Securities Regulation Daily Wrap Up, FEDERAL PREEMPTION—6th Cir.: Former CFTC/SEC Chairman Gary Gensler argues state sports betting laws are not preempted by CFTC prediction markets oversight, (Jun 12, 2026)

By Lene Powell, J.D.



Gensler said Congress did not mean to preempt state gambling laws in provisions on event contracts, and did not do so.

In a new amicus brief in the Sixth Circuit, former CFTC and SEC Chairman Gary Gensler defended states' authority to regulate gambling on prediction markets, despite the CFTC's vigorous assertions of exclusive jurisdiction over event contracts trading. Drawing on his own direct involvement, Gensler said the Dodd-Frank Act was not meant to and did not regulate sports betting at all, much less preempt state laws in the area (*KalshiEx LLC v. Schuler,* No. 26-3196 (6th Cir. June 11, 2026)).

"If Dodd-Frank had preempted the states on sports betting, it would have been one of the biggest stories about Dodd-Frank at the time. But nobody ever mentioned it," Gensler wrote.

Gensler was CFTC chairman during the passage of Dodd-Frank and oversaw CFTC implementation of the legislation. He said that then-Senate Majority Leader Harry Reid of Nevada would never have accepted legislation "displacing an activity so critical to his state's economy and politics."

Gensler filed the amicus brief in an appeal by the Kalshi exchange of an Ohio federal district court order denying Kalshi's request to block Ohio gaming enforcement over sports-event contracts. The case is part of growing litigation between exchanges, states, and the CFTC over oversight of prediction markets, which includes the CFTC directly suing multiple states. The CFTC has filed an amicus brief backing Kalshi in Kalshi's Sixth Circuit appeal.

Historical context. Gensler explained that federal derivatives laws developed to facilitate commercial interests' hedging of price risk in the agricultural, metals, energy, and financial markets. The Dodd-Frank Act was aimed at reining in unregulated swaps trading that contributed to the 2008 financial crisis and did not address sports betting, he said.

At the time of the Dodd-Frank Act, statutory schemes generally prohibited sports betting except for Nevada casinos and a few state lotteries, said Gensler. He noted that when the Supreme Court took up challenges to these sports betting statutes seven years later in *Murphy v. N.C.A.A.* (U.S. 2018), no one argued that Congress had already repudiated those statutes and turned nationwide sports betting over to the CFTC.

Statutory language. Turning to statutory language, Gensler said that Congress did not include sports betting contracts within the statutory Dodd-Frank definition of "swap." Even more broadly, Dodd-Frank's "Special Rule" by design does not place "agreements, contracts, or transactions" that involve "gaming" within the statutory definition of swap, he said.

Gensler cited a colloquy by Sen. Blanche Lincoln, the drafter of the Dodd-Frank derivatives title, who said that an event contract around a sports event like the Super Bowl would not serve any commercial purpose and would be "gambling."

"The only known reference to sports betting in the Dodd-Frank legislative history makes it clear that key members of Congress expected the CFTC to forbid all sports betting on exchanges it regulated," Gensler wrote.

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Gensler also pointed to his own direct experience.

“There was no mention of sports betting during *Amicus's* fifty-four times testifying before Congress as CFTC Chairman, nor did anyone involved in drafting Dodd-Frank speak of making the CFTC a national sports-betting regulator,” he wrote.

And, if Kalshi is correct that sports bets are swaps, said Gensler, then *all* off-exchange retail sports bets since October 2012—in every state—have been illegal. This because under 7 U.S.C. § 2(e), swaps that are not traded by “eligible contract participants” must be traded on exchanges. This was unlikely.

“That is every sports wager placed in a casino, on an online sports book, or between two friends at a bar,” Gensler wrote. “Moreover, somehow, everybody—every Nevada casino and sportsbook, the Supreme Court in *Murphy*—missed this for at least a decade.”

Gensler further noted that the CFTC did not ask Congress for staffing or appropriations to regulate millions of sports betting transactions—neither when Dodd-Frank passed nor when the Supreme Court removed sports betting restrictions in *Murphy*. The CFTC lacks the experience to oversee sports betting, he said.

No elephants in mouseholes. Gensler cited a foundational principle that Congress does not “hide elephants in mouseholes.”

“Preempting state authority over sports betting—an over $165 billion per year industry—has major implications for states' power to protect their residents,” Gensler wrote. “It's not the kind of thing Congress hides in a subpart of a definition—a mousehole too small for the Supreme Court to notice in *Murphy.”*

He observed that if Congress had wanted to preempt state betting laws, they knew how. Ten years before Dodd-Frank, Congress preempted certain enumerated state gaming and bucket shop laws in the Commodity Futures Modernization Act (CFMA, 2000). But they did not add contracts involving sports or gaming to this enumerated list in Dodd-Frank.

“Preemption elephants are not hidden in definitional mouseholes,” he wrote. “If Kalshi were right … there wouldn't be any off-exchange sports betting for states to regulate. The impact on state policies—that regulate and derive revenue from gaming, as well as those that ban it or (like Ohio) that limit it to residents older than 21—would be immense.”

This is case No. 26-3196.

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