The CFTC should approve the proposed contracts on Congressional control, not only because they provide important societal and forecasting benefits as numerous other comments in support have demonstrated, but also because under existing federal law, it is highly dubious that the CFTC even has the authority to block these proposed contracts in the first place.

I. The Commodity Exchange Act does not bestow the CFTC power to block markets involving elections or Congressional control.

The Commodity Exchange Act (CEA), as amended by Dodd-Frank, gives the CFTC discretion to "determine that [proposed event contracts 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." Contracts that have been designated by the CFTC as "contrary to the public interest" may not be made available for trading by registered entities, such as Kalshi.

To begin by setting aside the obvious, an event contract pertaining to control of Congress do not involve terrorism, assassination, or war by any ordinary usage of these terms, nor are they related to any of the aforementioned. The event "party control of Congress" is determined by and resolved through a federal election held every two years. Elections are not activities that are "unlawful under any Federal or State law" per CEA; quite on the contrary, each state establishes the "Times, Places and Manner of holding Elections for Senators and Representatives" as authorized by the Constitution, and federal law establishes a uniform date for federal elections across all states.

Any attempt by CFTC to disallow event contracts relating to political control, then, must rely on the interpretation that such contracts involve "gaming", or a similar activity to "gaming". Indeed, this is the category that CFTC has relied on to block such proposed contracts in the past, when the North American Derivatives Exchange (Nadex) was prohibited from listing contracts relating to the party with majorities in Congress in 2012[1]. In deciding whether to approve or deny the currently proposed contracts on congressional control, CFTC is likely to decide of whether such contracts involve "gaming" or an activity similar to "gaming."

1) https://www.cftc.gov/sites/default/files/idc/groups/public/@rulesandproducts/documents/ifdocs/nadexorder040212.pdf

A. Neither "control of Congress" nor "elections" involve "gaming" or an activity similar to "gaming"

Before explaining why these proposed contracts do not involve "gaming" or activities similar it, first note the apparent vagueness of the term "gaming" itself as it appears in section 5c(c)(5)(C) of the CEA; that term is not defined in that Act. Its usage is certainly ambiguous depending on the context, such that those "of common intelligence must necessarily guess at its meaning." *Connally v. General Construction Co., 269 U.S. 385 (1926).* However, it appears that in more recent cases, the Supreme Court's vagueness doctrine only applies in assessing *criminal laws*, so it seems unlikely that this provision of CEA would be invalidated on the grounds of being unconstitutionally vague.

Irrespective, there is no reasonable interpretation of "gaming" that encompasses control of Congress or elections, nor are elections similar to "gaming". For terms that do not contain explicit legislative definitions, such as "gaming" as it appears in the CEA, the Supreme Court tends to favor interpreting words and phrases in federal statues using their ordinary meaning – how a "reasonable person" at the time of enactment would read those words and phrases. There is another approach towards interpreting terms in a statue that involves a more literalist approach that can involve using contemporary legal dictionaries to ascertain the definitions of individual terms in a statute. (Sometimes the latter approach is used to guide the former approach). Regardless of which approach is used to interpret "gaming" as it appears in CEA, elections or control of Congress are not encompassed in that term.

B. The ordinary meaning of "gaming" does not encompass elections.

The "ordinary meaning" of a word or phrase in the context of statutory interpretation is generally considered to the meaning that a "reasonable person" or "reasonable reader" would draw from that word or phrase. (Self-described textualists may include the addendum "at the time of enactment"). Courts may also turn to the "common usage" of a word or phrase as an objective and impartial means of divining its meaning in a statute.

Dodd-Frank, the Act that amended the CEA to include its "gaming" provision, became law in 2010. That's not a huge amount of time ago in context of history, and it's not hard to find support

and indicators that the "common" and "everyday" usage of the term "gaming" had very little or none to do with elections, or even gambling. In both 2010 and today, the "common usage" of the term "gaming" usually draws visuals of people a board game, a person sitting on a chair playing a computer game, or individuals playing a professional sport. See, for instance, https://www.nytimes.com/2010/12/07/science/07tierney.html "On a Hunt for What Makes Gamers Keep Gaming (2010)", one of an endless array of sources that provide support for the argument that the ordinary usage of "gaming" envisions people *playing some kind of game*, be it board, card, computer, or sport, and not elections.

C. Legal or literal definitions of "gaming" do not encompass elections.

Black's Law Dictionary (used frequently by the Supreme Court) defines "gaming" as including any of the following:

-the act or practice of playing games for stakes or wagers;

-gambling;

-the playing at any game of hazard;

-an agreement between two or more persons to play together at a game of chance

-an agreement between two or more to risk money on a contest or chance of any kind, where one must be loser and the other gainer

An election, or congressional control, is not an act of playing a game for a stake or wager, gambling, playing a game of hazard, or an agreement to play a game of chance, or an agreement to risk money, nor is an election a plausibly similar activity to each of the aforementioned activities.

One argument that has been made by those that oppose these election contracts is that although elections are not "gaming", wagering money on the outcome of an election constitutes a form of "gaming" defined as "gambling" or an agreement between two or more to risk money on a chance event and thus empowers the CFTC with the authority to reject proposed elections contracts. That argument essentially boils down that betting money on elections contracts is a form of gaming (gambling). By that logic, *every event contract or futures contract* would be a form of "gaming", including longtime traditional contracts such as a grain futures, as they involve wagering money on some future outcome. But the CFTC in its history has never claimed a power to reject any kind of event contract as it pleases, nor does the law permit them to do so. And the law only permits the CFTC to disallow a limited set of contracts that involve terrorism, war, assassination, gaming, or an activity similar to the aforementioned. Elections or congressional control do not constitute a component any of those limited categories.

II. A CFTC denial of the proposed contracts may raise a conflict with the Major Questions Doctrine.

The Major Questions Doctrine is something of a recent phenomenon, but since it is currently endorsed by at least five current Supreme Court justices, including in the recent cases *West Virginia v. Environmental Protection Agency, 597 U.S. ___ (2022)* and *Biden v. Nebraska, 600 U.S. ___ (2023),* it is the law of the land. The doctrine is premised on the principle that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." And accordingly, when an agency such as the CFTC aims to "assert highly consequential power" it must be able to point to "clear Congressional authorization" for that exercise of power. It is worth considering, then, whether the CFTC, an unelected federal agency, acting to unilaterally block an event contract with enormous public ramifications and public interest is supported by such "clear authorization", and whether the CFTC, in denying these momentous contracts, is claiming this power in the "vague language of an "ancillary provision"" of the CEA.

To be fair, the Major Questions Doctrine, to be frank, is quite vague on its own terms. (For instance, the practical determination of when a "question" becomes "major" is borderline

standardless and is essentially left to the whims of the deciding judge or judges.) But even though there are certainly valid criticisms of the doctrine, the fact that it is endorsed by a majority of the current Supreme Court means it is our law and it may need to be considered when appropriate.

The Major Questions Doctrine kicks in when a federal department or agency (such as the CFTC) attempts to make decisions of "vast economic and political significance." If the doctrine kicks in, the agency would need to point to "clear Congressional authorization" of its actions.

It can possibly be reasonably argued that denying an elections contract is not an action of "vast economic and political significance", as for instance, prediction markets like Kalshi and PredictIt currently comprise a miniscule and negligible percentage of all futures contracts trading. But it can also be reasonably argued that prediction markets relating to elections and control of Congress have "vast economic and political significance", as for instance, many firms large and small may and use the hedging and forecasting uses of such markets to account for possible changes in government or policy that may impact their business. Even currently, trading firms use industry proxies to trade according to the results of elections. (For example, trades of green energy companies or oil companies depending on which party wins a national election.)

While the answer to whether denying permission to elections contracts broadly is an act of "vast economic and political significance" is reasonably ambiguous, with valid arguments on either side, what is unequivocally clear is that ***if it were the case, then the CFTC would not be able to point to "clear Congressional authorization" of its action,*** and thus would fail the merits of the Major Questions Doctrine. Faced with the merits of that doctrine, the CFTC would have to rely on the argument that Congress "clearly authorized" the term "gaming" in the CEA to encompass elections, an argument that is comical, meritless, and unsupported. For context, if the Supreme Court interpreted "waive or modify" in the HEROES Act to disallow the Secretary of Education to cancel student loan debt broadly, the chance that the same Court would interpret "gaming" in the CEA to clearly encompass elections is practically nonexistent. (It is worth pointing out that the term "waive of modify in the HEROES Act is demonstrably less vague than the term "gaming" as it appears in the CEA.) It is also worth noting that Congress in the past has "[made] major policy decisions itself" in the area of event contracts when it enacted through legislation a ban on box office contracts. This direct legislative ban on a specific kind of event contract can strengthen an argument that Congress did not intend for CFTC to have power to ban whole classes of event

contracts relying solely on a *vague* construction of one word in the CEA, as Congress could have and indeed has before done so itself. The Supreme Court has become increasingly hostile to *Chevron Deference*, and would certainly not defer to CFTC's own interpretation of the term "gaming" as it appears in the CEA as opposed than the plain meaning of the term itself. (A case that SCOTUS is hearing next term, *Loper Bright Enterprises v. Raimondo*, presents the question of whether *Chevron* should be outright overruled) There is ample "reason to hesitate" before concluding that Congress intended to vest CFTC with the power it would claim.

In sum, there is solid basis that the law does not permit the CFTC to unilaterally deny the proposed contracts on congressional control, and thus they should be approved.