The State Of Prediction Market Litigation After 9th Circ. Ruling

By **Mohamed Al-Hendy, Kenesha Starling Duncan and Brent Ray** (September 4, 2026)


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Prediction markets allow participants to trade event contracts whose value turns on a future outcome. A contract might ask whether the Federal Reserve will cut interest rates, whether a candidate will win an election or whether a team will win a game, and then settle at a fixed amount if the stated outcome occurs.

Although prediction markets have existed for decades, retail-facing event contracts entered the mainstream during the 2024 presidential election. Sports then became a principal source of activity, with reported global trading volume on leading platforms accelerating sharply in 2025 and 2026.

That rapid growth has put prediction market platforms on a collision course with state gaming regulators, which, followed the U.S. Court of Appeals for the Ninth Circuit's Aug. 28 decision in KalshiEx LLC v. Assad, has resulted in a developing circuit split.

The platforms contend that event contracts traded on U.S. Commodity Futures Trading Commission-registered designated contract markets, or DCMs, are federally regulated derivatives preempting state oversight. State regulators counter that a sports wager doesn't change its character merely because it is offered through a federally registered exchange.

The stakes are significant: whether a platform can operate under a single federal framework, or if it must also navigate state-by-state gaming laws, licensing requirements and enforcement risk.

The Commodity Exchange Act, or CEA, grants the CFTC exclusive jurisdiction over swaps traded on DCMs while also empowering the CFTC to prohibit event contracts that involve, among other things, unlawful activity or gaming.

The central dispute in the current litigation in myriad courthouses across the country is not simply whether a sports-related contract resembles a wager — it is whether the contract qualifies as a "swap" under the CEA and, if so, whether the CFTC's federal jurisdiction preempts state gaming regulation.

The U.S. Court of Appeals for the Third Circuit's April 6 decision in KalshiEx LLC v. Flaherty on this dispute favored federal preemption, but the Ninth Circuit's Assad opinion reached the opposite conclusion, resulting in an emerging appellate split.[1]

A Circuit Split Takes Shape

In March 2025, the New Jersey Division of Gaming Enforcement informed Kalshi that its sports event contracts constituted sports wagering, requiring a state license. Two days later, Kalshi **sued** in the U.S. District Court for the District of New Jersey, arguing that the

CEA preempted New Jersey's regulation.

In April 2025, the district court granted a preliminary injunction. A year later, the U.S. Court of Appeals for the Third Circuit affirmed.

The Third Circuit agreed with the district court that Kalshi demonstrated a reasonable likelihood of success in showing that its sports event contracts qualify as swaps traded on a CFTC-licensed DCM, and therefore fall within the CFTC's exclusive jurisdiction. It also emphasized that Congress expressly contemplated event contracts involving "gaming," which gave the CFTC authority to review and prohibit such contracts.

Further, the court reasoned that Congress' decision to include gaming within the CEA's event contract framework — rather than excluding gaming-related contracts from federal oversight — demonstrated an intent to keep those contracts within the CFTC's regulatory ambit, subject to whatever restrictions the commission might impose.[2]

Despite a divided panel, the majority's reasoning in Flaherty is the strongest appellate authority to date supporting Kalshi's preemption theory. But that guidance is limited: The Third Circuit reviewed only the propriety of a preliminary injunction, and though its decision addressed Kalshi's likelihood of success on the merits in that context, it should not be accorded the same weight as a decision on those merits.

On Aug. 28, the Ninth Circuit reached the opposite result in Kalshi v. Assad, affirming dissolution of a preliminary injunction against Nevada gaming regulators. The court held that Kalshi had not shown a likelihood that the CEA preempts Nevada's gaming laws as applied to its sports event contracts.

The Ninth Circuit's decision gives state regulators significant appellate backing for continued enforcement, creating a direct split with the Third Circuit on the crucial threshold question: whether sports events contracts are swaps under the CEA.[3]

Kalshi v. Assad

The Ninth Circuit did not reject CEA preemption wholesale. It acknowledged that the CEA's exclusive jurisdiction provision expressly preempts state regulation of swaps traded on a DCM — preserving a meaningful federal safe harbor for qualifying derivatives.

But the court rejected Kalshi's broader proposition that every transaction listed on a DCM is beyond state reach. The statute grants exclusive jurisdiction over enumerated transactions, not all exchange-listed products.[4]

The court concluded that Kalshi's sports contracts likely do not qualify as swaps. The CEA's swap definition reaches transactions dependent on an event or contingency "associated with a potential financial, economic, or commercial consequence."

The Ninth Circuit drew a critical distinction: A contract on whether a game occurs may concern such an event, but a contract on which team wins that game is a sports bet.

It also rejected Kalshi's reliance on downstream effects on sponsors, advertisers and local economies as extrinsic to the contract itself. If such attenuated consequences sufficed, the provision would have no limiting principle — virtually any event carries some conceivable economic consequences. The event itself, the court held, must be inherently associated with the requisite consequence.[5]

Statutory context, according to the court, reinforced that textual conclusion. The Ninth Circuit reasoned that Kalshi's reading lacked any meaningful limiting principle and would sweep nearly all sports wagering within the CFTC's exclusive jurisdiction.

Given the long-standing state and tribal role in regulating gambling, the court declined to infer that Congress effected such a sweeping regulatory realignment through broad terms like "event" and "associated with." It characterized that result as the kind of major policy change Congress would need to state clearly.[6]

The decision also gives substantial weight to the CFTC's existing gaming contract regulation. Under Title 17 of the Code of Federal Regulations, Section 40.11, a DCM generally may not list a swap based on an excluded commodity that involves, relates to or references gaming.

Kalshi had self-certified its sports contracts, but the Ninth Circuit treated self-certification as the DCM's own representation of compliance — not an agency approval that is capable of overriding the regulation's mandatory "shall not" language. The CFTC never initiated the rule's 90-day review or issued an order approving these contracts.[7]

The CFTC's June proposal would change that regulatory landscape. The proposed amendments to Regulation 40.11 would define "gaming" and when event contracts "involve" enumerated activities, establish setting public-interest factors, and formalize a 90-day review process under which a self-certified contract could remain listed if the CFTC does not issue a contrary-to-the-public-interest order by the end of the review.

But the Ninth Circuit held that the proposal carries no present legal effect. Unless and until it's adopted, the current rule governs.[8]

The court separately rejected Kalshi's conflict- and field-preemption arguments. It found no impossibility in complying with both the CEA and Nevada law, pointing to geofencing as a practical compliance measure. And while the CEA can occupy the field of regulating qualifying swaps on a DCM, Nevada's laws target gaming activity — a field Congress has historically left to the states.

The court therefore concluded that the remaining preliminary injunction factors, including irreparable harm and the public interest, favored Nevada.[9]

The ruling is limited in an important respect. The Ninth Circuit affirmed only as to sports-related event contracts and remanded for the district court to address Nevada's challenge to Kalshi's election contracts in the first instance. The opinion does not resolve the treatment of all prediction market products and leaves room for a different analysis where a contract more closely resembles a traditional derivative or turns on an event with a concrete commercial consequence.

Utah: Kalshi v. Cox

The Ninth Circuit's reasoning also reinforces the U.S. District Court for the District of Utah's Aug. 4 summary judgment decision in Kalshi v. Cox.

There, the court rejected Kalshi's preemption claim on the merits, holding that the CEA did not displace Utah's gambling laws as applied to sports event contracts. The Utah court reasoned that federal oversight and state gambling regulation can coexist, particularly because the CEA's special rule itself references activity unlawful under state law.[10]

Cox is procedurally distinct from the Third and Ninth Circuit cases because it resolves the preemption question on summary judgment rather than at the preliminary injunction stage. It therefore supplies a merits-stage district court perspective on the same classification and preemption issues now dividing the circuits.

What the Litigation Is Really About

The Third and Ninth Circuits agree on one important premise: The CEA can preempt state regulation of actual swaps traded on a DCM. Their disagreement turns on classification and the significance of the CFTC's gaming framework.

The Third Circuit treated Kalshi's sports contracts as likely qualifying swaps and read Congress' reference to gaming as evidence that the CFTC — not the states — should decide whether those products may be listed. The Ninth Circuit concluded that the contracts are likely sports bets, not swaps, and that the current CFTC regulation independently bars gaming-related contracts from DCM listing.

Under the Ninth Circuit's analysis, DCM registration alone is not dispositive. Platforms must evaluate the product's economic substance, the statutory swap definition, existing CFTC regulations, and the state and tribal laws where customers trade. The court's discussion of geofencing is particularly practical: It signals that a platform's ability to restrict access by jurisdiction may undercut arguments that state restrictions render CEA compliance impossible.

Where the Field Is Heading

The U.S. Supreme Court may enter the dispute soon. New Jersey submitted its certiorari petition for Supreme Court review of Flaherty on Sept. 2. Other proceedings are underway, including an expedited U.S. Court of Appeals for the Sixth Circuit appeal arising from Ohio.

The Ninth Circuit's decision increases the prospect that the Supreme Court will eventually be tasked with resolving the CEA's preemptive scope, especially as the circuits continue to divide on whether sports event contracts qualify as swaps.[11]

Agency action may prove equally decisive. The CFTC has proposed amendments to its event contract regulations, but until the commission adopts a final rule or otherwise supplies a legally effective framework, the current regulation remains part of the operative analysis. Congress, too, may elect to draw a clearer line between federally regulated event contracts and state-regulated sports wagering.

Conclusion

The Ninth Circuit's ruling transforms the prediction market debate from a developing district court disagreement into a live appellate split. It does not hold that the CEA can never displace state law. Rather, it holds that Kalshi's sports event contracts likely do not qualify for that protection — and that the current CFTC gaming rule bars their listing.

For platforms and market participants, federal registration alone does not supply a reliable nationwide answer for sports event contracts. Until further appellate, agency or legislative action provides a uniform framework, companies should take a jurisdiction-specific approach — assessing licensing exposure, product design, geofencing and access restrictions, consumer protection controls, and applicable state and tribal requirements.

The Ninth Circuit makes one immediate point clear: The path to federal exclusivity begins with the product, not merely the exchange on which it is listed.

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[1] 7 U.S.C. Sections 1a(47)(A)(ii), 2(a)(1)(A), 7a-2(c)(5)(C).

[2] KalshiEX LLC v. Flaherty, 172 F.4th 220, 227-32 (3d Cir. 2026).

[3] KalshiEX LLC v. Assad, No. 25-7516, slip op. at 2-5, 47 (9th Cir. Aug. 28, 2026).

[4] Id. at 20-24.

[5] Id. at 24-33.

[6] Id. at 37-41.

[7] Id. at 33-36; 17 C.F.R. Section 40.11.

[8] Id. at 35-36; Prediction Markets; Public Interest Determinations, 91 Fed. Reg. 35,806, 35,846-48, 35,861-62 (proposed June 12, 2026).

[9] Assad, No. 25-7516, slip op. at 41-46.

[10] KalshiEX LLC v. Cox, 2026 WL 2241564, at *7-8, *13 (D. Utah Aug. 4, 2026).

[11] Docket for No. 25A1465, Flaherty v. KalshiEX LLC (U.S. July 24, 2026); Docket for No. 26-3196, KalshiEX LLC v. Schuler (6th Cir.).