IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

KALSHIEX LLC, Appellee/Plaintiff, v. COMMODITY FUTURES TRADING COMMISSION, Appellant/Defendant.	No. (Appeal from Case No. 1:23-cv-03257)

EMERGENCY MOTION FOR STAY PENDING APPEAL AND IMMEDIATE INTERIM RELIEF

At issue in this appeal is whether a registered U.S. futures exchange should be able to offer election gambling, allowing U.S. customers, for the first time on such an exchange, to place bets on the outcomes of elections right in the heart of election season, in some cases wagering up to $100 million. Appellee KalshiEx LLC ("LLC"), knowing that this Court's review was imminent, has raced to launch its election gambling contracts on the same day the District Court issued a memorandum opinion, before Appellant the Commodity Futures Trading Commission ("Commission" or "CFTC") has had the opportunity to file this motion for stay pending appeal about the serious legal issues and public interests at stake.

Kalshi is a registered futures exchange subject to comprehensive regulation under the Commodity Exchange Act ("CEA"). It wants to offer bets on elections. To market the endeavor, it touts press coverage of its new "Contracts to Bet on Control of Congress," "Political Betting," "election betting," "Election Gambling," and "wager[s] on elections."[1] After the District Court issued its order, Kalshi's CEO posted a Wall Street Journal article titled *Are You Ready to Bet on U.S. Elections*?[2] As of today, Kalshi's website has begun trading election contracts on which political party will control each house of Congress. https://kalshi.com/elections (last visited September 12, 2024).

Kalshi is not a casino; it is an actor in markets regulated by the Commission and governed by the CEA. The CEA's purpose is to protect the "national public interest by providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities." 7 U.S.C. § 5(a).

On September 22, 2023, the CFTC issued an order holding that Kalshi was not permitted to offer election event contracts under a CEA section that empowers the CFTC to prohibit contracts that "involve" "gaming" or "activity that is unlawful under any … state law." 7 U.S.C. § 7a-2(c)(5)(C). On September 6,

[1] *Press*, Kalshi, https://kalshi.com/blog/press (last visited Sept. 12, 2024).

2024, the District Court vacated the CFTC's order for the "reasons stated in the Court's forthcoming memorandum opinion," [Dkt. 47], and the memorandum opinion issued today, September 12, 2024 [Dkt. 51].

The CFTC respectfully moves for an emergency stay of the District Court's order during this Court's consideration of the instant motion to stay pending appeal. The Commission seeks an emergency stay/injunction that suspends Kalshi from listing and trading the election contracts during the pendency of this motion, until further order of the Court, so that this Court has time to decide whether a stay pending appeal should issue.

Compliance with Fed. R. App. P. 8(a)(1) and Local Rule 8(a)(1)

Under Fed. R. App. Procedure 8(a)(1) and Local Rule 8(a)(1), the CFTC orally moved the District Court for the relief requested herein. *See* Sept. 12, 2024 Hearing Tr. (transcript attached). The District Court denied the CFTC's motion for stay pending appeal during the hearing, concluding that the standards for a stay had not been satisfied. *See* Sept. 12, 2024 Hearing Tr.

Compliance with Local Rule 27(e)

This Court's immediate intervention is needed because Kalshi has now listed the election contracts for trading, which poses a grave risk to the public interest. On Thursday, September 12, 2024, on the date the District Court issued its memorandum opinion, the Commission orally moved, and the District Court

denied, a motion to stay pending appeal. Thus, the Commission was not in a position to file this emergency motion before today. In accordance with both Circuit Rule 27(e) and Circuit Rule 8, counsel has communicated telephonically with opposing counsel and the Clerk's Office.

INTRODUCTION

On September 6, 2024, the District Court vacated the Commission's order prohibiting the listing and trading of election gambling contracts on Kalshi's U.S. futures market. The District Court issued its memorandum opinion on September 12, 2024. Now Kalshi has launched "Election Gambling" before the CFTC can even ask this Court for a stay pending appeal. As the CFTC found in its order, "allowing the public to trade on the outcome of elections threatens the public interest." [Dkt 51 at 2]. Moreover, as trading commences on Kalshi's election event contracts, even if only briefly, there is an acute risk of short-term manipulation of election markets and threats to election integrity. A court order is needed if such trading to be suspended during this appeal. Thus, the Commission requests a short administrative stay, suspending trading on the election contracts while this Court deliberates on whether a further stay is warranted.

BACKGROUND

A. The CFTC

The CFTC is an independent federal agency that regulates derivatives markets and administers the Commodity Exchange Act (the "CEA" or "Act"). A "derivative" is a financial instrument, or contract, such as a future, option, or swap, whose price is directly dependent upon—that is, "derived from"—the value of something else, such as an agricultural or financial commodity.[3] In this case, the derivatives in question are known as "event contracts," a type of derivative contract whose payoff is based on a specified "underlying" "event, occurrence, or value."[4] For example, an event contract might be based on the occurrence, nonoccurrence, or extent of an occurrence of a weather event such as snowfall or rainfall.

The CEA requires that certain derivatives instruments be traded only on regulated exchanges. Retail customers' only legal avenue to trade event contracts is on a contract market registered with the CFTC. *See* 7 U.S.C. §§ 2(e), 6, 6c(b);

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[3] CFTC, *Glossary: A Guide to the Language of the Futures Industry*, https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/CFTCGlossary/index.htm (last visited Sept. 9, 2024).

[4] CFTC, *Contracts & Products: Event Contracts*, https://www.cftc.gov/IndustryOversight/ContractsProducts/index.htm (last visited September 9, 2024). The asset or other factor that gives rise to the rights and obligations in a derivative contract is called its "underlying." *Underlying*, BLACK'S LAW DICTIONARY (11th ed. 2019).

17 C.F.R. § 33.3. Kalshi is a type of regulated exchange called a "designated contract market" ("DCM").

B. Event Contracts and Special Rule

For most derivatives contracts, a DCM can self-certify a new product and trade it one business day after its submission to the CFTC, without waiting for the Commission to take any action. 7 U.S.C. § 7a-2(c)(1); 17 C.F.R. § 40.2. Alternatively, a DCM may voluntarily submit a new product and seek the CFTC's pre-approval, in which case the Commission will review the submission and approve the product unless it violates a specific provision of the CEA or the Commission's regulations. 7 U.S.C. § 7a-2(c)(4)-(5); 17 C.F.R. § 40.3.

In 2010, Congress enacted the statutory provision relevant to this case, CEA Section 5c(c)(5)(C), codified at 7 U.S.C. § 7a-2(c)(5)(C), known as the "Special Rule" for certain event contracts. The Special Rule authorizes the Commission to review and determine whether the contract should be disallowed as contrary to the public interest. The Special Rule provides that the Commission "may determine" that certain "agreements, contracts, transactions, or swaps in excluded commodities that are based upon the occurrence, extent of an occurrence, or contingency," *i.e.*, event contracts, "are contrary to the public interest" "if the agreements, contracts, or transactions involve—

(I) activity that is unlawful under any Federal or State law;
(II) terrorism

(III) assassination;
(IV) war;
(V) gaming; or
(VI) other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest."

7 U.S.C. § 7a-2(c)(5)(C)(i). If an event contract or transaction therein "involve[s]" an enumerated category, and the Commission has determined the contract or transaction is contrary to the public interest, that contract may not be listed or made available for trading through a registered entity. 7 U.S.C. § 7a-2(c)(5)(C)(ii).

To establish a process for determining whether an event contract is prohibited from listing, the Commission enacted Regulation 40.11(c), which provides for a 90-day review period. 17 C.F.R. § 40.11(c). If the Commission engages in this review, it must request that the registered entity suspend the listing or trading of the contract under review. 17 C.F.R. § 40.11(c)(1).

PROCEDURAL HISTORY

A. Agency Proceedings

Kalshi operates as a CFTC-registered DCM that lists event contracts for trading. On June 12, 2023, Kalshi filed a product certification of certain Congressional Control Contracts (or "Contracts"), pursuant to Section 5c(c)(1) of the CEA and Regulation 40.2. AR 24, 26.

The Congressional Control Contracts are binary (yes/no) event contracts based on the question: "Will <chamber of Congress> be controlled by <party> for

<term>?". AR 27. The Contracts permit market participants to choose which political party will control either the House of Representatives or Senate. AR 26. Upon settlement, the holder of one side of the contract is paid a dollar per contract, and holders of the opposite position receive nothing. AR 28.

Shortly after Kalshi submitted the Congressional Control Contracts, the CFTC commenced a 90-day review of the contracts based on its determination that the Contracts may involve an activity enumerated in Regulation 40.11(a) and Section 5c(c)(5)(C) of the CEA. AR 148. In accordance with Regulation 40.11(c)(1), the CFTC requested that Kalshi suspend any listing and trading of the Contracts during the pendency of the review period. AR 148.

On September 22, 2023, at the conclusion of the review period, the Commission issued an Order prohibiting Kalshi from listing the Congressional Control Contracts for trading. The Commission's order determined that the Contracts "involve" two enumerated activities – "gaming" and "activities unlawful under state law." The Commission then determined that the Contracts were contrary to public interest because, *inter alia*, they (i) cannot reasonably be expected to be used more than occasionally for commercial or hedging interests; (ii) could be used in ways that adversely affect the integrity and perception of integrity of elections; (iii) could be manipulated to influence elections or electoral perceptions; and (iv) could put the CFTC in the position of having to investigate

election-related activities. The Commission accordingly ordered pursuant to CEA Section 5c(c)(5)(C)(ii) and Regulation 40.11(a)(1), that the Congressional Control Contracts are prohibited and shall not be listed for clearing or trading on or through Kalshi. AR 23.

B. District Court Proceedings

On November 1, 2023, Kalshi filed this lawsuit alleging the Order violated the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C). Kalshi alleged that the Commission's application of the term "involve" in determining that the Contracts involve enumerated activities for purposes of the Special Rule misconstrued the CEA; that the Commission's interpretations of statutory terms "gaming" and "activity that is unlawful under any . . . State law" were also incorrect; and finally that the Commission's public interest determination was not reasonable. [Dkt 1].

On September 6, 2024, a target date requested by Kalshi, the District Court entered an order granting summary judgment for Kalshi and vacating the Commission's order. The District Court's order stated that an opinion was "forthcoming" and the opinion issued six days later, on September 12, 2024. Dkt. 47, 51. The CFTC orally moved for a stay pending appeal on September 12, 2024. During the hearing, Kalshi refused to agree to even a 24-hour stay to allow for the docketing of this appeal and the filing of this motion. The CFTC argued that this

case presents serious legal issues, and a stay would pose little risk of injury to Kalshi. Further, the CFTC argued that the public interest lies with granting a stay because of the grave risk of harm to election integrity or the perception of election integrity posed by the listing and trading of the Contracts. The CFTC also argued that the orderly administration of justice should allow short period of time before Kalshi begins trading the contracts for the parties to brief, and this Court to decide, whether trading Kalshi's election contracts should be stayed pending appeal.

Kalshi opposed the motion at the hearing, arguing that there was widespread trading of election betting contracts already, pointing to Polymarket, which is not even permitted to offer event contracts to U.S. customers, and PredictIT, which may only offer event contracts pursuant to the terms of a no action letter and imposes a trading limit of $850, in contrast to Kalshi's limit of $100 million.

The District Court denied the CFTC's request for a stay pending appeal, prompting the Commission to seek emergency appellate intervention. This appeal followed.

ARGUMENT

A. Standard for Motions to Stay

The instant motion is in an unusual procedural posture because the District Court initially issued a summary judgment order without an opinion, and only issued the opinion hours before the Commission was compelled to come to this

Court for emergency relief. The motion is appropriately viewed not just as a motion for stay pending appeal, but also as a request for an administrative stay that will prohibit or suspend Kalshi's offering of the election contracts for trading while the parties brief, and the Court decides, whether a longer stay should issue pending the resolution of this appeal. The purpose of an administrative stay is "to minimize harm while an appellate court deliberates." *United States v. Texas*, 144 S. Ct. 797, 798 (2024). As another circuit has reasoned, the administrative stay "is only intended to preserve the status quo until the substantive motion for a stay pending appeal can be considered on the merits." *Doe#1 v. Trump*, 944 F.3d 1222, 1223 (9th Cir. 2019).[5] The *Nken* factors applicable to stays pending appeal may also be referenced for administrative stays. *Texas*, 144 S. Ct. at 798.

In deciding a motion to stay pending appeal, courts consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *In re NTE Connecticut, LLC*, 26 F.4th 980, 987 (D.C. Cir. 2022). While

[5] Although Kalshi raced to launch its election gambling markets in advance of this Court's review, it is unlikely that they will achieve significant volume before the Court has a chance to rule on this interim relief.

the first two are the most important and require more than a "possibility" of relief or potential irreparable injury, this Court has analyzed the four factors on a "sliding scale," whereby "a strong showing on one factor could make up for a weaker showing on another." *Sherley v. Sebelius*, 644 F.3d 388, 392-93 (D.C. Cir. 2011). The "sliding scale" framework allows a movant who presents a "serious legal question" on the merits to obtain a stay if "little if any harm will befall other interested persons or the public and . . . denial of the order would inflict irreparable injury on the movant." *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977).[6]

Where, as here, the party is a federal agency charged with serving the public interest, *see* 7 U.S.C. § 5(b), the Court should consider injury and public interest together because the government's interest "*is* the public interest." *See Pursuing America's Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016).

[6] It remains unresolved in this Circuit whether the sliding scale framework survives the Supreme Court's decision in *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). *See Changji Esquel Textile Co. v. Raimondo*, 40 F.4th 716, 726 (D.C. Cir. 2022); *see also Nat'l R.R. Passenger Corp. (Amtrak) v. Sublease Int. Obtained Pursuant to Assignment & Assumption of Leasehold Int. Made as of Jan. 25, 2007*, No. 22-CV-1043 (APM), 2024 WL 3443596, at *2 (D.D.C. July 15, 2024) ("[T]his court remains bound by *Holiday Tours'* sliding scale.").

B. Analysis of *Nken* Factors

1. The CFTC is Likely to Succeed on the Merits

The CFTC need not show "absolute certainty of success." *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986). Rather, it need only "raise[] questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Holiday Tours*, 559 F.2d at 844. Here, the District Court's interpretation of the statute was deeply flawed, because it rejected the plain meanings of three critical terms.

First, the District Court rejected the plain meaning of "involve" and missed critical context demonstrating that its plain meaning applies. It held that a contract or transaction only "involves" gaming if the contract or transaction's underlying is gaming. But, correctly read, to qualify for the Special Rule provision, two things must be true: **The Commission must determine if the "agreements" or "contracts" or "transactions" are "based upon" an "occurrence, extent of an occurrence, or contingency."**[7] "Based upon" is a term the CEA uses to refer to the underlying. Thus, these must be agreements, contracts, or transactions whose underlying is an event. ***Separately*, the Commission must determine if "*such***

[7] 7 U.S.C. § 7a-2(c)(5)(C)(i) (stating the provision applies to "agreements, contracts, transactions, or swaps in excluded commodities that *are based upon*" an event (emphasis added)).

agreements, contracts, or transactions [*i.e.*, whose underlying is an event] involve" a category of activity enumerated in the statute. That is, once the Commission has determined that the underlying is an event, the next step is to determine if the agreements or contracts or transactions—in any respect and without any stated limitation—"involve" an enumerated activity such as gaming or activity that is unlawful under state or federal law.[8]

The District Court mistakenly rejected the plain meaning of "involve." It acknowledged that the parties did not much disagree that the word is exceedingly broad:

> The Parties offer definitions of involve from various dictionaries that are largely the same, such as "[t]o contain as a part; include," "to have as a necessary feature or consequence," ECF 17-1 at 25 (citing American Heritage Dictionary 921 (4th ed. 2009)), and "to relate to or affect," "to relate closely," to "entail," or to "have as an essential feature or consequence," see ECF 30 at 33 (citing Merriam-Webster, https://perma.cc/2RS8-ZRBJ; Random House College Dictionary 703 (rev. ed. 1979); Riverside University Dictionary 645 (1983)); see also ECF 38-1 at 12 (CFTC Order).

As several courts have observed, the word has "expansive connotations." *See, e.g.*, *United States v. Alexander*, 331 F.3d 116, 131 (D.C. Cir. 2003) (citation omitted). So understood, the issue is simple. As the CFTC concluded, the election contracts "involve" gaming, because gambling is their purpose and essential

[8] *Id*. (stating that the provision applies where "such agreements, contracts, or transactions … involve" an enumerated activity).

feature, and a "transaction" in them involves gaming because it entails gaming. But the District Court expressly rejected the plain meaning. [Dkt 51 at 20] ("Construing the plain meaning of involve does not resolve the Parties' dispute"). Instead, the District Court held that, because "elections are not games," betting on them is not gaming.

Not only is this a misreading of the word "involve," it mistakenly conflates two separate clauses in the statute, discussed above—the "based on" clause, which addresses what the underlying must be, and separate clause that states what "such agreements, contracts, or transactions" must involve. The District Court erroneously held that to qualify for the Special Review provision, the contract or transaction's underlying must *be* the event, rather than any other way in which a contract or transaction may involve the event.

To reach that result, the District Court also rejected the plain meaning of the term "transaction" and held that it means "the contract" itself—but those are *also* separate terms of the statute. In Section 5c(c)(5)(C), as in ordinary legal usage, a "contract" is "[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law," CONTRACT, Black's Law Dictionary (11th ed. 2019), and a "transaction" is "the formation, performance, or discharge of a contract," TRANSACTION, Black's Law Dictionary (11th ed. 2019). Congress used the word "or" to connect these terms, the use of which "is

almost always disjunctive, that is, the phrases it connects are to 'be given separate meanings.'" *Pinson v. United States Dep't of Just.*, 964 F.3d 65, 69 (D.C. Cir. 2020) (quoting United States v. Woods, 571 U.S. 31, 45 (2013)) (cleaned up); *see also United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 432 (2023) (articulating the "interpretive principle that every clause and word of a statute should have meaning" (internal quotation marks omitted)). Nothing in the statute suggests that the Court should apply anything but the plain meaning of "contract" or "transaction" or "or."

Accordingly, the statute authorized the Commission to consider two different things - both Kalshi's contracts, and "transactions" in those contracts. Keeping its focus myopically on only one feature of the contract, the court held that a "transaction" only "involves" gaming if the event underlying the contract transacted is gaming. But that is not what the statute says.

It also applied an arbitrarily narrow definition of "gaming." The Commission defined "gaming" by reference to numerous sources: dictionary definitions of "gaming" to mean "gambling," and referring to both state laws and federal laws that define gambling or betting as the staking something of value upon the outcome of, among other things, a contest of others.

Thus, the Commission found that staking something of value on elections amounts to "gaming" or "gambling" because it is staking something of value on

the outcome of a contest of electoral candidates. The District Court's opinion wrongly rejected those references to hold that "gaming requires a game." [Dkt 51 at 14].[9] But there is no reason to think that Congress was concerned with only certain *types* of gambling, least of all in the common understanding of what "gaming" means. The concern was broad: to "prevent *gambling* through futures markets." 156 Cong. Rec. S5906-07, 2010 WL 2788026 (daily ed. July 15, 2010) (statements of Sen. Diane Feinstein and Sen. Blanche Lincoln). Indeed, as the Commission explained to the District Court, State and Tribal "Gaming" commissions prohibit betting on elections: The Nevada Gaming Commission prohibits wagers on "any election for public office." Regulation22.pdf (nv.gov). So does the Little River Band of Ottawa Indians Gaming Commission. Microsoft Word - Chapter 13 - Retail Sports Betting - APPROVED - FINAL (lrboi-nsn.gov).

The court further erroneously rejected the Commission's interpretation of "unlawful under any … State law." The Court held that the interpretation was too broad because several state laws prohibit staking money on a contingent outcome and, thus, every event contract would be unlawful under those laws and subject to Commission review under this category. Dkt. 51 at 23-24. However, the

[9] The opinion also misquoted the CFTC's proffered conclusion, instead quoting where the CFTC looked to state law for definitions: "Under most state laws, "gambling" involves a person staking something of value upon the outcome of a game, contest, or contingent event," AR 8.

Commission's interpretation of the category was not that broad. Rather, the Commission, noting that the CEA preempts any state law that would prohibit all event contracts, determined that the relevant state laws were not those targeting futures trading, but those concerning "important state interests expressed in statutes separate and apart from those applicable from trading on a DCM." AR 13 n.28. The Commission cited several state laws that expressly prohibit gambling on elections and thus express a state interest separate from regulating derivatives trading. *See, e.g.*, Nev. Rev. Stat. § 293.830. Accordingly, the Commission's interpretation would not subject all event contracts to public interest review and would not swallow the rule to render the other categories meaningless.

The District Court misunderstood the Commission to be asserting that state laws that ban all event contracts are preempted, but laws banning specific types of event contracts are not. To be clear, all state laws concerning event contracts are preempted under the CEA. However, if a state law banning a certain activity expresses a state interest separate from trading on a DCM, the Commission, which has the authority to regulate all event contracts, may subject an event contract that involves that activity to public interest review. Because several states express an interest in preventing wagering on elections, the Commission rightly decided that the election event contracts, which wager on the outcomes of elections, involved an activity unlawful under state law.

For these reasons, a decision rejecting these interpretations and determining the applicability of the Special Rule raises, at the very least, serious questions for this Court's consideration.

2. The CFTC Will Be Irreparably Injured Absent a Stay and the Public Interest Weighs in Favor of a Stay

When reviewing irreparable injury, this Court should look to the public interest because the government's interest in avoiding harm merges with the public interest. *See, e.g., Pursuing America's Greatness*, 831 F.3d at 511 ("[T]he government's interest *is* the public interest."). The public interest concerns relating to election gambling on a federally regulated exchange cannot be overstated. The Commission's order made extensive findings about adverse effects posed by the Contracts on election integrity or the perception of election integrity. This included concerns that the Contracts will create monetary incentives to vote (including as an organized collective) for particular candidates, incentivize the spread of misinformation in order to influence the markets, or incentivize the use of the market to influence perceptions about elections. The Commission observed the difficulty of guarding against misinformation and manipulative activity where the Contracts have no underlying cash market and price forming information and would be driven largely by opaque and unregulated sources such as polling, voter surveys, and even social media. AR 20-21.

While the District Court thought this interest was too speculative, these are not abstract concerns. The Commission's order cited detailed examples of "fake polls" and how they had consequences in corresponding event contracts. AR 22 n.39 (citing Tyler Yeargain, *Fake Polls, Real Consequences: The Rise of Fake Polls and the Case for Criminal Liability*, 85 MO. L. REV. 129 (2020)). Moreover, these real-world examples of market manipulation occurred on a market with a trading limit of only $850 per contract.[10] By contrast, Kalshi's election gambling contracts propose position limits as high as $100 million for institutional customers and high net-worth individuals. The incentive for wrongdoing in connection with Kalshi's Contracts is exponential. Moreover, there are reports of recent attempted manipulation just last week in the election event contracts offered on Polymarket.[11]

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[10] Tyler Yeargain, *Fake Polls, Real Consequences: The Rise of Fake Polls and the Case for Criminal Liability*, 85 MO. L. REV. 129, 134 (2020)).

[11] Polymarket, which cannot offer event contracts to U.S. persons, experienced a "spectacular" manipulation attempt with "a group of traders" betting "heavily on Harris and against Trump," wagering millions of dollars to manipulate the contract during a certain period. *See* Rajiv Sethi, *A Failed Attempt at Market Manipulation*, (Sept. 7, 2024) https://rajivsethi.substack.com/p/a-failed-attempt-at-prediction-market. The Commission submits that although this particular attempt failed, Kalshi admitted in its own briefing that "short-term risk exists with any derivative. A trader can always try to manipulate short-term pricing by spreading falsehoods and trading large quantities." [Dkt 36 at 30]. Where, as here, there are no underlying markets to help assess manipulation events—and where, as here—these very markets are being touted as important public information, this risk is much more stark.

Kalshi has not proposed prohibiting foreign entities or members of the media from trading. These risks cannot be overestimated: Just last week, a grand jury indicted Russian nationals for deploying a $10 million scheme in the United States to distribute political content to Americans with hidden Russian messaging.[12]

While Kalshi argues that its contracts have benefits—notably the alleged informational value of these "Election Gambling" contracts—it defies logic that contracts subject to short term manipulations should be championed as having up-to-the-minute informational value. Moreover, such short-term manipulations may do damage very quickly. A group of traders could target the contracts during an important event, such as a political debate, or during the close of a fundraising window, for maximum impact. These are very real potential harms, and moreover, would require an extensive utilization of Commission resources to investigate.

With Americans' confidence in elections at an all-time low, now is not the time to plunge into election gambling without reasoned review. The question here is whether the Court should prevent or suspend the trading long enough for this

[12]Press Release, DOJ, *Two RT Employees Indicted for Covertly Funding and Directing U.S. Company that Published Thousands of Videos in Furtherance of Russian Interests*, (Sept. 4, 2024) https://www.justice.gov/opa/pr/two-rt-employees-indicted-covertly-funding-and-directing-us-company-published-thousands.

Court to decide this motion, and to suspend trading for the duration of this appeal. Given the seriousness of the potential harms, the answer to both questions is yes.

3. A Stay Will Not Substantially Injure Kalshi

Kalshi will not be substantially harmed by a stay of the District Court's Order. Kalshi argued to the District Court, without supporting evidence, that it stakes its future on political event contracts. Kalshi has a business interest in listing the contracts before the November elections, so it can collect transaction fees from the trading. And if Kalshi is successful, it will surely offer election gambling beyond November.

Kalshi argued to the District Court that it would be harmed because it was the only DCM to offer event contracts on elections, and operations like Polymarket have been able to dominate the market for political event contracts during this litigation. This harm is misleading because Polymarket, which operates with offshore customers, is not registered with the CFTC and is, therefore, prohibited from offering *any* event contracts to U.S. customers.[13] No registered DCM lawfully offers political event contracts in the United States.

[13] The CFTC ordered Polymarket to cease and desist offering off-exchange event contracts in January 2022. Press Release, CFTC, *CFTC Orders Event-Based Binary Options Markets Operator to Pay $1.4 Million Penalty*, (January 3, 2022), CFTC, https://www.cftc.gov/PressRoom/PressReleases/8478-22.

Kalshi's argument is essentially it wants to enter the election betting marketplace under the mantle of respectability via its DCM designation. While Kalshi claims harm because other entities have dominated the election gambling market, its premise is wrong. Kalshi seeks to offer election gambling on a federally regulated exchange, something neither Polymarket nor PredictIt does. Kalshi is not harmed for the exact reason they say they are harmed: they are not similarly situated to other election gambling platforms.

* * *

CONCLUSION

For the reasons stated above, the Commission requests an emergency administrative stay of the District Court's order, a suspension of the trading of Kalshi's Congressional Control Contracts while this motion for stay pending appeal is pending, and respectfully requests that this Court grant a stay that extends this relief during the pendency of the appeal.

Dated: September 12, 2024

Respectfully submitted,

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Certificate of Parties and Amici Curiae and Corporate Disclosure Statement

Pursuant to D.C. Circuit Rule 8(a)(4), the U.S. Commodity Futures Trading Commission ("CFTC"), by and through undersigned counsel, submits this Certificate of Parties and Amici Curiae and Corporate Disclosure Statement.

Parties and Amici.

Parties in this case are: KalshiEX, LLC (KalshiEX LLC stated in its Certificate of Disclosure that "no other company holds at least 10% of the stock in KalshiEX LLC") and the CFTC (an agency of the United States government).

The Amici in this case are: Aristotle International, Inc. (Aristotle stated in its Amicus brief that it has no parent company, and no publicly held company has a 10% or greater ownership interest in it.); Better Markets, Inc., (Better Markets stated in its Amicus brief that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock); Joseph A. Grundfest; Paradigm Operations LP, (Paradigm stated in its Amicus brief that it has no parent company, and no publicly held company has a 10% or greater ownership interest in it); and Jeremy Weinstein.

Rulings Under Review

On September 6, 2024, the District Court entered an order ruling against the CFTC and in favor of KalshiEX and vacating the CFTC's September 22, 2023 Order prohibiting Plaintiff from listing its congressional control contracts for

trading. The Order stated the reasons would be stated in a forthcoming memorandum opinion. The Order and memorandum opinion are attached.

On September 12, 2024, the District Court held a hearing on the CFTC's emergency motion for a stay pending the issuance of the District Court's reasoned opinion. The Court denied the motion for reasons stated on the record. The transcript for that proceeding is attached.

Related Cases

This case was not previously on review before this Court. There are no other related cases currently pending in this Court or in any other court.

CERTIFICATE OF COMPLIANCE

I hereby certify under Fed. R. App. P. 32(g)(1) the following:

1. This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), it contains 5,102 words, as counted by the word processing software Microsoft Word.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, in Times New Roman 14-point type.

Dated: September 12. 2024 */s/ Anne W. Stukes*

CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2024, I served the foregoing Brief of Appellee on counsel of record using this Court's CM/ECF system.

/s/ Anne W. Stukes

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KALSHIEX LLC,

Plaintiff,

vs.

COMMODITY FUTURES TRADING COMMISSION,

Defendant.

Civil Action
No. 1:23-cv-03257-JMC

September 12, 2024
10:30 a.m.

TRANSCRIPT OF THE MOTIONS HEARING
VIA ZOOM
BEFORE THE HONORABLE JIA M. COBB
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff

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Court Reporter: Stacy Johns, RPR, RCR
Official Court Reporter

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription

P R O C E E D I N G S

DEPUTY CLERK: Good morning, Your Honor. We are on the record in civil case 23-3257, KalshiEX LLC.

Please state your name for the record.

MR. ROTH: Good morning, Your Honor. This is Yaakov Roth from Jones Day, on behalf of Kalshi. I also have on the line Amanda Rice, John Henry Thompson, Sam Lioi from Jones Day and Joshua Sterling from Milbank.

THE COURT: Good morning.

MS. STUKES: Good morning, Your Honor. This is Anne Stukes on behalf of the Commodity Futures Trading Commission. With me today is Raagnee Beri, and also in the room with us is Conor Daly.

THE COURT: Can you-all hear me okay? Your microphones --

MS. STUKES: No, Your Honor.

THE COURT: I can't hear myself. Is that better?

MS. STUKES: In the microphone it's better. Can you hear us?

THE COURT: I can hear you just fine. I'm not able -- I don't have the view that you have, Erica, on my screen. I have that view but I don't have that view. It's okay. This is weird. I don't know where I'm supposed to be looking or anything.

All right. I called this hearing in response to the

motion that was filed. I'm sure everyone saw that I posted my memorandum opinion. My first inclination was that that mooted the motion, but then I noticed that there was a request for 14-day stay following the opinion. So I wanted to bring us in just to kind of wrap everything up.

So it was my inclination to deny the motion. I think now that the opinion has issued, everyone's in the position, given the administrative stay, as if everything came out today. So you had a heads up as to what my ruling would be. I've now issued my decision.

So I don't see a basis for certainly an administrative stay because there's nothing that I'm the considering or any other stay that hasn't been requested. But I'll hear from defendant on kind of what you're asking for from me at this juncture.

MS. BERI: Good morning, Your Honor. Raagnee Beri for the CFTC. Thank you for taking the time to hear this motion today. We've received the Court's opinion this morning and the relief we're requesting essentially remains the same. We're asking for an administrative stay to maintain the status quo so that -- in order to allow this Court or the Court of Appeals adequate time to consider the CFTC's forthcoming motion for stay pending appeal.

As Your Honor noted, we initially proposed 14 days so that the CFTC could expeditiously file its motion and to allow

Kalshi time to respond and the Court to deliberate and decide whether this case should be stayed pending appeal. We're open to modifying that period of time and can represent that the CFTC will seek a stay pending appeal promptly.

We know that before this Court issued its summary judgment order, Kalshi itself emphasized the time for appellate review was needed, even after September 6th, and that that was in their interests. We similarly assert that it is in the CFTC's interests.

The purpose of our request is so that the election contracts do not begin trading. If they begin trading and a stay is later issued, the halting of the trading would be a disruptive market event. We also note that even if the contracts trade for a short period, they are susceptible to manipulation in that period, which could translate to risks to election integrity.

We note that the risk is not isolated to the Congressional control contracts that Kalshi plans to list imminently, but also appears to apply to presidential elections. Kalshi's website now boasts, under pictures of former President Trump and current Vice President Harris, quote, "The first legal way to trade the election," end quote.

If the Court is not inclined to grant our motion, we move in the alternative for a brief stay so that we can seek expedited appellate review.

As noted, we're seeking an administrative stay, which is commonly granted to give courts and parties an opportunity to deliberate while maintaining the status quo. Although the Nken factors are not controlling, they may be instructive here.

Courts look to four factors. The first is the likelihood of success. The second is whether, absent a stay, there will be irreparable harm to the movant, here, the CFTC. Third, whether a stay will cause injury to other parties involved. And fourth, the public interests.

When the government is involved, as is the case here, irreparable harm and public interest are considered together because the public's interest is the government's interest.

As to the first factor, likelihood of success. While the CFTC has not had the opportunity to meet and fully address the likelihood of its success in challenging the merits of the Court's summary judgment order, this factor should not weigh against a stay.

We note that the CFTC is not required to show absolute certainty of success. It is enough that the case presents questions so serious that there are fair grounds for litigation. This case does.

The parties have raised serious questions of statutory interpretation and agency policymaking, which ultimately determine whether election gambling contracts can be listed on federally-regulated exchanges. The Court's reasoned decision

did not treat the statutory questions of interpretations as simple or straightforward.

Looking to the second and fourth factors, irreparable harm and public interest. The election gambling contracts pose significant public interest risks, as outlined in findings by the Commission, which this Court did not disturb. The Commission noted serious concerns about potential adverse effects on election integrity or the perception of election integrity.

At a time where confidence in election integrity is incredibly low, these contracts would give market participants a $100 million incentive to influence either the market or the election, which could very certainly undermine confidence in election integrity. This is a very serious public interest threat. We can easily imagine this playing out in the form of misinformation.

There are also real risks even in the short term. Kalshi has admitted that the contracts are subject to short-term manipulation, like other contracts. We submit that any short-term impact on election integrity or the perception of election integrity which could alter voter behavior is uniquely concerning.

Kalshi has downplayed the risks, asserting that if the Commission prevails in a stay pending appeal, or ultimately prevails in winning a reversal of the summary judgment order,

the Commission can halt or unwind trades. However, as the Commission noted in its briefing, this is not easy to do and it would be a disruptive market event. Moreover, halting trading will not remediate effects on election integrity.

Looking at the third and, for our purposes, final factor here, injury to other parties involved. Kalshi has made some questionable claims of harm from a brief stay. Kalshi argues it's delayed by the -- it's harmed by the CFTC's delay tactics, but what it fails to note is that the timeline in this case has largely been driven by Kalshi.

Kalshi determined when to submit its first contract, when to seek extensions of the Commission's review, when to withdraw that contract. Kalshi determined, once this present contract was prohibited by the Commission, to file this lawsuit. Kalshi sought expedited briefing in this case and this -- and the CFTC agreed to that briefing and this Court entered the expedited scheduling order.

While the CFTC agreed, it did not give up its rights to seek appellate review or protect the government's interest. Thus, Kalshi's claim of delay is not supported.

Kalshi also argues harm because it supposedly staked its business on political event contracts. The claim is unsubstantiated and also questionable in light of Kalshi's robust nonpolitical offerings.

Kalshi cites Polymarket, another exchange, and laments

that it has had to sit back and wait while Polymarket dominates the market. This claim is misleading. Polymarket is prohibited from offering contracts to U.S. persons, including election contracts, as Kalshi seeks to do.

For this reason, Kalshi's asserted claims of harm do not weigh against the stay. The balance of factors weigh in favor of the stay, which will allow the courts and the parties to deliberate while maintaining status quo and minimizing risks to the public interest.

For these reasons, we respectfully request that this Court grant the Commission's request for a stay of the summary judgment order for at least a period of 14 days from today and continuing until the resolution by this Court and, where necessary, the Court of Appeals, a forthcoming motion for stay pending appeal. Thank you for your time, Your Honor.

THE COURT: Thanks. Can I just ask you a couple of questions?

MS. BERI: Yes, Your Honor.

THE COURT: I'm sorry if I'm not looking at you. We're having a technical issue in the court and I can't see myself. So if I am not looking at you, it's because I don't know what's going on with the Zoom technology.

A couple of things. One is, we're no longer in administrative stay land, I don't think, because now I've issued my opinion. Everyone is in the same position as if --

arguably, in a little better position because you got a heads up of where my ruling was going.

So I'm wondering whether, since you've made a robust argument and I don't think that a request for a stay pending appeal needs to be in writing, and also because under the rules of appellate procedure you have to ask the District Court first, I'm wondering if we can just deal with your request for a stay pending appeal substantively today, so that if I grant it then Kalshi can take its appellate rights. And if I deny it, then you can go right to the Circuit instead of briefing another round of briefing before me.

Is there any reason why we can't proceed that way? That feels most efficient, given that it seems like you're ready to address the merits of the stay pending appeal.

MS. BERI: Your Honor, can we now at this time orally move for a motion for stay pending appeal, and then we will --

THE COURT: I'll ask plaintiff if they disagree. I'm just trying to be as efficient as possible. I don't see any reason why it has to be in writing. Certainly, if you're not prepared to talk about it, I didn't let you-all know this was coming. But it seems to me that I just resolve an oral request for a stay pending appeal now, so that anyone who wants to go to the Circuit can. Does that make sense or is there something procedurally wrong with what?

Let me ask counsel for plaintiff. Is there something

procedurally wrong with what I proposed?

MR. ROTH: Not at all, Your Honor, and it was going to be the first thing I said when it was my turn to stand. That would make a lot more sense. They've already briefed it. It's the same arguments as they briefed before. So I fully agree with that, of course.

THE COURT: Quite frankly, I think it's what you just argued. You argued the factors. And so I will entertain an oral motion for stay pending appeal. I'll deny the pending motion as moot and I'll entertain now a motion for stay pending appeal, and then I'll resolve it now. And then the parties can go and proceed as they will. I think that's the most efficient way to do it.

Knowing that, are there any other arguments that you would have made that you didn't make before I turn to plaintiff to respond?

MS. BERI: No, Your Honor. We would note that in the event that this Court denies the motion for stay pending appeal, we would still like a brief administrative stay to take that stay motion up with the appellate court.

THE COURT: Is there authority for that?

MS. BERI: Yes, because the Court would then be deliberating the motion. So in order to maintain status quo --

THE COURT: Well, I'm not -- I mean, I guess I'm not deliberating a motion if I rule on the motion to stay. So I

don't know what I'm staying administratively because there's nothing before me. It seems to me that would be a request of the Circuit to stay pending resolution of your request to stay before the Circuit, right? I don't know what I would be staying.

If you have some authority that suggests that I can do that, but I think once I rule then -- if I rule against you, then you've satisfied Rule 8's requirements that you asked me first. You go to the Circuit and then I think they would be in the position to entertain any requests for a stay pending their consideration of your more fulsome motion to stay.

I'm assuming they'll want a briefing schedule and they may entertain a request to stay pending the logistics of getting that in place.

But if there's some authority that once I rule on the motion then I would have authority to stay -- I don't even know what I would be staying. There would be nothing before me at that point.

MR. ROTH: Your Honor.

THE COURT: Go ahead.

MR. ROTH: I'm just going to say that I think what Your Honor is contemplating is exactly what the D.C. Circuit's internal operating procedures and rules contemplate. There's a whole section about emergency motions and asking for an administrative stay pending resolution of an emergency motion.

So that's, I think, the right way to handle this.

If this Court were to deny the stay pending appeal, Commission files its notice of appeal, calls the circuit clerk's office and we work out a briefing schedule. And if the D.C. Circuit panel wants to issue an administrative stay pending resolution of that, they know how to do that and they do that sometimes.

MS. BERI: We would ask Your Honor for some time to be able to address the question as to whether this Court can issue an administrative stay while the parties are seeking -- while the CFTC is seeking a stay pending appeal with the D.C. Circuit. And we could certainly get that authority to you, if any, within an hour of this hearing.

THE COURT: You're well -- whatever the ruling is, you're welcome to send me authority if you think that there's some additional relief that you would be entitled to. I won't prohibit you from doing that.

Let's deal with the merits. Just so the record is clear, I am denying as -- I don't know if it's completely moot, but the basis for the administrative stay was so that the CFTC could get the benefit of the opinion. I administratively stayed it -- well, I was considering that motion -- I'm denying the motion given the change in circumstances, and I'm now entertaining an oral request for a stay pending appeal.

If I could just ask you two clarifying things before I

turn it over to plaintiff to respond. In terms of -- this is more of a factual question. My understanding is that Kalshi had initially self-certified these contracts, and then under the rules, regulations, they're permitted to begin trading within one business day of that. Did they begin trading within one business day of self-certification of these contracts?

MS. BERI: They have not.

THE COURT: Okay. So when the CFTC sent the review letter to them a couple weeks later, there had been no transactions that were listed at that point?

MS. BERI: That's correct.

THE COURT: Okay. That was my first question. And then the question I have about irreparable harm, and I didn't -- just to correct the record, it's not -- I didn't reach the issue of public interest. So I haven't made a decision about that one way or the other.

Yes, I didn't disturb the order. It's just because I didn't reach that part. It's not that I endorsed it or didn't endorse it.

But it's a little interesting in this context to think about irreparable harm because I understand that it has to be more than speculative. And if you recall from oral argument, I had a lot of questions and concerns about this product and kind of how it might affect things.

But when I'm drilling down as to what is the

irreparable harm that you can identify that's not kind of a what might or could happen, but a what will happen, what's your best argument as to something irreparable -- not might happen, could happen, reasonable minds can debate. And I'm not minimizing the importance of these issues. But what's the what will happen? Can you just articulate for me, if I don't stay my order pending your appeal, what will happen that will be irreparable?

MS. BERI: So, Your Honor, I apologize if I misspoke earlier about the Court's decision.

To answer your question, the Commission, under case law, was allowed to use its predictive judgment based on its experience and expertise. Based on that experience and expertise, we see manipulation in our markets, including short-term manipulation of contracts. There's no reason to believe that the election contracts would be any different.

THE COURT: Can you be real specific? I've educated myself on all of this for the purpose of this case. But when you say manipulation, talk to me as if I don't know what that means in real terms and what will happen.

MS. BERI: So, for example, on any contract there are two positions, a yes or a no. Right?

THE COURT: Right.

MS. BERI: Let's say we're talking about corn. And somebody puts out -- somebody holds a position in corn one way

or another and puts out misinformation about a drought, a drought is coming. And that could move the market on the price of corn because there may be a lower supply.

So the same thing could happen here. There's avenues for misinformation about which way the election is going to go. Kalshi has cited a couple other prediction markets that have wildly different predictions. So there's this incentive to move the market.

Whether it's in elections, we cannot know what will happen with elections without the contract listing, but the Commission is not required to suffer the flood before building a dam. The Commission could use its predictive judgments to see what is possible and likely in terms of manipulation in this market.

THE COURT: Okay. And then if I could just ask another factual question. You mentioned, I believe it's Polymarket. Is that the entity that we're talking about? Let me just understand. I know they're, obviously, not regulated by the CFTC. Did you say that they are not permitted to offer their product in the U.S. at all? So --

MS. BERI: That's correct. Under the terms of the settlement with the Commission, they are prohibited from offering any product, any event contracts, to people in the United States.

THE COURT: But the subject of their contracts are

U.S. elections?

MS. BERI: We understand that they do have some of those.

THE COURT: So some people overseas can purchase event contracts or whatever their product is based on U.S. elections; it's just that they can't offer it in the States, is essentially what it is?

MS. BERI: That's right.

THE COURT: Again, they can't offer it in the States but the same issues with misinformation and other problems would be apparent, I think, even if people overseas, which obviously you don't have any control over. Do you have any kind of stories or anecdotes about issues that have arisen as a result of that product?

MS. BERI: Yes. And I believe --

THE COURT: In terms -- I'm sorry, go ahead.

MS. BERI: We may have included this in our last filing.

THE COURT: I'll pull it up. Okay. And then is there another entity that is offering event contracts on a CFTC exchange or as a DCM on elections?

MS. BERI: No, there is not.

THE COURT: PredictIt is not --

MS. BERI: PredictIt is offering election contracts but not on a DCM.

THE COURT: But they're offering election contracts in the U.S.?

MS. BERI: Yes. And as Your Honor may be aware, the CFTC -- I want to use my words -- choose my words carefully, withdrew a no action letter. CFTC staff withdrew a no action letter and the CFTC is now the subject of an injunction.

THE COURT: Right. Okay. I will hear from whoever is speaking for counsel for plaintiff.

MR. ROTH: Thank you, Your Honor. Yaakov Roth for Kalshi. I'm going to go through the stay factors, given where we are now and what's been decided in the first little bit procedurally and explain why this Commission is not entitled to a stay pending appeal under any of the factors.

The first one and the one that really drives the train in most cases is the merits and the likelihood of success on the merits.

Of course, if the Court thought the Commission was likely to prevail on merits, it would not have issued the opinion it issued today. So at least for purposes of this Court, I think the success on the merits prong has already been resolved.

Of course, if the Commission goes up to the Circuit, it could argue that the Court got it wrong and then they'll make their assessment of likelihood of success. But for purposes of this Court, the opinion is clear about the

reasoning and rationale.

I want to emphasize, we really wanted the Court to be able to be in a position to make a fully informed judgment with confidence in the outcome. And that's why we gave the Commission -- we agreed to the time they wanted for their briefing. We agreed to the extra pages they wanted for their briefing. We withdrew our opposition to their supplemental brief following oral argument. We wanted everything to be in front of this Court, so it could really dig in, understand this and make the judgment. And that's the judgment we got with the full reasons today.

So likelihood, discuss on the merits is easy.

In terms of the harm to Kalshi, I think it's fairily self-evident. The election is now 50-some-odd days away. These markets are time bound. They're going to disappear in a matter of weeks. So there's obviously the loss of the business over the next period of time.

And it's important to remember, Kalshi is a startup. It invested significantly in the prospect of these markets. Kalshi has spent millions of dollars preparing to list these contracts, in terms of the engineering costs, the compliance costs, election lawyers to make sure all the terms were appropriate, marketing, hiring staff. And that's in addition to just thousands of hours of work over the past three years that have gone into this.

And Kalshi did that, Kalshi made those investments because it was confident that when the Court ultimately did reach the merits it would reach the conclusion it did. So I think it would be perverse if all of that investment now went up in smoke, notwithstanding that Kalshi was right about that and was right about the law.

And what makes it extra perverse is that, as we noted in the opposition, in the meantime, unregulated markets like Polymarket have been growing exponentially. We are the ones who were trying to comply with the law and the beneficiaries of the delay are the actors who don't want to comply with the law, the actors who are not subject to Commission oversight or regulation at all.

And that really brings me to the last factor, the harm to the Commission, which does merge here with the public interest. And so I emphasize two points, really, maybe three points.

First, given the Court's decision on the merits, the Supreme Court has said there is no public interest in allowing agencies to act unlawfully, even if they do so for desirable ends. That's the Alabama Realtors decision. So the merits and the public interest sort of are linked here.

The agency's predictive judgment may have been a legitimate argument when they were defending their order against our APA challenge, but the dynamics are different now.

Now the Commission bears the burden to prove that a stay pending appeal is necessary to advance the public interest. And so they cannot just say, well, we made a predictive judgment. We can't really point to anything but you should defer to us. That's not how it works at the stay stage, certainly.

The final point, and I think this one is actually dispositive. Whether the agency or the Court or anyone else thinks the contracts are good or bad for the public interest, they are already happening right now.

As the Commission just acknowledged, PredictIt does offer election contracts. That's been going on for a decade. Polymarket is now trading hundreds of millions of dollars in U.S. election contracts. If you go on their website, they have it right there. It's the lead item. You can see how much has been invested in each contract.

They say they're not allowed to sell to U.S. traders. I'm not sure that's really relevant for the public interest question; it's still happening. But I'll just note, there's widespread public reporting that -- this is a Bloomberg article from last month. Headline: "U.S. traders flock to an election-betting site they're banned from." Subheading: "Users can resort to virtual private networks to evade blockade."

So it's in the public domain that this trading is

happening in significant volumes in the U.S. and outside the U.S. And the consequence of that fact is that the only thing a stay of this order would do is ensure that all of that trading activity stays on Polymarket, outside the reach of any regulation or oversight, instead of being done, at least in part, on a regulated DCM that is bound by all sorts of rules and regulations and subject to Commission oversight. And I just cannot see how that result possibly advances the public interest.

The Court asked about any evidence of manipulation and the Commission pointed to -- they cited in their reply brief. I took a look at that. The Court can take a look at that. What it says is there was an attempt to engage in manipulation on Polymarket and it failed, and they lost the money they tried because the market worked.

So it's not a very good example of how this is going to be devastating to the public interest, that somebody who tried to manipulate the market failed.

And, of course, if this was being done subject to the Commission oversight, there would be enforcement authority, which would provide a deterrent against that type of behavior, which does not happen if the trading is happening in this offshore, unregulated exchange.

So, Your Honor, at the end of the day, the Court has concluded that we're legally entitled to list these contracts.

Staying that judgment would wipe out our investment, while allowing the same trading activity to continue outside the confines of any CFTC regulation. That would amount to punishing the one party that has tried to play by the rules. I don't think that's right. I don't think the Court should do it.

We would ask the Court to deny the stay and direct the Commission to seek relief from the Court of Appeals if it wants further view.

Last Friday, it filed in a matter of hours after this Court's judgment and it's had six days since then to get its ducks in a row. The Commission has already authorized an appeal. They voted on Monday. We know that because a dissenting statement was posted on the Commission's website. So that's already happened. There's nothing standing in the way of them going up to the Court of Appeals, and we're happy to brief the stay factors again for the D.C. Circuit.

Happy to answer any questions the Court may have.

THE COURT: I don't have any further questions.

Anything in rebuttal? And there's already been an appeal authorized. So you're not waiting to decide whether or not you're going to take an appeal. You're going to be ready to move expeditiously on that front, correct?

MS. BERI: Your Honor, if I may just phrase it this way.

THE COURT: Sure.

MS. BERI: We cannot -- we cannot seek appeal without Commission authorization. We could not have done it until they authorized. We intend to file our notice of appeal and stay pending appeal.

But what I would note is that even if we are authorized to file a notice of appeal earlier, that would have deprived this Court of jurisdiction to enter the opinion that you did this morning. And so it's not quite as simple as Mr. Roth says.

I would like to respond to a couple of other --

THE COURT: Sure. Of course.

MS. BERI: Kalshi referenced a loss of trading fees for the duration of the stay, whether that's a couple days or a couple weeks. And the D.C. Circuit has noted that it's well settled that economic loss does not in and of itself constitute irreparable harm. That case is John Doe versus CFPB, 849 F.3d 1129, in the D.C. Circuit 2017. Now, I will note that that addressed irreparable harm to the movant as opposed to the respondent.

We want to note that we cited the documented attempted manipulation in Polymarket and PredictIt. And counsel said that it was attempted and not perfected manipulation. But the fact that attempted manipulation occurs evidences that it is happening.

Kalshi, again, complains that other markets are doing election contracts, but the difference here is that what they are seeking to do is get the veneer of legitimacy that would be offered with being able to trade on a federally-regulated exchange. And that's a big difference.

Your Honor, what we would ask is a short stay pending appeal, even if it's not for the duration of the appeal, just to enable a stay while we ask the D.C. Circuit to issue an administrative stay.

Our concern is that Kalshi may trade while our motion is pending in the D.C. Circuit, even before that Court has decided the administrative stay issue. We are prepared to move forward expeditiously seeking appellate relief, and to answer your question at the outset of this. And for those reasons, we again request this Court stay its judgment.

THE COURT: Can you give me, again, the cite and name for the case you cited, the CFPB case?

MS. BERI: Yes. It's 849 F3d 1129, and that's D.C. Circuit 2017. The name is John Doe versus CFPB.

THE COURT: So it was an APA case?

MS. BERI: Yes.

MR. ROTH: Your Honor, can I offer a counterstatement?

THE COURT: Yes, of course.

MR. ROTH: Generally speaking, it's true that economic loss is not irreparable because you can get it back at the end

of the case.

THE COURT: Well, you can't get it back.

MR. ROTH: We can't. That's the point. The D.C. Circuit has said more recently, it's irreparable where no adequate compensatory or other corrective relief will be available at a later date. That's 26 F4th at 990 to -91. That's a 2022 decision from the D.C. Circuit. Economic injury caused by federal agency action is unrecoverable because the APA's waiver of sovereign immunity does not extend to damages claims. That's a decision from this Court, 444 F. Supp. 3d 1 at Page 24.

THE COURT: All right. I'm prepared to rule. And again, I think this is an important case because it involves elections and elections are important, but I'm going to deny the motion for a stay. And I understand that the CFTC will seek relief in the D.C. Circuit, and so I'll just briefly discuss the factors.

A stay pending appeal, as the parties know, is an extraordinary remedy. It is an intrusion into the ordinary processes of administration and judicial review and is not a matter of right, even if irreparable injury might otherwise result to an appellant. That's a Supreme Court case, Nken v. Holder, 556 U.S. 418 at 2009. And the party seeking a stay, here, the CFTC, bears the stringent requirements of a stay pending appeal.

The parties have indicated what the factors are, likelihood success on the merits. The stay applicant has to make a strong showing of likelihood of success. Two, whether the applicant will be irreparably injured.

And three and four, which I will consider together, is whether the issuance of the stay will substantially injure the other parties interested in the public proceeding and where the public interest lies. The first two factors, of course, are critical and require more than a mere possibility of relief and more than some possibility of irreparable injury.

I also note from long-standing Circuit precedent that irreparable harm must be both certain and great, and the harms to each party are tested for substantial likelihood of occurrence and adequacy of proof.

And so with those factors, again, as plaintiff pointed out, it's a little bit odd for me to be assessing likelihood of success, given that I made a decision. I think I'm right. I could be wrong but I think the Circuit is in the best position to tell me if I'm wrong. So if you ask me, I think I'm right and I don't think that that factor has been satisfied.

In terms of irreparable harm, again, I'm not at all minimizing general concerns about election integrity. But I don't think that anything that's been put forth during this hearing or in the briefs establishes any substantial likelihood of irreparable injury.

I asked some questions. It looks like, although not on CFTC exchanges, this type of activity is happening in an unregulated way, and I'm not sure that I have any evidence in the record to make that finding.

And, you know, again, I asked the question earlier about whether there was any lag time between Kalshi trading the contract and review, but I think -- and I've been told that there was not. But I think that if the Circuit -- if Kalshi begins trading and the Circuit stays it, there's a way to undo that, essentially.

So I just don't think on this record that I've been presented with information from which I can make the finding that I need to make.

I think those two factors are dispositive. I do think plaintiff has put forth evidence of injury that hasn't been rebutted. It is economic. But as plaintiff indicated, it's not as if they can recover that at the end of this litigation, even if they prevail. But that --

Again, these factors are on a sliding scale. That's not dispositive to my resolution. It's more the first two factors that I find strongly weigh in favor of denying the motion.

And again, three and four merge, but -- or are considered together. I shouldn't say merge. But I think that, on balance, the factors weigh strongly against staying my

order. I just don't find I have a record to do that. It's just plain and simple. I considered it carefully before this hearing and I've considered the parties' arguments carefully during this hearing, and I just don't see anything in the record from which I could make the finding that these factors warranted a stay.

So I did want to resolve that quickly and promptly, so that you can take whatever avenues you want to take to seek review of my decision.

I don't see a ground in which I can stay anything pending your filing of a motion for stay in the Circuit. It would be my understanding that any administrative stay would have to be presented to the Circuit, which I believe can be done on an emergency basis, and I'm sure that you're prepared to move quickly.

But to your point about needing time, of course, if you have authority that suggests I'm wrong on that point, you can submit it. And I guess what I will say is I will look at it and if I am convinced that the CFTC might be right about that, I will let Kalshi know that they can respond. But if I just determine, looking at it, that I disagree, then I won't have Kalshi waste resources responding to it.

But I will not prohibit you, obviously, from seeking that. But you might just decide that you're going to go to the Circuit and invest all of your energy in having the decision

and the stay pending appeal motion reviewed.

So leave it up to you how you want to proceed. But just wanted to let you know that, of course, there's no prohibition on you coming back to me for any reason if you have authority suggesting that my decision was incorrect.

Okay. I think I said this at the outset of the hearing, but because I denied the pending motion and I said the administrative stay would lift at the conclusion of the hearing, I don't see any basis, again, to continue that administrative stay, given that I issued my opinion.

So unless there's anything else, I'll let you-all go and take your next steps.

MS. BERI: Your Honor, may we briefly make a request?

THE COURT: Sure.

MS. BERI: We move the Court to reconsider its order and ask for a 24-hour stay to give us the opportunity to file an emergency motion in the D.C. Circuit. We note that under D.C. Circuit rules for emergency filings, we will need to submit this Court's transport. We have preemptively ordered two-hour transcripts, which we will receive this afternoon.

We also note the D.C. Circuit rules state a strong preference for seven days of consideration for emergency filings. And so for those reasons, we move that Your Honor reconsider its order denying our motion for stay.

THE COURT: Given my ruling on the factors, what would

be my basis? I know you disagree and, again, the Circuit might disagree with me. But given my ruling, what factor would I point to to warrant a stay? I issued my ruling that I don't think that the factors weigh in favor of a stay. In fact, I found that they weigh against a stay. So I don't know what basis I would issue a further stay.

MS. BERI: As Your Honor alluded, we do disagree with your ruling. But we note specifically the harms to public interest, even if these contracts are allowed to trade, say, this afternoon for a brief period of time. So we will note our disagreement on that. We will note our disagreement about economic harm.

Again, we've noted in our briefing Kalshi's robust markets. The economic harm that it may suffer by not collecting fees for 24 hours is minimal compared to the transactions that it lists. So we disagree on the economic harm finding.

Again, we disagree on the public interest injury finding, which we've extensively briefed and discussed. We also note that we can submit a more extensive argument to Your Honor in writing, as we have only orally moved for the motion for stay pending appeal.

THE COURT: Okay. And just --

MS. BERI: So we believe there are --

THE COURT: I'm sorry, I didn't mean to cut you off.

Go ahead.

MS. BERI: No problem.

THE COURT: I was going to say, I wanted to be clear, for the economic harm piece, that's not dispositive to my ruling. I think it was the first two factors. Again, the Circuit might disagree.

My understanding is this is a sliding scale, that the first two factors are of primary importance. I find that those two factors weigh strongly against staying the case. I did think that Kalshi articulated some harm. If that was all that they had and I thought there was a strong likelihood of success on the merits and irreparable injury to you absent a stay, I agree with you, their financial harm in a short time period would not have moved the scale.

I was just articulating that they've articulated some harm that's concrete and irreparable, even if not of great magnitude, as compared to what I think the agency has demonstrated. Which, again, on the record, I don't have anything specifically concrete that I can point to. So I just wanted to clarify that.

Again, I made my ruling. I did it this way because I thought it would enable you to take your next steps more quickly. Of course, if you want to put something in writing before me, I will look at it and consider it very quickly. I don't want to deprive you of the ability to do that.

But I did want to -- because I thought that the merits of the request had been briefed substantially, that the parties would be prepared and that this would be faster than requiring you to brief a motion.

But again, if you have authority for my ability to stay when there's no motion pending in front of me and the motion would be pending in front of the Circuit, if you have authority that I am in the position to consider a stay and that the analysis is different than the factors that I just outlined, I will accept your authority. And if you want to file that, that's fine.

But again, the question would be twofold. One, I've ruled -- I've denied the motion for stay pending appeal. So in my view, there's nothing before me to stay administratively. If I were considering a motion that was pending, I know that I could administratively stay while I consider a motion.

I could be wrong. I'm not familiar with a procedure where there's nothing pending before me and you're going to the Circuit and that I'm staying anything pending a forthcoming motion. I could be wrong. You'll give me authority if I am.

Then the second piece is would the analysis of that administrative stay or whatever you want to call it be different than the factors for a stay pending appeal because I've found those factors. And again, the Circuit may very well disagree with me and you'll ask them to.

But given my ruling, if it's just analyzing the same factors again, my ruling, unless you show me something new, is unlikely to change on that front. So again, you're free to file anything and I will look at it as soon as it comes in.

MS. BERI: Yes, Your Honor. Two things. We just wanted to get clarification about whether Kalshi will now trade these election contracts, after knowing that we are seeking relief in the D.C. Circuit. And we would submit that Your Honor has authority to manage your own docket and extend your administrative stay pending the order denying our motion.

THE COURT: I guess that's my point: It's not my docket -- it doesn't seem to be my docket anymore. But again, if I'm wrong -- I know it's my order but I don't have a motion pending before me that I'm considering.

If there was a motion pending before me that I hadn't ruled on, similar to the motion where I granted administrative stay earlier, I gave you that out of -- from a case management perspective, one, because I knew there was a short gap between my order and my opinion, and so I wanted to, just from a case management perspective, grant that stay. But there's nothing pending before me now. But again, you can show me authority.

Then, with respect to the other question, I think that's something you can communicate with plaintiff's counsel with after the hearing. I don't know that I need to be -- I don't know that that's relevant for me to be involved in that

conversation. If there's something that emerges from the conversation and you think that there's some relief that I can offer you, I'm happy to, again, hear from you.

MS. STUKES: Your Honor, if I may, this is Anne Stukes, here with Raagnee Beri. And I'll just make one more pitch to Your Honor, which is that of course the Court always has inherent authority to manage its own docket and the Court, in our view, has the inherent power to extend the administrative stay one more day, pending issuance of your ruling on the Commission's motion for stay pending appeal.

So, for instance, you could say the administrative stay is extended for 24 hours or until 5 p.m. tomorrow, and until such time as your order denying the motion for stay pending appeal is docketed on your docket. I think you have the inherent authority to do that.

THE COURT: I'm going to docket -- I made the ruling but I'm going to docket it as soon as this hearing is over. You'll get a minute entry saying it was denied. So there's not going to be any lag time. I've issued the order and I think that's what's controlling. But just for your benefit, it will be docketed in a matter of minutes. You'll get a minute entry following this hearing.

MR. ROTH: Thank you, Your Honor.

THE COURT: Hold on just one second, please.

Let me ask this -- I didn't ask this. Plaintiff,

would you oppose a 24-hour stay?

MR. ROTH: We would.

THE COURT: Okay. I should have asked that first.

Again, for the CFTC, if there's anything that you -- additional authority you want to give me or anything you want to file, you're welcome to do that. I will look at it immediately. I understand that time is of the essence in terms of your next steps. But I wanted to clear the path for you to be able to go to the Circuit as soon as possible.

Okay. If there's nothing else, thank you all for your time. And like I said, if you file anything additional, I will look at it immediately. Thank you.

MR. ROTH: Thank you, Your Honor.

MS. BERI: Thank you, Your Honor.

(Proceedings concluded at 11:31 AM)

C E R T I F I C A T E

I, Stacy Johns, certify that the foregoing is an accurate transcription of the proceedings in the above-entitled matter.

Please note: This hearing occurred via Zoom and is therefore subject to the technological limitations of reporting remotely.

/s/ Stacy Johns Date: September 12, 2024

Stacy Johns, RPR, RCR
Official Court Reporter

APPENDIX
Docket Entries

Page(s)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KALSHIEX LLC,
594 Broadway, New York, NY 10012,

Plaintiff,

v.

COMMODITY FUTURES TRADING COMMISSION,
1155 21st St NW, Washington, DC 20581,

Defendant.

No. 23-cv-3257

COMPLAINT

INTRODUCTION

1. This action challenges a final order by the Commodity Futures Trading Commission (CFTC or Commission) prohibiting Plaintiff KalshiEX LLC (Kalshi) from offering certain event contracts for trading on its federally regulated exchange. The Commission's order (Order) exceeds its statutory authority under the Commodity Exchange Act (CEA), 7 U.S.C. § 1 *et seq.*, and is arbitrary, capricious, and otherwise contrary to law. This Court should therefore vacate it.

2. Event contracts are financial instruments that entitle a purchaser to payment based on the occurrence or non-occurrence of a real-world event. Like other derivatives, they are used as a tool to mitigate risk. For example, consider a yes/no contract on whether a major hurricane will make landfall on the Gulf Coast. A hotel chain might acquire "yes" contracts as a hedge against closed beaches. Conversely, a construction firm focused on storm repair work might buy "no" positions as a hedge against lost revenue. If a major hurricane does hit, the hotel chain will receive a payout; if not, the construction company will. Each has hedged its risks.

3. This case involves event contracts based on political events, meaning those relating to the composition or activities of government. Political events carry enormous financial implications for businesses and individuals. Will Congress pass funding legislation before an impending shutdown? Will the EPA promulgate a new limit on tailpipe emissions? Will the Federal Reserve cut interest rates by the end of the year? Those are real examples of event contracts offered in the market, by Kalshi and others. For good reason: Uncertainty surrounding these events poses economic risk, no less than uncertainty over hurricanes, pandemics, or oil supply.

4. Beyond their economic hedging benefits, political event contracts serve the interests of the public by harnessing the unparalleled power of free markets to produce high-quality, dynamic predictive data. They offer the public a unique window into traders' perceptions of future political developments. Commentators and media thus often cite—alongside polling data—prediction market data, including from two institutions that offer contracts based on the results of elections: PredictIt and the University of Iowa's Iowa Electronic Markets (IEM) platform.

5. Under the CEA, exchanges registered and regulated by the CFTC may list event contracts for trading by the public. Congress made the judgment that these derivatives should be presumptively permissible. The CFTC is empowered to prohibit event contracts only if they (1) "involve" illegal activity, terrorism, assassination, war, gaming, or a "similar activity" that the CFTC determines by rule or regulation to be contrary to the public interest, and (2) are determined by the Commission to be "contrary to the public interest." 7 U.S.C. § 7a-2(c)(5)(C).

6. Kalshi operates a regulated exchange that allows members of the public to trade event contracts. Its mission is to create opportunities for individuals and small businesses to hedge risk in ways previously available only to large corporations using bespoke products designed by investment banks.

7. In June 2023, Kalshi sought to list contracts contingent on whether a particular party will control the House of Representatives or Senate as of a particular date (Congressional Control Contracts). Those contracts do not involve unlawful acts, terrorism, assassination, war, or gaming. The CFTC thus has no power to prohibit them. Nor are they in any way contrary to the public interest. Congressional Control Contracts would enable hedging against economic risks associated with one party's control of Congress. And their fluctuating prices would provide useful predictive data to the public. Hundreds of public comments—from noted academics, real business owners, and former CFTC officials, among others—explained all of this.

8. The CFTC blocked Kalshi's contracts anyway. It reasoned that the statute empowers it to ban event contracts whenever the *act of trading* on the contract would *amount to* one of the enumerated activities—not merely when the *event underlying* the contract *involves* such an activity. Trading on a contract that depends on the result of an election, the Commission continued, amounts to "gaming" and may also violate some state gambling laws, because it stakes money on a contingent event. Having found the Congressional Control Contracts subject to public-interest scrutiny, the CFTC concluded that the contracts fail it, because they supposedly would further no "economic purpose" while threatening election integrity.

9. The Order's analysis fails at every step. It contorts and misapplies the CEA's text, ignores its structure and purpose, allows a narrow exception to swallow the rule, and engages in faulty and unsupported reasoning.

10. To start, the Commission's "amounts to" test bungles the statute's text. Trading an event contract can *never* amount to terrorism, assassination, or warfare. Accordingly, the only way to make sense of the provision as a whole is to read the CEA's reference to contracts that "involve" those activities as focused on the contract's *underlying event*. For example, the Commission may prohibit a contract contingent on whether the President will be assassinated, because the contract's underlying event involves an assassination, and the CFTC may reasonably determine that it would be contrary to the public interest for a contract to pay out if the President is assassinated. On that common-sense reading, the Congressional Control Contracts are not subject to public-interest review, because partisan control of a congressional chamber involves neither "gaming" nor "unlawful" activity.

11. On its flawed reading of "involve," however, the Commission found that buying a Congressional Control Contract would amount to "gaming" or gambling prohibited by state law because purchasers would stake money on a contingent event, which some states define as gambling. But buying one of these contracts is nothing like betting on a game of chance or even the Super Bowl. Elections are not a game; they have real economic consequences. Nor did Congress implicitly empower 50 state legislatures to ban event contracts through the backdoor; just the opposite, Congress gave the CFTC exclusive jurisdiction and preempted contrary state law.

12. The Commission's interpretations of "involve," "gaming," and "unlawful" cause the CEA's narrow exceptions to swallow its general rule. If the CFTC may ban any event contract so long as buying or selling that contract would amount to illegal "gaming," and if illegal gaming includes staking money on any contingency, the CFTC could prohibit *any* event contract based solely on its view of the public interest. Had Congress intended to confer such sweeping authority on the CFTC, it would have said so. Instead, it authorized the Commission to undertake public-interest review of event contracts *only* if they fall into one of the enumerated categories.

13. The CFTC's public-interest analysis—which it had no authority to conduct in the first place—is just as flawed as its statutory construction. Applying an invented "economic purpose" test, the Commission dismissed comments from economists, investment bankers, and real business owners, all of whom identified demonstrable hedging benefits associated with the Congressional Control Contracts. The Commission instead improvised heightened requirements that fundamentally misunderstand how risk hedging works—and then ignored the evidence that Kalshi's proposed contracts meet even those requirements. It likewise ignored the established price-basing function of these contracts. And it followed up with unfounded and implausible speculation about election integrity, as if businesses and individuals did not *already* have significant economic exposure to electoral outcomes. Much of the CFTC's public-interest reasoning would equally condemn *most* event contracts. Once again, that approach is fundamentally irreconcilable with the statute Congress enacted.

14. At bottom, it is undeniable that election outcomes have consequences for everyone; they play a pivotal role in determining our collective future. Allowing people to trade safely on election outcomes will give them the freedom to protect their financial interests. A legitimate market will also yield more credible and transparent election forecasting, especially relative to the bias of polling. Election markets offer transparency, clarity, and truth—equipping Americans to filter out the noise and the nonsense, and empowering them to make informed decisions and navigate uncertainties. Trustworthy election forecasts, rooted in enabling people to put their money where their mouth is, are not just valuable; they are essential. And they are most certainly lawful. Kalshi has built the protective rails to comply with U.S. law. It expects the Commission to comply too.

15. Instead, the Order is an unlawful agency power grab that corrupts and dramatically expands the Commission's statutory mandate. In rejecting Kalshi's event contracts, the CFTC exceeded its lawful authority and engaged in arbitrary and capricious reasoning. This Court should therefore set aside the Order under the Administrative Procedure Act (APA), and declare that Kalshi is entitled by law to list the Congressional Control Contracts on its regulated exchange.

PARTIES

16. Kalshi is a financial services company with its principal place of business in New York. Kalshi operates a federally regulated derivatives exchange that allows the public to buy and sell event contracts.

17. Defendant CFTC is a federal agency that regulates derivatives markets, including for event contracts. The CFTC is headquartered in this district.

JURISDICTION AND VENUE

18. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, because this case arises under the APA, 5 U.S.C. §§ 703–06.

19. Sovereign immunity poses no bar to this action. *See* 5 U.S.C. § 702.

20. Venue is proper under 28 U.S.C. § 1391(e), because the CFTC resides in this district.

FACTUAL ALLEGATIONS

A. Event Contracts Are Established Tools for Hedging Risks.

21. Many derivatives contracts are tools to mitigate risk, including risk associated with the occurrence of events. Event contracts are the purest expression of that concept. They are financial instruments that specify a future event with different potential outcomes, a payment structure for those outcomes, and a date when the contract expires. These contracts typically center on a yes-or-no question—*e.g.*, whether the Federal Reserve will cut its target federal funds rate range before a certain date, or whether 30-year mortgage rates will exceed 8% by a certain date.

22. An event contract can typically be bought or sold at a price between 1¢ and 99¢. Every transaction has a counterparty—*i.e.*, every "yes" position corresponds to a "no" position. At the contract's expiration, it will be worth $1 if the underlying event occurs, and $0 if it does not. Until that date—*i.e.*, while it remains uncertain whether the underlying event will transpire—the contract's price will fluctuate. Event contracts trade on a centralized exchange, similar to a stock market. Their prices are determined by market forces, not by the exchange. Traders can buy and sell a contract at any time before its expiration.

23. As in other markets, traders arrive at prices for event contracts based on all available information at the time. If new information arises related to the likelihood of an event, the price of a contract contingent on that event will change. As a result, the market prices of event contracts reflect real-time probabilistic beliefs about whether the underlying event will occur. For example, if a "yes" contract on a government shutdown occurrence is trading for 60¢ (and thus the corresponding "no" position is trading for 40¢), that means the market currently believes there is a 60% chance the shutdown will occur (and a 40% chance that it will not).

24. Event contracts give traders direct exposure to the outcome of real-world events with economic ramifications. No other instrument perfectly captures the risks inherent in the occurrence or non-occurrence of an event. For example, a trader can use a futures contract on the S&P 500 stock index to take a position on whether the economy will grow generally. But that contract would be a very imprecise way of addressing whether the next GDP report will identify economic growth above a certain level. Only an event contract on the next GDP announcement would do that.

25. Like other forms of derivatives, event contracts thus allow businesses and individuals to hedge against risks. For example, a beachfront property owner in a city might buy contracts predicting that a hurricane will hit that city, because the payout could offset economic losses the owner is more likely to incur if a hurricane hits. Or a firm in a regulated industry might buy contracts predicting that a very aggressive nominee will be confirmed as its lead regulator, to help mitigate the risks associated with that official's adverse regulatory agenda.

26. Event contracts are distinct from insurance. The property owner in the example above could buy insurance to cover actual property losses, including from a hurricane. An event contract would instead hedge the diffuse *risk* of losses associated with a hurricane, including property damage, a decline in Airbnb revenues, and higher costs of food and water. Meanwhile, the regulated firm might be able to buy insurance for the cost of legal defense, but an event contract would directly hedge the manifold risks associated with a hostile regulator.

27. Beyond economic benefits to traders, event contracts also generate informational value for the public, as their prices can be understood as a collective prediction by the market. The expectations and willingness of traders to put their money on the line form the price, which reflects the market's view of the odds that an event will occur. Prediction markets therefore serve as high-powered (and highly effective) information-aggregation tools, generating crucial insights for researchers, businesses, individuals, and governments. And the resulting data about the market's perception of the event's likelihood can be used, in turn, to determine prices for assets whose value depends on the occurrence or non-occurrence of the underlying event.

B. Political Event Contracts Allow for Hedging of Political Risk and Aggregation of Useful Predictive Data.

28. Politics—no less than agriculture, weather, or inflation—is beset with uncertainty. And given the many ways in which governments influence the economy, political events can have just as profound an effect on a firm's bottom-line as spikes in energy prices or interest rates. Businesses and individuals thus have good reason to use derivatives to hedge political risks, just as they hedge other risks. And no

financial instrument is better suited to hedge risks associated with political events than contracts that reference the events themselves.

29. Indeed, Kalshi has offered event contracts based on whether certain legislation would be enacted, whether certain presidential nominees would be confirmed by the Senate, and whether the federal government would shut down—all of which are political events that carry obvious economic repercussions for a wide range of businesses and individuals.

30. Like other political events, election outcomes have vast consequences for businesses and individuals. To quote Harvard University Professor Jason Furman, the former Chairman of the Council of Economic Advisors under President Obama: "Congressional control impacts legislation, policy, and the business environment in ways that have direct economic consequence to businesses and workers. This risk is conceptually identical to climate risk, business interruption risk, and other similar risks that can and should be managed using the financial markets."

31. Large financial institutions already design bespoke derivatives for large corporate customers to hedge against these risks. They used complex structured products to prepare for risks associated with Brexit, the 2016 election, and other world-changing political events. Event contracts on regulated exchanges like Kalshi's offer the same opportunities to smaller enterprises and individuals.

32. Political event contracts also have other benefits. Researchers, public organizations, businesses, and governments continuously seek information about the likelihood of future political events. Among other things, that information helps to

determine prices for assets that are exposed to political risk. But traditional opinion polls and other methods of measuring public attitudes often cannot replicate the robustness, flexibility, or neutrality of market-based indicia. That is why media outlets routinely rely on political event marketplaces when reporting on political developments.

33. Indeed, political event markets are already widespread. The best known example, PredictIt, "is a futures market for politics" that allows trading on electoral outcomes. *Clarke v. CFTC*, 74 F.4th 627, 633 (5th Cir. 2023). CFTC staff have long permitted it to operate under a no-action letter; the Fifth Circuit recently enjoined the Commission's effort to retract that authorization. *Id.* at 633–44. The University of Iowa's IEM platform is another well-known market for political event contracts. Created before the 1988 presidential election, the IEM is a derivatives market where contract payoffs are based on real-world events, including political outcomes. The CFTC has permitted the IEM to offer political event contracts for decades too.

34. Political election markets have also existed for decades or longer in the United Kingdom, and are widespread in other democracies. Indeed, in Canada and elsewhere, one can take positions on the outcome of elections in the United States.

35. Of course, there are also unregulated, illegal markets providing similar services online and offshore. Those illicit markets lack the safeguards and oversight that traders enjoy on CFTC-regulated exchanges like Kalshi's.

C. Congress Permits Regulated Markets To List Event Contracts, Subject to a Narrow List of Exceptions.

36. Under federal law, "[e]vent contracts" are "agreements, contracts, transactions, or swaps in excluded commodities." 7 U.S.C. § 7a-2(c)(5)(C)(ii). While agricultural products like "wheat, cotton, rice, corn, oats," etc., are the most familiar commodities, the CEA also defines "excluded commodities" to include interest rates, certain financial instruments, economic indices, and risk metrics. *Id.* § 1a(9), (19)(i)–(iii).

37. Relevant here, "excluded commodities" also include *events*—in the statutory parlance, any "occurrence, extent of an occurrence, or contingency" that is "beyond the control of the parties to the relevant contract" and "associated with" economic consequences. *Id.* § 1a(19)(iv). Accordingly, event contracts are defined and regulated as swaps in excluded commodities. *See id.* § 1a(47)(A)(ii), (iv), (vi).

38. An entity must seek and receive the Commission's designation as a contract market to offer such derivatives for public trading. *Id.* §§ 2(e), 7(a); 17 C.F.R. § 38.100. The Commission has "exclusive jurisdiction" over those derivatives that are traded on regulated markets. 7 U.S.C. § 2(a)(1)(A).

39. A regulated exchange is subject to comprehensive CFTC oversight and must comply with numerous requirements governing recordkeeping, reporting, liquidity, system safeguards, conflicts of interest, disciplinary procedures, market surveillance, compliance resources, and more. *Id.* § 7(d); 17 C.F.R. pt. 38.

40. A regulated exchange may generally list an event contract without the Commission's pre-approval by self-certifying the contract's compliance in a filing with

the Commission, and the Commission may choose to initiate a review. *See* 7 U.S.C. § 7a-2(c)(1); 17 C.F.R. §§ 40.2(a), 40.11(c). Alternatively, a market may submit a new contract to the agency for advance review. 7 U.S.C. § 7a-2(c)(4)(A); 17 C.F.R. §§ 40.3(a), 40.11(c).

41. Either way, the Commission "shall approve" any event contract that it reviews *unless* it affirmatively finds that the contract violates the CEA or CFTC regulations. 7 U.S.C. § 7a-2(c)(5)(B); 17 C.F.R. § 40.3(b).

42. In 2010, Congress amended the CEA to prohibit the listing of certain event contracts "determined by the Commission to be contrary to the public interest." 7 U.S.C. § 7a-2(c)(5)(C)(ii). But the Commission's authority in this regard is limited. It "may determine" that an event contract is contrary to the public interest *only* if the contract "involve[s]" one of six enumerated activities: "activity that is unlawful under any Federal or State law," "terrorism," "assassination," "war," "gaming," or "other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest." *Id.* § 7a-2(c)(5)(C)(i). The Commission cannot undertake any public-interest review *unless* the contract involves one of the enumerated activities.

43. The process for reviewing event contracts therefore proceeds in two basic steps: *First*, the Commission determines whether the contract "involves" one of the six enumerated "activit[ies]." *Id.* § 7a-2(c)(5)(C). If not, the contract may be listed—period. *Second*, if the contract *does* "involve" a listed activity, the CFTC "may determine" that it is "contrary to the public interest," and bar its listing. *Id.*

44. For example, a contract that entitles the buyer to payment if a terrorist group carries out an attack on U.S. soil would "involve … terrorism." *Id.* § 7a-2(c)(5)(C)(i)(II). A contract contingent on whether the President will be assassinated would "involve … assassination." *Id.* § 7a-2(c)(5)(C)(i)(III). And one contingent on the progress of Russian forces against a Ukrainian target would "involve … war." *Id.* § 7a-2(c)(5)(C)(i)(IV). The CFTC would be empowered to review those contracts to determine whether they are "contrary to the public interest," and to block them if it concludes that they are. *Id.* § 7a-2(c)(5)(C)(ii). Although those examples may sound far-fetched, foreign websites are currently offering contracts on, among other things, "Will a nuclear bomb explode in Ukraine in 2023?" Congress thus had good reason to provide the CFTC with a means to block these dangerous contracts.

45. The CFTC has promulgated an implementing regulation. It provides that a market "shall not list for trading" any event contract "that involves, relates to, or references terrorism, assassination, war, gaming, or an activity that is unlawful under any State or Federal law," or "an activity that is similar to an [enumerated] activity … that the Commission determines, by rule or regulation, to be contrary to the public interest." 17 C.F.R. § 40.11(a)(1)–(2).

46. The Commission has not exercised its authority to determine, "by rule or regulation," that a contract involving any activity "similar" to the five enumerated ones is "contrary to the public interest." 7 U.S.C. § 7a-2(c)(5)(C)(i)(VI). As a result, the Commission may subject a contract to public-interest scrutiny *only if* it "involves" illegal activity, terrorism, assassination, war, or gaming.

47. The CEA does not authorize special scrutiny of political event contracts or those relating to elections. Congress could have added "elections" or "politics" to its list of enumerated activities, but did not—despite the long history of political event markets both in the United States and around the world.

D. Kalshi Proposes To List Contracts on Congressional Control.

48. Kalshi is a regulated exchange that allows people to buy and sell event contracts. Kalshi utilizes its innovative, proprietary technology to democratize investing opportunities for everyone. The Commission unanimously authorized Kalshi to operate its regulated exchange in 2020.

49. Contracts traded on Kalshi's market involve events that run the gamut from economics to culture, climate, public health, and transportation. For example, traders on Kalshi's platform may buy and sell contracts based on the number of major hurricanes that will form over the Atlantic next year, or whether China's GDP growth will exceed a certain rate.

50. Kalshi also lists contracts on political outcomes, such as whether the government will shut down, whether the debt ceiling will be lifted, or whether nominees will be confirmed. Earlier this year, Kalshi sought to offer contracts—the Congressional Control Contracts—that enable participants to take positions on which political party will control the House of Representatives or the Senate on a particular future date following the 2024 federal elections.

51. These are cash-settled, yes/no contracts based on the question: "Will <chamber of Congress> be controlled by <party> for <term>?" The contract defines control by reference to the party affiliation of the Speaker (for the House) or President

Pro Tempore (for the Senate). On settlement, those who purchased the winning side of the contract receive payment; those who purchased the side that selected the minority party receive no payment.

52. To illustrate: Imagine a green-energy start-up worried that Republicans will cut subsidy programs if they gain control of the Senate in 2025. It might hedge its risk by buying 50,000 contracts to that effect. Of course, a Republican Senate does not make it *certain* the subsidies will be phased out—but it does *increase the risk* of that loss, and the event contracts would hedge against that risk. If the Senate elects a Republican President Pro Tempore, the start-up would receive $50,000. Its profit would be the difference between that payout and the price it paid for the contracts, which will reflect the market's perception of the likelihood of Republican control at the time of the purchase.

53. The Congressional Control Contracts' terms prohibit trading by candidates for federal or statewide public office; paid staffers on congressional campaigns; paid employees of Democratic and Republican Party organizations; paid employees of PACs and Super PACs; paid employees of major polling organizations; existing members of Congress; paid staffers of existing members of Congress; household members and immediate family members of any of the above; and any of the above listed institutions themselves.

54. On June 12, 2023, Kalshi self-certified to the Commission that its Congressional Control Contracts complied with the CEA and CFTC regulations.

55. On June 23, 2023, the Commission initiated a review of the contracts by a 3-2 vote. Announcing the review, the Commission indicated that the Congressional Control Contracts may "involve, relate to, or reference" an activity enumerated in Rule 40.11(a). In dissent, Commissioner Mersinger highlighted that the review was "fundamentally unfair" and inappropriate since the contracts did "not fall within the categories enumerated in the CEA." Commissioner Pham dissented too, concluding that Kalshi should "be allowed to operate [its] political control markets."

56. During a public comment period, academics, other firms in the industry, former CFTC and SEC officials, human rights activists, and nonprofits all expressed support for the Congressional Control Contracts. Many commenters attested that they would use the contracts to hedge risk. Overall, the comments explained that Congressional Control Contracts and similar instruments are not merely *legal*—and therefore *must* be approved for trading—but also carry significant societal value.

E. The CFTC Issues a Flawed Order Rejecting Kalshi's Contracts.

57. The CFTC disagreed. On September 22, 2023, the CFTC issued an order prohibiting Kalshi from listing its Congressional Control Contracts. Three members joined the Order. One dissented. The last Commissioner abstained, citing the recent Fifth Circuit defeat in the CFTC's litigation against PredictIt. *Clarke*, 74 F.4th 627. The Order and separate statements are attached as Exhibit A.

58. The Order begins by reciting that "the Commission may determine that contracts in certain excluded commodities … are contrary to the public interest if the contracts involve" any of the six enumerated activities. Order at 3.

59. The Commission found that Kalshi's Congressional Control Contracts "involve" two enumerated activities: "gaming" and "unlawful" activity. *See* 7 U.S.C. § 7a-2(c)(5)(C)(i)(I), (V). But, of course, the Commission did not and could not find that elections, or the selection of a Speaker or President Pro Tempore, *themselves* involve "gaming" or "unlawful" activity. Rather, the Commission reasoned that an event contract "involve[s]" those activities if *trading in the contract* would *amount to* "gaming" or illegal activity. *See* Order at 5–7.

60. The Commission then declared that buying or selling Kalshi's contracts would *amount to* gaming and activity that is unlawful under state law. To reach that conclusion, the Commission relied on dictionary definitions and state statutes that broadly define illegal "gambling" to include staking money on the outcome of any "game, contest, or contingent event." *Id.* at 8.

61. Finally, having found that the Congressional Control Contracts were subject to public-interest review, the Commission determined that those contracts were "contrary to the public interest." *Id.* at 13–23.

62. Every step of the Order's analysis is fatally flawed.

63. *First*, the heart of the Commission's reasoning is its implausibly broad (and shifting) interpretation of "involve." The Commission concluded that a contract "involves" one of the enumerated activities "if *trading* in the contract *amounts to* the enumerated activity." *Id.* at 7 n.19 (emphases added). In other words, an event contract need not be contingent on the *occurrence* of an event that *involves* crime, a terrorist attack, an assassination, an act of war, or gaming. Instead, a contract is

subject to public-interest review and potential rejection if *engaging in the transaction* would *amount to* one of those activities.

64. That interpretation of "involves" fundamentally misunderstands the statutory structure. The activities enumerated in § 7a-2(c)(5)(C)(i) describe *events* that underlie a contract; if the event underlying a contract involves an enumerated activity, the CFTC may block it. The enumerated activities do not describe the act of *trading on the contract itself*.

65. That is most apparent from the fact that trading on an event contract could *never* constitute an act of terrorism, war, or assassination—for those activities, the focus *must* be on the contract's underlying event. To justify rejection of Kalshi's contracts, the Commission therefore had to embrace a radically different meaning of the word "involve" with respect to two (and only two) of the statute's six enumerated activities: "gaming" and "unlawful" acts. For those activities alone, the theory goes, Congress referred to the *act of contracting*, rather than to the contract's underlying *event*. That tortured approach—under which the same operative text toggles back and forth between two inconsistent meanings over five subparagraphs—is a sure sign that the Order misconstrues the CEA.

66. *Second*, turning to the enumerated activities, the Commission again adopted definitions that statutory context forecloses. The Commission reasoned that "gaming" means "gambling," and that "gambling" encompasses any wager on a "game, contest, or contingent event." *Id.* at 8. Because those who trade on Kalshi's contracts

"stak[e] something of value" on the outcome of an election, the Commission continued, that act of trading amounts to gambling—and thus, "gaming." *Id.* at 10.

67. But, especially in this context, "gaming" does not and cannot sweep that broadly. Rather, it refers to betting on *games*, and especially to betting on games of chance. An election is not a game at all, let alone the equivalent of bingo or roulette. It is the foundational exercise of democratic governance. Unlike games, elections have independent and meaningful political and economic consequences.

68. As a group of distinguished economics scholars (including a Nobel laureate) told the CFTC in a comment letter: "An election prediction market is no more gaming than traditional financial markets, including commodity, futures, and derivatives markets, due to the vast economic utility of the contracts."

69. The Commission's contrary interpretation fundamentally upends the CEA's entire approach. After all, *every* event contract *by definition* stakes money on a contingent event. As a result, under the Commission's reading of "involve" and "gaming," *no event contract* would escape public-interest scrutiny. That would render the remaining enumerated activities entirely superfluous. And it would cause this one narrow exception to swallow the rule, flipping the statute's default by authorizing CFTC public-interest review of *every* event contract.

70. Similarly, the Commission reasoned that trading in Kalshi's contracts would be "unlawful under state law" because gambling on elections is illegal in some States. *Id.* at 11–12. The Commission's "unlawful activity" analysis (all two sentences of it) fares no better than its approach to "gaming."

71. Once again, the Commission jeopardizes the entire statutory structure, this time by giving States veto power over the federal regime. The CEA *preempts* state law in this area in favor of "exclusive" CFTC jurisdiction. 7 U.S.C. § 2(a)(1). But the Order's reasoning empowers States to trump federal law and effectively *ban* trading in event contracts merely by broadly defining "gambling." Indeed, some state laws already forbid staking money on any contingent event. *See* Order at 8 n.22. So in this respect too, the agency's interpretation—taken seriously—would shut down the entire national market in event contracts. That is patently *not* what Congress intended by conferring on the CFTC targeted authority to prohibit contracts involving war, assassination, and the other tailored categories.

72. In her dissent, Commissioner Mersinger pointed out yet another flaw in the Commission's analysis: It presumes that Kalshi's contracts "are premised on the outcome of Congressional election[s]." *Id.* at 10. But Kalshi's contracts do not turn solely on the results of any one election. They turn on the aggregate results of *all* relevant elections in that year's cycle, *plus* the chamber's previous composition, *plus* internal party machinations. As recent events illustrate, internal factions can prevent even a majority party from electing a Speaker. At most, congressional control is highly correlated with the outcomes of many elections—but that is equally true of many event contracts that the CFTC has never derided as "gaming."

73. *Finally*, having decided that Kalshi's contracts "involve" both gaming and illegal activity, the Commission deemed them "contrary to the public interest." Here too, the Order's analysis fails the standards for reasoned decision-making.

74. The Commission began with an "economic purpose" inquiry found in no statute, regulation, or judicial decision. *Id.* at 13. It claimed the economic effects of congressional control are too "diffuse and unpredictable" to warrant hedging or price-basing. *Id.* at 16. That logic is demonstrably flawed on at least three levels.

75. For one, certain effects of congressional control are *not* diffuse. Think of a consulting firm with deep ties to one party. Congressional control by the other party would directly harm its business. The Congressional Control Contracts would allow it to hedge against that risk, and it would allow others to more accurately determine the economic value of that firm. The public comments are full of real examples of assets and markets where a direct link to electoral outcomes has been demonstrated.

76. For another, it is simply wrong to say that "diffuse" risks do not justify hedging or permit price-basing. The purpose of hedging is to mitigate *risks*, not (like insurance) to offset precise losses. That is why award-winning economists submitted comments explaining the hedging value of election contracts; it is why a managing director at a leading investment bank commented that he regularly assists clients with hedging election risk; and it is why a host of commenters from a wide range of industries (from cannabis to green energy) affirmatively stated they would use Kalshi's contracts to hedge risk. For all of the same reasons, the market's ability to aggregate information about the likelihood of election results would allow that data to play a role in determining prices for assets that face particular political risks (*e.g.*, oil companies or cryptocurrency firms). The Commission rejected all this evidence without explanation, resting on its own say-so in the face of concrete contrary proof.

77. For a third, financial products (including event contracts) are often used to hedge "diffuse" risks. Consider futures based on a price volatility index (VIX), which measures expected market volatility using S&P 500 options contracts. It is hard to imagine anything more "diffuse." But volatility is associated with economic risks, which is why derivatives are offered and traded based on it (including on the Chicago Mercantile Exchange, a large and well-established derivatives exchange).

78. In short, even if "economic purpose" were a legally appropriate inquiry, it was irrational for the Commission to subject election event contracts to a uniquely higher showing of economic purpose than other event contracts.

79. The CFTC next accused Kalshi of undermining American democracy. Parroting six Senators who submitted comments, the Commission intoned that the contracts threaten to "'profoundly undermine the sanctity and democratic value of elections.'" *Id.* at 19. Why? Because someone might vote for a candidate he despises in a Quixotic bid to swing settlement of a contract on control of Congress. *Id.* at 20. That is unsubstantiated: The CFTC can point to no example of such behavior despite the prevalence of prediction markets both in the United States and abroad. It is also implausible: Why would anyone buy a contract favoring a party they *oppose* and then bootstrap that purchase to change their voting intentions?

80. Worse yet, the Commission warned, malicious actors might "spread misinformation" to "manipulate the market in the Congressional Control Contracts." *Id.* True, in an environment with "unregulated" "informational sources"—*i.e.*, a free society—lies are unavoidable. But that is already true; there are already enormous

incentives to engage in political dirty tricks. The Commission's ploy to link Kalshi's contracts to the bogeyman of "misinformation" is feeble—consisting of a single blog post expressing "worri[es]" about fake polling companies. *See id.* at 22 n.39.

81. The Commission's supposed fears about election integrity also ignore the reality that businesses and individuals *already* face economic risks associated with elections. Political spending on the 2020 federal elections reportedly exceeded $14 billion. Elections matter; individuals and businesses already act accordingly. Allowing event contracts based on electoral outcomes would not increase the risks of manipulation; if anything, it would decrease them by allowing the risks associated with elections to be hedged. And the existence of a neutral, market-driven measure of public opinion would likewise reduce the threat of fake polls and disinformation. Contract markets create a financial incentive to separate the wheat from the chaff in political discourse, and limit the salience of any particular piece of "fake news."

82. Venturing even deeper into the realm of speculation, the Commission offered a final reason to ban Kalshi's contracts: the prospect of playing "'election cop.'" *Id.* at 23. The Commission fretted that approving these contracts might one day force it to "investigat[e] election-related activities—potentially including the outcome of an election itself." *Id.* at 22. Once again, the Commission's rationale proves too much. The CFTC already regulates countless derivatives markets involving commodities over which the agency lacks independent expertise or authority. For example, the CFTC oversees trading in futures contracts on the S&P 500. Yet the Commission does not regulate *stocks*; that is the job of the Securities and Exchange Commission,

which the CFTC relies on to prevent manipulation of the underlying market. Likewise, it is the role of the Federal Election Commission and numerous state and federal regulators to supervise the integrity of elections. They already take that responsibility incredibly seriously, as they should. Event contracts based on political outcomes would not somehow change that, or thrust this role onto the CFTC.

CLAIMS

Violation of APA

83. Kalshi realleges all prior paragraphs.

84. The APA provides that the Court "shall ... hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C).

85. The CFTC is an "agency" under the APA, *id.* § 551(1), and the Order is a final, reviewable "agency action for which there is no other adequate remedy in a court," *id.* § 704. The Order represents the consummation of the CFTC's decision-making process with respect to Kalshi's Congressional Control Contracts.

86. Kalshi has been adversely affected or aggrieved by the CFTC's Order and therefore can sue under the APA. *Id.* § 702.

87. The Order exceeds the Commission's statutory authority, is contrary to law, and is arbitrary and capricious.

88. The Order fundamentally misconstrues every relevant statutory term. To start, it misconstrues § 7a-2(c)(5)(C)(i) to authorize public-interest review anytime *trading in* the contract would *amount to* an enumerated activity. But the only reading

of the provision that makes sense as applied to all the listed activities is that an event contract "involves" illegal activity, terrorism, assassination, war, or gaming only if its settlement is contingent on the *occurrence* of such an event. The events underlying the Congressional Control Contracts do not "involve" any of those activities.

89. The Order compounds its error by distorting the two enumerated categories that it invokes. *First*, it converts the "gaming" category from a narrow but important limit on using derivatives markets to bet on *games* into an all-purpose tool for banning any event contract. *Second*, the Order construes the "unlawful activity" category in a way that empowers state legislatures to dictate the legality of event contracts, even though the CEA preempts state laws insofar as they interfere with the Commission's exclusive jurisdiction over derivatives markets.

90. The Commission's misreadings of the CEA arrogate authority found nowhere in the statute, enabling the agency to review and reject a potentially vast array of event contracts—indeed, potentially *all* of them. Any interpretation that gives the Commission *carte blanche* to reject any event contracts it wishes cannot seriously be defended as consistent with the CEA's text, purpose, or structure.

91. The Order again employs faulty and overreaching reasoning to deem Kalshi's contracts "contrary to the public interest." Here, too, the Order concocts a test that has no basis in the statute and proceeds to misapply it. Ignoring the record evidence of private and public benefits associated with political event contracts, the Order traffics in rank speculation about their supposed harms. It offers rationales that are untethered to the statutory purpose and would prove far too much.

92. The CEA entitles Kalshi to list its Congressional Control Contracts for trading on its market. The contracts do not "involve" any of the activities enumerated in § 7a-2(c)(5)(C)(i), and are therefore not subject to public-interest review. And in any event, Kalshi's contracts are not "contrary to the public interest."

93. Accordingly, the Court should vacate the Order.

PRAYER FOR RELIEF

Now, therefore, Kalshi requests a judgment in its favor as follows:

1. Vacating the Order;

2. Declaring that Kalshi's Congressional Control Contracts can be listed;

3. Awarding reasonable attorneys' fees and costs, plus interest accruing thereon, under 28 U.S.C. § 2412; and

4. Granting such other relief as the Court may deem appropriate.

Dated: November 1, 2023

Respectfully submitted,

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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

Memorandum in Support of Motion for Summary Judgment

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff KalshiEx LLC (Kalshi) operates a regulated exchange that allows the purchase and sale of event contracts. Event contracts entitle purchasers to payment based on whether particular events occur. Similar to futures and other derivatives, these instruments are tools to hedge risks; they also harness the "wisdom of crowds" to generate reliable predictive data. Under the Commodity Exchange Act (CEA), event contracts are presumptively permissible for trading on regulated exchanges. The Commodity Futures Trading Commission (CFTC or Commission) may prohibit an event contract only if it (1) "involve[s]" unlawful activity, terrorism, assassination, war, gaming, or a "similar activity" specified by regulation, *and* (2) is determined by the CFTC to be "contrary to the public interest." 7 U.S.C. § 7a-2(c)(5)(C)(i).

In June 2023, Kalshi sought to list event contracts on whether a particular party will control the House of Representatives or the Senate on a particular date (Congressional Control Contracts). Because those contracts do not "involve" unlawful activity, terrorism, assassination, war, gaming, or any similar activity that the CFTC has specified by regulation, the Commission had no power to prohibit them. Nor are they contrary to the public interest in any event. Quite the opposite. Uncertainty surrounding political events poses economic risks—no less than uncertainty over oil supply, hurricanes, or pandemics. As hundreds of academics, business owners, and former CFTC officials thus explained in formal comments, the Congressional Control Contracts would enable hedging against economic risks associated with partisan control of Congress while generating valuable predictive data.

Nevertheless, the CFTC prohibited Kalshi from listing its contracts. Its Order contorts and misapplies the CEA's text, ignores its structure and purpose, allows a narrow exception to swallow the rule, and engages in faulty, unsupported reasoning. It is unlawful and must be vacated for three independent reasons.

First, in concluding that Kalshi's contracts "involve" enumerated activities, the Commission misunderstood the meaning of that word in this statutory framework. An event contract "involves" an enumerated activity if its *underlying event* is or closely relates to that activity. For example, a contract contingent on a terrorist attack on American soil would "involve" terrorism. That intuitive interpretation of "involve" makes sense of every enumerated activity—and plainly does not reach the contracts here. The CFTC instead claimed it can ban an event contract if *trading* on the contract would *amount to* "gaming" or "unlawful activity." But that construction violates basic interpretive principles: It attributes disparate meanings to a single statutory term. It renders the other listed activities superfluous. It upends exclusive federal jurisdiction over regulated exchanges. And it ultimately flips the statute's default rule by subjecting *all* event contracts to public-interest scrutiny.

Second, even if the Commission were empowered to ban event-contract trading that would amount to "gaming" or "unlawful activity," trading on the contracts here would not. Elections are not games, so trading contracts on them is not "gaming." Nor does the "unlawful activity" category empower States to ban event contracts through their gambling statutes. Again, the Commission's broader interpretations of these terms would swallow both the rule and the other enumerated exceptions.

Finally, even if the Congressional Control Contracts were properly subject to public-interest scrutiny, the CFTC's analysis was arbitrary and capricious. The Commission dismissed comments from renowned economists, investors, and business owners, all of whom confirmed the concrete, real-world hedging benefits of Kalshi's contracts. It instead improvised heightened requirements that misunderstand how risk hedging works—and ignored the evidence that Kalshi's contracts meet even that test. On the other side of the ledger, the Commission merely offered unfounded and implausible speculation about election integrity, as if the Congressional Control Contracts *create* economic exposure to electoral outcomes rather than *reflect* it.

In short, the CFTC's decision to prohibit Kalshi's contracts contradicts both the statute and the record. This Court should vacate the challenged Order.

BACKGROUND

A. Event Contracts Are Established Tools for Hedging Risks and Aggregating Information.

Derivatives are tools to mitigate risk. *See* Administrative Record (AR) at 37, 101; *see also* Steven Nickolas, *How Can Derivatives Be Used for Risk Management*?, Investopedia (Sept. 29, 2022). Event contracts—which are a form of derivative—fit that mold. *See* AR 37–40, 101. They are financial instruments that specify a future event with different potential outcomes, a payment structure for those outcomes, and a date when the contract expires. *See* AR 27–28, 3163. These contracts typically center on a yes-or-no question—*e.g.*, whether 30-year mortgage rates will exceed 8% at the end of the year, or whether average temperatures in California will hit an all-time high by the end of the summer.

The buyer of an event contract takes a "yes" position on whether its underlying event will occur. For every such purchase, a counterparty (or seller) implicitly takes a "no" position. AR 28. An event contract can typically be bought or sold at a price between 1¢ and 99¢. AR 27. At the contract's expiration, the seller must pay the buyer $1 if the underlying event occurs, and $0 if not. AR 28, 33. Contracts can be bought or sold at any time before their expiration. AR 33. Until that date—*i.e.*, while it remains uncertain whether the event will occur—the contract price will fluctuate. *See* AR 28. Event contract prices, like stock prices, are determined by market forces, not set by the exchange on which the contracts or stocks are traded. *See* AR 58, 1398. Traders arrive at those prices based on all available information at the time of the transaction. *See* AR 27–28, 1479. As a result, the prices of event contracts reflect the market's real-time probabilistic belief about whether the underlying event will occur. AR 1398, 1479.

Event contracts give traders direct exposure to the economic ramifications of real-world events. AR 1478. Although traders can (and do) use many other financial instruments to capture related economic forces, few can do so as precisely as an event contract. For example, a trader can purchase a futures contract on the S&P 500 stock index to take a position on whether the national economy will grow, as movement in that index tends to correlate with movement in GDP. But that would be an imprecise way to address whether the next GDP report will actually show economic growth. An event contract on the next GDP announcement can provide that targeted exposure.

Businesses and individuals use event contracts—like other derivatives—to hedge against the risk of an event happening. *E.g.*, AR 1528. For example, a beachfront property owner might buy contracts predicting that a hurricane will make landfall nearby, because the payout from those contracts could offset economic losses the owner is likely to incur if a storm hits. Such an event contract is distinct from—and serves a different function than—an insurance policy. The property owner could buy insurance to cover damage actually incurred from a storm. But unlike an event contract, that policy would not hedge the risk of other losses associated with a hurricane hitting, such as lost rental revenues or higher costs of food and water. Of course, not everyone who trades an event contract is hedging risk—some simply seek a return. That is true of all derivative markets; indeed, a robust market depends in part on the liquidity provided by speculators. *See, e.g.*, AR 1310, 2748.

Beyond their hedging benefits to businesses and individuals, event contracts also generate informational value for the public. AR 1392–93, 1550–52, 2991–93. As explained, traders' expectations determine the contract price, which reflects the market's collective view of the odds that an event will occur. Prediction markets thus serve as high-powered and highly effective information-aggregation tools, generating insights for researchers, businesses, individuals, and governments. *See, e.g.*, AR 1444, 1528, 1550. The resulting data about the market's perception of the event's likelihood can be used, in turn, to determine prices for assets whose value depends on the occurrence of the event; this is known as "price-basing." AR 1550, 3006–08.

B. Political Event Contracts Allow for Hedging of Political Risk and Collection of Valuable Predictive Data.

Politics—no less than economic trends or weather—is beset with uncertainty. AR 1550, 2990. And political events—no less than recessions or droughts—can have vast economic consequences. AR 2990–93. To quote Harvard Professor Jason Furman, former Chairman of President Obama's Council of Economic Advisors: "Congressional control impacts legislation, policy, and the business environment in ways that have direct economic consequence to businesses and workers. This risk is conceptually identical to climate risk, business interruption risk, and other similar risks that can and should be managed using the financial markets." AR 1551.

Large financial institutions design bespoke derivatives for corporate customers and wealthy individuals to hedge against risks associated with political events. *See, e.g.*, AR 3367. For example, they used complex structured products to prepare for Brexit, the 2016 election, and other world-changing political events. AR 1404, 1422, 1598. But many individuals and businesses lack access to these specialized instruments. Political event contracts help level the playing field.

They also have other benefits. Better information about the likelihood of political events helps individuals to structure their lives, businesses to manage their affairs, and officials to make policy. AR 1549. It also helps to determine prices for assets exposed to political risk. AR 3367. But traditional polls and other methods of measuring public attitudes often cannot replicate the real-time responsiveness or neutrality of market data. AR 1452–53, 1556. That is why media outlets routinely rely on event markets when reporting on political developments. AR 1495.

For all of these reasons, markets for political event contracts are widespread. PredictIt, for example, "is a futures market for politics" that allows trading on electoral outcomes. *Clarke v. CFTC*, 74 F.4th 627, 633 (5th Cir. 2023). CFTC staff have long permitted it to operate under a no-action letter (although there is now active litigation arising from the Commission's recent efforts to rescind it). *See id.* at 633–44. The University of Iowa's IEM platform is another well-known market for political event contracts, one the CFTC has likewise permitted for decades. AR 73, 1509, 3008. Similar markets exist (and have long existed) in other countries around the world. *See, e.g.*, AR 1416. And unregulated, illegal markets—which lack the safeguards of regulated exchanges like Kalshi's—provide analogous services online and offshore. *See, e.g.*, AR 1752, 1822.

C. Congress Allows Regulated Exchanges To List Event Contracts, Subject to a Narrow List of Exceptions.

Under federal law, "[e]vent contracts" are regulated as "agreements, contracts, transactions, or swaps in excluded commodities." 7 U.S.C. § 7a-2(c)(5)(C)(i). While agricultural products like "wheat, cotton, rice, corn, [and] oats" are the most familiar commodities, the CEA defines "excluded commodities" to include non-tangible items like interest rates, certain financial instruments, economic indices, and risk metrics. *Id.* § 1a(9), (19)(i)–(iii). Relevant here, "excluded commodities" also include *events*—in the statutory parlance, any "occurrence, extent of an occurrence, or contingency" that is "beyond the control of the parties to the relevant contract" and "associated with" economic consequences. *Id.* § 1a(19)(iv).

An entity must seek and receive CFTC designation as a regulated exchange to offer event contracts or other derivatives broadly for public trading. *Id.* §§ 2(e), 7(a); 17 C.F.R. § 38.100. The CFTC has "exclusive jurisdiction" over derivatives traded on regulated exchanges. 7 U.S.C. § 2(a)(1)(A). Exchanges are subject to comprehensive oversight and must comply with requirements governing recordkeeping, reporting, liquidity, system safeguards, conflicts of interest, disciplinary procedures, market surveillance, compliance resources, and more. *Id.* § 7(d); 17 C.F.R. pt. 38.

While event contracts are presumptively lawful, *see* 7 U.S.C. § 7a-2(c)(5)(B), Congress in 2010 amended the CEA to prohibit event contracts if they (i) fall within certain narrow categories and (ii) are "determined by the Commission to be contrary to the public interest," *id.* § 7a-2(c)(5)(C)(i)–(ii). The Commission may undertake a public-interest review *only* if the contract "involve[s]": "activity that is unlawful under any Federal or State law," "terrorism," "assassination," "war," "gaming," or "other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest." *Id.* § 7a-2(c)(5)(C)(i). Unless the contract involves one of those activities, the CFTC has no public-interest determination to make.

Consistent with the CEA's text, then, the process for reviewing event contracts proceeds in two basic steps: *First*, the CFTC must determine whether the contract "involve[s]" one of the enumerated "activit[ies]." *Id.* § 7a-2(c)(5)(C)(i). If not, the Commission must allow the contract to be listed without further scrutiny. *Second*, if the contract does "involve" a listed activity, the CFTC "may determine" that it is "contrary to the public interest" and, if so, bar its listing. *Id.*

The Commission has promulgated an implementing regulation that largely mirrors the statute: An exchange "shall not list for trading" any event contract "that involves, relates to, or references terrorism, assassination, war, gaming, or an activity that is unlawful under any State or Federal law," or "an activity that is similar to an [enumerated] activity … that the Commission determines, by rule or regulation, to be contrary to the public interest." 17 C.F.R. § 40.11(a)(1)–(2). But the CFTC has not exercised its authority to determine, "by rule or regulation," that a contract involving any activity "similar" to the five enumerated ones is "contrary to the public interest." 7 U.S.C. § 7a-2(c)(5)(C)(i)(VI). As a result, public-interest scrutiny applies only if a contract "involves" unlawful activity, terrorism, assassination, war, or gaming.

D. Kalshi Proposes To List the Congressional Control Contracts.

Kalshi is a regulated exchange that allows the public to buy and sell event contracts. Kalshi seeks to democratize investing opportunities once restricted to large corporations and the super-rich. The CFTC unanimously authorized Kalshi to operate its exchange in 2020. *See* AR 1314. Contracts traded on Kalshi's exchange involve events that run the gamut from economics to climate, public health, and transportation—*e.g.*, the number of major hurricanes that will form over the Atlantic next year, or whether China's GDP growth will exceed a certain rate. AR 1314, 1394, 1405. Kalshi also lists contracts that involve political events, *e.g.*, whether the federal government will shut down, whether the debt ceiling will be lifted by a deadline, and whether particular nominees will be confirmed by the Senate. *See Events*, Kalshi, https://kalshi.com/events.

This case involves Congressional Control Contracts, which enable buyers to take positions on which political party will control the House of Representatives or the Senate on a particular future date. AR 26, 32. These are cash-settled, yes/no contracts based on the question: "Will <chamber of Congress> be controlled by <party> for <term>?" The contract defines control by reference to the party affiliation of the Speaker (for the House) or President Pro Tempore (for the Senate). AR 27. To avoid potential conflicts of interest, the contracts' terms prohibit certain individuals and institutions from purchasing them (including candidates for office; paid employees of Members of Congress, congressional campaigns, party organizations, PACs, Super PACs, or major polling organizations; existing Members of Congress; and household and immediate family members of the above). AR 35.

On June 12, 2023, Kalshi certified to the CFTC that the Congressional Control Contracts comply with applicable law. AR 26. That certification enables a regulated exchange to list a contract for trading. 7 U.S.C. § 7a-2(c)(1). But a split Commission chose to initiate a review of the contracts and thereby suspend the listing of the contracts. *See id.* § 7a-2(c)(2). In announcing its review, the CFTC indicated that the Congressional Control Contracts may involve an enumerated activity. AR 148. Two Commissioners dissented, with one expressly observing that the contracts did "not fall within the categories enumerated in the CEA." Mersinger Dissenting Statement, CFTC.gov (June 23, 2023), https://www.cftc.gov/PressRoom/SpeechesTestimony/mersingerstatement062323; Pham Dissenting Statement, CFTC.gov (June 23, 2023), https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement062323.

During the ensuing public comment period, academics, businesses, investors, former CFTC and SEC officials, human-rights activists, and nonprofits all expressed support for the Congressional Control Contracts.[1] Most commenters attested to the economic and informational value of political event contracts generally and the Congressional Control Contracts specifically.[2] And many attested that they would actually buy Congressional Control Contracts to hedge risk.[3] Overall, the comments reinforced that Congressional Control Contracts are not merely legal—and therefore must be approved for trading—but also have significant societal value.

E. The CFTC Issues an Order Rejecting Kalshi's Contracts.

On September 22, 2023, the CFTC issued an order (the Order) prohibiting Kalshi from listing its Congressional Control Contracts. AR 1–23 (Order). Commissioner Mersinger again dissented. Mersinger Dissenting Statement, CFTC.gov (Sept. 22, 2023), https://www.cftc.gov/PressRoom/SpeechesTestimony/mersingerstatement092223. Commissioner Pham abstained, citing the CFTC's recent defeat in its litigation against PredictIt. *See Clarke*, 74 F.4th 627; *see also* Pham Abstention Statement, CFTC.gov (Sept. 22, 2023), https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement092223.

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[1] *See, e.g.*, AR 1312–23, 1378–79, 1380–82, 1388–90, 1392–1403, 1404–05, 1443–45, 1448–53, 1474–75, 1477–81, 1527–29, 1537–38, 1541–45, 1549–52, 1555–57, 1558–60, 1573–78, 1584–85, 1602, 1616–23, 1744, 1745–46.

[2] *See, e.g.*, AR 1413–41, 1474–75, 1477–81; 1527–29, 2277–345.

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

In the Order, the Commission correctly observed that it "may determine that contracts in certain excluded commodities … are contrary to the public interest if the contracts involve" any of the enumerated activities. Order at 3. But it then went on incorrectly to find that Kalshi's Congressional Control Contracts are subject to public-interest review because they "involve" two enumerated activities: "gaming" and "unlawful" activity. *See* 7 U.S.C. § 7a-2(c)(5)(C)(i)(I), (V).

In so finding, the Commission did not (and could not) determine that elections are themselves "gaming" or unlawful activity. Rather, the Commission reasoned that a contract "involve[s]" those enumerated activities if *trading on the contract* would *amount to* "gaming" or unlawful activity. *See* Order at 5–7. The Commission then declared that trading these contracts would amount to gaming and unlawful activity, relying on dictionary definitions and state statutes that broadly define "gambling" to include staking money on the outcome of any "game, contest, or contingent event." *Id.* at 8. Finally, having found that the Congressional Control Contracts were subject to public-interest review, the Commission determined that they were "contrary to the public interest" because they supposedly had no legitimate economic purpose and would threaten election integrity. *Id.* at 13–23.

Kalshi then filed this lawsuit under the Administrative Procedure Act (APA), asking this Court to vacate the Order because it "exceeds the Commission's statutory authority, is contrary to law, and is arbitrary and capricious." Compl. ¶¶ 83–93, ECF 1 (Nov. 1, 2023). Kalshi now moves this Court to grant summary judgment in its favor. Fed. R. Civ. P. 56.

LEGAL STANDARD

Summary judgment based on the administrative record is the "appropriate mechanism to resolve an APA challenge to agency action." *Ludlow v. Mabus*, 793 F. Supp. 2d 352, 354 n.1 (D.D.C. 2011). A court must "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "in excess of statutory … authority." 5 U.S.C. § 706(2)(A), (C). In so doing, the court must "interpret … statutory provisions" for itself and "decide all relevant questions of law." *Id.* § 706. "The APA's arbitrary-and-capricious standard requires that agency [actions] be reasonable and reasonably explained." *Nat'l Tel. Co-op. Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009).

ARGUMENT

This Court should vacate the Commission's Order and declare that Kalshi may list its Congressional Control Contracts for trading. The CEA requires the CFTC to first assess whether an event contract falls into one of the discrete categories listed in the statute; if it does not, no public-interest review applies. Kalshi's contracts are not subject to public-interest review because they do not "involve" any of the enumerated activities. Those activities describe *events* that could *underlie* a contract, not the act of *trading on the contract itself*. And since partisan control of Congress does not "involve" terrorism, assassination, war, gaming, or unlawful activity, Kalshi is entitled to list its contracts—period. The statute is unambiguous on these points once traditional tools of statutory construction are applied, as they must be. *See, e.g.*, *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 781–82 (D.C. Cir. 2012).

In concluding otherwise, the Commission first adopted an untenable reading of "involve" that changes, chameleon-like, based on the category of activities at issue. It then misconstrued the two activities it invoked, converting the "gaming" exception into an a justification for scrutinizing *any* event contract and the "unlawful activity" exception into an invitation for 50 state legislatures to upend an exclusively federal regime. None of that is consistent with the statute. Under a proper reading of the CEA, Kalshi's contracts are not subject to public-interest review at all.

The CFTC's public-interest analysis was arbitrary and capricious in any event. It employed a legally misguided standard. And, under that erroneous standard, the Commission trumpeted unsubstantiated, implausible speculation about the alleged perils of the Congressional Control Contracts, while ignoring the record evidence of their demonstrated economic and social benefits.

I. THE ORDER IS PREMISED ON A LEGAL ERROR AS TO WHEN EVENT CONTRACTS "INVOLVE" AN ENUMERATED ACTIVITY.

Contracts contingent on congressional control do not "involve" "terrorism," "assassination," "war," "gaming," or "unlawful" activity. 7 U.S.C. § 7a-2(c)(5)(C)(i). Elections do not constitute—or even relate to—any of those things. Accordingly, the CFTC has no power to review (much less ban) the Congressional Control Contracts. Concluding otherwise, the CFTC reasoned that an event contract "involves" certain enumerated activities (but not others) if *buying or selling it* would "amount[] to" one of those activities. Order at 7 n.19. That convoluted reading flunks basic canons of statutory interpretation. And the Commission's criticisms of the common-sense, event-focused reading are meritless. That alone should be the end of this case.

A. The Commission's Shifting Interpretation of "Involve" Is Wrong.

The meaning of the word "involve" is context-dependent. Dictionaries typically offer a range of possible definitions. *See, e.g.*, *Involve*, *American Heritage Dictionary* 921 (4th ed. 2009) ("[t]o contain as a part; include"; "[t]o have as a necessary feature or consequence"; "[t]o engage as a participant"; etc.); *see also Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1009–10 (7th Cir. 2002) ("[D]ictionary definition[s] of 'involve' demonstrate[] the many levels of participation that could constitute involvement."). As a result, context is crucial to identifying the word's meaning in a particular statute or framework. *See Boim*, 291 F.3d at 1010; *NexPoint Diversified Real Est. Tr. v. Acis Cap. Mgmt., L.P.*, 80 F.4th 413, 419 (2d Cir. 2023).

Consider, for example, a theater that requires parents to accompany minors under 13 to any screening that "involves" violence or drug use. In context, the policy obviously refers to the content of the underlying film. The theater is not saying that parents must be present if the minors plan to use drugs or beat each other up during the movie, even though that interpretation may be semantically possible.

Here too, context makes clear that an event contract "involves" an enumerated activity when the *underlying event* constitutes or relates to that activity. That is the only reading of "involve" that works across all categories of enumerated activities. The Commission's contrary interpretation—which asks whether *trading the contract* amounts to the enumerated activity—makes no sense as applied to most of the listed activities. And, more broadly, it is inconsistent with the CEA's structure and purpose because it allows the exceptions to swallow the rule (and each other).

1. Consistent Meaning. The natural, event-focused interpretation is the only reading of "involve" that makes sense of every enumerated category. Indeed, as applied to three of the five extant activities—terrorism, assassination, and war—it is the *only* reading. An event contract "involve[s] … terrorism" if the underlying event is or relates to a terrorist attack. 7 U.S.C. § 7a-2(c)(5)(C)(i)(II). A contract "involve[s] … assassination" if the underlying event is or relates to the murder of a public official. *Id.* § 7a-2(c)(5)(C)(i)(III). And a contract "involve[s] … war" if the underlying event is or relates to a military campaign. *Id.* § 7a-2(c)(5)(C)(i)(IV). The CFTC's "amounts to" reading does not work with any of these activities, because buying or selling an event contract can *never* "amount to" terrorism, assassination, or war. As to the terrorism, assassination, and war exceptions, the word "involve" can therefore *only* refer to the event underlying a contract.

That event-focused reading fits the remaining enumerated categories, too. The "gaming" category reaches contracts contingent on *games*—for example, whether someone will win the Powerball lottery by a certain date, or whether a certain team will win the Super Bowl. It thus functions as a check on attempts to launder casino-style or sports gambling through the derivatives markets. *Id.* § 7a-2(c)(5)(C)(i)(V); *see also infra* at 22–23. The unlawful-activity category captures contracts contingent on illegal acts—for example, whether a company will defraud investors, or whether a famous painting will be stolen. It thus functions as a check on contracts that could incentivize crime. *Id.* § 7a-2(c)(5)(C)(i)(I). All of that makes perfect sense, and gives the word "involve" a consistent and coherent meaning across all applications.

The Order does not dispute that terrorism, assassination, and war require an event-focused interpretation of "involve." Instead, it adopts a different interpretation of the very same word as applied to the "gaming" and "unlawful" activities. For those (and only those) categories, the Commission posits, "involve" refers to the act of *buying or selling* the contract, not the contract's *event*. *See* Order at 7 n.19.

That shape-shifting approach ignores the basic rule of statutory construction that "identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007). If a term's "meaning is clear as used in one place, it will be construed to have the same meaning in the next place." *Brown v. NHTSA*, 673 F.2d 544, 546 n.5 (D.C. Cir. 1982). That presumption applies even where a term appears across different sections of an act. *See Sullivan v. Stroop*, 496 U.S. 478, 484 (1990). And it hardens as the gap between appearances shrinks. *See, e.g.*, *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) (same section); *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (observing that "presumption [is] surely at its most vigorous when a term is repeated within a given sentence"); *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 455–56 (2012).

Not surprisingly, the consistent-meaning canon is most potent as to "a *single* formulation," which must mean the same thing "each time it is called into play." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). Consistent with that principle, courts "refuse to adopt a construction that would attribute different meanings to the same phrase in the same sentence, depending on which object it is modifying." *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 329 (2000). For example, the Supreme Court

"reject[ed] as unreasonable" a construction of "the phrase 'other than' to mean one thing when applied to 'banks' and another thing as applied to 'common carriers'" when the phrase "modifies both words in the same clause." *Bankamerica Corp. v. United States*, 462 U.S. 122, 129 (1983). Similarly, it rejected a construction of the "phrase 'abridging the right to vote on account of race or color' [to] mean[ ]" one thing "when it modifies 'effect,' but [to] mean[ ]" something else "when it modifies 'purpose.'" *Reno*, 528 U.S. at 329. In these cases and others, the Court has recognized that, where a term "applies without differentiation to all … categories … that are its subject," giving the term "a different meaning for each category would … invent a statute rather than interpret one." *Clark v. Martinez*, 543 U.S. 371, 378 (2005).

The Order flouts that bedrock interpretive principle. Rather than read "a *single* formulation … the same way each time it is called into play," *Ratzlaf*, 510 U.S. at 143, the CFTC gives "involve" a "different meaning for each category" of enumerated activities, *Clark*, 543 U.S. at 378. A contract "involves" terrorism, assassination, or war if the contract is contingent on its occurrence. But a contract "involves" gaming or unlawful activity if *purchasing* it would *amount to* that activity. The Commission's interpretation of "involve" must fail for that reason alone.

2. Context. Statutory context confirms that conclusion. Courts interpret provisions "with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989); *Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699, 708 (D.C. Cir. 2009). And statutory components should be construed to work "in harmony" rather than "at cross-purposes." *Jones v. Hendrix*,

599 U.S. 465, 478 (2023); *James Madison Ltd. ex rel. Hecht v. Ludwig*, 82 F.3d 1085, 1093 (D.C. Cir. 1996). Accordingly, courts refuse to construe discrete exceptions in a way that would "read out the rule." *United States v. Slatten*, 865 F.3d 767, 807 (D.C. Cir. 2017); *Comm'r v. Clark*, 489 U.S. 726, 739 (1989). Yet the Order's inconsistent "amounts to" gloss would work "at cross purposes" with the rest of the CEA and, indeed, upend the statutory scheme in at least two different ways.

First, the default under the CEA is that regulated exchanges may list event contracts without special scrutiny. 7 U.S.C. § 7a-2(c)(5)(B) (requiring CFTC approval "unless" contract would violate statute or regulations). As discussed below, however, the Order defines "gaming" to mean staking money on any "contingent event." Order at 8 & n.21–22; *see infra*, Part II.A. Yet, by definition, anyone who trades an event contract is staking money on a contingent event. 7 U.S.C. § 1a(19)(iv) ("commodity" includes any "occurrence, extent of an occurrence, or contingency" that is "beyond the control of the parties" and "associated with" economic consequences). As a result, the Order's interpretation of "involve" (at least when combined with its interpretation of "gaming") affords the CFTC a roving mandate to review—and potentially to ban—*any* event contract. That flips the statutory default, dramatically expanding the CFTC's own power and transforming an orderly regime of narrow exceptions into an across-the-board public-interest test. It thus improperly swallows both the rule and the other carefully enumerated categories. *See United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 432 (2023) (articulating the "interpretive principle that every clause and word of a statute should have meaning").

Second, the act-of-trading approach makes a hash of the "unlawful activity" exception too. Congress had no need to authorize public-interest review of contracts whose trading is already illegal under *federal* law. And if a *State* tried to ban trading in event contracts, its law would be preempted by the CFTC's "exclusive jurisdiction" over derivatives markets. 7 U.S.C. § 2(a)(1)(A); *see also Leist v. Simplot*, 638 F.2d 283, 322 (2d Cir. 1980) (Friendly, J.) (explaining that CEA "preempts the application of state law" for regulated markets); *Am. Agric. Movement, Inc. v. Bd. of Trade*, 977 F.2d 1147, 1156 (7th Cir. 1992) (CEA preempts "application[s] of state law [that] would directly affect trading on or the operation of a futures market"); *Bibbo v. Dean Witter Reynolds, Inc.*, 151 F.3d 559, 563 (6th Cir. 1998). So taken at face value, the CFTC's interpretation of "involve" would leave the "unlawful activity" exception "with no work to perform"—another violation of the presumption against superfluity. *Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 698 (2022).

Alternatively, reading "involve" to turn the "unlawful activity" exception into a backdoor way for States to effectively reverse-preempt the CEA would improperly short-circuit exclusive federal regulation of event contracts. *But see Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989) (applying presumption against "making the application of [a] federal act dependent on state law"). It would also invite confusion by making an indeterminate nationwide survey of 50 state laws a prerequisite for review of any event contract. These contextual difficulties, like the others, are readily avoided by adopting the simple, intuitive, consistent, event-focused interpretation of "involve" that makes sense of the entire scheme.

B. The Order's Attacks on the Event-Based Reading Are Meritless.

The Order attempts to justify its inconsistent, convoluted reading of "involve" by criticizing the simpler, event-focused interpretation. But neither of its arguments holds water. Indeed, both rest on demonstrably false premises.

1. Other Statutory Uses. The Order first asserts that "involve[s]" must mean something broader than "based on" because the CEA uses the latter (or the term "underlying") when referring to a contingent event or commodity on which a contract is based. Order at 6. But in fact, Congress used all three of those terms—"involves," "based on," and "underlying"—in different ways across different contexts. Most relevant here, the CEA repeatedly *does* use "involve" to refer to the underlying commodity or subject of a contract or transaction.[4] That is fully consistent with the natural event-focused reading of the term. Meanwhile, when Congress in the CEA wished to say that one act *amounts to* another, it said so *without* using the word "involve."[5] The broader statutory text thus disproves the Order's claim that the CEA always uses terms other than "involve" to refer to a contract's basis. (And of course, the Commission must concede that "involve" does *exactly that* as to the terrorism, assassination, and war categories. *See* Order at 7; *supra* at 16.)

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[4] *See, e.g.*, 7 U.S.C. §§ 2(c)(2)(D)(ii)(III)(aa) ("the typical commercial practice in cash or spot markets for the commodity *involved*"); 6c(b) ("transaction *involving* any commodity regulated under this chapter"); 15b(d)–(h) ("cotton *involved*" in contracts); 23(b)(1) ("transactions *involving* different commodities"); 2(a)(1)(D)(i) ("contracts[] and transactions *involving* … a security futures product") (all emphases added).

[5] *See* 7 U.S.C. § 25(a)(1)(D)(ii) (private right of action available where "violation *constitutes* … a manipulation of the price of [a] contract" (emphasis added)).

In any event, the Commission's assumption that "involve" must carry some broadening effect is entirely consistent with the event-focused reading of the text. A contract might "involve" an activity (even if it is not strictly "based on" that activity) if its underlying event is *closely tied* to an enumerated activity. For instance, a contract on whether the Ukrainian military will acquire certain munitions in 2024 might be said to "involve … war," even though its underlying event is not itself an act of war. A contract on whether a certain CEO will be arrested for fraud might be said to "involve" unlawful activity even though the arrest is not itself unlawful. In other words, Congress could have chosen the term "involve" to prevent *circumvention* through contracts that are based on events technically distinct from, but still closely related to, the enumerated activities. The intuition that "involve" is broader than some alternatives therefore does not warrant, let alone require, dramatically shifting the statute's focus from the *underlying event* to the *act of trading*.

2. Null Sets. The Order also posits that the "gaming" category would be "a null set" under an event-based interpretation of "involve," since no event contract's "underlying event, itself, is 'gaming.'" Order at 7 n.18. Here too, the premise fails. Consider a contract on whether someone wins the Powerball before a certain date. The lottery—a quintessential game of chance—forms the underlying contingency. Or consider contracts pegged to the outcome of the World Series of Poker or other gaming tournaments. Those are clearly contracts involving "gaming," and thus subject to public-interest review under a common-sense reading of the CEA. Indeed, according to the CFTC itself, the "gaming" category encompasses contracts based on sporting

events. *See id.* at 8. And contracts contingent on sports betting are not hypothetical. *See* CFTC Release No. 8345-20, *CFTC Announces Review of RSBIX NFL Futures Contracts Proposed by Eris Exchange, LLC* (Dec. 23, 2020) (contracts predicated on point spreads and total points in NFL games). The only relevant legislative history, moreover, confirms that contracts on "sporting events such as the Super Bowl, the Kentucky Derby, and Masters Golf Tournament" were *precisely* what Congress had in mind as "gaming" contracts. 156 Cong. Rec. S5907 (daily ed. July 15, 2010).

* * *

In sum, statutory context confirms that an event contract "involves" a listed "activity" if it is *contingent* on that activity. The CFTC's "amounts to" reading breaks fundamental rules of statutory interpretation and scrambles the CEA's structure and function. Because Congressional Control Contracts do not "involve" any enumerated activity under the proper construction of that term, this Court need go no further. Kalshi is entitled to list these contracts on its regulated exchange.

II. THE ORDER ALSO MISCONSTRUES THE "GAMING" AND "UNLAWFUL ACTIVITY" CATEGORIES.

Even under the Commission's erroneous "amounts to" reading of "involve," the Order's analysis still fails. Its overbroad definition of "gaming" would fundamentally alter the statutory scheme governing event contracts and render every other category superfluous. And its approach to "unlawful activity" is self-defeating, because States cannot—and have not purported to—ban federally regulated derivatives. Trading a Congressional Control Contract therefore does not "amount to" either "gaming" or a violation of state law. This legal error too requires vacatur of the Order.

A. Trading Congressional Control Contracts Does Not Amount to "Gaming."

To sweep the trading of Congressional Control Contracts into the "gaming" category, the Order reasons that (1) "gaming" means "gambling," which some statutes define to include staking money on the "outcome of a game, contest, or contingent event"; and (2) "taking a position in the Congressional Control Contracts would be staking something of value upon the outcome of a contest." *See* Order at 8–10. That logic hinges on an overbroad interpretation of "gaming" that cannot be squared with ordinary usage and is flatly foreclosed by statutory context.

1. Ordinary Meaning. To begin, the CEA says "gaming," not "gambling." And in plain English, "gaming" typically refers to "playing at games of chance for money." *Gaming*, *Concise Oxford English Dictionary* (11th ed., rev. 2008); *see also Gaming*, Merriam-Webster.com ("playing games for stakes"); *Game*, *New Oxford American Dictionary* (3d ed. 2010) ("games of chance for money"). "Gaming" is most closely associated with "casino gambling." *Gaming*, *American Heritage Dictionary* (4th ed. 2009); *see also Gaming*, *Cambridge Dictionary of American English* (2d ed. 2008) ("industry in which people gamble by playing cards and other games in casinos"). It can describe betting on other games too. *See gaming contract*, *Chambers Dictionary* (13th ed. 2014) ("a wager upon any game (eg a horse race or football match)"); *Gaming*, *Bouvier Law Dictionary* (2011 ed.) ("[a] contract to enter a game of skill or chance that one might win or lose"; parties "play a game with certain rules at cards, dice, or another contrivance"). But the common denominator, as the term's root itself suggests, is the existence of a *game*.

That is just as true in federal and state statutes as it is in common parlance. Federal statutes, the most relevant source for determining congressional intent, use "gaming" to refer to betting on *games*. *See, e.g.*, 25 U.S.C. § 2703(6)–(8) (defining "gaming" classes in Indian Gaming Regulatory Act). Indeed, the only federal statute that the Order cites to justify its sweeping reading of "gaming" never uses that term, except to cross-reference other laws (such as the Indian Gaming Regulatory Act). *See* 31 U.S.C. §§ 5361–5367. Congress instead used "bet or wager"—not "gaming"—to refer to "staking … something of value upon the outcome of a contest of others." *Id.* § 5362(1)(A). And it expressly *excluded* derivatives regulated under the CEA—like event contracts—from such "bet[s]" and "wager[s]." *Id.* § 5362(1)(E)(iv).

State legislatures likewise overwhelmingly use "gaming" and related terms to refer to playing or betting on *games*, not to encompass any staking of money on a contingency. *See, e.g.*, Iowa Code § 725.7(1) ("illegal gaming" means "[p]articipat[ing] in a game for any sum"); Mass. Gen. Laws ch. 23K, § 2 ("gaming" means "dealing, operating, carrying on, conducting, maintaining or exposing any game for pay").[6]

[6] *See also, e.g.*, Ark. Code. Ann. §§ 5-66-104 (prohibiting "gaming devices"), 5-66-106 (prohibiting "bet[ting] any money … on any game"); Cal. Bus. & Prof. Code § 19805(f) (defining "gambling" as "to deal, operate, carry on, conduct, maintain, or expose for play a controlled game"); Colo. Rev. Stat. Ann. § 44-30-103(22) (defining "gaming" as "physical and electronic versions of slot machines, craps, roulette, and the card games of poker and blackjack"); Conn. Gen. Stat. § 12-557b(6); Fla. Stat. §§ 849.01 (prohibiting any "gaming table or room, or gaming implements or apparatus, … for the purpose of gaming or gambling"); 849.08 (defining "gambling" as "play[ing] or engag[ing] in any game at cards … or other game of chance"); 720 Ill. Comp. Stat. 5/28-1(a)(1) ("A person commits gambling when he or she … plays a game of chance or skill for money"); Ky. Rev. Stat. § 238.505 (defining "charitable gaming" by reference to games of chance); La. Stat. § 27:205 (defining legal "gaming operations" and "gaming activities" as "the offering or conducting of any game or

Consistent with ordinary usage, federal law, and state law, "gaming" must therefore involve a *game*. Mere betting—in the absence of an underlying "game"—

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gaming device in accordance with" state law); Md. Code Ann., Crim. Law § 12-101(d)(1)(ii) (defining "gaming device" as "a game or device at which money … is bet, wagered, or gambled"); Miss. Code. Ann. § 75-76-5(*l*) ("'Gaming' or 'gambling' means to deal, operate, carry on, conduct, maintain or expose for play any game as defined in this chapter"); Mo. Rev. Stat. § 313.800(13) (defining legal "gambling game[s]" as "games of skill or games of chance on an excursion gambling boat"); Nev. Rev. Stat. §§ 463.0152 ("'Game' or 'gambling game' means any game played with cards, dice, equipment or any mechanical or electronic device or machine for money"); 463.0153 ("'Gaming' or 'gambling' means to deal, operate, carry on, conduct, maintain or expose for play any game as defined [by law]"); N.J. Stat. § 5:12-22 (defining "gaming" and "gambling" as "[t]he dealing, operating, carrying on, conducting, maintaining or exposing for pay of any game"); N.M. Stat. Ann. § 60-2E-3(P) (defining "gaming" as "offering a game for play"); N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 1301(20) (defining "gaming" and "gambling" as "dealing, operating, carrying on, conducting, maintaining or exposing for pay of any game"); N.C. Gen. Stat. § 14-292 (defining "gambling" as operating, playing, or betting on "any game of chance"); Ohio Rev. Code Ann. §§ 2915.02(A)(2) (defining illegal "gambling" by reference to "any game of chance"), 2915.01(D) (defining "game of chance" as "poker, craps, roulette, or other game in which a player gives anything of value in the hope of gain"); 18 Pa. Stat. & Cons. Stat. Ann. § 5513(a)(1) (defining illegal "gambling" as maintaining a "slot machine or any [other] device to be used for gambling purposes"); 4 Pa. Stat. and Cons. Stat. Ann. § 1103 (defining legal "gaming" as "licensed placement, operation and play of slot machines, table games and interactive games"); 41 R.I. Gen. Laws § 41-9-1 (defining "gambling" by reference to "horseracing, dog racing, and jai alai"); S.C. Code Ann. § 3-11-100(2) ("'Gambling' or 'gambling device' means any game of chance and includes, but is not limited to, slot machines, punchboards," etc.); S.D. Codified Laws §§ 22-25-1 (defining "gambling" as "wager[ing] on a sporting event or engag[ing] in gambling in any form with cards, dice, or other implements or devices"); 42-7B-1 (authorizing "limited gaming" including "card games, slot machines, craps, roulette, keno, and wagering on sporting events" in certain areas); Vt. Stat. Ann. tit. 13, § 2141 (defining "gambling" by reference to "play or hazard at any game"); Va. Code Ann. § 58.1-4100 (defining "casino gaming" and "game[s]" to mean "baccarat, blackjack, twenty-one, poker, craps, dice, slot machines, roulette wheels, Klondike tables, Mah Jongg, electronic table games, hybrid table games, punchboards, faro layouts, numbers tickets, push cards, jar tickets, or pull tabs, or any variation of the aforementioned games, and any other activity that is authorized by the Board as a wagering game or device").

does not constitute "gaming." If two employees stake $5 on whether their boss will show up for work on Monday, they have certainly made a bet, but no one would say that they are "gaming." Likewise, if a business buys derivatives pegged to the future price of pork bellies, that might be colloquially characterized as "betting" on that market, but it certainly is not "gaming."

Purchasing one of Kalshi's Congressional Control Contracts is not "gaming," either. Elections are not games. They are not remotely analogous to casino games, lotteries, bingo, or even sporting events. Elections, unlike "games," are not staged for entertainment or to facilitate speculation for sport. *See Game*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2020) ("engaged in for diversion or amusement"); *see also* AR 1315 ("Gaming describes wagering money on an occurrence that has no inherent economic value itself other than the money wagered."). Rather, elections—again, unlike games—have extrinsic effects outside the contest itself, and indeed carry significant economic consequences in the real world. Buying or selling election event contracts therefore does not amount to "gaming."

2. Statutory Context. The Order defined "gaming" more broadly, citing a few dictionaries and state laws that define "gambling" (not "gaming") to include staking money on *any* contingent event beyond the parties' control. *See* Order at 8–9. But as discussed above, that interpretation of "gaming" (when combined with the Commission's interpretation of "involve") would turn the statutory default on its head and render the remaining categories superfluous. *See supra* at 19.

Again, defining "gaming" that broadly would subject *every* event contract to heightened public-interest review, because anyone who trades an event contract is by definition staking money on a contingency beyond his control. Yet, as Justice Holmes observed over a century ago: "It seems to us an extraordinary and unlikely proposition that the dealings which give its character to the great market for future sales in this country are to be regarded as mere wagers." *Bd. of Trade v. Christie Grain & Stock Co.*, 198 U.S. 236, 249 (1905). Indeed, that construction would render superfluous all of the other enumerated activities—ignoring the "interpretive principle that every clause and word of a statute should have meaning." *Polansky*, 599 U.S. at 432. And it would grant the CFTC a roving commission to scrutinize the social utility of all event contracts—a sweeping, surprising power Congress would not hide in a single word. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes"). Especially when that word on its face—and based on its legislative history (*supra* at 23)—appears to be concerned with casinos and sports, not with the premise of the entire industry. Statutory context thus forecloses the Commission's overbroad approach to "gaming." Giving the term its ordinary meaning—betting on *games*—avoids all of those pitfalls.

Perhaps aware that its logic would scramble the statutory scheme—but still determined to wedge Kalshi's contracts into a suspect category—the CFTC gestured at a potential limiting principle: "gaming" could be limited to wagers on "contests," supposedly including elections. *See* Order at 9–10 & n.25. That attempt to thread the needle both misconstrues "gaming" and mischaracterizes elections.

To start, "gaming" is defined by reference to "games," not "contests." *See supra*, Part II.A.1. In fact, the Order cites no dictionary or statutory definition of "gaming" that invokes "contests." And its lone federal statute refers to "contest[s] of others" but not to "gaming." *See* 31 U.S.C. § 5362(1)(A).

States that define "gambling" by reference to "contests" or otherwise refer to "contests" in their gambling statutes do not bridge the gap. *See* Order at 8 n.22 & 9 n.24 (collecting 13 state statutes). Even setting aside that "gaming" is different from "gambling," *elections* are not "contests" for purposes of those laws. More than half of the cited statutes use the phrase "contest *of chance*," which is an obvious reference to traditional gambling activities, not elections.[7] The others use the word "contest" in ways that likewise plainly exclude elections. Delaware and Florida, for example, ban "wagers upon the result of any trial or contest … of skill, speed or power of endurance of human or beast." Del. Code Ann. tit. 11, § 1403(1); Fla. Stat. § 849.14. Louisiana defines "gambling" as "any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value." La. Stat. § 14:90(A)(1)(a).[8]

The word "contest" in these statutes must be understood "by the company it keeps." *Yates v. United States*, 574 U.S. 528, 543 (2015); *see also Dole v. United*

[7] *See* Ala. Code § 13A-12-20(4); Alaska Stat. Ann. § 11.66.280(2)–(3) (defining "contest of chance" as "a contest, game, gaming scheme, or gaming device"; defining "gambling" as staking "something of value upon the outcome of a contest of chance"); Haw. Rev. Stat. § 712-1220; Me. Rev. Stat. tit. 17-A, § 952(3)–(4); Mo. Rev. Stat. § 572.010(4); N.Y. Penal Law § 225.00(2); Wash. Rev. Code § 9.46.0237.

[8] *See also* Ky. Rev. Stat. § 528.010(6)(a) ("the outcome of a contest, game, gaming scheme, or gaming device"); Utah Code Ann. § 76-10-1101(a) (same).

Steelworkers of Am., 494 U.S. 26, 36 (1990) ("The traditional canon of construction, *noscitur a sociis*, dictates that words grouped in a list should be given related meaning."). In context, these statutes clearly use "contest" to reach events that are not usually called "games" but share key attributes with them—*e.g.*, horseraces or boxing matches. Such "contests" are staged purely for entertainment and to facilitate betting. They have no independent significance; their outcomes carry no economic risks. AR 1315. Elections are nothing like the other terms on those lists. They have extrinsic effects and vast economic consequences. They therefore cannot be treated as "contests" under any State's gambling laws. Indeed, many States that define "gambling" to include betting on "contests" *separately* ban betting on elections—a wholly unnecessary step if "contests" already captured elections.[9]

In short, the Commission is trying to have it both ways by reading "gaming" to reach elections, yet resisting the overbroad "any contingency" construction that would obviously upend the CEA. But there is no viable middle road here. The only workable construction of "gaming" requires the presence of a *game*. Because the Congressional Control Contracts do not involve a game, and trading them does not amount to betting on a game, this statutory exception is not implicated by Kalshi's contracts.

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[9] *See* Ariz. Rev. Stat. Ann. § 16-1015; Ga. Code Ann. § 16-12-21(a)(1)–(2) (separate prohibitions for betting on a "game or contest" and betting "upon the result of any … election"); 720 Ill. Comp. Stat. 5/28-1; Mich. Comp. Laws § 168.931(l); Neb. Rev. Stat. § 28-1101(4); N.J. Stat. § 19:34-24; Or. Rev. Stat. § 260.635; Tex. Penal Code Ann. § 47.02(a) (person commits "gambling" if he "(1) makes a bet on the partial or final result of a game or contest" *or* (2) "makes a bet on the result of any … election"). *See also infra*, Part II.B (addressing significance of these prohibitions).

B. Trading Congressional Control Contracts Is Also Not "Unlawful" Activity.

The Order similarly misreads the "unlawful" activity exception. Even under the Commission's erroneous reading of "involve," that exception does not apply here because buying or selling a Congressional Control Contract does not amount to illegal activity. The Commission's contrary reasoning is incoherent.

The Commission contends that purchasing one of Kalshi's contracts would be illegal in jurisdictions that prohibit betting on elections by statute or common law. *See* Order at 11–13 & nn.26–27. But those statutes cannot be construed to ban the trading of event contracts on federally regulated exchanges; as explained above, the federal scheme vests exclusive jurisdiction over such trading in the Commission and thus preempts any contrary state laws. *See* 7 U.S.C. § 2(a)(1); *Leist*, 638 F.2d at 322; *supra* at 20. Recognizing as much, most of the state gambling laws cited by the Order expressly *carve out* lawful business transactions, including commodity futures and other derivatives.[10] Those carve-outs reflect what federal law has long acknowledged: Although many bona fide transactions falling under CFTC jurisdiction may *look like* gambling to a layman, they are nothing like craps, lotteries, or horseracing.

[10] *See* Ala. Code § 13A-12-20(4); Alaska Stat. Ann. § 11.66.280(3)(A); Ariz. Rev. Stat. § 13-3301(6); Colo. Rev. Stat. Ann. § 18-10-102; Haw. Rev. Stat. § 712-1220; Idaho Code § 18-3801(2), (5); Ind. Code § 35-45-5-1(d)(2); Kan. Stat. Ann. § 21-6403(a)(1); Minn. Stat. § 609.75, Subd. 3(1)–(2); Mo. Rev. Stat. § 572.010(4); N.M. Stat. Ann. § 30-19-1(B); N.D. Cent. Code Ann. § 12.1-28-01; Ohio Rev. Code Ann. § 2915.01; Okla. Stat. Ann. Tit. 21, § 981(1)(a); Or. Rev. Stat. § 167.117(7)(a); Tenn. Code Ann. § 39-17-501(2)(A); Utah Code Ann. § 76-10-1101(c)(i); Wash. Rev. Code § 9.46.0237; Wis. Stat. Ann. § 945.01(1)(a); Wyo. Stat. Ann. § 6-7-101(a)(iii)(B)–(C).

The Order ultimately admits as much, acknowledging that "transacting these products … *cannot, in and of itself*, be an 'activity that is unlawful under any … State law.'" Order at 13 n.28 (emphasis added). That concession is dispositive: Because States cannot prohibit "trading in" event contracts, purchasing them cannot "amount to" activity prohibited by state law. *Id.* at 7 n.19; *see also supra* at 20.

Realizing this flaw, the Order tries to introduce yet a *third* reading of the word "involve." Even if trading in these contracts is legal, the Order posits, it nevertheless "entail[s]" or "relate[s] closely" to illegal activity. Order at 13 n.28. What does that even mean? How can an activity "entail" illegality without being illegal? How "closely" must a legal activity "relate" to an illegal one? In how many States? The Order provides no answers to justify its bizarre interpretive manipulation. Here too, the Commission's "interpretation" appears to be merely an outcome-driven effort to block the Congressional Control Contracts—not honest statutory construction.

In any event, taking the Order's incoherent reasoning at face value would once again upend the CEA's regulatory scheme by empowering state legislatures to dictate the regulation of event contracts. As the Order acknowledges, a number of States treat staking money on *any* contingent future event as illegal gambling.[11] New York,

[11] *See, e.g.*, Ala. Code § 13A-12-20(4) ("future contingent event not under his control or influence"); Alaska Stat. Ann. § 11.66.280(3); Ariz. Rev. Stat. § 13-3301(8); Colo. Rev. Stat. Ann. § 18-10-102; Haw. Rev. Stat. Ann. § 712-1220; Idaho Code § 18-3801; Me. Rev. Stat. tit. 17-A, § 952; Mich. Comp. Laws § 750.301; Miss. Code Ann. § 97-33-1; Mo. Ann. Stat. § 572.010; N.H. Rev. Stat. Ann. § 647:2; N.J. Stat. § 2C:37-1; N.D. Cent. Code Ann. § 12.1-28-01; Or. Rev. Stat. § 167.117(7); Va. Code Ann. § 18.2-325(1); Wash. Rev. Code Ann. § 9.46.0237; Wyo. Stat. Ann. § 6-7-101.

for example, prohibits "risk[ing] something of value upon … a future contingent event not under [one's] control," N.Y. Penal Law § 225.00(2)—which closely tracks the federal definition of an event contract, 7 U.S.C. § 1a(19)(iv)(I). On the Commission's view, therefore, trading any event contracts would "relate closely" to activity that is unlawful in New York. *See* Order at 13 n.28. As a result, the Order would apparently subject *every* event contract to public-interest review. That would moot the provision conferring "exclusive jurisdiction" on the CFTC, 7 U.S.C. § 2(a)(1)(A), and vest 50 state legislatures with control over application of a federal statute. That cannot be right. *See Holyfield*, 490 U.S. at 43 ("We start … with the general assumption that 'in the absence of a plain indication to the contrary, … Congress when it enacts a statute is not making the application of the federal act dependent on state law.'").

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Even with the benefit of its novel and misdirected interpretation of "involve," the Commission is forced to bob and weave to justify subjecting the Congressional Control Contracts to public-interest review. Those efforts fail, because trading these event contracts cannot be squeezed into the categories of either "gaming" or "unlawful activity"—at least not without mangling the CEA's structure, rendering every other exception surplusage, and turning the principle of federal supremacy on its head. Of course, Congress is free to forbid trading of political event contracts, or to authorize the Commission to do so—it would be as simple as adding contracts that "involve" "elections" to the enumerated activities in the statute. But Congress did not do that, and the Commission's efforts to rewrite the CEA are futile.

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

For the reasons already explained, the Commission had no authority to subject Kalshi's Congressional Control Contracts to public-interest review in the first place, because its conclusion that the contracts "involve" "gaming" or "unlawful" activity is erroneous as a matter of law on multiple levels. That is enough to require vacatur of the Order, and so the Court need not go further. But even assuming a public-interest analysis were authorized, the Commission's finding that the Congressional Control Contracts are contrary to the public interest is arbitrary and capricious. This is yet another independent basis for vacating the Order.

An agency's decision is arbitrary and capricious if it relies on improper factors, ignores important considerations, or offers explanations that are implausible or run counter to the evidence. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency also acts arbitrarily and capriciously when it fails to "meaningfully address comments and evidence that undercut its conclusion." *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1112–14 (D.C. Cir. 2019).

The Commission violated those rules of reasoned decisionmaking here. *First*, it announced an arbitrarily heightened standard for assessing the economic utility of Kalshi's contracts, and then disregarded evidence showing that they satisfy even that arbitrary standard. *Second*, the Commission ignored record evidence of non-economic benefits, failing to account for their impact on the public interest. *Third,* the CFTC credited unsubstantiated and unreasonable speculation about the contracts' threat to "election integrity," again while ignoring the contrary record materials.

A. The CFTC Imposed and Misapplied an Arbitrarily Heightened "Direct Effects" Standard for Evaluating Economic Utility.

The Order centered its public-interest inquiry around "economic purpose," asking whether the Congressional Control Contracts have economic utility. Insisting on *some* economic purpose is sensible, given that the CEA itself identifies the role of its regulated transactions as serving "a national public interest by providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information." 7 U.S.C. § 5(a).

The problem for the Commission, of course, is that partisan control of Congress has vast economic consequences—both directly and through its influence on policy. That is why major financial institutions routinely offer projections on the economic impacts of election outcomes. Ahead of the 2020 federal election, for instance, Bank of America analyzed the likely effects of different congressional outcomes on fiscal stimulus, tariffs, tax rates, and regulations. *See* AR 2991. Researchers, too, have consistently found that the balance of political power affects the prices of equities, commodities, and other assets. AR 2992–93 (collecting studies). Businesses and individuals agree: A software company serving green-energy ventures explained in a comment that its success hinges in part on political outcomes, including control of Congress and associated policy changes. *See* AR 1597. A fund founder set forth how biotech startups face congressional risks, including cuts to research funding and stalled regulatory appointments. *See* AR 1567–68. And the CEO of a recycling robotics firm recounted that legislation expanding recycling is likely to rise or fall depending on which party triumphs. *See* AR 1533.

Because control of Congress has meaningful economic effects, Congressional Control Contracts would further an "economic purpose" by allowing firms to manage those risks (*i.e.*, hedging) and enabling the market to price them (*i.e.*, price-basing). That is not their *only* possible use, but their economic purpose is undeniable.

Unable to dispute that reality, the Commission changed the standard. The economic effects of congressional control, the CFTC opined, are too "diffuse and unpredictable" to warrant hedging or price-basing because they depend on other factors—*e.g.*, which bills end up on the legislative agenda, presidential vetoes, and litigation. Order at 16–17. In other words, the Commission concluded that elections lack *direct* economic effects, and therefore that the Congressional Control Contracts would serve no economic purpose. That analysis is wrong—and shirks the reasoned decision-making requirement—twice over. The CFTC's novel test is misguided in its own right, and the Commission also misapplied it here.

First, insisting on "direct" effects misunderstands the economic function of hedging and price-basing. The point of hedging is to *mitigate risk*, not (like insurance) to *offset precise losses*. And risk is all about uncertainty. Consider a hotel that acquires contracts on a hurricane impacting the Gulf of Mexico. Whether such a hurricane would *actually* harm the hotel's bottom line depends on various factors, including where the storm strikes, whether it damages the hotel, and whether news coverage deters tourists. *See* AR 2999. Indeed, if the hurricane ends up hitting neighboring beaches but leaving the immediate coastline untouched, the hotel could bring in *more* revenue by attracting a larger share of the business. But the *risk* of

loss climbs if a storm materializes *at all*—and that risk warrants hedging. As this example illustrates, it is commonplace for businesses to buy hedging instruments without "certainty that the event … will actually manifest in net harm for the company." *See* AR 1528. And for the same reasons, a market in event contracts facilitates price-basing, even assuming the event only carries indirect and uncertain economic effects. Determining the risk of a hurricane, to return to the hypothetical, would help the market to accurately judge the value of the hotel.

Political risks are no different. As renowned investor Jorge Paolo Lemann explained, "[a]n investment may look very different if hypothetical legislative and regulatory events" occur—and if an election outcome makes those events "materially more likely," it "poses significant risk to the parties in the deal." AR 1590. For example, if Republicans take control of Congress in 2024, renewable-energy subsidies will not vanish overnight. But a Republican win would present a serious *risk* of cuts. The Congressional Control Contracts would allow green-energy firms to hedge that risk. *See* AR 1597 (firm would hedge against risk that a "hostile" government "could be elected," not merely "that a particular policy will be enacted"); AR 1553 (investor explaining how business "risks indisputably rise when certain Congresses come into power, and hedging instruments are needed to mitigate that risk"). Likewise, the Congressional Control Contracts would allow the market to more accurately price firms and assets that are exposed to political risks—"direct" or otherwise. *See* AR 1423–26 (explaining price-basing utility of election contracts); AR 1452–53 (same).

Second, the Commission's analysis fails as a factual matter—put differently, the CFTC ignored the evidence that the Congressional Control Contracts satisfy its own "direct effects" standard. Which party wins control of Congress *does* have direct economic effects, and therefore *does* warrant hedging and price-basing even on the Commission's flawed understanding of those functions.

Consider a consulting firm with deep ties to one party. Congressional control by the other party would directly harm that firm's business, separate and apart from any policy changes the new Congress might enact. Kalshi's contracts would allow the firm to hedge against that risk, and allow others to determine the firm's value more accurately. *See* AR 3001. Moreover, the record proves that the partisan balance of political power can *itself* influence investor behavior independent of any particular legislation.[12] Indeed, it features specific assets whose value is directly linked to partisan control. For example, JP Morgan projected that Democratic victory in the 2020 election would boost the price of, among other things, "China-exposed stocks" and "renewables." AR 2991. Sure enough, the Democratic Party's Senate takeover *did* trigger a large rally in the green-energy sector—well before the new majority passed any laws.[13] Similarly, President Bush's election in 2000 raised the value of

[12] *See, e.g.*, AR 1348 (cannabinoid company explaining that "potential" adverse actions by Congress influence investor behavior); AR 1597 (green-energy software firm explaining that a potential cofounder did not join the venture due to concerns about harmful election outcomes).

[13] *See* AR 1397. The iShares Global Clean Energy ETF surged 17% between December 31, 2020, and January 8, 2021, as Democratic candidates won runoff elections in Georgia to take control of the Senate; the Dow Jones Industrial average rose by only 1.6% over the same period. *Id.*; *see also* AR 1396 (other examples).

tobacco companies by 13%.[14] Another example: When Senator Jeffords swung Senate control by joining the Democratic Party in 2001, valuations of firms that donated to Democrats rose, while Republican-aligned companies saw valuations fall.[15] These well-documented patterns are far from "unpredictable." Order at 10, 16, 18–19. And so, not surprisingly, numerous commenters *specifically attested* that they would use the Congressional Control Contracts for hedging.[16] There could hardly be any more probative or compelling evidence of the contracts' hedging purpose.

On all of these points, the CFTC "refused to engage with the commenters'" points and evidence, *Del. Dep't of Nat. Res. & Env't Control v. EPA*, 785 F.3d 1, 15 (D.C. Cir. 2015), and instead "cherry-pick[ed]" observations that served its desired outcome, *Sierra Club v. Salazar*, 177 F. Supp. 3d 512, 540 (D.D.C. 2016). Indeed, the Commission baldly asserted that the contracts would not serve any hedging function in the face of concrete contrary proof staring at it right from the pudding bowl.

In sum: In analyzing the economic purpose of Kalshi's Congressional Control Contracts, the Commission used a "direct effects" standard with no basis in law or economics, and then ignored copious record evidence that congressional elections *do* have direct economic effects. That is textbook arbitrary-and-capricious reasoning.

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[14] *See* AR 1365 (citing B. Knight, *Are policy platforms capitalized into equity prices? Evidence from the Bush/Gore 2000 Presidential Election*, 90 J. Pub. Econ. 751 (2006)).

[15] *See* AR 2993 (citing S. Jayachandran, *The Jeffords Effect*, 49 J. L. & Econ. 397 (2006)); *see also* AR 3004–05 (citing research).

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

B. The CFTC Ignored the Evidence of Non-Economic Benefits.

The Commission also ignored robust record evidence that event contracts like Kalshi's have important benefits beyond hedging and price-basing. Nothing in the CEA suggests the CFTC is *limited* to weighing economic considerations. Indeed, the Order itself devoted much of its analysis to amorphous political concerns. *See* Order at 19–23. Accordingly, the CFTC was obligated to consider the evidence that political prediction markets generate socially valuable data. *See Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019) (agency must "respond to significant points and consider all relevant factors"). It failed to do so.

The record on this point is robust. For example, a 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 (among others) noted that influential studies have relied on the "powerful resource" of prediction data to develop "valuable" political, economic, and social insights. AR 1750–53; *see also* 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"). And such data is not just useful for academics: It offers the general public a neutral, market-driven alternative to traditional polling, which has proven unreliable in recent years. *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 Order makes no effort to engage with this evidence or explain why it is irrelevant to the public interest. Instead, it dismisses out of hand "assertions … that market-based alternatives tend to be more accurate than polling or other methods of predicting election[s]," without questioning the factual basis of those claims. Order at 21. Once more, the CFTC did not merely err in weighing the evidence—it ignored it altogether. The APA forbids that. *See Carlson*, 938 F.3d at 344.

C. The CFTC Rested on Implausible, Unsubstantiated Speculation About Election Integrity.

For the reasons above, the Commission engaged in arbitrary and capricious reasoning when analyzing the *benefits* of the Congressional Control Contracts. But it also violated the APA's requirements in identifying their supposed *harms*. The CFTC deemed Kalshi's contracts a threat to the "ideals of democracy and the sanctity of the electoral process." Order at 19. Rhetoric aside, the Order gives two main reasons why Kalshi's contracts would threaten election integrity: A market in election contracts would supposedly (1) spark electoral manipulation and misinformation; and (2) force the CFTC to play "election cop." The Order fails to substantiate either aspect of this parade of horribles, and it ignores the contrary evidence.

First, the Order claims that Congressional Control Contracts would incentivize manipulation of elections, including by spreading misinformation. Yet the Order provides no real-world examples of market-induced manipulation, despite the long history of political prediction markets in the United States and other democracies. *See* AR 1528 (noting that "the U.S. allowed such markets for many years and the U.K. still does," yet "[n]o one questions the legitimacy of Margaret Thatcher or Tony Blair because people bet money on the outcome"). To the contrary, research in the record shows that the "likelihood of this kind of manipulation occurring is extremely remote." AR 1448; *see also* AR 1429–31.

Indeed, if anything, listing the contracts on federally regulated exchanges like Kalshi's would *ameliorate* manipulation concerns associated with unregulated and offshore markets.[17] And the neutral, market-driven data generated by a regulated exchange is the best way to *mitigate* the threats of misinformation, including from the fake polls that the CFTC purports to worry about (Order at 22). Again, that is what the record shows. *See* AR 1745 ("Real-world data repeatedly emphasizes the superior forecasting accuracy of prediction markets to polls and pundits."); AR 1576–77 (similar).

[17] *See, e.g.*, AR 1402 (discussing how a regulated exchange like Kalshi's is "in a better position to police the manipulation of markets by insider trading than the unregulated offshore exchanges (such as Polymarket) that currently serve as liquid exchanges that host a significant share of these trades" and "[b]ringing these trades onto federally regulated markets would mitigate the issues that the Commission is expressing concern over"); 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.").

The CFTC ignored all this evidence, instead musing that Kalshi's contracts could "creat[e] monetary incentives to vote for particular candidates, even when such votes may be contrary to a voter's … political preferences or views of such candidates." Order at 19–20. But that "speculation," with no foundation in the record, cannot replace "examination of the relevant data and reasoned analysis." *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1269 (D.C. Cir. 1994).

Nor is it credible: Would a voter really vote for a candidate he *opposes* in a ploy to influence an outcome contingent on *dozens* of federal elections? *See* AR 1430 (concern that voters will "steal votes from themselves" is "speculative, abstract, and almost entirely absent from our experience with political prediction markets"). More fundamentally, the notion that a market in Kalshi's contracts would meaningfully alter incentives to manipulate elections or to distribute misinformation is utterly implausible: Given the enormous consequences of election outcomes, the massive sums already spent by political campaigns, and the sheer volume of inputs to the national political discourse, Kalshi's contracts would, at most, be a drop in the bucket. *See, e.g.*, AR 1528 ("implausible that anyone" buying these contracts would have enough "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 other sources).

Second, there is no reason to think the CFTC would need to anoint itself "election cop" if it permitted Kalshi's contracts. Order at 23. The Commission fretted that approving these contracts might one day force it to "investigat[e] election-related activities—potentially including the outcome of an election itself." *Id.* at 22. That suggestion is frankly absurd. The CFTC regulates countless derivatives markets involving commodities over which it lacks independent expertise or authority. For example, while the Commission oversees trading in futures contracts on the S&P 500, it does not regulate stocks; that is the job of the Securities and Exchange Commission, which the CFTC relies on to police the underlying market. Likewise, while the CFTC supervises trading on derivatives based on GDP data, it is the Federal Reserve that has responsibility for producing and ensuring the integrity of that data. *See, e.g.*, AR 2793–94. By the same token, the Federal Election Commission and many other state and federal regulators already shoulder the critical responsibility of ensuring that our elections are fair and secure. Event contracts based on political outcomes would not change that, or thrust this role onto the CFTC. The Order certainly provides no non-speculative reason for concluding otherwise. It arbitrarily—and irresponsibly—stokes fear about the integrity of elections without any basis in the record.

* * *

The Commission had no statutory authority to subject Kalshi's contracts to a public-interest inquiry in the first place. Regardless, its efforts to undertake one only violated the law yet again—by dismissing benefits that the record established while speculating about harms that the record refuted.

CONCLUSION

For any and all of these reasons, this Court should grant Kalshi's motion for summary judgment, vacate the CFTC's Order, and declare that Kalshi is entitled to list the Congressional Control Contracts for trading.

Dated: January 25, 2024

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KALSHIEX LLC, Plaintiff, v. COMMODITY FUTURES TRADING COMMISSION, Defendant.	Civil Action No. 1:23-cv-03257 (JMC)

Defendant Commodity Futures Trading Commission's Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment

Defendant Commodity Futures Trading Commission files its Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment. A memorandum of points and authorities is attached.

Dated: February 26, 2024

Respectfully submitted,

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PRELIMINARY STATEMENT

Before the Court is an order of the Commodity Futures Trading Commission ("Commission" or "CFTC"), which declined to grant plaintiff KalshiEX ("Kalshi") permission to offer "Congressional Control Contracts" on Kalshi's registered contract market. The proposed contracts would have enabled participants to take a position on the binary (yes/no) question: "Will <chamber of Congress> be controlled by <party> for <term>?". The CFTC made three determinations in its disapproval of the contracts, each of which was sound. One, it determined that the contracts involve "gaming" — that is, betting, wagering or gambling on elections. Two, it determined that the contracts involve activity that is unlawful under state law, as many states' laws prohibit betting, wagering, or gambling on elections. And three, it determined that the contracts are contrary to the public interest because, *inter alia*, they (i) cannot reasonably be expected to be used more than occasionally for commercial or hedging interests; (ii) could be used in ways that adversely affect the integrity and perception of integrity of elections; (iii) could be manipulated to influence elections or electoral perceptions; and (iv) could put the CFTC in the position of having to investigate election-related activities. Kalshi asks this Court to vacate the Commission's decision and order that Kalshi's election contracts be allowed to trade on a regulated contract market. The Court should instead rule in favor of the Commission, which was well within its discretion to refuse to nationally legalize gambling on elections via the financial markets it regulates.

THE CFTC AND REGULATORY FRAMEWORK

A. Brief Introduction to the CFTC, the Commodity Exchange Act, and Derivatives.

The CFTC is an independent federal agency that regulates derivatives markets, and administers the Commodity Exchange Act (the "CEA" or "Act"). A "derivative" is a financial

instrument, such as a future, option, or swap, whose price is directly dependent upon—that is, "derived from"—the value of something else, such as an agricultural or financial commodity.[1]

Relevant here, an "event contract" is a type of derivative contract whose payoff is based on a specified "underlying" "event, occurrence, or value."[2] For example, an event contract might be based on the occurrence, nonoccurrence, or extent of an occurrence of a weather event such as snowfall or rainfall. The asset or other factor that gives rise to the rights and obligations in a derivative contract is called its "underlying." *Underlying*, BLACK'S LAW DICTIONARY (11th ed. 2019). In a futures contract, the "underlying" is generally a specified quality and quantity of the cash market asset in the same commodity. Thus, for example, in a corn futures contract, the "underlying" would be corn.

The stated purposes of the CEA include to ensure "fair and financially secure trading facilities" and protection of "all market participants from fraudulent or other abusive sales practices" in the markets that it regulates. 7 U.S.C. § 5(a)-(b). One way the CEA does this is with broad anti-fraud and anti-manipulation authority. The Act prohibits any person from directly or indirectly employing or attempting to employ a manipulative or deceptive device or engaging in fraud in connection with any product on a derivatives exchange, or any commodity in interstate commerce. 7 U.S.C. § 9. Thus, the Commission's enforcement authority includes investigating and bringing actions against persons who commit manipulative or fraudulent acts in connection with derivatives

[1] CFTC, *Glossary: A Guide to the Language of the Futures Industry*, https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/CFTCGlossary/index.htm (last visited Feb. 23, 2024).

[2] CFTC, *Contracts & Products: Event Contracts*, https://www.cftc.gov/IndustryOversight/ContractsProducts/index.htm (last visited Feb. 23, 2024).

markets,[3] including registered exchanges, as well as manipulative or fraudulent acts in connection with an underlying commodity market.[4]

The CEA requires that futures and certain other derivatives instruments be traded only on regulated exchanges. Retail customers' only legal avenue to trade futures contracts, or derivatives such as event contracts, is on a contract market registered with the CFTC.[5] *See* 7 U.S.C. §§ 2(e), 6, 6c(b); 17 C.F.R. § 33.3; *see also In re Blockratize*, CFTC No. 22-09, 2022 WL 73864 (Jan. 3, 2022) (consent order).[6]

Kalshi is a type of regulated exchange called a "designated contract market" ("DCM"). As a regulated exchange, a DCM must comply with certain core principles laid out in 7 U.S.C. § 7(d),

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[3] *See, e.g., In re Ceres Global Ag. Corp.*, CFTC No. 24-01, 2023 WL 8650000 (Oct. 23, 2023) (consent order) (attempted manipulation of the oats futures markets); *CFTC v. Xie*, 1:23-cv-01947, Dkt. No. 17, 2023 WL 8532325 (N.D. Ill. 2023) (consent order) (fraudulent trades in the futures market based on misappropriated information).

[4] *See, e.g., CFTC v. Glen Point Capital Advisors*, 1:22-cv-10589, Dkt. 1 (S.D.N.Y. 2022) (complaint) (manipulative scheme in cash market to trigger payout in corresponding derivative); *CFTC v. Safeguard Metals, LLC*, 2:22-cv-00691, Dkt. No. 201 (C.D. Cal. 2023) (consent order) (fraudulent solicitations in cash metals transactions).

[5] Legalized online sports betting websites and apps, such as FanDuel or Draft Kings, are not designated by the Commission as contract markets, but instead are permitted to operate under applicable state law and certain provisions in the Unlawful Internet Gambling Enforcement Act. 31 U.S.C. §§ 5361-5367. The rules and protections in the CEA and Commission Regulations do not apply to legalized betting websites and apps insofar as they do not operate in markets or offer products that are subject to the CFTC's jurisdiction.

[6] Separately, and without engaging in the process under 7 U.S.C. § 7a-2(c)(5)(C) and Regulation 40.11(a), the staff of the Commission's Division of Market Oversight issued a staff No-Action letter to Victoria University of Wellington, New Zealand in 2014. Letter from Vincent McGonagle, Dir., Div. of Mkt. Oversight, to Neil Quigley, Deputy Vice-Chancellor, Research, Victoria Univ. of Wellington, (Oct. 29, 2014), https://www.cftc.gov/csl/14-130/download. Victoria University, which is not registered with the CFTC as a contract market, had "propose[d] the creation of a small-scale, not-for-profit, online market for event contracts in the U.S. for educational purposes," limiting the traders on that proposed platform to 5,000 persons. *Id.* The No-Action request "was not in any way premised upon claims that its proposed event contracts have any hedging or price-basing utility." *Id.* That No-Action letter is now the subject of litigation. *Clarke v. CFTC,* 24-cv-00167 (D.D.C.). Aristotle, which associates itself with the recipient of the No-Action letter, has filed an amicus brief in this matter in support of Kalshi. Dkt. No. 26.

including, among other things, requirements to list contracts not readily susceptible to manipulation and to have the capacity to prevent manipulation and price distortion through surveillance and enforcement. *See, e.g.*, 7 U.S.C. § 7(d)(3), (d)(4).

B. The Public Interest in Regulated Derivatives Markets: Hedging and Pricing.

The CEA includes a Congressional finding that transactions subject to the Act "are affected with a national public interest by providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities." 7 U.S.C. § 5. In other words, there is a codified public interest in regulation of derivatives markets because such markets provide a means to "hedge" economic risks. As it relates to markets regulated by the Commission, "hedging" utility in derivatives markets is generally understood to be the use, by market participants, of derivatives to manage the various price risks incidental to their commercial activity.[7] A further codified public interest in the regulation of derivatives markets is the concept of price discovery, or the process of determining the price level for a commodity through interaction of buyers and sellers, and based on supply and demand conditions.[8]

[7] For instance, airlines that need to buy jet fuel in the foreseeable future might manage the risk that the price will increase by entering into a derivative contract, *e.g.* a futures contract, to hedge against that risk. It would take a "long" position, *i.e.*, a futures contract that will increase in value if the price of the airline's fuel increases. On the other hand, a fuel supplier might manage the risk that the price of oil will decline by taking a "short" position, *i.e.*, a futures contract that will increase in value if the price of fuel goes down. The derivatives markets also include "speculators" who trade to profit from price movements, despite having no use for the underlying commodity. For instance, a trader might take long positions in oil derivatives simply based on a view that fuel prices will increase. Speculators are considered important because they help ensure that hedgers can find counterparties with whom to trade.

[8] CFTC, *Glossary: A Guide to the Language of the Futures Industry*, https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/CFTCGlossary/index.htm (last visited Feb. 23, 2024).

From 1974 to 2000, the CEA required exchanges to demonstrate to the Commission that any new contract was in the public interest before it was permitted to be listed for trading on an exchange. *See* S. Rep. No. 1194, 93rd Cong., 2d Sess. 36 (1974). This meant that each contract to be traded on a DCM had to meet an "economic purpose test" and not otherwise be contrary to the public interest. *See* Contract Market Designation, 40 Fed. Reg. 25849 (June 19, 1975). To meet the economic purpose test, the DCM was "expected to establish that something more than occasional use of the contract for hedging or price basing[9] exists, or can reasonably be expected to exist." *Id.* at 25,850.[10]

Over the years, the procedure for designating a new contract was streamlined. In 2000, Congress added CEA Section 5c(c), which significantly changed the Commission's role in allowing or disallowing the trading of particular contracts, and empowered DCMs to "self-certify" that new contracts comply with the Act and CFTC regulations. *See* Pub. L. No. 106-554, 114 Stat. 2763 (2000); 7 U.S.C. § 7a-2(c)(5); 17 C.F.R. §§ 40.2, 40.3. In 2010, Congress enacted a "Special Rule" for certain event contracts, which is the subject of this case. 7 U.S.C. § 7a-2(c)(5)(C) (entitled "Special rule for review and approval of event contracts and swap contracts" ("Special Rule")).

C. The CEA's "Special Rule" for Certain Event Contracts.

For most derivatives contracts, a DCM can self-certify a new product and trade it within one business day of submission to the CFTC, without waiting for the Commission to take any action. 7

[9] Similar to price discovery, price basing occurs when producers, processors, merchants, or consumers of a commodity establish commercial transaction prices based on the futures price for that or a related commodity. AR 18.

[10] To make that showing, the market was required to provide evidence that 1) the prices in the futures transaction can reasonably be expected to be generally quoted and disseminated as a basis for determining prices to producers, merchants, or consumers of the commodity or its byproducts and 2) such transaction can be expected to be utilized by merchants or consumers engaged in handling the commodity or its byproducts as a means of hedging themselves against possible loss through fluctuations in price.

U.S.C. § 7a-2(c)(1); 17 C.F.R. § 40.2. Alternatively, a DCM may voluntarily submit their new products to seek pre-approval, in which case the Commission will review the submission and approve the product unless it violates a specific provision of the CEA or the Commission's regulations. 7 U.S.C. § 7a-2(c)(4)-(5); 17 C.F.R. § 40.3.

However, for certain event contracts, the Special Rule authorizes the Commission to review and determine whether a given contract or transaction should be disallowed as contrary to the public interest. *See* CEA Section 5c(C)(5), codified at 7 U.S.C. § 7a-2(c)(5)(C). The Special Rule provides that the Commission "may determine" that certain "agreements, contracts, transactions, or swaps in excluded commodities[[11]] that are *based upon* the occurrence, extent of an occurrence, or

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[11] "Excluded commodity" is a type of intangible commodity, and includes such things as interest rates, indices, and occurrences. The CEA defines "excluded commodity" as:

> (i)an interest rate, exchange rate, currency, security, security index, credit risk or measure, debt or equity instrument, index or measure of inflation, or other macroeconomic index or measure;
>
> (ii)any other rate, differential, index, or measure of economic or commercial risk, return, or value that is—
>
> > (I)not based in substantial part on the value of a narrow group of commodities not described in clause (i); or
> >
> > (II)based solely on one or more commodities that have no cash market;
>
> (iii)any economic or commercial index based on prices, rates, values, or levels that are not within the control of any party to the relevant contract, agreement, or transaction; or
>
> (iv)an occurrence, extent of an occurrence, or contingency (other than a change in the price, rate, value, or level of a commodity not described in clause (i)) that is—
>
> > (I)beyond the control of the parties to the relevant contract, agreement, or transaction; and
> >
> > (II)associated with a financial, commercial, or economic consequence.

7 U.S.C. § 1a(19). Despite their name, "excluded" commodities are subject to the CEA. *See, e.g.*, *United States v. Wilkinson*, 986 F.3d 740, 745 (7th Cir. 2021) (noting that broad-based indices are "excluded commodities" that "remain 'commodities' under the Act as a whole, including its fraud provisions").

contingency," *i.e.* event contracts, "are contrary to the public interest" "if the agreements, contracts, or transactions *involve*—

(I) activity that is unlawful under any Federal or State law;
(II) terrorism
(III) assassination;
(IV) war;
(V) gaming; or
(VI) other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest."

7 U.S.C. § 7a-2(c)(5)(C)(i) (emphases added). If an event contract or transaction therein "involve[s]" one of these enumerated activities and the Commission has determined the contract or transaction to be contrary to the public interest, that contract may not be listed or made available for trading through a registered entity. 7 U.S.C. § 7a-2(c)(5)(C)(ii). With respect to "gaming," legislative history suggests that when the CFTC evaluates the public interest, it should consider whether the "proposed derivatives contract would be used predominantly by speculators or participants not having a commercial or hedging interest," and if so, the Commission is authorized to determine "that a contract is a gaming contract" rather than one that has a "hedging or economic use." *See* 156 Cong. Rec. S5906-07, 2010 WL 2788026 (daily ed. July 15, 2010).

To establish a process for determining whether an event contract is prohibited from listing, the Commission enacted Regulation 40.11(c), which provides for a 90-day review period. 17 C.F.R. § 40.11(c). If the Commission decides to engage in this review, it must request that the registered entity suspend the listing or trading of the contract under review.[12] 17 C.F.R. § 40.11(c)(1). Nothing in the CEA, CFTC regulations, or any other law requires that the CFTC engage in a notice and comment process or formal hearings in evaluating event contract submissions.

[12] For that reason, a DCM may choose to receive definitive resolution regarding an event contract that may be implicated by 7 U.S.C. § 7a-2(c)(5)(C) by submitting the product for Commission pre-approval under 17 C.F.R. § 40.3.

D. Prior Application of the "Special Rule" to Political Event Contracts.

The Commission has completed a review under 7 U.S.C. § 7a-2(c)(5)(C) and Regulation 40.11(a) once before. In December 2011, North American Derivatives Exchange (NADEX), a DCM, self-certified a variety of political event contracts for the 2012 election cycle, including contracts involving Democratic or Republican Control of the House of Representatives, Democratic or Republican Control of the Senate, and United States President Binary Contracts. The Commission exercised its authority under the Special Rule to review the contracts, and issued an order prohibiting their trading. CFTC, *CFTC Order Prohibiting North American Derivatives Exchange's Political Event Derivatives Contracts* (Apr. 2, 2012), available at https://www.cftc.gov/PressRoom/PressReleases/6224-12. The Commission found that these contracts involved "gaming" and were contrary to the public interest. *Id.* Among other findings, the Commission noted that the unpredictability of specific economic consequences of an election meant the contracts could not reasonably be expected to be used for hedging on more than an occasional basis and there was no situation where the contracts' prices could form the basis for pricing a commercial transaction involving a physical commodity. *Id.*

AGENCY PROCEEDINGS IN THIS CASE

Kalshi is a financial services company that operates as a DCM that lists event contracts for trading. On June 12, 2023, Kalshi filed a product certification (the "2023 Submission") of the Congressional Control Contracts (or "Contracts"), pursuant to Section 5c(c)(1) of the CEA and Regulation 40.2.[13] AR 24, 26. Kalshi's website touts press coverage that describes the Congressional

[13] This product certification followed Kalshi's prior voluntary submission of a largely similar contract for pre-approval in 2022 (the "2022 Submission"). AR 3058-3146. While the 2022 Submission was under review, Kalshi sought and received several extensions of the review period. AR 3197, 3215, 3267. Kalshi ultimately withdrew the 2022 Submission shortly before it made the 2023 Submission. AR 3275.

Control Contracts as "Election Gambling," "Political Betting," "election betting," and an "Election-Betting Market."[14]

The Congressional Control Contracts are binary (yes/no) event contracts based on the question: "Will <chamber of Congress> be controlled by <party> for <term>?". AR 27. The Contracts permit market participants to choose which political party will control either the House of Representatives or Senate. AR 26. The settlement values of the Congressional Control Contracts are determined by the party affiliation of the leader of the identified chamber of Congress on the expiration date. AR 32. In the case of the House of Representatives, the leader is the Speaker of the House, and in the case of the Senate, the leader is the President Pro Tempore. AR 32. Upon settlement, the holder of one side of the contract is paid a dollar per contract, and holders of the opposite position receive nothing. AR 28.

Kalshi planned to list the Congressional Control Contracts every two years, corresponding to each Congressional term, with the contracts expiring at 10:00 A.M. Eastern Time on February 1 of the year the relevant Congressional term begins. AR 26, 33. The Contracts would have a notional value of one dollar with a minimum price fluctuation of $0.01 and would be purchased in multiples of 5,000 contracts per order. AR 32-33. During the time the contract is open, traders would have the ability to adjust their positions and trade freely. AR 28. The Contracts would have tiered position limits depending on the category of market participant—individual, entity, or eligible contract participant—and whether the participant has a "demonstrated established economic hedging need."[15] AR 32-33. An institutional trader would have been permitted to place a bet of up to $100,000,000. AR 32.

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[14] *Press*, Kalshi, https://kalshi.com/blog/press (last visited Feb. 23, 2024).

[15] The 2023 Submission contract terms and conditions included some purported safeguards including a prohibition of trading by certain individuals and entities, including: 1) candidates for

Shortly after Kalshi submitted the Congressional Control Contracts, the CFTC commenced a 90-day review of the contracts based on its determination that the Contracts may involve an activity enumerated in Regulation 40.11(a) and Section 5c(C)(5) of the CEA. AR 148. In accordance with Regulation 40.11(c)(1), the CFTC requested that Kalshi suspend any listing and trading of the Contracts during the pendency of the review period. AR 148. As part of the review, though not required by the CEA or Regulation 40.11, the CFTC sought public comment on specific questions related to Kalshi's self-certification during a 30-day public comment period. AR 149. The CFTC's questions covered a variety of topics, including: whether the Contracts involve gaming or an activity that is unlawful under State or Federal law; whether and how the Contracts might serve a hedging function; whether the Contracts are contrary to the public interest; and whether the Contracts could be used to undermine election integrity including by influencing perception of a political party or candidate or by implicating attempted election manipulation. AR 150.

On September 22, 2023, at the conclusion of the review period, the Commission issued an Order prohibiting Kalshi from listing the Congressional Control Contracts for trading. The Commission determined that the Contracts "involve" two enumerated activities – gaming and activities unlawful under state law. The Commission then determined that the Contracts were contrary to public interest and, as such, prohibited them from listing and trading. AR 1-23.

Noting that "involve" is not defined by statute for purposes of Section 5c(c)(5)(C)(i), the Commission looked to its ordinary meaning in analyzing whether the Congressional Control Contracts "involve" enumerated activities. AR 5. The Commission drew the ordinary meaning

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federal or statewide public office; 2) paid campaign staffers on Congressional campaigns; 3) paid employees of Democratic and Republican Party organizations; 4) paid employees of political action committees ("PACs") and "Super PACs" (independent expenditure only political committees); 5) paid employees of major polling organizations; 6) existing members of Congress; 7) existing paid staffers of members of Congress; 8) household members and immediate family members of any of the above; and 9) "any of the above listed institutions themselves."

from multiple dictionaries and determined that the definitions of "involve" include "to relate to or affect," "to relate closely," to "entail," or to "have an essential feature or consequence." AR 5. The Commission rejected Kalshi's proposed narrower reading that a contract involves an enumerated activity only if that activity is the contract's underlying. AR 6. The Commission noted that Kalshi's reading is inconsistent with the CEA, including Section 5c(c)(5)(C)(i) itself, because when the CEA refers to a contract's underlying, it uses the word "underlying" or states what the contract is "based on" or "based upon." AR 6. The Commission reasoned that, most notably, Section 5c(c)(5)(C)(i) itself uses "based on" to describe event contracts as those "based on an occurrence, extent of an occurrence, or contingency." AR 6. Thus, the Commission reasoned, the only thing Section 5c(c)(5)(C)(i) says about the underlying is that it must be a certain kind of excluded commodity (an event contract) and not that it must be one of the enumerated activities. AR 6-7. On these findings, the Commission reasoned that Congress's choice of the broader term "involve" means that CEA Section 5c(c)(5)(C)(i) broadly captures both contracts whose underlying is one of the enumerated activities and contracts with a different connection to one of the enumerated activities. AR 7.

In finding that the Congressional Control Contracts "involve" the enumerated activity of "gaming" the Commission applied the ordinary meaning of "gaming" to include betting or wagering on elections. AR 8-10. The Commission reasoned that: (1) dictionaries define "gaming" to mean "gambling;" (2) under most state laws "gambling" involves staking something of value upon the outcome of a game, contest, or contingent event; (3) the Unlawful Internet Gambling Enforcement Act ("UIGEA") defines the term "bet or wager" as "the staking or risking by any person of something of value upon the outcome of a contest of others …, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome;" and (4) state statutes link the terms "gaming" or "gambling" to betting or wagering on elections. AR 8-9. Accordingly, because taking a position in the Congressional Control

Contracts would be staking something of value (*i.e.* betting or wagering) upon the outcome of a contest of others (*i.e.* the outcome of Congressional elections), the Contracts involve "gaming." AR 10.

As to unlawful activity, the Commission found that the Congressional Control Contracts involve an activity that is unlawful under state law because betting or wagering on elections is prohibited by numerous state statutes and because several state court decisions hold that betting or wagering on elections is illegal. AR 11-12. The Commission reasoned, and Kalshi does not contest, that taking a position in the Congressional Control Contracts would be staking something of value (or betting) upon the outcome of contests between electoral candidates, which is illegal in a number of states. AR 12-13. The Commission also explained that to permit nationwide election gambling would directly undermine important state interests in controlling election gambling. AR 13 n.28.

Having found the Contracts "involved" two enumerated activities, the Commission next evaluated whether the Contracts are contrary to the public interest. AR 12. The Commission found that the Congressional Control Contracts are contrary to public interest because of their negligible hedging and price-basing utility, AR 15-19, because of their potential negative impact on election integrity or the perception of election integrity, AR 19-22, and because permitting trading in the Contracts could require the Commission to assume a role in overseeing the electoral process, AR 22-23. The Commission also explained that to permit nationwide election gambling would directly undermine important state interests in controlling election gambling. AR 13 n.28.

In assessing the hedging and price-basing utility, the Commission applied a form of the "economic purpose test" supported by the legislative history of CEA Section 5c(c)(5)(C)(i), as well as the Congressional finding in CEA Section 3 of a national public interest in well-regulated markets for hedging and price basing. AR 15. This entailed determining whether the Contracts could be reasonably expected to be used for hedging and/or price basing on "more than an occasional basis"

or could reasonably be expected to be used predominantly by market participants having a commercial or hedging interest. AR 19. The Commission examined the Contracts' salient features, considered the relevant comments, and applied its expertise to make a series of findings. AR 15-18. The Commission found that control of a chamber of Congress does not, in and of itself, have sufficiently direct, predictable, or quantifiable economic consequences for the Congressional Control Contracts to serve an effective hedging function. AR 17. The Commission acknowledged that control of a chamber of Congress may ultimately have economic effects but that those eventual effects are diffuse and unpredictable, considering the many intervening events and variables that exist between control of a chamber of Congress and the actual implementation of policy, such that the Contracts could be useful for specific, identifiable hedging purposes. AR 17. The Commission noted the specifications for the contract, including the binary nature of the payout and the settlement only once every two years, further limited the hedging capabilities of the contract. AR 17-18. For these same reasons, the Commission explained that the Contracts could not predictably be used for price basing. AR 18-19.

As to election integrity, the Commission found that the Contracts could potentially adversely affect election integrity or the perception of election integrity by creating monetary incentives to vote (including as an organized collective) for particular candidates or by incentivizing the spread of misinformation in order to influence the markets and that the market could be used to influence perceptions about elections. The Commission cited, among other things, comment letters from six United States Senators expressing serious concerns along those lines. AR 19-20.

The Commission noted the difficulty of guarding against misinformation and manipulative activity because the Contracts have no underlying cash market and instead the price forming information is driven largely by opaque and unregulated sources such as polling and voter surveys. AR 20-21. This differs from the reliable informational sources, such as information in government

crop forecasts, that are used to price the vast majority of commodities underlying Commission-regulated derivatives contracts. AR 21.

The Commission found that the Contracts' proposed trading prohibitions provided insufficient protections against manipulative activities because they do not exclude all persons who could have a motivation to manipulate the markets, nor do they prevent the prohibited individuals and entities from engaging in activity other than trading that could artificially move the market in the Congressional Control Contracts. AR 22.

Finally, the Commission found that as a regulator of the Congressional Control Contracts markets, the CFTC could find itself in the position of investigating suspected manipulation of the markets, which could, by extension involve investigating election-related activities. AR 22-23. The Commission observed that several commenters, including members of the House of Representatives, noted that the Commission is not equipped or well suited for this role, which falls well outside its mandate as established by Congress. AR 22-23.

In light of these findings, the Commission determined that the Congressional Control Contracts involve gaming and activity that is unlawful under State law, and are contrary to the public interest. Accordingly, the Commission ordered that pursuant to CEA Section 5c(c)(5)(C)(ii) and Regulation 40.11(a)(1), the Congressional Control Contracts are prohibited and shall not be listed for clearing or trading on or through Kalshi. AR 23.

SUMMARY OF ARGUMENT

Kalshi's arguments are based overwhelmingly on unreasonable interpretations of the CEA, mischaracterizations of the Commission's Order, straw men, faulty logic, and mistaken reliance on evidentiary standards that apply to rulemakings and not individual adjudications like this one. The CFTC is entitled to judgment as a matter of law for the following reasons:

First, the CFTC correctly applied the ordinary and broad meaning of "involve," in determining whether the Congressional Control Contracts and transactions therein involve an enumerated activity under CEA Section 5c(c)(5)(C)(i). The Commission's application of the broad meaning of "involve" to include "to relate to or affect," "to relate closely," to "entail," or to "have as an essential feature or consequence," is supported by dictionary definitions, the usage of other terms in the CEA, and the legislative history of the statutory language of Section 5c(c)(5)(C)(i), and is reinforced by multiple tools of construction. Kalshi asserts that a contract can only "involve" an enumerated activity "when the underlying event constitutes or relates to that activity." This argument disregards the plain meaning of "involve" and is not consistent with terms in the CEA. Kalshi further accuses the Commission of using "shifting" definitions of "involve," but the accusation is baseless. The definition is not "shifting;" it is just broad, which the Commission explained in its Order in a passage Kalshi simply ignores.

Second, the Commission correctly determined that the Contracts involve "gaming." In so doing, the Commission applied the ordinary meaning of "gaming" to cover "betting or wagering on elections" including "staking something of value on the outcome of contests of others." This application is supported by the use of the terms "gaming" and "gambling" in both state and federal statutes, the purpose of the CEA Section 5c(c)(5)(C)(i), and the legislative history of CEA Section 5c(c)(5)(C)(i). The Commission then correctly concluded that the Contracts involve gaming pursuant to Section 5c(c)(5)(C)(i), because taking a position in the Contracts would be staking something of value on the outcome of the contest of others, where the Contracts are premised on the outcome of Congressional elections. Kalshi argues that "gaming" does not cover betting on elections, and only narrowly covers activities that involve a game, such as playing cards or betting on a football match. This narrow reading contradicts Kalshi's own view that a contract only "involves"

gaming if the underlying is "gam*ing*" (as opposed to a "game" like football) and is, in any event, not supported by the other statutes Kalshi cites, or Section 5c(c)(5)(C)(i) or its legislative history.

Third, the Commission correctly determined that the Contracts involve activity that is "unlawful under any … State law." The Commission found that the Congressional Control Contracts involve betting or wagering on elections, an activity the Commission observed is unlawful under numerous state laws, because staking something of value on the outcome of contests between electoral candidates is an essential feature or consequence of transacting in the Contracts. Kalshi does not challenge these findings, but instead argues that the Commission's analysis threatens to undermine its own exclusive jurisdiction and regulatory authority over derivatives markets by permitting states to dictate trading prohibitions by simply outlawing activity. This argument is without merit because contracts that involve enumerated activities are subject to prohibition only if the Commission, in its discretion, determines they are contrary to public interest.

Fourth, the Commission rationally considered the contracts' hedging and price-basing utility in determining whether the Congressional Control Contracts are contrary to public interest. The Commission's use of an economic purpose test is supported by the text of the CEA and the relevant legislative history.

Fifth, the Commission reasonably determined that the Congressional Control Contracts could not reasonably be expected to be used for hedging or price basing "on more than an occasional basis." This determination was based on the Commission's analysis of the relevant facts and application of its expertise. Kalshi wastes pages of its brief disputing a conclusion the Commission did not reach—that the Contracts could *never* be used by *anyone* to hedge a risk. But nothing that Kalshi cites undermines the Commission's judgment that, even considering Kalshi's assertions of certain narrow hedging uses, the Contracts cannot reasonably be expected to be used for hedging or price basing on more than an occasional basis.

Sixth, the Commission reasonably determined the Contracts may be vulnerable to manipulative efforts, and such events or efforts could undermine perception of the integrity of elections, the integrity of those elections, and put the Commission in a role that is misaligned with the Commission's mission. The specifications of the contract, the lack of an underlying cash market, and the record, including the opinions of economists that Kalshi cites, all point to a contract that could be manipulated, especially in short bursts. Kalshi argues that the Commission did not consider Kalshi's proposed public interest of socially valuable data, but that is not true—the Commission acknowledged that claim, but reasonably chose to weigh that interest against other factors, including the potential for manipulative events which could affect confidence in, or the even the outcome of, elections, and the possibility that the Commission would be drawn into investigations of manipulative events in elections. The Commission made a predictive, policy decision, and while Kalshi has a difference in view, that disagreement is no reason for this Court to disturb the decision.

STANDARD OF REVIEW

In cases challenging a final agency action under the Administrative Procedure Act ("APA"), the Rule 56 summary judgment standard does not govern the court's review. *Truitt v. Kendall*, 554 F. Supp. 3d 167, 174 (D.D.C. 2021). Instead, the court "sits as an appellate tribunal," *Concert Inv., LLC v. Small Bus. Admin.*, 616 F. Supp. 3d 25, 29 (D.D.C. 2022) (quoting *Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009)), and applies the APA's standards for judicial review, *Citizens for Resp. & Ethics in Washington v. FEC*, 316 F. Supp. 3d 349, 366 (D.D.C. 2018), *aff'd*, 971 F.3d 340 (D.C. Cir. 2020). Under those standards, the court determines, as a matter of law, "whether the agency's decision was arbitrary, capricious, an abuse of discretion, or unlawful," *Medica Ins. Co. v. Becerra*, No. 1:22-CV-1440-RCL, 2023 WL 6314571, at *5 (D.D.C. Sept. 28, 2023) (citing *Truitt*, 554 F. Supp. 3d at 174 and 5 U.S.C. § 706).

The arbitrary-and-capricious standard "requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021). Judicial review "is deferential, and a court may not substitute its own policy judgment for that of the agency." *Id.* Rather, the court "simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Id.*

Kalshi's criticisms of the Commission's analysis are flawed due to a basic legal error: They rely on the wrong procedural requirements under the APA for adjudicating a product certification. Kalshi mistakenly relies on *rulemaking* cases in arguing about the Commission's analysis of the record. However, the Order at issue is an "informal adjudication," and not a rulemaking. This is because the Commission issued a case-specific decision and was not statutorily required to engage in a notice and comment process or hold proceedings on the record. *See* 7 U.S.C. § 7a-2(c)(5)(C); *Neustar, Inc. v. FCC*, 857 F.3d 886, 893 (D.C. Cir. 2017).[16] This means that while under the APA the agency must "examine the relevant data and articulate a satisfactory explanation for its action," *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983), it need not include "an exhaustive analysis of the record" or "cite or explain its reasoning as to every piece of evidence that could be read to run contrary to its determination," *Concert Inv., LLC*, 616 F. Supp. 3d at 33. Rather, the agency need only "engage with as much evidence as necessary such that its logic can reasonably be discerned." *Id.* (citing *Bowman Transp. Inc. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 286 (1974)). And, "even if not explicitly backed by information in the record," "common

[16] Rulemakings carry out broad applications of more general principles that resemble legislation, rather than case-specific individual determinations. *Neustar*, 857 F.3d at 893. The fact that an order rendered in an adjudication "may affect agency policy and have general prospective application," does not make it a rulemaking. *Conf. Grp., LLC v. FCC*, 720 F.3d 957, 965 (D.C. Cir. 2013). Seeking public comment also does not affect whether an agency action is a rulemaking or an informal adjudication. *Neustar*, 857 F.3d at 895.

sense and predictive judgments" may be attributed to the agency's expertise. *Phoenix Herpetological Soc'y, Inc. v. U.S. Fish & Wildlife Serv.*, 998 F.3d 999, 1005-06 (D.C. Cir. 2021).

Because Kalshi is challenging the Commission's statutory interpretations, the two step-analysis applies—at least as of this writing—as set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In the first step, the court examines the statute de novo and employs traditional tools of statutory construction to determine if the intent of Congress is clear. N*at'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1228 (D.C. Cir. 2007). In determining whether Congress's intent is clear, the court reviews the statute's text, structure, purpose, and legislative history. *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 605 (D.C. Cir.), *on reh'g en banc*, 671 F. App'x 822 (D.C. Cir. 2016), *and on reh'g en banc in part*, 671 F. App'x 824 (D.C. Cir. 2016). If the intent is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013) (quoting *Chevron*, 467 U.S. at 842-43).

If a statute is ambiguous, the analysis proceeds to step two, and the court will defer to the agency's interpretation as long as it is "based on a permissible construction of the statute." *Pub. Citizen, Inc. v. U.S. HHS*, 332 F.3d 654, 659 (D.C. Cir. 2003).[17] In this case, the Court should find that even if there were no deference due to the agency, the Commission's construction of the statute is the most reasonable interpretation.

Finally, where Congress charges an agency with determining whether something is contrary "to the public interest," courts recognize broad authority on the part of the agency. *See, e.g., Chamber*

[17] An agency interpretation that is enunciated through an action that lacks the force of law, such as a policy statement, is subject to *Skidmore* deference, in which the court will accept agency interpretations of ambiguous statutes if they are persuasive. *Pub. Citizen, Inc.*, 332 F.3d at 660, 662 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The Commission's Order is an adjudication subject to the more deferential *Chevron* standard of review because it was an action authorized by Congress that carries the force of law. *Menkes v. U.S. DHS*, 637 F.3d 319, 330-31 (D.C. Cir. 2011).

of Commerce v. SEC, 412 F.3d 133, 139 (D.C. Cir. 2005); *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978); *see also Sw. Airlines Co. v. Transp. Sec. Admin*, 650 F.3d 752, 756 (D.C. Cir. 2011) (Kavanaugh, J.) (noting the "distinction between the objective existence of certain conditions and the [agency]'s determination that such conditions are present, stressing that a statute phrased in the latter terms fairly exudes deference to the [agency]."") (quoting *AFL-CIO v. Chao*, 409 F.3d 377, 393 (D.C. Cir. 2005)) (Roberts, J., concurring in part and dissenting in part). Under *State Farm*, 463 U.S. at 52, when the Commission makes a policy determination as to whether something is contrary to the public interest, it need only demonstrate "a rational connection between the facts found and the choice made." *See, e.g., Nasdaq Stock Market LLC v. SEC*, 38 F.4th 1126, 1135 (D.C. Cir. 2022) (quoting *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 52); *see also Verizon v. FCC*, 740 F.3d 623, 649 (D.C. Cir. 2014) (same). And a court may not scrutinize an agency's decision for perfect clarity: It is sufficient that the agency's path may "reasonably be discerned." *CBOE Futures Exch. v. SEC*, 77 F.4th 971, 977 (D.C. Cir. 2023) (quotations omitted).

ARGUMENT

I. The Commission correctly concluded that the Congressional Control Contracts involve both gaming and activity that is unlawful under state law.

A. The Commission did not err in applying the ordinary meaning of "involve."

The Commission correctly rejected Kalshi's made-up definition of "involve" as a reference to a contract's "underlying." As the Order explained, because the statute does not define "involve," the plain meaning applies, and it is broad enough to cover *both* contracts whose underlying is an enumerated activity, and contracts with a different connection to that activity. AR 7. As stated above, the Special Rule provides that the Commission "may determine" that certain "agreements, contracts, transactions, or swaps in excluded commodities that are *based upon* the occurrence, extent of an occurrence, or contingency," *i.e.* event contracts, "are contrary to the public interest" "if the

agreements, contracts, or transactions *involve*—(I) activity that is unlawful under any Federal or State law; . . . (IV) gaming . . .” 7 U.S.C. § 7a-2(c)(5)(C)(i) (emphasis added).

Kalshi argues that Congress did not mean to capture in Section 5c(c)(5)(C)(i) all contracts or transactions that “involve” an enumerated activity as that word is commonly understood—only those whose “underlying” is one of the activities or “relates to” one of the activities.[18] Kalshi Motion at 15. But Kalshi’s asserted definition of “involve” is not consistent with other terms in the statute, and multiple tools of construction reinforce that the ordinary and broad meaning of “involve” applies here.

“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). As explained above, “[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *City of Arlington*, 569

[18] Kalshi never raised the “relates to” argument before the Commission (or even in its Complaint), and it is accordingly waived. *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1290 (D.C. Cir. 2004); *Coburn v. McHugh*, 679 F.3d 924, 929 (D.C. Cir. 2012). Until now, Kalshi argued that for purposes of Section 5c(c)(5)(C)(i), “involve” is interpreted narrowly to mean that the enumerated activity *is* the contract’s underlying event, and that this is “the only way to make sense of” the statute. *See* Compl., Dkt. No. 1 at ¶ 10; *see also* AR 6, 111, 115, 119-22, 130-132. Kalshi’s concession likely reflects a recognition that the unsupported narrow definition would create absurd results—*i.e.*, a statute that applies to nothing, or close enough that it makes no difference. And the argument that the statute applies to contracts and transactions where the underlying “relates to” an enumerated activity is *the Commission’s* argument. For example, the Congressional Control Contracts “involve” gaming because an election “relates to” gaming – *if you gamble on it* – which is what Kalshi’s Contracts are for. Collin Sherwin, *Where can you bet on the 2024 US presidential election?*, DraftKings.com (July 22, 2022), https://dknetwork.drafkings.com/2022/7/14/23216300/us-presidential-election-where-is-betting-legal-2024-odds-joe-biden-donald-trump (describing the contracts that have received no-action Letters from the CFTC as accepting “election bets” and noting that “[w]hile there is no federal prohibition on election betting as of yet, no state or jurisdiction in the United States has allowed it”). Kalshi offers that possibly Congress chose the term to prevent circumvention of the statute through contracts based on technically distinct events. The Commission agrees. As discussed below in the discussion of the legislative history, it appears Congress was attempting to prevent the use of these contracts to “enable gambling.” *See infra* at 33.

U.S. at 296 (quotation marks omitted). As relevant here, Section 5c(c)(5)(C)(i) unambiguously captures far more than contracts whose underlying *is* an enumerated activity.

The CEA does not define "involve," so its ordinary meaning applies. *See Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). As several courts have observed, the word has "expansive connotations." *See, e.g.*, *United States v. Alexander*, 331 F.3d 116, 131 (D.C. Cir. 2003) (citation omitted); *United States v. Williams*, 931 F.3d 570, 575 (7th Cir. 2019); *United States v. McKenney*, 450 F.3d 39, 42-43 (1st Cir. 2006) (rejecting a "'narrow' definition of 'involve'"); *United States v. King*, 325 F.3d 110, 113 (2d Cir. 2003). It means "to relate to or affect," "to relate closely," to "entail," or to "have as an essential feature or consequence."[19] The Contracts here "relate closely" to gaming;[20] it is their essential feature; and—notwithstanding Kalshi's assertion that "Election Gambling" (per Kalshi's own website) is a "hedging" tool, *see infra* at 30—gaming is what these transactions "entail." AR 10. And the Contracts likewise "relate closely" to and would "affect"—by utterly undermining—state laws that prohibit gambling on elections. AR 11-13. Accordingly, the Contracts "involve" gaming and activity that is illegal under state law, and Section 5c(c)(5)(C)(i) is satisfied.

The statute's plain meaning is bolstered here by the "meaningful-variation canon." *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 457-58 (2022). Where Congress uses "one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea." *Id.* at 458. In the CEA, where Congress refers only to a contract's underlying, it generally

[19] *See* Merriam-Webster, https://www.merriam-webster.com/dictionary/involve (last visited Feb. 23, 2024); Random House College Dictionary 703 (Revised ed. 1979); Riverside University Dictionary 645 (1983); *see also* Roget's International Thesaurus 1040 (7th ed. 2010) (giving as synonyms "entail" and "relate to").

[20] As explained, *infra*, in Section I.B. "gaming" and "gambling" can be understood to mean the same thing.

uses the word "underlying," *e.g.*, 7 U.S.C. §§ 6c(d)(2)(A)(i), 20(e), 25(a)(1)(D)(ii), or, where syntax requires, refers to what the contract is "based on" or "based upon," 7 U.S.C. §§ 2(a)(1)(C)(i)(I), 2(a)(1)(C)(ii), 2(a)(1)(C)(iv), 6a(a)(4)(A).[21] Nowhere does the statute define "involve" as limited to a contract's underlying.[22] If Congress intended Section 5c(c)(5)(C)(i)(V) to apply only where an enumerated activity like gaming is the underlying, it would have said so. *See Bldg. Owners & Managers Ass'n Int'l v. FCC*, 254 F.3d 89, 95 (D.C. Cir. 2001).

The "meaningful-variation" canon is especially powerful here because Section 5c(c)(5)(C)(i) uses the terms "based upon" and "involve" *in the same sentence* and differentiates between the two. First, Section 5c(c)(5)(C)(i) states that the provision applies to "agreements, contracts, transactions, or swaps in excluded commodities that are *based upon* the occurrence, extent of an occurrence, or contingency." 7 U.S.C. § 7a-2(c)(5)(C) (emphasis added). In other words, the contract's underlying must be an event. Then, just a few words later, Section 5c(c)(5)(C)(i) states that "such agreements, contracts, or transactions" must "involve" an enumerated activity. In context, "based upon" and "involve" must have different meanings, with "based upon" referring to the underlying and requiring only that it be an event, and "involve" retaining its broader ordinary meaning and referring not just to the underlying, but to "such agreements, contracts, or transactions" as a whole. AR 6-7.

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[21] Kalshi too does this throughout its Complaint. *See, e.g.*, Compl. ¶ 22 ("underlying"); ¶ 23 (same); ¶ 27 (same); ¶ 65 (same); ¶ 64 ("underlie" and "underlying"); ¶ 2 ("based on"); ¶ 3 (same); ¶ 4 (same); ¶ 29 (same); ¶ 81 (same).

[22] Kalshi argues that certain CEA provisions using "involve" to refer to an "underlying" mean the Commission was incorrect when it observed that when Congress uses "underlying," "based on," or "based upon" to refer narrowly to a contract's underlying. Kalshi Motion at 21. This mischaracterizes the Order. The Commission acknowledged that the ordinary meaning of "involve" *can* include, for purposes of Section 5c(c)(5)(C)(i)(V), contracts where an enumerated activity is the contract's underlying. It rejected Kalshi' contention that this was the *only* meaning of "involve." So, the fact that certain CEA provisions use "involve" in a context where it refers to a contract's underlying does not help Kalshi to prove that is the *only* thing to which "involve" can refer here.

The legislative history of Section 5c(c)(5)(C)(i) further supports that Congress meant to include contracts like Kalshi's that, as a whole, relate to or entail an enumerated activity. Senator Blanche Lincoln, then-Chair of the Senate Agriculture Committee, the CFTC's oversight committee, stated in colloquy that CEA Section 5c(c)(5)(C) is intended to "prevent gambling through futures markets" and to restrict exchanges from, for example, "construct[ing] an 'event contract' around sporting events such as the Super Bowl, the Kentucky Derby, and Masters Golf Tournament."[23] If Kalshi were right, and a contract "involves" gaming only if the underlying *is* gaming, none of those events would be covered—football, horseracing, and golf are "games," not "gaming." *Betting on them* is "gaming"—just like betting on elections is gaming, because it is staking something of value on a contest of others. As the Commission observed, under Kalshi's definition, "it is difficult to conceive of a contract whose underlying is 'gaming'."[24] AR 7 n.18. But courts must presume that Congress does not "include words that have no effect." *Mercy Hosp., Inc. v. Azar*, 891 F.3d 1062, 1068 (D.C. Cir. 2018). Here, the legislative history confirms that Congress intended 5c(c)(5)(C) to cover bets on contests of others and contracts that relate closely to illegal activity, which describes Kalshi's contracts here.

[23] *See* 156 Cong. Rec. S5906-07, 2010 WL 2788026 (daily ed. July 15, 2010) (statements of Sen. Diane Feinstein and Sen. Blanche Lincoln).

[24] For the first time, in its brief, Kalshi suggests two possibilities: A contract whose underlying is whether someone wins the Powerball by a certain date, or one whose underlying is the World Series of Poker. Kalshi Motion 22. The first of these possibilities is a rather peculiar example that would represent an inconsequential share of potential event contracts, and nothing in the text of the CEA or its legislative history (or common sense) indicates that Congress's concerns were so picayune. Rather, the evidence is that Congress was concerned more broadly with "gambling." 156 Cong. Rec. S5906-07, 2010 WL 2788026 (daily ed. July 15, 2010). The second example, a contract tied to the winner of the World Series of Poker, would fall under the Commission's construction of "involve," as such a contract would both relate to or entail "gaming." By Kalshi's logic (at least in this part of its brief), this would only be a contract based on gaming if the players were themselves betting, regardless of the fact that traders would be placing their own best on the game. The position that Congress intended for that contract be considered "gaming" only where the subjects participating in the "game" are themselves betting is absurd.

Rather than engage with any of this, Kalshi contends that a contract can "involve" an enumerated activity only "when the underlying event constitutes or [now] relates to that activity" because "this is the only reading of 'involve' that works across all categories of enumerated activities." Kalshi Motion at 15. Kalshi wastes an enormous amount of space in its brief arguing that the Commission's definition is "inconsistent" and "shape-shifting," but that is simply a false description of the Order. The Commission explained that the term is broad enough to capture the underlying *and* other features:

> Congress's choice of the broader term "involve" means that CEA section 5c(c)(5)(C)(i) can capture both contracts whose underlying is one of the enumerated activities, and contracts with a different connection to one of the enumerated activities because, for example, they "relate closely" to, "entail," or "have as an essential feature or consequence" one of the enumerated activities.

AR 7.[25] Thus, the Commission clearly explained that one definition captures all five enumerated activities. Kalshi simply ignores this part of the Order.

For its part, Kalshi cites nothing to support its definition of "involve" as "the underlying," and there is no such definition. "[I]nvolve" is unambiguously broader than "underlying," so that is "the end of the matter," *City of Arlington*, 569 U.S. at 296, and Section 5c(c)(5)(C)(i) applies squarely to Kalshi's contracts. The Commission's application of this broad meaning of "involve" was therefore the most reasonable interpretation of the statute, and should not be disturbed.

Nevertheless, Kalshi argues that when applied, the Commission's definition of "involve" "when combined with its interpretation of 'gaming'" "affords the CFTC a roving mandate to review—and potentially to ban—any event contract." Kalshi Motion at 19. But, as discussed below, this argument relies on Kalshi's mischaracterization of the Commission's Order as defining

[25] If anything, Kalshi is now pushing "shape-shifting" definitions. Kalshi argues that a contract can "involve" an activity only if the underling "is" the activity Kalshi Motion at 15, or—for the first time, here in court—when the underlying "relates to" gaming. This is puzzling because, as the Commission correctly determined, the Contracts relate to gaming.

"gaming" to include all event contracts. *See infra* at 27-28. Because the Commission did not define gaming in this way, the argument is without merit.

Finally, Kalshi challenges the Commission's application of "involve" as "making a hash of" the unlawful activity provision as it relates to both federal law and state law. This argument is also a mischaracterization of the Commission's Order—specifically, Kalshi argues as though the Commission were defining "involve" with regard to unlawful activity as meaning that the *act of trading* the contract itself must be unlawful. On that false premise, Kalshi goes on to argue that under this definition the Commission's authority to engage in a public interest review is meaningless because "Congress had no need to authorize public-interest review of contracts whose trading is already illegal under federal law" and any state law banning trading would be preempted by the CEA. Kalshi Motion at 20. But, again, that is not what the Commission said. The Commission did not define "involve" for purposes of unlawful activity to mean that the trading itself must be unlawful. As noted, the Commission applied the ordinary meaning of "involve" to mean "to relate to or affect," "to relate closely," to "entail," or to "have as an essential feature or consequence," and under this definition, the Commission could review event contracts that have other connections to unlawful activities. For example, the Commission could review a contract that "involves" the unlawful activity of narcotics trafficking in the sense that the contract's payout depends on whether a certain amount of cocaine is seized by federal or state authorities in a given month. Accordingly, Kalshi's argument that the Commission rendered its own authority meaningless, is without merit.

B. The Commission correctly determined that the Congressional Control Contracts involve gaming.

The Commission's determination that the Congressional Control Contract involve "gaming" for purposes of CEA Section 5c(c)(5)(C) was properly based on the application of the ordinary meaning of "gaming" to "include[] betting or wagering on elections." In explaining its decision, the Commission "note[d] that a common thread throughout the large majority of definitions of 'gaming'

and 'gambling' is the act of staking something of value on the outcome of a contest of others," a subject on which "futures contracts traditionally have not been premised." AR 10 n.25. Kalshi does not dispute that taking a position in the Congressional Control Contracts is betting or wagering on elections because Kalshi does not contest that the Congressional Control Contracts involve staking something of value upon the outcome of a contest of others. AR 8-10. Instead, Kalshi argues without basis that this does not amount to "gaming" because elections are not a "game" (which is different from "gaming" anyway) nor a "contest" in the sense Congress intended. Kalshi further argues "gaming" and "gambling" have different meanings, that gaming cannot include wagers based on contests, and that if gaming includes wagers based on contests the contests must be staged purely for entertainment. None of that has any basis in the statute, and this Court should reject Kalshi's arguments.

1. The Commission did not construe "gaming" to mean the staking of money on any contingent event.

Kalshi overstates its case by suggesting the Order defined "gaming" "to include staking money on *any* contingent event beyond the parties' control" such that every event contract would be subject to a public interest review, rendering the remaining enumerated activities in CEA Section 5c(c)(5)(C) superfluous. Kalshi Motion at 19, 27. This is a straw man. The Commission found that the Contracts involve "gaming" because taking a position in the Contracts would be "staking something of value *upon the outcome of a contest of others*," AR 10 (emphasis added), not just any contingent event beyond the parties' control.[26] This reasoning would not subject all event contracts to public interest review.

[26] Indeed, the Commission acknowledged that some state law definitions of "gaming" would have broader application that arguably capture all contingent events, AR 8, but the Commission did not adopt the broad definition, AR 10. Kalshi fixates on a footnote that says a contract "involves" gaming if trading it "amounts to" gaming, and repeats the term *ad nauseum*, as though it were the

The difference may best be illustrated by example: Under the Commission's construction of "gaming," an event contract based on who will win the Super Bowl could be categorized as "gaming" because it involves staking something of value on a contest of two teams; on the other hand, an event contract based on the how much rain the Des Moines Airport will get in a specified month would not fall within the Commission's interpretation because, while it involves staking money on a contingent event (here rainfall), that event is not a contest of others.

2. The Commission's interpretation of "gaming" to include betting or wagering on a contest of others is consistent with the ordinary meaning of "gaming."

The Commission arrived at its interpretation of "gaming" by looking to ordinary, dictionary definitions of "gaming" to mean "gambling,"[27] and referring to both state laws and federal laws that define gambling or betting as the staking something of value upon the outcome of, among other things, a contest of others. Thus, the Commission found that staking something of value on elections amounts to "gaming" or "gambling" because it is staking something of value on the outcome of a contest of electoral candidates. AR 10.

Kalshi argues that "gaming" is more limited than "gambling," and means "playing games of chance for money," "casino gambling,"[28] and "betting on other games." Kalshi Motion at 24.

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reason the Commission ruled against Kalshi's Contract. The Commission's statement in the footnote is correct, but again, it is not the test the Commission applied to the Congressional Control Contracts—the Congressional Control Contracts involve gaming because they "relate to or affect," "relate closely," to "entail," or to "have as an essential feature or consequence" the staking of value on a contest of others. AR 7.

[27] *See, e.g.*, *Gaming*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/gaming (defining the noun "gaming" as "the practice or activity of playing games for stakes: gambling") (last visited Feb. 23, 2024); *Gaming*, BLACK'S LAW DICTIONARY, https://thelawdictionary.org/gaming/ (last visited Feb. 23, 2024) ("In general, the words 'gaming' and 'gambling,' in statutes, are similar in meaning.").

[28] Notably, multiple international gambling websites, including one operated by the casino giant MGM, do offer election betting. *See* BetMGM, https://sports.on.betmgm.ca/en/sports/politics-61 (last visited Feb. 23, 2024); FanDuel,

Kalshi concludes an activity must involve a *game*, such as playing cards or betting on a football match, to fall under the "gaming" category. But Kalshi's narrow interpretation is unsupportable under the plain meaning of "gaming." For instance, Kalshi cites a dictionary definition of "gaming" that includes playing "games" for stakes, but Kalshi fails to note that the very same definition cross-references "gambling."[29] *See Gaming*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/gaming. Notably, the Supreme Court has recognized synonymity of "gaming" and "gambling" in the context of wagering or betting, and has held that the term "gaming activities" under the Indian Gaming Regulatory Act refers to the act of "gambling." *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 792 (2014) ("The 'gaming activit[y]' is (once again) the gambling."); *see also In re Betcorp Ltd.*, 400 B.R. 266, 271 n.3 (Bankr. D. Nev. 2009) ("'Gaming' is generally regarded as a mild euphemism for gambling."). Kalshi's argument that Congress's use of "gaming" instead of "gambling" limits the application of Section 5c(c)(5)(C) to wagers on "games" is thus without merit. *All Party Parliamentary Grp. on Extraordinary Rendition v. U.S. Dep't of Def.*, 754 F.3d 1047, 1051 (D.C. Cir. 2014) ("Where, as here, two words share at least one common meaning, we read nothing into Congress's use of one rather than the other."). The Commission correctly applied the accepted meaning, which includes staking something of value on a contest of others.

3. The Commission's interpretation of "gaming" is consistent with state and federal gambling statutes.

The Commission's construction of "gaming" is also consistent with state gambling statutes. As the Commission's Order notes, several state statutes define "gambling" to encompass wagering or betting on the outcome of "contests of others," and election event contracts fit squarely within

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https://canada.sportsbook.fanduel.com/en/sports/navigation/32473.25/32492.25 (last visited Feb. 23, 2024); BetOnline, https://www.betonline.ag/sportsbook/futures-and-props/congress-specials (last visited Feb. 23, 2024).

[29] Kalshi also argues the definition is limited to contests that are staged "purely for entertainment." But this definition is without support in any definition or statute.

this definition. Other state statutes cited in the Order define the term to include bets upon the "result" of a "game or contest." *See, e.g.*, Ga. Code Ann. § 16-12-21(a)(1). Though Kalshi asserts that elections are not *games*, elections in which candidates are vying to win a seat in the House of Representatives or Senate are undoubtedly *contests*. *See, e.g., Contest*, THE BRITANNICA DICTIONARY, https://www.britannica.com/dictionary/contest (last visited Feb. 23, 2024) (providing the definition, "a struggle or effort to win or get something," and an example, "the presidential contest").[30] Indeed, the Commission's Order cites several state statutes that *expressly* define wagering on elections as a form of gambling. *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/28-1 ("A person commits gambling when he . . . [m]akes a wager upon the result of any game, contest, or any political nomination, appointment or election.").

Kalshi argues that other state statutes and a federal statute support its position that "gaming" means "betting on *games*" and does not, as the Commission properly explained, include, "contests of others." Kalshi Motion at 25. However, the state statutes Kalshi cites are broadly worded and do not exclude wagering on elections. Rather, they define "gaming" to mean engaging in "a game for any sum" or "any game for pay," Kalshi Motion at 25 (citing Iowa Code § 725.7(1); Mass. Gen. Laws ch. 23K, § 2), which for a person placing bets on an "Election Gambling" site, it is. Similarly, the state statutes that use the term "contest of chance" and that ban wagering on trials or contests "of skill, speed or power of endurance" do not limit "gaming" to wagering on games.[31] Kalshi cites

[30] The Order noted that it is common parlance to refer to elections as "contests." AR 10 n.25 (citing *Frozen Needle in GOP Contest*, THE WASHINGTON POST, Sept. 3, 2023; *Biden: Dems revitalizing manufacturing*, HOUSTON CHRONICLE, Sept. 10, 2022).

[31] For example, Kalshi cites a state statute, Ala. Code § 13A-12-20, that prohibits staking "something of value upon the outcome of a contest of chance," which Kalshi claims obviously references only traditional gambling activities. However, Kalshi fails to note that the statute also prohibits wagers on "*a future contingent event not under his control or influence*," which would plainly cover betting on elections (though the basis given in the Commission's Order is narrower than that). Ala. Code § 13A-12-20(4) (emphasis added).

other statutes that define "gambling" to include wagering on "games," but those definitions also include wagering on "contests" and not just "contests of chance." Kalshi Motion at 29 (citing La. Stat. § 14:90(A)(1)(a); Ky. Rev. Stat. § 528.010(6)(a); Utah Code Ann. § 76-10-1101(a)).

Though elections are plainly considered contests ordinarily, Kalshi further claims that the term "contests" in the state statutes do not include elections because those statutes use the term to reach events that are not games but share similar attributes, such as horseraces. Kalshi argues that under the canon of *noscitur a sociis*, in which words grouped in a list should be given related meanings, the terms alongside "contest" in these statutes, such as "game" or "gaming scheme," demonstrate that it should be limited to competitions staged purely for entertainment and to facilitate betting. The canon of *noscitur a sociis* "requires some context cues indicating that the statutory text should be limited by its company." *United States v. Fischer*, 64 F.4th 329, 346 (D.C. Cir. 2023). Here, the connections between the broadly worded terms accompanying "contest" in the state statutes are "not so tight or so self-evident" to preclude the ordinary meaning of the term and, instead, suggest that the terms should be construed broadly. *See Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 288 (2010). Kalshi fails to provide any other context cues that indicate that the meaning of "contest" should be artificially limited to exclude elections and, thus, this argument fails.

Similarly, Kalshi's argument fails when it cites the Indian Gaming Regulatory Act ("IGRA") to assert that "federal statutes … use 'gaming' to refer to betting on games." Kalshi Motion at 25. But the language of IGRA undermines this limited view. IGRA defines three classes of "gaming" that are subject to regulation, including two classes that include "social games" and "bingo and card

games," among other things.[32] 25 U.S.C. § 2703(8). But there is a the third, catchall, class that is telling. It captures "all forms of gaming that are not class I gaming or class II gaming," and does not itself define "gaming." *Id.* Without a definition of "gaming" in this catchall, the IGRA cannot be read as limiting gaming to betting on games.

4. The Commission arrived at the best interpretation of "gaming" given the statutory context.

The Commission's interpretation of "gaming" makes sense within the context of Section 5c(c)(5)(C). The Commission's interpretation is proper when reviewed "not only by reference to the language itself" but also "the specific context in which th[e] language is used, and the broader context of the statute as a whole." *Am. Coal Co. v. Fed. Mine Safety & Health Rev. Comm'n*, 796 F.3d 18, 26 (D.C. Cir. 2015); *see also United States v. Wilson*, 290 F.3d 347, 355 (D.C. Cir. 2002) (noting statutory provisions are construed "to 'make sense' in combination"); *Am. Min. Cong. v. EPA*, 824 F.2d 1177, 1187 (D.C. Cir. 1987) (requiring courts to "read statutes as a whole" rather than "construe phrases in isolation").

A review of Section 5(c)(5)(C), including the complete list of the enumerated activities, confirms Congress's intent to provide broad authority to the Commission to prohibit event contracts that the Commission determines are contrary to the public interest. As to "gaming" specifically, Congress used broad language that "should be given broad, sweeping application." *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 664 (D.C. Cir. 2009). Had Congress intended to further narrow the Commission's authority to review event contracts involving sports or games of chance, it could have included more limiting language. *See Bldg. Owners & Managers Ass'n Int'l*, 254

[32] "[C]lass I gaming" is "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations," 25 U.S.C. § 2703(6); "class II gaming" is "bingo" and "card games" but not "banking card games, including . . . blackjack." 25 U.S.C. § 2703(7).

F.3d at 95. But it chose not to. Accordingly, the language of Section 5(c)(5)(C) favors the Commission's inclusive interpretation of "gaming" over Kalshi's narrow interpretation.

5. Legislative history supports the Commission's interpretation of "gaming."

Finally, the legislative history of Section 5(c)(5)(C) supports the Commission's application of "gaming." In considering "'the problem Congress sought to solve' in enacting the statute in the first place," *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 782 (D.C. Cir. 2012) (quoting *PDK Labs., Inc. v. DEA*, 362 F.3d 786, 796 (D.C. Cir. 2004)), a colloquy between Senators Feinstein and Lincoln regarding Section 5c(c)(5)(C) is instructive. That colloquy confirms the understanding that "gaming" and "gambling" are interchangeable. Senator Lincoln remarked that the provision is intended "to assure that the Commission has the power to prevent . . . *gambling* through futures markets" and "derivatives contracts" that "exist predominately to enable *gambling*." 156 Cong. Rec. S5906-07, 2010 WL 2788026 (daily ed. July 15, 2010) (emphases added). When asked by Senator Feinstein about whether the provision would give the Commission "the power to determine that a contract is a *gaming* contract," Senator Lincoln confirmed that the intent was to prevent derivatives contracts that "enable *gambling*." *Id.* (emphasis added).

The colloquy also confirms that the scope of activities covered by "gaming" was not intended to be limited to "games of chance," as Kalshi suggests. In providing examples of covered event contracts, Senator Lincoln included event contracts constructed "around sporting events such as the Super Bowl, the Kentucky Derby, and Masters Golf Tournament." *Id.* at S5907. Any wagers on these competitions would clearly constitute "stak[ing] something of value upon the outcome of contests of others" and not "games of chance."

Kalshi argues that the examples offered by Senator Lincoln support its contention that "gaming" includes only betting on contests that are "*games*," but there is no basis to conclude that sports gambling is the *only* gambling Congress meant to cover. And even if that was Senator

Lincoln's focus, broadly worded statutory prohibitions "often go beyond the principal evil to cover reasonably comparable evils." *United States v. Fischer*, 64 F.4th 329, 347 (D.C. Cir. 2023) (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)). Evidence of a specific rationale for the enactment of a broadly worded statute "does not define the outer limits of the statute's coverage." *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003) (quoting *New York v. FERC*, 535 U.S. 1, 21 (2002)). Staking something of value on elections is a reasonably comparable activity to betting on sports or other competitions and falls within the scope of "gaming" under Section 5c(c)(5)(C).

C. The Commission correctly concluded that the Congressional Control Contracts involve activity that is unlawful under state law.

Drawing on the ordinary meaning of "involve" to include the definition to "have as an essential feature or consequence," the Commission found that the Congressional Control Contracts involve wagering on elections, which is unlawful in a number of states. As the Commission observed, wagering on elections is unlawful under 22 state statutes and by common law in 18 states. AR 11-12, n.26, 27. The Commission reasoned that because taking a position in the Congressional Control Contracts means staking something of value on the outcome of contests between electoral candidates, taking a position in the Contracts means wagering on elections. And, accordingly, the Commission found, the Contracts involve unlawful activity because wagering on elections is "an essential feature or consequence of the contracts."[33] AR 13 n.28.

Kalshi ignores the Commission's findings and instead argues that the Commission's reasoning enables states to "ban the trading of event contracts on federally regulated exchanges."

[33] Kalshi suggests that the Commission relied on the "entail" and "relates closely to" definitions of "involve," and then asks "What does this even mean?" Kalshi Motion at 32. But, as explained, the Order applied the "essential feature or consequence" definition in determining the contracts involve an activity "unlawful under … State law." *See* AR 13 n.28.

Kalshi Motion at 31. But that is not what the Commission said. The Commission expressly recognized its exclusive jurisdiction over event contracts. The Commission agreed that state laws cannot prohibit trading futures on registered exchanges, and that the CEA preempts state law to the contrary. There are such state laws on the books, sometimes called "bucket shop" laws, but those are not the laws on which the Commission based its determination.

The Commission explained in detail why Kalshi's argument "misses the point," AR 13 n.28, but Kalshi simply ignores what the Commission said. As the Commission correctly explained (AR 13 n.28): CEA section 2(a)(1) grants the Commission "exclusive jurisdiction" over futures and swaps traded on a DCM. 7 U.S.C. § 2(a)(1). This "preempts the application of state law," *Leist v. Simplot*, 638 F.2d 283, 322 (2d Cir. 1980), so transacting these products on a DCM cannot, in and of itself, be an "activity that is unlawful under any … State law." On the other hand, these products may still "involve … activity" that is unlawful under a state law, in the sense, for example, that transactions in the products may "relate closely" to, "entail," or "have as an essential feature or consequence" an activity that violates state law. *See* Merriam-Webster, available at https://www.merriam-webster.com/dictionary/involve (last visited Feb. 23, 2024); Random House College Dictionary 703 (Revised ed. 1979); Riverside University Dictionary 645 (1983). Here, state laws (that are not preempted by the CEA) prohibit wagering on elections. Taking a position in the Congressional Control Contracts would be staking something of value on the outcome of contests between electoral candidates, such that wagering on elections is "an essential feature or consequence" of the contracts. Thus, while transactions in the Congressional Control Contracts on a DCM do not violate, for example, state bucket-shop laws, they nevertheless involve an activity that is unlawful in a number of states—wagering on elections. To permit such transactions on a DCM would undermine important state interests expressed in statutes separate and apart from those applicable to trading on a DCM. Kalshi does not dispute this.

Kalshi nevertheless argues that the Commission's reasoning threatens to "upend the CEA's regulatory scheme by empowering state legislatures to dictate the regulation of event contracts." Kalshi Motion at 31-32. But under the CEA, event contracts are subject to prohibition only if the Commission initiates a discretionary review and determines that the contracts are contrary to public interest. 7 U.S.C. § 5(c)(5)(C)(i)-(ii). As Kalshi admits, Section 5c(c)(5)(C)(i) provides that the Commission "may determine" that the contract is contrary to public interest and therefore subject to prohibition, but there is no requirement that the Commission do so, much less an automatic prohibition that kicks in if a state outlaws an activity. Kalshi Motion at 8 (acknowledging that the Commission "may determine" contracts are contrary to public interest). Thus, the Commission's reasoning in no way empowers state legislatures to dictate regulation of event contracts.

II. The Commission reasonably determined that the Congressional Control Contracts are contrary to public interest.

Section 5c(c)(5)(C)(i) provides that the Commission "may determine" that event contracts involving an enumerated activity are contrary to public interest and therefore prohibited from being listed or made available for clearing or trading pursuant to Section 5c(c)(5)(C)(ii). During the review of the Contracts, Kalshi conceded the Commission has wide discretion in considering a variety of factors in making the public-interest determination, and Kalshi appears to concede as much in this Court.[34] Thus, the arguments before this Court are confined to whether the public interest portion

[34] Kalshi appears to admit that the "contrary to public interest" standard is broad, stating that "[n]othing in the CEA suggests the CFTC is *limited* to weighing economic considerations." Kalshi Motion at 40. Further, a comment Letter submitted by counsel for Kalshi in support of Kalshi's 2022 Submission states: "I do note, however, that the Commission is not limited to using an economic purpose test for determining whether a contract is within the public interest. That test is found nowhere in the text of Section 5c(c)(5)(C) or Rule 40.11. One reference to the economic purpose test between two Senators in a brief discussion of what would become Section 5c(c)(5)(C) is insufficient to bind the Commission to that test." AR 137, 3747. Another comment letter of Kalshi's in support of the 2023 Submission states "Congress wanted the Commission to look at the variety of factors that are discussed in the CEA, its purpose, and the core principles." AR 1811

of the Commission's Order was arbitrary and capricious under the rational-connection standard, *i.e.*, that there was "a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43. The Commission's determination comfortably clears that deferential bar.

In considering whether the Congressional Control Contracts are contrary to the public interest, the Commission considered in detail the proposed contract's specifications and applied its expertise to evaluate how the relevant contract may work in practice. The Commission determined that the contracts did not meet the economic purpose test and could be subject to manipulation and other deceptive practices that may undermine confidence in elections, election integrity, and would thrust the Commission into a role for which, members of the House of Representatives noted in a comment, the Commission is not equipped or well-suited. *See Bd. of Cty. Comm'rs v. U.S. Dep't of Transp.*, 955 F.3d 96, 99 (D.C. Cir. 2020) ("Both the Supreme Court and our court have recognized that agencies should be given a wide berth when making predictive judgments . . . that is so because such predictions are policy-laden, and courts are not well equipped to second-guess agency estimates, especially where those estimates fall within the field of an agency's expertise."); AR 2723-26. The Commission also engaged with the comments supporting and opposing the contracts, considering all important aspects of the problem, as required. *CBOE Futures Exch.*, 77 F.4th at 977. *See, e.g.*, AR 15-16, 19, 20 n.37-38, 21-22 (discussing comments and research).

Kalshi's arguments merely amount to a "difference in view" for how the Commission should have evaluated whether the Congressional Contract Contracts were against the public interest and

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n.82. Even Kalshi's motion notes that insisting on some economic purpose "is sensible." Kalshi Motion at 35.

By contrast, Amicus Aristotle argues that the CFTC acted in a way that was manifestly contrary to the statute by using the economic purpose test. However, Aristotle cannot expand the scope of this appeal. *See Met Life v. Fin. Stability Oversight Counsel,* 865 F.3d 661, 666 n.4 (D.C. Cir. 2017) ("Nor may amici expand an appeals scope to sweep in issues that a party has waived."). In any event, for the reasons given, the Commission validly applied the economic purpose test as part of its broader public interest analysis.

do not demonstrate that the Commission's Order was arbitrary and capricious. *Baystate Franklin Med. Ctr. v. Azar*, 950 F.3d 84, 89 (D.C. Cir. 2020). The arbitrary and capricious standard is narrow; courts refuse to substitute their judgment for the agency's and will accept the decision as long as the agency has provided a reasonable explanation. *Id.* A court's review is especially deferential when, as here, "the decision under review requires expert policy judgment of a technical, complex, and dynamic subject" and involves "matters implicating predictive judgments." *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009).

A. Kalshi incorrectly relies on rulemaking cases and mischaracterizes the Commission Order in arguing that the Commission's public interest analysis was arbitrary and capricious.

In challenging the Commission's public interest analysis, and specifically the economic purpose determination, Kalshi relies almost exclusively on rulemaking cases to argue that the Commission engaged in "textbook arbitrary-and-capricious reasoning." Kalshi Motion at 34, 39. Kalshi contends that the Commission did not "meaningfully address comments and evidence," "disregarded evidence" in "assessing the economic utility of Kalshi's contracts," "ignored record evidence of non-economic benefits," "ignor[ed] the contrary record material," and "refused to engage with the commenters' points and evidence'." Kalshi Motion 34, 39. But Kalshi's attempt at legal support is a blunder because the Commission's Order is not a rulemaking. It is an informal adjudication which is a distinct administrative procedure. As explained above, in adjudicating Kalshi's two product submissions, the Commission was not required to include "an exhaustive analysis of the record" or "cite or explain its reasoning as to every piece of evidence that could be read to run contrary to its determination," *Concert Inv., LLC*, 616 F. Supp. 3d at 33. Rather, it was sufficent to do just what the agency did: "engage with as much evidence as necessary such that [its] logic can reasonably be discerned." *Id.* (citing *Bowman Transp. Inc. v. Arkansas-Best Freight System*, 419

U.S. 281, 286 (1974)). Because Kalshi relied on the wrong cases, it makes no argument that the Commission did otherwise.

Kalshi's argument also again mischaracterizes the Commission's Order. As discussed below, the Commission properly considered the economic effects of Congressional control and the economic utility of the Contracts, and therefore did not "ignore" relevant data. *See e.g.* AR 15 (noting "the Commission has considered comments from Kalshi and others that state that Congressional control impacts a wide variety of assets and cash flows"); AR 16 (noting that the Commission considered "detailed examples … attempting to predict broad-ranging economic impacts of various political outcomes" and assertions about the Contracts "hedging purpose").

B. The Commission's application of the economic purpose test was not arbitrary or capricious.

The Commission's use of the economic purpose test, as well as its consideration of other factors in evaluating whether a Contract is contrary to the public interest, was appropriate under the text of the statute and its legislative history.

As the Commission explained, AR 14, consideration of the public interest in hedging and managing price risks stems from the text of the CEA, 7 U.S.C. § 5, which states that the transactions subject to this Act are "affected with a national public interest by providing a means for managing and assuming price risks, discovery prices, or disseminating pricing information through trading in liquid, fair and financially secure markets." Thus, as the Commission noted, the Act "recognizes hedging—and, in particular, price hedging (the 'managing [of] price risks')" is the "public interest that transactions subject to the CEA are intended to serve." AR 14. Kalshi does not challenge this, and it was entirely reasonable for the Commission to apply an economic purpose test that relies on those factors.

The Commission's decision was also rationally based on the history of the statute. As discussed above, during the era in which registered exchanges were required to satisfy the economic

purpose test for every new contract before it could be listed for trading, the test asked "whether [a] contract reasonably can be expected to be, or has been, used for hedging and/or price basing on more than an occasional basis." 17 C.F.R. § 5, Appendix A- Guideline No. 1 (repealed 2001).[35] Critically, the test historically was not whether there was *any* existing or *potential* hedging or price-basing use for a contract. Rather, it asked if that use was "more than occasional." *Id.* Congress repealed that historical test, but then when discussing the Special Rule on Senate floor, Senator Feinstein noted it was "very important to restore CFTC's authority to prevent trading that is contrary to the public interest." She summarized the history, with the CFTC being required to prevent trading in futures contracts that were "contrary to the public interest" from 1974 to 2000 and how in 2000 Congress took away this authority. She then stated a hope that Senator Lincoln's intent was "to define 'public interest' broadly so that the CFTC may consider the extent to which a proposed derivative contract would be used predominantly by speculators or participants not having a commercial or hedging interest…" Senator Lincoln responded affirmatively. *See* 156 Cong. Rec. S5906-07, 2010 WL 2788026 (daily ed. July 15, 2010) (emphasis added). As the Commission explained, this is further evidence that an economic purpose test should apply. Indeed, Kalshi here admits that insisting on some economic purpose "is sensible." Kalshi Motion at 35.

Thus, the Commission properly considered the Congressional Control Contracts' hedging and price-basing utility, including whether the contracts were predominantly speculative or would be used for hedging on more than an occasional basis. AR 19. That Kalshi or other commenters "might have chosen a different" economic test or factors to consider "is of no moment so long as

[35] Appendix A may be found in the various adopting releases, *See, e.g.*, Economic and Public Interest Requirements for Contract Market Designation, 47 Fed. Reg. 49,832, 49,839 (Nov. 3, 1982); Economic and Public Interest Requirements for Contract Market Designation, 64 Fed. Reg. 29,217, 29,222 (June 1, 1999).

the [Commission's] decision was justifiable and clearly articulated," which here, it was. *In re Polar Bear Endangered Species Act Listing*, 709 F.3d 1, 16 (D.C. Cir. 2013).

C. The Commission reasonably determined that the Congressional Control Contracts did not have a sufficient economic purpose for purposes of the CEA.

Examining the Contracts' economic purpose, the Commission determined that the Congressional Control Contracts could not reasonably be expected to be used either for hedging or price basing on more than an occasional basis, or predominantly by market participants having a commercial or hedging interest. AR 19. This determination is supported by the Commission's findings that: (i) control of a chamber of Congress itself has no sufficiently direct, predictable, or quantifiable economic consequences; (ii) any eventual effects that Kalshi and commenters cited were diffuse and unpredictable; and (iii) the economics and structure of the transactions limit their utility as a vehicle for hedging. The Commission's explanation was rational and supported by the facts. The APA and CEA require no more.

Kalshi does not challenge the Commission's factual findings that the features of the Contracts undermine them as hedging and price-basing tools. As the Commission observed, the Congressional Control Contracts result, upon settlement, in a payout of $1 or $0, per contract, only once every two years (coinciding with the election cycle). And, unlike many hedging and risk management contracts, the payout on the Contracts is not in any way tied to actual or estimated losses incurred elsewhere, and a loss on the Contracts is not offset by a gain elsewhere. Thus, the Commission concluded, the binary payout and frequency of settlement of the Contracts limit their utility as a vehicle for hedging eventual economic effects resulting from which party controls Congress.

Kalshi asserts that the Commission's application of the economic purpose test amounted to "arbitrarily heightened standard," alleging that the Commission incorrectly required that Kalshi demonstrate "direct economic effects" of control of a chamber of Congress. Kalshi Motion at 16-

18. This is not true. In considering hedging utility, the Commission examined whether there were *any* economic effects of control of one chamber of Congress, including indirect effects advanced by Kalshi and commenters, that the Contracts might be used to hedge. At the outset, the Commission made the common sense point that control of one chamber did not, itself, have "sufficiently direct, predictable, or quantifiable economic consequences." AR 15. The Commission then turned to eventual (*i.e.* indirect) effects that Kalshi and the commenters cited. AR 16. The Commission determined such effects were too "diffuse and unpredictable" to establish a specific identifiable hedging or price-basing purpose for the Contracts, on more than an occasional basis. AR 15-16.

As the Commission observed, the eventual economic effects were related to *potential* legislative policy changes. The Commission acknowledged that the likelihood of adoption of a given policy may increase or decrease based on control of a single chamber of Congress, but reasonably observed that "many intervening events and variables exist between control of a chamber of Congress and the actual implementation of such a policy." AR 16. This is because, as the Commission noted, there are several steps required to enact and implement legislation, the likelihood of which does not depend on control of a chamber of Congress alone. AR 16-17. Implementation also depends on, for example, whether a party controls one or both chambers, the size of its majority, the votes by individual party members, and the political affiliation of the president, among other factors. AR 16 n.34. Thus, the Commission reasonably concluded, the cited potential economic effects of control of a single chamber of Congress were insufficient to demonstrate that the Contracts had a specific, identifiable hedging purpose or that they could be used to establish commercial transaction prices, as necessary to satisfy the economic purpose test.

Kalshi points to a handful of examples of possible hedging.[36] As a threshold matter, many of these do not relate to the Congressional Control Contracts at all—they relate to other forms of theoretical political risk. Kalshi argues that JPMorgan projected that "Democratic victory in the 2020 election would boost the prices of … 'China-exposed stocks' and 'renewables'" and "[s]ure enough, the Democratic Party's Senate takeover did trigger a large rally in the green-energy sector." Kalshi Motion at 38. Yet, the JPMorgan projection that Kalshi cites is about the presidential election, as the title of the cited Bloomberg article suggests—JPMorgan Says *Biden* Victory Could Mark a Stock Market Shift. *See* Kalshi Motion at 38 (citing AR 2991 n.8) (emphasis added)). It should go without saying that the President's control over the executive branch may involve different issues than the partisan composition of Congress. But, more fundamentally, nowhere does Kalshi engage with the question of whether that hedging function would be its "predominant use" or whether the identified hedging function could be reasonably expected to be used on "more than an occasional basis," when all indications are, as common-sense and new stories on Kalshi's own website dictate, the proposed markets are simply a form of "Election Gambling."

To resist the obvious, Kalshi points to a hypothetical "consulting firm with deep ties to one party" whose business would be "directly harm[ed]" by "Congressional control by the other party." Kalshi Motion at 38. Kalshi argues that the Congressional Control Contracts could be used by the hypothetical firm to hedge this risk and by others to determine the firm's value. *Id.* Kalshi neither quantifies these hypothetical effects nor demonstrates how they would support more than occasional hedging or price-basing utility, which on their face they could not. And Kalshi's own

[36] Notably, many of Kalshi's arguments cite "control of Congress" as opposed to control of one chamber of Congress. For example, Kalshi refers to "partisan control of Congress," Kalshi Motion at 35, "control of Congress," *Id.* at 36, "if Republicans take control of Congress in 2024," *Id.* at 37, "Congressional control," *Id.* at 38. Other arguments refer to the party affiliation of the president, such as the effect of President Bush's election on the value of tobacco companies, *Id.* at 38-39, and JP Morgan's 2020 projection for green energy with a Biden win, *Id.* at 38 (citing AR 2991).

2022 Submission undermines any assertion of a hypothetical hedging need because, it notes, political consulting firms "are careful to bill themselves as bi-partisan" in light of the importance of political connections to their business. AR 3001 at n.42. Nevertheless, even if the consulting firm Kalshi describes were rooted in fact, it would do nothing to undermine the Commission's rational judgment that the Contracts are predominantly for gambling, not hedging.

Kalshi also cites examples of "specific assets whose value is directly linked to partisan control" to argue that Congressional control has predictable effects on equity prices. But Kalshi's examples are observations of isolated movements in stock prices or firm valuations, not predictable patterns or repeated occurrences of economic effects in any particular asset price. And as noted above, the Contracts only apply to control of a single chamber of Congress. Kalshi does not point to *any* particular commercial transaction price that would be based on or include the price of the Congressional Control Contracts to support an argument the Contracts would serve a price-basing function. Nor does the record support such a finding. For these reasons, Kalshi has not demonstrated that there is a frequency of movement in any asset that could support more than occasional hedging or price basing, even if some of the price movements Kalshi cites could be tied to an election result.

D. The Commission was not arbitrary and capricious in addressing comments.

Finally, Kalshi argues that the Commission was arbitrary and capricious because it "refused to engage" with commenters who provided "probative and compelling evidence of the contracts' hedging purpose." Kalshi Motion at 39. But as discussed above, Kalshi's argument in this regard is based on a research mistake: Kalshi relies almost entirely on cases addressing the APA's requirements for rulemaking, not informal adjudication. Contrary to Kalshi's suggestion, the Commission was not required to specifically respond to each and every comment that might be

construed as contrary to its position.[37] *See Concert Inv., LLC*, 616 F. Supp. 3d 25 at 33. And, in any event, as the Order indicates, the Commission did consider comments from Kalshi and others about the eventual economic effects of Congressional control and the purported hedging and price-basing utility of the Contracts. *See* AR 15-16. The comments that Kalshi specifically cites identify potential policy changes that might affect various industries.[38] But these comments cannot overcome the reasonableness of the Commission's conclusion that eventual economic effects of Congressional control in the form of potential policy changes are simply too diffuse and unpredictable to support a finding of hedging and price-basing utility sufficient to demonstrate a true economic purpose.

E. The Commission reasonably determined that the Contracts could potentially be used in ways that would have an adverse effect on election integrity, or the perception of election integrity, and could put the Commission in the position of investigating election-related activities.

The Commission's focus on real and perceived election integrity and the Commission's potential role in policing election-related activities, including misinformation, was reasonable. As the Commission noted, the record included studies regarding the potential for, and examples of, such manipulation. AR 22 n.39. Moreover, the Commission reasonably explained how the lack of an underlying cash market for the Contracts, and the opaque and unregulated sources of price forming information of the Contracts, may increase the risk of manipulative activity relating to the Contracts, while decreasing Kalshi's or the Commission's ability to detect such activity. AR 21. Again,

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[37] Even in notice and comment rulemaking, the agency need only respond to "significant points raised by the public," and "an agency's failure to address a particular comment or category of comments is not an APA violation *per se*." *Sherley v. Sebelius*, 689 F.3d 776, 784 (D.C. Cir. 2012).

[38] The commenters claim, for example, that they would hedge against: (1) a change in legal status of cannabinoids (AR 1348, AR 1613); (2) changes to tax policy that could affect business operations (AR1375-76, AR 1391, AR 1533); (3) changes to green energy policies that could affect the valuation of a green energy business and the ability to attract talent or investors in the business (AR 1386, AR 1597); and change to immigration policies that might also affect ability to attract talent to tech businesses (AR 1391, 1533). Even taken together, the Commission rationally determined that hedging would not take place on more than an occasional basis.

"common-sense determination[s]" such as these "pass[] muster, particularly in an informal adjudication." *Phoenix Herpetological Soc'y*, 998 F.3d at 1005.

Kalshi's argument that the record did not include data on the potential for manipulation misreads the record. For instance, the Commission cited a law review article detailing examples of "fake polls" and how they had consequences in corresponding event contracts. AR 22 n.39.[39] And even the economists that Kalshi cites admitted that manipulation attempts *can* have a discernible effect on prices "during a short transition phase." AR 1449-1450; AR 1751 (noting price pump attempts were "short-lived"); AR 1404 ("As Hanson and Opera (2009) correctly argue, manipulation encourages entry to trade against it. *In the long run*, this improves liquidity and accuracy of prices. Moreover…past suspected episodes of manipulation have involved *relatively quick* reversion of prices") (emphases added); AR 1434 (discussing the phenomenon of "fake polls" used to manipulate a particular event-contract market, including an example regarding a fake poll affecting a re-election contract for Senator Stabenow, and stating "market motivations may have been secondary to the trolling factor, but the mere fact that the markets can be so easily manipulated is noteworthy" and citing a paper with "many more examples").[40] The Order further observes that several commenters noted specific examples of manipulation or attempts in election markets and that other commenters "downplayed these incidents." AR 20 n.38. In any event, the Commission "need not suffer the flood before building the levee." *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) (Kavanaugh, J.).

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[39] The Commission received a number of comments on expressing a concern the contracts could be manipulated, including from six Senators, AR 2816-17, Sen. Klobuchar, AR 2818, Representatives Sarbanes and Raskin, AR 2273-76, Undergraduate researchers at Duke University, AR 159-182, Better Markets, AR 1889-1910, the Center for American Progress, AR 2260-61, Campaign for Accountability, AR 2258-59, Public Citizen, AR 222-225.

[40] The Commission also cited the same research, AR 22 n.39, and thus, contrary to Kalshi's contention, the Commission order does provide "real-world examples." Kalshi Motion at 52.

Kalshi appears to be suggesting that the only appropriate focus is long-term manipulative activity. However, short-term manipulations can be profoundly damaging to market participants. *See, e.g., CFTC v. McAfee*, No. 21-cv-1919 (JGK), 2022 WL 3969757 (S.D.N.Y. July 14, 2022) (consent order) (illegal pump-and-dump scheme of virtual currency). And the effects can occur in more than just the manipulated market. If timed correctly, such manipulative conduct could affect fundraising efforts around the end of a reporting period, or turnout during early voting, among other things. Now, consider a viral "deep fake" video of a partisan leader in Congress made to look like said person was involved in serious crime. Such a video—even though false—could have at least a short-term effect on the price of the contract, and the Commission could find itself investigating its release. Finally, a group of supporters of a political party, or even a foreign power, could organize around a misinformation campaign, and make money off of their campaign by timing their purchase and sale of the Contracts.[41] Short-term manipulations could also have serious effects on the public perception of election integrity. All of the above examples could, as the Commission observed, undermine confidence in the electoral process. *See* AR 19-20 (noting over 600 comments, including from United States Senators, expressing concern about the potential impact of the Contracts on election integrity and the perception of election integrity).

Contrary to Kalshi's argument, the Commission's consideration that the Contracts may create monetary incentives to vote for particular candidates was not "outside the bounds of reasoned decision making." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). The contracts on their face create monetary incentives related to the election—up to as much as

[41] Kalshi has not proposed prohibiting foreign entities or members of the media from trading. AR 22, 33-34. The Commission noted that groups of individuals who were not prohibited from trading but may have an incentive to create a false impression included, for example, Congressional campaign volunteers, consultants to Congressional campaigns, or donors or other supporters of political parties or individual Congressional candidates. AR 22 n.40.

$100,000,000. AR. 32-33. Plenty of eligible voters do not cast ballots in each election, and not everyone who does feels equally strongly about their candidate of choice—there is nothing unreasonable in the common-sense determination that monetary incentives may have an impact on at least some voters, acting individually or, more disturbingly, as part of an organized group.[42] *Phoenix Herpetological Society*, 998 F.3d at 1006.

To prop up the argument that their contracts would not easily be manipulated, Kalshi argues that "listing contracts on federally regulated exchanges like Kalshi's would *ameliorate* manipulation concerns." Kalshi Motion at 42; *see also* Aristotle Amicus brief at 15 (calling attempts to manipulate the market "profit opportunities"); Grundfest Amicus brief at 17 (arguing price "pump" attempts are short-lived and "disciplined by the market's self-correcting mechanisms"[43]). This argument is based on the idea that the market will correct itself over a period of time, but that does not change the possibility that the market could still be subject to short-term manipulative activity, which could affect at least the perception of election integrity. Further, it also appears that Kalshi is arguing that for these contracts, it is better for "the house" to be regulated by the CFTC than a gaming commission.[44] But that argument goes to the heart of the Commission's concern about its role in

[42] Kalshi argues the Commission's determination on this is not "credible" and "utterly implausible," but the Commission cited Tyler Yeargain, *Fake Polls, Real Consequences: The Rise of Fake Polls and the Case for Criminal Liability*, 85 MISSOURI L. REV. 129 (2020). AR 22 n.39. That article details events that occurred on a market with a trading limit of $850 per contract, a limit that is well below Kalshi's proposed limits. The incentive for wrongdoing in connection with Kalshi's Contracts is orders of magnitude greater.

[43] Professor Grundfest's brief does not consider that a wrong-doer may profit by short-term price manipulation events, regardless of whether the market eventually self-corrects. *See, e.g., In re JPMorgan Chase & Co.*, CFTC No. 20-69, 2020 WL 5876730 (Sep. 29, 2020) (manipulation and spoofing in the precious metals futures market and the U.S. Treasury futures market).

[44] Kalshi also inexplicably seems to analogize CFTC-regulated derivatives markets to overseas gambling markets, in arguing that creating a financial instrument, regulated by a derivatives regulator, would not affect the legitimacy of the elections. Specifically, Kalshi argues that no one questions the legitimacy of the election of Margaret Thatcher or Tony Blair, notwithstanding the existence of the UK gambling markets. First of all, even if true, Prime Ministers Thatcher and Blair last stood for

investigating elections. If Congressional Control Contracts are traded on a Commission-regulated DCM, the concerns about manipulations will belong to the Commission—and without underlying cash markets that allow the Commission to verify real-time prices are behaving as expected, but instead with opaque, unregulated sources of pricing information for the contracts which may not follow scientifically reliable methodologies. AR 21. Thus, to determine manipulation the Commission might have to investigate aspects of the electioneering process itself.

Kalshi argues that the Commission "ignored" evidence that the Contracts could give societally valuable data.[45] However, the Commission stated in its Order that it considered the argument the Contracts could provide "a check on misinformation and inaccurate polling," but also noted the research suggesting that election markets "may incentivize the creation of 'fake' unreliable information in the interest of moving the market" and that, for example, certain individuals and entities who would not, by the terms of the Contracts be permitted to trade them, such as paid employees of political campaigns could nonetheless engage in other activity "intended to create the impression of likely electoral success or failure on the part of a particular political candidate or candidates – that could artificially move the market in the Congressional Control Contracts." AR

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election in 1987 and 2005, respectively. By contrast, conspiracy theories abound concerning the 2016 Brexit vote. And, importantly, the UK derivatives markets are overseen by the Financial Conduct Authority or Prudential Regulation Authority, and those authorities will prosecute manipulation in those markets, but betting on prime ministers is separate. Those markets are regulated by the UK Gambling Commission, which does not have any requirement that a betting line be a vehicle of price discovery. *See, e.g.* U.K. Gambling Commission, *License Conditions and Code of Practice* (Jan. 31, 2024), https://www.gamblingcommission.gov.uk/licensees-and-businesses/lccp/print. In fact, two different licensees could offer different odds on the same event, without raising any concern at all. Thus, if a gambling market were to inaccurately predict the outcome of an election, such as Brexit—which the betting markets predicted would be a "remain" vote—the effect on the electorate's confidence should logically be minimal.

[45] Kalshi also argues, wrongly, that "most commenters attested to the economic informational value of political event contracts generally and the Congressional Control Contracts specifically." Kalshi Motion at 11. However, more than 600 of the commenters, including members of Congress, researchers, non-profits, institutions, and ordinary citizens expressed opposition to the contracts. AR 19.

21-22. The Commission's conclusion that election integrity concerns (including public perception of election integrity) outweighed the potential for valuable data is reasonable and within the Commission's discretion. Because "the available data does not settle a regulatory issue and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion," the Commission need only show a "rational connection between the facts found and the choice made." *Verizon v. FCC*, 740 F.3d 623, 649 (D.C. Cir. 2014) (quoting *Motor Vehicle Mfrs. Ass'n of US v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)); *compare CBOE Futures Exch.*, 77 F.4th at 980 (requiring the SEC to provide a statement of reasoning rather than a mere conclusion), *with Crooks v. Mabus*, 845 F.3d 412, 424 (D.C. Cir. 2016) (stating agency did not need to "explain away every point raised"). Here, it did so.

Moreover, the potential for short term manipulations of these contracts undercuts Kalshi's argument that the contracts are valuable based on their ability to produce "up-to-the-minute assessments." AR 1495, AR 1550 (discussing a market that can react immediately); AR 1404 (use of event markets in tracking news events). Kalshi cannot have it both ways: If the data is valuable *because* of the short-term, immediate information, its likelihood to succumb to short-term manipulations—which cannot be independently assessed as either manipulation or legitimate price movements by reference to an underlying market—devalues the reliability of that data.

Finally, Kalshi advances an argument that the Commission would not be required to police election-related activity because other agencies "already shoulder the critical responsibility of ensuring that our elections are free and secure." Kalshi Motion at 54. This misses the point. The Commission has the responsibility to address fraud and manipulation in markets for derivatives contracts that trade on Commission regulated exchanges that other government bodies lack. 7 U.S.C. § 9(c). Further, the fact that another federal regulator may have jurisdiction over an underlying product does not alter the Commission's obligation to ensure integrity in its markets.

Sophisticated commenters, such as the Chicago Mercantile Exchange (a large DCM) and members of Congress underlined this very concern. AR 1912-13 (noting that were the Contracts designated, the Commission would be required to police for fraud in a political election underlying a contract and asking "Do any of us really believe that Congress intended for the CFTC to play this role in the electoral process?"); AR 2273-75 (outlining "serious concerns about the misalignment of [an election cop] role with the CFTC's historic mission and mandate as established by Congress). And while commodities outside the Commission's direct remit do underlie derivatives without giving rise to significant problems, elections obviously play a special role in our society such that it was rational for the Commission to determine that the public interest favors keeping the CFTC out of any oversight role. Indeed, the examples Kalshi cites of products based on underlying commodities outside of the Commission's jurisdiction are each economic in nature.

The Commission adequately explained that it had considered the non-economic reasons for approving the Congressional Control Contracts asserted by Kalshi and public commenters but that they did not outweigh the substantial risks presented by the Contracts. Accordingly, the Commission met its obligation to provide "a statement of reasons [] sufficient to permit a court to discern its rationale" for determining the Congressional Control Contracts were contrary to public interest. *Tourus Recs., Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001) (citing *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

Kalshi asks the Court to declare that the Commission was arbitrary and capricious in its refusal to legalize—nationally—election gambling via the derivatives markets governed by the CEA. The Commission's mission includes to "deter and prevent price manipulation or any other disruptions to market integrity." 7 U.S.C. § 5(b). Kalshi's concession that its proposed markets could be affected by short-term spasms of manipulation—thereby damaging ordinary market participants—shows how reasonable the Commission indeed was in considering the potential for

manipulation. With the potential for manipulation, even in short bursts, to have effects outside the contract market, the Commission's concern for election integrity and the perception of election integrity was rational and provided a reasoned foundation for the Commission's concern about its own role in policing election-related activity.

CONCLUSION

For the foregoing reasons, the CFTC respectfully requests that this Court grant the Commission's motion for summary judgment, deny Kalshi's motion for summary judgment, enter judgment in favor of the CFTC and against Kalshi on all claims, and order any other relief that this Court determines is appropriate.

Dated: February 26, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2024, I served the foregoing on counsel of record using this Court's CM/ECF system.

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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]

[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.").

[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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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KALSHIEX LLC, Plaintiff, v. COMMODITY FUTURES TRADING COMMISSION, Defendant.	Civil Action No. 1:23-cv-03257 (JMC)

Defendant Commodity Futures Trading Commission's Reply in Support of its Cross-Motion for Summary Judgment

Defendant Commodity Futures Trading Commission submits this Reply in Support of its Cross-Motion for Summary Judgment, Dkt. No. 30. A memorandum of points and authorities is attached.

Dated: April 10, 2024

Respectfully submitted,

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INTRODUCTION

The Commodity Exchange Act ("CEA") grants the Commodity Futures Trading Commission ("Commission") broad discretionary authority to determine whether certain agreements, contracts, or transactions that "involve" activities enumerated in Section 5c(c)(5)(C) are contrary to the public interest. Applying the statute's plain meaning, the Commission found that the Congressional Control Contracts ("Contracts") were agreements, contracts, or transactions that involve two enumerated categories, "activity that is unlawful under … State law" and "gaming."

After the Commission determined the Contracts involved "activity that is unlawful under … State law" and "gaming," the Commission considered whether the Contracts were contrary to the public interest. In so doing, the Commission considered the Contracts' economic purpose and, based on the evidence before it and using its expertise, determined the Contracts would not be used for hedging on more than an occasional basis. The Commission further found that, while Kalshi and some commenters argued the Contracts would serve as a check on misinformation, research indicated that election markets may nonetheless incentivize "fake" or unreliable information, and thus impact either election integrity or the public perception of election integrity. The Commission considered that this, in turn, would require the Commission to investigate election-related activities, including potentially the outcome of an election itself, and noted the "very serious concerns" expressed by members of Congress that "assuming the role of an 'election cop'" may not align with the CFTC's historic mission and mandate. The Commission therefore reasonably determined the Contracts were contrary to the public interest.

Kalshi now asks this Court to overturn the Commission's reasoned decision and order that these "election betting" contracts[1] be listed on a federally regulated futures exchange, based on a

[1] *Press*, Kalshi, https://kalshi.com/blog/press (last visited Apr. 10, 2024).

plainly mistaken interpretation of Section 5c(c)(5)(C), artificial and narrow definitions of "involve" and "gaming," and a flawed understanding of "activity that is unlawful under state law." None of Kalshi's arguments demonstrates that the Commission was arbitrary and capricious or exceeded its authority in any way. Rather, the Commission employed the ordinary meaning of the broad terms of the statute to determine that the Contracts were precisely the sort of event contracts that Congress empowered the Commission to prohibit.

Kalshi's attacks on the Commission's reasoned judgment in determining that the Contracts were contrary to the public interest further fall flat. Despite the broad discretion Section 5c(c)(5)(C) affords the Commission in making a public interest determination, and the deference due to an agency's expertise, Kalshi protests the Commission's weighing of the public interest considerations. However, as reflected in the Order, the Commission engaged in a reasoned analysis using its expertise and discretion, considered the evidence before it, and evaluated the appropriate factors to arrive at a sound determination that Kalshi's Contracts were contrary to public interest. This Court should, accordingly, affirm the Commission's Order.

ARGUMENT

I. The Commission articulated the correct meaning of involve.

A. Kalshi's argument that "involve" refers to a contract's "underlying" ignores the plain language of Section 5c(c)(5)(C)(i), and is not supported by statutory context.

Section 5c(c)(5)(C)(i) authorizes the Commission to determine whether an event contract is contrary to public interest and therefore prohibited from listing, trading, and clearing in Commission-regulated markets if the "agreements, contracts, or transactions *involve*" certain enumerated activities, including "gaming" or "activity that is unlawful under … State law." 7 U.S.C. § 7a-2(c)(5)(C) (emphasis added). Despite this plain language, Kalshi insists that the statute applies only where "a contract's *event*" "involves" the activities enumerated in the statute. Kalshi Reply at 4

(arguing that "involve" "refer[s] to the [contract's] underlying event"); *see also* Kalshi Reply at 6 n.2. Thus, statutory text aside, Kalshi contends that the Commission should not have asked whether the "agreement, contracts, or transactions involve" an enumerated activity, but only whether elections (the Contracts' underlying event) involve an enumerated activity. Building on its argument that "involve" is "event-based," Kalshi contends that it is insufficient "for trading a contract to relate to an enumerated activity." Kalshi Reply at 6.

Kalshi's problem is that Section 5c(c)(5)(C)(i) says it *is* sufficient. It applies where "the agreements, contracts, *or transactions* involve" an enumerated activity. Thus, the Commission correctly invoked Section 5c(c)(5)(C)(i) here because "taking a position in the Congressional Control Contracts," *i.e.*, trading or transacting in them, amounts to gaming and to activity that is unlawful under State law. AR 10. The analysis is similar if the focus is on the "contracts" themselves rather than "transactions" in them. Because it is the "contracts" (and not just the underlying) that may "involve" the enumerated activity, the Commission properly examined the Contracts "as a whole." AR 7. As the Commission correctly explained, the Contracts "involve" gaming because that is what they are for—gaming is an "essential feature or consequence" of them. AR 13 n.28. Either way, Kalshi's interpretation violates the statutory text.

Kalshi's reliance on the "consistent-meaning canon" is misguided. As a threshold matter, canons of statutory interpretation cannot be used to overcome a statute's plain meaning. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002) ("Our role is to interpret the language of the statute enacted by Congress. This statute does not contain conflicting provisions or ambiguous language."); *see generally Roschen v. Ward*, 279 U.S. 337, 339 (1929) (Holmes, J.) ("[T]here is no canon against using common sense in construing laws as saying what they obviously mean."). But in any event, nothing about the "consistent-meaning canon" justifies Kalshi's insistence that "involve" refers narrowly to a contract's "underlying," rather than the "agreement, contract, or transaction" as a whole, which is

what the statute says. Kalshi Reply at 4, 6-7. The presumption of consistent usage means that "[i]n a given statute, the same term usually has the same meaning." *Pulsifer v. United States*, 144 S. Ct. 718, 735 (2024). It operates so as to prevent "attribut[ing] different meanings to the same phrase in the same sentence depending on which object it is modifying." *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 329 (2000); *Bankamerica Corp. v. United States*, 462 U.S. 122, 129 (1983).[2] Here, the meaning of "involve" does not change depending on the activity—the activities are different from one another, and agreements, contracts, and transactions take different forms. It is unsurprising that the nexus between the contract and activity can manifest in different ways. Kalshi's argument suggests that the Court must narrow the meaning of "involve" so that only one type of connection qualifies; but the presumption requires only that language in the same statute be accorded a consistent meaning, *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 225 (1992), not the narrowest common denominator. If Congress intended to apply Section 5c(c)(5)(C)(i) only where "the underlying event involves" an activity, rather than more broadly when the "agreements, contracts, or transactions involve" the activity, it would have said so.

[2] Kalshi does attempt to use precedent for its argument that a term must apply "without differentiation" to a set of defined categories. The cited cases, however, are easily distinguished when, as here, the Commission is simply using the same broad definition across all categories. *Clark v. Martinez*, 543 U.S. 371, 378 (2005) (holding the government could not detain an individual indefinitely if they were deemed inadmissible and removable under one subsection when they could only detain an individual for a limited time for purposes of removal under another subsection); *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 329 (2000) (stating that under Section 5 of the Voting Rights Act "abridging the right to vote on account of race or color" means retrogression, and therefore Section 5 does not extend to a proposed change that did not have a purpose of retrogression, even if it had a purpose of discrimination); *Bankamerica Corp v. US*, 462 U.S. 122, 129 (1983) (holding that the Clayton Act's prohibition on corporations with interlocking boards prevented persons to be on two or more boards of corporations "other than banks … or common carriers" must mean none of which is a bank given the government conceded it meant none of which is a common carrier).

The Commission's Order accords "involve" consistent meaning within Section 5c(c)(5)(C)(i) and across the CEA.[3] The Commission determined that for purposes of Section 5c(c)(5)(C)(i), the broad ordinary meaning of "involve" applies so as to "capture both contracts whose underlying is one of the enumerated activities, and contracts with a different connection to one of the enumerated activities because, for example, they 'relate closely' to, 'entail,' or 'have as an essential feature or consequence' one of the enumerated activities." AR 7. The Commission did not, as Kalshi contends, "assign two meanings" by "conced[ing]" that "involve" "refers to a contract's underlying event for most of [Section 5c(c)(5)(C)(i)]'s enumerated activities" but finding that involve refers to "the act of trading for the 'gaming' and 'unlawful activity' categories." Kalshi Reply at 4 and 6.

The Commission's application of the ordinary broad meaning of "involve" was appropriate and does not amount to inconsistent usage. Courts have confirmed that "involve" has an expansive connotation when used in federal statutes. *See United States v. Scheels*, 846 F.3d 1341, 1342 (11th Cir. 2017) (recognizing that 'the ordinary meaning of 'involve' when used as a verb is 'to have as a necessary feature or consequence; entail' … or 'to have within or as part of itself'"); *United States v.*

[3] Kalshi suggests the Commission has conceded that "involve" means the contract's "underlying" in other provisions of the CEA, but that mischaracterizes the Commission's position. The Commission has not taken the position that "involve" in other sections of the CEA is interpreted to mean *only* the underlying. Rather, the Commission noted that "involve" is used throughout the CEA to *include* the underlying but is not *limited* to the underlying. For instance, CEA Section 4c(b), 7 U.S.C. § 6c(b) grants the Commission jurisdiction over both options on commodities (where the relevant commodity would be the underlying) and options on commodity futures (where the relevant futures contract would be the underlying, and the commodity itself would have a different relationship to the transaction). *See* 17 C.F.R. pt. 32 (Regulation of Commodity Options Transactions), pt. 33 (Regulation of Commodity Option Transactions that are Options on Contracts of Sale of a Commodity for Future Delivery). Thus, the provision that refers to "any transaction involving any commodity" is referring both to transactions where the commodity is the underlying *and* to transactions where the *future* (and not the commodity), is the underlying. Thus, as in Section 5c(c)(5)(C)(i), "involve" *includes* the underlying, but is not limited to solely the underlying. That is to say, even if one can find an example where the context restricts "involve" to the underlying, that has no bearing on some other context where by the ordinary meaning of the word it can refer to multiple aspects of the contract.

Gould, 30 F.4th 538, 545 (6th Cir. 2022) (noting that "[c]ircuit courts have repeatedly held … that the term 'involve' is expansive") (collecting cases). Courts also recognize that "involve" can capture the terms that it modifies in more than one way. *See United States v. King*, 325 F.3d 110, 113 (2d Cir. 2003) (finding sentencing enhancement for "serious drug offense" "*involving* manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance" applied to attempted drug offenses because "involvement" extends inquiry beyond precise crimes); *Kawashima v. Holder*, 565 U.S. 478, 483-84 (2012) (rejecting petitioners' challenge to deportation for commission of crimes that "involved fraud or deceit" on grounds that respective crimes did not include formal elements of fraud or deceit, because "involve" broadly captured "offenses with elements that necessarily entail fraudulent or deceitful conduct."). By contrast, Kalshi does not cite a single case that says that when "involve" modifies a set of statutory terms, it can only mean one kind of connection to those terms.

B. The Commission's interpretation of "involve" reflects the broad authority provided by Congress in Section 5c(c)(5)(C).

Kalshi protests that the Commission's interpretation "reduce[s] multiple statutory terms to surplusage," claiming that the "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." However, it is not surprising that a broadly worded statute enacted by Congress naturally features overlap between the enumerated categories, especially given the deference provided to the Commission to scrutinize event contracts potentially contrary to the public interest.

Moreover, Kalshi's overly-restrictive "is" or "closely relates to" definition of "involve" suffers the same supposed problem because, under this definition, the first enumerated category "(I) activity that is unlawful under any Federal or State law;" would swallow at least two other categories: "(II) terrorism;" and "(III) assassination." 7 U.S.C. 7a-2(c). However, Congress placed

"activity that is unlawful under any Federal of State law"—a very broadly worded category—*first*. Only after this broad formulation did Congress enumerate (II) terrorism, (III) assassination, (IV) war, and (V) gaming, and finally, (VI) other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest. Even if the general words in the statute are rendered partially redundant, this fits the natural construction and accords with the doctrine of *ejusdem generis*. *See* 2A C. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § 47.17 (7th ed. 2023) *(ejusdem generis)* ("If, on the other hand, the series of specific words is given its full and natural meaning, the general words are partially redundant. The rule 'accomplishes the purpose of giving effect to both the particular and the general words, by treating the particular words as indicating the class, and the general words as extending the provisions of the statute to everything embraced in that class, though not specifically named by the particular words.'") (quoting *Nat'l Bank of Commerce v. Estate of Ripley*, 161 Mo. 126, 131 (1901)). Moreover, Congress may have included the enumerated categories, even if technically unnecessary, "to remove any doubt" these categories were included. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227-28 (2008) ("In any event, we do not woodenly apply limiting principles every time Congress includes a specific example along with a general phrase."); *see Fort Stewart Schs. v. FLRA*, 495 U.S. 641, 646 (1990) (noting that "technically unnecessary" examples may have been "inserted out of an abundance of caution"); *Kawashima*, 565 U.S. at 487 ("We disagree with the Kawashimas' contention that the specific mention of one type of tax crime in Clause (ii) impliedly limits the scope of Clause (i)'s plain language, which extends to any offense that "involves fraud or deceit." We think it more likely that Congress specifically included tax evasion offenses under 26 U.S.C. § 7201 in Clause (ii) to remove any doubt that tax evasion qualifies as an aggravated felony.").

II. The Commission correctly determined that the Contracts involved gaming and activity unlawful under state law.

A. The Commission correctly determined that the Congressional Control Contracts involve gaming.

Kalshi's Reply fails to show that the Commission unreasonably determined that the Congressional Control Contracts involve "gaming" for purposes of CEA Section 5c(c)(5)(C) by applying the ordinary meaning of "gaming" to "include[] betting or wagering on elections." Kalshi does not contest that wagering or betting on the outcomes of elections is "gambling," or that taking a position in their Contracts means betting on the outcomes of elections. Indeed, they tout their proposed market as "Election Gambling", "Political Betting," "election betting," and an "Election-Betting Market."[4] Instead, Kalshi attempts to distinguish "gambling" from "gaming," and then argues that the Contracts do not involve "gaming" under its definition because elections are not games. Kalshi's argument defies common usage of the term "gaming," and ignores dictionary definitions and congressional intent, all of which demonstrate that the terms are interchangeable generally, and for purposes of Section 5c(c)(5)(C).

1. "Gaming" and "gambling" are interchangeable terms.

Kalshi first repeats its argument that "gaming" and "gambling" are not interchangeable terms and that, therefore, the Commission incorrectly referred to definitions of "gambling" in interpreting "gaming" as including "staking something of value upon the outcome of a contest of others." Kalshi Reply at 14. Specifically, Kalshi claims, without support from any authority, that "gaming" is a subset of "gambling," the latter of which includes more than just "gaming." Kalshi also insists, again without support, that the terms ordinarily have different meanings. By contrast,

[4] *Press*, Kalshi, https://kalshi.com/blog/press (last visited Apr. 10, 2024).

the Commission set forth in support of its application of "gaming" both dictionary definitions[5] and caselaw[6] that show that the terms are interchangeable and carry the same meaning (CFTC Motion at 28-29; Order at 8 n.21). The Commission also cited the statute's legislative history, in which Senators Feinstein and Lincoln confirmed in a colloquy that the "gaming" provision is intended "*to prevent . . . gambling* through futures markets" and "derivatives contracts" that "exist predominately to enable gambling." 156 Cong. Rec. S5906-07, 2010 WL 2788026 (daily ed. July 15, 2010) (emphasis added). Notably, many state agencies that regulate gambling are known as "gaming" commissions. *See, e.g.*, Nevada Gaming Commission and Nevada Gaming Control Board, https://gaming.nv.gov/ (last visited Apr. 10, 2024); New York State Gaming Commission, https://www.gaming.ny.gov/ (last visited Apr. 10, 2024); Illinois Gaming Board, https://www.igb.illinois.gov/ (last visited Apr. 10, 2024). Kalshi simply ignores all of this.

Kalshi next insists that "gaming" has a specific meaning that limits it to "games," including "playing games of chance for money" or "betting on games, including sporting events." But this narrow interpretation lacks any significant support, and Kalshi fails to provide any dictionary definition that interprets "gaming" in this limited way, and to the exclusion of "gambling."[7]

Kalshi relies only on the definitions of the three classes of gaming under the Indian Gaming Regulatory Act ("IGRA") in 28 U.S.C. § 2703 to support its interpretation. Acknowledging that the

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[5] *See Gaming*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/gaming (defining the noun "gaming" as "the practice or activity of playing games for stakes: gambling"); *Gaming*, DICTIONARY.COM, https://www.dictionary.com/browse/gaming (defining "gaming" as "gambling"); *Gaming*, BLACK'S LAW DICTIONARY (2nd ed.), https://thelawdictionary.org/gaming/ (defining gaming as "gambling" and "an agreement between two or more to risk money on a contest or chance of any kind").

[6] *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 792 (2014) ("The 'gaming activit[y]' is (once again) the gambling."); *see also In re Betcorp Ltd.*, 400 B.R. 266, 271 n.3 (Bankr. D. Nev. 2009) ("'Gaming' is generally regarded as a mild euphemism for gambling.").

[7] Kalshi claims in its Reply that "[d]ictionary definitions and common usage alike confirm that gaming—unlike the broader terms 'gambling' or 'wagering'—typically requires a predicate game.

IGRA's "class III gaming" is a catchall category that only defines "gaming" as all gaming activities not listed in classes I or II, Kalshi turns to a regulation to argue that class III gaming is limited to activities such as blackjack, slot machines, and sports betting under the IGRA. 25 C.F.R. § 502.4. That citation is unpersuasive for two reasons. First, it is the Department of the Interior's National Indian Gaming Commission's description by regulation of gaming activities, and not Congress's definition of gaming. *See generally Definitions Under the Indian Gaming Regulatory Act*, 57 Fed. Reg. 12382-01 (Apr. 9, 1992). The regulation, therefore, does not provide insight into Congress's interpretation of "gaming." Second, the regulation on its face does not limit "gaming" to "games" because it is non-exhaustive: class III gaming includes "all forms of gaming . . . including *but not limited to*" the listed activities listed. 25 C.F.R. § 502.4 (emphasis added); *see United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1115 (D.C. Cir. 2009) (noting that "the phrase 'including, but not limited to' . . . indicate[s] a non-exhaustive list"); *Cooper Distrib. Co. v. Amana Refrig. Inc.*, 63 F.3d 262, 280 (3d Cir. 1995) (Alito, J.) (discussing the phrase "including, but not limited to"). Therefore, the list of gaming activities provided in the regulation are not exhaustive and does not exclude wagering or betting on the outcomes of elections.

2. The Commission's interpretation of "gaming" is neither too broad nor too narrow.

Kalshi next contends that the ordinary meaning of "gambling" is too broad because it would cover bets on all contingent events. In this regard, Kalshi critiques the Commission's interpretation of "gaming" as contrived (or, as Kalshi puts it, "gerrymandered") to avoid covering all event contracts. But the question before the Commission was whether *Kalshi's* proposed Contracts involved gaming, not other contracts. Because transacting in these Contracts so clearly falls within

Kalshi Br. 25–26." Kalshi Reply at 14. However, Kalshi fails to provide any of the allegedly supportive dictionary definitions in its Reply or in the portion of its Motion that it cites.

the ordinary meaning of the word "gaming," the Commission's decision was neither too narrow nor too broad. Moreover, the Commission's interpretation is consistent with the basic statutory canon that statutory terms cannot be read in isolation and must also be considered in "the specific context in which th[e] language is used, and the broader context of the statute as a whole." *Am. Coal Co. v. Fed. Mine Safety & Health Rev. Comm'n*, 796 F.3d 18, 26 (D.C. Cir. 2015) (quoting *Yates v. United States*, 574 U.S. 528, 537 (2015) (plurality opinion)). Thus, the purpose and legislative history of CEA Section 5c(c)(5)(C) also shapes the meaning of the statutory term. *See Lindeen v. SEC*, 825 F.3d 646, 653 (D.C. Cir. 2016). The Commission rightfully did not interpret "gaming" to include bets or wagers on all contingent events; to do so could have rendered the other enumerated categories superfluous. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 646 (2012) ("[E]ffect shall be given to every clause and part of a statute."). This was not "an outcome-driven gerrymander," as Kalshi accuses, but rather, the Commission's interpretation of the term complies with the "broad, sweeping" authority provided by Congress to "prevent gambling through futures markets" without subjecting every event contract to public interest review under the "gaming" category. *See Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 664 (D.C. Cir. 2009); 156 Cong. Rec. S5906; *cf. United States v. Mead*, 533 U.S. 218, 227-28 (2001) (noting "[w]e have long recognized that considerable weight should be accorded to an executive department's construction of the statutory scheme it is entrusted to administer") (quoting *Chevron U.S.A. v. Nat. Res. Def. Counsel*, 467 U.S. 837, 844 (1984)).

3. Elections are contests.

Kalshi contends that elections are not "contests" in the context of gambling and, thus, betting on the outcome of an election is not staking something of value upon the outcome of a contest of others. This argument lacks foundation in common sense or parlance. As discussed in the Commission's Cross-Motion but ignored in Kalshi's Reply, elections for seats in either chamber

of Congress undoubtedly fall within the ordinary definition of a contest. *See, Contest*, THE BRITANNICA DICTIONARY, https://www.britannica.com/dictionary/contest (last visited Apr. 10, 2024) (providing the definition, "a struggle or effort to win or get something," and an example, "the presidential contest"); *Contest*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/contest (last visited Apr. 10, 2024) (providing the definition, "an attempt, usually against difficulties, to win an election or to get power or control"); *Contest*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/contest#dictionary-entry-2 (last visited Apr. 10, 2024) (providing an example, "She hopes to win the contest for mayor"). Kalshi claims that no legal authority characterizes elections as contests in the context of gambling, despite itself citing state gambling laws that prohibit bets or wagers "upon the result of any . . . contest, wherever conducted, of skill." Del. Code Ann. tit. 11, § 1403(1); Fla. Stat. § 849.14. This requires Kalshi to take the implausible position that that "[n]o one would classify" an election as a contest of skill. Kalshi Reply at 17. Of course they are – all else equal, the more skilled candidate wins the contest.

Kalshi also contends that the fact that some state statutes separately state that wagering on elections is gambling while also stating that wagering on contests is gambling demonstrates that elections are not contests for the purposes of gambling laws. Kalshi Reply at 17. However, the fact that state gambling statutes have overlap and redundancies between different terms and provisions demonstrates comprehensive regulation, rather than a narrow meaning of terms. *See Mercy Hosp., Inc. v. Azar*, 891 F.3d 1062, 1068 (D.C. Cir. 2018) (noting "overlap may very well exist to make 'double sure' that [statutory provisions] remain above the fray of litigation").

Kalshi adds that Congress could not have considered elections as contests in the context of Section 5c(c)(5)(C) because an "election is not a game" or "staged for entertainment" and has "vast extrinsic and economic consequences." However, there is no indication that the consequences or

significance of the contest is relevant to whether the wager or bet on the contest is categorized as "gaming" or "gambling." Kalshi cites Senator Lincoln's reference to bets on sporting events, such as the Kentucky Derby, as examples of event contracts that fall within the "gaming" category and argues that bets on sporting contests was Congress's main concern when enacting Section 5c(c)(5)(C). However, a law's broadly-worded text guides our application of the statute, "rather than the *principal* concerns of our legislators." *See Bostock v. Clayton Cty.*, 590 U.S. 644, 664 (2020) (quoting *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 59 (1998)) (noting that "unexpected applications of broad language reflect only Congress's 'presumed point [to] produce general coverage—not to leave room for courts to recognize ad hoc exceptions'") (quoting A. SCALIA & B. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 101 (2012)). Accordingly, the Commission was not arbitrary and capricious when it determined that taking a position in the Contracts is "gaming."

B. The contracts or transactions involve activity that is unlawful under State law.

In enacting Section 5c(c)(5)(C), Congress included a provision that the Commission may determine that such agreements, contracts, or transactions are contrary to the public interest if the "agreements, contracts, or transactions involve— (I) activity that is unlawful under any Federal or State law." 7 U.S.C. § 7a-2(c)(5)(C). The Commission determined that the Contracts involved activity that is unlawful under state law because taking a position, or transacting, in the Contracts would be staking something of value, or wagering, upon the outcome of contests between electoral candidates, and many states prohibit wagering on elections. AR 12-13. Kalshi raised to the Commission that any state law prohibiting wagering on elections does not and cannot refer to Commission-regulated event contracts, and the Congressional Control Contracts are therefore not unlawful under state law. The Commission responded that this "misses the point." AR 13 n.28. The Commission then explained that the relevant state laws here are not the state laws prohibiting

futures trading,[8] which are expressly preempted by the CEA. Rather, the Commission explained that the category was concerned with the "important state interests expressed in statutes separate and apart from those applicable to trading on a DCM." AR 13 n.28.

Kalshi continues to argue that "any . . . State law" cannot mean *any* state law because some state laws are subject to federal preemption. However, in this case, the Commission focused on state laws that were *not* preempted by the CEA and that expressed a state interest outside the Commission's regulatory regime. AR 13 n.28. Here, that interest was betting on elections. AR 12-13. Even states that allow gambling prohibit betting on elections, because the concern is not gambling *per se*, but election integrity. *See, e.g.*, Nev. Rev. Stat. § 293.830; N.J. Stat. § 19:34-24. There is no support for the proposition that exclusive federal jurisdiction over exchange-traded futures means that those state interests must give way to a registered DCM's desire to run an "Election Gambling" operation on a regulated futures exchange.

Further, when Congress passed the Special Rule, they were aware the CEA would preempt state law, such as bucket shop laws, but they nonetheless stated that the Commission may perform a public interest review of an agreement, contract, or transaction that involved activity that was unlawful under *any* state law. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) ("We have previously noted that '[r]ead naturally, the word "any" has an expansive meaning, that is, "one or some indiscriminately of whatever kind."'") (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)). Accordingly, the CEA's preemption of certain state laws does not preclude the Commission from reviewing event contracts that involve activity that violates state laws that express state interests

[8] To describe these, the Commission used the term "bucket-shop laws." AR 13 n.28. The term "bucket shop" refers to an illegitimate gambling operation, common at the end of the nineteenth century, that permitted betting on the market prices of stocks and commodities. The CEA preempts these laws. *See generally Thrifty Oil v. Bank of Am. Nat'l Trust and Sav. Ass'n*, 322 F.3d 1039 (9th Cir. 2003).

separate and apart from those that would be preempted. *See, e.g., Bostock*, 590 U.S. at 658-59 (determining Title VII's meaning based on the plain meaning of the broad language Congress used and rejecting narrower interpretations because Congress "could have written the law differently").

Kalshi nevertheless insists that "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." Kalshi Reply at 20. But *that* argument overlooks federal preemption. A state *cannot* prohibit trading all event contracts because, as the Commission observed, CEA Section 2(a)(1) grants the Commission "exclusive jurisdiction" over futures and swaps traded on a DCM, and this preempts the application of state law. AR 13 n.28 (citing 7 U.S.C. § 2(a)(1) and *Leist v. Simplot*, 638 F.2d 283, 322 (2d Cir. 1980)). So while a state is preempted from outlawing futures trading simply because someone thinks it resembles gambling, it *can* prohibit gambling on elections with no obstacle from the CEA. That is the sense in which Kalshi's proposal "involves" activity that violates state law, without regard to the CEA's general preemption. The question for the Commission was whether to *legalize* gambling activity that is prohibited by *unpreempted* state laws, by allowing Kalshi to establish an Election Gambling business on a federally registered DCM. The Commission rationally determined not to.

Kalshi posits that by this reasoning, "but for federal preemption of state law," trading on any event contract would be unlawful under state laws prohibiting trading on contingencies. Kalshi Reply at 20. However, the Commission's careful application of the CEA's preemptive effect is consistent with the structure of the statute as a whole. While Congress has preempted certain state laws, it has also expressly stated the CEA will not interfere with state investigatory power or general civil or criminal antifraud laws, while also empowering the states to use the CEA's antifraud authority. 7 U.S.C. § 13a-2. Further, the relevant state laws that the Commission focused on in the Order express interests that are separate and apart from laws applicable to trading on a DCM. AR

13 n.28. An inference from both Section 6d (7 U.S.C. § 13a-2) and Section 5c(c)(5)(C) is that Congress did not want to wholly annihilate state interests that may otherwise be subsumed by the CEA. The Commission's construction effectuates the purpose of the section, the Congressional interest in preserving state interests, and the plain meaning, but does not subject all event contracts to the Commission's public interest determination.

The Commission's definitions of "involve," "gaming," and its interpretation of "activity that is unlawful under any . . . State law" were all driven by the plain meaning of the statute. Therefore, the Commission was able to exercise its discretion to determine whether the Contracts are contrary to public interest.

III. The Commission's public interest determination was not arbitrary or capricious.

The Commission engaged in reasoned decision-making and easily met the standard for informal adjudications, even under the cases Kalshi relies on. *Butte Cty. v. Hogan*, 613 F.3d 190, 195 (D.C. Cir. 2010) (stating an agency must provide a statement of reasoning and cannot refuse to consider evidence bearing on the issue); *Clark Cty. v. FAA*, 522 F.3d 437, 441 (D.C. Cir. 2008) (Kavanaugh, J.) (requiring an explanation when the only evidence in the record supported the opposite conclusion). The Commission did not refuse to consider evidence, like in *Butte County*, nor was the agency confronted with only evidence that did not support its decision, like in *Clark County*. Rather, the Commission adequately explained its reasoning, considered the relevant evidence, and demonstrated a "rational connection between the facts found and the choice made." *Nasdaq Stock Mkt. LLC v. SEC*, 38 F.4th 1126, 1135 (D.C. Cir. 2022) (quoting *Motor Vehicle Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S 29, 52 (1983)).

A. The Commission's determination under the economic purpose test was not arbitrary and capricious.

Kalshi's opening brief incorrectly characterized the Commission's Order as requiring "direct economic effects." Kalshi now attacks the Commission's brief for not engaging with their straw-

man argument. Apparently, Kalshi views the Commission's role in determining whether the Contracts are in the public interest as deciding if there is *any hedging purpose at all*, and if so, Kalshi seems to argue the Commission must permit them.[9] But, that is not the statute's structure. The statute gives the Commission discretion to determine whether the Contracts are contrary to the public interest, and because the statute is phrased in such terms, it "fairly exudes deference to the [agency]." *Sw. Airlines Co. v. Transp. Sec. Admin.*, 650 F.3d 752, 756 (D.C. Cir. 2011) (Kavanaugh, J.) (quoting *AFL-CIO v. Chao*, 409 F.3d 377, 393 (D.C. Cir. 2005) (Roberts, J., concurring in part and dissenting in part)). The agency found (i) control of a chamber of Congress itself has no sufficiently direct, predictable, or quantifiable economic consequences; (ii) any eventual effects that Kalshi and commenters cited were diffuse and unpredictable; and (iii) the economics and structure of the transactions limit their utility as a vehicle for hedging. Based on these findings, the agency determined the Contracts could not reasonably be expected to be used for hedging and/or price basing on more than an occasional basis and/or that the Contracts could not reasonably be expected to be used predominantly by market participants having a commercial or hedging interest.[10] AR 19. It need go no farther.

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[9] It indisputable that the Commission has the discretion to prevent a contract with *some* hedging purpose from trading. War and terrorism, for example, may have effects on economic interests that are more predictable than an election's, and for which someone could articulate a mechanism for hedging with on-exchange derivatives, but the Commission may still determine it is contrary to the public interest. As noted in the Order, the Senate colloquy even discussed that the provision would allow the Commission to prevent trading in contracts "that may serve a limited commercial function but threaten the public good." AR 14 n.31.

[10] Kalshi also attacks the Commission's use of the test here, stating that the Commission did not apply the economic purpose test in its decision on the NADEX contracts. CFTC, *CFTC Issues Order Prohibiting North American Derivatives Exchange's Political Event Derivatives Contracts* (Apr. 2, 2012), https://www.cftc.gov/PressRoom/PressReleases/6224-12. The NADEX order, a 4-page order, is not at issue here, but nonetheless that order *did* reference the pre-CFMA economic purpose test, though the order did not fully articulate it. Regardless, in the NADEX order, as here, the CFTC found NADEX had not met the economic purpose test, and the contracts were contrary to the public interest. Thus, the agency has not changed course. However, even if it had, it would only need to explain its reasons—and the agency's reasons for its use of the economic purpose test are

Kalshi also posits that because *some* commenters said they would use the contract for hedging—despite hundreds of comments opposing the contracts, many of which equated the contracts to gambling—the Commission *could not* find the expected hedging and/or price basing use is insufficient under the economic purpose test.[11] In addition, and notably, throughout Kalshi's briefs, the record citations often focus on their own unsubstantiated views or those of Aristotle, which serves as a clearing house for trades on the PredictIt Market. *Clarke et al. v. CFTC*, 1:24-cv-00167-JMC, ECF No. 55 at ¶ 38 (D.D.C.). The CFTC cannot rely to the exclusion of others on the "self-serving views of the regulated entity." *CBOE Futures Exch. v. SEC*, 77 F.4th 971, 979 (D.C. Cir. 2023) (quoting *Susquehanna Int'l Grp v. SEC*, 886 F.3d 442, 447 (D.C. Cir. 2017)) (requiring a "critical review" of the submissions of a securities exchange). Regardless of whether these few comments are sufficient to establish a hedging use at all, the comments do not establish a hedging use that would be more than occasional or that the contracts would not be predominantly used by speculators.

The common sense, predictive judgment that the contracts in the "Election Gambling" market could not be reasonably expected to be used for hedging or price-basing on more than occasional basis is *precisely* the type of determination that is based on "highly complex and technical matters" and is therefore "entitled to great deference." *Citadel Secs. LLC v. SEC*, 45 F.4th 27, 32 (D.C. Cir. 2022); *see also Bd. of Cty. Comm'rs v. U.S. Dep't of Transp.*, 955 F.3d 96, 99 (D.C. Cir. 2020) (noting that courts should give agencies "a wide berth when making predictive judgments"). Indeed, due to the nature of the informal adjudication, the Commission's common sense and predictive

adequately articulated here. *See, e.g.*, *Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 376 (D.C. Cir. 2013) (describing the requirements for a change in agency position as "a low bar").

[11] Kalshi cites one commenter arguing for a hedging purpose that compares the prediction markets to sports betting and casino gambling and stating he uses the prediction markets for income. AR 1539-40.

judgment "*need not be explicitly backed by information in the record*,"[12] and this posture is exactly where the difference between a formal and informal adjudication "should not be underestimated."[13] *Phoenix Herpetological Society v. U.S. Fish and Wildlife Serv.*, 998 F.3d 999, 1006 (D.C. Cir. 2021) (noting that in informal adjudications common sense and predictive judgments need not be explicitly backed by information in the record, whereas in formal adjudications, they do).

[12] Nevertheless, the Commission cited plenty of evidence for its judgment, including the economics and structure of the transaction, the evidence of the diffuse and unpredictable effects of partisan control of a chamber of Congress—including the very nature of the process for enacting legislation, and the many variables that affect the actual implementation of public policy, etc. AR 15-17.

[13] Kalshi argues that the Commission placed on it an "unclear burden to sufficiently prove the extent of its contracts' economic utility," which "flips Congress's framework on its head" because "a contract is presumptively legal unless the Commission determines that the contract is 'contrary to the public interest.'" Kalshi Reply at 29. The nature of Kalshi's precise objection is not apparent, but it is certainly not true that the Commission applied a presumption against allowing the Contracts to trade. The Commission did not base its decision on some unmet burden as to the Contracts' economic purpose. It examined that purpose as something that could have weighed in favor of permitting the Contracts, and in so doing, Commission conducted its own analysis of the Contracts' economic utility evident from the structure, mechanics, and economics of the Contracts; reviewed public comments and Kalshi's own submissions regarding economic utility; and relied on its own expertise. The Commission concluded that "it has not been demonstrated that the Congressional Control Contracts could reasonably be expected to be used for hedging and/or price basing on more than an occasional basis or that the Congressional Control Contracts could reasonably be expected to be used predominantly by market participants having a commercial or hedging interest." AR 19. This does not suggest that the Commission imposed an unclear burden. Kalshi was undoubtedly aware that the Commission would consider economic utility because transactions subject to the CEA "are affected with a national public interest by providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities." 7 U.S.C. § 5. In this regard, Kalshi included with the 2023 Contract Submission, Appendix C "Risk Mitigation and Price Basing Utilities," AR 36-60, and later responded to the Commission's questions for public comment, including those about the Contracts' potential hedging and price-basing utility. AR 1786-1841; 2669-2757. The Commission owed Kalshi nothing more. *See Indep. U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 926 (D.C. Cir. 1982) ("An agency is not obliged to publish a tentative opinion for comment."). And, importantly, the Commission did not disapprove the Contracts simply because they lacked a meaningful economic purpose – it disapproved them in light of that fact and because numerous public-interest factors cut the other way.

B. The CEA has no specific factor the Commission must consider.

Kalshi's argument that the Commission did not "meaningfully engage" with its asserted "extensive informational benefits" crumbles upon examination of the case it cites. Kalshi Reply at 28. In *Getty v. Federal Savings & Loan Insurance Corp.*, the agency was required *statutorily* to consider a specific factor, and the DC Circuit noted: "[w]hen a statute requires agencies to consider particular factors, it imposes upon agencies duties that are essentially procedural . . . . The only role for a court is to ensure that the agency has considered the factor." 805 F.2d 1050, 1055 (D.C. Cir. 1986). Section 5c(c)(5)(C) requires the Commission to consider no specific factor in its public interest analysis. The Commission noted that Kalshi and other commenters stated the Contracts would serve as a check on misinformation, but there was also research that such markets may incentivize the creation of unreliable information. AR 21-22. The Commission's decision weighed the competing interests and risks, including the risk of incentivizing misinformation. This is another example of how the Commission had to make a common sense, predictive judgment, based on uncertain future events. *See Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009) ("The 'arbitrary and capricious' standard is particularly deferential in matters implicating predictive judgments and interim regulations.").

C. The Commission's determination on election integrity provided a reasoned analysis and the Commission did not refuse to consider evidence.

Kalshi now admits the Commission would be required to investigate manipulative events, and, realizing that its own economists had conceded short-term manipulations would happen, argues that what matters is long-term manipulative events. The Commission's order focused on manipulations, and the CEA does not distinguish between a short and a long-term manipulation.

The Commission's brief only pointed out that the risk of short-term manipulative events, as admitted by Kalshi's own economists, *alone* supports the Commission's order.[14]

The Commission does not, and did not, agree there would be no long-term manipulative effects, and the Commission expressed concern about election integrity and perceptions of election integrity. As the Order states, the Contracts create monetary incentives to vote (including as an organized collective) for particular candidates, AR 20, up to $100,000,000, AR 32-33. Moreover, as the Order stated, the Contracts could incentivize the spread of misinformation[15]—and the public interest in guarding against such information is all the more pressing in context of federal election outcomes. AR 20. The Commission "need not suffer the flood before building the levee." *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) (Kavanaugh, J.). Further, contrary to Kalshi's implication, short-term manipulations could have long-term effects by impacting fundraising, voter turnout efforts, and news stories covering candidates. *See* AR 20, 22. In short, the Commission found itself in the type of situation where it needed to forecast uncertain, future events. In such moments, agencies are allowed to conduct a general analysis based on informed

[14] Kalshi completely misses the point by arguing "that kind of short-term risk exists in *any* derivative," Kalshi Reply at 30, overlooking one of the bases for the Commission's Order. The Commission's Order discussed how the Contracts differ from vast majority of commodities underlying Commission-regulated derivatives—those have informational sources such as weather forecasts, federal government economic data, market-derived supply and demand metrics for commodities, market-based interest rate curves, etc. Contrast those sources to what would underly the Contracts here—not a cash market with bona fide economic transactions—instead, the pricing information would be driven by unregulated informational sources that do not follow scientifically reliable methodologies. AR 21. The Commission noted this difference in price forming information "may increase the risk of manipulative activity relating to the trading and pricing of the contracts, while decreasing Kalshi's and the Commission's ability to detect such activity." AR 21. Again, this is precisely the type of determination, based on informed conjecture, the agency is entitled to conduct. *See Nasdaq Stock Mkt. v. SEC*, 38 F.4th 1126, 1142 (D.C. Cir. 2022); *Phoenix Herpetological Soc'y v. U.S. Fish and Wildlife Serv.*, 998 F.3d 999, 1006 (D.C. Cir. 2021).

[15] Further, as the Commission noted, the Contracts do not exclude all individuals or entities who could have a motivation to create the impression of likely electoral success or failure on the part of a political candidate or candidates. AR 22. Kalshi does not, for instance, exclude agents of foreign powers.

predictions—and it did so here, reasonably. *Nasdaq Stock Mkt. v. SEC*, 38 F.4th 1126, 1142 (D.C. Cir. 2022) ("But an agency 'need not—indeed cannot—base its every action upon empirical data' and may, 'depending on the nature of the problem, . . . be "entitled to conduct . . . a general analysis based on informed conjecture."'") (quoting *Chamber of Commerce of U.S. v. SEC*, 412 F.3d 133, 142 (D.C. Cir. 2005)).

Thus, all that is required here is that, even under Kalshi's own case law, cited above, the agency provides a statement of reasoning, not refuse to consider evidence with bearing on the issue, and provide a fulsome explanation if the only evidence in the record supports the opposite conclusion. Here, the agency explained its reasoning, engaged with the relevant evidence, and was not confronted with a one-sided record. The Commission considered the Contracts' proposed economic utility properly using a critical review, the proposed non-economic benefits, and the concerns about election integrity and the perceptions on election integrity, as well as the Commission's role in policing it, and came to a reasoned judgment. The public interest determination is therefore sound.

CONCLUSION

For the foregoing reasons and those stated in the CFTC's Cross-Motion for Summary Judgment, the CFTC respectfully requests that this Court grant the Commission's motion for summary judgment, deny Kalshi's motion for summary judgment, enter judgment in favor of the CFTC and against Kalshi on all claims, and order any other relief that this Court determines is appropriate.

Dated: April 10, 2024

Respectfully submitted,

/s/ Raagnee Beri
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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2024, I served the foregoing on counsel of record using this Court's CM/ECF system.

/s/ Raagnee Beri

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KALSHIEX LLC, Plaintiff, v. COMMODITY FUTURES TRADING COMMISSION, Defendant.	Civil Action No. 23-3257 (JMC)

ORDER

For the reasons stated in the Court's forthcoming memorandum opinion, the Court **GRANTS** Plaintiff's motion for summary judgment, ECF 17, and **DENIES** Defendant's cross-motion for summary judgment, ECF 30. Defendant's September 22, 2023 order prohibiting Plaintiff from listing its congressional control contracts for trading is hereby **VACATED**.

This is a final appealable order.

SO ORDERED.

JIA M. COBB
United States District Judge

Date: September 6, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KALSHIEX LLC, Plaintiff, v. COMMODITY FUTURES TRADING COMMISSION, Defendant.	Civil Action No. 1:23-cv-03257 (JMC)

Defendant Commodity Futures Trading Commission's
Emergency Motion to Stay the Court's Decision
Until 14 Days After the Issuance of the Forthcoming Memorandum Opinion

Defendant Commodity Futures Trading Commission ("CFTC" or "Commission") seeks an emergency stay of the Court's Order, dated September 6, 2024, vacating the CFTC's September 22, 2023 order prohibiting Plaintiff from listing its election contracts for trading [DE #47]. Without the benefit of the Court's reasoning, the CFTC is unable to make an informed decision whether to appeal, nor is it able to fully brief a motion for stay pending any forthcoming appeal. The CFTC, therefore, respectfully requests that the Court stay the vacatur of the CFTC's September 22, 2023 order until two weeks (14 days) after the Court issues its reasoned opinion.

Time is of the essence in the issuance of a stay. The CFTC expects that Plaintiff Kalshi will immediately list the relevant election contracts and that trading will begin as soon as the contracts list. Plaintiff has already announced on its homepage that "Election Markets are Coming to Kalshi!" https://kalshi.com (last visited September 6, 2024). This announcement is presumably because, under CFTC rules, a designated contract market ("DCM") such as Plaintiff can submit a new contract to the Commission, self-certifying that it is in compliance with relevant statutory and regulatory requirements, and list the contract for trading on the next business day after submission,

without waiting for the Commission to take any action. 7 U.S.C. § 7a-2(c)(1); 17 C.F.R. § 40.2. This means, absent a stay, if Kalshi self-certifies the contracts before 8:15 a.m. on Monday, September 9, it may list them as early as Tuesday morning.

In deciding a motion to stay pending appeal, courts consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (emphasis added) (*quoting Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). Of these factors, the first two are the most important, and require more than a "possibility" of relief, or potential irreparable injury. *Id.* In this Circuit, courts have analyzed these four factors on a "sliding scale," whereby "a strong showing on one factor could make up for a weaker showing on another." *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011). The "sliding scale" framework allows a movant who presents a "serious legal question" on the merits to obtain a stay if "little if any harm will befall other interested persons or the public, and ... denial of the order would inflict irreparable injury on the movant." *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977).[1]

To be clear, this motion is not a full motion for stay pending appeal because the CFTC cannot address the first two factors without the benefit of the Court's reasoning for its Order. However, applying the "sliding scale" framework, the CFTC is entitled to a stay pending issuance of

[1] It remains unresolved in this Circuit whether the sliding scale framework survives the Supreme Court's decision in *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). *See Changji Esquel Textile Co. v. Raimondo*, 40 F.4th 716, 726 (D.C. Cir. 2022); *Aamer v. Obama*, 742 F.3d 1023, 1043 (D.C. Cir. 2014). Current caselaw continues to apply the *Holiday Tours* sliding scale. *See, e.g., Nat'l R.R. Passenger Corp. (Amtrak) v. Sublease Int. Obtained Pursuant to Assignment & Assumption of Leasehold Int. Made as of Jan. 25, 2007,* No. 22-CV-1043 (APM), 2024 WL 3443596, at *2 (D.D.C. July 15, 2024) ("this court remains bound by *Holiday Tours'* sliding scale").

the memorandum opinion because serious legal questions are involved, and a temporary stay presents "little if any harm." Thus, the CFTC respectfully requests that the Court grant a 14-day stay of the Court's Order dated September 6, 2024, to enable the CFTC to make an informed decision about whether to appeal and to prepare a motion for stay pending any forthcoming appeal.

Serious Legal Question. The Commission is in the unenviable position of finding out that it has lost but without any explanation or reasoning. There can be no doubt that the issues presented in this case are serious legal questions. However, at this time, the CFTC is unable to make full arguments as to likelihood of success in any forthcoming appeal, because the Court has not yet issued its memorandum opinion. Accordingly, the CFTC respectfully submits that it is enough at this time to grant a temporary stay on the grounds that there are serious legal questions at stake, the other factors favor a stay, and the CFTC needs the benefit of the Court's reasoning to craft a proper motion for stay pending appeal.

Irreparable Injury. The CFTC would be irreparably injured absent a stay. If Plaintiff lists its contracts for trading, the CFTC has very limited recourse to cease trading or otherwise unwind the contracts. *See* 17 C.F.R. § 40.2(c). Further, the Commission anticipates that other DCMs, in addition to Plaintiff, may seek to self-certify election contracts that are similar to Plaintiff's. These contracts also could be listed for trading one business day after the DCM's filing of its self-certified submission with the Commission, and the CFTC would have very limited recourse in this event. Without the benefit of the Court's reasoning, the CFTC cannot ascertain what the alternative paths may be, as the CFTC would have difficulty knowing how it could proceed without running afoul of the Court's Order.

Injury to other parties: The balance of the harms weighs in favor of the CFTC. A short, temporary stay, pending the issuance of the Court's opinion, will not substantially injure Plaintiff Kalshi. Plaintiff Kalshi has numerous event contracts trading. The stay of Kalshi's proposed

election contracts for two weeks while allowing the CFTC sufficient time to review the Court's opinion will not substantially injure them.

Public interest: The public interest lies with granting the CFTC a temporary stay. As laid out in the CFTC's public interest analysis in its summary judgment briefing, the relevant contracts could potentially be used in ways that would have an adverse effect on election integrity, or the perception of election integrity, and could put the Commission in the position of investigating election-related activities. At a time when distrust in elections is at an all-time high, even a short listing of Plaintiff's contracts, and/or similar election contracts on other DCMs, could harm public perception of election integrity and undermine confidence in elections.

For the reasons stated above, the CFTC respectfully requests a stay of the Court's vacatur of the CFTC's September 22, 2023 order prohibiting Plaintiff from listing its election contracts for trading until two weeks (14 days) after the Court issues its reasoned opinion, so the CFTC can appropriately assess its appeal options and file a full motion for stay pending any forthcoming appeal. Both the balance of harms and the public interest factors are in the Commission's favor to at least allow the Commission time to review the Court's explanation of its decision and seek further relief from the Court before Kalshi lists the contracts for trading.

Dated: September 6, 2024

Respectfully submitted,

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LCvR 7(m) CERTIFICATE

I hereby certify that counsel for Defendant the CFTC made a good faith effort to contact counsel for Plaintiff KALSHIEX LLC before this motion was filed to determine whether there is any opposition to the relief sought, and as of the time of this filing counsel for Plaintiff has not responded.

/s/ Anne W. Stukes

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2024, I served the foregoing on counsel of record using this Court's CM/ECF system.

/s/ Anne W. Stukes

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

Plaintiff's Opposition to Defendant's Emergency Motion for Stay

OPPOSITION TO DEFENDANT'S EMERGENCY MOTION FOR STAY

The Commission's preemptive emergency motion for a stay (ECF 48 ("Mot.")) is meritless. From the outset, Kalshi emphasized "this case is time sensitive," with "meaningful relief … only possible if the case is adjudicated reasonably in advance of the 2024 congressional elections." ECF 14 at 2. Yet Kalshi took no shortcuts. It did not demand a preliminary injunction on a hasty timeline. Instead, the Commission assembled the full record; the parties filed robust merits briefs; and the Court held a lengthy oral argument. The goal, from the start, was to ensure that the Court could reach—and have full confidence in—a final judgment by "September 6, 2024, which is 60 days before the November 2024 congressional elections." *Id.* The Court adhered to the precise timeline the parties have expected since last November, and has now agreed that the Commission acted unlawfully by blocking Kalshi's contracts.

Because the Court's Order flowed from full consideration of the merits in the ordinary course, there is no reason to take the extraordinary step of suspending its effect now. The Commission lost, fair and square, on the law. It should not be allowed to snatch a procedural victory from the jaws of defeat by running out the clock.

The traditional stay factors all point in the same direction. On the merits, this Court's Order simply did what the law compelled in recognizing that the Commission exceeded its statutory authority when it barred Kalshi's contracts. While the Court's memorandum opinion will detail the reasons why, anyone reading the briefs and oral argument transcript would readily grasp the Order's core, legally correct basis.

As to irreparable harm, only *Kalshi* would suffer it. After unlawfully delaying these contracts for over a year (and previously obstructing an earlier iteration of the contracts by stringing out review), the Commission would now swallow at least two weeks of the little time still remaining before the 2024 elections. That delay—which the agency would assuredly try to parlay into another, then another, until it is too late—would be devastating for Kalshi, which has staked its future on this litigation and these markets.

Meanwhile, the CFTC faces no such harm. The Commission has long known the timeline for a decision in this case, and has had ample opportunity to prepare for an adverse outcome. Meanwhile, election prediction markets are up and running on both PredictIt and the unregulated exchange Polymarket, causing no harm to the public but accumulating market share at the expense of law-abiding Kalshi.

If the Commission ultimately decides to pursue a quixotic appeal, it is free to seek a stay pending appeal in the ordinary course. But there is no legitimate basis for two-plus weeks of delay *before the agency even decides whether to appeal*. Rather, as the election nears, Kalshi and the public deserve access to the contracts that the CFTC has blocked for too long already. The Court should deny the motion.

ARGUMENT

I. THE CFTC IS NOT ENTITLED TO AN EMERGENCY STAY.

This Court will stay an order "only in exceptional circumstances." *Dunlap v. Presidential Advisory Comm'n on Election Integrity*, 319 F. Supp. 3d 70, 109 (D.D.C. 2018). In assessing a stay request, this Court asks "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009). None of these factors favors a stay. Nor has the Commission carried its "burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433–34.

1. ***Merits.*** The likelihood-of-success factor is critical; when the movant cannot satisfy it, it is "arguably fatal" to a stay request. *Citizens for Responsibility & Ethics in Wash. ("CREW") v. FEC*, 904 F.3d 1014, 1019 (D.C. Cir. 2018) (per curiam); *see also Labrador v. Poe*, 144 S. Ct. 921, 928–34 (2024) (op. of Kavanaugh, J.). The Commission's inability to satisfy this requirement should be fatal here.

The dispositive legal question that the Court decided in its Order was whether the CFTC violated the law when it banned Kalshi's Congressional Control Contracts. By granting Kalshi's motion for summary judgment seeking vacatur of that order, the Court determined the answer was yes. The Order ruled that the CFTC's "order prohibiting [Kalshi] from listing its congressional control contracts for trading" was "**VACATED**." ECF 47. Importantly, that was not a tentative or preliminary decision

made on a cramped timeline or based on an incomplete record—rather, it was a final judgment that followed full briefing from the parties and *amici*, and an oral argument that allowed the Court to probe the parties' positions in depth.

The Commission makes no effort to show a likelihood of success on the merits, complaining that it cannot do so in the absence of the Court's memorandum opinion. Mot. 3. But there is no mystery: As Kalshi set forth in its briefs and at oral argument, the Commission's claim that event contracts on elections somehow involve "unlawful activity" or "gaming" would make nonsense of the statutory scheme. The Commission was given opportunity after opportunity to defend its construction of the statute—and it failed each time. At this juncture, the CFTC cannot seriously claim a likelihood of success on the merits, or even that an appeal would present a serious question.

Indeed, the CFTC has no real hope of success should it hazard an appeal. The D.C. Circuit recognizes that statutory interpretation begins with the text—and "must end there if the text is clear." *Force v. Islamic Republic of Iran*, 610 F. Supp. 3d 216, 222 (D.D.C. 2022). The D.C. Circuit has also explained that statutory structure and context are crucial to any interpretive exercise. *See, e.g.*, *United States v. Slatten*, 865 F.3d 767, 807 (D.C. Cir. 2017); *Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699, 708 (D.C. Cir. 2009). And as the Supreme Court recently clarified, statutory interpretation lies in the province of "courts, not agencies." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2261 (2024). In light of these principles, the likelihood that the D.C. Circuit would conclude that Kalshi's contracts contingent on control of Congress "involve … unlawful activity" or "involve … gaming" is remote indeed.

In short, the text and structure of the statute compelled the Court's Order. The text and structure of the statute would likewise doom any CFTC appeal.

2. ***Irreparable harm.*** Irreparable harm to the movant must be "certain and great" to justify a stay. *CREW*, 904 F.3d at 1019. Here, the CFTC barely bothers to explain its supposed injury—much less prove irreparable, certain, great harm—and offers no reason to think that allowing Kalshi to list its contracts for the next two weeks would pose an "exceptional" threat. *Dunlap*, 319 F. Supp. 3d at 109.

What little the CFTC does say on irreparable harm is unpersuasive and "fail[s] to rise beyond the speculative level." *CREW*, 904 F.3d at 1019. *First*, the Commission worries that "other DCMs" might propose different "election contracts." Mot. 3. Even if that were not completely speculative, it is not clear why it would matter—if those contracts are lawful, then their listing poses no irreparable harm. In all events, this is a red herring. The Court's Order vacates just one agency action: the September 23, 2023 order banning Kalshi's Congressional Control Contracts. As such, staying the Order would have no legal impact on other hypothetical contracts.

Second, the CFTC says that, if it later succeeds on appeal, it "has very limited recourse to cease trading or otherwise unwind the contracts." Mot. 3. But "limited" is not the same as "none." In fact, the CFTC can order the unwinding of contracts, and has done so before. And it retains potent enforcement authority over derivatives markets and the contracts that trade on them. *See generally, e.g.*, 17 C.F.R. 40.2(c) (authority to scrutinize self-certifications); 7 U.S.C. § 12a(7) (outlining CFTC's broad powers to oversee conduct of registered exchanges).

Tellingly, the CFTC does not even commit to pursue an appeal at all. *See* Mot. 3 (noting that the agency has yet "to make an informed decision about whether to appeal"). Apparently, it might decide the effects of Kalshi's victory are not so dire after all—and the Commission supposedly requires *two full weeks* after the release of the Court's memorandum opinion just to make that judgment call. That equivocation and leisurely timeline makes it impossible to take seriously the notion that a stay of the Order is needed to prevent irreparable harm. Instead, it exposes the CFTC as returning to its standard playbook—delaying and obstructing until it can come up with some new chicanery to shut down Kalshi's lawful markets.

3. ***Injury to Kalshi.*** On the other side of the equitable scale, granting the Commission's extraordinary request would irreparably injure Kalshi, those who wish to trade its lawful contracts, and the public at large.

This Court's Order makes clear that the CFTC has already unlawfully banned Kalshi's contracts for over a year since their June 2023 self-certification (and another year if one considers Kalshi's 2022 submission that the agency strung along). Now, the CFTC seeks to inflict additional harm, potentially mooting the contracts for the current election cycle if the agency can run out the clock. With the relevant elections less than 60 days away, any day that passes while this Court's Order is stayed would impose serious harm on Kalshi that cannot be undone. And there would be *no way* to unwind the clock and allow Kalshi to recover the time during which its contracts are blocked by unlawful agency action—let alone the significant time and money that the company has invested in these contracts.

The Commission tries to minimize the harm by observing that Kalshi also lists non-election contracts. The comparison is specious. Kalshi has staked its future on political event markets. And as Kalshi has waited for the litigation process to run its course, unregulated operations like Polymarket have taken advantage of that time to dominate the market. *See, e.g.*, Sean Carter, *From Presidential Races to Popcorn Flicks: How Polymarket Predicts the Future*, FORBES (July 25, 2024) (noting that "more than $380 million in bets have been placed on the outcome of the U.S. presidential election alone" on Polymarket). Further delays may make it impossible for Kalshi to meaningfully compete in this space.

Kalshi is grateful that the Court adhered to the timeline it requested at the outset of the litigation. The purpose of that timeline was to ensure that Kalshi could secure meaningful relief before the elections. To backtrack and stay the Order now would undo all of that, causing irreparable harm to Kalshi and the public.

4. ***Public interest.*** As Kalshi and commenters have explained, the public has much to gain from these contracts. Academics, investors, former CFTC and SEC officials, human-rights activists, businesses, and nonprofits have all expressed support for the Congressional Control Contracts.[1] These commenters have attested to the economic and informational value of political event contracts generally and the Congressional Control Contracts specifically.[2] Many have attested that they would

[1] *See, e.g.*, AR 1312–23, 1378–79, 1380–82, 1388–90, 1392–1403, 1404–05, 1443–45, 1448–53, 1474–75, 1477–81, 1527–29, 1537–38, 1541–45, 1549–52, 1555–57, 1558–60, 1573–78, 1584–85, 1602, 1616–23, 1744, 1745–46.

[2] *See, e.g.*, AR 1413–41, 1474–75, 1477–81; 1527–29, 2277–345.

actually buy Congressional Control Contracts to hedge risk.[3] Others have discussed the many informational benefits that these types of markets generate for the public.[4] The public has already been denied these benefits for over a year, while the CFTC's unlawful order was in place. And with the election now fewer than 60 days away, there has never been a more important time for those benefits to materialize.

All of the CFTC's purported concerns with these contracts are unfounded for the reasons discussed in Kalshi's briefs (ECF 17-1 at 41–44; ECF 35 at 29–32), and further belied by the ongoing operation of other election-prediction markets. More important, the Court's Order necessarily determined that Congress did not empower the Commission to block these contracts as involving "unlawful activity" or "gaming." So the only proposition that really matters is that it does not serve "the public interest" to "permit agencies to act unlawfully *even in pursuit of desirable ends*." *Ala. Ass'n of Realtors v. HHS*, 594 U.S. 758, 766 (2021) (emphasis added).

Finally, it is also worth observing that the CFTC's own conduct is inconsistent with its current request for emergency relief. As this Court knows, Kalshi has consistently communicated its need for relief in advance of the November election (*see* ECF 14 at 2; ECF 36 at 3), and this Court has acknowledged the need for that timely relief. So the CFTC has known for months that an adverse decision, if it transpired, would arrive in short order. Yet the agency has seemingly taken no proactive steps

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

[4] *See, e.g.*, AR 1392–93, 1550–52, 2991–93.

to prepare for this result. Instead, it now asks the Court for another two-plus week delay—nearly *a quarter* of the remaining time before the elections—while reserving the right to ask for further delays once that period expires. This certainly looks like an attempt to run out the clock, as the agency has done in the past, and thus win in practice even after losing in court. The Court should not indulge it.

* * *

In the end, none of the factors supports the Commission's "hail Mary" request. Marc Hochstein, *CFTC Pleads With Judge to Block Kalshi Election Contracts for 14 Days*, COINDESK (Sept. 7, 2024). The Court has reached a considered judgment that is plainly correct on the merits and would easily withstand any appeal. The agency cannot explain why it would suffer cognizable irreparable harm without a stay. Yet a stay would impair Kalshi's now-vindicated interests, inflict irreparable competitive injury, deprive the public of the benefit of the ability to trade these contracts on a regulated exchange, and potentially even moot the contracts for the entire election cycle if the agency persists in obstructionist tactics. Kalshi played by the rules and turned every square corner in awaiting this Court's Order. It is now time for the Commission to respect that judgment.

CONCLUSION

This Court should deny the CFTC's emergency motion for a stay.

Dated: September 8, 2024

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KALSHIEX LLC, Plaintiff, v. COMMODITY FUTURES TRADING COMMISSION, Defendant.	Civil Action No. 1:23-cv-03257 (JMC)

Defendant Commodity Futures Trading Commission's
Reply in Support of Emergency Motion for a Stay

A registered U.S. futures exchange is about to launch election gambling on its website such that U.S. customers can, for the first time on such an exchange, place bets on the outcomes of elections right in the heart of election season, in some cases wagering up to $100 million. This Court has ruled against the CFTC, but has not yet said what the Commission did wrong. Kalshi protests that it should be allowed to immediately begin trading these contracts because it has waited long enough and should be able to pursue its business, heedless of the public interests indicating that election gambling poses threats to election integrity and the perception of election integrity. Kalshi also accuses the CFTC of just trying to stall. The Commission's motion is not a mere delay tactic. On the contrary, a short stay to enable the Court to issue its memorandum opinion and to enable this Court, or potentially the D.C. Circuit, to evaluate a fully briefed motion for stay pending appeal, is the prudent course, and is a routine mechanism to allow the orderly administration of cases such as this one.

As of this filing, Kalshi has not informed CFTC staff about its listing intentions. It appears that Kalshi may be of the view that it may list its election contracts for trading immediately, based

upon vacatur of the Commission's order that denied its June 12, 2023 self-certification. 17 C.F.R. § 40.2. The Commission believes Kalshi may intend to list the election contracts imminently, without further self-certification (or, apparently, any notification to the court in its response to the CFTC's motion or otherwise). Thus, without a stay, the relevant election contracts may begin trading before the CFTC has had the opportunity to file a notice of appeal or obtain a stay pending appeal. Accordingly, the time sensitivity of this motion remains acute. The CFTC respectfully requests that the Court immediately issue a stay pending resolution of this motion.

The CFTC's requested relief is essentially an administrative stay. Courts commonly grant an administrative stay pending resolution of, for instance, a motion for stay pending appeal, either on their own motion or at the behest of one of the parties. *Nat'l Urban League v. Ross*, 977 F.3d 698, 700-01 (9th Cir. 2020) (considering the government's emergency motion for an administrative stay); *United States v. Texas*, 97 F.4th 268, 274 (5th Cir. 2024) (noting the panel had granted an administrative stay upon the motion of the defendants); *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 762 Fed. Appx. 7, 8 (D.C. Cir. 2019) (noting an administrative stay on the Court's own motion).

An administrative stay "freeze[s] legal proceedings until the court can rule on a party's request for expedited relief." *United States v. Texas*, 144 S. Ct 797, 798 (2024). While a stay pending an appeal requires the consideration of the *Nken* factors, an administrative stay "buys the court time to deliberate." *Id.* Here, the Court has not issued its memorandum opinion. And the CFTC has thus not been able to evaluate the Court's opinion and properly file a motion for stay pending appeal. A limited stay is appropriate to enable both.

Administrative stays are not controlled by the *Nken* factors, but may reference them. Because an administrative stay holds the status quo while courts consider motions such as those for a stay pending appeal, "the *Nken* factors are obviously on the court's radar, and unsurprisingly, they

can influence the stopgap decision, even if they do not control it." *See United States v. Texas*, 144 S. Ct. at 799. Rather, the point of an administrative stay is to "minimize harm while [a] court deliberates." *See United States v. Texas*, 144 S .Ct. at 799.

Here, the CFTC submits that it would minimize harm to stay the order while the Court deliberates and issues its reasoned opinion, and to give the CFTC and potentially the D.C. Circuit adequate time should appellate court involvement be required.[1] As it is without a stay, Kalshi's contracts may trade imminently, despite that gambling on the outcome of elections has long been unlawful in this country and never before been permitted on financial markets overseen by the CFTC. The contracts, according to Kalshi's own experts, could be manipulated in the short-term, causing potential consequences for the integrity of elections, such as influencing early voting turnout, or the perception of election integrity. These grave concerns should factor in favor of a short administrative stay to preserve the status quo.

Further, a stay is warranted under the *Nken* factors, which are not controlling but can influence the decision. First, without a reasoned opinion, the CFTC is prejudiced because it cannot submit an argument on likelihood of success on the merits. Second, the Commission will be irreparably injured absent a stay based upon its own injury deriving from the uncertainty of the Court's decision and the injury to its mission to protect the public. The Commission's injury and the public interest, typically separate *Nken* factors, merge when the government is a party. *See Pursuing America's Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016) (stating, in evaluating the denial of a preliminary injunction against the government "in this case, the FEC's harm and the public interest are one and the same, because the government's interest *is* the public interest"). One

[1] The appellate posture of this case is also procedurally complicated, because despite the Court's statement that the September 6 order is final and appealable, a notice of appeal is a jurisdictional event that would very likely deprive this Court of jurisdiction to even enter the memorandum opinion. This is yet another reason a brief stay is warranted.

purpose of the Commodity Exchange Act is preventing disruptions to market integrity. 7 U.S.C. § 5. Were the trading to commence in the election contracts and then the Commission received a stay pending appeal, this would be a disruptive market event. Preserving the status quo for a short administrative period would thus protect that public interest.

The remaining public interests were set out at length in the Commission's summary judgment briefing, which the Commission will not belabor here, but involve very serious concerns about election integrity.[2]

Moreover, the Commission is injured because, without the rationale behind Court's decision, it cannot adequately evaluate its next course of action. The potential that the Court may base its decision on a variety of grounds could require different Commission actions, something that the Commission should be allowed to evaluate for some reasonable amount of time without a potential disruptive market event.

In addition to the injury to the public interest, as the CFTC noted in its motion, if trading of election contracts commences, the CFTC will have very limited recourse to halt trading or otherwise unwind contracts that are already trading. *See* 17 C.F.R. § 40.2(c). Kalshi downplays this risk by citing the Commission's general authority to regulate event contracts and suggesting the CFTC could simply unwind the contracts. However, when CFTC staff withdrew a no-action letter issued to PredictIt, traders in those contracts obtained an injunction against the CFTC that prevented the wind-down of that market. *Clarke v. CFTC*, 74 F.4th 627 (5th Cir. 2023). Thus, there is a real risk that if the contracts begin trading, the CFTC will be prevented from unwinding them. Kalshi downplays this risk, but its own conduct suggests that it is racing to trade the contracts so that they

[2] Indeed, there are reports of recent attempted manipulation in the election event contracts offered on Polymarket. *See* Rajiv Sethi, *A Failed Attempt at Market Manipulation*, https://rajivsethi.substack.com/p/a-failed-attempt-at-prediction-market (Sept. 7, 2024) (last visited September 9, 2024).

will be difficult if not impossible to stop later, or indeed to prevent the CFTC from ever obtaining a stay pending appeal.

As to injury to other parties, Kalshi cannot establish substantial harm from an administrative stay. A temporary stay, pending the issuance of the Court's opinion and the CFTC's ability to move for a stay pending appeal, will not substantially injure Kalshi. Kalshi requested a ruling so that the relevant contracts could be listed prior to the election. *See* May 30, 2024 Tr. 2-3. There was never any magic to September 6, 2024, as Kalshi intimated to the Court in its advocacy and its email. If anything, the date was Kalshi's attempt to preserve its own appellate rights. In the Joint Motion for Entry of Scheduling Order and for Other Relief, Kalshi requested the Court to issue its decision by September 6, 2024, stating that "meaningful relief for the upcoming election cycle is only possible if the case is adjudicated reasonably in advance of the 2024 congressional elections, **with sufficient time to seek expedited interim relief** in the Court of Appeals if necessary." See Dkt. 14 at 2 (emphasis added). At oral argument, Kalshi reiterated its request for a decision from this Court within sixty days of the election precisely so they could seek appellate review if they did not prevail. *See* May 30, 2024 Tr. 2-3. Now that Kalshi has prevailed, it is racing to list the contracts, irrespective of previously expressed appellate concerns.

Kalshi simply made a business decision to attempt to get the election contracts trading in this election cycle. But whether the contracts list immediately or after a stay, the difference to Kalshi is simply the fees from the trading. Even if Kalshi is stayed from immediately listing its proposed contracts in the near term, it is poised to profit on such contracts at the conclusion of any stay, and at the conclusion of any appeal in this case to the extent it continues to prevail in court.

Kalshi nevertheless claims injury by alleging that the CFTC's request is part of a pattern of delay designed to "inflict additional harm" or "run out the clock." In this regard, Kalshi falsely accuses the Commission of "obstructing" or delaying the review of its 2022 election contract. *See*

Response at 2, 6 (stating that the Commission "strung along" Kalshi's 2022 contract submission). But, as Kalshi must know, it was Kalshi that sought multiple extensions of the Commission's 2022 contract review period. AR 3197 (letter dated November 22, 2022 requesting an extension until January 23, 2023), 3215 (letter dated January 6, 2023 requesting an extension of the Commission's review period until March 23, 2023), 3267 (letter dated March 15, 2023 requesting an extension of the review period until May 22, 2023). Ultimately, Kalshi withdrew the 2022 Submission. AR 3275 (letter dated May 16, 2023 withdrawing the submission). Shortly thereafter, Kalshi made the 2023 Submission, and the Commission then acted promptly on it: Kalshi certified the 2023 contract on June 12, 2023, the Commission issued the relevant order on September 22, 2023. Kalshi then waited over a month to bring this lawsuit, presumably spending the time assessing the Commission order and determining how to proceed. The CFTC's 14-day request by comparison, hardly seems unreasonable.

Kalshi also contends that it has already been harmed because operations like Polymarket have be able to dominate the market for political event contracts during this litigation. However, Polymarket is not registered with the CFTC and is, therefore, prohibited from offering any event contracts to U.S. customers, [3] and it was ordered in January 2022 to cease and desist offering off-exchange event contracts while failing to obtain designation as a DCM or a swap execution facility. [4] In fact, no registered DCM lawfully offers political event contracts in the United States.

Finally, Kalshi asserts harm because it has purportedly staked its future on political event contracts. Kalshi fails to substantiate this claim, and it is a questionable claim in light of Kalshi's seemingly robust listing of hundreds of other non-political event contracts on its exchange.

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[3] *Compliance Update — January 2022*, POLYMARKET, https://polymarket.medium.com/compliance-update-january-2022-9d5337ffdab8 (Jan. 12, 2022).

[4] *CFTC Orders Event-Based Binary Options Markets Operator to Pay $1.4 Million Penalty*, CFTC, https://www.cftc.gov/PressRoom/PressReleases/8478-22 (Jan. 3, 2022).

For the reasons stated above, the CFTC respectfully requests a stay of the Court's vacatur of the CFTC's September 22, 2023 order prohibiting Kalshi from listing its election contracts for trading until two weeks (14 days) after the Court issues its reasoned opinion, so the CFTC can appropriately assess its appeal options and file a full motion for stay pending any forthcoming appeal. This administrative stay would preserve the status quo; enable the Court, the Commission, and potentially the D.C. Circuit, adequate time to deliberate; and not present substantial harm to Kalshi.

Dated: September 9, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2024, I served the foregoing on counsel of record using this Court's CM/ECF system.

/s/ Anne W. Stukes

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KALSHIEX LLC, Plaintiff, v. COMMODITY FUTURES TRADING COMMISSION, Defendant.	Civil Action No. 23-3257 (JMC)

MEMORANDUM OPINION

This lawsuit concerns the interpretation of the Commodity Exchange Act (CEA)'s special rule for the review of event contracts, a type of derivative contract whose payoff is based on the outcome of a contingent event. The special rule authorizes the Commodity Futures Trading Commission (CFTC) to review, and prohibit, event contracts that it determines are contrary to the public interest if, and only if, they involve specific activities, including "activity that is unlawful under any Federal or State law" and "gaming." 7 U.S.C. §§ 7a-2(c)(5)(C)(i)(I),(V).[1] Plaintiff KalshiEX LLC (Kalshi), a financial services company, tried to offer event contracts that would allow participants to take positions and trade on the outcome of United States congressional elections. The CFTC issued an order prohibiting Kalshi from offering the contracts after it determined that such contracts involve unlawful activity and gaming, and are contrary to the public interest. Kalshi filed this suit challenging the CFTC's decision as arbitrary, capricious, and otherwise not in accordance with the law under the Administrative Procedure Act (APA).

[1] Unless otherwise indicated, the formatting of citations has been modified throughout this opinion, for example, by omitting internal quotation marks, emphases, and alterations and by altering capitalization. All pincites to documents filed on the docket in this case are to the automatically generated ECF Page ID number that appears at the top of each page.

The CFTC's order exceeded its statutory authority. Kalshi's contracts do not involve unlawful activity or gaming. They involve elections, which are neither.

Although the Court acknowledges the CFTC's concern that allowing the public to trade on the outcome of elections threatens the public interest, this Court has no occasion to consider that argument. This case is not about whether the Court likes Kalshi's product or thinks trading it is a good idea. The Court's only task is to determine what Congress did, not what it could do or should do. And Congress did not authorize the CFTC to conduct the public interest review it conducted here.

Accordingly, the Court **GRANTS** Plaintiff's motion for summary judgment, ECF 17, and **DENIES** Defendant's cross-motion for summary judgment, ECF 30.

I. BACKGROUND

A. Event Contracts

The CFTC is an independent federal agency that regulates financial derivative markets. A derivative is a financial instrument or contract whose price is "directly dependent upon (i.e.[,] derived from)" the value of one or more underlying assets—for example, commodities (like corn and wheat), securities, or debt instruments. *See Futures Glossary: A Guide to the Language of the Futures Industry*, CFTC, https://perma.cc/63HY-DD7E. Derivatives take many forms, including "futures, options, and swaps." *Id.* [2] These instruments "provide a way to transfer market risk or

[2] These terms refer to various agreements or contracts. A "future" is "an agreement to purchase or sell a commodity for delivery in the future." *Futures Glossary: A Guide to the Language of the Futures Industry*, CFTC, https://perma.cc/63HY-DD7E. "Option" refers to a "contract that gives the buyer the right, but not the obligation, to buy or sell a specified quantity of a commodity or other instrument at a specific price within a specified period of time, regardless of the market price of that instrument." *Id.* The CFTC acknowledges that the definition of "swap" is "detailed and comprehensive," *id.*, but broadly it is "a type of derivative involving the exchange of cash flows from financial instruments." *Inv. Co. Inst. v. Commodity Futures Trading Comm'n*, 720 F.3d 370, 373 (D.C. Cir. 2013).

credit risk between two counterparties." *Inv. Co. Inst. v. U.S. Commodity Futures Trading Comm'n*, 891 F. Supp. 2d 162, 168 n.3 (D.D.C. 2012) (citations omitted).

This case concerns a specific derivative called an "event contract." An event contract is a derivative contract "whose payoff is based on a specified event, occurrence, or value." *Contracts & Products: Event Contracts*, CFTC, https://perma.cc/CG2B-3YWY. For example, an event contract might involve the occurrence of a weather event (e.g., snowfall or hurricanes). *See id.*; ECF 38-2 at 23 (Comment Letter from John A. Phillips to U.S. Commodity Futures Trading Comm'n 3 (Sept. 23, 2022) [*hereinafter* Phillips Comment]). These contracts usually pose a yes-or-no question. The buyer of the event contract, for example, may take a "yes" position on whether the underlying event will happen, *see* ECF 38-1 at 35 (KalshiEX LLC, Commission Regulation 40.2(a) Notification (June 12, 2023) [*hereinafter* Kalshi Notification])—such as whether the level of snowfall in a certain region will exceed a specific amount in a given timeframe. The seller implicitly takes the opposite, or "no," position. *See id*.

Event contract prices are based upon the current probability that an event will occur and thus, like stock prices, fluctuate. *Id.* at 34–35; ECF 38-2 at 27 (Phillips Comment). The contract specifies the value to be paid on the contract. *See* ECF 38-1 at 34–35 (Kalshi Notification). Event contracts expire at a cutoff date and can be purchased and sold at any time before that date. *Id.* at 40. They are binary. When the contract expires, the seller must pay the buyer if the underlying event on which the buyer took a "yes" position occurs, but the buyer gets paid nothing if it does not. *Id.* at 35.

Like derivatives generally, event contracts can be used to mitigate risk. Kalshi provides an illustrative example in its brief concerning a beachfront property owner who might purchase an event contract predicting that a hurricane will reach landfall in the area. ECF 17-1 at 15. If the

hurricane hits as the owner predicted, the payout from the contract could offset the owner's loss of rental income incurred because of the storm. *Id.* But, like other investments, some buyers trade event contracts simply to seek some financial return.

B. The CEA's Special Rule for the Review of Event Contracts

The CEA, 7 U.S.C. § 1 *et seq*., provides a "comprehensive regulatory structure" for the trading of commodities and futures. *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 355–356 (1982). The CFTC is responsible for administering and enforcing the CEA, and the statute vests it with exclusive jurisdiction to regulate various types of commodities and futures on regulated exchanges, as well as to establish implementing regulations. *See* 7 U.S.C. § 2(a)(1)(A); 17 C.F.R. § 1 *et seq*. Event contracts are subject to regulation under the CEA as "excluded commodities",[3] and thus by the CFTC. 7 U.S.C. § 7a-2(c)(5)(C)(i). Pursuant to the statute, an entity seeking to offer event contracts must seek and receive CFTC designation as a regulated exchange (a designated contract market or "DCM") before listing and publicly trading its contracts. 7 U.S.C. §§ 2(e), 7(a); 17 C.F.R. § 38.100.

The statute's requirements for listing event contracts on CFTC-approved and -regulated exchanges have changed over time. From 1974 to 2000, the CEA required DCMs to demonstrate to the CFTC that their contracts satisfied an "economic purpose test" and were not contrary to the public interest before they could trade their contracts. *See* Pub. L. No. 93-463, § 207, 88 Stat. 1389, 1400 (1974) (codified at 7 U.S.C. § 7(7) (1994)); Contract Market Designations, 40 Fed. Reg. 25849, 25850 (June 19, 1975). In other words, the statute required the CFTC to preapprove new event contracts before DCMs could offer them. In 2000, however, Congress amended the CEA to

[3] Relevant here, the CEA's definition of an "excluded commodity" subject to the statute's requirements includes "an occurrence, extent of an occurrence, or contingency" that is "beyond the control of the parties to the relevant contract, agreement, or transaction" and "associated with a financial, commercial, or economic consequence." 7 U.S.C. § 1a(19)(iv).

remove the default rule that all event contracts be subject to a "public interest" review and instead to allow DCMs to self-certify that their proposed contracts complied with the statute and the CFTC's regulations, with no prior review required for many types of event contracts. *See* 7 U.S.C. § 7a-2(c)(1) (2006). Finally, in 2010, Congress further amended the CEA by enacting a "[s]pecial rule" for the review and approval of event contracts. 7 U.S.C. § 7a-2(c)(5)(C). The special rule, which remains in effect, is at issue in this case.

The special rule authorizes the CFTC to review certain event contracts to determine whether (or not) they can be traded. Under the CEA, as currently amended, DCMs can still self-certify that their contracts comply with the statute and applicable regulations, and can begin publicly trading those contracts within one business day of their certification. 7 U.S.C. § 7a-2(c)(1); 17 C.F.R. § 40.2. Or, DCMs can voluntarily request that the CFTC preapprove their contracts to confirm that they do not violate the CEA or the CFTC's regulations. 7 U.S.C. § 7a-2(c)(4)–(5); 17 C.F.R. § 40.3. But under the special rule, the CFTC is empowered to review, and prohibit, specific types of event contracts if it determines that those contracts are "contrary to the public interest." 7 U.S.C. § 7a-2(c)(5)(C)(i). Specifically, the special rule provides:

> 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 Commission may determine that such agreements, contracts, or transactions are contrary to the public interest if the agreements, contracts, or transactions involve—
>
> (I) activity that is unlawful under any Federal or State law;
> (II) terrorism;
> (III) assassination;
> (IV) war;
> (V) gaming; or
> (VI) other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest.

Id.

As is apparent from the statute's text, the special rule applies only to those agreements, contracts, or transactions that involve the activities specifically enumerated in the statute. In other

words, the CFTC may determine that an agreement, contract, or transaction is contrary to the public interest only if it involves unlawful activity, terrorism, assassination, war, or gaming.[4] If the CFTC makes such a determination, the agreement, contract, or transaction cannot "be listed or made available for clearing or trading on or through a registered entity." *Id.* §§ 7a-2(c)(5)(C)(i)–(ii). On the other hand, if the agreement, contract, or transaction *does not* involve one of the enumerated topics, the special rule is not implicated, the CFTC has no occasion to make any public interest determination, and the contract should be listed for trading. *Id.* §§ 7a-2(c)(5)(C)(i), (c)(5)(B) ("The Commission shall approve a new contract or other instrument unless the Commission finds that the new contract or other instrument would violate this chapter (including regulations).").

The CFTC's implementing regulations set forth its process for reviewing event contracts under the special rule. 17 C.F.R. § 40.11. Pursuant to its regulations, the CFTC "may determine, based upon the review of the terms or conditions of a submission . . . that an agreement, contract, transaction, or swap based on an excluded commodity . . ., which may involve, relate to, or reference an ['enumerated' 'activity'], be subject to a 90-day review." *Id.* § 40.11(c). During the 90-day review period, the CFTC "shall request that a registered entity suspend the listing or trading" of the "agreement, contract, transaction, or swap." *Id.* § 40.11(c)(1). By the conclusion of its review period, the CFTC must issue an order either approving or disapproving of the contract. *Id.* § 40.11(c)(2).

[4] The Court recognizes that the special rule applies to "other" unspecified activities "similar" to those enumerated. 7 U.S.C. § 7a-2(c)(5)(C)(i)(VI). But the CFTC can only designate such activities through formal rulemaking or regulation. *Id.* The CFTC has not exercised its authority to develop and issue any rule or regulation prohibiting event contracts involving any other similar activity. *See* ECF 38-1 at 150 n.16 (Dissenting Statement of Commissioner Caroline D. Pham Regarding the Review and Stay of KalshiEX LLC's Political Event Contracts (quoting 76 Fed. Reg. at 44786)) ("The Commission may, at some future time, adopt regulations that prohibit products that are based upon activities 'similar to' the enumerated activities. It has determined not to propose such regulations at this time."). Accordingly, the Court focuses on the statute's enumerated categories in discussing and interpreting the special rule and has no occasion to consider whether the contracts at issue involve activities that are similar to those enumerated in the CEA.

C. The CFTC's Order Prohibiting Kalshi's Congressional Control Contracts

In 2020, the CFTC authorized Kalshi, a financial services company, to list event contracts for public trading as a DCM. ECF 38-1 at 209 (Comment Letter from Christopher Greenwood to U.S. Commodity Futures Trading Comm'n (Sept. 25, 2022)). The contracts Kalshi has offered on its exchange have involved a broad range of events—from the number of major hurricanes that will form over the Atlantic during a given year, to whether China's GDP growth will exceed a certain rate, and even whether a particular nominee will win in their category at the Oscars. *See id.*; ECF 38-2 at 23 (Comment Letter from Aristotle Intl., Inc. to U.S. Commodity Futures Trading Comm'n 3 (Sept. 23, 2022)). Kalshi has also offered event contracts concerning political events, such as whether the federal government will shut down or if certain nominees will be confirmed by the U.S. Senate. ECF 17-1 at 19 (citing *Events*, Kalshi, https://perma.cc/3PCC-TLE9).

The dispute between the Parties concerns a specific product that Kalshi attempted to offer that it refers to as "[c]ongressional [c]ontrol [c]ontracts." ECF 17-1 at 11. Kalshi's congressional control contracts allow buyers to predict which political party will control the U.S. House of Representatives or Senate on a specific, future date. ECF 38-1 at 33–39 (Kalshi Notification). The congressional control contracts are "yes"/"no" event contracts that pose the question: "Will <chamber of Congress> be controlled by <party> for <term>?" *Id.* at 34–35. The contracts expire on February 1 of the year that the relevant term begins, *id.* at 40, and the payout is determined by the party affiliation of the leader of a specific chamber of Congress (i.e., the Speaker of the House for the House of Representatives or the President Pro Tempore for the Senate), *id.* at 39. Upon the contracts' expiration, buyers who correctly predicted the electoral outcome will receive one dollar per contract purchased, but purchasers who made an erroneous prediction about congressional

control receive nothing in return for their investment. *Id*. at 34–35. To avoid potential conflicts of interest, Kalshi's congressional control contracts identify categories of prohibited traders to include candidates for any federal or statewide public office and paid employees with various political affiliations, including members of Congress, campaign staffers on congressional campaigns, employees of Democratic and Republican Party organizations and political action committees, and employees of major polling organizations, as well as the immediate family members of any prohibited traders, among other categories. *Id.* at 40–41.

On June 12, 2023, Kalshi filed a self-certification to trade its congressional control contracts, pursuant to 7 U.S.C. § 7a-2(c)(1). *See* ECF 38-1 at 33 (Kalshi Notification). But on June 23, 2023, the CFTC sent a letter to Kalshi representing that it had exercised its authority to initiate a 90-day review of Kalshi's self-certified submission because it determined that the contracts "may involve, relate to, or reference an activity enumerated" in the CEA and applicable regulations. ECF 38-1 at 152 (Letter from Christopher J. Kirkpatrick, Secretary, U.S. Commodity Futures Trading Comm'n, to Xavier Sottile, Head of Markets, KalshiEX LLC). Consistent with 17 C.F.R. § 40.11(c)(1), the CFTC requested that Kalshi suspend any listing and trading of its congressional control contracts during the review period. ECF 38-1 at 152. The CFTC's letter also informed Kalshi that it decided to open a 30-day public comment period to assist it with its evaluation. *Id.*; *see also id.* at 153–56 (Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Announces Review of Kalshi Congressional Control Contracts and Public Comment Period (June 23, 2023); CFTC, Questions on the KalshiEX LLC "Will <chamber of Congress> be controlled by <party> for <term>?" Contracts for Public Comment).[5] The CFTC's decision to commence a

[5] The administrative record reflects that the CFTC received many comments from various sectors. *See, e.g.*, ECF 38-1 at 157–236; ECF 38-2 at 8–234; ECF 38-3 at 8–109; ECF 38-4 at 8–132. Some commenters were in favor of the CFTC prohibiting Kalshi's congressional control contracts, and others urged the CFTC to approve the contracts for trading. *See generally id*.

review of Kalshi's congressional control contracts was not unanimous. Two of the five commissioners dissented because they did not agree that Kalshi's congressional control contracts involved any of the special rule's enumerated activities. *See* ECF 17-1 at 20 (citing Mersinger Dissenting Statement, CFTC.gov (June 23, 2023), https://perma.cc/XG2U-FNRZ; Pham Dissenting Statement, CFTC.gov (June 23, 2023), https://perma.cc/V9VB-Z24S); *see also* ECF 38-1 at 146-151 (Dissenting Statement of Comm'r Caroline D. Pham (Aug. 26, 2022)).

On September 22, 2023, at the conclusion of the review period, the CFTC issued an order prohibiting Kalshi from listing its congressional control contracts for trading pursuant to the special rule, ECF 38-1 at 8–30 (Commodity Futures Trading Comm'n, Order (June 12, 2023) [*hereinafter* CFTC Order]), with one commissioner dissenting and one abstaining from the decision. ECF 17-1 at 21 (citing Mersinger Dissenting Statement, CFTC.gov (Sept. 22, 2023), https://perma.cc/2G23-5XNF; Pham Abstention Statement, CFTC.gov (Sept. 22, 2023), https://perma.cc/7D8G-C3ET). In its order the CFTC determined that Kalshi's congressional control contracts involve two activities enumerated in the special rule—gaming and unlawful activity. *See, e.g.*, ECF 38-1 at 17, 19 (CFTC Order).

To reach its conclusion, the CFTC first considered what it means for a contract to "involve" an enumerated activity under the special rule. 7 U.S.C. § 7a-2(c)(5)(C)(i); ECF 38-1 at 12–14 (CFTC Order). Acknowledging that the CEA does not define the word "involve," the CFTC looked to its plain meaning derived from cited dictionaries that define "involve" to mean "to relate to or affect," "to relate closely," to "entail," or to "have as an essential feature or consequence." *Id.* at 12 (citations omitted). Applying these definitions of "involve," the CFTC rejected Kalshi's position that a contract "involve[s]" an enumerated activity "only if that activity is the contract's underlying." *Id.* at 13. The CFTC reasoned that the definition of the word "involve" in the statute

is broad enough to "capture both contracts whose underlying *is* one of the enumerated activities, and contracts with a different connection to one of the enumerated activities because, for example, they 'relate closely to,' 'entail,' or 'have as an essential feature or consequence' one of the enumerated activities." *Id.* at 14. The CFTC also reasoned that "the legislative history of [the statute] … indicates that the question for the Commission in determining whether a contract 'involves' one of the activities enumerated in [the special rule] is whether the contract, considered as a whole, involves one of those activities." *Id.* The CFTC reasoned that considering the contract "as a whole," *id.*, a contract could "involve" one of the special rule's enumerated activities "if trading in the contract amounts to the enumerated activity," *id.* at n.19.

After construing the word "involve," the CFTC then provided the bases for its determination that Kalshi's congressional control contracts involve "gaming." *Id.* at 15–17. Again, because the CEA does not define "gaming," the CFTC looked to the ordinary meaning of the term according to dictionaries and statutory definitions (specifically, in state statutes). *Id.* at 15–16. The CFTC reasoned as follows to conclude that the term "gaming" in the special rule "includes betting or wagering on elections": First, the order cited to various dictionary definitions of the word gaming that include, or cross-reference, "gambling" as part of its definition. *Id* at 15 & n.21. Then, the CFTC found that under "most state laws, 'gambling' involves a person staking something of value upon the outcome of a game, contest, or contingent event," citing numerous state penal statutes. *Id* at 15 & n.22.[6] The CFTC then cited the federal Unlawful Internet Gambling

[6] For example, the state statutes the CFTC cited include: KY. REV. STAT. ANN. § 528.010(6)(a) ("'Gambling' means staking or risking something of value upon the outcome of a contest, game, gaming scheme, or gaming device which is based upon an element of chance, in accord with an agreement or understanding that someone will receive something of value in the event of a certain outcome"); MICH. COMP. LAWS § 750.301 ("Any person or his or her agent or employee who, directly or indirectly, takes, receives, or accepts from any person any money or valuable thing with the agreement, understanding or allegation that any money or valuable thing will be paid or delivered to any person where the payment or delivery is alleged to be or will be contingent upon the result of any race, contest, or game or upon the happening of any event not known by the parties to be certain . . . ."); and N.Y. PENAL LAW § 225.00(2) ("A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a

Enforcement Act (UIGEA), 31 U.S.C. § 5361 *et seq.*, which defines the term "bet or wager" as "the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome." ECF 38-1 at 16 (CFTC Order (citing 31 U.S.C. § 5362(1)(A)). Based upon the UIGEA's definition of "bet or wager," the CFTC determined that to "bet or wager on elections is to stake something of value upon the outcome of contests of others, namely, contests between electoral candidates." ECF 38-1 at 16 (CFTC Order). The order then recognized that "several state statutes . . . link the terms 'gaming' or 'gambling' to betting or wagering on elections." *Id.*[7] Accordingly, the CFTC found that Kalshi's congressional control contracts involve "gaming," and are thus subject to the special rule, because "taking a position in the [c]ongressional [c]ontrol [c]ontracts would be staking something of value upon the outcome of a contest of others," namely "the outcome of Congressional election contests." *Id.* at 17.

The CFTC also set forth the reason it determined that Kalshi's congressional control contracts involved unlawful activity under § 7a-2(c)(5)(C)(i)(I). It recognized that many states criminalize betting or wagering on elections. ECF 38-1 at 18 (CFTC Order).[8] Accordingly, the

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future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome"). *See* ECF 38-1 at 15 n.22 (CFTC Order).

[7] For example, the state statutes the CFTC cited include: 720 ILL. COMP. STAT. ANN. 5/28-1(a)(2) ("A person commits gambling when he . . . makes a wager upon the result of any game, contest, or any political nomination, appointment or election"); NEB. REV. STAT. § 28-1101(4) ("A person engages in gambling if he or she bets something of value upon the outcome of a future event, which outcome is determined by an element of chance, or upon the outcome of a game, contest, or election"); and N.D. CENT. CODE. ANN. § 12.1-28-01 ("'Gambling' means risking any money . . . upon lot, chance, the operation of gambling apparatus, or the happening or outcome of an event, including an election or sporting event, over which the person taking the risk has no control"). *See* ECF 38-1 at 16 n.24 (CFTC Order).

[8] For example, the state statutes the CFTC cited include: ARIZ. REV. STAT. ANN. § 16-1015 ("A person who, before or during an election provided by law, knowingly makes, offers or accepts a bet or wager, or takes a share or interest in, or in any manner becomes a party to the bet or wager, or provides or agrees to provide money to be used by another in making the bet or wager, upon any contingency whatever arising out of such election, is guilty of a class 2 misdemeanor"); ARK. CODE ANN. § 7-1-103(20) ("No person shall make any bet or wager upon the result of any election in this state[.]"); and COLO. REV. STAT. ANN. § 31-10-1531 ("It is unlawful for any person, including any

CFTC determined that the congressional control contracts, which allow buyers to purchase and potentially receive a payout based on the results of congressional elections, amounted to activity that is illegal in many states. *Id.* at 19–20.

Finally, the CFTC found that Kalshi's congressional control contracts were contrary to the public interest. It reasoned that the control of a chamber of Congress does not have "sufficiently direct, predictable, or quantifiable economic consequences" for Kalshi's contracts to serve an effective hedging or risk mitigating function. *Id.* at 22. The order also identified the impact that such contracts could have on the integrity of elections and the perception of integrity, including, for example, by creating monetary incentives to vote for candidates or incentivizing the spread of misinformation by those trying to influence perceptions of a party or candidate to maximize potential financial gain. *Id.* at 27. Finding that the contracts involved enumerated activities and were contrary to the public interest, the CFTC's order prohibited Kalshi from listing and trading its contracts. *Id.* at 30.

Kalshi then brought this suit challenging the CFTC's order as arbitrary, capricious, contrary to law, and in excess of the CFTC's statutory authority under the Administrative Procedure Act. ECF 1 ¶¶ 86, 87 (citing 5 U.S.C. § 706(2)(A), (C)). Kalshi moved for summary judgment seeking vacatur of the order. ECF 17. The CFTC opposed Kalshi's motion and cross-moved for summary judgment, requesting that the Court affirm its determination prohibiting Kalshi from listing and trading its congressional control contracts. ECF 30.

candidate for public office, before or during any municipal election, to make any bet or wager with a qualified elector or take a share or interest in, or in any manner become a party to, any such bet or wager or provide or agree to provide any money to be used by another in making such bet or wager upon any event or contingency whatever arising out of such election."). *See* ECF 38-1 at 18 n.26 (CFTC Order).

II. LEGAL STANDARD

This Court reviews the CFTC's order under the APA to determine whether it is "arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence." *Taylor v. USDA*, 636 F.3d 608, 613 (D.C. Cir. 2011) (quoting *Kleiman & Hochberg, Inc. v. USDA*, 497 F.3d 681, 686 (D.C. Cir. 2007)); *see* 5 U.S.C. § 706(2)(A), (E). When a court reviews agency action under the APA, the summary judgment standard set forth in Rule 56 does not apply. *Ardmore Consulting Grp., Inc. v. Contreras-Sweet*, 118 F. Supp. 3d 388, 393 (D.D.C. 2015). Instead, "the district judge sits as an appellate tribunal" and "the entire case on review is a question of law." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001). The court does not engage in fact finding and its review is "typically limited to the administrative record." *Kondapally v. U.S. Citizenship & Immigr. Servs*., 557 F. Supp. 3d 10, 20 (D.D.C. 2021).

At the time this case was originally briefed, the two-step analysis set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), governed the Court's review of the CFTC's statutory interpretation. But in *Loper Bright Enterprises v. Raimondo*, the Supreme Court overruled *Chevron* and explained that the role of the reviewing court is "to independently interpret the statute and effectuate the will of Congress subject to constitutional limits." 144 S. Ct. 2244, 2263 (2024). The Court therefore relies on "traditional tools of statutory construction" to resolve the Parties' motions. *Id.* at 2268.[9]

[9] In *Loper Bright*, the Supreme Court recognized that courts may seek aid from an agency's "body of experience and informed judgment." 144 S. Ct. at 2262 (quoting *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944)). Because the CFTC did not argue that the Court should do so here, the Court neither considers nor addresses the scope of deference owed to the CFTC in the wake of *Loper Bright.*

III. ANALYSIS

Relevant here, the special rule authorizes the CFTC to determine that an event contract is contrary to the public interest if it "involve[s]—activity that is unlawful under any Federal or State law" or "gaming." 7 U.S.C. §§ 7a-2(c)(5)(C)(i)(I), (V). Below, the Court considers two disputes about the statute's meaning. First, the Court resolves the Parties' disagreement about the definition of "gaming," ultimately finding that the word "gaming" in the statute carries its ordinary, plain meaning and involves playing a game. Second, the Court considers the function of the word "involve" in the statute and concludes that it broadly refers to the underlying subject of the event contract or transaction. Because Kalshi's congressional control contracts involve elections (and politics, congressional control, and other related topics) and not illegal activities or gaming, the Court concludes that the special rule is not triggered, which makes it unnecessary for the Court to determine whether the CFTC was right that these event contracts are contrary to the public interest.

A. Gaming Requires a Game

To determine whether Kalshi's congressional control contracts "involve" either "activity that is unlawful under any Federal or State law" or "gaming" under the CEA's special rule, 7 U.S.C. § 7a-2(c)(5)(C)(i), the Court first construes the meaning of the relevant, enumerated categories. The Court need not spend much time articulating a definition of the phrase "activity that is unlawful under any Federal or State law" because its definition is clear. The Parties disagree about what it means for an event contract to "involve" such an activity (which the Court addresses later), but both sides understand this phrase to encompass activity or conduct that is illegal, and no one presses the Court to attach a different meaning to this phrase beyond the obvious.

However, the Parties dispute the meaning of "gaming" as used in the CEA. Kalshi argues that the term "gaming" in the statute must be "defined by reference to 'games.'" ECF 17-1 at 39.

The CFTC advances a broader definition. Its order equates "gaming" with "gambling," and observes that "gambling" is often defined as "staking something of value upon the outcome of a game, contest, or contingent event." ECF 38-1 at 15 (CFTC Order). (Although it only advances a definition of gambling (or gaming) that includes betting on a contest in this litigation. ECF 30 at 39.) After considering the text of the CEA, the statute's structure and context, and the Parties' arguments, the Court must agree with Kalshi.

Start with the text. The CEA does not define "gaming." *See generally* 7 U.S.C. § 1 *et seq*. "When a term goes undefined in a statute, [courts] give the term its ordinary meaning." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). To discern that meaning, courts often begin with a survey of dictionaries. *See id.* at 569. Dictionaries define "gaming" as "the practice or activity of playing games for stakes" and "the practice or activity of playing games." *Gaming*, Merriam-Webster.com, https://perma.cc/9JZW-SRS2; *see also Gaming*, Oxford English Dictionary, https://perma.cc/R99K-A2HD (defining gaming, in relevant part, as "[t]he action or practice of playing games . . . for stakes."). The ordinary meaning of the term "gaming" is thus consistent with Kalshi's position. The Court finds no reason to stray from the ordinary definitions of "gaming," which are "the practice or activity of playing games" and "playing games for stakes." Indeed, the statute's broader context and its structure compel the Court to reject the CFTC's more expansive definition and, therefore, the reasoning of its order.

First, the CFTC contends that "gaming" is synonymous with "gambling" and should be defined accordingly. ECF 30 at 39; ECF 38-1 at 15 (CFTC Order). The Court finds that definitions of "gambling" that are untethered to the act of playing a game are much too broad in the context of the CEA's special rule. The Court acknowledges that some dictionary definitions of "gaming" cross-reference gambling, or otherwise define "gaming" to include "gambling." The

Merriam-Webster dictionary, for example, (which, as observed above, defines "gaming" to include "the practice or activity of playing games") includes such a cross-reference. *Gaming*, Merriam-Webster.com, https://perma.cc/9JZW-SRS2. But it defines "gambling" to include "the practice or activity of betting" without any limitation on what is being bet upon. *Gambling*, Merriam-Webster.com, https://perma.cc/3FRP-QNBU; *see also Gaming*, Black's Law Dictionary (12th ed. 2024) (defining "gaming" as "gambling"); *Gambling*, Black's Law Dictionary (12th ed. 2024) (defining "gambling" as "[t]he act of risking something of value, especially money, for a chance to win a prize."). That definition is consistent with the order's articulation that "gambling" under many state statutes means to "stak[e] something of value upon the outcome of a game, contest, or contingent event." ECF 38-1 at 15 (CFTC Order), *id.* at n.22.[10] However, it quickly becomes clear that definition is unworkable in the context of this statute.

One glaring issue emerges given the CFTC's view that the special rule is implicated if the act of trading an event contract "amounts" to an enumerated activity. ECF 38-1 at 14 n.19 (CFTC Order). The Court addresses, and rejects, that reading below, but it is difficult to understand how the CFTC settled on such an expansive definition of gaming (or gambling) given its position. If the Court agreed with the CFTC's construction, all event contracts would be subject to review under the special rule because they all involve purchasing (and thus risking money on) some contingent event with the hope of receiving a payoff. *See* CFTC, *Contracts & Products: Event Contracts*, https://perma.cc/Q4LP-B6UY. Given that the CEA authorizes the CFTC to review

[10] In further support of its contention that gaming and gambling are interchangeable, the CFTC cites to a Supreme Court case in which the Court equated gaming with gambling. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 792 (2014) ("The 'gaming activit[y]' is (once again) the gambling."). But this Court does not find the CFTC's argument persuasive, or helpful, in construing the meaning of "gaming" in the CEA. *Bay Mills* involved a question of tribal sovereign immunity under the Indian Gaming Regulatory Act, which required the Court to consider whether and where a tribe engaged in "gaming activities." *See* 572 U.S. at 791–93. The "gaming activities" at issue involved the operation of casinos, and the quote the CFTC relies on describes "gaming activity" to include "gambling in the poker hall." *Id*. at 792. Certainly gaming, as this Court has found it to mean in the CEA, can also be gambling. Playing poker is both "gaming" and "gambling." But that does not mean all forms of gambling are gaming.

event contracts only if they involve specific, enumerated activities, any definition of "gaming" that could be read to subject *all* event contracts to the special rule just cannot be right.[11]

Nor is the Court persuaded that the order's discussion of a more limited definition of gambling (and thus gaming) as "stak[ing] something of value upon the outcome of contests of others" should displace the plain and ordinary meaning of gaming that the Court has recognized. ECF 38-1 at 16. (Unless the contest at issue is some sort of game, which many are). That is because the Court does not find that the CFTC's sources for the definition it advances are particularly relevant. In considering the ordinary meaning of the word "gaming," the CFTC bypassed dictionary definitions of that term, cited above, which equate "gaming" with "games," in favor of more expansive definitions of gambling, which is not a term used in the statute. Similarly, it surveyed state statutes that prohibit gambling and cited some of those statutes' broader definitions of the term, but did not look to state statutes that expressly use or define the word "gaming." ECF 38-1 at 15–16 n.22 (CFTC Order). Notably, there are many state statutes that define "gaming" as tied to games, consistent with the definition of "gaming" Kalshi advances. *See, e.g.*, Iowa Code § 725.7(1)(a) ("illegal gaming" means "[p]articipat[ing] in a game for any sum"); Mass. Gen. Laws ch. 23K, § 2 (defining "gaming" as "dealing, operating, carrying on, conducting, maintaining or exposing any game for pay"); La. Stat. § 27:205 (defining legal "gaming operations" and "gaming

[11] The CFTC argues in its briefing that it did not adopt a definition of gaming that includes staking money on any contingent event. *See* ECF 30 at 38. But after observing that gaming and gambling are synonymous, the CFTC's order goes on to recognize a definition of gambling that includes "staking something of value upon the outcome of a game, contest, or contingent event." ECF 38-1 at 15 (CFTC Order). Yes, it ultimately reasoned that Kalshi's congressional control contracts concerned gaming because gaming means gambling, and gambling involves wagering on a contest, but the order includes numerous citations to definitions of gambling that make reference to betting on contingencies generally. *Id*. at 15–16 n.2. If the CFTC did not agree that the definition of gambling included betting on contingent events, it is not clear to the Court why it referred to definitions of gambling that included such language (and equated "gaming" and "gambling"). The CFTC cannot have it both ways: it cannot synonymize gaming with gambling, but simultaneously argue that only some gambling is gaming.

activities" as "the offering or conducting of any game or gaming device in accordance with" state law).

And while the CFTC's order also considered and pulled definitions from a federal statute, it did not look to the only one that the Court is aware actually uses the term "gaming"—the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701. Although the IGRA does not expressly define gaming, it refers to various "gaming" classes that, by statute or regulation, each concern categories of games.[12] Instead, the federal statute discussed in the order is the Unlawful Internet *Gambling* Enforcement Act (UIGEA), 31 U.S.C. § 5361 *et seq*. (emphasis added), which also does not define or use the term "gaming." That statute, instead, uses the terms "bet" and "wager" and defines those terms as "the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that [someone] will receive something of value in the event of a certain outcome." *Id.* § 5362(1)(A). The CFTC borrowed this definition and applied it to "gaming" in the special rule, but the Court cannot understand why it did that. *See* ECF 38-1 at 16 (CFTC Order). The CEA does not use the terms "bet" or "wager" anywhere. *See generally* 7 U.S.C. § 1 *et seq*. The Court can think of no canon of statutory interpretation that counsels toward looking to an unrelated statute that defines a different term in a different context to determine a statute's meaning.[13] Accordingly, the Court

[12] IGRA sets forth three classes of gaming activity: "class I gaming" means social games; "class II gaming" means "the game of chance commonly known as bingo" and certain card games; and "class III gaming" is an undefined catch-all "class III gaming" category. 25 U.S.C. § 2703(6)-(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 "game[s] of chance;" "sports betting," including "wagering on horse racing, dog racing or jai alai;" and "[l]otteries." 25 C.F.R. § 502.4.

[13] Even if the Court were to apply the UIGEA's definition of "bet" or "wager" to "gaming" under the special rule, it would have difficulty finding that an election is a "contest" under that statute. "The traditional canon of construction, *noscitur a sociis*, dictates that words grouped in a list should be given related meaning." *Dole v. United Steelworkers of Am.,* 494 U.S. 26, 36 (1990). The Court can accept the CFTC's argument that elections are sometimes referred to colloquially as "contests," but elections bear little relation to "sporting events" or "games of chance," which appear alongside the term "contest" in the UIGEA's definition of "bet" and "wager." 31 U.S.C. § 5362(1)(A). The Court is persuaded by Kalshi's argument that, considering the other terms in the definition, "contest" must refer to a similar

does not agree that "gaming" under the CEA includes wagering on contests that do not involve or closely relate to a game of some sort.[14]

In sum, the Court finds that "gaming," as used in the special rule, refers to playing games or playing games for stakes. The Court next considers the special rule's use of the word "involve."

B. "Involve" Interacts with the Instrument's Underlying Event

The special rule authorizes the CFTC to review, and potentially prohibit, event contracts that "involve" one or more of the enumerated categories. 7 U.S.C. § 7a-2(c)(5)(C)(i). The Parties disagree about what this provision means. Kalshi argues that, under the special rule, an event contract "involves" an enumerated activity where the underlying event constitutes or relates to that activity. *See, e.g.*, ECF 17-1 at 25. In its order, however, the CFTC determined that an event contract "involves" an enumerated activity, not only if the contract's "underlying *is* one of the enumerated activities," but if the contract has a "different connection to one of the activities," ECF 38-1 at 14 (CFTC Order), including "if trading in the contract amounts to the enumerated activity," *id.* at n.19. After carefully scrutinizing the statute and considering the Parties' arguments, the Court again agrees with Kalshi and finds that its event-focused reading of the word "involve" is the only interpretation that makes sense in the context of this provision.

As always, the Court begins its analysis with the statute's text. *See, e.g.*, *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006). And because "involve" is left undefined by the CEA, the Court first considers the ordinary meaning of that word. *See, e.g.*, *id.* As a preliminary matter, the Court observes that there is not much daylight between the Parties about what "involve" means in

event for entertainment that might not be characterized as a sporting event or a game of chance—a pageant might fit. *See* ECF 17-1 at 40.

[14] Although not dispositive, the Court observes that the CFTC has not subjected Kalshi's event contracts about whether certain nominees will win an Oscar to review under the special rule, ECF 41-1 at 7, even though, at least as the Court sees it, the Academy Awards are a contest.

ordinary parlance. The Parties offer definitions of involve from various dictionaries that are largely the same, such as "[t]o contain as a part; include," "to have as a necessary feature or consequence," ECF 17-1 at 25 (citing American Heritage Dictionary 921 (4th ed. 2009)), and "to relate to or affect," "to relate closely," to "entail," or to "have as an essential feature or consequence," *see* ECF 30 at 33 (citing Merriam-Webster, https://perma.cc/2RS8-ZRBJ; Random House College Dictionary 703 (rev. ed. 1979); Riverside University Dictionary 645 (1983)); *see also* ECF 38-1 at 12 (CFTC Order). Both sides agree that the term is defined broadly, *see* ECF 17-1 at 25, ECF 30 at 26, and thus, for example, is more expansive in scope than a phrase like "based upon" (which is used elsewhere in the CEA). ECF 30 at 34; ECF 36 at 12. Rather, the real disagreement between the Parties is the function of the word "involve" in the statute and how it interacts with the enumerated activities.

Construing the plain meaning of "involve" does not resolve the Parties' dispute. As the Supreme Court has recognized, "a statute's meaning does not aways turn solely on the broadest imaginable definitions of its component words." *Dubin v. United States*, 599 U.S. 110, 120 (2023) (quoting *Epic Sys. Corp.* v. *Lewis*, 584 U.S. 497, 523 (2018)). Accordingly, the Supreme Court has instructed that where a statute includes terms whose plain meaning is broadly defined, courts should not construe the language "in isolation," but must "look to statutory context." *Dubin*, 599 U.S. at 119 (citing *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (considering the term "relate to" and recognizing that if "'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes" there would be no limits as "really, universally, relations stop nowhere")). To determine how "involve" operates in the statute, the Court can consider "traditional tools of statutory interpretation—text, structure, purpose, and legislative history." *In re Sealed Case*, 932 F.3d 915, 928 (D.C. Cir. 2019)

(quoting *Tax Analysts v. IRS*, 350 F.3d 100, 103 (D.C. Cir. 2003)). Considering many of these tools, and related canons of statutory construction, the Court rejects the CFTC's reading of the statute in favor of Kalshi's for several reasons.

First, the CFTC's argument that an event contract "involves" an enumerated activity if the act of trading the contract "amounts to" the activity cannot be applied consistently throughout the statute. "[S]tandard principle[s] of statutory construction provide[] that identical words and phrases within the same statute should normally be given the same meaning" and effect. *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007). And where one term in a statute "applies without differentiation to" a set of defined categories, "[t]o give the[] same words a different meaning" for different categories "would be to invent a statute rather than interpret one." *Clark v. Martinez*, 543 U.S. 371, 378 (2005). Other than with respect to the two categories it claims are implicated here—unlawful activity and gaming—the CFTC's reading of "involve" does not work for any other activity enumerated in the special rule.

The "act of trading in" an event contract can never "amount to" war. The "act of trading in" an event contract cannot "amount to" terrorism. And no one would formulate a construction of the statute to read that an "act of trading in" an event contract could ever "amount to" assassination. With respect to those categories of the special rule, then, the Court is not remotely confused about how "involve" operates. An event contract can only involve war, terrorism, or assassination if the contract's subject itself relates in some way (admittedly broadly) to war, terrorism, or assassination. There is simply no other workable construction applied to those categories that the Court can think of. And the Court cannot identify any principled reason, consistent with applicable canons of construction, that it would treat the two enumerated categories at issue in this case any differently. In other words, the Court finds no basis to invite ambiguity into a statutory framework

that is otherwise clear by construing the relationship between "involve" and the unlawful activity and gaming categories—and only those categories—more broadly, and thus differently, than the others.

The CFTC further argues that the special rule is implicated when the act of trading a contract amounts to an enumerated activity, and not just when a contract's underlying involves an activity, because the special rule applies to "transactions." Specifically, the statute gives the CFTC authority to review "agreements, contracts, or *transactions*" that "involve" an enumerated activity. *Id*. Because the plain meaning of the word "transaction" includes "the formation, performance, or discharge of a contract," the CFTC contends that the statute's authorization of its review of "transaction[s]" that "involve" an enumerated activity is consistent with its reading of the statute—namely, that a transaction "involve[s]" an enumerated activity if the act of trading in the contract amounts to that activity. ECF 41-1 at 3 (citing *Transaction*, Black's Law Dictionary (11th ed. 2019)). Kalshi argues that "transaction," as used in this statute, refers to a financial instrument. ECF 42 at 2. The Court recognizes the ordinary meaning of the term "transaction," but also understands Kalshi's point. After all, the other terms that are listed alongside "transactions" in the statute—agreements, contracts, swaps—refer to various derivative instruments, which go by many names. 7 U.S.C. § 7a-2(5)(c)(ii). And the statute identifies a transaction as something that can be "list[ed]," further suggesting that it is referring to an actual financial instrument or the product being exchanged. *Id.*

But the Court finds it unnecessary to pick a side because, even using the CFTC's ordinary definition of "transaction," the Court still cannot adopt its "involve-means-trading-in-the-product-amounts-to-an-enumerated-activity" construction. A financial transaction on an exchange has an underlying subject just like a contract does. And again, the CFTC's reading does not lend itself to

a consistent application across the statute. Replacing "transaction" with the term "contract" changes no part of the Court's analysis. A transaction can only "involve" war, terrorism, or assassination if the offering underlying the transaction relates in some way to war, assassination, or terrorism. No one reading this provision would read the statute to mean that a transaction "involves" war because the discharge of contractual obligations somehow amounts to war, or that a transaction "involves" terrorism because performance on the contract amounts to terrorism, or that a transaction on a DCM can amount to assassination in some way. Indeed, the special rule is not the only provision of the CEA that uses the terms "transaction" and "involve" where it is clear that the statute can only be referring to the underlying commodity or subject of the transaction. *See, e.g.*, 7 U.S.C. § 6c(b) ("transaction *involving* any commodity regulated under this chapter"); *id.* § 23(b)(1) (referencing "transactions *involving* different commodities"); *id.* § 2(a)(1)(D)(i) ("contracts[] and transactions *involving* . . . a security futures product"). Overall, the Court declines to apply a construction of the statute that only works for some, but not all, of the enumerated categories.

Second, the CFTC's interpretation of the statute would render its reach too broad, and thus does not make sense to the Court in the context of the statute. This point is best illustrated through consideration of the special rule's "unlawful activity" category. According to the CFTC's order, Kalshi's congressional contracts "involve" unlawful activity, not because the subject matter of the contracts (Congress and elections) relates to anything unlawful, but because in many states it is unlawful to stake money on the outcome of an election. ECF 38-1 at 19–20 (CFTC Order). But as the order also recognizes, many states define unlawful gambling as staking money on any contingent outcome. *Id.* at 15 n.22. Event contracts, by definition, involve staking money on some contingent event. CFTC, *Contracts & Products: Event Contracts*, https://perma.cc/Q4LP-B6UY.

Accordingly, under the CFTC's logic, it could presumably review *any* event contract, because (1) a person or entity purchasing an event contract is putting money on the outcome of a contingent event and (2) many states define such conduct as "gambling" and make it unlawful. But no one would contend that reading represents a plausible construction of the statute. Not only because the CEA specifically preempts the application of state law over derivative markets, 7 U.S.C. § 2(a)(1)(A), but because it would swallow the special rule's provisions authorizing the CFTC to review only event contracts that relate to specific, enumerated topics, *id.* § 7a-2(c)(5)(C)(i); *see also Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 809 (1989) (recognizing that it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").[15] Such an interpretation would also effectively undo the Congressional amendment to the CEA that eliminated the CFTC's across-the-board review. *See* 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)). The only formulation of the interaction between "involve" and "unlawful activity" that actually works, then, is if the contract or transaction's underlying event relates in some way to activity that is illegal—not if the act of staking money on the contract's underlying would be unlawful under any state law.

Finally, the legislative history offers no support for the CFTC's position. The statute's legislative history is not dispositive to the Court's analysis, but the CFTC discusses it in its order

[15] The CFTC acknowledges this argument, but contends that preemption would operate as a backstop. It argues that because state laws banning futures contracts are preempted by the CEA, all event contracts would not (and could not) be considered "unlawful activity" and, therefore, the CFTC's definition of "involve" does not swallow the rule. ECF 31 at 46. The Court has trouble following the CFTC's argument. The CFTC does not provide a coherent justification as to why it argues that state laws that categorically ban all event contracts are preempted, but those that ban specific types of event contracts are not. To be clear, this Court does not make any decision or judgment on the preclusive scope of the CEA's special rule. But the friction the CFTC's interpretation creates further demonstrates why it is wrong.

and briefing here, *see* ECF 31 at 35; ECF 38-1 at 14 n.18 (CFTC Order), so the Court will too. The CFTC argues that the CEA's legislative history supports its conclusion that Congress was concerned about the overall characteristics of an event contract, and not just whether the underlying subject of the contract involved an enumerated activity. *Id.* In particular, the order cites to a colloquy on the Senate floor, in which one senator remarked that the provision ultimately enacted as Section 5(c)(5)(C) of the CEA was intended to "prevent gambling through futures markets" and restrict "'event contract[s]' around sporting events such as the Super Bowl, the Kentucky Derby, and Masters Golf Tournament." *Id.* (citing 156 Cong. Rec. S5906-07, 2010 WL 2788026 (daily ed. July 15, 2010)). According to the CFTC, under the event-focused reading of the statute Kalshi advances, contracts involving these sporting events would not fall under the statute's gaming category because events like the Super Bowl themselves are games, not "gaming." ECF 31 at 35. The Court understands the CFTC to be arguing that these contracts could only be considered "gaming" if one considers the fact that someone bet money on them.

A couple points about the CFTC's invocation of the statute's legislative history. First, the order's point appears to be moot given the Court's conclusion that "gaming" includes the activity of playing games and playing games for stakes. Applying that definition, event contracts related to any of the sporting events the senator mentioned on the floor could implicate the gaming category. All these events can easily be construed as games; they can even be construed as games played for stakes (cash prizes and trophies, for example).[16] And second, the Court cannot take much from the remarks of one senator to elucidate the meaning of the statute. The D.C. Circuit has

[16] The CFTC argues that if "involve" only related to a contract's underlying, the gaming category would not include any event contracts at all because it is difficult for the CFTC "to conceive of a contract whose underlying event, itself, is 'gaming.'" *Id.* The Court has adopted the plain meaning of the word gaming, which is not limited to the act of betting money on a game. But even if the Court were to accept that narrower definition of gaming, it is not hard to think of examples—like an event contract asking buyers to predict who will win the World Series of Poker Tournament.

warned that "judges must 'exercise extreme caution'" with such floor exchanges. *Tex. Mun. Power Agency v. EPA*, 89 F.3d 858, 875 (D.C. Cir. 1996) (quoting *Gersman v. Grp. Health Ass'n, Inc.*, 975 F.2d 886, 892 (D.C. Cir. 1992)). In fact, if the Court were to take anything from this floor exchange, it would be that the senator would not have intended "gaming" to include elections given the examples offered.

To sum it up, the Court agrees that "involve" should be broadly construed. The Court does not find (nor does Kalshi contend) that the instrument or contract must specifically refer to an enumerated event to "involve" or relate to it.[17] But a contract or transaction "involves" an enumerated activity if the event being offered and traded as part of that contract or transaction relates to that activity. That is the most natural, and only consistently workable, reading of the provision.

* * *

Kalshi's event contracts ask buyers to take a yes/no position on whether a chamber of Congress will be controlled by a specific party in a given term. That question involves (relates to, entails, has as its essential feature, or any other iteration of the word) elections, politics, Congress, and party control; but nothing that any Party to this litigation has identified as illegal or unlawful activity. Nor does that question bear any relation to any game—played for stakes or otherwise. Accordingly, the Court concludes that Kalshi's congressional control contracts do not involve unlawful activity or gaming. And thus the Court has no occasion to consider whether they are contrary to the public interest.

[17] Event contracts that "involve" war, for example, could include "whether there will be a war in X country," but might also cover events related to war, such as weapons trades or military deployments.

IV. CONCLUSION

For the foregoing reasons, the Court finds that Kalshi's congressional control contracts do not involve activity that is unlawful under any Federal or State law, nor do they involve gaming. Accordingly, the Court must **GRANT** Plaintiff's Motion for Summary Judgment and **DENY** Defendant's Cross-Motion for Summary Judgment. A separate order has issued.

SO ORDERED.

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JIA M. COBB
United States District Judge

Date: September 12, 2024

APPENDIX
Administrative Record Citations

Page(s)

UNITED STATES OF AMERICA

Before the

COMMODITY FUTURES TRADING COMMISSION

In the Matter of the Certification by KalshiEX LLC of Derivatives Contracts with Respect to Political Control of the United States Senate and United States House of Representatives

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ORDER

BACKGROUND

By a submission dated June 12, 2023 (the "Submission"), KalshiEX LLC ("Kalshi"), a designated contract market ("DCM"), filed a certification of congressional control political event contracts (the "Congressional Control Contracts"), pursuant to section 5c(c)(1) of the Commodity Exchange Act ("CEA") and Commodity Futures Trading Commission ("CFTC" or "Commission") Regulation 40.2. On June 23, 2023, the Commission commenced review of the Submission pursuant to Commission Regulation 40.11(c), because the Commission determined that the Submission comprised contracts that may involve, relate to, or reference an activity enumerated in Commission Regulation 40.11(a)(1) and CEA section 5c(c)(5)(C)(i). By letter dated June 23, 2023, the Commission informed Kalshi of its determination to commence review of the Congressional Control Contracts pursuant to Commission Regulation 40.11(c), and requested that Kalshi suspend the listing and trading of the Congressional Control Contracts during the pendency of the review period. In addition, on June 23, 2023, the Commission

opened a comment period to request public comments to assist the Commission's evaluation of the Submission. The public comment period ended on July 24, 2023.[1]

The Congressional Control Contracts are cash-settled, binary (yes/no) contracts based on the question: "Will <chamber of Congress> be controlled by <party> for <term>?" Kalshi describes the Congressional Control Contracts as event contracts. The settlement values of the Congressional Control Contracts are determined by the party affiliation of the leader of the identified chamber of the United States Congress on the expiration date. In the case of the House of Representatives, the leader is the Speaker of the House ("Speaker"), and in the case of the Senate, the leader is the President Pro Tempore ("Pres Pro Temp"). Upon settlement, an absolute amount is paid to the holder of one side of the contract, and no payment is made to the counterparty. All contracts trading on Kalshi are fully-collateralized.

The Congressional Control Contracts have a notional value of one dollar with a minimum price fluctuation of $0.01, and must be purchased in multiples of 5,000 contracts per order. The Congressional Control Contracts have tiered position limits, depending on the category of market participant and whether that market participant has "demonstrated established economic hedging need," which may be demonstrated to Kalshi according to means and methods established by Kalshi.

The terms of the Congressional Control Contracts prohibit certain individuals and entities from trading the contracts, namely: 1) candidates for federal or statewide public office; 2) paid campaign staffers on Congressional campaigns; 3) paid employees of Democratic and Republican Party organizations; 4) paid employees of political action committees ("PACs") and

[1] The Commission received 1,378 comments, including four comments that were received after the close of the public comment period but were added to the comment file. *See* https://comments.cftc.gov/PublicComments/CommentList.aspx?id=7394.

"Super PACs" (independent expenditure only political committees); 5) paid employees of major polling organizations; 6) existing members of Congress; 7) existing paid staffers of members of Congress; 8) household members and immediate family members of any of the above; and 9) "any of the above listed institutions themselves."

LEGAL STANDARD

Under CEA section 5c(c)(5)(C)(i), the Commission may determine that contracts in certain excluded commodities, as defined in CEA section 1a(19), are contrary to the public interest if the contracts involve: (1) activity that is unlawful under any Federal or State law; (2) terrorism; (3) assassination; (4) war; (5) gaming; or (6) other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest.[2]

CEA section 5c(c)(5)(C)(ii) provides that "[n]o . . . contract . . . determined by the Commission to be contrary to the public interest under [CEA section 5c(c)(5)(C)(i)] may be listed or made available for clearing or trading on or through a registered entity[,]" including a DCM (such as Kalshi).[3]

Commission Regulation 40.11(a)(l) provides that registered entities, including DCMs, "shall not list for trading or accept for clearing" any contract based upon an excluded commodity, as defined in CEA section 1a(19)(iv), that "involves, relates to, or references terrorism, assassination, war, gaming, or an activity that is unlawful under any State or Federal law. . ."[4] Commission Regulation 40.11(a)(2) further provides that registered entities, including DCMs, "shall not list for trading or accept for clearing" any contract based upon an excluded

[2] CEA section 5c(c)(5)(C)(i); 7 U.S.C. § 7a-2(c)(5)(C)(i).
[3] CEA section 5c(c)(5)(C)(ii); 7 U.S.C. § 7a-2(c)(5)(C)(ii).
[4] 17 C.F.R. §§ 40.11(a)-(a)(1).

commodity, as defined in CEA section 1a(19)(iv), that "involves, relates to, or references an activity that is similar to an activity enumerated in [Commission Regulation] 40.11(a)(1) … and that the Commission determines, by rule or regulation, to be contrary to the public interest."[5]

Under Commission Regulation 40.11(c), when a contract that is submitted to the Commission by a registered entity, pursuant to Commission Regulation 40.2 or Commission Regulation 40.3, is based upon an excluded commodity, as defined in CEA section 1a(19)(iv), "which may involve, relate to, or reference" an activity enumerated in Commission Regulation 40.11(a)(1) or Commission Regulation 40.11(a)(2), the Commission is authorized to commence a 90-day review of the contract.[6] Commission Regulation 40.11(c)(1) requires the Commission to request that the registered entity suspend the listing or trading of such contract during the 90-day review period.[7] The Commission must ultimately issue an order approving or disapproving such contract by the end of its review or at the end of any extended period agreed to or requested by the registered entity.[8]

[5] 17 C.F.R. §§ 40.11(a)-(a)(2).
[6] 17 C.F.R. § 40.11(c).
[7] 17 C.F.R. § 40.11(c)(1).
[8] 17 C.F.R. § 40.11(c)(2).

FINDINGS

Having reviewed the complete record in this matter, including the Submission and the public comments received, the Commission makes the following findings and determinations pursuant to CEA section 5c(c)(5)(C) and Commission Regulation 40.11:

The Congressional Control Contracts Involve Enumerated Activities

WHEREAS, the Commission has evaluated whether the Congressional Control Contracts involve an activity enumerated in CEA section 5c(c)(5)(C)(i) and Commission Regulation 40.11(a)(1).

WHEREAS, the term "involve" is not defined for purposes of CEA section 5c(c)(5)(C)(i).

WHEREAS, an undefined term in a statute is generally given its ordinary meaning.[9] To determine the ordinary meaning of undefined statutory terms, courts typically look to dictionary definitions for guidance.[10]

WHEREAS, definitions of the word "involve" include "to relate to or affect," "to relate closely," to "entail," or to "have as an essential feature or consequence."[11]

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[9] *See Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187, 115 S.Ct. 788 (1995); *See also*, *Morrisette v. United States*, 342 U.S. 246, 263, 72 S.Ct. 240 (1952) (holding that undefined statutory words that are not terms of art are given their ordinary meanings, frequently derived from the dictionary).
[10] *Sanders v. Jackson*, 209 F.3d 998, 1000 (7th Cir. 2000).
[11] *See Involve Definition,* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/involve (last visited September 7, 2023); Random House College Dictionary 703 (Revised ed. 1979); Riverside University Dictionary 645 (1983); *see also* Roget's International Thesaurus 1040 (7th ed. 2010) (giving as synonyms "entail" and "relate to").

WHEREAS, the Commission has considered assertions by Kalshi and some commenters that, under CEA section 5c(c)(5)(C)(i), contracts "involve" an enumerated activity only if that activity is the contract's underlying.

WHEREAS, when the CEA refers to a contract's underlying, it uses the word "underlying,"[12] or it refers to what the contract is "based on"[13] or "based upon."[14]

WHEREAS, CEA section 5c(c)(5)(C)(i) itself uses "based upon" to refer to the underlying: it applies with respect to "contracts … in [certain] excluded commodities that are *based upon* the occurrence, extent of an occurrence, or contingency" (emphasis added).[15] The underlying must therefore be a kind of excluded commodity, but that is all that CEA section 5c(c)(5)(C)(i) says about the underlying.

WHEREAS, in CEA section 5c(c)(5)(C)(i), the requirement that the contract "involve" an enumerated activity is separate:

> In connection with the listing of … ***contracts*** … ***in excluded commodities that are based upon the occurrence, extent of an occurrence, or contingency*** … the Commission may determine that ***such*** … ***contracts*** … are contrary to the public interest ***if the*** … ***contracts*** … ***involve*** [an enumerated activity] (emphasis added).[16]

WHEREAS, in context, "based upon" and "involve" have different meanings for purposes of CEA section 5c(c)(5)(C)(i): "based upon" refers to the contract's underlying (as it does elsewhere in the CEA), and "involve" refers to the enumerated activities and retains its broader ordinary meaning. In other words, the contract must be "based upon" a type of excluded

[12] *E.g.*, 7 U.S.C. §§ 6c(d)(2)(A)(i), 20(e), 25(a)(1)(D)(ii).
[13] *E.g.*, 7 U.S.C. §§ 2(a)(1)(C)(i)(I), 2(a)(1)(C)(iv), 6b(e).
[14] *E.g.*, 7 U.S.C. § 2(a)(1)(C)(ii).
[15] CEA section 5c(c)(5)(C)(i); 7 U.S.C. § 7a-2(c)(5)(C)(i)
[16] *Id.*

commodity, and the contract must "involve" an enumerated activity. But the contract need not be "based upon" an enumerated activity.

WHEREAS, Congress's choice of the broader term "involve" means that CEA section 5c(c)(5)(C)(i) can capture both contracts whose underlying *is* one of the enumerated activities, and contracts with a different connection to one of the enumerated activities because, for example, they "relate closely" to, "entail," or "have as an essential feature or consequence" one of the enumerated activities.[17]

WHEREAS, the legislative history of CEA section 5c(c)(5)(C) supports the plain meaning of the term "involve,"[18] and indicates that the question for the Commission in determining whether a contract "involves" one of the activities enumerated in CEA section 5c(c)(5)(C)(i) is whether the contract, considered as a whole, involves one of those activities.[19]

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[17] The types of activities enumerated in CEA section 5c(c)(5)(C)(i) – including terrorism, war, and activities that are unlawful under federal or state law – of themselves support a broad reading of the term "involve," to ensure that the Commission has the authority that Congress intended to prevent trading on Commission-regulated markets that is contrary to the public interest. *See* footnotes 29 and 31, *infra*

[18] In a colloquy with Senator Diane Feinstein on the Senate floor regarding the proposed Dodd-Frank Act provision that ultimately was enacted as CEA section 5c(c)(5)(C), Senator Blanche Lincoln, then-Chair of the Senate Committee on Agriculture, Nutrition and Forestry, stated that, among other things, the provision was intended to "prevent gambling through futures markets" and to restrict exchanges from "construct[ing] an 'event contract' around sporting events such as the Super Bowl, the Kentucky Derby, and Masters Golf Tournament." *See* 156 Cong. Rec. S5906-07 (daily ed. July 15, 2010) (statements of Sen. Diane Feinstein and Sen. Blanche Lincoln), *available at* https://www.congress.gov/111/crec/2010/07/15/CREC-2010-07-15-senate.pdf. None of the Super Bowl, the Kentucky Derby, or the Masters Golf Tournament are, of themselves, "gaming." Rather, the statement of Senator Lincoln, who is identified in the colloquy as one of the authors of CEA section 5c(c)(5)(C), focuses on the overall characteristics of the contract. It does not base the evaluation of whether the contract involves an enumerated activity – here, "gaming" – on the underlying alone. Indeed, it is difficult to conceive of a contract whose underlying event, itself, is "gaming." If "involve" were to refer only to a contract's underlying, contracts based on the outcome of sporting events such as horse races and football games would not qualify, because sports typically are not understood to be "gaming" – they are understood to be "games." In effect, if "involve" were to refer only to a contract's underlying, the scope of certain prongs of CEA section 5c(c)(5)(C)(i) could effectively be limited to a null set of event contracts, which could not have been Congress's intent.

[19] For example, giving the term its ordinary meaning, a contract "involves" one of the activities enumerated in CEA section 5c(c)(5)(C)(i) if trading in the contract amounts to the enumerated activity.

Gaming

WHEREAS, the term "gaming" is not defined in the CEA or Commission regulations.

WHEREAS, as discussed above, an undefined term in a statute is generally given its ordinary meaning, and to determine the ordinary meaning of undefined statutory terms, courts typically look to dictionary definitions for guidance. In addition, courts consider the construction of similar terms in other statutes, as well as the purpose of the statute being interpreted.[20]

WHEREAS, the term "gaming" includes betting or wagering on elections, as demonstrated by the following:

A. Dictionaries define the term "gaming" to mean "gambling."[21]

B. Under most state laws, "gambling" involves a person staking something of value upon the outcome of a game, contest, or contingent event.[22]

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[20] *See, e.g.*, *Sanders v. Jackson*, 209 F.3d 998, 1000-02 (7th Cir. 2000).

[21] *See, e.g., Gaming Definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/gaming (defining the noun "gaming" as "the practice or activity of playing games for stakes: gambling") (last visited March 14, 2023); *Gaming Definition*, DICTIONARY.COM, https://www.dictionary.com/browse/gaming (defining "gaming" as "gambling") (last visited Sept. 7, 2023); *Gaming Definition*, Black's Law Dictionary, https://thelawdictionary.org/gaming/ (last visited September 10, 2023) (refers to gambling as gaming and cross-refers the definition to gambling).

[22] *See, e.g.*, GA. CODE ANN. § 16-12-21(a)(1) (West 2020) (". . . A person commits the offense of gambling when he . . .[m]akes a bet upon the partial or final result of any game or contest or upon the performance of any participant in such game or contest . . . ."); KY. REV. STAT. ANN. § 528.010(6)(a) (West 2023) ("'Gambling' means staking or risking something of value upon the outcome of a contest, game, gaming scheme, or gaming device which is based upon an element of chance, in accord with an agreement or understanding that someone will receive something of value in the event of a certain outcome."); MICH. COMP. LAWS § 750.301 (2023) ("Any person or his or her agent or employee who, directly or indirectly, takes, receives, or accepts from any person any money or valuable thing with the agreement, understanding or allegation that any money or valuable thing will be paid or delivered to any person where the payment or delivery is alleged to be or will be contingent upon the result of any race, contest, or game or upon the happening of any event not known by the parties to be certain . . . ."); N.Y. PENAL LAW § 225.00(2) (McKinney 2015) ("A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome."); TEX. PENAL CODE ANN. § 47.02(a) (West 2019) ("A person commits an offense [of gambling] if he: (1) makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest . . . ."); VA. CODE ANN. § 18.2-325(1) (West 2022) ("'Illegal gambling' means the making, placing, or receipt of any bet

C. The Unlawful Internet Gambling Enforcement Act ("UIGEA"), a federal statute, defines the term "bet or wager" as "the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome . . ."[23]

D. To bet or wager on elections is to stake something of value upon the outcome of contests of others, namely, contests between electoral candidates.

E. Several state statutes, on their face, link the terms "gaming" or "gambling" to betting or wagering on elections.[24]

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or wager . . . of money or other consideration or thing of value, made in exchange for a chance to win a prize, stake, or other consideration or thing of value, dependent upon the result of any game, contest, or any other event the outcome of which is uncertain or a matter of chance . . .").

[23] 31 U.S.C. § 5362(1)(A). The UIGEA, 31 U.S.C. §§ 5361-5367 (2006), prohibits gambling businesses from knowingly accepting payments in connection with the participation of another person in a bet or wager that involves the use of the Internet and that is unlawful under any federal or state law. Unlike the Wire Act, 28 U.S.C. § 1084 (1961), the UIGEA defines a "bet or wager", but it criminalizes it only if it is connected with unlawful Internet gambling that violates any federal or state law. *See* 31 U.S.C. § 5362. The UIGEA does not alter the definitions in other federal and state laws and expressly excludes any transaction conducted on or subject to the rules of a registered entity or exempt board of trade under the CEA from the definition of "bet or wager." *See id*. at § 5362 (1)(E).

[24] *See*, *e.g.*, 720 ILL. COMP. STAT. ANN. 5/28-1 (West 2011) ("A person commits gambling when he . . . [m]akes a wager upon the result of any game, contest, or any political nomination, appointment or election . . . ."); NEB. REV. STAT. § 28-1101(4) (2011) ("A person engages in gambling if he or she bets something of value . . . upon the outcome of a game, contest, or election . . . ."); N.M. STAT. ANN. § 44-5-10 (1978) ("Bets and wagers authorized by the constitution and laws of the United States, or by the laws of this state, are gaming within the meaning of this chapter."); N.D. CENT. CODE. ANN. § 12.1-28-01 (West 2011) ("Gambling means risking any money . . . upon . . . the happening or outcome of an event, including an election . . . over which the person taking the risk has no control."). *See also* GA. CODE. ANN. § 16-12-21(a)(2) (West 2011) ("A person commits the offense of gambling when he . . . [m]akes a bet upon the result of any political nomination, appointment, or election . . . ."); MISS. CODE ANN. § 97-33-1 (West 2011) ("If any person . . . shall wager or bet . . . upon the result of any election . . . he shall be fined in a sum not more than Five Hundred Dollars . . . ."); S.C. CODE ANN. § 16-19-90 (2011) ("Any person who shall make any bet or wager of money . . . upon any election in this State shall be guilty of a misdemeanor . . . ."); TEX. PENAL CODE ANN. § 47.02(a)(2) (West 2011) ("A person commits an offense if he . . . makes a bet on the result of any political nomination, appointment, or election . . . .").

WHEREAS, the Congressional Control Contracts involve "gaming," pursuant to CEA section 5c(c)(5)(C)(i) and Commission Regulation 40.11(a)(1), because taking a position in the Congressional Control Contracts would be staking something of value upon the outcome of a contest of others. The Congressional Control Contracts are premised on the outcome of Congressional election contests, which ultimately determine the party affiliation of the Speaker and the Pres Pro Temp.[25]

[25] Kalshi argues that elections are not "contests" even if they are at base competitions, and that, if the Congressional Control Contracts constitute gaming, all event contracts are also arguably gaming. Certain commenters agreed, with one arguing that the Congressional Control Contracts are no more like gaming than anything else trading in traditional financial markets, and another arguing that recognizing the Congressional Control Contracts as gaming would imply that all futures contracts are gaming. The Commission disagrees, and notes, first, that it is common parlance to refer to elections as contests. *See, e.g.*, *A Frozen Needle in GOP Contest*, The Washington Post (Sept. 3, 2023); *Biden: Dems revitalizing manufacturing*, Houston Chronicle (Sept. 10, 2022) (discussing the "contest to control Congress"). One commenter similarly stated that elections fall squarely within the definition of a "contest," citing the following definition in the Cambridge English Dictionary: "a competition to do better than other people, esp. to win a prize or achieve a position of leadership or power: 'In the last election, he survived a close contest against a political newcomer.'" Moreover, the Commission reiterates that many state statutes, on their face, specifically link the terms gaming and gambling to betting or wagering on elections. As such, unlike all futures contracts (or all financial instruments), the Congressional Control Contracts fall squarely within statutory definitions of gaming. More generally, the Commission notes that a common thread throughout the large majority of definitions of "gaming" and "gambling" is the act of staking something of value on the outcome of a contest of others. To take a position in the Congressional Control Contracts would be to stake something of value upon the outcome of a contest of others, since the Congressional Control Contracts are premised on the outcome of contests between electoral candidates (which ultimately determine the party affiliation of the Speaker and the Pres Pro Temp). By contrast, futures contracts traditionally have not been premised on the outcome of a contest of others. As discussed *infra,* futures contracts traditionally have served hedging and risk management functions, and have therefore been designed to correlate to direct and quantifiable changes in the price of commodities or other financial assets or instruments. As also discussed *infra*, the economic impacts of the outcome of contests for Congressional control are too diffuse and unpredictable to serve the hedging and risk management functions that futures contracts have traditionally been intended to serve.

Activity That Is Unlawful Under State Law

WHEREAS, in many states, betting or wagering on elections is prohibited by statute[26] or common law.[27]

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[26] ARIZ. REV. STAT. ANN. § 16-1015 ("A person who, before or during an election provided by law, knowingly makes, offers or accepts a bet or wager . . . upon any contingency whatever arising out of [an] election, is guilty of a class 2 misdemeanor."); ARK. CODE ANN. § 7-1-103 (20) (West) ("No person shall make any bet or wager upon the result of any election . . . ."); COLO REV. STAT. ANN. § 31-10-1531 (West) ("It is unlawful for any person, including any candidate for public office, before or during any municipal election, to make any bet or wager with a qualified elector or take a share or interest in, or in any manner become a party to, any such bet or wager or provide or agree to provide any money to be used by another in making such bet or wager upon any event or contingency whatever arising out of such election."); GA. CODE. ANN. § 16-12-21(a)(2) (West 2011) ("A person commits the offense of gambling when he . . . [m]akes a bet upon the result of any political nomination, appointment, or election . . . ."); IDAHO CODE ANN. § 18-2314 (West) ("Every person who makes, offers, or accepts any bet or wager upon the result of any election . . . is guilty of a misdemeanor."); 720 ILL. COMP. STAT. ANN. 5/28-1 (West 2011) ("A person commits gambling when he . . . [m]akes a wager upon the result of any game, contest, or any political nomination, appointment or election . . . ."); MD CODE, ELECTION LAW § 16-902 ("A person may not make a bet or wager on the outcome of an election held under this article."); MICH COMP. LAWS ANN. § 168.931 (I) (West) ("A person shall not keep a room or building for the purpose, in whole or in part, of recording or registering bets or wagers, or of selling pools upon the result of a political nomination, appointment, or election."); MISS. CODE ANN. § 97-33-1 (West 2011) ("If any person . . . shall wager or bet . . . upon the result of any election . . . he shall be fined in a sum not more than Five Hundred Dollars . . . ."); NEB. REV. STAT. § 28-1101(4) (2011) ("A person engages in gambling if he or she bets something of value . . . upon the outcome of a game, contest, or election . . . ."); NEV. REV. STAT. ANN. § 293.830 (West) ("Any person who makes, offers or accepts any bet or wager upon the result of any election . . . is guilty of a gross misdemeanor."); N.J. STAT. ANN. § 19:34-24 (West)("No person shall make, lay or deposit any bet, wager or stake, to be decided by the result of any election . . . or by any contingency connected with or growing out of any election."); N.C. GEN. STAT. ANN. § 163-274 ("It shall be unlawful . . . [f]or any person to bet or wager any money or other thing of value on any election."); N.D. CENT. CODE. ANN. § 12.1-28-01 (West 2011) ("Gambling' means risking any money . . . upon . . . the happening or outcome of an event, including an election . . . ."); OKLA STAT. ANN. TIT. 21, § 181 (West) ("Every person who makes, offers or accepts any bet or wager upon the result of any election . . . is guilty of a misdemeanor."); OR. REV. STAT. ANN. § 260.635 (West) ("No candidate shall make or become party to a bet of anything of pecuniary value on any event or contingency relating to a pending election" and "[n]o person, to influence the result of any election, shall make a bet of anything of pecuniary value on the result of a pending election, or on any event relating to it."); 18 PA. STAT. § 5514 (West) ("A person is guilty of a misdemeanor of the first degree if he . . . receives, records, registers, forwards, or purports or pretends to forward, to another, any bet or wager upon the result of any political nomination, appointment or election . . . ."); S.C. CODE ANN. § 16-19-90 (2011) ("Any person who shall make any bet or wager of money . . . upon any election in this State shall be guilty of a misdemeanor . . . ."); TENN. CODE ANN. § 2-19-129 (West) ("A person commits a Class C misdemeanor if such person makes any bet or wager of money or other valuable thing upon any election."); TEX. PENAL CODE ANN. § 47.02(a)(2) (West 2011) ("A person commits an offense if he . . . makes a bet on the result of any political nomination, appointment, or election . . . ."); W. VA. CODE ANN. § 3-9-22 (West) ("It shall be unlawful to bet or wager money or other thing of value on any election held in this state"). A number of states also have more limited statutes in place. See, e.g., S.D. CODIFIED LAWS § 12-26-19 ("Any person who shall directly or indirectly make a bet with a voter depending upon the result of any election, with the intent thereby to procure the challenge of such voter or to prevent his voting at an election, is guilty of a Class 2 misdemeanor."); WIS. STAT. ANN. § 6.03 (West) ("No person shall be allowed to vote in any election in which the person has made or become interested, directly or indirectly, in any bet or wager depending upon the result of the election.").

WHEREAS, the Congressional Control Contracts involve "activity that is unlawful under … State law," pursuant to CEA section 5c(c)(5)(C)(i) and Commission Regulation 40.11(a)(1), because taking a position in the Congressional Control Contracts would be staking something of value upon the outcome of contests between electoral candidates (which ultimately

[27] Alabama, *White v. Yarbrough*, 16 Ala. 109, 110 (1849) ("A wager on an election is void as against public policy"); Arkansas, *Williams v. Kagy*, 3 S.W.2d 332, 333-34, 176 Ark. 484, 3 (1928) ("Even before the passage of the statute quoted, this court ruled . . . that wagers upon elections then pending are calculated to endanger the peace and harmony of society and have a corrupting influence upon the morals and are contrary to sound policy"); Colorado, *Maher v. Van Horn*, 60 P. 949, 17-18 (Colo. 1900) ("[W]ager contracts on the result of elections are contrary to public policy and void and will not be enforced by the courts"); Delaware, *Gardner v. Nolen*, 3 Del. 420, 420 (Del. Super. Ct. 1842) ("As within the policy of prohibiting betting on elections, an election wager cannot be recovered though laid after the closing of the polls"); Georgia, *McLennan v. Whidon*, 48 S.E. 201, 202-03, 120 Ga. 666 (1904), quoting *Leverett v. Stegal*, 23 Ga. 259 (1857) (finding that all gambling contracts are illegal but noting that "If there be any class of gambling contracts which should be frowned upon more than another it is bets on elections. They strike at the foundations of popular institutions, corrupt the ballot box, or, what is tantamount to it, interfere with the freedom and purity of elections"); Indiana, *Worthington v. Black*, 13 Ind. 344, 344-345 (1859) ("It has been often decided that wagers upon the result of an election are against the principles of sound policy, and consequently illegal . . ."); Iowa, *David v. Ransom*, 1 Greene 383, 383-85 (Iowa 1848) ("A wager or bet made between parties on the result of an election is void. If the wager is made before an election, illegal votes are often secured, and others induced, contrary to the better judgment of the voter; or if made after an election, the parties interested might be led to exert a corrupt influence upon the canvassing, and returns of the votes"); Kansas, *Reynolds v. McKinney*, 4 Kan. 94, 101 (1866) ("[A bet] involving an inquiry into the validity of the election of a public officer. … was therefore, illegal and void on principles of public policy"); Massachusetts, *Ball v. Gilbert*, 53 Mass. 397, 400-02 (1847) (a wager upon the event of an election to a public office - at the federal, state, or local level - is illegal and void on numerous public policy grounds); Missouri, *Hickerson v. Benson*, 8 Mo. 8 (1843) (wagers on the result of public elections and collateral matters are "clearly" against public policy and "sound morality" and consequently illegal and void at common law); Nebraska, *Specht v. Beindorf*, 56 Neb. 553, 76 N.W. 1059 (1898) (promissory note premised on the election of a public official is a wager on the result of an election and void on grounds of public policy); New York, *Rust v. Gott*, 1828 WL 1964 (N.Y. Sup. Ct. 1828) (wager on the event of an election is illegal and void, even where made after the poll of election is closed but before the canvass is complete); North Carolina, *Bettis v. Reynolds*, 34 N.C. 344, 345-48 (1851) ("the practice of betting on elections has a direct tendency to cause undue influence[,]" and even where neither party was a voter, a wager on the result of a Presidential election void as against public policy); Oregon, *Willis v. Hoover*, 9 Or. 418, 419-20 (1881) (wagers on the result of public elections are illegal and void upon grounds of public policy); Rhode Island, *Stoddard v. Martin*, 1 R.I. 1, 1 (1828) (all wagers on elections and judicial decisions "are of immoral tendency, against sound policy," and therefore void); Tennessee, *Russell v. Pyland*, 21 Tenn. 131, 133 (1840) (a note premised on the outcome of an election is illegal and void under common law principles); Texas, *Thompson v. Harrison*, 1842 WL 3625, at *1 (Tex. 1842) (wagers on the result of public elections are "contrary to good morals" and void on grounds of public policy); Wisconsin, *Murdock v. Kilbourn*, 6 Wis. 468, 470-71 (1857) (wager upon the event of a public election is contrary to public policy, illegal, and void).

determine the party affiliation of the Speaker and the Pres Pro Temp), and in many states such conduct is illegal.[28]

The Congressional Control Contracts Are Contrary to the Public Interest

WHEREAS, the Commission has evaluated whether the Congressional Control Contracts are contrary to the public interest.

WHEREAS, the legislative history of CEA section 5c(c)(5)(C) indicates Congressional intent for the Commission to consider, among other things, in its evaluation of whether a contract is contrary to the public interest for purposes of that provision, a form of the "economic purpose test" that was applied to determine whether a contract was contrary to the public interest under former CEA section 5(g) prior to its deletion by the Commodity Futures Modernization Act of 2000 ("CFMA").[29]

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[28] Kalshi argues that many state gaming laws carve out exceptions for Commission-regulated products and, relatedly, that the Commission's jurisdiction over futures and swaps preempts any state gaming laws as to those products. Seen in this context, Kalshi argues, the state laws that prohibit betting or wagering on elections do not and cannot refer to Commission-regulated event contracts, and the Congressional Control Contracts are therefore not unlawful under state law. This misses the point. CEA section 2(a)(1) grants the Commission "exclusive jurisdiction" over futures and swaps traded on a DCM. 7 U.S.C. § 2(a)(1). This "preempts the application of state law," *Leist v. Simplot*, 638 F.2d 283, 322 (2d Cir. 1980), so transacting these products on a DCM cannot, in and of itself, be an "activity that is unlawful under any … State law." On the other hand, these products may still "involve … activity" that is unlawful under a state law, in the sense, for example, that transactions in the products may "relate closely" to, "entail," or "have as an essential feature or consequence" an activity that violates state law. *See* Merriam-Webster, *available at* https://www.merriam-webster.com/dictionary/involve (last visited Oct. 12, 2022); Random House College Dictionary 703 (Revised ed. 1979); Riverside University Dictionary 645 (1983). Here, state laws (that are not preempted by the CEA) prohibit wagering on elections. Taking a position in the Congressional Control Contracts would be staking something of value on the outcome of contests between electoral candidates, such that wagering on elections is "an essential feature or consequence" of the contracts. Thus, while transactions in the Congressional Control Contracts on a DCM do not violate, for example, state bucket-shop laws, they nevertheless involve an activity that is unlawful in a number of states—wagering on elections. To permit such transactions on a DCM would undermine important state interests expressed in statutes separate and apart from those applicable to trading on a DCM.

[29] 7 U.S.C. § 7(g), *as amended* by the Commodity Futures Trading Commission Act of 1974, Pub. L. 93-463, 8 Stat. 1389 (1974). In the colloquy between Senator Feinstein and Senator Lincoln on the Senate floor regarding the proposed Dodd-Frank Act provision that ultimately was enacted as CEA section 5c(c)(5)(C), Senator Feinstein referenced the Commission's pre-CFMA authority "to prevent trading that is contrary to the public interest," and asked Senator Lincoln whether, with respect to CEA section 5c(c)(5)(C), the intent was to "define 'public interest' broadly so that the CFTC may consider the extent to which a proposed derivative contract would be used

WHEREAS, the general "Findings and Purpose" provision of the CEA, at CEA section 3, states that "[t]he transactions subject to [the CEA] . . . are affected with a national public interest by providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair, and secure financial facilities,"[30] and thus recognizes hedging – and, in particular, price hedging (the "managing [of] price risks") – as a public interest that transactions subject to the CEA are intended to serve.

WHEREAS, the Commission has the discretion to consider other factors in its evaluation of whether a contract is contrary to the public interest for purposes of CEA section 5c(c)(5)(C), and the legislative history of CEA section 5c(c)(5)(C) supports consideration of whether a contract may threaten the public good.[31]

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predominantly by speculators or participants not having a commercial or hedging interest." Senator Feinstein asked whether the Commission would "have the power to determine that a contract is a gaming contract if the predominant use of the contract is speculative as opposed to a hedging or economic use[,]" and Senator Lincoln replied, "That is our intent." *See* 156 Cong. Rec. S5906-07 (daily ed. July 15, 2010) (statements of Sen. Diane Feinstein and Sen. Blanche Lincoln), *available at* https://www.congress.gov/111/crec/2010/07/15/CREC-2010-07-15-senate.pdf. Pre-CFMA Commission guidelines articulated the economic purpose test as an evaluation of "whether [a] contract reasonably can be expected to be, or has been, used for hedging and/or price basing on more than an occasional basis." 17 C.F.R. § 5, Appendix A- Guideline No. 1 (repealed 2001). The colloquy between Senators Feinstein and Lincoln suggests a modification of the "on more than an occasional basis" standard; it suggests that the Commission should consider whether a contract is used predominantly by speculators or market participants not having a commercial or hedging interest.

[30] CEA section 3(a); 7 U.S.C. § 5(a). Section 3 further states that it is the purpose of the CEA to serve such public interests "through a system of effective self-regulation of trading facilities, clearing systems, market participants and market professionals under the oversight of the Commission." CEA section 3(b); 7 U.S.C. § 5(b).

[31] In the colloquy on the Senate floor, Senator Lincoln further confirmed for Senator Feinstein that CEA section 5c(c)(5)(C) would empower the Commission to prevent trading in contracts "that may serve a limited commercial function but threaten the public good by allowing some to profit from events that threaten our national security." Senator Lincoln cited terrorist attacks, war and hijacking as examples of events that "pose a real commercial risk to many businesses in America," but stated that "a futures contract that allowed people to hedge that risk would also involve betting on the likelihood of events that threaten our national security. That would be contrary to the public interest." Senator Feinstein thanked Senator Lincoln for this confirmation, concluding that, "[a] futures market is for hedging." *See* 156 Cong. Rec. S5906-07 (daily ed. July 15, 2010) (statements of Sen. Diane Feinstein and Sen. Blanche Lincoln), available at https://www.congress.gov/111/crec/2010/07/15/CREC-2010-07-15-senate.pdf.

WHEREAS, in light of the foregoing, in evaluating whether the Congressional Control Contracts are contrary to the public interest, the Commission has considered the contracts' hedging utility and price-basing utility.[32] Additionally, the Commission has considered the potential impact that trading in the Congressional Control Contracts may have on election integrity, or the perception of election integrity – as well as the extent to which permitting trading in the Congressional Control Contracts could require the Commission to assume a role in overseeing the electoral process.[33]

Hedging and Price Basing Utility

WHEREAS, control of a chamber of Congress does not, in and of itself, have sufficiently direct, predictable, or quantifiable economic consequences for the Congressional Control Contracts to serve an effective hedging function.

WHEREAS, the Commission has considered comments from Kalshi and others that state that Congressional control impacts a wide variety of assets and cash flows, for a variety of

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[32] *See* footnote 29, *supra*.

[33] In making findings regarding whether the Congressional Control Contracts are contrary to the public interest, the Commission distinguishes two staff no-action positions referenced by some commenters that have been issued by the Commission's Division of Market Oversight ("Division") to two academic institutions. Subject to specified terms, these no-action positions state that the Division will not recommend enforcement action against the academic institutions for operating, without registration as a DCM, SEF, or foreign board of trade, small-scale not-for-profit markets that offer trading in political and economic indicator event contracts for academic purposes. CFTC Staff Letter No. 93-66 (June 18, 1993), issued to the University of Iowa, *available at* https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/93-66.pdf; CFTC Staff Letter No. 14-130 (Oct. 29, 2014), issued to Victoria University of Wellington, New Zealand, *available at* https://www.cftc.gov/csl/14-130/download. The terms of these staff no-action positions contemplate that each market will be operated by the relevant academic institution for academic purposes and without compensation. The terms of the no-action positions also contemplate limitations on, among other things, the number of market participants and the number of contracts that each market participant may hold. In issuing the no-action positions, the Division did not recognize the political event contracts that would be offered by the markets as having hedging or price-basing utility. In issuing each of the no-action positions, the Division explicitly noted that it was not rendering an opinion on the legality of the academic institutions' activities under state law. Kalshi has not submitted that the Congressional Control Contracts would be subject to analogous limitations to those contemplated under the Division's no-action positions, including limitations providing for the market for the Congressional Control Contracts to be operated on a small-scale, not-for-profit basis for academic purposes.

entities, and that market participants already engage in behavior aimed at hedging risks related to Congressional control. Kalshi notes that Congress has extensive powers to influence the economy and that shifts in political power often portend changes in policy.

WHEREAS, the Commission has considered detailed examples provided by Kalshi of statements from private research firms attempting to predict broad-ranging economic impacts of various political outcomes, and academic research indicating that the marketplace generally considers political risks in its operation (citing, for example, links between changes in the price of equities and other assets, and expected changes in Congressional control).

WHEREAS, the Commission has also considered similar assertions from commenters that the effect of Congressional control on the economy is sufficiently predicable and measurable for the Congressional Control Contracts to have a hedging purpose.

WHEREAS, conversely, several commenters expressed the view that the economic effects of Congressional control are too attenuated and unpredictable for the Congressional Control Contracts to serve as an effective hedging tool.

WHEREAS, the Commission finds that while control of a chamber of Congress may ultimately have economic effects, those eventual economic effects are both diffuse and unpredictable. While the likelihood of adoption of a given policy may increase or decrease based on the composition of Congress, many intervening events and variables exist between control of a chamber of Congress and the actual implementation of such a policy.[34] Furthermore,

[34] There are several steps required to enact legislation. Proposed legislation must be approved by both chambers of Congress and by signature of the president or a Congressional override of a presidential veto. During that process, the nature of proposed legislation can change in dramatic ways. Beyond that, legislation requires implementation and is subject to judicial review. All of these dynamics make it difficult to predict the nature, magnitude, and timing of policy outcomes resulting from a given party's control of a chamber of Congress.

the likelihood of implementation is not dependent on control of a chamber of Congress alone; it also depends upon many other things, including, for example, whether a party controls one or both chambers of Congress, the size of its majority, votes by individual party members, and the political affiliation of the president.

WHEREAS, control of a chamber of Congress could, following a number of independent intervening events, generally affect a wide variety of personal liabilities and economic factors, but that does not establish that the Congressional Control Contracts can be used for specific, identifiable hedging purposes and thus does not establish the hedging utility of the Congressional Control Contracts. Rather, it further indicates that control of a chamber of Congress does not have a direct, predictable, or quantifiable impact on any commodity or other financial asset. [35]

WHEREAS, the Congressional Control Contracts result, upon settlement, in a payout of either $1 or $0, depending on the party in control of the relevant chamber of Congress, with settlement and payout occurring only once every two years, to coincide with the election cycle.

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[35] Kalshi implies that the Congressional Control Contracts should be permitted to trade because certain other contracts currently trading on Commission-regulated exchanges involve a degree of removal from the actual risk that is intended to be hedged. As a preliminary matter, the Commission notes that an exchange's certification of a product for trading pursuant to CEA section 5c(c)(1) and Commission Regulation 40.2 does not entail or amount to Commission approval of that product. Further, while Kalshi does not cite to specific contracts in most of the examples it provides, the contracts that Kalshi appears to be referring to for comparison generally have more specific and targeted hedging utility than the Congressional Control Contracts and are otherwise materially different from such contracts. For example, Heating and Cooling Degree Day futures contracts that Kalshi appears to reference do not settle based on an overarching nationwide heating degree day/cooling degree day calculation – they settle based on a calculation at a very specific location. Similarly, real estate index contracts that Kalshi appears to reference settle based on the value of the index in a specific metropolitan area, with the index itself based on real estate price values. In contrast, the Congressional Control Contracts are based on which political party will control the relevant chamber of Congress – they are not based on or tied to any actual price or related values. Furthermore, certain of the event contracts that Kalshi appears to reference do not fall within the scope of CEA section 5c(c)(5)(C) and Commission Regulation 40.11 – which apply with respect to contracts in certain types of excluded commodities – and most of the contracts that Kalshi appears to reference are not event contracts at all.

WHEREAS, the payout for the Congressional Control Contracts is not tied in any way to actual or estimated losses incurred elsewhere, and a loss on the Congressional Control Contracts is not offset by a related gain elsewhere, as is the case for contracts with hedging and risk management capabilities.

WHEREAS, 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, as does their frequency of settlement.

WHEREAS, price-basing occurs when producers, processors, merchants, or consumers of a commodity establish commercial transaction prices based on the futures price for that or a related commodity.[36]

WHEREAS, the Commission has considered comments from Kalshi and others that the outcome of Congressional elections could affect the pricing of a number of diverse commercial transactions because the outcome could impact the pricing of various commodities underlying those transactions.

WHEREAS, other commenters stated that the Congressional Control Contracts cannot have price-basing utility for the same reason that they do not have hedging utility – namely, that the economic ramifications of an election are indirect and unpredictable, and therefore cannot help determine the price of a commodity or financial asset in a predictable manner.

WHEREAS, even if some level of political risk may be embedded in the pricing of many commercial transactions, that does not, in itself, support a finding that the Congressional Control Contracts serve a price-basing function.

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[36] *See* CFTC Futures Glossary, *available at* https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/CFTCGlossary/index.htm#P.

WHEREAS, since the economic effects of control of a chamber of Congress are diffuse and unpredictable, the price of the Congressional Control Contracts is not directly correlated to the price of any commodity, and so the price of the Congressional Control Contracts could not predictably be used to establish commercial transaction prices.

WHEREAS, in light of the foregoing, the Commission finds that it has not been demonstrated that the Congressional Control Contracts could reasonably be expected to be used for hedging and/or price basing on more than an occasional basis or that the Congressional Control Contracts could reasonably be expected to be used predominantly by market participants having a commercial or hedging interest.

Election Integrity and the Commission's Role in the Electoral Process

WHEREAS, more than 600 commenters – a significant proportion of the public commenters on the Submission – expressed concerns about the effect that the Congressional Control Contracts could have on election integrity, including concerns that the Congressional Control Contracts are inconsistent with ideals of democracy and the sanctity of the electoral process.

WHEREAS, these commenters included members of Congress, who expressed concern about the potential impact of the Congressional Control Contracts on the electoral process. A comment letter from six United States Senators stated that "[e]stablishing a large-scale, for-profit political event betting market in the United States … would profoundly undermine the sanctity and democratic value of elections … There is no doubt that mass commodification of our

democratic process would raise widespread concerns about the integrity of our electoral process."[37]

WHEREAS, the Congressional Control Contracts could potentially be used in ways that would have an adverse effect on the integrity of elections, or the perception of integrity of elections – for example, by creating monetary incentives to vote for particular candidates, even when such votes may be contrary to a voter's (or an organized group of voters') political preferences or views of such candidates.

WHEREAS, the Congressional Control Contracts raise concerns that conduct designed to artificially affect the electoral process could also, intentionally or otherwise, manipulate the market in the Congressional Control Contracts, or that the market in the Congressional Control Contracts could be manipulated to influence elections or electoral perceptions. In particular, several commenters (including members of Congress) stated that the Congressional Control Contracts could incentivize the spread of misinformation by individuals or groups seeking to influence perceptions of a political party or a party candidate's success.

WHEREAS, the public interest in guarding against such misinformation is all the more pressing in the context of contracts rooted in the outcome of United States federal elections.[38]

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[37] The signatories to the letter are Senators Jeffrey Merkley, Sheldon Whitehouse, Edward Markey, Elizabeth Warren, Chris Van Hollen, and Diane Feinstein (the "Six Senators"). Senator Amy Klobuchar filed a separate comment letter expressing "concern" with the Submission. The comment letter from the Six Senators underscores differences between a potential market for the Congressional Control Contracts and the markets for political event contracts in respect of which the Division has previously issued staff no-action positions. Kalshi is a for-profit entity seeking to offer a broad-based market in the Congressional Control Contracts. Kalshi has not submitted that the Congressional Control Contracts would be subject to analogous limitations to those contemplated under the Division's no-action positions. In particular, Kalshi has not submitted that the markets for the Congressional Control Contracts would be operated on a small-scale, not-for-profit basis for academic purposes.

[38] Kalshi cites to a paper on the history of election betting in the United States for the premise that such betting did not negatively affect the political process. *See* Paul Rhode and Coleman Strumpf, "Historical Presidential Betting Markets," Journal of Economic Perspectives, Vol. 18, No. 2 (Spring 2004). The Commission notes that the markets examined in that study existed in a very different historical context – before 1940 – and that the study nonetheless

WHEREAS, the Congressional Control Contracts have no underlying cash market with bona fide economic transactions to provide directly correlated price forming information. Rather, price forming information for the Congressional Control Contracts is driven in large measure by polling, voter surveys, and other informational sources that are unregulated, frequently have opaque underlying processes and procedures, and may not follow scientifically reliable methodologies. This differs from the informational sources (*e.g.*, government issued crop forecasts, weather forecasts, federal government economic data, market-derived supply and demand metrics for commodities, market-based interest rate curves, etc.) used for pricing the vast majority of commodities underlying Commission-regulated derivatives contracts.

WHEREAS, the opaque and unregulated sources of price forming information for the Congressional Control Contracts may increase the risk of manipulative activity relating to the trading and pricing of the contracts, while decreasing Kalshi's and the Commission's ability to detect such activity.

WHEREAS, the Commission has considered assertions by Kalshi and other commenters that the Congressional Control Contracts would serve as a check on misinformation and inaccurate polling, stating that market-based alternatives tend to be more accurate than polling or other methods of predicting election outcomes.

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acknowledges both attempts to manipulate the odds and concerns that the betting markets provided a potential means of influencing elections. Several other commenters noted specific examples of manipulation or attempted manipulation incidents on election markets, while others downplayed these incidents.

WHEREAS, there is also research suggesting that election markets may incentivize the creation of "fake" or unreliable information in the interest of moving the market, and a number of commenters also raised this concern.[39]

WHEREAS, the Congressional Control Contracts prohibit certain individuals and entities likely to have a stake in the outcome of elections from trading in the contracts – including paid employees of political campaigns and major polling organizations. However, these trading prohibitions would not prevent such individuals and entities from engaging in other activity – intended to create the impression of likely electoral success or failure on the part of a particular political candidate or candidates – that could artificially move the market in the Congressional Control Contracts.

WHEREAS, the trading prohibitions for the Congressional Control Contracts also do not exclude all individuals or entities who could have a motivation to create the impression of likely electoral success or failure on the part of a political candidate or candidates.[40]

WHEREAS, if trading in the Congressional Control Contracts were to be permitted, the Commission, as regulator of the markets in those contracts, would be required to investigate suspected manipulation in those markets. By extension, the Commission could find itself investigating election-related activities – potentially including the outcome of an election itself. Several commenters stated that this was not a role for which the Commission is equipped or

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[39] *See* Yeargain, Tyler, "Fake Polls, Real Consequences: The Rise of Fake Polls and the Case for Criminal Liability," Missouri Law Review, Volume 85, Issue 1 (Winter 2020) *citing* Enten, Harry, "Fake Polls are a Real Problem," *available at* https://fivethirtyeight.com/features/fake-polls-are-a-real-problem/ (Aug. 22, 2017) (noting how a seemingly false or unreliable poll caused significant movement on an event contract market and suggesting that such poll could have been, or at least could be, created to cause such market movement; further arguing that such false polls can have a real and detrimental effect on elections).

[40] Such individuals and entities could include, for example, Congressional campaign volunteers, consultants to Congressional campaigns, or donors or other supporters of political parties or individual Congressional candidates.

well-suited, with two members of the House of Representative stating in a joint comment letter that "because the CFTC is not equipped or authorized to enforce election laws, the prospect of the Commission assuming the role of an 'election cop' raises very serious concerns about the misalignment of such a role with the CFTC's historic mission and mandate as established by Congress."[41]

Therefore, the Commission FINDS that:

Pursuant to section 5c(c)(5)(C)(i) of the Commodity Exchange Act and Commission Regulation 40.11, the Congressional Control Contracts: (1) involve gaming and activity that is unlawful under State law; and (2) are contrary to the public interest.

Accordingly, IT IS HEREBY ORDERED THAT:

Pursuant to CEA section 5c(c)(5)(C)(ii) and Commission Regulation 40.11(a)(1), the Congressional Control Contracts are prohibited and shall not be listed or made available for clearing or trading on or through Kalshi.

The provisions of this Order shall be effective as of this date.

By the Commission.

Christopher J. Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission

Date: September 22, 2023

[41] Comment Letter of Reps. Sarbanes and Raskin at 3.

COMMODITY FUTURES TRADING COMMISSION

DCM Products

UNITED STATES
COMMODITY FUTURES TRADING COMMISSION

Submitter Information

Organization Name Kalshi	
Organization Type DCM	**Organization Acronym** KEX
Submitted By xsottile	**Email Address** xsottile@kalshi.com

Cover Sheet

Submission Number 2306-1218-0838-36	**Submission Date** 6/12/2023 6:08:38 PM ET
Submission Type 40.2(a) Product Certification	
Submission Description Will chamber of Congress be controlled by party for term?	
☑ **Request Confidential Treatment**	
Registered Entity Identifier Code	
Intended Listing Date 6/27/2023	
☐ **Listing Date Unknown**	

Product Information

Official Product Name Will chamber of Congress be controlled by party for term?	
Product Type Swap (Binary Option)	**Settlement Method** Cash Settlement
Product Group Event	**Product Sub Group** Binary Option
☐ **Novel Product Subject to Jurisdictional Determination**	
Product Publication Website	

Documents

CONTROL CONTRACT for posting.pdf
CONTROL CONTRACT confidential.pdf (Confidential Treatment Requested)
Additional Materials -- Counsel Letters.pdf
Additional Materials -- Pham dissent.pdf

Request For Confidential Treatment - Detailed Written Justification

Confirmation Number
2306-1218-0838-36

Submitted
6/12/2023 6:08:38 PM

CFTC Kalshi FOIA Request (contract filing) (latest).pdf

June 12, 2023

SUBMITTED VIA CFTC PORTAL
Secretary of the Commission
Office of the Secretariat
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: KalshiEX LLC - Commission Regulation 40.2(a) Notification Regarding the Initial Listing of the "Will <chamber of Congress> be controlled by <party> for <term>?" Contract

Dear Sir or Madam,

Pursuant to Section 5c(c) of the Commodity Exchange Act and Rule 40.2(a) of the regulations of the Commodity Futures Trading Commission, KalshiEX LLC (Kalshi or Exchange) hereby notifies the Commission that it is self-certifying the "Will <chamber of Congress> be controlled by <party> for <term>?" contract (Contract) for Commission review and approval. The Exchange intends to list the contract on a biannual basis (every two years). The Contract's terms and conditions (Appendix A) include the following strike conditions:

- **<party> (the political party)**
- **<chamber of Congress> (the House or the Senate)**
- **<term> (e.g. the 119th Congress)**

Along with this letter, Kalshi submits the following documents:

- A concise explanation, analysis and background of the Contract;
- Certification;
- Appendix A with the Contract's Terms and Conditions;
- Confidential Appendices with further information; and
- A request for FOIA confidential treatment.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Xavier Sottile
Head of Markets
KalshiEX LLC
xsottile@kalshi.com

KalshiEX LLC
Official Product Name: Will <chamber of Congress> be controlled by <party> for <term>?
Rulebook: CONTROL
Kalshi Contract Category: Political Decision
Control of Congress
June 12, 2023

CONCISE EXPLANATION AND ANALYSIS OF THE PRODUCT AND ITS COMPLIANCE WITH APPLICABLE PROVISIONS OF THE ACT, INCLUDING CORE PRINCIPLES AND THE COMMISSION'S REGULATIONS THEREUNDER

Pursuant to Commission Regulation 40.2(a)(3)(v), the following is a concise explanation and analysis of the product and its compliance with the Act, including the relevant Core Principles, and the Commission's regulations thereunder.

I. Introduction

The "Will <chamber of Congress> be controlled by <party> for <term>?" Contract (Contract) is a contract relating to the partisan control of Congress.

Further information about the Contract, including an analysis of its risk mitigation and price basing utility, as well as additional considerations related to the Contract, is included in Confidential Appendices.

Pursuant to Section 5c(c) of the Act and CFTC Regulations 40.2(a), the Exchange hereby certifies that the listing of the Contract complies with the Act and Commission regulations under the Act.

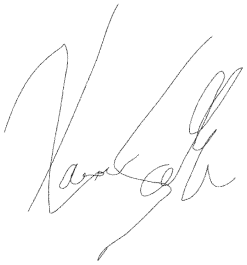
General Contract Terms and Conditions: The Contract operates similar to other event contracts that the Exchange lists for trading. The minimum price fluctuation is $0.01 (one cent). Price bands will apply so that the Contract may only be listed at values of at least $0.01 and at most $0.99. The Contract has a one dollar notional value and has a minimum price fluctuation of $0.01 to be consistent with other Kalshi contracts. Contracts must be purchased in multiples of 5,000 contracts per order. This order size is an appropriate amount for large institutions to mitigate risk and is consistent with other futures and derivatives products. The Exchange has further imposed position limits (defined as maximum loss exposure) as described in Appendix A. As outlined in Rule 5.12 of the Rulebook, trading shall be available at all times outside of any maintenance windows, which will be announced in advance by the Exchange. Members will be charged fees in accordance with Rule 3.6 of the Rulebook. Fees are charged in such amounts as may be revised from time to time to be reflected on the Exchange's Website. Additionally, as

outlined in Rule 7.2 of the Rulebook, if any event or any circumstance which may have a material impact on the reliability or transparency of a Contract's Source Agency or the Underlying related to the Contract arises, Kalshi retains the authority to designate a new Source Agency and Underlying for that Contract and to change any associated Contract specifications after the first day of trading. That new Source Agency and Underlying would be objective and verifiable. Kalshi would announce any such decision on its website. All instructions on how to access the Underlying are non-binding and are provided for convenience only and are not part of the binding Terms and Conditions of the Contract. They may be clarified at any time. Furthermore, the Contract's payout structure is characterized by the payment of an absolute amount to the holder of one side of the option and no payment to the counterparty. During the time that trading on the Contract is open, Members are able to adjust their positions and trade freely. After trading on the Contract has closed, the Expiration Value and Market Outcome are determined. The market is then settled by the Exchange, and the long position holders and short position holders are paid according to the Market Outcome. In this case, "long position holders" refers to Members who purchased the "Yes" side of the Contract and "short position holders" refers to Members who purchased the "No" side of the Contract. If the Market Outcome is "Yes" (please see Appendix A for the conditions upon which the Market Outcome is "Yes"), then the long position holders are paid an absolute amount proportional to the size of their position and the short position holders receive no payment. If the Market Outcome is "No," then the short position holders are paid an absolute amount proportional to the size of their position and the long position holders receive no payment. Specification of the circumstances that would trigger a Market Outcome of "Yes" are included below in the section titled "Payout Criterion" in Appendix A. The Expiration Date of the Contract is designed to account for multiple possible contingencies regarding the timing of the determination of control of a given chamber of Congress.

CERTIFICATIONS PURSUANT TO SECTION 5c OF THE COMMODITY EXCHANGE ACT, 7 U.S.C. § 7A-2 AND COMMODITY FUTURES TRADING COMMISSION RULE 40.2, 17 C.F.R. § 40.2

The Exchange certifies that this submission (other than those appendices for which confidential treatment has been requested) has been concurrently posted on the Exchange's website at https://kalshi.com/regulatory/filings.

Should you have any questions concerning the above, please contact the exchange at ProductFilings@kalshi.com.



By: Xavier Sottile
Title: Head of Markets
Date: June 12, 2023

Attachments:

Appendix A - Contract Terms and Conditions
Appendix B - Trading Prohibitions
Index of confidential appendices
Confidential appendices

APPENDIX A – CONTRACT TERMS AND CONDITIONS

Official Product Name: Will <chamber of Congress> be controlled by <party> for <term>?
Rulebook: CONTROL

CONTROL

Scope: These rules shall apply to this contract.

Underlying: The Underlying for this Contract is the political party membership of each Member of Congress for <term>, as well as the political party membership of the Speaker of the House and the political party membership of the President Pro Tempore, according to congress.gov. The Exchange will also consider the caucus decisions of Independent members. Revisions to the Underlying made after Expiration will not be accounted for in determining the Expiration Value.

Source Agency: The Source Agency is congress.gov.

Type: The type of Contract is an Event Contract.

Issuance: The Contract is based on the outcome of a recurrent data release, which is issued for each new term of Congress. Thus, Contract iterations will be issued on a recurring basis, and future Contract iterations will generally correspond to the next election cycle.

<**chamber of Congress**>**:** refers to a chamber of the United States Congress. It can take the value of "U.S. House of Representatives" or "U.S. Senate".

<term>: refers to a term of the United States Congress. A term of Congress begins and ends every two years.

<party>: refers to a political party.

Payout Criterion: The Payout Criterion for the Contract encompasses the Expiration Values where the leader of <chamber of Congress> is a member of <party> on the Expiration Date. In the case of the U.S. House of Representatives, this is the Speaker of the House. In the case of the U.S. Senate, this is the President Pro Tempore.

Minimum Tick: The Minimum Tick size for the referred Contract shall be $0.01.

Position Limit: The Position Limit for the $1 referred Contract shall be as follows:

- The Position Limit for Individuals shall be $125,000 per Member; and $250,000 for those with demonstrated established economic hedging need
- The Position Limit for Entities shall be $5,000,000 per Member; and $10,000,000 for those with demonstrated established economic hedging need

- The Position Limit for Eligible Contract Participants ("ECP") shall be $50,000,000 per Member; and $100,000,000 for those with demonstrated established economic hedging need

Established economic hedging need may be demonstrated to Kalshi according to the means and methods established by Kalshi. Whether a member has demonstrated that it has a sufficiently established economic hedging need is determined solely at Kalshi's discretion.

Last Trading Date: The Last Trading Date of the Contract will be the same as the Expiration Date. The Last Trading Time will be the same as the Expiration Time.

Settlement Date: The Settlement Date of the Contract shall be no later than the day after the Expiration Date, unless the Market Outcome is under review pursuant to Rule 7.1.

Expiration Date: The Expiration Date of the Contract shall be February 1 in the year that <term> begins.

Expiration time: The Expiration time of the Contract shall be 10:00 AM ET.

Settlement Value: The Settlement Value for this Contract is $1.

Order Size: Contracts must be purchased in multiples of 5,000 contracts per order.

Expiration Value: The Expiration Value is the value of the Underlying as documented by the Source Agency on the Expiration Date at the Expiration time.

Contingencies: Before Settlement, Kalshi may, at its sole discretion, initiate the Market Outcome Review Process pursuant to Rule 6.3(c) of the Rulebook. Additionally, as outlined in Rule 7.2 of the Rulebook, if any event or any circumstance which may have a material impact on the reliability or transparency of a Contract's Source Agency or the Underlying related to the Contract arises, Kalshi retains the authority to designate a new Source Agency and Underlying for that Contract and to change any associated Contract specifications after the first day of trading.

Trading Prohibitions: In addition to the general trading prohibitions found in Kalshi's Rulebook, the following are prohibited from trading this contract:

- Candidates for federal or statewide public office. Please note that this prohibition applies to more than just candidates for Congress.
- Paid campaign staffers on Congressional campaigns.
- Paid employees of Democratic and Republican Party organizations, such as the

Democratic Congressional Campaign Committee or the Republican National Committee.

- Paid employees of Political Action Committees (PACs) and "Super PACs" (independent expenditure only political committees).
- Paid employees of major polling organizations. This prohibition does not apply to all employees of an organization that contains a polling division (e.g. the prohibition does not apply to all employees of Quinnipiac University despite the presence of Quinnipiac University's polling division). The Exchange shall determine which polling organizations constitute "major" and may modify that determination at any time.
- Existing members of Congress, including those not running for re-election.
- Existing paid staffers of members of Congress.
- Household members and immediate family family members (siblings, children, and parents) of any of the above.
- Any of the above listed institutions themselves.

APPENDIX B – TRADING PROHIBITIONS

In addition to the general prohibition against trading on material nonpublic information, the Exchange will be instituting additional prohibitions for trading the CONTROL contract. The following individuals and entities will be prohibited from trading:

- Candidates for federal or statewide public office. Please note that this prohibition applies to more than just candidates for Congress.
- Paid campaign staffers on Congressional campaigns.
- Paid employees of Democratic and Republican Party organizations, such as the Democratic Congressional Campaign Committee or the Republican National Committee.
- Paid employees of Political Action Committees (PACs) and "Super PACs" (independent expenditure only political committees).
- Paid employees of major polling organizations. This prohibition does not apply to all employees of an organization that contains a polling division (e.g. the prohibition does not apply to all employees of Quinnipiac University despite the presence of Quinnipiac University's polling division). The Exchange shall determine which polling organizations constitute "major" and may modify that determination at any time.
- Existing members of Congress, including those not running for re-election.
- Existing paid staffers of members of Congress. Household members and immediate family members (siblings, children, and parents) of any of the above.
- Any of the above listed institutions themselves.

INDEX OF CONFIDENTIAL APPENDICES

APPENDIX C (CONFIDENTIAL) – RISK MITIGATION AND PRICE BASING UTILITIES

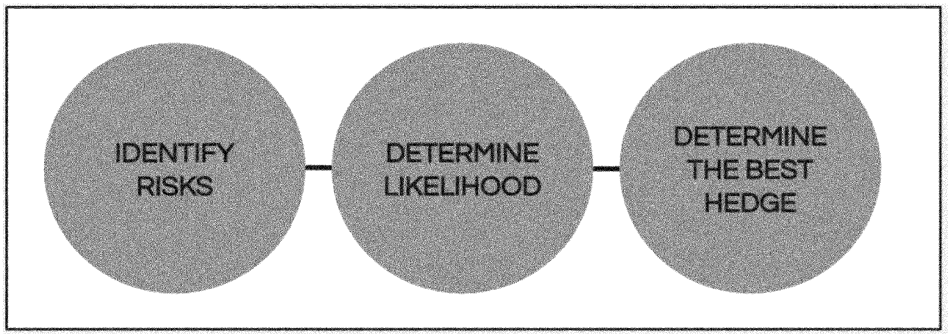
The following sections will provide an explanation of the hedging utility of this contract.

- First, in section A, we will establish how firms generally make risk management decisions and how hedging fits into those decisions;
- Section B sets forth contract specific analysis, which will establish how political control contracts fit into the risk management framework described in section A. Section B also presents an analogy to climate risk hedging;
- Section C highlights the extensive evidence that demonstrates the impacts of elections are not merely hypothetical, but an actual phenomenon that presents tangible financial risk for firms;
- Section D presents several extensive illustrations of how the CONTROL contract will be used for hedging;
- Section E offers analogies to similar products;
- Section F explains how the Contract's specifications enhance its hedging utility for many market participants;
- Section G discusses the price basing utility of the contract; and
- Section H addresses miscellaneous comments that touch on the contract's hedging and price basing functions.

A. *General risk management*

Businesses face a panoply of potential harms that will affect and impact their value. These potential harms are risks. Risks include valuation risk (the value of the business's services or asset's decline), funding risk (access to credit or other funding declines), and operational risks (possible disruptions or errors in the production process that undermine their earnings), among many others. Each one of these general categories of risk will manifest and impact each business according to the business's unique activities, profile, composition, *et cetera*. In addition to these examples, there are many more categories of risks, including strategic risks (e.g., getting outcompeted by a competitor), reputation risks, liability risks and beyond.

There are three steps that businesses generally follow when they are managing the risk of harm. The first step is to identify the risk's impact, meaning the various places where the business can suffer, such as its income or valuation. The second step is for the business to assess how likely it is that the potential harms will materialize, and how severe or acute will the impacts of these harms be. In order to do that, the business must consider the factors that can affect the likelihood and severity of the risks. These include market conditions and all related factors that can have a bearing on the potential harm.



This three-step process characterizes an appropriate risk management framework. It works for all manners of risks.

To illustrate, a business might identify that a decline in profit margin is a harm that it faces. One of the many factors that could cause this harm is changes in demand for its product that will change what it can charge. The business won't stop there, though. It will identify what trends or events will create a change in demand for its product. For example, the business will consider what market forces impact its core customer base. A slowdown in that sector might have a corresponding downward impact on the demand for the business's product. To illustrate, consider a builder of extra-large river barges in the upper Midwest. They know that "changes in demand" impact their risk, but they need to know what affects demand. Naturally, they look to key factors such as lower grain yield in the upper Mississippi River Valley (as lower grain yield may mean lower need for river barges). Both of these are factors that will impact the acuteness of the risk, *i.e.*, whether the harm is likely to happen and how severe it will be if it does happen. As a result, they may purchase short contracts on grain futures in order to hedge their risk.

Similarly, many businesses face potential harms that are impacted by inflation. Inflation can impact nearly all term contracts, impacting the business's real costs. For instance, a firm locked into a 10-year commercial lease on their office space will see lower real costs as a result of inflation than with a shorter lease. However, if the company is also a supplier and has locked in their sales contracts (e.g., they have agreed to sell 100,000 tons of fertilizer at $900/ton), then the real value of those sales decline and inflation will harm them. Of course, inflation affects many other risks as well. Higher inflation raises the probability that the Federal Reserve raises its target interest rates, which tends to substantially reduce stock valuations and the value of assets.[1] Inflation is just one of many examples of factors that impact the likelihood and severity of

[1] The price of a stock is often considered the "discounted present value of future dividends". When the interest rate (a.k.a. the discount rate) goes up, then the present value of future dividends declines and thus the stock value declines. In simpler terms, when the interest rate goes up, it raises the relative value of present money over future profit. So an asset that incurs costs in the short-run but profits in the long-run is less valuable when interest rates are higher. A stock–which costs money in the short run but may generate dividends in the long-run–is thus less valuable when interest rates rise. That's doubly true for "growth stocks" that may be generating no profits now, but may generate them 5-10 years from now.

potential harms. To mitigate those risks, they may seek to purchase any one of many inflation hedges, such as inflation swaps, inflation-protected Treasuries, or inflation event contracts.

B. *Application to political control contracts*

Political control represents another factor that could impact a company's risk profile, much like inflation. Firms use the same risk management strategy as before. A company first identifies harms–operational, reputational, valuation, credit, and more–and then identifies the ways those risks could change. The aforementioned fertilizer company may be purchasing fertilizer inputs like potash from other countries (potash is often found in Russia, Belarus, and China) and identify their largest operational risk as disruption in the global potash supply chain. They further identify that changes in congressional political control could increase the probability that the supply chain is disrupted since different Congresses may take different approaches to tariffs, sanctions and other trade-related policies. The election of a new Congress skeptical about status quo policy will immediately impact their business by reducing the expected revenues of current investments, new investments, and making partners and investors skittish. As a result, changes in political control directly increases (or decreases) the firm's operational risks.

Perhaps the clearest example of this description of risk management comes from the CFTC's report "Managing Climate Risk in the U.S. Financial System" ("CFTC Climate Report").[2] In Figure 2.1 (shown below) and expounded upon at length in Chapter 2 of the report, the report discusses transition risk, which is defined as the "risk associated with the uncertain financial impacts that could result from a transition to a net-zero emissions economy". They note that transition risk implicates "market, credit, policy, legal, technological, and reputational risks" for firms and must be a part of any honest risk assessment. Most importantly, the report specifically identifies how transition risks "could arise, for example, from changes in policy" along with other factors such as "technological breakthroughs, and shifts in consumer preferences and social norms".

As the Financial Stability Oversight Council corroborates, policy changes (along with technological change and consumer preference changes) "especially if delayed or uneven in application and therefore requiring more abrupt economic shifts—may lead to sharp changes in the values of certain assets or liabilities, impacting nonfinancial activity and the financial sector."[3] As a draft rule from the Federal Reserve Board states, "Financial institutions with sound risk management practices employ a comprehensive process to identify emerging and material

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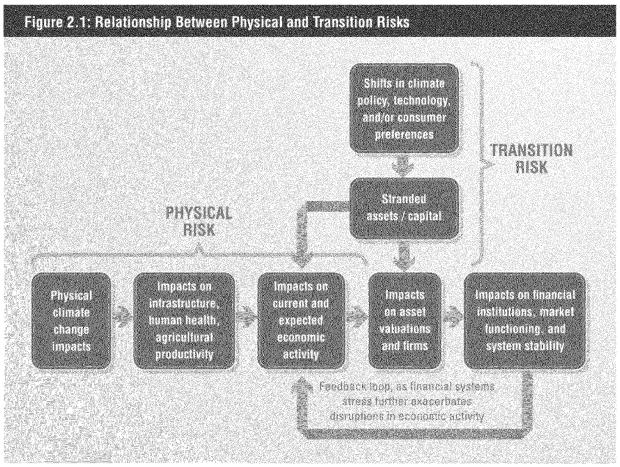
[2] Commodity Futures Trading Commission. 2020. "Managing Climate Risk in the U.S. Financial System". https://www.cftc.gov/sites/default/files/2020-09/9-9-20%20Report%20of%20the%20Subcommittee%20on%20Climate-Related%20Market%20Risk%20-%20Managing%20Climate%20Risk%20in%20the%20U.S.%20Financial%20System%20for%20posting.pdf

[3] Financial Stability Oversight Council. 2021. "Report on Climate-Related Financial Risk" https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf

risks related to the financial institution's business activities. The risk identification process should include input from stakeholders across the organization with relevant expertise (*e.g.,* business units, independent risk management, internal audit, and legal). Risk identification includes assessment of climate-related financial risks across a range of plausible scenarios and under various time horizons."[4] As both reports show, firms *must* consider all of the risks facing their businesses, and the only honest and accurate way to do so is to consider the way changes in policy affect those risks. This analogy is drawn out further in Appendix L.



Commodity Futures Trading Commission. 2020. "Managing Climate Risk in the U.S. Financial System". Page 12

C. *Evidence of election risk and hedging need*

Elections clearly impact myriad cash flows and assets. Political parties vie for office with credible commitments to affect public policy. As a consequence, elections portend risk for many firms with politically exposed cash flows and assets. The financial press frequently reports on how elections (and even changes in election polling) affect the prices of financial assets well before a new Congress has even been seated.[5] Election hedging specifically is also often referenced in the financial press.[6] Below, we present evidence from academic and private

[4] Board of Governors of the Federal Reserve System. 2022. "Principles of Climate-Related Financial Risk Management for Large Financial Institutions.". https://www.federalregister.gov/documents/2022/12/08/2022-26648/principles-for-climate-related-financial-risk-management-for-large-financial-institutions

[5] There are scores of articles which could serve as examples, but some are: Noel Randewich. 2020. "S&P 500 futures rise as U.S. election suggests less regulatory risk." *Reuters*; Myra P. Saefong. 2020. "Here's how the U.S. presidential election could shake up the oil market." *Marketwatch*; Matthew Weaver. 2020. "Congressional elections could impact commodity prices most, expert says." *Capital Press*.

[6] There are scores of articles which could serve as examples, but some are: Weismann, Jordan. "Wall Street Says You Should Short Mexico to Prepare for Trump." 2016. *Slate*; Brice, Jessica, and Cota, Isabella. "How Hedging and a Certain Someone Upended the Year of the Peso." 2016. *Bloomberg.*

research, firm testimony, and the comment file on Kalshi's previous submission detailing the existence of election risk and a core use case for Kalshi's Contract .

Academic research has consistently found that changes in political control result in changes to the prices of traded assets. For example, researchers Erik Snowberg, Justin Wolfers, and Eric Zitzewitz used a variety of prediction markets (including one permitted by the Commission, Iowa Electronic Markets) to establish a relationship between the odds of a given party's success in Congressional midterms and financial markets/indicators.[7] They found that there was a consistent link between changes in expectations of who would control Congress and the prices of equities, government bonds, and the exchange rates between the U.S. dollar and foreign currencies. The fact that financial markets utilize political control as a pricing factor demonstrates that not only are elections something that should be hedged, but that firms are already hedging and repricing assets on public markets. If this is the case, there is no case to argue that elections are not "sufficiently predictable" events to hedge; the market is already doing so.

That same team looked at high-frequency trading data immediately following the release of (what turned out to be inaccurate) exit poll data which briefly caused a major change in the odds of a Democratic victory in 2004. Such a sudden spike during what is normally a quiet trading period allowed the researchers to isolate the effects of the changes in political expectations from other economic events during the same period. They concluded that markets expected a Republican victory to result in higher equity prices, interest rates, oil prices, and a stronger dollar than a Democratic one.[8] They reperformed that analysis in 2016, where they found that markets anticipated that a Republican victory would reduce the value of the S&P 500, foreign stock markets, reduce oil prices, and lead to a significant decline in the Mexican Peso, while also increasing future market volatility compared to a Democratic win.[9] A similar study in 2008 found that Democratic politicians polling higher than Republican ones was better for equity markets.[10]

Similarly, Northwestern professor Seema Jayachandran used a natural experiment to study the effects of changes in the partisan control of Congress.[11] In 2001, Vermont Senator James Jeffords switched parties from Republican to Democrat, shifting control of the Senate. In what she called "the Jeffords effect", the equity valuations of firms that donated to Republicans decreased by 0.4%, while the equity valuations of firms that donated to Democrats increased by 0.1%, again indicating the marketplace's belief that Congressional control has real, predictable consequences

[7] Erik Snowberg, Justin Wolfers and Eric Zitzewitz. "Party Influence in Congress and the Economy." 2007.
[8] Erik Snowberg, Justin Wolfers and Eric Zitzewitz. "Partisan Impact on the Economy". *Journal of Economic Perspectives.* 2004.
[9] Justin Wolfers and Eric Zitzewitz. 2016. "What do financial markets think of the 2016 election?"
[10] Demissew Diro Ejara, Raja Nag, and Kamal P. Upadhyaya, 2012. "Opinion polls and the stock market: evidence from the 2008 US presidential election." *Applied Financial Economics*.
[11] Seema Jayachandran. 2006. "The Jeffords Effect". *Journal of Law and Economics*.

on firm valuations. Brown University economist Brian Knight found that "under a Bush administration, relative to a counterfactual Gore administration, Bush-favored firms are worth 3% more and Gore-favored firms are worth 6% less, implying a statistically significant differential return of 9%".[12] Economist Andrea Mattozi found by regressing Bush- or Gore-affiliated portfolios against surprising poll results, "an increase in the probability of a Bush victory from 50 to 51 percent, increases the annual expected excess return of the Bush portfolio by 25 percent and decrease[s] the annual expected excess return of the Gore portfolio by 35 percent".[13] This finding–that changes in the expectations of who controls government affects the prices of assets–have been replicated time and time again.[14]

Financial assets are derivatives of real economic cash flows and commodities. For example, the stock of a company is representative of that company's value, a function of its costs and cash flows. Thus, market participants are imputing elections' impacts into those assets, suggesting markets believe that elections create economic risks, but those impacts are predictable enough to spend money repricing assets and hedging even in advance of policy decisions.

Consequently, banks regularly inform their clients as to how Congressional elections may impact their clients' extant risks. In 2020, investment bank research divisions offered projections about the economic and financial impacts of various political outcomes. For example,

- Goldman Sachs's chief economist stated publicly that full Democratic control of government would cause the bank to upgrade their earnings forecast by sharply increasing the probability that a large fiscal stimulus bill would become law.[15] Full Democratic control would also, according to the bank's insights, "likely include a stimulus package in Q1, followed by infrastructure and climate legislation. In this scenario, we would expect legislation expanding health and other benefits, financed by tax increases, to pass."[16]

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[12] Brian Knight. 2006. "Are policy platforms capitalized into equity prices? Evidence from the Bush/Gore 2000 Presidential Election" *Journal of Public Economics.*
[13] Andrea Mattozzi. 2005. "Can we insure against political uncertainty? Evidence from the U.S. stock market".
[14] Examples abound, but also include, in addition to the research already discussed: Frederico Belo, Vito D. Gala, and Jun Li. 2013. "Government spending, political cycles, and the cross section of stock returns." *Journal of Financial Economics*; and Kyle Handley and Nuno Limao. 2015. "Trade and investment under policy uncertainty: theory and firm. evidence." *American Economic Journal: Economic Policy*; Bryan Kelly, Lubos Pastor, and Pietro Veronesi. 2016. "The price of political uncertainty: Theory and evidence from the option market." *The Journal of Finance.*
[15] Matthew Fox. 2020. "Goldman's chief economist breaks down why a Biden-led blue wave would prompt an upgrade in growth forecasts". *Business Insider.*
[16] Thomas Franck. 2020. "Goldman Sachs says Democratic sweep would unleash 'substantially' more stimulus." CNBC.

- Morgan Stanley also cited the chance of stimulus along with infrastructure spending and corporate tax changes as a vehicle for a "blue wave" leading to a weaker dollar, lower interest rates, stronger GDP growth and lower bond prices.[17][18]
- JP Morgan Chase projected that a Democratic victory would lead to a rally in 'left-behind' equities, such as "European cyclicals, value, China-exposed stocks and renewables."[19]
- Bank of America provided roadmaps for each type of partisan outcome (e.g. one party controls all of government, divided government, et cetera). They wrote that full Democratic control of government would lead to $2-2.5 trillion in stimulus compared to a Biden win with a divided Congress ($0.5-1 trillion) or a Trump win with a divided Congress ($1.5-2 trillion). They also detailed impacts to specific sectors, like businesses exposed to Chinese trade, in each scenario.[20]
- UBS published a report noting partisan outcomes for policy and the economy, and recommended investors specifically focus on candidates' policy commitments with regards to politically-sensitive industries like energy, health care, financials, and the environment. They noted that their investors should consider how the S&P 500 has performed best in environments where Republicans win, and their clients should make portfolio appropriate adjustments.
- Moody Analytics–not an investment bank, but a credit rating agency with a market research division–explicitly estimated that Democratic control of government would result in 4.2% growth between 2020-2024, compared to 3.1% under a Republican control scenario.[21] They similarly projected a one percentage point lower unemployment rate and a 0.6 percentage point higher S&P 500 under a Democratic sweep.

This research is distributed, at great cost, to major financial institutions, especially capital pools like hedge funds and pension funds. This behavior strongly suggests that firms care a great deal about the specific impacts of elections on their assets, and take action to hedge their positions in advance. This was corroborated in a comment letter provided by a Managing Director of JPMorgan Chase. He wrote,

> At JPMorgan, election risk is one of the largest risks our clients face, and they frequently engage us proactively on how to minimize it (hedge it, in other words). We work with and advise our clients on how to avoid that risk in their portfolios, especially when a client's cash flows or investments are very politically sensitive (for example, those in the coal industry are very concerned regarding election outcomes and policy expectations).

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[17] Morgan Stanley. 2020. "A Revised Guide to Economic Policy Paths & Market Impacts".
[18] Morgan Stanley. 2020. "2020 US Election Preview: 5 Themes to Watch for Investors."
[19] Ksenia Galouchko. 2020. "JPMorgan Says Biden Victory Could Mark a Stock Market Shift." Bloomberg.
[20] Bérengère Sim. 2020. "Bank of America wrote a massive 92-page report on the election's impact — here's what investors need to know." Financial News.
[21] Moody's Analytics. 2020. "The Macroeconomic Consequences: Trump vs. Biden".

> Since clients have different risk profiles, we do extensive research to fine-tune how these risks add up in our clients' positions. Our division employs a team of economists, at service to our partners, whose role in election years is heavily to research election probabilities as well as the impact election outcomes will have on equities and other investment products. We frequently host discussions with experts and clients on the relevant risks (including one coming up this week!) and publish research for both clients and the public.[22]

In addition, businesses themselves often note electoral outcomes as an important factor in their value. In Q3 2020, more than one-third of company quarterly earnings conference calls used the term 'election' in the context of their financial assessments and projections.[23] On these calls, concerns were most frequently raised regarding regulatory changes that would impact business, as well as tax reform and additional potential fiscal stimulus. Earnings calls also frequently included discussions regarding the economic and business impacts of different political control outcomes (e.g., a "blue wave", divided government, et cetera). Consider this fall 2020 testimony from Thomas Peterffy, Chairman of Interactive Brokers, a brokerage firm:

> Well, in the last couple of weeks, we do notice some moderation in activity, and -- which would be expected as we come up to the election. And then, of course, I think it will pick up when the results come out, especially if the Senate goes Democratic, I expect that people will start taking the long-term gains because of the expected 43% long-term capital gains tax rate. And then of course, we are looking further down the road, more and more spending that will result in asset inflation, including higher and higher stock prices.

The marketplace's expectations of the impacts of changes in political control are so credible that the Federal Reserve uses them when making monetary policy decisions. For example, during the December 2012 Federal Open Market Committee meeting, Simon Potter, the Federal Reserve's Head of Economic Research said:

> The outcome of the election reinforced investors' expectations for a continuation of highly accommodative monetary policy...Some market participants also believe that there is an increased chance of housing policy changes following the election, which would increase refinance activity and origination volumes associated with credit-constrained borrowers.[24]

Commenters on Kalshi's previous submission overwhelmingly argued in favor of the Contract's risk mitigation value. This included industry leaders (such as Jorge Paulo Lemann, Christopher Hehmeyer, Ron Conway, Seth Weinstein) and owners of politically sensitive businesses (such as those of Continental Grain Company, Nabis, Greenwork, Upsolve) who specifically discussed

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[22] Public Comment by Angelo Lisboa. Available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69666.
[23] John Butters. 2020. "More than one third of S&P 500 companies are discussing the election on Q3 earnings calls." Factset.
[24] Meeting of the Federal Open Market Committee. December 11–12, 2012.

hedging use cases for their companies.[25] This included Greg Sirotek, the co-founder and CEO of Moneytree Power, a startup dedicated to installing solar power:

> Congress has an incredible influence over the future of the zero-carbon energy industry, particularly the solar industry…Given the respective differences in the two parties' positions on the importance of climate change mitigation, renewable energy development and the deficit, the risk profiles depending on which party is in power is vast. An event contract which pays out on the basis of Congressional control would allow our business to manage this previously unhedged risk.[26]

Jorge Paulo Lemann, a founder at 3G Capital and a Board member of firms like AB-InBev and Kraft Heinz (some of the largest participants in traditional agricultural futures), wrote:

> These statements [claims that there are no hedging or price basing use cases for election contracts] are inconsistent with the preponderance of the academic research on the subject and is inconsistent with the actual experience of anyone who has ever operated a business in or with the United States or traded on the global commodity markets. Experience and empirical observation show that elections have consequences, and these consequences directly create risk that can be hedged, and are factored into pricing commodities, financial assets, and services.[27]

Hehmeyer, former Chair of the National Futures Association and Board Member of the Futures Industry Association, added that many are affected regardless of policy outcomes:

> For example, media personalities and companies face risk from Congressional control and elections. Early professionals hoping to work on Capitol Hill know there are far more positions available if their preferred party is victorious, as there are more Congressional offices and committee positions for them to staff. A consultancy that specializes in specific topic areas (for example, a green energy consultancy) may know the demand for their services will decline in anticipation that their issue of expertise is less likely to be operative under a split Congress. These risks occur regardless of the legislation that actually passes. There are billions of dollars at risk surrounding the outcome of Congressional control and elections. These risks can reasonably be expected to be managed through this contract on Congressional control.[28]

Although some commenters claimed election outcomes aren't predictable enough to be a useful hedge, that in no way contradicts or even diminishes those who say the opposite. At most, those commenters do not see hedging utility for themselves. They cannot credibly say that all the firms who identified how they would use the contracts for hedging and managing their risk are mistaken or deficient in their ability to recognize risk and potential tools to manage or mitigate that risk. It would be arbitrary for the Commission to listen only to the few who assert that there

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[25] Public comments 69668, 69715, 69667, 69683, 69678, 69619, 69684, 69717, 69714, 69718, 69727, 69707, 69677, 69655.
[26] Public Comment by Greg Sirotek. Available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=70751.
[27] Public Comment by Jorge Paulo Lemann. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69684.
[28] Public Comment by Christopher Hehmeyer. Available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69717&SearchText=christopher.

is no hedging use case for anyone when most others who state that they would use the product for themselves or their business.

Thus, it is clear that businesses consider political control an important risk to be hedged. This reality is recognized by the CFTC in the CFTC's Climate Report and the aforementioned FSOC report. It noted that, "uncertainty associated with policy risk is already penalizing oil companies that are investing in undeveloped fossil fuel reserves" and "financial market participants are already looking for ways to manage transition risk in their investment portfolios."[29] The partisan makeup of Congress is a critical factor of policy risk that Kalshi's Contract addresses.

Even if the above evidence was not clear, the market is best positioned to make that determination, not the Commission or Kalshi. If that risk is too tangential, then the product will be a commercial failure. With a contract designed for hedging, such as this contract with its minimum order size and increased position limits, the market and market participants will be able to determine their own risk management strategies, and whether the contract is a necessary component of their strategies or not. That is a decision that is appropriately left to the participants to decide for themselves.

D. *How the CONTROL contract can be used to hedge political risk in practice*

Note that the CONTROL contract is not a panacea that can hedge all risks. It is not appropriate for all market participants, and it is not appropriate for all risks. The CONTROL contract is appropriate for businesses that face risk impacted by partisan political control of Congress. For those businesses, the CONTROL contract can be an important hedge and part of their overall risk management process. A typical business that has risks that are impacted by political control will have risks that are appropriately hedged by the CONTROL contract, as well as risks that are not. The following examples illustrate the risk management analysis a typical business will follow, with risks that are impacted by political control and risks that are not, in order to illustrate how the contract fits into a broader risk management strategy that a firm may undertake.

Though the comment file (and other evidence discussed in Section C above) provide many tangible examples of firms describing the risks they are subject to and would use the Contract to mitigate, Section D will include detailed descriptions of firms' hedging. Consider an enhanced geothermal systems company producing process heat for industrial processes (*e.g.* paper mills). The business will identify the potential harms that the company faces. Naturally, there are many operational risks (what if a rig breaks?), but those are hardly the only risks they face. Some other risks are enumerated below:

[29] Commodity Futures Trading Commission. 2020. "Managing Climate Risk in the U.S. Financial System".

- Increases in transportation costs, which could affect the cost of transporting specialized boring equipment. This may occur due to increases in trucking rates or changes in gas/diesel prices. For illustration, let us say that every 1% increase in transportation costs costs the firm $200,000.
- Changes in the price they can sell their goods, which could occur due to rising energy prices or government rebates. For example, suppose a 1% increase in energy costs increases firm profits by $500,000.
- A shift in the demand curve for their services. There is a subtle but important distinction between changes in services demand due to lower prices (which in economic terms would be considered a move along the same demand curve) and a shift in the demand curve, whereby demand is different even if the price remains the same as before. This scenario could occur due to changes in environmental rules inducing more industrial firms to purchase zero-carbon electricity or changes in subsidies and tax credits that makes their product more affordable for firms when compared to fossil fuel services. Suppose a *ceteris paribus* 1% increase in demand would increase firm profits by $300,000.
- Changes in retained profits. This could occur due to changing revenues, changing costs, but also changing corporate tax rates–including marginal rates and depreciation treatment. Suppose reversing the 2017 tax cuts would, all else equal, increase firm costs by $5 million.
- Changes in expansion opportunities. This could occur due to changes in permitting standards that may affect the speed at which the firm can develop new geothermal sites or changes in environmental standards may affect which sites can be developed.
- Changes in expansion costs. This may occur due to changes in interest rates may affect the cost of financing new rigs and sites or changes litigation costs from NEPA rules that affect whether local groups can sue to stop a new site development.

The firm will assess what are the factors that will impact each of their potential harms, factors that can impact the likelihood of harms materializing, and factors that can impact the severity of harms should they materialize. Not every harm will be directly impacted by elections and political control, and the contract will not be a part of every hedging strategy. Looking at the transportation cost variable, for instance, the firm may decide that trucking rates are likely unaffected by changes in Congressional control (though in 2022, Congress's vote on the freight rail strike did likely affect trucking prices, a firm may not consider this frequent enough to be worth calculating) and gas prices–while related to political variables–is not easily anticipated by changes in Congressional majorities. Regarding their output price, while wholesale energy prices are certainly influenced by political variables, the firm may determine that the relationship to elections are too attenuated to evaluate. Likewise, while permitting standards under the National Environmental Policy Act is a top priority for the 118th Congress, it's widely viewed as a bipartisan priority and thus unlikely to change regardless of how political conditions evolve.

But the business may determine that other potential harms will be directly impacted by elections and political control. For example, retained profits and shifts in the demand curve are influenced by which party wins Congress, as parties have substantially different positions on corporate taxes, zero-carbon subsidies, and emission standards for industrial processes.[30] As a result, depending on how the Congressional election plays out, certain risks become more salient. Mitigatory actions may be insufficient–the firm cannot cost-efficiently diversify into fossil fuels to reduce their exposure to clean energy subsidy policy in the same way a corn farmer cannot cost-efficiently diversify into an uncorrelated domain in order to reduce their exposure to agriculture prices. A firm may conduct some simple math: a given party winning may increase the probability of beneficial tax changes by 20%, creating an expectation of $1 million ($5 million * 20%) more in retained profits, but have a 50% chance of enacting environmental rules that reduce demand by 10%, creating an expectation of loss of $1.5 million (50% * 10%/1% * $300,000). As a result, a financial hedging product may be more appropriate. Suppose the probability of Party X winning control of Congress was 33.3% and the price of the $5000 contract was thus $1,666.67. In that case, they would purchase 60 contracts for a total of $100,000. If the adverse event does occur, the firm would be paid $300,000 to compensate for their expected losses. If the adverse event does not occur, they would not be paid, but they would reap the benefits of the more favorable event occurring.

The chart below summarizes this process. Green-colored rows indicate risks that can be mitigated using the CONTROL contract, whereas magenta-colored rows indicate risks that would not be hedged by the CONTROL contract.

Potential Harm (Risk)	**Factors that could affect the likelihood and severity of the risk**	**How these risks could be hedged**
Transportation cost increases	1. A potential labor strike on the railroads increases trucking rates as rail freight shippers must all now shift to trucking temporarily 2. Russia's war in Ukraine increases the global price of gasoline and diesel fuel	There is a relationship to Congressional control, but it's likely too attenuated for the Contract to be a useful hedge. Instead, the firm purchases short-contracts on WTI oil and buys long-term trucking contracts

[30] This is not just rates. The tax code is filled with numerous and interrelated provisions that impact businesses in different ways. The business may have a number of different provisions that, while seemingly minor to the average citizen, impact them deeply. For instance, while millions of companies are affected by the headline marginal tax rates (making marginal tax rates a good candidate for a policy-specific event contract), a small number are affected by individual provisions such as the treatment of carried interest (for hedge funds) or easements for wetland protection. However, for the firms for which those "minor" provisions matter, they matter a great deal. In order to get enough liquidity, those firms would essentially pool their liquidity on a general Congressional control contract, where the firms who care about each of the thousands of minor provisions all might participate.

Sales price decreases	1. Large-scale technological advances in hydraulic fracturing technology decreases the price of natural gas, lowering the price by which energy can be sold competitively to industrial users 2. New Congress decreases government zero-carbon energy subsidies previously authorized under the Inflation Reduction Act that were given directly to zero-carbon producers	Similarly to transportation, the relationship to energy price changes is real but better hedged through oil futures. However, the subsidy risk remains real, and the forms it takes are too manifold to hedge using a specific policy-product, and instead the firm buys Contracts that hedge against a subsidy-hostile Congress winning power
Loss of demand	1. Changes to the overall federal legislative and regulatory approach to energy policy that no longer encourage industrial users to use zero-carbon electricity in the same way 2. Recession results in decreased manufacturing in the business's service area	Recession risk is best hedged using other instruments- such as shorts on the S&P 500 or a recession-specific event contract. But changes to the overall legislative approach to energy policy is best hedged using a contract that pays out on the basis of Congressional control
Loss of retained profits	1. New Congress reverses the marginal corporate tax rate cuts and bonus depreciation provisions authorized under the Tax Cut and Jobs Act of 2017 2. New Congress introduces new surtaxes and surcharges onto large corporations as part of an effort to reduce the deficit	TCJA reversal may be able to be hedged using a specific policy-level event contract. However, the second channel is too broad or general for a policy-specific contract, and instead the firm would buy a contract that pays out on the basis of a tax-friendly Congress taking power
Higher input costs	1. New Congress has a more protectionist stance, and has various proposals to- among other things- renegotiate existing trade agreements, reject newly proposed agreements, impose new tariffs on foreign goods, increase regulatory scrutiny on foreign investments, and globally signal a new attitude on trade policy	The trade uncertainty channel is too broad or general for a policy-specific contract, and instead the firm would buy a contract that pays out on the basis of a more protectionist Congress taking power

Loss of demand	1. A new Congress has a more restrictive view on antitrust policy and will work to reduce the number and size of mergers and acquisitions through a combination of new legislation, changing personnel in relevant bureaucratic agencies (such as the Federal Trade Commission), and asking those bodies for new regulations	The decline in M&A activity, as well as general uncertainty in the sector, is too broad or general for a policy-specific contract, and instead the firm would buy a contract that pays out on the basis of a more anti-M&A Congress taking power
Business model regulated or destroyed	1. A new Congress believes that a particular industry or business is socially harmful and decides to ban it, either directly or indirectly through regulation and bureaucratic appointments. Congress has considered doing so with many firms and industries, such as TikTok and e-cigarettes	A business model being regulated in a punishing way is too broad or general for a policy-specific contract, and instead it would make more sense for the firm to to buy a contract that pays out on the basis of a hostile Congress taking power
Loss of expansion opportunities	1. Judicial action strikes down modifications to state-level permitting law reforms, thereby allowing frequent NEPA litigation over site development 2. Interest rates, monetary policy, and tax changes make venture capital markets go tighter, and reducing the access to capital markets	There are no good hedges to state-level judicial action, and instead the firm should "self-insure" by maintaining a capital buffer. Changes in interest rates and monetary policy can be hedged using other financial instruments, such as interest rate swaps
Increase in expansion costs	1. An unexpected surge in inflation causes the Federal Reserve to hike interest rates, thereby raising the cost of borrowing money to build new rigs	Increases in inflation and interest rates can be hedged using inflation-protected treasuries or interest rate swaps

Or consider a firm specializing in providing specialized lab-developed tests (LDTs) for certain genomic conditions. They regularly take stock of their company's biggest risk factors. They include:

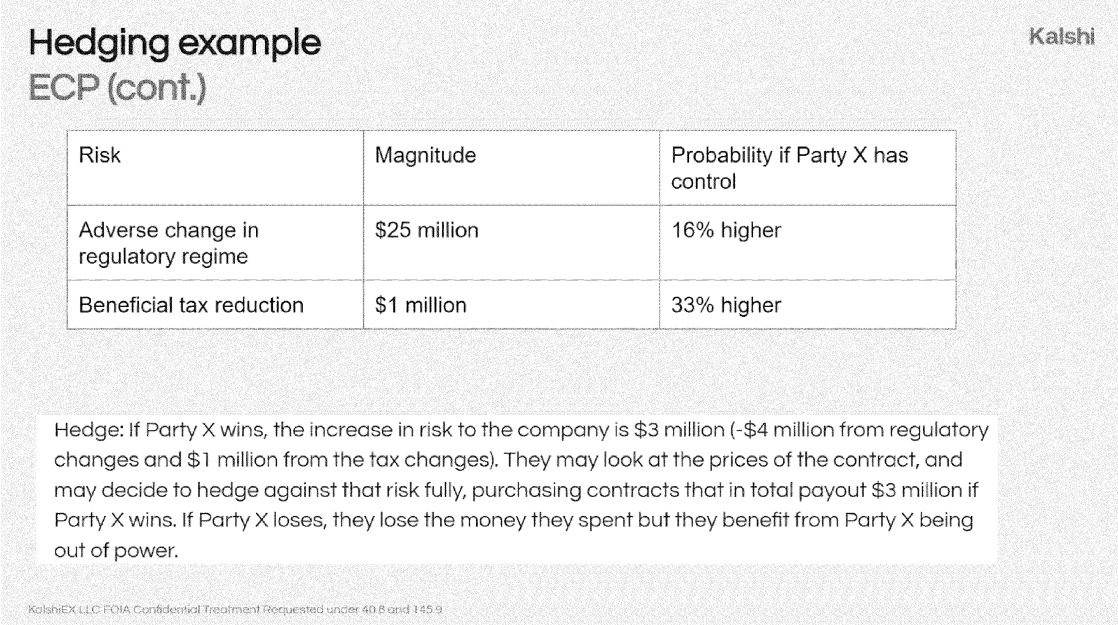
- Changes in research and development financing costs. Three major factors include changes in funding to the National Science Foundation (NSF) and National Institutes of Health (NIH), changes in interest rates, and research and development tax breaks. They

estimate that every 1 percentage point increase in interest rates increases their costs by $5 million.

- Changes in regulatory approval costs. One major contributor to the risk is the probability that Congress changes the law such that LDTs are treated the same as all commercial-use diagnostic tests, thereby changing from the regulatory remit of the Center for Medicare Services (CMS) to the Food and Drug Administration (FDA), where approval timelines are typically substantially longer. They estimate that change would add an additional six months to their approval process, which could cost them roughly $25 million per year.
- Changes in revenue and profit, which could be affected by changes in Medicare reimbursement rates, which may affect the willingness of hospitals to offer their tests. They estimate that a reduction of 1% in the Medicare reimbursement rate change would cost them $10 million per year. Another factor related to this risk is changes in corporate taxes, including marginal rates, which may affect overall profitability. They estimate reversing the 2017 corporate tax reductions could cost their company $3 million.

The firm may determine that NSF/NIH funding remains a bipartisan priority and is unlikely to change regardless of the results of the Congressional elections. Likewise, the effect on interest rates from Congress may be too attenuated to effectively assess; but they determine that legislation to change the regulatory treatment of LDTs is more likely under one political coalition than another. Since they are a firm specializing in LDTs, this risk could be quite severe. As a result, they may wish to purchase a financial product that mitigates their risk exposure.

The relationship between the election and their risks is sufficiently direct that a financial hedge may be valuable. For instance, suppose they believe that Party X winning the midterm election would result in a 16 percentage point increase in the probability that LDT reform legislation becomes law. As a result, the election of Party X creates $4 million in risk through that channel alone (0.16 * 25m). However, Party X winning also reduces the probability of costly corporate tax changes by 33%, thereby reducing the expected loss by $1 million. As a result, they may wish to purchase $3 million of hedging products to zero out their extant election risks, which they could do so by purchasing 3,000,000 contracts. They may also wish to only partially hedge by purchasing less than that. Critically, even though the election is not deterministic on their bottom line, it has clear and unambiguous effects on risks to their profitability that can be hedged.



E. *Similarities to existing products*

Many products listed on Commission-regulated exchanges mitigate risk in a similar manner to Kalshi's proposal. For instance, the CME Case-Shiller futures, which pay out based on an index that tracks the overall housing market, does not perfectly map onto any real estate portfolio. It is nonetheless a useful hedging product. Below we have assembled a table that highlights relevant characteristics of existing self-certified products.

Self-certified contract	**Relevant characteristics**	**Comparison to Political Control Contracts**
Micro Bitcoin futures	• Geared towards retail participants • The micro size itself does not hedge real economic activity • Does not have price-basing value for other goods and services	• Geared towards retail/firms (original Kalshi submission) or just entities (current submission)[31] • Allows for hedging real economic activity, even if not 1:1 • Provides valuable price-basing for pricing other assets such as oil, currencies and equities
Cooling and Heating Degrees futures (there are many dozen variations of these, for particular areas and seasons)	• Does not perfectly hedge 1:1 anyone's risk, since the primary purchasers (natural gas companies, air conditioner companies) are exposed to energy consumption, but that does not line up either 1:1 with weather or with CDD/HDD	• Similar hedging value proposition: primary purchasers' risk is correlated strongly with elections, even if not perfectly correlated
Case-Shiller Housing Price Index futures (and other real estate futures products)	• Does not perfectly hedge 1:1 anyone's risk, since the primary purchasers (real estate investors) have risk that is correlated, but not perfectly correlated, with the overall real estate market and any index in particular	• Similar hedging value proposition: primary purchasers' risk is correlated strongly with elections, even if not perfectly correlated
Hurricane contracts	• Does not perfectly hedge 1:1 anyone's risk, since it is uncertain whether a hurricane of a given speed hitting a given area will cause any amount of damage at all, let alone damage to the user, and to what severity	• Similar hedging value proposition: primary purchasers' risk is correlated strongly with elections, even if not perfectly correlated
Equity index	• At their inception, equity	• Similar hedging value

[31] Although the contract will be available to all Exchange members, as required by the CEA and Core Principle 2.

futures (there are many dozen variations of these live on commodity futures exchanges, e.g. CME's E-mini Utilities Select Sector Futures)	index futures were designed to capture the risks investors faced from the market as a whole. However, the particular indices (such as the S&P 500) do not perfectly capture and hedge 1:1 anyone's risk. Their risk is correlated, but not perfectly correlated, with the overall market. Though some index futures have products that directly reflect them (e.g. S&P 500 ETFs) today this is not true of all index products listed, nor true of any hypothetical product	proposition: primary purchasers' risk is correlated strongly with elections, even if not perfectly correlated • Many iterations (e.g. e-Minis, Micros) are targeted and used heavily by retail (original Kalshi submission) or by institutions (current submission)
Consumer Price Index futures	• Though individuals and firms are subject to inflation risk, their particular inflation risk is not generally not perfectly correlated with the consumer price index, which chooses a particular set of goods in a particular composition in order to measure inflation	• Similar hedging value proposition: primary purchasers' risk is correlated strongly, though not perfectly with the derivative product in question
CBOE's Volatility Index (VIX)	• Though individuals are affected by the risk associated with the stock market, they are not perfectly affected by the risk implied by S&P 500 options	• Similar hedging value proposition: primary purchasers' risk is correlated strongly, though not perfectly with the derivative product in question
Environmental offset futures	• In this case, purchasers are not even offsetting personal risk. They are offsetting social risk, risk to society that is caused by their operations; as well as the marginal risk caused to	• Similar hedging value proposition: primary purchasers' risk is correlated, though not perfectly with the derivative product in question

	them by increased carbon output	

F. *Focus on large-scale hedging*

Class	Bona fide hedgers	Everyone else
Individual	$250K	$125K
Entity	$10M	$5M
ECP	$100M	$50M

Position limits for different users of Kalshi's CONTROL contract

Critically, this product is designed for firms, ECPs, and other large-scaled hedgers, although of course individuals are not prohibited from trading, as required by Core Principle 2. The contract order size (multiples of 5,000 contracts) is appropriate for large scale financial hedging activity.

While it is true that not all participants will be hedgers (as with other futures, there need to be some non-hedgers to provide liquidity), with the high contract order size and larger position limits for ECPs and entities, it is highly likely that these non-hedging participants will be sophisticated firms and specialized liquidity providers, which is a dynamic found in many CFTC-regulated markets.

G. *Price basing and price discovery utilities*

There is extensive price basing utility for the Contract. As discussed earlier, the market frequently reprices assets on the basis of changes in election expectations and election outcomes.[32] Investment banks and other research divisions provide clients and the public with recommendations on how Congressional outcomes will change the price of financial assets; an event contract on election outcomes would help price discovery for those products. For example, in 2020, projected a one percentage point lower unemployment rate and a 0.6 percentage point higher S&P 500 under a Democratic sweep.[33]

[32] There are scores of articles which could serve as examples, but some are: Noel Randewich. 2020. "S&P 500 futures rise as U.S. election suggests less regulatory risk." *Reuters*; Myra P. Saefong. 2020. "Here's how the U.S. presidential election could shake up the oil market." *Marketwatch*; Matthew Weaver. 2020. "Congressional elections could impact commodity prices most, expert says." *Capital Press*.
[33] Moody's Analytics. 2020. "The Macroeconomic Consequences: Trump vs. Biden".

In 2012, more than two dozen economists signed a letter to the Commission supporting arguing as much. Led by the late Nobel Laureate Kenneth Arrow in that 2012 letter, they wrote:

> Political event futures facilitate price discovery in other asset markets. One of the findings of [our] research is that firms and industries are exposed to political and policy risk. Political event futures provide investors with a market-based assessment of outcome probabilities, which reduces investors' uncertainty when trading other assets.[34]

Many economists have done the same for Kalshi's previous submission, including Nobel Laureate Robert J. Shiller, Phillip Tetlock, Justin Wolfers, Scott Sumner, Michael Abramowicz, Joseph Grundfest, Alex Tabarrok, Michael Gibbs, Jason Furman, David Pennock, Harry Crane, David Rothschild, Koleman Strumpf, Ryan Oprea, and others.[35] A letter signed by Pennock, Crane, Rothschild, and Strumpf argued,

> Prediction market prices in political and policy events would help facilitate price discovery in a wide-range of asset markets, affecting the entire economy (note that pricing is freely available to non-traders). Political and policy events matter: they expose a wide-variety of businesses to risk that traditional financial markets have trouble pricing. A robust set of markets for political and policy events could price that risk, and, if they were allowed to flourish, could eventually grow to provide hedges where uncertainty is particularly acute.[36]

The contracts can also be used to price MGEX's corporate tax futures and Kalshi's other political event markets related to bills passing, government shutdowns, and the debt ceiling. They can also be used to price other nonpolitical products, like equities and bonds. For example, imagine a junior investment bank has been instructed to price a security. That price is reflective of the stocks' net present value, itself a reflection of future expected profits. This includes political risk. If that banker knew with certainty that Republicans will take control of Congress, for example, and corporate taxes are thus less likely to be raised, she would price the security higher than otherwise. Kalshi's contracts would help her in doing so.

Many other members of industry and businesses stated as much in public comments, including Angelo Lisboa, Peter Kempthorne, Seth Weinstein, David Pollard, David Trinh, Eriz Zitzewitz, James Cust, Caesar Tabet, Jorge Paulo Lemann, Sebastian Strauss, Christopher Hehmeyer, and Ron Conway.[37] Margaret Stumpp, a senior vice president at Prudential Financial and a co-founder of Quantitative Management Associates, wrote,

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[34] Nadex public comment by Zitzewitz et al. Available at https://www.cftc.gov/sites/default/files/stellent/groups/public/@rulesandproducts/documents/ifdocs/ericzitzewitzltr020312.pdf.
[35] See public comments 70761, 69708, and 69735.
[36] Public Comment by David Rothschild. Available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69735.
[37] See public comments 69662, 69703, 69718, 70743, 70763, 70747, 70753, 70765, 69684, 69721, 69717, and 69714.

> …a well functioning market for contingent political outcomes should improve the prices at which other securities (eg, stocks, bonds, options, etc…) trade. This reduces uncertainty, enhances capital market liquidity, and improves the efficiency by lowering uncertainty.[38]

On the standard for price basing

One commenter argued that there is no hedging or price basing use case for the Contract because there is no underlying cash market, unlike with traditional agricultural and energy derivatives.[39]

This is not the standard that the Commission should apply in its decision. It is not the standard applied in *Nadex* (which considered whether Nadex's proposal could base the price of a physical commodity, financial asset, or service); it is also not the standard that the Commission asked the public to use in judging Kalshi's original submission (which uses the same test as *Nadex*). To do otherwise and limit price basing to only contracts with an underlying cash market would be arbitrary.

It would also essentially invalidate the existence of price basing, or price discovery, for the vast majority of event contracts, which do not have underlying cash markets. This is inconsistent with Commission precedent and would upend myriad products listed with the Commission in the last two decades. Many derivatives products currently listed with Commission-registered Designated Contract Markets do not have underlying cash markets, such as:

- Macroeconomic indicator derivatives (e.g. Gross Domestic Product contracts)
- Tax rate derivatives (e.g. MGEX's corporate tax rate futures)
- Weather derivatives (e.g. hurricane and heating/cooling degree days contracts)
- Carbon offset futures (e.g. CME's CBL Global Emissions Offset Futures)
- Housing price index futures (e.g. CME's futures based on Case-Shiller house price indices)

Because of the permissionless nature of self-certification, the Commission has not *specifically* stated that the above contracts have hedging or price basing utilities; the Commission did so implicitly by permitting their registration for decades. However, in some cases, the Commision has been specific. For example, the Commission actively determined that futures which pay off based on the amount of box office revenue a motion picture produces has price basing utility, even though it has no cash commodity market.[40]

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[38] Public Comment by Margaret Stumpp. Available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69722.
[39] Public Comment by Steve Suppan. Available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=70791.
[40] "The Commission found that the contracts can perform hedging and price discovery purposes…The Commission analysis applied three tests to determine whether or not these contracts could be used by an identifiable segment of an industry or industries for hedging or price basing on more than an occasional basis."

The price basing value of Kalshi's proposal is no different. A market-based determination of the probability of a given party taking control of a given chamber of Congress would be helpful in basing the price of politically sensitive commodities (such as oil), assets (such as politically sensitive stocks, like cannabis and energy firms), and services (such as investments in politically sensitive sectors).

There is no hard and fast rule defining when price basing does and doesn't occur in a manner sufficient to justify a CFTC-listed derivative. In some cases, the Commission/Commission staff indicated that price basing is when a commodity future specifically bases the price of its underlying commodity; in other cases, also related commodities;[41] in other cases (including Kalshi's), also non-commodities.[42]

Several Commissioners have indicated in statements they believe that intangible event contracts, sans cash markets, have price basing utility. This includes Commissioners Brian Quintenz and Dan Berkovitz in the case of ErisX's proposed NFL Futures Contracts; Commissioner Sharon Brown-Hruska when discussing how event contracts may have primarily price discovery as opposed to hedging functions; as well as Commissioners Quintenz and Mark Wetjen on election contracts themselves.[43][44][45][46] In fact, in its release discussing event contracts in 2008, Commission

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https://www.cftc.gov/sites/default/files/idc/groups/public/@otherif/documents/ifdocs/mdexcommissionstatement061410.pdf.

[41] For example, the CFTC's rule on Exempt Commercial Markets describes price basing this way at some points, as does the definition provided on the Commission's website; at other points, the rule refers to price basing as being about only the underlying commodity itself.

[42] For example, the Commission's decision in *Nadex* or the Commission's questions for the public in Kalshi's original submission specifically discuss whether the contracts can be used for basing the price of a physical commodity, financial asset, or service. The Commodity Exchange Act also does not specify what derivatives must or should be managing price risk/discovering prices/price basing for.

[43] Statement of Commissioner Dan M. Berkovitz Related to Review of ErisX Certification of NFL Futures Contracts, April 7, 2021, available at https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement040721#_ftn27 *Note*: Commissioner Berkovitz argues that, although he does not believe ErisX demonstrated price basing utility, he does clarify that it could have such utility, and is open to being shown that.

[44] The Functions of Derivative Markets and the Role of the Market Regulator, May 18, 2006. Dr. Sharon Brown-Hruska, Commissioner, available at. https://www.cftc.gov/PressRoom/SpeechesTestimony/opabrownhruska-45

[45] See Public Comment on Kalshi Contract from Brian D. Quintenz, available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=70786

[46] See Public Comment on Kalshi Contract from Mark Wetjen, available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=70771

staff used election markets to describe how price discovery in event contracts could work.[47] This utility was true then, and it remains true today.[48]

The law, similarly, does not restrict price basing to specifically the commodity upon which the derivative is based. Specifically, the CEA says, "transactions subject to this Act are entered into regularly in interstate and international commerce and are affected with a national public interest by providing a means for managing and assuming price risks, discovery prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities."

Even if the Commission had used the standard whereby price basing only applies to an underlying cash market (and it has not) at one point, why should it continue to do so in the future? The fact that a derivative can provide price discovery for a different commodity, asset, or service is consistent with the CEA's price discovery goals; stopping a derivative from being listed on that basis is inconsistent with it. Moreover, the fact that a derivative could be used for price discovery for another kind of product or service suggests relation, falling within one of the common definitions Commission staff use in describing price basing.

That being said, if the standard was "related" commodity, election markets are patently related to major commodity markets, such as energy and agricultural markets. The United States government is a major participant in such markets, both directly trading in them and providing significant industry subsidies. In addition, research has consistently found a link between elections and changes in oil prices, demonstrating that the market is using election probabilities to base the price of commodities and commodity futures.[49]

H. *Other comments on hedging and pricing issues*

A few commenters disputed the hedging and/or price basing utilities of the contract in ways that are not addressed by the above. They said:

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[47] As noted above, the Commission's release stated that "The trading of such contracts can facilitate the discovery of information by assigning probabilities, through market-derived prices, to discrete eventualities. For example, a binary contract based on whether a particular person will run for the presidency in 2012, can pay a fixed $100 to its buyer if and only if that individual runs for the presidency in 2012. If the contract's traders believe that the likelihood of the individual's candidacy in 2012 is around 17 percent, the price of the contract will be around $17, and will approximate the market's consensus expectation of the individual's candidacy." https://www.federalregister.gov/documents/2008/05/07/E8-9981/concept-release-on-the-appropriate-regulatory-treatment-of-event-contracts

[48] The fact that the concept release predated Dodd-Frank is of no consequence. The point is that the contract has obvious price basing utility, and even if Dodd-Frank, *arguendo*, reincarnated the economic utility test, the contract passes because of its price basing utility.

[49] *E.g.* Erik Snowberg, Justin Wolfers and Eric Zitzewitz. "Partisan Impact on the Economy". Journal of Economic Perspectives. 2004.

- The $25,000 position limit was not enough to constitute hedging for most businesses and institutions. In Kalshi's new submission, the position limits have been raised, with an emphasis on those with established hedging needs.
- Election outcomes are not sufficiently predictable in order to justify a hedging product. Above, evidence is provided that market participants extensively discuss, hedge, and price election risk well before a new Congress is even seated. If the market is already doing so, then there is no place to say otherwise.
- Election risk can be de-risked through other equities and derivatives products. However, other products are insufficient to hedge electoral risk, which is a unique risk that could flow through many different parts of a firm's business. Moreover, there is no "uniqueness" requirement that hedging products have.
- One commenter, Richard Q. Wendt, argued that hedging behavior would reduce the Contract's informational utility, since hedgers are less price sensitive than speculators. However, large, liquid markets with hedgers, speculators, and liquidity dealers are broadly able to simultaneously provide accurate pricing information and hedging opportunities. For example, when the price of an oil future is pushed down below fair market value by a price insensitive hedger, speculators come in and push the price back up to take advantage of the discrepancy between the current price and the fair price.
- The Commission, in its questions, questioned whether it should be considering what percentage of a given market must be made of hedgers versus speculators; as well as whether hedging needs can be merely theoretical or need "evidence". These standards were not applied against Nadex, ErisX, or any other contract proposed to the Commission. They are not found in law, rule, or regulation; although Kalshi's contract clearly does have established hedging utility, it would be arbitrary for the Commission to impose novel burdens on it.

APPENDIX D (CONFIDENTIAL) – COMMISSION JURISDICTION AND THE SPECIAL RULE FOR EVENT CONTRACTS

In addition to the details discussed below, Kalshi has attached letters on the matter from former Commission General Counsel Daniel Davis and Jonathan Marcus, as well Commissioner Caroline Pham's dissent on whether to impose a stay and review pursuant to Regulation 40.11 of Kalshi's original submission. Additional commenters on this point include, but are not limited to, former Nadex CEO Timothy McDermott, former Commissioner Brian Quintenz, former Commissioner Mark Wetjen, "father of futures" Dr. Richard Sandor, Gregory Kuserk, who led the Product Review branch in DMO, former MPD Director Josh Sterling, Daniel Gorfine, Lewis Cohen, Jeremy Weinstein, Susquehanna International Group, Tabet DiVito & Rothstein, and Railbird Technologies.[50] Kalshi has adopted these comments and they form part of the basis on which Kalshi determined that this contract is consistent with the CEA. Rather than attach all the comments here, which would consume a fair bit of paper, Kalshi has referenced them in the prior footnotes and notes that these comments are all in the Commission's possession and available on the Commission's website. However, should the Commission find it convenient to have all of these comments attached, Kalshi will supply them to the Commission.

Commission jurisdiction

Section 2(c)(2)(A)(ii) of the Act provides that the Commission has jurisdiction over swaps. Swaps are defined in section 1a(47)(ii) of the Act to include, among other things, "any agreement, contract, or transaction . . . that provides for any purchase, sale, payment, or delivery (other than a dividend on an equity security) 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 consequence." The Contract provides for payments that are dependent on the occurrence, nonoccurrence, or the extent of an event. The Contract is therefore a swap, and the listing and trading of the contract on Kalshi are therefore under the Commission's jurisdiction. Section 5c(c)(5)(B) and Commission Regulation 40.2(b) create a presumption in favor of approving contracts.

Special rule for the review and approval of event contracts

Section 5c(c)(5)(C) of the Act provides a special rule for the review and approval of event contracts. Under this special rule, the "Commission *may* determine" (emphasis added) that event contracts or swaps ("based upon the occurrence, extent of an occurrence, or contingency") are "contrary to the public interest" if those contracts "involve" certain enumerated activities.[51] 7

[50] Public comments 70786, 70771, 69687, 70754, 69737, 70755, 69736, 69723, 70743, 70765, 70752.

[51] The relevant language of "involve, relate to, or reference" comes from Commission regulation 40.11. This language cannot be broader than the statutory language that is simply "involves". By definition, if the regulation applied more broadly than the statute, it would *per se* violate the APA and be invalid.

U.S.C § 7a-2(c)(5)(C)(i).[52] Those enumerated activities are: an "(I) activity that is unlawful under any Federal or State law; (II) terrorism; (III) assassination; (IV) war; (V) gaming; or (VI) other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest." *Id.* The discretionary use of this special rule for event contracts is implemented in the Commission's Regulations. 17 C.F.R. § 40.11, which provides that "the Commission *may determine*" that a certain contract "may involve" one of the enumerated activities and subject that contract to a 90-day review period after which it "shall issue an order" with its determination.[53] 17 C.F.R. § 40.11(c).

The CEA's special rule for event contracts applies to contracts that "involve" one of the six enumerated activities: an "(I) activity that is unlawful under any Federal or State law; (II) terrorism; (III) assassination; (IV) war; (V) gaming; or (VI) other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest." 7 U.S.C § 7a-2(c)(5)(C)(i)(I)-(VI). These specific examples demonstrate that the term "involves" in the statute (and application of the special rule) refers to the actual "occurrence, extent of occurrence, or contingency" that forms the underlying basis for the contract to be traded; and not the trading of the contract itself.

The statute's second enumerated activity is "terrorism," and thus, a contract that "involves" terrorism is subject to the CEA's special rule for event contracts. An event contract will involve terrorism if the underlying event that forms the basis of the contract is terrorism; the act of trading on a contract itself is not terrorism. The same is true for the third and fourth enumerated activities. An event contract will "involve" assassination when the underlying event that forms the basis of the contract is assassination; the act of trading itself is obviously not assassination. An event contract will "involve" war when the underlying event that forms the basis of the contract is war; the act of trading itself is obviously not war. This common sense understanding is explicit in the statute. The statute's first and the sixth enumerated activities are an "*activity* that is unlawful under any Federal or State law" and "other similar *activity* determined by the Commission, by rule or regulation, to be contrary to the public interest." (emphasis added) The noun "activity" makes it clear that the statute is referring to the underlying event, not to the *activity* of trading on the contract.[54] Thus, the statute is clear that an event contract "involves" an

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[52] If the Commission chooses to review an event contract to determine whether it is contrary to the public interest and finds that a listed event contract is "contrary to the public interest," that contract may not be "listed or made available for clearing or trading on or through a registered entity." 7 U.S.C § 7a-2(c)(5)(C)(ii).

[53] As interpreted by former Commissioner Dan Berkovitz, regulation 40.11 mirrors the statute, 7a-2(c)(5)(C), and sets forth the process for the Commission to determine whether a specific event contract is contrary to the public interest. Statement of Commissioner Dan M. Berkovitz Related to Review of ErisX Certification of NFL Futures Contracts, April 7, 2021, available at https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement040721#_ftn27 ("Berkovitz Statement").

[54] Although this is abundantly clear with regard to five of the six enumerated events, an argument might be mounted that it is not true with regard to the fifth of the enumerated activities, gaming. This argument fails, as it is a basic tenet of both semantic and substantive statutory interpretation that a single usage of a word, in this case "involve",

enumerated activity when the underlying event that forms the basis of the contract, not the trading on the contract, involves the activity.

The statute's first enumerated activity ("activities that are illegal under federal or state law") further buttresses the conclusion that it is the underlying event that forms the basis of the contract that is relevant to the special rule and not the act of trading itself. If "involves" means that the trading on the contract is the enumerated event, that would mean that CEA's special rule applies to trading on a contract *when the trading on the contract itself already violates federal law*. Recall that the special rule does not prohibit such contracts, it merely authorizes the Commission to make that determination. It would be odd for Congress to make a federal law that makes trading on a certain contract illegal, but nonetheless say listing that contract is prohibited only if the CFTC determines that it is against the public interest. Once Congress made it illegal, it is unlikely it would have turned around and allowed it unless the CFTC agrees that the activity is disfavored.

Instead, it is abundantly clear that the enumerated activity of "illegal under federal law" means that the underlying event that forms the basis of the contract is illegal under federal law, not that the trading on that contract is illegal under federal law. An example of a contract that would fall under this first enumerated activity is a contract on the number of people that commit tax evasion. Tax evasion is a felony under I.R.C. § 7201. Trading on the contract is obviously not tax evasion. Nonetheless, that does not matter. The event in that contract is an activity that is illegal under federal law. The fact that trading on the contract is not illegal under federal law is irrelevant, because whether the CEA's special rule for event contracts applies to an event contract is determined based on whether the underlying event that forms the basis of the contract is an enumerated activity, not the act of trading on the contract.[55]

Because it is the underlying event that forms the basis of the contract that is the only trigger of the CEA's special rule for event contract review, political control event contracts are clearly not included in that rule. The event that underlies these contracts is the political control of the United States Congress by a political party. Political control of government by a political party is obviously not illegal under federal or state law. It is not an activity that the Commission has determined to be contrary to the public interest. Nor is it terrorism, assassination, war, or a game. As such, political control contracts are not included in the narrow reach of the CEA's special rule

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will not have two meanings, one for items 1, 2, 3, 4, and 6 on a list, and a second meaning for item 5 on that same list.

[55] The rare exception to this would be when the act of trading a contract itself is prohibited, as is the case for contracts "for the sale of motion picture box office receipts (or any index, measure, value, or data related to such receipts) or onions for future delivery" which are expressly prohibited in the Act. 7 U.S.C § 13-1. Trading a political control contract, however, is not prohibited by the Act nor is the underlying event illegal.

for certain, enumerated activities and the rule and relevant regulations (17 C.F.R. § 40.11) does not apply.[56]

Additionally, the activities that are enumerated can be seen as all involving an undesirable activity. Terrorism, war, assassination, illegal activity, and gaming are activities that can be considered "undesirable". The sixth activity too is essentially any other activity that the Commission considers to be undesirable. Political control is not one of those activities.

However, even if one did believe that the Commission should consider whether trading on the contract itself is part of "involve", the Contracts would still not involve either gaming or illegal activity.

A. Gaming

Elections and political control are not games

Unlike games, in which the underlying activity has no inherent economic value apart from the money wagered on it, political control has an obvious and large economic impact, as it heavily influences expectations and the likelihood of public policy change. As Gregory Kuserk noted, unlike games, "Elections are events that are very important to the public, and there is a very strong public interest in having accurate data regarding elections."[57] Kalshi detailed as much in dozens of pages of evidence provided to the Commission, drawing on private and university research, policymaker and industry testimony, and the financial press.[58] Many public comments by retail, industry, and academia have confirmed as much.[59]

Kalshi's contracts do not involve gaming. It involves the partisan affiliation of the Speaker of the U.S. House of Representatives and the U.S. Senate's President *pro tempore*, which are not

[56] The Commission in the Nadex order took a very expansive view of the authority that the CEA conferred on it with the special rule for event contracts. The Nadex Order stated simply "the legislative history of CEA Section 5c(c)(5)(C) indicates that the relevant question for the Commission in determining whether a contract involves one of the activities enumerated in CEA Section 5c(c)(5)(C)(i) is whether the contract, considered as a whole, involves one of those activities." However, the legislative history that the Commission pointed to back then is of the weakest kind, a simple colloquy between two senators about preventing contracts on game outcomes, and certainly not enough to override the clear semantic and substantive indications in the statute itself as to what it means. The Commission should not reinforce a flawed legal position from a decade ago.
[57] Public Comment by Gregory Kuserk. Available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=70754.
[58] Memorandum in Support of Kalshi's Political Control Contracts, submitted to Division of Market Oversight (DMO) March 28, 2022.
[59] See, for example, public comments by Chicago Booth school Professor Michael Gibbs and Susquehanna International Group Special Counsel David Pollard. Available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69704 and https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=70743.

determined through or relate to games of chance, or games of skill.[60] Elections are not games, full stop. Indeed, the *Nadex Order* did not identify political elections themselves–the core of American democracy–as being a game.[61]

Trading on Congressional control is not gaming

The *Nadex Order* asserted that gaming is equivalent to placing a wager or bet, and it cited a federal statute that defined the term bet or wager as "the staking or risking by any person of something of value upon the outcome of a contest of others."[62] It further concluded that this is the same as taking a position on a Congressional control contract. If taking a position on a Congressional control contract is equivalent to a 'wager' or 'bet' because it places money on an event's outcome, that would imply that taking a position in any event contract is also equivalent to a 'wager' or 'bet'.[63] This would imply that event contracts themselves violate state gambling laws. This is incorrect. While gambling is illegal in many states and interstate betting is prohibited, event contracts are legal in all jurisdictions. Political control is also not a "contest" even if it indirectly involves competition. Trading on an event contract is also not the same as a "bet" in practice; as former Commissioner Quintenz wrote:

> Gaming describes wagering money on an occurrence that has no inherent economic value itself other than the money wagered on its outcome. For instance, wagering money on roulette or blackjack should be considered gaming because there is no economic significance of the activity apart from the wager itself. Speculation, on the contrary, is risking value where the underlying activity has economic consequences, which then means the speculative activity creates valuable societal and economic benefit from a price-discovery and risk transfer function for those exposed to the risk of that underlying activity.[64]

B. Illegal activity under federal or state law

Kalshi's Contract does not involve illegal activity. Taking a position in an event contract is not equivalent to, as states or the federal government may define it, "gaming" "gambling" or "wagering". This is not true legally (interstate betting is illegal, and betting is illegal in many states; event contracts are legal in all jurisdictions) or in practice. As then Commissioner Quintenz wrote in his *ErisX* statement,

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[60] Kalshi's Congressional control submission, available at: https://www.cftc.gov/sites/default/files/filings/ptc/22/08/ptc082422kexdcm001.pdf. See page 9.
[61] In the Matter of the Self-Certification by North American Derivatives Exchange, Inc. of Political Event Derivatives Contracts and Related Rule Amendments under Part 40 of the Regulations of the Commodity Futures Trading Commission (April 2, 2012), available at: https://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/nadexorder040212.pdf.
[62] *Nadex Order* at 3
[63] Some commentators appear to equate speculation with gaming and do not sympathize with the important role speculation plays in price discovery and risk transfer. Many commodity futures markets, such as those in oil, often feature large amounts of speculative behavior yet clearly do not constitute "gaming" contracts.
[64] See Public Comment on Kalshi Contracts from Brian D. Quintenz, available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=70786

> Whereas bettors participate in games of pure chance, whose sole purpose is to completely reward the winner and punish the loser for an outcome that would otherwise provide no economic utility (think roulette), speculators in the derivatives market participate in non-chance driven outcomes that have price forming impacts upon which legitimate businesses can hedge their activities and cash flows.[65]

Taking a position in an event contract is also not equivalent to gaming, as defined by those laws, because such laws are not operative on CFTC-regulated products. Federal law definitions of gaming, betting, and wagering (such as the Wire or Unlawful Internet Gambling Enforcement Act) carve out exemptions for CFTC-regulated products.[66] This includes the definition of gaming cited by the *Nadex Order*. Many states' gaming provisions also include such exemptions.[67] States' gaming provisions are preempted explicitly as well by the Commodity Futures Modernization Act ("CFMA").[68] Congress has repeatedly recognized that futures and other derivative contracts serve economic purposes and, therefore, state laws that purport to prohibit or regulate futures or derivative contracts (including gaming laws) do not violate the CEA and are preempted. There is a critical distinction between betting and legitimate, federally recognized and regulated financial activity. Election contracts that are designed for price formation and hedging on a derivative exchange constitute legitimate financial activity. Therefore, it would be incorrect to give consideration of the definitions under state and federal gambling laws. As these laws themselves recognize, they do not apply to contracts like Kalshi's.

Indeed, a key purpose of the CEA and granting the CFTC exclusive jurisdiction over futures was to authorize and promote trading of futures contracts notwithstanding state laws that might purport to prohibit them as gambling. The only way in which state law is relevant is if the activity underlying the event contract violates state law, such as a contract on murder or state income tax evasion. In that case, Congress wanted to make sure that a futures contract would not legitimize that activity without the Commission considering whether trading the contract would be contrary to the public interest.[69]

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[65] See Statement of Commissioner Brian D. Quintenz on ErisX RSBIX NFL Contracts and Certain Event Contracts, "Any Given Sunday in the Futures Market" (Mar. 25, 2021), available at https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement032521)

[66] The Unlawful Internet Gambling Enforcement Act of 2006 "do[es] not include…any transaction conducted on or subject to the rules of a registered entity or exempt board of trade under the Commodity Exchange Act". 31 U.S.C. § 5362(1)(E) (2006).

[67] For example, Washington state RCW 21.30.030 clarifies that CFTC-regulated transactions are not affected by its anti-bucket shop provisions.

[68] 7 USC 2(a)(1) covers exclusive CFTC jurisdiction over futures and swaps, so any state laws that would purport to regulate or prohibit futures or swaps would be preempted.. The CEA also preempts state gaming laws with respect to derivative products that are excluded or exempt from the CEA. *See* 7 USC 16(e)(2) ("This Act shall supersede and preempt the application of any State or local law that prohibits or regulates gaming or the operation of bucket shops . . . in the case of --- (A) an electronic trading facility excluded under section 2(e) of this Act; and (B) an agreement, contract, or transaction that is excluded from this Act under [provisions of] the Commodity Futures Modernization Act of 2000, or exempted under section 4(c) of this Act.").

[69] Congress obviously would not be concerned about legitimizing elections. Even if the focus comes to legitimizing the trading on elections as part of the ultimate public interest analysis, the Commission has already crossed that

Additionally, many broad state gambling laws would define *all* event contracts as gaming, as well as many other futures, swaps, and options. States like New Hampshire, for example, define gambling as having "to risk something of value upon a future contingent event not under one's control or influence."[70] If the Commission were to find that the contracts involve gaming on the theory that New Hampshire state law prohibit gambling/wagering on elections, that would mean "wagering" is equivalent to taking a position on any event contract, which in turn would require that the Special Rule is triggered by *any* event contract because many New Hampshire's and many other state's gambling laws prohibit wagering on the outcome of *any* future event. That interpretation was clearly not Congress' intent. Instead, Congress narrowly defined a small number of event contracts whose underlying event involves an unsavory activity that Congress did not want the CFTC to legitimize without evaluating whether trading a contract on that activity would be contrary to the public interest (as per the text, which isolates a selected set of enumerated events to target).

Time and time again, Congress and states have indicated that the Commission has the decision making power over derivatives market issues, including event contracts, and approval of Kalshi's contract has no involvement with gaming any more than an event contract on the growth of Gross Domestic Product or whether a bill becomes law. If the Commission chooses to isolate these contracts as involving gaming but not those many others, it would be acting contrary to Commission precedent and in an arbitrary manner.

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bridge by long permitting market participants to trade such contracts pursuant to no action letters awarded to unregulated markets, such to Iowa Electronic Markets and PredictIt. The notion that allowing a regulated exchange to offer the contracts is what changes the public interest analysis is insupportable.

[70] New Hampshire Rev Stat § 647:2(II)(d) (2017); see also Alaska Stat. § 11.66.280(3) ("gambling" means that a person stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under the person's control or influence, upon an agreement or understanding that that person or someone else will receive something of value in the event of a certain outcome"); Oregon Rev. Stat. § 167.117(7) ("'Gambling' means that a person stakes or risks something of value upon the outcome of a contests of chance or a future contingent event not under the control or influence of the person . . .").

APPENDIX E - OTHER CONSIDERATIONS FOR THE PUBLIC INTEREST

This section will be split into two sections: first, why the Contract is affirmatively in the public interest; and second, addressing objections thereof from the comment file.

A: Kalshi's Contract will provide significant social value

The contracts have a strong economic purpose.

The hedging and price basing use cases are myriad and would allow individuals to take advantage of a product that is currently strongly in demand. Elections cause extremely large economic impacts and are some of the biggest risks that many businesses will encounter. This is detailed at great length in Appendix B and has been validated by dozens of public comments from retail, business, academia, and members of industry.

The contracts would serve as useful tools for voters, the media, and the public that would fight disinformation, improve election integrity, and improve decision making including policy making

The demand for accurate information surrounding elections is enormous–and valuable. This is why so many Americans turn to election models and updates offered by *FiveThirtyEight*, *The New York Times*, and *The Economist* around election time for advanced election models. Unregulated exchanges created by the Commission, such as PredictIt, are also very popular for this purpose. Its markets are consistently referenced as informative and useful by major, credible news organizations like *CNN*, *CNBC*, *Politico*, *Bloomberg*, *The Economist*, *The Wall Street Journal*, *The Washington Post*, and *The New York Times*, across sections like *The Upshot*, *DealBook*, opinion columns, and the technology section. In addition, Predictit has repeatedly been cited by prominent political officials and thinkers. Examples include economists like Jason Furman, previously President Obama's Council of Economic Advisors Chair; Nobel Laureate Paul Krugman, a Professor at The Graduate Center and a columnist for *The New York Times*; and data scientists/reporters like Nate Silver, founder and editor-in-chief of *FiveThirtyEight*.[71][72]

In a public comment, Furman also emphasized the importance of election markets for policy making. As he wrote,

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[71] Examples of this include: La Monica, Paul R. "Joe Biden's Fed conundrum: Stick with Jerome Powell or let him go?" CNN. 2021; Heath, Thomas. "These gamblers are putting money on the outcome of the impeachment inquiry." Washington Post. 2019; Contrera, Jessica. "Here's how to legally gamble on the 2016 race." Washington Post. 2016; The New York Times search results: https://www.nytimes.com/search?query=PredictIt; https://twitter.com/NateSilver538/status/1242845027014971394; https://twitter.com/jasonfurman/status/1460404350975680514; and https://twitter.com/paulkrugman/status/1177602108763316227?lang=en.

[72] Public comment letter by Jason Furman. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69708.

> …in the White House I, along with other members of the economic team, would regularly refer to prediction markets on electoral outcomes and specific events to help inform our understanding of how political and economic developments would affect economic policymaking. In understanding the risks of a government shutdown or debt limit showdown, for example, it would be helpful to understand what informed traders with money at stake would expect—a method of understanding probabilities that research has consistently shown is superior to other ways of summarizing and updating based on information.[73]

Professor Furman went on to detail the other benefits for the contract, including helping academic researchers and educational benefits, a point also made by others, including Sebastian Strauss. PredictIt also has been used to promote civic engagement by undergraduates. Berg and Chambers (2016) found that using prediction markets, including PredictIt, increased user interest in civics and user news consumption.[74]

The preponderance of the academic literature suggests that existing media has misaligned incentives when it comes to reporting on a given party's chances of political control. This often results in bad reporting. For example, University of Pennsylvania professor Philip Tetlock evaluated the statements made by pundits and found that 15 percent of predictions claimed to be "impossible" did indeed occur and 27 percent of predictions claimed to be a "sure thing" did not.[75]

By providing an instant check against pundits, a market-based price created by the contracts can aid information aggregation for the public. For the numerically-inclined or the financially-minded, a viewer can see that one commentator is asserting that party X is a "sure thing" but the Kalshi contract gives them only (e.g.) a 20% chance of winning. They now have a competing alternative to that pundit's information.

Markets tend to be more accurate than any pundit or forecasting alternatives. The efficient, price-discovering nature of markets in a wide range of contexts is a well-substantiated finding in academic research.[76][77][78][79] The collective wisdom of many people who have a direct monetary stake in the outcome results in a valuable price signal. Weather derivatives and agricultural

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[73] *Ibid*
[74] Berg & Chambers. *Bet Out the Vote: Prediction Markets as a Tool to Promote Undergraduate Political Engagement*. 2018. Journal of Political Science Education.
[75] Philip Tetlock. "Expert Political Judgment". 2005.
[76] Justin Wolfers and Eric Zitzewitz. 2004. "Prediction Markets." *Journal of Economic Perspectives*.
[77] Kenneth J. Arrow, Robert Forsythe, Michael Gorham, Robert Hahn, Robin Hanson, John O. Ledyard, Saul Levmore, Robert Litan, Paul Milgrom, Forrest D. Nelson, George R. Neumann, Marco Ottaviani,1 Thomas C. Schelling,1 Robert J. Shiller, Vernon L. Smith, Erik Snowberg, Cass R. Sunstein, Paul C. Tetlock, Philip E. Tetlock, Hal R. Varian, Justin Wolfers, and Eric Zitzewitz. 2008. "The Promise of Prediction Markets." *Science Magazine*.
[78] Joyce Berg, Forrest D. Nelson, and Thomas A. Reitz. 2008. "Chapter 80 Results from a Dozen Years of Election Futures Markets Research." Handbook of Experimental Economics Results.
[79] Georgios Tziralis and Ilias P. Tatsiopoulos. 2007. "Prediction Markets: An Extended Literature Review." *The Journal of Prediction Markets*.

futures are better at predicting the weather than meteorologists.[8081] Markets trading on the reproducibility of scientific research are better at discovering which papers will reproduce than experts, who do no better than chance.[82] Most importantly, research studying IEM and PredictIt have confirmed that markets provide more accurate information than traditional forecasting methods.[8384]

Kalshi's contracts would provide a visible, well-trusted benchmark against which to evaluate a pundit's predictive power. As Professor Tetlock observed, "prudent consumers should become suspicious" when they confront a public record of poor performance relative to the market. In his words, "Unadjusted ex ante forecasting performance tells consumers in the media, business, and government what most want to know: how good are these guys in telling us what will happen next?"[85]

The contracts would not serve as threats to either election integrity or the perception thereof; instead, it would improve them both (also discussed at length in Appendix G, as part of Core Principle 3 analysis)

It is important for the Commission to engage with the evidence on election integrity rather than speculate. The *Nadex Order's* suggestion that voters could be incentivized to switch their votes, and thus harm election integrity, was outright speculative in 2012, and has since been disproven by the success of a Commission-sanctioned but unregulated market, PredictIt. PredictIt has grown to more than a billion shares traded–with little hedging participants because of the Contract's low position limits–without any claim of, let alone proof of, election impropriety driven by those markets.[86] Election trading is also common over-the-counter among the largest financial institutions and high net worth individuals.[87] Today, election trading remains alive and well in other democracies like the United Kingdom, Australia, Ireland, and New Zealand, without documented attempts at–let alone successful–distortion of the electoral process. Several commenters confirmed this, including Eric Crampton, the academic advisor to iPredict, a New Zealand based political prediction market:

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[80] Richard Roll. 1984. "Orange Juice and Weather." *The American Economic Review*.
[81] Matthias Ritter. 2012. "Can the market forecast the weather better than meteorologists?" *Economic Risk*.
[82] Anne Dreber, Thomas Pfeiffer, Johan Almenberg, Siri Isaksson, Brad Wilson, Yiling Chen, Brain A. Nosek, and Magnus Johannesson. 2015. "Using prediction markets to estimate the reproducibility of scientific research." *PNAS*.
[83] Joyce Berg, Forrest D. Nelson, and Thomas A. Reitz. 2008. "Chapter 80 Results from a Dozen Years of Election Futures Markets Research." *Handbook of Experimental Economics Results.*
[84] Joyce Berg, Forrest D. Nelson, and Thomas A. Reitz. 2006. "Prediction market accuracy in the long run." *International Journal of Forecasting*.
[85] *Ibid*
[86] PredictIt. https://www.predictit.org/insight/aHR0cHM6Ly9hbmFseXNpcy5wcmVkaWN0aXQub3JnL3Bvc3QvMTg4NzQ3ODgwMDQzL2EtcHJlZGljdGFibGUtbmV3c2xldHRlci0xMTExOSNtb2JpbGU=
[87] Public Comment by Angelo Lisboa. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69662

> What experience we had with iPredict suggests CFTC really doesn't have anything substantial to worry about in allowing contracts on political events. If anything, they heightened voter engagement. The CE [Chief Executive] of iPredict even featured on the nightly news during the election, giving the latest on election market prices. And for that brief period, whenever blowhard partisans insisted that some outcome was going to happen, people could just point to the iPredict price on the event and ask them why they thought that price was wrong, and whether they'd actually put their money where their mouth was. It was a remarkable era. iPredict inflation forecasts (they also had markets on inflation going out several years - it was so very good) wound up being noted in our Reserve Bank's Monetary Policy Statements. I desperately miss it. I envy the opportunities Americans could have if CFTC takes a sensible approach to regulation.[88]

Or Dustin Moskovitz, a co-founder of Facebook and founder of Asana:

> Of course, it's important to validate that these contracts would not conflict with the public interest, and specifically the integrity of our elections. I am confident, however, they would not do so. Similar markets not only exist in many liberal democracies like the UK, but create a thriving scene that actually encourages voter participation and engagement.[89]

The economic impacts of elections themselves dwarf the value of Kalshi's contracts many, many times over. Likely trillions in stock value are deeply dependent on elections; entire sectors, firms, and places can be favored by a candidate for office; and almost every actor in the economy is directly affected by tax rates. The marginal addition of Kalshi's contract will not change whether or not elections are events of enormous consequence, and thus not increase anyone's incentive meaningfully to attempt manipulation of several hundred elections across the United States. American elections are not readily susceptible to manipulation, full stop, thanks to their decentralized nature, strong political norms, and laws protecting the vote. Elections, unlike many other reference markets or events that have CFTC-derivatives trading on them, are governed by multiple law enforcement agencies whose very existence is to prevent and detect election manipulation and fraud. This includes the Federal Election Commission, the federal Department of Justice, state election commissions, state Secretaries of State, and state ethics commissions. History has shown that these agencies are very good at their job.

The only groups that can directly affect the leadership decisions are the U.S. Senate and U.S. House of Representatives. Members of these groups are extremely unlikely to attempt intentional manipulation of the leadership of their chambers merely to settle the contracts a certain way. Their finances are heavily monitored and subject to public disclosure and scrutiny, and Kalshi does not permit them, their close associates, or families to trade, along with numerous other related political actors. Kalshi is taking especially stringent action here, as detailed in Appendix B. Members of Congress also have a sworn duty to represent their constituents and have strong

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[88] Public Comment by Eric Crampton. Available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69738.
[89] Public Comment by Dustin Moskovitz. Available athttps://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69716.

incentives not to manipulate electoral processes for private gain. This should clarify any claim that this could de-legitimize elections internal to Congress itself.

Other related officials (like election officials, vote counters) also take such oaths and are heavily monitored because of the strong public interest in maintaining election integrity. In practice, the information gained by being a vote counter is of near-zero marginal value to determining whether or not a given party wins a given chamber of Congress.

As further evidence, consider the history of political control contracts. University of Michigan professor Paul Rhode and Wake Forest professor Koleman Strumpf conducted a systematic review of the history of prediction markets both domestically and abroad, documenting their emergence back to "16th century Italy, 18th century Britain and Ireland, 19th century Canada and 20th century Australia and Singapore."[9091] In the United States, they were popular from the post-Civil War period until the Great Depression tarnished the image of Wall Street in the public imagination. They wrote,

> Although vast sums of money were at stake, we are not aware of any evidence that the political process was seriously corrupted by the presence of a wagering market. This analysis suggests many current concerns about the appropriateness of prediction markets are not well founded in the historical record.[92]

Prices are not able to be manipulated to the give the false impression of momentum

One may also imagine that a coordinated group of individuals may conspire to manipulate market prices to give the false impression of candidate "momentum," thus potentially harming the democratic process. This concern has been tested several times by researchers on far smaller markets, who have concluded that all attempts at manipulation have failed.

Koleman and Strumpf in a later paper examined American political prediction markets and found that no previous effort at manipulation was capable of sustaining anything more than fleeting price movements. They wrote, "we find little evidence that political stock markets can be systematically manipulated beyond short time periods."[93] Moreover, the markets examined were much smaller and thus even more prone to manipulation than a fully regulated, liquid market like one offered by a Designated Contract Market. As a result, manipulation on Kalshi's market is even less plausible. Indeed, as George Mason University professor Robin Hanson and University of California at Santa Barbara professor Ryan Oprea found, one major reason why political

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[90] Paul Rhode and Koleman Strumpf. 2012. "The Long History of Political Betting Markets: An International Perspective." Strumpf also was a signatory to a supportive public comment. *See* Public comment 69735. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69735&SearchText
[91] Paul Rhode and Koleman Strumpf. 2003. "Historical Prediction Markets: Wagering on Presidential Elections".
[92] Paul Rhode and Coleman Strumpf. 2003. "Historical Prediction Markets: Wagering on Presidential Elections".
[93] Paul Rhode and Koleman Strumpf. 2005. "Manipulating Political Stock Markets: A Field Experiment and a Century of Observational Data."

contracts are resistant to manipulation attempts is that any attempt to manipulate prices induces informed counter-parties to enter on the other side of the market.[94] In fact, the greater the attempts to push up one side's prices, the greater the returns to becoming an informed trader. As University of Michigan economist Justin Wolfers and Dartmouth economist Eric Zitzewitz wrote regarding previous political contracts, "none of these attempts at manipulation had a discernible effect on prices, except during a short transition phase."[95] This finding was also supported by over two dozen economists in their 2012 Nadex letter and by many letters supporting Kalshi's submission.[9697]

This information–that billions of dollars have been traded on contemporary political control contracts without triggering manipulation–was not available to the Commission the last time it considered similar event contracts in 2012. Although another political contract trading venue, the Iowa Electronics Market, received a no-action letter in 1992, IEM is smaller and harder to access by individuals not associated with the University of Iowa. Now, far more money is known to have been traded on election outcomes without any adverse consequences.

The contracts would combat illegal behavior, improving the perception of election integrity

Americans can also readily access offshore platforms using a virtual private network such as Betfair.[98] Betfair had more than $500 million traded on the 2020 election.[99] These platforms are not registered with the Commission as DCMs, but frequently host such markets. There are no indications that the markets caused or induced an attempt to manipulate elections, let alone a successful manipulation. However, if the Commission is concerned that election markets could nevertheless create election integrity threats, it is imperative to shift trading to an exchange compliant with the Core Principles, with insider trading protections, surveillance, and KYC. In this way, among others, approving the contracts would improve, not harm, election integrity and the perception of it.

The contracts would promote the public perception in election integrity by providing an accurate and competing tool for election forecasting

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[94] Robin Hanson and Ryan Oprea. 2008. "A Manipulator Can Aid Prediction Market Accuracy." *Economica*.
[95] Justin Wolfers and Eric Zitzewitz. 2006. "Prediction Markets in Theory and Practice".
[96] *Nadex* public comment by Zitzewitz et al. Available at https://www.cftc.gov/sites/default/files/stellent/groups/public/@rulesandproducts/documents/ifdocs/ericzitzewitzltr020312.pdf.
[97] For example, the public comment by David Rothschild and company. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69735.
[98] Comment letter by policy commentator Matt Bruenig. Available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69670.
[99] Seen at this link: https://www.actionnetwork.com/politics/2020-election-odds-trump-vs-biden-presidential-race-sportsbook-rovell

Studies consistently show that polarization and partisanship has increased dramatically in the last few decades: every year, greater numbers of people say they believe people from the opposite party are "immoral" and express other hostile sentiments. More concerning than mere hostility is how partisan antipathy can create alternative sets of facts--voters from different parties simply believe two sets of facts about the world. It is from this miasma where conspiracy theories about stolen elections emerge that damage the electoral process.

Prediction markets can help remedy this problem. Economists John Bullock, Alan Gerber, Seth Hill, Gregory Huber conducted an experiment in 2013 and found that partisan gap in beliefs (e.g. if Republicans believe a statement is true with probability 80%, and Democrats believe it with probability 35%, then the partisan gap is 45 percentage points) shrunk by a shocking 55 percent when participants were given a financial incentive for being right.[100] If they were given a lesser financial prize for answering "unsure" (versus none for being wrong and a greater amount for getting it correct), the gap shrunk by about 80 percent.

The reasoning roughly tracks as follows: when no money is at stake, people conflate their beliefs as preferences. For example, a highly partisan liberal may say that a Democratic Party candidate is definitely going to win the 2024 presidential elections this year (a belief), when in reality they merely want the Democrat to win the championship (a preference). However, that same individual when challenged to trade money on that "definite" prediction will re-evaluate and calculate the odds and decide whether or not they should take that trade. In short, when no money is at stake, people express beliefs as mere signaling, lending itself to heavy partisan bias. When money is at stake, they are able to differentiate their beliefs from their preferences. In other words, the partisan reality gap shrinks, and individuals who trade on election markets become more attune to facts and less to partisan groupthink.

In conclusion, the Contract is not contrary to the public interest; rather, it strongly supports the public interest, as demonstrated by the evidence above. The Contract will improve asset pricing, provide risk management opportunities, enhance election integrity and trust, and shift trading activity to regulated exchanges.

B: Addressing objections

Commenters were overwhelmingly in support of Kalshi's contract; nonetheless, the Exchange takes concerns seriously. Some commenters also raised concern that price manipulation is possible because of insider information. Kalshi maintains that there are near zero actors with inside information on the result of the totality of the elections in the United States House or Senate; nonetheless, in its new submission, Kalshi is proactively prohibiting a host of political

[100] John Bullock, Alan Gerber, Seth Hill, Gregory Huber. 2013. "Partisan Bias in Factual Beliefs about Politics."

actors from participating in the markets along with additional surveillance, as listed in Appendix B.

Another concern raised was that, even if the contract does not genuinely make elections more manipulable, it may increase the perception that they are. The Commission must rely on evidence in this sort of deliberation rather than feeling. This perception problem is not an issue in other nations with large-scale election trading (such as the United Kingdom), and in fact, probabilities created by offshore and unregulated exchanges (and discussions of the hundreds of millions traded) are regularly reported on by the political and financial press.[101] Election trading is already significant in the United States among large-scale institutions over the counter (as testified to by commenter Angelo Lisboa) and by Americans using offshore/unregulated exchanges as well as by trading indirectly through traditional asset classes.[102] Rather, as discussed at length in Section A of this appendix, the contracts would promote election integrity rather than harm it

A small number of commenters argued that Kalshi's market could have its price manipulated, thus distorting the public perception of a race. The vast majority of these claims are unsubstantiated, though the letter provided by Dennis Kelleher of Better Markets does try and provide some evidence. Specifically, it argued:

> The proposed event contract is readily susceptible to manipulation… In her 2009 Harvard Law Review article "Prediction Markets and Law: A Skeptical Account," Professor Rebecca Haw Allensworth detailed how bad actors might manipulate prediction markets: 'Prediction markets are vulnerable to manipulation…First, they could profit by artificially lowering the trading price temporarily and purchasing shares to be sold at a higher price when the market returns to 'normal'. Second, they could try to affect the informational value of the market. For example, a candidate's supporter could purchase his shares at an inflated value, raising the perceived odds that he would win the election, and (hopefully) getting more voters to jump on the putative bandwagon'.[103]

There are several issues with this line of reasoning:

1. Critically, this is a misapplication of the cited research.
    a. Allensworth only cites one incident of successful manipulation, on an online exchange called TradeSports, referencing the case study on the incident conducted by Paul W. Rhode & Koleman S. Strumpf's, "Manipulating Political Stock

[101] There are scores of articles which could serve as examples, but some are: Mashayehki, Rey. "Betting markets called the presidential election more accurately than polls." *Fortune*. 2020. Kirshner, Alex. "How Offshore Oddsmakers Made a Killing off Gullible Trump Supporters." *Slate*. 2020; Yakowicz, Will. "Betters Have Wagered More Money on Trump vs. Biden Than Nevada Collected During the Super Bowl." *Forbes*. 2020; Bumbuca, Chris. "2020 U.S. presidential election expected to involve more than $1 billion in wagers." *USA Today*. 2020; Reuters Staff. "Betting markets give Trump slightly improved chances after debate." *Reuters*. 2020.
[102] Public Comment by Angelo Lisboa. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69662
[103] Public Comment by Dennis Kelleher. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=70788

Markets: A Field Experiment and a Century of Observational Data." However, Rhode and Strumpf conclude the opposite of Allensworth/Better Markets: that even the attempt to manipulate TradeSports' small, unregulated market only succeeded in changing prices briefly, and conclude, "In the cases studied here, the speculative attack initially moved prices, but these changes were quickly undone and prices returned close to their previous levels. We find little evidence that political stock markets can be systematically manipulated beyond short time periods."

b. The other study cited, by Deck et al., does find researchers successfully manipulate a small exchange of *their own creation, with made up assets, with a mere eight traders*.

2. The vast majority of research on this issue demonstrates how shockingly resilient such markets are to manipulation even in spite of no regulation. This is discussed at length also in Appendix G, which details how the Contract is in compliance with Core Principle 3.
   a. Like Allenworth, Deck et al. acknowledge this.[104] They wrote, "Wolfers and Zitsewitz (2004, p. 119) assert that 'The profit motive has usually proven sufficient to ensure that attempts at manipulating these [prediction] markets were unsuccessful.' Failed attempts at manipulating markets include political candidates betting on themselves (Wolfers and Leigh 2002) and bettors placing large wagers at horse races (Camerer 1998). Hansen, et al. (2004) did successfully manipulate election prediction markets, but the effects were short lived. In fact, Rhode and Strumph (2009, p. 37) provide an extensive discussion of attempts to manipulate political markets and conclude that 'In almost every speculative attack, prices experienced measurable initial changes. However, these movements were quickly reversed and prices returned close to their previous levels.'" They go on to cite more experiments that showed resilience to manipulation, including that of Ryan Oprea and Robin Hanson, two supportive commenters.[105] They do not find any research that shows any successful manipulation that is not short-lived.
3. The research cited by Better Markets only focused on small-scale, generally illiquid, unregulated online prediction markets. A highly regulated market that can onboard institutional clients is even less likely to be a victim of a particular manipulator, as markets incentivize speculators to reverse any potential price impact a manipulator could have. Indeed, Hanson and Oprea found, one major reason why political contracts are resistant to manipulation attempts is that any attempt to manipulate prices induces informed counter-parties to enter on the other side of the market. In fact, the greater the attempts to jack up one side's prices, the greater the returns to becoming an informed trader. As University of Michigan economist Justin Wolfers and Dartmouth economist

[104] Deck, C., Lin, S., & Porter, D. (2010). Affecting policy by manipulating prediction markets: Experimental evidence. ESI Working Paper 10-17.
[105] Hanson, R. and Oprea, R. "A Manipulator Can Aid Prediction Market Accuracy," Economica, 2009, 76, 304-314.

Eric Zitzewitz wrote regarding previous political contracts, "none of these attempts at manipulation had a discernible effect on prices, except during a short transition phase." This finding was also noted by over two dozen economists in their 2012 Nadex letter and by many letters supporting Kalshi's submission.

APPENDIX F (CONFIDENTIAL) – SOURCE AGENCY

The data which is used to determine the Expiration Value of the Contract is published by the Library of Congress, the official government repository of information for the public since 1800.

Congress.gov is an affiliate of the Library of Congress and contains a record of all members of Congress, their leadership status, and party membership. It updates every weekday morning at 8:00 AM with the complete record of the previous day's activities.

As stated on the Congress.gov website:

> Congress.gov is the official website for U.S. federal legislative information. The site provides access to accurate, timely, and complete legislative information for Members of Congress, legislative agencies, and the public. It is presented by the Library of Congress (LOC) using data from the Office of the Clerk of the U.S. House of Representatives, the Office of the Secretary of the Senate, the Government Publishing Office, Congressional Budget Office, and the LOC's Congressional Research Service.
>
> Congress.gov is usually updated the morning after a session adjourns. Consult Coverage Dates for Congress.gov Collections for the specific update schedules and start date for each collection.
>
> Congress.gov supersedes the THOMAS system which was retired on July 5, 2016. Congress.gov was released in beta in September 2012. The THOMAS URL was redirected to Congress.gov in 2013. The beta label was removed in 2014.
>
> The scope of data collections and system functionality have continued to expand since THOMAS was launched in January 1995, when the 104th Congress convened. THOMAS was produced after Congressional leadership directed the Library of Congress to make federal legislative information freely available to the public.
>
> Congressional documents from the first 100 years of the U.S. Congress (1774-1875) can be accessed through A Century of Lawmaking.[106]

[106] https://www.congress.gov/about

The information used to determine the Expiration Value of the Contract is highly visible. Any discrepancy between the true value and the reported values at the Source Agency would be swiftly detected and any individual who engaged in said manipulation of the Source Agency would likely be fired. Importantly, the Exchange has chosen to only use official government sources to determine the Expiration Value of the Contract. The Exchange understands that political control can often be hotly contested, with accusations that an election is improper. Moreover, the Exchange understands that news agencies frequently "call" the results of elections incorrectly. As a result, it does not use any news reporting in our determinations, nor the results of election certifications, as individuals may step down or resign prior to actually taking office. The Exchange thus relies on the official federal government report of who actually took office.

In summary, the data which will be used to determine the Expiration Value of the Contract is prepared by the Library of Congress, the official website of the United States Senate, and the official website of the Clerk of the House of Representatives, in a rigorous manner with multiple layers of checks in place to ensure the highest accuracy possible, and there are robust safeguards against any potential manipulation.

APPENDIX G (CONFIDENTIAL) – COMPLIANCE WITH CORE PRINCIPLES

Compliance with Core Principles

The Exchange has conducted a comprehensive analysis of the designated contract market core principles ("Core Principles") as set forth in Part 38 of the Act.[107] The Core Principles relevant to the Contract are outlined and discussed in further detail below:

Core Principle 2 - Compliance with Rules and Impartial Access: The Exchange has adopted the Rulebook, which provides the requirements for accessing and trading on the Exchange. Pursuant to Chapter 3 of the Rulebook, Members must utilize the Exchange's services in a responsible manner, comply with the rules of the Rulebook ("Rules"), cooperate with Exchange investigations, inquiries, audits, examinations and proceedings, and observe high standards of integrity, market conduct, commercial honor, fair dealing, and equitable principles of trade. Chapter 3 of the Rulebook also provides clear and transparent access criteria and requirements for Exchange Members. Trading the Contract will be subject to all the rules established in the Rulebook, which are aimed at enforcing market integrity and customer protection.

In particular, Chapter 5 of the Rulebook sets forth the Exchange's Prohibited Transactions and Activities and specifically prescribes the methods by which Members trade contracts, including the Contract. Pursuant to Rule 3.2, the Exchange has the right to inspect Members and is required to provide information concerning its business, as well as contracts executed on the Exchange and in related markets. Chapter 9 of the Rulebook sets forth the Exchange's Discipline and Rule Enforcement regime. Pursuant to Rule 9.2, each Member is required to cooperate with an Exchange investigation by making their books and records available to the Exchange. The Exchange's Market Regulation Department performs trade practice surveillance, market surveillance, and real-time market monitoring to ensure that Members adhere to the Rules of the Exchange. The Market Surveillance Department reserves the authority to exercise its investigatory and enforcement power where potential rule violations are identified.

Core Principle 2 also stipulates that an exchange shall establish means to provide market participants with impartial access to the market. Chapter 3 of the Rulebook, and Rule 3.1 in particular, provides clear and transparent access criteria and requirements for Members. The

[107] CFTC Rule 40.2(a)(3)(v) requires a "concise explanation and analysis of the product and its compliance" with core principles. The rule also allows the DCM to incorporate information contained in documents supporting or relied upon to reach these conclusions. We note that we have relied significantly on the rulemaking record for for CFTC Industry Filing 22-022: Review and Public Comment Period of KalshiEx Proposed Congressional Control Contracts Under CFTC Regulation 40.11, available at https://comments.cftc.gov/PublicComments/CommentList.aspx?id=7311. As a result, we incorporate the comment file for CFTC Industry Filing 22-022 into this submission.

Exchange will apply access criteria in an impartial manner, including through the application process described in Rule 3.1.

Core Principle 3 - Contract not Readily Susceptible to Manipulation:

Core Principle 3 and Rule 38.200 provide that a DCM shall not list for trading contracts that are readily susceptible to manipulation. The Exchange's marketplace and contracts, including this Contract, have been designed in accordance with this fundamental principle. The Exchange maintains various safeguards against outcome manipulation and other forms of manipulation, including, (i) automatic trade surveillance and suspicious behavior detection, (ii) Rulebook prohibition, Member certification, and notification, (iii) Member monitoring and know-your-customer verification, and (iv) sanctions. These safeguards render the Contract not readily susceptible to manipulation.

(i) **Automatic trade surveillance and suspicious behavior detection**: The Exchange's trade monitoring and market surveillance systems compute statistics using information from all trades that occur on the Exchange over a range of timeframes, ranging from per trade to the full history of trading activity. These statistics are geared towards identifying unusual trading activity and outlier behaviors. If the trade monitoring and market surveillance system identifies behavior deemed to be unusual, the Exchange's compliance personnel have the ability to investigate and determine applicable sanctions, including limits to or suspension of a Member's access to the Exchange.

(ii) **Rulebook prohibition, member certification and notification:** The Exchange's Rulebook includes various provisions that prohibit manipulative behaviors. As noted above in the discussion of Core Principle 2, the Exchange's Rulebook gives the Exchange the authority to investigate potential violations of its rules. Pursuant to Rule 3.2, the Exchange has the right to inspect Members' books and records, as well as contracts executed on the Exchange and in related markets. Pursuant to Rule 9.2, each member is required to cooperate with an Exchange investigation by making their books and records available to the Exchange for investigation. The Exchange's Market Regulation Department performs trade practice surveillance, market surveillance, and real-time market monitoring to ensure that Members adhere to the Exchange's rules. The Rulebook also imposes sanctions on Members who break rules. Potential penalties include fines, disgorgement, and revocation of membership in Kalshi. Only Members are allowed to trade on the Exchange, and the Exchange requires its Members to strictly comply with the Rulebook. Members cannot complete the account creation process and trade on the Exchange until they certify that they have read the Exchange's rules and agree to be bound by them.

In addition, the Exchange requires applicants for membership to represent and covenant that the applicant will not trade on any contract where they have access to material non-public

information, may exert influence on the market outcome, or are an employee or affiliate of the Source Agency. In order to further reduce the potential for manipulation, the Exchange maintains a dedicated page on the trading portal that lists all the source agencies and their associated contracts, together with a warning that employees of those companies, persons with access to material non-public information, and persons with an ability to exert direct influence on the underlying of a contract are prohibited from trading on those contracts. This page is intended to serve as an effective means of raising Members' awareness of these rules and prohibitions, further reducing the potential for manipulation. Similarly, the Exchange places a prominent notice on each contract page that notifies Members of the prohibition on trading the Contract while employed by its Source Agency, trading the Contract on the basis of non-public information, and trading the Contract while having the ability to exert influence on the Contract's Market Outcome.

(iii) **Member monitoring and know-your-customer verification ("KYC")**: The Exchange has a robust KYC process. The KYC process is an important tool that helps flag and uncover higher risk traders before they become Members of the platform. The Exchange's KYC process leverages technology to develop a clear and proper understanding of its members, and the various risks they may pose with respect to market integrity and fairness, including manipulation. During the application process, applicants are required to share personally identifiable information, such as their full legal name, identification number, date of birth, and address with the Exchange. Additionally, applicants are required to provide a government issued photo ID (passport, drivers license, etc.) that is used to validate the personally identifiable information shared by the applicant during the application process. Applicant information is run through a comprehensive set of databases that are actively compiled and maintained by an independent third party. The databases are utilized by the Exchange to identify applicants that are employees or affiliates of various governments and other agencies. Moreover, the databases can identify known close relatives and associates of such people as well. Applicants that are flagged go through enhanced due diligence, including manual review, as part of the onboarding process.

Additionally, as part of the KYC process, the Exchange runs applicants through adverse media databases. The adverse media dataset is a real-time structured data feed of companies and individuals subject to adverse media. Monitoring thousands of news sources, business and trade journals, in addition to local, regional and national newspapers, the adverse media feed isolates and highlights any entities or individuals subject to a range of adverse media. The Exchange utilizes the database to trigger enhanced due diligence, because applicants with adverse media may be more likely to engage in certain types of unlawful activity including market manipulation.

The Exchange engages in active and continuing KYC checks. The KYC checks are initially performed upon application, and the Exchange then monitors its Members on an ongoing basis by running member information through the KYC databases. If material new information concerning an existing Member is at some point added to a database, the Exchange's system will flag the Member even if the cause for the flag was not extant at the time of the Member's application. That Member will then go through enhanced due diligence.

In addition, the Exchange shall engage in an additional three-step protection process.

a. Before being allowed to participate, market participants must certify that they are not implicated by the prohibition list in Appendix B
b. Before being allowed to participate, market participants must certify that they do not have access to material nonpublic information
c. The Exchange's surveillance staff will conduct manual background checks and interviews with the top traders in a market, as well as randomly selected participants, to monitor and enforce the gating rules

(iv) **Sanctions**: Exchange Members must agree to the terms and conditions of the Exchange's Rulebook before being allowed to trade. As a result, Members are subject to disciplinary actions and fines for engaging in improper market conduct that is prohibited by the Exchange's Rulebook. In the event that suspicious trading activity is detected and results in an investigation initiated by the Exchange, market participants are required to provide the Exchange with information relevant to the scope of the investigation under Rule 3.2. Chapter 9 of the Exchange's Rulebook details the process for discipline and rule enforcement. Disciplinary action can range from a letter of warning to fines to referral to governmental authorities that can result in criminal prosecution.

In addition to these global policies and safeguards, there are a number of contract specific attributes and considerations that render the Contract not readily susceptible to manipulation.
In addition to these global policies and safeguards, there are a number of contract specific attributes and considerations that render the Contract not readily susceptible to manipulation.
Congress.gov is a division of the U.S. Library of Congress with multiple checks on publishing data. For example, given that Congress.gov is publicly available for any Congressional official or member of the public to access, discrepancies between whether an individual has or has not been made leader on Congress.gov (and their party membership) would likely be detected quickly, making manipulation of the website unlikely. In addition to the general availability of Congress.gov, the Contract relates to a high-profile event, which is the subject of immense media coverage and interest. Thus, any attempt to publish incorrect data would be quickly noticed and identified. The negative consequences that Library of Congress staff would likely face for

publishing incorrect data in order to intentionally manipulate the market would also serve as a strong disincentive from attempting manipulation.

With regard to possible outcome manipulation, it is clear that the totality of U.S. Congressional elections are not readily susceptible to manipulation. The only groups that can directly affect the leadership decisions are the U.S. Senate and U.S. House of Representatives. Members of this group are extremely unlikely to attempt intentional manipulation of the leadership of their chambers to settle the Contract a certain way--the economic and political ramifications of which are far greater than the position limits on the Exchange. Instead of considering the potential outcome of the Contract on the Exchange, legislators involved with the confirmation are more likely to incorporate other factors into their decision-making process, such as political circumstances. The weight of these factors is much greater than any consideration of a market on the Exchange - thus manipulation for the sole purpose of influencing the outcome of the Contract is unlikely. The amount of media attention and financial reporting done on potential changes in leadership means that opportunistic attempts to manipulate reporting to affect prices is likely to be ignored given the amount of attention given to the subject. Members of Congress also have a sworn duty to represent their constituents and would not manipulate Congressional processes for private gain. Their finances are also heavily monitored and subject to public disclosure and scrutiny.

Moreover, election officials swear an oath to faithfully uphold the results of the elections. Tampering with federal elections is a serious federal crime and the consequences of violating would be quite severe. Vote counting is also supervised by trained members of both parties, whose incentive is to detect any deviation or error. In addition, any close election results in a recount, and therefore any manipulation by an individual or small group of individuals could reasonably be expected to be detected.

As further evidence, consider the history of political control contracts. University of Michigan professor Paul Rhode and Wake Forest professor Coleman Strumpf conducted a systematic review of the history of prediction markets both domestically and abroad, documenting their emergence back to "16th century Italy, 18th century Britain and Ireland, 19th century Canada and 20th century Australia and Singapore."[108][109] In the United States, they were popular from the post-Civil War period until the Great Depression tarnished the image of Wall Street in the public imagination. They wrote,

> Although vast sums of money were at stake, we are not aware of any evidence that the political process was seriously corrupted by the presence of a wagering market. This

[108] Paul Rhode and Coleman Strumpf. 2003. "Historical Prediction Markets: Wagering on Presidential Elections".
[109] Paul Rhode and Coleman Strumpf. 2012. "The Long History of Political Betting Markets: An International Perspective."

> analysis suggests many current concerns about the appropriateness of prediction markets are not well founded in the historical record.[110]

Today, election trading is alive and well in other democracies like the United Kingdom, without documented attempts at–let alone successful–manipulation. Any effort to coordinate votes for the sake of the Contract would take significant planning and coordination, and is unlikely to occur because none can know beforehand what the margin of victory is going to be. Accordingly, the organizers would have no way of knowing the size of the conspiracy they would need to orchestrate. Such an attempt would be implausible. Large-scale coordination of sufficient volume to affect an election of even a few hundred thousand voters (as exists in the smallest states or mid-size cities) would be too large to avoid scrutiny from market surveillance and counter-partisan mobilization. Nearly every commodity market can be altered if tens to hundreds of thousands of people all conspire simultaneously; however, it is nearly impossible to coordinate across tens of thousands of individuals without being visible. If this was a viable path, then highly motivated partisans would already attempt to do so and profit from the myriad ways they could profit by knowing the outcome of an election beforehand. The reason this type of criminal activity does not occur is that such a scheme would be readily detected.

One may also imagine that a coordinated group of individuals may conspire to manipulate market prices to give the false impression of candidate "momentum", thus potentially harming the democratic process. This concern, too, is empirically implausible. Coleman and Strumpf in a later paper examined previous American political prediction markets and found that no previous effort at manipulation were capable of sustaining anything more than fleeting price movements. They wrote, "we find little evidence that political stock markets can be systematically manipulated beyond short time periods."[111] Moreover, the markets examined were much smaller and thus even more prone to manipulation than a fully regulated, liquid market like a DCM. As a result, the probability of manipulation is implausible. Indeed, as George Mason University professor Robin Hanson and University of California at Santa Barbara professor Ryan Oprea found in one paper, one major reason why political contracts are rather invulnerable to manipulation attempts is that any attempt to manipulate prices induces informed counter-parties to enter on the other side of the market.[112] In fact, the greater the attempts to jazz up one side's prices, the greater the returns to becoming an informed trader. As University of Michigan economist Justin Wolfers and Dartmouth economist Eric Zitzewitz write regarding previous political contracts, "none of these attempts at manipulation had a discernible effect on prices, except during a short transition phase."[113]

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[110] Paul Rhode and Coleman Strumpf. 2003. "Historical Prediction Markets: Wagering on Presidential Elections".
[111] Paul Rhode and Koleman Strumpf. 2005. "Manipulating Political Stock Markets: A Field Experiment and a Century of Observational Data."
[112] Robin Hanson and Ryan Oprea. 2008. "A Manipulator Can Aid Prediction Market Accuracy." *Economica*.
[113] Justin Wolfers and Eric Zitzewitz. 2006. "Prediction Markets in Theory and Practice".

There are also legal protections against disrupting or pressuring the voting process of others. For example, the secret ballot is a guaranteed right in the vast majority of state constitutions, and statutorily protected in the rest.

The lack of substantiated attempts at manipulation of political control contracts by such methods is quite telling in the context of how much is already at stake in American elections. The economic impacts of elections themselves dwarf the value of Kalshi's contracts many, many times over. Likely trillions in stock value are deeply dependent on elections; entire sectors, firms, and places can be favored by a candidate for office; and almost every actor in the economy is directly affected by tax rates. The marginal addition of Kalshi's contract will not change whether or not elections are events of enormous consequence, and thus not increase anyone's incentive meaningfully to attempt manipulation of several hundred elections across the United States. American elections are not readily susceptible to manipulation, full stop, thanks to their decentralized nature, strong political norms, and laws protecting the vote. Elections, unlike many other reference markets or events that have CFTC-derivatives trading on them, are governed by multiple law enforcement agencies whose very existence is to prevent and detect election manipulation and fraud. This includes the Federal Election Commission, the federal Department of Justice, state election commissions, state Secretaries of State, and state ethics commissions. History has shown that these agencies are very good at their job.

Importantly, the fact that these contracts have already been *trading* on venues in the United States by Americans should demonstrate that they do not cause manipulation and that the markets are safe. In 2014, the Commission granted PredictIt, a new unregistered trading venue dedicated to election and political event contracts, a no-action letter. Since then, PredictIt has traded more than one billion shares.[114] This information--that billions of dollars can be traded on contemporary exchange-traded political control contracts without creating manipulation concerns--was not available to the Commission the last time it considered similar event contracts in 2012.[115] Election trading is also common over-the-counter in the United States among the largest financial institutions and high net worth individuals.[116]

Americans can also readily access cryptocurrency-based decentralized exchanges (DEXes) which offer political control markets on platforms such as Polymarket and Omen.[117][118]

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[114] PredictIt. https://www.predictit.org/insight/aHR0cHM6Ly9hbmFseXNpcy5wcmVkaWN0aXQub3JnL3Bvc3QvMTg4NzQ3ODgwMDQzL2EtcHJlZGljdGFibGUtbmV3c2xldHRlci0xMTExOSNtb2JpbGU=
[115] Nadex order. 2012. CFTC. https://www.cftc.gov/sites/default/files/idc/groups/public/@rulesandproducts/documents/ifdocs/nadexorder040212.pdf
[116] Public Comment by Angelo Lisboa. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69662
[117] Polymarket. https://polymarket.com/market/will-gavin-newsom-be-governor-of-california-on-december-31-2021
[118] Omen.eth. https://omen.eth.link/#/0x95b2271039b020aba31b933039e042b60b063800/finalize

Polymarket's markets on Congressional control have traded millions.[119] In total, more than half of volume ever traded on Polymarket (north of $50,000,000) were traded on election-related markets. These platforms are not registered with the Commission as Designated Contract Markets (DCMs), but frequently host such markets. Despite the CFTC's January 2022 order against Polymarket, it is still readily accessible by Americans via VPN. Betfair had more than $500 million traded on the 2020 election.[120] There are no indications that the markets caused or induced an attempt to manipulate elections, let alone a successful manipulation.

With regards to possible price manipulation, in practice, there are few actors who hold meaningful non-public information that could affect the value of the Contract. Nonetheless, Kalshi is taking a large step to prohibit a large number of political actors from participating in the contract. Further, as part of the Exchange's KYC verification and monitoring system, the Exchange also cross-checks applicants against comprehensive databases. In particular, the Exchange will check whether any Members trading on this Contract are on databases of Politically Engaged Persons. The Exchange further cross checks applicants against databases of family members and close associates of Politically Engaged Persons. These checks help to further reduce the potential for trading violations and further increase the integrity of this Contract.

Core Principle 4 - Prevention of Market Disruption: Trading in the Contracts will be subject to the Rules of the Exchange, which include prohibitions on manipulation, price distortion, and disruption to the cash settlement process. Trading activity in the Contract will be subject to monitoring and surveillance by the Exchange's Market Surveillance Department. In particular, the Exchange's trade surveillance system monitors the trading on the Exchange to detect and prevent activities that threaten market integrity and market fairness including manipulation, price distortion, and disruptions of the settlement process. The Exchange also performs real-time market surveillance. The Exchange sets position limits, maintains both a trade practice and market surveillance program to monitor for market abuses, including manipulation, and has disciplinary procedures for violations of the Rulebook.

Core Principles 7 and 8 - Availability of General Information and Daily Publication of Trading Information: Core Principles 7 and 8, implemented by Regulations Sections Subsections 38.400, 38.401, 38.450, and 38.451, require a DCM to make available to the public accurate information regarding the contract terms and conditions, daily information on contracts such as settlement price, volume, open interest, and opening and closing ranges, the rules, regulations, and mechanisms for executing transactions on or through the facilities of the contract market, and the rules and specifications describing the operation of the contract market's electronic matching platform.

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[119] Polymarket. https://polymarket.com/market/will-trump-win-the-2020-us-presidential-election
[120] Seen at this link:
https://www.actionnetwork.com/politics/2020-election-odds-trump-vs-biden-presidential-race-sportsbook-rovell

Rule 2.17 of the Rulebook sets forth the rules for publicizing information. The Rulebook and the specifications of each contract are made public on the Exchange website and remain accessible via the platform. The Exchange will post non-confidential materials associated with regulatory filings, including the Rulebook, at the time the Exchange submits such filings to the Commission. Consistent with Rule 2.17 of the Rulebook, the Exchange website will publish contract specifications, terms, and conditions, as well as daily trading volume and open interest for the Contract. Each contract has a dedicated "Market Page" on the Kalshi Exchange platform, which will contain the information described above as well as a link to the Underlying used to determine the Expiration Value of the Contract. Chapter 5 sets forth the rules, regulations and mechanisms for executing transactions, and the rules and specifications for Kalshi's trading systems.

Core Principle 11 - Financial Integrity of Transactions: Each Member must be in good standing and in compliance with the Member eligibility standards set forth in Chapter 3 of the Rulebook. All contracts offered by the Exchange, including the Contract, are cleared through the Clearinghouse, a Derivatives Clearing Organization ("DCO") registered with the CFTC and subject to all CFTC Regulations related thereto. The Exchange requires that all trading be fully cash collateralized. As a result, no margin or leverage is permitted, and accounts must be pre-funded. The protection of customer funds is monitored by the Exchange and ensured by the Clearinghouse as "Member Property."

All Remaining Requirements: All remaining Core Principles are satisfied through operation of the Exchange's Rules, processes, and policies applicable to the other contracts traded thereon. Nothing in this contract requires any change from current rules, policies, or operational processes.

APPENDIX H (CONFIDENTIAL) – COMPLIANCE WITH THE CONTRACT VETTING FRAMEWORK

As part of its registration as a Designated Contract Market, the Exchange submitted a Contract Vetting Framework (CVF) through which all contracts would have to be vetted against in order to be eligible for self-certification. At designation, the CVF prohibited contracts on the outcomes of United States political elections. Since then, Kalshi submitted an amendment to the CVF permitting it to self-certify contracts related to partisan political control of the House and Senate which was approved by the Commission.

APPENDIX I (CONFIDENTIAL) – DIRECTLY ADDRESSING COMMISSION QUESTIONS

The Commission asked for public input on seventeen questions. These seventeen questions can be broadly categorized into five distinct categories of questions. These are:

1. Whether Kalshi's contract triggers one of the prongs of CFTC Regulation 40.11 or CEA 5c(c)(5)(C), in particular, "gaming" and "activity illegal under state law"; (questions 1-4)
2. Whether Kalshi's contract is distinct from Nadex's 2011 contract submission; (question 5)
3. Whether Kalshi's contract would provide economic utility to market participants; (questions 6-11)
4. Whether Kalshi's contract would serve the public interest; and (questions 12-14, 17)
5. Whether and how Kalshi's contract can be readily subject to manipulation. (questions 15 and 16)

In developing the CONTROL contract, the Exchange carefully considered both the Commission's questions on the prior submission, as well as the public's input on the prior submission. The public's input formed a bedrock of the Exchange's determination, together with its own analysis, that the contracts are consistent with the CEA and valid Commission Regulations. The Exchange summarizes some of the comments below, and incorporates the entire comment file from the original submission by reference. (The CFTC's comment file is available here: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=7311).[121] The Exchange considered all of the comments in full in developing this contract, and the comment record is an important part of this contract. The Exchange notes that all the comments are in the Commission's possession, and are in fact electronically searchable on the Commission's website.

One: does Kalshi's contract trigger one of the prongs of CFTC Regulation 40.11 or CEA section 5c(c)(5)(C), in particular, gaming and unlawful activity? (questions 1-4)

The public comments largely stated that the answer is no, the proposed contract does not involve, relate to, or reference gaming, or any of the other prongs of CEA 5c(c)(5)(C) or Regulation 40.11. Commenters noted that elections do not involve, relate to, or reference gaming or gambling. Rather, elections are events of incredible and far-reaching economic impact. Kalshi's

[121] CFTC Rule 40.2(a)(3)(v) requires a "concise explanation and analysis of the product and its compliance" with core principles. The rule also allows the DCM to incorporate information contained in documents supporting or relied upon to reach these conclusions. We note that we have relied significantly on the rulemaking record for for CFTC Industry Filing 22-022: Review and Public Comment Period of KalshiEx Proposed Congressional Control Contracts Under CFTC Regulation 40.11, available at https://comments.cftc.gov/PublicComments/CommentList.aspx?id=7311. As a result, we incorporate the comment file for CFTC Industry Filing 22-022 into this submission.

contract would also not involve, relate to, or reference unlawful activity. A contract on election outcomes would provide market participants with a powerful tool to hedge political risk.

The underlying assumption of the Commission's question is that in considering CEA 5c(c)(5)(C) or Regulation 40.11, one should consider not only whether the contract's subject involves gaming (e.g. a contract like "Will the roulette ball fall on white or red?"), but rather, whether the act trading on the contract *itself* constitutes gaming. The commenters noted that this is an incorrect application of the statute. This is evidenced by the fact that the other items of the list (assassination, murder, war) are clearly referring to the underlying event, not the act of trading. If that reading were correct, it would make the enumerated categories of terrorism, assassination or war superfluous, as clearly trading on such events would also be gaming. This argument, in particular, is made by comments from both of the last two General Counsels of the CFTC as well as other law firms such as Jones Day and Tabet DiVito & Rothstein.[122]

With regard to unlawful activity, commenters noted that, unlike gambling offerings, Kalshi's contract is a federally regulated derivative product and is exempted from the federal interstate betting prohibition and state laws that prohibit gambling. Thus, the existence of state laws that prohibit 'gambling' on election outcomes does not confer an involvement with illegal activity on Kalshi's contract anymore than the existence of state laws that prohibit 'gambling' confer an involvement with illegal activity onto any event contract or derivatives product. The letter submitted by Better Markets, arguing that Kalshi's contract does trigger a prong of 40.11/5c(c)(5)(C), relies on the false idea that Kalshi's contracts certified with the Commission are subject to the Unlawful Internet Gambling Enforcement Act, when CFTC products are expressly carved out of such regulations.[123][124] The Exchange rejects this comment as being patently legally incorrect, and the Exchange's position is supported by the legal analysis of the Commission's most recent two general counsels attached as part of Appendix M.

Commenters further informed the Commission that it should not consider the presence of election outcomes in gaming venues such as casinos. They noted that the question is not relevant to the particular contracts as such contracts not available on any legal American sportsbook, and that the Commission precedent contradicts such consideration, as this standard was not even applied by the Commission when considering contracts on the outcomes of sports games in *ErisX* and was not considered in *Nadex*.

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[122] Public Comments 70781, 69737, and 70765.
[123] Public Comment by Dennis Kelleher, available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=70788
[124] The Unlawful Internet Gambling Enforcement Act of 2006 "do[es] not include…any transaction conducted on or subject to the rules of a registered entity or exempt board of trade under the Commodity Exchange Act". 31 U.S.C. § 5362(1)(E) (2006).

Commenters also pointed out that there is either a conflict between Regulation 40.11 and the CEA with respect to the breadth of the special rule, as former Commissioner Quintenz noted, or Regulation 40.11 does not prohibit any contracts, as former Commissioner Berkovitz assumed in his statement on *ErisX*.

Commenter Richard Sandor, the "father of futures" who developed the first interest rate products, informed the Commission that financial speculation is not the same as gambling. Gregory Kursek, who led the DMO's Product Review Branch, did the same.

Some commenters argued that the contract is related to gaming because the contract would not serve an economic purpose. That is addressed in Appendix B.

The foregoing analysis and public comments support the conclusion that the question of CEA 5c(c)(5)(C) or Regulation 40.11 is answered in the negative. In Kalshi's new submission, it increased the contract order size (to purchases in 5,000 contract multiples) and increased the position limits for parties with *bona fide* hedging need to reduce the ease of low-value speculative behavior relative to hedging behavior. Accordingly, the Exchange has determined that the contract is not inconsistent with either CEA 5c(c)(5)(C) or Regulation 40.11, a conclusion that is strongly supported by the information from the public that the Commission requested.

Two: is Kalshi's contract distinct from Nadex's 2011 contract submission? (question 5)

Kalshi has provided a separate document that details the distinctions between Nadex's contract submission and Kalshi's new contract. However, even with regards to Kalshi's original submission, commenters such as former CFTC Chairman Mark Wetjen who was on the Commission when the *Nadex Order* was released, and former CFTC Deputy Director of Product Review Greg Kuserk, noted the changes in circumstances since Nadex's 2011 submission that also justify looking and considering the contract, its public impact, and the role of gaming, differently. These circumstances include the success of other electoral markets that the Commission has approved of (PredictIt, hosted by Victoria University of Wellington) and the increasing salience of electoral risk on market participants. In light of these changes, they informed the Commission that it would be inappropriate to rotely prohibit the original submission on the grounds of a non-regulatory, contract specific conclusion from a decade ago. The correct conclusion now is for the contract to be allowed by the Commission. In light of these comments, and the material and significant economic differences between the contracts at the subject of the *Nadex* Order and the current contract, among other salient points of black-letter settled administrative law, the Exchange determined that the contract is consistent with the CEA and Regulations and is not in any way prohibited by *Nadex*.

Three: Would Kalshi's contract provide economic utility to market participants? (questions 6-11)

In its submission, which is publicly available, Kalshi provided evidence–from decades of academic research, business testimony, the public press, and policymakers-that partisan election outcomes have consistent and predictable effects on the values of assets, prices of services, and economic activity more broadly. Commenters overwhelmingly agreed, including (though hardly limited to) academics such as Nobel Laureate Robert Shiller and former Chair of the Council of Economic Advisors Jason Furman; former policymakers former SEC Commissioner Joseph Grundfest and former CFTC Commissioner Mark Wetjen; and members of private industry, such as AB-inBev board member Jorge Paulo Lemann (a major participant in extant agricultural futures), the CEO of Continental Grain Company Paul Fribourg, and Susquehanna International Group Head of Strategic Planning David Pollard.[125] Angelo Lisboa, a Managing Director of J.P. Morgan argued that large institutions already trade such products over-the-counter.[126] The public press and private businesses routinely discuss how election outcomes are traded significantly through other exchange-traded assets, like stocks.

In the public comment process, many businesses and business leaders, in industries such as energy, cannabis, and finance, testified to their personal hedging needs and use cases for the contract.

Some commenters argued that the contract would not serve their own hedging needs, or speculated that it would not serve the needs of others. The fact that a contract would not help a particular commenter's hedging needs is not relevant to whether it would serve those of others. The uninformed and speculative bets of commenters cannot form the basis of any reasoned decision making by a government agency. This would be black-letter administrative law in a vacuum. In the face of the overwhelming majority of commenters who informed the Commission about their own hedging utility and the overwhelming evidence that elections have economic consequences, these speculative comments contradict reality.

In one of its questions, the Commission asked specifically if election impacts are sufficiently predictable–even if they have a large impact–to justify a hedging product. Commenters argued that this is not a standard found in law, regulation, or in any previous decision or consideration. They further noted that the question of how to hedge is not the province of the Commission. The job of the Commission is not to determine whether a hedge is a "good" or not; that is for the market and its participants to decide. The Commission does not want to find itself in the business of grading participants' hedging strategies. The Commission would never be called to testify in a

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[125] Public Comments 70761, 69708, 69695, 70771, 69684, 69727, and 70743.
[126] Public Comment by Angelo Lisboa. Available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69666.

shareholder suit against a company because the company's hedging strategy was unsuccessful. Rather, the market should determine whether a given contract is appropriate for their risk.

It is important to acknowledge that the comments did not at all agree that the notional value of the contract impacts the analysis at all, and this is for many reasons. These include the understanding that retail participants have economic needs that the Commission should not discriminate against. Also, the Commission has embraced contracts like micro bitcoin contracts and it is incongruous to assume a different economic reality for these contracts.

Commenters also noted that hedging does not require a 1:1 hedge against a specific asset; hedging is a means of risk management, and the contracts can be used to manage risk from elections. This hedging truth is recognized in the numerous contracts that the Commission has embraced such as weather and many other contracts that either do not have 1:1 hedging use or where 1:1 hedging is overwhelmingly not the primary use of the contract.

Commenters also noted that the contracts have economic utility well beyond hedging. Hedging, after all, is only one of the twin pillars of economic utility. The second pillar is price basing, and the contracts have significant price basing utility. It is nigh axiomatic that there is utility in pricing risk that affects assets, service agreements, and other economic utility. These contracts do exactly that.

Based on the information from the public, as well as the clear evidence of the impact of elections (just watch the news during elections), the Exchange concluded that the contract has economic utility, both hedging and price basing. This is certainly true for the current submission which has a significantly increased order size (to purchases in 5,000 contract multiples) and increased position limits for parties with *bona fide* hedging utility.

Four: Would Kalshi's contract serve the public interest? (questions 12-14, 17)

Commenters agreed that Kalshi's contract would serve the public interest. In addition to the public interest by virtue of its hedging and price basing functions, the Contract will generally provide a valuable forecasting tool that complements existing polling and other forecasting tools. Accurate data regarding the state of elections is very socially valuable and sought after, prompting the development of advanced polling and analytics publications like *FiveThirtyEight*. In addition, former Chair of the Council of Economic Advisors Jason Furman detailed in his comment how political markets, even on a limited basis, had informational value that were used even in the Obama White House.[127] Eric Crampton wrote about how New Zealand political

[127] Public comment letter by Jason Furman. Available at: https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69708.

markets were used by their country's central bank.[128] By providing an alternative, and possibly more accurate (certainly faster) forecast of an election outcome to polls, Kalshi's contract would enrich the public discourse through an unbiased, decentralized prediction of the future. Others, such as OpenPhilanthropy founder Dustin Moskovitz, emphasized how he could use the market to help influence future decision making with regards to politics.[129]

A small number of commenters argued that Kalshi's contract could distort the electoral process if the contracts were manipulated. These comments ignored PredictIt, which has traded more than a billion dollars–sans hedging–without any such issues; it ignores how banks and financial institutions already trade these products; and how many other nations (such as the United Kingdom, Canada, Ireland, Australia, and other liberal democracies) have large outright gambling on electoral outcomes without any documented harm. Importantly, they ignored both the evidence that markets like the Contract are very difficult to manipulate and the Exchange's surveillance system that would further make manipulation extremely unlikely. Further, as other commenters noted, the Contract would provide a source of information that is much less likely to be manipulated than polling, media, advertising, and social media.

The Exchange notes that the prior submission and the Commission's questions received significant press attention from many different news sites. The commenters included individuals, businesses of all sizes, and many experts in their fields. In light of the commenters support on the Contract's social value, highlighting the real world evidence and utilization of the contracts, and the defects with the few comments that speculated about a public harm, the Exchange has concluded that the public has spoken to its interests, and these contracts are in the public's interest.

Five: Would Kalshi's contract be readily susceptible to manipulation, and how should it protect against it? (questions 15 and 16)

Several commenters, including commenters with extensive expertise in the industry and in detecting fraud and manipulation, noted how there is little to no ability for individuals to either manipulate the outcomes of hundreds of Congressional elections or to manipulate the contract's price because of insider information. There are enormous incentives in the status quo for individuals to try and do so, without any success. American elections are not readily susceptible to manipulation, and neither is Kalshi's contract.

Kalshi, however, takes the threat of even a marginal or unexpected case seriously, and in its new submission has clarified how it will treat politically associated individuals. Kalshi preemptively

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[128] Public Comment by Eric Crampton. Available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69738.
[129] Public Comment by Dustin Moskovitz. Available athttps://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69716.

runs users through a list of politically exposed persons and will ban such individuals from trading. Before being allowed to participate on a political risk market, participants will be required to certify that they are not affiliated with any campaign, PAC, or political party, and do not have any insider information on the matter. Kalshi's surveillance team will conduct manual background checks and interviews with the top traders in a market, as well as randomly selected participants, to monitor and enforce the gating rules. Kalshi will also provide the Commission with additional reporting that the Commission determines would assist with regulating this specific market.

The letter provided by Better Markets cites two studies which argue prediction markets can be manipulated (though not necessarily readily, which the Exchange notes is the standard of law). One of these cites a manipulation attempt on a small, online exchange in the early 2000s that is swiftly corrected by other traders. The other refers to a market created by academics with only eight participants and fake funds. Unlike many of the underlying markets the CFTC monitors, American elections have dedicated enforcement agencies (such as the Federal Election Commission) and have never been manipulated. Consequently, dozens of economists, including major policymakers and a Nobel Laureate, wrote comments arguing specifically that these contracts are not readily susceptible to either outcome or price manipulation.

In light of the many factual and analytical deficiencies in Better Markets' comment, and the overwhelming information from commenters with actual market and economic experience that the contracts are not readily susceptible to manipulation, and the extra protections that the Exchange will adopt to go above and beyond, the Exchange has determined that the contracts are not readily susceptible to manipulation.

APPENDIX J (CONFIDENTIAL) – COMPARISON WITH NADEX SUBMISSION

The proposed new terms of the Political Control contract differ significantly and materially from the *Nadex Order* contract, which was disallowed by Commission Order in 2012. The table below highlights those differences by comparing the Nadex contract, the withdrawn Political Control Contract ("CONGRESS"), and the proposed Political Control contract ("CONTROL"). The proposed new terms are designed to provide a tool to shift economic risk tied to political elections and to be utilized by firms, industry, and other traditional participants in derivatives markets.[130]

Contract attribute	Nadex	CONGRESS contract	CONTROL contract
Order size	1 $100 contract	1 $1 contract	5,000 $1 contracts; functionally $5,000 notional value
Position limit	2,500 contracts	$25,000	Tiered, up to $100M for ECPs with a *bona fide* hedging need

These changes will significantly alter the way that the market will participate in the contract. Even though order sizes are not considered material with regard to the "equivalent swap" analysis under the Position Limits Rule, codified in Regulation 150.1, that analysis is not relevant to the analysis here. The policy and purpose of economic equivalency for position limits is stated by Congress as being necessary to "to (i) Diminish, eliminate, or prevent excessive speculation; (ii) deter and prevent market manipulation, squeezes, and corners; (iii) ensure sufficient market liquidity for *bona fide* hedgers; and (iv) ensure that the price discovery function of the underlying market is not disrupted." Those factors are very different from the factors that were considered in *Nadex*, namely the application of CEA section 5c(c)(5)(C) and Regulation 40.11. The relevant factors that the Commission considered in *Nadex* were the nature of how market participants will use the contract, and the economic attributes of a contract such as notional size is highly material to that question.

In fact, the Commission intuited that economic attributes such as notional size are important to the analysis and specifically asked a number of questions directly and indirectly to the public about the Contract's size in its questions regarding Kalshi's CONGRESS submission. The comments in response to the Commission's question all indicated that the economic attributes of the contract *should* be considered (most argued that the original contract passed any economic

[130] Although the contract is available for trading by all Exchange members, as required under the CEA and Core Principle 2.

utility test, of course; *a fortiori* the new contract passes the same tests). Accordingly, the Exchange notes that the current submission is distinguishable from the contracts that were the subject of the *Nadex* order, a point that is strongly buttressed by the public comments that the Commission requested.

APPENDIX K (CONFIDENTIAL) – ADDITIONAL CORE PRINCIPLE 3 CONSIDERATIONS

The CONTROL contract is not readily susceptible to manipulation. There are robust protections against manipulation. The Exchange has rules that prohibit manipulative trading, and the Exchange performs surveillance to detect manipulation. This serves as a deterrent to attempts to manipulate the market via manipulative trading. In addition, the Exchange's rules also prohibit trading on non-public information, and the Exchange performs surveillance to detect violations of this rule. The Exchange is also adopting contract specific gating rules that further buttress this rule. Specifically:

a. Before being allowed to participate, market participants must certify that they are not implicated by the prohibition list in Appendix B
b. Before being allowed to participate, market participants must certify that they do not have access to material nonpublic information
c. The Exchange's surveillance staff will conduct manual background checks and interviews with the top traders in a market, as well as randomly selected participants, to monitor and enforce the gating rules

The Exchange will be surveilling its market for any sign of trading that is indicative of manipulative or fraudulent behavior. The Commission will have all of the necessary data to do the same, should it so wish.

As discussed at length in Appendices E and F, American elections are not readily susceptible to manipulation. In fact, manipulation of which party controls the U.S. Congress has never occurred. This is in contrast to existing markets that the CFTC regulates. Indeed, the CFTC has brought numerous enforcement actions against market participants who either manipulated or attempted to manipulate markets in oil, precious metals, cattle, and other commodity spot and futures markets. The Commission regularly brings almost a hundred enforcement actions per year and orders billions in monetary relief. Then, of course, there are digital asset markets, where the Commission has brought dozens of actions in an incredibly short time. Contrast that with elections, where election or voter fraud is extremely rare, and never succeeds at flipping the outcome of which party controls Congress. Even in cases where election manipulation has been attempted, it has only succeeded in affecting extremely small, local elections.[131]

Election manipulation is a crime.[132] There are law enforcement agencies who police elections, and elections are policed much more effectively than other markets that have CFTC derivative products trading on them. Any attempt to manipulate the contract would most certainly involve a high degree of speculation; the contract is in regard to the sum of hundreds of elections. It is not

[131] https://www.brennancenter.org/our-work/research-reports/truth-about-voter-fraud
[132]https://www.fbi.gov/how-we-can-help-you/safety-resources/scams-and-safety/common-scams-and-crimes/election-crimes-and-security#:~:text=Intentionally%20deceiving%20qualified%20voters%20to,%2Fhow%2Dto%2Dvote.

even possible to determine which elections will be the closest (and thus easiest to affect) in advance, even if some races are understood to be more close than others. As detailed in Appendix F, a large-scale conspiracy to coerce many individuals to vote a particular way across many different jurisdictions without being detected. A fraud of sufficient size would mean that this fraud is no *Ocean's 8*, or even *Ocean's 11*. You'd be looking at Ocean's-well-into-the-hundreds-if-not-hundreds-of-thousands. Manipulation of polling machines themselves is equally quixotic.[133] Taken all in all, it is very unlikely that a fraud pertaining to this contract will be attempted, and considerably less likely than in other areas that fall under the Commission's enforcement authority.

Additionally, concerns regarding policing election fraud are absent from, and foreign to, the CEA's goal of fostering innovation and trading on American markets. The Commission is not the only "cop on the beat" with regard to election fraud. Elections, unlike many other reference markets or events that have CFTC-derivatives trading on them, are governed by multiple law enforcement agencies whose very existence is to prevent and detect election manipulation and fraud. This includes the Federal Election Commission, the federal Department of Justice, state election commissions, state Secretaries of State, and state ethics commissions. History has shown that these agencies are very good at their job.

Critically, there are already enormous stakes in U.S. elections, creating incentives for outcome manipulation; this contract will not change that fact. As discussed in extensive detail in Appendix B, in the public comments, and to anyone involved in industry, elections move prices and it is specious to presume that they do not. Wall Street firms and global finance all trade elections. The contract before the Commission is not novel in that regard; rather, it is a more efficient instrument than what firms currently use to take positions on elections.

[133] https://www.washingtonpost.com/politics/2022/11/01/truth-about-election-fraud-its-rare/

APPENDIX L (CONFIDENTIAL) – THE IMPORTANCE AND SALIENCE OF CLIMATE RISK TO POLITICAL RISK CONTRACTS

Climate Risk Exposure

The CFTC's Market Risk Advisory Committee published a seminal report on managing climate risk in the United State's financial system ("Report").[134] The Report cogently described the urgency for the financial markets, and financial regulators, to enhance the existing climate risk management framework, in part because of the impossibility of predicting with any precision how climate change will impact participants, including economically. The Report explains how participants should translate climate risk into economic terms, and then once translated, derivatives can be used to manage that risk.

As the Report explains, risk is a composite measure of exposure, sensitivity and, in this case, the adaptive capacity of a firm to manage the climate risks of a particular asset. Exposure reflects the presence of financial assets coinciding with climate impacts—namely acute extreme events or recognizable patterns of stress, which includes the likelihood of an economically harmful incident occurring. Exposure is the prerequisite to the transmission of climate risks to financially relevant metrics. Sensitivity reflects a measure of the responsiveness of exposed assets to any given shock or stress. In other words, risk is the product of the potential economic impact of an event and the likelihood of that event occurring. Because risk is technically a probabilistic function of sensitivity and exposure, the novelty of climate change means that there is greater uncertainty and ignorance about the range of possible outcomes and the Report recommends the use of a variety of tools to overcome this uncertainty, such as scenario analysis. This method of risk management is key to effectively managing climate risk. If market participants would wait until they can precisely, or even broadly, quantify the *expected impact* of climate change to manage risk, it would likely be too late. Instead of managing expected impact, market participants manage their *risk*, which is the "what if", not the "most likely."

Managing Climate Risk

Based on the understanding of risk as a probabilistic function of the product of two metrics (i) sensitivity of a financial interest to climate change, and (ii) exposure of the financial interest to a climate change event or the likelihood of that event occurring, the Report suggests two methods for managing risk. One method is to decrease exposure, which can be done for example by reducing carbon output or ideally achieving carbon net-neutrality. The decrease in exposure will have the effect of reducing the overall risk. The second method is to decrease the net sensitivity

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[134] Commodity Futures Trading Commission. 2020. "Managing Climate Risk in the U.S. Financial System". https://www.cftc.gov/sites/default/files/2020-09/9-9-20%20Report%20of%20the%20Subcommittee%20on%20Climate-Related%20Market%20Risk%20-%20Managing%20Climate%20Risk%20in%20the%20U.S.%20Financial%20System%20for%20posting.pdf

of the asset, which can be done via financial derivatives that hedge the asset's sensitivity. For example, a carbon offset future. That decrease in sensitivity will also reduce the overall risk.

Climate Risk/Political Control Risk Similarities

Even though the particular impacts of climate change are not known, and certainly the impacts to any market participant are not known, climate change nonetheless poses risk to market participants, and that risk can and should be hedged. This understanding of risk, and risk management, is equally important and applicable to political control. Like climate change, the precise impact of political control to a market participant is not known. Like climate change, political control nonetheless impacts risk. An asset or financial interest that is sensitive to policy or political change, such as climate change, has exposure to political control, as political control impacts the likelihood of a negative incident occurring. A derivative contract can be used to reduce the net sensitivity, and just like in the case of climate change risk, the reduced sensitivity will effectively reduce risk. The same risk management and climate risk hedging described in the Report applies to political control hedging using derivative contracts.

Characteristic	**Climate Change Risk**	**Political Control Risk**
Is a risk because it could lead to negative financial impact	✔	✔
Specific impacts unknown	✔	✔
Risk is the product of (i) potential impact of an event or events (sensitivity), and (ii) likelihood of the event occurring (exposure)	✔	✔
Derivatives can be used to reduce net *sensitivity*, which reduces overall risk	✔	✔

APPENDIX M (CONFIDENTIAL) – ADDITIONAL MATERIALS

Letters by Kalshi's counsel are provided in a separate document attached to this certification. Also attached is a copy of Commissioner Pham's dissent on a vote favoring review of Kalshi's original contract pursuant to the special rule.

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June 23, 2023

Xavier Sottile
Head of Markets
KalshiEX LLC
594 Broadway
New York, NY 10012

Re: Notification of Commodity Futures Trading Commission ("Commission") Commencement of 90-day Review of "Will <chamber of Congress> be controlled by <party> for <term>?" Contracts

Dear Mr. Sottile:

This is to inform you that, pursuant to Commission regulation 40.11(c), the Commission has commenced a 90-day review of the KalshiEX LLC ("Kalshi") self-certified submission dated June 12, 2023 (the "Submission") of "Will <chamber of Congress> be controlled by <party> for <term>?" contracts (the "Congressional Control Contracts"). The Commission has determined that the Submission comprises contracts that may involve, relate to, or reference an activity enumerated in Commission regulation 40.11(a)(1) and section 5c(c)(5)(C)(i) of the Commodity Exchange Act. Accordingly, the Commission requests, pursuant to Commission regulation 40.11(c)(1), that Kalshi suspend any listing and trading of the Congressional Control Contracts during the pendency of the Commission's 90-day review period, which will commence as of the date of this notification letter.

Please note that, consistent with Commission regulation 40.11(c)(1), the Commission will post on its website a notification of its intent to carry out a 90-day review of the Submission. Please further note that the Commission has decided to open a 30-day public comment period within the 90-day review period to assist the Commission in its evaluation of the Submission. To do so, the Commission intends to supplement the notification posted on the Commission's website with the publicly filed portion of the Submission and specific questions regarding the Congressional Control Contracts.

If you have any questions regarding this notification, please contact Chris Goodman (cgoodman@cftc.gov; (202) 418-5616).

Sincerely,

Christopher J. Kirkpatrick
Secretary of the Commission