The proposed election contracts should be denied, because they indisputably constitute gaming, which Congress designated as "against the public interest".

1. Do these contracts involve, relate to, or reference gaming as described in Commission regulation 40.11(a)(1) and section 5c(c)(5)(C) of the Commodity Exchange Act, or in the alternative, involve, relate to, or reference an activity that is similar to gaming as described in regulation 40.11(a)(2) or section 5c(c)(5)(C) of the Commodity Exchange Act?

Yes. In order to answer this question, we need to of course define "gaming" as it appears in the text of the relevant laws. However, it seems that an explicit legislative definition of gaming is not provided in the relevant laws (CEA, Dodd-Frank). Of course, federal courts must interpret the meaning of words or phrases that are not explicitly defined in legislative text all the time. To do this, the Supreme Court often relies on contemporary dictionary definitions to interpret words or phrases in legislation that are not clearly defined by Congress.

American Heritage Dictionary, often cited by the Supreme Court to define relevant terms that do not have explicit definitions in legislative text, defines "gaming" as:

> Gambling, especially casino gambling.

https://www.ahdictionary.com/word/search.html?q=gaming

We see that following the approach federal courts would take when defining specific terms, **gaming means gambling.** To further support this, another tool that federal courts use to interpret words and phrases in a piece of legislation that is not explicitly defined in that same legislation, is to refer to related legislation that also use the term for guidance. For example, the Unlawful Internet Gambling Enforcement Act of 2006 references gambling and gaming virtually interchangeably, and Dodd-Frank, enacted in 2010, gives CFTC explicit legislative authority to prohibit markets related to gaming as contrary to the public interest, adding further support that in context of the relevant laws at hand, **gaming means gambling.**

It is established that CFTC clearly has authority to strike contracts that involve gaming, meaning gambling (Dodd-Frank Sec 745). So then, do the proposed elections contracts constitute gambling?

It's hard to argue that they don't. For one, consider the similarities to sports betting, which not a single person on earth would believe is NOT gambling. Indeed, sports gambling firms routinely host or aim to host elections gambling. (See DraftKings opening US elections betting in Canada, FanDuel opening general election betting in West Virginia in 2020 before it was quickly shut down by state regulators, among others)

The parallels are remarkable. Both sports and elections involve:

1) At least 2 parties
2) participating in a competitive event against each other
3) whose outcome cannot be publicly determined in advance
4) with the goal of winning that event

The CFTC has long and consistently opposed sports betting contracts appearing on DCMs due to the correct and obvious interpretation that they constitute gaming (gambling). With the parallels so similar, it's a no-brainer that these elections contracts should be also rejected on the same basis.

Remark: On a related note, I would comment that CFTC improperly granted certification for Kalshi's Emmy and Oscars markets, as they clearly constitute gaming (gambling). They also clearly have no hedging value whatsoever, and exist solely to enable online gambling on the outcome of a competitive event. The CFTC should correct its error and withdraw the certification for those markets. On another note, Emmy and Oscars markets are obliquely related to box office events, which are explicitly banned by Congress.

2. Should the Commission consider whether similar offerings are available in traditional gaming venues such as casinos or sports books and/or whether taking a position on elections or congressional control is defined as gaming under state or federal law?

Sports betting venues routinely aim to host elections betting, usually outside the United States as they understand that such betting is generally illegal in the United States and their hosting them would run into enforcement by state or federal agencies. Of course CFTC should consider that sports books generally have not successfully hosted elections betting in the US because they have generally interpreted them to be illegal per state or federal policy.

Per the response to Question 1, taking a position on elections or congressional control is clearly gaming (meaning gambling) under state or federal law.

3. Do these contracts involve, relate to, or reference "an activity that is unlawful under any State or Federal law" as described in Commission regulation 40.11(a)(1) and section 5c(c)(5)(C) of the Commodity Exchange Act?

Yes. Elections betting is banned by legislation in numerous states. The most recent enforcement of such a ban as far as I'm aware was actually quite recent in 2020, when the sports betting firm

FanDuel went live in West Virginia with general elections betting, but was quickly shut down by state regulators due to violating state law.

See: https://www.nbcnews.com/news/us-news/west-virginia-became-first-state-offer-bets-politics-then-quickly-n1179391

Also see: https://sos.wv.gov/news/Pages/04-08-2020-A.aspx Remarks from the WV Secretary of State in relation to the shutting down of elections betting due to violating state law: **"Gambling on elections has been illegal in West Virginia since 1868," Warner said. "Gambling on the outcome of an election has no place in our American democracy. Not today. Not tomorrow. Not ever."**

"This is a terrible idea. Let's shut this down right now and be very clear about it."

Some individuals have argued that because elections are not gaming, terrorism, assassination, war, or something prohibited by state or federal law, markets on such should be permitted. But this is merely an attempt to obscure a proper interpretation. The problem with this argument, is that they are failing to distinguish the general term "election" with the underlying event that actually resolves the proposed markets: the ***outcome*** of an election. There are numerous ways to create markets centered around elections, i.e. 1) Whether an election will be held by a particular time (more relevant in foreign countries than in the US) 2) Which particular candidates may run in a particular election, and of course 3) The outcome of an election. (Other markets about elections are also possible).

The underlying event "election" by itself does not constitute gaming or something prohibited by federal or state law, but **it is clearly obvious that the underlying event "*outcome of an election"*** DOES constitute gaming.

A proposed contract merely has to "involve, relate to, or reference …. An activity that is unlawful under any state or federal law" to be rejectable. A contract on the ***outcome of an election*** clearly involves and relates to activities prohibited by federal and state laws (including the West Virginia law that prompted the state to shut down an election market in 2020), notably laws prohibiting various forms of online gambling, including states that ban sports betting.

Also, further relating to the point that elections do not constitute gaming or something prohibited by federal or state law (but that elections betting is clearly both gaming and prohibited by law in numerous states), it is worth mentioning that the Supreme Court rejected interpreting words and phrases to the extent that it ignores all context of its applicability and intent. In the landmark case *Bostock v Clayton County*, the Supreme Court determined that Title VII of the Civil Rights Act's protection against employment discrimination on the basis of sex is violated when an employee is dismissed because of their sexual orientation or gender identity, even though neither orientation nor gender identity appears in the law, "because discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently because of their sex", and that "There is no escaping the role intent plays: Just as sex is necessarily a but-for cause when an employer discriminates against homosexual or transgender employees, an

employer who discriminates on these grounds inescapably intends to rely on sex in its decisionmaking." It's easy to apply an analogue and hold that a DCM that proposes a market on elections relating to the Control of Congress necessarily proposes a market on elections betting, which is prohibited by the laws of at least one state.

In sum, these proposed contracts both constitute gaming and activity that is illegal under the laws of at least one state. They should be denied.

4. In determining whether any of these contracts involves an activity that is unlawful under any State or Federal law, should the Commission be influenced by whether state laws permit betting on the outcome of elections or other political outcomes and/or by the prohibition of interstate betting under Federal law?

See response to Q3. CFTC should be influenced by the fact that numerous states ban elections betting, and that such proposed contracts would clearly constitute "an activity prohibited by federal or state law", notwithstanding attempts to argue that elections aren't gaming or illegal. A contract on the underlying event the ***outcome of an election*** cannot reasonably be construed as anything other than elections betting, which is illegal in numerous states. If laws could be skirted on these kinds of technicalities, pretty much any provision in United States Code can be exploited to enable activity clearly intended to be illegal.

5. Are the contracts substantively different than Nadex's previously proposed contracts such that the Commission's analysis should be different? For reference, please see "CFTC Order Prohibiting North American Derivatives Exchange's Political Event Derivatives Contracts" (Apr. 2, 2012) available at https://www.cftc.gov/PressRoom/PressReleases/6224-12.

There is no discernible difference whatsoever. Nadex tried to offer elections betting for the 2012 elections, and was denied due to the CFTC's determination that they involve gaming (gambling, as is clearly defined in the response to Q1) and are contrary to public interest. CFTC regulations and the relevant laws have not changed since then. There is immense public interest in ensuring that CFTC is following a uniform set of rules, and not unduly favoring one organization over

another, which stifles competition, which CFTC is by law supposed to help promote. If CFTC approved Kalshi's election markets despite rejecting Nadex's markets, that would seem extraordinarily unfair to Nadex and against CFTC's purpose, wouldn't it? The fair and appropriate course of action, then, is to act consistently, deny these contracts, and seek new legislation from Congress as to which kinds of topics are explicitly banned, and if elections is included. CFTC should act consistently where the laws haven't changed, and let Congress legislate.

6. Do the contracts serve a hedging function? Are the economic consequences of congressional control predictable enough for a contract based on that control to serve a hedging function? Please provide tangible examples of commercial activity that can be hedged directly by the contracts or economic analysis that demonstrates the hedging utility of the contracts.

These contracts are a poor vehicle to hedge because electing a certain Congress does not ensure that any particular legislation will pass, or even if particular legislation does pass, what it will actually do. Congress is well known for being highly unpredictable as to what it will do and when it will do it (i.e., Build Back Better ultimately becoming the Inflation Reduction Act, something vastly different, and it was unknown for essentially the entire time whether it would ever appear or pass). The economic consequences of congressional control are highly unpredictable and many commentators (looking at you, Jim Cramer) and even actual professionals are very frequently wrong about their predictions of what Congress would or won't do.

7. Are there unique economic risks tied to the outcome of congressional control that cannot be hedged via derivative products on equities, debt, interest rates, tax rates, asset values, and other commodity prices?

No. The way congressional control (or more relevantly, a change in congressional control) can introduce economic risks is 1) More favorable or less favorable legislative treatment towards particular companies or industries (for example, Dem control might be less favorable to oil companies and more favorable to clean energy companies, and GOP control might be less favorable to Big Tech and more favorable to oil companies), but that can be hedged with regular instruments like stocks and bonds. Other economic risks (such as inflationary monetary and fiscal

policy, and government shutdown prospects) can be hedged with traditional instruments like interest rates, gold, among other traditional commodities and assets.

8. What standard should the Commission use in reviewing the contact's hedging function? Is it sufficient that a contract could theoretically be used for hedging or, should an exchange provide evidence of demonstrated need by likely hedgers in the market? How often must a contract be used for hedging or what percentage of market participants or open interest must represent hedging use?

The Commission should rigorously verify that a contract is actually going to be used for hedging, and not to primarily enable gambling. If CFTC approves any contract that merely only has a theoretical hedging case, then it would wind up approving practically any proposed contracts, including those regarding war, terrorism, assassination, and illegal activities including violent crime, as it is possible to imagine a theoretical hedge case against any kind of contract. But clearly, that is against the intentions of the relevant laws (CEA, Dodd-Frank) to enable markets that promote lawbreaking, and elections betting is illegal is the laws in numerous states.

The CFTC should examine how often traditional contracts it has long regulated (ie swaps, traditional commodity futures) are used for hedging and see if these proposed contracts can meet a comparable standard.

It is also relevant to consider that PredictIt and other unregulated venues have been offering elections betting for some time now, and over their existence, practically no one used those elections contracts to hedge anything. Their predominant purpose was to enable gambling and speculation on election outcomes. Indeed, podcasts and other public commentary about individual betting markets never discuss hedging cases for the markets; rather, they discuss speculation techniques for those markets.

9. Should the Commission consider contract and position sizes and the exchange's intended customer base to help assess whether a product is likely to be used for hedging in at least some cases? Are very small dollar value contracts targeted at individual retail customers likely to have hedging utility for such customers when the contracts offer positions

macro level national political events? Does whether contracts are margined or fully collateralized affect this analysis?

The CFTC should be primarily focused on applying the law as written, and under the laws as written, election contracts constitute gaming (gambling), and elections betting is illegal in the laws of numerous states.

12. Are the proposed contracts contrary to the public interest? Why or why not?

Yes. To answer this, we will have to define "contrary to the public interest" as it appears in the text of the relevant law (Dodd-Frank).

''(i) EVENT CONTRACTS.—In connection with the listing of agreements, contracts, transactions, or swaps in excluded commodities that are based upon the occurrence, extent of an occurrence, or contingency (other than a change in the price, rate, value, or levels of a commodity described in section 1a(2)(i)), by a designated contract market or swap execution facility, the Commission may determine that such agreements, contracts, or transactions are contrary to the public interest if the agreements, contracts, or transactions involve— ''(I) activity that is unlawful under any Federal or State law; ''(II) terrorism; ''(III) assassination; ''(IV) war; ''(V) gaming; or ''(VI) other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest. ''(ii) PROHIBITION.—No agreement, contract, or transaction determined by the Commission to be contrary to the public interest under clause (i) may be listed or made available for clearing or trading on or through a registered entity.

The way I see it, there are two ways that "contrary to the public interest" can be interpreted and applied here:

1) The first way, which is the way that most commentors seem to have interpreted, is that the CFTC is tasked with making judgment calls on what constitutes contrary to the public interest, and why a proposed contract may be contrary to the public interest. They will advocate for or against these contracts based on their own explanations of why the contract is or is not "contrary to the public interest"
2) The second way, which I think is the correct approach based on the reading of the law, is that "contrary to the public interest" is the name of a category that Congress has established. That category includes contracts relating to war, terrorism, gaming, assassination, and activities unlawful under federal or state law. Under this interpretation, it makes no difference as to whether the name of the category is called "contrary to the public interest", "stuff Congress doesn't like", or "Tom's personal wish list"; in all cases, the category encompasses contracts related to war, terrorism, gaming, assassination, and unlawful activities under federal or state law.

The reason I think the second interpretation is correct because it more naturally follows from a textualist approach to interpretating that section of Dodd-Frank, and textualism is the overwhelmingly preferred approach the current Supreme Court takes when interpreting statues. Under that approach, that law of the law is not at all unconstitutionally vague (whereas the first interpretation may raise reasonable unconstitutional vagueness concerns), it is clear in establishing what CFTC is tasked to do.

1) Congress has established a category named "contrary to the public interest"
2) That category includes contracts that "involve— ''(I) activity that is unlawful under any Federal or State law; ''(II) terrorism; ''(III) assassination; ''(IV) war; ''(V) gaming; or ''(VI) other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest."
3) Part (VI) allows CFTC to add other contracts to the initial list, which currently consists of 1) unlawful activities under federal or state law, 2) terrorism, 3) assassination, 4) war, or 5) gaming, but ***only if that contract is similar to*** an unlawful activity under federal or state law, terrorism, assassination, war, or gaming.

It has been established that the proposed election contracts clearly constitute gaming (gambling), and betting on the outcome of an election is illegal under numerous state laws. CFTC is thus clearly empowered by the plain text of the Dodd-Frank Act to prohibit those election contracts, and it should do so because Congress designated such contracts as "contrary to the public interest" because they involve gaming and enable illegal betting on elections in violation of state laws.

14. Could the contracts facilitate violations of, or otherwise undermine, federal campaign finance laws or regulations? For example, could the contracts make it easier to sidestep prohibitions governing coordination between candidate campaign committees and political action committees?

I think with large scale elections betting you would probably have scenarios where PACs (particularly those that aren't directory involved with the campaign) may intentionally pump prices with the aim of generating positive press or signs of momentum. They may view it as spending to promote candidates similar to traditional forms of methods to get name recognition out. There are actually some indicators that this occurred in some PredictIt primary markets. As individual political campaigns routinely raise 7, 8, or 9 figures, spending $25000 or less (or having multiple people spending up to $25000) to manipulate models or generate positive press may seem strategically worthwhile from a campaign's perspective.

15. Do the contracts present any special considerations with respect to susceptibility to manipulation or surveillance requirements? For example, could candidate campaign committees or political action committees manipulate the contracts by trading on internal, non-public polling data?

Yes! For instance, PredictIt's existence has spawned an entire fake polling industry, even though one can only bet up to $850 per contract on that site! Imagine the scale of this issue if those prospective manipulators can make money off of $25000 bets instead of $850. Fake polling also does real damage to confidence in reliability of polling in general and forecasting, and can generate controversies among campaigns themselves. (i.e. see Trump campaign complaints about public polling)

17. What other factors should the Commission consider in determining whether these contracts are "contrary to the public interest?"

The Commission should consider applying the plain letter of the law, which is that "contrary to the public interest" is a category that Congress has designated that includes contracts relating to activity unlawful per federal or state law, assassination, war, terrorism, gaming, and any other activities similar to one of the preceding. These election contracts are clearly both gaming (gambling) and illegal under numerous state laws, so they fall into the category of "contrary to the public interest", and CFTC should enforce Congress's legislative judgment.

Conclusion: The proposed election contracts should be denied.