

[ORAL ARGUMENT NOT YET SCHEDULED]

NO. 24-5205

**In the United States Court of Appeals
For the District of Columbia**

KALSHIEX LLC,
Plaintiff-Appellee,

v.

COMMODITY FUTURES TRADING COMMISSION,
Defendant-Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**BRIEF OF *AMICUS CURIAE* ARISTOTLE
INTERNATIONAL, INC., IN SUPPORT OF APPELLEE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29 of the Federal Rules of Appellate Procedure, and D.C. Circuit Rules 26.1 and 29(b), undersigned counsel certifies:

Amicus Curiae Aristotle International has no parent company, and no publicly held company has a 10% or greater ownership interest in it.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) and D.C. Circuit Rule 29(4)(E), *Amicus* certifies that no counsel for any party authored the brief in whole or in part, and no entity or person other than the *Amicus* contributed money that was intended to fund the preparation or submission of this brief.

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

Pursuant to Federal Rule of Appellate Procedure 29(a)(2) and D.C. Circuit Rule 29(b), undersigned counsel for Aristotle International, Inc. (“Aristotle”) certifies that all parties have consented to the filing of this brief. Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for Aristotle further certifies that this separate brief is necessary. Aristotle is aware of no other potential amicus curiae that has extensive experience operating markets of the type at issue in this litigation.

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GLOSSARY

APA	Administrative Procedure Act, 5 U.S.C. § 551, <i>et seq.</i>
App.	Joint Appendix
CEA	Commodity Exchange Act, 7 U.S.C. § 1, <i>et seq.</i>
CFTC or Commission	U.S. Commodity Futures Trading Commission
DCM	Designated Contract Market

INTEREST OF AMICUS CURIAE

Aristotle International, Inc. (“Aristotle”), through its PredictIt, Inc. subsidiary, acts as a clearing house and service provider to Victoria University of Wellington’s PredictIt market, which has offered contracts comparable to those at issue in this matter.

PredictIt began operating pursuant to a No Action Letter issued to Victoria University by the Commodity Futures Trading Commission (“CFTC” or “Commission”) Division of Market Oversight in 2014. Within the bounds of the 2014 No Action Letter, PredictIt has offered Congressional Control Contracts for the 2016, 2018, 2020, and 2022 election cycles, and has offered Presidential Contracts in 2016, 2020, and 2024. In servicing these markets, Aristotle has generated valuable experience and data relevant to issues in this matter.

INTRODUCTION

One year into this litigation, the Commodity Futures Trading Commission (“CFTC”) is still struggling to explain why it prohibited Kalshi from listing contracts that resolve based upon the outcomes of elections. The CFTC jumps through hoops to claim that the proposed contracts involve gaming and are unlawful under state law. And the CFTC cannot explain why it has not applied its own rationales to the many other types of event contracts listed on CFTC-regulated exchanges.

Before the CFTC prohibits a designated contract market from listing an event contract, the CFTC is required to adhere to a two-step process. 7 U.S.C. § 7a-2(c)(5)(C). First, it must determine that the contracts involve: (1) activity that is unlawful under any Federal or State law; (2) terrorism; (3) assassination; (4) war; (5) gaming; or (6) other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest. *Id.* Second, it must determine that the contracts are contrary to the public interest. *Id.*

The CFTC found that Kalshi’s proposed contracts relate to both gaming and activity that is unlawful under State law, and that the Proposed Contracts are contrary to the public interest. The District Court vacated the Order because the Proposed Contracts involve neither gaming nor activity that is unlawful under state law. App. 93-119.

The District Court was correct. Elections are not games, and the CFTC has yet to, over a year into this litigation, articulate a definition of “gaming” that includes elections but does not include broad swaths of the other topics found within CFTC-regulated event contracts. Elections are also not “unlawful under . . . State law,” and the CFTC has not articulated a construction of this provision that would not apply to literally every event contract on a DCM.

The CFTC has plainly demonstrated that it does not like political event contracts. The agency’s unlawful attempt to shut down the PredictIt market for political event contracts (*see Clarke v. Commodity Futures Trading Comm’n*, 74 F.4th 627, 641-44 (5th Cir. 2023)), among other actions, made that clear. But the law is also clear; the Commission must demonstrate that a proposed contract fits into one of the articulated categories before it proceeds to review and then block its listing.

ARGUMENT

I. ELECTION CONTRACTS ARE NOT GAMING

As the District Court correctly held, “gaming” requires a game. App. 106-11. The Supreme Court has made it clear that, “[i]n statutory construction, we begin with the language of the statute. If the statutory language is unambiguous and “the statutory scheme is coherent and consistent” — as is the case here — “[t]he inquiry ceases.” *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162 (2016).

The CFTC would like this Court to take a different approach. The CFTC's definition of gaming starts by defining gaming as being synonymous with gambling, and then defining gambling to mean the staking something of value upon the outcome of "a game, contest, or contingent event." App. 134-35. The CFTC's approach is unworkable and does not reflect its years of experience in regulating event contracts. Its subsequent explanations for its rationales misuse and miscite the legislative history of the underlying statute and ignore the key distinctions between games and elections.

A. The CFTC's Proposed Definition of Gaming is Unworkable and Has Already Lead to Arbitrary Outcomes.

The CFTC, in the Kalshi Order, proposed gaming to mean gambling, and then proposed that gambling was "staking something of value upon the outcome of a game, contest or contingent event." App. 134-35. Because elections are sometimes described as a "contest," the CFTC found that the contracts relate to gaming. *Id.*

This definition, however, would apply to most, if not all, event contracts that are currently traded. As the District Court explained, under "the CFTC's construction, all event contracts would be subject to review under the special rule because they all involve purchasing (and thus risking money on) some contingent event with the hope of receiving a payoff." App. 108. The CFTC's definition would

capture a broad range of markets, such as contracts that relate to weather¹ or the future value of the Singapore Consumer Price Index.² The CFTC has never contended that these markets are subject to public interest review. As the District Court correctly explained, “any definition of ‘gaming’ that could be read to subject *all* event contracts to the special rule just cannot be right.” App. 108-09.

The CFTC now seeks to retreat to a narrower definition of gaming. In this new definition, gaming is still gambling, but gambling merely involves the “staking something of value on a contest of others.” CFTC Br. at 44. But “[i]t is a foundational principle of administrative law that judicial review of agency action is limited to the grounds that the agency invoked when it took the action.” *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1907–08 (2020) (internal citations omitted). The agency can only offer “a fuller explanation of the agency's reasoning *at the time of the agency action.*” *Id.* (internal citation omitted).

At the time of the agency action, the Commission proposed the more expansive definition but neglected to apply it to anything other than its disfavored

¹ “*Weather Products*” CME Group, available at <https://www.cmegroup.com/markets/weather.html>.

² Forecastex, *Will the year-over-year change in the Singapore Consumer Price Index exceed 3% in October 2024?*, (Nov. 22, 2024, 9:04 PM), available at https://forecastex.com/markets/SGCPI/SGCPI_1024_3.0

category, political event contracts. The same is true of its contest-specific definition. Indeed, Designated Contract Markets, both at the time that the Order was written and prior to the District Court decision, offered contracts on everything from the Grammy Awards³, the top songs on Spotify⁴, to advances in artificial intelligence⁵. The outcomes of the Grammy Awards and the Spotify charts involve contests because artists compete with each other on both the quality of their music and the quantity of their music streams. Advances in artificial intelligence involve and are often described as contests because corporations and nation states compete to produce technology and products.⁶

The CFTC disclaims any need for consistency in treatment of contracts because the Order is an *ad hoc* determination that does not govern “*future* applications of the Special Rule presenting different facts[.]” CFTC Br. at 43-46. The CFTC then admits that it dropped the “future contingent event” definition in a proposed rulemaking precisely because it is overly broad, and acknowledges that it may also drop the “contest of others” prong in future adjudications if the usage of

³ Kalshi, *Grammy for Album of the Year?*, (Nov. 22, 2024, 8:55 PM), available at <https://kalshi.com/markets/kxgramaoty/grammy-for-album-of-the-year>.

⁴ *Top song on Spotify USA Chart today?*, (Nov. 22, 2024, 8:57 PM), available at <https://kalshi.com/markets/kxspotifyd/daily-usa-spotify-chart>.

⁵ Kalshi, *GPT beaten by another LLM this year?*, (Nov. 22, 2024, 8:55 PM), available at <https://kalshi.com/markets/kxtopllm/gpt-no-longer-top-ranked-llm>

⁶ See, e.g., David Lague, *U.S.-China Tech Battle Heats Up Over Drones*, Reuters (Sept. 8, 2023), <https://www.reuters.com/investigates/special-report/us-china-tech-drones/>.

the prong does not help it arrive at its desired outcome. *Id* at 45-46. What all of this shows, however, is that the agency has not advanced a coherent interpretation of the statute and that the avowed basis of its action is contrary to law.

The CFTC is proposing that it subject virtually all event contracts to the exact type of regulatory “game of chance” that the “APA's ‘arbitrary and capricious’ standard is designed to thwart. *Judulang v. Holder*, 565 U.S. 42 (2011) (internal citations omitted).

The District Court got it right when it determined that the CFTC’s Order is plainly unworkable because, through all of its attempts to define election contracts as gaming, it has failed to provide a definition that would not radically change the legal environment for event contracts. This failure alone is evidence that the Proposed Contracts simply do not involve gaming within this statutory context.

B. The CFTC’s Definition of Gaming is Unsupported and is Contradicted by the Legislative History.

The CFTC’s reliance on a Senate floor colloquy between Senators Blanche Lincoln and Diane Feinstein does not advance its argument. According to the Commission, the Senators suggested that “gaming” can refer to the act of trading rather than to the nature of the underlying activity that the event contract concerns. CFTC Br. 42-43; App. 139 n.29, 140 nn.30-31.

First, that colloquy did not occur on the floor of the Senate and thus is not the type of immediately pre-enactment floor statement that some courts have looked as

persuasive legislative history.⁷ Instead, the colloquy was submitted to the Congressional Record and printed only after passage of the legislation.

Nat'l Woodwork Mfrs. Ass'n v. N. L. R. B., 386 U.S. 612, 639 n.34 (1967).

Second, the colloquy at most concerns keeping “games” off of futures markets, by having special review of contracts that are designed to be backdoors into bets on the outcomes of “sporting events such as the Super Bowl, the Kentucky Derby, and Masters Golf Tournament.”⁸

The CFTC’s view has been further rejected by Senator Lincoln herself, who clarified in comments submitted to the agency that ““gaming” referred to “playing a game,” and “[e]lections are not games.”⁹ “The law was meant to capture recreational gambling on sporting events and casino-type activities, not the Nobel Prize in Physics or the outcome of major elections. These events are nothing like the Super Bowl, the Kentucky Derby, or the Masters Tournament.” *Id.*

⁷ Compare the C-SPAN archive for July 15, 2010 <https://www.c-span.org/video/?294558-1/senate-session>, reviewed May 16, 2024, showing no appearances by either Senator Feinstein or Senator Lincoln on the Senate floor during debate on passage of the Dodd-Frank legislation to Congressional Record for the same date at S5906.

⁸ 156 Cong. Rec. S5906-07 (daily ed. July 15, 2010) (statements of Sen. Dianne Feinstein & Sen Blanche Lincoln).

⁹ *Comment of Senator Blanche Lincoln on Proposed Rule Regarding Event Contracts* (Aug. 8, 2024), <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=74357>

In its brief, the CFTC bizarrely contends that that “football and golf are ‘games,’ not ‘gaming[,]’” and that “involve” in this context should be read to refer to the act of *trading* the football contracts, rather than to the fact that the contracts *involve* football. CFTC Br. at 46.

Senator Lincoln’s clarification demonstrates that the CFTC’s counterintuitive reading of her words is incorrect. The law was written to prohibit contracts that relate to games, and gaming requires a game. Golf is a game, horse racing is a game, and football is game. Elections are not games.

C. Elections are Distinct from Games Because Elections Have Direct and Far-reaching Economic Effects.

The CFTC claims that contracts on elections relate to “gaming” because elections do not have direct economic consequences. According to the CFTC, “futures contracts traditionally have served hedging and risk management functions... the economic impacts of the outcome of contests for Congressional control are too diffuse and unpredictable to service the hedging and risk management functions that futures contracts have traditionally been intended to serve.” App. 136 n.25.

The financial markets themselves say otherwise. PredictIt and Kalshi elections probabilities, for example, already appear on the Bloomberg Terminal, where investors can see current probabilities of election winners. PredictIt odds can

also be found on Thompson Reuters,¹⁰ and the Financial Times,¹¹ among other services. These data are covered on financial platforms because elections influence the disposition of trillions of dollars in economic activity.

The recent 2024 election cycle in the United States further demonstrates this point. Even before the party conventions took place, Candidate Trump's polling lead and stated policy preferences lead to a "Trump Trade."¹² JP Morgan directly tied the popularity of this trade to Candidate Trump's PredictIt odds.¹³ Later in the election cycle, THE NEW YORK TIMES, THE WALL STREET JOURNAL, THE ECONOMIST, and THE FINANCIAL TIMES repeatedly cited PredictIt odds.¹⁴

As markets later processed the news that Republicans had won the White House and Senate, and were favored to win the House of Representatives, the broad-

¹⁰ *Trump Media Shares Tumble to New Lows After Insider Selling Curbs Expire*, Reuters (Sept. 23, 2024), <https://www.reuters.com/technology/trump-media-shares-tumble-new-lows-after-insider-selling-curbs-expire-2024-09-23/>.

¹¹ Oliver Roeder & Eva Xiao, *What Are Kamala Harris's Chances Against Donald Trump?*, Financial Times (July 23, 2024), <https://www.ft.com/content/77b32462-3d56-43f9-bb4d-44f8c58edc8a>.

¹² Lu Wang, *The Trump Trade Is Back: What It Means for Investors*, Bloomberg (July 17, 2024), <https://www.bloomberg.com/news/articles/2024-07-17/the-trump-trade-is-back-what-it-means-for-investors>.

¹³ Alan Wynne, *Is the Trump Trade a Good Deal?*, JP Morgan Private Bank, (Jul. 26, 2024) <https://privatebank.jpmorgan.com/nam/en/insights/markets-and-investing/tmt/is-the-trump-trade-a-good-deal>.

¹⁴ See, e.g., Paul Kiernan, *Election Betting Markets Favor Harris as Democratic Nominee*, Wall Street Journal (July 3, 2024), <https://www.wsj.com/livecoverage/stock-market-today-dow-sp500-nasdaq-live-07-03-2024/card/election-betting-markets-favor-harris-as-democratic-nominee-Q0WuHt30kx0IFgxAahjX>.

market S&P500 index (which can be tracked via SPY), rose by 2.5% on November 6. Financial institutions (trackable via SPXBK), which expect deregulation under the incoming Republican trifecta, rose by 10%. Alphabet (GOOGL), which has been facing the threat of a forced breakup under the Biden Administration, rose by 4%. Treasury yields rose in anticipation of the imposition of the tariffs promised by President-Elect Trump on the campaign trail.¹⁵ By contrast, iShares Global Clean Energy ETF (ICLN), which tracks a basket of renewable energy stocks, dropped by 7% on the same day, defying the broader market trend as investors anticipated rollbacks of the clean energy subsidies passed under a previous Democratic Administration and Congress. The cryptocurrency industry spent tens of millions of dollars trying to unseat industry-antagonist Senator Sherrod Brown,¹⁶ and Coinbase stock (COIN) subsequently rose by 30% in one day in the wake of his defeat. The CEO of Coinbase indicated this surge was specifically related to the Ohio Senate Election.¹⁷

¹⁵ Chuck Mikolajczak, *S&P 500 futures soar to record high after Trump claims victory*, Reuters (Nov. 6, 2024), <https://www.reuters.com/markets/us/sp-500-futures-soar-record-high-after-trump-claims-victory-2024-11-06/>.

¹⁶ Harri Leigh, *Crypto industry pours tens of millions of dollars into Ohio Senate race to defeat Sherrod Brown*, Spectrum News (Oct. 17, 2024), <https://spectrumnews1.com/oh/columbus/news/2024/10/17/crypto-brown-moreno-senate>.

¹⁷ MacKenzie Sigalos, *Coinbase CEO Brian Armstrong \$2 Billion Richer on Election Stock Pop*, CNBC (Nov. 6, 2024), <https://www.cnbc.com/2024/11/06/coinbase-ceo-brian-armstrong-2-billion-richer-on-election-stock-pop.html>

These are not flukes. Markets have repeatedly demonstrated that they are capable of interpreting election results and making predictions of how they will affect market economies. The same clean energy index (ICLN) rallied after Democrats won control of the Senate after the 2020 elections: It increased by 17% between December 31, 2020, and January 8, 2021, far outpacing the Dow Jones Industrial Average which rose by 1.6% during the same period. The Global X Lithium & Battery Tech ETF (LIT), which tracks companies involved in the production and processing of Lithium, a key element of electric vehicle and other battery production, rose by 14.5% during this same period. The markets predicted that the Democratic majorities would pass legislation that would create incentives for renewable energy companies and electric vehicle production, and the Democratic gains in the elections rewarded investors with \$1.843 trillion in new spending through 2031, much of which related to clean energy subsidies.¹⁸

Top investment firms are now hiring political scientists for guidance because geopolitical risk is now a greater driver of investment performance than at any time

¹⁸ Congressional Budget Office, “*Estimated Budgetary Effects of HR 1319, American Rescue Plan Act of 2021 as Passed by the Senate on March 6, 2021*,” Mar. 2021, available at www.cbo.gov/system/files/2021-03/Estimated_Budgetary_Effects_of_HR_1319_as_passed_0.pdf; Congressional Budget Office, “*Estimated Budgetary Effects of H.R. 5376, the Inflation Reduction Act of 2022, as Amended in the Nature of a Substitute (ERN22335) and Posted on the Website of the Senate Majority Leader on July 27, 2022*,” Aug. 5, 2022, available at www.cbo.gov/system/files/2022-08/hr5376_IR_Act_8-3-22.pdf.

since the Cold War.¹⁹ One of these firms has opined that more than half of the top risks for markets are political.²⁰

Contrary to the CFTC's arguments, the steps between an election and the passage of legislation—such as approval by both Chambers of Congress and a presidential signature—do not make the economic consequences of elections attenuated. App. 142 n.34. The availability of those approvals are the direct consequence of elections. And there are immediate effects on markets that flow directly from the results of elections, without the need for subsequent legislation. After all, markets have demonstrated an understanding of the lawmaking process. Following the 2020 elections, the markets reflected the direct reality that Democrats could use the Senate Budget Reconciliation process to pass President-Elect Biden's clean energy agenda, but not other important items. While clean energy indices soared, investors on PredictIt did not consider it likely that Congress would pass a minimum wage increase.²¹

¹⁹ Nicholas Megaw, Madison Darbyshire & James Fontanella-Khan, *How the investment world is trying to navigate geopolitics*, Financial Times (July 5, 2024), <https://www.ft.com/content/23ce295d-bf65-47fd-bebd-808b5a7bcab5>.

²⁰ *Id.*

²¹ A PredictIt market asking if the Democrat control of Congress and the presidency would raise the minimum wage to \$15 per hour peaked at an average daily trade price of \$0.17, implying that traders thought that such an increase was always below a 20% probability. *See* [https://www.predictit.org/markets/detail/7075/Will-Biden-policy-to-raise-minimum-wage-to-\\$15-per-hour-in-2021-succeed](https://www.predictit.org/markets/detail/7075/Will-Biden-policy-to-raise-minimum-wage-to-$15-per-hour-in-2021-succeed). *See also* Sozzi, Brian, “Don't Expect a \$15 Federal Minimum Wage: Goldman Sachs,” YAHOO! FINANCE, (Feb.

Moving away from the findings in the Commission's actual order, CFTC litigation counsel now claims that the economic effects of the underlying activity are not dispositive, because games like the Super Bowl and World Series also have economic effects. CFTC Br. at 48.

This argument misses the point. A contract involving the World Series would not involve gaming just because of a lack of economic consequences; it would involve gaming because baseball is a game. The fact that industries have been built around certain games does not change the core element of the activity. By contrast, the economic consequences of elections are part of the point of holding elections in the first place. That consumers might spend money to purchase a baseball ticket or merchandise does not change the fact that they are watching the men on the field play a game for the viewers' amusement; the same consumers watch election returns because they want to know what will happen to their tax rates, electric vehicle subsidies, and student loan repayment plans.

8, 2021), finance.yahoo.com/news/dont-expect-a-15-federal-minimum-wage-goldman-sachs-130431033.html (demonstrating the unavailability of the reconciliation process for a minimum wage increase).

II. THE PROPOSED CONTRACTS DO NOT INVOLVE ACTIVITY THAT VIOLATES STATE OR FEDERAL LAWS.

The CFTC's conclusion that contracts regarding the outcome of elections involve activity that is unlawful under state law is contrary to statutory text and the CFTC's treatment of other contracts.

The Commission asserted that, by reaching "agreements, contracts, or transactions [that] involve . . . activity that is unlawful under any Federal or State law," the statute permits the CFTC to prohibit both "contracts whose underlying is one of the enumerated activities, and contracts with a different connection to one of the enumerated activities because, for example, they 'relate closely' to, 'entail,' or 'have as an essential feature or consequence' one of the enumerated activities." App. 132-133. The CFTC later noted that some States explicitly prohibit staking something of value on the outcome of an election. App. 137-38. In effect, the CFTC is arguing that if contracts would violate those state laws if they were not traded on a designated contract market, then the CFTC may subject them to a public interest review. This reading fundamentally deviates from the CFTC's interpretation of the statute in every other context and undermines the rationale for federally regulated futures markets altogether.

Consider, for example, the fact that the CFTC, for over a decade, has permitted designate contract markets to list contracts based upon the number of

hurricanes in a given calendar year.²² These contracts would potentially constitute unlawful gambling in the many states that define gambling as wagering on a future contingent event.²³ The same would be true about markets relating to atmospheric carbon levels,²⁴ the date of a rocket launch,²⁵ or the number of Ozempic prescriptions in a given quarter.²⁶ The Chicago Mercantile Exchange alone offers over 350

²² Kalshi, *Number of Hurricanes in 2023?*, (Nov. 22, 2024, 8:55 PM), available at kalshi.com/markets/hurctot/number-of-hurricanes; Commodity Futures Trading Commission, “Cantor Futures Exchange, L.P: Rule 40.2 New Contract Submission—Atlantic Named Storm Landfall Binary Option Contract Submission #2016-5,” Jun. 13, 2016, available at www.cftc.gov/sites/default/files/filings/ptc/16/06/ptc061416cantordcm001.pdf.

²³ See, e.g., Ala. Code § 13A-12-20 (“A person engages in gambling if he stakes or risks something of value upon the outcome of a contest of chance *or a future contingent event not under his control or influence*, upon an agreement or understanding that he or someone else will receive something of value in the event of a certain outcome.” (emphasis added)); S.D. Codified Laws § 22-25A-1 (“For the purposes of this chapter, the term, bet or wager, means to directly or indirectly take, receive, or accept money or any valuable thing with the understanding or agreement that the money or valuable thing will be paid or delivered to a person if the payment or delivery is contingent upon the result of a race, contest, or game *or upon the happening of an event not known to be certain.*” (emphasis added)).

²⁴ Forecastex, *Will Atmospheric Carbon Dioxide be greater than 426.1ppm in 2024?*, (Nov. 22, 2024, 9:04 PM), available at https://forecastex.com/markets/ACD/ACD_1224_426.1

²⁵ Kalshi, *SpaceX Starship 6th launch?*, (Nov. 22, 2024, 8:56 PM), available at <https://kalshi.com/markets/kxspacexstarship/spacex-starship-launch>

²⁶ Kalshi, *Ozempic and Wegovy prescriptions increase this quarter?*, (Nov. 22, 2024, 8:56 PM), available at <https://kalshi.com/markets/weightdrugsq/ozempic-and-wegovy-prescriptions-increase#weightdrugsq-4-24>

weather-based contracts.²⁷ The CFTC has never subjected any of these markets to public interest review.

The District Court correctly held that many states define unlawful gambling as staking money on a contingent outcome, and noted that the Commission's logic in this matter would have the effect of subjecting every single event contract traded on a designated contract market to public interest review. App. 116. This outcome would be contrary to Congress's amendments to the Commodity Exchange Act that eliminated the CFTC's authority to review all event contracts on public interest grounds.

That some states have specific laws, separate from general gambling laws, that prohibit wagering on elections does not strengthen the CFTC's markets. CFTC Br. at 53-54.

The statutory text does not make a distinction between generalized State anti-gambling laws and those targeting a specific subset of events. The CFTC cites no evidence for the proposition that State legislatures consider election-specific wagering laws to be more important than general wagering regulations. To the contrary, the New York,²⁸ New Jersey²⁹, and Nebraska³⁰ Constitutions, among

²⁷ “*Weather Products*” CME Group, available at <https://www.cmegroup.com/markets/weather.html>.

²⁸ N.Y. Const. art. I, § 9.

²⁹ N.J. Const. art. IV, § 7

³⁰ Neb. Const. art. III, § 24

others, contain gambling restrictions that would prevent the staking of money on the outcomes of many of the contracts that can be found today on designated contract markets and that were not subject to public interest review.

The “contrary to state law” condition is more reasonably read, as Kalshi suggests, to apply to prohibited activities such as personal and property crime rather than as a device to cherry pick some parts only of state gaming law prohibitions while ignoring immediately adjacent parts of the same state laws. Kalshi Br. at 20-23. If all that were required for a state to trigger the CEA’s special review provision for event contracts were a state statute banning wagering on a specific activity, then a single state could upend the Commodity Exchange Act’s statutory scheme by passing such a law. Florida, for instance, might decide to enact a state law prohibition on wagering on hurricane landfalls, making widely offered contracts on precisely those events subject to the special review provision.

The CFTC’s new interpretation of the relevant statute risks creating havoc in regulated event markets. If the CFTC were consistent in its interpretation of the legal standard articulated in the Order and applied it elsewhere, it would undermine the rationale for every market regulated under the Commodity Exchange Act, as nearly all futures markets may in some way risk overlapping with state laws. But the CFTC is not consistent in its interpretation, and it has not applied it in any other context. That the CFTC has only ever applied this interpretation to election contracts

is a demonstration of its outcome-determined arbitrary review process, and this Court should reject it.

CONCLUSION

The CFTC's Order is arbitrary, capricious, and otherwise contrary to law. The Order clearly began at a conclusion—that the CFTC wanted to prevent election contracts from being listed on a DCM—and worked its way backwards. That the CFTC has never applied its two rationales regarding gaming and state law to *any other contract* demonstrates the inherent unworkability and bias of the Order.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rules of Appellate Procedure (“FRAP”) 29(a)(4)(G) and 32(g)(1), I hereby certify that the foregoing 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 4,142 words.

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

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System which will automatically send e-mail notification of such filing to all counsel of record.

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