

No. 24-5205

IN THE
United States Court of Appeals
for the District of Columbia Circuit

KALSHIEX LLC,
Plaintiff-Appellee,

– v. –

COMMODITY FUTURES TRADING COMMISSION,
Defendant-Appellant.

On Appeal From a Final Judgment of the United States
District Court for the District of Columbia (Cobb, J.)

**BRIEF OF FORECASTEX, LLC
AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE AND
AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT AND CONSENT TO FILE

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, *amicus curiae* states that ForecastEx, LLC is a wholly owned subsidiary of Interactive Brokers Group, Inc and that no publicly traded company owns 10% or more of the stock of Interactive Brokers Group, Inc.

Pursuant to Federal Rule of Appellate Procedure 29(a)(2) and D.C. Circuit Rule 29(b), *amicus curiae* states that all parties to this proceeding have consented to the filing of this brief.

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GLOSSARY

CFTC: Commodity Futures Trading Commission

CEA: Commodity Exchange Act

DCMs: Designated Contract Markets

GDP: Gross Domestic Product

FEC: Federal Election Commission

SEC: Securities and Exchange Commission

STATEMENT OF INTEREST OF *AMICUS CURIAE**

Amicus curiae ForecastEx, LLC (ForecastEx) is a CFTC-registered Designated Contract Market (DCM) and Derivatives Clearing Organization (DCO). It is subject to the Commodity Exchange Act (CEA), including the CEA’s special rule for the review of event contracts that authorizes the CFTC to review and prohibit trading in event contracts that are contrary to the public interest, if (and only if) those contracts involve specific activities including “activity that is unlawful under any Federal or State law” or “gaming.” 7 U.S.C. §§ 7a-2(c)(5)(C)(i)(I),(V).

ForecastEx started providing access to ForecastEx election-based forecast contracts for eligible customers in October 2024 after this Court denied the CFTC’s motion to stay the district court’s decision pending appeal. These include contracts concerning the outcome of the presidential election, control of the Senate, control of the House, and the outcome of key congressional races. The addition of election-based contracts allowed US-based investors to trade their predictions on these political outcomes, alongside contracts ForecastEx already offered on economic data releases and climate indicators, through the ForecastEx exchange. Like ForecastEx’s other

* All parties consent to the filing of this brief. No counsel for any party in this case authored this brief in whole or in part. No person or entity—other than *amicus* and its counsel—made a monetary contribution specifically for the preparation or submission of this brief. Counsel for ForecastEx certify that, to their knowledge, no other *amicus* brief focuses on the same issues as this brief or the unique perspective *amicus* provides on the First Amendment and public interest analysis.

contracts, the election-based contracts give participants a powerful tool to manage the risk associated with uncertainty that affects their business operations and investment portfolios. Participants' trades express their views on key global events. The aggregation of these views reflects a consensus view on the probability of a certain election outcome derived from the collective wisdom of entities and individuals who have economic stakes in making accurate predictions. That wisdom is available in the form of contract prices to the public, including politicians and key decisionmakers.

ForecastEx has a strong interest in the use of all event contracts, including political event contracts. As of November 6, 2024, ForecastEx hosted over \$560 million of trades in presidential election contracts since early October.

ForecastEx's bottom line and ability to appeal to the public will be impaired if the CFTC's statutory interpretation and public interest determinations prevail. If allowed to proceed, ForecastEx and other prediction markets will be increasingly utilized by the public based on demonstrated success and increasingly appreciated as a valuable tool that offers unique data and insights that, as recent experience confirms, cannot be captured by traditional mediums like polling.

ARGUMENT

ForecastEx agrees with the District Court and Kalshi's analysis that the CEA's special rule that gives the CFTC authority to regulate certain event contracts that are against the public interest does not apply to election-based event contracts.

However, even assuming *arguendo* that this Court finds the statutory construction arguments presented by both parties plausible, under the Supreme Court's application of constitutional avoidance, it must reject the CFTC's interpretation because that interpretation raises serious First Amendment issues. The First Amendment protects speech on matters of public concern such as predictions about elections expressed through the purchase of ForecastEx contracts. The First Amendment protects such speech no less than a newspaper op-ed predicting a political victory or defeat. The aggregation of the views of all the traders into a contract price reflecting a collective probabilistic assessment about an election outcome is likewise protected by the First Amendment. The First Amendment also supports the rights of the public to receive and then use this election-related information to make important decisions.

The CFTC's restriction is content-based because it excludes only election-based event contracts. This content-based restriction on a matter of public concern fails strict scrutiny for three reasons.

First, insulating voters from outside influences based on concerns about how people will react to the information is not a compelling governmental interest. Second,

even assuming “election integrity” constitutes a valid governmental interest, the Government has less restrictive means to achieve that interest. Indeed, the Government has provided no evidence to undercut the myriad comments and empirical data provided to it by commenters that market manipulation is self-correcting because it induces informed traders to enter the market. Third, even assuming the CFTC’s restriction does advance the Government’s interest, it is fatally underinclusive because it fails to reach much of the speech that implicates the Government’s interest in protecting election integrity. This is the case because there is a plethora of inaccurate existing information in the election prediction ambit including punditry, polls, and models that predict results and that could be used “in ways that would have an adverse effect on the integrity of elections, or the perception of integrity of elections.” App. 146.

Separately, even if this Court disagrees that the CFTC’s interpretation raises a serious First Amendment doubt and decides to reach the CFTC’s public interest determination, it should nevertheless affirm the District Court’s judgment because ForecastEx’s experience with political event contracts refutes the CFTC’s thinly supported public interest analysis. The CFTC’s election integrity concerns are speculative and belied by ForecastEx’s experience with these contracts as well as the history discussed in detail by several commenters that shows that in the United States and worldwide, election trading has not resulted in manipulation or fraud. The CFTC fails to present a reasoned basis to disregard this evidence or to explain why traditional

tools and requirements for regulating market manipulation under the CFTC's current regime, including criminal penalties, are insufficient. There is no evidence to support the CFTC's cursory assertion that allowing election contracts to trade will force it to regulate elections. To the contrary, the CFTC has not become entangled in policing the production, warehousing, and transportation of agricultural and energy products or any other area related to a derivative contract under its purview.

I. THIS COURT SHOULD AVOID INTERPRETING POLITICAL EVENT CONTRACTS TO BE EITHER “GAMING” OR “CONTRARY TO FEDERAL OR STATE LAW” BECAUSE HOLDING OTHERWISE WOULD RAISE SERIOUS CONSTITUTIONAL QUESTIONS UNDER THE FIRST AMENDMENT.

“A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.” *United States v. Jin Fney Moy*, 241 U.S. 394, 401 (1916); *see also Public Citizen v. U.S. Department of Justice*, 491 U.S. 440, 455, 462–63, 466 (1989) (rejecting “plain-meaning” rule to avoid constitutional difficulties). The Supreme Court has repeatedly reaffirmed constitutional avoidance in the First Amendment ambit. For example, in *United States v. Rumely*, 345 U.S. 41, 47 (1953), it interpreted the phrase “lobbying activities” in a resolution passed by Congress to avoid an interpretation that would create a serious constitutional doubt by proscribing conduct protected by the First Amendment.¹ Here Congress has not

¹ Its rationale rested in part on separation of powers considerations: “Whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits.” *Id.* at 46.

delegated to the CFTC the authority to challenge the boundaries of the First Amendment and the CFTC must not do so.

A. Election-based Contracts Reflect Archetypical Speech on Matters of Public Concern Within the First Amendment because of the Interests of both the Speaker (each market participant and ForecastEx) and the Audience (the public).

The First Amendment reflects the “profound national commitment” to the principle that “debate on public issues should be uninhibited, robust, and wide-open,” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), because speech on matters of public concern “is more than self-expression; it is the essence of self-government,” *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). Accordingly, speech on public issues occupies the “highest rung of the hierarchy of First Amendment values” and is entitled to “special protection.” *Connick v. Myers*, 461 U.S. 138, 145 (1983). Speech about elections, candidates, and governmental affairs is “core political speech.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995); *see also Mills v. Alabama*, 384 U.S. 214, 218 (1966). Thus, ForecastEx’s election-based contracts address matters of public importance under the First Amendment. As the District Court explained, Kalshi’s contracts “involve elections (and politics, congressional control, and other related topics)” but “not illegal activities.” App. 106, 111. Importantly, profit motive plays no role in the First Amendment inquiry. *See Pittsburgh Press Co. v. Pittsburgh Comm’n on Hum. Rel.*, 413 U.S. 376, 385 (1973) (holding that a newspaper’s profit motive does not bear on the nature of the speech contained within or the tier of scrutiny applied thereto); *see*

also *Daily Herald Co. v. Munro*, 838 F.2d 380, 384 (9th Cir. 1988) (rejecting argument that exit polling is commercial speech that is less deserving of constitutional protection than speech on matters of public concern merely because the pollsters make money by disseminating exit polls).

The special protection afforded to speech on matters of public concern extends to each individual market participant as well as to ForecastEx. Each market participant is offering his opinion on the outcome of an uncertain future election. This is expressive speech covered by the First Amendment to the same extent as an op-ed predicting the winner of an election. *See Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567, 570 (2011) (stating that there is a strong argument that “information is speech” and holding that speech that results from an “economic motive” is still subject to strict scrutiny and includes “a great deal of vital expression”).²

² Whether purchasing election-based contracts is classified as actual speech or expressive conduct makes no difference because both are equally protected by the First Amendment, and strict scrutiny applies to content-based restrictions of both. *See Brooklyn Branch of Nat’l Ass’n for Advancement of Colored People v. Kosinski*, 657 F. Supp. 3d 504, 528-29 (S.D.N.Y. 2023). To be considered expressive conduct, an activity need not communicate a “narrow, succinctly articulable message,” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995), and need not even be interpreted to convey the same message by each person, so long as a reasonable person would infer “some sort of message” from it, *see Kosinski*, 657 F. Supp. 3d. at 521 (adopting consensus view that handing out water to voters in line at the polls is expressive conduct because it could be interpreted to support voting). At the very least, purchasing an election-based contract is expressive conduct because a reasonable person can infer a prediction about the election from it.

ForecastEx's First Amendment rights are implicated for two related and mutually reinforcing reasons. First, its expressive rights are implicated when it decides which contracts to offer and decides how to display the results because the First Amendment protects compiling others' speech as much it protects the original speech. As the Supreme Court made clear in deciding that a parade organizer is protected by the First Amendment—even though the parade simply consists of others' floats: “[T]he presentation of an edited compilation of speech generated by other persons is a staple of most newspapers’ opinion pages, which, of course, fall squarely within the core of First Amendment security, as does even the simple selection of a paid noncommercial advertisement for inclusion in a daily paper.” *Hurley*, 515 U.S. at 570 (internal citations omitted). ForecastEx decides which elections to offer contracts on and sets conditions on those contracts. It is organizing the markets using its judgment much like when Google decides which search results to display. *See Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 439 (S.D.N.Y. 2014) (concluding that a search engine’s ranking of pages was “fully protected First Amendment expression”). Further, the parade in *Hurley* was highly unselective allowing nearly all applicants to march. *Hurley*, 515 U.S. at 569-70. ForecastEx is highly selective and offers contracts on only a subset of elections and global events. Further, ForecastEx prohibits various individuals likely to have inside information from trading in any contracts. Its selectivity is comparable to newspaper op-ed pages, which feature at most a small fraction of potential submissions. Therefore,

even if ForecastEx is not making predictions like the market-participants, its judgments and opinions are fully protected by the First Amendment.

Second, and relatedly, ForecastEx’s aggregation of each market participant’s speech into a clearing price for dissemination to the public at large is protected by the First Amendment, which not only values self-expression but also the rights of listeners/recipients and thus includes a mandate “to prohibit government from limiting the stock of information from which members of the public may draw.” *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978); *see also Daily Herald*, 838 F.2d at 384 (holding that exit polling is protected as expressive “speech” because the information disseminated is speech on matters of public concern). Critically, the First Amendment right to gather news and information for public dissemination is not limited to the press which has neither “a monopoly on . . . the First Amendment [n]or the ability to enlighten.” *Id.* at 782. Indeed, the Supreme Court has repeatedly referred to “a First Amendment right to receive information and ideas” across a variety of contexts. *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (citation omitted).

1. The CFTC’s Content-based Restriction Fails Strict Scrutiny.

Laws that target speech “because of the topic discussed” are presumptively unconstitutional and subject to the strictest scrutiny as content-based regulations. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015); *see also Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010) (“Premised on mistrust of governmental power, the

First Amendment stands against attempts to disfavor certain subjects.”). Thus, the CFTC’s restriction is subject to strict scrutiny, meaning that the Government must prove that a restriction “furthers a compelling interest and is narrowly tailored to achieve that interest.” *Citizens United*, 558 U.S. at 340.

Compelling Interest. Critically, compelling governmental interests to justify speech regulation do not include a general interest in insulating voters from outside influences. See *Daily Herald Co.*, 838 F.2d at 387 (“Just as with election-day broadcasts or newspaper editorials that may affect voter choices, regulating [the taking of exit polls] . . . on the basis that [broadcasting early returns while polls remain open] . . . might indirectly affect the voters’ choice [in those states] is impermissible”); see also *Vanasco v. Schwartz*, 401 F. Supp. 87, 100 (S.D.N.Y. 1975) (three-judge court) (“[W]hen the State through the guise of protecting the citizen’s right to a fair and honest election tampers with what it will permit the citizen to see and hear even that important state interest must give way to the irresistible force of protected expression under the First Amendment.”), *aff’d mem.*, 423 U.S. 1041 (1976). At bottom, the CFTC wants to restrict information for fear that voters will be swayed by what it views as an inaccurate and easily manipulable signal as compared to traditional signals like polls. But the First Amendment leaves that judgment to the people, not the CFTC.

Furthers Government Interest. The Government has provided no evidence that restricting election-based contracts will result in less manipulation and more

election integrity. To the contrary, all its claims are premised upon unjustified speculation that is undermined by the rich tapestry of empirical and historical evidence discussed in detail below. *See infra* pp. 12-21.

Narrowly Tailored: A content-based restriction on speech necessarily fails strict scrutiny when counter speech is available as a remedy to achieve the Government's stated interest. *See United States v. Alvarez*, 567 U.S. 709, 726-27 (2012). "This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth." *Id.* at 727. The evidence shows that the market harms are self-correcting here because manipulated prices induce market participants to enter orders to benefit from resulting market dislocation. *See infra* pp. 12-21.

In sum, the serious First Amendment issues raised by the CFTC's attempt to restrict these political event contracts counsel affirming the District Court's decision.

II. FORECASTEX'S EXPERIENCE WITH POLITICAL EVENT CONTRACTS REFUTES THE CFTC'S THINLY SUPPORTED PUBLIC INTEREST ANALYSIS.

ForecastEx has allowed trading in various political event contracts since this Court refused to order a stay of the District Court's decision in October 2024.

ForecastEx's experience and observation of the trading of political event contracts bely the concerns that the CFTC identified in its public interest analysis.³

A. The CEA and CFTC Rules Have Significant and Meaningful Requirements to Protect Market and Product Integrity.

Under the CEA, event contracts must be offered on federal exchanges called Designated Contract Markets ("DCMs"), such as ForecastEx. DCMs must comply with Core Principles in the CEA, and its implementing CFTC regulations. Core Principle 3 is prophylactic and limits DCMs to listing "only contracts that are not readily susceptible to manipulation." 17 C.F.R. § 38.200 (2024). Core Principle 2 backstops Core Principle 3 by requiring DCMs to make "[r]ules prohibiting abusive trade practices on the contract market." *Id.* § 38.150. Core Principle 4 provides for enforcement by requiring that DCMs "shall have the capacity and responsibility to prevent manipulation [and] price distortion . . . through market surveillance, compliance, and enforcement practices and procedures, including (a) [m]ethods for conducting real-time monitoring of trading; and (b) [c]omprehensive and accurate trade reconstructions." *Id.* § 38.250. Further, these Core Principles require DCMs to investigate and report suspicious activities to the CFTC. `

³ This Court need not reach the CFTC's public interest determination. Nevertheless, if it chooses to do so, the arbitrary and capricious character of the CFTC's determination is an independent ground for affirming.

ForecastEx has implemented these Core Principles for election-based contracts. ForecastEx determines that an election-based contract is not readily susceptible to manipulation by following the CFTC's guidance for non-price-based futures contracts. *See* 17 C.F.R. § 38. This fidelity to CFTC guidance is reflected by ForecastEx's careful gauging of market activity (including the identity of market participants) and continuous evaluation of the risks of market manipulation associated with a product. For example, inside information can be uniquely valuable to those trading in election-based contracts. Thus, ForecastEx has introduced a series of restrictions to prevent political insiders and foreigners from deploying material non-public information to gain an unfair edge over other market participants. Indeed, as a prophylactic measure, anyone likely to have confidential information regarding any contract is prohibited from participating in all ForecastEx contracts. Worse still, for aspiring market manipulators, ForecastEx vigorously monitors its markets for manipulation through a series of sophisticated surveillance tools it has adopted in adherence to the CFTC Core Principles 2 and 4. Finally, ForecastEx, through ForecastEx Rules 309 and 702⁴ (which bind its users), deploys its considerable enforcement authority to prevent, investigate, stop, and even punish any attempts at manipulation.

⁴ The ForecastEx Rulebook is available at <https://forecastex.com/regulatory> (last visited Nov. 22, 2024).

The CFTC actively regulates and monitors DCMs like ForecastEx. The CFTC conducts regular reviews of DCMs to ensure compliance with the CEA's Core Principles. These reviews examine a DCM's audit trail and trade practice surveillance, affording a level of transparency to the CFTC that it lacks over entirely unregulated offshore exchanges (such as Polymarket, which has not registered with the CFTC). Further, CFTC staff monitor traders to identify trades and traders that disrupt the market. Furthermore, the CFTC Division of Enforcement conducts investigation of alleged fraud, market manipulation, and trade practice violations. The CFTC can serve subpoenas, call witnesses, and hold hearings to determine whether a trader is manipulating an event contract. 7 U.S.C. § 9. Manipulating or attempting to manipulate the price of a commodity is also a felony under Federal law punishable by up to ten years prison. 7 U.S.C. § 13(a)(2).

The CFTC has exercised these powers in numerous enforcement actions against individuals who have engaged in banned activity. For example, the CFTC has ramped up civil enforcement actions against “spoofers” who seek to profit by injecting false information into exchanges and distorting prices to trick others into trading at artificial prices to gain an unlawful advantage over them. *See FY 2023 Enforcement Results*, CFTC PRESS RELEASE (Nov. 7, 2023).⁵ (Spoofers place small orders on one side of the book

⁵ <https://www.cftc.gov/PressRoom/PressReleases/8822-23>

and a significant order on the opposing side, which they never intend to execute.)

The CFTC fails to consider why these robust and mutually reinforcing measures are inadequate to prevent the series of theoretical harms that it raises. According to the CFTC, “opaque” and “unregulated” information sources like polls will inform voters’ predictions in election markets and these unreliable sources in turn “may increase the risk of manipulative [market] activity,” while “decreasing [its] ability to detect the manipulation.” App. 147. The CFTC’s syllogism fails because it does not explain why an increased risk of manipulative market activity results in a decrease in its ability to detect manipulation. More fundamentally, the CFTC also provides no support for its speculation that attempted manipulation will meaningfully increase by allowing election-based contracts to trade. That conclusion would strain credulity given the vast number of polls, models, and op-eds that already exist in the election prediction ambit. *See, e.g., Sorenson Communications, Inc. v. FCC*, 755 F.3d 702, 708-09 (D.C. Cir. 2014) (holding that agency action based on speculation rather than evidence is arbitrary and capricious).

ForecastEx’s experience since October 2024 in trading political event contracts belies the CFTC’s speculation. ForecastEx’s political markets are highly liquid—more than 560 million contract pairs were traded by nearly half a million unique market

participants from October 2024 to election day on November 6, 2024.⁶ As one would expect, this strong liquidity has resulted in low price volatility for ForecastEx because a liquid market can absorb massive orders without substantial price changes. Critically, it follows then that highly liquid markets are not readily susceptible to manipulation, for any one trader could not move the market prices for any significant duration. Traders know this. Unsurprisingly, the so-called Polymarket⁷ “Trump Whale” who staked \$30 million on a Trump victory did not accumulate his position all at once, instead opting to accumulate his position discreetly and over time using different cryptocurrency wallets. *See* Ferguson & Manny Rincon-Cruz, *infra* at pages 19-20, at 1. The trader likely knew large “Yes” purchases on a Trump victory would induce rapid entry by informed and profit-seeking traders taking “No” positions on Trump as the “No” became increasingly inexpensive compared to the “Yes” with each of the trader’s large purchases driving up the price for “Yes.”⁸ Notably, liquidity deters manipulation even

⁶ Liquidity describes how easily assets can be purchased or sold without impacting their prices. A greater number of market participants means greater liquidity because more participants translate to more opinions on the appropriate market price and greater odds that a large trade will be swiftly counteracted by those with opposing views rather than resulting in the price volatility that exists in an illiquid market where entry and exit is harder given the lower number of participants willing to take the opposite position.

⁷ Unlike ForecastEx, Polymarket is not registered with the CFTC.

⁸ The discreet purchasing behavior of the Whale Trader also shows that contrary to many media narratives, his motive was not to influence the public to believe that a Trump victory was more likely.

more significantly in event-based contracts than in traditional securities markets regulated by the SEC. This is the case because the SEC has multiple rules restricting investors from taking the equity equivalent of a “No” position by short selling a stock making entry for short-sellers more difficult, and thus less able to counteract large purchases of any stock.

1. **Any Attempted Manipulation Would Be Ephemeral and Self-Correcting.**

Contrary to the CFTC’s speculation, the evidence submitted by commenters and ForecastEx’s experience in these markets shows that any attempted manipulation-induced changes in market price would be ephemeral because the market would self-correct. Indeed, Stanford Law Professor and former Chairman of the SEC, Joseph Grundfest has argued that Kalshi’s market is not as vulnerable to the concerns that undermine the accuracy of polling data (including the unwillingness of respondents to respond truthfully to pollsters and the bias introduced by the evolution of the internet and cellphones into polling practice) precisely because “Kalshi market-participants have powerful incentives to accurately predict election outcomes” as “expressing any other incentive would be financially costly and adverse to a trader’s financial interests.” App. 501. Such a conclusion follows because “knowledgeable observers interested in adjusting for biases that might be influencing polling practices have incentives to express their adjustment factors by participating in a Kalshi contract, and thereby informing the rest of the market of these adjustment factors.” App. 501. Exactly right.

Election-based contracts provide citizens with superior probabilistic data regarding uncertain election outcomes because contract prices recalibrate in real time. That is precisely why Harvard Economics Professor and former Obama official Jason Furman has advanced that “a liquid, well-regulated prediction market” about election outcomes would be “highly valuable.” App. 485-86. Beyond expert opinions, the comments to the CFTC include empirical observations and economic experiments.

Several commenters to the CFTC argued in support of Kalshi by citing evidence that election trading is flourishing without market manipulation in other global democracies including the United Kingdom, Australia, Ireland, and New Zealand. App. 560. Historical evidence is consistent: studies conducted by University of Michigan Economics Professor Paul Rhode and Wake Forest University Economics Professor Koleman Strumpf include a systematic review of prediction markets dating back to 16th century Italy, 18th century Britain and Ireland, 19th century Canada, and 20th century Australia and Singapore. App. 561. Rhode and Strumpf have also conducted a historical study of the now-defunct presidential betting markets in the United States and reached the same conclusion. *See* App. 439-40 (citing Paul Rhode and Koleman Strumpf, *Historical Presidential Betting Markets*. JOURNAL OF ECONOMIC PERSPECTIVES, Vol. 18, No. 2 (Spring 2004)). Similarly compelling is the study cited in the comments to the CFTC that shows even participants who were *paid* to manipulate prediction markets, failed to do so because other traders discovered the attempts and counteracted the attempted manipulation. *See* App. 383 (citing Ryan Oprea, Robin Hanson, and David

Porter, *Information Aggregation and Manipulation in an Experimental Market*, JOURNAL OF ECONOMIC BEHAVIOR & ORGANIZATION, 60, 449-59 (2006)).

The CFTC asserts that Koleman's conclusions "existed in a very different historical context," App. 146 fn. 37, because the study analyzed events before 1940. It also attempts to undermine the study by saying that the study noted various attempts to manipulate elections. These responses are not reasoned explanations. *See Nat'l Tel. Co-op. Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009) ("The APA's arbitrary-and-capricious standard requires that agency [actions] be reasonable and reasonably explained."). Each is addressed in turn.

First, the CFTC fails to explain why the period matters. Nor could it credibly do so. Indeed, as the CFTC is surely aware, recent events have reinforced that the past is prologue regarding the accuracy of prediction markets. These markets outperformed pundits and pollsters alike in predicting the results of the 2024 Presidential election in the United States. While the prediction markets gave candidate Trump odds of prevailing between 57% and 62% on election day, contemporaneous polls showed the election was a coin toss. Based on these polls, pundit Nate Silver wrote that candidate Harris won 40,012 of the 80,000 simulations he ran on election day. *See* Niall Ferguson & Manny Rincon-Cruz, *How the Trump Whale and Prediction Markets Beat the Pollsters in*

2024, WALL ST. J. (Nov. 15, 2024).⁹ Thus, prediction markets were correct to give candidate Trump a significant edge. Further, the accuracy of prediction markets in the recent election was far from anomalous. Analysis of the very first modern election-based prediction markets in the United States shows that from 1988, when these markets first emerged through 2008, across five Presidential election cycles, they bested polls nearly 75% of the time in predicting election results. *Id.*

Second, the CFTC fails to explain why an unsuccessful attempt to manipulate an election supports its conclusion. In fact, unsuccessful attempts at manipulation undermine the CFTC's argument because they show that the existing checks to prevent manipulation are sufficient to address its concerns. That has been ForecastEx's experience.

2. The CFTC's Concerns About Spread of Disinformation Did not Pan Out.

The CFTC asserts election-based contracts may "incentivize the spread of misinformation by individuals or groups seeking to influence perceptions of a political party or a party candidate's success." App. 148. That in turn could corrode election integrity according to the CFTC. However, the CFTC offer scant evidence to justify its speculation. It cites an article analyzing a single example of a fake poll from

⁹ <https://www.wsj.com/politics/elections/how-the-trump-whale-and-prediction-markets-beat-the-pollsters-in-2024-dd11ec4e>

the once-rumored Senate matchup in Michigan between Kid Rock and incumbent Senator Debbie Stabenow that never came to pass. *See* App. 148 fn. 39 (citing Tyler Yeargain, *The Rise of Fake Polls and the Case for Criminal Liability*, 85 MO.L.REV. 129, 133 (2020)). The “fake poll” showed Kid Rock leading a hypothetical matchup and the day the poll was published, Senator Stabenow’s share-price on PredictIt fell by fifteen cents.

This evidence fails to bear the enormous weight that the CFTC puts on it. Indeed, the very same article it cites about fake polling states that “the long-term effect of the Michigan poll was virtually undetectable” given Kid Rock decided not to challenge Senator Stabenow (who won re-election). Yeargain, *supra* page 20, at 134. The article also explains that fake polling is anything but a new phenomenon, *see id.*, yet the CFTC does not adequately account for the myriad independent incentives for malicious actors to create fake polls to influence public opinion that are entirely unrelated to profiting from election-based contracts. Once again, the CFTC finds itself adrift in a sea of speculation. *See, e.g., Sorenson*, 55 F.3d at 708-09 (holding that agency action based on speculation rather than evidence is arbitrary and capricious). And ForecastEx’s experience, described above, belies the CFTC’s speculation.

B. The CFTC Provides No Support to Substantiate Its Concern That Allowing listing of Election-based Contracts Would Turn It Into an Election Cop

The CFTC’s concern that allowing listing of election-based contracts will embroil it in investigating election-related activities (including potentially the outcome of

elections), which it is ill-suited for, does not withstand even modest scrutiny for at least three closely related reasons. First, election law is a mix of some federal and mostly state law, and implied pre-emption of state law is heavily disfavored. *Cf. Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (holding that Congress must “enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power.”) Second, in the ambit of enforcing federal election law, Congress has tasked the Federal Election Commission (FEC) with that duty. Congress has never hinted that the CFTC should or must assist the FEC with that duty, and the CFTC cannot assume such a major role in regulating an area of vast political and economic significance without clear congressional authorization, so it need not worry. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2605 (2022). Third, as the CFTC is aware, it has not come to police myriad areas related to contracts listed on the exchanges over which it has jurisdiction. To illustrate, it is indisputable that the CFTC has not turned into the weather police or agricultural police even though weather and agricultural derivatives trade on exchanges it oversees. Those niche responsibilities remain with the United States Department of Agriculture. Examples abound. For over thirty years and across multiple areas, event contracts have been permitted without any delegation of responsibility to the CFTC for policing the subjects that the contracts relate to: the CFTC is not the cop for regional insured property losses (because state insurance regulators are), bankruptcy proceedings (because state courts are), changes in corporate officers (because the SEC is), GDP data accuracy (because the Department of Commerce is), or warehousing and transporting

energy products (because the Federal Energy Regulatory Commission is). The CFTC does not provide any valid basis for distinguishing election contracts from these other derivatives, because there is no such fundamental difference. Nor does it argue that it needs and has substantive regulatory powers over all the myriad activities and events referenced by the derivative markets and products it regulates, including those areas described above. The CFTC neither needs nor has such powers, and so its concerns about becoming an accidental “election cop” are unfounded.¹⁰

¹⁰ The availability of post-trial motions for staying the mandate pending remand, *see* D.C. Cir. R. 41(a)(2), does not prohibit raising the issue in merits briefing, *see Comcast Corp. v. F.C.C.*, 579 F.3d 1, 11 (D.C. Cir. 2009) (Randolph, J., concurring) (explaining that because no litigant relishes “anticipating a loss,” requiring the parties to address the subject of whether to stay the mandate in case of a loss would waste their time). If this Court reverses on statutory construction grounds and remands for the District Court to determine the public interest question, it should stay its mandate until the District Court decides that question per the long-standing law of this Court that establishes factors regarding whether a stay should be granted. *See, e.g., Virginia Petroleum Jobbers v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *WMATA v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673–74 (D.C. Cir. 1985) (*per curiam*). These factors include the probability of prevailing on remand; the probability of irreparable harm absent a stay; the prospect that others will be harmed if this Court grants a stay; and the public interest in granting a stay. Given the CFTC’s concerns are premised on speculation, no party will be harmed by staying the mandate pending remand. For the same reason, the CFTC will likely lose on the merits. Moreover, public interest counsels taking a cautious approach to the First Amendment to avoid a chilling effect on other speech that may never enter the market because of the CFTC’s restrictions. For example, the CFTC’s restriction could very well chill the offering of other event contracts that investors, citizens, and traders find logically indistinguishable from election-based contracts with respect to the CFTC’s purported concerns. Finally, there would be irreparable harm to exchanges that offer election-based contracts absent a stay because all existing contracts would be disrupted, and traders would be unlikely to return to the exchanges.

CONCLUSION

This Court should affirm the District Court's judgment.

Date: November 22, 2024

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1) and D.C. Circuit Rule 32(e)(2)(C), I hereby certify that that the foregoing Brief of *Amicus Curiae* is proportionately spaced; uses a Roman-style, serif typeface (Garamond) of 14-point; and contains 5,764 words, exclusive of the material not counted under Federal Rule of Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of *Amicus Curiae* with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on November 22, 2024.

I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

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