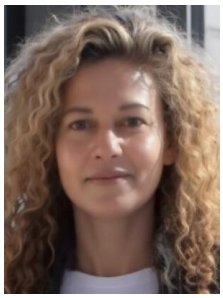
What The CFTC's Event Contracts Amicus Brief Is Missing

By **Tamara de Silva** (March 12, 2026)



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On Feb. 17, the U.S. Commodity Futures Trading Commission filed an amicus brief in the U.S. Court of Appeals for the Ninth Circuit, entering the event contracts litigation as a formal participant for the first time.[1] The case, North American Derivatives Exchange Inc. v. Nevada, concerns whether state gambling laws may reach event contracts listed on CFTC-registered designated contract markets. The CFTC says no.

The brief argues that event contracts are "swaps" within the plain meaning of the Commodity Exchange Act. The CEA, the CFTC contends, field-preempts state gambling laws as applied to instruments traded on designated contract markets, or DCMs, the federally registered exchanges on which derivatives are listed and traded. And the federal impartial-access requirement creates an impossible conflict with state prohibitions.

But the brief's most consequential feature is not what it argues. It is what it declines to resolve.

Midway through its analysis, the CFTC acknowledges that it need not determine the outer boundary between instruments that qualify as swaps and those that might be characterized as wagers.[2]

This concession has implications well beyond the outcome of this appeal. It reveals the CFTC's theory of its own regulatory authority in a post-Loper Bright landscape. And it leaves market participants, exchanges and intermediaries operating within a regulatory framework whose boundaries remain officially undrawn.

Background: The Road to the Ninth Circuit

The dispute arose after North American Derivatives Exchange, operating as Crypto.com's derivatives platform, began listing sports event contracts on its CFTC-registered DCM.

Crypto.com had acquired the exchange in 2022 and, following Kalshi's self-certification of sports event contracts in January 2025, began offering similar products to its users. The Nevada Gaming Control Board took the position that these contracts constituted unlicensed sports wagering under state law and moved to prohibit their offering within the state.[3]

Crypto.com filed suit in June in the U.S. District Court for the District of Nevada, arguing that the CEA's grant of exclusive jurisdiction to the CFTC preempted state gambling laws as applied to DCM-traded event contracts. Chief U.S. District Judge Andrew Gordon, who had in April granted Kalshi a preliminary injunction on similar grounds in a separate case — KalshiEx LLC v. Hendrick — denied relief to Crypto.com on Oct. 14.[4]

The court concluded that sports event contracts are not swaps within the meaning of the CEA because the underlying sporting events lack the requisite "financial, economic, or commercial consequence." The court subsequently dissolved the earlier Kalshi injunction as well, adopting the same reasoning.

Crypto.com appealed to the Ninth Circuit on Nov. 13, where the case now presents the first appellate test of the preemption question. CFTC Chairman Michael Selig previewed the commission's position in a Wall Street Journal op-ed the day before the filing.[5] It is in this posture that the CFTC chose to intervene.

Event Contracts as Swaps: The CFTC's Textual Argument

The brief's statutory analysis proceeds from Section 1a(47) of the CEA, which defines a "swap" to include contracts that provide for payments based on the "occurrence" or "extent" of an event "associated with a financial, commercial, or economic consequence."[6]

The CFTC invokes this language to argue that sports event contracts satisfy the statutory definition on their face. A binary contract paying one dollar if a specified team wins and zero if it does not is, in the commission's view, a contract providing for a payment dependent on the occurrence of an event with economic consequences.

The economic-consequences prong does the heaviest analytical lifting. The CFTC contends that major sporting events generate substantial regional economic activity, including effects on hospitality, tourism, media licensing and business planning. The argument is not that individual contract holders are hedging commercial risk exposure to a particular game, but that the underlying events are sufficiently embedded in the broader economy to satisfy the statutory requirement.

This reading is plausible but expansive. Critics will note that virtually any event with measurable economic spillover effects could serve as the basis for a swap under this logic, and the brief does not offer a limiting principle. That absence is related to the boundary question that the commission explicitly declined to address.

The brief also relies on an independent statutory basis under Section 1a(47)(A)(i) of the CEA, arguing that event contracts qualify as options on "quantitative measures" or financial interests in commodities.[7] This alternative prong provides additional textual support, but the commission's primary emphasis falls on the broader "event with consequences" language, which most naturally maps onto the binary payoff structure of the contracts at issue.

The Outer Boundary Concession: Strategic Silence as Regulatory Policy

The CFTC's acknowledgment that it need not resolve the outer boundary between swaps and wagers is the brief's most analytically interesting feature. It is worth considering what this concession accomplishes and what it forecloses.

What the Concession Accomplishes

The CFTC is telling the Ninth Circuit that even if there exists, at some point along the spectrum of event-based contracts, a category of instruments better characterized as wagers than as swaps, the contracts at issue here are not in that category. The commission's position is that the statutory text is clear enough at its core to resolve the dispute without mapping the periphery.

The approach has the virtue of doctrinal economy. It asks the court to do less, and it avoids the risk of an overbroad ruling that might later prove unworkable.

What the Concession Forecloses

By declining to articulate a principled distinction between swaps and wagers, the CFTC has left the regulatory framework without a usable test.

More than 3,000 event contracts have been self-certified across eight designated contract markets.[8] These contracts span sports, weather, economics, politics, entertainment and more. Every one of them exists in a regulatory space where the federal overseer has now confirmed, in a formal submission to a federal appellate court, that the boundary between its jurisdiction and state gambling authority has not been determined.

This is not ambiguity created by congressional silence. It is ambiguity maintained by deliberate agency choice.

The Loper Bright Dimension

The CFTC's strategic silence must be understood against the backdrop of the U.S. Supreme Court's 2024 decision in Loper Bright Enterprises v. Raimondo, which overruled Chevron deference and held that courts must exercise independent judgment on questions of statutory interpretation.

In a post-Loper Bright world, if the commission were to articulate a test for the swap-wager boundary and the Ninth Circuit were to disagree, the result would be a binding judicial construction that constrains the agency's authority going forward. By declining to propose a test, the CFTC avoids subjecting its interpretation to independent judicial review and preserves its flexibility for future rulemaking.

This is a sophisticated litigation strategy. Selig has announced plans for a new rulemaking on event contracts.[9] The CFTC's refusal to define the boundary in litigation strongly suggests that the commission intends to address it through notice-and-comment rulemaking, where the agency retains greater control over the framing and where the resulting rule would carry the force of law.

The amicus brief, read in conjunction with the promised rulemaking, reflects an agency that is sequencing its assertion of authority with considerable care.

Preemption: Field, Conflict and the Savings Clause

The brief's preemption analysis operates on two independent tracks, either of which the CFTC contends is sufficient to resolve the case.

Field Preemption

The CFTC argues that Section 2(a)(1)(A) of the CEA, which grants the commission "exclusive jurisdiction" over transactions involving swaps traded on registered exchanges, reflects congressional intent to occupy the entire field of derivatives regulation on DCMs.[10]

The brief traces this intent through the legislative history, from the 1922 Grain Futures Act through the 1974 amendments that created the CFTC, the Commodity Futures Modernization Act of 2000 and the Dodd-Frank Act in 2010. The commission's narrative is that each successive piece of legislation expanded the scope of exclusive federal jurisdiction in response to the persistent threat that state-by-state regulation posed to national

derivatives markets.

This historical argument is particularly effective because it mirrors the original problem Congress sought to solve. In the 19th and early 20th centuries, state courts routinely characterized futures trading as gambling, applying state antiwagering statutes to suppress exchange-traded instruments.[11]

The federal regulatory framework that culminated in the CFTC's creation was designed to end precisely that pattern. The commission's brief argues, in essence, that Nevada is repeating the historical error.

Conflict Preemption

The brief's conflict preemption argument centers on the "impartial access" requirement of Title 17 of the Code of Federal Regulations, Section 38.151(b), which mandates that DCMs provide market access on a "fair, equitable, and nondiscriminatory" basis.[12] If a state prohibits its residents from trading event contracts on a federally registered exchange, the exchange cannot comply with both the federal access requirement and the state prohibition.

The CFTC argues that this creates a textbook impossibility conflict. If accepted, the principle would limit state authority over all DCM-listed instruments, not merely those related to sports.

The Savings Clause

Nevada's strongest textual counterargument is the savings clause in Section 2(a)(1)(A), which provides that the CFTC's exclusive jurisdiction does not "supersede or limit the jurisdiction" conferred on any other regulatory body.[13]

The commission argues that this provision preserves traditional state police powers over fraud, consumer protection and state-licensed gambling establishments, but does not authorize states to prohibit instruments that federal law classifies as swaps.

The distinction is between complementary state authority and co-regulatory state authority. The analytical structure is familiar from banking law, where the National Bank Act's savings clause preserves state consumer protection claims while preempting state laws that would "significantly interfere" with a bank's exercise of its federally authorized powers.[14]

Whether this analogy holds will depend on the Ninth Circuit's assessment of the depth of congressional intent. On Aug. 1, the U.S. District Court for the District of Maryland in Kalshi v. Martin, notably, found the savings clause more expansive than the CFTC's reading would allow.[15]

The Structural Implications

The CFTC's amicus brief arrives at a moment of deepening judicial disagreement. On April 28, the U.S. District Court for the District of New Jersey in Kalshi v. Flaherty, on top of the District of Nevada, initially granted a preliminary injunction in favor of federal preemption. The Maryland district court rejected preemption. The Nevada court then reversed itself.

Three circuits, the U.S. Courts of Appeals for the Ninth, Third and Fourth Circuits, now have appeals testing some version of the same question. A circuit split appears increasingly likely, and the CFTC's entry into the litigation may accelerate the path to Supreme Court

review.

The structural problem is this: The CFTC is asserting exclusive jurisdiction over instruments whose classification it has not definitively resolved. The agency is telling courts that event contracts are swaps, that only the CFTC may determine whether particular contracts fall within or outside that classification, and that until the agency acts through rulemaking, no state may make the determination on its own.

This is a claim of preemptive regulatory primacy that operates through the assertion of jurisdiction rather than the exercise of it. The claim has textual support, but its strength depends on a question the brief deliberately avoids: whether the instruments at issue are actually within the statutory definition.

This is a gap that the courts may not tolerate indefinitely. If the Ninth Circuit accepts the CFTC's argument in this case, the next case will present a contract closer to the boundary. At some point, a court will demand the test that the CFTC has thus far declined to provide. The only question is whether the commission will have promulgated one through rulemaking before that demand arrives.

Conclusion: The Significance of the Line Not Drawn

The CFTC's amicus brief in North American Derivatives Exchange v. Nevada is the most significant assertion of federal regulatory authority over event contracts since Dodd-Frank. It is aggressive in its textual analysis, sweeping in its preemption arguments and candid in its warning about the consequences of state-by-state prohibition for the broader derivatives ecosystem.

But the brief's most important contribution to the ongoing legal and regulatory debate may be its deliberate incompleteness. By asserting jurisdiction while declining to define its outer limits, the CFTC has created a regulatory structure in which the agency claims sole authority to classify event contracts while reserving the exercise of that authority for a future rulemaking. The result is a period of jurisdictional suspension in which no sovereign — federal or state — has definitively resolved whether particular contracts are swaps or wagers.

For market participants, the practical implication is straightforward but uncomfortable. The 3,000-plus event contracts currently traded on DCMs remain within the CFTC's claimed jurisdiction, but the boundaries of that jurisdiction are formally undetermined.

Compliance planning must account for the possibility that the forthcoming rulemaking, or a subsequent judicial decision, could redraw the line in ways that affect existing products. Exchanges, clearinghouses and intermediaries should be evaluating their event contract portfolios now, before the boundary is drawn by someone other than themselves.

The line the CFTC refused to draw is, for now, the most important line in derivatives regulation. When it is eventually drawn, it will determine not only the fate of sports event contracts but also the scope of federal preemption over the entire event contract ecosystem.

The commission's amicus brief has made the stakes unmistakably clear. The answer, by design, will come later.

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[1] Amicus Brief of the Commodity Futures Trading Commission, North American Derivatives Exchange Inc. v. Nevada, No. 25-7187 (9th Cir. Feb. 17, 2026).

[2] See Amicus Brief at 14-20 (arguing that event contracts fall within the core of the swap definition and that the Court need not resolve the outer boundaries of that definition to decide this case).

[3] See Amicus Brief at 2-3 (describing state enforcement actions against CFTC-registered exchanges offering event contracts).

[4] See North American Derivatives Exchange Inc. v. Nevada, No. 2:25-cv-00978-APG-BNW (D. Nev. Oct. 14, 2025); see also KalshiEX LLC v. Hendrick, No. 2:25-cv-00575-APG-BNW (D. Nev. Nov. 24, 2025) (dissolving earlier preliminary injunction and adopting same reasoning).

[5] Michael S. Selig, States Encroach on Prediction Markets, Wall St. J. (Feb. 16, 2026).

[6] 7 U.S.C. § 1a(47)(A)(ii).

[7] 7 U.S.C. § 1a(47)(A)(i).

[8] See Amicus Brief at 5, 28 (noting 24 registered DCMs and the self-certification process under 17 C.F.R. § 40.2 by which event contracts are listed); see also CFTC Press Release No. 9183-26 (Feb. 17, 2026).

[9] See CFTC Press Release No. 9179-26 (Feb. 4, 2026) (announcing withdrawal of prior event contracts rulemaking and intent to pursue new rulemaking).

[10] 7 U.S.C. § 2(a)(1)(A).

[11] See S. Rep. No. 93-1131, at 36 (1974), reprinted in 1974 U.S.C.C.A.N. 5843, 5885 (stating that the CFTC's jurisdiction was to "supersede[] State as well as Federal agencies"); see also H.R. Rep. No. 93-975, at 51 (1974).

[12] 17 C.F.R. § 38.151(b) (requiring DCMs to provide market access on a "fair, equitable, and nondiscriminatory basis"); see also Amicus Brief at 26-28.

[13] Amicus Brief at 24-26.

[14] See Barnett Bank of Marion Cnty. v. Nelson, 517 U.S. 25, 33 (1996).

[15] See KalshiEX LLC v. Martin, No. 1:25-cv-01283-ABA (D. Md. Aug. 1, 2025) (Abelson, J.) (denying preliminary injunction and finding that Kalshi had not shown a likelihood of success on its preemption claim).