INDIAN GAMING ASSOCIATION
Rebuilding Communities Through Indian Self-Reliance

February 18, 2025

Via email to: publicroundtables@CFTC.gov

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

Re: Prediction Markets Roundtable: The Indian Gaming Association's ("IGA") Comments Regarding Sports-Related Events Contracts

Dear Chairperson Pham:

The Indian Gaming Association ("IGA") welcomes the opportunity to submit feedback and suggestions in advance of the Commodity Futures Trading Commission's ("CFTC") Prediction Markets Roundtable concerning sports-related event contracts ("Sports Contracts"). The IGA is an inter-tribal association of 124 federally recognized Indian Tribes committed to advancing the lives of Indian peoples economically, socially, and politically.[1] Our mission is to protect and preserve tribal sovereignty and self-

[1] These Tribes include: Douglas Village; Klawock Cooperative Association; Catawba Indian Nation; Cayuga Nation; Chitimacha Tribe of Louisiana; Eastern Band of Cherokee Indians; Jena Band of Choctaw Indians; Mohegan Tribe; Oneida Indian Nation; Poarch Band of Creek Indians; Seminole Tribe of Florida; Seneca Nation of Indians; St. Regis Mohawk Tribe; Tunica-Biloxi Tribe of Louisiana; Cheyenne and Arapaho Tribes; Chickasaw Nation; Choctaw Nation; Citizen Potawatomi Nation; Delaware Nation; Eastern Shawnee Tribe of Oklahoma; Miami Tribe of Oklahoma; Modoc Nation; Muscogee (Creek) Nation; Osage Nation; Otoe-Missouria Tribe; Peoria Tribe of Indians of Oklahoma; Quapaw Tribe of Indians; Wyandotte Nation; Oglala Lakota Nation; Ponca Tribe of Nebraska; Rosebud Sioux Tribe; Spirit Lake Tribe; Three Affiliated Tribes; Winnebago Tribe of Nebraska; Bois Forte Band of Chippewa; Fond du Lac Band of Lake Superior Chippewa; Forest County Potawatomi Community; Grand Traverse Band of Ottawa & Chippewa Indians; Keweenaw Bay Indian Community; Lac Vieux Desert Band of Lake Superior Chippewa; Leech Lake Band of Ojibwe; Little Traverse Bay Bands of Odawa; Lower Sioux Indian Community; Match-e-be-nash-she-wish Band of Pottawatomi; Mille Lacs Band of Ojibwe; Oneida Nation of Wisconsin; Pokagon Band of Potawatomi; Prairie Island Indian Community; Red Lake Band of Chippewa Indians, Minnesota; Saginaw Chippewa Indian Tribe of Michigan; Shakopee Mdewakanton Sioux Community; Sokaogon Chippewa Community; Stockbridge Munsee Community, Wisconsin; White Earth Nation; Navajo Nation; Confederated Tribes of Grand Ronde; Confederated Tribes of Siletz Indians; Confederated Tribes of the Colville Reservation;

sufficiency through gaming and other forms of economic development. We are an educational, legislative, and public policy resource for tribal policy makers and the public on issues related to tribal community development and Indian gaming under the Indian Gaming Regulatory Act ("IGRA"). 25 U.S.C. § 2701 *et seq.*

The IGA strongly urges the CFTC to make it clear that Sports Contracts are prohibited from being listed or made available for clearing or trading. Trading of Sports Contracts is gaming, violates state and federal law and is contrary to public policy for various reasons. Importantly, allowing Sports Contracts to be listed and traded will 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. Additionally, listing and trading Sports Contracts would decimate the value of the bargained-for-exchange made between tribes and states in their gaming compacts when tribes agree to share their gaming revenues – contributing billions to state governments -- in exchange for substantial exclusivity over sports betting in their

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Confederated Tribes of the Umatilla Indian Reservation; Confederated Tribes of the Warm Springs; Coquille Indian Tribe; Cow Creek Band of Umpqua Tribe of Indians; Cowlitz Indian Tribe; Jamestown S'Klallam Tribe; Kalispel Tribe of Indians; Kootenai Tribe of Idaho; Muckleshoot Indian Tribe; Nez Perce Tribe; Port Gamble S'Klallam Tribe; Puyallup Tribe of the Puyallup Reservation; Shoshone-Bannock Tribes; Skokomish Indian Tribe; Snoqualmie Indian Tribe; Spokane Tribe of Indians; Suquamish Indian Tribe; Swinomish Indian Tribal Community; Tulalip Tribes; Agua Caliente Band of Cahuilla Indians; Berry Creek Rancheria of Maidu Indians; Big Sandy Rancheria of Western Mono Indians; Blue Lake Rancheria; Cahuilla Band of Mission Indians; Chicken Ranch Tribe of Me-Wuk Indians; Coyote Valley Band of Pomo Indians; Elk Valley Rancheria; Federated Indians of Graton Rancheria; Habematolel Pomo of Upper Lake; Mechoopda Indian Tribe of Chico Rancheria; Middletown Rancheria of Pomo Indians; Morongo Band of Mission Indians; Northfork Rancheria of Mono Indians; Pala Band of Mission Indians; Pechanga Band of Indians; Picayune Rancheria of Chukchansi Indians; Redding Rancheria, California; San Manuel Band of Mission Indians; Santa Rosa Rancheria Tachi Yokut Tribe; Scotts Valley Band of Pomo Indians; Sherwood Valley Band of Pomo Indians; Susanville Indian Rancheria, California; Sycuan Band of the Kumeyaay Nation; Table Mountain Rancheria of California; Tule River Indian Tribe; Tuolumne Band of Me-Wuk Indians; Twenty-Nine Palms Band of Mission Indians; Blackfeet Tribe; Confederated Salish & Kootenai Tribes of the Flathead Reservation; Northern Arapaho Tribe; Alabama-Coushatta Tribe; Iowa Tribe of Kansas & Nebraska; Kaw Nation; Kickapoo Tribe in Kansas; Sac and Fox Nation; Ohkay Owingeh Pueblo; Pueblo of Sandia; Pueblo of Santa Ana; Ak-Chin Indian Community; Fort McDowell Yavapai Nation; Gila River Indian Community; Pascua Yaqui Tribe; Salt River Pima-Maricopa Indian Community; San Carlos Apache Tribe; Tohono O'odham Nation of Arizona; and White Mountain Apache Tribe.

state. Lastly, listing and trading Sports Contracts will siphon critically needed revenue that supports tribal and state governments and their citizens by providing an end-run around tribal and state regulation of sports betting. Moreover, they directly violate the Commodity Exchange Act ("CEA"), and the plain language of the CFTC's implementing regulations because they involve gaming and violate state and federal laws. Any determination that Sports Contracts comply with the CEA would therefore run afoul of the plain text of the CEA and its implementing regulations.

I. Sports Contracts Violate Public Policy.

As discussed below, Sports Contracts are categorically contrary to the public interest pursuant to 7 U.S.C. § 7a-2(c)(5)(C) and 17 C.F.R. § 40.11(a)(1). In addition to these statutory and regulatory violations, Sports Contracts violate public policy for several reasons. First, Sports Contracts diminish tribal and state sovereignty. Second, Sports Contracts deteriorate the value of tribes' bargained-for exclusivity to offer sports betting pursuant to compacts under the Indian Gaming Regulatory Act ("IGRA"). Third, Sports Contracts threaten to cut off vital revenue streams from sports betting conducted pursuant to valid gaming compacts that provide funding to tribal and state governments upon which both tribal and state citizens rely. Fourth, unlike sports betting regulated by tribes and states, Sports Contracts do not operate under robust regulations to address problems such as gambling addiction, problem-gambling, or match-fixing, and they do not provide funding for states to mitigate the negative externalities of 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*. IGRA also codified tribes' "exclusive right to regulate gaming activity on Indian lands," *id.* § 2702, subject to limited exceptions. 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., 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. 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 would impermissibly infringe on tribal sovereignty and run afoul of federalism principles enshrined in the Constitution.

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. By encroaching on the sports betting market, Sports Contracts therefore infringe upon that exclusivity and undermine the sovereign rights of tribes and states, protected by IGRA, to negotiate mutually beneficial gaming compacts.

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* Adam Hoffer, *Online Sports Betting Taxes by State, 2024* (Sept. 17, 2024) (accessible here).

Finally, despite sharing all the hallmarks of gaming, and indeed qualifying as "Class III gaming," as discussed below, Sports Contracts and registered exchanges are not required to provide the same public health and consumer safety measures as lawful gaming operations. Moreover, Sports Contracts and registered exchanges are likewise not required to share revenue with state governments meant to defray the costs of addressing such impacts. Thus, while potentially facilitating certain harmful impacts, Sports Contracts and registered exchanges are not required to help prevent, counteract, or mitigate such impacts in contravention to the public wellbeing. In addition, it is significant that some states have decided not to allow sports betting at all, which means Tribes in those states are unable to offer sports betting under IGRA. Sports Contracts and registered exchanges would impose sports betting without any regard to the public policy determinations made by the elected leaders in those jurisdictions.

II. Sports Contracts Are Contrary to the Public Interest.

While it is clear, as discussed above, that Sports Contracts are contrary to public policy—particularly with regard to tribal and state sovereign rights—they are also

contrary to the public interest, per se. As such, we respectfully urge the CFTC to prohibit Sports Contracts pursuant to its authority under the CEA's "Special Rule."[2]

A. Sports Contracts Constitute "Class III Gaming" Under IGRA.

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). IGRA established the National Indian Gaming Commission ("NIGC") as an independent Federal regulatory authority "to protect such gaming as a means of generating tribal revenue." 25 U.S.C. § 2702(3). Under IGRA, Indian gaming is "not only 'a source of substantial revenue' for tribes, but the lifeblood on 'which many tribes have 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. In fact, many tribes offer sports betting pursuant to Tribal-State Class III gaming compacts ("IGRA compact(s)"). *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);[3] 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

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[2] 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.

[3] *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).

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 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).[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 an allowable 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.

Regardless of whether Sports Contracts constitute Class III gaming under IGRA—which they do—they are expressly prohibited by both the CEA and the CFTC's implementing regulations because they "involve . . . gaming."[5]

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[4] *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).

[5] The CFTC's adoption of regulation 17 C.F.R. § 40.11(a)(1) prohibiting event contracts that "involve . . . gaming" constituted a Final Determination that those contracts are contrary to the public interest under 7 U.S.C. § 7a-2(c)(5)(C)(i). *See* 7 U.S.C. § 7a-2(c)(5)(C)(ii) ("No agreement, contract, or transaction determined by the [CFTC] to be contrary to the public interest under clause (i) may be listed or made available for clearing or trading through a registered entity."). While such contracts clearly are contrary to the public interest, if an event contract "involves . . . gaming[,]" that contract is categorically prohibited and no further public interest determination by the CFTC is

B. Sports Contracts "Involve . . . Gaming" Under Federal Caselaw.

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

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necessary under the plain meaning of the terms of the CEA's and its implementing regulations.

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.[6]

C. Sports Contracts Are Expressly Prohibited Under the Commodity Exchange Act's "Special Rule," 7 U.S.C. § 7a-2(c)(5)(C), and the CFTC's Implementing Regulations, 17 C.F.R. § 40.11(a)(1), Because They Involve 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] 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—
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> (I) activity that is unlawful under any Federal or State law;
> (II) terrorism;
> (III) assassination;
> (IV) war;
> (V) gaming; or

[6] 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.).

[7] It is important to note that Sports Contracts, arguably, may not be covered "commodities," and could therefore be beyond the scope of both the CEA and the CFTC's regulatory jurisdiction. *See* 7 U.S.C. § 2(a)(1)(A) ("The Commission shall have exclusive jurisdiction . . . with respect to accounts, agreements …, and transactions involving swaps or contracts of sale of a commodity for future delivery . . . ."); 7 U.S.C. § 1a(9) (defining the term "commodity" to mean certain tangible goods like wheat, cotton, or corn); *Id.* § 1a(19)(iv) (defining the term "excluded commodity" to mean, among other things, "an occurrence, extent of an occurrence, or contingency . . . that is . . . associated with financial, commercial, or economic consequences."). Here, a sports event may not be "associated with financial, commercial, or economic consequences." As such, Sports Contracts would be outside the bounds of activity governed by the CEA and would therefore be strictly governed by tribal or state gaming laws.

> (VI) other similar activity determined by the [CFTC], by rule or regulation, to be contrary to the public interest.
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> (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.[8] *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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[8] 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 on ErisEX RSBIX NFL Contracts and Certain Event Contracts (Mar. 25, 2021) (available 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) (J. Alito, 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 Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943) (upholding delegation to FCC to regulate broadcast licensing in the public interest); *NY 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).

However, even if the CTFC were to determine that Sports Contracts do not involve gaming—which they do—it would still have the authority to prohibit such contracts because they concern a "similar activity" to gaming. 7 U.S.C. § 7a-2(c)(5)(C)(i)(VI); 17 C.F.R. § 40.11(a)(2). As discussed in more detail below, the CFTC has several reasons for determining, in its broad discretion, that Sports Contracts are contrary to the public interest.

Accordingly, because Sports Contracts clearly involve gaming, or at the very least concern "similar activity" to gaming, they are therefore prohibited under the CEA and its implementing regulations.

D. Sports Contracts Are Prohibited Because They Are Unlawful Under State Laws.

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 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) ("[T]he 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 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) 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 or 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]

E. Sports Contracts Are Prohibited Because They Are Unlawful Under the Federal Wire Act and the Indian Gaming Regulatory Act.

Section 40.11(a)(1) of the CEA's implementing regulations also prohibits event contracts that involve "an activity that is unlawful" under any *federal* law. In this case, the Sports Contracts are prohibited by section 40.11(a)(1) because 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).

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[9] *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).

[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") (available here).

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 online sports betting. *In re MasterCard Int'l Inc.*, 313 F.3d 257, 263–64 (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 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 Commission 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).

In addition to violating federal law under the Wire Act, 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.

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[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).

F. If Sports Contracts Do Not Involve Gaming or Violations Of State and Federal Law, They Involve "Similar Activity" Contrary To The Public Interest.

Sports Contracts involve gaming and activity that is unlawful under both Federal and State law. However, the CFTC may provide clarification to preclude future challenges by exercising its authority under the Special Rule to make the official determination that 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 and 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 contracts that involve one of the five enumerated categories or "other similar activity to be 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.

CONCLUSION

For all of the reasons stated above, we respectfully urge the CFTC to enforce the CEA Special Rule and its regulations and prohibit Sports Contracts.

Respectfully submitted,

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