

Comments Submitted on Behalf of Aristotle International, Inc. and its Subsidiaries

Regarding

Commodity Futures Trading Commission Proposed Rule on Event Contracts

17 CFR Part 40, RIN 3038-AF14

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These comments are submitted on behalf of Aristotle International, Inc. and its subsidiaries (Aristotle). Aristotle, through its subsidiary PredictIt, Inc., provides services to the PredictIt political prediction market that is operated by Victoria University of Wellington (New Zealand) pursuant to an No Action Letter issued by the CFTC. Aristotle has also applied to the CFTC for permission to operate a Designated Contract Market and a Designated Clearing Organization intended for trading and clearing event contracts.

Request for Hearing; Request to Testify

Even Commissioners supporting issuance of this NPRM expressed regret that the Commission had not held roundtables as it typically does in seeking input on important policy issues. Only twice in the history of commodities markets, both times by legislation, have entire classes of products been banned. Thus, this proposal is of historic proportions. We request that the Commission hold hearings or roundtables on this proposal. The back-and-forth of oral presentations sharpens arguments and gives proponents and opponents an opportunity to dispute claims directly rather than writing past one another. If a hearing or roundtable is held, Aristotle respectfully requests an opportunity for a representative to testify.

The NPRM Evidences a Pre-judged Conclusion

The portions of the NPRM addressing election contracts appear to be an exercise in attempting to justify a pre-determined conclusion. The evidence of this disposition is widespread and varied and includes:

- The Chair's repeated comments made in Congressional hearings and industry fora about the intent to prohibit election markets
- The failure to hold roundtables or use other methods of gaining regulated entity input ordinarily used by the CFTC in making regulatory and policy decisions
- The rush to issue a proposed rule without the important Appendix E
- The failure to address and benefit from the voluminous comments on election contracts submitted in two recent Kalshi proceedings
- The failure of the Commission to review or attempt to derive lessons from its 32-year history of allowing experimental election markets at Iowa Election Markets and PredictIt
- The exclusive focus on negative factors in the public interest discussion

- The failure to consider alternatives to a ban such as position and participant limits
- The strained and stretched definition of gaming that betrays result-oriented reasoning

Several of these failures are addressed in more detail below but the combination of these factors displays a prejudice that warrants scrapping the current NPRM and initiating a more deliberative and reasoned approach to election contracts.

The Heavy Reliance on the Lincoln-Feinstein Colloquy is Misplaced

The Commission's NPRM refers over twenty times in at least nine separate areas¹ to a supposed colloquy between then-Senators Lincoln and Feinstein. The Commission relies on these references to support key determinations involving the interpretation of the term "gaming" and of the "public interest" test (which the Commission improperly equates with and collapses into the pre-CFMA economic purpose test). The Commission's heavy reliance on the colloquy for these and other key determinations is, to put it mildly, misplaced. That colloquy never occurred. That is to say that the words printed in the Congressional Record were never spoken on the floor of the Senate.² Nor can the colloquy have played any role in informing the understanding of the Congress as to the meaning of CEA 5c(c)(5)(C) because it was submitted to the Congressional Record and printed only after passage of the legislation.

Statements inserted into the Record after passage of the bill have been dismissed as "represent[ing] only the personal views of [the] legislators" involved. *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 639 n.34 (1967). Even in defending the use of legislative history, former Judge Abner Mikva³ states flatly that legitimate legislative history "excludes any post enactment declarations." Abner J. Mikva, et al., *The Muzak of Justice Scalia's Revolutionary Call to Read Unclear Statutes Narrowly*, 53 SMU L. Rev. 121, 131 (2000) <https://scholar.smu.edu/smulr/vol53/iss1/7>. Writing elsewhere, Mikva dismissed such statements as "a congressional version of a psychodrama". Mikva, *Reading and Writing Statutes*, 28 S. Tax. L. REV. 181, 185 (1986).

Thus, the CFTC's heavy reliance on this never-spoken, never-heard colloquy for key elements of the proposed rule (and for prior rulings on related topics) is entirely unsupported. This lack of support fatally wounds both the CFTC's proposed expansive definition of gaming and its effort to read the public interest test enunciated by Congress narrowly by attempting to revive the repealed economic purpose test. These flaws touch several specific elements of the

¹ NPRM voting copy page 10, page 23, page 27, pages 38-39, pages 40-41, page 42, pages 42-44, page 49, pages 49-50, page 71.

² 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.

³ Mikva was a long time Member of Congress, Chief Judge of the DC Circuit, White House Counsel, and coauthor of a leading law school text on legislative process.

proposal and are sufficiently thoroughgoing that the Commission should withdraw the NPRM so heavily dependent on such unreliable authority and reexamine its approach.

Failure to Examine or Draw Lessons from Relevant Commission-Approved Markets

For 32 years the Commission has allowed Iowa Electronic Markets to operate under a No Action Letter offering event contracts on US and non-US elections. That period is well over half of the entire time the CFTC has existed. For ten years, Victoria University of Wellington has operated the PredictIt market offering event contracts on elections and, until the CFTC objected, related topics. A minute-by-minute ticker of PredictIt trading statistics is available on the Bloomberg wire. PredictIt statistics are widely cited in the financial media. Presumably a major point of allowing experimental academic research markets under No Action Letters (NALs) is to draw lessons from those markets. IEM and PredictIt trading statistics have been widely used in academic studies.

The Commission had an event contract rulemaking on its unified regulatory agenda for approximately a year and a half prior to issuance of this NPRM. There is no evidence in the NPRM that the Commission made even a cursory effort to understand and draw lessons from these Commission-approved efforts. Both markets are mentioned but relegated to footnotes. No actual experience related to the markets is mentioned. The NPRM speculates about potential market abuses but failed to examine actual market experience. The NPRM speculates about harms but ignores the demonstrated public benefits of these and other prediction markets. It is pertinent to note relative to the speculative harms to elections conjured by the Commission that the UK, Ireland, and Australia, all with political, economic, and social systems similar to the US, have permitted regulated financial speculation on elections for decades without substantial problems.

In no other area of policy would the Commission consider proceeding to an NPRM without first gathering input from markets and market participants already engaged in the areas to be affected by the proposed regulations.

As noted at the outset, this striking incuriosity about event markets the Commission approved and allowed to operate for over three decades gives the strong appearance that the outcome of the rulemaking was pre-decided, and that evidence was optional and perhaps welcome only when it fit the conclusion. The Commission should suspend the current NPRM and return to the drawing board to examine the experience, beneficial or harmful, of the election prediction markets the Commission allowed to operate for such extended periods.

Elections are not Games and Election Contracts are Not Gaming

The Commission's entire effort to ban election contracts can be boiled down to the argument that elections are contests and contests are gaming. This argument is a glaring example

of the logical fallacy of equivocation.⁴ The effort also rests on a stretched and selective choice of definitions from state gaming law that is further evidence of outcome-based reasoning. Political contests are often referred to, even in legal contexts to as campaigns.⁵ The term campaign was converted from military to political⁶ use and indeed the term is still used to describe both political and military contests. That dual usage does not, however, convert elections into battles (though that term is also used in both political and military contexts) or wars subject to the prohibition of CEA 5c(c)(5)(C)(i)(IV). By that logic, taking speculative positions in futures contracts would be prohibited since doing so is often referred to as a “bet”.

The Proposed Rule’s definition of “gaming” is both overbroad and under-inclusive, and its use of the definition to ban election contracts is inappropriate. The CFTC proposal would prohibit contracts that relate to a “a contest of others,” and it specifies that contracts relating to the outcome of elections would be prohibited under this Proposed Rule. The Commission must recognize that its proposed definition of “gaming” threatens to swallow up the entire category of event contracts. This definition also ignores a critical component of the word “gaming,” which is its nexus with events that can reasonably be classified as games. Elections are not games, and the CFTC’s attempt to classify them as such ignores the very significant real-world effects of their results.

In the absence of a definition of gaming in the CEA or federal law the CFTC refers to state law definitions of gaming or gambling. The most common definition of gaming under state law involves wagering money on a future contingent event not under the control of the participants to the wager. The CFTC rejects this most common definition, however, because it obviously would swallow up every futures contract ever written. The Commission then latches on to a less common state law definition involving contests and applies it as if there were no legal or logical distinction between elections and an effort to guess how many jellybeans are in a large glass jar. The selection of the second-best state law definition is more evidence of the outcome-based reasoning underlying the NPRM.

And even if we accept the second-best state law definition of gaming, the equivocal use of the term contest fatally undermines the Commission’s proposed application. Elections are not contests at all properly understood and elections are certainly not contests within the meaning of any state gaming law. Contests in state law definitions are competitions between two or more individuals or groups, often involving skill as distinguished from chance.⁷ Though sometimes referred to as “contests”, elections properly understood are not competitions between candidates. Elections are a process of self-government involving the selection by citizens of persons to represent them in lawmaking bodies or executive positions. Citizens, many of whom want to

⁴ Using a key word or phrase in an ambiguous way, e.g. “I’d rather have a ham sandwich than eternal happiness because nothing is better than eternal happiness and a ham sandwich is better than nothing.”

⁵ See, e.g. the Federal Election *Campaign* Act.

⁶ <https://www.merriam-webster.com/wordplay/when-did-campaign-become-political>

⁷ Oregon, ORS 646A.803; Virginia: Fantasy Contest is one where “winning outcomes reflect the relative knowledge and skill of the participants....” Code of Virginia § 59.1-556. Washington (contrast): “Contest of chance,” as used in this chapter, means any contest, game, gaming scheme, or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein. RCW 9.46.0225. Wisconsin: contest involves “skill, speed, strength, or endurance”. Wisc Stat 945.01(1)(b)

participate in the markets the Commission is threatening to ban, are not bystanders in elections, they are the participants, and they are not seeking a prize (often a key element of state law definitions of contests), they are seeking to govern themselves. Thus, elections are not contests even remotely within the activities sought to be regulated by state gaming law.

Proof of this proposition lies in the state gaming laws themselves. Not a single state that outlaws wagering on contests reads that prohibition as prohibiting wagers on elections. Many states separately ban wagering on elections often within the same section of their law banning wagering on contests. If the state “contest” bans prohibit wagering on elections, the separate state election wagering prohibitions would violate the rule against surplusage, a fundamental canon of statutory interpretation. Can all twenty or thirty states the CFTC is relying on for their contest definitions have misunderstood their own laws so fundamentally? Can none of those states have realized that the ban on wagering on contests already covered wagering on elections? Or might the CFTC’s effort to regulate by equivocation rest on a misreading and impermissible stretching of those state laws?

Even if we accept the unfounded and erroneous adaptation of the state law definition of contest, the Commission’s proposal is unacceptably overbroad. The Commission is proposing to redefine gaming, in the context of 17 CFR § 40.11, to refer to “(i) the outcome of a contest of others;⁸ (ii) the outcome of a game involving skill or chance; (iii) the performance of one or more competitors in one or more contests or games; or (iv) any other occurrence or non-occurrence in connection with one or more contests or games.”

One of these things is not like the others. The second, third, and fourth prongs of the proposed definition maintain the nexus between gaming and its root word, “game.” The first prong, on the other hand, severs this nexus⁹ and captures a broad set of activities, far broader than Congress could possibly have intended to capture when it wrote CEA section 5(c)(5)(C).¹⁰ In fact, this broad redefinition of gaming risks altogether swallowing almost the entire category of Event Contracts.

Consider, for example, a Contract on the number of prescriptions for a given medication, such as Ozempic. This contract is allowed under the current rules and a Designated Contract Market (“DCM”) currently offers futures contracts on such topics.¹¹

Under the new rule, the exchange would have to determine whether the contract can be construed as “involv[ing]” a contest, or anything involving a struggle for superiority or victory,

⁸ The Commission also clarifies that the word “contest” includes “a struggle for superiority or victory.” Proposed Rule at 48974 n.65.

⁹ The CFTC justifies this language, in part, through reference to state gaming statutes that refer to contests. The CFTC ignores that many of these state statutes use the word contest in reference to games, or in reference to “contests of man or beast,” making it clear that these statutes were designed to refer to sporting events and similar activities. See, for example, Ga. Code Ann. section 16–12–21(a)(1) (“A person commits the offense of gambling when he makes a bet upon the partial or final result of any game or contest or upon the performance of any participant in such game or contest.”); Tex. Penal Code Ann. section 47.02(a) (“A person commits an offense of gambling if he: (1) makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest”); Iowa Code § 725.10 (“Any person who records or registers bets or wagers or sells pools upon the result of any trial or contest of skill, speed, or power of endurance of human or beast... shall be guilty of a serious misdemeanor.”)

¹⁰ The Commission must also reconsider its use of the word “contests” in other prongs of the definition.

¹¹ <https://kalshi.com/markets/weightdrugsq/ozempic-and-wegovy-prescriptions-increase#weightdrugsq-2-24>

over others. The exchange would also have to note that in its Kalshi Order, and in the subsequent litigation relating to the Order,¹² the Commission defined “involve” as loosely as possible, in such a way that any feasible relationship between the contract and an enumerated category could trigger the regulation.¹³ The exchange would also note that the CFTC based its 2023 rejection of Kalshi’s proposed contracts, in part, on the fact that the media sometimes uses the word “contest” in connection with the underlying of the proposed contracts.¹⁴

The exchange would reasonably conclude that pharmaceutical manufacturers are engaged in contests against their competitors to sell medications and acquire market share. A drug manufacturer, such as Ozempic producer Novo Nordisk, would certainly describe itself as being engaged in a “struggle for superiority” in market share against competitors like Mounjaro producer Eli Lilly. Both of these companies and products are further engaged in competition against traditional weight loss programs offered by companies like Weight Watchers and Noom. The exchange would have to conclude that it could not offer this contract.

The exchange would similarly have to shelve its plans to offer a contract on whether a corporate CEO would remain in office¹⁵ because the CEO could reasonably be described as being in competition with rival candidates for his position. A contract on a corporate merger¹⁶ would also be off the table because corporations frequently make competing offers and use buyouts to build market share and battle for supremacy in the marketplace.

The exchange would then have to conclude that the proposed rule prohibits contracts on US semiconductor production growth¹⁷ because the United States and China are often described in media as being in a competition, or battle for supremacy, over the production of these chips.¹⁸ A contract on advancements in artificial intelligence¹⁹ would similarly be imperiled because it relates directly to competition between different tech companies and nation states.²⁰

The CFTC, through its proposed rule, may not have intended to ban these types of contracts. The CFTC overtly wanted to ban contracts relating to elections and awards shows. But, for unclear reasons, the CFTC chose to do so by promulgating an overbroad definition of gaming whereby any event contract that could reasonably be described as involving a contest, and that is not explicitly defined as being an economic indicator, would be prohibited.

The plain text of the Commodity Exchange Act, including the choice of the word “gaming,” makes it clear that Congress intended to prohibit markets on games. The Feinstein-Lincoln colloquy that the CFTC has repeatedly and misleadingly cited to shows an intent to

¹² See, for example, Defendant Commodity Futures Trading Commission’s Cross-Motion for Summary Judgment and Opposition to Plaintiff’s Motion for Summary Judgment, 20-23, KalshiEx LLC. V. CFTC, Case 1:23-cv-03257-JMC, (D.D.C. 2024).

¹³ Kalshi Order at 5-7.

¹⁴ Kalshi Order at 8-10.

¹⁵ <https://kalshi.com/markets/amcceochange/new-amc-ceo#amcceochange>

¹⁶ <https://www.cftc.gov/IndustryOversight/IndustryFilings/TradingOrganizationProducts/14272>

¹⁷ <https://kalshi.com/markets/semiprodh/us-semiconductor-production#semiprodh-24>

¹⁸ <https://www.bloomberg.com/news/newsletters/2024-05-10/the-us-china-semiconductor-rivalry-is-entering-a-new-phase>

¹⁹ <https://kalshi.com/markets/chinatoplmm/china-top-llm#chinatoplmm-25>

²⁰ <https://www.aei.org/op-eds/the-uaes-ai-dreams/>

prohibit 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.”²¹

The CFTC’s alternative view of the Senators’ intent has been expressly rejected by Senator Lincoln herself, who submitted a comment on this proposed rule. Senator Lincoln clarified that the CFTC “misinterprets the intent of [her] 2010 Senate colloquy[...] The activity that [she and Senator Feinstein] intended to keep out of the futures markets is recreational gambling for entertainment[.]” Senator Lincoln also confirmed that “gaming” was intended to be defined in reference to “playing a game,” and made clear that “[e]lections are not games.”²²

Per Senator Lincoln, “[t]he 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. If we had intended to include these events, we would have done so explicitly.”²³

The CFTC now knows that it is interpreting the statute, using a piece of legislative history, in direct opposition to the intent of the relevant legislators. The proposed rule must be reconsidered in light of the clarification by Senator Lincoln.

The plain text of the Commodity Exchange Act, including the choice of the word “gaming,” makes it clear that Congress intended to prohibit markets on games. The Feinstein-Lincoln colloquy that the CFTC has repeatedly and misleadingly cited to references an intent to prohibit 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 This proposed rule strays too far from this intent.

The CFTC is correct to argue that it needs to be on the lookout for contracts that would be functionally indistinguishable from sports gambling.²⁴ The notion though, that the Congressional prohibition on contracts that relate to gaming could possibly have been intended to sweep up any event contract that can reasonably be tied to a competition is ludicrous. The CFTC has provided no evidence whatsoever that Congress intended to use the word “gaming” in a way that prohibited contracts on medication prescriptions, semiconductor production, corporate actions, or scientific advancements. Congress also did not use the word gaming to refer to elections.

In response to the NPRM’s specific request for comment on the possibility of regulating election contracts as “similar to gaming,” for essentially these same reasons the Commission may not use the similar activities category to expand the definition of gaming.

²¹ See 156 Cong. Rec. S5906-07 (daily ed. July 15, 2010) (statements of Senator Dianne Feinstein and Senator Blanche Lincoln), available at <https://www.congress.gov/111/crec/2010/07/15/CREC-2010-07-15-senate.pdf> (“Feinstein-Lincoln colloquy”).

²² Comment of Senator Lincoln, <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=74357>

²³ *Id.*

²⁴ A DCM could, for example, propose a contract on which city would host a game of the Major League Baseball (“MLB”) World Series. Because MLB games are typically played in one of the stadiums of a competing team, this contract would correlate directly with the winner of the league playoff rounds that immediately precede the World Series. The CFTC would be correct to determine that this contract involves gaming under 17 CFR § 40.11.

The Commission clearly began at a conclusion—that it wanted to ban election contracts via rulemaking—and built this definition to arrive at that conclusion. The Commission must address the unintended consequences of this broad definition and either propose a narrower definition of gaming—one that recognizes that gaming involves games—or scrap this Proposed Rule.

The NPRM’s unbounded definition of the term “involve” as a daisy chain to regulate any activity that can be connected to an enumerated activity is impermissibly broad.

Section A.2. of the NPRM asks for comment on the Commission’s proposal to remove the terms “relate to” and “reference” from Section 40.11, retaining only the statutory term “involve.” We agree that revising the regulations to track the statute more directly is beneficial. The Commission, however, appears to be engaging in a subterfuge by arguing that “involve” should be defined as including activities that “relate to or affect” enumerated activities. Removing “relate to” from the regulatory text and reinserting it via a definition of “involve” that will not be published in the CFR is worse than no change at all because it offers the appearance of closer adherence to the statutory text while masking the reality of continuing to adhere to an impermissibly broad interpretation of the term involve.

The CFTC errs in limiting its NPRM inquiry of the appropriate definition of “involve” to a dictionary search. The Supreme Court has repeatedly considered the appropriate breadth to grant to the term “involve” when attempting to define or expand the reach of prohibited conduct.²⁵ The Supreme Court has held, for instance that an unwanted physical touching does not “involve” the use of physical force.²⁶ The high court concluded that a labor union’s refusal to load a ship for political reasons does not “involve” a labor dispute.²⁷ The court has held that “burglary, arson, extortion, and the use of explosives” involve “conduct that presents a serious potential risk of physical injury to another”.²⁸ The Court has concluded that a DUI offence does not “involve[] conduct that presents a serious potential risk of physical injury to another”.²⁹

What these otherwise disparate cases have in common is a rigorous examination of the link required for one activity or action to “involve” a statutory classification. In contrast, the NPRM seeks to rope in virtually any activity that can somehow be associated with enumerated activity. In the face of extensive Supreme Court jurisprudence on precisely this issue the NPRM’s lazy reference to ordinary dictionary meanings will not survive the scrutiny triggered by *Loper Bright*. This is yet another reason that the CFTC should withdraw the current NPRM and reinitiate a transparent and fully APA-compliance rulemaking process.

Election Contracts Serve Economic and Social Purposes

Elections are not games. Elections are real world events with highly significant consequences that reverberate throughout the economy. Some of these consequences are clear

²⁵ See, e.g. *Jordan v. De George*, 341 U.S. 223 (1951) holding that crimes of fraud “involve” moral turpitude. *Dunn v. Commodity Futures Trading Comm’n*, 519 U.S. 465 (1997). *Kawashima v. Holder*, 565 U.S. 478 (2012).

²⁶ *Johnson v. U.S.*, 559 U.S. 133 (2010).

²⁷ *Jacksonville Bulk Terminals v. Longshoremen*, 457 U.S. 702 (1982).

²⁸ *Taylor v. United States*, 495 U.S. 575, 597 (1990).

²⁹ *Begay v. United States*, 553 U.S. 137, 148 (2008).

and predictable, while others may take years to understand. This is in dramatic contrast to games which, using the ordinary dictionary definition of the word, fundamentally relate to entertainment or sport.³⁰

The Commission's Proposed Rule fails to address this clear and obvious distinction between elections and games, though the Commission has articulated a rationale, however weak, in its previous Nadex and Kalshi orders. In those orders, the CFTC characterized the link between elections and their consequences as "diffuse and unpredictable," and inaccurately claimed that Commenters in previous comment periods had failed to demonstrate specific links between elections and economic consequences.³¹ The CFTC's conclusion, which is mirrored in the Proposed Rule's insinuation that elections are games, is divorced from reality, and ignores clear evidence that investors already consider potential consequences of elections in their investing strategies and hedge against unfavorable election results.

PredictIt Data, for example, already appears on the Bloomberg Terminal where investors can see current probabilities of election winners. BlackRock offers a Geopolitical Risk Indicator, which highlights several potential risks, including those of US-China strategic competition and technology decoupling, and climate policy gridlock, which are directly impacted by American congressional and presidential elections.³² A recent Financial Times article described how investors are now hiring political scientists for guidance on how to navigate geopolitical changes because geopolitical risk is now an essential part of investing to a greater extent than it has been since the end of the Cold War.³³ Per the Financial Times, BlackRock and Optiver both describe geopolitical issues as being among the most important trends impacting markets, with Optiver claiming that more than half of the top tail risks for markets are political.³⁴ The CFTC must explain why it disagrees with Bloomberg, BlackRock, and Optiver, among others regarding the economic consequences of elections.

Political risk insurance is already widespread,³⁵ and political risk is a staple topic at leading business schools including Wharton,³⁶ Stanford,³⁷ and Harvard.³⁸ While political risk insurance has traditionally been offered to American or European-based companies doing business in Africa, Latin America, and parts of Asia, coverage for US-based risks is now under

³⁰ <https://dictionary.cambridge.org/us/dictionary/english/game>

³¹ Kalshi Order at 16-17. The Commission's failure to incorporate comments it received in the two referenced comment periods into this rulemaking is striking.

³² "BlackRock Geopolitical Risk Indicator." BlackRock, www.blackrock.com/corporate/insights/blackrock-investment-institute/interactive-charts/geopolitical-risk-dashboard. Accessed 31 Jan. 2024.

³³ <https://www.ft.com/content/23ce295d-bf65-47fd-bebd-808b5a7bcab5>

³⁴ *Id.*

³⁵ Political Risk Insurance, NAIC Updated February 25, 2021; <https://content.naic.org/cipr-topics/political-risk-insurance> See, e.g. <https://starrcompanies.com/Insurance/Casualty/Political-Risk>; https://www.allianz-trade.com/en_global/news-insights/business-tips-and-trade-advice/what-is-political-risk-and-how-to-protect-against-it.html; <https://www.aig.com/business/insurance/political-risk>; <https://www.lloyds.com/conducting-business/risk-locator/business-guidance/political-risk>; <https://www.marsh.com/us/services/politicalrisk/insights/political-risk-map-2021.html>; <https://www.aon.com/risk-services/crisis-management/political-risks.jsp>.

³⁶ <https://knowledge.wharton.upenn.edu/article/companies-can-successfully-navigate-political-risks/>.

³⁷ <https://fsi.stanford.edu/publication/political-risk-how-businesses-and-organizations-can-anticipate-global-insecurity>.

³⁸ <https://hbr.org/2018/05/managing-21st-century-political-risk>.

discussion.³⁹ During a previous comment period, a commentator described how big banks already design packages to hedge American political risk to clients.⁴⁰

American elections have clear and predictable economic consequences. One paper found that a full 4.35 percent of US companies could be labeled as “blue”, meaning their stocks perform better under a Democratic President.⁴¹ The same study found that “red” firms constitute 5.11 percent of stocks. Red and blue stocks are subject to 48 percent higher volatility than colorless ones in election years. An investment strategy of longing and shorting opposite-colored stocks at the beginning of a new administration was projected to generate an abnormal return of 9.3 percent per year.⁴²

Many of the economic effects of elections are both direct and entirely predictable. Candidate Biden, for example, repeatedly campaigned on his plan to revoke the permit for the Keystone XL Pipeline.⁴³ He followed through with this promise on his first day in office.⁴⁴ Investors in Keystone’s operator and related companies clearly could have hedged their positions based on projected outcomes in the Presidential race. As discussed below, partisan control of Congress has similarly predictable consequences for red and blue stocks, leading to obvious hedging opportunities.

The CFTC previously tried to describe these consequences as “diffuse and unpredictable” because there are several steps between an election and the enactment of a law, such as approval by both Chambers of Congress and a presidential signature.⁴⁵ Investors understand this and can already set their expectations of an election’s economic consequences accordingly. Nor is it the CFTC’s role to decide for investors what instruments provide the best fitting hedges; virtually any hedging strategy involves basis risk.

Consider, for example, the market reaction to the news that Democrats had won control of the Senate, clinching a legislative trifecta (meaning that Democrats held majorities in both the Senate and the House of Representatives, and the President was a Democrat), after the Georgia runoffs in the 2020 elections.⁴⁶ The iShares Global Clean Energy ETF (\$ICLN), an index of equities in the clean energy sector (which was substantially affected by the Budget Reconciliation process), rallied after Democrats won control of the Senate, increasing by a full

³⁹<https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/political-risk-coverage-for-us-may-be-live-issue-after-riots-shake-country-62627872>; <https://www.policyholderpulse.com/insuring-political-risk-united-states/>.

⁴⁰ <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69666&SearchText=lisboa>

⁴¹ Yan, Yuxing, “Red vs. blue stocks: politics and profitability of firms,” PROCEEDINGS OF 27TH INTERNATIONAL BUSINESS RESEARCH CONFERENCE June, 12 2014.

⁴² *Id.* at 190.

⁴³ Oliphant, James, “Democrat Biden Says He Would Kill Keystone XL Pipeline,” REUTERS, May 19, 2020, [available at](https://www.reuters.com/article/idUSKBN22V0RF/) www.reuters.com/article/idUSKBN22V0RF/.

⁴⁴ E.O. 13990, *Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis* (Jan. 20, 2021).

⁴⁵ Kalshi Order at 16.

⁴⁶ Markets did not even need to wait for the races to be called. A recent paper found “striking correlations” between movements in markets and PredictIt data as the Georgia election results were being reported. See DeHaven, Matthew, Hannah Firestone, and Chris Webster. “Minute-by-Minute: Financial Markets’ Reaction to the 2020 US Election.” arXiv preprint arXiv:2407.03527 (2024).

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.

Investors understood that Democrats could use the Senate Budget Reconciliation process to pass President-Elect Biden's clean energy agenda, but could not use it to pass other items discussed on the campaign trail. Investors did not consider it likely⁴⁷ that Congress would pass other Democratic campaign priorities, such as a minimum wage increase, that could not easily be included in the Budget Reconciliation process.⁴⁸

Democrats, along party lines, then proceeded to pass two major bills using the Budget Reconciliation process, known as the American Rescue Plan and the Inflation Reduction Act, which included \$1.843 trillion^{49,50} in new spending through 2031, much of which related to clean energy subsidies. This spending was well within investor expectations of what a Democratic trifecta could focus its lawmaking power on.

The economic effects of elections are not always tied to the passage of legislation and are sometimes tied to the failure to pass legislation. If, for example, Republicans win both the American Presidency and the Senate in 2024 but Democrats win control of the House of Representatives, green energy companies would view this result with cautious optimism. This is because gridlock in Washington would likely result in a failure to roll back the subsidies and tax breaks for green energy contained within the Inflation Reduction Act.

The upcoming American presidential election is another demonstration of the economic consequences of elections. The nominees for both major political parties lay out starkly different visions for America's economy. One candidate plans to introduce across-the-board import tariffs, a sector-specific import ban on products made in China, an extension of the 2017 Tax Cuts and Jobs Act, tax breaks for fossil fuel producers, and the revocation of much of the Inflation Reduction Act, among other items.⁵¹ The other candidate has proposed a defense of the Inflation Reduction Act, further appropriations of subsidies for American semiconductor manufacturers, at least a partial rollback and expiration of the 2017 Tax Cuts and Jobs Act, universal pre-school and child-care subsidies, the expansion of legal protections for labor unions,

⁴⁷ A PredictIt market asking if the Democratic trifecta 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)

⁴⁸ Sozzi, Brian, "Don't Expect a \$15 Federal Minimum Wage: Goldman Sachs," YAHOO! FINANCE, Feb. 8, 2021, finance.yahoo.com/news/dont-expect-a-15-federal-minimum-wage-goldman-sachs-130431033.html.

⁴⁹ 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.

⁵⁰ 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.

⁵¹ <https://abcnews.go.com/Business/trumps-plans-economy-potential-2nd-term/story?id=106097659>

and tax increases for high-earning individuals, among other policies.⁵²

These policy differences and the emergence in July of a small but clear Trump lead in polling and prediction markets even led to a “Trump Trade” widely discussed in financial media.⁵³ When the financial markets attach a candidate’s name to a specific trading strategy the CFTC is simply ignoring financial reality when it denies that elections have economic consequences that are predictable and significant enough for investors to base decisions on.

Investors understand that Presidents and members of Congress cannot implement everything that they discuss on the campaign trail. Investors though, have demonstrated that they can figure out how bills become laws, what a President can do without Congress, and what can or cannot pass through a divided Congress. Elections—both presidential and congressional—have enormous and predictable economic consequences. Even average voters grasp this fundamental point; the Director of the University of Michigan Surveys of Consumers indicates that consumer’s “expectations for the economy hinge on the results of the [2024] presidential election.”⁵⁴

Recent foreign elections demonstrate that the direct economic link between elections and market movement is a global phenomenon. Bond markets calmed both in anticipation of and in the aftermath of the landslide victory for the United Kingdom’s Labour party in the 2024 general election.⁵⁵ The London-based Financial Times linked the market movement directly to the election result and “the prospect of a period of political stability” in the country caused by the scale of Labour’s victory.⁵⁶ This stands in contrast with France, where political fragmentation contributed to a decision by S&P Global to downgrade French government bonds.⁵⁷ French

⁵² <https://www.economist.com/finance-and-economics/2024/01/30/bidenomics-is-an-unfinished-revolution-what-would-four-more-years-mean>

⁵³ The ‘Trump Trade’ Is Back: What It Means for Investors, Esha Dey, Bloomberg, July 17, 2024 available at <https://www.bloomberg.com/news/articles/2024-07-17/the-trump-trade-is-back-what-it-means-for-investors>; “Gold, Not Dollar, Is the Best Trump Trade, Survey Shows,” Carter Johnson and Yvonne Yue Li, Bloomberg News, July 28, 2024.; “And even if Trump is at least six months away, markets are already reacting, with Trump-sensitive sectors like energy rising as a Trump win becomes more likely on the betting markets.” Peter St. Onge “Are We on Verge of Stagflation?” The Daily Signal, July 22, 2024. Available at: <https://www.dailysignal.com/2024/07/22/major-banks-warn-disaster/>; “[B]efore the Biden announcement it seemed that the market had decided we were heading for a Trump victory, and we even had a “Trump Trade.” ... “The change in the election landscape will add to volatility.” Knights of Columbus Asset Advisors, CIO Corner, July 27, 2024, available at <https://www.kofcassetadvisors.org/kadvs/en/resources/cio-corner/same-fight-different-opponent.html>; The “increased the market-implied probability of [Trump’s] victory in November’s presidential race” led to record performance in the Russell 2000 small stock index. “Record speed-run into small caps leaves US stock market searching for catalysts,” Sherwood News, Luke Kawa, 7/17/2024. Available at <https://sherwood.news/markets/small-caps-russell-2000-tech-demand-catalyst/>; Trump Media, gun stocks surge after assassination attempt By Medha Singh and Noel Randewich, Reuters, July 15, 2024, available at <https://www.reuters.com/markets/us/trump-media-crypto-stocks-jump-odds-trump-victory-rise-after-shooting-2024-07-15/>; <https://www.cnbc.com/2024/07/08/trumps-better-election-odds-after-debate-are-already-moving-markets.html> Published July 8, 2024, Jeff Cox, CNBC.

⁵⁴ Presidential Election Expectations, Joanne Hsu, PhD, available at <https://data.sca.isr.umich.edu/fetchdoc.php?docid=76206>

⁵⁵ <https://www.ft.com/content/07287c5b-8d3e-498e-bb1b-480342d95f17>

⁵⁶ *Id.*

⁵⁷ <https://www.reuters.com/markets/europe/sp-lowers-frances-long-term-sovereign-ratings-aa-aa-2024-05-31/>

bond markets were further roiled by President Macron’s decision to call a snap election, which polls showed as likely to lead to a loss in seats for Macron’s business-friendly party and an increase in seats for the far-left and far-right parties.⁵⁸ Although France avoided what was generally seen as the worst-case election scenario for businesses, markets correctly predicted and are now grappling with the effects of “unprecedented deadlock” in the French National Assembly.⁵⁹ International markets also moved in direct response to 2024 election results in India,⁶⁰ Taiwan,⁶¹ Mexico,⁶² and Indonesia,⁶³ among others. These markets did not need to wait for the new governments to pass legislation, or even to be sworn in. They did not just move on the winners of the elections, but they also moved on the margins of victory and the number of seats won by particular parties. In some countries, such as France, the United Kingdom, and India, markets viewed the governing party’s proposed agenda favorably and fell or rose based on the size or existence of the governing majority. In others, such as Mexico, markets would have preferred to see more gridlock because they oppose the policies proposed by the election winners. These real-world examples refute the CFTC’s claim that the economic effects of elections are too diffuse or unpredictable to provide legitimate hedging value, and the CFTC is in error to ban contracts on these elections.⁶⁴

Another critical distinction between election futures and gaming markets is the liquid nature of the contracts. Prediction market positions are tradeable until the date of settlement. On both PredictIt and Kalshi, traders who purchase shares at one price are free to sell shares prior to the resolution of the market. In PredictIt’s market asking about partisan control over Congress following the 2022 midterm elections, for example, 68 percent of shares purchased over the life of the market were sold at least once prior to the settlement of the market. In the equivalent 2020 market, 80 percent of shares were sold at least once prior to settlement. Contrast this with the typical all-or-nothing structure of a gambling bet. Once a gambling bet is made there is no secondary market where a participant can exit the bet.

While the final payout structures in gaming and prediction markets are similar—all to the correct side, and nothing to the incorrect side—the free tradability of prediction market positions prior to settlement makes the uses and behavior of prediction market positions quite different from gaming. On PredictIt, typical traders do not buy and hold shares to the payout date for an all or nothing result, but instead make an investment, observe a profit or loss, and exit the market via a trade with a payout of some amount other than the binary \$0 or \$1. Similar behavior is evident in non-binary futures markets where many traders take and then exit positions before settlement dates.

⁵⁸ <https://www.reuters.com/markets/europe/risk-premium-french-debt-hits-highest-since-2012-crisis-ahead-election-2024-06-28/>

⁵⁹ <https://www.wsj.com/world/europe/deeply-divided-france-risks-unprecedented-deadlock-after-election-shock-7817a4d9>

⁶⁰ <https://www.cnbc.com/2024/06/05/india-stocks-erase-over-371-billion-after-bjp-disappoints-in-elections.html>

⁶¹ <https://www.bloomberg.com/news/articles/2024-01-14/taiwan-election-result-to-force-compromise-in-boost-for-markets?>

⁶² <https://www.bloomberg.com/news/articles/2024-06-03/investors-caught-off-guard-as-sweep-in-mexico-vote-tanks-peso>

⁶³ <https://www.reuters.com/markets/asia/indonesian-markets-cheer-after-prabowo-claims-victory-2024-02-15/>

⁶⁴ Proposed Rule at 48976.

Another key difference between gaming and event contracts, particularly those on elections, is the public benefit generated by event contract prices. The data produced by these contracts is valuable and its availability is greatly in the public interest, as discussed further below. Prediction market odds are quoted in the media and have become part of how individuals and organizations gauge the current state of an upcoming or occurring election. By proposing to ban these markets, the CFTC is acting as an election information censor.⁶⁵

Elections are not games, and contracts relating to the outcome of elections are not gaming. The CFTC is erroneously trying to lump election contracts in with contracts on the Super Bowl or Kentucky Derby, without considering that those events, unlike elections, are conducted for entertainment and sport. Elections are conducted precisely because of the consequences that flow from them. The CFTC must use a definition of gaming that maintains its connection with games and must not lump election contracts in with gaming and gambling.

Elections are Not a Contest of Others

The CFTC is also in error when it includes election outcomes within the category of “contests of others.” This phrase implies a scenario, like in a sporting match, in which an individual trading on the outcome is a mere observer rather than an active participant. This description does not accurately describe an election because voting is an act of direct participation in the outcome.⁶⁶ Over 158 million Americans, or two-thirds of eligible voters, participated in the 2020 Presidential Election.⁶⁷ Over 100 million Americans participated in the 2022 Midterm Elections.⁶⁸ Each of these Americans contributed directly to the final result. Citizens are not bystanders in elections, they are the principals.

Trading in Election Contracts Depends on Skill, Not Luck or Chance

The Proposed Rule recognizes that several state and federal statutes define gaming through reference to outcomes that are dependent on luck or chance. This is in contrast to trading in traditional financial futures markets, where traders generally are expected to trade based on informed and reasoned analysis of data and market dynamics.

Election Contracts are much more like trading in traditional futures markets than they are like gaming. During the prior Kalshi comment periods, the CFTC received several comments from PredictIt traders who explained that they do deep research and analysis on the relevant

⁶⁵ See discussion on constitutional infirmities of the NPRM below.

⁶⁶ The CFTC has already demonstrated that it understands this through its concern that a voter would switch their vote in order to influence the outcome of an election. Through this concern, the Commission recognized that the voter is not merely an observer of a contest between two candidates. Proposed Rule at 48983.

⁶⁷ <https://www.fec.gov/resources/cms-content/documents/federalections2020.pdf>

⁶⁸ <https://www.cookpolitical.com/charts/house-charts/national-house-vote-tracker/2022>

events, and the available data, before trading on the outcomes.⁶⁹ It is this research and analysis that creates the probabilistic forecasts that have been found to be on par with or better than models based on polls and economic fundamentals.⁷⁰ The CFTC must not continue to ignore this first-person testimony, and this comment incorporates the referenced comments. The record reflects that election contracts are not games of chance, and are not gaming at all.

Election Contracts Are in the Public Interest

If the CFTC finds that a proposed contract involves one of the enumerated categories, it is required by the statute to proceed to an analysis of whether the Proposed Contracts are within the public interest.⁷¹ In this rulemaking, the Commission is proposing to categorically determine that contracts that fit within its overbroad definition of gaming are outside of the Public Interest. This subversion of the congressionally mandated process is arbitrary and capricious because the CFTC is determining that proposed contracts (that do not yet exist) are against the public interest without having done any fact finding and without having provided any explanation of its reasoning. This determination shirks the CFTC's responsibility to review contracts on an individual basis, and it is flat out wrong. The Commission cannot shirk its responsibility simply by declaring that it is too much work.⁷² Election contracts are within the public interest, and the CFTC must address the evidence that both major financial institutions and the general public—including retail traders and anyone seeking better information about likely election outcomes—benefit from the existence of these contracts.

As described above, the economic purpose of the Election Contracts has already been extensively demonstrated to the Commission, which has not seriously grappled with the evidence put before it in the previous Kalshi Comment periods. The Commission, in the Proposed Rule, also failed to discuss any of the positive aspects of election contracts, which is indicative of a pre-determined outcome and an arbitrary decision-making process. Election contracts pass the Public Interest test that the Statute requires the CFTC to follow.

Election contracts would serve the public interest through their ability to generate probabilities of the occurrence or non-occurrence of future events. In the context of elections, the general public has already demonstrated a significant interest in these probabilities.

When event contract markets, such as PredictIt and Kalshi, offer contracts for sale, they are initially offered without any sale price attached. The contracts generate prices when traders—one buying the “Yes” side of the contract option and the other buying the “No” side—agree on a price. This price then repeatedly changes over the course of the life of the contract as traders digest new information. These prices continuously reflect the probability of the specified

⁶⁹ See, for example: <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=70762>;
<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69611>;
<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=72572>;
<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=72116>;
<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69715>;

⁷⁰ Crane, Harry, and Darrion Vinson. "Models vs. markets: Forecasting the 2020 us election." *The Journal of Prediction Markets* 17.2 (2023): 35-62.

⁷¹ 7 U.S.C. § 7a-2(c)(5)(C).

⁷² NPRM at Section I.A., page 7 of voting copy.

event of outcome occurring, and they reflect the consensus of the wide diversity of opinions and worldviews of a diverse pool of traders.

This is the essential public service that prediction markets offer. They serve an information aggregation function for individual members of the public, as well as academics, companies, and governments who use them to further their research, manage their business operations, and set policy.⁷³ Since its launch in 2014, PredictIt prices have generated significant public interest. These prices have been widely cited in media⁷⁴ and among investment analysts, often as an alternative to polling or election models. PredictIt data has been used by students and academics at over 130 universities across a wide range of subjects including microeconomics, political behavior, computer science, and game theory.

In the previous Kalshi Comment periods, and in this comment period, investors and decisionmakers repeatedly told the CFTC that they use prediction markets for this exact purpose. A former White House Chairman of the Council of Economic Advisors told the CFTC that he and his White House team used prediction market probabilities to inform their understanding of how political developments would affect economic policymaking.⁷⁵ OpenAI CEO Sam Altman described how startup businesses in regulated environments can use this data to make plans for the future.⁷⁶ The head of an Angel Investing firm described how political risk was one of his main investment concerns, and how PredictIt Data has helped to make sense of the future economic environment.⁷⁷ The founder of a significant philanthropic organization stated that he used the data to guide his organization's strategies.⁷⁸ An analyst at Eurasia Group specializing in macro and geopolitical research stated that these markets are essential when conducting research into the economic effects of elections.⁷⁹

The list goes on. A significant cross-section of society, including but not limited to economists,⁸⁰ researchers,⁸¹ retail traders,⁸² and business owners⁸³ informed the CFTC that these markets are essential to their work. The CFTC received many dozens of comments along these lines, and it is both doing a disservice to the process and demonstrating its arbitrary outcome-driven process by failing to incorporate them into its rulemaking. In Aristotle's experience providing services to PredictIt, we have also seen first-hand how in-demand the data is among the general population.

⁷³ Hong, L., & Page, S. (2012). *Some Microfoundations of Collective Wisdom*, a chapter in H. Landemore & J. Elster (Eds.), *Collective Wisdom: Principles and Mechanisms* (pp. 56-71). Cambridge: Cambridge University Press. doi:10.1017/CBO9780511846427.004

⁷⁴ "What to Expect in 2021 According to Prediction Markets." THE ECONOMIST, 2 Jan. 2021, <https://www.economist.com/graphic-detail/2021/01/02/what-to-expect-in-2021-according-to-prediction-markets>

⁷⁵ <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69708>

⁷⁶ <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69699>

⁷⁷ <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69714>

⁷⁸ <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69716>

⁷⁹ <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69721>

⁸⁰ <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=70747>;

<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=70753>

⁸¹ <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=73787>;

<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69735>

⁸² <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69658>

⁸³ <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69725>

Well more than a million unique individuals visited the PredictIt website during the week of the 2020 election, far in excess of the number of individuals buying and selling contracts during this time period. This activity indicates that members of the public were visiting PredictIt not only to make trades, but also to see how the market was reacting to information as it came in. It also shows that the public sees prediction market data as an important tool in understanding election results, which are often unclear and even misleading as individual counties across the country report partial results. PredictIt traders, for example, had priced in that candidate Biden was likely to win the State of Michigan in 2020, well before ballot returns from Detroit gave him the lead in the official count. In a recent example, PredictIt Traders digested early returns and concluded that former President Trump was almost guaranteed to win the 2024 Republican Presidential Primary election in New Hampshire, even as these returns showed a close race.⁸⁴

This dynamic was apparent during the Trump-Biden debate on June 27 and its aftermath. In a market asking who will be the Democratic nominee for President,⁸⁵ over 800,000 shares traded hands during the day of the debate, up from just over 40,000 the day before. Volume in this market continued to escalate as speculation over Biden's future hit a fever pitch and over 10 million shares traded on the day he announced his withdrawal from the race. Hundreds of thousands of additional visitors looked at PredictIt's data during this period. Among the visitors to PredictIt during the debate was the Bloomberg Organization. PredictIt Data was processed for the Bloomberg Terminal in real time, and Bloomberg Media used the data to support the claim that the debate would "generate another round of Democratic hand-wringing about whether it's possible to replace [President Biden] on the [Democratic presidential] ticket."⁸⁶ The Wall Street Journal,⁸⁷ the New York Times⁸⁸, and Politico⁸⁹ similarly cited PredictIt odds when discussing the possibility that President Biden would drop out of the race. The Financial Times used PredictIt data in its subsequent coverage of President Biden's fight for political survival.⁹⁰

The CFTC's position is untenable. On the one hand, the CFTC claims that these markets "would conflat[e] gambling and financial instruments... for retail market participants to trade for entertainment purposes."⁹¹ On the other hand, the data generated by these markets is important enough for America's premier financial institutions and media to process, distribute to investors, and publish in financial news stories. These news stories are far from "entertainment;" they discuss matters with serious economic and societal consequences, such as the possibility that an incumbent President might be forced to suspend his campaign. The CFTC must explain why it disagrees with Bloomberg, the Wall Street Journal, the New York Times, the Financial Times,

⁸⁴ "Who will win the 2024 New Hampshire Republican primary?" PREDICTIT, *available at* <https://www.predictit.org/markets/detail/8071/Who-will-win-the-2024-New-Hampshire-Republican-primary>. Accessed 31 Jan. 2024.

⁸⁵ <https://www.predictit.org/markets/detail/7057/Who-will-win-the-2024-Democratic-presidential-nomination>

⁸⁶ <https://www.bloomberg.com/news/newsletters/2024-06-28/democrats-hit-panic-button-in-wake-of-biden-debate-debacle>

⁸⁷ <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>

⁸⁸ <https://www.nytimes.com/2024/06/27/us/politics/biden-debate-democrats.html?smid=nytcore-android-share>

⁸⁹ <https://www.politico.com/newsletters/politico-nightly/2024/07/03/betting-on-kamala-harris-00166562>

⁹⁰ <https://www.ft.com/content/d23ec4d9-cb5d-4b4f-9777-cfa27824c127#post-66ad90b2-0616-4c4a-a37a-84dc7f42bf84>

⁹¹ Proposed rule at 48982.

and Politico when it describes these contracts as being for “entertainment purposes.” It has not done so.

America’s top-tier institutions cite PredictIt market prices because, over time, political prediction markets have built a reputation for accurately reflecting the probability that a candidate or party will win an election. The diversity of available viewpoints is essential to the accuracy of these price movements, and it distinguishes prediction markets from other tools such as expert forecasts.⁹² In a political prediction market, individuals make trades based on a significant number of data sources. These include objective measures like polling results, fundraising, and endorsements, but they also include subjective measures like debate performances, the perceived impact of press reports, local yard sign or bumper sticker sightings, perceived crowd sizes, and perceptions about bias in polling data. One pool of traders, for example, may see a candidate’s debate performance as likely to help earn votes, while others may see such a performance as likely to do more harm than good.

The enormous number of site visits and media citations to PredictIt in the wake of the Trump-Biden debate indicates that people wanted to know how the public reacted to the candidates’ performances. It took several days for polling averages and polling-based forecasts, which are inherently lagging indicators, to catch up and incorporate reactions to the debate. PredictIt markets moved in real-time. Substitutes like polling aggregates or expert forecasts cannot serve as substitutes for the public service that prediction markets provide.

The case for prediction markets relies on the same insight that supports democracy⁹³ and the efficiency of a market economy.⁹⁴ The aggregate of the decisions of millions of voters or consumers will produce better outcomes than decisions made by even the best qualified experts. Some modern research suggests that both diversity of viewpoint and individual expertise are important to the accuracy of prediction markets.

The Commission is further concerned that unscrupulous individuals will spread misinformation in order to both manipulate market prices and manipulate elections. As an aside, the stakes of elections are so consequential that if means existed to manipulate results those would have been employed already. The existence of well-regulated election prediction markets will reduce rather than increase the risks of election manipulation. As an example, prediction markets already serve as a counterweight to the unscrupulous use of polling, which is already a widespread practice.

In contrast to the barriers to manipulation in well-functioning, liquid markets, public opinion polls are routinely used with the express intent of manipulating perceptions of likely success, fundraising, and voting. Pollsters can publish the results of Push Polls, which measure voter attitudes about candidates, but only after the voters have heard targeted negative or positive messages about said candidates.⁹⁵ Partisan and in-house campaign pollsters routinely manipulate

⁹² Miller, Thomas W., “Predicting the 2020 Presidential Election,” DATA SCIENCE QUARTERLY 1.1 (2021).

⁹³ This is not a new observation. Two millennia ago, Aristotle, in his seminal work *Politics*, made a compelling case that collective judgment is as good or better than that of experts.

⁹⁴ Hayek, Friedrich A. “The Use of Knowledge in Society,” AMERICAN ECONOMIC REVIEW 4 at 519-530 (1945)

⁹⁵ See Jonathan S. Fox, *Push Polling: The Art of Political Persuasion*, 49 FLA. L. REV. 563 (1997).

sampling methodologies, question design, and even polling times and methods to generate positive indicators for their clients, and release the most favorable results to the public. Other pollsters may manipulate their data, using the same tactics discussed above, in order to prevent the release of outlier polls in a practice known as “herding.”⁹⁶ In the 2022 midterm elections, Democratic strategists raised credible concerns that partisan Republican pollsters were “flooding” polling averages in order to manipulate public perceptions.⁹⁷

Efforts to manipulate well-functioning markets in similar ways are simply profit opportunities for informed traders, who are financially incentivized to discern fact from fiction. The CFTC’s acceptance of these markets would not only not lead to the sort of manipulation about which the Commission is concerned. Rather, it would be a significant tool in combating election misinformation.

The Commission’s Construction of the Public Interest Test is Impermissibly Narrow

CEA 5c(c)(5)(C) allows the Commission to prohibit listing of certain contracts if they are “contrary to the public interest”. The Commission discusses this standard in Section C.2. of the NPRM, citing the discredited Lincoln-Feinstein post-enactment *Congressional Record* insertion to describe the mandated test as a “form of the ‘economic purpose test’” that was in a previous version of the statute. The economic purpose test, however, was repealed in the Commodity Futures Modernization Act of 2000 (CFMA). If Congress had intended only ten years later to re-enact that test, it would have used the same phrase. Even a statement by a sponsor cannot reinsert a repealed provision into a statute. Instead, Congress deliberately chose to use a facially broader phrase, “public interest.” Indeed, in the *Record* insertion cited by the CFTC a question is posed regarding “economic use” but answered using the statutory phrase “public interest.” 56 Cong. Rec. S5906-07 (July 15, 2010) (statements of Sen. Diane Feinstein and Sen. Blanche Lincoln), available at <https://www.congress.gov/111/crec/2010/07/15/CREC-2010-07-15-senate.pdf>. Despite manifestly broader language in the 2010 statute, “the Commission anticipates that a contract, or category of contracts, that does not satisfy one such articulation also would likely not satisfy the other.”⁹⁸ Thus, the Commission proposes to collapse the Dodd-Frank Act’s Public Interested test into the repealed Economic Purpose test.

The CFTC though, cannot act in a way that “is manifestly contrary to the statute,” as it would in swapping in a repealed Economic Purpose test where the statute uses a Public Interest test. *See, e.g., Good Fortune Shipping SA v. Comm’r*, 897 F.3d 256, 261 (D.C. Cir. 2018).⁹⁹

⁹⁶ Silver, Nate. “Here’s Proof Some Pollsters Are Putting a Thumb on the Scale.” FIVETHIRTYEIGHT, Nov. 14, 2014, available at fivethirtyeight.com/features/heres-proof-some-pollsters-are-putting-a-thumb-on-the-scale/.

⁹⁷ Shepard, Stevan. “The Biden Gap and the Partisan Poll Flood: Breaking Down the Latest Senate Surveys.” POLITICO, Nov. 1, 2022, available at www.politico.com/news/2022/11/01/biden-gap-senate-surveys-00064362.

⁹⁸ NPRM at C.2., Voting Copy at page 41.

⁹⁹ *See also Dorszynski v. United States*, 418 U.S. 424, 449 (1974) “congressional intent finds clear expression in the words of the statute” concurring opinion of Justices Marshall, Douglas, Brennan, and Stewart. *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984) “[I]t should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses, we have often stated that “[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.” *North Dakota v. United States*, 460 U.S. 300, 312 (1983) (quoting *Consumer Product Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

Indeed, the CFTC itself acknowledges that it has “discretion to consider other factors, in addition to hedging and price-basing utility.”¹⁰⁰ But the Commission downplays those factors as discretionary. More strikingly, the Commission can imagine only negative factors in the public interest analysis (threats to national security, other threats to the public good, drawing the Commission into areas outside of its primary remit, the risk of manipulative activity, and the possibility of profiting from harm to any person or group of persons).¹⁰¹ We agree that hedging, price basing utility, and the various risks identified by the Commission are relevant factors in a public interest analysis. We disagree, however, with the proposition that all factors other than hedging and price basing are “optional”. Further, the Commission’s failure even to address the strong economic and public utility arguments in favor of election markets in the two Kalshi proceedings amounts to a failure to consider an entire aspect of the issue. The Commission must consider other positive actors in the public interest analysis. Among other factors, the Commission should consider the informational value of election markets, an analog to the commercial price basing test, but focused on broader uses and benefits that the pricing of a particular commercial transaction. For instance, event contracts could save lives in a public health crisis, they provide needed alternatives to distrusted government and media sources.¹⁰²

Despite its deficient but fairly lengthy discussion of public interest factors, the Commission proposes to make a blanket, per se determination that all election contracts whatsoever and forever into the future are not in the public interest. This makes the entire public interest discussion disingenuous. As discussed above, this approach is impermissible.

The Commission is In Error in Failing to Distinguish US and Foreign Elections

The CFTC is also acting in error when it applies its public interest analysis to all elections, including foreign elections. The concerns that the CFTC raises do not apply equally to US and non-US elections. The proposed rule speculates that election contracts may incentivize individuals to vote for candidates who they do not align with, or somehow fraudulently tamper with elections.¹⁰³ In a recent oral argument, the Commission professed that it was concerned about election workers manipulating election results for financial gain.¹⁰⁴

Those manipulation concerns simply do not apply to US persons taking positions on foreign elections. Nor do the more generalized concerns about the sanctity of the US election process apply to US persons taking positions on foreign elections. Due to the parliamentary nature of many non-US governments, the argument that the relationship between election results and economic consequences is too diffuse to make election contracts a useful hedge is also diminished if not eliminated in the case of non-US elections.

The (non) analysis of foreign elections also fails to grapple with the fact that US elections have long been the subject of betting markets in the UK and Australia and more recently in

¹⁰⁰ Id.

¹⁰¹ NPRM at C.2., Voting Copy at pp 43-44.

¹⁰² See these and other examples in the comment submitted by Professors Crane, Abramowicz, Froeb, Hanson, and Strumpf.

¹⁰³ Proposed Rule at 48983

¹⁰⁴ KalshiEx v. CFTC transcript of oral argument.

Ontario and via ostensibly offshore crypto platforms such as Polymarket. In the many decades that Brits have been able to wager large sums of money on US elections no one has even hinted at concerns involving manipulation of US elections. Against that actual experience, what risk can reasonably be conjured related to allowing US citizens to take financial positions on British elections?

The Commission is in Error by Failing to Consider Manipulation Risks Related to the Size of the Electorate

The CFTC should also consider that, while perhaps an unscrupulous poll worker could impact short-term perceptions of the outcome of a small mayoral election, doing so for a Presidential election would be impossible. Similarly, no individual or even small group of persons could conceivably manipulate the outcome of the control of Congress contracts that Kalshi sought to list.

The CFTC's One Size Fits All Public Interest Analysis Fails to Meet the Commission's Statutory Duty

The CFTC applies the same analysis to election contracts regardless of the size of the electorate or whether traders are able to participate in the election. The CFTC could easily mitigate imagined harms in contracts relating to foreign elections by, for example, limiting participation in these markets to US persons, thus significantly decreasing the possibility that a trader will have any ability to impact the outcome.

The proposed rule's public interest analysis falls short and arbitrarily applies factors across the board without having considered the particular details, as the Commission is required to do under the CEA, of each possible contract that it prohibits.

Failure to Consider Alternatives to a Ban Represents a Fatal Flaw in the Commission's Approach

It is a fundamental maxim of regulatory policy that agencies must consider lesser alternatives to outright bans on economic or social activity. All of the imagined harms of election contracts such as incentives for manipulation and improper influence by the wealthy can be addressed by ordinary regulatory tools such as position limits and trader exclusions. Congress has spoken clearly on this point. Contributions to candidates of up to \$6,600 per election cycle¹⁰⁵ have been determined to be small enough to deter corruption or even the appearance of corruption.¹⁰⁶ Even higher limits might be justified in event markets since the politicians themselves would be excluded from participation, but Congress has already made a policy decision that amounts at least up to that limit are not corrupting in connection with federal elections.

The CFTC and its regulated markets use position limits widely and daily to prevent and limit the potential for market abuse. Rather than banning these markets, the Commission should

¹⁰⁵ See <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits/>

¹⁰⁶ See *Buckley v. Valeo*, 424 US 1 (1976).

seek comment on whether a combination of position limits and other standard regulatory tools such as categorical participant exclusions can allow us to reap the benefits of event contract markets while limiting or eliminating possible harms.

This failure to consider the use of standard regulatory tools to prevent supposed harms is yet more evidence that the Commission is interested in advancing a pre-determined outcome rather than understanding the actual risks and benefits of these markets.

The CFTC is Discriminating Against Retail Investors in an Unjustified Manner and Fails to Understand that Retail Traders are Key to Prediction Markets.

The proposed rule repeatedly emphasizes that the CFTC is concerned about retail traders participating in event contract markets. The only explanation that the CFTC provides is that retail traders may be “most likely to trade such contract[s] for entertainment purposes only.”¹⁰⁷

The CFTC did not provide any evidence for the notion that retail traders are more likely to trade these contracts, compared to any other contract, on a CFTC regulated exchange. The premise does not make sense and is refuted by the comments that the CFTC received during previous comment periods that explain that traders do significant volumes of research, and even build models, to trade these contracts.¹⁰⁸

Entertainment, by definition, relates to something that provides pleasure, diversion, or amusement.¹⁰⁹ This definition fits a slot machine or bingo, activities that do not involve any real higher-level thinking. The research and thought that traders apply to PredictIt’s election contests demonstrates that they do not constitute a form of entertainment. If retail traders want to gamble and be entertained by the slot-machine style randomness of profit or loss on a regulated market, they are free to randomly place bets via zero-day options on agricultural or metals futures and subsequently be entertained as their position values move up or down. The CFTC cannot prohibit election contracts merely because some individuals may use them for pure entertainment or speculative purposes. All markets contain, and even rely on, some degree of speculation,¹¹⁰

¹⁰⁷ Proposed rule at 48982.

¹⁰⁸ See, for example: <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=70762>;
<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69611>;
<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=72572>;
<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=72116>;
<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69715>;

¹⁰⁹ <https://www.dictionary.com/browse/entertainment>

¹¹⁰ “The activity of speculators is essential to the operation of a futures market in that the composite bids and offers of large numbers of individuals tend to broaden a market, thus making possible the execution with minimum price disturbance of the larger trade hedging orders. By increasing the number of bids and offers available at any given price level, the speculator usually helps to minimize price fluctuations rather than to intensify them. Without the trading activity of the speculative fraternity, the liquidity, so badly needed in futures markets, simply would not exist. Trading volume would be restricted materially since, without a host of speculative orders in the trading ring, many larger trade orders at limit prices would simply go unfilled due to the floor broker's inability to find an equally large but opposing hedge order at the same price to complete the match.” Merrill Lynch, Pierce, Fenner Smith v. Curran, 456 U.S. 353, 360 n.11 (1982) Quoting H.R. Rep. No. 93-975, p. 1 (1974) accompanying adoption of the Commodity Exchange Act.

and the CFTC has not introduced any evidence suggesting that retail traders can use these contracts for entertainment in a way that is untrue of other futures contracts.

Retail traders merely want access to the opportunities that are already available to wealthy individuals and institutional investors. During one of the previous Kalshi comment periods, a Managing Director at JP Morgan's Private Wealth Management Division informed the CFTC that his division employs teams of economists to develop suites of products that wealthy individuals can use to hedge the risk of an election on their portfolios.¹¹¹ JP Morgan offers this precisely because "election risk is one of the largest risks [his] clients face[.]" The CFTC has not explained why it does not believe retail participants have hedging needs. During the previous Kalshi comment periods, retail traders repeatedly wrote in to express the need to hedge against their own personal political risk exposure.¹¹² Retail participants are capable of understanding the political exposure to their portfolios¹¹³ and of understanding the need to hedge.

What the CFTC sees as a danger – retail participation – is an essential and beneficial feature of prediction markets. Those markets function best when they aggregate the opinions of large numbers of individuals with diverse viewpoints. The CFTC has also not explained why it is concerned about retail traders participating in regulated markets and ignores evidence that such traders are necessary for the proper functioning of the market. In 2020, for example President Biden won 55% of votes from individuals who make less than \$50,000 per year, but only 42% of votes from individuals who make over \$100,000 per year.¹¹⁴ A similar income gap was found in the 2018¹¹⁵ and 2022¹¹⁶ midterm elections. There are similar—and sometimes even more pronounced—gaps by age, gender, education level, and geography, all of which may bias a sample of traders that is limited to wealthy individuals and professional investors. Additionally, studies have shown that prediction markets are more accurate when they are composed of a larger number of participants.¹¹⁷ Small and skewed samples may lead to less accurate market prices.

¹¹¹ <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69666>

¹¹² See, for example, <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69728>;
<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69594>;
<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=70773>;
<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69732>;
<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69712>;
<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69709>;
<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69690>;
<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69682>;
<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69681>;
<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69678>;

¹¹³ The list of the 100 most popular stocks and ETFs held by users of Robinhood, a brokerage popular among retail traders, includes SNDL (cannabis), Tesla (electric vehicles), NIO (electric vehicles), Lucid (electric vehicles), Rivian (electric vehicles), Plug Power (green energy), Tilray Brands (cannabis), Canopy Growth (cannabis), FuelCell Energy (green energy), Exxon Mobile (carbon-based energy), ChargePoint (electric vehicle infrastructure), Cronos Group (cannabis), Energy Transfer (carbon-based energy infrastructure), and Marathon Oil (carbon-based energy), among others. Each of these stocks has clear political exposure.

¹¹⁴ 2020 Exit Polls, CNN. <https://www.cnn.com/election/2020/exit-polls/president/national-results>

¹¹⁵ 2018 Exit Polls, CNN. <https://www.cnn.com/election/2018/exit-polls>

¹¹⁶ 2022 Exit Polls, CNN. <https://www.cnn.com/election/2022/exit-polls/national-results/house/0>

¹¹⁷ Bassamboo, Achal, Ruomeng Cui, and Antonio Moreno. "Wisdom of crowds in operations: Forecasting using prediction markets." Available at SSRN 2679663 (2015).

Political outcomes are of great interest to many Americans. In the 2020 election cycle, several million Americans donated money to¹¹⁸ or volunteered on campaigns.¹¹⁹ Each of these Americans has a unique viewpoint and insight into the many pieces of data that contribute to the outcomes of elections. The CFTC's baseless discrimination against retail investors ignores the value of their viewpoints and risks biasing market pricing.

Elections are Not Contrary to State Law

The Proposed Rule states that the CFTC anticipates following the logic of the Kalshi and Order, which determined that election contracts fall under the enumerated category of "activity that is unlawful under any Federal or State law."¹²⁰ This conclusion was and remains in error and it risks swallowing the entire category of event contracts.

At the most fundamental level, elections are not contrary to state law. The principle of *noscitur a sociis* informs us that the enumerated activities in CEA 5c(c)(5)(C) must be read as part of a larger category. Terrorism, assassination, and war are *malum in se* crimes. In that context the most natural reading of the "unlawful under any Federal or State law" category is that it is intended to cover categories such as murder or more general crime rates. This category cannot be stretched as the Commission suggests to leapfrog via the term "involve" to the act of taking a future or option position on a matter because most futures and options contracts are illegal under the laws of most states. The operative provision of 5c(c)(5)(C) refers to contracts on a contingency. Wagering on a future contingent event is unlawful under most state laws. The Commission cannot logically read a provision that allows contracts on certain contingencies as having a rule swallowing exception that prohibits taking a financial position (wager) on contingencies. Nor can the Commission logically read a general "unlawful under Federal or State law" provision as secretly targeted specifically to elections and awards shows but allowing wager-type activity on weather or any other event that is also illegal under many state laws.

The CFTC's treatment of Kalshi's proposed election contracts, which the CFTC should not extend, is inconsistent with the CFTC's treatment of other contracts. The CFTC's Order claims that the use of the word "involve" in the Statute means that CFTC can prohibit both "contracts whose underlying purpose 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."¹²¹ The CFTC then cites several state statutes that define gaming as akin to taking a stake on the outcome of a contest of others or on a future contingent event that is not influenced by one of the parties taking a stake.¹²² The CFTC also notes that some states explicitly prohibit gaming on elections.¹²³ For the CFTC, the fact that an election is a contest of others was enough

¹¹⁸ The Donors Powering the Campaign of Bernie Sanders, *The New York Times*, February 1, 20, 2020.

<https://www.nytimes.com/interactive/2020/02/01/us/politics/democratic-presidential-campaign-donors.html>

¹¹⁹ Donald Trump Has More Campaign Volunteers than Obama Ever Did and Democrats Are Nervous, *Newsweek*.
<https://www.newsweek.com/donald-trump-has-more-campaign-volunteers-obama-ever-did-democrats-are-nervous-1540398>

¹²⁰ Proposed Rule at 48977.

¹²¹ Kalshi Order at 6-7.

¹²² *Id.* at 8-9.

¹²³ *Id.* at 9.

to define Kalshi's Proposed Contracts as both impermissible gaming, and impermissible violations of state law.¹²⁴

In effect, the CFTC argues that the enumerated prohibitions do not merely extend to what people are trading on, but can extend to the act of trading altogether. This reading fundamentally deviates from the CFTC's interpretation of the statute in other contexts, including in its past dealings with Kalshi and other DCMs, and risks undermining the rationale for regulated futures markets altogether.

Consider, for example, the fact that the CFTC, for over a decade, has permitted Kalshi¹²⁵ and other DCMs¹²⁶ to list contracts that resolve based upon the number of hurricanes that hit in a given calendar year. These contracts would potentially constitute unlawful gaming in several states.¹²⁷ Kalshi offers contracts on weather events in New York City,¹²⁸ even though such bets would likely constitute unlawful gaming under New York State law.¹²⁹

The CFTC has an obligation under the Administrative Procedure Act to acknowledge and explain its departure from past practices, lest its actions be found to be arbitrary and capricious. *Grace v. Barr*, 965 F.3d 883, 903 (D.C. Cir. 2020). This includes an obligation to reconcile the Order's interpretation or application of a statute with the agency's previous interpretations and applications of it. In the Kalshi Order, the CFTC fails to acknowledge, let alone explain, why the same logic that found that Kalshi's Proposed Contracts relate to violations of state laws or gaming deviates so significantly from the statutory interpretation used to permit event contracts on other future contingent events.

The Commission fails to acknowledge or grapple with the fact that its disapproval of Kalshi's Proposed Contracts differs from its longstanding practices. The future sale price of a traditional commodity is clearly a "contingent event" not in the control of the parties to a futures contract. Under the reasoning the CFTC advances in the Kalshi Order, nearly every transaction regulated by the CEA would be in violation of some state gaming laws.

¹²⁴ *Id.* at 8-12.

¹²⁵ "Number of Hurricanes in 2023?" Kalshi, *available at* kalshi.com/markets/hurctot/number-of-hurricanes.

¹²⁶ 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.

¹²⁷ *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)).

¹²⁸ "Total snow in NYC this month?" Kalshi, <https://kalshi.com/markets/snownym/total-snow-in-nyc#snownym-24jan>. Accessed 31 Jan. 2024.

¹²⁹ *See* N.Y. Penal Law § 225.00(2) ("A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.").

The CFTC's arbitrary interpretation of the relevant statute risks creating havoc in regulated event markets. If the CFTC were serious about its interpretation of the legal standard articulated in the Kalshi Order and extended 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 "involve" gaming or risk overlapping with state laws. Nowhere in Kalshi Order does the CFTC address the sweeping consequences of the Order's interpretation of the Act. Nor does the CFTC attempt to reconcile this interpretation with decisions it has made and contracts it has allowed in the past. The CFTC's Order fails to adequately explain how it is that Kalshi's Proposed Contracts involve violations of state laws, but other contracts offered on DCMs do not. Both of these shortcomings define the arbitrary decisionmaking prohibited by the Administrative Procedure Act. The CFTC must provide the public with a logic that it can consistently and non-arbitrarily apply to proposed contracts. It has not done so.

Election Contracts do not Involve and Are not Similar to War, Terrorism, or Assassination.

The CFTC is considering whether it should codify a view that election contracts involve an activity that is similar to war, terrorism, assassination, or activities that are unlawful under state or federal law.¹³⁰ This would be a stunning expansion of the terms "similar" and "involve" that would risk swallowing up the entire category of event contracts, and the CFTC should refrain from this overreach.

In its Kalshi Order, the CFTC defined "involve" to mean "to relate to or affect," "to relate closely," to "entail," or to "have as an essential feature or consequence."¹³¹ Using these ordinary definitions of the word, elections do not involve the referenced enumerated categories. Election outcomes are determined by voters, volunteers, and the candidates themselves. Violence has no place in our political process, and reasonable Americans on all sides of the political divide are expected to understand this. The CFTC's insinuation that these violent activities may be "an essential feature or consequence" of elections is outrageous. These contracts would clearly not involve an enumerated category under the definitions the CFTC has previously applied.

The CFTC may insinuate that these violent and heinous acts can possibly influence elections, and thus fit under the definition of "involve." This would be in error, and would be a significant expansion of the statutory provisions. The word "involve" cannot possibly mean, and has never been defined to mean, that a contract can involve an enumerated activity if it can possibly have any relationship to the activity.

The CFTC has never applied such a stretched definition to contracts that relate to the price of oil or other commodities, the exchange rates for currencies, or key economic indicators. This is despite the fact that commodities like oil, grain, fertilizers, and currencies like the Russian Ruble or Ukrainian Hryvnia have all been significantly affected by war in recent years. The CFTC has allowed exchanges to run futures markets on crypto prices, even as such crypto prices plausibly have a connection to illegal efforts to evade international financial sanctions. The CFTC allows contracts on Uranium prices, even as such prices are affected by demand relating to war materials.

¹³⁰ Proposed Rule at 48977.

¹³¹ Kalshi Order at 5.

The Commodity Exchange Act clearly allows the CFTC to prohibit contracts that relate to war, terrorism, or assassination. Contracts on whether a country will invade another country, conquered territory, or equipment losses would all fall within these categories. Contracts on commodity prices or elections clearly do not. The CFTC should continue to monitor contract listings to ensure that regulated markets are not used as backdoors for war, terrorism, or assassination questions.¹³² A categorical prohibition on election contracts does not accomplish that goal.

The CFTC is demonstrating an intent to use a stretched definition of the word involve to take another bite of the apple of prohibiting election contracts. This is yet another outcome-determined attempt to fit a square peg into a round hole. The CFTC has never used a definition of involve that is as broad as the one that it is proposing here, and doing so would risk categorizing almost the entire category of futures contracts as relating to war, terrorism, or assassination. This would be in error.

The Commodities Exchange Act Requires the CFTC to Follow a Two-Step Process

When the CFTC finds that a proposed contract involves one of the enumerated categories, it is required by the Commodities Exchange Act to proceed to an analysis of whether the Proposed Contracts are within the public interest.¹³³ In this rulemaking, the Commission is proposing to categorically determine that contracts that the Commission finds as involving an enumerated category are inherently outside of the Public Interest.¹³⁴ The Commission provides no justification whatsoever for this determination.

The CFTC cannot act in a way that “is manifestly contrary to the statute.”¹³⁵ Here, the CFTC is determining that proposed contracts (that do not yet exist) are against the public interest without having done any fact finding and without having provided any explanation of its reasoning. This is manifestly contrary to the statute.

Consider, for example, a DCM that intends, after the implementation of this proposed rule, to list a contract asking if a new country will join a defense pact like NATO or an arms procurement partnership like AUKUS. The CFTC could reasonably determine that these contracts involve war. The CFTC would then state that it has determined that these contracts are against the public interest and that the contract cannot be listed. The fundamental problem for the CFTC though, is that the CFTC never actually made such a determination. The CFTC never did any fact finding, never provided any reasoning, and never gave the DCM the opportunity to argue to the contrary. The CFTC did provide some rationale (albeit inadequate) for its conclusion that election contracts are against the public interest, but it provided none whatsoever

¹³² A contract asking about the output of the Azovstal Iron and Steel Works in Mariupol, Ukraine, for example, could reasonably have been interpreted as a contract relating to the existence or outcome of the Siege of Mariupol in 2022.

¹³³ 7 U.S.C. § 7a-2(c)(5)(C).

¹³⁴ Proposed Rule at 48978.

¹³⁵ See, e.g., *Good Fortune Shipping SA v. Comm'r*, 897 F.3d 256, 261 (D.C. Cir. 2018); *Dorszynski v. United States*, 418 U.S. 424, 449 (1974); *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984) (“congressional intent finds clear expression in the words of the statute”) (Marshall, J., concurring); *North Dakota v. United States*, 460 U.S. 300, 312 (1983) (“[I]t should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses, we have often stated that ‘[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.’” (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980))).

for its conclusion that the NATO or AUKUS contracts are against the public interest. This is the definition of arbitrary and capricious.

To determine whether an agency action was adequately explained, the Supreme Court directs us to “first, know[] where to look for the agency's explanation.”¹³⁶ This is an extraordinary case because the agency's explanation cannot be found anywhere. The Commission will inevitably be dragged into court where it may try to argue that proposed contracts are against the public interest. But whatever arguments it makes at that point would be invalid, because the agency can only offer “a fuller explanation of the agency's reasoning *at the time of the agency action*.”¹³⁷ The time of the agency action would be upon the implementation of the proposed rule, when it made the public interest determination. At that time, the agency will not have provided a word of reasoning about contracts related to NATO expansion or any of the multitude of contracts that could reasonably be interpreted as involving an enumerated activity. As discussed *supra*, even the Commission's election contract analysis would fail in certain cases, such as foreign elections, that the Commission's analysis does not fully account for. This provision of the proposed rule is arbitrary and capricious, and must be withdrawn.

The Commission Cannot Publish a Secret Appendix Without Comment

The Proposed Rule states that any final rule that results from this rulemaking will include an Appendix E. This Appendix E will contain guidance in the form of factors the Commission may consider, in addition to other factors the Commission deems appropriate in light of individual facts and circumstances, when making a determination under § 40.11(a)(2) that such event contracts are contrary to the public interest.¹³⁸

If the Commission were to adopt some form of this rule, we agree that an appendix listing factors the Commission would consider in its public interest analysis would be very useful. As we pointed out elsewhere in this comment, the Commission's discussion of public interest factors in the NPRM is deficient because that discussion excludes the public interest benefits of election contracts, evidence that is readily available and has been put before the Commission.

This Appendix E does not appear in the Proposed Rule. The Proposed Rule does not describe the appendix, nor does it provide any clues about what might be in this appendix. Commentors are being asked to comment on something that does not exist, in violation of the Administrative Procedure Act notice and comment requirement.¹³⁹ Appendix E must not be part of any final rule until it has been subject to a notice and comment period. Better yet, the pending proposal should be withdrawn and a new NPRM with Appendix E included should be published if the Commission continues to want to issue a rule covering event contracts.

¹³⁶ *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907, (2020).

¹³⁷ *Id.* (internal citations omitted) (emphasis in original).

¹³⁸ Proposed rule at 48984.

¹³⁹ 5 U.S.C. § 553.

The CFTC’S “Election Cop” Argument is Illusory

In support of its overreaching proposed rule banning all election-related markets, the CFTC has invented a rationale that flies in the face of both reason and actual experience. The Commission has asserted that allowing such markets will force it to become an “election cop,¹⁴⁰”-- a role that would push the CFTC well beyond its Congressional mandate and expertise and overwhelm the agency’s resources.¹⁴¹

The phrase is a clever bit of bumper sticker-style sloganeering. It conjures an image of an excessively overburdened CFTC staff, forced to steep itself in all of the nuances of not only federal election laws, but also of the election statutes and regulations of all US states and territories. The Commission claims to believe that, if it allows these markets, it will be routinely adjudicating the results of elections. In the CFTC’s dire future, Americans would be waiting on the Commission’s blessing before celebrating (or commiserating) the results of an election for Congress, the Senate, or even the Presidency.

The ominous picture that the CFTC paints is merely a fiction, an illusion, and is out of step with reality. The CFTC does not provide any evidentiary foundation for this claim. This favorite CFTC talking point is simply unsupported, sensationalized speculation.

The CFTC does not decide election outcomes, election fraud, or other issues of election law. Such determinations are the legal responsibility of the Federal Election Commission, state election Commissions, Congress, the Department of Justice, and the judiciary.

The CFTC’s “election cop” fiction was debunked by Commissioner Summer K. Mersinger, in her Dissenting Statement Regarding Proposed Rulemaking on Event Contracts. Commissioner Mersinger’s refutation of the CFTC’s position is so thorough that it bears repeating here¹⁴²:

Fallacies Concerning the CFTC’s Regulatory and Enforcement Roles: The Proposal raises in alarmist tones the red herring that sweeping public interest determinations are necessary so that the CFTC does not get drawn into a regulatory or enforcement role for which it is not well-equipped. For example, the Proposal says (at page 44) that one factor that may be relevant in evaluating whether event contracts are contrary to the public interest is the extent to which they “would draw the Commission into areas outside of its primary regulatory remit.” Other examples are: 1) the statements (at page 55) relating to event contracts involving elections that the Commission “is not tasked with the protection of election integrity or enforcement of campaign finance

¹⁴⁰ Proposed Rule at 48992.

¹⁴¹ Proposed Rule at 48983.

¹⁴² Dissenting Statement of Commissioner Summer K. Mersinger Regarding Proposed Rulemaking on Event Contracts, May 10, 2024 <https://www.cftc.gov/PressRoom/SpeechesTestimony/mersingerstatement051024> (internal citations omitted).

laws;” and 2) the statement (in the first sentence of footnote no. 127) that “the oversight function in this area [regarding elections] is best reserved for other expert bodies.”

To be clear: The CFTC does not administer, oversee, or regulate elections, sporting events, gambling, or any other activity or event discussed in the Proposal – and that will not change with respect to any event contract that is found not to be contrary to the public interest. Rather, the CFTC would exercise its exact same authorities under the CEA that it does with respect to all other derivatives contracts.

Nor would the CFTC become some type of “election cop.” After all, the CFTC has anti-fraud and anti-manipulation enforcement authority with respect to futures contracts on broad-based security indices, but that does not mean the CFTC regulates the securities markets or that it is tasked with the protection of the integrity of the securities markets or enforcement of securities laws – the Securities and Exchange Commission (“SEC”) does all that. The CFTC similarly has enforcement authority with respect to natural gas and electricity since there are futures contracts on those commodities, but that does not mean the CFTC regulates the transmission of natural gas or electricity or that it is tasked with the protection of the integrity of physical natural gas or power markets, or enforcement of the Natural Gas Act or the Federal Power Act – the Federal Energy Regulatory Commission (“FERC”) does all that.

The same is true with respect to an event contract that is not contrary to the public interest and thus is permitted to trade on a regulated exchange. As the Supreme Court has stated: “This Court’s cases have consistently held that the use of the words ‘public interest’ in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation.” If a particular event contract involving elections were found not to be contrary to the public interest and thus permitted to trade, the CFTC would have absolutely no authority to administer, oversee, or regulate the elections that are the subject of that contract, or to enforce any campaign finance laws. Its authority would extend only so far as is the case with respect to all commodities underlying derivatives contracts within our jurisdiction, as provided by Congress in the CEA.

As Commissioner Mersinger notes, the CFTC already regulates derivatives markets involving underlying subject matter over which the agency lacks independent expertise or authority. In addition to the event markets that Commissioner Mersinger identified, there are many other CFTC-regulated event markets, none of which have required the CFTC to become a “cop” for events involving the underlying subject. The CFTC currently regulates markets on

carbon,¹⁴³ hurricanes,¹⁴⁴ music,¹⁴⁵ semiconductor production,¹⁴⁶ FDA Approvals¹⁴⁷, changes in corporate leadership¹⁴⁸, and carbon dioxide levels¹⁴⁹, among many others.¹⁵⁰ The CFTC does not thereby displace the EPA as a climate regulator, it is not a carbon cop, a weather cop, a music cop, a semiconductor cop, or a cop of any of the subject matter represented in these markets.

As Commissioner Mersinger correctly points out, the CFTC has anti-fraud and anti-manipulation enforcement authority with respect to all event markets under the agency's purview. This does not mean that the agency administers, oversees, or regulates the underlying subject matter.

The CFTC has not and cannot provide specific example of remotely likely scenarios which would require the CFTC to investigate election processes or procedures. Election contracts, like all event contracts have a reference agency (typically a state election agency or Congress). In the case of elections those agencies themselves have authority to investigate allegations of fraud, manipulation, etc. and those determinations are reviewable by courts (and by Congress for Congressional elections¹⁵¹). Markets offering election contracts would rely on those determinations and the CFTC would have no authority or reason to second guess those legally binding decisions.

The CFTC has claimed in its litigation with Kalshi¹⁵² that false statements (such as a release of a phony poll) involving elections might require their investigation. But this is no different than false statements intended to influence any other futures market. The CFTC does not need to be a subject matter expert in election rules or procedures to investigate such an imagined fraud any more than needing to be an expert in hydrocarbon physics to investigate a claim that a phony announcement of a big oil discovery was an illegal effort to manipulate the energy futures markets.

The irrefutable conclusion to be drawn from the agency's "election cop" claim is that ANY new event market should be banned because the agency's generic anti-fraud and anti-manipulation responsibilities regarding that contract create more work. The supposed logic

¹⁴³ <https://www.cftc.gov/PressRoom/PressReleases/8829-23>

¹⁴⁴ <https://kalshi.com/markets/hurcat/hurricane-category#hurcat-william>

¹⁴⁵ <https://kalshi.com/markets/topalbumjcole/j-cole-1-album>

¹⁴⁶ <https://kalshi.com/markets/semiprodh/us-semiconductor-production#semiprodh-24>

¹⁴⁷ <https://kalshi.com/markets/vaccinew/vaccine-approval-withdrawn#vaccinew-24>

¹⁴⁸ <https://kalshi.com/markets/openaiceochange/openai-hires-another-ceo>

¹⁴⁹ <https://www.cftc.gov/sites/default/files/filings/ptc/24/07/ptc0726243862.pdf>

¹⁵⁰ See also, page after page of CFTC-regulated event markets at

https://www.cftc.gov/IndustryOversight/IndustryFilings/TradingOrganizationProducts?Category=Event&Date_From=&Date_To=&Organization=&Show_All=0&Status=&Subcategory=&Type=&page=8

¹⁵¹ United States constitution, Article I, Section 5.

¹⁵² *KalshiEx LLC v. CFTC* Civil Action No. 1:23-cv-03257 (JMC) DDC.

underlying this argument actually reflects an abdication of the Agency's mandate to foster innovation in event contracts. As Commissioner Mersinger concluded:

*A belief for which no evidence is cited, and that is acknowledged not to be true across-the-board, cannot justify an absolutist determination that all event contracts involving an activity are automatically contrary to the public interest, nor can it justify a prohibition on trading all event contracts in that category.*¹⁵³

The CFTC's claim is also unsupported by the long and widespread history of prediction markets. The CFTC has yet to cite to a single example of a regulator who oversees election markets acting as an "election cop."

Foreign democracies, most notably the United Kingdom, have extensive experience with political futures trading. The CFTC has not provided any example of a foreign market or gaming regulator adjudicating the results of an election, or otherwise resolving questions of election fraud or election law.

Similarly, the CFTC has overseen the Iowa Electronic Markets for 30 years, and has overseen Victoria University of Wellington's PredictIt market for ten years. The CFTC has not pointed to a single example of a case in this three-decade history where the Commission has had to rule on a question of election law, determine election fraud, or adjudicate an election outcome.

As has been noted in the comments regarding the proposed rule, the CFTC concerns about investigating manipulation can be mitigated by creating a framework that distinguishes between contract manipulation and event manipulation, similar to the SEC approach, distinguishing between regulating investor and investor relation practices, and business practices.¹⁵⁴

To the extent that the CFTC has reasonable concerns about creating perverse incentives, it can resolve these through a) position limits, b) restrictions on contracts based on small-constituency elections, or c) restrictions on participation in the market that would prohibit participation by individuals with potential conflicts. Trillions of dollars in spending decisions already flow directly from federal elections. A CFTC-regulated market, especially with reasonable position limits, could not create new incentives for election manipulation that do not already exist.

Position limits in particular are an apt tool for protecting against the threat, even if only imagined, of large derivative positions affecting elections or providing incentives for election shenanigans. The CFTC and DCMs use position limits every day to control manipulation concerns. The CFTC's failure even to ask about how this common and widely used tool might

¹⁵³ Dissenting Statement of Commissioner Summer K. Mersinger Regarding Proposed Rulemaking on Event Contracts May 10, 2024 <https://www.cftc.gov/PressRoom/SpeechesTestimony/mersingerstatement051024>

¹⁵⁴ See, for example:

<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=73752&SearchText=mitigated>

address manipulation concerns is further evidence that the CFTC came to this rulemaking with a pre-determined conclusion rather than seeking informative comment on the issues surrounding election event contracts.

The Proposed Rule Will Be Circumvented Easily

In many cases commenters must speculate about likely behavioral reactions to proposed rules. In the case of a rule banning election contracts, we need not speculate. Wealthy firms and individuals will be able to evade the rule perfectly legally and anyone willing to use widely available internet tools will be able to evade the ban easily. This is already occurring.

For instance, one of the largest US-based trading firms has set up an Irish subsidiary and offered in 2020 to take election bets worth up to \$100 million.¹⁵⁵ Any US firm or individual with the capital and inclination can similarly set up an Ireland or UK entity and trade on US elections to their heart's and wallet's content on UK or Irish betting markets. Given the concerns of some commenters about wealth buying elections this approach that says OK for the uber-rich but no to retail traders makes no economic, regulatory, or political sense.

But retail traders need not worry either. Multiple recent news reports indicate that ostensibly offshore crypto platform Polymarket is taking election bets from US traders, one report featuring the helpful subhead "Users can resort to virtual private networks to evade [US] blockade".¹⁵⁶ Helpful "how to" trade from the US instructions are just a Google search away.¹⁵⁷ Residents of Detroit and Buffalo can simply drive across a bridge to Ontario and place their US election bets there.

What the CFTC's approach does guarantee is that trading by US and foreign citizens on US elections will occur outside of US regulatory jurisdiction, forgoing the transparency, consumer protections, and anti-fraud and anti-manipulation rules imposed on US markets. This is a worst of both worlds approach where US and non-US persons will stake large financial positions on US election outcomes but where US regulators will have zero oversight or control of the markets.

The CFTC should consider the proven ease of circumvention of their election contract ban and recalibrate its approach to embrace sound US-based regulation of these markets. Given the undeniable reality that election-related contracts already exist and are widely available, the

¹⁵⁵ Susquehanna Will Take Your Election Bets, Up to \$100 Million, Annie Massa, Bloomberg, October 30, 2020. Available at: <https://www.bloomberg.com/news/articles/2020-10-30/one-quant-trader-wants-to-take-hedge-funds-bets-on-the-trump-biden-election>

¹⁵⁶ US Traders Flock to an Election-Betting Site They're Banned From, Lydia Beyoud and Sridhar Natarajan, Bloomberg, August 1, 2024. Available at: <https://www.bloomberg.com/news/articles/2024-08-01/polymarket-rides-election-betting-frenzy-that-defies-a-us-ban>

¹⁵⁷ How to use Polymarket in the United States, Medium, available at <https://medium.com/@joeearvis7/how-to-use-polymarket-in-the-united-states-8a891dde1a91>, last visited August 8, 2024.

CFTC's suggestion that banning such markets in a regulated environment in the United States will somehow protect the sanctity of our democracy is both naive and disingenuous.

The Commission Should Approve a Broader Set of Economic Indicator Contracts

The Commission asks What indices or measures are “other macroeconomic index[es] or measure[s]” for purposes of CEA section 1a(19)(i).

The Census Bureau produces a series of 13 economic indicators <https://www.census.gov/economic-indicators/> . The Commerce Department’s BEA publishes a different list of nine National economic Accounts, including several that break data down to the state or county level. <https://www.bea.gov/news/glance> . The OECD groups “Main Economic Indicators”¹⁵⁸ into a dozen major categories, several with multiple specific indicators included. For instance, the OECD category for “Labour Market Statistics” includes:

- Employed population by age groups
- Employed population by economic activity
- Employment rate
- Infra-annual labour statistics
- Labour force participation rate
- Labour force population
- Monthly unemployment levels
- Monthly unemployment rates
- Population outside the labour force
- Unemployed population
- Unemployment rate
- Working-age population

The World Bank includes a list of 36 “Featured Indicators”¹⁵⁹

In addition to US and international governmental agencies, some recognized non-governmental organizations publish economic indicators that are widely considered important and reliable. The Conference Board’s Consumer Confidence Index¹⁶⁰ has been published since 1967. The University of Michigan Consumer Sentiment Index has been published since 1952 and the university publishes two related indices for Current Economic Conditions and Consumer Expectations.¹⁶¹ Both are regularly published as financial data on Bloomberg and similar sources and both are widely cited in economic literature. The National Bureau of Economic Research

¹⁵⁸ Available at <https://web.archive.oecd.org/temp/2023-09-05/76384-oecdmaineconomicindicatorsmei.htm>

¹⁵⁹ Available at: <https://datatopics.worldbank.org/world-development-indicators/themes/economy.html>

¹⁶⁰ See <https://www.conference-board.org/topics/consumer-confidence>

¹⁶¹ <http://www.sca.isr.umich.edu/>

(NBER) is a credible source for business cycle dating¹⁶² and publishes a list of 91 recognized governmental and non-governmental economic indicators.¹⁶³

The Commission should recognize all of these indicators published or recognized by US government agencies, international organizations, and respected non-governmental sources as macroeconomic indices or measures for purposes of CEA section 1a(19)(i). Rather than attempting to catalog a large and evolving list the Commission should recognize government and international economic and statistical agencies and respected non-governmental sources (with appropriate but non-exclusive examples as those cited above) and indicate that indicators published or recognized by those agencies will qualify.

The Proposed Rule Suffers Constitutional Deficiencies

Separation of Powers. Reading the undefined statutory term “gaming” to include event contracts on electoral outcomes likely goes so far beyond any commonsense understanding of that word that the Commission would be engaging in legislation via rulemaking. The separation-of-powers principles upon which our government is founded do not allow an agency of the executive branch to exercise the power of the legislative branch.

Not only is the legislative-executive divide implicated, so too is the judicial-executive one. The Supreme Court just overturned the doctrine of *Chevron* deference in which courts afforded agencies broad discretion in interpreting their key statutes, such as, for the Commission, the CEA.¹⁶⁴ The Commission should not expect any judicial deference in defining elections to be the equivalent of a boxing match or a spinning roulette wheel.

Economic Liberty. The Due Process Clause of the Fifth Amendment requires government action to satisfy basic standards of rationality. Courts interpret this obligation as having two components: (1) the government must have a legitimate interest at stake; and (2) there must be a rational fit between that legitimate interest and the means the government has chosen to pursue it. Here, it is not clear that the Commission, as a futures-market regulator, has a legitimate interest in restricting event contracts based on philosophical objections that such contracts will injure the sanctity or dignity of democracy. Nor is there a rational fit. Even if the Commission has a role in policing elections (a dubious proposition as discussed above), there is no plausible evidence that event contracts in electoral outcomes can alter those electoral outcomes in a way the Commission should care about. The notion that such contracts will unravel democracy,

¹⁶² <https://www.nber.org/research/business-cycle-dating>

¹⁶³ <https://back.nber.org/releases/>

¹⁶⁴ *Loper Bright Enterprises v. Raimondo*, 22-451.

something that hasn't happened in any jurisdiction where such contracts are allowed, is the sort of "fantasy" thinking that courts reject as a valid, constitutional basis for economic regulation.

Defining "Gaming" to Include Elections Violates the Separation of Powers in Two Ways.

Legislative-Executive Line. Congress did not define "gaming." As the Supreme Court has long said, "when the statutory language is plain, we must enforce it according to its terms." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). Merriam-Webster defines "gaming" as "the practice or activity of playing games for stakes."¹⁶⁵

The commonsense understanding of "playing games for stakes" is what happens in Las Vegas, such as betting on horses or sporting events or games of chance like roulette wheels. The purpose of the term "gaming" is to prevent a CFTC-regulated entity from becoming a *de facto* casino. The CFTC could not, therefore, allow event contracts like "a roulette wheel will be spun on December 31, 2024 at 9:00 p.m. at the Bellagio casino and the ball will come up black" or "Smith will TKO Jones in the fourth round of their December 31, 2024 boxing match at the MGM casino."

But an election is not a casino game of chance or sporting event. That reality cannot be evaded by defining "gaming" as a "contest of others" because that sweeps in vast amounts of economic activity. Whether Ford or Tesla will sell the most electric sedans is a "contest of others." Once the Commission decides that it can prohibit anything that can be described as a "contest of others," then the CFTC can arbitrarily pick and choose according to its own internal criteria of what is valuable and what is not.

But that is quintessentially a legislative determination. This is especially evident in the policy justifications that the proposed amendment cites: the "perception of election integrity," "monetary incentives to vote for particular candidates even when such votes may be contrary to a voter's (or organized group of voters') political views," "false reporting or other misinformation" about elections, and the specter of "investigating the outcome of an election itself."

Congress could have, but did not, define "gaming" in the expansive manner the draft amendment proposes. And Congress did not do that despite the longstanding existence of the Iowa Electronic Market, for example, or election contracts in foreign jurisdictions. Had Congress perceived event contracts in electoral outcomes to be dangerous (and members of Congress, of course, understand the electoral process and its stakes), then Congress would have supplied the expansive definition of "gaming" that the Commission now proposes.

In short, expanding the definition of "gaming" beyond its commonsense dictionary meaning, and doing so for policy reasons that are fundamentally legislative, threatens to arrogate legislative power to the Commission, which is an executive-branch agency.

¹⁶⁵ <https://www.merriam-webster.com/dictionary/gaming>

Judicial-Executive Line. The Supreme Court just overturned the *Chevron* doctrine of broad deference to executive agencies in interpreting their key statutes.¹⁶⁶ (“But courts need not and under the [Administrative Procedure Act] may not defer to an agency interpretation of the law simply because a statute is ambiguous.”). Thus, to the extent the proposed amendment is premised on two-part assumption that the word “gaming” is ambiguous and that courts will accept whatever definition the Commission seeks to impose, that framework is obsolete with the overruling of the *Chevron* doctrine.

Defining “Gaming” to Include Elections Violates the Constitutional Requirement of Rationality.

The Due Process Clause of the Fifth Amendment requires government action to bear a rational relationship to a legitimate government interest. Though deferential, the so-called rational-basis test “is not a toothless one.” *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981). There must be a demonstrable basis in reality for economic regulation. A “hypothetical rationale,” for regulation, “even post hoc cannot be fantasy.” *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013).

First, it is not clear the proposed amendment’s proffered justifications for prohibiting event contracts in electoral outcomes are grounded in legitimate interests. For example, the concern about misinformation or inauthentic voter choices is fundamentally a concern about political speech and voting. The government has essentially no power to regulate the content of political speech and so, logically, it is not clear the Commission has any legitimate interest in prohibiting event contracts based on concerns about misinformation in political speech. Any attempt to ban politically related activity due to government concern about the content of related political speech would clearly violate the First Amendment. Similarly, the Commission’s professed concern with voters being “incentivized” to vote against their interest is a core personal choice protected by a secret ballot and subject to a dizzying array of incentives, financial or otherwise.

So too of concerns about how markets may affect the outcome of elections. Event contracts about elections may affect outcomes by supplying voters with useful information about the relative strength of candidates at any given moment. In that regard, event contracts produce useful information to supplement polling and political commentary. The Commission has no legitimate interest in squelching information sources on the theory that they may affect elections because the whole point of information is to affect election outcomes. Indeed, the Supreme Court has held that the First Amendment has particular application in the context of elections.¹⁶⁷ The last thing we want is the Commission deciding what information is good or bad when it comes to elections. The obvious solution is to allow event contracts on election results, not ban them.

¹⁶⁶ Loper Bright, *Ibid*.

¹⁶⁷ See, generally *Buckley V. Valeo*, 424 US 1 (1976) and its progeny.

Second, whatever legitimate interest may be at stake, there is no rational relationship between those interests and a blanket ban on event contracts in electoral outcomes. To the contrary, the proposed amendment's justifications for such a ban seem like fantasy. There is no evidence, for example, that small-scale markets such as the Iowa Electronic Market or PredictIt (or such markets in overseas jurisdictions) have resulted in information manipulation or elections coming out differently in a way the CFTC should care about. As just discussed, one valuable effect of event contracts in elections is that they produce useful information for voters. That may affect electoral outcomes and that is a good thing. The notion that more and better information will result in some sinister consequence for democracy (and that the Commission must protect us from that dark future) is an overwrought fantasy. Economic regulation premised on sheer fantasy is unconstitutional.

Conclusion

This NPRM is fatally compromised. It shows strong evidence of being crafted to support a pre-determined conclusion. It ignores readily available evidence. It wholly disregards voluminous comments regarding the benefits of event markets. It fails to consider commonly employed alternatives short of a sweeping ban. It employs fallacious reasoning in attempting to contort inapt state law definitions to cover elections. It attempts to resurrect a repealed statutory test by means of a never-spoken post-passage colloquy. It seeks to take a historically dramatic step without serious engagement with affected markets and market participants. It fails to engage with the voluminous academic literature on the benefits of event markets. It seeks to abdicate or delegate to staff important regulatory functions committed to the Commission. It ignores the notorious operation of offshore markets offering US election contracts that are functionality available to US residents.

The Commission should withdraw the current NPRM and re-engage with advocates as well as critics of event markets in order to gain a better understanding of the functions, operations, and benefits of these markets with the objective of crafting a regulatory approach to address actual rather than merely imagined harms while reaping the benefits of these markets.