IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KALSHIEX LLC,
Plaintiff,

v.

COMMODITY FUTURES TRADING COMMISSION,
Defendant.

No. 23-cv-03257-JMC

Reply in Support of Motion for Summary Judgment and Opposition to Cross-Motion for Summary Judgment

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The CEA empowers the CFTC to review—and potentially prohibit—an event contract *only* if the contract "involves" one of five enumerated activities. *See* 7 U.S.C. § 7a-2(c)(5)(C)(i). Elections are not one of them. That should end this case. Because Kalshi's Congressional Control Contracts turn on the outcomes of federal elections—events wholly unrelated to illegal activity, terrorism, assassination, war, or gaming—they do not trigger CFTC scrutiny. In nevertheless barring Kalshi from listing them, the Commission exceeded its statutory authority and flouted the APA's guarantee of reasoned decision-making. And in arguing otherwise in its response brief (ECF 30, "CFTC Br."), the Commission advances arguments that are, if anything, even less coherent than those in its Order. Neither the brief's length nor its volume of footnotes can conceal its lack of substance on the key, controlling issues in this case.

First, the Commission fundamentally misunderstands what the statute means when it refers to event contracts that "involve" the enumerated activities. The CFTC acknowledges that, for most of the enumerated activities, the question is whether the contract's *underlying event* "involves" the activity. But for "gaming" and "unlawful activity"—and only for those activities—the Commission insists the question becomes whether *trading the contract* "involves" the activity. Those are two totally different inquiries. The Commission identifies no other statute that employs language in such a shape-shifting way—using a single term in a single sentence to repeatedly toggle back and forth between two different subjects. This reading flies in the face of basic interpretive principles and also upends the basic structure of the scheme.

Second, the Commission's initial wrong turn forces it down other blind alleys. It claims that buying or selling Kalshi's contracts involves "gaming." But there is no "game" here—only real-world events with real economic impacts. Nor can the CFTC construe "gaming" broadly to mean all "gambling"—*i.e.*, staking something of value on a contingency—since that would sweep in *all* event contracts, making nonsense of the statutory enumeration. The Commission admits as much. Attempting to steer between that Scylla and Charybdis, it gerrymanders a novel definition of "gaming" to cover wagers on games *or contests*, but nothing else. The Commission cannot and does not explain, however, why that neither-here-nor-there interpretation is the best reflection of congressional intent—as opposed to the best way to ensnare Kalshi's contracts, which appears to be the Commission's sole objective. And the games-or-contests construction fails even on that score, since elections are plainly *not* "contests" under the state gambling statutes upon which the Commission rests.

The CFTC's attempt to condemn Kalshi's contracts as involving "unlawful activity" requires even stranger contortions. It argues that this category is implicated because some States prohibit betting on elections. But, as the Order itself observed, many States ban *all* wagering on contingencies. On the Commission's logic, *every* event contract thus "involves" unlawful activity in just the same way as Kalshi's Congressional Control Contracts do. Despite some nearly unintelligible denials, the Commission effectively admits as much. It thereby turns the statutory scheme on its head and effectively reinstates the across-the-board pre-clearance regime that Congress *repealed* decades ago. That cannot be right.

Finally, the Commission's efforts to prop up the Order's public-interest finding fall flat. It is undeniable that elections impact people and businesses. Indeed, hardly any other events matter *as much* as elections do. And if elections matter, the risks associated with them can be hedged. That simple reality is more than enough to align Kalshi's contracts with the public interest. In its brief, the Commission only doubles down on the Order's analytical errors. It ignores the mountains of concrete evidence of the contracts' benefits while repeating irrelevant platitudes about election integrity (which Kalshi wholeheartedly supports) and elevating unfounded bogeyman claims that have no basis in fact.

The Commission tries to hide behind the formality that the Order resulted from an informal adjudication, but that is no excuse for arbitrary and capricious reasoning. The CFTC chose to ask for the public's input—but then ignored it when the facts did not fit the Commission's pre-ordained agenda of protecting Wall Street's monopoly over risk-hedging financial products.

In the end, it is clear that this Court must vacate the Order and permit Kalshi to list the Congressional Control Contracts. To the extent Congress determines that election contracts should be banned, it remains free to add "elections" to the list of enumerated activities that trigger CFTC review. But current law is clear, and the Commission cannot twist or rewrite it to protect an incumbent hegemony. Kalshi is therefore entitled to summary judgment, and respectfully reiterates its request for a ruling to that effect in advance of the next set of federal elections.

ARGUMENT

I. THE CFTC IS WRONG ABOUT WHAT IT MEANS FOR AN EVENT CONTRACT TO "INVOLVE" AN ENUMERATED ACTIVITY.

Under the only consistent, coherent interpretation of the CEA's event-contract provision, Kalshi's contracts "involve" neither "gaming" nor "unlawful activity." At the threshold, that is because the word "involve," read in its statutory context, links the enumerated activities to a contract's *event*—not to the *act of trading* it. This event-focused reading makes sense of each enumerated activity and accommodates the statute's broader structure. Meanwhile, the Commission's contrary reading—under which "involve" refers to the underlying event for some enumerated activities but to the act of trading for the "gaming" and "unlawful activity" categories—does not fit. No matter how broad, a single statutory term in a single sentence cannot perform two completely different tasks simultaneously. And basic principles of statutory construction confirm that "involve" here must refer to the underlying event, lest *every* event contract be subjected to public-interest scrutiny even after Congress specifically repealed that regime and curtailed the Commission's review authority.

A. "Involve" Connects Enumerated Activities with Underlying Events, Not with the Actions of Traders.

The Commission never disputes that, for the "terrorism," "assassination," and "war" categories, an event contract can "involve" those activities only if its *underlying event* relates to them. And the Commission concedes that the CEA elsewhere uses the term "involve" to do the same work—*i.e.*, to refer to a contract's underlying. *See* CFTC Br. 22–23 & n.22. Yet the Commission never suggests that *elections* involve

"gaming" or "unlawful activity"; it argues only that *trading election-based contracts* involves those activities.[1] The CFTC thus turns "involve" into a chameleon. It is utterly implausible that Congress—through a single word—repeatedly shifted the focal point of a crucial statutory inquiry back and forth across five subparagraphs of the same sentence. *See* ECF 17-1 ("Kalshi Br.") at 16–18. The Commission's shifting construction conflicts with the consistent-meaning canon and upends the statute's basic structure. The Court should therefore reject it.

Consistent Meaning. The first obstacle to the Commission's interpretation is the consistent-meaning canon. Statutory terms have fixed meanings; they do not expand and contract to fit particular applications. The Commission tries to avoid this canon by casting the dispute as hinging on the definition of "involve." *See* CFTC Br. 22, 25. "Involve," it insists, means to "relate closely to" or to "entail," and holds that same broad meaning across "all five enumerated activities." CFTC Br. 25.

[1] The Commission occasionally disputes that description of its position, but its brief—like the Order—speaks for itself. At every turn, it consults the actions of a hypothetical trader to determine whether an enumerated activity is "involved." *See, e.g.*, CFTC Br. 11–12 ("because taking a position in" Kalshi's contracts "would be staking something of value … upon the outcome of a contest," they "involve 'gaming'"), 12 ("taking a position in" these contracts "would be staking something of value (or betting) upon the outcome of [elections], which is illegal in a number of states"), 21 n.18 (these contracts "'involve' gaming because an election 'relates to' gaming—*if you gamble on it*"), 22 (these contracts "involve" gaming because "gaming is what these transactions 'entail'"), 27 ("*taking a position in* the [contracts] is betting or wagering on elections" (emphasis added)), 34 (these contracts "involve" unlawful activity because "taking a position in [them] means wagering on elections"), 35 (similar). Its *amicus* sums up the CFTC's argument well: Kalshi's contracts supposedly "involve gaming because entering into [them] means engaging in the activity of 'gaming.'" ECF 34 (Better Markets Amicus Br.) 5.

That misses the point entirely. The dispute here is not what "involve" *means* in the abstract. Indeed, Kalshi used a nearly identical definition to the one the CFTC presses. *Compare* Kalshi Br. 14, 15 ("constitute" or "relate to"), *with* CFTC Br. 22 ("relate to," "to entail," or "to have as an essential feature or consequence"). Instead, the dispute is about what *work* that word performs in the statute—specifically, *to what* must the enumerated activity relate? In other words, this case is not about how closely an underlying event must relate to an enumerated activity to "involve" it; it is about whether it suffices for *trading a contract* to relate to an enumerated activity.[2]

In answering that question, the Commission concedes that "involve" refers to a contract's underlying event for *most* of the provision's enumerated activities—as well as elsewhere in the statute. *See* CFTC Br. 22–23 & n.22; Kalshi Br. 16. That concession guts the Order's categorical claim that "when the CEA refers to a contract's underlying, it uses the word 'underlying,' or it refers to what the contract is 'based on' or 'based upon.'" Order at 6. And the consistent-meaning canon compels

[2] The Commission suggests Kalshi has "waived" reliance on the undisputed, ordinary definition of "involve." CFTC Br. 21 n.18. Nonsense. From the start, Kalshi has raised a binary question of statutory interpretation: Must a contract's *event* "involve" an enumerated activity, or can the Commission trigger public-interest review by concluding that the *act of trading* the contract would "involve" the activity? *See, e.g.*, AR 110–12; AR 121; AR 3169–70. At every step, Kalshi has advanced the former position and attacked the latter. *See, e.g.*, *id.*; ECF 1 ¶¶ 8, 10, 63–65, 88; Kalshi Br. 15–23. At every step, Kalshi has given the Commission "a fair opportunity to pass on [its] legal … argument." *Wash. Ass'n for Television & Child. v. FCC*, 712 F.2d 677, 681 (D.C. Cir. 1983). And at every step, Kalshi has given "involve" its ordinary relational meaning—often using language identical to the Commission's. Because the parties' dispute has never been about the scope of relationships captured by the word "involve," but rather about the *subject and object* of those relationships, Kalshi did not (and could not) "waive" any argument on the former score.

the conclusion that Congress employed the same, event-focused usage of "involve" across *each* enumerated activity. As the Supreme Court has explained, "a *single* [statutory] formulation" must be read "the same way each time it is called into play." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). And when one term "applies without differentiation to" a set of defined "categories," reading it to perform different work as to "each category would … invent a statute," not "interpret one." *Clark v. Martinez*, 543 U.S. 371, 378 (2005); *see also Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 329 (2000) ("refus[ing] to adopt a construction that would attribute different meanings to the same phrase in the same sentence, depending on which object it is modifying"); *Bankamerica Corp. v. United States*, 462 U.S. 122, 129 (1983) (same).

Try as it might, the Commission cannot escape that inconsistency. Again, even accepting that "involve" means "relate to" or "entail," it would be bizarre for Congress to switch back and forth between two fundamentally different inquiries in rapid succession—asking first whether *trading the contract* entails unlawful activity, then whether the contract's *underlying event* entails terrorism, assassination, or war, then reverting to inquire whether *trading the contract* entails gaming. The Commission identifies no statutory term that has *ever* been construed that way. It suggests there is no problem because, on its view, "involve" consistently performs one of two possible tasks—either the contract's underlying is one of the statutory activities, or else the contract has a "different connection" with the activity. CFTC Br. 25 (quoting Order at 7). But that semantic trick would render the consistent-meaning canon meaningless. Defining a term to mean "X *or* Y" assigns it *two* meanings, not *one*.

To illustrate, revisit the hypothetical in Kalshi's opening brief involving a theater policy requiring parents to accompany minor children to any screening that "involves" violence or drug use. Kalshi Br. 15. In context, that policy uses the word "involve" to refer to the film's content, not to the behavior of attendees—even though it is semantically possible for the act of *attending* the screening to "involve" the listed activities. Now suppose the policy also lists "horror" and "science fiction" alongside "violence" and "drug use." Those additional objects of "involve" place the policy's focus beyond doubt, because it is *not* semantically possible for the act of attending a screening to entail science fiction or horror. As a result, "involve" can *only* refer to the underlying film across all four categories. No reasonable person would read the policy to refer to the film's content with respect to science fiction and horror, but to the attendees' behavior with respect to violence and drug use. Nor would anyone call that odd construction "consistent." While the *definition* of "involve" is unchanged, the word would perform two fundamentally different *tasks*. The Commission's split-screen reading of the CEA fails for the same reason.

Statutory Context. Context underscores the Commission's error, because its interpretation would reduce multiple statutory terms to surplusage and unwind the U.S. Code to revive a sweeping pre-clearance regime that Congress repealed.

Start with "gaming." If "gaming" means anything a layperson might describe as "betting," construing "involve" to refer to the actions of traders would "capture all contingent events." CFTC Br. 27 n.26. The Commission tries to avoid that obvious problem by ginning up a definition of "gaming" that is limited to bets on games "or

contests" but no other contingencies. CFTC Br. 27–30. But that definition fails for reasons explained below. *See* Part II.A, *infra*. And the Commission's embrace of that plainly gerrymandered rule underscores its threshold error on "involve"; one error begets another. By contrast, Kalshi's consistent, event-focused reading of "involve" requires no gymnastics: It authorizes public-interest scrutiny only if the contract's underlying event involves gaming in its ordinary, plain-meaning sense. *See* Kalshi Br. 24. As even the Commission now acknowledges, that is not a null set: A contract "tied to the winner of the World Series of Poker," for instance, would qualify under either party's reading. CFTC Br. 24 n.24. Contracts contingent on games—like the Super Bowl and other sporting events—would too. *See* Kalshi Br. 23.[3]

The problem with the Commission's reading is even starker when it comes to "unlawful activity." Because multiple States already ban wagering on *any* contingent event, construing "involve" to refer to the act of trading would subject *every* event contract to public-interest pre-clearance. *See* Kalshi Br. 20, 32–33. And this time, the Commission identifies no limiting principle to avoid that result. *See* CFTC Br. 26, 35–36. It denies reading "involve" to mean "that the *act of trading* the contract itself must be unlawful." CFTC Br. 26. But while a state-law prohibition on trading

[3] Attempting to manufacture disagreement on this point, the CFTC straw-mans Kalshi as claiming that a contract "involves" an activity "only if the underlying *is*" that activity; the Super Bowl is a "game" but is not itself "gaming." CFTC Br. 24. But, as explained, the real question is whether the underlying event "constitutes *or relates to*" gaming. Kalshi Br. 15 (emphasis added). The Super Bowl plainly does. Again, the dispute is not about how *closely* an underlying event must relate to one of the enumerated activities; it is about whether it suffices for *trading* a contract to relate to an enumerated activity. The latter inquiry has no basis in the statute.

the contract might not be *necessary* under the Commission's reading, the Commission certainly treats such a law as *sufficient* to trigger public-interest scrutiny. *See* n.1, *supra*. Indeed, that is the only way the Commission can cram Kalshi's contracts into the "unlawful activity" category. And, on that logic, trading any event contract would equally trigger review. *See infra*, 20–21; *see also, e.g.*, N.D. Cent. Code Ann. § 12.1-28-01 (outlawing "risking any money" on the "outcome of an event").

As a result, the Commission's construction of "involve" ultimately requires these two enumerated activities (gaming and unlawful activity) to swallow their neighbors—and to upset the statute's basic structure, whereby event contracts are subject to public-interest review *only* in narrowly defined circumstances. The CFTC offers no real defense of that result, which not only violates the surplusage canon, *see United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 432 (2023), but also implausibly construes lone exceptions so broadly as to "read out the rule," *United States v. Slatten*, 865 F.3d 767, 807 (D.C. Cir. 2017).

The Commission's only retort is to suggest that it might exercise its discretion to allow some event contracts to proceed; in other words, public-interest review is not tantamount to a ban. *See* CFTC Br. 36. That is true, but does not solve the problem with the Commission's reading. Under the CEA, event contracts are presumptively *allowed*. Congress adopted that basic structure in 2000, abandoning an old regime that conditioned the listing of any new contract on a showing by the exchange that the product was "in the public interest." CFTC Br. 5; *see also* Pub. L. No. 93-463, § 207, 88 Stat. 1389, 1400 (1974) (codified at 7 U.S.C. § 7(7) (1994)); Pub. L. No. 106-

554, §§ 110(2), 113, 114 Stat. 2763, 2763A-384, 399 (2000) (codified at 7 U.S.C. §§ 7, 7a-2 (2006)). In 2000, Congress flipped the presumption. *See* 7 U.S.C. § 7a-2(c)(3) (2006). And when Congress returned to the issue a decade later in the Dodd-Frank Act, it chose *not* to restore the across-the-board "public interest" rule that reigned from 1974 to 2000. Instead, it crafted the provision at issue here—a "special rule" for event contracts that allows for public-interest scrutiny only if they "involve" one of the enumerated activities. *See* Pub. L. No. 111-203, § 745(b), 124 Stat. 1376, 1736 (2010) (codified at 7 U.S.C. § 7a-2 (2018)). Any reading of the "special rule" that nonetheless sweeps in *all* event contracts for CFTC review ignores the CEA's basic structure and history.

Kalshi's common-sense reading of "involve," by contrast, avoids all of these problems. Under Kalshi's reading, the statute authorizes public-interest review only when a contract's *underlying event* involves (relates to, entails, etc.) "gaming" or an "unlawful" activity (or one of the other enumerated activities). That reading respects the statutory structure, works with all of the enumerated activities, and affords each category a clear and appropriately constrained sweep without swallowing the rule. It is clearly the correct interpretation.

B. The CFTC's Attacks on Kalshi's Reading Fail.

Unable to defend its own reading of the statute, the Commission goes after Kalshi's. It starts by making a textual argument that (once again) mischaracterizes Kalshi's position. And it continues by claiming that Kalshi's reading is at odds with a snippet of legislative history. Both gambits fail.

On the text, the Commission points out that, earlier in the statute, Congress used the phrase "based upon" in relation to an "occurrence, extent of an occurrence, or contingency." CFTC Br. 23 (quoting 7 U.S.C. § 7a-2(c)(5)(C)). Gesturing at the meaningful-variation canon, the Commission argues that Congress must have used "involve" to mean something "broader" than "based upon." CFTC Br. 23.

Again, however, the Commission is attacking a straw man. Kalshi agrees that "involve" carries its typical meaning (to relate to, entail, etc.), which is broader than "based upon." *See supra*, 5–7. To use the Commission's example, a contract that pays out based on "whether a certain amount of cocaine is seized" by authorities might not be "based upon" illegal activity, since the seizure itself would be legal. The contract's event would still "involve"—*i.e.*, relate to—unlawful activity. CFTC Br. 26. Kalshi agrees. But none of that has anything to do with the question here, which is whether it is the *underlying event* or the *act of trading* that must "involve" the activity. For example, does an event contract on the average U.S. temperature next July "involve" unlawful activity simply because wagering on such an outcome would be unlawful gambling in some States? The answer to that question is surely "no."

Finding no refuge in statutory text, the CFTC turns to a particularly unreliable fragment of legislative history: a short floor colloquy. CFTC Br. 24. The D.C. Circuit has warned that "judges must 'exercise extreme caution'" with such exchanges. *Tex. Mun. Power Agency v. EPA*, 89 F.3d 858, 875 (D.C. Cir. 1996). And legislative history cannot "cloud a statutory text that is clear." *Ratzlaf*, 510 U.S. at 148. Regardless, the colloquy only bolsters Kalshi's event-focused reading. The Senators expressed

concerns about contracts contingent on certain *events*: both "*events* that threaten our national security," such as "terrorist attack[s]," and "sporting *events* such as the Super Bowl, the Kentucky Derby, and Masters Golf Tournament." 156 Cong. Rec. S5907 (daily ed. July 15, 2010) (emphases added). In all of these examples, the focus is on the *underlying events*, not the *behavior of traders*. And nothing in the Senators' exchange supports the Commission's bizarrely inconsistent reading of the statute.

II. THE CFTC'S READING OF THE ENUMERATED ACTIVITIES IS UNTENABLE.

Even accepting the Commission's erroneous reading of "involve," Kalshi still prevails. *First,* trading Kalshi's contracts does not involve "gaming" because traders take positions on *elections*, not *games*. The Commission's attempt to expand "gaming" to cover wagers on "contests"—but nothing else—has no basis in law or common sense, and Kalshi's contracts are not covered by that definition anyway. *Second*, the act of trading Kalshi's contracts does not involve "unlawful" activity because federal law preempts state law in this sphere. The Commission's argument, to the extent it is comprehensible, hinges on a reading of "unlawful activity" that subjects *every* event contract to public-interest review, which is obviously untenable.

A. "Gaming" Requires a Game.

As Kalshi explained in its opening brief, "gaming" ordinarily means playing games of chance for money. It can also refer to betting on games, including sporting events. *See* Kalshi Br. 24–25. Elections are not games. So event contracts contingent on elections cannot fairly be said to "involve" "gaming." Kalshi Br. 27. As a matter of ordinary meaning, "gaming" is too *narrow* to encompass Kalshi's contracts.

The Order observed that some dictionaries connect "gaming" with "gambling," and then pointed to some definitions of "gambling" that sweep in any and all wagers on uncertain contingencies. *See* Order at 8–9. But that approach—treating "gaming" as a catchall for anything colloquially described as "gambling" or "wagering"—would sweep *every* event contract into this category. *See* Kalshi Br. 20, 27–28. And it's hard to imagine a less reasonable construction of a single exception on an enumerated list than one that consumes each of its neighbors and the general rule to boot. *See supra*, 8–11. This interpretation is too *broad* to serve the Commission's objectives.

Accordingly, the CFTC devises a made-for-litigation Goldilocks definition: just broad enough to reach Kalshi's contracts, but just narrow enough not to swallow the rule. On its view, "gaming" reaches everything covered by Kalshi's reading (betting on "games") *plus* "staking something of value on a contest of others"—but *nothing else*. CFTC Br. 29. To get there, the Commission takes three leaps: (1) gaming means "gambling," (2) gambling means wagering on games *or contests*, and (3) elections are "contests." Each step transgresses basic principles of statutory interpretation.

First, "gaming" is not the same as "gambling." Dictionary definitions and common usage alike confirm that gaming—unlike the broader terms "gambling" or "wagering"—typically requires a predicate *game*. Kalshi Br. 25–26. A water-cooler bet between coworkers, for instance, could count as "gambling" but is not "gaming." To be sure, all "gaming" is a form of "gambling," which is why definitions of the former sometimes cross-reference the latter. CFTC Br. 27 & n.28. But the converse is not true: Not all "gambling" is "gaming." Congress chose the narrower term.

The Commission has no response to the many state statutes confirming the ordinary, game-based reading of "gaming." *See* Kalshi Br. 25–26 & n.6. And it abandons the Order's misguided reliance on the Unlawful Internet Gambling Enforcement Act, which does not use the word "gaming" at all. *See* Kalshi Br. 25. The Commission does attempt to explain away the Indian Gaming Regulatory Act (IGRA), which defines "gaming" by reference to "games." 25 U.S.C. § 2703(6)–(7). The CFTC responds by pointing out that IGRA does so only for two categories of "gaming," but then includes a "catchall" category lacking that limitation. CFTC Br. 31–32. But that supposed "catchall" is "class III gaming"—the most heavily regulated category, typically offered at casinos. 25 U.S.C. § 2703(8). Regulations define Class III by reference to "[c]ard games such as baccarat, chemin de fer, blackjack (21), and pai gow"; "[c]asino games such as roulette, craps, and keno"; "slot machines" and other "games of chance"; "sports betting," including "wagering on horse racing, dog racing or jai alai"; and "[l]otteries." 25 C.F.R. § 502.4. That regulatory definition exemplifies the conventional, game-based reading of "gaming" that Congress clearly meant to invoke in the CEA. It well proves Kalshi's point.

Second, conflating "gaming" with "gambling" only walks the Commission into another problem. The ordinary definition of "gambling" is too *broad* to fit here, since it would "capture all contingent events." CFTC Br. 27 n.26. The Commission is thus forced to gerrymander a limited definition of "gambling" to cover wagers on games *or contests*—but no other bets. That limit is artificial and unpersuasive. There are 21 state laws that define gambling to include wagering on "contests." Of those, however,

the majority (13) reach betting on *any* future event beyond the bettor's control,[4] as do 16 other statutes that do not single out "contests" but subsume them within broader definitions of gambling.[5] Again, that sweeping definition is untenable in context, since it would turn *all* event contracts into "gaming." *Supra*, 14. That is why even the Commission disclaims the broader definition. CFTC Br. 27–28 & n.26 (declaring that the "Commission did not adopt the broad definition" found in many state laws).

That leaves just eight state gambling laws that encompass wagers on contests but not *all* wagers on contingent events. As discussed below, even those eight use the term "contests" in a way that clearly *excludes* elections. *Infra*, 17–18. But setting that aside, the question remains: Why is this narrow, outlier definition of "gambling" the best understanding of what Congress intended by "gaming" in the CEA?

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[4] *See* Ala. Code § 13A-12-20(4); Alaska Stat. Ann. § 11.66.280(3); Ariz. Rev. Stat. § 13-3301(6); Haw. Rev. Stat. § 712-1220; Me. Rev. Stat. tit. 17-A, § 952; Mich. Comp. Laws § 750.301; Mo. Rev. Stat. § 572.010; Neb. Rev. Stat. § 28-1101(4); N.J. Stat. § 2C:37-1; N.Y. Penal Law § 225.00(2); Or. Rev. Stat. § 167.117(7); Va. Code Ann. § 18.2-325(1); Wash. Rev. Code § 9.46.0237.

[5] *See* Colo. Rev. Stat. Ann. § 18-10-102; Conn. Gen. Stat. Ann. § 53-278a; Idaho Code § 18-3801; Ind. Code § 35-45-5-1(d); Iowa Code § 725.7(1)(b); Kan. Stat. Ann. §§ 21-6403(a)(1), 6404(a)(1); Minn. Stat. Ann. §§ 609.75, 609.755(1); Miss. Code Ann. § 97-33-1; Mont. Code Ann. § 23-5-112(14)(a); N.H. Rev. Stat. Ann. § 647:2; N.M. Stat. Ann. §§ 30-19-1, 30-19-2(A); N.D. Cent. Code Ann. § 12.1-28-01; Okla. Stat. Ann. tit. 21, §§ 981, 982; Tenn. Code Ann. § 39-17-501; Wis. Stat. Ann. §§ 945.01, 945.02(1); Wyo. Stat. Ann. § 6-7-101.

Notably, many of the States with broad definitions of "gambling" and similar concepts separately define "gaming" more narrowly, to focus on games. That confirms Kalshi's point that the Commission went off-track at the first step of its analysis. *Compare* Colo. Rev. Stat. Ann. § 18-10-102 ("gambling"), *with id.* § 44-30-103(22) ("gaming"); *compare* Miss. Code Ann. § 97-33-1 ("wagering or betting"), *with id.* § 75-76-5(*l*) ("gaming"); *compare* N.M. Stat. Ann. § 30-19-2 ("gambling"), *with id.* § 60-2E-3 ("gaming"); *compare* N.Y. Penal Law § 225.00(2) (criminal "gambling"), *with* N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 1301(19)–(20) ("gambling," "gaming," "game").

The Commission's answer is utterly conclusory. It says "Congress used broad language" to "provide broad authority to the Commission to prohibit event contracts." CFTC Br. 32. That is backwards. The "broad" definition of "gambling" is untenable, so the Commission rejects it. There is no reason to believe that Congress, by using the word "gaming," meant to exceed that word's ordinary game-based meaning and instead reach "gambling"—but then stop at that term's relatively rare, contest-based definition while excluding all other bets. This neither-fish-nor-fowl definition is an outcome-driven gerrymander, not a serious effort to discern congressional intent.

Third, even looking past all of that, elections are not "contests" for purposes of the statutory definitions on which the Commission relies. *See* Kalshi Br. 29–30. The Commission notes that elections are sometimes colloquially called "contests" by the media. CFTC Br. 30 n.30. But it identifies no statute, case, or other legal authority that characterizes elections that way. And in the context of the gambling statutes on which the Commission bases its argument, "contests" does *not* include elections. Of the eight statutes that define gambling to mean wagering on games *or contests* (but nothing else), three *separately* ban betting on elections—which would be superfluous if elections were already "contests."[6] The other five use "contests" in ways that clearly refer to events typically staged for amusement and betting. No one would classify an election as a "contest … of skill, speed or power of endurance of human or beast."[7]

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[6] *See* Ga. Code Ann. § 16-12-21(a)(2); 720 Ill. Comp. Stat. 5/28-1; Tex. Penal Code Ann. § 47.02(a)(2).

[7] Del. Code Ann. tit. 11, § 1403(1); Fla. Stat. § 849.14.

Nor would anyone understand an election to be a "contest" when that word appears in a list neighboring "game, gaming scheme, or gaming device," or "game, … lottery, or contrivance."[8] Words must be known by the company they keep.

The CFTC protests feebly that *noscitur a sociis* cannot apply here, lamenting a dearth of "context cues." CFTC Br. 31. Please. Were legislatures really addressing elections when they banned wagers on "contest[s], game[s], gaming scheme[s], or gaming device[s]," or contests of "skill, speed, or power"? *See* Kalshi Br. 29 & nn.7–8. Of course not. The drafters of those statutes did not intend "contest" to capture elections any more than Congress intended "gaming" to mean a bespoke subset of "gambling" that includes wagers on "contests" but nothing else.

The Commission's favorite snippet of legislative history only proves the point. *See* CFTC Br. 33. Senator Lincoln's litany of "sporting events"—a football game, a horse race, and a golf tournament—is perfectly consistent with Kalshi's reading of "gaming." The Commission acknowledges that, but responds that staking something of value on an election "is a reasonably comparable activity to betting on sports." CFTC Br. 34. No, it's not. An election is not a game. It is not staged for entertainment. It has vast extrinsic and economic consequences. Does the CFTC really believe there is no difference between the 2024 Super Bowl and the 2024 congressional elections? That the identity of the next President has the same impact on Americans as which horse wins the Kentucky Derby? That control of the House

[8] Ky. Rev. Stat. § 528.010(6)(a); La. Stat. § 14:90; Utah Code Ann. § 76-10-1101(8)(a).

and the Senate is economically comparable to the outcome of the Masters? If staking money on an election is "reasonably comparable" to sports betting, so too is staking money on wheat harvests, demand for gold, or oil production. As Justice Holmes observed long ago, it is "extraordinary and unlikely" that any of this is "to be regarded as mere wagers." *Bd. of Trade v. Christie Grain & Stock Co.*, 198 U.S. 236, 249 (1905).

The CFTC's convoluted analysis thus fails at each step: "Gaming" isn't the same as "gambling"; "gambling" isn't limited to bets on "contests"; and elections aren't "contests." If anything, the panoramic view of these interpretive gymnastics looks even worse than those close-ups. There is no earthly reason Congress would have used the word "gaming" in such an idiosyncratic way—and the Commission doesn't supply one. "Had Congress intended" to cover contracts on elections, "it surely would have said so more simply." *Moreau v. Klevenhagen*, 508 U.S. 22, 33 (1993).

B. "Unlawful Activity" Requires Unlawful Activity.

Even under the CFTC's reading of "involve," Kalshi's contracts do not "involve" unlawful activity for a simple, undisputed reason: Trading them is not unlawful. The CEA preempts "application[s] of state law [that] would directly affect trading on or the operation of a futures market." *Am. Agric. Movement, Inc. v. Bd. of Trade*, 977 F.2d 1147, 1156 (7th Cir. 1992). Accordingly, buying and selling event contracts on licensed exchanges like Kalshi's cannot be prohibited by state gambling laws—whether those laws prohibit wagering on future events generally, wagering on elections specifically, or anything else. *See* Kalshi Br. 31.

The Commission does not dispute any of this. In particular, it "agree[s] that state laws cannot prohibit trading futures on registered exchanges, and that the CEA preempts state law to the contrary." CFTC Br. 35. Nevertheless, the Commission insists that "[t]aking a position" on Kalshi's contracts has "as an essential feature or consequence" an "activity that is unlawful in a number of States—wagering on elections." CFTC Br. 35. It is hard to discern what the Commission even means by that, much less how this "essential feature" test might differ from other formulations of "involve." Wordplay aside, the Commission's argument appears to be that an event contract "involves" unlawful activity if trading it *would be* illegal in any jurisdiction *but for* federal preemption of state law.

As Kalshi explained in its opening brief, however, *all* event contracts fit that description. *See* Kalshi Br. 32–33. The Commission does not (and cannot) dispute that numerous States already prohibit staking money on any contingent future event. Kalshi Br. 32 n.11; *supra*, nn.4–5. So if the Congressional Control Contracts "involve" unlawful activity because some States prohibit wagering on elections, then every event contract equally "involves" unlawful activity because many States prohibit all wagering on contingencies. Acquiring a contract contingent on a future event beyond the buyer's control would, for example, "have as an essential feature or consequence" (CFTC Br. 35), the "risk[ing] something of value upon … a future contingent event not under [one's] control," N.Y. Penal Law § 225.00(2). The Commission cannot avoid that result—no matter how many formulations of "involve" it trots out.

Once again, any construction of one category of enumerated activity that would sweep in every event contract is not a tenable one. *Supra*, 8–11. Even the CFTC knows that. What else explains its herculean efforts to cabin "gaming" to wagers on "contests" rather than all events? *Supra*, Part II.A. Here, though, the Commission has no limiting principle, so it quietly drops the façade. It appears to acknowledge that its approach would subject every event contract to public-interest scrutiny, and simply responds that this doesn't compel it to *ban* every event contract. CFTC Br. 36. Still, however, that turns the statutory regime upside down, leaving the other four enumerated activities with no work to perform, and effectively undoing the 2000 amendment that eliminated across-the-board CFTC review. *See supra*, 10–11. This is not a defensible construction of the statute.

* * *

One last note. Apparently apprehensive about its interpretation, the CFTC gestures at *Chevron* deference without actually invoking it. CFTC Br. 19 (arguing that *Chevron* applies but that the Court should adopt the Commission's construction because it "is the most reasonable interpretation"). Whatever *Chevron*'s future, it does not apply here. Deference kicks in only when a statute remains genuinely ambiguous after exhausting all traditional interpretive tools. *See, e.g.*, *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 781–82 (D.C. Cir. 2012). The Commission does not claim any ambiguity, and for all the reasons explained, the traditional tools of construction unambiguously support Kalshi's interpretation—and foreclose the Commission's. Kalshi's contracts are thus not subject to public-interest scrutiny.

III. THE ORDER'S PUBLIC-INTEREST DETERMINATION IS ARBITRARY AND CAPRICIOUS.

Because the Commission had no authority to subject Kalshi's contracts to a public-interest inquiry in the first place, this Court need go no further. But the agency's public-interest review also violated the law by dismissing benefits the record established while hypothesizing harms the record refuted. The CFTC's attempts to prop up the Order's faulty analysis only further illuminate its errors.

A. The CFTC Misleads on the Standard of Review.

Sensing the Order's vulnerability, the Commission leads off by urging the Court to apply a more relaxed standard of review supposedly applicable to informal adjudications. *See* CFTC Br. 14, 18, 38, 44. That argument—made even as the Commission trumpets its own expertise and invokes deference to its legally binding Order, *see* CFTC Br. 19—is as meritless as it is shameless.

The arbitrary-and-capricious standard set by 5 U.S.C. § 706(2)(A) applies to *all* final agency actions, regardless their form. *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413–14 (1971) (informal adjudication); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (rulemaking). And informal adjudication—no less than rulemaking—requires reasoned decision-making. *See, e.g.*, *Butte County v. Hogen*, 613 F.3d 190, 194–95 (D.C. Cir. 2010) (remanding informal adjudication on that basis); *Clark County v. FAA*, 522 F.3d 437, 441 (D.C. Cir. 2008) (Kavanaugh, J.) (same); *Dr Pepper/Seven-Up Cos. v. FTC*, 991 F.2d 859, 863, 866 (D.C. Cir. 1993) (same). If an agency "ignore[s] evidence contradicting its position," "refus[es] to consider evidence bearing on the issue," or "refuse[s] to

evaluate" pertinent information, its adjudication is "arbitrary … within the meaning of § 706." *Butte County*, 613 F.3d at 194–95; *contra* CFTC Br. 38. Indeed, the CFTC's favorite adjudication case confirms that point—and cites rulemaking cases in so doing. *See Concert Inv., LLC v. Small Bus. Admin.*, 616 F. Supp. 3d 25, 33–35 (D.D.C. 2022) (explaining that an "agency must show it has considered the relevant aspects of the issue" and cannot "fail[ ] to discuss or distinguish" pertinent contrary evidence). That is Kalshi's argument in a nutshell. *See* Kalshi Br. 34.

To be sure, certain procedural requirements applicable to formal rulemakings do not apply to informal adjudications. *See Neustar, Inc. v. FCC*, 857 F.3d 886, 893 (D.C. Cir. 2017). But Kalshi has never suggested that the Commission violated any procedural obligation. Nor has Kalshi asked the Court to substitute its judgment for the Commission's, or claimed it must "respond to each and every comment." CFTC Br. 18, 40–41, 44. Kalshi merely seeks to hold the Commission to the APA's universal guarantee of reasoned decision-making. Even in an adjudication, an agency's top-level policymakers cannot solicit comments only to cherry-pick favorable tidbits while elevating unfounded speculation over concrete evidence. *See Butte County*, 613 F.3d at 194–95; *Clark County*, 522 F.3d at 441–43. That is what happened here.

B. The CFTC's Arguments about "Economic Effects" Are Meritless.

Partisan control of Congress has vast economic consequences, both directly and through its influence on policy and other governmental decisions. Kalshi Br. 35–36; CFTC Br. 42–43. That is undeniable. Event contracts allow affected parties to hedge against those economic risks. The Commission's responses do not pass muster.

First, while the parties agree that the CEA's public-interest determination may properly account for economic considerations such as hedging utility, *see* Kalshi Br. 35, the Commission wrongly conflates that common ground with acquiescence to its amorphous and ever-shifting "economic purpose" test, *see* CFTC Br. 36–37 n.34. Kalshi does *not* endorse whatever test the Commission purports to be applying here—particularly since it is near impossible to tell what that test is or how it operates. The Commission constantly moves the goalposts throughout both its Order and its brief. *Compare* Order at 19 (requiring "more than [ ] occasional" hedging), *with id.* (also asking whether contracts will be used "predominantly" for commercial purposes); *compare id.* at 13, 19 (characterizing "economic purpose" as virtually dispositive), *with id.* at 19–23 (touting non-economic harms); *see also* CFTC Br. 36–52 (similar inconsistencies). And the agency has no regulations in effect to guide this inquiry.

Second, while the Commission repeats that the economic consequences of congressional control are not "sufficiently direct, predictable, or quantifiable" to hedge against, CFTC Br. 42, it barely tries to defend that "direct effects" test from Kalshi's legal and factual critique. *See* Kalshi Br. 36–37. Instead, it pivots to a standard the Order mentioned only in passing: whether Kalshi's contracts will be used for "hedging or price basing" on a "more than an occasional" basis. CFTC Br. 40–42. In doing so, the Commission implicitly accepts that Kalshi's contracts *can and will* be used for hedging, and shifts its focus to *how often*. But that "more than occasional" standard appears to be derived solely from regulations rescinded decades ago. CFTC Br. 5, 40. Congress repealed the statutory structure that justified those

regulations. *See supra*, 10–11. And the Commission has, since then, failed to apply this "more than occasional" standard in similar cases. *See* CFTC, *CFTC Issues Order Prohibiting North American Derivatives Exchange's Political Event Derivatives* Contracts (Apr. 2, 2012), *available at* https://www.cftc.gov/PressRoom/PressReleases/6224-12. Moreover, the standard raises more questions than answers. Is "occasional" an *absolute* concept (requiring some unknown number of hedgers) or a *relative* one (requiring some unknown ratio of hedgers to speculators)? Either way, how can it be applied to contracts, like these, that have not yet been listed for trading?

Third, the Order remains arbitrary and capricious even under the "occasional hedging" test. The CFTC concedes that elections—and specifically congressional control—present real economic risks. *See* CFTC Br. 42–43. And there is copious record evidence that many individuals and entities would—and do—wish to use the contracts to hedge economic risks.[9] Multiple *amici* provide further substantiation.[10] The Commission identifies no concrete reason to disbelieve those assertions. And there is *zero* evidentiary basis for the Commission's theory that hedging uses will be less than "occasional"—in either an absolute or a relative sense.

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[9] *See, e.g.*, AR 1348, 1375–76, 1386–87, 1391, 1532, 1533, 1539–40, 1590–91, 1597, 1613, 3367.

[10] *See* ECF 24 (Paradigm Amicus Br.) at 3–8 (discussing how legislation, confirmations, and taxation can all directly affect interests in various sectors and those depend on who wields power); ECF 26 (Aristotle Amicus Br.) at 6–8 (discussing predictable economic effects of elections); ECF 25 (Grundfest Amicus Br.) at 13 (discussing research on how prediction markets are "useful both for investors who want to speculate on the election outcome and for those who want to reduce the exposure of their portfolio (or hedge against) the election outcome").

Indeed, the Commission's attempts to defend its non-record speculation about how Kalshi's contracts will be used only underscore the weakness of its position. For example, it says that congressional elections occur "only once every two years." CFTC Br. 41. That is obviously true, but just as obviously says nothing about the extent to which businesses and individuals may wish to hedge the risks associated with these biennial events. *See* CFTC Br. 41. Futures and forward contracts often tie to singular points in time—say, the price of a commodity on a certain date. The same goes for any number of event contracts—say, the GDP statistics for a certain quarter or the occurrence of a hurricane in July. Whether the underlying events occur quarterly, yearly, or one time only has nothing to do with whether or to what extent traders will use event contracts to hedge economic risks. If anything, the fact that congressional elections don't happen every day only *amplifies* their economic implications.

Nor does the unexceptional structure of these contracts lend support: Most if not all event contracts are "binary," and pay out only once. CFTC Br. 41. Those characteristics do not render their economic benefits any less legitimate—or their hedging use less than "occasional." Moreover, the Commission ignores that parties can *continuously* trade these contracts as prices fluctuate until their settlement date, expanding their potential economic uses over time. *Cf.* Aristotle Amicus Br. 9 (noting that gambling, by contrast, typically lacks such secondary markets). The Commission's scattershot efforts to criticize aspects of these contracts that are shared by the event contracts the Commission regularly approves highlights the lack of reasoned decision-making it employed to reject contracts it disliked.

The Commission also objects that the contracts' payout is not tied to "actual or estimated losses" and that congressional control *alone* does not have economic impacts without "intervening events and variables." CFTC Br. 41–42. But these critiques again fail to distinguish the Congressional Control Contracts from any other event contracts. They also misunderstand how hedging and risk-mitigation actually work. Return to the example of a hurricane contract. Kalshi Br. 36–37. Whether a hurricane materializes differs from whether it results in a property loss, given all the "intervening events and variables." Event contracts are not insurance policies. They serve instead to hedge the *risk* of whether the event will *happen*. In a complicated global economy, businesses and individuals must *always* consider the combination of factors that compose risks. The Commission makes these same points about *election risks*—yet somehow forgets that same reality here. CFTC Br. 42, 47.

The unmistakable throughline from all of the Commission's arguments is that it believes Kalshi did not carry some unclear burden to sufficiently prove the extent of its contracts' economic utility. But by persistently placing this burden on Kalshi, the Commission yet again flips Congress's framework on its head. Congress replaced the prior pre-clearance regime, under which markets had to establish compliance with the public-interest standard, with a new system under which a contract is presumptively legal unless *the Commission* determines that the contract is "*contrary to* the public interest." 7 U.S.C. § 7a-2(c)(5)(C)(i) (emphasis added); *see also supra*, 10–11. And even after shifting the burden to Kalshi, the Order's adverse finding rests on an impossibly amorphous test, ignores extensive record evidence, and repeatedly

relies on arguments that would apply equally to all event contracts. That is textbook arbitrary-and-capricious reasoning. *See, e.g.*, *Butte County*, 613 F.3d at 194–95; *Clark County*, 522 F.3d at 441–43.

C. The Commission Does Not Meaningfully Engage with the Non-Economic Benefits the Order Ignored.

Beyond their hedging and price-basing uses, Kalshi's contracts provide extensive informational benefits. To highlight a few:

- The former chairman of the Council of Economic Advisers explained that the White House consulted prediction-market data "to understand what informed traders with money at stake would expect." AR 1549; *see also* AR 1451–53, 1494–99.
- A Nobel laureate economist noted that influential studies have relied on the "powerful resource" of prediction data to develop "valuable" political, economic, and social insights. AR 1750–53.[11]
- Several commentors discussed how such data also offers the general public a neutral, market-driven alternative to traditional polling, which has proven unreliable in recent years.[12]

Amici reinforce the same points. *See* Aristotle Amicus Br. 12–14 (prediction markets are an "essential public service" for public, academics, companies, and governments); Paradigm Amicus Br. 8–11 (similar); Grundfest Amicus Br. 14–16 (same).

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[11] *See also, e.g.*, AR 1404 (collecting research); AR 1438–39 (similar); AR 1452–53 (example of study using "prediction market prices to infer market beliefs" and thus make "accurate measurements of [climate] abatement costs").

[12] *See, e.g.*, AR 1577 (explaining why Kalshi's contracts would advance accuracy and transparency); AR 1543–44 (collecting media coverage relying on prediction markets and research finding that such data outperforms traditional forecasting); AR 1584 (human-rights activist who relies on prediction markets as alternative to unreliable polls and fake media reports); AR 1437 (explaining how election contract markets can build social consensus and educate the public); AR 1499–503 (documenting advantages of political prediction markets over polls).

The CFTC acknowledges that those non-economic benefits are relevant to the public interest. CFTC Br. 36, 49. But the Commission's brief—like its Order—simply dismisses them. CFTC Br. 49. "Stating that a factor was considered" is not a "substitute for considering it," especially when it involves a key consideration for the agency's ruling—*i.e.*, whether these contracts serve the public interest—and the agency is vague about its role in the final determination. *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986). The Commission's refusal to engage with these issues reflects the opposite of reasoned decision-making.

D. Speculation about Election Integrity Cannot Save the Order's Public-Interest Determination.

Having artificially minimized the contracts' benefits, the Commission amplifies their supposed harms. CFTC Br. 45–52. But its speculation about election integrity and playing "election cop" is quintessential arbitrary-and-capricious reasoning.

To start, the Commission does not seriously contend that Kalshi's contracts would result in any long-term manipulative effects. *See* CFTC Br. 47–48. Nor could it. Political event markets have existed for many years and in other democracies. *See, e.g.*, AR 1528; AR 2786. Research in the record shows that the "likelihood of this kind of manipulation occurring is extremely remote." AR 1448; *see also* AR 1429–31. And the Commission offers no response to the basic, intuitive point that Kalshi's Congressional Control Contracts would not meaningfully alter the already-existing incentives with respect to elections and misinformation, given the sheer volume of inputs to the national political discourse, the enormous sums already spent on

campaigns, and the vast consequences of election outcomes.[13] Indeed, "if a person seeks to manipulate election outcomes, manipulating the event market would be a foolish mechanism by which to achieve that result" and it "is more likely to have an anti-manipulative effect." Grundfest Amicus Br. 16–17.

The Commission instead insists that Kalshi's contracts carry unique potential for *short-term* manipulation. Specifically, the Commission posits that someone might attempt to spread false information in the hopes of briefly spiking event-contract values and profiting off that distortion. CFTC Br. 47–48. But the Order itself never distinguished between long- and short-term manipulation. *See Clark County*, 522 F.3d at 443 n.1 (rejecting such post-hoc rationalizations); *see also SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). In any event, that kind of short-term risk exists with *any* derivative. A trader can always try to manipulate short-term pricing by spreading falsehoods and trading large quantities. So this risk does not distinguish Kalshi's contracts as uniquely contrary to the public interest. If anything, such ploys are even less likely to work here than in other contexts. AR 1475 ("With a transparent order book it is very easy to see if someone is attempting to manipulate a market, immediately mitigating the impact of any short-lived price manipulation.").

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[13] *See, e.g.*, AR 1528 ("implausible that anyone" buying these contracts would have "incentive" to "somehow then flip an election through concerted effort"); AR 1449 (concluding "that this election market almost certainly produces no additional manipulation risk relative to those produced by already existing markets"); AR 1577 ("concerns that a contract like Kalshi's might be used for manipulative purposes are easily exaggerated"); *see also* AR 3007–08 (collecting sources).

Nor is the Commission uniquely incapable of investigating attempted short-term market manipulation in this context. As Kalshi explained, the CFTC regulates myriad derivatives markets involving commodities over which it lacks independent authority, and the risk of short-term manipulation exists in all of them. Kalshi Br. 44. The Commission regularly flexes its regulatory muscles to prevent misconduct by "supervis[ing] market activity and market participants" and to "hold wrongdoers accountable by investigating and prosecuting violations of the CEA." *See* CFTC, *Holding Wrongdoers Accountable*, *available at* https://www.cftc.gov/LawRegulation/HoldingWrongdoersAccountable. The agency can use the same tools here.

Importantly, policing markets and commercial activity surrounding them is not the same as investigating election *outcomes*. *Contra* CFTC Br. 50–51 (conflating the two); *see also, e.g.*, AR 2793–94 (repudiating "election cop" fears). The CFTC is (and should be) concerned with attempts to manipulate the pricing of derivatives (*e.g.*, buying a large volume of Congressional Control Contracts after spreading falsehoods that depress market prices); but it is not (and should not be) responsible for combating electoral fraud (*e.g.*, unlawful voting or ballot-counting). The Order's fearmongering about the difficulty of undertaking the latter task is therefore irrelevant.

With nowhere else to hide, the Commission falls back on the gauzy refrain that elections are "special." CFTC Br. 51. That only highlights the fundamental flaw in the Commission's case: "Congress easily could have listed Congressional control, or elections, or both, as enumerated activities subject to a public interest review." Mersinger Dissenting Statement, CFTC.gov (Sept. 22, 2023), *available at*

https://www.cftc.gov/PressRoom/SpeechesTestimony/mersingerstatement092223. But that is not the statute that Congress wrote. Contracts involving elections do not trigger public-interest scrutiny in the first place, and the Commission cannot use the review process to single out these contracts that it evidently disfavors.

CONCLUSION

This Court should grant Kalshi's motion for summary judgment, deny the CFTC's cross-motion for summary judgment, vacate the CFTC's Order, and declare that Kalshi is entitled to list the Congressional Control Contracts for trading. Given the upcoming November 2024 congressional elections, Kalshi respectfully requests that the Court adjudicate the pending motions reasonably in advance of that date.

Dated: March 27, 2024

Respectfully submitted,

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