[ORAL ARGUMENT NOT YET SCHEDULED]
No. 24-5205

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KALSHIEX LLC,
Appellee,

v.

COMMODITY FUTURES TRADING COMMISSION,
Appellant.

On Appeal from the U.S. District Court
for the District of Columbia
Case No. 1:23-cv-03257-JMC (Hon. Jia M. Cobb)

BRIEF AMICUS CURIAE, BY CONSENT, OF BETTER MARKETS, INC. IN SUPPORT OF APPELLANT AND REVERSAL

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October 23, 2024

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29 of the Federal Rules of Appellate Procedure ("FRAP") and D.C. Circuit Rules 26.1 and 29, Better Markets, Inc. ("Better Markets") states that it is a non-profit organization that advocates for the public interest in the financial markets; that it has no parent company; and that there is no publicly-held company that has any ownership interest in Better Markets.

REPRESENTATION OF CONSENT FROM ALL PARTIES AND CERTIFICATE STATING WHY A SEPARATE BRIEF IS NECESSARY

In accordance with FRAP 29(a)(2) and D.C. Circuit Rule 29(b), undersigned counsel for Better Markets certifies that all parties have consented to the filing of this brief.[1]

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for Better Markets further certifies that this separate brief is necessary. Better Markets is aware of no other amicus curiae planning to file a brief in support of the appellant.

[1] In accordance with FRAP 29(a)(4)(E), Better Markets certifies that (i) no counsel for any party authored this brief in whole or in part; (ii) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (iii) no person—other than Better Markets, its members (of which there are none), or its counsel—contributed money that was intended to fund preparing or submitting this brief.

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IDENTITY AND INTEREST OF THE AMICUS CURIAE

Better Markets is a nonprofit, nonpartisan organization that promotes the public interest in the financial markets through comment letters on proposed rules, independent research, amicus curiae briefs, public advocacy, and Congressional testimony. It advocates for reforms that stabilize our financial system, protect investors from fraud and abuse, and make all of our financial markets—securities, banking, and derivatives—more fair and efficient. Better Markets has filed hundreds of comment letters with the financial regulators, including the Commodity Futures Trading Commission ("CFTC" or "Commission"), and dozens of amicus briefs in the federal courts supporting strong financial regulation.

Much of Better Markets' advocacy has focused specifically on the derivatives markets, including the importance of measures to prevent market manipulation and excessive speculation. *See generally* www.bettermarkets.org. Better Markets filed an extensive comment letter urging the CFTC to prohibit the listing by the appellant ("Kalshi") of the election gambling contracts at issue in this case ("EGCs").[2]

Better Markets has a strong interest in this case because a decision affirming the district court's decision to lift the CFTC's ban on Kalshi's election gambling contracts would undermine important goals that Better Markets seeks to advance

[2] Better Markets, *Comment Letter to CFTC re KalshiEx, LLC's Proposed Political Event Contract* (Sept. 25, 2022), https://bettermarkets.org/wp-content/uploads/2022/09/Better_Markets_ Comment_Letter_KalshiEX.pdf.

through its advocacy. Inevitably, in addition to undermining the integrity of our elections, EGCs will foster market manipulation and victimize potentially millions of investors. EGCs will unleash all of these harms without supplying either of the tools for which the derivatives markets were established: hedging against commodity price risk and establishing pricing benchmarks so that Americans can rely on stable prices for the groceries, gas, and many other products they depend upon in their everyday lives.

All of these threats are being amplified in real time, as Kalshi is furiously developing and offering dozens of additional gambling contracts involving a wide range of election outcomes, in addition to its original "congressional control" wager. *See* Kalshi, Elections, https://kalshi.com/events/elections (last visited Oct. 20, 2024). And evidence is fast emerging that these types of election wagering contracts may already be serving as instrumentalities of either election manipulation for political gain, market manipulation for financial gain, or both.[3] The stakes are enormous, as these contracts may eventually sway any number of extremely close

[3] Alexander Osipovich, *A Mystery $30 Million Wave of Pro-Trump Bets Has Moved a Popular Prediction Market*, WALL ST. J. (Oct. 18, 2024), https://www.wsj.com/finance/betting-election-pro-trump-ad74aa71?; Aila Slisco, *Polymarket Prediction Platform Possibly Manipulated to Favor Trump: Report*, NEWSWEEK (Oct. 18, 2024), https://www.newsweek.com/polymarket-prediction-platform-possibly-manipulated-favor-trump-report-1971589.

election contests and fundamentally alter our democratic landscape. Better Markets is therefore seeking to defend the public interest against the threats posed by EGCs.

SUMMARY OF ARGUMENT

First, the district court misinterpreted Section 5c(c)(5)(c)(i) of the Commodity Exchange Act ("CEA"), 7 U.S.C. § 7a-2(c)(5)(C)(i) ("Section 5c"), under core principles of statutory construction. *See KalshiEX LLC v. CFTC*, No. 23-3257 (JMC), 2024 WL 4164694 (D.D.C. 2024). The court consistently chose to read the key terms in the statute narrowly, deviating from their plain meaning. Based on those unwarranted and restrictive interpretations of the law, the court erroneously vacated the CFTC's determination that Kalshi's election gambling contracts are subject to public interest review and that they should be prohibited as contrary to the public interest.

Second, the district court compounded these basic interpretive errors by failing to consider the ramifications of its ruling, including the long list of threats that EGCs pose to election integrity, investors, and the CFTC's ability to fulfill its core mission. Ignoring these threats to the public interest was especially inappropriate since the CEA, and Section 5c in particular, epitomizes a remedial statute that should be read broadly, not narrowly and technically, to effectuate its underlying purposes.

Third, had the court interpreted the wording in Section 5c in light of the public interests that are in jeopardy and Congress's obvious intention to guard against such threats, it would have had to draw different conclusions about the proper meaning and scope of the statute. Those threats are prodigious. As detailed below, EGCs will create powerful tools and incentives for engaging in election interference; they will foster market manipulation and victimize investors on a large scale; and they will weaken the CFTC's ability to discharge its core mission by requiring it to divert its already scarce resources to policing elections, a daunting task that it lacks the budget or expertise to perform.

Finally, the district court erroneously declined to consider the CFTC's extensive knowledge and experience on the issues presented in this case surrounding event contracts. In a short footnote, the court observed it would not consult that "body of experience and informed judgment" because the CFTC had not invited the court to do so. *See KalshiEX LLC v. CFTC*, 2024 WL 4164694 at *13 n.9 (D.C. Cir. 2024). But turning a blind eye to the CFTC's ample reservoir of expertise on the issues presented was a mistake on three levels. First, the Supreme Court recently affirmed that although courts may no longer defer or yield to an agency's interpretations of the law, they nevertheless may—and indeed are expected to—draw on an agency's expert views about the legal and factual matters arising during judicial review. *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2262, 2267

(2024). Second, nothing in the *Loper Bright* decision indicates that courts may only take advantage of an agency's knowledge and expertise if petitioned to do so by a party. Third, the CFTC does in fact have extensive knowledge and experience regarding the event contracts and issues presented in this case, acquired over the past 30 years and consistently applied in guidance, no-action letters, and rulemakings. Obviously, had the district court given proper weight to the CFTC's interpretation of the law and the factual underpinnings of its Order, it would have to have read Section 5c very differently, to encompass Kalshi's EGCs.

I. THE CFTC CORRECTLY INTERPRETED SECTION 5C, WHILE THE DISTRICT COURT MISREAD THE PROVISION, REPEATEDLY FAVORING UNDULY NARROW MEANINGS OF THE KEY TERMS.

In its September 22, 2023 Order ("Order" or "CFTC Order"),[4] the CFTC correctly concluded that EGCs fall into two distinct categories of event contracts listed in Section 5c that the CFTC may subject to public interest scrutiny. First, it arrived at the legally sound and intuitively sensible conclusion that trading in EGCs involves "gaming" because gaming is widely understood to encompass betting or wagering on a wide variety of contests, including election contests. *See* CFTC Order at 8–11. The CFTC also concluded that EGCs involve "activity that is unlawful"

[4] CFTC, *CFTC Disapproves KalshiEX LLC's Congressional Control Contracts* (Sept. 22, 2023), https://www.cftc.gov/PressRoom/PressReleases/8780-23.

under state law. *Id.* This finding rested on the plain fact that under dozens of state laws and state judicial decisions, gambling on elections—what transacting in EGCs amounts to—is flatly prohibited. CFTC Order at 11 & n.26 (cataloging 22 state laws that criminalize making any bet or wager on the result of an election); *id.* at 12 n.27 (cataloging 17 state court decisions, spanning over 150 years, that declare wagering on elections as against public policy). As the predicate for both of these conclusions, the CFTC also rightly concluded that the word "involve," as used in Section 5c, is a broad term that refers not only to the events or activities *underlying* a contract but also to instances where *trading* in the contract constitutes one of the activities enumerated in Section 5c—in this case "gaming" as well activity outlawed by many states. CFTC Order at 5–7.

The district court nevertheless vacated the Order based on multiple misinterpretations of the law. In its opening brief, the CFTC has persuasively demonstrated, as a matter of basic statutory construction, that the district court erroneously rejected the plain and ordinary meaning of the key terms and phrases in Section 5c. *See generally* CFTC Appellant Brief, *KalshiEX LLC v. CFTC*, 2024 WL 4164694, No. 2080035 (D.C. Cir., Oct. 16, 2024). Specifically, the court erred because it adopted exceedingly narrow definitions of the terms "gaming" and "involve"; ignored relevant sources of meaning for those terms; misconstrued the status of gambling under state law through a misapprehension about the role of

preemption; ignored the statutory context in which the key words appear in the CEA; misapplied or shunned canons of statutory construction; and at times offered no support at all for its conclusions.

Purely as a matter of statutory interpretation, then, the district court erred, and its ruling in favor of Kalshi should be reversed for that reason. As explained below, however, the court further erred by failing to consider the ways in which EGCs jeopardize the public interest and by declining to draw on the CFTC's extensive knowledge and expertise as guidance on the proper interpretation of Section 5c.

II. THE DISTRICT COURT IMPROPERLY IGNORED THE REMEDIAL NATURE OF THE COMMODITY EXCHANGE ACT AND THE THREATS THAT EGC'S POSE TO ELECTION INTEGRITY, INVESTORS, AND THE CFTC ITSELF.

The district court further erred because it fashioned its narrow interpretation of Section 5c without considering any of the remedial purposes underlying the CEA and Section 5c in particular. The court ignored all of the harmful consequences that will follow from allowing EGCs to trade, which Congress specifically sought to prevent in Section 5c. The court thus violated the canon that remedial statutes are to be construed broadly, not hyper-technically or narrowly in ways that frustrate Congress's objectives.

It is well-established that remedial statutes are to be construed broadly to effectuate their remedial purposes. *See R&W Technical Servs., Ltd. v. CFTC*, 205 F.3d 165, 169 (5th Cir. 2000) ("Remedial statutes are to be construed liberally, and

in an era of increasing individual participation in commodities markets, the need for such protection has not lessened."). It is equally clear that the CEA is such a remedial statute. *See CFTC v. R.J. Fitzgerald & Co.*, 310 F.3d 1321, 1329 (11th Cir. 2002) ("[W]e are guided by the principle that the CEA is a remedial statute that serves the crucial purpose of protecting the innocent individual investor—who may know little about the intricacies and complexities of the commodities market—from being misled or deceived."). As a general matter, the "Findings" clause in the CEA shows that the statute is a thoroughly remedial one, animated by the need to serve the public interest: "The transactions subject to this chapter are entered into regularly in interstate and international commerce and are affected with a *national public interest* by providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities." 7 U.S.C. § 5(a).

That section goes further and delineates the specific remedial purposes that underlie the law, including protecting investors, combatting manipulation, ensuring the integrity of the markets, and even promoting "responsible" innovation. 7 U.S.C. § 5(b). These are among the very public interests that are threatened by the EGCs. As explained below, those contracts will—in addition to compromising the integrity of elections—inflict huge investor losses, create an exceptionally hospitable

environment for manipulation, undermine the traditional role of the derivatives markets, and give "responsible innovation" in finance a bad name.

The obligation of the district court to consider the impact of its decision on the public interest carries special force in this case. At issue is the scope of Section 5c, a provision in the law that is singularly "remedial" because it was expressly written by Congress to safeguard the public interest against the unique perils associated with certain event contracts. The plain wording and thrust of the provision is to give the CFTC the authority to consider whether certain event contracts are "contrary to the public interest" and therefore should be prohibited.

And the types of contracts that Congress made subject to such review in Section 5c pose the gravest possible threats to the public interest. In that list, "gaming" (as well as activity that is illegal under state law) keeps company with war, terrorism, and assassination. This grouping reflects the intensity of Congress's concern over anticipated efforts to turn the derivatives markets into casinos—a phenomenon we are witnessing in real time. *See* articles cited in n.3 *supra.* In short, Section 5c reflects Congress's heightened concern that trading in certain types of event contracts—including election gambling—can pose exceptionally serious threats to the markets, investors, and other societal values. 156 Cong. Rec. S5906-07, 2010 WL 2788026 (daily ed. July 15, 2010) (confirming in colloquy between

Senators that the "gaming" provision is intended to prevent "derivatives contracts" that "exist predominately to enable gambling").

The district court justified its tunnel vision by advancing the mistaken notion that since the CFTC was precluded (in the court's view) from considering whether EGCs were contrary to the public interest under Section 5c, the court in turn could not, or at least would not, reach that analysis. 2024 WL 4164694 *1. However, the court was not justified in blinding itself to those harms simply because it concluded (erroneously) that the CFTC had no authority to determine if the EGCs were contrary to the public interest. That specific legal determination about the authority of the *agency* under Section 5c stands entirely apart from the broad and ever-present authority of *federal courts* to take into account the consequences of their legal determinations.

And where a court is interpreting a remedial statute, as here, it is essential that the court assess the likely policy consequences of its chosen reading of the law and determine how those consequences square with the Congressional purposes underlying the law. Here, the district court erred by interpreting a remedial statute while flatly refusing to consider the law's overarching objectives and the impact of its decision on the attainment of those objectives.

III. ALLOWING ELECTION GAMBLING CONTRACTS TO TRADE THREATENS TO UNDERMINE ELECTION INTEGRITY, HARM COUNTLESS INVESTORS, AND BURDEN THE CFTC WITH AN INAPPROPRIATE DUTY TO POLICE ELECTIONS.

A. EGCs will undermine election integrity.

Allowing EGCs to trade is threatening the integrity of our federal elections, "which are the very linchpin of our democracy." *KalshiEX LLC v. CFTC*, No. 24-5205, 2024 WL 4364204 *6 (D.C. Cir. 2024). This concern was chief among those set forth in the CFTC's "public interest" analysis of Kalshi's contract. CFTC Order at 19-20. It was also one that the district court could have and should have carefully assessed in arriving at the best interpretation of the scope of Section 5c, a plainly remedial statute.

Kalshi's EGC contracts will undermine our electoral process in a number of ways. For example, they will incentivize the dissemination of misinformation for profit, as some bad actors can be expected to assume large positions in the contracts and then disseminate false or misleading information to skew election outcomes in favor of their market position. In a separate vein, these contracts will also serve as direct tools of election interference, as some bad actors will take large positions in the contracts to convey misleading information about the status of an electoral race, with the goal of either stimulating or suppressing fundraising, voter turnout, and the general level of support for a candidate. In short, EGCs will not only incentivize the use of misinformation to "manipulate" election outcomes in pursuit of winnings on

wagers, they will also serve as attractive tools for distorting perceptions about candidates' prospects, for political or electoral gains. *See, e.g.*, CFTC Order at 20. The result will be not only a heightened risk of corrupted elections but further erosion in the public's already tenuous confidence in the integrity of those elections.

These threats are being magnified as this litigation unfolds. Once the stay against EGCs was lifted, Kalshi immediately began offering EGCs and then proceeded to create dozens of additional political gambling contracts for widespread public trading. Dan Mangan, *Kalshi Expands Trump, Harris Election Bet Options, Adds Senate Races; CFTC Objects*, CNBC (Oct. 9, 2024), https://www.cnbc.com/2024/10/09/kalshi-expands-election-betting-options-cftc-complains.html. Pandora's box was opened. Moreover, alarming reports of possible election manipulation on another platform offering election wagers have recently surfaced. Four anonymous accounts, likely under common control, are suddenly placing huge wagers—to the tune of $30 million— in favor of Trump's presidential candidacy, through the offshore platform known as Polymarket. Alexander Osipovich, *supra* note 3. While some surmise that these bets may reflect a genuine sentiment about the odds of a Trump victory and a desire to profit on that belief, others contend that it is "almost certainly a case of market manipulation." Slisco, *supra* note 3. Still others surmise that this trading surge may be a ploy to create the misimpression of "momentum" to foster additional political support for Trump. As

one article explained, it could be someone who wants to "make Trump appear to have better prospects than the market would otherwise suggest, in the expectation that this will boost morale and keep donations and volunteer effort flowing." Osipovich, *supra* note 3. Yet more theories have been floated, suggesting it may constitute trading based on inside information, or even an attempt to lay the groundwork for claims that the election must have been stolen in the event Trump ultimately loses. Osipovich, *supra* note 3. In any event, if the trading amounts to any one of these species of election or market manipulation, then it is also likely to artificially skew the pricing of contracts in a way that is divorced from election "fundamentals," thus creating volatility that will undoubtedly harm many smaller retail investors who have placed their own bets.

In addition to these recent developments, the administrative record in this case contains substantial evidence that allowing wagering on our federal elections poses a threat to the integrity of those elections. As the CFTC Order notes, over 600 commenters voiced concerns about the potential harm to election integrity that EGCs pose. Among them were a group of United States Senators, who warned that "[e]stablishing a large-scale, for-profit political event betting market in the United States . . . would profoundly undermine the sanctity and democratic value of elections. . . . There is no doubt that mass commodification of our democratic process

would raise widespread concerns about the integrity of our electoral process." CFTC Order at 19-20.

The evidence is yet more voluminous, indeed overwhelming, in the form of admonitions from innumerable state courts since nearly the founding of our Republic. For 200 years, state courts have consistently and emphatically warned of the unique societal harm that comes with corruption in the electoral process through gambling. These cases confirm the need to protect elections from gambling—and they also confirm the wisdom of Congress's decision to incorporate state law as a means of identifying event contracts that pose unacceptable risks to the public interest.

For example, as early as 1799, Jeremiah Chase wrote for the General Court of Maryland that an election wager "would be 'against sound policy, and ought not to be sanctioned by a court of justice.'" Jeffrey Steven Gordon, *Silence for Sale*, 71 ALA. L. REV. 1109, 1160–61 (2020) (quoting *Wroth v. Johnson*, 4 H. & McH. 284, 286 (Md. Gen. Ct. 1799)). Chase added that election wagers "'have a malignant and evil tendency by making the parties, their connexions and friends, partizans in the election, and creating an interest and views incompatible with the general good and sound policy.'" *Id.* (quoting *Wroth*, 4 H. & McH. at 286-87).

Following that decision, numerous state courts in the 1800s held that election wagers posed grave dangers to the public interest and election integrity. The

"principles animating these cases found their fullest expression in an opinion of the Massachusetts Supreme Judicial Court, speaking through Chief Justice Lemuel Shaw, in 1847." *Id.* at 1163:

> If one bet can be made on an election, many can be made. If small sums can be staked, large ones can. So that, on a great and exciting popular election, a large amount of money may depend on the result. . . . If it be true that wagers on elections would have any tendency to create such a pecuniary interest in their result, as we have no doubt they have, we can have no hesitation in saying, that all such wagers are illegal and utterly void.

Ball v. Gilbert, 53 Mass. 397, 400-02 (1847); *see also, e.g.*, *Bettis v. Reynolds*, 34 N.C. 344, 346 (1851) ("[W]hatever has a tendency, in any way, unduly to influence elections, is against public policy. . . . It seems equally clear, that the practice of betting on elections has a direct tendency to cause undue influence."); *David v. Ransom*, 1 Greene 383, 385-86 (Iowa 1848) ("But in a free country, where its very existence, and the majesty of its laws, depend upon an enlightened and unbiased popular will, betting upon elections should especially be restrained."); *Stoddard v. Martin*, 1 R.I. 1, 2 (1828) ("The strong hold of freedom in our country, is in the freedom of our elections. Destroy this, and our freedom is at an end. Whatever tends to this destruction, in the remotest degree, ought to be resisted here, with a determination that admits of no compromise. Wagers on elections, whether by the people or the general assembly, have this tendency directly.").

These cases also make clear that the dangers of betting on elections go beyond the concerns that animate prohibitions on gambling generally. "If there be any class of gambling contracts which should be frowned upon more than another it is bets on elections. They strike at the foundations of popular institutions, corrupt the ballot box, or, what is tantamount to it, interfere with the freedom and purity of elections." *McLennan v. Whidon*, 48 S.E. 201, 202-03, 120 Ga. 666 (1904) (quoting *Leverett v. Stegal*, 23 Ga. 259 (1857); *see also Merchants' Savings, Loan & Trust Co. v. Goodrich*, 75 Ill. 554, 560-61 (1874) ("All wagers are not void at common law. It is only those that are contrary to public policy; as, on the question of war or peace, *on the event of an election*, etc.") (emphasis in original); *Commonwealth v. Crass*, 203 S.W. 708, 708 (Ky. 1918); *Shumate v. Commonwealth*, 56 Va. 653, 661 (1860); *Quarles v. State*, 24 Tenn. 561, 562 (1845). Conduct such as betting on elections "should be guarded against with the strictest watchfulness, and pursued with the most prompt condemnation by courts and legislators." *Nichols v. Mudgett*, 32 Vt. 546, 549 (1860).

However one measures the likelihood of election interference through contracts that allow wagering on elections, the stakes are undeniably high: If EGCs and the other political gambling contracts now proliferating do change election outcomes, especially in the closest and most important races, the consequences could well be devastating, permanently altering our democratic landscape. These concerns

are amply reflected in the long history of state condemnation of the practice; the comment letters submitted on Kalshi's petition to list EGCs; the Senators singularly relevant fears; the examples of abuses offered by the CFTC; and the recent reports of potential election interference via Polymarket. The district court should have considered this evidence about the dangers of allowing gambling on elections, as it decided how best to interpret the intended scope of the remedial provisions of Section 5c.

B. EGCs are rich targets for market manipulation, which will be difficult to detect.

EGC contracts will be especially vulnerable to market manipulation for a variety of reasons. First, they will not be tethered to any underlying cash market. Moreover, political prediction markets operate in an opaque space that would readily lend itself to manipulation and other forms of abusive activity. CFTC Order at 21. "[T]he opaque and unregulated sources of price forming information for the Congressional Control Contracts may increase the risk of manipulative activity relating to the trading and pricing of the contracts, while decreasing Kalshi's and the Commission's ability to detect such activity." *Id*. These markets raise the specter of political insiders privy to non-public information—such as internal polling or

campaign finance data—wielding their informational advantage to profit at the expense of others.[5]

And the threat goes far beyond insiders. The data that determine the pricing of EGCs will be a hodge podge of unregulated, opaque, and unscientific sources such as polls, voter surveys, rumors, and media reports, all of widely varying degrees of rigor and reliability. Much of this data can be selectively compiled, skewed, and deployed by almost anyone in ways designed to manipulate prices in the EGC market. And this activity will be especially difficult to detect. In short, this market environment will present irresistible opportunities for manipulation of the EGC contracts through the dissemination of false information coupled with strategic trading patterns in the contracts, and the record includes evidence of manipulation schemes. CFTC Order at 21 n.38.[6] The recent sudden and large wagers on Trump,

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[5] *See* Alex Altman, *Political Betting Market Raises Questions About Insider Trading*, TIME (Oct. 6 2015), https://time.com/4062628/fantasy-sports-predictit-political-forecasting/.

[6] *See generally* Paul W. Rhode & Koleman S. Strumpf, *Manipulating Political Stock Markets: A Field Experiment and a Century of Observational Data* 2 (Jan. 2007) (unpublished manuscript, https://economics.yale.edu/sites/default/files/files/Workshops-Seminars/Economic-History/rhode-051116.pdf) (observing that "parties with an interest in the outcome have an incentive, whenever possible, to move the odds prices in their preferred direction"); *see also* Brad Plumer, *How to Swing the Prediction Markets and Boost Mitt Romney's Fortunes*, THE WASHINGTON POST (Oct. 23, 2012), https://www.washingtonpost.com/news/wonk/wp/2012/10/23/how-to-manipulate-prediction-markets-and-boost-mitt-romneys-fortunes/; Alex Klein, *InTrade And Jon Hunstman: Why the Media's Faith in the Internet Betting Ring Is Foolish*, THE NEW REPUBLIC (Jun. 21, 2011), https://newrepublic.com/article/90371/intrade-and-jon-

placed via Polymarket, may well represent a classic market manipulation. Overall, investors are bound to suffer, as will confidence in the integrity of the election process and the derivatives markets.[7] The remedial provisions in Section 5c were aimed in part at curbing these heightened risks of market manipulation, and the district court should have taken them into account as it interpreted the law.

C. EGCs will victimize investors on a large scale.

The threats posed by EGCs go beyond those identified in the CFTC's Order, as investors are likely to suffer huge losses on these contracts as they are made easily accessible via sanctioned exchange trading. This stems in part from the ease and frequency with which these markets are likely to be manipulated. That manipulation not only renders EGCs poor risk management and price discovery tools, as discussed below, but also subjects investors to unpredictable volatility that thwarts even the most rational attempts at wagering on election outcomes.

Investor losses will inevitably be intensified through the rapidly expanding use of "gamification" and "retailization" in the financial markets. Through these

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huntsman-president-odds-republican-nomination; National Conference of State Legislatures, *Wagering on Elections? Not a Smart Bet* (Sept. 17, 2014), https://www.ncsl.org/blog/2014/09/17/wagering-on-elections-not-a-smart-bet.aspx.

[7] EGCs would also conflict with core principle number 3 stipulating that a DCM may list "only contracts that are not readily susceptible to manipulation." *See* 7 U.S.C. § 7(d)(3).

tactics and technologies, everyday consumers and investors are lured into new financial products and services, often against their best interest. These strategies pair advanced technologies, including AI, with high-profile advertising campaigns and game-like features such as points, rewards, leaderboards, push notifications, and other methods to encourage users to engage in constant trading activities. And they are deployed through online trading platforms, robo advisers, and mobile apps.

This pattern was starkly revealed in the "gamification practices" deployed by the broker-dealer Robinhood that fueled the meme stock frenzy. *See generally* Dennis M. Kelleher, Jason Grimes, & Andres Chovil, *Securities—Democratizing Equity Markets With And Without Exploitation: Robinhood, Gamestop, Hedge Funds, Gamification, High Frequency Trading, And More*, 44 W. NEW ENG. L. REV. 51 (2022). They also appear in the market for cryptocurrencies. And the explosion in the online gambling industry highlights the financially ruinous consequences that these business models can inflict. Katherine Sayre, *A Psychiatrist Tried to Quit Gambling. Betting Apps Kept Her Hooked*, WALL ST. J. (Feb. 18, 2024). EGCs and the many variants that are appearing are bound to follow this same pattern. The signs are unmistakable, beginning with huge ads promoting Kalshi on the jumbo screens in Times Square. Tarek Mansour, X (Oct. 9, 2024, 6:07 PM EST), https://x.com/mansourtarek_/status/1844137640934899809 (Tweet from Kalshi

CEO Tarek Mansour noting a Kalshi advertisement on an electronic Times Square billboard).

Promoters relying on these methods for enticing clients and encouraging trading activity often proclaim that the offerings represent beneficial "democratization" and "innovation" in finance. *See* Kelleher *et al.*, *supra.* Kalshi is invoking these very themes. It proclaims that it "seeks to democratize investing opportunities once restricted to large corporations and the super-rich." Kalshi D. Ct. Br. at 9. But more likely, as with gamified brokerage apps, cryptocurrencies, and online gambling, the result will be massive wealth accumulation for Kalshi and its cadre of principals but massive losses suffered by the majority of investors.

D. EGCs place the CFTC in the untenable and burdensome position of policing elections.

As the CFTC explained in its Order, another ramification of allowing EGCs to trade on a designated contract market is that they place the agency in the untenable position of policing these markets for fraud, manipulation, and other violations. That will ultimately entail investigating election fraud and even election results. This responsibility is inconsistent with the agency's traditionally assigned mission, its core expertise, and its limited resources.

Commenters voiced these very concerns. For example, two members of the House of Representatives submitted a joint comment letter cautioning that "because the CFTC is not equipped or authorized to enforce election laws, the prospect of the

Commission assuming the role of an 'election cop' raises very serious concerns about the misalignment of such a role with the CFTC's historic mission and mandate as established by Congress."[8]

The CFTC already oversees a huge derivatives market, comprised of trading in trillions of dollars in futures, options, swaps, and event contracts. Yet it is by far among the smallest and least funded financial regulators. Its latest budget appropriation was for only $365 million, and it has fewer than 700 employees (in contrast with $2.594 billion in budget and over 4,500 employees for the SEC).[9] It is no answer that other agencies, such as the Federal Election Commission and various state agencies, have a role in overseeing elections. The CFTC has a statutory duty to address fraud and manipulation in the markets for derivatives contracts that trade on Commission regulated exchanges. 7 U.S.C. § 9(c). It cannot simply delegate or hand that duty off to other agencies, even where other agencies may have some jurisdiction over an underlying commodity or event. The fact that another federal regulator may have jurisdiction over an underlying product does not alter the Commission's obligation to ensure integrity in its markets.

[8] Comment Letter of Reps. Sarbanes & Raskin at 3.

[9] Congressional Research Service, Financial Services and General Government (FSGG) FY 2024 Appropriations: Overview (Oct. 5, 2023).

IV. THE DISTRICT COURT ALSO FAILED TO CONSIDER THE CFTC'S EXTENSIVE KNOWLEDGE AND EXPERIENCE IN DEALING WITH EVENT CONTRACTS, INCLUDING THOSE INVOLVING ELECTION GAMBLING.

A. Notwithstanding the end of *Chevron* deference, federal courts remain entitled to consider an agency's body of experience and informed judgment about the issues presented upon judicial review.

The Supreme Court recently ended an era of judicial deference to agency interpretations of statutory provisions in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). Fortunately, the Court in *Loper* expressly preserved a related principle in the form of *Skidmore* deference. The Court explained that federal courts may, and will ordinarily be expected to, draw on an agency's "body of experience and informed judgment" as it decides an "agency case":

> The APA, in short, incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions. In exercising such judgment, though, courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" consistent with the APA. *Skidmore*, 323 U.S. at 140, 65 S.Ct. 161.

Loper Bright, at 2262. Thus, the Supreme Court expressly preserved the *ability* of federal courts to take an agency's views and analysis into account, even as it ended a court's *obligation* to defer to an agency's interpretation of the law.

Here, however, the district court declined to draw on the CFTC's robust "body of experience and informed judgement" in the matter of derivatives markets generally and event contracts more specifically. It did so based on the startling observation, in a footnote, that the CFTC did not expressly urge the court to do so. *See KalshiEX LLC v. CFTC*, 2024 WL 4164694 at *13, n.9 (Sept. 12, 2024) ("Because the CFTC did not argue that the Court should [draw on the CFTC's expertise] here, the Court neither considers nor addresses the scope of deference owed to the CFTC in the wake of *Loper Bright*."). Yet the Supreme Court did not say or suggest in *Loper Bright* that courts must receive an invitation or an urging from a party before taking full advantage of an agency's reservoir of knowledge and experience in administering its organic statute. On the contrary, the Court in *Loper* anticipated that courts would do so as a matter of course.

The district court thus erred in its interpretation of *Loper,* needlessly rejecting an important body of expertise that would have informed the court's analysis of Section 5c. Drawing on that expertise would have been especially appropriate in this case, as the issues presented are unquestionably complex and technical, and the CFTC has a wealth of experience in addressing them as it oversees the derivatives markets, including the arcane world of event contracts.

B. The CFTC has extensive experience in dealing with the complex issues presented.

As general matter, well-functioning derivatives markets are vitally important to our economy, yet they are also complex and arcane. The Commission has been overseeing these markets for nearly 50 years, interpreting and applying the CEA to innumerable futures, options, and swaps contracts; overseeing a wide range of market participants, from futures commission merchants to clearing agencies; combatting fraud and manipulation; and of particular relevance here, determining which derivatives products should be listed and traded on publicly accessible exchanges.

With respect to the specific issues raised in this case, the Commission has been addressing the appropriate regulatory treatment of event contracts since at least 1993. Following an increase in requests for guidance on these contracts, it issued a concept release in 2008 as part of "a comprehensive review of the Act's applicability to event contracts and markets." Concept Release on the Appropriate Treatment of Event Contracts, 73 Fed. Reg. 25669, 25670 (May 7, 2008). It sought expertise from a wide range of sources, including market participants, legal practitioners, state and federal regulatory authorities, and academicians "with respect to the practical and regulatory issues relevant to regulating event contracts and markets." *Id.*

In 2011, it promulgated Rule 40.11 to implement the provisions of Section 5c. Final Rule, Provisions Common to Registered Entities, 76 Fed. Reg. 44776 (July 27,

2011), codified at 17 C.F.R. § 40.11(a). And in May of this year, the CFTC proposed a rule that, if finalized, will declare that all of the contracts enumerated in Section 5c, including those involving gaming, "are contrary to the public interest and shall not be listed for trading or accepted for clearing on or through a registered entity." *See* Event Contracts, 89 Fed. Reg. 48,975; 48992 (June 10, 2024; proposed May 10, 2024). It would further make unmistakably clear that "gaming" means staking or risking something of value upon "the outcome of a contest of others," to include, without limitation, "the outcome of a political contest, including an election." *Id.*

Beyond the regulatory analysis underlying the concept release and the rulemakings, the Commission has repeatedly been called upon to apply its considerable knowledge and expertise to the very type of political event contract at issue in this case. And its treatment has been thoroughly consistent with the principles set forth in the CFTC Order. For example, in 2012, the CFTC prohibited the North American Derivatives Exchange ("NADEX") from offering political event contracts relating to the political control of the Congress and the Presidency.[10] In its order, the Commission found that the contracts involved gaming and were contrary to the public interest under CEA Section 5c(c)(5)(C)(i). In its analysis, which

[10] U.S. COMMODITIES FUTURES COMMISSION, *Order Prohibiting the Listing or Trading of Political Event Contracts* (Apr. 2, 2012), https://www.cftc.gov/sites/default/files/stellent/groups/public/@rulesandproducts/documents/ifdocs/nadexorder040212.pdf.

parallels the Order in many respects, the Commission determined, among other things, that the contracts could not reasonably be expected to be used for hedging purposes; could not form the basis for the pricing of a commercial transaction involving a physical commodity, financial asset, or service; and could be used in ways that would have an adverse effect on the integrity of elections."[11]

On two other occasions, the first in 1993, the Commission's staff determined *not* to prohibit the trading of political event contracts that were fundamentally distinguishable from the contracts advanced by NADEX and Kalshi. They chose instead to strictly limit their purpose, operations, and scope under no-action letters.[12] Common to both no-action letters were stipulations providing that the platforms could only operate as non-profits, for educational or academic research purposes, and on a small scale.[13] Neither letter was predicated on any finding that those event

[11] *Id.*; *see also* Dave Aron & Matt Jones, *States' Big Gamble on Sports Betting*, 12 UNLV GAMING L. J. 53, 75–76 (2021) (discussing Commission's treatment of the NADEX contracts).

[12] Letter from Vincent McGonagle, Dir., Div. of Mkt. Oversight, to Neil Quigley, Deputy Vice-Chancellor, Research, Victoria Univ. of Wellington, (Oct. 29, 2014), https://www.cftc.gov/csl/14-130/download; CFTC No-Action Letter, CFTCLTR No. 93-66, 1993 WL 595741 (June 18, 1993), https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/93-66.pdf.

[13] In August 2022, the CFTC rescinded that no-action letter, a decision challenged in court by PredictIt. *See Clarke v. CFTC*, No. 1:22-cv-909 (W.D. Tex.) (transferred to the U.S. District Court for the District of Columbia, No. 1:24-cv-167, as of Jan. 19, 2024).

contracts could serve as meaningful hedging or price discovery tools. In stark contrast with these two platforms, Kalshi has no intention of operating on a non-profit basis, exclusively for research purposes, or on a limited scale.

In this case, the Commission has concluded that Kalshi's Election Gambling Contracts involve gaming as well as activity that is illegal under state law, within the meaning of Section 5c of the CEA. It furthermore concluded that they pose serious threats to the public interest, including harm to investors and damage to the integrity of our federal elections, all without serving as the type of reliable hedging and price discovery tools that are fundamental to the derivatives markets. The Commission made these findings after receiving robust public input and applying its extensive knowledge and experience, acquired over 30 years, to the legal and policy issues presented. The district court could have and should have taken this vast body of knowledge and experience into account.

CONCLUSION

For all of the foregoing reasons, the district court's judgment should be reversed.

Dated: October 23, 2024

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with FRAP 29(a)(4)(G)and FRAP 32(g)(1), I hereby certify that the forgoing brief complies with the type-volume limit of FRAP 29(a)(5) and D.C. Circuit Rule 32(e)(3) because, excluding the parts of the document exempted by FRAP 32(f), this document contains 6498 words.

I further certify that this document also complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6) because it has been prepared in 14-point Times New Roman font, a proportionately spaced, plain Roman typeface that includes serifs, using Microsoft Word for Office 365 MSO.

/s/Stephen W. Hall
Stephen W. Hall

October 23, 2024

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2024, the foregoing brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF system. Service was accomplished on counsel of record by the CM/ECF system.

/s/ Stephen W. Hall
Stephen W. Hall

Dated: October 23, 2024