

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KalshiEx LLC,

Plaintiff,

v.

Commodity Futures Trading
Commission,

Defendant.

No. 1:23-cv-03257-JMC

**BRIEF OF JEREMY D. WEINSTEIN AS *AMICUS CURIAE* IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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INTEREST OF *AMICUS CURIAE*

Amicus Jeremy D. Weinstein is a private energy commodities law transactional and regulatory attorney. *Amicus* has long been interested in seeking transparency for the law regarding commodities, especially when it comes to the opaque rulemaking often engaged in by the Commodity Futures Trading Commission (CFTC), so that energy companies can enjoy the benefits of being able to comply with tractable law and regulation. *Amicus* has contributed to the literature and scholarship on issues in commodity law regulation, including writing articles and submitting comments in federal and state rulemakings.

This brief highlights the adverse consequences that arise from aspects of the CFTC's position here. It also highlights evidence in the record that underscores the arbitrariness and capriciousness of the CFTC's Order.¹

ARGUMENT

I. The CFTC Does Not Have Plenary Jurisdiction.

CFTC's Order here argues that one reason why it cannot approve the contracts at issue is that it lacks the resources to investigate elections and enforce federal election laws. AR 22–23 (final WHEREAS clause). In the underlying administrative process, the CFTC also asserted itself as a plenary investigative agency, with an unexpressed relationship with the authority of other government agencies with jurisdiction. AR 1063–64.

¹ No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money to fund the preparation or submission of this brief. No person—other than the *amicus curiae* and his counsel—contributed money to fund the preparation or submission of this brief.

The Second Circuit recently dismissed a purported class action against some large foreign banks for manipulating the Yen-LIBOR interest rate “because the alleged conduct occurred predominantly outside the United States” and the applicable provision of the Commodity Exchange Act lacked Congressional intent for extraterritorial effect. *Laydon v. Cooperatieve Rabobank U.A.*, 55 F.4th 86, 95 (2d Cir. 2022), *cert. denied*, 144 S. Ct. 192 (2023). The CFTC filed an *amicus* brief in support of rehearing at the Second Circuit. See Brief for *Amicus Curiae* U.S. Commodity Futures Trading Commission in Support of Rehearing, *Laydon*, No. 20-3626, Dkt. 383, 2022 WL 17369433 (2d Cir. Nov. 29, 2022). The CFTC focused on the meaning given by the Second Circuit to the word “commodity,” and argued that it has jurisdiction over “commodities,” that “commodities” means virtually every good or service, tangible or intangible, domestic or foreign, and that the CFTC’s interpretation is entitled to *Chevron* deference. *Id.* at 5–9. The CFTC has also suggested a similarly broad enforcement authority over ordinary consumer transactions elsewhere. See, e.g., *Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 77 Fed. Reg. 48,208, 48,246–47 (Aug. 13, 2012).

In the context of event contracts, the CFTC’s jurisdiction claim is momentous. Plaintiff explains the concept of “event contracts.” Long ago, the CFTC teased a rulemaking for event contracts. See *Concept Release on the Appropriate Regulatory Treatment of Event Contracts*, 73 Fed. Reg. 25,669 (May 7, 2008). According to the CFTC, “Event contracts have been based on a wide variety of interests including the

results of presidential elections, the accomplishment of certain scientific advances, world population levels, the adoption of particular pieces of legislation, the outcome of corporate product sales, the declaration of war and the length of celebrity marriages.” *Id.* at 25,670.

Sixteen years later, the CFTC has not yet undertaken an events contract rulemaking. The CFTC’s assertion of plenary jurisdiction is especially dangerous in the context of event contracts for which the CFTC has yet to express clear rules. Take one of the event contracts posited by the CFTC, the length of a celebrity marriage. Perhaps it would be reasonably within the scope of investigating market manipulation if the celebrity’s attorney or accountant had a position in the contract, or one of the couple was photographed in public being intimate with a non-spouse. But based on the CFTC’s stated position in its Order here, including an ability to question why someone voted as he or she did, AR 20, it seems that the CFTC would claim jurisdiction to step in even when there are other government entities that regulate the activity, such as to determine when and whether there was a divorce, or whether the grounds for divorce were proper.

Or consider the case of an event contract on the population of a city. CFTC’s claim would presumably include authority to investigate for market manipulation, for example, a person with a long position in the contract who advocated against abortion.

The CFTC has elsewhere seemed to assert that its jurisdiction to investigate manipulation is not limited to transactions in commodities, but also includes claimed

personal uses of commodities. For example, one CFTC Commissioner claimed that the CFTC has authority to investigate “fraud with respect to the purported environmental benefits of purchased carbon credits.” Kristin N. Johnson, *Keynote Remarks of Commissioner Kristin N. Johnson at Rice University’s Baker Institute for Public Policy Annual Energy Summit: Credibility, Integrity, Visibility: The CFTC’s Role in the Oversight of Carbon Offset Markets*, <https://www.cftc.gov/PressRoom/SpeechesTestimony/opajohnson7> (Oct. 5, 2023). By this logic, the CFTC would have the authority to investigate fraud with respect to the purported health benefits of vaccines. And why stop with “purported benefits”? If the CFTC has the power to investigate fraud with respect to any aspect of any commodity, the CFTC’s jurisdiction is virtually unlimited, especially when “commodities” means everything.

The breadth of power claimed by the CFTC could mean that if an election changed control of Congress in a way the CFTC dislikes, it could investigate that election as manipulation of the event contract. And before an election, a government’s ability to regulate and investigate opinion polling could be abused to stay in power. AR 1062. This Court should thus consider whether the CFTC’s actual jurisdiction and investigative authority in administering these contracts matches what the CFTC claims.

II. The CFTC’s Order is Arbitrary and Capricious

In its Order here, the CFTC said that “the binary payout of the Congressional Control Contracts further limits their utility as a vehicle for hedging any eventual economic effects resulting from which party controls a chamber of Congress.” AR 18. This makes no sense and is contradicted by the record, which provided evidence that

binary payouts enhance hedging utility, for example a company that faces a risk from one political party but not the other. AR 1054–55. If only one party presents a risk, there is no need for a payout if the other party is not in power. Thus, binary payouts are appropriate and effective at mitigating risk.

Respectfully submitted,

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