economic or commercial indices. The final clause, clause (iv), broadens the scope of this provision to include occurrences or contingencies outside the contracting parties' control that are "associated with a financial, commercial, or economic consequence." This clause is ostensibly what allows the CFTC to regulate event contracts. However, based on the statutory context of this provision, an "excluded commodity" should be interpreted narrowly and must only concern strictly "financial commodities." In doing so, the CFTC should conclude that Sports Contracts, which involve sports events or parts thereof, are not strictly "financial" events and therefore do not constitute "excluded commodities." To read clause (iv) broadly—so as to encompass all events that have any financial, commercial, or economic consequence, no matter how minimal or attenuated—would be in error. Doing so would permit virtually *all* events to be commodities covered by the CEA,[5] which is an outcome that would undermine federal statutory and regulatory schemes concerning gaming and would raise constitutional concerns.

In enacting the CEA, Congress recognized that the CEA does not "supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State." 7 U.S.C. § 2(a)(1)(A). At the time Congress added the statutory definition of "excluded commodity" to the CEA in 2000, several other federal statutory and regulatory schemes existed that directly concerned gaming and sports betting. For example, sports betting was prohibited in many states pursuant to the Professional and Amateur Sports Protection Act ("PAPSA"), which was only overturned in 2018. *See Murphy v. NCAA*, 584 U.S. 453, 460–62 (2018). Additionally, various other statues provided the general federal approach to gaming, including the Wire Act, the Illegal Gambling Business Act, the Unlawful Internet Gambling Enforcement Act, and the Indian Gaming Regulatory Act. *See* 18 U.S.C. §§ 1084, 1955; 31 U.S.C. § 5361 *et seq.*; 25 U.S.C. § 2701 *et seq.* With full knowledge of these federal schemes, it would be implausible to assume Congress intended to preempt the federal approach to gaming with a single clause

[5] *See Statement of Commissioner Brian D. Quintenz on ErisX RSBIX NFL Contracts and Certain Event Contracts* (Mar. 25, 2021) ("Since practically any event has at least a minimal financial, commercial, or economic consequence, all events are commodities.") (accessible here).

within the definition of "excluded commodity." Doing so would undermine the entire structure and purpose of these laws, and as noted above, would raise constitutional concerns regarding tribal and state regulatory authority.

Thus, interpreting the CEA so as to provide broad, exclusive jurisdiction over sports betting to the CFTC would undermine robust statutory and regulatory schemes concerning sports betting, infringe upon tribal and state sovereignty, and raise constitutional concerns. As such, the CFTC should determine that Sports Contracts fall outside the bounds of the CEA and are therefore strictly governed by tribal and state gaming laws.

C. In the Alternative, the CFTC Should Issue Regulations Barring Companies or Registered Exchanges from Offering Sports Contracts Otherwise Prohibited by State Law

Alternatively, if the CFTC determines that it *does* have jurisdiction over Sports Contract—which, as established above, it does not—it should issue regulations expressly prohibiting Sports Contracts. In particular, Sports Contracts are categorically contrary to the public interest and should therefore be prohibited pursuant to the CEA's "Special Rule."[6]

1. The CFTC may prohibit sports betting that is contrary to state law under the "Special Rule" provision covering "gaming."

The CEA's "Special Rule" provides that the CFTC may determine that contracts involving certain enumerated categories (which expressly include "gaming") are contrary to the public interest, and as a result are prohibited from being listed or traded. 7 U.S.C. § 7a-2(c)(5)(C). In particular, the "Special Rule" provides:

> (i) Event Contracts
> In connection with the listing of agreements, contracts, transactions, or swaps in excluded commodities that are based upon the occurrence, extent of an occurrence, or contingency . . . by a designated contract market . . . , the [CFTC] may determine that such agreements, contracts, or transactions are contrary to the public interest if the agreements, contracts, or transactions involve—
>
> (I) activity that is unlawful under any Federal or State law;
> (II) terrorism;
> (III) assassination;
> (IV) war;

[6] Any order, determination, rule, or regulation promulgated by the CFTC to this effect would be expressly limited to *federal* sports betting and event contracts, and could not disrupt state, local, and tribal sports betting regulatory schemes.

> (V) gaming; or
> (VI) other similar activity determined by the [CFTC], by rule or regulation, to be contrary to the public interest.
>
> (ii) Prohibition
> No agreement, contract, or transaction determined by the Commission to be contrary to the public interest under clause (i) may be listed or made available for clearing or trading on or through a registered entity.

7 U.S.C. § 7a-2(c)(5)(C). Thus, Congress clearly intended to prohibit any event contract involving gaming as contrary to the public interest.

The CFTC's implementing regulations, in turn, make the categorical determination that event contracts involving gaming are contrary to the public interest.[7] *See* 75 Fed. Reg. 67282, 67288–89 (Nov. 2, 2010) (explaining that CFTC was enacting § 40.11(a)(1) "[p]ursuant to [the authority granted in 7 U.S.C. § 7a-2(c)(5)(C]" to determine whether certain contracts are contrary to the public interest); 76 Fed. Reg. 44776, 44786 (July 27, 2011) (same). As such, the CFTC's implementing regulations also expressly prohibit event contracts involving "gaming" from being listed for trading or accepted for clearing on or through a registered entity. Specifically, 17 C.F.R. § 40.11(a)(1) provides, in relevant part:

> *Prohibition.* A registered entity shall not list for trading or accept for clearing on or through the registered entity any of the following:

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[7] On March 25, 2021, Commissioner Quintenz issued a statement in which he challenged the constitutionality of the Special Rule's delegation of authority to the CFTC to determine whether an events contract is contrary to the public interest. *Statement of Commissioner Brian D. Quintenz* (accessible here). While it is true that some Supreme Court Justices have expressed an interest in revisiting the nondelegation doctrine, *see Gundy v. United States*, 588 U.S. 128, 148–49 (2019) (Alito, J., concurring), the United States Supreme Court has long upheld Congressional delegation of power to executive agencies to regulate in the public interest or to protect the public health. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) ("Section 109(b)(1) of the CAA, which to repeat we interpret as requiring the EPA to set air quality standards at the level that is 'requisite' that is, not lower or higher than is necessary—to protect the public health with an adequate margin of safety, fits comfortably within the scope of discretion permitted by our precedent."); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943) (upholding delegation to FCC to regulate broadcast licensing in the public interest); *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24-25 (1932) ("It is a mistaken assumption that this [delegation of authority to regulate railroads in the public interest] is a mere general reference to public welfare without any standard to guide determinations. The purpose of the [Interstate Commerce] Act, the requirements it imposes, and the context of the provision in question show the contrary.")

> (1) An agreement, contract, transaction, or swap based upon an excluded commodity . . . that involves, relates to, or references . . . *gaming* . . . .

(Emphasis added); *see also* 7 U.S.C. § 7a-2(c)(5)(C).

In *KalshiEX LLC*, the United States District Court for the District of Columbia adopted KalshiEX LLC's ("Kalshi") definition of "gaming," as the term is used in the CEA, to mean "playing games" and "playing games for stakes." *KalshiEX LLC v. CFTC*, No. 23-3257, 2024 WL 4164694, *8 (D.D.C. Sept. 12, 2024). Under the definition advocated by Kalshi and adopted by the District Court, Sports Contracts clearly involve gaming. As the District Court explained, Congress specifically intended to prohibit sports betting. *Id.* at *12. According to the CEA's legislative history, Senator Lincoln (the drafter of the 2010 amendments to the CEA) remarked during "colloquy on the Senate floor . . . that the provision ultimately enacted as Section 5(c)(5)(C) of the CEA was intended to 'prevent gambling through futures markets' and restrict 'event contract[s] around sporting events such as the Super Bowl.'" *Id.* In that colloquy, Senator Lincoln stated that the intent of the 2010 Dodd-Frank amendments to the CEA was "to protect the public interest from gaming contracts." 156 Cong. Rec. S5906 (2010). Senator Feinstein asked if the intent of the legislation was to empower the CFTC "to determine that a contract is a gaming contract if the predominant use of the contract is speculative as opposed to a hedging or economic use." *Id.* Senator Lincoln responded:

> That is our intent . . . to prevent derivatives contracts that are contrary to the public interest because they exist predominantly to enable gambling through supposed "event contracts." It would be quite easy to construct an "event contract" around *sporting events* such as the Super Bowl, the Kentucky Derby, and Masters Golf Tournament. These types of contracts would not serve any real commercial purpose. Rather, they would be used solely for gambling.

Id. at S5906-7 (emphasis added).

The District Court in *KalshiEX* distinguished the Congressional control contracts at issue in that case because "elections bear little relation to 'sporting events.'" *KalshiEX LLC*, 2024 WL 4164694, at *9. The District Court concluded that "event contracts related to any of the sporting events the senator mentioned on the floor could implicate the gaming category," and "[a]ll these [sports] events can easily be construed as gaming; they can even be construed as games played for stakes (cash prizes and trophies, for example)." *Id.* at *12. During oral arguments in the D.C. Circuit, Kalshi further clarified its definition of "gaming," confirming to the judges that sports betting would be covered because "sports are games." Thus, Sports Contracts clearly involve

gaming, as evidenced by the District Court's sound reasoning in *KalshiEX*, Congress's clear intent and the CEA's legislative history, and Kalshi's on-the-record statements.[8]

Accordingly, because Sports Contracts clearly involve gaming, they are prohibited under the CEA and its implementing regulations.

2. The CFTC may prohibit sports betting that is contrary to state law under the "Special Rule" provision covering "activity that is unlawful under any Federal or State law."

Section 40.11(a)(1) of the CEA's implementing regulations also prohibits event contracts that involve "an activity that is unlawful" under any state or federal law. States' police powers are an essential component of their sovereignty guaranteed by the Tenth Amendment of the United States Constitution. The longstanding authority of states to regulate matters of health, safety, welfare, and morals is fundamental to the federalist system enshrined in the Constitution. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). This is especially true with respect to state regulation of gambling. It is well established that the regulation of gambling is a core police power of the state. *See Ah Sin v. Wittman*, 198 U.S. 500, 505–06 (1905) ("The suppression of gambling is concededly within the police powers of a state."); *Johnson v. Collins Entm't Co., Inc.,* 199 F.3d 710, 720 (4th Cir. 1999) ("The regulation of gambling enterprises lies at the heart of the state's police power."); *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 439 (8th Cir. 2007) ("A state's police power encompasses controlling gambling . . . ."); *United States v. Washington*, 879 F.2d 1400, 1401 (6th Cir. 1989) ("The enactment of gambling laws is clearly a proper exercise of the state's police power . . . ."); *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 302 (4th Cir. 2009) ("[R]egulating gambling is at the core of the state's residual powers as a sovereign in our constitutional scheme."). For over a century, the state police power to regulate gaming, specifically, has been affirmed by the Supreme Court and the federal government as a core exercise of state sovereignty. Sports betting is a form of gaming. 25 C.F.R § 502.4(c) (defining "Class III gaming" to expressly include sports betting); *see also Is Sports Betting Considered Gambling?*, Kindbridge (July 27, 2023) (accessible here).

In 2018, the U.S. Supreme Court held in *Murphy v. NCAA* that the Professional and Amateur Sports Protection Act ("PASPA"), Pub. L. No. 102-559, was unconstitutional and that states could legalize sports betting. 584 U.S. 453, 486 (2018). According to the Congressional Research Service, since the U.S. Supreme Court's ruling in *Murphy*, 38 states and the District of Columbia have regulated (and legalized)

[8] On September 12, 2024, the CFTC appealed the District Court's decision to the D.C. Circuit. That appeal is ongoing and the D.C. Circuit has not yet issued an opinion on the merits. *KalshiEX LLC v. Commodity Futures Trading Comm'n*, No. 24-5205 (D.C. Cir.).

sports gambling.[9] Approximately 20 states prohibit online sports betting and nearly a dozen states prohibit all forms of sports betting.[10]

Sports Contracts effectively enable citizens in every state to gamble on sports online, including in states that have enacted laws prohibiting sports betting and on tribal lands. Therefore, they are in direct conflict with state laws that prohibit retail or online sports betting and allowing them to be traded on a federal exchange would usurp a core police power of states to regulate gaming within their borders. Section 40.11(a)(1) of the CEA's implementing regulations thus prohibits Sports Contracts because Sports Contracts involve an activity—sports betting—that is unlawful under many states' laws.[11]

Furthermore, Sports Contracts also violate federal law. First, they are unlawful under the federal Wire Act. 18 U.S.C. § 1084. Under the Wire Act, no one may "knowingly use a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers . . . on any sporting event or contest . . . ." *Id.* § 1084(a). U.S. Courts of Appeals and the U.S. Department of Justice ("DOJ") have interpreted the Wire Act to prohibit interstate online sports betting.

For example, the Fifth Circuit held that the Wire Act prohibits only interstate transmissions of wire communications related to online sports betting. *In re MasterCard Int'l Inc.*, 313 F.3d 257, 262–64 (5th Cir. 2002). The DOJ Office of Legal Counsel issued an opinion in 2011 supporting the Fifth Circuit's interpretation that the Wire Act applies only to interstate sports betting. However, in 2018, after the Supreme Court overturned the PASPA in *Murphy v. NCAA*, the DOJ issued another opinion concluding that the

[9] *See* Sports Gambling and Consumer Finance, Congressional Research Service (Sept. 12, 2024) (accessible here).

[10] States that prohibit all forms of sports betting include California, Alaska, Hawaii, Idaho, Utah, Texas, Oklahoma, Minnesota, Alabama, Georgia, and South Carolina. *See The Complete Guide to States Where Sports Betting is Legal in the US*, Responsible Gaming (last visited Feb. 11, 2025) (accessible here).

[11] A distinction could be made between contracts involving illegal activity and illegal contracts involving legal activity, the latter of which would encompass Sports Contracts (sports events are, by and large, not illegal activities) and could theoretically be exempt from the "Special Rule" and CFTC's implementing regulation. However, the prohibition merely requires the contract to "involve" illegal activity; a contract necessarily involves the act of entering into it. *See Involve*, Merriam-Webster Dictionary (defining the term "involve" to mean "to engage as a participant" and "to oblige to take part") (accessible here).

Wire Act prohibits a broader scope of interstate gambling communications.[12] In response to the DOJ's 2018 opinion, the First Circuit reaffirmed what the Fifth Circuit previously decided, and held that "[l]ike the Fifth Circuit, and the district court in this case, we therefore hold that the prohibitions of section 1084(a) apply only to the interstate transmission of wire communications related to 'any sporting event or contest.'" *N.H. Lottery Comm'n v. Rosen*, 986 F.3d 38, 61–62 (1st Cir. 2021).

Since the First Circuit's determination in 2021, no other Court of Appeals has considered the question of whether the Wire Act prohibits more than just interstate gambling communications related to sporting events. But according to caselaw and DOJ opinions interpreting the Wire Act, interstate online sports betting is uniformly considered an unlawful activity under federal law. Therefore, listing or trading Sports Contracts, which requires the interstate transmission of sports wagers, is prohibited under 17 C.F.R. § 40.11(a)(1).

Moreover, Sports Contracts also violate IGRA and its implementing regulations. First, as discussed above, Sports Contracts constitute Class III gaming. And under IGRA, Class III gaming activity conducted on Indian lands is lawful only when such activity is: (1) authorized by a tribal ordinance or resolution; (2) located in a state where such gaming is permitted; and (3) conducted pursuant to an IGRA compact. 25 U.S.C. § 2710(d)(1). Because Sports Contracts are not geographically restricted so as to avoid Indian lands—and are therefore offered *on* Indian lands—all Sports Contracts must be conducted pursuant to an IGRA compact. *See e.g.*, *Coeur d'Alene Tribe v. Idaho*, 842 F. Supp. 1268, 1282 (D. Idaho 1994) (finding that state lottery conducted on Indian lands in the absence of a tribal gaming ordinance or compact violated IGRA). Across the board, Sports Contracts are neither authorized by a tribal ordinance or resolution nor conducted pursuant to Tribal-State gaming compacts and directly contravene IGRA compacts. As such, Sports Contracts also violate federal law under IGRA.

Lastly, companies or registered exchanges that offer Sports Contracts also likely violate the Illegal Gambling Business Act ("IGBA"). 18 U.S.C. § 1955. As established above, Sports Contracts violate state prohibitions on sports betting. Under the IGBA, it is unlawful to operate an "illegal gambling business." *Id.* § 1955(a). For purposes of that law, "illegal gambling business" means one that

> (i) is a violation of the law of a State or political subdivision in which it is conducted; (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (iii) has

[12] *See Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, 42 Op. O.L.C. 158 (Nov. 2, 2018) (accessible here); *Whether the Wire Act Applies to Non-Sports Gambling*, 35 Op. O.L.C. 134 (Sept. 20, 2011) (accessible here).

> been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in a single day.

Id. § 1955(b). This provision is interpreted based on statutory text and state law definitions, not nuances such as skill v. chance analyses. *See United States v. DiCristina*, 726 F.3d 92, 99–100 (2d Cir. 2013) ("[T]he focus of the statute's criminal proscription is not on what game is being played, but on the size of the business and the revenue derived by those who are running it. . . . Had Congress intended to limit the reach of the IGBA to businesses operating games of chance, it could have done so by inserting that language in subsection (b)(2)."). Thus, even if trading on a Sports Contract requires skill or some "non-chance" component,[13] it still meets the essential elements of sports betting (noted above). As such, the business of operating a company or registered exchange offering Sports Betting would likely violate IGBA.

3. The CFTC may prohibit sports betting that is contrary to state law under the "Special Rule" provision covering "other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest."

Lastly, even if the CFTC determines that Sports Contracts do not "involve . . . gaming" or violate state or federal laws, Sports Contracts involve activity *similar* to gaming and are thus prohibited as contrary to the public interest. This would allow the CFTC to close any perceived "loophole" to the "Special Rule" under the CEA and its implementing regulations. It would also allow the CFTC to tailor a rule to prohibit federal sports betting without disrupting state and tribal sports betting regulatory schemes.

The "Special Rule" allows the CFTC to prohibit event contracts that involve one of the five enumerated categories or "other similar activity determined by the [CFTC], by rule or regulation, to be contrary to the public interest." 7 U.S.C. § 7a-2(c)(5)(C)(i)(VI); 17 C.F.R. § 40.11(a)(2). If Sports Contracts are not covered by the text of the statute, they are at the very least a "similar activity" to gaming, and similarly contrary to the public interest. As discussed in detail above, there are ample reasons for the CFTC to use its broad discretion to determine that Sports Contracts violate public policy and are contrary to the public interest. Therefore, Sports Contracts, which effectively allow nationwide sports betting, may be determined by the CFTC to be similar to "gaming" and similarly contrary to the public interest.

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[13] *See Statement of Commissioner Brian D. Quintenz* (distinguishing between "betting" and "speculation," the latter of which is involved in Sports Contracts and requires "participat[ion] in non-chance driven outcomes that have price forming impacts upon which legitimate businesses can hedge their activities and cash flows") (accessible here).

CONCLUSION

For all of the reasons stated above, we respectfully urge the CFTC to prohibit Sports Contracts. If you have any questions and/or concerns, please do not hesitate to contact me at [redacted] via phone at [redacted]

Respectfully submitted,

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