Where The Preemption Fight Over Prediction Markets Stands

By **Johnny ElHachem** (May 12, 2026)

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On April 6, a divided U.S. Court of Appeals for the Third Circuit panel issued a landmark ruling in KalshiEx LLC v. Flaherty, becoming the first federal appellate court to hold that the Commodity Exchange Act preempts state gambling laws as applied to sports-related event contracts traded on designated contract markets, or DCMs, registered with the U.S. Commodity Futures Trading Commission.

Since then, developments have followed in rapid succession:

- The U.S. Court of Appeals for the Ninth Circuit heard oral arguments on April 16 in North American Derivatives Exchange Inc. v. Nevada, in which the panel appeared skeptical of the platforms' preemption arguments;

- The U.S. Court of Appeals for the Sixth Circuit on April 24 in Kalshi v. Schuler denied Kalshi's motion for an injunction pending appeal, finding the preemption arguments "largely in equipoise (if not favoring Ohio)";

- The U.S. District Court for the District of Arizona, on May 5 in Arizona v. Kalshi, granted the CFTC and U.S. Department of Justice's motion for a preliminary injunction, the first such relief obtained by the federal government itself; and

- The U.S. Court of Appeals for the Fourth Circuit heard oral arguments in Kalshi v. Martin, a case involving Maryland gaming regulators, where the panel on May 7 vigorously questioned both sides on the scope of the CEA's swap definition and the applicability of federal preemption, further deepening the emerging circuit split and strengthening the case for U.S. Supreme Court review.

This article analyzes the Third Circuit decision, the increasingly fragmented appellate landscape and implications for the industry.

The Third Circuit's Analysis

In a 2-1 decision authored by U.S. Circuit Judge David J. Porter and joined by Chief U.S. Circuit Judge Michael A. Chagares, with U.S. Circuit Judge Jane R. Roth dissenting, the Third Circuit affirmed the U.S. District Court for the District of New Jersey's April 28, 2025, preliminary injunction barring New Jersey from enforcing its gambling laws against Kalshi.

Critically, this remains a preliminary injunction ruling — the appeals court found only that Kalshi has "a reasonable chance, or probability, of winning" — and the case has returned to the district court for full merits adjudication.

The court addressed two principal questions: whether Kalshi's sports-related event contracts qualify as "swaps" under the CEA, and whether the CEA preempts New Jersey's gambling laws as applied to those contracts when traded on a CFTC-registered DCM.

Swap Classification

The majority held that Kalshi's sports-related event contracts satisfy the CEA's swap definition because they provide for payments "dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence."

The court rejected New Jersey's proposed heightened "joined or connected" standard — New Jersey had argued that event contracts are not swaps "because the outcome of a sports game is not 'joined or connected' with a financial, economic, or commercial instrument or measure" — finding that the statute requires only an "association" with a potential economic consequence, a threshold easily met given the documented financial impact of sports outcomes on sponsors, advertisers, networks and communities.

The majority emphasized a strict textual reading, dismissing hypotheticals about overbroad applications as "far-fetched" and noting that Congress expressly delegated to the CFTC and U.S. Securities and Exchange Commission the power to "further define" swaps, a safety valve that would address any genuinely overbroad applications.

Even the dissent conceded that "[a] plain reading of the Act's text suggests that Kalshi's sports-event contracts fit comfortably within the statutory definition."

Federal Preemption

The principle that federal law overrides conflicting state law under the supremacy clause of the U.S. Constitution can be either express — where a statute explicitly says it displaces state law — or implied.

Implied preemption takes two forms: (1) field preemption, where federal regulation is so comprehensive that it leaves no room for state law in a given area; and (2) conflict preemption, where compliance with both federal and state law is impossible, or state law stands as an obstacle to federal objectives.

The Third Circuit found that both forms of implied preemption apply here.

On field preemption, the majority concluded that the CEA occupies the field of trading on CFTC-regulated DCMs, drawing on long-standing circuit authority and carefully defining the preempted field as "regulation of trading on a DCM," rather than the broader field of gambling regulation.

The court rejected New Jersey's reliance on two savings clauses in the CEA, holding that neither preserves state regulatory authority over DCM trading — the first preserves state jurisdiction only where Congress has not already granted the CFTC exclusive authority, and the second preserves only state court jurisdiction over common-law causes of action.

Going beyond the district court's analysis, the majority also found conflict preemption, holding that enforcing New Jersey's gambling laws would "prohibit Kalshi, which operates a licensed DCM under the exclusive jurisdiction of the CFTC, from offering its sports-related event contracts in New Jersey," creating exactly the "patchwork" of state regulations "that Congress replaced wholecloth by creating the CFTC."

The majority addressed the dissent's invocation of the presumption against preemption, acknowledging states' traditional role in regulating gambling, but emphasizing that the federal government has regulated derivatives markets for more than a century and that the CEA clearly grants the CFTC exclusive jurisdiction over swaps traded on DCMs.

Judge Roth's vigorous dissent characterized Kalshi's products as "virtually indistinguishable from the betting products available on online sportsbooks"; argued that the presumption against preemption should apply with "special force"; and contended that the savings clauses are "fundamentally incompatible with complete field preemption" and that CFTC Rule 40.11(a)(1), which prohibits DCMs from trading gaming contracts, itself undermines the conflict preemption argument.

Recent Appellate Developments

The Ninth Circuit Oral Arguments

On April 16, the Ninth Circuit heard consolidated oral arguments in cases involving Kalshi, Robinhood and Crypto.com challenging the Nevada Gaming Control Board. The three-judge panel — U.S. Circuit Judges Ryan D. Nelson, Bridget S. Bade and Kenneth K. Lee — heard more than two hours of argument, with the CFTC participating as amicus.

The panel appeared skeptical of the platforms' preemption arguments. Judge Nelson was particularly pointed, questioning the distinction between a sports wager placed at a sportsbook and a sports event contract listed on a DCM. When counsel for Crypto.com argued that the two are fundamentally different because DCM contracts are trades placed on an open market with a clearinghouse intermediary rather than bets against the house, Judge Nelson responded: "This is sophistry to the Nth degree ... I don't understand how you can say that those are different."

Judge Nelson also pressed the platforms on their failure to seek CFTC approval before listing sports event contracts, telling counsel that the platforms "had the obligation" to gain approval and that Congress put the CFTC in place as a "gatekeeper" to determine whether individual swaps are in the public interest.

The panel also focused on CFTC Rule 40.11(a)(1), which prohibits DCMs from listing contracts involving "gaming" or activity "unlawful under any State or Federal law," with Nevada's counsel arguing that this rule itself demonstrates that the CEA does not preempt state gambling laws. Judge Nelson stressed to Robinhood that "no one [has] come up with a coherent English reason why" Rule 40.11 does not prohibit these contracts.

The Ninth Circuit's ruling is expected within the next two months. If the court affirms the U.S. District Court for the District of Nevada's ruling against the platforms, which found that sports event contracts are not swaps — a position directly at odds with the Third Circuit's holding — a circuit split would be created, dramatically increasing the likelihood of Supreme Court review.

The Sixth Circuit: Injunction Pending Appeal Denied

On April 24, the Sixth Circuit denied Kalshi's motion for an injunction pending appeal in Kalshi v. Schuler, a case arising from Ohio's enforcement of its sports betting laws against Kalshi.

In a per curiam opinion by U.S. Circuit Judges Alice M. Batchelder, Eric E. Murphy and Kevin G. Ritz, the court acknowledged that Kalshi "has raised serious questions on the merits" and that "judges from around the country have fractured on both questions that this appeal presents," but concluded that Kalshi had shown "at most only that the merits are in equipoise," a showing insufficient to enjoin Ohio's gambling laws pending appeal, given Ohio's strong interest in enforcing those laws and the underlying public interests they serve.

The Sixth Circuit's analysis diverged from that of the Third Circuit in several important respects.

On express preemption, the court found the CEA's "exclusive jurisdiction" provision an "unusual express-preemption provision" because it identifies the governing agency rather than the governing law, unlike typical express-preemption clauses that use words like "preempt" or "supersede." The court also noted that the CEA contains separate express-preemption provisions applicable to specific categories of state laws, suggesting that Congress did not intend the exclusive-jurisdiction clause to preempt all state regulation.

On field preemption, the court observed that the CEA's multiple savings clauses signal that Congress did not intend to occupy the field, citing the Seventh Circuit's holding that "Congress did not intend to preempt the field of futures trading."

On conflict preemption, the court found Kalshi's obstacle-preemption argument undercut by the presumption against preemption in areas of traditional state police power, and questioned whether the CFTC's "impartial access" regulation truly creates impossibility preemption, noting that other companies have complied with both federal and state requirements through geofencing. The court concluded that geofencing may be "challenging, time-consuming, and expensive," but "expensive does not mean impossible."

Critically, the Sixth Circuit distinguished its posture from that of the Third Circuit: In Flaherty, the Third Circuit reviewed a district court's grant of a preliminary injunction under an abuse-of-discretion standard that favored Kalshi; in Schuler, the Sixth Circuit reviewed the U.S. District Court for the Southern District of Ohio's denial of an injunction, placing the burden on Kalshi to show a "significantly higher justification" for relief.

Nevertheless, the court's substantive skepticism toward preemption — particularly its extensive analysis of the savings clauses and its reading of the impartial-access requirement — provides early signals of how a merits panel may view the case.

The court ordered the appeal expedited. Kalshi's brief was due May 5 and the state's response is due June 4, while it directed the clerk to assign the case to a merits panel as soon as practicable.

The Fourth Circuit: Oral Arguments in the Maryland Case

On May 7, a Fourth Circuit panel made up of U.S. Circuit Judges Roger L. Gregory, Stephanie D. Thacker and DeAndrea G. Benjamin heard oral arguments in the Maryland case: Kalshi v. Martin.

The arguments exposed the central doctrinal tension that has divided the courts: whether the CEA's grant of exclusive jurisdiction over swaps traded on DCMs necessarily preempts state gambling regulation of those same instruments, or whether the two regimes can coexist. The panel tested both positions with equal rigor.

On the preemption side, the court probed the logical end point of the platforms' theory: If every contract meeting the statutory swap definition falls within the CFTC's exclusive domain, the federal government becomes the sole regulator of all gaming and lotteries that happen to satisfy the swap criteria. This is the reductio ad absurdum that the Third Circuit's dissent identified, and the panel's sustained focus on it suggests that at least some members of the court do not share the majority's view in Flaherty that such hypotheticals are "far-fetched."

The panel also pressed the Rule 40.11 self-certification problem: A DCM that lists contracts arguably falling within the regulation's gaming prohibition faces a logical tension in self-certifying compliance with CFTC rules. The platforms' response, that Rule 40.11 is not a categorical ban because Subsection (c) provides an approval mechanism, and that the CFTC itself has disclaimed the "gaming" characterization, is textually supportable but may not fully resolve the structural concern.

The panel subjected the state's position to equally searching scrutiny. The conflict preemption inquiry proved particularly revealing: The court questioned how state enforcement can be reconciled with the federal regulatory framework when the CFTC actively regulates the very instruments that states seek to prohibit.

Maryland's analytical framework in response rested on three propositions: (1) Impossibility preemption fails because platforms can obtain state licenses and thereby comply with both regimes; (2) obstacle preemption demands a showing that state law stands as an obstacle to federal purposes, a high threshold that mere regulatory tension does not satisfy; and (3) interstate regulatory variation is a pure federalism question that does not supply independent preemptive force.

The state's ultimate contention, that sports wagering regulation does not conflict with the purposes that led Congress to enact the Dodd-Frank Act, has doctrinal coherence but rests on a narrow construction of federal objectives that excludes the CEA's market-integrity and impartial-access mandates from the relevant purposes analysis.

A ruling is expected within 60 to 120 days. One member of the panel observed during oral argument that these cases will likely end up before the Supreme Court, an acknowledgment that Judge Gregory himself views the current fragmentation as unsustainable.

If the Fourth Circuit rejects preemption, the resulting direct conflict with the Third Circuit, combined with the Ninth Circuit's pending decision and the Sixth Circuit's expedited merits schedule, would make Supreme Court review virtually inevitable.

CFTC Offensive Litigation

The CFTC and DOJ on April 2 jointly sued Arizona, Connecticut and Illinois, asserting that those states' enforcement actions against prediction market platforms are preempted by the CEA.

The federal offensive has since expanded and, critically, yielded its first judicial victory in

Arizona.

On April 24, the CFTC and DOJ filed a complaint in the U.S. District Court for the Southern District of New York against New York Gov. Kathy Hochul, Attorney General Letitia James and the New York State Gaming Commission, challenging both a cease-and-desist letter sent to Kalshi in October 2025 and civil enforcement actions filed by the state against Coinbase and Gemini.

On April 28, the CFTC sued Wisconsin in response to that state's lawsuits against Kalshi, Robinhood, Coinbase, Polymarket and Crypto.com. The CFTC has also filed an amicus brief on Kalshi's behalf in Massachusetts, where 38 state attorneys general have supported state enforcement authority.

This unprecedented and escalating federal offensive, now spanning at least six states, underscores the current administration's commitment to defending CFTC jurisdiction.

The Arizona District Court: Preliminary Injunction Granted

On May 5, 2026, the U.S. District Court for the District of Arizona granted the federal plaintiffs' motion for a preliminary injunction in Kalshi v. Johnson, enjoining Arizona from enforcing its gambling laws against event contracts listed on CFTC-regulated DCMs.

The ruling by U.S. District Judge Michael T. Liburdi is analytically significant for two reasons: (1) It is the first injunction granted on a motion brought by the federal government rather than by the platform, and (2) the court reached this conclusion after having previously denied Kalshi's own motion on substantially the same grounds, suggesting that the federal government's institutional posture and litigation framing carried independent persuasive weight.

The court's substantive analysis tracks the Third Circuit's framework but extends it in important respects.

On swap classification, the court correctly identified that the statutory text requires only an "association" with a potential financial, economic, or commercial consequence, "and that Congress's use of broad, disjunctive language forecloses any narrow construction of what qualifies. On preemption, the court found the CEA's jurisdictional grant sufficiently pervasive to leave no room for state supplementation, holding that the "Special Rule" for event contracts — Title 7 of the U.S. Code, Section 7a-2(c)(5)(C) — confirms rather than limits the preempted field.

Most significantly, the court found both obstacle and impossibility preemption, holding that Arizona's enforcement makes compliance with the CFTC's impartial-access regulation — Title 17 of the Code of Federal Regulations, Section 38.151(b) — impossible.

This impossibility holding directly engages the question the Sixth Circuit addressed skeptically in Schuler, where that court suggested geofencing is merely "challenging, time-consuming, and expensive" but not impossible. The Arizona court's contrary conclusion, grounded in the regulatory obligation's absolute character, represents the stronger analytical position: The impartial-access mandate admits of no geographic exception, and a platform that geofences residents of a particular state out of its market is, by definition, not providing impartial access.

The court simultaneously issued a separate order indicating its inclination to stay the case pending the Ninth Circuit's resolution of the consolidated appeals, with briefing ordered by May 15 and responses due May 22. This procedural posture, following the approach taken by the U.S. District Court for the Northern District of California in Blue Lake Rancheria v. Kalshi on April 21, reflects a growing judicial recognition that the Ninth Circuit's forthcoming opinion will likely prove dispositive of the swap-classification and preemption questions that all of these cases present.

Conclusion

The Third Circuit's ruling remains a significant win for prediction market platforms, reinforced by the Arizona district court's May 5 preliminary injunction — the first granted on a motion brought by the federal government rather than by Kalshi. But the legal landscape is far from settled.

The Sixth Circuit's April 24 order reflects a markedly more skeptical view of preemption, the Ninth Circuit panel's pointed questioning suggests a ruling against the platforms is a realistic possibility, and the Fourth Circuit's May 7 arguments confirm that the judiciary remains deeply fractured.

Within the Third Circuit and Arizona, platforms may continue to offer sports-related event contracts while the respective injunctions remain in effect, but the rulings do not provide protection elsewhere, and platforms operating in multiple jurisdictions should maintain compliance programs calibrated to the legal posture in each state.

The Third Circuit's opinion, the Arizona ruling and the CFTC's aggressive federal offensive signal that federal primacy over prediction markets is the current regulatory trajectory. The Arizona court's willingness to grant the federal government's motion — even after denying Kalshi's own motion on substantially the same grounds — may embolden the CFTC and DOJ to seek similar relief in other pending actions.

However, more than 34 states have filed amicus briefs asserting regulatory authority, and appellate courts outside the Third Circuit have shown considerably less receptivity to the platforms' arguments.

A multicircuit split could emerge as early as mid-to-late 2026, and the Fourth Circuit panel's own acknowledgment that these cases are headed for the Supreme Court reflects a growing consensus that the current fragmentation is unsustainable. The ultimate resolution will almost certainly require either congressional action or Supreme Court review, and the pace of developments suggests that resolution may come sooner rather than later.

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