

**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. 24-5205

(Appeal from Case No. 1:23-cv-03257)

**CFTC’S REPLY IN SUPPORT OF
MOTION FOR STAY PENDING APPEAL**

At issue is whether large-dollar election gambling should commence—during this election season—before this Court can decide whether the Commodity Exchange Act (“CEA”) authorized the Commodity Futures Trading Commission (“Commission” or “CFTC”) to disallow that activity on futures exchanges. KalshiEX LLC (“Kalshi”) argues it will suffer irreparable harm if it is not allowed to launch election gambling *right now*. But Kalshi’s claims of financial loss are deeply misleading and, in any event, pale compared to the harm that would flow from allowing election gambling on U.S. futures markets. The CFTC respectfully asks this Court to stay the district court’s September 6 and September 12, 2024 orders [Dkt. 47, 51] and enjoin Kalshi from offering election contracts during the

pendency of this appeal. This Court should have the opportunity to review the district court's missteps in allowing this election gambling to take place. Without a stay, Kalshi will relaunch its betting markets, and the CFTC will have little or no recourse to stop Kalshi, or other entrants, from offering a panoply of wagers on the outcome of U.S. elections.

ARGUMENT

A. The CFTC Has Established Likelihood of Success on the Merits.

The district court concluded that the CFTC had not established likelihood of success because its arguments had not persuaded that court. Sept. 12 Tr. at 26:15-20 (“I think I’m right and I don’t think that that factor has been satisfied.”). But that is not the standard. The CFTC need only show “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,” *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977), which it has.

1. The District Court Misconstrued “Involve.”

Under the pertinent statute, the CFTC can prohibit an event contract from listing “if the agreements, contracts, or transactions involve” one or more enumerated categories. 7 U.S.C. 7a-2(c)(5)(C) (emphasis added). Nevertheless, the district court held that the word “involve” “can only be referring to the underlying commodity or subject of the transaction,” not the contracts or

transactions as a whole. [Dkt. 51 (“Op.”) at 23]. There is “fair ground for litigation and thus for more deliberative investigation” on this point. *Holiday Tours*, 559 F.2d at 844. As the CFTC argued, Kalshi’s contracts, and transactions in those contracts, involve gaming because the contracts “relate closely” to gaming and it is their “essential feature,” and that is what “transactions” in those contracts “entail” [Dkt. 30 at 20-26; Dkt. 37 at 2-7], each of which descriptor is in the agreed definition of “involve” [Op. 20]. This is similarly true of illegal activity.

Kalshi, not the CFTC, ignores the text of the statute. The district court held “a contract or transaction ‘involves’ an enumerated activity ... if the *event* [*i.e.*, the underlying] ... relates to that activity.” [Op. 26]. But in the statute, the word “involve” modifies “the agreements, contracts, or transactions,” not the underlying event. 7 U.S.C. § 7a-2(c)(5)(C)(i). There is only one statutory requirement for the underlying—the instrument or transaction must be “based upon” an event, *id.*, which the CEA uses in reference to the underlying, 7 U.S.C. § 2(a)(1)(C)(ii).¹ “Based upon” and “involve” must have different meanings, with the former explicitly referring to the underlying and the latter, explicitly, to the agreement, contract, or transaction more broadly.

¹ See also 7 U.S.C. §§ 2(a)(1)(C)(i)(I), 2(a)(1)(C)(iv), 6b(e) (using “based on”).

Kalshi has no answer to this point, and the district court simply missed it. Because the district court confused the “based upon” clause with the “involve” clause, the CFTC is likely to succeed on the merits.

Kalshi insists that the CFTC has no likelihood of success because it is impossible to think of an example where transacting in a contract “amounts to” the statutory categories of war, terrorism or assassination, thus a contract or transaction can only involve such a category if the underlying event “involves” that category.² But that makes no difference. It does not change the plain language of the statute, in which “involve” modifies “the agreements, contracts, or transactions” without limitation, and without linking the word “involve” to the “based upon” clause, which alone establishes the requirement for the underlying. Congress deliberately chose a word (“involve”) with “expansive connotations,” *United States v. Alexander*, 331 F.3d 116, 131 (D.C. Cir. 2003), and tied it to the “agreements, contracts, or transactions” as a whole.

Such a sweeping term could apply to different concepts in different ways. An “agreement, contract, or transaction” *could* involve gaming if a game were its

² “Amounts to” is not even the definition the Commission relied on, other than passing mention in a footnote as an “example.” AR 7 n.19. The Commission prominently relied on definitions including “to relate to or affect,” “to relate closely,” to “entail,” or to “have as an essential feature or consequence.” AR 7.

underlying. But to say that is the *only* way an instrument or transaction can “involve” gaming violates the plain meaning of the term.

Kalshi cites *Clark v. Martinez*, 543 U.S. 371, 378 (2005), for the proposition that a term must apply “without differentiation” to a set of “categories.” But in *Clark*, the Court rejected giving “the same word[] a different”—and contradictory—“meaning for each category.” *Id.* Here, “involve” by its plain meaning can, without contradiction, embrace situations where an agreement, contract, or transaction involves an enumerated activity in differing ways.³

2. The District Court Misconstrued “Gaming.”

The Commission construed “gaming” according to its ordinary, dictionary definition as synonymous with “gambling,”⁴ and, on the facts before it, as including gambling on the outcome of a contest of others. AR 10. Because

³ The district court also rejected the statutory term “transaction,” holding that it means “instrument” simply because an agreement or contract is an instrument, and only an instrument can be “listed.” But the district court overlooked the very next phrase, which says the transaction also may not be “made available for clearing.” A transaction *can* be cleared. *Clearing Organization*, CFTC Glossary, <https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/CFTCGlossary/index.htm#C> (“An entity through which futures and other derivative transactions are cleared and settled.”), so this language is no basis to conflate “transaction” with “instrument.”

⁴ *See, e.g.*, <https://thelawdictionary.org/gaming/> (last visited Sept. 13, 2024) (“In general, the words ‘gaming’ and ‘gambling,’ in statutes, are similar in meaning.”).

Kalshi's contracts involve staking something of value on the outcome of elections, they fall within the ordinary definition of "gaming."

The district court erroneously rejected the CFTC's definition, concluding "gaming" requires a "game." Op. 15-16. Yet the court ignored that the very dictionary it cited lists "gambling" as a synonym for "gaming."⁵ And the statute's legislative history indicates that Congress sought "to prevent . . . gambling through futures markets" and "derivatives contracts" that "exist predominately to enable gambling." 156 Cong. Rec. S5906-07 (daily ed. July 15, 2010), 2010 WL 2788026.

The district court also erroneously concluded that the definition of "gaming" as "gambling" was "unworkable" because it would subject all event contracts to the Special Rule. Op. at 15-16. To the contrary, the Commission acknowledged that some state law definitions of "gaming" could arguably capture all contingent events, AR 8, and it *eschewed* those definitions, AR 10. The CFTC did not implicitly adopt every alternative definition in every source it cited, any more than a court adopts every alternative definition in its preferred dictionary. The district court erroneously based its ruling on a definition the CFTC did not apply.

⁵ <http://www.merriam-webster.com/dictionary/gaming> (defining the noun "gaming" as "the practice or activity of playing games for stakes: gambling") (last visited Sept. 13, 2024).

Finally, the district court stated it did not find the sources cited by the CFTC “relevant,” and that the Commission should have relied upon other sources. Op. 17-18. Kalshi, more bluntly, accuses the CFTC of “gerrymandering.” Oppos. 17. But the question before the Commission was whether Kalshi’s contracts, designed to wager on the outcome of elections, were within the ordinary meaning of “gaming.” After concluding that they were, the Commission was not required to consider other sources or formulate a prospective rule of general applicability. A contract that did not involve wagering on a contest of others would present different considerations.⁶ An agency “retain[s] power to deal with ... problems on a case-to-case basis.” *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947). Courts often do the same. *See e.g., Strothers v. City of Laurel*, 895 F.3d 317, 331 (4th Cir. 2018) (“[W]e need not test the definition’s outer limits.”); *Fink v. Time Warner Cable*, 810 F. Supp. 2d 633, 643 (S.D.N.Y. 2011) (finding no “need[] to define the outer limits of the concept, [because] the term ‘access’ should be interpreted broadly enough to include Defendant’s alleged conduct”); *see also United States v.*

⁶ The district court also mistakenly believed that “contest” is a synonym for “game.” Even in the Kalshi-endorsed Oxford English Dictionary, “contest” includes other “conflict,” “contention,” and “struggle for victory.” *Contest*, Oxford English Dictionary (not mentioning entertainment until the third alternate definition).

Simpkins, 826 F.2d 94, 96 (D.C. Cir. 1987) (noting “no issue arises concerning the outer limits of the meaning of ‘danger to the community’”).

3. The District Court Misconstrued Unlawful Activity.

As to the Commission’s unlawful activity finding, again the district court premised its decision on “involve,” which it held means “relates in some way,” while acknowledging it only needed to do so “broadly.” [Op. 21]. In the court’s mistaken view, because the Special Rule does not apply when trading a contract amounts to the enumerated activity (misstating the definitions the Commission applied, *see supra* n.2), this category was not met either. [Op. 22]. But even on the district court’s terms, the contracts relate broadly to unlawful activity.

“Unlawful under state law” focuses on state interests. It is not about whether the contracts would violate state law if they traded on a DCM—clearly the CEA would preempt that law. Rather, the election contracts involve unlawful activity because they undermine state interests other than gambling regulation. AR 13 n.28. To illustrate, many state laws ban the sale of marijuana, but those laws don’t forbid trading futures contracts on its price; hence, the drug laws are not preempted. However, the Commission could invoke the Special Rule to ask whether trading an event contract on the price of marijuana would undermine state interests in drug laws.

The analysis here is the same. The Commission cited 22 state statutes and 18 cases that forbid betting on elections. AR 11-12, n.26, 27. These laws express interests in election integrity. The Commission properly determined that the election contracts involved—or “relate[d] in some way (admittedly broadly)” [Op. 21]—to unlawful activity because the contracts undermined those state interests in protecting elections. Op. 21. Stated differently, even under the district court’s flawed but “broad” construction of “involve,” these contracts sufficiently relate to unlawful activity.

B. Public Interest and Irreparable Injury Favor a Stay.

The district court’s order has been construed by Kalshi and others as open season for election gambling. Immediately after the decision, Kalshi’s website boasted that more election contracts would be coming soon. Another CFTC-registered platform announced a new betting market for the Harris-Trump contest.⁷ Without a stay, other DCMs will follow suit. An explosion in election gambling on U.S. futures exchanges will harm the public interest.⁸

⁷ <https://www.wsj.com/finance/election-betting-is-going-mainstream-after-major-brokerage-gets-on-board-595bc9a6>.

⁸ Kalshi states inaccurately that only institutions can wager up to \$100 million. That limit also applies to wealthy individuals. 7 U.S.C. § 1a(18)(A)(xi) (“eligible contract participant”).

Irreparable injury is established when “harm has occurred in the past and is likely to occur again.” *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Here, documented cases of market manipulation have already been realized in the very markets Kalshi points to. On PredictIt,⁹ a fake poll showing Kid Rock leading Senator Stabenow 30% to 26% moved the price of the re-election contract for Senator Stabenow.¹⁰ Polymarket experienced a “spectacular manipulation” attempt by a group of traders betting heavily on Vice President Harris.¹¹ In 2012, one trader bet millions on Mitt Romney, likely to make the U.S. presidential election seem closer than it was.¹² These examples are not mere speculation; manipulation has happened and is likely to recur.

Unwitting participants may believe Kalshi’s contracts are less susceptible to manipulation or misinformation because they are on a regulated exchange, but this

⁹ PredictIt is not a DCM; it operates pursuant to a CFTC Staff Letter, <https://www.cftc.gov/idc/groups/public/@lrllettergeneral/documents/letter/14-130.pdf>.

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

¹¹ It only “failed” in the sense that the perpetrators lost money—the episode caused “sharp price movements.” <https://rajivsethi.substack.com/p/a-failed-attempt-at-prediction-market>.

¹² <https://slate.com/news-and-politics/2013/09/2012-intrade-paper-suggests-a-single-intrade-trader-spent-millions-to-make-it-look-like-mitt-romney-could-win.html>.

should heighten concern for the public interest, not allay it.¹³ Kalshi argues that the CFTC can simply use its enforcement authority, but such enforcement actions are typically filed after financial damage is done. The CFTC cannot remediate damage to election integrity after the fact.

The Commission is not alone in its concerns. Elected officials expressed alarm during the review process. *See* AR 2816-17; AR 2818, Sen. Klobuchar, *et al.*; AR 2273-76, Representatives Sarbanes and Raskin. More recently, Senator Merkley called this a “nightmare” scenario and “deeply corrupting.”¹⁴

Kalshi suggests that a stay will deprive the public of the predictive value of its contracts. However, the contracts’ predictive value is questionable considering Kalshi’s admission that the contracts are susceptible to manipulation. Dkt. 36 at 30. There is no guarantee Kalshi’s market would be accurate. Betting markets inaccurately predicted the outcome of Brexit until the vote count began.¹⁵

Kalshi misleadingly states its “time-limited contracts” will be “worthless” if the Court issues a stay. It fails to note that the contracts extend to *every future*

¹³ Neither the CEA nor Kalshi’s rules prohibit non-U.S. persons trading on a DCM. https://kalshi-public-docs.s3.amazonaws.com/regulatory/rulebook/rulebook_contracts_elections.pdf.

¹⁴ <https://www.politico.com/news/2024/09/12/election-gambling-us-00178904>.

¹⁵ <https://www.vox.com/2016/6/23/12022436/brexit-odds-of-a-british-exit-are-surg-ing-on-betting-markets>.

election cycle. See AR 26 (“[Kalshi] intends to list the contract on a biannual basis (every two years).”). In any case, “economic loss does not, in and of itself, constitute irreparable harm.” *Wisconsin Gas*, 758 F.2d at 674. “Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant’s business,” which Kalshi has not established. *Id.* Kalshi’s website has hundreds of other offerings. And, as noted, Kalshi intends to offer contracts on other elections as well. If it prevails on appeal, it can list election contracts into the foreseeable future and make up its losses. *See id.* at 675 (“it is as likely as not that the pipelines will recover the payments during the make-up period”).

Kalshi argues that a stay would preclude it from recouping the millions of dollars it invested in developing and marketing these contracts—a deceptive claim given the contracts are to be offered perpetually. That aside, Kalshi’s sunk costs are not attributable to a stay, they are attributable to Kalshi’s decision to spend big on election gambling, knowing that the Commission disapproved such contracts in the past.¹⁶

Kalshi complains that unregulated Polymarket has accrued unlawful market share by engaging in prohibited trading while Kalshi waits for resolution of this

¹⁶ *CFTC Order re NADEX*, <https://www.cftc.gov/sites/default/files/stellent/groups/public/@rulesandproducts/documents/ifdocs/nadexorder040212.pdf>.

litigation. But the argument that trading should launch because others are already doing it is sophomoric. A pharmacy does not get to dispense cocaine just because it is sold on the black market. The Commission determined that election gambling on U.S. futures markets is a grave threat to election integrity. AR 19-23. That another platform is offering it without oversight from the CFTC is no justification to allow election gambling to proliferate.

CONCLUSION

The Commission respectfully requests that its motion for a stay be granted.

Dated: September 14, 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, which was issued September 12, 2024. The Order and memorandum opinion were submitted with the CFTC's motion.

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. During that hearing the District Court heard the CFTC's oral motion for stay pending appeal. The district court denied the CFTC's motions for reasons stated on the record. The transcript for that proceeding was attached to the CFTC's motion in this Court.

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 2,595 words, as counted by the word processing software Microsoft Word.
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Dated: September 14, 2024

/s/ Anne W. Stukes

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2024, I served the foregoing Reply on counsel of record using this Court's CM/ECF system.

/s/ Anne W. Stukes

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GAMING Definition & Legal Meaning

Definition & Citations:

The act or practice of playing games for stakes or wagers; gambling; the playing at any game of hazard. An agreement between two or more persons to play together at a game of chance for a stake or wager which is to become the property of the winner, and to which all contribute. In re Stewart (D. C.) 21 Fed. 398; People v. Todd, 51 Hun, 440, 4 N. Y. Supp. 25; State v. Shaw, 39 Minn. 153, 39 N. W. 305; State v. Morgan, 133 N. C. 743, 45 S. E. 1033. Gaming is an agreement between two or more to risk money on a contest or chance of any kind, where one must be loser and the other gainer. Bell v. State, 5 Sneed (Tenn.) 507. In general, the words "gaming" and "gambling, in statutes, are similar in meaning, and either one comprehends the idea that, by a bet, by chance, by some exercise of skill, or by the transpiring of some event unknown until it occurs, something of value is, as the conclusion of premises agreed, to be transferred from a loser to a winner, without which latter element there is no gaming or gambling. Bish. St. Crimes,

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gaming

Dictionary

Thesaurus

gaming noun

gam·ing (ˈgā-mīŋ)

1 : the practice or activity of playing games for stakes : **GAMBLING**

After a six-decade absence, casino *gaming* makes its return next month to this Southern Indiana valley, once famous for luxury resorts that attracted the nation's elite.

– Michael Rubino

In the same way, casino owners almost never refer to "gambling," which brings to mind damp basements and dice, but always "*gaming*," which suggests Whist or Scrabble enjoyed in front of a crackling fireplace.

– Wayne Curtis

→ often used before another noun

the *gaming* industry

2 : the practice or activity of playing games (such as board games, card games, or video games)

online/mobile/PC *gaming*

When most people think of computer *gaming*, they envision some things that aren't exactly politically correct. Things like blazing lasers, spattering blood and beheaded aliens. However, Internet *gaming* really does offer something for everyone.

– Kim Komando

→ often used before another noun

You can get curved *gaming* monitors too, for added immersion in certain games.

– Jon Martindale

After looking through the *gaming* options, we decided on Quick Draw—a game that gives one participant a word to draw, while the other callers try to guess what the word is.

– Becca Miller

Dictionary

Thesaurus

Recent Examples on the Web

The **gaming** controller is white with blue accents, just like Astro Bot, while its touchpad has two blue circles that resembles the caped small robots eyes.

– Rudie Obias, *Variety*, 6 Sep. 2024

As well as information on the incoming game feed, this menu gives you fast access to a few **gaming** aids, including mini-map auto detection/magnification, and a selection of virtual aim pointer designs.

– John Archer, *Forbes*, 5 Sep. 2024

But now, at a point where AAA **gaming** is beginning to show its seams with big budget misfires chasing too many trends, Sony has looked to its past to potentially reshape its future.

– Christopher Cruz, *Rolling Stone*, 5 Sep. 2024

The series was also recognized by the **gaming** community winning Best Adaptation at The Game Awards (2022).

– Denise Petski, *Deadline*, 5 Sep. 2024

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Etymology

GAME entry 1 or GAME entry 3 + -ING entry 1

First Known Use

Dictionary

Thesaurus

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tabletop gaming

In Tech, What Does 'K' Mean?

gaminerie

gaming

gaming house

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Style

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Facebook



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gaming noun

gam·ing 'gā-mīŋ

- 1 : the practice of gambling
- 2 : the acting out of a situation (as war) for training or testing
- 3 : the playing of video games

English: Translation of *gaming* for Spanish Speakers

Britannica English: Translation of *gaming* for Arabic Speakers

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EXCLUSIVE

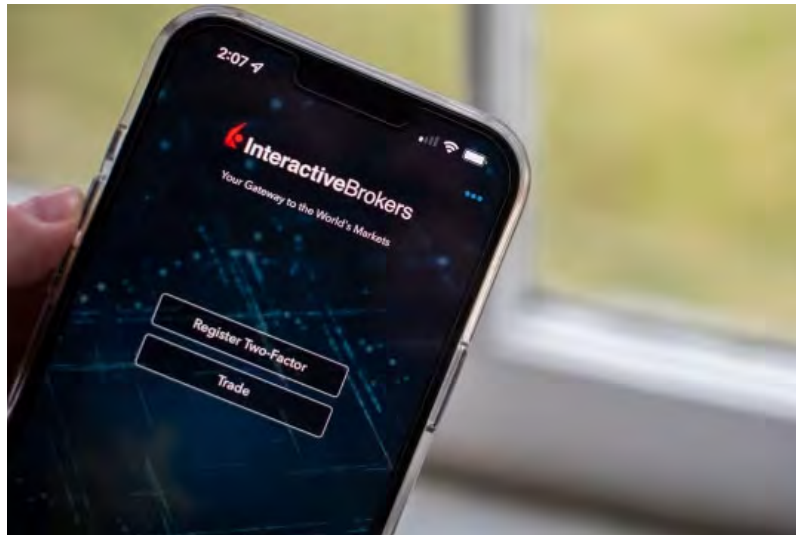
MARKETS & FINANCE

Election Betting Is Going Mainstream After Major Brokerage Gets on Board

Interactive Brokers to launch election bets next week, taking advantage of court ruling

By [Alexander Osipovich](#) [Follow](#)

Updated Sept. 12, 2024 5:41 pm ET



The launch on Interactive Brokers, which has over three million client accounts, would open election betting to a broad customer base. PHOTO: TIFFANY HAGLER-GEARD/BLOOMBERG NEWS

Until a few days ago, election betting was banned by the federal government. Now it is set to reach millions of Americans.

The popular trading platform Interactive Brokers plans to launch a market where investors can bet on the outcome of the presidential election, taking advantage of a federal court ruling that has effectively legalized election betting in the U.S.

Starting Monday, Interactive Brokers plans to allow its users to place wagers on whether Vice President Kamala Harris beats former President Donald Trump in November, the company's founder and chairman Thomas Peterffy said in an interview.

Interactive Brokers expects to follow up by allowing similar wagers on swing-state Senate races, Peterffy added.

Peterffy's announcement came hours after a judge denied a last-ditch attempt by the Commodity Futures Trading Commission to prevent a startup trading platform from launching a betting market on congressional elections.

U.S. District Judge Jia Cobb of the District of Columbia ruled Friday that the CFTC had overreached last year when it blocked the startup, called Kalshi, from launching the congressional-control markets.

The CFTC—which has argued that such betting markets were unlawful and could harm the integrity of U.S. elections—filed an emergency motion to block Cobb's ruling from taking force.

In a hearing Thursday morning, the judge rejected the CFTC's arguments and cleared the way for Kalshi's launch. The CFTC appealed her ruling immediately after the conclusion of the hearing.

Critics of election betting, including some Democratic politicians and liberal groups, say it could warp voters' incentives and encourage bad actors to manipulate elections for financial gain.

“When big bets are cast on elections and dark money can smear candidates, you have the perfect combination of factors that can undermine trust in our democracy,” Sen. Jeff Merkley (D., Ore.) said in a statement, adding that the court ruling was “deeply damaging to the integrity of our upcoming election.”

Proponents say election-betting markets can provide useful, real-time insights into the dynamics of an election.

The current presidential race has led to a huge surge of activity at Polymarket, a crypto-based prediction market whose users have placed hundreds of millions of

dollars of bets on the Harris-Trump race. Polymarket is off-limits to Americans under the terms of a 2022 settlement with the CFTC.

Two election-betting markets went live on Kalshi's website shortly after Thursday's hearing concluded, tied to whether Democrats or Republicans win control of the House and Senate in November. The debut means that Americans can now legally place bets on elections on a regulated U.S. marketplace.

"Now is finally the time to allow these markets to show the world just how powerful they are at providing signal amidst the noise and giving us more truth about what the future holds," said Kalshi co-founder and CEO Tarek Mansour.

But the coming launch on Interactive Brokers—which, with over three million client accounts, is much larger than Kalshi—would open election betting to a far broader customer base.

Interactive Brokers' election contracts will be part of its newly launched prediction market, ForecastEx, which made its debut earlier this summer. ForecastEx allows users to buy "yes" or "no" contracts in response to a particular question, and users who are proved correct in the end receive \$1 per contract. Contract prices range from 2 cents to 99 cents and fluctuate depending on what users are willing to pay for that outcome.

So far, ForecastEx's questions have been limited to the economy and climate. Once political contracts go live, prices on ForecastEx will reflect how market participants assess the probability of a candidate winning a particular election.

Peterffy said Interactive Brokers is planning to purchase digital ads on The Wall Street Journal's website and on X, the social-media platform, that stream live prices from its new election-betting contracts. Viewers of those ads would then see in real time how the candidates are faring, in the opinion of ForecastEx bettors.

Currently, only users of Interactive Brokers can access ForecastEx's markets, but the company is working on connecting it to other brokers, Peterffy said.

Write to Alexander Osipovich at alexo@wsj.com

Appeared in the September 13, 2024, print edition as 'Big Brokerage Gets Aboard Presidential Election Betting'.

**U.S. COMMODITY FUTURES TRADING COMMISSION**

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Division of
Market Oversight

CFTC Letter No. 14-130
No-Action
October 29, 2014
Division of Market Oversight

Neil Quigley
Deputy Vice-Chancellor, Research
Victoria University of Wellington
Macdiarmid Building, Am404
Kelburn Parade
Wellington, 6012, New Zealand

Re: Victoria University of Wellington's Request for No-Action Letter regarding the Operation of a Small-Scale, Not-For-Profit Market for the Trading of Event Contracts for Educational Purposes

Dear Mr. Quigley:

This letter is in response to your letter to the Division of Market Oversight ("DMO" or "Division") of the Commodity Futures Trading Commission ("CFTC" or "Commission") dated August 26, 2014, requesting no-action relief that would allow Victoria University of Wellington, New Zealand ("Victoria University")¹ to operate a not-for-profit market for the trading of event contracts and the offering of such event contracts to U.S. persons.

As you note in your letter, the Division of Trading and Markets ("T&M"), which preceded DMO as the CFTC division with oversight responsibilities for regulated markets, granted no-action relief by letter dated June 18, 1993, to the University of Iowa to permit the operation of a non-profit electronic market ("Iowa Electronic Markets" or "IEM").² The IEM consists of submarkets for binary contracts concerning political elections and economic indicators — it is operated for academic research purposes only, and its operators, who are faculty at the University, receive no separate compensation.

¹ Victoria University was founded as Victoria College in 1897. The University comprises four campuses, more than 2,000 staff and 16,000 students. Additional information about the University's history, faculty, academic offerings, reputation, rankings, and related matters is available at <http://www.victoria.ac.nz/about/>.

² CFTC No-Action Letter No. 93-66 (June 18, 1993), available at <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/93-66.pdf>.

Victoria University proposes the creation of a small-scale, not-for-profit, online market for event contracts in the U.S. for educational purposes that will use the IEM as a model, with certain features that would vary from that model. As such, you request on behalf of Victoria University similar no-action relief with respect to the operation of your proposed market for event contracts as was granted to the University of Iowa with respect to operation of the IEM. In particular, you request that DMO recognize that Victoria University's market for event contracts, as proposed, should not be required to register as a designated contract market ("DCM") under section 5 of the Commodity Exchange Act ("CEA") and part 38 of the Commission's regulations, nor as a foreign board of trade ("FBOT") under section 4 of the CEA and part 48 of the Commission's regulations, and that its operators need not register under the CEA or the Commission's regulations.

I. Background

Based upon the representations contained in your letter, as supplemented by telephone conversations with DMO staff, we understand the facts to be as follows. Victoria University (henceforth "University") intends to operate two submarkets: one for political event contracts, and the other for economic indicator contracts. The University proposes to utilize the results of the market information derived from trading in these contracts for educational and research purposes. For example, the University plans to utilize the results from its market as teaching tools in its courses on statistical analysis, market theory, and trader psychology. The University has also expressed plans to utilize the results to publish related research papers and analyses.

All of the proposed event contracts would be structured as follows:

- all contracts would be initially priced at \$1;
- each contract for the correct outcome would pay off at \$1, while all other contracts (i.e., contracts with incorrect outcomes) would not pay-off; and
- the price of each contract at any given time would reflect the probability that the traders believe that the event will happen.

The proposed submarket for political event contracts will include winner-take-all contracts to predict the following outcomes:

- which presidential nominee will win his or her party's primary, the general election popular vote, and the Electoral College;
- who will be the major party nominees for Vice President; and
- which party will control the next Congress.

The proposed submarket for economic indicator contracts will include winner-take-all contracts to predict monetary policy decisions of the Federal Open Market Committee regarding the federal funds target rate. The University represents that it will not list any economic indicator contract that would compete with any contract that is listed by a CFTC-regulated contract market, and the University would not list more than five economic indicator contracts at any one

time. Participation in the submarket for economic indicator contracts would be limited to students, faculty and staff at any participating universities.³

By design, the University's model for its proposed market for event contracts bears many close similarities to the IEM model, including the following items:

- The University's key employees overseeing the project will be three University professors and one administrator.
- Neither the professors nor the administrator will receive any compensation or other payment, directly or indirectly, for operating the market.
- Neither the University nor any of the key personnel operating the proposed market is required to register with the Commission, nor is any of these persons or entities a business affiliate of any person required to register with the Commission.
- There will be no additional fees other than those necessary to cover the basic expenses of running the market, including the cost of credit card processing of deposits and withdrawals, fulfillment of the know-your-customer ("KYC") process,⁴ and all other associated regulatory compliance and operating costs.
- Participants will execute their own trades, no brokerage service will be available or allowed, and no commissions will be charged.

However, the University's proposed market for event contracts would feature certain aspects that would distinguish it from the IEM model. The following four departures from the IEM model, you argue, would cause the University's market for event contracts to produce more accurate results, thereby furthering the educational public interest purpose of the project, by permitting:

- (1) a larger allowable number of traders in each contract;
- (2) a larger number of traders that are not affiliated with the University to trade political event contracts;
- (3) a larger allowable investment by any single market participant; and
- (4) a limited level of advertising.

1. Number of traders in each contract

Participation in IEM is limited to 2000 total traders in any particular election for which a political market is operated, and to 1000 total trades in any particular economic indicator submarket. The University proposes to have a limit of 5000 total traders in any particular contract, explaining that broader participation would make these contracts more efficient and effective prediction tools. The University anticipates that the higher proposed cap on participation, coupled with a higher maximum deposit limit (discussed below), would together

³ The University represents that several U.S. universities have indicated a willingness to participate in the University's market for event contracts. Thus far, the University has neither sought nor obtained firm commitments from any of the universities contacted and does not intend to do so until it obtains the necessary relief from Commission staff. Such participation by other universities, as planned, would be similar to the participation by several universities in the IEM that the University of Iowa has been able to obtain.

⁴ The University represents that it will implement an age and identity verification system as part of a KYC process, performed by an outside independent party: Aristotle International, Inc.

increase the value of the academic research generated by the project by reducing the likelihood of thinly-traded contracts. Thinly-traded contracts, the University explains, would likely allow individual users to have an outsized impact on contracts, thereby creating the potential for artificially skewed results and undermining the academic utility of the project.

2. Access to submarket for political event contracts

IEM limits participation in its political submarket to primarily students, faculty and staff at participating universities, and restricts participation in its economic indicator submarket to only such “academic traders.” While the University proposes that participation in its economic indicator submarket be restricted to only academic traders at participating universities, the University has also proposed that trading in its political submarket not be limited to primarily academic traders. In support of its proposal, the University posits that many of the same reasons stated above for expanding the maximum number of allowable traders would also logically apply to this issue — a reduced number of traders would bias the market and reduce access to a broader range of informational sources, thereby reducing accuracy and academic utility.

3. Larger allowable investment by any single market participant

IEM limits the maximum investment by any single participant in any particular contract to \$500. The University proposes raising the limit on investment by any single participant in any particular contract to \$850. The University represents that, using the Consumer Price Index, \$500 in 1992 (the year in which the Division first granted no-action relief to the University of Iowa) had the same buying power as \$844.99 in 2014. The University explains that increasing the maximum allowable investment would allow participants the ability to participate in several more contracts than they might otherwise if limited to 1992 dollar levels. This, the University explains, would make its market more efficient by minimizing the likelihood of thinly-traded contracts, while still adhering to the small-dollar, educational purpose of the IEM model.

4. Advertising would be permitted

In its 1993 relief request, IEM represented that none of its operators, nor any other person involved with the IEM, engages in any advertising concerning the IEM. The University proposes to engage in limited advertisement of its market in media outlets where there is a high likelihood of reaching those interested in the subject matter of its contracts. Any such advertisements would prominently disclose that the proposed market is unregulated, experimental, and being operated for academic purposes. It is the University’s view that limited advertisement is necessary to attract sufficient and diverse users to its proposed market.

The University represents that it will use little, if any, paid advertisements to market its contracts. Instead, the University would attract participants through channels of communication within the academic community, including word-of-mouth marketing, articles and interviews with media.

DMO notes that the University’s proposed political event contracts can be distinguished from the North American Derivatives Exchange’s (“Nadex”) political event contracts that were

disapproved by Commission Order on April 2, 2012.⁵ Specifically, the University's request for no-action relief was not in any way premised upon claims that its proposed event contracts have any hedging or price-basing utility. Much to the contrary, the University's proposed market for event contracts represents an academic exercise demonstrating the information gathering and predictive capabilities of markets. Another important distinction is that the University's proposed market would operate on a non-profit basis. Furthermore, because participation levels and maximum allowable investments in the University's proposed contracts would each be capped at very low levels, the University's proposed political event contracts would not have the same potential for compromising the integrity of elections as would Nadex's disapproved political event contracts, which were much larger.

II. Scope of no-action relief provided by DMO

Based upon your representations concerning the purposes and manner of operation of your proposed market for event contracts, the Division does not believe that operation of this proposed market without registration as a DCM, FBOT, or swap execution facility ("SEF"),⁶ or without registration of its operators, would be contrary to the public interest. The Division's conclusion is based upon the facts that, among others, your proposed market for event contracts has been designed to serve academic purposes and the operators will receive no compensation. Furthermore, the Division would allow the University's four proposed variations from the IEM model, as discussed above, because each is intended to produce more accurate results, which would promote the educational public interest purpose of the project while maintaining the small-scale, not-for profit nature of the proposed market.

Consequently, based upon your representations, DMO will not recommend that the Commission take any enforcement action in connection with the operation of your proposed market for event contracts based upon the operators' not seeking designation as a contract market, registering under the Act or otherwise complying with the Act or Commission regulations.

DMO does not render any opinion as to whether the operation of your proposed market for event contracts violates any state law provisions, nor does the Division's position excuse non-compliance with any such law.

This letter is based upon the information that has been provided to the Division and is subject to the conditions stated above. Any different, changed or omitted material facts or circumstances may render this no-action relief void.

This letter, and the no-action position taken herein, represents the views of DMO only, and does not necessarily represent the positions or views of the Commission or of any other division or

⁵ *Order Prohibiting the Listing or Trading of Political Event Contracts* (April 2, 2012), available at <http://www.cftc.gov/ucm/groups/public/@rulesandproducts/documents/ifdocs/nadexorder040212.pdf>. The disapproved Nadex contracts were binary option contracts that would have paid out based upon the results of various U.S. federal elections in 2012.

⁶ DMO staff believes that the proposed event contracts could be characterized as swaps pursuant to CEA section 1a(47)(A)(ii). In general, no person may operate a facility for the trading or processing of swaps unless the facility is registered as a SEF or as a DCM. See CEA section 5h(a)(1).

office of the Commission. As with all no-action letters, DMO retains the authority to condition further, modify, suspend, terminate or otherwise restrict the terms of the no-action relief provided herein, in its discretion.

If you have any questions concerning this correspondence, please contact David Van Wagner, Chief Counsel, Division of Market Oversight, at (202) 418-5481 or dvanwagner@cftc.gov, or David Pepper, Attorney Advisor, Division of Market Oversight, at (202) 418-5565 or dpepper@cftc.gov.

Sincerely,

Vincent McGonagle
Director, Division of Market Oversight

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Fake Polls, Real Consequences: The Rise of Fake Polls and the Case for Criminal Liability

Tyler Yeargain

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Fake Polls, Real Consequences: The Rise of Fake Polls and the Case for Criminal Liability

*Tyler Yeargain**

ABSTRACT

For better or for worse, election polls drive the vast majority of political journalism and analysis. Polls are frequently taken at face value and reported breathlessly, especially when they show surprising or unexpected results. Though most pollsters adhere to sound methodological practices, the dependence of political journalism – and campaigns, independent political organizations, and so on – on polls opens a door for the unsavory. Fake polls have started to proliferate online. Their goal is to influence online political betting markets, so that their purveyors can make a quick buck at the expense of those they've tricked.

This Article argues that these actions – the creation and promulgation of fake polls to influence betting markets – is a classic case of either commodities fraud, or wire fraud, or both, or conspiracy to commit either. It argues that publishing fake polls, even for the relatively esoteric purpose of influencing political prediction markets, could have adverse societal consequences if left unpunished. Accordingly, it makes the case for criminal liability and provides federal prosecutors with a roadmap of how to see it through.

* Law Clerk, United States Court of Appeals for the Eleventh Circuit, 2019–20. The author thanks Professor Morgan Cloud for his editorial insights and encouragement of this piece; Richada Ky for her patience, support, and love throughout my fixation on research projects like this one; and both the online community at DailyKos Elections and the denizens of “Election Twitter,” especially Kevin Keelty Gartland and David Nir, for their constant inspiration, education, and indulgence. And a special note of appreciation to the staff of the *Missouri Law Review* who worked on this piece – Emily Holtzman, Michael Essma, Brittany Briggs, and Carleigh Cavender – for their hard work and dedication in improving this Article.

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INTRODUCTION

Suppose that someone is an investor in one of America's most profitable novelty weathervane manufacturers. The company is doing well, but the investor wants to drive up the value of her shares, so she crafts a clever scheme. Using her business acumen, she generates a devastating, but entirely fraudulent, earnings report for the company's biggest competitor and posts a link to the report on Twitter – from a Twitter account she created that purports to be a legitimate financial news outlet. The news goes viral, the competitor's stock dips, the investor's company sees a slight increase in its price, and she sells her shares for a nice profit.¹

The conclusion that the investor's actions – a sort-of reverse “pump and dump”² or a “distort and short”³ – would violate federal (and probably state)⁴

1. This is *roughly* a condensed description of minor subplot in the much-awaited sequel to *Wall Street*. See generally WALL STREET: MONEY NEVER SLEEPS (20th Century Fox 2010) (in which Shia LeBeouf's character spreads false rumors that an African government will soon nationalize its oil industry in an effort to kill the stock price of a rival investment firm).

2. “The pump-and-dump scheme generally operates by a manipulating party acquiring a position in a financial instrument, like a stock, then artificially inflating the stock through fraudulent promotion before selling its position to unsuspecting parties at the inflated price, which often crashes after the sale. . . . [M]odern variations of pump-and-dump schemes involve the use of boiler rooms, Internet chat rooms, fraudulent websites, social media, and spam e-mails to artificially inflate securities as part of the manipulative scheme.” Tom C.W. Lin, *The New Market Manipulation*, 66 EMORY L.J. 1253, 1284–85 (2017).

3. “In a distort and short campaign, short sellers and their confederates promulgate a number of misleading or even fraudulent press releases containing negative news about a company and its prospects. They then attempt, through short selling, to accelerate declines in the company's share price first caused by the dissemination of negative news.” Douglas M. Branson, *More Muscle Behind Regulation SHO? Short Selling and the Regulation of Stock Borrowing Programs*, 5 VA. L. & BUS. REV. 1, 12 n.38 (2010); see also Christopher Cox, *What the SEC Really Did on Short Selling*, Opinion, WALL STREET J. (July 24, 2008, 12:01 AM), <https://www.wsj.com/articles/SB121685865187779279> [perma.cc/LCA5-CSPB].

4. Notwithstanding, of course, federal preemption of state securities law actions. See generally Richard W. Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 CORNELL L. REV. 1 (1998). “The Uniform Securities Act is in effect in forty states,” which includes a “verbatim copy of SEC Rule 10b-5 The obvious consequence is that a plaintiff or prosecutor could bring . . . a securities law claim and have behind her the force of a statutory enactment, not merely the rule of an administrative agency.” Douglas M. Branson, *Choosing the Appropriate Default Rule – Insider Trading Under State Laws*, 45 ALA. L. REV. 753, 771–72 (1994).

law would be uncontroversial.⁵ But how would this conclusion differ if, instead of generating a false earnings report in an attempt to drive down a *company's* stock price, the investor generated a fake poll in an attempt to drive down a *political candidate's* “stock price” on an online betting market for elections?

PredictIt is a prediction market – officially a “not-for-profit market for event contracts” – operated by the Victory University of Wellington in New Zealand.⁶ It allows its users to bet on a number of different political events⁷ – like the outcome of elections, the successful passage of legislation in Congress, the possibility of action by federal agencies, the odds of certain political actors being criminally prosecuted, and so on. But unlike virtually every other political prediction market, PredictIt is legal.⁸ It received a no-action letter from the U.S. Commodity Futures Trading Commission (“CFTC”) in 2014, which authorized its operation with a handful of restrictions.⁹ PredictIt is, at least ostensibly, “operated for academic research

5. *E.g.*, United States v. Skelly, 442 F.3d 94, 97–99 (2d Cir. 2006) (affirming conviction of defendant for illegal pump-and-dump scheme as a violation of 18 U.S.C. §§ 1343, 1346 (2018) (wire fraud statutes) and SEC Rule 10b-5).

6. Press Release, U.S. Commodity Futures Trading Comm’n, CFTC Staff Provides No-Action Relief for Victory University of Wellington, New Zealand, to Operate a Not-For-Profit Market for Event Contracts and to Offer Event Contracts to U.S. Persons (Oct. 29, 2014), <https://www.cftc.gov/PressRoom/PressReleases/pr7047-14> [perma.cc/4PFJ-76LJ]. This determination is introduced here in passing but will be discussed much more comprehensively later. *Infra* Part II.A.3.

7. Husna Haq, *Why Is It Now Legal to Gamble on the 2016 Elections?*, CHRISTIAN SCIENCE MONITOR (Oct. 8, 2015), <https://www.csmonitor.com/USA/Politics/2015/1008/Why-is-it-now-legal-to-gamble-on-the-2016-elections> [perma.cc/DSJ4-AYH3]; Joe Perticone, *There’s a ‘Stock Market for Politics’ Where Users Can Make Money on Washington’s Chaos*, BUSINESS INSIDER (June 17, 2018, 7:41 am), <https://www.businessinsider.com/predictit-is-a-stock-market-for-politics-where-users-can-make-money-2018-5> [perma.cc/A8QB-9JWN].

8. Press Release, Commodity Futures Trading Comm’n, *supra* note 6; *see also*, *e.g.*, Jessica Contrera, *Here’s How to Legally Gamble on the 2016 Race*, WASH. POST (Mar. 28, 2016), https://www.washingtonpost.com/lifestyle/style/heres-how-to-legally-gamble-on-the-2016-race/2016/03/28/14397dde-f1dc-11e5-85a6-2132cf446d0a_story.html?utm_term=.ffa2a8e40f14 [perma.cc/2HQT-DZS2]; Haq, *supra* note 7. Though PredictIt is the most prominent political prediction market operating today, it is certainly not the only one. For example, the Iowa Electronic Markets, run by the University of Iowa, was created in the early 1990s as the first mainstream political market and is still operated today. *See infra* note 39 and accompanying text. Betfair, an online gambling site, has expanded to include political prediction markets for American and European elections. *US Politics*, BETFAIR, <https://betting.betfair.com/politics/us-politics/> [perma.cc/BM6M-XTEX] (last visited Sept. 24, 2019). Other markets, like Augur, have developed as prediction markets built with blockchain technology. *See Frequently Asked Questions*, AUGUR, <https://www.augur.net/faq> [perma.cc/KDG3-VU8P] (last visited Sept. 24, 2019).

9. A “no-action letter” is “[a] letter from the staff of a governmental agency stating that if the facts are as represented in a person’s request for an agency ruling, the staff will advise the agency not to take action against the person.” *No-Action*

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purposes only,” and its “main objective . . . is to determine whether it can aggregate information and predict outcomes of certain events,” like elections, “more accurately than through alternative means, such as public opinion polling.”¹⁰ Bettors on PredictIt rely on inside information, current events, and opinion polls (both publicly released and internal) in making their investments.¹¹

Given the heavy reliance of PredictIt bettors on public opinion polls, it is perhaps unsurprising that some unscrupulous actors decided to publish fake polls,¹² likely in an effort to distort PredictIt’s market.¹³ This was first reported in July 2017 when Delphi Analytica released a poll of the U.S. Senate election taking place in Michigan in 2018.¹⁴ The poll showed musician Kid Rock, who was tested as the Republican nominee, leading Democratic Senator Debbie Stabenow 30% to 26% and received a great deal of media attention and hand-wringing over Stabenow’s election prospects.¹⁵ Notably, the share

Letter, BLACK’S LAW DICTIONARY (8th ed. 2008). Here, the CFTC’s Division of Market Oversight’s letter stated that it “will not recommend that the [CFTC] take any enforcement action in connection with the operation of [the University’s] proposed market for event contracts based upon the operators’ not seeking designation as a contract market, registering under the Act[,] or otherwise complying with the Act or Commission regulations,” but “[did] not render any opinion as to whether the operation of [the] proposed market for event contracts violates any state law provisions” Letter from Vincent McGonagle, Director of Market Oversight, U.S. Commodity Futures Trading Commission, to Neil Quigley, Deputy Vice-Chancellor, Research, Victoria University of Wellington (Oct. 29, 2014), <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/14-130.pdf> [perma.cc/C3ZU-ZGD8]; see also Press Release, Commodity Futures Trading Comm’n, *supra* note 6.

10. Press Release, Commodity Futures Trading Comm’n, *supra* note 6.

11. See Harry Enten, *Fake Polls Are a Real Problem*, FIVETHIRTYEIGHT (Aug. 22, 2017), <https://fivethirtyeight.com/features/fake-polls-are-a-real-problem/> [perma.cc/ZA7X-KGV2]; Perticone, *supra* note 7.

12. As used in this Article, a “fake poll” refers to falsified opinion polling that presents itself as legitimate by a fraudulent “polling outlet” – fake polls are “fake” because they were never conducted in the first place, and their entire existence is a work of fiction. Enten, *supra* note 11. “Fake polls” identified herein are fundamentally different than the “fake polls” about which Donald Trump frequently complains. See, e.g., Tamara Keith, *How Trump Tries to Discredit What He Doesn’t Like With ‘Fake’ And ‘Phony’ Labels*, NPR (Aug. 31, 2018, 4:29 pm), <https://www.npr.org/2018/08/31/643798637/how-trump-tries-to-discredit-what-he-doesnt-like-with-fake-and-phony-labels> [perma.cc/UF%L-XVCX].

13. Enten, *supra* note 11.

14. *Id.*

15. See, e.g., *Early Polling Strong for Bawitdaba Da Bang a Dang*, NAT’L REVIEW (July 27, 2017, 1:16 PM), <https://www.nationalreview.com/corner/early-polling-strong-bawitdaba-da-bang-dang/> [perma.cc/UV83-LELP].

price of Stabenow “stock” initially dropped on PredictIt from 78 cents to 63 cents, and ended at 70 cents for the day¹⁶ – a fairly significant response to a single event.

However, when Harry Enten – an analyst with Nate Silver’s *FiveThirtyEight* – reviewed the poll, he concluded that “something didn’t smell right about it” and that it “may not have been conducted.”¹⁷ Enten pointed out that the lack of specifics about the poll’s methodology,¹⁸ the total anonymity of the polling firm’s leadership, and contemporaneous remarks in chatroom by the person apparently responsible for promulgating the poll all suggested that the poll wasn’t actually conducted.¹⁹ If Delphi Analytica didn’t actually conduct its Michigan poll – as seems likely – it definitely wasn’t alone. Other outfits operating under a similar haze published polls in at least six other elections in five other states.²⁰

While the long-term effect of the Michigan poll was virtually undetectable – Kid Rock decided not to run for the Senate and Senator Stabenow easily won re-election over someone who likely never ate a grit sandwich for breakfast²¹ – the long-term effects of *other* fake polls might not be so easily dismissed. Polls are usually seen as reflections of public thought, but they do more than reflect public opinion – they refract it, too.²² As this Article explains later, this refraction has real-world political effects, like allowing candidates to participate in debates, helping (or hurting) campaigns’ fundraising efforts, affecting turnout (positively or negatively), and even impacting election results.²³ Fake polls, therefore, have far more serious harms than manipulating small-dollar political prediction markets – in the wrong hands, they could chip away at the integrity of our democracy.

Therefore, like *Wall Street*, *The Wolf of Wall Street*, or any other good movie about securities fraud, the story of fake polls and their impact on PredictIt markets – and elections themselves – deserves a satisfying conclusion, with comeuppance for the fraudsters. This Article argues that, in the denouement of this story, federal criminal liability should come to bear on the creators and purveyors of fake polls. It provides a detailed overview of fake polls and identifies several theories of criminal liability for publication

16. Enten, *supra* note 11.

17. *Id.*

18. Proper disclosure of methodology generally includes reporting the sample size, the calculated error rate, the date range during which the poll was conducted, and the phrasing of the questions. *Id.*; see generally *Assessing Public Opinion Polls*, CONST. RTS. FOUND., <http://www.crf-usa.org/election-central/public-opinion-polls.html> [perma.cc/9CCD-5R9B] (last visited Mar. 2, 2019); Leighton Walter Kille, *Polling Fundamentals and Concepts: An Overview for Journalists*, JOURNALIST’S RES. (Nov. 10, 2016), <https://journalistsresource.org/tip-sheets/reporting/polling-fundamentals-journalists/> [perma.cc/E98U-RYYB].

19. Enten, *supra* note 11.

20. *Infra* notes 81–100 and accompanying text.

21. See generally Kid Rock, *Grits Sandwiches for Breakfast* (Jive Records 1990).

22. *Infra* notes 325–40 and accompanying text.

23. *Infra* notes 328–344 and accompanying text.

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of fake polls. It then argues that, regardless of which theory is utilized, the authors of publicized fake polls should face criminal charges.

Part I begins by providing a more detailed explanation of how PredictIt operates and then addresses the origin of fake polls. It explains – to the greatest extent possible given the shadowy nature of the subject matter – the life cycle of fake polls, from conception to publication to fallout. Next, Part II addresses two different theories of criminal liability for the publishers of fake polls – namely, commodities fraud and wire fraud.

Finally, Part III substantively argues that the publication of fake polls should be considered illegal and prosecuted to the fullest extent of the law. It contends that fake polls could have real-world consequences, like defeating PredictIt's purpose as an organization, affecting the public's trust in polling companies and political journalism, altering election outcomes in close races, and most concerningly, opening the door to even greater foreign interference in American elections.

I. PREDICTIT, FAKE POLLS, AND ONLINE ELECTORAL MANIPULATION

To understand how the publication of fake polls by rogue traders is likely illegal – and why it should be – it is helpful to understand how PredictIt operates from the user's perspective, from start to finish. Section A begins by providing a thorough, mechanical examination of PredictIt's operations. Section B traces the origin of the first-reported fake polls, details the subsequent release of other fake polls, and puts forward evidence pointing towards the falsity of the polls. It then concludes this Part by explaining how these fraudulent polls affect, or could affect, online betting markets.

A. *How PredictIt Operates*

In many ways, PredictIt operates like a miniature version of a stock market but with a much more limited number of “stock” options, all of which relate to the occurrence of a political event.²⁴ At any given time, PredictIt provides several hundred “markets” for users to purchase shares in.²⁵ The

24. PredictIt generally refers to “the outcome of political and financial events and circumstances” as “factors.” *Terms and Conditions*, PREDICTIT, <https://www.predictit.org/terms-and-conditions> [perma.cc/S655-ZWLE] (last accessed March 2, 2019).

25. *All Markets*, PREDICTIT, <https://www.predictit.org/markets> [perma.cc/4VGH-2DEP] (last visited Mar. 3, 2019). PredictIt also allows users to suggest new markets. *Frequently Asked Questions*, PREDICTIT,

markets operate by asking a question – like, “Will Donald Trump be the 2020 Republican nominee for President?”²⁶ or “Who will win the 2020 Iowa Democratic caucuses?”²⁷ – and then by allowing users to purchase an answer to the question as a “share.”²⁸ Some of the questions present only a binary decision for users – they can buy “Yes” or “No” – while others allow users to buy one (or more) of several different options.²⁹ The prices are set both by PredictIt’s market trends³⁰ and by users themselves.³¹

<https://www.predictit.org/support/faq> [perma.cc/QL9H-2X98] (last visited Mar. 2, 2019).

26. *Will Donald Trump Be the 2020 Republican Nominee for President?*, PREDICTIT, <https://www.predictit.org/markets/detail/3390/Will-Donald-Trump-be-the-2020-Republican-nominee-for-president> [perma.cc/VUW5-RBNP] (last visited Mar. 3, 2019).

27. *Who Will Win the 2020 Iowa Democratic Caucuses?*, PREDICTIT, <https://www.predictit.org/markets/detail/5241/Who-will-win-the-2020-Iowa-Democratic-caucuses> [perma.cc/G2WM-JG5U] (last visited Mar. 3, 2019).

28. *How to Trade on PredictIt*, PREDICTIT, <https://www.predictit.org/support/how-to-trade-on-predictit> [perma.cc/P9R8-P8QG] (last visited Mar. 3, 2019).

29. See, e.g., *Will Donald Trump Be the 2020 Republican Nominee for President?*, *supra* note 26; *Who Will Win the 2020 Iowa Democratic Caucuses?*, *supra* note 27. For the market of who will win the 2020 Iowa Democratic caucuses, users can pick one of eight choices – Bernie Sanders, Joe Biden, Beto O’Rourke, Kamala Harris, Amy Klobuchar, Elizabeth Warren, Sherrod Brown, or Cory Booker. *Who Will Win the 2020 Iowa Democratic Caucuses?*, *supra* note 28.

30. See *Frequently Asked Questions*, PREDICTIT, *supra* note 25 (“[T]he price assigned to each potential outcome is a reflection only of the most recent trade in that contract . . .”).

31. *Id.* (“PredictIt depends on traders offering prices for others to match. If you don’t see a price you like, name the price and quantity you’re looking for and we’ll register an ‘open’ offer on your behalf.”).

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To purchase “shares,”³² users must create an account and deposit funds onto the website through PredictIt’s designated clearing house.³³ The clearing house holds users’ deposited funds in trust in a clearing account, and it maintains a separate ledger for each user’s funds.³⁴ Users purchase “shares” for a particular outcome – for example, predicting that Senate Candidate A will win her election – each of which costs less than one dollar.³⁵ Users can sell their shares at any time, or they can wait until an event has been completed.³⁶ If they choose not to sell, their shares will be cashed out with a value that depends on whether their prediction was correct.³⁷ If it was, their shares will be redeemed for one dollar each; if it wasn’t, they are redeemed for nothing at all.³⁸ Regardless of the user’s choice, after a sale has been completed, the user’s profit (after subtracting PredictIt’s 10% fee on profits) is deposited in trust with the clearing house.³⁹ When a user wishes to withdraw funds, the clearing house subtracts PredictIt’s 5% fee on withdrawals and credits the user for the remainder.⁴⁰ As prerequisite conditions for its no-action letter, the CFTC requires PredictIt to “have a limit of 5000 total traders in any particular [election market],” with a “limit on

32. Under both its own and the CFTC’s identification, PredictIt is a market for futures contracts. *See* Press Release, Commodity Futures Trading Comm’n, *supra* note 6; Letter from Vincent McGonagle to Neil Quigley, *supra* note 9. Bettors are actually “buying and trading *futures contracts* linked to political or financial events or circumstances,” PREDICTIT, *Terms and Conditions*, *supra* note 24 (emphasis added). This understanding largely reflects the academic consensus for prior political event betting markets, like the Iowa Electronic Markets, though some commentators have proposed alternative classifications. *E.g.*, Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 N.Y.U. L. REV. 962, 1029–31 (2005); *but see, e.g.*, Philip Robin Cleary, Note, *Predicting the Taxation of Prediction Markets*, 27 VA. TAX. REV. 953, 956, 989–90 (2008) (arguing that an interest in a prediction market is a “forward contract”); Andrew S. Goldberg, Note, *Political Prediction Markets: A Better Way to Conduct Campaigns and Run Government*, 8 CARDOZO PUB. L. & POL’Y & ETHICS J. 421, 435–37 (2010) (arguing that an interest in a prediction market is an “excluded commodity”). However, for ease of clarity and explanation, this Article uses the term “shares” in lieu of “futures contracts.”

33. *Terms and Conditions*, PREDICTIT, *supra* note 24.

34. *Id.*

35. *See Frequently Asked Questions*, PREDICTIT, *supra* note 25. The cost of each “share” “is a reflection only of the most recent trade in that contract.” *Id.*

36. *Id.*; *Terms and Conditions*, PREDICTIT, *supra* note 24.

37. *Frequently Asked Questions*, PREDICTIT, *supra* note 25; *Terms and Conditions*, PREDICTIT, *supra* note 24.

38. *Frequently Asked Questions*, PREDICTIT, *supra* note 25.

39. *Id.*

40. *Id.*

investment by any single participant in any particular [election market] of \$850.”⁴¹ These restrictions are more generous, though similar in scope, to what the CFTC applied to the Iowa Electronic Markets (“IEM”), one of the first political prediction markets, in the 1993 no-action letter it sent to the IEM.⁴² These restrictions exist to ensure that PredictIt remains a non-profit, academic endeavor⁴³ and cultivate a feel that *is* distinctly academic. Pursuant to these requirements, PredictIt restricts the number of users and their investments in a single market⁴⁴ – it also only allows its shares to be bought and sold on the website (off-website trading is expressly forbidden),⁴⁵ prohibits users from using fronts to purchase shares,⁴⁶ bans “automated trading,”⁴⁷ reserves the right to “suspend the trading of any Contract on the Website at any time and for any period,”⁴⁸ and possesses the sole right to determine how a payout is structured.⁴⁹ The ambience, therefore, is not dissimilar to a high school economics class participating in a simulated stock market for a grade.

But despite the site’s restrictions, PredictIt users are effectively trading on a real stock market – they’re playing with real money and face real consequences depending on the outcome of their decisions. PredictIt acknowledges this reality, which it finds essential to its academic undertaking:

Prediction markets work best when players have some stake, however small, in the outcome. With play money, many players take risks they wouldn’t otherwise take or don’t attend to their holdings as carefully.

41. Letter from Vincent McGonagle to Neil Quigley, *supra* note 9.

42. Letter from Andrea M. Corcoran, Director of Market Regulation, U.S. Commodity Futures Trading Commission, to George R. Neumann, Professor of Economics, University of Iowa Department of Economics (June 18, 1993), <https://www.cftc.gov/sites/default/files/files/foia/repfoia/foirf0503b004.pdf> [perma.cc/H42W-83LV]. In the IEM’s Political Markets, no more than 2,000 traders could participate in any market “for any particular election,” and all traders were restricted to a maximum investment of five hundred dollars. *Id.*

43. *See generally* Press Release, Commodity Futures Trading Comm’n, *supra* note 6; Letter from Vincent McGonagle to Neil Quigley, *supra* note 9.

44. *Supra* note 41 and accompanying text.

45. *Terms and Conditions*, PREDICTIT, *supra* note 24.

46. *Id.* (“By applying for a User Account, you represent, warrant, and undertake to us that you: . . . [b] do not already have (and will, at no time while you have the User Account for which you are applying, have) a User Account, whether directly or indirectly (including through any company or other legal entity which you directly or indirectly control); . . . [d] are (and will at all times be) acting solely for yourself and not on behalf of any other individual, company, or other legal entity . . .”).

47. *Id.*

48. *Id.*

49. *Id.* (“The Provider will . . . examine the Rules applicable to [a particular] contract and judge whether or not the Rules require a Payout and, if so, what the Actual Payout is; and . . . liquidate that contract Provider may resolve a Market whenever, in Provider’s judgment, the conditions to decide the outcome have been met. The Provider’s decision . . . will be final.”).

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Such markets may therefore have less research value than real money ones. Besides, we think real money is fun too.⁵⁰

And participants are acting as though they're trading on a real stock market too. Though participation varies depending on the market in question, PredictIt markets attract significant participation.⁵¹ By March 2016 – less than two years after PredictIt was launched – it had 29,000 active traders, each with an average of about \$120 wagered on the site.⁵² By 2018, the site had around 80,000 traders.⁵³ Despite the investment caps and the limits on total traders in a given market, one researcher estimated that around \$1 million was invested in the 2016 presidential election.⁵⁴ And following PredictIt's spike in interest during the 2016 election, 300 million shares in total were traded in 2017 alone, despite the paucity of marquee elections.⁵⁵ Today, the most popular market on PredictIt is the 2020 Democratic primary, which has seen over 125 million shares traded since the market began and currently has over 28 million active shares.⁵⁶

With this robust activity in mind, it is unsurprising that fraudulent activity has developed. Indeed, PredictIt seems to have predicted that fraud will occur. As it notes in its Terms and Conditions, “[T]here are no controls on market manipulation”⁵⁷

50. *Frequently Asked Questions*, PREDICTIT, *supra* note 25.

51. See, e.g., David Hill, *The Wolves of K Street*, RINGER (Mar. 21, 2018, 6:20 AM), <https://www.theringer.com/2018/3/21/17130490/predictit-politics-elections-gambling> [perma.cc/X2XH-9YHK]; Contrera, *supra* note 8.

52. Contrera, *supra* note 8.

53. Hill, *supra* note 51.

54. Philip Wallach, Op-Ed, *Sick of Political Polls? Try Prediction Markets*, L.A. TIMES (Sept. 28, 2018), <https://www.latimes.com/opinion/op-ed/la-oe-wallach-prediction-markets-20160928-snap-story.html> [perma.cc/Ax36-HKH5].

55. Hill, *supra* note 51.

56. *Who Will Win the 2020 Democratic Presidential Nomination?*, PREDICTIT, <https://www.predictit.org/markets/detail/3633/Who-will-win-the-2020-Democratic-presidential-nomination> [perma.cc/L42U-M7TZ] (last visited Mar. 27, 2020).

57. *Terms and Conditions*, PREDICTIT, *supra* note 24 (emphasis added).

B. The Emergence of Fake Polls

Despite some notable times when polls have missed the mark,⁵⁸ modern polling is largely accurate, especially among top-tier pollsters.⁵⁹ Accordingly, PredictIt bettors are well-advised to include public opinion polls in the total mix of information when making their betting decisions.⁶⁰ So with massive profits potentially on the line and with a community of bettors who base their trading decisions (at least in part) on polls, fraudsters have likely started churning out fake polls to take advantage of these unsuspecting PredictIt bettors.

In fairness, falsified polling is nothing new. In late 2009, analyst Nate Silver suggested that Strategic Vision, an Atlanta-based public relations firm that dabbled in public opinion polling for conservative causes, was falsifying its results.⁶¹ The American Association for Public Opinion Research reprimanded Strategic Vision – though *not* because of Silver’s piece.⁶² Instead, the Association was conducting a post-mortem investigation of polling in the 2008 Democratic presidential primary in New Hampshire, which incorrectly estimated that Barack Obama would win, and Strategic Vision declined to turn over details of its polling.⁶³ In response, the Association reprimanded it for falling short of the industry’s disclosure requirements.⁶⁴

In early 2010, three researchers investigating polls allegedly conducted by Research 2000 concluded that its results were fraudulent: “[W]e are

58. See, e.g., Emily L. Mahoney, *Here’s How Ron DeSantis Defied the Polls and Beat Andrew Gillum*, MIAMI HERALD (Nov. 7, 2018), <https://www.miamiherald.com/news/politics-government/state-politics/article221146890.html> (“[Ron] DeSantis’ victory defied most polls that showed him trailing [Andrew] Gillum.”); Andrew Mercer, Claudia Deane & Kyley McGeeney, *Why 2016 Election Polls Missed Their Mark*, PEW RES. CTR.: FACTTANK (Nov. 9, 2016), <http://www.pewresearch.org/fact-tank/2016/11/09/why-2016-election-polls-missed-their-mark/> [perma.cc/A824-XX9W] (“Across the board, polls underestimated Trump’s level of support.”).

59. E.g., Scott Clement, *‘The Sky is Not Falling’: Two Major Studies Show Election Polls Are Not Getting Less Accurate*, WASH. POST (June 1, 2018, 6:00 AM), https://www.washingtonpost.com/news/the-fix/wp/2018/06/01/the-sky-is-not-falling-two-major-studies-show-election-polls-are-not-getting-less-accurate/?utm_term=.0c308100b5b2 [perma.cc/Y4JT-UXPF]; Nate Silver, *The Polls Are All Right*, FIVETHIRTYEIGHT (May 30, 2018, 11:00 AM), <https://fivethirtyeight.com/features/the-polls-are-all-right/> [perma.cc/QC5S-7Jyy].

60. *Supra* note 13 and accompanying text.

61. Shaila Dewan, *Polling Firm’s Reprimand Rattles News Media*, N.Y. TIMES (Oct. 2, 2009), <https://www.nytimes.com/2009/10/03/us/03survey.html> [perma.cc/42JC-SAG3]; Nate Silver, *Strategic Vision Polls Exhibit Unusual Patterns, Possibly Indicating Fraud*, FIVETHIRTYEIGHT (Sept. 25, 2009, 1:04 PM), <https://fivethirtyeight.com/features/strategic-vision-polls-exhibit-unusual/> [perma.cc/QC2J-V58M].

62. Dewan, *supra* note 61.

63. *Id.*

64. *Id.*

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confident that [Research 2000's results] could not accurately describe random polls."⁶⁵ The researchers shared the results of their investigation with Daily Kos, a progressive media outlet that had contracted with Research 2000 to conduct polls in a number of states in 2008 and 2010.⁶⁶ Daily Kos had terminated its contract with Research 2000 several weeks prior, following the pollster's poor evaluation from Nate Silver's *FiveThirtyEight* article,⁶⁷ but upon receiving credible allegations of fraud, it filed a federal lawsuit against the pollster for fraud.⁶⁸ Research 2000's President responded to the lawsuit with a "rambling public response" that strongly suggested falsification on his company's part.⁶⁹ A year later, Daily Kos and Research 2000 settled the lawsuit with terms that were not disclosed but with clear indications of fraud on Research 2000's part.⁷⁰

In that instance, Research 2000's alleged falsification resulted in very real consequences – not for online bettors but for candidates, voters, the news media, and third-party campaign organizations. In Arkansas's 2010 runoff to determine the Democratic nominee for the U.S. Senate, Research 2000 polls – which were the only public polls in the field – consistently showed Lieutenant Governor Bill Halter leading incumbent Senator Blanche Lincoln.⁷¹ The Halter campaign promoted the polls (even as they privately

65. Nate Silver, *BREAKING: Daily Kos to Sue Research 2000 for Fraud*, FIVETHIRTYEIGHT (June 29, 2010, 5:40 PM), <https://fivethirtyeight.com/features/breaking-daily-kos-to-sue-research-2000/> [perma.cc/93ZS-BHCD].

66. *Id.*; Mark Grebner, Michael Weissman & Jonathan Weissman, *R2K Polls: Problems in Plain Sight*, DAILY KOS (June 29, 2010, 12:01 PM), <https://www.dailykos.com/stories/2010/06/29/880179/-Research-2000:-Problems-in-plain-sight> [perma.cc/CT3J-HP2J]; Markos Moulitsas, *Polling*, DAILY KOS (June 9, 2010, 12:33 PM), <https://www.dailykos.com/storyonly/2010/6/9/874403/-Polling> [perma.cc/K5AV-4VNT].

67. Moulitsas, *supra* note 66; Silver, *supra* note 65.

68. Markos Moulitsas, *More on Research 2000*, DAILY KOS (June 29, 2010, 12:01 PM), <https://www.dailykos.com/storyonly/2010/6/29/880185/-More-on-Research-2000> [perma.cc/99RE-H5DD]; *Kos Media, LLC et al. v. Research 2000 et al.*, No. 3:10CV02894 (N.D. Cal. July 12, 2012) (this case was dismissed on July 12, 2012).

69. "Yes[,] we weight heavily and I will, using [the] margin of error adjust the top line [results]." Mark Blumenthal, *Daily Kos vs. Research 2000 Lawsuit Settled*, HUFFPOST (May 27, 2011, 7:43 AM), https://www.huffingtonpost.com/2011/05/27/daily-kos-research-2000-lawsuit_n_867775.html [perma.cc/SVM2-FNW3] (emphasis added).

70. *Id.*

71. David Catanese, *Poll Scandal Shocks Campaigns*, POLITICO (July 1, 2010, 4:39 AM), <https://www.politico.com/story/2010/07/poll-scandal-shocks-campaigns-039265?o=0> [perma.cc/Y88F-LV7Z]; Chris Good, *Looking Back at Daily Kos, Research 2000, and Bill Halter*, ATLANTIC (July 19, 2010),

doubted their authenticity) and used them to raise money, attract national attention as the “perceived frontrunner,” and convince labor unions to spend several million dollars supporting their campaign.⁷² Halter ended up losing the election by four points, a result that public polling missed by seven or eight points.⁷³ Similarly, in California’s Republican primary for the Senate that same year, an incorrect Research 2000 poll that showed former Congressman Tom Campbell leading Carly Fiorina by fifteen points enabled the Campbell campaign to raise money and scrambled expectations of the race.⁷⁴

While faking polls is perhaps old news, doing it to affect the prices of futures contracts on an online political betting market is a very recent development. The July 2017 poll allegedly conducted by Delphi Analytica, which infamously showed musician Kid Rock leading Senator Debbie Stabenow, first attracted media attention to the concept of fake polls.⁷⁵ But outlets identified by commentators as fraudulent were publishing polls before the Michigan poll was widely publicized.⁷⁶

For example, Delphi Analytica published three polls in the weeks prior to releasing its controversial Michigan poll: an extremely early poll of the 2020 Democratic primary,⁷⁷ a poll suggesting that a plurality of Arizona voters wanted John McCain to resign from the Senate following his terminal cancer diagnosis,⁷⁸ and a poll of the Republican primary for the special Senate election in Alabama.⁷⁹ Similarly, CSP Polling – which, according to University of Florida political science professor Michael McDonald and Jeff Blehar of the *National Review*, stands for “Cuck Shed Polling”⁸⁰ – alleged that

<https://www.theatlantic.com/politics/archive/2010/07/looking-back-at-daily-kos-research-2000-and-bill-halter/60024/> [perma.cc/XLG3-959V].

72. Catanese, *supra* note 71; Good, *supra* note 71.

73. Catanese, *supra* note 71; Good, *supra* note 71.

74. Catanese, *supra* note 71.

75. Enten, *supra* note 11.

76. *Id.*

77. *Democrats Have a Huge Leadership Void Heading Towards the 2020 Presidential Elections*, DELPHI ANALYTICA (July 11, 2017), <https://medium.com/@DelphiAnalytica/democrats-have-a-huge-leadership-void-heading-towards-the-2020-presidential-elections-586a0faf7a74> [perma.cc/PZ8H-37VT]. In the event that these releases are deleted prior to, or following, the publication of this Article, all three are on file with the author.

78. *Majority of Arizonians Want McCain to Step Down Following Cancer Diagnosis*, DELPHI ANALYTICA (July 25, 2017), <https://medium.com/@DelphiAnalytica/majority-of-arizonians-want-mccain-to-step-down-following-cancer-diagnosis-670af8ba6c96> [perma.cc/57CR-FHKV].

79. *Luther Strange Slightly Ahead of Mo Brooks in 3 Way Alabama Senate Race*, DELPHI ANALYTICA (July 23, 2017), <https://medium.com/@DelphiAnalytica/luther-strange-slightly-ahead-of-mo-brooks-in-3-way-alabama-senate-race-6bcd1671a60b> [perma.cc/79C4-WDD3].

80. Jeff Blehar (@EsotericCD), TWITTER (Mar. 2, 2018, 3:29 PM), <https://twitter.com/EsotericCD/status/969671133871173637> [https://perma.cc/7Z5J-U97J]; Enten, *supra* note 11. In providing this anecdote, the Author acknowledges

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it conducted polls in the 2017 special congressional election in Montana,⁸¹ the special congressional election in Georgia,⁸² and the Virginia Democratic primary for Governor.⁸³ Even after being identified in *FiveThirtyEight* as a fake pollster, CSP Polling continued to release polls,⁸⁴ though the seriousness of the poll “releases” noticeably deteriorated in the year that followed.⁸⁵

Blumenthal Research Daily (“BRD”) made its debut in March 2018, two weeks prior to the special election in Pennsylvania’s 18th congressional district.⁸⁶ It released a poll in the special election showing Democrat Conor

that many readers are unfamiliar with the term “cuck” and that this Article must, regrettably, provide an elaboration. In this instance, “cuck” is short for “cuckold,” an antiquated term for a man whose wife is not faithful. *Cuckhold*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/cuckold> [perma.cc/5DVV-NSK8]. The term has been adopted by the alt-right and many white supremacists. Avowed white supremacist Richard Spencer is a frequent user of the term and declared, “It is the cuckold who, whether knowingly or unknowingly, loses control of his future. This is an apt psychological portrait of white ‘conservatives’ whose only identity is comprised of vague, abstract ‘values,’ and who are participating in the displacement of European Americans – their own children.” David Weigel, ‘*Cuckervative*’ – *The Conservative Insult of the Month, Explained*, WASH. POST (July 29, 2015, 9:05 AM), https://www.washingtonpost.com/news/the-fix/wp/2015/07/29/cuckervative-the-conservative-insult-of-the-month-explained/?utm_term=.2e84460b7eb3 [perma.cc/9KFF-9PGQ]. The Author apologizes for the necessity of this clarification.

81. @CSP_Polling, TWITTER (May 25, 2017, 6:09 PM), https://twitter.com/CSP_Polling/status/867910603167289344 [perma.cc/45RI-FV62] (“Final prediction: Greg Gianforte will win MT Special Election, 50.1% to 46.35%.”). In the event that CSP Polling’s tweets are deleted, screenshots remain on file with the author.

82. @CSP_Polling, TWITTER (June 18, 2017, 10:46 AM), https://twitter.com/CSP_Polling/status/876496380100984832 [perma.cc/A4WM-3R8J] (“Our final GA-6 poll: Handel 49, Ossoff 48, GA-6 election too close to call!”).

83. Enten, *supra* note 11.

84. *E.g.*, @CSP_Polling, TWITTER (Nov. 13, 2017, 4:33 PM), https://twitter.com/CSP_Polling/status/930232257406648320 [perma.cc/X5FN-ZLLC] (“We find [Roy Moore] leading [Doug Jones] in the Alabama Senate election by 4 points, 49-45, in our #ALSen poll. 6% undecided.”).

85. *See, e.g.*, @CSP_Polling, TWITTER (Nov. 12, 2018, 10:18 PM), https://twitter.com/CSP_Polling/status/1062228172006133760 [perma.cc/2JGE-L2WE] (“Just completed our poll in [M]ississippi. [T]hat one republican chick: 58. [T]hat one dem dude: 39[.]”).

86. Karlyn Bowman, *The Trouble with Polling*, NAT’L AFFAIRS (Summer 2018), <https://www.nationalaffairs.com/publications/detail/the-trouble-with-polling> [https://perma.cc/N9QC-8JHG]; Ryan Deto, *Beware of a Fake Poll Circulating About the Special Election for Pennsylvania’s 18th Congressional District*, PITTSBURGH CITY PAPER (Mar. 5, 2018, 3:24 PM), <https://www.pghcitypaper.com/>

Lamb leading Republican Rick Saccone by one point, but just three hours later, Timothy Blumenthal, the apparent founder of BRD, disavowed it.⁸⁷ Blumenthal acknowledged that BRD was a “fake pollster,” that the “numbers used were random,” and that he did “little to no research before piecing together a rather sloppy google doc.”⁸⁸ He claimed that it was “an obvious troll” attempt that “almost nobody” fell for.⁸⁹ However, despite Blumenthal’s disavowal and BRD’s known identity as a fake pollster, BRD seemed to pretend that Blumenthal never actually came clean. Blumenthal’s statement was quickly deleted from Twitter,⁹⁰ and BRD’s website is inactive. And just hours after tweeting out Blumenthal’s statement, BRD tweeted, “We do not need to prove ourselves to anyone. Our poll will speak for itself on March 13.”⁹¹ Several days later, another organization presenting itself as a polling company, KG Polling – which was apparently run by the same people behind BRD and CSP⁹² – released a poll of the special election, showing Lamb ahead of Saccone by four points.⁹³

Following the election – which saw Lamb win by one point, as BRD “predicted” – it continued the act and congratulated itself as “the most accurate pollster” in the race.⁹⁴ And like CSP Polling, BRD continued to “conduct” “polling” – of the 2018 Illinois Democratic primary for Governor,⁹⁵ the special election in Arizona’s 8th congressional district,⁹⁶ and the North Dakota Senate election.⁹⁷ Though these fraudulent pollsters largely fell dormant after the 2018 elections, KG Polling released a purported poll of the

[Blogs/archives/2018/03/05/beware-of-a-fake-poll-circulating-about-the-special-election-for-pennsylvanias-18th-congressional-district](https://blogs.archives.org/2018/03/05/beware-of-a-fake-poll-circulating-about-the-special-election-for-pennsylvanias-18th-congressional-district) [perma.cc/2WFE-KEQJ].

87. Deto, *supra* note 86.

88. *Id.*

89. Bowman, *supra* note 86.

90. Deto, *supra* note 86.

91. @BRD_Polling, TWITTER (Mar. 2, 2018, 11:44 AM), https://twitter.com/brd_polling/status/969659837863940096 [perma.cc/4P23-74RN].

92. G. Elliott Morris (@gelliottmorris), TWITTER (Mar. 11, 2018, 1:30 PM), <https://twitter.com/gelliottmorris/status/972887501332533248> [perma.cc/YZC5-MU4X] (Morris is a political journalist for *The Economist*.)

93. *Pennsylvania 18 Special Election Poll 3/10/18*, KG POLLING (Mar. 10, 2018), <https://kgpolling.wordpress.com/2018/03/10/pennsylvania-18-special-election-poll-3-10-18/> [perma.cc/Y9YR-JKK4] (last visited Jan. 23, 2020)

94. @BRD_Polling, TWITTER (Mar. 14, 2018, 4:49 AM), https://twitter.com/brd_polling/status/973888769958010880 [perma.cc/HWD9-US5U] (“We were the first poll to have Lamb winning. We were called fake news, mocked and laughed at. Not only were we the first to predict the correct outcome, but we were by far the most accurate pollster of the #pa18 race.”).

95. @BRD_Polling, TWITTER (Mar. 19, 2018, 5:53 PM), https://twitter.com/brd_polling/status/975867970403684353 [perma.cc/4HPL-MQ6A].

96. @BRD_Polling, TWITTER (Apr. 17, 2018, 12:07 PM), https://twitter.com/brd_polling/status/986289949904461838 [perma.cc/W2HV-E75Q].

97. @BRD_Polling, TWITTER (Oct. 5, 2018, 12:28 PM), https://twitter.com/brd_polling/status/1048263613792903168 [perma.cc/7ZPZ-N4DA].

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2020 Democratic caucus in Iowa, showing Bernie well ahead of his opponents with 31% of the vote, while Pete Buttigieg, who led in most polls at the time,⁹⁸ was in fourth place with 12%.⁹⁹

The motive for releasing these “polls” – which almost assuredly were not actually conducted – is suspect according to many political commentators who have followed their development.¹⁰⁰ Professor Michael McDonald started following furtive conversations taking place on Discord, a chatroom application used by many Trump supporters and alt-right activists,¹⁰¹ where the users were talking about political developments and online betting markets.¹⁰² After following these conversations – in which some users were bragging about the Delphi Analytica poll, including the alleged founder of the “polling” agency – McDonald concluded that the users had two goals.¹⁰³ “The first: to gain notoriety and troll the press and political observers. . . . The second: to move the betting markets,” by tricking PredictIt users to bet on a certain outcome – like Kid Rock winning the Senate election – and shorting that position.¹⁰⁴

There may be no *direct* proof of this assertion – Delphi Analytica denies that its poll was falsified to affect online betting markets¹⁰⁵ – but some circumstantial evidence certainly supports it. As Harry Enten of *FiveThirtyEight* pointed out, “[S]hares of the stock for Michigan’s 2018 Senate race *saw their biggest action of the year by far the day after Delphi*

98. See, e.g., *Who’s Ahead in Iowa?*, FIVETHIRTYEIGHT (last visited Jan. 23, 2020), <https://projects.fivethirtyeight.com/polls/president-primary-d/iowa/> [perma.cc/C78U-P48B].

99. @KGPolling, TWITTER (Dec. 31, 2019, 8:43 PM), <https://twitter.com/KGPolling/status/1212187475617210368> [perma.cc/W5RG-KBW3].

100. Jeff Blehar (@EsotericCD), TWITTER (Mar. 2, 2018, 3:17 PM), <https://twitter.com/esotericcd/status/969668115817750529?lang=bg> [perma.cc/JVR3-UEBS] (“Just so you know, [Blumenthal Research Daily] (the outfit with that supposed PA-18 poll) comes from the same group of scammers that released fake polls in GA-6 and AL-SEN. The goal is to move prediction markets using fake polls for profit”); Enten, *supra* note 11.

101. Samantha Cole, *Pro-Trump Discord Server ‘Centipede Central’ Says It’s Being Monitored*, VICE: MOTHERBOARD (Aug. 14, 2017, 6:40 PM), https://motherboard.vice.com/en_us/article/zmmxje/pro-trump-discord-server-centipede-central-says-its-being-monitored [perma.cc/FX4M-7GQ8].

102. Enten, *supra* note 11.

103. *Id.*

104. *Id.*

105. *Id.* Technically, because PredictIt doesn’t allow shorting, the comparable action in a market with a binary option would be to invest in the opposing candidate’s shares, which would have the same practical effect as shorting a stock in a PredictIt market.

Analytica published its survey,” increasing from less than 100 trades per day just the day before to nearly 3,000 the day after the poll was published.¹⁰⁶ Further, the polls published by the outlets mentioned above – Delphi Analytica, CSP Polling, and Blumenthal Research Daily – tended to feature results that were *quite* divergent from the general political consensus at the time.

The Delphi Analytica poll provides an obvious starting point. Suggesting that Kid Rock – a B-list musician with little history of advocacy before 2016¹⁰⁷ – would have a four-point lead over a well-liked politician before he had even entered the race strained credulity. A poll released around the same time by Target-Insyght, a more reliable pollster,¹⁰⁸ showed Senator Stabenow leading Kid Rock by eight points.¹⁰⁹ But Target-Insyght’s much less flashy poll received significantly less media attention than the Delphi Analytica “poll” and had no discernible impact on PredictIt’s trades.¹¹⁰

One of Delphi Analytica’s other polls provides a similar point of reference: Its “poll” of the Republican primary in Alabama’s special Senate, released on July 23, 2017, showed incumbent Senator Luther Strange with 29% of the vote, Congressman Mo Brooks with 25%, and former State Supreme Court Chief Justice Roy Moore with 24%.¹¹¹ This prediction *wildly* differed from every other poll conducted in a similar timeframe, nearly all of which showed Strange and Moore in first or second place with Brooks much further behind.¹¹² This estimate, which was released several weeks prior to the primary, looks even more suspicious in light of the election’s actual results in which Moore received 40%, Strange received 32%, and Brooks received 20%.¹¹³ In October 2018, after several months of silence, BRD published a

106. *Id.* (emphasis added).

107. See Amanda Petrusich, *Kid Rock’s Senate Run is a Terrifying New Normal*, NEW YORKER (July 13, 2017), <https://www.newyorker.com/culture/culture-desk/kid-rocks-senate-run-is-a-terrifying-new-normal> [perma.cc/KW32-HPB4].

108. *FiveThirtyEight’s Pollster Ratings*, FIVETHIRTYEIGHT (May 30, 2018, 11:00 AM), <https://projects.fivethirtyeight.com/pollster-ratings/> [perma.cc/TT6X-XPVG]. Per *FiveThirtyEight’s* metrics, Target-Insyght received a “C” grade, which, while not great, beats a fake poll. *Id.*

109. Jonathan Oosting, *Poll: Kid Rock Trails Stabenow 50–42% in Senate Race*, DETROIT NEWS (July 31, 2017, 6:48 PM), <https://www.detroitnews.com/story/news/politics/2017/07/31/poll-kid-rock-trails-stabenow/104176822/> [perma.cc/W373-6XPF].

110. See Enten, *supra* note 11.

111. DELPHI ANALYTICA, *Luther Strange Slightly Ahead of Mo Brooks in 3 Way Alabama Senate Race*, *supra* note 79.

112. See *Alabama Senate Special Election – Republican Primary*, REALCLEAR POLITICS (last visited March 3, 2019), https://www.realeclearpolitics.com/epolls/2017/senate/al/alabama_senate_special_election_republican_primary-6220.html#polls [perma.cc/2NBJ-QXS9].

113. See David Weigel, *Sen. Luther Strange Will Face Jurist Roy Moore in Alabama’s Republican Senate Runoff*, WASH. POST (Aug. 15, 2017), <https://www.washingtonpost.com/powerpost/as-polls-open-in-alabama-senate-race->

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“poll” of the Senate race in North Dakota, showing incumbent Democratic Senator Heidi Heitkamp leading her Republican opponent, Congressman Kevin Cramer, by 52% to 46%.¹¹⁴ This estimate was wildly at odds with what other polls were showing and with what prognosticators were predicting. Heitkamp had not led in any publicly released poll in the preceding six months,¹¹⁵ both parties indicated that their private polling had Heitkamp losing,¹¹⁶ and most independent election raters had moved the race to “Leans Republican.”¹¹⁷ In the end, Cramer ended up defeating Heitkamp by eleven points,¹¹⁸ making BRD’s estimate off by *seventeen points*.

CSP Polling and Blumenthal Research Daily published two polls that, though they ultimately ended up very close to the final margins, confounded expectations at the time. For example, CSP Polling’s “poll” of the special election in Georgia’s 6th congressional district, released on June 18, 2017, showed Republican Karen Handel with a one-point lead over Democrat Jon Ossoff.¹¹⁹ At the time, this was the first poll released in a month and a half showing Handel with a lead over Ossoff.¹²⁰ Similarly, BRD’s poll of the special election in Pennsylvania’s 18th congressional district showed

republican-candidates-court-trump-voters/2017/08/15/b535cd58-81b1-11e7-ab27-1a21a8e006ab_story.html?utm_term=.fa25b9c8a219 [perma.cc/3XHJ-GYNY].

114. @BRD_POLLING, (Apr. 17, 2018, 12:07 PM), *supra* note 96.

115. Janie Velencia & Dhruvil Mehta, *Can Heitkamp Pull Off a Second Upset in North Dakota?*, FIVETHIRTYEIGHT (Oct. 12, 2018, 5:59 AM), <https://fivethirtyeight.com/features/can-heitkamp-pull-off-a-second-upset-in-north-dakota/> [perma.cc/4AY5-ETYA].

116. Burgess Everett, *GOP Closes in on Heitkamp Knockout – and Control of the Senate*, POLITICO (Oct. 11, 2018, 5:08 AM), <https://www.politico.com/story/2018/10/11/heidi-heitkamp-north-dakota-senate-2018-891461> [perma.cc/Y4LD-3RC4].

117. *E.g.*, Jennifer E. Duffy, *North Dakota Senate: Race Moves to Lean Republican*, COOK POLITICAL REPORT (Oct. 19, 2018), <https://cookpolitical.com/analysis/senate/north-dakota-senate/north-dakota-senate-race-moves-lean-republican> [perma.cc/8XYA-JLYW].

118. *North Dakota Election Results*, N.Y. TIMES (Jan. 28, 2019, 10:38 AM), <https://www.nytimes.com/interactive/2018/11/06/us/elections/results-north-dakota-elections.html> [perma.cc/KBB6-XBEW].

119. @CSP_POLLING, (June 18, 2017, 10:46 AM), *supra* note 82.

120. *Georgia 6th District Run-Off Election – Handel v. Ossoff*, REALCLEAR POLITICS (last visited Mar. 3, 2019), https://www.realclearpolitics.com/epolls/2017/house/ga/georgia_6th_district_runoff_election_handel_vs_ossoff-6202.html#polls [perma.cc/68TS-YJHR]; Jeff Stein, *Where the Polls Stand 2 Days Before Georgia’s Special Election*, VOX (June 18, 2017, 10:20 AM), <https://www.vox.com/policy-and-politics/2017/6/18/15825944/special-election-ossoff-handel> [perma.cc/D7CF-FGFD] (“Polling over the last three weeks suggests Ossoff has a narrow but potentially shrinking lead over Handel . . .”).

Democrat Conor Lamb beating Republican Rick Saccone by one point.¹²¹ BRD's "poll" was indeed the first publicly released estimate to put Lamb ahead of Saccone,¹²² as all other polls released until that point had put Saccone ahead, albeit by a decreasing margin.¹²³ Given that Lamb narrowly defeated Saccone by one point, the few polls putting Lamb ahead were accurate¹²⁴ but still confounded expectations.¹²⁵

The point here isn't to suggest that these polls were bad or inaccurate. Though some of them certainly *were* significantly off,¹²⁶ in hindsight, others ended up being quite accurate.¹²⁷ It is instead to suggest that these polls showed results that were unbelievable or otherwise out-of-line with either expectations for the election or the eventual results. Most pollsters have the exact *opposite* inclination: When they get a result that seems out of place, they decline to release it¹²⁸ or they rebalance the results so that their poll fits the norm.¹²⁹ Though documented reports of pollsters junking their own polls are scant, they do happen. Most prominently and most recently, a pollster

121. Deto, *supra* note 86 and accompanying text.

122. @BRD_POLLING, (Mar. 14, 2018, 4:49 AM), *supra* note 94.

123. *Pennsylvania 18th District Special Election - Saccone v. Lamb*, REALCLEAR POLITICS (last accessed Mar. 4, 2019), https://www.realclearpolitics.com/epolls/2018/house/pa/pennsylvania_18th_district_special_election_saccone_vs_lamb-6327.html#polls [perma.cc/7SCM-YD83].

124. *Id.*

125. See Alex Isenstadt, *Republicans Trash Their Candidate in Pa. Special Election*, POLITICO (Mar. 7, 2018, 6:25 PM), <https://www.politico.com/story/2018/03/07/republicans-pennsylvania-special-election-445221> [perma.cc/TH4B-FEHA] (noting that the special election was taking place in a Republican-favored district that Donald Trump "won by 20 percentage points")

126. *Supra* notes 107–117 and accompanying text.

127. *Supra* notes 119–125 and accompanying text.

128. E.g., Tal Kopan, *PPP Reveals It Held Colo. Poll*, POLITICO (Sept. 11, 2013), <https://www.politico.com/story/2013/09/ppp-colorado-poll-096628> [perma.cc/H3QW-BY4U]. In this case, Public Policy Polling conducted polls of a State Senate recall election in Pueblo, Colorado, and decided not to release the results. *Id.* Following the unexpected recalls of State Senators Angela Giron and John Morse, the head of PPP disclosed that the firm had polled the races and had accurately predicted the outcome. *Id.*

We did a poll last weekend in Colorado Senate District 3 and found that voters intended to recall Angela Giron by a 12 point margin, 54/42. In a district that Barack Obama won by almost 20 points I figured there was no way that could be right and made a rare decision not to release the poll. It turns out we should have had more faith in our numbers.

Id.

129. Nate Silver, *Here's Proof Some Pollsters Are Putting a Thumb on the Scale*, FIVETHIRTYEIGHT (Nov. 14, 2014, 1:58 PM), <https://fivethirtyeight.com/features/heres-proof-some-pollsters-are-putting-a-thumb-on-the-scale/> [perma.cc/4KJ7-9EZU]. This process is known as "herding," or "the tendency of polling firms to produce results that closely match one another, especially toward the end of a campaign." *Id.*

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publicly admitted that it declined to release a poll of the 2019 Australian federal election that predicted the incumbent Coalition government would win re-election.¹³⁰ The poll ended up being correct, but it contradicted virtually every other publicly released poll, so the polling agency's chief executive decided not to publish it: "No one wants to release a poll that is wildly out of step."¹³¹

A poll that challenges a status quo assumption, whether correct or incorrect in the end, tends to disrupt expectations.¹³² It is no surprise, then, that in the aftermath of the Delphi Analytica poll, trading on the Michigan Senate race exploded on PredictIt, Debbie Stabenow's "stock" price went down, and the Republican nominee's "stock" surged.¹³³ This reflects, generally speaking, how Wall Street traders respond to new information, like a change in a credit rating for a particular company¹³⁴ or an earnings report.¹³⁵

Therefore, the *content* of the "polls" themselves provides some support for the assertion that they were fraudulent and were published to affect online betting markets. Regardless of their accuracy, the vast majority of them contradicted publicly available data and expectations. This contradiction would make sense if the publisher's goal was to affect stock prices. If a bettor's goal is to make money by shorting a candidate's "stock price" on PredictIt,¹³⁶ they could efficiently do so by identifying a candidate widely perceived as a favorite and releasing a fraudulent poll showing that candidate either losing or being in an unexpectedly close race. Given the speed with

130. Michael Koziol, *'Embarrassed' Pollster Ripped Up Poll That Showed Labor Losing Election*, SYDNEY MORNING HERALD (June 9, 2019, 12:00 AM EST), <https://www.smh.com.au/politics/federal/embarrassed-pollster-ripped-up-poll-that-showed-labor-losing-election-20190604-p51u9v.html> [perma.cc/Z88R-WXJT].

131. *Id.*

132. *Supra* notes 71–74 and accompanying text.

133. Enten, *supra* note 11; *see also supra* note 106 and accompanying text.

134. *See generally* John Hand et al., *The Effect of Bond Rating Agency Announcements on Bond and Stock Prices*, 47 J. FIN. 733 (1992).

135. *See generally* Anne E. Chambers & Stephen H. Penman, *Timeliness of Reporting and the Stock Price Reaction to Earnings Announcements*, 22 J. ACCT. RES. 21 (1984). Indeed, PredictIt assumes that their traders *will* behave this way. In its "Frequently Asked Questions," PredictIt answers the question, "When is it a good idea to buy or to sell?" by noting in part, "You could consider selling your shares if the price moves towards what you think is the right probability, *or if events cause you to reconsider your judgment of the right price.*" PREDICTIT, *Frequently Asked Questions*, *supra* note 25 (emphasis added).

136. *Supra* note 105 (noting that, while PredictIt doesn't allow shorting as a technical matter, shorting can nonetheless occur in a binary market if a better purchases an event contract for the other candidate).

which political news – and shocking polls, in particular – travels on Twitter,¹³⁷ the fake poll could convince innocent PredictIt bettors to buy or sell shares, which would affect the overall stock price.¹³⁸ As explained in the introduction, this is exactly what happened to share prices in the Michigan Senate race.¹³⁹

Assuming that the intent of the authors of these fake polls is to manipulate PredictIt markets – and assuming that the polls are, in fact, fake – the question then naturally arises: What crimes, if any, have they committed? Part II endeavors to answer that question.

II. THE AVENUES FOR CRIMINAL LIABILITY

This Part proceeds on the critical and necessary assumption that fraudsters are creating and publishing fake polls with the intent to affect share prices on an online political betting market.¹⁴⁰ As explained in Part I, this allegation is certainly possible – if not probable – and it is with this in mind that Part II addresses potential criminal liability for this conduct.

The two likeliest theories of criminal liability – commodities fraud and wire fraud – are addressed in Sections A and B, respectively. Both sections outline the requirements that any federal prosecutor would face in filing charges for commodities fraud and wire fraud and then argue that the conduct described in Part I satisfies those requirements.

A. *Commodities Fraud*

This Subpart focuses on the possibility that commodities fraud liability can attach to the creation and publication of a fake poll to influence political prediction markets. It begins by reviewing the relevant history of commodities fraud – which has undergone monumental change in the near-century since its inception – before outlining the elements of commodities fraud. Finally, this Subpart applies the elements of the crime and concludes that they are likely satisfied.

137. See Deto, *supra* note 86 (discussing the quick spread of BRD’s poll of the Pennsylvania special election, despite the low number of Twitter users following BRD’s account).

138. See *Frequently Asked Questions*, PREDICTIT, *supra* note 25 (“[T]he price assigned to each potential outcome is a reflection only of the most recent trade in that contract . . .”).

139. *Supra* note 18 and accompanying text.

140. This Article makes such an assumption not to paper over the conduct at issue, but instead to recognize that further investigation, combined with the inevitable discovery that would take place in civil or criminal litigation, would authoritatively confirm or deny this characterization of the available facts.

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1. Development of Commodities Fraud

The seed of commodities fraud was first planted by the Grain Futures Act, which sought to prevent “false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of grain in interstate commerce.”¹⁴¹ Though a federal statute – currently codified as 7 U.S.C. § 9 – that initially regulated against manipulation of agricultural markets seems an unlikely hero in the battle against fake polls, the Grain Futures Act was soon replaced by the Commodity Exchange Act (“CEA”) in 1936.¹⁴² As the law evolved, the definition of “commodity” expanded from solely agricultural products, as initially defined in the Grain Futures Act¹⁴³ and Commodity Exchange Act,¹⁴⁴ to include “all other goods and articles . . . and all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt in.”¹⁴⁵

In safeguarding these interests, the CEA, as first adopted, meant to “protect[] commodity futures trading on exchanges from ‘speculation, manipulation or control.’”¹⁴⁶ But preventing “manipulation” proved easier said than done. Until the passage of Dodd-Frank in 2010, commodities fraud was difficult for the CFTC to pursue.¹⁴⁷ This difficulty was borne largely by the fact that the CEA, unlike the Securities Exchange Act, contained only “general anti-manipulation provisions” and lacked any explicit prohibition of fraud.¹⁴⁸ At that time, “no statute, regulation, or case define[d] manipulation”

141. Grain Futures Act, Pub. L. No. 67-331, 42 Stat. 998 (1922); *see also* Kevin T. Van Wart, *Preemption and the Commodity Exchange Act*, 58 CHI.-KENT L. REV. 657, 666 (1982).

142. Grain Futures Act, Pub. L. No. 67-331, 42 Stat. 998 (1922).

143. *Supra* note 141 and accompanying text.

144. *See* Commodity Exchange Act, Pub. L. No. 74-675, 49 Stat. 1491 (1936) (current version at 7 U.S.C. § 1a(9) (2018)).

145. 7 U.S.C. § 1a(9) (2018).

146. Walter Bachrach, *The Cloverleaf Case, and Suspension of State Gambling Statutes as Applied to Commodity Futures Transactions*, 7 J. MARSHALL L.Q. 457, 461 (quoting Commodity Exchange Act, Pub. L. No. 74-675, 49 Stat. 1491 (1936)). Still, in the CEA, “commodity” is defined as “wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs and *Solanum tuberosum* (Irish potatoes).” Commodity Exchange Act § 3(a).

147. Rosa M. Abrantes-Metz et al., *Revolution in Manipulation Law: The New CFTC Rules and the Urgent Need for Economic and Empirical Analyses*, 15 U. PA. J. BUS. L. 357, 362–66 (2013); *see generally* Craig Pirrong, *Commodity Market Manipulation Law: A (Very) Critical Analysis and a Proposed Alternative*, 51 WASH & LEE L. REV. 945 (1994).

148. Andrew Verstein, *Benchmark Manipulation*, 56 B.C. L. REV. 215, 253–54 (2015).

for the purposes of the Act, leading to a “grab bag of accounts of manipulation” crafted by administrative and judicial opinions.¹⁴⁹ This led to the development of “extraordinarily confused” caselaw, which was frequently contradictory and which was “violently attacked” by judges and commentators¹⁵⁰ for its inconsistency¹⁵¹ and lack of foundational support.¹⁵²

The passage of Dodd-Frank in 2010 resolved most of this confusion.¹⁵³ The law added to the CEA the ability to prosecute *fraud*, not just manipulation.¹⁵⁴ The CEA now prohibits the use of “any manipulative or

149. Abrantes-Metz et al., *supra* note 147, at 362–63.

150. See Pirrong, *supra* note 147, at 945.

151. Cargill, Inc. v. Hardin, 452 F.2d 1154, 1166, 1172–73 (8th Cir. 1971) (criticizing the Fifth Circuit’s approach in *Volkart Brothers v. Freeman*, a seminal case of commodities fraud, which it noted was reached “without any economic analysis whatsoever” and with no discussion of “its apparent discrepancy with the *Great Western* case”).

152. See Note, *The Delivery Requirement: An Illusory Bar to Regulation of Manipulation in Commodity Exchanges*, 73 YALE L.J. 171, 180–81 (1963) (criticizing the Fifth Circuit’s approach in *Volkart Brothers v. Freeman*, a seminal case of commodities fraud, which it argued was “not well founded”).

153. To a significantly lesser extent, the Sarbanes-Oxley Act and the Fraud Enforcement and Recovery Act of 2009 also worked to strengthen federal prohibitions on commodities fraud. Sarbanes-Oxley was passed in 2002 in response to the Enron scandal, and created 18 U.S.C. § 1348. Section 1348 creates a new securities fraud crime that exists independently of the Securities Act of 1933, the Securities Exchange Act of 1934, and the SEC regulations that both Acts empowered it to promulgate. Michael A. Perino, *Enron’s Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes-Oxley Act of 2002*, 76 ST. JOHN’S L. REV. 671, 681–84 (2002). Securities fraud under Section 1348 largely mirrored the prohibition on securities fraud that had existed previously, though perhaps made it easier to prosecute. *Id.* at 681–82. Many commentators viewed Section 1348 as largely repetitive and ineffectual, though Kathleen Brickey argued that it “make[s] significant strides toward piercing the veil of corporate silence.” Kathleen F. Brickey, *From Enron to Worldcom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357, 359 (2003). In 2009, FERA amended Section 1348 and added “and commodities” before “fraud” and “any commodity for future delivery, or any option on a commodity for future delivery, or” before “any security.” Cindy A. Schipani & H. Nejat Seyhun, *Defining “Material, Nonpublic”: What Should Constitute Illegal Insider Information?*, 21 FORDHAM J. CORP. & FIN. L. 327, 360 n. 203 (2016). There is little academic discussion of FERA’s impact beyond this note, and no academic discussion of commodities fraud prosecution in the year between FERA’s passage and Dodd-Frank’s. See, e.g., *id.* at 360 (“In 2009, [Section 1348] was amended by [FERA] to extend the criminal penalties to commodities fraud.”).

154. Rosa M. Abrantes-Metz et al., *supra* note 147, at 392–93. In many ways, the addition of fraud to the CEA settled a debate that had been brewing in the background since the CEA’s adoption nearly a century earlier. See Harry B. Borders, Note, *Ernst & Ernst v. Hochfelder As Applied to Commodities Fraud: No Intent Required*, 79 KY. L.J. 369, 375 (1991) (“Although the 1936 Act contained no antifraud provision, [an] amendment would have made it illegal to ‘knowingly’ defraud a consumer. The

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deceptive device or contrivance, in contravention of such rules and regulations as the [CFTC] shall promulgate,” “in connection with any swap, or a contract of sale of any commodity interstate commerce.”¹⁵⁵ This language mirrors almost verbatim the relevant provisions of the Securities Exchange Act.¹⁵⁶ The CFTC later promulgated Rule 180.1, which included a broad prohibition on manipulation and fraud in connection with a swap, commodity sale, or contract for future delivery.¹⁵⁷ The Rule echoes SEC Rule 10b-5,¹⁵⁸ and establishes that, in connection with the aforementioned transactions, it is illegal to:

- (1) Use or employ, or attempt to use or employ, any manipulative device, scheme, or artifice to defraud;
- (2) Make, or attempt to make, any untrue or misleading statement of a material fact or to omit to state a material fact necessary in order to make the statements made not untrue or misleading;
- (3) Engage, or attempt to engage, in any act, practice, or course of business, which operates or would operate as a fraud or deceit upon any person; or,
- (4) Deliver or cause to be delivered, or attempt to deliver or cause to be delivered, for transmission through the mails or interstate commerce, by any means of communication whatsoever, a false or misleading or inaccurate report concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, knowing, or acting in reckless disregard of the fact that such report is false, misleading or inaccurate.¹⁵⁹

In adopting Rule 180.1, the CFTC further mirrored the SEC’s Rule by noting that it “does not interpret the final Rule as requiring a showing of

amendment was rejected, apparently because Congress believed that prosecution under state laws was a sufficient deterrent for fraud.”).

155. 7 U.S.C. § 9 (2018).

156. See 15 U.S.C. § 78j(b) (2018) (prohibiting anyone from using, “in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange Commission] may prescribe”); Verstein, *supra* note 148, at 253–54.

157. 17 C.F.R. § 180.1 (2019).

158. Gregory Scopino, *The (Questionable) Legality of High-Speed “Pinging” and “Front Running” in the Futures Markets*, 47 CONN. L. REV. 607, 663–66 (2015).

159. § 180.1.

reliance or harm to market participants in a government action brought” under 7 U.S.C. § 9 or Rule 180.1.¹⁶⁰ The CFTC also established that, in interpreting the scope of the Rule, “it will be guided, but not controlled by, the substantial body of judicial precedent applying the comparable language of SEC Rule 10b-5.”¹⁶¹

2. Elements of Commodities Fraud

The requirements of Section 9 and Rule 180.1 have been articulated slightly differently by the CFTC and the courts,¹⁶² but this Article proceeds on the conclusion that the elements of commodities fraud are: (1) a material misrepresentation, (2) scienter (or intent), and (3) a connection to a

160. See Prohibition on the Employment, or Attempted Employment of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. 41398, 41403 (July 14, 2011).

161. *Id.* at 41399. The CFTC noted that there are differences between the securities and derivatives markets that justify flexibility in developing a body of interpretation. *Id.*

162. U.S. Commodity Futures Trading Comm’n v. Southern Trust Metals, Inc., 894 F.3d 1313, 1325 (11th Cir. 2018), *cert. denied sub nom* S. Trust Metals, Inc. v. Commodity Futures Trading Comm’n, 139 S. Ct. 1464 (2019) (“The CFTC must prove the same three elements to establish liability under each . . . provision[]: ‘(1) the making of a misrepresentation, misleading statement, or a deceptive omission; (2) scienter; and (3) materiality.’” (quoting Commodity Futures Trading Comm’n v. R.J. Fitzgerald & Co., 310 F.3d 1321, 1328 (11th Cir. 2002))); Commodity Futures Trading Comm’n v. Gelfman Blueprint, Inc., No. 17-CV-07181, 2018 U.S. Dist. Lexis 207379, at *13–14 (S.D.N.Y. Oct. 1, 2018) (“[Section 9 and Rule 180.1] make it unlawful for any person, in connection with contracts of sale of any commodity in interstate commerce, including virtual currencies such as Bitcoin, to intentionally or recklessly: (1) use or employ, or attempt to use or employ, any manipulative device, scheme, or artifice to defraud; (2) make, or attempt to make, any untrue or misleading statement of a material fact or to omit to state a material fact necessary in order to make the statements made not untrue or misleading; or (3) engage, or attempt to engage, in any act, practice, or course of business, which operates or would operate as a fraud or deceit upon any person.”); Commodity Futures Trading Comm’n v. McDonnell, 332 F. Supp. 3d 641, 717 (E.D.N.Y. 2018) (“To prove a violation . . . the Commission must show that Defendants engaged in prohibited conduct (i.e., employed a fraudulent scheme; made a material misrepresentation, misleading statement or deceptive omission; or engaged in a business practice that operated as a fraud); with scienter; and in connection with a contract of sale of a commodity in interstate commerce.”); Prohibition on the Employment, or Attempted Employment of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. at 41400 (“Final Rule 180.1 prohibits fraud and fraud-based manipulations, and attempts: (1) By any person (2) acting intentionally or recklessly (3) in connection with (4) any swap, or contract of sale of any commodity in interstate commerce, or contract for future delivery on or subject to the rules of any registered entity (as defined in the CEA).”).

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commodity.¹⁶³ Scierter (or intent) as applied here is presumed to be satisfied,¹⁶⁴ and the remaining two elements – material misrepresentation and connection to a commodity – are each addressed in turn.¹⁶⁵

Material misrepresentation, the first element, is logically divided into two sub-elements: (a) a misrepresentation (b) that is material.¹⁶⁶ Rule 180.1 outlines four different types of misrepresentations for which it provides criminal (and civil) liability, which echo SEC Rule 10b-5's prohibited acts.¹⁶⁷ Unlike securities fraud, commodities fraud – as articulated by the CFTC – excludes insider trading.¹⁶⁸ In any event, the conduct covered by Rule 180.1

163. This conclusion is grounded in the CFTC's own articulation of the requirements, and by its acknowledgement that Rule 180.1 is based off of – and that the CFTC's enforcement of the Rule will be guided by the judicial precedent applying – SEC Rule 10b-5. *See supra* note 158 at 41400, 41399. For a securities fraud prosecution, the requirements under Rule 10b-5 are: “(1) a material misrepresentation (or omission); (2) scierter, i.e., a wrongful state of mind; [and] (3) a connection with the purchase or sale of a security.” Samuel W. Buell, *What is Securities Fraud?*, 61 DUKE L.J. 511, 545–46 (2011).

164. Though intent is undoubtedly a critical element of commodities fraud, it is largely a question of fact. *See SEC v. Merch. Capital, LLC*, 311 F. App'x 250, 252 (11th Cir. 2009). This Article does not attempt to address it in the abstract. Instead, this Article proceeds on the assumption that the conduct outlined in Part I occurred as characterized – in other words, that a group of people published fake polls intending to affect online political betting markets like PredictIt. It goes without saying that if the CFTC opted to pursue an enforcement action for this conduct, it would have to prove intent.

165. In discussing the elements of commodities fraud, this Article frequently cites cases and articles that discuss what qualifies as securities fraud. These conclusions should be taken with a grain of salt, given that the CFTC finds securities fraud jurisprudence *persuasive*, not *binding*. Prohibition on the Employment, or Attempted Employment of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. at 41399. Therefore, this Article does not use brackets in this discussion to replace “securities” with “commodities.”

166. *See James J. Park, Rule 10b-5 and the Rise of the Unjust Enrichment Principle*, 60 DUKE L.J. 345, 360 (2011) (discussing the requirement “that there be a misrepresentation that is material”).

167. *Supra* note 159 and accompanying text.

168. Jerry W. Markham, *Commodity Exchanges and Regulation*, in *COMMODITIES: MARKETS, PERFORMANCE, AND STRATEGIES* 37, 45–46 (H. Kent Baker et al., eds., 2018). “Nevertheless, trading on ‘misappropriated information’ (i.e., stolen information) is prohibited. Trading [on] or disclosing nonpublic information to others is prohibited for CFTC commissioners and their employees, personnel of [self-regulatory organizations], as well as employees and members of Congress and judicial employees.” *Id.* at 46. For an argument that commodities fraud should include insider trading, see Andrew Verstein, *Insider Trading in Commodities Markets*, 102 VA. L. REV. 447 (2016).

is broad: in the related securities fraud context, “Any form of publicized deception can create liability.”¹⁶⁹ But unlike wire fraud,¹⁷⁰ “there can be no securities fraud liability for a true statement.”¹⁷¹ This limitation of liability for true statements exists even if the statements were not “literally false, [but] taken as a whole . . . were fraudulently misleading and deceptive.”¹⁷²

Further, a misrepresentation also must be *material*. Implicit in this requirement is the basic notion that “[n]ot all misrepresentations or omissions in connection with a security transaction . . . are fraudulent.”¹⁷³ But defining “materiality” can be challenging. The U.S. Supreme Court has noted that the determination of materiality “requires delicate assessments of the inferences a ‘reasonable shareholder’ would draw from a given set of facts and the significance of those inferences to him.”¹⁷⁴ If the misrepresentation (or omission) “would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available,” the misrepresentation is generally considered to be material.¹⁷⁵ A relatively simple case – though one that nonetheless made it to the Supreme Court – helps illustrate this concept. In *Matrixx Initiatives, Inc. v. Siracusano*, a group of plaintiffs brought a suit against Matrixx, a pharmaceutical company that manufactured the popular Zicam cold remedies.¹⁷⁶ The plaintiffs alleged that Matrixx had become aware of Zicam’s side effects but did not disclose them. Instead, it made public statements to investors predicting that revenue would rise by 80%.¹⁷⁷ The Supreme Court ultimately concluded that Matrixx’s knowledge of these side effects was “material” because it “had information indicating a significant risk to its leading revenue-generating product.”¹⁷⁸ In other words, the Court concluded that “a reasonable investor would have viewed this information as having significantly altered the ‘total mix’ of information available.”¹⁷⁹

Second, a material misrepresentation must be “in connection with any swap, or contract of sale of any commodity in interstate commerce, or contract

169. Ron Joshua Havas et al., *Securities Fraud*, 54 AM. CRIM. L. REV. 1787, 1792 (2017).

170. *Infra* Part II.B.

171. See *In re Loewen Group Inc. Sec. Litig.*, No. 98-6740, 2003 U.S. Dist. Lexis 15680, at *41 (E.D. Pa. July 15, 2013).

172. *Lustiger v. United States*, 386 F.2d 132, 136–37 (9th Cir. 1967) (discussing wire fraud liability even for “literally true” statements); *but see generally* Donald C. Langevoort, *Half-Truths: Protecting Mistaken Inferences by Investors and Others*, 52 STAN. L. REV. 87 (1999) (comparing treatment of half-truths in the securities fraud context with treatment in the common law fraud context).

173. Havas et al., *supra* note 169, at 1796.

174. *TSC Indus. v. Northway*, 426 U.S. 438, 450 (1976).

175. See *Helwig v. Vencor, Inc.*, 251 F.3d 540, 556 (6th Cir. 2001), *overruled by* *Ricker v. Zoo Entm’t, Inc.*, 534 F. App’x 495 (6th Cir. 2013).

176. 563 U.S. 27, 30–31 (2011).

177. *Id.* at 31–34.

178. *Id.* at 47.

179. *Id.* (quotation and citation omitted).

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for future delivery on or subject to the rules of any registered entity.”¹⁸⁰ In this context, “in connection with” is meant “broadly, not technically or restrictively.”¹⁸¹ When it promulgated Rule 180.1, the CFTC interpreted the phrase to “reach all manipulative or deceptive conduct in connection with the purchase, sale, solicitation, execution, pendency, or termination” of any commodity.¹⁸² This requirement is “not limitless,”¹⁸³ however, and the CFTC essentially adopted the Supreme Court’s interpretation of SEC Rule 10b-5 to require that, at a minimum, a transaction occur.¹⁸⁴

Similarly, “any commodity in interstate commerce” is a broad phrase – like the definition of “security” in the context of securities law¹⁸⁵ – and this broad phrasing dovetails with the broad definition of commodity under the current CEA.¹⁸⁶ As one commenter put it, “[T]he CEA definition of ‘commodity’ seems to include literally everything except, expressly, onions and movie box office receipts.”¹⁸⁷ The CFTC’s regulatory authority extends well beyond the specific definition of “commodity” in the Act, given the far reach of categories of financial instruments like options and excluded commodities.¹⁸⁸

3. Application of Commodities Fraud

Considering the factual scenario discussed in Part I – in which a group of people create and distribute a fake poll to influence online political betting markets – commodities fraud liability likely comes to bear. First, by publishing a “poll” that they did not actually conduct, the purveyors clearly communicated a misrepresentation. This is a straightforward conclusion, but identifying the specific misrepresentation is conceptually necessary. The misrepresentation here is best understood as: “I conducted a poll of the election, the results of which showed Candidate A with X% of the vote and Candidate B with Y%.” The misrepresentation is necessarily comprised of *both* clauses of the statement. Someone who misrepresents that they

180. 17 C.F.R. § 180.1 (2019).

181. Prohibition on the Employment, or Attempted Employment of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. at 41405.

182. *Id.*

183. *Id.*

184. *See id.* at 41405–06; *see also* Havas et al., *supra* note 169, at 1800.

185. Havas et al., *supra* note 169, at 1800–02.

186. *Supra* notes 143–145 and accompanying text.

187. Timothy E. Lynch, *Derivatives: A Twenty-First Century Understanding*, 43 LOY. U. CHI. L.J. 1, 13 n.48 (2011).

188. *See* Commodity Futures Trading Comm’n v. Trade Exch. Network Ltd., 117 F. Supp. 3d 29, 37–38 (D.D.C. 2015).

conducted a poll without releasing the results undoubtedly makes a misrepresentation, but one that is unlikely to be material. On the other hand, someone who misrepresents that they believe Candidate A will win X% of the vote may be making a statement that is neither misleading¹⁸⁹ nor material.¹⁹⁰ Here, their entire statement is misleading – they *did not* conduct a poll showing Candidate A with X% of the vote and stating otherwise is false.

Second, their misrepresentation was likely material. To some extent, this can be a difficult element to prove in the abstract – materiality is usually seen as a mixed question of law and fact, though some courts view it as a pure question of fact.¹⁹¹ Nonetheless, on a practical level, several things are true: PredictIt bettors rely on a variety of public information, including polls, in making their betting decisions.¹⁹² Polls have affected betting markets for nearly a hundred years – well before the creation of online political betting markets like the IEM and PredictIt – and have actually made betting markets *less* accurate, which reflects the extent to which bettors take them into account.¹⁹³ Therefore, it seems a likely conclusion in this instance that, at a

189. The resolution of this question, though unnecessary for this Article, depends on the application of courts' frequently contradictory jurisprudence of when an opinion is misleading and gives rise to securities fraud liability. See Wendy Gerwick Couture, *Opinions Actionable as Securities Fraud*, 73 LA. L. REV. 381, 386–429 (2013) (for an in-depth discussion of this jurisprudence).

190. There could be circumstances where someone with a well-earned reputation for accuracy in political prognostication – like, for example, Nate Silver – could communicate a material misrepresentation if he falsely represented his belief that Candidate A would receive X% of the vote. See *Va. Bankshares v. Sandberg*, 501 U.S. 1083, 1090–91 (1991) (discussing liability for corporate directors' statements of belief if false because “[s]hareholders know that directors usually have knowledge and expertise far exceeding the normal investor’s resources . . .”). However, this can be difficult to prove. See generally *Podany v. Robertson Stephens, Inc.*, 318 F. Supp. 2d 146 (S.D.N.Y. 2004) (in which the court dismissed plaintiffs' claims that “an equity analyst engaged in a scheme . . . to commit securities fraud by publishing false statements of opinion about certain issuers in reports disseminated by [his employer] broker-dealer” for lack of proof).

191. Compare *United States v. Litvak*, 808 F.3d 160, 169 (2d Cir. 2015), and *ABC Arbitrage Plaintiffs Grp. v. Tchuruk*, 291 F.3d 336, 359 (5th Cir. 2002), and *Weiner v. Quaker Oats Co.*, 129 F.3d 310, 317 (3d Cir. 1997), with *Bacon v. Stiefel Labs.*, 677 F. Supp. 2d 1331, 1345 (S.D. Fla. 2010).

192. Enten, *supra* note 11; Perticone, *supra* note 7; see PREDICTIT, *Frequently Asked Questions*, *supra* note 25.

193. Robert S. Erikson & Christopher Wlezian, *Markets vs. Polls as Election Predictors: An Historical Assessment*, 31 ELECTORAL STUDIES 532, 535 (2011) (“[T]he correlation and regression-based evidence indicates that the knowledgeable price-setters were able to gauge degrees of relative Democratic vs. Republican strength with amazing clarity – greater, so it appears, than price-setters in the thinner markets of the polling era. Polls may have had a distorting effect on markets. When the polls have been accurate, so too have been market prices. But when polls have gone wrong, so have market prices.”); see also *supra* note 14 and accompanying text (discussing impact of Delphi Analytica poll on PredictIt share prices).

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minimum, polls *affect* the “total mix” of information made available¹⁹⁴ – and it seems possible that polls actually *drive* the “total mix,” too.¹⁹⁵

Whether *these* “polls” affected the “total mix” is a closer question, however. Fake polls are still relatively rare, so it can be difficult to isolate them from “real” polls to determine their effect on political betting markets or on expectations more generally. But to some extent, the effects of one fake poll – the Delphi Analytica poll of the Michigan Senate race – can serve as a case study. As mentioned previously, the release of the poll resulted in the value of Senator Debbie Stabenow’s “share” on PredictIt dropping by nearly 20%,¹⁹⁶ the largest volume of trades (by far!) the following day.¹⁹⁷ The poll was also widely distributed by the media,¹⁹⁸ Kid Rock himself,¹⁹⁹ and Texas Governor Greg Abbott.²⁰⁰ Though the media didn’t distribute the results of other fake polls, political prognosticators have noted that the American news media has a systemic problem with accurately reporting on public opinion polls,²⁰¹ and fake news more generally,²⁰² which bodes poorly for responsible media reporting of suspected fake polls in the future.²⁰³ With that context in mind, promulgating a fake poll *could* be material depending on the attendant circumstances – which include the extent to which the poll’s release was correlated with a noticeable increase in the volume of trading in a particular market, the distribution of the poll online, and so on.

Finally, the material misrepresentation was likely made in connection with a commodity. The exact nature of this financial instrument is somewhat of an open question,²⁰⁴ as is the CFTC’s ability to regulate political prediction

194. *Supra* note 175 and accompanying text.

195. *Supra* note 193 and accompanying text.

196. *Supra* note 18 and accompanying text.

197. *Supra* note 106 and accompanying text.

198. *E.g.*, *Kid Rock 4 Points Ahead in Race for Michigan Senate Seat, Poll Says*, FOX NEWS (July 25, 2017), <https://www.foxnews.com/entertainment/kid-rock-4-points-ahead-in-race-for-michigan-senate-seat-poll-says> [perma.cc/7L6F-B3FJ].

199. Judy Kurtz, *Kid Rock Tweets Poll Showing Him Leading Senate Race*, HILL (July 24, 2017), <https://thehill.com/blogs/in-the-know/in-the-know/343461-kid-rock-tweets-poll-showing-him-leading-senate-race> [perma.cc/5J3G-FKB2].

200. Jeremy Wallace, *Was Gov. Abbott Punk’d by Fake Poll?*, HOUSTON CHRON. (Aug. 23, 2017), <https://www.chron.com/news/politics/texas/article/Was-Gov-Abbott-punk-d-by-fake-poll-11951030.php> [perma.cc/XYH5-22Z5].

201. *E.g.*, Nate Silver, *The Media Has a Probability Problem*, FIVETHIRTYEIGHT (Sept. 21, 2017), <https://fivethirtyeight.com/features/the-media-has-a-probability-problem/> [perma.cc/M5K3-H7WP].

202. *See generally* Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POLITICAL BEHAVIOR 303 (2010).

203. *See generally* Enten, *supra* note 11.

204. *Supra* note 32 and accompanying text.

markets – or, at least, it *was* an open question prior to the passage of Dodd-Frank.²⁰⁵ The CFTC has two bases of authority for claiming that it has jurisdiction over political prediction markets: the CEA and Dodd-Frank.²⁰⁶ In its definition of “commodity,” the CEA gave the CFTC regulatory authority over “all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt in,”²⁰⁷ including event contracts.²⁰⁸ The passage of Dodd-Frank in 2010 supplemented the CFTC’s authority by giving them sole authority²⁰⁹ to approve contracts “that are based upon the occurrence, extent of an occurrence, or contingency,” which by its very terms, explicitly includes event contracts.²¹⁰ The CFTC has, in turn, fully embraced this authority – relying on both the CEA and Dodd-Frank – to grant no-action letters to some political prediction markets²¹¹ and to issue orders prohibiting markets from operating.²¹²

In an even stronger indicia of its jurisdiction over these markets, the CFTC has also pursued repeated enforcement actions against InTrade, an Irish-operated political prediction market.²¹³ In response to the CFTC’s 2012 enforcement action, InTrade resisted the CFTC’s exercise of its jurisdiction.²¹⁴ However, the U.S. District Court for the District of Columbia

205. *Infra* note 221 and accompanying text.

206. Michael P. Vandenberg et al., *Energy and Climate Change: A Climate Prediction Market*, 61 UCLA L. REV. 1962, 1993–94 (2014).

207. 7 U.S.C. § 1a(9) (2018).

208. See Vandenberg et al., *supra* note 206 at 1994.

209. *Id.*

210. 7 U.S.C. § 7a-2(c)(5) (2018).

211. *E.g.*, Press Release, Commodity Futures Trading Comm’n, *supra* note 6; Letter from Andrea Corcoran to George R. Neumann, *supra* note 42; Letter from Vincent McGonagle to Neil Quigley, *supra* note 9. The issuance of a no-action letter may not explicitly indicate that the CFTC believes it has jurisdiction over a particular subject matter or organization, but in another context, the CFTC noted that it “has many tools to reduce or eliminate regulatory burdens on entities or activities within its jurisdiction,” including “staff exemptive, no-action, and interpretative letters.” Trading Commission’s Consolidated Reply in Support of its Cross-Motion for Summary Judgment, Opposition to Plaintiffs’ Motion for Summary Judgment, and Motion to Dismiss in Part at 10, Sec. Indus. & Fin. Mkts. Ass’n v. U.S. Commodity Futures Trading Comm’n, 67 F. Supp. 3d 373 (D.D.C. 2014) (No. 13-1916).

212. *E.g.*, Press Release, U.S. Commodity Futures Trading Comm’n, *CFTC Issues Order Prohibiting North American Derivatives Exchange’s Political Event Derivatives Contracts* (Apr. 2, 2012), <https://www.cftc.gov/PressRoom/PressReleases/pr6224-12> [perma.cc/NL9C-HV4B]; see also Kesan & Hayes, *infra* note 221, at 812–13 (discussing CFTC’s finding that the North American Derivatives Exchange’s political futures contracts were “contrary to the public interest”).

213. U.S. Commodity Futures Trading Comm’n v. Trade Exch. Network Ltd., 117 F. Supp. 3d 29, 31–34 (D.D.C. 2015) (discussing 2005 and 2012 CFTC enforcement actions).

214. *Id.* at 35, 37 (discussing InTrade arguments that the contracts it offered “are not options” and are excluded from the CEA’s definition of “commodity”).

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fully rejected these arguments and held that the futures contracts traded on InTrade's prediction markets – which included contracts concerning weather-related events and economic data – were “commodity options [regulated] under the Act.”²¹⁵

Admittedly, the CFTC's actions occurred while an academic debate – albeit a mild one – was quietly simmering over whether the CFTC could properly exercise jurisdiction over political prediction markets. Several leading scholars argued that the CFTC's jurisdiction is either nonexistent or unclear;²¹⁶ chief among them was Professor Tom Bell, who has written extensively on the subject of prediction markets.²¹⁷ Bell argued that the average claim on a prediction market is classified as a “hybrid instrument predominantly a security,” which would exclude it from CFTC oversight by the CFTC's own regulations.²¹⁸ That classification contains a crucial exception, however, for an instrument “marketed as a futures contract,”²¹⁹ which applies in PredictIt's case.²²⁰ It is worth noting, however, that the academic debate over the CFTC's jurisdiction largely occurred *before* the 2010 passage of Dodd-Frank and that the discussion following the Act's passage, though limited, has leaned much more heavily in support of the CFTC's jurisdiction.²²¹

215. *Id.* at 38. InTrade's specific argument was that contracts “based on questions about weather events and economic statistics” were not “goods or articles” contemplated under the CEA. *Id.* at 37. However, the court noted that the CEA's definition of “commodity” includes a large scope of financial instruments and held that InTrade's contracts were appropriately considered “commodity options under the Act.” *Id.*

216. *Infra* note 221 and accompanying text.

217. *See generally*, Tom W. Bell, Private Prediction Markets and the Law, 3 J. PREDICTION MARKETS 89 (2009); Tom W. Bell, Prediction Markets for Promoting the Progress of Science and the Useful Arts, 14 GEO. MASON L. REV. 37, 67–77 (2006); Tom W. Bell, Gambling for the Good, Trading for the Future: The Legality of Markets in Science Claims, 5 CHAP. L. REV. 159 (2002).

218. Bell, Prediction Markets for Promoting the Progress of Science and the Useful Arts, *supra* note 217 at 68–69.

219. 17 C.F.R. § 34.3(a)(3)(ii) (2019).

220. *Terms and Conditions*, PREDICTIT, *supra* note 24; *see also* Press Release, Commodity Futures Trading Comm'n, *supra* note 6; Letter from Vincent McGonagle to Neil Quigley, *supra* note 9.

221. *Compare* Michael Abramowicz & M. Todd Henderson, *Prediction Markets for Corporate Governance*, 82 NOTRE DAME L. REV. 1343, 1374 (2007) (noting that the CFTC's jurisdiction is unclear), *and* Bell, *Prediction Markets for Promoting the Progress of Science and the Useful Arts*, *supra* note 217, at 67–77 (arguing the CFTC does not have jurisdiction), *and* Miriam A. Cherry & Robert L. Rogers, *Prediction Markets and the First Amendment*, 2008 U. ILL. L. REV. 833, 863–64 (2008) (noting that the CFTC's jurisdiction is “not entirely clear”), *and* Cleary, *supra* note 32 at 961

In any event, by PredictIt's own terms and conditions, it is selling "futures contracts linked to political or financial events and circumstances."²²² It is therefore prevented from evading the CFTC's jurisdiction under the classification identified by Bell,²²³ and futures contracts are irrefutably under the CFTC's oversight, anyway.²²⁴ All of this is to say that the weight of the available evidence and legal analysis strongly suggests that any material misrepresentation in the arena of fake polls is "in connection with a commodity," thereby triggering commodities fraud liability for the actions. But even if this conclusion is incorrect, liability can *still* attach to the publication of a fake poll – namely, through wire fraud.

B. Wire Fraud

In this context, regardless of the applicability of the federal laws criminalizing commodities fraud – outlined in Section A – wire fraud serves as an additional source of legal liability.²²⁵ In many ways, it is a more

n.29 (noting that the CFTC's jurisdiction is unclear), and Goldberg, *supra* note 32 at 435–38 (noting that the CFTC's jurisdiction is unclear), and Alexandra Lee Newman, Comment, *Manipulation in Political Prediction Markets*, 3 J. BUS. ENTREPRENEURSHIP & L. 205, 208 (2010) (noting that the CFTC's jurisdiction over prediction markets is a point of disagreement, especially under the CEA's anti-manipulation regime), with Tom W. Bell, *Government Prediction Markets: Why, Who, and How*, 116 PENN. ST. L. REV. 403, 420–22 (2011) (noting that "it remains unclear and to what extent the jurisdiction of the [CFTC] would reach prediction markets offering trading in claims pertaining to public policy issues"), and Jerry Brito et al., *Bitcoin Financial Regulation: Securities, Derivatives, Prediction Markets, and Gambling*, 16 COLUM. SCI. & TECH. L. REV. 144, 196–99 (2014) (noting the CFTC's asserted jurisdiction over prediction markets), and Jay P. Kesan & Carol M. Hayes, *Bugs in the Market: Creating a Legitimate, Transparent, and Vendor-Focused Market for Software Vulnerabilities*, 58 ARIZ. L. REV. 753, 812–13 (2016) (noting that the "CFTC's recent actions concerning NADEX and [PredictIt] support" the claim that the "definition of commodity is broad enough that it could cover contracts in a political prediction market"), and Vanderbergh et al., *supra* note 206 at 1994–96, 2014–15 (arguing that the CFTC has jurisdiction over political prediction markets). Notably, Bell's pre-Dodd-Frank opinion, that the CFTC did not have jurisdiction, softened after the Act's passage, and he now describes the CFTC's jurisdiction as "unclear." See Bell, *Government Prediction Markets: Why, Who, and How*, at 420–22; Bell, *Prediction Markets for Promoting the Progress of Science and the Useful Arts*, *supra* note 217, at 67–77.

222. *Terms and Conditions*, PREDICTIT, *supra* note 24.

223. Bell, *Prediction Markets for Promoting the Progress of Science and the Useful Arts*, *supra* note 217, at 68–69.

224. See 7 U.S.C. §§ 1a(9), 7a-2(c) (2018).

225. The proposed defendants in this case could be charged with both commodities and wire fraud. Even though "a number of the underlying facts used to prove . . . securities fraud [would] also [be] used to prove . . . wire fraud," the "two crimes are distinct and require the government to prove different elements in order to secure a conviction." *United States v. ReBrook*, 58 F.3d 961, 967 (4th Cir. 1995). Accordingly, a prosecution based on both theories of liability would not violate the

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appealing avenue of liability – certainly for a criminal prosecution²²⁶ – and inarguably easier to prove. This Section outlines the elements of the offense, briefly explains the historical development of the wire fraud statute, and then applies the elements to the conduct described in Part I.

1. Defining Wire Fraud

The wire fraud statute – currently codified at 8 U.S.C. § 1343 – was adopted in 1952 and was modeled after the mail fraud statute, which was first adopted in 1872.²²⁷ The statute contains nearly identical language to its sister statute, save for the jurisdictional hook,²²⁸ and both statutes are interpreted *in pari materia*.²²⁹ In other words, “Where the two statutes share the same language, the law developed under the mail fraud statute applies to wire fraud and vice versa.”²³⁰

The statute is logically understood broken into several subparts: Someone must devise a “scheme or artifice to defraud” or to “obtain[] money or property.”²³¹ This scheme must be intended to be accomplished through the use of “false or fraudulent pretenses, representations, or promises.”²³² To execute the scheme, the actor must transmit “any writings, signs, signals, pictures, or sounds” through “wire, radio, or television communication in interstate or foreign commerce.”²³³ In interpreting the wire fraud statute, courts have concluded that it contains three elements: (1) a scheme to defraud,

Blockburger test of double jeopardy because “each contains an element that is not contained in the other. Securities fraud requires a showing of fraud in connection with the purchase or sale of any security – an element not required to prove wire fraud. Wire fraud requires a showing of use of interstate wires – an element not required to prove securities fraud.” *United States v. Regensberg*, 604 F. Supp. 2d 625, 634 (S.D.N.Y. 2009).

226. One advantage of commodities fraud is that it allows a private right of action, while wire fraud likely does not. This Article focuses on the viability of a criminal prosecution for the conduct outlined in Part I, but this discussion should not occur at the expense of the victims of this fraud.

227. C.J. Williams, *What is the Gist of the Mail Fraud Statute?*, 66 OKLA. L. REV. 287, 291–94, 304–05 (2014).

228. *Id.* at 305.

229. *Pasquantino v. United States*, 544 U.S. 349, 355 n.2 (2005).

230. William K.S. Wang, *Application of the Federal Mail and Wire Fraud Statutes to Criminal Liability for Stock Market Insider Trading and Tipping*, 70 U. MIAMI L. REV. 220, 224 (2015).

231. 18 U.S.C. § 1343 (2018).

232. *Id.*

233. *Id.*

(2) the use of interstate wires in furtherance of the scheme, and (3) with specific intent to “deceive or defraud.”²³⁴

First, the wire fraud statute requires a “scheme to defraud.”²³⁵ This term, by both its very nature and by Congress’s lack of any definition or specification, is a broad and ambiguous term.²³⁶ Courts interpreting its scope have responded to its breadth and ambiguity with gusto and have usually interpreted it broadly.²³⁷ At its core, the prohibition of a “scheme to defraud” reflects the courts’ idealistic standards of appropriate conduct: it prohibits “dishonest methods or schemes” and the use of “trick, deceit, chicanery, or overreaching” to deprive someone of something with value.²³⁸ But in many ways, this prohibition does not appear to capture any particular conduct. Instead, it captures “a plan, intention, or state of mind, insufficient in itself to give rise to any kind of criminal sanctions.”²³⁹ It is perhaps unsurprising, then, that “[f]ew restrictions have been placed on what will be subject to prosecution under this statute.”²⁴⁰

An obvious requirement in any scheme to defraud is a misrepresentation. A qualifying misrepresentation is significantly broader in wire fraud than it is for commodities fraud.²⁴¹ “Although [wire fraud] can be committed by means of outright lies, literal falsity is seldom, if ever, required.”²⁴² For example, wire fraud can attach to statements that may be “literally true,” but that taken

234. *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1400 (9th Cir. 1986). Many courts articulate these three requirements differently. For example, the Fifth Circuit notes that there are only two elements: “(1) a scheme to defraud and (2) the use of interstate communications in furtherance of the scheme.” *United States v. Gordon*, 780 F.2d 1165, 1171 (5th Cir. 1986). In *Gordon*, the Fifth Circuit noted that the government in the mail fraud context must also prove “a specific intent to commit fraud.” *Id.* at 1170 (quoting *United States v. Freeman*, 619 F.2d 1112, 1117 (5th Cir. 1980)). Regardless, these three requirements are universally accepted as coterminous with both mail and wire fraud. *E.g.*, Wendy Gerwick Couture, *White Collar Crime’s Gray Area: The Anomaly of Criminalizing Conduct Not Civilly Actionable*, 72 ALB. L. REV. 1, 4 (2009).

235. Gerwick Couture, *supra* note 234, at 4.

236. Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 789 (1980).

237. Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 160 (1993).

238. *McNally v. United States*, 483 U.S. 350, 358 (1987) (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)).

239. Rakoff, *supra* note 236, at 775 (internal citations omitted).

240. Ellen S. Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729, 753–54 (1999) (“An incredible array of schemes have been prosecuted under the mail fraud statute. One finds, for example, ‘divorce mill’ fraud, insurance fraud, securities fraud, and franchise fraud.”) (internal citations omitted).

241. *Supra* notes 166–68 and accompanying text (discussing misrepresentation in the commodities fraud context).

242. Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157, 188 (2001).

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as a whole, are “fraudulently misleading and deceptive.”²⁴³ The nature of the misrepresentation interacts with the materiality and intent of the statement, discussed *infra*, because courts generally recognize that a statement that is “material and made with intent to deceive” qualifies as a misrepresentation.²⁴⁴

Though materiality is not explicitly mentioned in either the mail or wire fraud statutes, the Supreme Court added a materiality requirement to mail, wire, and bank fraud prosecutions in *Neder v. United States*.²⁴⁵ In defining “materiality,” the Court approvingly quoted the Second Restatement of Torts’ definition of materiality, which provides that a matter is material if:

- (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or
- (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.²⁴⁶

Federal courts disagree on the application of this materiality requirement – a circuit split has developed between circuits that apply an “objective standard, which measures [schemes] as applied to the hypothetical *reasonable* victim” and those that apply a “subjective standard, which takes into account the particular perspective of actual victims of a deception.”²⁴⁷

But all courts agree that the standard of materiality adopted by the Court in *Neder* is looser for mail and wire fraud than it is for commodities and securities fraud.²⁴⁸ A necessary implication of *both* the objective and subjective standards is that “material” is defined as including statements that “an objectively reasonable person would *not* regard as important.”²⁴⁹ The minimization of a “reasonable” recipient of deceptive information – even under the objective standard – perhaps reflects that “materiality” operates at a less practical level in wire fraud than it does in commodities or securities fraud. Liability in wire fraud is not predicated on the success of the fraud or

243. *E.g.*, *Lustiger v. United States*, 386 F.2d 132, 136–37 (9th Cir. 1967).

244. *Green*, *supra* note 242, at 188.

245. *Neder v. United States*, 527 U.S. 1, 20–25 (1999).

246. *Id.* at 22 n.5 (quoting RESTATEMENT (SECOND) OF TORTS § 538 (Am. Law Inst. 1976)).

247. Mark Zingale, Note, *Fashioning a Victim Standard in Mail and Wire Fraud: Ordinarily Prudent Person or Monumentally Credulous Gull?*, 99 COLUM. L. REV. 795, 796 (1999).

248. Gerwick Couture, *supra* note 234, at 6.

249. *Id.* at 8 (emphasis added); *supra* note 246 and accompanying text.

even its completion.²⁵⁰ It is instead predicated on the attempt itself.²⁵¹ Therefore, it makes intuitive sense that the current trend in evaluating materiality focuses on “using the credibility of the scheme merely as an indicator of whether the defendant possessed the requisite intent to defraud.”²⁵² After all, if a scheme was not seen through to completion, it *could not* be classified as “material” under the standard used in commodities fraud – it affected neither its intended victims nor their behavior. The divergent attention paid to effects under both theories of liability reflects the core difference between the two theories. Though commodities fraud defines “materiality” loosely²⁵³ – but certainly not as loosely as wire fraud – it focuses the bulk of its energy on the likelihood that a reasonable investor would consider the statement, or its omission, “important in deciding how to vote.”²⁵⁴

The remaining two elements – transmission by “wire, radio, or television communication” and intent – are simpler than materiality and require less explanation. First, federal courts have largely interpreted the transmission requirement loosely to encompass activity only tangentially related to the actual fraud.²⁵⁵ The Supreme Court held in *Schmuck v. United States* that an interstate communication need only be “incident to an essential part of the scheme” or a mere “step in the plot” to be “for the purpose of executing” the scheme.²⁵⁶ This flexible approach grew out of the mail fraud statute’s broad reach and original intent – which was to “punish those who misused a government agency, namely the United States Post Office, in the purpose of executing a fraudulent scheme.”²⁵⁷ In keeping with that purpose, the original statute was interpreted from the very beginning to designate each separate mailing as a separate offense.²⁵⁸ The result of this broad approach – which triggers federal jurisdiction over transmissions that are incidental or sometimes even made by actors other than the fraudsters themselves – has been the growing use of the mail and wire fraud statutes to bring what might ordinarily be state-level fraud crimes to federal court.²⁵⁹

250. See *Neder v. United States*, 527 U.S. 1, 24–25 (1999) (noting that the statute “prohibit[s] the ‘scheme to defraud,’ rather than the completed fraud”).

251. *Id.*

252. Gerwick Couture, *supra* note 234, at 8–9.

253. See generally Dale A. Oesterle, *The Overused and Under-defined Notion of “Material” in Securities Law*, 14 U. PA. J. BUS. L. 167 (2011).

254. *Id.* at 175 (quoting *TSC Indus. v. Northway*, 426 U.S. 438, 449 (1976)); see also *supra* notes 173–173 and accompanying text.

255. *Schmuck v. United States*, 489 U.S. 705, 712 (1989).

256. *Id.* at 710–11 (1989) (quoting *Badders v. United States*, 240 U.S. 391, 394 (1916)). Though *Schmuck* was decided in the mail fraud context, its holding has been similarly applied to wire fraud. See, e.g., *United States v. Hasson*, 333 F.3d 1264, 1272–73 (2003) (applying *Schmuck* to wire fraud prosecution).

257. Williams, *supra* note 227, at 287.

258. *Id.*

259. See *Schmuck*, 489 U.S. at 722–23 (Scalia, J., dissenting).

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In keeping with this broad interpretation, the statute has evolved with the times as the definition of “wire” expanded from physical telephone wires to wireless Internet transmissions. The statute is now widely understood to include crimes that involve the use of computers and the Internet generally.²⁶⁰ This reach is necessarily broad – it’s likely that the jurisdictional element of the wire fraud statute even applies to Internet communications that are sent and received in the same state.²⁶¹ “Because of fluctuations in the volume of Internet traffic and determinations by the systems as to what line constitutes the ‘Shortest Path First,’ a website connection request can travel entirely intrastate or partially interstate.”²⁶² Accordingly, many courts have essentially held that the “very interstate nature of the Internet” means that *any* Internet activity results in data traveling in interstate commerce.²⁶³ Some courts have distanced themselves from this generous application and have articulated that the government needs to prove more in a wire fraud prosecution based on Internet activity, such as evidence that a defendant uploaded content to a server based in one state and that the server transmitted the content across state lines to a “local host server.”²⁶⁴

260. E.g., Richard W. Downing, *Shoring Up the Weakest Link: What Lawmakers Around the World Need to Consider in Developing Comprehensive Laws to Combat Cybercrime*, 43 COLUM. J. TRANSNAT’L L. 705, 725 n.39 (2005) (collecting cases).

261. Morgan Cloud & George Shepherd, *Law Deans in Jail*, 77 MO. L. REV. 931, 946 (2012) (“[T]he geography of the internet makes it likely that messages travel across state lines, and perhaps across even national borders, even if the origin and destination sites are in the same state. Similarly, if packages are sent by private courier, the hub systems used by the leading companies makes it likely that packages traverse an interstate itinerary. *Because knowledge of the bases for federal jurisdiction is not necessary under these statutes, the sender need not intend or even know that the email or package has crossed state lines.*”) (emphasis added).

262. United States v. MacEwan, 445 F.3d 237, 244 (2006).

263. E.g., *id.*

264. United States v. Kieffer, 681 F.3d 1143, 1154–55 (10th Cir. 2012). “Accordingly, we have no quarrel with the narrow proposition [that] one individual’s use of the internet, ‘standing alone,’ does not establish an interstate transmission.” *Id.* at 1155 (quoting United States v. Schaefer, 501 F.3d 1197, 1200–01 (10th Cir. 2007)). See also Valeria G. Luster, Note, *Let’s Reinvent the Wheel: The Interstate as a Means of Interstate Commerce* in United States v. Kieffer, 67 OKLA. L. REV. 589, 597–99, 601–07 (2015) (discussing *Kieffer*’s approach to the Internet in the wire fraud context). The most voluminous discussion – and disagreement – by the courts over the jurisdictional requirement for crimes, like wire fraud, that require interstate transmission has been in the realm of child pornography. The federal laws prohibiting both wire fraud and child pornography use the same “‘in interstate commerce’ language” and are generally interpreted in tandem with each other. See Michael D. Yanovsky Sukenik, *Distinct Words, Discrete Meanings: The Internet and Illicit Interstate Commerce*, 2011 U. ILL. J.L. TECH. & POL’Y 1 22–23 (2011). A circuit split

Finally, the government needs to prove that the defendant had an intent to defraud.²⁶⁵ This standard is perhaps the loosest of the three, and simply requires proof that the defendant possessed “an intent to deceive through misrepresentation”²⁶⁶ – though some courts have even found the intent requirement to be satisfied where the defendant merely had an intent to deceive.²⁶⁷ The government frequently uses circumstantial evidence to prove intent, like an attempt by the defendant to conceal their conduct, the defendant’s misrepresentations, the defendant’s knowledge that their statements were false, or even evidence of prior or subsequent bad acts.²⁶⁸

2. Applying Wire Fraud

In many ways, despite the previous discussion of the nature of the interests on PredictIt – which suggests, at the very minimum, that they have commodity-like features – wire fraud fits more easily with the conduct, stripped to its basics, described in Part I. Put simply, lies were communicated over the Internet in an attempt to yield a financial return for the liars. This is textbook wire fraud. The additional context – namely, that the lies were told to affect the value of *some* sort of financial instrument on a (pseudo-) stock exchange, as opposed to inducing the purchase or sale of a good or service – perhaps makes wire fraud a complementary charge in conjunction with commodities fraud. Of course, the conduct that triggers liability for commodities fraud *also* frequently triggers liability for wire fraud,²⁶⁹ even if the reverse isn’t always true. On a practical level, the more frequent prosecution of wire fraud, rather than commodities (or securities) fraud, occurs as an exercise of prosecutorial discretion because wire fraud prosecutions are both easier to prove *and* criminalize conduct usually left untouched by commodities fraud law alone.²⁷⁰

Based on the facts outlined in Part I (and the probable inferences naturally drawn from them), the elements of wire fraud are almost assuredly

has developed over whether the “in interstate commerce” requirement is satisfied by proof of Internet use alone. Jonathan R. Gray, *United States v. Schaefer and United States v. Sturm: Why the Federal Government Should Regulate All Internet Use as Interstate Commerce*, 90 DENV. U. L. REV. 691, 697 n.57 (2013) (comparing cases).

265. Skye Lynn Perryman, *Mail and Wire Fraud*, 43 AM. CRIM. L. REV. 715, 721–24 (2006).

266. Julie R. O’Sullivan, *Honest-Services Fraud: A (Vague) Threat to Millions of Blissfully Unaware (and Non-Culpable) American Workers*, 63 VAND. L. REV. EN BANC 23, 35 (2010).

267. Wang, *supra* note 230, at 229–31.

268. Perryman, *supra* note 265, at 722–24.

269. *See* Gerwick Couture, *supra* note 234, at 3–4; *see generally* Wang, *supra* note 230 (discussing wire fraud liability for insider trading).

270. Gerwick Couture, *supra* note 234, at 9–12 (discussing federal prosecutors’ use of the so-called “wire/mail fraud run-around” due to the lower materiality standard and the ability to charge defendants for “allegedly false forward-looking statements accompanied by meaningful cautionary language”).

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met. Like the discussion of commodities fraud in Section A, for the purposes of this discussion, this Article presumes without substantial discussion that the element of intent is satisfied.²⁷¹ Based on the ends-driven application of the intent requirement by federal courts,²⁷² the element of intent is satisfied even if the use of the internet was tangential to the overall scheme.²⁷³ In any event, the subpoenas preceding and discovery during a criminal trial or enforcement action by either the CFTC or the Department of Justice would definitively address this element. This Subsection therefore proceeds by discussing the remaining two elements – the existence of a “scheme to defraud” and the use of wires to further the scheme.

First, the conduct described in Part I is clearly a “scheme to defraud” under the wire fraud statute. Like intent, however, the existence of a “scheme to defraud” is largely a question of fact.²⁷⁴ However, given that it has a higher standard of proof than intent²⁷⁵ and that the existence of such a scheme is undeniably central to any wire fraud prosecution, a greater discussion of this element is appropriate here.

The practice of publishing fake polls with the goal of artificially driving up the price of futures contracts on PredictIt is best analogized to a pump-and-dump scheme. Fake polls serve as a reasonable analog for “intentionally misleading press releases”²⁷⁶ or “promotional materials contain[ing] false and misleading information”²⁷⁷ that are similarly published and distributed to artificially drive up (or down, in the case of a “distort-and-short” scheme) prices. Pump-and-dump schemes – though perhaps somewhat uncommon in

271. *Supra* note 164 and accompanying text.

272. *See supra* notes 265–64 and accompanying text.

273. *Id.*

274. *See, e.g.*, *United States v. Doke*, 171 F.3d 240, 243 (5th Cir. 1999) (noting that “intent to deceive” and the existence of a “scheme to defraud” are “questions of fact”); *supra* note 164 and accompanying text.

275. *See generally* Perryman, *supra* note 265, at 722–24.

276. *E.g.*, Robert J. Anello & Brian A. Jacobs, *Securities Fraud, in WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES* § 12.02[2] (Otto G. Obermaier & Robert G. Morvillo eds., 2019).

277. *E.g.*, *United States v. Clark*, 717 F.3d 790, 807 (10th Cir. 2013).

the context of futures contracts²⁷⁸ – are generally considered to be “schemes to defraud” in wire fraud prosecutions.²⁷⁹

On a practical level, the scheme to defraud described in Part I included material misrepresentations. The misrepresentation, as outlined *supra* in Section A, is essentially: “I conducted a poll of the election, the results of which showed Candidate A with X% of the vote and Candidate B with Y%.” If the purveyors of these fake polls did not actually conduct polls – or even if they conducted “polls” that seriously lacked in statistical accuracy and rigor such that its purveyors knew it was worthless information²⁸⁰ – they were communicating a misrepresentation.

And that misrepresentation was material. By either definition of “materiality” adopted by the *Neder* court²⁸¹ – and by either the objective or

278. The paucity of both academic discussion and caselaw addressing “pump-and-dump” or “distort-and-short” schemes in the context of futures markets suggests that these schemes are rare, though market manipulation obviously occurs. *See generally* *Levy v. BASF Metals Ltd.*, 917 F.3d 106, 107–08 (2d Cir. 2019) (a rare “pump-and-dump” case involving a scheme that manipulated the value of platinum futures in violation of the CEA”); Jerry W. Markham, *Manipulation of Commodity Futures Prices – The Unprosecutable Crime*, 8 YALE J. ON REG. 281 (1991) (discussing the difficulty of prosecuting manipulation of markets for futures contracts prior to Sarbanes-Oxley and Dodd-Frank). Some of this rarity could come from the fact that “[c]ommodities that are readily available and can easily be transported cannot be cornered.” Daniel R. Fischel & David J. Ross, *Should the Law Prohibit “Manipulation” in Financial Markets?*, 105 HARV. L. REV. 503, 547 n.193 (1991). Much of the “pump-and-dump” schemes prosecuted by the CFTC involve the manipulation of currency markets, not futures contracts. *See* Press Release, U.S. Commodity Futures Trading Comm’n, CFTC Warns Customers to Avoid Pump-and-Dump Schemes (Feb. 15, 2018), <https://www.cftc.gov/PressRoom/PressReleases/pr7697-18> [perma.cc/HXF6-JMC6].

279. *See, e.g.*, *United States v. Skelly*, 442 F.3d 94, 96 (2d Cir. 2006) (affirming conviction for wire fraud for “pump and dump” scheme in which the defendants “used manipulative techniques to artificially inflate (‘pump’) the price of certain thinly-traded securities in which they held a substantial interest, and then used fraudulent and high-pressure tactics to unload (‘dump’) the securities on unsuspecting customers”).

280. This hypothetical – in which the publishers of these fake polls “conducted” a poll using shoddy methods and claimed that it was a poll conducted using statistical rigor – helpfully illustrates how wire fraud prosecutions differ from securities fraud prosecutions. *See* Enten, *supra* note 11. This sort of hypothetical would likely be insufficiently misrepresentative to trigger securities fraud liability, because “literally true” statements cannot trigger securities fraud liability. *Supra* notes 166–64 and accompanying text. However, because “literally true” statements *can* be the basis of wire fraud if they are still misrepresentative when viewed in context, a statement that an ostensibly reputable pollster conducted a poll – which implies a degree of statistical rigor that is absent from the actual “poll” conducted – may be “literally true” but nonetheless materially misrepresentative. Even sidestepping the “literal falsehood” question, liability could still attach to shoddily conducted polls if prosecutors could prove that the representation of its accuracy was “made with reckless indifference to its truth or falsity.” *United States v. Cusino*, 694 F.2d 185, 187 (9th Cir. 1982).

281. *Supra* note 246 and accompanying text.

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subjective standard put forth by the federal circuit courts²⁸² – this sort of statement was material. As explained in the context of commodities fraud, PredictIt users rely on polls to make buying and selling information,²⁸³ to some extent regardless of any one poll’s reliability. Even more tellingly, the representation made by the publishers of these fake polls – namely, the *results* of the “polls” – was specifically crafted to be viewed as relevant to the narrow universe of PredictIt users.²⁸⁴

But not only was the representation intended to be *relevant*, it was intended to be *important*, and PredictIt users understandably relied on the information, despite its flaws, in making decisions on the website.²⁸⁵ Assuming that the strictest possible standard applies, the representation of the purveyors of fake polls was important to reasonable people. The appropriate way to consider importance in this context is to consider how a PredictIt user would view the results of a single poll with dubious reliability – just like how we would consider how an investor would view a representation (or omission) in the context of a decision of her own.²⁸⁶

In the fast-paced environments of Twitter²⁸⁷ and PredictIt, a poll of an upcoming election released by a new-on-the-scene pollster would likely be viewed with importance by a reasonable PredictIt user. There are practical reasons why this is so. Hundreds of pollsters regularly conduct and publish polls,²⁸⁸ preventing virtually everyone who does not have an eidetic recollection of political news from recognizing a new pollster instantly. Therefore, a PredictIt user seeking to purchase a futures contract on the outcome of the Republican primary in Alabama’s 2017 special U.S. Senate election who comes across a poll predicting a result of that exact election, allegedly conducted by CSP Polling,²⁸⁹ might reasonably consider that poll in their purchasing decision – even if they do not know that CSP lacks a track

282. *Supra* note 247 and accompanying text.

283. Enten, *supra* note 11; Perticone, *supra* note 7; *Frequently Asked Questions*, PREDICTIT, *supra* note 25; *see also supra* notes 192–91 and accompanying text for the discussion of the reliance that PredictIt users have on polls.

284. *See generally* Enten, *supra* note 11 (discussing the apparent goals of fake poll publishers).

285. *Id.*

286. *See* Wendy Gerwick Couture, *Materiality and a Theory of Legal Circularity*, 17 U. PA. J. BUS. L. 453, 459–60 (2015) (discussing how to measure importance in the securities fraud context); George S. Georgiev, *Too Big to Disclose: Firm Size and Materiality Blindspot in Securities Regulation*, 64 UCLA L. REV. 602, 622–23 (2017) (same).

287. *See* Deto, *supra* note 86 (discussing how quickly the fraudulent Blumenthal Research Daily poll spread).

288. *See* FIVETHIRTYEIGHT, *supra* note 108 (ranking pollsters by accuracy).

289. *See* DELPHI ANALYTICA, *supra* note 84.

record or any indicia of reliability. And given the speed with which PredictIt users buy and sell contracts, a user seeing this information might reasonably conclude that if she is to use this information to her benefit, she needs to act quickly.²⁹⁰ But on the other hand, in the example of Blumenthal Research Daily, subsequent polls released after the pollster admitted its fraudulent nature may be less likely to be taken seriously by users.

In other words, at the risk of stating the obvious, the importance of a fake poll to a PredictIt user is dependent on the context in which it is publicized: A fake poll – especially one that garners significant attention on social media, spreads rapidly, contains an estimated result that flies in the face of conventional wisdom, and comes from a new pollster²⁹¹ – may be reasonably viewed as “important,” thereby triggering the *Nader* court’s definition of “materiality.”

Second, the conduct described clearly involves the use of wires to achieve the intended scheme to defraud. Though the caselaw has been relatively slow to explicitly encompass the use of Twitter, Facebook, and other social media platforms to commit wire fraud, the unanimity of the caselaw holds that the fraudulent use of the Internet to execute a scheme to defraud satisfies the statute’s jurisdictional element.²⁹² Most of the developed caselaw regarding the Internet – in a context other than emails – has focused on fraudulent postings on a defendant’s own website, advertisements for sale,²⁹³ or postings on a sales-driven, pseudo-social media platform like eBay,²⁹⁴ but the existence of only these factual contexts does not limit wire fraud’s applicability.²⁹⁵

In sum, the elements of wire fraud are clearly met when PredictIt users create and publish a fake poll with the intent of altering the prices of futures contracts on PredictIt’s markets.²⁹⁶ The lies told by these fraudsters – the alleged “results” of a poll they did not conduct – are best understood as

290. See Enten, *supra* note 11 (discussing the volume of trades in the Michigan Senate election following the July 2017 release of the Delphi Analytica poll); cf. Verstein, *supra* note 168, at 469 (noting that the “relative speed of commodities markets allow[s] information to be used very profitably”).

291. These characteristics describe the polls released by BRD and Delphi Analytica discussed *supra* at notes 75–85 and their accompanying text.

292. See Downing, *supra* note 260, at 725 n.39.

293. See *United States v. Pirello*, 255 F.3d 728, 730–31 (9th Cir. 2001) (finding wire fraud liability for fraudulent advertisements posted on online classifieds website).

294. *United States v. Gajdik*, 292 F.3d 555, 556 (7th Cir. 2002) (finding wire fraud liability for fraudulent posts on eBay).

295. See Downing, *supra* note 260, at 725 n.39.

296. This channel of criminal liability is less navigable if the motivation of the purveyors is different. If, for example, malevolent actors publish a fake poll to benefit a campaign, it would be challenging to lay the foundation for a wire fraud prosecution. Even if the motivation was financial – for example, attracting campaign contributions – the causal link between the fraud and the financial loss is likely too weak. Instead, fraud of that nature could be prosecuted under a different theory: the violation of 52 U.S.C. § 30104(b) by failing to report an in-kind campaign contribution.

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material misrepresentations, given the extent to which they affect the market decisions of PredictIt users.

C. Comparing the Avenues

As the above discussion illustrates, neither theory of liability is perfect; the advantages of each are somewhat coterminous with the disadvantages of the other. Wire fraud is perhaps a better fit, both in terms of standards of proof and the likelihood of its usage in a federal prosecution, but commodities fraud makes more sense given its subject-matter link to the conduct.

On that note, commodities fraud relates more naturally to the conduct meant to trigger criminal liability here. While the exact classification of the interest available for purchase on PredictIt is unclear, it has the distinct *feel* of a financial instrument. And in terms of practicality, commodities fraud, unlike wire fraud, has a private right of action,²⁹⁷ so even if federal prosecutors decline to pursue charges, the harmed PredictIt investors might have a civil claim.

But the uncertainty in classifying the interests sold by PredictIt looms large over commodities fraud. The CFTC or federal prosecutors may be loath to pursue commodities fraud charges if doing so requires them to litigate whether a commodity was even at issue.²⁹⁸ Further, the high threshold for materiality,²⁹⁹ at least compared to wire fraud,³⁰⁰ could make a commodities fraud prosecution dicier.

While wire fraud may lack the tighter subject-area link of commodities fraud, it functions as a more utilitarian approach to the issue at hand. Especially compared to commodities fraud, wire fraud has easier materiality and jurisdictional requirements; prosecutors find mail and wire fraud “easier

297. Rosa M. Abrantes-Metz et al., *Revolution in Manipulation Law: The New CFTC Rules and the Urgent Need for Economic and Empirical Analyses*, 15 U. PA. J. BUS. L. 357, 362 (2013); Wang, *supra* note 230, at 227 n.17. However, this private right of action does not extend to civil RICO actions. See *Sedima v. Imrex Co.*, 473 U.S. 479, 505–06 (1985) (Marshall, J., dissenting) (“[E]ven though commodities fraud is not a predicate offense listed in § 1961, the carefully crafted private damages causes of action under the Commodities Exchange Act may be circumvented in a commodities fraud case through civil RICO actions alleging mail or wire fraud.”).

298. Cf. Mary M. Calkins, Note, *They Shoot Trojan Horses, Don’t They? An Economic Analysis of Anti-Hacking Regulatory Models*, 89 GEO. L.J. 171, 193 (2000) (arguing that prosecutors are likelier to pursue fraud charges – rather than other charges, which in this case would have been hacking charges – when there is an “uncertain[.]” statute at issue and the prosecutors fear the “difficulty of presenting a high-technology case to a lay judge and/or jury”).

299. *Supra* notes 191–99 and accompanying text.

300. Gerwick Couture, *supra* note 234, at 6.

to prove” than the underlying commodities or securities fraud statutes.³⁰¹ And to the extent that the elements of either fraud charge is too difficult to prove, prosecutors could always fall back on conspiracy charges. Further, unlike commodities fraud, wire fraud is a predicate act for both civil and criminal RICO claims,³⁰² and as Justice Marshall noted in *Imrex*, commodities fraud claims can simply be converted to wire fraud claims to lay the groundwork for a civil RICO claim,³⁰³ demonstrating its versatility.

III. THE CASE FOR CRIMINAL LIABILITY

In a vacuum, it may make little sense to criminally charge the people who create and publish fake polls to affect online political betting markets on PredictIt. After all, given the CFTC-mandated restrictions on the markets,³⁰⁴ the fraudsters likely made a collective profit of no greater than a few thousand dollars, and the individual loss amounts, absent some unusually large investments, may be even less substantial. And given the unfortunately predictable commission of other, ostensibly more serious crimes, a federal prosecution for a loss amount of just a few thousand dollars may seem like a waste of time and money.

In a vacuum, this may be true. But the harms of distributing fake polls (to affect online markets or for other malicious purposes) are not coextensive with the *financial* loss that they cause some people to suffer. This Part begins by arguing in Section A that fake polls can undermine the purpose of political markets like PredictIt and, more seriously, erode trust in polling companies and manipulate the democratic process. Section B then discusses how these serious harms could be exploited by unethical candidates for political office or foreign governments seeking to sow discord in the United States. Finally, Section C concludes this Part and argues that the concerns raised in the preceding Sections are weighty enough to justify the criminal prosecution of the conduct at hand.

A. *The Known (and Possible!) Harms of Fake Polls*

This Section begins by noting the known harms that come from fake polls and later broadens the discussion by making reasonable guesses about possible harms that could flow from the distribution of fake polls in the future. Subsection 1 discusses the most obvious and least harmful consequence of fake polls: the purpose of political markets is defeated, and their academic

301. Wang, *supra* note 230, at 257 n.133; see also Peter R. Ezersky, Note, *Intra-Corporate Mail and Wire Fraud: Criminal Liability for Fiduciary Breach*, 94 YALE L.J. 1427, 1440–42 (1985).

302. 18 U.S.C. § 1961(1) (2018) (defining “racketeering activity” as including “any act which is indictable under . . . section 1341 (relating to mail fraud), [and] section 1343 (relating to wire fraud)”).

303. *Sedima v. Imrex Co.*, 473 U.S. 479, 505–06 (1985) (Marshall, J., dissenting).

304. See *supra* notes 41–49 and accompanying text.

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potential quashed. Subsection 2 ups the ante by arguing that the proliferation of fake polls threatens to smash the fragile trust that the public has in legitimate polling companies and the media. Finally, Subsection 3 concludes this Section with the assertion that the very real effects of legitimate polls – like on turnout, fundraising, and even election results themselves – could become very real harms of fake polls.

1. Undermining the Purpose of Political Prediction Markets

Markets like PredictIt – and the Iowa Electronic Markets before it – were formed with a distinctly academic purpose.³⁰⁵ Researchers at the universities that created and ran the markets wanted to know if the wisdom of crowds could yield more accurate predictions than public opinion polls could on their own.³⁰⁶ The answer – surprisingly or not – has been yes. When spectators to an event risk their own money in guessing what an outcome is, they quite consistently prove to be more accurate.³⁰⁷ In many ways, this is to be expected. While political scientists have long known that asking survey respondents, “Who do you think will win the X election?” is more accurate than asking them who *they* will vote for, those results have been tempered somewhat by the fact that survey respondents engage in wishful thinking.³⁰⁸ Effectively asking pseudo-survey respondents to *bet* on the outcome of an election, therefore, seeks to remove wishful thinking from the equation altogether.³⁰⁹

305. Letter from Andrea Corcoran to George R. Neumann, *supra* note 42 (“The IEM is an electronic trading market trading contracts in specified ‘products’ which is organized as an experimental and academic program at the University of Iowa.”); Press Release, U.S. Commodity Futures Trading Comm’n, *supra* note 6 (“Like the [Iowa Electronic Markets], Victoria University of Wellington’s proposed market for event contracts [PredictIt] . . . is operated for academic research purposes only[.]”).

306. *Frequently Asked Questions*, PREDICTIT, *supra* note 25. But PredictIt’s utility to researchers has expanded beyond this question. For example, two political scientists used PredictIt data to evaluate the impact of Donald Trump’s victories in individual Republican primary contests to ascertain the effect on high-quality congressional candidates deciding to run. *See generally* Gavin Riley & Jacob Smith, *The Trump Effect: Filing Deadlines and the Decision to Run in the 2016 Congressional Elections*, 16 FORUM 193 (2018).

307. Erikson & Wlezian, *supra* note 193, at 535.

308. David Rothschild & Justin Wolfers, *Forecasting Elections: Voter Intentions Versus Expectations*, 1–4, 34–38 (Jan. 23, 2013) (unpublished paper) (on file with the University of Pennsylvania Wharton School), <http://users.nber.org/~jwolfers/Papers/VoterExpectations.pdf> [perma.cc/U3NJ-DQGD].

309. *Frequently Asked Questions*, PREDICTIT, *supra* note 25. This is consistent with PredictIt’s goal, as communicated on its website. *Id.* (“Prediction markets work best when players have some stake, however small, in the outcome. With play money,

All of this careful planning is undone when fraud invades the market. Though PredictIt discloses to its users that there are “no controls on market manipulation,”³¹⁰ it nonetheless issues a set of comprehensive terms and conditions governing user behavior, presumably to guard against the tainting of its data collection.³¹¹ The argument advanced in this Subsection – that harm to the literal market itself, as opposed to the ethereal market consisting of companies, their shareholders, and traders³¹² – is certainly not a traditional one. Admittedly, few tears are shed for the New York Stock Exchange when traders engage in fraud on the market, but smaller, less-established markets have a vested interest in protecting their integrity. The SEC’s ability to ban offenders from the markets or revoke an offender’s registration as a broker-dealer³¹³ can be seen in that light as a way of protecting the participants on the market *and* the market itself.

Accordingly, the harm done to PredictIt’s viability and integrity as a political prediction market is a reason for criminal liability to attach to the act of distributing intentionally disruptive fake polls. PredictIt’s users might reasonably conclude that the prices on the market don’t accurately reflect the value of the contract because they’re set by manipulated market trends and the fraudulent actions of users.³¹⁴ Accordingly, they might choose to not participate in any of the markets that PredictIt offers, which given the relatively low ceiling on the number of users in any set market,³¹⁵ could have a disproportionate effect on the market’s academic value. And while this sort of academic or research-based harm is usually legally insufficient to trigger liability,³¹⁶ it should trigger liability in the unique context presented here.

many players take risks they wouldn’t otherwise take or don’t attend to their holdings as carefully. Such markets may therefore have less research value than real money ones.”).

310. *Terms and Conditions*, PREDICTIT, *supra* note 24.

311. *See generally id.*

312. Usually, when courts and commentators refer to the market harms that flow from securities fraud, they are not referring to the *literal* market, but rather to the *concept* of “maintaining free securities markets.” Urska Velikonja, *The Cost of Securities Fraud*, 54 WM. & MARY L. REV. 1887, 1901 n.55 (2013) (quotation omitted).

313. Urska Velikonja, *Reporting Agency Performance: Behind the SEC’s Enforcement Statistics*, 101 CORNELL L. REV. 901, 935 (2016).

314. *See Frequently Asked Questions*, PREDICTIT, *supra* note 25.

315. Letter from Vincent McGonagle to Neil Quigley, *supra* note 9.

316. *Cf.* Abigail Brown, *Medical Research: Understanding Pharmaceutical Research Manipulation in the Context of Accounting Manipulation*, 41 J.L. MED. & ETHICS 611, 615–16 (2013) (“[T]here are generally no legal remedies for misleading or incorrect academic research – this would threaten the foundation of academic freedom.”).

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2. Destroying Trust in Polling Companies and the News Media

It goes without saying that the American news media is facing a crisis of confidence. For nearly a century, conservative politicians complained about the so-called “liberal media.”³¹⁷ In recent years, this refrain has changed slightly. Though politicians in the early 21st century referred to the “liberal media” or the “lamestream” media,³¹⁸ they now refer to media reports they don’t like as “fake news”³¹⁹ and associate the media with the so-called “Deep State.”³²⁰ This rhetorical shift capitalizes on and weaponizes an attempt to use an accurate term to describe a growing problem: fake news. In the mid-2010s, as participation on social media platforms like Facebook and Twitter became more universal, fabricated news began flooding users’ newsfeeds.³²¹

This reality (or unreality?) sunk in and gave many Americans a reason to do what they already did: disbelieve the news media. Donald Trump began weaponizing the term, calling news organizations that he didn’t like “fake news” and “enemies of the American people.”³²² This purposeful rhetoric has achieved its goal. A Quinnipiac University poll from August 2018 found that 26% of respondents believed that the news media was “the enemy of the people,” with 65% disagreeing.³²³ Perhaps more concerning, an Axios/Survey Monkey poll from just a few months earlier found that 72% of respondents believed that “news sources report news they know to be fake, false or purposefully misleading” “[a] lot” or “sometimes,” compared to 25% who thought that this “rarely” or “never” occurred.³²⁴

317. Nicole Hemmer, *The Conservative War on Liberal Media Has a Long History*, ATLANTIC (Jan. 17, 2014), <https://www.theatlantic.com/politics/archive/2014/01/the-conservative-war-on-liberal-media-has-a-long-history/283149/> [perma.cc/CG93-USEB].

318. E.g., Andy Barr, *Palin Trashes ‘Lamestream Media’*, POLITICO (Nov. 18, 2009), <https://www.politico.com/story/2009/11/palin-trashes-lamestream-media-029693> [perma.cc/BLF8-L77M].

319. See generally Lili Levi, *Real “Fake News” and Fake “Fake News”*, 16 FIRST AMEND. L. REV. 232 (2017).

320. See, e.g., Michael Crowley, *The Deep State Is Real*, POLITICO MAG. (Sept./Oct. 2017), <https://www.politico.com/magazine/story/2017/09/05/deep-state-real-cia-fbi-intelligence-215537> [perma.cc/H4N9-LNSJ].

321. Levi, *supra* note 319, at 248–57.

322. *Id.* at 257–62.

323. Eli Watkins, *Poll: Majority of GOP Agrees News Media is ‘Enemy of the People’*, CNN (Aug. 15, 2018), <https://www.cnn.com/2018/08/14/politics/quinnipiac-media-gop/index.html> [perma.cc/4WFX-BCDR].

324. Sara Fischer, *92% of Republicans Think Media Intentionally Reports Fake News*, AXIOS (June 27, 2018), <https://www.axios.com/trump-effect-92-percent->

But public skepticism of media reporting – and calculated efforts by politicians to capitalize on that skepticism – does not end with reports of factual statements. It extends to polling, too. The American public has a deep-rooted skepticism about the accuracy of public opinion polls,³²⁵ and Donald Trump’s pronouncement that “Any negative polls are fake news” finds fertile ground in that skepticism. In this context, the proliferation of fake polls is even more concerning. The media lacks sufficient knowledge of statistical methodology to accurately report on polls in the first place,³²⁶ rendering them vulnerable to accidentally reporting fake polls as legitimate ones.³²⁷ This leads to an obvious problem: If people *already* believe that the media lies and that polls are faked – even when they almost always aren’t – the proliferation of *actually* fake polls could have an even more damaging effect on the public’s trust in the media and polling companies by extension.

3. Manipulating the Democratic Process

Many of the harms of fake polls – either as they are used right now or as they could be used in the future – are derived from what decades of political science and public opinion research has shown are the results of *real* polls. Polls are common fodder for political reporting; the media regularly mentions

republicans-media-fake-news-9c1bbf70-0054-41dd-b506-0869bb10f08c.html
[perma.cc/KQ5Z-8RBN].

325. Rosenstiel, *infra* note 329, at 711–12 (discussing public skepticism of polls).

326. Yosef Bhatti & Rasmus Tue Pedersen, *News Reporting of Opinion Polls: Journalism and Statistical Noise*, 28 INT’L J. OF PUB. OPINION RESEARCH 129, 130–37 (2016) (noting failure of media outlets to accurately report on polling methodology).

327. In response to this vulnerability, a number of political analysts have developed sets of guidance for political reporters to use when reporting on polls. *See generally, e.g.*, Harry Enten, *How to Avoid Falling for a Fake Poll*, FIVETHIRTYEIGHT (Aug. 23, 2017, 12:24 PM), <https://fivethirtyeight.com/features/how-to-avoid-falling-for-a-fake-poll/> [perma.cc/C34K-A7PU]; Vicki Krueger, *5 Guidelines for Writing About Poll Numbers*, POYNTER (Oct. 18, 2016), <https://www.poynter.org/educators-students/2016/5-guidelines-for-writing-about-poll-numbers/> [perma.cc/5P6V-EJQR]; Brian Resnick & Nora Kelly, *The Pollsters’ Guide to Reporting on Polls*, ATLANTIC (June 16, 2015), <https://www.theatlantic.com/politics/archive/2015/06/the-pollsters-guide-to-reporting-on-polls/448410/> [perma.cc/65WA-KYFD].

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polls,³²⁸ especially when polls project a close³²⁹ or tightening race,³³⁰ so their results can spread quickly. Perhaps owing to their popularity with journalists, polls have real effects on elections.

For example, public opinion polls affect turnout in elections.³³¹ Polls can affect turnout positively or negatively, depending on the perceived closeness of the election.³³² When polling predicts a close election, voter turnout experiences a noticeable “boost”,³³³ but when the opposite is true, and a “landslide victory is expected,” polls projecting the landslide actually decrease turnout.³³⁴

Unsurprisingly, given the extent to which public opinion polls drive media coverage, they can also affect the viability of campaigns. The media’s coverage of polls does more than just help gin up expectations of a close race – it also draws attention to individual candidates with a frequency that largely corresponds to those candidates’ standings in the polls themselves.³³⁵ Those

328. See generally Bhatti & Pedersen, *supra* note 326.

329. Tom Rosenstiel, *Political Polling and the New Media Culture: A Case of More Being Less*, PUB. OPINION Q. 698, 705 (2005) (“Polls that are outliers, diverging from the results of other polls, are . . . provocative and draw traffic to a news outlet, particularly to a Web site, where consumers who hear about a poll on TV might subsequently visit the site that originally published it. Controversial polls, in other words, can even be construed by some as good salesmanship.”); Kathleen Searles et. al, *For Whom the Poll Airls: Comparing Poll Results to Television Poll Coverage*, 80 PUB. OPINION Q. 943, 952 (“[T]he [media] gatekeepers may be incentivized to cover polls that are either surprising or close.”).

330. Searles, *supra* note 329, at 957 (“Significant changes in poll margins make it more likely that it will air.”).

331. *Id.*

332. See Jens Großer & Arthur Schram, *Public Opinion Polls, Voter Turnout, and Welfare: An Experimental Study*, 54 AM. J. POL. SCI. 700, 714–15 (2010). This is also true for the kinds of election “forecasts” like FiveThirtyEight that estimate the likelihood that a particular candidate will win. Sean J. Westwood et al., *Projecting Confidence: How the Probabilistic Horserace Confuses and Demobilizes the Public*, 82 J. POLITICS (forthcoming) (manuscript at 26–27) (on file with author) (noting that “probabilistic horserace coverage lowers perceived electoral competition, confuses many potential voters, and, as odds diverge from 50-50, can have demobilizing effects compared [to] coverage focusing on vote share” and that “forecasting and fundamentally alter the information environment available to potential voters, with the potential to change the outcome of elections”).

333. *Id.* at 714.

334. *Id.*

335. See, e.g., Nate Silver, *Trump Boom or Trump Bubble?*, FIVETHIRTYEIGHT (Dec. 15, 2015, 9:10 AM), <https://fivethirtyeight.com/features/trump-boom-or-trump-bubble/> [perma.cc/W5DD-29FA]; Jonathan Stray, *How Much Influence Does the Media Really Have Over Elections? Digging into the Data*, NIEMANLAB (Jan. 11,

poll results, the media attention, or both also contribute to candidate fundraising; candidates that do better in polls tend to raise more money.³³⁶ Further, polls are used by national parties and the Commission on Presidential Debates as proxies for viability – which then determines a candidate’s ability to participate in a sponsored debate.³³⁷ Excluded candidates have understandably filed suit against the Commission for its use of polling in its requirements.³³⁸ Third-party presidential candidates routinely allege that the failure to include them in presidential debates “cause[s] them to lose access to television audiences and resulting campaign contributions worth hundreds of millions of dollars,” which is likely an accurate statement of the effects of debate exclusion – though not an injury redressable by courts.³³⁹

Even less surprisingly – given that polls affect media attention, perceived viability, and fundraising – polls also affect election results. To begin with, the Asch conformity experiments of the 1950s showed that people generally

2016, 2:49 PM), <https://www.niemanlab.org/2016/01/how-much-influence-does-the-media-really-have-over-elections-digging-into-the-data/> [perma.cc/F6B2-4UAW]; see generally Wayne P. Stegar, *Who Wins Nominations and Why? An Updated Forecast of the Presidential Primary Vote*, 60 POLI. RESEARCH Q. 91 (2007).

336. Randall E. Adkins & Andrew J. Dowdle, *The Money Primary: What Influences the Outcome of Pre-Primary Presidential Nomination Fundraising?*, 32 PRESIDENTIAL STUDIES Q. 256, 263–65 (2002).

337. Bob Bauer, *Political Parties and the Candidate Debates in the Presidential Nominating Process*, 93 N.Y.U. L. REV. 590, 603–612 (2018) (discussing the use of polling as part of candidate debate criteria for primary debates and general election debates in presidential elections). The Democratic Party’s 2020 presidential debate criteria establishes a binary option for candidates: “Register 1% or more support in three polls . . . publicly released between January 1, 2019, and 14 days prior to the date of the Organization Debate,” with a list of qualifying pollsters, or “by demonstrating that the campaign has received donations from at least (1) 65,000 unique donors; and (2) a minimum of 200 unique donors per state in at least 20 U.S. states.” Press Release, Democratic Nat’l Comm., DNC Announces Details for the First Two Presidential Primary Debates (Feb. 14, 2019), <https://democrats.org/press/dnc-announces-details-for-the-first-two-presidential-primary-debates/> [perma.cc/2AX4-X3E8].

338. The Commission has established three criteria for presidential debate inclusion:

First, the candidate had to be constitutionally eligible to be president. Second, he or she must have qualified to appear on “enough state ballots to have at least a mathematical chance of securing an Electoral College majority in the 2012 general election.” And, third, the candidate had to have achieved a “level of support of at least 15% (fifteen percent) of the national electorate as determined by” averaging the most recent results of “five selected national public opinion polling organizations.”

Johnson v. Comm’n on Presidential Debates, 869 F.3d 976, 979 (D.C. Cir. 2017) (internal citations omitted).

339. *Id.* at 981.

tend to conform to majority opinions and social pressure.³⁴⁰ This conformity discernibly manifests itself in public opinion too; when polls are released indicating the public's view on a matter of public policy, they "can be self-fulfilling prophecies and produce opinion cascades."³⁴¹ In other words, in some cases, people's opinions on an issue can be changed when a poll is released showing that a majority of the public feel a certain way on that issue. And in the context of voting for parties and candidates, political science research shows the presence of a "bandwagon effect," where voters are likelier to vote for perceived "winners."³⁴² These perceptions are at least in part driven by the results of public opinion polls.³⁴³ Related research has shown an interaction between the "bandwagon effect" and strategic voting, where voters, in response to polls, switch their vote from their first preference to their second to prevent their *least*-preferred choice from winning.³⁴⁴

But consider for a moment that these effects – on turnout, candidate viability, fundraising, issues, and *election results themselves* – flow naturally, and likely unintentionally, from legitimate opinion polls. Though some of these effects may be desirable by individual actors who release polls,³⁴⁵ there

340. See generally Solomon E. Asch, *Opinions and Social Pressure*, 193 SCI. AM. 31 (1955). "There is, however, increasing evidence that the tendency to conform has declined over time." Barry C. Edwards, *Why Appeals Courts Rarely Reverse Lower Courts: An Experimental Study to Explore Affirmation Bias*, 68 EMORY L.J. 1035, 1044 n.50 (2019) (internal citations omitted).

341. David Rothschild & Neil Malhotra, *Are Public Opinion Polls Self-Fulfilling Prophecies?*, 1 RESEARCH & POL. 1, 6 (2014). It is worth noting, however, that these cascades are strongest for "issues where people seem to have the weakest pre-treatment attitudes, the most uninformative priors of perceived public opinion, and for which their attitudes are not hardened by partisan predispositions." *Id.*

342. E.g., Steven Callander, *Majority Rule When Voters Like to Win*, 64 GAMES & ECON. BEHAV. 393, 394–96 (2008); Jens Olav Dahlgaard et al., *How are Voters Influenced by Opinion Polls? The Effect of Polls on Voting Behavior and Party Sympathy*, 12 WORLD POL. SCI. 283, 296–99 (2016).

343. See generally *supra* note 340.

344. See Haldun Evrenk & Chien-Yuan Sher, *Social Interactions in Voting Behavior: Distinguishing Between Strategic Voting and the Bandwagon Effect*, 162 PUB. CHOICE 405, 405, 421 (2015).

345. Pollsters may alter their results in order to get their polls on television or to provide campaigns and affiliated political organizations with desired results. Rosenstiel, *supra* note 329, at 703–05. And individual campaigns may release misleading polling data, often in the form of a so-called "informed ballot," polls showing a close election in order to attract financial contributions and to boost turnout, or even flood unscientific online polls in order to build a narrative that their campaign has momentum. See Stuart Rothenberg, *I Never Read 'Informed Ballots.' You Shouldn't Either*, INSIDE ELECTIONS (Oct. 11, 2005, 11:47 PM), <https://www.insideelections.com/news/article/i-never-read-informed-ballots.-you->

is no widespread effort to manipulate elections by releasing fraudulent polls – for now. But considering the exhaustive efforts undertaken by Russian intelligence services in the 2016 elections to sow discord and undermine the integrity of American democracy,³⁴⁶ it is not hard to imagine a similar effort using fake polls.

B. Weaponizing Fake Polls

After more than a century of the United States meddling in the democratic elections of *other* countries,³⁴⁷ it became a victim of its own success with the Russian government's successful interference in the 2016 elections. Though the extent of the Russian interference is not fully known – and given the classified nature of the information, it may not be fully known for a while, if ever³⁴⁸ – it is clear that the Russian government's efforts were extensive. Hackers supported by the Russian government hacked into the Clinton campaign's emails,³⁴⁹ internal Democratic National Committee correspondence and data,³⁵⁰ and confidential documents belonging to the Democratic Congressional Campaign Committee and the campaigns of Democratic congressional candidates.³⁵¹

shouldnt-either [perma.cc/NY2D-NZ8B]; Michael Rothfield et al., *Cohen Hired IT Firm to Rig Early CNBC, Drudge Polls to Favor Trump*, WALL ST. J. (Jan. 17, 2019, 6:52 PM), <https://www.wsj.com/articles/poll-rigging-for-trump-and-creating-womenforcohen-one-it-firms-work-order-11547722801> [perma.cc/PCY6-3F8V]; e.g., Simone Pathé, *One Candidate's Positive Poll Is Another's Fundraising Boon*, ROLL CALL (July 14, 2016, 6:35 PM), <https://www.rollcall.com/news/politics/one-candidates-positive-poll-anothers-fundraising-boon> [perma.cc/HH2X-VBZ3].

346. See generally, OFF. OF THE DIR. OF NAT'L INTELLIGENCE, ICA 2017-01D, Background to "Assessing Russian Activities and Intentions in Recent US Elections": The Analytic Process and Cyber Incident Attribution (2017), https://www.dni.gov/files/documents/ICA_2017_01.pdf [perma.cc/CL9H-S8ZH].

347. Ishaan Tharoor, *The Long History of the U.S. Interfering with Elections Elsewhere*, WASH. POST (Oct. 13, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/10/13/the-long-history-of-the-u-s-interfering-with-elections-elsewhere/?utm_term=.e623ba19be84 [perma.cc/4ZBN-ATA7].

348. Natasha Bertrand, *Even Congress Might Not Get the Full Mueller Report*, ATLANTIC (Mar. 29, 2019), <https://www.theatlantic.com/politics/archive/2019/03/what-has-happen-muellers-report-become-public/586060/> [perma.cc/MW2F-XU8V].

349. Ido Kilovaty, *Doxfare: Politically Motivated Leaks and the Future of the Norm on Non-Intervention in the Era of Weaponized Information*, 9 HARV. NAT'L SEC. J. 149, 156–57 (2018).

350. *Id.* at 154–56

351. Dan Efrony & Yuval Shany, *A Rule Book on the Shelf? Tallinn Manual 2.0 on Cyberoperations and Subsequent State Practice*, 112 A.J.I.L. 583, 616 (2018); Eric Lipton & Scott Shane, *Democratic House Candidates Were Also Targets of Russian Hacking*, N.Y. TIMES (Dec. 13, 2016), <https://www.nytimes.com/2016/12/13/us/politics/house-democrats-hacking-dccc.html> [perma.cc/92XK-GLGJ]; see generally Indictment, United States v. Netyksho, Case No. 1:18-cr-00215-ABJ (D.D.C. July 13, 2018), available at <https://int.nyt.com/data/documenthelper/80-netyksho-et-al->

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Of course, some political campaigns benefited from and used the fruits of the Russian government's hacking, which maximized its impact³⁵² – regardless of whether “collusion” could be legally established. Republican candidates and organizations – like the National Republican Congressional Committee, the campaign arm of House Republicans – embraced the hacked information and used it against Democratic congressional candidates, even after House Democrats declared that doing so would make House Republicans “complicit in aiding the Russian government in its effort to influence American elections.”³⁵³ Officials affiliated with the Trump campaign seemingly coordinated with Russian-affiliated hackers to schedule document drops,³⁵⁴ and Trump campaign manager Paul Manafort apparently shared polling data with Konstanin Kilimnik, a Russian political consultant with close ties to his country's intelligence services.³⁵⁵

But Russian intelligence services played a more active role than just hacking information and leaking it. They also organized active online efforts to weaponize the hacked information against its victims.³⁵⁶ The Russian-affiliated users started Facebook groups – which disseminated *en masse* carefully crafted messages meant to increase Trump's support in the election – and planned protests and other events in the United States, which were successfully carried out.³⁵⁷

indictment/ba0521c1eef869deecbe/optimized/full.pdf?action=click&module=Intentional&pgtype=Article [perma.cc/Z7HP-4C4V].

352. Lipton & Shane, *supra* note 351 (noting that Republican candidates and Republican-affiliated organizations used the documents hacked and leaked by Russian-affiliated hackers in their 2016 campaigns).

353. *Id.*

354. See Rosalind S. Helderman, *Roger Stone was in Close Contact with Trump Campaign About Wikileaks, Indictment Shows*, WASH. POST (Jan. 25, 2019), https://www.washingtonpost.com/politics/roger-stone-was-in-close-contact-with-trump-campaign-about-wikileaks-indictment-shows/2019/01/25/65d9ad1a-20a2-11e9-8e21-59a09ff1e2a1_story.html?utm_term=.d612326dc102; see generally *Indictment, United States v. Roger Stone*, Case No. 1:19-cr-00018-ABJ (D.D.C. Jan. 24, 2019), available at <https://www.justice.gov/file/1124706/download>.

355. Rachel Weiner et al., *Paul Manafort Shared 2016 Polling Data with Russian Associate, According to Court Filing*, WASH. POST (Jan. 8, 2019), https://www.washingtonpost.com/local/legal-issues/paul-manafort-shared-2016-polling-data-with-russian-employee-according-to-court-filing/2019/01/08/3f562ad8-12b0-11e9-803c-4ef28312c8b9_story.html?utm_term=.7da0eaf6709d [perma.cc/P2Y8-SMUT].

356. Scott Shane & Mark Mazzetti, *The Plot to Subvert an Election*, N.Y. TIMES (Sept. 20, 2018), <https://www.nytimes.com/interactive/2018/09/20/us/politics/russia-interference-election-trump-clinton.html> [perma.cc/B6ET-UDBX].

357. *Id.*

The scope of the Russian government's efforts – which are certainly not exhaustively documented here – demonstrate the harm that could come from weaponizing fake polls. What would stop the Russian government, for example, from starting and funding a polling agency designed to release fake polls? Their 2016 interference reflects a keen understanding of American politics, so given the obsession that American political journalists have with polls and that prognosticators have with poll aggregators like *RealClearPolitics* and *FiveThirtyEight*, this would be a logical, if chilling, step forward. The fake polls published in 2017 and 2018, which were apparently designed to affect PredictIt markets, were amateurish and easily uncovered as fraudulent.³⁵⁸ But what would happen if unscrupulous manipulators, with more nuance and funds at their disposal, decided to do the same? They could play a long game by starting a polling firm that actually conducts polls, perfects the art of polling accuracy, cultivates respect from political analysts . . . and then changes course. The respected polling firm could then fake its numbers to boost the chances of favored candidates, confound polling averages, and alter expectations. And why stop with just *one* polling shop? Why not more? A single poll, even from a well-regarded pollster, can be recognized as an outlier,³⁵⁹ but with confirmation from other pollsters, the narrative of a race can start to shift. And almost all of this would be undetectable, absent focused attention and a hearty supply of subpoenas.

The harms don't stop with foreign interference. What would stop similarly unscrupulous candidates from doing the same? Candidates already rely on misleading polls to attract fundraising support and to drive a narrative that they *can* win – but only if you, like-minded voter, turn out! What would stop them from *faking* a poll, then?

2019 might have seen the first instance of a candidate doing so. In March, Jacksonville mayoral candidate Anna Brosche's campaign began pushing a poll purportedly from Gravis Marketing to argue that she had a chance in the upcoming election.³⁶⁰ But Gravis had not conducted that poll – or any other for the mayoral race.³⁶¹ Brosche responded by filing a complaint with Florida Attorney General Ashley Moody's office, which referred the matter to the Florida Department of Law Enforcement.³⁶² Though Brosche ended up losing the election, the poll ended up being pretty close to the mark,

358. Enten, *supra* note 11.

359. See Nate Silver, *Outlier Polls Are No Substitute for News*, FIVETHIRTYEIGHT (June 20, 2012, 6:37 PM), <https://fivethirtyeight.com/features/outlier-polls-are-no-substitute-for-news/> [perma.cc/SQ2J-EEDC].

360. Peter Schorsch, *Sham Survey: Gravis Marketing's Jacksonville Mayoral Race Poll a Fraud*, FLA. POL. (Mar. 16, 2019), <https://floridapolitics.com/archives/291085-sham-survey-gravis-jacksonville-mayor-poll-a-fraud> [perma.cc/8X6V-WGPC].

361. *Id.*

362. A.G. Gancarski, *Gravis-gate: FDLE Still Looking at Fake Jacksonville Poll*, FLA. POL. (Mar. 27, 2019), <https://floridapolitics.com/archives/291968-gravis-gate-fdle-still-looking-at-fake-jacksonville-poll> [perma.cc/H4D3-UNUN].

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and she closed her campaign by arguing that she was the victim of untoward election interference.³⁶³

In the event that a candidate uses a fake poll to solicit campaign contributions, a prosecution for wire fraud would be without helpful precedent – unlike a prosecution for foreign manipulation, of which there is now plenty.³⁶⁴ Admittedly, federal prosecutions dating back to Watergate have certainly targeted the operators of “scam political action committees” – which convince contributors that “the money [they] raise[] will go to help or defeat [a] candidate” but actually funnel the contributions to the corrupt political operatives running them.³⁶⁵ But those prosecutions are uncommon and usually are based on “fraudulent misrepresentation” under the 1974 amendments to the Federal Election Campaign Act.³⁶⁶ Prosecutions against *candidates* themselves for fraudulent solicitation of campaign funds are certainly unheard of outside of the context of bribery³⁶⁷ or unreported contributions.³⁶⁸ Some federal prosecutors have successfully alleged – and courts have at least sometimes upheld – mail and wire fraud violations for

363. *Id.* The FDLE’s investigation is ongoing, and though there is no evidence that Brosche’s campaign was anything other than the victim of manipulation, the results of the investigation should yield more facts.

364. *See generally* Indictment, United States v. Netyksho, Case No. 1:18-cr-00215-ABJ (D.D.C. July 13, 2018), available at <https://int.nyt.com/data/documenthelper/80-netyksho-et-al-indictment/ba0521c1eef869deecbe/optimized/full.pdf?action=click&module=Intentional&pgtype=Article> [perma.cc/Z7HP-4C4V].

365. Matthew S. Raymer, *Fraudulent Political Fundraising in the Age of Super PACs*, 66 SYRACUSE L. REV. 239, 240 (2016); *see also* George S. Scoville III, Note, *Curtailing the Cudgel of “Coordination” by Curing Confusion: How States Can Fix What the Feds Got Wrong on Campaign Finance*, 48 U. MEM. L. REV. 463, 495–97 (2017) (discussing scam PACs).

366. *See* Raymer, *supra* note 365, at 245–63; *but see* United States v. Curry, 681 F.2d 406, 410–16 (5th Cir. 1982) (finding sufficient evidence of wire fraud for improprieties in running political action committee); Press Release, U.S. Dep’t of Justice, *Fraudulent Political Action Committee Operator Sentenced to Two Years in Prison* (Mar. 15, 2019), <https://www.justice.gov/usao-sdny/pr/fraudulent-political-action-committee-operator-sentenced-two-years-prison> [perma.cc/7QPG-9ETQ] (noting that the defendant pled guilty “to one count of conspiracy to commit wire fraud.”).

367. *See, e.g.*, Deborah Hellman, *A Theory of Bribery*, 38 CARDOZO L. REV. 1947, 1950 (2017).

368. *E.g.*, Anthony J. Gaughan, *The Case for Limiting Federal Criminal Jurisdiction over State and Local Campaign Contributions*, 65 ARK. L. REV. 587, 615–17 (2012) (discussing John Edwards’s unsuccessful prosecution for accepting what federal prosecutors characterized as an illegal campaign contribution that his campaign did not report).

“what federal prosecutors view as ‘corrupt’ campaign contributions,” based on a theory of honest services fraud.³⁶⁹ Presumably, honest services fraud *could* extend to a campaign that solicits contributions based on a fraudulent poll, but given the significant cutback to the doctrine since the Supreme Court’s decision in *Skilling v. United States*, such a prosecution may sit on weak ground.³⁷⁰

These dual risks – that foreign governments can use fake polls to undermine American democracy and that candidates can use them to enhance their own standing – come with different harms, but avoiding both is desirable. With the existential threats to democracy posed by gerrymandering, SuperPACs, legalized bribery following the Supreme Court’s opinion in *McDonnell v. United States*, and more,³⁷¹ American democracy can hardly stand to be even *further* undermined.

C. Justifying Criminal Liability

Historically, there have been few instances in which criminal law has been available as a means of protecting the basic integrity of American democracy. Though most agree that one of the most basic functions of criminal law is to protect civil society,³⁷² few would go so far as to posit that another, related function is to protect *democratic* society. Indeed, criminal law was largely inapplicable to election conduct until the late nineteenth century, when the first federal and state efforts to clean up elections were passed.³⁷³ Prior to this, the only “regulation” came in the form of political efforts, like election contests filed with the U.S. House of Representatives, which were woefully inadequate.³⁷⁴

369. See generally *Curry*, 681 F.2d at 411; Gaughan, *supra* note 368.

370. *Id.* at 603.

371. See generally Michael Kent Curtis & Eugene D. Mazo, *Campaign Finance and the Ecology of Democratic Speech*, 103 KY. L.J.K 529 (2014–15); Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004); Eugene Temchenko, Note, *A First Amendment Right to Corrupt Your Politician*, 103 CORNELL L. REV. 465 (2018).

372. See Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1486, 1549–55 (2016) (“The state in the criminal context should be the embodiment and protector of society’s lived moral culture – its way of life.”).

373. Jocelyn Friedrichs Benson, *Voter Fraud or Voter Defrauded? Highlighting an Inconsistent Consideration of Election Fraud*, 44 HARV. C.R.-C.L. L. REV. 1, 9 (2009) (discussing federal efforts to criminalize and ban election fraud); Richard A. Schurr, Note, *Burson v. Freeman: Where the Right to Vote Intersects with the Freedom to Speak*, 15 WHITTIER L. REV. 869, 890–91 (1994) (discussing state-level efforts to ban election fraud).

374. Sean J. Wright, *The Origin of Disputed Elections: Case Studies of Early American Contested Congressional Elections*, 81 ALB. L. REV. 609, 624–46 (2017/2018) (describing early nineteenth-century procedures for contesting elections and providing case studies). During this time period – and even before, in colonial

In many ways, little is different today. The progress made during the Civil Rights Era to protect the integrity of elections by expanding the franchise to all eligible voters was quickly followed by a greater use of the criminal law to block access to that franchise.³⁷⁵ Today, the most notable intersection of criminal and election law is to block those who have been imprisoned from casting ballots³⁷⁶ and to criminally prosecute those who do vote, even accidentally.³⁷⁷ Meanwhile, the greatest opportunities to use the criminal law to protect the franchise have not been fully utilized. Though the U.S. Code is ripe with sections that criminalize election-related activities,³⁷⁸ the enforcement of these crimes has been minimal. The FEC, for example, rarely refers election violations for criminal prosecution³⁷⁹ and, due at least in part to gridlock,³⁸⁰ rarely even pursues civil enforcement actions.³⁸¹ And the Supreme Court struck a serious blow to corruption prosecutions with its holding in *McDonnell*,³⁸² the results of which have already been felt.³⁸³

This asymmetric failure – the enforcement of criminal laws to narrow the franchise and the non-enforcement of criminal laws that seek to protect it

times – election fraud certainly occurred, but legal historians disagree about its frequency. See generally TRACY CAMPBELL, *DELIVER THE VOTE: A HISTORY OF ELECTION FRAUD, AN AMERICAN POLITICAL TRADITION – 1742–2004* (2006), see also, Dayna L. Cunningham, *Who Are to Be the Electors? A Reflection on the History of Voter Registration in the United States*, 9 *YALE L. & POL'Y REV.* 370, 380–85 (1991).

375. See Friedrichs Benson, *supra* note 373, at 9–12.

376. See generally Note, *One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 *HARV. L. REV.* 1939 (2002).

377. E.g., Sandra E. Garcia, *Texas Woman Sentenced to 5 Years in Prison for Voter Fraud Loses Bid for New Trial*, *N.Y. TIMES* (June 13, 2018), <https://www.nytimes.com/2018/06/13/us/texas-woman-voter-fraud.html> [perma.cc/4QLK-E9DV].

378. The Department of Justice divides these crimes into election fraud, patronage crimes, and campaign financing crimes. U.S. DEP'T OF JUSTICE, *FEDERAL PROSECUTION OF ELECTION OFFENSES 2–4* (8th ed. 2017).

379. Kenneth P. Doyle, *FEC Rarely Votes to Refer Criminal Cases to Justice*, *BLOOMBERG L.* (July 29, 2015), <https://www.bna.com/fec-rarely-votes-n17179934048/> [perma.cc/YJZ3-SXA9].

380. See Pichaya P. Winichakul, Note, *The Missing Structural Debate: Reforming Disclosure of Online Political Communications*, 93 *N.Y.U. L. REV.* 1388, 1399–1403 (2018).

381. See, e.g., Michael W. Carroll, Note, *When Congress Just Says No: Deterrence Theory and the Inadequate Enforcement of the Federal Election Campaign Act*, 84 *GEO. L.J.* 551, 554–63 (1996).

382. See generally Khadija Lalani, *McDonnell v. United States: Legalized Corruption and the Need for Statutory Reform*, 113 *NW. U. L. REV. ONLINE* 29 (2018).

383. Joshua S. Sellers, *Contributions, Bribes, and the Convergence of Political and Criminal Corruption*, 45 *FLA. ST. U.L. REV.* 657, 698–702 (2018).

– comes at a time when the criminal law *could* be used more than ever to protect elections. Reports authorized by American intelligence agencies and the fruits of Special Counsel Robert Mueller’s investigation have revealed the extent to which Russian agents interfered in American elections.³⁸⁴ Candidates, party organizations, and even state registration systems were hacked, and the proceeds of these hacks leaked to the benefit of domestic political actors.³⁸⁵ These efforts show no signs of halting,³⁸⁶ and the Trump Administration’s sluggish response to the problem of protecting election administration through robust cybersecurity efforts certainly doesn’t help.³⁸⁷

It is in this vein that this Article suggests a straightforward way to use the criminal law to protect the integrity of American elections: federal prosecutions for the distribution of fake polls.³⁸⁸ This is, admittedly, a bold solution, given that the fraudulent activity at issue in this Article may not ordinarily justify federal jurisdiction. After all, the loss amount – actual or anticipated – here likely does not exceed several thousand dollars, in contrast to the substantially larger loss amounts usually seen in federal fraud cases.³⁸⁹

384. U.S. DEP’T OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2019 PRESIDENTIAL ELECTION (2019), <https://cdn.cnn.com/cnn/2019/images/04/18/mueller-report-searchable.pdf> [perma.cc/8EV4-ZY5P].

385. *Id.*

386. See Patricia Zengerle & Doina Chiacu, *U.S. 2018 Elections ‘Under Attack’ by Russia: U.S. Intelligence Chief*, REUTERS (Feb. 13, 2018), <https://www.reuters.com/article/us-usa-security-russia-elections/u-s-2018-elections-under-attack-by-russia-u-s-intelligence-chief-idUSKCN1FX1Z8> [perma.cc/9JHU-6NLR].

387. See David P. Fidler, *Transforming Election Cybersecurity*, COUNCIL ON FOREIGN REL. (May 17, 2017), <https://www.cfr.org/report/transforming-election-cybersecurity> [perma.cc/2CSJ-68E8]; Paul Rosenzweig et al., *Next Steps for U.S. Cybersecurity in the Trump Administration: Active Cyber Defense*, THE HERITAGE FOUND. (May 5, 2017), <https://www.heritage.org/sites/default/files/2017-05/BG3188.pdf> [perma.cc/G7WS-SPJ2].

388. While 2020 presidential candidates have been sluggish to address digital disinformation outside of broad strokes, Elizabeth Warren recently released a plan to “fight[] digital disinformation.” Her plan specifically calls for the creation of “civil and criminal penalties for knowingly disseminating false information about when and how to vote in U.S. elections.” *Fighting Digital Disinformation*, WARREN FOR PRESIDENT, <https://elizabethwarren.com/plans/fighting-digital-disinformation> [perma.cc/ZH87-ZTRW] (last visited Jan. 29, 2020); Cristiano Lima, *How Warren Would Fight Election Disinformation*, POLITICO (Jan. 29, 2020, 11:08 AM EST), <https://www.politico.com/news/2020/01/29/warren-plan-election-disinformation-2020-108854> [perma.cc/QP97-RPUA]. The proposal outlined by this Article comfortably fits with Warren’s plan.

389. E.g., Glenn R. Schmitt & Cassandra Syckes, *Overview of Federal Criminal Cases – Fiscal Year 2017*, U.S. SENTENCING COMM’N, 11 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/FY17_Overview_Federal_Criminal_Cases.pdf [perma.cc/LK5A-7V6A] (“The losses in [federal fraud] cases [in 2017] ranged from no loss (in 170

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Indeed, any U.S. Attorney's Office presented with the possibility of pursuing these charges would likely find that the loss amount falls below the "generally applicable minimum thresholds" in their internal prosecution guidelines.³⁹⁰

But in any event, federal prosecution would be appropriate given the facts of the case. Though the individual losses were – or would be – very small, they would likely be spread out over a large, national range, which would prevent a state prosecutor from effectively bringing charges.³⁹¹ So perhaps counterintuitively, *because* the loss amount is so small, "federal prosecution would be appropriate not only because of state inability to deal with the situation, but because the abuse of the [wires] is an inherent element of the scheme."³⁹²

In this case, prosecution would serve a strong federal interest. The interest at stake is weightier than concerns over how fake polls can shade the accuracy of an academic endeavor in prediction markets. It is instead to deter other wrongdoers, the sort who would weaponize fake polls to manipulate elections. Though the statutory theories that may lead to criminal liability for the publishers of *these* fake polls may not lead to similar liability for *other* publishers, like foreign governments and campaigns, deterring this sort of fraud before it can happen – and raising awareness of it – is vital.

CONCLUSION

The fake polls that have been created and distributed to online political betting markets seemingly represent just another routine use of fraud to make a quick buck. And in many ways, this is true. But to other, far more malicious

cases) to more than \$8 billion (one case), with an average loss amount of \$6,100,603 and a median loss amount of \$246,553."); *but see* Stephen F. Smith, *Federalization's Folly*, 56 SAN DIEGO L. REV. 31, 52 n.81 (2019) ("With a 'median loss amount of \$246,553,' it is clear that many involved fairly small losses to victims. Indeed, almost a quarter (23.7%) of fraud defendants were not required to pay any restitution.") (citation omitted).

390. Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135, 1142 (2004). These specific thresholds, as well as the internal guidelines more generally, are not publicly available, but usually differ depending on the U.S. Attorney's office in question and the volume of cases it handles. Patrick E. Corbett, *Prosecution Responses to Internet Victimization: Prosecuting the Internet Fraud Case Without Going Broke*, 76 MISS. L.J. 841, 863–64, 864 n.90 (2007).

391. Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1140–45 (1995).

392. L.B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROBS. 64, 73–75 (1948). Of course, this justification was, at least historically, predicated on *mail*, not *wire*, fraud, because abuse of the mails was an abuse of a "federally supported means of communication." *Id.* at 74.

actors, they could represent something more enticing – an opportunity to disrupt American elections as a means of achieving a foreign policy objective or for personal political gain. At first blush, these threats may seem unimaginable and unrealistic. However, with the benefit of hindsight and a more thorough understanding of the successful election interference in 2016 by Russian intelligence forces, these threats should be taken seriously by federal prosecutors. The consequences of fake polls are quite real – and so, too, should be their punishment.

A Failed Attempt at Market Manipulation



RAJIV SETHI
SEP 07, 2024

♡ 26

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Share

There are now several statistical models and prediction markets generating forecasts for the upcoming presidential election, and they point to a very close race. Harris has the edge in the [FiveThirtyEight](#) forecast and on [PredictIt](#), but is behind in the [Silver Bulletin](#) forecast and on [Polymarket](#). The [Economist](#) has the race essentially tied.

Some political scientists [argue](#) that these forecasts are quite meaningless, that it will take decades if not centuries to accumulate enough data to convincingly establish that they are more accurate than naive coin flips. I [disagree](#) with this assessment, but it's certainly true that models and markets both have some serious limitations. Models are built and calibrated based on historical outcomes and run into deep trouble if we enter [uncharted waters](#). And markets are subject to [overreaction](#) and [manipulation](#).

There was a spectacular [attempt](#) at manipulation on Polymarket yesterday, and you can see evidence of it in the following sharp price movements:



👤 \$105,214,083 Bet ☆ <> 🔗 ✕

Kamala Harris

YES
47% chance ↑ 1.05% 50%



Source: Polymarket.com
1H 6H **1D** 1W 1M ALL ↺ ⚙



👤 \$119,789,039 Bet ☆ <> 🔗 ✕

Donald Trump

YES
51% chance ↓ 1.95% 50%

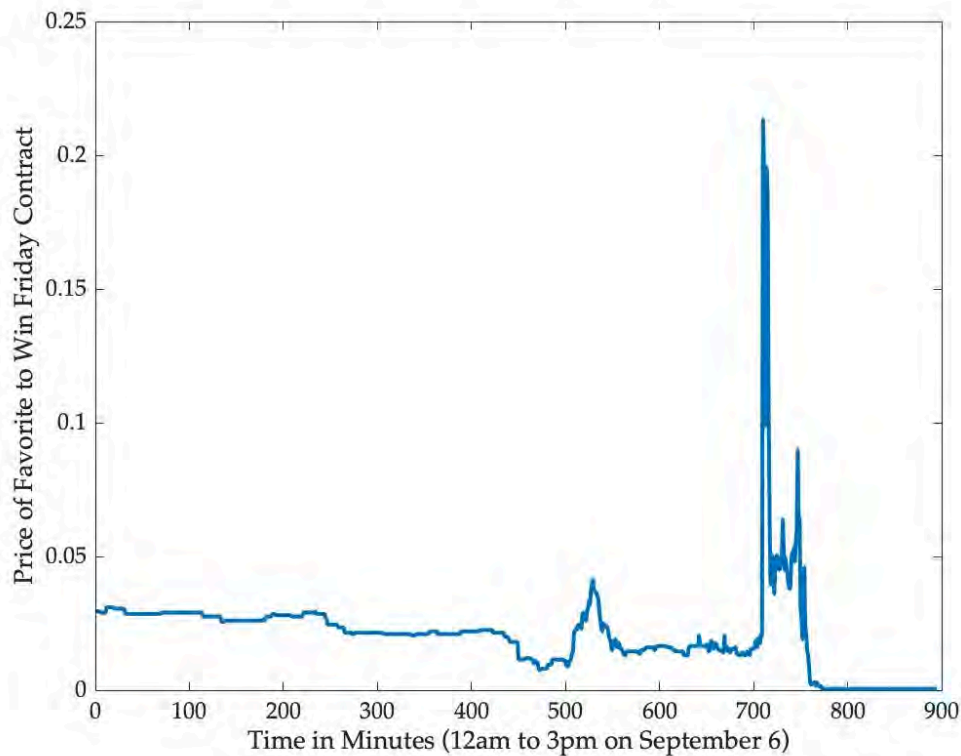


Source: Polymarket.com
1H 6H **1D** 1W 1M ALL ↺ ⚙

What happened was this. A group of traders bet heavily on Harris and against Trump in an attempt to push her into the lead for a couple of hours. The sums involved were quite large, with [one trader](#) alone wagering about 2.5 million dollars. The goal was to ensure that the Harris contract would have the higher price for a majority of minutes during the three hour period

between noon and 3pm EST on Friday, in order to profit from a derivative market that referenced prices in the primary market.

Specifically, the market [Favorite to win on Polymarket on Friday](#) listed contracts that would pay a dollar if Harris was ahead for a majority of the 180 minutes in the referenced period. These contracts were trading at about three cents at the start of the day, but would rise to above 20 cents at around the beginning of the three hour window:



One [trader](#) spent over 11,000 dollars buying these contracts at an average price of 8 cents each, accumulating around 140,000 contracts. Had the attempt at manipulation been successful, there would have been a gain of about 130,000 dollars. This would have been offset by losses in the primary markets, assuming that the prices would have returned to pre-manipulation levels. Even so, it looks like a six-figure profit in a single day on a 2.5 million dollar investment would have been secured.

Despite the fact that the attempt failed, most of the amounts spent in the primary market were recoverable. The would-be manipulators lost a few thousand dollars, but nowhere near the millions that they wagered in executing the plan.

Andrew Gelman [argues](#) that such manipulation is tantamount to “interfering with democracy.” And you can see his point, since beliefs about election outcomes can be self-fulfilling. Pessimism about the viability of a candidate results in lower morale, fundraising, volunteer effort, and turnout by supporters, all of which make defeat objectively more likely.

Markets that reference prices in other markets are common in the world of finance of course— all stock options and index futures have this property. But when it comes to electoral prediction markets, I see no rationale for such derivative contracts. They serve no legitimate purpose and open up rather obvious strategies for manipulation. And even if attempts at manipulation fail in the end, they still arouse suspicion and sow confusion.

Derivative contracts of this kind [continue](#) to be listed on Polymarket. It would be a good thing if they were discontinued.



26 Likes · 8 Restacks

Discussion about this post

Comments Restacks



Write a comment..



Egg Syntax · Sep 8 · *edited Sep 8*

It would be really helpful to have y-axis ticks in that first image.

Just went and checked; looks like in the main move Trump dropped from 53 - 48; Harris jumped from 45 - 48.

♡ LIKE ◻ REPLY 📄 SHARE ...

2 replies by Rajiv Sethi and others

2 more comments...

THE SLATEST

Why a Single Trader Was Willing to Lose Millions Betting on a Romney Win

BY JOSH VOORHEES

SEPT 24, 2013 • 10:34 AM



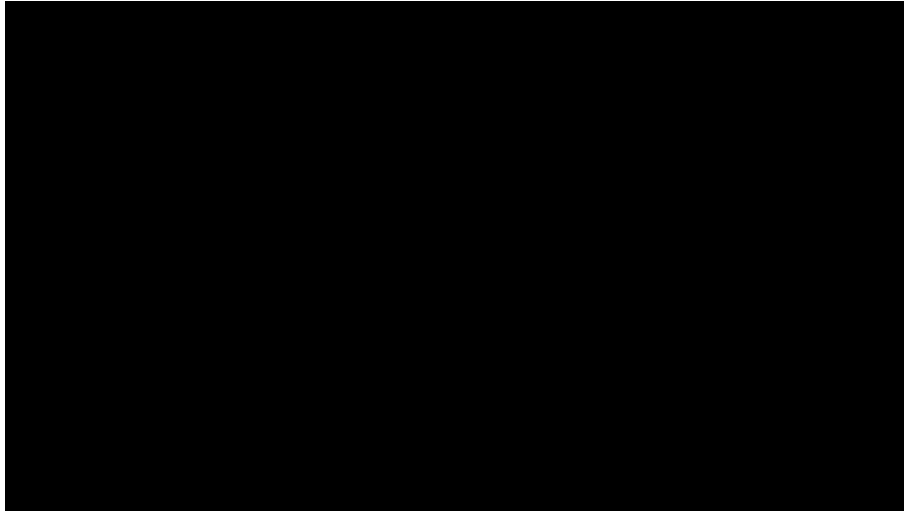
Mitt Romney speaks at the Conservative Political Action Conference (CPAC) in National Harbor, Maryland, on March 15, 2013

Photo by Nicholas Kamm/AFP/Getty Images

A new academic paper suggests that during the home stretch of the 2012 presidential election a single trader lost between \$4 million and \$7 million placing Intrade bets on Mitt Romney—most likely in a bid to make the presidential race appear closer than it really was.

The paper from Columbia University's Rajiv Sethi and Microsoft Research's David Rothschild found that the single anonymous trader accounted for about one-third of all bets made on Romney during the final two weeks of the campaign. So, regardless of motivation, it's clear the trader played an out-sized role in determining an Intrade line that was all too often used by pundits and political journalists to suggest the presidential race remained a toss-up until the very end.

The more interesting question is why Trader X would wager so heavily on the GOP nominee at a point when publicly available data increasingly pointed toward an Obama victory. Of course, interesting questions often come with obvious answers. Here's the three possible reasons the authors examined before largely settling on the one that makes the most sense in the world of politics:



(i) the trader was convinced that Romney was underpriced throughout the period and was expressing a price view, (ii) he was hedging an exposure held elsewhere, or (iii) he was attempting to distort prices in the market for some purpose.

Assuming the trader was rational and informed, Option 1 can most likely be ruled out because the trader could have bought pro-Romney positions for cheaper on Betfair, another exchange similar to Intrade (although one the authors admit comes with some added headaches for U.S. traders). So, too, is Option 2 unlikely given how the market reacted at other key points during the election, like during the first debate and on Election Day.

That leaves Option 3 as the most likely explanation for the heavy pro-Romney trading. "This was someone who was extremely sophisticated," Sethi, who also teaches at Barnard College, told the [Wall Street Journal](#). "It was not someone who was dumb or stupid."

And while \$4 million is obviously a large chunk of change to lose on what is basically an online betting site, the outcome of such a wager would only be secondary in the eyes of someone looking to skew the data in Romney's favor, which in turn could boost everything from fundraising to campaign morale. And in that regard, Sethi and Rothschild note, the millions may have actually been money well spent when you consider that their research shows that "a highly visible market that drove many a media narrative could be manipulated at a cost less than that of a primetime television commercial." [Read the full research paper here.](#)

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2024 ELECTIONS

Ready your bets: Election gambling is going mainstream in the US

It's a striking reversal of fortune for the election-betting complex in the US after a three-year crusade by regulators against the prediction markets.



A federal judge's ruling has opened the door for Kalshi, a financial exchange startup, to launch new political-betting markets tied to the control of Congress next year. | Francis Chung/POLITICO

By **DECLAN HARTY**
09/12/2024 05:14 PM EDT



Americans are about to vote with their wallets in a big way.

Financial exchange startup Kalshi on Thursday got the green light to begin offering day traders, wannabe political pundits and financial institutions the chance to wager thousands of dollars on whether Democrats or Republicans

will control Congress next year. Some financial firms will be allowed to bet as much as \$100 million.

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The Silicon Valley-backed company debuted the first fully regulated election-betting markets in the U.S. shortly after District Judge Jia Cobb in Washington rejected a bid by Wall Street regulators to temporarily block the company from launching them. The Commodity Futures Trading Commission, the top U.S. derivatives cop, says the markets violate federal and state law.

How long the markets will last is unclear. The CFTC quickly appealed the judge's ruling, and the agency's lawyers indicated they plan to ask for a stay. But Kalshi's markets are already drawing interest: As of 3:30 p.m. Washington time, 50,000 contracts had been traded, according to the company's website.

2024

Trump: No more debates

Blended families on the ballot

JD Vance and the New Right

It's go time for Harris

Harris won the debate

Election betting has existed in the shadows of American politics for generations, through offshore betting sites like Polymarket and academic ventures such as PredictIt. But Kalshi's markets could catapult it onto the main stage of election season, just in time for November.

It's a striking reversal of fortune for the election-betting complex in the U.S. Over the last three years, the CFTC has waged a regulatory crusade against the prediction markets. For critics, wagering on voting outcomes is a risky development that could threaten the sanctity of American elections at a perilous moment when balloting integrity is a major issue. Supporters — who

include former White House officials, Silicon Valley leaders and prominent economists — say the markets are superior to public opinion polls, in part because participants have money on the line.

Sen. Jeff Merkley (D-Ore.) called it a “nightmare” scenario that could allow wealthy players to put their “thumb on the scale” in elections.

AD

“Think about that anonymous political power or that anonymous corporate power that says, ‘Not only do we want this candidate to lose or that candidate to win, we’re going to bet on the person that we want to win,’” Merkley said in an interview. “It’s a deeply corrupting combination of dark money and election bets.”

Kalshi welcomed the judge’s ruling as a historic victory.

“Today marks the first trade made on regulated election markets in nearly a century,” CEO Tarek Mansour said in a statement. “Now is finally the time to allow these markets to show the world just how powerful they are at providing signal amidst the noise and giving us more truth about what the future holds.”

The CFTC didn’t respond to a request for comment.

Kalshi is offering traders within the U.S. the ability to bet on which party will control either the House or the Senate following the November elections, though the company has signaled plans for other markets as well. By comparison, New York-based Polymarket has a wide array of election-themed markets, but the company is not permitted to offer trading to people inside the U.S. And on PredictIt, a site affiliated with a university in New Zealand, traders can wager on the presidential election but with strict spending limits.

Gambling has already become enmeshed in the 2024 elections. Day traders have [ratcheted up their bets](#) on the presidential race since Vice President Kamala Harris took over the Democratic ticket. Betting odds from PredictIt and Polymarket have become fixtures in news coverage and on cable TV. In the immediate aftermath of Tuesday’s presidential debate, [Fox News host Laura Ingraham](#) called out how Harris had pulled even with Donald Trump — citing not opinion polls but the betting markets. And the companies themselves have sought to bolster their profile among the Washington elite.

During the Democratic National Convention, Kalshi touted itself as “The first legal election market in the US” on the back of a truck driving around downtown Chicago. Polymarket CEO Shayne Coplan was photographed across the table from Donald Trump Jr. at an event during the Republican National Convention. His company also held a party at the DNC.

Those in favor of the markets say they can be a crucial tool for investors looking to offset the risks that their financial investments may face from a change in administration and therefore, a shift in policy toward certain industries.

Others say the data generated by the markets is an increasingly critical gauge of voter sentiment.

“Political polling has a long and storied history in the United States,” said Justin Wolfers, a public policy and economics professor at the University of Michigan. “Political polling is also pretty close to being dead.”

AD

The movement caught new wind last week when Cobb, who was appointed by President Joe Biden, threw out the CFTC’s prior rejection of Kalshi’s plans. But hours later, the CFTC asked for Cobb’s ruling to be temporarily put on ice so the agency could review her opinion.

On Thursday, Cobb denied the CFTC’s request, ruling that the CFTC had exceeded its statutory authority when it rejected Kalshi’s proposal because the products did not involve illegal activity or gaming.

The CFTC has resisted political betting in the U.S. derivatives markets for years. Officials say such trading is already prohibited by federal and state law — and warn of its potential ripple effects on U.S. elections. Chair Rostin Behnam said in May that election-betting derivatives products could “commoditize and degrade the integrity of the uniquely American experience of participating in the democratic electoral process.”

“We saw what happened when, three years ago, a certain candidate didn’t win the election,” said Cantrell Dumas, director of derivatives policy for the financial watchdog group Better Markets. “Can you imagine a situation where people with real money in the election [are] betting? ... The integrity of our Democracy is already in a fragile state.”

Kaishi's launch will make it more difficult for the CFTC to shut down trading in the future, the agency has said.

The agency is working on a proposed rule for prediction market operators. The drafted rule, issued earlier this year, would effectively ban derivatives products that act as wagers on political elections, sporting events and even awards ceremonies like the Oscars.

"There's a lot of caution here," said Pratik Chougule, executive director of the Coalition for Political Forecasting and a long-time political trader. "We are going to have election betting in some shape or form. They're going to be referenced and applicable to a greater degree in the mainstream political environment and disclosure. There's no question about that. The question is: How does it happen?"

FILED UNDER: CONGRESS, CFTC, DONALD TRUMP, DONALD TRUMP 2024, LAURA INGRAHAM, ...

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POLITICS / WORLD POLITICS

Brexit: odds of a British exit are surging on betting markets

by **Timothy B. Lee**

Jun 23, 2016, 11:29 PM EDT



Photo by Carl Court/Getty Images

In the last few days, betting markets were pretty confident that British voters would reject Brexit — a British exit from the European Union. A few hours ago, they showed the odds of Britain leaving the UK around just 20 percent.

But in the past few hours, as voting results have started to trickle in, the numbers have changed dramatically. As I write this, prediction markets are now showing a 96 percent chance of “Leave” winning:

Chance that Britain will vote to leave European Union



(Election Betting Odds)

Of course, betting markets could still be wrong, as only about half of votes have been counted. But things are starting to look grim for those rooting for Britain to remain in the European Union.

A British exit could be bad for the British economy

Economists say the stakes in the vote are high.

In the short run, uncertainty about Britain's future relationship with the EU, its largest trading partner, could push the UK into a recession. If Leave supporters win, market watchers predict an "explosion of volatility" on Friday morning as the markets process the implications of Britain's exit.

Many economists expect both the British stock market and the pound to open lower on Friday morning. Britain's chancellor of the exchequer, George Osborne, even hinted that he could suspend stock market trading if Britons voted to exit the EU.

In the long run, the situation could be worse. The UK government has estimated that exiting the EU could cause the British economy to be between 3.8 and 7.5 percent smaller by 2030 — depending on how well negotiations for access to the European market ultimately go. Other reports have found smaller but still significant impacts.

Further reading:

Brexit, the UK referendum that could tear Europe apart, explained

The 7 most important arguments for Britain to leave the EU

The Brexit vote is a symptom of larger problems with the European Union

UNITED STATES OF AMERICA

Before the

COMMODITY FUTURES TRADING COMMISSION

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

**ORDER PROHIBITING THE LISTING OR TRADING OF POLITICAL
EVENT CONTRACTS**

By a submission dated and received by the Commodity Futures Trading Commission (“Commission”) on December 19, 2011, the North American Derivatives Exchange (“Nadex” or “Exchange”) self-certified, pursuant to Section 5c(c)(1) of the Commodity Exchange Act (“CEA”) and Commission Regulations 40.2(a) and 40.6(a), new contracts: a Democratic Majority in the U.S. House of Representatives Binary Contract; a Republican Majority in the U.S. House of Representatives Binary Contract; a Democratic Majority in the U.S. Senate Binary Contract; a Republican Majority in the U.S. Senate Binary Contract; and ten 10 U.S. Presidency Binary Contracts (collectively, the “Political Event Contracts”) and related rule amendments. The Political Event Contracts are each binary option contracts that pay out based upon the results of the various United States federal elections in 2012. Having reviewed the complete record in this matter, including Nadex’s submission, public comments and a Nadex supplementary submission, the Commission makes the following findings and rulings:

WHEREAS, under CEA Section 5c(c)(5)(C)(i), the Commission may determine that a contract in certain excluded commodities, as defined in CEA Section 1(a)(19), is contrary to the public interest if the contract involves: (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;

WHEREAS, 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;

WHEREAS, CEA Section 5c(c)(5)(C)(ii) mandates that no “contract . . . determined by the Commission to be contrary to the public interest under Section 5c(c)(5)(C)(i) may be listed or made available for clearing or trading on or through a registered entity”;

WHEREAS, Commission Regulation 40.11(a)(1) provides that registered entities, as defined in CEA Section 1(a)(40) and inclusive of designated contract markets such as Nadex, shall not list for trading any contract based upon an excluded commodity, as defined in CEA Section 1(a)(19), that “involves, relates to, or references terrorism, assassination, war, gaming, or an activity that is unlawful under any State or Federal law”;

WHEREAS, several state statutes, on their face, link the terms gaming or gambling (which are used interchangeably in common usage, dictionary definitions and several state statutes) to betting on elections,¹ and state gambling definitions of “wager” and “bet” are analogous to the act of taking a position in the Political Event Contracts;²

¹ 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 on an election 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 [on gambling debts and losses.]”); 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

WHEREAS, 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. . . .”³ and taking a position in a Political Event Contract fits the plain meaning of a person staking “something of value upon a contest of others,” as the Political Event Contracts are all premised either directly (in the case of the presidential Political Event Contracts) or indirectly (in the cases of the House and Senate majority control Political Event Contracts) on the outcome of a contest between electoral candidates;

WHEREAS, the legislative history of CEA Section 5c(c)(5)(C) indicates Congress’s intent to restore, for the purposes of that provision, the economic purpose test that was used by the Commission to determine whether a contract was contrary to the public interest pursuant to CEA Section 5(g) prior to its deletion by the Commodity Futures Modernization Act of 2000;

WHEREAS, the restored economic purpose test calls for an evaluation of an event contract’s utility for hedging and price basing purposes;

WHEREAS, the unpredictability of the specific economic consequences of an election means that the Political Event Contracts cannot reasonably be expected to be used for hedging purposes;

WHEREAS, there is no situation in which the Political Event Contracts’ prices could form the basis for the pricing of a commercial transaction involving a physical commodity, financial asset or service, which demonstrates that the Political Event Contracts have no price basing utility;

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”).

² See, e.g., N.H. REV. STAT. ANN. § 287-D:1(VI) (2011) (“‘Wager’ means a monetary agreement between 2 or more persons that a sum of money . . . shall be paid to one of them on the happening or not happening of an uncertain event.”); WIS. STAT. ANN. § 945.01(1) (2011) (“A bet is a bargain in which the parties agree that, dependent upon chance even though accompanied by some skill, one stands to win or lose something of value specified in the agreement.”)

³ 31 U.S.C. §§ 5361–5367 (2006).

WHEREAS, the Commission has the discretion to consider other factors in addition to the economic purpose test in determining whether an event contract is contrary to the public interest;

WHEREAS, the Political Event Contracts can potentially be used in ways that would have an adverse effect on the integrity of elections, for example by creating monetary incentives to vote for particular candidates even when such a vote may be contrary to the voter's political views of such candidates;

The Commission FINDS that the Political Event Contracts involve gaming as contemplated by CEA Section 5c(c)(5)(C)(i)(V) and Commission Regulation 40.11(a)(1);

The Commission FURTHER FINDS that the Political Event Contracts are contrary to the public interest as contemplated by CEA Section 5c(c)(5)(C);

Therefore:

IT IS HEREBY ORDERED that, pursuant to CEA Section 5c(c)(5)(C)(ii) and Commission Regulation 40.11(a)(1), the Political Event Contracts shall not be listed or made available for clearing or trading on the Exchange.

Issued in Washington, D.C. this 2nd day of April, 2012.

By the Commission



David Stawick
Secretary

United States Senate

WASHINGTON, DC 20510

August 8, 2023

Chairman Rostin Behnam
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Dear Chair Behnam:

I write to express concern about KalshiEX LLC's submission of contracts to allow for legal gambling on the outcome of U.S. elections.

Our free and fair elections are essential to public confidence in our democracy, and serious concerns have been raised that allowing for widespread gambling on election outcomes could undermine the trust of voters. This type of activity could fuel claims about election fraud, while also posing a risk that those with financial or political interests at stake may be incentivized to interfere in particular elections. At the same time, others have noted that the manipulation of betting markets could serve as a tool for foreign actors seeking to interfere in our democracy. Notably the Commission's 2012 order that prohibited similar contracts to allow for betting on U.S. elections raised concerns about their potential impact on election integrity and ultimately concluded that the proposal was "contrary to the public interest."

Given these potential threats to our system of government, I urge you to give full consideration to these risks as you assess the proposal now before you. Thank you for your attention to this important issue.

Sincerely,



Amy Klobuchar
Chairwoman, U.S. Senate
Committee on Rules and
Administration

Congress of the United States
Washington, DC 20510

July 24, 2023

The Honorable Rostin Behnam
Chairman
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Comment on KalshiEX LLC's Congressional Control Contracts

Dear Chair Behnam:

We write today in response to the Commodity Futures Trading Commission (CFTC) review of and [request for public comment](#) on KalshiEX, LLC's (Kalshi) congressional control event contract [proposal](#). As Members of Congress, we feel a special responsibility to ensure that the democratic process by which we are elected is safeguarded at every turn and we view Kalshi's proposed event contract as posing a fundamental threat to that goal. Especially at a time when a majority of American voters believe democracy is under threat, the stakes are too high to incentivize activities that would further erode trust in the integrity of our democratic institutions or elected leaders. We strongly believe that Kalshi's proposed congressional control event contract is contrary to the public interest and urge the Commission to bar its listing.

As you know, the CFTC regulates derivatives and commodities – like wheat, soybeans and cattle – that are vital to all Americans. Properly regulating and policing those markets ensures commodities are delivered in the right amounts at the right times, and at prices that are reasonably reflective of the supply and demand available to the American people. These are critical functions, and CFTC plays an important role in the daily lives of all Americans as it undertakes its mission.

In this instance, however, the CFTC is being asked to make a decision that fundamentally implicates areas outside of its mission: American elections. The CFTC's involvement in gambling and elections would be a wild departure from the core principles and historic foundations of the futures markets it is responsible for regulating and overseeing. The primary purpose of those markets is to serve as a mechanism for hedging risk and facilitating price discovery for physical commercial purchasers and producers of commodities that are vital to every American family. Those markets do not exist to promote, facilitate or enable widespread speculative gambling among retail traders and are not intended or designed to function as casinos.

Kalshi's proposal seeks to have the CFTC consent to allowing Kalshi to offer de facto betting contracts on the outcome of elections in the United States via so-called "event contracts." These contracts would allow participants to place money at risk as they predict which political party will control a chamber of the United States Congress for a given term. Ultimately, participants who correctly predict control of a chamber of Congress would receive a monetary payout based on the market's assessment of the probability of the outcome, while participants who guess incorrectly lose their monetary investment.

Gambling on elections in this way is concerning for many reasons, and the CFTC itself has, in fact, already reached this very conclusion. Under Section 5c(c)(5)(C)(i) of the Commodity Exchange Act, the CFTC may prohibit event contracts that involve (1) an activity that is unlawful under state or federal law,

(2) terrorism, (3) assassination, (4) war or (5) gaming.¹ Additionally, because not all undesirable contracts may fall neatly within the specific categories listed, the CFTC adopted a regulation, 40.11(a)(2), that prohibits event contracts involving an activity that is “similar to” the activities enumerated above so long as the CFTC determines the contract to be “contrary to the public interest.”² The legislative history of CEA Section 5c(c)(5)(C) indicates that the CFTC should consider whether the event contract *as a whole* involves activities listed under Section 5c(c)(5)(C)(i), meaning that the CFTC should consider, among other things, the event underlying the event contract, in this case, elections, and the purpose of the contract, betting on elections. Moreover, the CFTC broadened the scope of Section 5c(c)(5)(C)(i) through the adoption of Regulation 40.11(a)(1), which now prohibits not only an event contract that “involves” the five enumerated activities but also one that “relates to, or references” them.

In 2012, the CFTC was presented with a proposal that was substantially similar to the Kalshi proposal from the North American Derivatives Exchange (NADEX). The NADEX proposal also sought to offer binary event contracts relating to the political control of each chamber of Congress in a given term, and similarly planned to pay out monetary amounts to winning individuals. After analysis of the NADEX proposal, the CFTC, in an April 2, 2012 order, denied the listing of the NADEX contract on the basis that it not only included an activity prohibited under state law and involved or was similar to “gaming,” but also because it was deemed contrary to the public interest. In stating its decision, the CFTC noted such an event contract could “potentially be used in way that would have an adverse effect on the integrity of elections.” We agree and believe the 2012 determination provides a strong basis for a similar determination on Kalshi’s current proposal.

Free, fair and transparent elections are the foundation of American democracy. When our constituents exercise their fundamental right to vote, they are not merely choosing the winner of a contest. They are making a values-based declaration regarding the future direction of our country and the nature of the policy that should govern it. The CFTC should avoid blessing any betting scheme that would frustrate that expectation by undermining the credibility of our democratic elections and contributing to voter cynicism about the political process.

That means rejecting proposals such as those put forward by NADEX and Kalshi. While these proposals are facially similar and what was true of this type of political event contract in 2012 remains true today, now, 11 years later, the stakes are even higher. As betting apps proliferate on mobile phones, widespread gambling on our elections through the simple click of a button has an insidious effect upon the purpose, function and integrity of the electoral process. Moreover, since 2012, our nation has seen a deluge of dark money attempt to drown out the voices of voters, an undercurrent of election denialism and extremism, and an increase in politically-motivated violence. The proposed political event contract would only further incentivize such activity and encourage bad actors, or even those just looking to make a fast dollar, to interfere with our elections and seek to sway voters outside of the democratic process.

For example, it is easy to imagine how artificial intelligence (AI) or social media might be manipulated to quickly circulate false and misleading information within hours or days of an election that could move enough votes to change the results.³ As Bloomberg News reported on July 12, 2023:

¹ 7 U.S.C. § 7a-2(c)(5)(C)(i). The Commodities Exchange Act (CEA) is codified at 7 U.S.C. § 1 *et seq.*

² 17 C.F.R. § 40.11.

³ See, e.g. *AI’s Use in Elections Sets Off a Scramble for Guardrails*, New York Times (June 25, 2023) online at: www.nytimes.com/2023/06/25/technology/ai-elections-disinformation-guardrails.html?smid=nytcore-ios-share&referringSource=articleShare.

AI holds the potential to supercharge the dissemination of misinformation in political campaigns. The technology is capable of quickly creating ‘deepfakes,’ fake pictures and videos that some political operatives predict will soon be indistinguishable from real ones, enabling miscreants to literally put words in their opponents’ mouths. Deepfakes have plagued politics for years, but with AI, savvy editing skills are no longer required to create them.⁴

Deepfakes are already being deployed to impact voters, and as technology advances, so does this threat. Allowing gambling on elections would exacerbate this, as now the fulfillment of an individual’s political goals would not only hang in the balance, but so would their money. Given the current environment where many Americans already question the integrity of U.S. elections, this would be adding fuel to the fire at the worst possible time.

With this incentive would also come the incentive to increase the flow of dark money in our political process. Since the Supreme Court’s disastrous decision in *Citizen’s United v. FEC*, we have witnessed the perverse and pervasive influence of large sums of undisclosed, unchecked and unregulated money in our political process. Kalshi’s proposal would likely exacerbate this in two ways. First, with payouts of up to \$100 million per contract, the proposal would incentivize the flow of funds to boost a candidate’s chances of winning an election and incentivize even higher spending on our elections. And, unlike a traditional campaign contribution, bets placed through the event contract would also provide the bettor – or in this case, a bettor and contributor – the added incentive of effectively recouping the amount of their donation as well as an additional profit. Allowing the personal financial gain of deep-pocketed donors and special interests – rather than the priorities of every day Americans – to dictate our nation’s policymaking agenda is squarely against the public interest.

Second, 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. While the additional spending related to Kalshi’s proposed event contract could increase the recognition or standing of a given candidate, it would likely not fall under the types of contributions regulated under existing campaign finance law. Absent the Federal Election Commission’s expertise in such forms of regulation, the money spent under the contract could be even more untraceable than existing forms of dark money. That result is clearly contrary to the public interest.

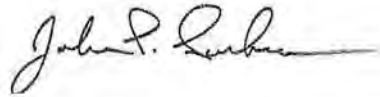
Finally, there is the potential for an event contract like Kalshi’s to increase incidents of terrorism or assassination, two of the categories that are expressly defined as “contrary to public interest.” Harassment, threats and violence against election workers and elected officials continues to rise. According to a 2023 survey conducted by the Brennan Center for Justice, nearly one third of election officials have been harassed, abused or threatened because of their job. Forty five percent of local election officials said they fear for the safety of their colleagues. The potential for monetary gain would only increase the possibility of these grave threats and further undermine the safety and integrity of our elections.⁵

⁴ *AI is Making Politics Easier, Cheaper and More Dangerous*, Bloomberg News (July 11, 2023) online at www.bloomberg.com/news/features/2023-07-11/chatgpt-ai-boom-makes-political-dirty-tricks-easier-and-cheaper?smd=premium&sref=mQvUqJZj.

⁵ *Poll of Election Officials Shows High Turnover Amid Safety Threats and Political Interference*, Brennan Center for Justice (Apr. 25, 2023) online at: <https://www.brennancenter.org/our-work/analysis-opinion/poll-election-officials-shows-high-turnover-amid-safety-threats-and>.

No one should be able to wager the rights and opportunities of millions of individuals for his or her personal gain. Elections free from interference, abuse or the corrupting influence of money are in the public interest, as is the prohibition of activities that could reasonably incentivize individuals to interfere with our electoral process. For these reasons, we urge the CFTC to again recognize the dire implications of betting on elections and deny the Kalshi congressional control event contract.

Sincerely,



Representative John P. Sarbanes



Representative Jamie Raskin



Rule Book Contracts

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 members (siblings, children, and parents) of any of the above.
- Any of the above listed institutions themselves.