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July 24, 2026

Michael Selig
Chairman
Commodity Futures Trading Commission
1155 21st St. NW
Washington, DC 20581

RE: USET SPF Comments in Response to the CFTC's Advance Notice of Proposed Rulemaking on "Prediction Markets; Public Interest Determinations," RIN 3038–AF65

Dear Chairman Selig,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we write to strongly oppose the Commodity Futures Trading Commission's (CFTC) proposed rule that would amend 17 C.F.R. § 40.11, which implements the Commodity Exchange Act's (CEA) special rule for review and approval of event contracts and swaps consistent with the public interest at 7 U.S.C. § 7a-2(c)(5)(C).[1]

USET SPF is a non-profit, inter-Tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Turtle Island.[2] USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and to assisting its membership in dealing effectively with public policy issues.

We previously submitted comments conveying our strong opposition to any revision of the CFTC's regulations that would purport to authorize the use of futures markets to facilitate online gambling, including on the outcome of sporting events, under the auspices of the CEA. Despite our opposition, and the opposition of many others, the CFTC has now published this proposed rule that would purport to do just that.

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[1] *Prediction Markets; Public Interest Determinations*, 91 Fed. Reg. 35806 (proposed June 12, 2026) (to be codified at 17 C.F.R. pt. 40).

[2] USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe–Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mi'kmaq Nation (ME), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Tribe (VA), and Wampanoag Tribe of Gay Head (Aquinnah) (MA).

USET SPF continues to be urgently concerned about the illegal and unregulated gambling occurring through prediction markets, including by entities such as Kalshi, Crypto.com, and Robinhood. These entities are encroaching on Tribal Nations' exclusive rights as sovereign governments, confirmed and federally codified in the Indian Gaming Regulatory Act (IGRA), to regulate and conduct gaming occurring on our Indian lands. Their illegal gambling also violates many Tribal Nations' bargained-for and federally protected gaming exclusivity rights under IGRA. Indian Country relies upon this gaming to generate revenue for our Tribal governments in order to provide services to our people. The federal government must protect that Tribal government revenue, and this proposed rule does just the opposite. Instead, the proposed rule prioritizes prediction markets' profits above all else—capitulating to their pressure by attempting to jam transactions into the CEA framework that were never meant to fit.

I. <u>The Proposed Rule Would Inappropriately Give the CFTC Broad Discretion to Decide Whether Particular Sports Event Wagering Violates the Public Interest Rather than Maintain a Blanket Prohibition on Such Wagering</u>

The CEA creates a regulatory structure for event contracts and swaps. *See* 7 U.S.C. §§ 1–27f. The prediction markets have argued their sports wagers qualify as swaps regulated by the CFTC under the CEA, and that the CEA has jurisdiction over these "swaps" exclusive of states and Tribal Nations.

An event contract is a financial instrument based on: (1) a prediction of whether an event will or will not happen; (2) the purchase of a contract based on that prediction, where the price for the contract reflects the market's implied probability assessment of the likelihood of the event occurring or not occurring; and (3) a payout that is only received if the prediction was correct. A swap involves parties exchanging financial obligations, often to better manage their risks.

Importantly, the CEA contains a special rule to prevent its regulatory framework from being used for purposes contrary to the public interest, including gaming. It is this statutory provision on which the proposed rule focuses. The statutory provision setting out the special rule states:

> 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 or swap execution facility, the [CFTC] may determine that such agreements, contracts, or transactions are *contrary to the public interest* if the agreements, contracts, or transactions involve . . . *gaming* . . . or other similar activity determined by the [CFTC], by rule or regulation, to be contrary to the public interest. . . . No agreement, contract, or transaction determined by the [CFTC] to be contrary to the public interest . . . 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)(i)–(ii) (emphasis added). The CFTC has long implemented this important statutory protection through its regulations. The current version of the CFTC's regulations implementing the special rule mandates:

> A registered entity *shall not list* for trading or accept for clearing on or through the registered entity . . . [a]n agreement, contract, transaction, or swap based upon an excluded commodity . . . that involves, relates to, or references terrorism, assassination, war, *gaming*, or an activity that is unlawful under any State or Federal law; or [a parallel form of transaction that is related to an activity similar to those enumerated], and that the [CFTC] determines, by rule or regulation, to be contrary to the public interest.

17 C.F.R. § 40.11(a) (emphasis added); *see also Provisions Common to Registered Entities*, 76 Fed. Reg. 44776, 44785–86 (July 27, 2011) (codified at 17 C.F.R. pt. 40).

The CFTC just two years ago confirmed its position that "[t]he [CFTC] is not a gaming regulator" and "the [CFTC] does not believe that it has the statutory mandate nor specialized experience appropriate to oversee [gaming], or that Congress intended for the [CFTC] to exercise its jurisdiction or expend its resources in this manner." *Event Contracts*, 89 Fed. Reg. 48968, 48982–83 (proposed June 10, 2024) (to be codified at 17 C.F.R. pt. 40).

In a complete reversal, the CFTC now proposes to change its regulation implementing the special rule so that, rather than prohibiting the use of event contracts and swaps for gaming, the CFTC could make a case-by-case determination of whether or not that particular gaming would be against the public interest.

The CFTC's proposed rule states "the [CFTC] *may* determine . . . that agreements, contracts, transactions, or swaps described [in a list of enumerated activities] are contrary to the public interest." 91 Fed. Reg. at 35859 (proposed 17 C.F.R. § 40.11(a)(1)) (emphasis added). In listing enumerated activities subject to this discretionary assessment, the proposed language includes the following:

> [A]greements, contracts, transactions, or swaps in excluded commodities based upon the occurrence, extent of an occurrence, or contingency . . . that involve . . . *[g]aming* [or] [a]ctivity that is unlawful under any Federal or State law.

Id. (proposed § 40.11(a)(2)) (emphasis added).

What is more, the proposed rule would charge the CFTC not only with determining whether an event contract or a swap related to gaming is against the public interest, but also whether it sufficiently "involves," *id.* (proposed § 40.11(a)(3), (4)(iii)), "gaming," *id.* at 35861, 35863 (proposed § 40.11(b)(1), App. F(d)), in the first place—creating multiple potential discretionary loopholes for the CFTC. As discussed below, any regulatory changes by the CFTC aimed at legalizing gaming under the CEA framework would violate federal law and exceed the CFTC's authority.

II. Under the Text of the CEA, the Proposed Rule Cannot Legalize Prediction Markets' Conduct of Sports Betting

(1) The proposed rule cannot work to legalize sports betting under the CEA because such gaming is not a "swap"—and the public interest analysis only comes into play once a transaction has qualified as a "swap."

In order to get to the point where one utilizes the new regulations implementing the "special rule" to assess public interest in the proposed rule, a transaction must first qualify as a "swap,"[3] 7 U.S.C. § 1a(47), over which the CFTC has jurisdiction under the CEA, *id.* § 2(a)(1)(A). The proposed rule does not affect the legal assessment of whether a transaction is a swap.

The statutory subpart of the definition of "swap" that the prediction markets have relied on refers to a contract "that provides for . . . payment . . . that is dependent on the *occurrence, nonoccurrence, or the extent of the occurrence* of an event or contingency associated with a *potential financial, economic, or commercial*

[3] Because the prediction markets argue their sports wagering qualifies as a swap, we do not assess the other language regarding "agreements, contracts, [or] transactions" herein.

consequence." *Id.* § 1a(47)(A)(ii) (emphasis added). The prediction markets' sports betting activity does not meet this definition.

For example, the outcome of a sporting event, or of any subevent within that sporting event, is not dependent on "the *occurrence* of an event" but rather on the *outcome* of that event or its subparts. The wagers are not on whether a particular basketball game will *occur*, but rather they pertain to which team will win and, potentially, also to subparts of the game such as which player will score the most points or earn the most fouls.

Additionally, the outcome of a sporting event is not "associated with a potential financial, economic, or commercial consequence" for purposes of meeting the definition of a "swap." Though sporting events may have tangential downstream financial consequences, like those related to advertisement sales, and though individuals may win or lose their bets, such financial consequences are not sufficiently associated with the game itself. In other words, engaging in the game brings no *inherent* financial risk that the swap serves to counterbalance.

Congressional intent also indicates that prediction markets are not engaged in swaps within the meaning of the CEA. Event contracts were designed as a protective measure for those engaged in risky markets, like farmers growing and selling their produce without knowing if weather would harm their harvests or what their crops would yield when having to make decisions about how much seed to buy and plant. Indeed, even the CEA in its purposes section describes a "national public interest" in "providing a means for managing and assuming price risks," in addition to "discovering prices" and "disseminating price information." 7 U.S.C. § 5(a). The CFTC's own preamble to the proposed rule discusses the CEA as designed to protect people from the risk of losing their income. *See* 91 Fed. Reg. at 35855.

Swaps, in particular, were added to the CEA in 2010 via the Dodd-Frank Wall Street Reform and Consumer Protection Act to address the 2007 and 2008 financial crisis and prevent it from happening again—so that the protective capabilities of the CEA could stretch to protect derivatives transactions with legitimate hedging functions.[4]

Serving as further evidence that the primary purpose of the CEA is to protect those engaged in producing and trading commodities from losing their income in the uncertainty of the market, the CEA simply creates a system whereby those engaged in commodity markets and those seeking to provide them insurance can interact with one another. The CEA creates "a system of effective self-regulation" of those engaged in these markets under only "the oversight of the [CFTC]." 7 U.S.C. § 5(b).

A real-world example shows the practical difference between offering swaps as binary wagers versus swaps in their traditional sense. The company, ElectronX, offers event contracts related to energy production, including prediction market-style binary payout electricity swaps as well as traditional electricity swaps.[5] Those engaged in the energy business are choosing the traditional electricity swaps because they are what makes commercial sense for providing the protective capabilities that swaps were designed to create.[6]

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[4] *DTCC Data Repository (U.S.) LLC v. CFTC*, 25 F. Supp. 3d 9, 11–12 (D.D.C. 2014); *see also Dodd-Frank Act*, CFTC, https://www.cftc.gov/LawRegulation/DoddFrankAct/index.htm (last visited July 24, 2026).

[5] *See* Press Release, ElectronX, *Energy Exchange ElectronX Launches First Direct-Access U.S. Power Derivatives for Intraday Volatility* (Feb. 10, 2026), https://www.electronx.com/news-insights-collections/energy-exchange-electronx-launches-first-direct-access-u-s-power-derivatives-for-intraday-volatility; *see also Bounded Futures & Binary Options for Intraday Power Trading,* ElectronX https://www.electronx.com/products (last visited July 24, 2026) (describing traditional futures and binary options).

[6] *See* Daily Market Data Report for July 17, 2026, *Market Data,* ElectronX: Regulatory, https://www.electronx.com/regulatory (last visited July 24, 2026) (showing end of market activity report, with 50 contracts with open interest or trading activity, all being futures and no activity on binary options).

(2) *Even if the prediction markets' sports betting activities did qualify as swaps, the CEA contains carve-outs to avoid stepping into other federal statutes' jurisdictional scope, deferring to those other federal regulatory schemes.*

The CEA contains savings clauses limiting the breadth of its jurisdiction, and the CEA and IGRA can be read in harmony pursuant to those savings clauses.

In one such savings clause, Congress, in passing the CEA, preserved the jurisdiction and regulatory authorities conferred by federal or state laws on other regulatory authorities. While the CEA says the CFTC "shall have exclusive jurisdiction . . . with respect to . . . transactions involving swaps or contracts of sale of a commodity for future delivery . . . traded or executed on" boards of trade or designated contract markets,[7] in that same provision it enumerates exceptions to the CFTC's jurisdiction. 7 U.S.C. § 2(a)(1)(A). One important exception is a mandate that "nothing contained in this section shall (I) supersede or limit the *jurisdiction* at any time conferred on . . . *other regulatory authorities* under the laws of the United States or of any State, or (II) restrict . . . such other authorities from carrying out their duties and responsibilities in accordance with such laws." *Id.* (emphasis added).[8]

To facilitate enforcement by those other regulatory authorities of other federal and state laws, this provision also mandates that "[n]othing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State." *Id.* Also supporting deference to other regulatory authorities, Congress included language making clear that the CEA does not preempt federal criminal statutes. *Id.* § 16(e)(1) (stating "[n]othing in this chapter shall supersede or preempt—(A) criminal prosecution under any Federal criminal statute").

As discussed in detail below, the federal government has enacted IGRA to provide a regulatory scheme for gaming activities occurring on Indian lands. IGRA sets out overlapping regulatory authorities for such gaming, where Tribal Nations, the federal government, and states all play key regulatory roles. Further, as set forth below, gaming on Indian lands without meeting the requirements of IGRA is a criminal violation of federal law.

Even the proposed rule acknowledges the CFTC's "definition of the term 'gaming' in the [proposed rule]. is limited to the Special Rule context and does not purport to interpret or displace any other federal or state statutory regime using the same or a related term." 91 Fed. Reg. at 35825.

Thus, activities regulated by other regulatory bodies are explicitly exempted from the CEA's exclusive jurisdiction over swaps—including the gaming activities regulated by regulatory bodies overseeing gaming on Indian lands under IGRA.

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[7] The full description of the scope of the CEA's jurisdiction is as follows: "accounts, agreements . . . , and transactions involving swaps or contracts of sale of a commodity for future delivery (including significant price discovery contracts), traded or executed on a contract market designated pursuant to section 7 of this title or a swap execution facility pursuant to section 7b-3 of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the [CFTC] pursuant to section 23 of this title." 7 U.S.C. § 2(a)(1)(A).

[8] Congress in passing the CEA also included language preempting state gaming laws only in limited circumstances, none of which are met by sports betting or other gaming disguised as swaps, thus demonstrating that Congress knew how to create exceptions to its deference to other state and federal regulatory authorities and chose not to do so here. *See* 7 U.S.C. § 16(e)(2) ("This chapter shall supersede and preempt the application of any State or local law that prohibits or regulates gaming or the operation of bucket shops (other than antifraud provisions of general applicability) in the case of—(A) an electronic trading facility excluded under section 2(e) of this title; and (B) an agreement, contract, or transaction that is excluded from this chapter under section 2(c) or 2(f) of this title or sections 27 to 27f of this title, or exempted under section 6(c) of this title (regardless of whether any such agreement, contract, or transaction is otherwise subject to this chapter).").

II. <u>It Would Violate Federal Law to Read the Proposed Rule to Legalize the Prediction Markets' Conduct of Sports Betting or Other Types of Gaming</u>

(1) Gaming activity occurring on Indian lands is illegal unless conducted in compliance with IGRA and its regulatory framework.

In 1988, Congress enacted IGRA to provide a comprehensive federal regulatory framework for gaming activity occurring on Indian lands. Pub. L. No. 100-497, 102 Stat. 2467 (Oct. 17, 1988) (codified at 25 U.S.C. §§ 2701–2721); *see also* 18 U.S.C. § 1166 (containing associated criminal provisions).

One requirement to authorize gaming activity occurring on Indian lands under IGRA is that the Tribal Nation's governing body must authorize the gaming by adopting an ordinance and issuing a facility license. 25 U.S.C. § 2710(b)(1)(B), (d)(1)(A). The ordinance must set out internal regulatory controls that meet federally created minimum standards, *id.* § 2710(b)(2), (d)(2)(A), and the ordinance must be approved by the relevant federal regulatory body, the National Indian Gaming Commission (NIGC), *id*. § 2710(b)(1)(B), (d)(1)(A)(iii); *see also id.* §§ 2704–06 (describing roles and responsibilities of the NIGC).

IGRA creates more regulatory hurdles specific to Class III gaming, meaning gaming typically found in casinos rather than traditional forms of gaming or bingo. When the gaming activities qualify as Class III, IGRA requires that they be conducted in conformance with a compact that has been negotiated between the Tribal Nation and the relevant state. *Id.* § 2710(d)(3); *see also* 25 C.F.R. § 502.21. Negotiating and entering into an IGRA compact can be a lengthy and difficult process that also includes approval—and sometimes intervention—by the U.S. Department of the Interior. 25 U.S.C. § 2710(d)(7)(B)(vii), (d)(8).

Those who engage in unauthorized gaming activity on Indian lands are subject to federal criminal prosecution, 18 U.S.C. § 1166(d),[9] unless all requirements of IGRA's regulatory scheme are met, *id.* § 1166(c). Further, IGRA states that "Class III gaming activities shall be lawful on Indian lands *only if* such activities are," among other things, "authorized by [Tribal law and] . . . conducted in conformance with a Tribal-State compact." 25 U.S.C. § 2710(d)(1) (emphasis added). Gaming not conducted in compliance with IGRA on Indian lands is illegal not just under IGRA but also other federal law. *See, e.g.*, 18 U.S.C. § 1084 (Wire Act).[10]

(2) The prediction markets are conducting gaming activity on Indian lands.

IGRA is a federal statute that benefits from statutory definitions and a body of case law interpreting and applying those definitions—creating clear boundaries around the jurisdictional scope of IGRA's reach. IGRA applies to all "gaming activit[ies]" occurring "on Indian lands." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 785 (2014) (citing 25 U.S.C. § 2702(3)). "Indian lands" encompass areas within a Tribal Nation's reservation as well as trust land and land subject to restraints on alienation. 25 U.S.C. § 2703(4); 25 C.F.R. § 502.12. Courts have interpreted "gaming activity" to mean the actual operation of the game. *Bay Mills*, 572 U.S. at 792.

Courts have also said that both placement and receipt of wagers, including those made electronically, are "gaming activity" for purposes of IGRA. *See W. Flagler Assocs., Ltd. v. Haaland*, 71 F.4th 1059 (D.C. Cir. 2023),

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[9] IGRA assimilates state laws pertaining to gambling prohibitions and makes those state laws the basis of federal criminal prosecutions. 18 U.S.C. § 1166(a), (b).

[10] We note that some have argued the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), 31 U.S.C. §§ 5361–5367, enacted after the CEA, governs instead of IGRA, and that UIGEA has a CEA carve-out. For the reasons described herein, IGRA was not impliedly repealed by the CEA, and IGRA still governs all gaming activity occurring on Indian lands. While UIGEA makes clear that gaming activity conducted on Indian lands in compliance with IGRA is not prohibited, *id.* § 5362(10)(C), for the reasons described herein, the prediction markets are not complying with IGRA—so UIGEA thus serves as another potential violation of federal law for the prediction markets, *see California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960 (9th Cir. 2018).

cert. denied, 144 S. Ct. 2671 (2024); *California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960 (9th Cir. 2018). When placement or receipt of a wager takes place on Indian lands, even when the opposite end of the gaming transaction may have occurred off Indian lands, the on-Indian lands portion of the gaming transaction is still subject to authorization or prohibition by IGRA. *See W. Flagler*, 71 F.4th at 1061–62, 1066–67 (referring to placement and receipt of online sports betting wagers as "gaming activity," including when one half of the gaming transaction occurs outside Indian lands); 25 C.F.R. § 293.26.

The prediction markets are offering sports betting—meaning wagers on gaming events. Sports betting is one type of IGRA game, and a Class III game at that. *See* 25 C.F.R. § 502.4(c) (classifying "sports betting" as Class III gaming). The prediction markets are accepting wagers electronically—itself a gaming activity—from patrons located on Indian lands. Thus, they are engaged in Class III IGRA gaming as defined by IGRA.

Even the CFTC recognizes that the transactions themselves are gaming, as described in detail in the preamble to the proposed rule. For example, in explaining why it believes one must look to the underlying activity to which the event contract is related rather than to the event contract itself when assessing whether the event contract is "gaming," the CFTC recognized the "event contract itself" involves "the act of risking something of value, especially money, for a chance to win a prize." 91 Fed. Reg. at 35825.

(3) The prediction markets' gaming activity occurring on Indian lands is not conducted in compliance with IGRA and is therefore illegal.

IGRA sets out a detailed regulatory scheme that requires many hurdles to be met before gaming activity is legal and involves a system of cooperative federalism whereby Tribal Nations, states, and the federal government each play key roles. *See Chicken Ranch Rancheria of Me-Wuk Indians v. California*, 42 F.4th 1024, 1032 (9th Cir. 2022).

As an initial matter, IGRA requires Tribal Nations to be the primary beneficiaries of any gaming occurring on Indian lands. Congress made abundantly clear that *Tribal Nations*—not private entities—must have the sole proprietary interest in gaming conducted on their Indian lands. 25 U.S.C. § 2710(b)(2)(A), (d)(2)(A). IGRA also mandates that Tribal Nations regulate gaming activities occurring on their lands. *Id.* § 2701(5); *see also id.* § 2710(b), (d). Thus, third parties *may not* conduct gaming activities on Tribal Nations' Indian lands, except in the narrow exception of the Tribal Nation issuing a license to an individual in accordance with the specific requirements set out in IGRA. *Id.* § 2710(b)(4)(A). When third parties are involved in even the *management* of gaming conducted on Indian lands, IGRA requires certain requirements to be met as well as approval of the management agreement by the NIGC. *Id.* §§ 2710(d)(9), 2711.

Beyond IGRA's mandate that Tribal Nations benefit from and regulate gaming activity occurring on their Indian lands, IGRA also creates layers upon layers of regulatory oversight and requirements, as described above. The prediction markets' so-called swaps do not and cannot meet these IGRA-mandated requirements for gaming activities occurring on Indian lands.

(4) If one assumed the CEA on its face can apply to gaming activities occurring on Indian lands—a premise with which we do not agree, as set forth in Section I above—IGRA nonetheless trumps, no implied repeal has occurred, and the CEA is ineffective.

For the reasons discussed in Section I above—namely, that prediction markets' activity is not a swap, and, even if it were, the CEA contains carve-outs whereby it defers to other regulatory bodies' authorities—the CEA and IGRA can be read together. Those construing multiple statutes "should give effect to co-existing federal statutes"—including when one of those statutes is IGRA. *Iipay Nation*, 898 F.3d at 968 (citation omitted). As the statutes can be read in harmony, no implied repeal analysis is necessary. Yet, if one were to read the CEA to apply here, despite the analysis in Section I above, IGRA would trump the CEA via an implied repeal analysis.

Courts apply a "strong presumption" against repeals by implication, instead assuming "that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 510 (2018) (citation omitted). Congress's intent to repeal must be "clear and manifest," *id.* (citation omitted), based on the understanding that "Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions," *id.* at 515 (citation omitted).

Further, federal Indian law's canons of construction meant to carry out the United States' trust and treaty obligations also affect an implied repeal analysis. First, there is the often-cited Indian canon of construction requiring ambiguous statutes to be interpreted liberally in favor of and to the benefit of the Tribal Nation. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Yet related Indian canons of construction include the reserved rights doctrine and the clear statement rule, together requiring Congress to be clear and explicit in its intent to divest a Tribal Nation of its reserved sovereign or negotiated-for rights or authorities under the so-called "plenary power" doctrine. *McGirt v. Oklahoma*, 591 U.S. 894, 904 (2020).[11]

Thus—under statutory interpretation principles applicable to implied repeals generally, as well as the Indian canons of construction—later-enacted statutes of general applicability cannot repeal earlier-enacted legislation that is designed to advance the United States' trust and treaty obligations without a *clear statement* from Congress. *See, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974); *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142, 1159–60 (9th Cir. 2020).

Under these rules, IGRA applies instead of the CEA, no implied repeal of IGRA has occurred, and the CEA is ineffective.

For one, the 2010 amendment adding swaps to the CEA structure is an after-enacted statute to IGRA that is general in scope in comparison to IGRA's detailed and Tribal-specific scope. The CEA was enacted in 1936 as a general law regulating markets for commodities and financial products to ensure fairness, transparency, and honesty—expanding on its predecessor, the Grain Futures Act of 1922. IGRA was adopted in 1988 to provide a regulatory framework for Tribal gaming throughout Indian lands. Swaps were not added to the CEA's regulatory structure until 2010, in the aftermath of the financial crisis.

Second, IGRA is a federal statute benefiting Tribal Nations that would require clearly expressed congressional intent to alter. As discussed below, IGRA carries forward Tribal Nations' inherent sovereign jurisdictional authority recognized by the U.S. Supreme Court regarding gaming occurring in Tribal territorial jurisdictions. It also helps to fill Tribal government coffers, an obligation the United States fails to meet with its own federal funding owed through trust and treaty obligations, also discussed further below. Congress, in its 2010 amendment to the CEA adding swaps, expressed no clear intent to repeal IGRA.

Instead, when swaps were added to the CEA in 2010, there was evidence that Congress did *not* want to include sports betting. When it enacted the CEA, Congress included statutory language within the special rule indicating its belief that allowing gaming to occur within the CEA's regulatory framework would be against the public interest. 7 U.S.C. § 7a-2(c)(5)(C)(i)(V). This statutory inclusion reflected congressional members' desire to prevent "gambling through supposed 'event contracts,'" including the listing of event contracts "around sporting

[11] Separately, statutory interpretations also require Congress to be clear when it "alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001). We do not make state arguments herein, instead focusing on IGRA.

events such as the Super Bowl." *See* 156 Cong. Rec. S5907 (daily ed. July 15, 2010) (statement of Sen. Lincoln).

Congress sought to maintain the status quo regarding gaming in its 2010 amendment to the CEA—leaving untouched its then-illegal status. For example, in 2010 when swaps were added to the CEA, the CFTC's own regulations prohibited gaming within the CEA framework. 17 C.F.R. § 40.11(a)(1); *see also* 76 Fed. Reg. at 44786. Indeed, at that time, Congress was legislating with the knowledge that its federal statute prohibiting sports betting nationwide—the Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. §§ 3701–3704—was securely in place. When the U.S. Supreme Court held eight years later that PASPA was enacted outside congressional authority and that legalization of sports betting should be left to states, the Court nowhere said sports betting had already been legalized through the 2010 amendments to the CEA. *Murphy v. NCAA*, 584 U.S. 453, 461–62 (2018).

(5) Also evidencing that Congress intended for the CEA to leave IGRA untouched is the utility that each statute was designed to provide.

When examining statutory meaning, including when "defining its key term," one may go beyond the text alone and "look instead to the objectives" of the statute "as a guide to [its] scope." *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995). IGRA and the CEA each serve important and very different purposes, providing different societal utility.

Congress when enacting IGRA sought to recognize and protect Tribal Nations' sovereign right to regulate gaming activities occurring on our lands.[12] Tribal Nations are inherently sovereign governments that predate the arrival of colonizing forces, and the United States acknowledged this early on. *See* U.S. Const. art. I, § 8, cl. 3; *Worcester v. Georgia*, 31 U.S. 515 (1832). The United States has also recognized that, stemming from our status as inherently sovereign governments, Tribal Nations possess inherent sovereign rights to regulate gaming activities occurring on our Indian lands. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). Congress enacted IGRA to provide a comprehensive federal regulatory framework for such gaming, confirming that Tribal Nations "have the exclusive right to regulate gaming activity on Indian lands." 25 U.S.C. § 2701(5); *see also id.* § 2710.

In enacting IGRA, Congress also sought to help fill a critical funding gap for Tribal governments. Prior to the arrival of colonizing forces to our shores, Tribal Nations fully exercised our sovereign jurisdiction over all two billion acres of what is now called the United States, developing robust local economies and complex, wide-ranging trade networks alongside effective governance structures. In taking for itself nearly all our original territory through war, treaty-making, and other political means, the United States incurred a debt to Tribal Nations that manifests in trust and treaty obligations to provide services and funding to Tribal Nations, Tribal communities, and Native people, including for economic development purposes.[13]

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[12] It is not only IGRA but also Tribal Nations' sovereign jurisdiction at stake. Thus, rather than examining overlapping jurisdictional preemption questions under the U.S. Constitution's supremacy clause, to which Tribal Nations are not subject, *see* U.S. Const. art. VI, cl. 2, prediction-market-versus-Tribal-gaming legal review involves two federal statutes and Tribal Nations' inherent sovereign authorities.

[13] *See Mancari*, 417 U.S. at 551–52; *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942) ("In carrying out its treaty obligations with the Indian tribes, the Government . . . has charged itself with moral obligations of the highest responsibility and trust."). Indeed, many of the statutes authorizing or appropriating funds for Tribal programs carry out trust and treaty obligations, whether or not they specifically acknowledge this fact, and those statutes serve as independent mandates. *See, e.g.*, Indian Health Care Improvement Act, 25 U.S.C. § 1602 (declaring "the policy of this Nation" with respect to the health care of Native people is carried out "in fulfillment of its special trust responsibilities and legal obligations to Indians"); Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5301(a) (recognizing "the Federal Government's historical and special legal relationship with, and resulting

Yet, by the government's own accounting, the United States has persistently fallen far short of meeting its trust and treaty obligations with sufficient federal funding.[14] Moreover, federal policies have often caused or contributed to economic hardship in Indian Country. For example, the United States has erected convoluted legal precedent that siphons revenue away from Tribal lands and prevents Tribal Nations from collecting taxes like other governmental entities do.[15] The federal government also strictly regulates the development activities we attempt to undertake on our lands, such as by creating a burdensome process requiring federal approval for entering into leases. *See, e.g.*, 25 C.F.R. pt. 162. This lack of parity with other units of government places Tribal Nations at a disadvantage when trying to fund government services and spur economic development.

To fill these crippling funding gaps and account for this lack of parity, Tribal Nations have created Tribally owned businesses that generate governmental revenues for services to our citizens. Gaming and federal contracting have been the greatest economic drivers for Indian Country,[16] and, while these businesses sometimes operate as commercial entities, their purpose is the generation of governmental revenue.

Congress recognized these realities when it enacted IGRA, acknowledging many Tribal Nations already engaged in gaming "as a means of generating tribal governmental revenue," 25 U.S.C. § 2701(1), and that a primary purpose of IGRA was "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," *id.* § 2702(1). For this reason, Congress made clear in IGRA that Tribal Nations must "have the sole proprietary interest" in gaming occurring on our lands. *Id.* § 2710(b)(2)(A). Tribal gaming has succeeded as a tool for allowing Tribal Nations to build our governance structures and care for our people. *Bay Mills*, 572 U.S. at 810 (Sotomayor, J., concurring) (explaining that "tribal gaming operations cannot be understood as mere profit-making ventures that are wholly separate from the Tribes' core governmental functions").[17]

IGRA also plays an important societal good in helping to fund state and local governments through mutually beneficial revenue-sharing agreements, in addition to employing non-Tribal citizens and strengthening local economies. Under IGRA, Tribal Nations and states have negotiated compacts providing for Tribal Nations to

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responsibilities to, American Indian people"); *see also United States v. Antelope*, 430 U.S. 641, 647 n.8 ("[L]egislation directed toward Indian tribes is a necessary and appropriate consequence of federal guardianship under the Constitution.").

[14] *See* U.S. Comm'n on Civ. Rts., *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* ix (2003) (explaining that federal spending fails to "compensate for a decline in spending power" or "overcome a long and sad history of neglect and discrimination"); U.S. Comm'n on Civ. Rts., *Broken Promises: Continuing Federal Funding Shortfall for Native Americans* 4 (2018) (finding that "[f]ederal funding for Native American programs across the government remains grossly inadequate to meet the most basic needs the federal government is obligated to provide"); Off. of Health Pol'y, Dep't of Health & Hum. Servs., *How Increased Funding Can Advance the Mission of the Indian Health Service to Improve Health Outcomes for American Indians and Alaska Natives* 15 (2022) (stating Indian Health Service "appropriations fund approximately half of the total funding that would be required to fully address existing health care resource needs"); Bureau of Indian Affs., *Report to the Congress on Spending, Staffing, and Estimated Funding Costs for Public Safety and Justice Programs in Indian Country, 2021*, at 1–2 (2024) (describing federal funding at a level of just 13% for Indian Country public safety and justice programs).

[15] *See, e.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176–77 (1989) (permitting states to tax certain activities on Indian Country lands, effectively precluding Tribal Nations from collecting taxes on those same activities to avoid "dual taxation" that would drive business away from Tribal communities); *Bay Mills*, 572 U.S. at 812–13 (Sotomayor, J., concurring) (describing how destructive former federal policies "left a devastating legacy" on Tribal Nations that are "largely unable to obtain substantial revenue by taxing members . . . . [because] 'there is very little income, property, or sales [that Tribal governments] could tax'" (quoting Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N. D. L. Rev. 759, 771, 774 (2004))).

[16] *See* Hue Nguyen & Jay Weiner, *The Economic Ripple Effects of Tribal Gaming and Federal Contracting*, Ctr. for Indian Country Dev. (Oct. 1, 2024).

[17] *See also* Nat'l Indian Gaming Comm'n, FY 2023 Gross Gaming Revenue Report 4–5 (July 2024), https://www.nigc.gov/wp-content/uploads/2025/02/GGR23_Final.pdf.

share a portion of their gaming revenue with states in exchange for the states' guarantee of Tribal Nations' ability to exclusively offer certain types of gaming without competition—benefiting Tribal Nations and states alike. *See* 25 U.S.C. § 2710(d)(3); *Rincon Band of Luiseño Mission Indians of Rincon Rsrv. v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010). Should prediction markets be allowed to infringe on those exclusivity rights, such violations trigger remedies under existing compacts, including Tribal Nations' right to no longer engage in revenue sharing with the relevant state.

The CFTC itself acknowledged in its preamble for the proposed rule that IGRA is meant to help alleviate the lack of Tribal government revenue, 91 Fed. Reg. at 35858–59, which stems from the United States taking our lands and resources, limiting our ability to raise revenue through taxation and otherwise, and failing to provide sufficient federal funding.

As discussed in Section I above, the CEA, on the other hand, was designed to create security, almost like insurance, for those engaged in commodity markets bearing inherent risk—like farmers. Through the CEA, Congress sought to regulate derivatives transactions "by providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information." 7 U.S.C. § 5(a).

Further, to allow the CEA to authorize sports betting or other types of gaming would *effectuate* a societal harm rather than work to correct one. IGRA contains layers of regulatory oversight in part to protect individual patrons participating in gaming. Gaming conducted pursuant to IGRA, or even state law, provides significantly more consumer protection for patrons than the self-certification regulatory framework of the CEA.

III. Conclusion

The proposed rule twists the CEA framework in knots to justify enabling prediction markets' profits, despite the illegality of and harms caused by prediction markets' gambling. Sports betting, and any other type of gaming, offered by prediction markets is not made legal by the CEA, first, because these transactions do not qualify as swaps, and second, because the CEA's carve-outs defer to other regulatory bodies and authorities, such as those set forth in IGRA. We know the CEA was not designed to extend to gaming, but instead that Congress enacted the CEA to protect those engaged in commodities markets, like farmers, from the risks inherent in growing and selling their commodities, such as produce. And even if the prediction markets' gambling would otherwise qualify for regulation under the CEA, IGRA would nevertheless control over the CEA under an implied repeal analysis. IGRA was enacted before the CEA's swap provision, and it was designed specifically to serve Indian Country by protecting Tribal Nations' sovereign jurisdictional rights and carrying out the United States' trust and treaty obligations. The CFTC in this proposed rule is therefore exceeding its authority under the law.

We call on the CFTC to stop taking actions, like this proposed rule, that attempt to make it easier for prediction markets to engage in gaming activities that harm Indian Country.

Sincerely,

Chief Kirk Francis
President

Kitcki A. Carroll
Executive Director