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A PROFESSIONAL CORPORATION

June 27, 2024

Christopher Kirkpatrick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581
https://comments.cftc.gov/PublicComments/CommentForm.aspx?id=7512

Re: 17 C.F.R. Part 40, Event Contracts, Notice of Proposed Rulemaking, 89 Fed. Reg. 48968 (Jun. 10, 2024) PR 8907-24 ("NOPR") RIN 3038-AF14

Dear Mr. Kirkpatrick:

In 2010, Congress added a new §5c(c)(5)(C) to the Commodity Exchange Act empowering the CFTC to prohibit futures contracts that "involve … gaming":

> Special Rule For Review And Approval Of Event Contracts … In connection with the listing of [futures contracts] … that are based upon the occurrence, extent of an occurrence, or contingency … , the Commission may determine that such [futures contracts] are contrary to the public interest if [they] 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.

According to the CFTC, contracts that "involve … gaming" do not include contracts that "involve" "games":

> [I]t is difficult to conceive of a contract whose underlying event, itself, is "gaming." If "involve" were to refer only to a contract's underlying, contracts based on sporting events such as horse races and football games would not qualify, because sports typically are not understood to be "gaming" – they are understood to be "games." In effect, if "involve" were to refer only to a contract's underlying, the scope of certain prongs of CEA section 5c(c)(5)(C) could effectively be limited to a null set of event contracts, which could not have been Congress's intent.[1]

[1] NOPR Voting Copy - as approved by the Commission on 5/10/2024 ("Voting Copy") p. 23, fn. 62 (https://www.cftc.gov/media/10706/votingcopy051024_EventContracts/download); 89 Fed. Reg. at 48974 fn. 61.

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From its predicate that since the word "gaming" in the statute couldn't possibly mean "games," because "games" is a "null set," the CFTC argues that Congress must have authorized the CFTC to prohibit any conceivable synonym for "gaming":

> The Commission proposes to define "gaming" in new § 40.11(b)(1) as "the staking or risking by any person of something of value upon: (i) the outcome of a contest of others; (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."[2]
>
> … the Commission proposes to set forth in new § 40.11(b)(2) a non-exclusive list of examples of activities that constitute "gaming," as proposed to be defined. … The Commission emphasizes that the list of examples provided in proposed § 40.11(b)(2) is non-exclusive. To the extent that other activity falls within the definition of "gaming" set forth at proposed § 40.11(b)(1), such activity would also constitute "gaming."[3]

The CFTC argues from there that anything within an internet dictionary's "ordinary meaning" of any of the synonyms is within the prohibition:

> The Commission considers the term "contest" to have its ordinary meaning, and to encompass a "competition." See, e.g., MERRIAM-WEBSTER.COM, available at https://www.merriam-webster.com/dictionary/contest (defining the noun "contest" as: "1) a struggle for superiority or victory: competition; 2) a competition in which each contestant performs without direct contact with or interference from competitors").[4]

And from there the CFTC argues that the "ordinary meaning" of *synonyms* also includes possible *metaphors* that use any of the synonyms, such as an election as a "political contest":

> Proposed § 40.11(b)(2) states that "gaming" includes, but is not limited to, the staking or risking by any person of something of value upon: (i) the outcome of a political contest, including an election or elections … .[5]

So, according to the CFTC, the prohibition on event contracts involving "gaming" could not possibly simply refer to games, since "games" is a "null set"; therefore the

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[2] NOPR Voting Copy p. 25.
[3] NOPR Voting Copy pp. 28-29.
[4] NOPR Voting Copy pp. 25-26, fn. 66; 89 Fed. Reg. at 48974-75 fn. 65. Courts citing dictionaries typically cite actual dictionaries rather than internet sites. See, e.g., Wessel & Weissenberg, *The Role Of Dictionaries In Last Term's High Court Decisions*, Law360 (Jul. 12, 2019).
[5] NOPR Voting Copy p. 28. The use of the word "including" implies that the CFTC believes that there is a superset of "political contests" of which "elections" are only a subset.

CFTC can prohibit event contracts on the basis of synonyms for "gaming"; "contests" is a synonym for gaming, and, since people sometimes say "political contest" as a metaphor for election, the CFTC can prohibit futures contracts on elections because they "involve … gaming."

However, that's not what Congress said. Congress gave the CFTC power to prohibit contracts that "involve … gaming." "Games," include for example, "football"; futures contracts on football games are very clearly prohibited by §5c(c)(5)(C), even though the CFTC and its Commissioners seemed confused when presented with this question a few years ago.[6] Section 5c(c)(5)(C) gives the CFTC power to prohibit futures contracts that "involve" unlawful activity, terrorism, assassination, war, and gaming; it does not give the CFTC power to prohibit futures contracts on activities that are sometimes described with metaphors that include synonyms for unlawful activity, terrorism, assassination, war, or gaming.

Elections Are Not "Contests"

Elections are the consent of the governed to their government. According to the Declaration of Independence:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, *deriving their just powers from the consent of the governed … .*

This consent is granted through elections. James Madison notes in Federalist 53:

> … as the state will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will have had their voice in the election of the government which is to exercise authority over them; as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them; and as the authority of the legislature of the state, and of the inhabitants of the ceded part of it, to concur in the cession, will be derived from the whole people of the state … .[7]

To get its claimed jurisdiction over elections, the CFTC declares elections are actually not the foundation of a free society, not the consent of the governed to their

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[6] Jeremy D. Weinstein, *Football Gambling Futures Contracts: Can the CFTC Measure Up to the Keystone Cops?*, 41 Futures & Derivatives Law Report (Jul./Aug. 2021), https://bit.ly/3qJrBZ4.

[7] See also Declaration of Rights (1765) ("it is inseparably essential to the freedom of a people … that no taxes should be imposed on them, but with their own consent, given personally, or by their representatives … chosen therein, by themselves … ."); Declaration of Rights (1774); Thomas Paine, Common Sense (1776); *The Meaning of Government by Consent* in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATE (Signet Classics 1986); Abraham Lincoln, The Gettysburg Address (1863) ("government of the people, by the people, for the people").

government, but "gambling,"[8] mere "political contests,"[9] simply "for entertainment purposes."[10]

In 2012, the CFTC called elections "political contests": "the Political Event Contracts are all premised either directly (in the case of the presidential Political Event Contracts) or indirectly (in the cases of the House and Senate majority control Political Event Contracts) on the outcome of a contest between electoral candidates … ."[11]

The CFTC's cynical and reductive view of elections has yet to catch on, and has no legal precedent. As of today, there are 86,957 reported U.S. judicial decisions using the words "political" and "election,"[12] and only 318 reported judicial decisions using the phrase "political contest."[13] Since 1936, there have been only three uses of the phrase "political contest" in the Federal Register: by the CFTC in this NOPR, by the Federal Communications Commission in 1975 to mean political campaign,[14] and by the Securities and Exchange Commission in 1964 to mean telling lies to get votes.[15] In contrast, 25,340 separate documents in the Federal Register use the word "election."[16] The word "election" appears in the U.S. Constitution, but not the word "contest." The Federalist papers say "elect" or "election" 261 times; "political contest" not at all. In Federalist 17 and 18, Alexander Hamilton *contrasts* government under the Constitution with "contests" of might.[17] There is no legal precedent on which to build a regulation that defines "election" as "political contest" as "gaming." Rather, the legal authority is fully to the contrary of the CFTC's labeling of our sacred (Federalist 14) national elections as mere "contests."

When in Court, the CFTC could not even argue with a straight face that

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[8] NOPR Voting Copy p. 26.
[9] NOPR Voting Copy p. 28.
[10] NOPR Voting Copy p. 50; 89 Fed. Reg. at 48982.
[11] CFTC, *In the Matter of the Self-Certification by North American Derivatives Exchange, Inc., of Political Event Derivatives Contracts and Related Rule Amendments under Part 40 of the Regulations of the Commodity Futures Trading Commission* (Apr. 2, 2012) at p. 3.
[12] https://www.courtlistener.com/?q=political%20election&type=o&order_by=dateFiled%20desc&stat_Precedential=on&stat_Non-Precedential=on&stat_Errata=on&stat_Separate%20Opinion=on&stat_In-chambers=on&stat_Relating-to%20orders=on&stat_Unknown%20Status=on.
[13] https://www.courtlistener.com/?q=%22political%20contest%22&type=o&order_by=dateFiled%20desc&stat_Precedential=on&stat_Non-Precedential=on&stat_Errata=on&stat_Separate%20Opinion=on&stat_In-chambers=on&stat_Relating-to%20orders=on&stat_Unknown%20Status=on.
[14] 40 Fed. Reg. at 48967 col. 3 (Oct. 20, 1975).
[15] SEC Release 34-7208, 29 Fed. Reg. at 341 (Jan. 15 1964).
[16] https://www.govinfo.gov/app/search/%7B%22query%22%3A%22election%22%2C%22offset%22%3A0%2C%22facetToExpand%22%3A%22accodenav%22%2C%22facets%22%3A%7B%22accodenav%22%3A%5B%22FR%22%5D%7D%2C%22filterOrder%22%3A%5B%22accodenav%22%5D%7D.
[17] Similarly James Madison in Federalist 53 and 63. "Contest" is not reported to be used as a metaphor for elections in the national debate over the adoption of the Constitution in Kaminski, et al., METAPHORICALLY SPEAKING: THE U.S. CONSTITUTION DESCRIBED IN METAPHORS AND SIMILES, 1787-1791 (Center for the Study of the U.S. Constitution, Madison WI 2022).

"elections" are "contests" are "games." In the May 30, 2024, District Court oral argument in the suit against the CFTC by a futures exchange objecting to the banning of its proposed elections futures contracts, the following exchange occurred:

> THE COURT: Besides elections, in your view, is there a contest of others that doesn't involve a game as plaintiff would define what game means?
>
> MS. STUKES [counsel for the CFTC]: I actually thought the horse race wasn't a game. But there are contests, Academy Awards, award types of things that doesn't seem like a game, just seems like a contest.[18]

CFTC Appetites

In this NOPR the CFTC claims:

> if trading was permitted on CFTC-registered exchanges in event contracts that involve the staking or risking of something of value on a political contest, then the Commission could find itself investigating the outcome of an election itself. While certain commodities outside the Commission's direct remit do underlie derivatives without giving rise to significant problems, due to the special role of elections in our society, the Commission believes that the oversight function in this area is best reserved for other expert bodies. Of course, governmental bodies are tasked with that function, but the Commission has both the authority and responsibility to address fraud, false reporting, and manipulation in markets for derivatives that trade on CFTC-registered exchanges. See, e.g., CEA section 6(c), 7 U.S.C. 9(c); 17 CFR 180. As such, if trading were permitted in event contracts that involve the staking or risking of something of value on the outcome of a political contest, or upon an occurrence or non-occurrence in connection with such a contest, the Commission would have a statutory responsibility to exercise its surveillance, investigation, and enforcement authority to ensure the integrity of the markets in such contracts. Conversely, attempts at manipulation of such markets could have broader electoral implications, similarly drawing the Commission into investigations of election-related activities. Indeed, accusations of fraud have been leveled at government bodies tasked with administering elections. Such scenarios underscore for the Commission that it has no appropriate role in this area.[19]

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[18] *Kalshi v. CFTC*, No. 1:23-cv-03257-JMC, May 30, 2024, hearing transcript (attached), p. 55. See Jared Foretek, *Kalshi Says Elections Aren't Games In Voting Wager Hearing*, Law360, May 30, 2024 ("But when Judge Cobb pressed Stukes on what else the agency's definition of 'gaming' might prohibit for futures betting aside from games and sports in the traditional sense, Stukes hesitated before pointing to the outcome of an awards show like the Grammys. On rebuttal, Jones Day's Yaakov Roth pointed out that, actually, Kalshi offers contracts on awards show outcomes, and has done so for 'a long time.' 'They've never subjected those to review,' he told Judge Cobb. 'I think that really underscores the ... outcome-driven aspect of this. It's not statutory interpretation.'").

[19] NOPR Voting Copy p. 55 (fn. 127); 89 Fed. Reg. at 48983. Note the CFTC's careful usage- elections are "political contests" when they need to be "gaming," but critical when they need CFTC oversight.

According to the CFTC, even if other government bodies are tasked with surveilling and enforcing, if the CFTC allows a futures contract on something, the CFTC "would have a statutory responsibility," even without actual statutory authority, to take on "market" surveillance, investigation, and enforcement regarding that something.

In an *amicus* brief at the Second Circuit[20] the CFTC argued that it has jurisdiction over "commodities," that "commodities" means virtually every good or service, tangible or intangible, domestic or foreign, and that this CFTC interpretation was entitled to *Chevron* deference.[21] The CFTC separately suggested broad enforcement authority over ordinary consumer transactions.[22] The CFTC has also asserted its jurisdiction to investigate manipulation is not limited to transactions in commodities, but also includes claims made by a person concerning that person's use of the commodities he or she purchased; for example, a CFTC Commissioner claimed the CFTC has authority to investigate "fraud with respect to the purported environmental benefits of purchased carbon credits,"[23] and the CFTC set up a task force,[24] and a whistleblower hotline to "combat" greenwashing.[25] By this logic, the CFTC would have the authority to investigate "fraud with respect to the purported health benefits of purchased vaccines." Why stop there? CFTC jurisdiction would be unlimited, and over every activity in society, if it can be self-obtained by approving an event contract in an underlying, if "commodities" means everything, and if jurisdiction extends not just to market transactions in, but also to anything people do with, or say about, commodities.

In the context of event contracts, the CFTC's jurisdiction claim is momentous. The CFTC's construct would, for example, give the CFTC authority to investigate for market manipulation those who advocated for or against abortion or birth control, by approving an event contract on population levels or rates and designating anything that affects population as the "market" for the event contract. Perhaps the CFTC could advise whether it believes it has the authority to investigate abortion or birth control advocacy – pro and con – by a person who holds a position in an event contract that is based on a

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[20] See CFTC, Brief for *Amicus Curiae* in Support of Rehearing, *Laydon*, No. 20-3626, Dkt. 383, 2022 WL 17369433 (2d Cir. Nov. 29, 2022), in a purported class action against some large foreign banks for manipulating the Yen-LIBOR interest rate, *Laydon v. Cooperatieve Rabobank U.A.*, 55 F.4th 86, 95 (2d Cir. 2022), *cert. denied*, 144 S. Ct. 192 (2023); see Jessica Corso, *CFTC Urges 2nd Circ. Redo Of Yen Libor-Rigging Suit*, Law360, Nov. 30, 2022.

[21] CFTC, Brief for *Amicus Curiae* in Support of Rehearing, at 5 - 9.

[22] *See, e.g.*, CFTC, *Further Definition of "Swap,"…*, 77 Fed. Reg. 48208 at 48246–47 (Aug. 13, 2012).

[23] Kristin N. Johnson, *Keynote Remarks of Commissioner Kristin N. Johnson at Rice University's Baker Institute for Public Policy Annual Energy Summit: Credibility, Integrity, Visibility: The CFTC's Role in the Oversight of Carbon Offset Markets* (Oct. 5, 2023) https://www.cftc.gov/PressRoom/SpeechesTestimony/opajohnson7.

[24] "The Environmental Fraud Task force will focus on addressing fraud and manipulation in carbon credit markets *and other forms of greenwashing, including material misrepresentations about ESG investment strategies*." CFTC, Release No. 8736-23. *CFTC Division of Enforcement Creates Two New Task Forces One Team Will Address Cybersecurity and Emerging Technology, Another to Combat Environmental Fraud* (June 29, 2023) https://www.cftc.gov/PressRoom/PressReleases/8736-23 (emphasis supplied).

[25] CFTC, Release No. 8723-23, CFTC Whistleblower Office Issues Alert Seeking Tips Relating to Carbon Markets Misconduct (June 20, 2023) https://www.cftc.gov/PressRoom/PressReleases/8723-23.

population number or rate.[26]

The CFTC refers to "event contracts that involve the staking or risking of something of value on the outcome of a political contest, or upon an occurrence or non-occurrence in connection with such a contest,"[27] which may tell us the superset of "political contests" implied by the CFTC statement that "'gaming' includes … the outcome of a political contest, ***including*** an election".[28] The prohibition would also seem to include event contracts based on the passage of any law or regulation that depends on a vote, which is all of them, or on any appellate court decision, as they require majority votes by Judges, who are elected or appointed based on the outcome of elections.

Perhaps the CFTC could advise whether its prohibition includes event contracts on the passage of any law or regulation, on the outcome of litigation, which is sometimes metaphorically described as a "contest" between litigants, on confirmation of Supreme Court Justices, on lengths of government shutdowns or on US government bond debt defaults due to the "non-occurrence" of a vote on government funding in the "contest" between political parties in Congress, or on corporate dividends that depend on an authorizing shareholder or Board vote.

Paranoid Fantasy

Probably most distressing is the CFTC's disappointing feeding of the paranoid and disproven fantasy that national elections can be manipulated. As Kalshi's counsel noted in the hearing referenced above:

> I think if there were a way to manipulate control of Congress, someone would have tried. It's hard to imagine that the event contract market could change all of the profound incentives that already exist.[29]

There is no way to "fix" national elections like dog races. It is extraordinarily economically inefficient for a person to seek election of a national slate of candidates simply to win a fully collateralized futures contract binary outcome. It could be economically efficient to leverage a position in a contract with relatively low initial margin that will be impacted by the policies of the winning party, such as crude oil. Donors receive far more value for money by donating to candidates to obtain access and favors than they could ever achieve through some fantastic illegal election futures contract manipulation.[30]

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[26] See CFTC, *Concept Release on the Appropriate Regulatory Treatment of Event Contracts*, 73 Fed. Reg. 25669 at 25670 (May 7, 2008): "Event contracts have been based on a wide variety of interests including the results of presidential elections, the accomplishment of certain scientific advances, world population levels, the adoption of particular pieces of legislation, the outcome of corporate product sales, the declaration of war and the length of celebrity marriages."

[27] NOPR Voting Copy p. 55 (fn. 127); 89 Fed. Reg. at 48983.

[28] NOPR Voting Copy p. 28.

[29] *Kalshi v. CFTC*, No. 1:23-cv-03257-JMC, May 30, 2024, hearing transcript (attached), p. 31.

[30] For example, hedge fund managers got far more bang for their million dollars from Senator Sinema, who

The CFTC is not even following its own precedent on criteria for susceptibility of new futures contracts for manipulation. The CFTC approved film box office receipt futures contracts,[31] finding them found them "not readily susceptible to manipulation,"[32] even though such manipulation is easily conceivable, as studios and third parties can advertise movies, disrupt exhibition, and deploy insider status to predict receipts. Also in contrast to this NOPR,[33] the CFTC in approving box office receipt futures contracts said that "false … rumors or misreporting does not constitute a legal basis to conclude that a proposed futures or options contract would violate" the CEA.[34]

No one can "manipulate" which party controls a chamber of Congress. Positing evidence-free conspiracy theories to the contrary is inappropriate and highly irresponsible for the CFTC to even hint at. Federal rulemaking must be reasoned.[35]

Contrary to Public Interest – In the Nineteenth Century

The CFTC cites 16 state law cases to support its argument that "wagering on elections is contrary to sound public policy."[36] These cases are an average age of 158 years old, and none less than 96 years old; they are respectively 175, 96, 124, 120, 167, 165, 176, 158, 177, 181, 126, 173, 143, 196, 182, and 167 years old. Ten of the cases are from states where sports gambling is now legal,[37] and are therefore not remotely precedential.[38] Four are pre-Civil War cases from state courts that were at the time also upholding a "public policy" of slavery.[39]

The CFTC outdoes the U.S. Supreme Court, which relied on (post-Civil War) Reconstruction Era law when it rescinded the Constitutional right to abortion.[40] At least the Supreme Court looked at the law in 1868. In contrast, the CFTC relies on the

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single-handedly prevented the closing of the carried interest tax loophole, Fortune, *Kyrsten Sinema's donations from investors surged to nearly $1 million in the year before she killed a huge new tax on private equity and hedge funds*, Aug. 13, 2022, https://fortune.com/2022/08/13/sinema-wall-street-money-killing-tax-investors/. than they ever could have hoped to make on futures contracts by spending hundreds of millions to influence hundreds of elections nationwide.

[31] CFTC, Release No. 5834-10, *CFTC Approves Box Office Receipt Contracts Submitted by Media Derivatives* (Jun. 14, 2010) https://www.cftc.gov/PressRoom/PressReleases/5834-10.

[32] CFTC, *Statement of the Commission,* Jun. 14, 2010, pp. 6-9, https://www.cftc.gov/idc/groups/public/@otherif/documents/ifdocs/mdexcommissionstatement061410.pdf.

[33] NOPR Voting Copy p. 54-55.

[34] CFTC, *Statement of the Commission,* Jun. 14, 2010, p. 8. The CFTC included this Statement as Exhibit 3 in CFTC, Brief for Amicus Curiae ... in Support of Rehearing, *Laydon v. Cooperative Rabobank, et al.,* 2d Cir. Case 20-3626, doc. 383, Nov. 29, 2022.

[35] A Guide to the Rulemaking Process Prepared by the Office of the Federal Register, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.

[36] NOPR Voting Copy p. 56 fn. 128; 89 Fed. Reg. 48983-84 fn. 127.

[37] https://en.wikipedia.org/wiki/Gambling_in_the_United_States.

[38] To the extent they purport to prohibit futures contracts, they are all federally pre-empted. CEA §§2(a)(1)(A) and 2(d). See Barry Taylor-Brill, *Cracking the Preemption Code: The New Model for OTC Derivatives*, 13 Virginia Law & Business Review 1 (2019).

[39] See the Citing Slavery Project, https://www.citingslavery.org/.

[40] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), Appendix A.

antebellum (pre-Civil War) case of

> *Leverett v. Stegal*, 23 Ga. 259 (1857) (finding that all gambling contracts are illegal but noting that "If there be any class of gambling contracts which should be frowned upon more than another it is bets on elections. They strike at the foundations of popular institutions, corrupt the ballot box, or, what is tantamount to it, interfere with the freedom and purity of elections");[41]

The opinion in *Leverett v. Stegal* was delivered by the Georgia Supreme Court's first Chief Justice, Joseph Henry Lumpkin, co-author of the Georgia 1833 penal code, and author of the Georgia Supreme Court's later, and therefore relatively more contemporary, opinion in *Biggs v. State* (1860), which established the right of a husband to kill a man he caught in bed with his wife, and that provides some insight into public policy in the era on which the CFTC relies for its "public policy" argument:

> Has an American jury ever convicted a husband or father of murder or manslaughter, for killing the seducer of his wife or daughter? … Is it not their right to determine whether, in reason or justice, it is not as justifiable in the sight of Heaven and earth, to slay the murderer of the peace and respectability of a family, as one who forcibly attacks habitation and property? What is the annihilation of houses or chattels by fire and faggot, compared with the destruction of female innocence; robbing woman of that priceless jewel, which leaves her a blasted ruin, with the mournful motto inscribed upon its frontals, "thy glory is departed?" Our sacked habitations may be rebuilt, but who shall repair this moral desolation? How many has it sent suddenly, with unbearable sorrow, to their graves?
>
> In what has society a deeper concern than in the protection of female purity, and the marriage relation? The wife cannot surrender herself to another. It is treason against the conjugal rights. Dirty dollars will not compensate for a breach of the nuptial vow. And if the wife is too weak to save herself, is it not the privilege of the jury to say whether the strong arm of the husband may not interpose, to shield and defend her from pollution?[42]

In evaluating what is in the "public interest," the CFTC should focus on society, statutes, case law, and public interest as it exists right now, in 2024, and not on overruled, irrelevant Victorian era and pre-Victorian era case law. Times change. Public policy should change with the times.

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[41] NOPR Voting Copy p. 56 fn. 128; 89 Fed. Reg. 48983-84 fn. 127.

[42] *Biggs v. State*, 29 Ga. 723, 728-29 (1860). This line of Georgia cases establishing the right of a husband to kill a man that he caught in bed with his wife was overruled in 1977, because by then, "adultery is merely a misdemeanor." See generally Jeremy D. Weinstein, *Adultery, Law and the State: A History*, 38 UC Law Journal 195 (1986), https://repository.uclawsf.edu/hastings_law_journal/vol38/iss1/3/. New Mexico's and Utah's equivalents, both statutes, were repealed in 1973 when states were considering ratifying the Equal Rights Amendment. Texas's statutory equivalent, repealed in 1974, granted the surprised paramour a "sporting chance."

The Actual Manipulation

In 2022, the CFTC withdrew previously granted no action relief to a venue that traded election event contracts.[43] That withdrawal is currently in litigation.[44] In 2023, the CFTC denied a different exchange's election contracts, and that matter is also currently in litigation.[45] The actual manipulation seems fairly plain. Unwilling to admit its misreading of the statute and its own regulations, the CFTC is attempting to put its thumb on the scale of these pending lawsuits.

Conclusion

More than half the words in the active part of the NOPR's rule relate to attempting an infrastructure to prohibit election contracts. Rather than provide a solid rulemaking on event contracts, the CFTC sought to bolster its position in two pending lawsuits. It is a profoundly missed opportunity. The CFTC offers little discussion of the 24 questions asked in its 2008 events contracts Concept Release,[46] which the CFTC treats as a dead letter; which it should not, as Commissioner Pham makes very clear in her dissent.[47] Commissioner Pham also noted:

> The Event Contracts Proposal completely omits any discussion of the comment letters the Commission recently received on the definition of gaming, as well as Rule 40.11 and event contracts more broadly. All told, the Commission has received around 200 comments in response to requests for public comment on an exchange's political control contracts. These comments came from exchanges, academics, former CFTC officials, and other industry participants, and were directly on point on the issues raised in today's Proposal. The Commission cannot selectively decide to tell one side of the story. It strains credulity that the Commission has selective amnesia and makes no mention of these letters in the Event Contracts Proposal.[48]

The CFTC could have honestly engaged with the discussion in those 200 comment letters. Instead, the CFTC says it only sought those public comments "in an

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[43] CFTC Letter No. 22-08, Withdrawal of CFTC Letter No. 14-130 (Aug. 4, 2022) https://www.cftc.gov/csl/22-08/download.

[44] *Clarke et al. v. CFTC*, case no. 1:22-cv-00909, W.D.Tx. See, e.g., Katryna Perera, *5th Circ. Judge Decries CFTC 'Bully' In Election Betting Suit*, Law360, February 8, 2023; Katryna Perera, *Election Betting Co. Can Continue For Now, 5th Circ. Says*, Law360, Jan. 27, 2023; Katryna Perera, *Election-Betting Firm Sues CFTC Over Order To Shut Down*, Law360, Sept. 12, 2022.

[45] *KalshiEx v. CFTC*, case no. 1:23-cv-03257, D.D.C. See, e.g., Ali Sullivan, *CFTC Insists Agency Has Authority To Ban Election Gambling*, Law360, Feb. 26, 2024.

[46] CFTC, *Concept Release on the Appropriate Regulatory Treatment of Event Contracts*, 73 Fed. Reg. 25669 at 25673 (May 7, 2008); comment file at https://www.cftc.gov/LawRegulation/PublicComments/08-004.html.

[47] 89 Fed. Reg. at 48998-49000.

[48] Commissioner Pham dissent, 89 Fed. Reg. at 49000. I submitted comments in each of these dockets, as well as in the earlier secretive ErisX docket. See Jeremy D. Weinstein, *Football Gambling Futures Contracts: Can the CFTC Measure Up to the Keystone Cops?*, 41 Futures & Derivatives Law Report (Jul./Aug. 2021), https://bit.ly/3qJrBZ4.

abundance of caution."[49] The CFTC also could have explored the event contract concepts that its own Commissioners hotly debated in public.[50]

The CFTC should withdraw the NOPR, and repropose event contracts rules on the basis of the promise of event contracts acknowledged by the Concept Release, rather than on the narrow and parochial basis of trying to put a thumb on the scale of two pending lawsuits. The CFTC can lobby Congress if it wants authority to prohibit election futures contracts. The CFTC should recognize that as currently proposed its NOPR is so defective that it will not survive judicial challenge, and the CFTC will just sap its own budget and staff time vainly defending it.

Yours truly,

/s/
Jeremy D. Weinstein

[49] *Kalshi v. CFTC*, No. 1:23-cv-03257-JMC, May 30, 2024, hearing transcript (attached), p. 40.
[50] See, e.g., the many musings of the two CFTC Commissioners discussed in Jeremy D. Weinstein, *Football Gambling Futures Contracts: Can the CFTC Measure Up to the Keystone Cops?*, 41 Futures & Derivatives Law Report (Jul./Aug. 2021), https://bit.ly/3qJrBZ4.

ATTACHMENT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KALSHIEX LLC,

Plaintiff,

vs.

COMMODITY FUTURES TRADING COMMISSION,

Defendant.

Civil Action
No. 1:23-cv-03257-JMC

May 30, 2024
1:00 p.m.

Washington, D.C.

TRANSCRIPT OF THE MOTION HEARING
BEFORE THE HONORABLE JIA M. COBB
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff

JACOB M. ROTH, ESQ.
AMANDA KELLY RICE, ESQ.
JOHN HENRY THOMPSON, ESQ.
JOSHUA BROOKS STERLING, ESQ.
SAMUEL V. LIOI, ESQ.
Jones Day
51 Louisiana Avenue, NW
Washington, D.C. 20001

For the Defendant

ANNE WHITFORD STUKES, ESQ.
CONOR BARRY DALY, ESQ.
RAAGNEE BERI, ESQ.
MARGARET P. AISENBREY, ESQ.
Commodity Futures Trading Commission
Office of the General Counsel
1155 21st Street, N.W.
Washington, D.C. 20581

Court Reporter: Stacy Johns, RPR
Official Court Reporter

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription

P R O C E E D I N G S

MR. ROTH: Good afternoon, Your Honor. Jacob Roth from Jones Day on behalf of Kalshi. And with me at counsel table is Amanda Rice, Josh Sterling, John Henry Thompson and Sam Lioi.

THE COURT: Good afternoon.

MS. STUKES: Good afternoon, Your Honor. My name is Anne Stukes for the Commodity Futures Trading Commission. And with me at counsel table is Raagnee Beri, Margaret Aisenbrey, and Conor Daly.

THE COURT: Good afternoon, everyone. So we are here on the parties' cross motions for summary judgment. I don't typically have oral argument, although I thought this was a case where argument would be helpful to me in resolving the motions.

I don't know who's arguing for plaintiff. Is there a time sensitivity in this case? I know there's not a PI that's been filed, but I'm just trying to understand.

MR. ROTH: It was actually the first thing I was going to say was thank you for hearing argument on motions. We haven't asked for a preliminary injunction but there is time some time sensitivity because the contracts are tied to the November elections. So what we would like, ideally, is a resolution that would allow, if needed, for appellate intervention so that the contracts can be listed prior to that

election.

THE COURT: That was my preliminary question.

All right, I will start with plaintiff. I may interrupt with some questions, but otherwise will try to restrain myself to listen to your presentation.

MR. ROTH: Great. Thank you so much, Your Honor.

So as Your Honor knows we filed this case because the Commission blocked Kalshi from listing its event contracts that turn on partisan control of the House and the Senate. And the question for the Court is whether that agency action complies with the Commodity Exchange Act and the APA. And we've reproduced on a slide here the text of the key statutory provision from the Commodity Exchange Act. And as you'll see, it authorizes the Commission to block, prohibit the listing of event contract if two elements are satisfied.

First, the contract has to involve one of the six enumerated categories of activities, and then if it does, the Commission may determine that the contract is contrary to the public interest, in which case it's prohibited. So far, I don't think that's a point of dispute. That's just what the statute says.

Following that framework, our challenge here has two basic components. First, we do dispute that Kalshi's contracts fall within the scope of those six -- any of those six enumerated categories. And that's really just a matter of

statutory interpretation.

Then the second piece is that we argue that even assuming the contracts did fall within one of those categories that Commission's public interest analysis was arbitrary or capricious.

THE COURT: I know I said I was going to restrain myself, but can I ask just a preliminary question? I understand your argument to be because of this two-step framework that the statute sets forth, that if it's not in -- and I'll say enumerated, although the last one is a catchall -- but in not one of these categories then you don't even get to public interest.

I noticed in your brief you had outlined some of the safeguards that you client has put in into place with respect to this contract in particular. For example, paid members of congressional staff aren't permitted to trade, other safeguards. I'm assuming that your client thought those were important to maintain integrity of the process.

MR. ROTH: Correct.

THE COURT: But under your argument, because elections don't fall, according to you in these categories, there's no occasion for CFTC to even reach those safeguards. So presumably someone could post an event contract similarly to what your client does, another DCM could do this without any of those safeguards, and it's my understanding that under your

framework, CFTC would not have any interest in that.

MR. ROTH: I agree that it wouldn't be relevant to whether it falls within one of these statutory categories and, therefore, this provision would not capture it. What I'm not sure about and what I can ask is whether there are other regulations or provisions that may --

THE COURT: Come into play.

MR. ROTH: Yeah, that may speak to issues like that, like who's allowed to trade on it, are there certain restrictions beyond this, sort of, in-or-out provision. Which is just it's either allowed or it's not allowed.

THE COURT: On a similar vein, I understood one of your positions to be, look, this is a contract involving control of the House; it's not talking about a discrete election between two candidates, there are so many intervening factors that have to occur before -- not even intervening factors but it's not often dispositive of one election, who controls the chamber. Under your framework, though, would a DCM be able to post an event contract for a presidential election?

MR. ROTH: Yes.

THE COURT: Okay. So that piece is responsive or relevant to what? Your point about this being a House, about control of the House and that it's not, you know, a two-party or two-candidate election, there's a lot of moving parts, what

is that relevant to?

MR. ROTH: Let me try to answer it this way.

THE COURT: Okay.

MR. ROTH: If you imagine that there was a category on this list that said elections --

THE COURT: Okay.

MR. ROTH: -- then I think one could still say that these contracts involve elections even though it's one step removed from the election itself.

THE COURT: Okay.

MR. ROTH: Which goes to an issue that was sort of debated in the briefs, which is does it have been to be literally the underlying event or does it have to -- does this underlying event just have to relate to the category.

We agree it's enough that it relates to the category. So if you had the category that said "elections," even though this was a couple steps removed, I think you could say it would relate to elections and, therefore, fall within the scope. Our main argument, though, is it doesn't say elections.

THE COURT: All right. Continue please.

MR. ROTH: Okay. What I was going to say before moving on was I'm going to be speaking to the statutory interpretation piece of the argument, and my colleague, Amanda Rice, is going to be speaking to the arbitrary and capricious piece when I'm done.

Looking to the enumerated categories, we can sort of simplify by taking four of them off the list right off the bat. The last one, as Your Honor noted, is a catchall. The Commission is essentially allowed to add categories by rule if they're similar to the listed five. The Commission hasn't done that, so we can sort of cross that one off the list for now.

And then, obviously, the Commission does not argue that these contracts involve terrorism, assassination or war. They do think "involve" is very broad, but not broad enough to get them quite that far. So we can strike two, three and four from the list as well.

And that leaves the two enumerated categories that the Commission focuses on, which are, number 1, unlawful activity and then number five, gaming. And I'd like to take them in that order, which is the order they appear in the statute.

THE COURT: Okay.

MR. ROTH: So starting with the unlawful activity, the way we understand that is that it refers to contracts where the underlying event relates to some unlawful act. Okay? So for example, if you had a contract on whether the D.C. murder rate in 2024 is going exceed a certain level, if you had a contract on whether a particular piece of art in the National Gallery is going to be stolen within a period of time, those are unlawful acts. If you had a contract on those events, it would fall within the scope of number one.

I think it fits the text and I think it fits the context of the statute, and that's sort of an important point. It aligns it with the terrorism, assassination and war provisions that immediately follow it. If you think about terrorism, assassination and war, the common denominator is they're bad. Those are things we don't -- they're bad things. Congress is concerned about people profiting from bad things and about incentives to do bad things. Right?

Using my hypothetical of the D.C. murder rate, you don't want somebody to go hire a hit man to get the rate above a level so you can make money. Bad incentives. It also just feels offensive to have people profiting from, you know, there was a terrorist attack, I'm going to make a lot of money from that. That's sort of the gist of 2, 3 and 4.

If you read 1 the way we read 1, it lines up perfectly with that. We don't want to incentivize crime, we don't want to have people profiting from crime, so it's all parallel.

And, of course, that interpretation doesn't sweep in Kalshi's contracts. Elections are not unlawful. They don't even relate to unlawful activity. So now let's consider the Commission's interpretation.

As I understand it on this prong, what they're saying is some states prohibit betting on elections, either as part of their gambling statutes or in stand-alone provisions. And the Commission admits that those state laws don't directly apply in

the sense that they can't prohibit trading on a regulated exchange because of preemption principles. But the way I understand what they're arguing is that they say, well, buying and selling those contracts sort of amounts to a betting on an election because you're staking something of value on the electoral outcome. If you did that outside the context of a regulated exchange, then it would violate these state laws and therefore the trading of the contract relates to unlawful activity.

So a couple problems with that. Number one, unlike our interpretation, it doesn't align with the three that follow it, because the key move that they're making there is instead of looking at the underlying event and whether it is related to the enumerated activity, they're looking at the trading of the contract and whether it's related to the underlying activity. That is a, sort of just a different focus of the analysis, and it makes 1 sort of stand out relative to 2, 3 and 4.

THE COURT: Can I ask you about that, because I think that this defendant made this point -- the government made this point. Where it says "agreements, contracts or transactions involved," what work do you argue "transactions" is doing in the statute as it relates to involve?

MR. ROTH: As I understand it, the agreement, contract or transaction sort of triplet, it appears throughout the statute. It's just the way they refer to these types of

instruments when they define it. So I don't think that they have independent significance. I think they're just capturing any different way you might structure the arraignment.

THE COURT: So you're not reading transactions to refer to the act of trading the thing, it's another way to say contract agreement; it is the contract, itself.

MR. ROTH: It's the instrument, and I think that follows from the fact that this is how it's used throughout the statute, the three together.

And just to be clear, we're not saying that you couldn't have a statute that said transaction involving X, where what it meant was the act of contracting, it involves that activity. It's not that that's semantically impossible. It's grammatically appropriate, it makes sense; it's just that it doesn't line up with the way the statute works for 2, 3 and 4, and so it makes it just an unusual, sort of strange way of speaking.

The hypothetical I was thinking about as I was preparing, you could say, my lunch generally involves a sandwich, a salad, a pastry or robust conversation with my work colleagues. You could say that, and yes, it could involve those things, but putting them together in that way is weird. It's not the way people normally speak.

But I actually don't think that's the most problematic aspect of the Commission's reading of the unlawful category. I

think the most serious problem with it and the one that really is, I think, fatal is that it proves way too much, because as the Commission observes elsewhere in the briefing, there are a whole lot of states that prohibit betting on any contingent event.

If we go to the second slide -- we've collected them -- there's at least 29 that we've found that prohibit staking something of value on an uncertain event or contingency, and of course, that defines an event contract. It would mean that every event contract falls within the scope of Roman I and would involve unlawful activity, and that just can't be right because it makes the other five enumerated activities superfluous. And it defeats the whole purpose of having enumerated activities in the first place because it would allow the Commission to subject every event contract to public interest scrutiny.

So every kind of interpretation tells us that's wrong, and so does the statutory history, because sort of notably, prior to 2000, that is how the statute worked. If we go to the next slide, we have that language. They actually have to make this public interest determination for every contract. That was repealed in 2000, and then in 2010 Congress enacted this more limit provision that singles out the categories. So I think anything that covers the waterfront is necessarily an erroneous interpretation. I think the Commission actually

admits that. They say on page 11 of their final reply brief that, sure, you can't read any of these to cover everything, that would not be tenable.

And so they try to explain why their interpretation doesn't do that. And just to be candid, I don't really understand what they're trying to do there. To me, if Kalshi's contracts involve unlawful activity because some states prohibit betting on elections, then all event contracts involve unlawful activity because some states ban betting on contingent events. So I think the bottom line on number 1 is our interpretation is the only one that sort of makes sense in context that gives this provision real work to do without swallowing everything else.

THE COURT: Can you respond -- and apologies if it's in your reply, the Commission gave an example of a circumstance in which they would say a contract involved war without the underlying event actually being about war. And I think the example they gave is whether the Ukrainian military will acquire certain munitions in 2024. Can you speak to that example? They're saying, well, that would be, under their broader reading, involve something that relates to war, but the underlying event in the contract is not, itself, an act of war.

MR. ROTH: That may have been our example. I'm not sure, because I think we agree with that. It may have been theirs.

THE COURT: Maybe it was your example, sorry.

MR. ROTH: I'm not sure it's a point where the parties disagree. I think it goes to the difference between "involve" and "based on."

THE COURT: I think that was your example.

MR. ROTH: So "based on" would speak literally about the underlying event. That's too narrow for this, this says involve, so there's this broader scope. Our point is that the broader scope is tethered around the event.

THE COURT: Okay.

MR. ROTH: So you're still looking at the event and saying does the event relate to unlawful activity, does it relate to war, does it relate to terrorism. So you can sort of game it by circumventing -- by sort of making it technically something that's just a proxy, it would capture this.

THE COURT: I just wanted you to flesh that out. Okay.

MR. ROTH: Okay.

THE COURT: So when they say that you're reading or using the word involved too narrowly, you would dispute that. You're not disputing that involve means relate to -- all those other dictionary definitions of involve. It's just relates to the underlying event in the contract.

MR. ROTH: It's what has to involve. We don't actually disagree on what involve means; we disagree on what

has to involve what. Right? It's a subtle but important point.

Okay, that takes us through Roman I. Unless Your Honor has further questions about unlawful activity, I'll move to gaming, which is the second one that they argue. Again, the fight is about what does gaming mean in this statutory context.

Our core point is really simple: Gaming requires a game. So if there's no underlying game, there's no gaming. And so for example, if you have a contract on who's going to win the Kentucky Derby, that's a game. It's a horse race, it's a game. If you have an event contract on who's going to win the Super Bowl or the point spread in the Super Bowl, it involves a game. There's an underlying game. Same thing with the lottery. They have an underlying game that forms the basis for the contract. And if you read it and you understand it that way, I think there are a number of benefits to that.

Number one, going back to what we were talking about earlier, it lines it up with the others in the sense that there is this connection back to the underlying event rather than just talking about the act of trading in isolation.

Number two, I think is most consistent with the text. The root word of gaming is game. I think it aligns with the legislative history, the famous colloquy that gets a lot of discussion in the briefing between Senators Feinstein and Lincoln -- which by the way, if Your Honor wants to watch it on

C-SPAN, you won't be able to find it. I think it was inserted in writing after the fact.

It wasn't literally a colloquy, but you can see it in the congressional record, and they give three examples of gaming contracts: Football, horseracing and golf. They're all games. I don't think that's an accident. I think that interpretation makes sense too, because what is a game? It's something that has no inherent economic significance. It's something that is done for amusement. It may be done for sport. It may be done purely to facilitate the betting itself, right, for its own sake.

So I think it makes sense for Congress to have thought about that category. Contracts that involve games are probably not the type of contracts that we want to be listed on an exchange, because they don't have any real economic value to them. But again, what's tying that together is the existence of the game because the game is the thing that doesn't have intrinsic economic significance.

Now, of course, elections are not games. They're not done for amusement; they're not done for sport; they're not done to facilitate betting. Elections matter. They determine our government; they determine our governance. Nobody would really call them games. So in our view a contract relating to an election is not gaming.

THE COURT: I have never before this case considered

the difference between gaming and gambling, but I'd love to hear more about your position on that, because I did look at the various dictionary definitions just to understand what these words mean that I have used many times. And there are some definitions that you would say "cross reference" and they say "define as" gambling.

So I understand your position to be, sure, gaming is part of gambling, but gambling is not gaming -- or gaming is a subset of gambling; gambling is not synonymous with gaming.

MR. ROTH: I do think that's the better understanding of the way the terms relate. I think gaming has this more close tie to the game, whereas gambling can have a broader meaning.

I will say when I went through the dictionary definitions closely, what I found was -- I think this is important. Even if you look at the definition of gambling, there's generally two different definitions that are offered in the dictionaries. There's a narrower one and there's a broader one.

So for example, the Merriam-Webster, the first definition of gamble is "to play a game for money or property."

The second definition is "to stake something on a contingency or take a chance." Okay?

So you've got one definition that is tied to a game and then one definition that is not tied to a game. And the

same is true of the Concise Oxford English Dictionary -- which I think is also cited in the briefs -- two definitions of gamble. Number one: Play games of chance for money.

Number two: Take risky action in the hope of a desired result.

I think that's sort of fair, there are two different ways of understanding gambling. One is tied to the existence of a game, and one is just colloquially sort of broader, right, a betting. I think what's important here is that the broader definition does not work for the same reasons we talked about earlier. If you sort of adopted and imported the broader definition of gambling and treated any contract that involves staking something of value on a contingency or an uncertain outcome, then you've covered the waterfront of event contracts. And so that can't be the right interpretation of gaming in the statute. And I think that leaves us with the narrower interpretation in the dictionary, which incorporates the concept of a game.

Now the CFTC, they recognized this problem with the broader definition and actually not -- I didn't fully understand this from the order, but from the briefing it became clear. They're sort of disclaiming the broader definition, because they understand that that doesn't work in context. And so instead they're sort of offering a intermediate approach where they say, well, it does require betting on a game or a

contest, and then they say an election is a contest. So voila, there we go. It fits.

In the brief we walk through each step of that logic. What I'd like to here is offer a few higher-level observations on that argument, because when you take a step back, especially, I think it's just too clever by half. It's sort of this lawyerly attempt to parse it and get it in. It's not really a serious attempt at statutory interpretation. I'll just offer a few reasons for that.

Number 1, if Congress was really trying to get at election contracts, the easy way to do that would have been to have a Roman VI or VII that said "elections." Very easy. One word.

To say that they were trying to do it by saying gaming, which some definitions cross reference gambling, which you could say involves a game or contest, it's the most attenuated way of getting at this. So strained that I don't think it's very credible.

Second point is there's no support for this in the legislative history. The colloquy, again, it's all games, nothing about politics.

Third, if you look at where they're getting the word contest from, it's really instructive because they pull it from a few state statutes. And if we pull up -- we've got the text of a couple of the samples of those. But it's very clear when

you look at them that they're talking about contests that are like games.

So for example, this is the Delaware -- their version which is also materially identical to Florida -- and they talk about betting or wagering on the result of any trial or contests wherever conducted of skill, speed or power, of endurance or human or beast.

I suppose there are some candidates for office who may be described as beasts, but it's really not -- I just don't think anyone would say in this context of the statute contest means election, just like you wouldn't say in the context of the statute that trial means a trial in this courtroom. That's not what this is about.

Same thing if you look at the next -- this is the Louisiana version, talks about conducting as a business any game, contest, lottery or contrivance. When you put game and lottery next to contest it, I think, implies a certain meaning, and treating that as including elections is really a stretch. I think we wouldn't -- we don't dispute that you can refer to an election as a contest, just like you can refer to a corporate board fight as a contest. You could refer to a lawsuit as a contest. But in the context of these gambling statutes, that's not what they are talking about.

And then the final point on this is I think it just leads to some really arbitrary results, because if you focus on

gaming as involving a game, then there's a certain sense to it, right? As I said earlier, like games don't have any external economic significance, generally speaking, so as a category it makes sense for Congress the carve that out.

If you treat it as games plus elections, it's very strange because it means you could have event contracts on the weather, on whether somebody's going to be nominated for a cabinet role, on what color dress Taylor Swift is going to wear next week. Any of those are fine, but elections would be swept up by the gaming category. It's just weird because even if you think, look, elections are different and should be treated differently. And I know my colleague is going to try to explain why that's misguided, but even if you accepted that, it has nothing to do with the word "gaming."

So I think the, sort of, takeaway is the Commission is latching onto this word as sort of a convenient way to squeeze its desired policy outcome into the statute, but it's not a serious attempt to really understand what Congress meant by this term in this context.

THE COURT: When you're saying, and I would agree, that a game doesn't have any external economic significance, how does that -- how is that relevant for the specific argument you're making? What exactly do you mean by that?

MR. ROTH: What I mean is if we're trying to think of what was Congress trying to get at with gaming --

THE COURT: Okay.

MR. ROTH: If we understand gaming to mean a contract that involves an underlying game, then there's a certain policy sense to treating that category differently, because Congress could have been thinking about it and saying well -- there is some of this in the legislative history, the colloquy, if you look at it -- well, games don't matter in the real word; they're games. So we don't want people essentially gambling, right, on something that doesn't matter in a CFTC-regulated exchange. So it gives some sense to the categorization that Congress laid out. And the problem I have with the alternative interpretations is they don't have that, sort of, unifying policy rationale behind them. Right?

Again, the really broad version sweeps up everything; that doesn't work. And then games plus elections, what is tying those things together? It's not, it doesn't seem to me, a line that you could really seriously draw from this word. So that's what I'm trying to get at.

THE COURT: Okay.

MR. ROTH: Okay. So that takes care of Roman V, and so our position is that is then the end of the analysis and there's no need to go any further, but I will turn it over to my colleague, if Your Honor has no further questions on this piece, to address the arbitrary and capricious issue.

THE COURT: There are a lot of references by the

Commission about kind of representations on your client's website about what it does. Do you want to respond to that?

MR. ROTH: I think it's a page that just pulls press articles.

THE COURT: Okay.

MR. ROTH: So it's just like a collection of links to articles that have mentioned Kalshi. It's not like a representation by the client about what --

THE COURT: What its business is.

MR. ROTH: It's like here, people are talking about us. Here's a list of stories.

THE COURT: Okay.

MR. ROTH: Thank you, Your Honor.

MS. RICE: Good morning, Your Honor. My name is Amanda Rice, and I'm here to talk briefly about the Commission's public interest analysis. As my colleague explained, we think the statutory issue is dispositive, so you don't have to go this far, so I'll try to keep it pretty quick. But even if you disagree with us on the statutory argument, they are still required here because the Agency's public policy analysis was arbitrary and capricious.

I'll start with just a brief note on the standard of review. There was some back-and-forth on this issue in the brief, but as I think the Commission acknowledges in the end, the arbitrary and capricious standard applies to all final

agency actions regardless of their form. That's a deferential standard for sure, but it has some real teeth. It means agencies have to engage in reasoned decision making, and agency actions are arbitrary and capricious if they apply the wrong standard or ignore relevant considerations or they don't explain themselves reasonably.

Those are the kinds of arguments we're making here. And they go to both sides of the public interest analysis, the sort of benefits on the one hand and the alleged harms on the other. So I'll take those two points in turn starting with the benefits.

(Court reporter clarification.)

MS. RICE: I was trying to be quick but don't want to speak too quick.

THE COURT: Take your time.

MS. RICE: So the economic benefits all follow, I think, from one simple proposition, which is that partisan control of Congress has economic implications. I think that's pretty commonsensical, but there's a ton of evidence in the record to support that point. I've just got a couple of points highlighted on the slides here. The first one is from Harvard professor, Jason Furman who's a former chairman of President Obama's Council of Economic Advisors. He explains that Congressional control impacts legislation, policy and the business environment in ways that have direct economic

consequences to businesses and workers. He says this risk is conceptually identical to climate risk, business interruption risk and other risks that can be managed using financial markets.

On the next slide we've got managing director of JPMorgan, so coming from a different perspective, who explains that election risk is one of the largest risks that their clients face, that the frequently engage proactively on how to minimize it or to hedge it. Hedging is a word, as I understand it, for minimizing risk.

Mr. Lisboa gives the example of specifically the coal industry, but there are a lot of other examples in the record that stand out on different sides. So there's a software company serving green energy businesses. It's at page 1597 of the record. There's a recycling robotics firm. That's at 1533 of the record. These are just sort of common sense examples of businesses that have direct control of partisan control of Congress.

And then take it from Sam Altman who's the CEO of OpenAI. He explains here the different risks that biotech companies face. Those are direct and they're predictable. He explains they involve everything from the FDA and different approvals to research, funding and legislation. So it's not just legislation, there's all kinds of other things that Congress is doing here.

Because these risks are so significant, financial institutions already offer projections on the economic impacts of elections, and there's instruments for hedging against those risks. You've already seen it from JPMorgan. There's more examples of that on pages 42 to 44 of the record, if that's helpful.

And then there are the noneconomic benefits. Researchers, policymakers, the public, everyone benefits from market-based data about elections. These markets already exist. I know Your Honor is familiar with in nonprofit forms because this information is so valuable. So these are just a few examples from the record. But that's really just tip of the iceberg. I thought pages 40 and 41 of our opening brief and 68 to 70 of the record really tell this story of the noneconomic benefits.

So the agency doesn't have much to say about either of those two points, so they respond mostly by trying to move the goal post. They make what I understand to be two primary arguments. The first one is about direct effects. They say that the economic effects of elections, sure, that they exist but they're not direct enough. I think Your Honor is using the language of too many intervening events to make a difference.

We explained in our brief that the record says otherwise. You've already seen some examples today. I think more important and more fundamental is the idea that the whole

point of having hedging with event contracts is to account for diffused risks. This is not a one-to-one kind of hedging product like the way insurance works. If there's a hurricane, for example. That example helps me because you can see both the direct and indirect effects of a hurricane, right? It might destroy property, but it does other stuff too. It deters tourists. You can't always predict exactly what those effects might be, but it's a feature, not a bug of these contracts. They allow you to capture anything that might follow from an event like this.

THE COURT: If I can just stop you right there. So what I understood the argument on the other side to be is certainly if a hurricane hit, the extent of the damage or effect on tourism or property, that might not be able to be predicted in advance. So whatever your worst fear might not materialize, but whatever effect there is will be direct. Meaning to the extent that there is property damage, you can trace that directly to the hurricane. So maybe the result doesn't materialize in the way that it was predicted, but there is a direct effect.

And my understanding is that, at least they would argue, with elections, particularly in this context where we're talking about control of a chamber of Congress by a party that, sure, whatever thought about what might happen may not materialize, but to the extent there is an effect, you may not

be able to trace it directly to who controls a party at a given time or a chamber of Congress at a different time because there are so many variables: Who's in office as president, kind of what the split is, if it's a more even split, kind of what the priorities are of Congress. Despite control, legislation doesn't always get passed or become a priority.

So what would you respond to their point about this not being the kind of direct economic effect that some of the other trading contracts have?

MS. RICE: I think you're right about what their argument is, but I think both pieces of it are wrong. And starting with the hurricane example, I think hurricanes do have very similar indirect effects, so you're talking about property damage. But that's not it. There might also be decreases in tourism that might also have to do with other features of the weather, did an amusement park get built nearby. Things like that might also affect tourism. It's not going to be one-to-one. There's actually a pretty helpful chart on pages 53 to 55 of the record that identifies some other event contracts and tries to explain exactly that point: Here are the ways in which the economic impacts are not direct; they're indirect. And that's true of temperature fluctuations. So is it going to be hot in California this month, that might have some direct effects and then some indirect effects. That's the first piece of it the way other contracts work.

The way Congress works, there's also a lot of evidence in the record that there are direct effects here. That just the election, a change of control in Congress affects stock prices immediately, affects the valuations of entities immediately without any legislation passing; that legislation passing is, of course, a piece of this, but these economic impacts happen even if no legislation passes.

So I thought the discussion at 40 to 46 of the record is pretty helpful on that. It has some examples. I'll point to 1397, which shows that the green energy sector surged as a result of the democratic party senate takeover. Again, before anything happened, it's just control of Congress that has these direct effects.

So to circle back to your question, I think direct effects is a strange question to be asking for these contracts but not others when all event contracts have these sort of indirect economic effects. But even if that were the question, I think it's pretty clear that there are direct effects here, if that answers your question.

THE COURT: Maybe you're about to get to this. I don't want to distract you from your presentation, but can you speak to the manipulation and integrity piece, because I do think -- and obviously I'm going to look very closely at the statute and follow what it says, but I do think there is kind of a -- just to be honest, a gut reaction that people might

have that, wow, betting on elections doesn't seem like a good idea. It seems like there's a lot of room for manipulation, for kind of unsavory things happening.

Can you speak to that directly and what your position is as it relates to the public interest concern? Because I understand a significant part of the Commission's view that this is against public interest has to do with some of those concerns.

MS. RICE: Absolutely. I'll skip right there. I think you're right that that's what the Commission said, that it sort of feels icky or that there's a risk of election manipulation in some form. And I think starting with the risk of manipulation, which I think is the more serious public interest analysis, the icky feeling I think is misguided, but I think it stems from the misunderstanding that these contracts could influence elections in some way or people will be buying votes or things like that.

So I guess I'd start by pointing out that political event markets have existed forever, in unregulated forms but also in other democracies. And I don't think there's a feeling in those places that somehow the existence of these markets affects the integrity of elections. Then there's good research in the records showing that this kind of manipulation is not remotely plausible.

I found the comment from the Center for Effective

Altruism particularly helpful at this point. That's at pages 1427 to 1436 of the record. Kind of take each aspect of the election manipulation arguments and unpack them one at a time and explain why they're wrong.

At that time most basic level I think the key point is that people try to influence elections because they matter. They matter for our lives, they matter for their economic effects, but for lots of other reasons. And so there's lots of money and effort spent on influencing elections. That's what campaign finance fights are all about.

And there's a way in which you might think that some of that's icky, or you have the same reaction that spending money to try to get elections is icky, but I think it's important here to point out how much money and how many incentives there are in these elections because it makes manipulation seem pretty darn unlikely, particularly as Your Honor pointed out at the beginning, that this is a contract about control of Congress. I think this is another place where that point is relevant. So it's not particularly relevant to the statutory analysis, but on the public interest piece, if you're asking what's the public interest here, we're looking at this specific contract and asking whether there's a serious public interest harm on the other side, if there's some possibility that having a regulated event contract market as opposed to the unregulated ones that already exist could result

in manipulation of control of Congress.

It's just pretty hard to imagine -- I think if there were a way to manipulate control of Congress, someone would have tried. It's hard to imagine that the event contract market could change all of the profound incentives that already exist. It sort of circles back to the initial point that elections matter, they have real life consequences and that's why people try to impact elections. I think the record is pretty clear that the possibility of manipulation is just pure speculation; that there's not evidence supporting that sort of intuition that you came up with at the beginning that there's something that feels a little bit strange about that.

One last point, I think the Commission suggested, too, it would have to police elections if it approved these contracts. My response to that is just the Agency regulates contracts that have underlying events of all kinds. So an event contract on power plant emissions doesn't mean the CFTC has to become the EPA all of a sudden and regulate power plant emissions. In the same way that an event contract that has to do with stock prices doesn't turn it into the SCC, all the Agency does is the same thing it does in any other context, it just regulates the market, not the underlying activity. So insomuch as that's the other aspect of this, that there's a concern about manipulation and there's a concern about the Agency and what it would have to do as a result, I think

there's no real reason to worry that its role would be any different here than it is in any other context.

THE COURT: Do you have anything to add to what your colleague was saying when I asked the question about the particular safeguards that your client has put into place and obviously deemed important? For example, the one that sticks out is, well, if you're a paid member of a congressional staff then you obviously cannot trade these contracts. And there are other safeguards that were put into place, but as I understand your position, the Commission wouldn't reach that because it's not enumerated in the statute so there would be no public interest inquiry, and so those kind of conditions or safeguards would not be required, nor is the fact that this is an election contract involving control of the House particularly relevant. A DCM could have this event contract for the upcoming presidential election, right? So those things that you point to as evidence of, well, there are safeguards in place and this is about control of Congress, that's not really relevant to the statutory question, correct?

MS. RICE: You're right that it's not part of the statutory question. It is relevant to the public interest analysis, if you get that far. If you assume that we lose on the statutory analysis, which we don't think is the right answer here, but if you get to public interest so this is a gaming contract or unlawful activity contract, then you're

looking at the public interest and it is relevant the kinds of safeguards we have in place and the fact that this is a contract involving --

THE COURT: I guess that's my point, if under your reading you wouldn't get to the public interest, so that's my point, the Commission would have no ability or interest in considering the fact that a contract didn't have such a safeguard.

MR. ROTH: I didn't want to cut you off, but I had to ask my colleague who actually knows the statutory framework better.

THE COURT: Okay.

MR. ROTH: What he clarified for me was that there are separate antifraud provisions, anti-manipulation provisions and what they call the core principles that you have to comply with. And so that's where some of these other safeguards come from. It's just not from this particular statute.

Sorry, I didn't mean to --

MS. RICE: No, no, no.

THE COURT: Let me just make sure I understand. You're saying it's not implicated by this statutory provision that's at issue in the lawsuit, but as part of this scheme, generally, there's other safeguards. And these are statutory from the Commission, meaning that you have to comply with these provisions?

MR. ROTH: Right. That's right.

THE COURT: Okay.

MS. RICE: That's all consistent with my understanding, and there's some stuff in the record on this, too. Pages 80 to 88 of the JA and 99 to 100, we talk about the core principles and the kind of background rules in place just to be a regulated market that this CFTC regulates, you have to have these protections. You listed out the specific people that aren't allowed to trade, and all of that is exactly right, but there is separately and for all contracts a prohibition on any insider with any non-public information trading on these contracts. So that's in addition to the specifically-enumerated categories.

THE COURT: That makes sense. And that applies to any of these event contracts?

MS. RICE: Exactly. To everything. So where there is insider trading or manipulation, the Agency has the tools to go out and investigate those things. They're just not relevant to the statutory analysis in the first instance, if that makes sense.

Unless you have anything further, Your Honor, I'll just wrap up by reiterating that I don't think you need to get to public interest, but if you do, you still should vacate the order as arbitrary and capricious.

THE COURT: I do have another question. I don't know

whose, so I will let whoever answer this. There is something in the Commission's brief that I thought was -- it's this point: Unlike many hedging and risk management contracts, the payout on the contract at issue here is not in any way tied to actual or estimated losses incurred elsewhere and a loss on the contracts is not offset by a gain elsewhere. I just thought that was interesting and wanted your response to that.

MS. RICE: I don't think that's as unusual as the Commission makes out. The example that comes to mind immediately is the temperature-related contracts. I think that works in the same way, that that's not a gain or a loss necessarily. It's not clear even which way that cuts. There may well be other examples, but my immediate reaction to that is I don't think that's particularly unusual in this context.

THE COURT: I'm learning more about this market through this case, but this whole futures market, it seems to me it's grown beyond the days in which only those who are interested in the commodity or directly affected are participating. I mean, that's the case for all these contracts, right?

MS. RICE: That's true of all the contracts. In fact, I think as the Commission's order, I think, acknowledges, some amount of speculation or people who are investing in these instruments to make money is actually necessary for the markets to be liquid, because if it was just hedgers, if it was

100 percent hedgers, you don't actually get someone willing to balance out the price and sell you or buy from you at the other side.

So there are people in all of these market who don't have a direct hedging interest, but the hedging piece of it is certainly meaningful, and potentially more meaningful in this context than many of the others.

THE COURT: Is there anything else you want to say about their economic purpose test? I'm trying to see what the daylight between the two parties is with respect to that test and how it's applied.

MS. RICE: So I think we agree that the Commission has discretion to consider the economic impacts of these contracts, that this statue and these instruments are about economic benefits. I think where we diverge is the Commissions focus on, sort of, two things. One is direct effects as opposed to indirect effect, we talked about.

And the other is this predominately hedging or more than occasional hedging.

THE COURT: That's what I meant.

MS. RICE: The language shifts in the order, and I think the difference probably matters. Occasional sounds to me like something less than predominant. I'm not entirely clear which one the Commission is advocating for. So I think part of the problem with that standard is that it's not clear what it

means, whether it means a certain number of uses, how many dollars are going to be spent in a hedging way, is it a proportion of uses, is it some combination of the two and how much is occasional. I don't know that you need to get into that, Your Honor, because I think by any metric, the record shows there will be more than occasional uses here. But I think those are the two points on which we really disagree, not on whether economic benefits are relevant.

THE COURT: The same question. I don't really understand there to be a dispute about my standard of review here and what the applicable review framework is.

MS. RICE: I agree with that, Your Honor. There was some back and forth about rule-making cases versus adjudication cases. Ultimately the standard is arbitrary and capricious for both. There are more rule-making cases, and this proceeding is a bit unusual in that there were formal comments accepted and considered, which doesn't turn it into a formal rule-making. That's never been our argument. But it looks a little bit more formal than informal adjudication does, but you're right that the standard is the same.

THE COURT: All right. Thank you.

MS. STUKES: Good afternoon, Your Honor. To reintroduce myself, I'm Ann Stukes on behalf of the Commodity Futures Trading Commission. As we did in our briefs, I'm going to refer to my agency today as the CFTC, or the Commission.

And I'll refer to the plaintiff simply as Kalshi.

I have about an hour's worth of remarks for Your Honor today, if that is okay with you.

THE COURT: We may take just a court reporter break at some point, so I'll let you get started.

MS. STUKES: Thank you. Any time you want me to jump to an issue, please just let me know.

THE COURT: Could I just ask you something I'm curious about to start?

MS. STUKES: Absolutely. Sure.

THE COURT: With respect to this catchall category, the Commission specifically didn't make an argument that this contract falls within the catchall, and I was just curious as to -- I'm not saying it does, I'm just curious as to why that wasn't the position of the Commission.

MS. STUKES: In considering the case that was before it, the Commission examined these contracts and determined that two categories applied, enough to bring it within the statute and therefore didn't reach any further categories.

THE COURT: Okay.

MS. STUKES: So as the Court is aware, the CFTC's order that's at issue in this case determined under CEA section 5CC5C -- I call it 5CC5C, I'm talking about the same statutory language that's codified at 7 U.S.C. 78-2. The CEA is, like many statutes, sort of odd where sometimes our statutory

sections don't line up with the codification.

In any event, the order at issue here determined under CEA 5CC5C, that Kalshi's proposed Congressional control contracts should not be offered on Kalshi's platform because the Commission determined that those contracts were contrary to the public interest. And we submit that this Court should conclude that the Commission's decision was not arbitrary or capricious.

The Commission's decision addressed four principle issues that the parties have briefed and I will discuss today. First, how does the word "involve" apply to activities enumerated in the statute.

Second, do these proposed contracts involve the enumerated activity of gaming.

Third, do the contracts involve the enumerated activity of activity unlawful under state or federal law.

And four, are the contracts contrary to public interest.

Before I get into the substance of each of these issues, I want to emphasize that the Commission's order is an informal adjudication, and Your Honor just asked about the standard of review. This is not a rule-making and it's not even a formal adjudication, and that means in practical terms that the Commission was deciding just one issue, whether these particular proposed contracts should be listed on Kalshi's

event contracts platform. And the Commission didn't purport to address any other question larger than that. So for instance, the order doesn't establish the full metes and bounds of how the statute might apply to any other event contract other than the ones that were before it.

THE COURT: And just for my own information, is it typical for the Commission to solicit comment in a circumstance like this?

MS. STUKES: It's not required. It did so, I think, in an abundance of caution.

THE COURT: Is that an unusual event or not unusual?

MS. STUKES: I don't want to say something misleading, especially without talking to my colleagues about how frequently have we done this. I wish I had a better answer for Your Honor.

THE COURT: It's more out of my curiosity.

MS. STUKES: I can see why. I think the Commission did it really in an abundance of caution because of public interest associated with this topic generally.

THE COURT: Okay.

MS. STUKES: I'm emphasizing that this is an informal adjudication, because when Your Honor considers the question before you, which is rather the Commission ran afoul of what's required under the Administrative Procedures Act, the standard of review is a lenient one.

The law requires only that the Agency acted within a zone of reasonableness. Here the CFTC reasonably considered the relevant issues and reasonably explained its position and no more was required under the APA. The APA gives the Agency deference on its predictive judgments and on its public interest determination.

Now, there are questions of statutory interpretation in this case. And Your Honor finds herself maybe in the unenviable position of having each party in this case tell you the statute is unambiguous, that the plain meaning advocated by each side supports each side.

I submit that the Commission has the better of the argument on what the statute means and how it applies on involve, gaming and unlawful under state law, that the Court's review on the statutory interpretation questions is de novo.

I'll get into now the first of the four issues that are before the Court that are briefed in the party's papers, and that is the Commission's reading of the word "involve" to have its ordinary meaning to relate to or affect, to relate closely, to entail or to have as an essential feature a consequence.

These are the ordinary dictionary definitions of the term, and that is the definition that applies because the term involved is the -- the term involve is not defined in the statute. And so case law has held for a long time that when

there's -- when the statute doesn't define the term, its ordinary meaning applies and that means the ordinary meaning in dictionaries.

So what that means for the statute here is that the plain meaning of "involve" when we're talking about the categories enumerated in the statute that would render an event contract eligible for public interest review, the word "involve" is broad enough by its plain meaning to cover event contracts whose underlying, meaning the event on which the contract is premised, here the outcome of congressional elections. The statute is broad enough to cover contracts where whose underlying involved the enumerated activity, as well as contracts that relate closely, entail or have as their essentially feature or consequence the enumerated activity.

THE COURT: I don't understand the plaintiff to necessarily disagree with the definition that you've set forward, but I think when you say that closely relates to or entails, they're saying yes, to the subject matter or underlying activity of the contract.

So can you just speak to that? Because I had thought initially that there was some difference with how you were defining involve. And now having heard from plaintiff and going back and reading their brief, reviewing those portions of the brief, I now see more clearly what they were saying, that those definitions have to relate to the activity at issue

underlying the contract.

So if you could just speak directly to that.

MS. STUKES: That is generally my understanding of the dispute between the parties here. And that is, as I understand the plaintiff's -- and not to mischaracterize, but as I understand the plaintiff's position, they're saying involve, if it means anything, it has to mean that the underlying event involves an enumerated activity and it can't be a broader relationship involving the contract itself.

So when we look at the statutory language and whether a contract is in the scope of the -- pardon me, of the statute at all, it's a two-step inquiry. So the first step in the statutory language is, does the agreement, contract, transaction, or swap in an excluded commodity that is based upon, based upon -- that means the underlying, based upon the extent of an occurrence or contingency.

So step one in other words asks, is the contract based on, does it -- is it based on -- is the underlying an event. Because this -- pardon me -- this statute applies only to event contracts. So step one under the plain language of the statute which uses "based upon," meaning "underlying," in the same sentence that it uses "involve."

Step one is is this an event contract at all, is the underlying an event. If so, we're in the statute, at least this far.

Step two is whether the agreements, contracts or transactions involve the enumerated activity. And that's a broader question than whether just the underlying event involves the enumerated activities.

"Based on," as used in the statute, unambiguously refers to the underlying event. It must be an event, that's all.

"Involve" is broader. Any aspect of the contract, transaction or agreement, if it involves an enumerated activity, we submit that by the plain meaning of the word involve it's in the statute. At least it gets you so far as to be eligible -- that's the relationship between the contract and the enumerated activities. If the contract, transaction or agreement involves the enumerated activity, we're in the statute. Underlying, what the contract is based upon, what the actual event is can be, can -- the underlying can involve the enumerated activities. They're fairly easy to think of examples.

If the event contract is based upon whether a war will break out, it's in an enumerated activity.

THE COURT: Is there an example of a contract that under this broader definition that you're advocating for would involve war where the underlying activity in the contract doesn't speak to war, itself.

MS. STUKES: The examples are -- the examples of how a

contract could involve war but not involve an act of war have to do, and I think both parties cite this kind of example, will -- I hate to give these real world examples, will a foreign body be able to use U.S. weapons on its enemy's soil, something like that. That involves -- oh gosh, I don't want to get too in the weeds -- will funding be allocated to a country that's at war, that involves war.

THE COURT: I think they would say yes --

MS. STUKES: I actually don't think we're too off base on that. I think the real dispute between the parties is what are you looking at, what has to involve the enumerated activities, and the real rub here is that the Commission interprets the plain language of this statute to say if transacting in the contracts, if the feature or purpose of these contracts is one of the enumerated activities, gambling is the one -- gaming, pardon me, is the one that comes to mind. Is transacting in the contract, is that essential feature gaming. And the Commission here said yes for gaming and for unlawful under state law.

THE COURT: So what is your best argument for their response that there are a lot of states, and they listed them for me, that make any type of betting stakes on any contingent event unlawful under state law such that that's what these event contracts are? So every event contract should theoretically -- if the transaction of the contract in and of

itself is what involve means and not the underlying activity at issue in the contract, than just the mere transacting event contracts would violate state law; how do you respond to that?

MS. STUKES: I want to say two things about that, and I can jump to the discussion of how we analyzed unlawful under state law. The Commission is not saying that involve in every instance means anything other than its plain meaning. Let me say that in a little more -- with a little better articulation.

Involve is a broad term. It's broad enough to cover event contracts whose underlying is one of the enumerated activities, and it's broad enough to cover an event contract whose essential feature is one of the enumerated activities, and here an essential feature of these contracts is betting or wagering on elections.

THE COURT: But an essential feature of some other contract could be betting or wagering on, fill in the blank.

MS. STUKES: Right. So your Honor's concern, I think, is the plaintiff's argument: What do we do with this, what I interpret as an extrapolation from what the Commission actually said, to say, well, that would be absurd in another context because other state laws say it's unlawful -- there are state laws that say it's unlawful to wager on any contingent event. And that would sweep in every event contract to a public interest review.

THE COURT: Right.

MS. STUKES: So I'm just getting to my notes where I have this.

THE COURT: Sure. Take your time.

MS. STUKES: The Commission had before it the question of whether these contracts, which involve wagering on elections, involve activity under state law. Here we have numerous state laws that forbid wagering on elections, and that was sufficient for the Commission to say state law forbids wagering on elections. That's the essential feature of these contracts, and we can stop there.

What the Commission didn't do is say state law forbids or makes unlawful wagering on any contingent event. That was not the basis of the Commission's reasoning, and even if you can say if A is to B then C is to D, like some logical extrapolation, that's not what the Commission did here. It just said we see under state law that wagering on elections is unlawful. And that's the essential feature of these contracts, and that's enough. That's enough that we're in the zone of the statute.

THE COURT: Right, but --

MS. STUKES: And it's not unreasonable -- I'm sorry, I've interrupted Your Honor.

THE COURT: I just wanted to -- because right now I think we're talking about what the meaning of the terms in the statute are, and their argument, as I understand it, is that

the Commission's reading doesn't make sense; this is otherwise unambiguous and they're applying this word in a way that kind of means one thing in one subsection and another in another subsection.

And what they're saying is elections is not on this enumerated list and that's full stop, end of case. And you're saying, well, no, it fits under the first category because betting on or wagering on elections violates many state laws.

And their response is wagering on any contingent event violates many state laws. And if that were the reading, if that's how the statute was read, that would mean that every event contract would be subject to this two-step review, which was not the intent when the statute was amended to streamline this process and not make the DCM have to make an initial showing that the contract was in the public interest.

So I'm just speaking more about the unlawful under state law. What does that mean? Does that mean that the act of trading the contract is unlawful under state law, in which case that would -- might relate to many contracts or all event contracts, or does the underlying activity -- for example, I think plaintiff gave an example whether or not some crime was going to occur, whatever it is, some specific criminal activity, where the subject of the contract relates to, involves something that is unlawful.

So I just want to understand the difference -- your

response to that, that your reading would put every event contract under this inquiry.

MS. STUKES: Respectfully, I don't believe that what the Commission held in this order would subject every event contract because what the Commission said is only that examining these contracts, whose essential feature is to bet on elections, that involves activity that many state laws prohibit.

What the Commission did not say is these contracts involve wagering on a contingent event and many state laws make wagering on a contingent event unlawful. Therefore, it is.

THE COURT: Hypothetically, let's say I'm a plaintiff, I'm a DCM, I want to post my event contract about whether or not a hurricane will hit in Florida. And the Commission came back and said this is against public interest and it also falls under -- I'm doing this out of order. It falls under category one because in Florida and elsewhere the state law prohibits people from posting or making bets or wagering on contingent events, and a hurricane is a contingent event and this contract involves a wager on a contingent event, so we're not going to allow it. Would that be allowed under this statute? Would that work?

MS. STUKES: I think it would be an unusual reading of the statute.

THE COURT: And why?

MS. STUKES: And it's because this statute sets forth in broad terms the categories that are the subject of public interest review, and none of those categories on their face suggest that Congress intended to capture all event contracts. And it --

THE COURT: Right, that's their point. I think that's exactly what they're saying.

MS. STUKES: I think, actually, the parties agree. I think where we're off is the Commission doesn't agree that that's what it concluded in this case. It concluded that state laws forbid wagering on elections, and that's an important state interest that Kalshi is asking the Commission to undermine by allowing these contracts to trade on a federally-registered exchange -- a federally-regulated exchange.

To be clear, the Commission's order didn't find that -- like if these contracts were allowed, it didn't find that purchasing one of Kalshi's congressional control contracts would be illegal in jurisdictions that prohibit betting on elections by statute or common law.

Kalshi argues that the Commission was arbitrary and capricious or fell afoul of the law because it can't be illegal under state law to offer the contracts on a market regulated by the CFTC because Fransha (ph.). But that, as the Commission held in its order, misses the point.

The CEA is a federal statutory regime for the regulation of commodities derivatives markets, and it does preempt state laws that prohibit the trading of commodities contracts. No state law can ban a contract that's lawfully listed on a CFTC-regulated market. But what Kalshi asks the Commission to do here and what Kalshi is asking the Court to do is to order the CFTC to permit these contracts, when Kalshi's own website cites news articles that characterize them repeatedly as election gambling, betting on elections, when under state law it's illegal to gamble on elections.

And this, by the way, is the reason we're here. If Kalshi could lawfully offer election-betting contracts on CFTC markets, it could ignore any state law that disallows election gambling. Even states that allow gambling prohibit betting on elections. And that indicates that the concern is not so much gambling but election integrity. You can't place a bet on an election in Las Vegas or Atlantic City.

For the CFTC to allow the contracts, it would have had to undermine these important state interests. And so when the Commission concluded in its order that, in considering whether a contract involves activity under state law, it considered whether the activity is unlawful under state laws that are not otherwise preempted by the CFTC, laws that go to state interest that are not overlapping with the CEA's regulatory authority. And when the Commission considers that it can consider whether

the CFTC's exclusive jurisdiction over federal commodities markets, federal commodities derivatives markets, should be used to subvert important state interests.

So this question of -- well, it's frustrating to me -- well, I'm an advocate, I should be frustrated by my opponent's arguments. But what's frustrating to me about that is this concept that the Commission's interpretation of the statute doesn't make sense because some state laws make it illegal to place a wager on any contingent event, it's a distraction. It's not what the Commission held here.

The Commission went as far as it needed to go because this is an informal adjudication. It's one case. Under a different set of facts and a different proposed contract, it might look to that language. It would be an unusual reading of the statute to say because many state laws prohibit wagering on any contingent event, that all event contracts are unlawful, it would be an usual reading of a statute that sets forth only enumerated categories.

THE COURT: I think they would agree with that.

MS. STUKES: Right. I think we agree on that.

THE COURT: Well, I don't think you want to agree on -- if you do want to agree on that, I think you want to distinguish that from the election.

MS. STUKES: No. What I am saying is the Commission didn't base its decision on the existence of state laws that

make wagering on any contingent event unlawful. The Commission based its decision on the existence of state laws that make election wagering unlawful. It didn't consider in its decision and it didn't base its decision on the existence of these other broader state laws.

And so it doesn't even factor in to the review here. Whether they exist or not, it wasn't the basis for the Commission's decision. And even if you can extrapolate what the Commission was not doing here -- the Commission wasn't ruling here. It went only as far as it needed to go to decide the issue before it. I hope that that is coming through to Your Honor.

So here, because these contracts have as their essential feature not that they're wagering on any contingent event but they are wagering on the outcome of elections, and wagering on elections is unlawful under numerous state laws, the Commission was reasonable in its determination that these contracts fit within that category of unlawful under state law to render them at least in the statute in subsection I.

I can move on to talk about gaming, unless you want to talk about --

THE COURT: Let's talk about gaming.

MS. STUKES: Okay. Again, with the term "gaming," the Commission applied the ordinary meaning of the term "gaming" to conclude that these contracts would fall within that enumerated

category. Again, "gaming" is not a defined term in the statute.

And so what the Commission did reasonably is look to its ordinary meaning as defined in dictionaries and in ordinary meanings as defined in state law and federal law -- well, I'll talk about that in a second. And concluded that it falls within the ordinary -- that those proposed contracts, which wager on the outcome of congressional elections, fall within the meaning of "gaming."

First, the Commission looked at that the ordinary dictionary definition of gaming and found that gaming in its ordinary dictionary meaning is synonymous or interchangeable with gambling. And that's actually supported in the congressional record when we see that colloquy between Senators Feinstein and Lincoln, where the first thing, I think, that Senator Lincoln's comment says is this section of the CEA, 5CC5C, is intended to prevent gambling, using the futures markets for gambling.

THE COURT: How do you define "gambling"?

MS. STUKES: Let me come back to the definition. So "gaming" in ordinary dictionary definitions is synonymous with "gambling." There's actually a Supreme Court case that we cite. in our brief, also, for that proposition. They're interchangeable terms.

THE COURT: Okay.

MS. STUKES: So what's gambling? The Commission looked at various definitions under state law of how "gambling" is defined. And a common thread in many state law definitions of "gambling" is to stake something of value on a contest of others. It's within a common thread, a frequently used phrasing included in the definition of "gambling," staking something of value on a contest of others. A number of states linked the terms "gaming" or "gambling" to betting or wagering on elections.

The Commission also looked at this Unlawful Internet Gambling Enforcement Act, which has the definition of "to bet" or "wager." Betting or wagering is a common definition of "gambling." And in that statute wagering on a contest -- staking something of value on a contest of others is included in the definition.

THE COURT: Can I ask you a question.

MS. STUKES: Yeah, absolutely.

THE COURT: Besides elections, in your view, is there a contest of others that doesn't involve a game as plaintiff would define what game means?

MS. STUKES: I actually thought the horse race wasn't a game. But there are contests, Academy Awards, award types of things that doesn't seem like a game, just seems like a contest. So --

THE COURT: Okay. So an event contract on something

about one of these awards would fall under the gaming or gambling prong?

MS. STUKES: First of all, I don't want to get ahead of my Commission which -- the Commission didn't define it -- didn't define -- didn't talk about whether the -- in this order didn't get into other examples because it was sufficient to determine that elections fall within this ordinary definition of staking something of value on a contest of others.

THE COURT: Right. I'm trying to make sure that I understand what the terms mean in the statute. So it's certainly relevant for me to understand how this would apply even beyond this case, while I know I'm only looking at the order in this case.

So based on what you said, an event contract about any kind of contest, like an award show, Academy Award, Grammy's --

MS. STUKES: It's not a game. It seems like a contest.

THE COURT: That would fall under the gaming prong.

MS. STUKES: Wagering on it, it sounds look it might, yeah.

THE COURT: Keep going.

MS. STUKES: So one of the criticisms that Kalshi levies at the Commission's decision here is they say that the definition is gerrymandered because it includes only wagering something or staking something of value on a contest of others.

And gaming can be so much more than that. Gaming can be games, gaming can be so much more than that.

What the Commission did, however, is it looked at what are these contracts. These contracts are staking something of value on the outcome of elections. Does that fit in an ordinary definition of gaming? We submit yes. Because gaming is interchangeable with gambling and ordinary meaning of gambling is to stake something of value on a contest of others, and an election is a contest by its plain meaning.

Dictionary definitions define "contest" to include elections. The examples that we cite in our brief talk about the presidential election as a contest, the presidential contest, meaning an election.

So "gaming" reasonably and plainly includes by its plain meaning staking something of value on the outcome of the contest of others. This might not be to the exclusion of other types of gaming and gambling that were not at issue in this particular matter. But these contracts are designed to wager on the outcome of congressional elections.

THE COURT: But the definitions don't change based on the contract at issue, right? The statute says what it says.

MS. STUKES: The statute says what it says.

THE COURT: And it's your role to determine whether -- if you undertake this type of review under the statute, then you decide or make a decision as to whether or not the contract

fits the definition. So the definition doesn't change; it's whether the contract fits the definition.

So it can't be -- I'm not going to find gambling means contest here and then in another case be given a different definition from the Commission about what gambling might mean based on the contract at issue there. That's not what you're suggesting.

MS. STUKES: What I am suggesting is that because this is not a rule making, that the Commission's determination of whether these contracts fit within the ordinary meaning of "gaming" did not require the Commission to define "gaming's" entire universe for it to determine that these contracts fit within an ordinary meaning of "gaming."

THE COURT: I guess that's what I'm having difficulty with because what I'm hearing you say is that there could be many definitions and we pick the one applicable here. If there are many definitions -- I hope no one is asking me to find this is an ambiguous statute. This is not the time to deal with ambiguities in statutory interpretation.

So I guess -- I mean, I hope that the Commission is taking the position that "gaming" means X and that this contract fits X because of whatever argument. You're not saying that you're adding a contest here, but in other circumstance you'd use another dictionary definition. There should be a definition that applies that's unambiguous.

MS. STUKES: What the Commission found here is an ordinary definition of "gaming" includes wagering on a contest of others, because -- and that's not, as Kalshi puts it, gerrymandering.

THE COURT: I can accept that.

MS. STUKES: That's deciding what's before it.

THE COURT: I can accept that in the dictionary there may be one, two, three, and if it fits any of those prongs. I just want to know the extent of what the definition of "gambling" is under the Commission's view. So what you're saying is it includes this contest of others. And so because an election, in your view, is a contest of others, then betting or wagering on that violates that provision of the statute.

MS. STUKES: Or at least brings it into that enumerated category of the statute, yes.

THE COURT: Okay. But if there are other definitions of gambling -- and I'm losing track of whether I saw it myself or whether it's in the papers, but that would just say, for example, you might have said it earlier, betting or wagering on a contingent event.

MS. STUKES: On any contingent event.

THE COURT: On any contingent event. Would that mean that every event contract involves gambling and, thus, gaming?

MS. STUKES: That's not what the Commission held here and it's unlikely to be what the Commission would hold in

another context if it came up. But that wasn't the question presented here.

So what was presented here was: Do these contracts, which are routinely characterized as election-betting contracts, fall within the ordinary meaning -- an ordinary meaning of "gaming," where gaming is synonymous with gambling and gambling includes wagering on a contest of others and a contest of others includes elections. And that was enough --

THE COURT: Okay.

MS. STUKES: -- to be a reasonable interpretation of the plain meaning of the statute.

We've talked about gaming and unlawful under state law and involve, and unless Your Honor wants to talk further about any of those subissues, I can move on to the public interest.

THE COURT: Sure. Yes, please.

MS. STUKES: Okay. So having determined that Kalshi's proposed contracts involve two enumerated activities under the statute, the Commission proceeded to determine that the contracts are contrary to public interest and, therefore, are prohibited from trading. And in making this determination, the Commission considered the contract's economic purpose as well as other factors. So I'll start with the economic purpose evaluation.

So the parties point this out in our briefs, but our statute here, the CEA, codifies two public interests in

commodities markets, hedging and price discovery. So hedging, in general, means to use the commodity derivatives markets to manage risk of price fluctuations in commodities. For example, we put in our brief an example of an airline. They have to buy jet fuel to operate their business and they have a price sensitivity to movements in the price of jet fuel.

So a market participant who wants to hedge their risk of price fluctuations, and they're worried that the price of a commodity will go up, will hedge that risk by entering into a commodity derivatives contract whose value will go up if the price of that commodity increases. So in other words, hedging means you can enter into a derivatives contract in a CFTC-regulated market that will move in your financial interest if the commodity that you're sensitive to moves against your financial interest. That's hedging.

Price discovery, which is the other enumerated public interest in the CEA and in commodity derivatives markets generally, means to determine a price level for a commodity based upon its pricing in a CFTC-regulated market. So for instance, futures contracts on, like, agricultural commodities can be used -- the trading on futures contracts can be used to discover the price of the actual commodity in the cash market.

As noted in the order, the Commission considered the public interest of Kalshi's proposed contracts and considered their economic purpose. So this statute, 5CC5C, doesn't define

what it means to consider the public interest but because the CEA itself codifies economic interests, in the years before 2000, when the CFTC examined every derivatives contract for public interest, it looked at an economic purpose test that asked whether a contract can be reasonably expected to be or has been used for hedging or price basing on more than an occasional basis. That was the test.

And the CFTC looked at that test in considering whether these proposed contracts have an economic purpose, and the CFTC also mentioned this colloquy between Senators Feinstein and Lincoln in which Senator Feinstein asked if the Commission would have the power to determine that a contract is a gaming contract if the predominate use of the contract is speculative as opposed to hedging or economic use.

So the Commission cited both of these formulations of considering the economic purpose of the contracts in evaluating these proposed contracts.

And it considered comments that Kalshi highlighted for Your Honor that congressional control has economic effects. And it considered comments from commenters that said they would use these contracts to hedge.

But, as the Commission found, the economic effects of one chamber of Congress or another are -- the word the Commission used is diffuse and unpredictable. The price of these contracts is not correlated to the price of any

commodity, and so the price of the contracts couldn't reasonably or predictably be used to establish commercial transaction prices for hedging or discovery.

THE COURT: Can I get a clarification? Is the test -- is it the more than occasional language or is it the predominantly for commercial purpose?

MS. STUKES: The test -- the Commission evaluated both. It looked at both and found that even considering the comments that suggested -- pardon me, that these contracts would be used for hedging purposes, most of the comments suggested that the hedging uses were not really related to the control of a single chamber of Congress, but rather the ultimate changes in law or policy that could be affected many steps down the line from control of a single chamber of Congress.

So even taking all the commenters together who stated an intent to hedge economic risk by trading these contracts, it didn't establish that the contracts would be used for hedging on more than an occasional basis.

But even if there were robust economic purposes for these contracts, the economic purpose of the contracts was just one aspect of the evaluation here, because a contract with economic purpose, an event contract, even if it has an economic purpose, it doesn't make it per se in the public interest.

There's an example actually in the colloquy of the

congressional record. You can have a contract on whether a terrorist event will occur and it could be used for hedging, even. If you're going to suffer an economic consequence from that, it doesn't make it in the public interest. It doesn't make it a good idea.

So the Commission here considered the alleged economic purposes of these contracts and it found that these contracts could not -- because control of a single chamber of Congress, the impact for economic hedging is so diffuse, there are so many steps that are involved between the election and actual enactment of legislation, that the economic purpose of these contracts did not weigh in favor of their public interest, but it considered other aspects too.

I want to address one thing, that Kalshi argues that the Commission imposed an arbitrary and capricious direct-effects test. Stating that these contracts don't have a direct economic effect, simply because a single chamber of Congress doesn't itself have the power to enact law, is not an arbitrary test. It's a description of the limited hedging utility that these contracts would have.

But again, even if these contracts had a robust economic purpose, other factors play in to the public interest determination, and they did here. So I'll talk about election integrity, unless Your Honor would like to talk about the economic purpose --

THE COURT: I guess the only question is plaintiff made an argument in their briefs, and I talked to them a little today, about even putting aside any legislation that's passed, just the mere fact of elections that dictate who is in control of what chamber has maybe impact on the stock market or other direct economic consequences that are real and tangible and that can be observed in the aftermath of elections, and I wanted to know what your response was to that.

MS. STUKES: My response is maybe something you've already said, which is even if there are economic benefits to trading these contracts, the Commission determined in its discretion that those were not outweighed by the very serious public interest --

THE COURT: So you don't dispute that?

MS. STUKES: I find that even if it's true, it doesn't make a difference because the Commission was reasonable and not arbitrary and capricious in its determination that the concerns about election integrity here overwhelmingly are reasonable and not arbitrary or capricious.

THE COURT: Okay. Let's go to the election integrity.

MS. STUKES: So factors including specific concerns about election integrity supported the Commission's determination that the contracts were contrary to public interest, and the principal concerns that the Commission identified included that these contracts could create monetary

incentives for individuals or organized groups to vote for particular candidates for financial gain, to win a bet, not -- regardless --

THE COURT: And before you said to win a bet, I was thinking you're describing what I think happens now in real life in terms of the financial incentives of people putting money behind elections and what motivates people to vote for certain candidates is often financial in nature, right? But you're saying specifically to collect on these event contracts.

MS. STUKES: These event contracts, their very existence would establish -- could establish a financial incentive to vote in a particular way that doesn't presently exist because these contracts are not traded anywhere. You can't gamble on elections. So they can incentivize voting in particular ways that could influence how people vote.

THE COURT: How would we ever measure that?

MS. STUKES: Well, the --

THE COURT: The reason I'm asking is because I think the plaintiff's argument is that concern is so unlikely to happen it's -- and I thought that they made a good argument today that there are already so many incentives, financial and otherwise, behind elections that motivate people to do certain things -- I mean, the point being that if there were some way to get control over a -- if someone could figure out a way to ensure control of a chamber of Congress, that probably would

have happened by now, right? So what is your response to that?

MS. STUKES: My response is the existence of a federally-regulated derivatives contract on the outcome of elections could incentivize people to manipulate either that contract or the election itself for financial gain.

I'll give you some examples to talk about the kind of thing we're concerned about. And I'm skipping ahead to the -- the order I was going to talk with you about these things.

The Commission is not just a regulatory agency. We're also a law enforcement agency. And we're tasked under the CEA with antifraud authority. And we're tasked under the CEA to ensure integrity in the markets that we oversee. And because of that, the Commission could be drawn in to investigating manipulative conduct in these markets in a way that doesn't -- is outside of its ordinary mission.

So here's an example. A political activist with a big social media following, they float a rumor on social media damaging to a candidate who is important to one party's control of the Senate. In a couple of weeks, this rumor spins up and spins out and it turns out maybe it's untrue. It turns out to be false.

But during the weeks that the rumor was circulating, the congressional control contract on the other party goes up and many people make a lot of money by selling that contract when the market is high. And then the CFTC gets a tip and

says, well, that person put that rumor on social media in order to manipulate the congressional control contract.

There's a couple of implications here. The very availability of that contract has added one more reason, and maybe a big reason for some people, to disseminate false information about elections. And that's certainly relevant to the public interest.

Another thing that the Commission considered here is that it would draw the Commission into investigating these kinds of activities, and that's not farfetched.

THE COURT: Is that something that the Commission is tasked with doing now? I'm assuming there are other contract -- I probably could come up with an example of any contract that could be subject to some manipulation where there's money involved. Is that the kind of thing that the Commission would typically investigate if there was an issue with -- okay.

MS. STUKES: Absolutely, Your Honor. As a federal regulator of commodities markets, the CFTC, as I said, is in charge of ensuring price integrity on our federally-regulated exchanges. In the ordinary course, there's many ways to manipulate markets.

Now, I say this in the same breath that I say I think the markets regulated by the CFTC are among the safest in the rule, but the limit of manipulation is really just the limit of

human ingenuity. Manipulation is attempted, and the CFTC, as a law enforcement agency, routinely investigates allegations of fraud and manipulation in the markets that it oversees.

THE COURT: I asked that because when I read your brief it sounded like one of the arguments you were making was that if you had to do that in this circumstance it would put you in a position that the CFTC is not equipped to do. But it sound like, if it's part of your regular mission, it wouldn't put you in a position that you're not already required or routinely do.

MS. STUKES: My answer to that, Your Honor, is that there are two important differences because this is not a minimal concern. It's not simple enough to say, oh, but you investigate manipulation in markets that you're not an expert in all the time. And it's true, we have a division of enforcement that investigates alleged manipulation in a lot of markets on a lot of commodities.

The difference here, there are two important differences. First and most important, any government investigation and enforcement activity involving the political process is inherently sensitive. There's a difference in the CFTC investigating economic activity related to commodity derivatives markets and the CFTC investigating acts that may be political speech or other conduct central to the political process.

Second, as we briefed and as the Commission found in its order, most of the markets regulated by the CFTC have objective economic data that may not totally decide a case but at a minimum it provides some objective grounding through the CFTC's investigations of whether manipulation has occurred.

The vast potential of these contracts to incentivize misinformation could absolutely draw the Commission into investigations of a vast array of possible manipulation. The pricing of these congressional control contracts would be impacted by such a broad array of information. Anything that could influence the election could influence the price of these contracts. So polls, rumors, news, announcements, faked information, advertisement, I can't even think of it all. And this would be for every congressional race in the country.

Kalshi doesn't have jurisdiction to investigate any alleged manipulation on these contracts. It would fall to the CFTC. In its everyday operation, the CFTC receives tips of possible market manipulation and it would be drawn into investigating whether information disseminated about congressional elections illegally manipulated the market in these contracts, and that is not a role for which the Commission is equipped and it would greatly expand the jurisdiction of the CFTC.

Assuming the role of an election cop raises very serious concerns about not only the misalignment of that role

with the Commission's mission and its history but with election integrity. And it was reasonable for the CFTC to have considered this.

As another example, it's not farfetched. It's not a de minimus concern. Kalshi says, oh, it's not a big deal. You do that anyway. Or it's not likely to happen.

The Commission's predicted judgment based upon its existence as a law enforcement agency that routinely investigates manipulation and as a regulatory agency that is entrusted with ensuring the integrity of its markets, it was a reasonable predictive judgment to say that that would draw the CFTC into investigating conduct that relates to elections.

There's another example. There's another example I wanted to talk with Your Honor about, and that would be you asked Kalshi's counsel about the limits that it proposed to put on who could trade these contracts. As far as I read that list, it wouldn't prohibit people who count the votes from trading in these contracts.

So imagine a scenario -- and the position limits, meaning how much can be traded on these contracts, the position limits proposed would allow trading of up to $5 million if you're a company or entity. So imagine a group of poll workers -- and I don't mean people that are involved in surveys. I mean people that count the votes. They form a company of some kind and they're accused of putting their money

together and putting a $5 million position on these congressional-control contracts. These are the people counting the votes.

Someone refers this to the CFTC because they think the vote counting has been manipulated to make a profit in the event contract. So here would be the CFTC being drawn into whether the vote count is accurate.

THE COURT: Or whether there was fraud in connection with the event contract, right?

MS. STUKES: Correct. Because it would ask the question of whether there was fraud in the event contract. Because that would be manipulating -- manipulative or fraudulent conduct that unduly influenced the event contract.

And that's an example of the CFTC's concern. Because these contracts could -- their very existence could incentivize conduct designed to artificially affect the electoral process for the purpose of manipulating the price of the contract for financial gain or they could incentivize the manipulation of the market for the purpose of artificially affecting the election or perceptions of the election.

I want to mention one thing that Kalshi talks about and that is -- oh, actually, before I get there, research in the record -- one comment submitted in the record involved the actual manipulation of a political event contract by false information. There was -- it's a bizarre fact pattern. The

pop singer Kid Rock was shown to be ahead in the polls in a match-up against a sitting senator before he had ever -- he had not even declared a candidacy for the Senate, but he was shown in a poll to be ahead of a sitting senator, and that caused the price of a corresponding event contract to drop and it caused trading volume to surge, and users were later, on social media, bragging about how that poll trolled the news media and influenced the election event contract.

Researchers have theorized that that kind of fake information could be used to generate market movement in other election event contracts. So it's not farfetched to say that this is a serious concern. Over 600 comment letters were received by the agency, including from Senators and members of the House of Representatives, expressing significant concerns about election integrity and the improper commodification of our elections.

And I don't say commodification just as rhetorical flourish. When you have an event contract trading on a CFTC-regulated market and the underlying event of that contract is an election, the election is a commodity under the Commodity Exchange Act.

Where a large number of states have specifically disallowed gambling on elections by either statute or common law, and that reflects the view of a large number of states that this kind of wagering is against the public interest, the

Commission grants significant weight to any threat to election integrity, as well as the threat to the perception of election integrity.

And this is especially important at a point in time where so many people question the validity of elections. The Commission is not required to let threats to election integrity happen before recognizing election integrity as a public interest concern with respect to these contracts.

There's one other value that Kalshi argues -- that Kalshi and Amici and commenters argue that these contracts have, and that is that they could provide beneficial market-based predictive data. And that that's societally valuable information. The Commission considered that but it didn't find that generation of such data outweighed the very real and grave concerns about the threat to election integrity that these contracts would pose.

The CFTC's predictive judgment about possible negative consequences that could arise from these proposed contracts are entitled to deference under APA law. The Commission didn't ignore evidence. It didn't refuse to engage with contrary positions. It found that any economic utility of the contracts didn't outweigh the very serious risks that the contracts could be manipulated and could incentivize the spread of misinformation or be used to undermine election integrity or the perception of election integrity.

So for all of these reasons, the CFTC submits that Your Honor should deny Kalshi's motion for summary judgment and grant judgment to the CFTC.

THE COURT: Okay. Thank you.

Any brief rebuttal?

MR. ROTH: Very brief. Very, very brief.

THE COURT: Yes.

MR. ROTH: I appreciate the Court's time. I will be very, very brief. Three quick points. First Your Honor asked about the catchall category, why they didn't rely on the catchall.

THE COURT: Yes.

MR. ROTH: The catchall requires a rule making. It's by rule or regulation. They haven't done a rule making. And so that's -- they couldn't rely on the catchall.

THE COURT: They could not rely on the catchall.

MR. ROTH: Yes. So they would first have to do a rule making to determine some activity is similar to the others. They have not done that. So that's the answer to that.

THE COURT: Thank you. I appreciate that.

MR. ROTH: On unlawful, I still did not really hear a theory as to why their reading doesn't sweep in everything. What I heard was, you don't have to worry about that because that's not this case. That's not how statutory interpretation works. We need to understand what the statute means. Counsel

admitted that's a de novo question for this Court to consider. And, of course, in considering what the statute means, the Court is going to look at how it would apply in other contexts.

That doesn't mean you need to figure out the answer to every other hypothetical case that might exist. But the Supreme Court, whenever it's considering a question of statutory interpretation, looks at how it's going to apply elsewhere, and if it's going to be absurd in a wide variety of other cases that means it's a bad interpretation. That, I think, covers unlawful.

The only thing I'll say about gaming, to add to earlier, Your Honor asked if their interpretation of contests would sweep in anything that isn't a game other than elections. And counsel's response was potentially awards shows, like who's going to win the Emmy or the Oscar, which I thought was a fascinating example because Kalshi offers those and has offered those for a long time, and they have never subjected those to the review process.

And I think that really underscores the sort of outcome-driven aspect of this. It's not a good-faith statutory interpretation. It's an attempt to get it in without a real coherent theory of what the statute means.

That's all I have, Your Honor, unless you have further questions.

THE COURT: No. Thank you. I appreciate the briefs

were very good and helpful and I appreciate your time.

Before we leave, I'm going to embarrass Ms. Franklin because -- this is my courtroom deputy, Ms. Franklin, and this is her last in-person hearing. She's going to be retiring after over 30 years on the court.

(Applause)

So I did not know there were going to be this many people here. I brought cupcakes for the parties and for us. I am sorry to the people in the audience. I do not know if I can accommodate everyone. There's more coming.

I'm sad but happy for Ms. Franklin. After 32 years on the court, she certainly deserves to retire but we're going to miss her. And so I just wanted to recognize her for this last hearing of hers in this courtroom. So thanks everyone.

(Applause)

We're waiting for more cake.

There's not a song that we can sing. I don't know if people blow out candles for retirement. We just wanted to say thank you so much. We're going to miss you. Please don't leave us too in the wind, and I hope you come back.

(Off-the-record discussion.)

THE COURT: I'll take this matter under advisement. Thank you, everyone.

(Proceedings concluded at 3:03 PM)

C E R T I F I C A T E

I, Stacy Johns, certify that the foregoing is an accurate transcription of the proceedings in the above-entitled matter.

/s/ Stacy Johns Date: June 3, 2024

Stacy Johns, RPR
Official Court Reporter

ATTACHMENT 2

REPORT

Futures & Derivatives Law

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POINT OF VIEW

FOOTBALL GAMBLING FUTURES CONTRACTS: CAN THE CFTC MEASURE UP TO THE KEYSTONE COPS?

By Jeremy D. Weinstein

Email: jweinstein@jweinsteinlaw.com and website http://jweinsteinlaw.com. *I gratefully acknowledge the review, comments, recommendations, critiques, and encouragement of Ryan Barry, Patty Dondanville, Geoff Heffernan, Julie Morris, Ginger Price, Chris Stokley, Debby Weinstein, and Chris York, but I take sole responsibility for content.*

INTRODUCTION

One hundred years ago, movies lacked soundtracks, and so comedy often relied for laughs on broad physical comedy, known as "slapstick." An early master of the form, Mack Sennett, made a series of short films from 1912 to 1917 for the Keystone Film Company featuring a team of frantic and frenetic, yet clueless and bumbling, policemen working at cross-purposes. These were known as the "Keystone Cops."[1]

Recently, a futures exchange brought to the Commodity Futures Trading Commission ("CFTC") for review a proposed new futures contract designed to allow illegal (and legal) football gambling "bookies"[2] to lay off the risks of gamblers' bets on NFL football games. And . . . a provision of the Commodities Exchange Act ("CEA"), as amended by the Dodd-Frank Act of 2010, authorizes the CFTC to make a determination that certain types of futures contracts are against the public interest. So in 2011, as it implemented the Dodd Frank Act amendments to the CEA, the CFTC published a rule that prohibited as against the public interest any futures contract that "involves, relates to, or references . . . gaming."[3] The last time a futures exchange triggered this rule, in 2012, the CFTC quickly and conclusively dispatched the matter, saying that many state statutes include sports betting and other types of betting on events within the meaning of "gaming."[4] Since the newly proposed futures contracts presented in 2021 by the futures exchange to the CFTC involved, related to, ***and*** referenced betting on football games, the answer for the CFTC would have seemed clear.

But it wasn't. Mere hours before the CFTC was to issue an order denying the proposed football gambling futures contracts, the proposing futures exchange withdrew its request. A few days later, a CFTC commissioner issued a public statement[5] giving a glimpse into the substance and process of the unissued order, adding that he would have voted against it. In his statement, this commissioner seemed to me to have invited the public to submit Freedom of Information Act (FOIA) re-

quests to see the unissued order. So I did so.

In response to my FOIA request, CFTC staff told me that the draft order was too voluminous to provide readily, or might be offsite and difficult to access, or might require the permission of another federal agency prior to disclosure but, in any case, I should expect to wait a long time. The CFTC also rejected my argument that disclosure of the draft order was in the public interest.[6]

Meanwhile, another CFTC commissioner issued his own public statement,[7] in which he treated the controlling CFTC rule as a nullity. He had no issue with a futures contract relating to activity that is illegal in many states so long as the proposing futures exchange shows the futures contract has "sufficient evidence of hedging utility." In contrast with the first commissioner, the second commissioner said the futures exchange needed to prove "hedging utility" and failed to provide this evidence, and that was one reason he opposed these futures contracts. He went on to advance two more reasons why he opposed the proposed futures contracts, which were not reported as in the draft order, and which implicitly accepted the hedging utility that was allegedly not proven.

In sum, the CFTC engaged in a rulemaking process that was obscured from public view, unmoored from Congress's 2010 instructions to the CFTC, contrary to the CFTC's 2011 implementation of those instructions, and divorced from ordinary legal norms. However much they chased their own tails, at least the Keystone Cops showed respect for rule of law.

CFTC REGULATION OF "EVENT CONTRACTS"

The CEA defines "event contracts" as "an occurrence, extent of an occurrence, or contingency (other than a change in the price, rate, value, or level of a commodity not described [here]) that is (I) beyond the control of the parties to the relevant contract . . .; and (II) associated with a financial, commercial, or economic consequence."[8] Event contracts are a category of "excluded commodity," a term that in the CEA originally meant commodities excluded from the CFTC's authority, as distinguished from agricultural commodities and "exempt" commodities, but now essentially means financial commodities.[9] In 2008, the CFTC explained, "event contracts may be based on eventualities and measures as varied as the world's population in the year 2050, the results of political elections, or the outcome of particular entertainment events. . . . Event contracts have been based on . . . the accomplishment of certain scientific advances, . . . the adoption of particular pieces of legislation, the outcome of corporate product sales, the declaration of war and the length of celebrity marriages."[10]

In 2010, with § 745 of the Dodd-Frank Act, Congress added a new § 5c(c)(5)(C) to the Commodity Exchange Act:

> Special Rule For Review And Approval Of Event Contracts And Swaps Contracts.—(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.

Basically, the statute provides that the CFTC "may determine" that "such" event contracts are "contrary to the public interest" for one of six listed reasons, and if the CFTC does so, "such" event contracts are prohibited.

> A year later the CFTC promulgated new Rule 40.11:[11]
>
> Review of event contracts based upon certain excluded commodities. (a) Prohibition. A registered entity ***shall not list for trading or accept for clearing*** on or through the registered entity any of the following: (1) An agreement, contract, transaction, or swap based upon an excluded commodity, as defined in Section 1a(19)(iv) of the Act,[12] that ***involves, relates to, or references*** terrorism, assassination, war, ***gaming***, or an activity that is unlawful under any State or Federal law; or (2) An agreement, contract, transaction, or swap based upon an excluded commodity, as defined in Section 1a(19)(iv) of the Act, which involves, relates to, or references an activity that is ***similar*** to an activity enumerated in § 40.11(a)(1) of this part, and ***that the Commission determines***, by rule or regulation, to be contrary to the public interest.[13]

In Rule 40.11(a)(1), as expressly permitted by § 745, the CFTC made the determination, that event contracts that meet five of Congress's six reasons ***are*** contrary to the public interest and therefore ***are*** prohibited. In Rule 40.11(a)(2) the CFTC included Congress's statutory mechanism for making a further "similar" determination for any specific contract using the six reasons.

The prohibitions of Rule 40.11 apply only to event contracts, and not to agricultural commodities, like soybeans, the other "excluded commodities" of CEA § 1a(19), like interest rates and price indices, or the "exempt commodities" of CEA § 1a(20), like oil or gold.[14]

NADEX'S 2012 ELECTION CONTRACTS—PRECEDENT OR NOT?

Rule 40.11 became effective Sept. 26, 2011.[15] Shortly thereafter, a futures exchange called Nadex sought to self-certify event contracts about who would win the 2012 elections. The CFTC on January 5, 2012, announced a 90-day review[16] and posted questions for public comment.[17] On April 2, 2012, the CFTC issued a very simple, four-page double-spaced order prohibiting them:[18]

> . . . several state statutes, on their face, link the terms gaming or gambling (which are used interchangeably in common usage, dictionary definitions and several state statutes) to betting on elections, and state gambling definitions of "wager" and "bet" are analogous to the act of taking a position in the Political Event Contracts;[19]
>
> . . . the Political Event Contracts can potentially be used in ways that would have an adverse effect on the integrity of elections, for example by creating monetary incentives to vote for particular candidates even when such a vote may be contrary to the voter's political views of such candidates;[20]
>
> The Commission FINDS that the Political Event Contracts involve gaming as contemplated by

> CEA Section 5c(c)(5)(C)(i)(V) and Commission Regulation 40.11(a)(1); The Commission FURTHER FINDS that the Political Event Contracts are contrary to the public interest as contemplated by CEA Section 5c(c)(5)(C) . . . .[21]

As a result of the Nadex Order, the CFTC's prohibition of gaming contracts would have seemed clear.[22]

ErisX's 2020/21 NFL GAMBLING CONTRACTS

On December 15, 2020, the CFTC received a self-certification by a futures exchange called Eris ("Eris" or "ErisX") for listing three financially settled contracts called "RSBIX NFL Futures Contracts."[23] Eris proposed to restrict participation in these futures contracts by limiting who could trade them with a net worth test.[24] On December 23, 2020, the CFTC told Eris that it had determined that these futures contracts "may involve, relate to, or reference . . . gaming" under Rule 40.11, instructed Eris to suspend listing the proposed futures contracts for a 90-day review period,[25] and posted questions for public comment.[26] The CFTC received 25 comments,[27] including one from me.[28]

Then, on March 22, 2021, just one day before the end of the 90-day review period, Eris withdrew its self-certification.[29] It soon became apparent that the CFTC would have issued an order denying the NFL Contracts.[30]

HE SAID, HE SAID: BUT WHAT DID THE DRAFT ORDER SAY?

On March 25, 2021, CFTC Commissioner Brian Quintenz posted a public statement on the CFTC website. He told the story of the withdrawn draft order:

> . . . Prior to 2018, sports gaming was limited by a federal law which only allowed it to legally occur in Nevada. After [a Supreme Court case] struck down that law, multiple states have legalized sports gambling and thereby allowed legitimate business activity in that area. Since the derivative markets' historical use is the hedging of commodity price risk associated with economic activity, contracts relating to the outcome of sporting events could now have a legitimate economic and hedging purpose for businesses in these states. Such was the intent of ErisX's contracts.
>
> . . . Subsequently [to the public comment period], Commission staff proposed an Order that found the ErisX NFL contracts involved gaming, were prohibited by regulation, and were also contrary to the public interest. This proposed Order (which for simplicity's sake I will refer to just as the Order) was circulated to the Commission for a vote, utilizing a process where the Order is considered by the most junior Commissioner first then moving to the next Commissioner in seniority. Just hours before this voting process could conclude, and likely in anticipation of the Order's approval by the Commission [prohibiting the ErisX NFL contracts], ErisX decided to withdraw their certification, preventing the Order from being fully and formally considered by the Commission and publicly issued.
>
> . . . [T]he withdrawal also meant that the Commission's Order will never be public. The staff's analysis and working law that was applied to the ErisX NFL contracts may well be the same that Commission staff will apply in current or future direct discussions with exchanges to similar contracts, and outside of the purview of the Commissioners or the public. But the legal analysis and interpretations will remain secret until forced into the open by another, bolder exchange's decision to see a self-certification process through to a conclusion.
>
> ***Secret agency law is anathema in our democracy, and should only be tolerated where abso-***

> ***lutely necessary. The government can try to hide behind FOIA exemptions, deliberative process, or prohibitions on disclosing "confidential information,"*** but it shouldn't be able to take the ball home in the middle of the fourth quarter when leading by a field goal.
>
> I would have dissented from the Order prohibiting the ErisX NFL contracts due to significant concerns around the statute's constitutionality, the regulation's validity, and the order's arbitrariness. Customarily, my dissent would be made moot by virtue of ErisX's withdrawal, and my ability to comment on the Order therefore nullified. But, because of the severity of these concerns and their implication for any future event contract filing, I feel compelled to release this statement to bring transparency to this debate and process.[31]

Commissioner Quintenz went on to express his views on the process infirmities at the CFTC and unconstitutionality of DFA § 745 and the CFTC's implementation of that statute.

Less than two weeks later, on April 7, 2021, Commissioner Dan Berkovitz issued his own statement on the proposed ErisX order,[32] in which he seemed to treat the CFTC's prior public interest determination set forth in Rule 40.11 as a nullity even though he was the CFTC's General Counsel at the time Rule 40.11 was promulgated.[33] Commissioner Berkovitz said, "ErisX officials have been quoted as stating that they may re-file another certification. In light of the public comments received on the initial filing, and the potential for a subsequent filing, I believe that it may be helpful to provide my views on the now-withdrawn ErisX certification and some of the issues it presented."[34]

Much more on what the two commissioners said about the draft order below. But first . . .

INVITATION ACCEPTED

Inspired by Commissioner Quintenz, on April 6, 2021, I sent a FOIA request to the CFTC for the proposed ErisX order.[35] On April 7, 2021, the CFTC's FOIA office replied that it "will be unable to respond to your request within the statutory 20-business day deadline" because my request

> falls under one or more of these three circumstances: (1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request; (2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; and/or (3) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

In contrast to the CFTC's FOIA office, Commissioner Quintenz's statement described a draft order that was on-site and not voluminous, and that specifically did not involve consultation with other agencies.[36] Therefore on April 9, 2021, I wrote to both Commissioners Berkovitz and Quintenz asking if they could send me the proposed order. Because I had previously spoken with Commissioner Berkovitz, including as a co-panelist at an industry conference, I thought he would be open to engaging in discussion on the issues involved. However, Commissioner Berkovitz did not reply.[37] Commissioner Quintenz wrote a friendly and short reply about the issues, and his Senior Counsel called me and said he would contact the FOIA office about my request.

In my FOIA letter, I argued that the CFTC

should waive fees for my request, especially in light of Commissioner Quintenz's public statement, because regulatory process transparency was in the public interest.[38] On April 14, 2021, the CFTC FOIA Office wrote to me stating that it would not waive fees because "We have found that you did not demonstrate that disclosure is not primarily in your commercial interest." CFTC staff evidently believes regulatory transparency is primarily for my own commercial interest, but the staff is wrong. I wrote my comments not on behalf of any client or trade group, explained to the CFTC I would share copies of the draft order with the press and others, am not being paid for this article, have no clients that are futures exchanges and do not plan to seek any, and do not bet on football games; that is, I have no commercial interest in seeing the draft order.[39]

ErisX NFL CONTRACT-THE PUBLIC COMMENT PROCESS

In its questions to the public, CFTC staff asked if Eris' futures contracts involve, relate to, or reference "gaming" or "an activity that is unlawful under any State or Federal law" as described in Rule 40.11(a)(1), whether Eris' proposed restrictions on trading participation were relevant to a public interest determination, how pervasively illegal must an activity be to qualify as "illegal" under Rule 40.11(a), whether the futures contracts created incentives to fix games, whether the CFTC could surveil for manipulation, and what factors the CFTC should consider in determining whether the futures contracts were against the public interest.[40] CFTC staff seemed to take for granted that Eris' trading restrictions were attempting to be responsive to Rule 40.11 requirements.

I wrote in opposition, because I am opposed to money laundering, which often attends illegal sports gambling. In my comments, I noted that Eris has an appropriate name. Eris is the Greek goddess of discord, the mother of famine, murder, fights, lies, and ruin;[41] she rolled a golden apple into a wedding feast and set off the Trojan War.[42] I noted that Rule 40.11's standard is not illegal gaming, but gaming, period, and each ErisX contracts clearly "involves, relates to, ***or*** references . . . gaming."

Eris' futures contracts involved, related to, ***and*** referenced sports gambling, as was clear in their very names[43]—the "moneyline,"[44] "point spread,"[45] and "over/under"[46] for individual games-terms of sports gambling and the three main types of illegal sports bets.[47] The standard of Rule 40.11(a)(1) is "gaming," not "illegal gaming," so, even if gambling was legal in every state, the contracts would still be prohibited. Moreover, gaming/gambling is in fact unlawful in about half of the United States.[48]

The decline in enforcement of anti-gambling laws[49] does not make illegal gambling any less illegal. Even in states that have legalized sports gambling, there is and still will be illegal sports gambling.[50] And putatively legal gambling companies can have extensive black market operations.[51] The American Gaming Association has estimated that more than $150 billion is unlawfully wagered every year on sporting events in the United States.[52]

The availability of hedging instruments, including those traded in public futures markets, is an essential tool for businesses that need to mitigate commercial risks.[53] Reducing commercial risks through hedging[54] enhances the ability of any business to succeed. That is what the ErisX

futures contracts would have done for organized crime. The contracts would have given illegal bookies futures contracts to hedge their commercial risks by allowing the futures markets to be used for layoff betting.[55] Giving illegal bookies a futures contract to hedge their commercial risks likewise would enhance their ability to succeed. Sports gambling and illegal sports bookmaking are foundational tools for organized crime.[56] The ability to hedge commercial risk helps businesses succeed, and the ability to use these futures contracts to hedge commercial risk would have helped these illegal businesses succeed. That success would have inflicted upon the public more of all of the harms that accompany illegal gambling, including money laundering,[57] loan sharking,[58] extortion, game-fixing, corruption,[59] infiltration of legitimate businesses,[60] and broken families.[61]

By § 745 of the Dodd-Frank Act, as implemented in part by the CFTC with Rule 40.11(a), Congress made a policy determination to restrict certain event contracts, even if they could be used by legitimate businesses, "because"[62] making such hedging tools available could help persons involved in gambling. The standard of Rule 40.11 and § 745 is not whether the trader of the instrument is involved in the illegal activity; it is whether ***the instrument*** has any involvement with, relationship to, or reference of listed activities.[63] Congress developed more than ample evidence in public hearings to back its policy decision to keep hedging the commercial risk of gambling out of the futures markets.[64]

I noted in my comments that these types of futures contracts carry incentives to influence the outcome of football games. There are many sports gambling scandals.[65] Gamblers have been known to bribe players to throw games, and players to throw games themselves for profit.[66] There are no adequate surveillance mechanisms available to the CFTC to detect game fixing. The CFTC should not reverse Congress's clearly stated intent by turning the futures markets into a venue for scandals that could taint the entire market, which some already decry as disguised gambling.[67]

In its comments, the National Football League (NFL)[68] contradicted Eris' claim that the NFL did not object to the futures contracts. The NFL noted that "ErisX did not seek the NFL's permission to make the representation." The NFL stated more study was required, including whether the contracts would only be used legitimately, whether other federal laws were implicated, and whether there would be escaping by regulated entities from the jurisdiction of sports betting regulators. The National Basketball Association (NBA) submitted comments[69] supporting those of the NFL, and also noted that it did not authorize Eris to claim the NBA supported the futures contracts.

TWO COMMISSIONERS DEBATE A CANCELLED DRAFT ORDER—WHICH THE PUBLIC CANNOT SEE

Even though the CFTC did not issue an order on the ErisX contracts, two sitting CFTC commissioners issued lengthy public statements about the unissued draft order. Commissioner Quintenz wrote of Congress's and the CFTC's failures, and Commissioner Berkovitz wrote of Eris' failures. Commissioner Quintenz said, "The issues here are bigger than ErisX's contracts; the statute is unconstitutional, the regulation is invalid, and even without those issues, there were

flaws in the Order that made it arbitrary and capricious."[70] Commissioner Berkovitz said, "the proposal . . . was deficient because . . . ErisX did not provide sufficient evidence of hedging utility; and . . . ErisX's proposed exclusion of the general public from trading the contract . . . violate . . . CFTC regulations . . . ."[71] Parsing through the statements to get to the legal meaning of the draft order is like reading dueling food critic reviews of a restaurant that never opened.

DUE PROCESS

Commissioner Quintenz argued, "The Commission is also not a transparent arbitrator of debate. Consider the very convenient example of the Order. ErisX submitted its contracts, and the agency got into a huddle. There were inside discussions, meetings, draft Orders and revisions to those draft, none of which were presented in a public forum as would a Congressional Committee hearing or floor vote with amendments and debate. While the Commission eventually determined to open a comment period to allow the public to give input that ostensibly would assist the Commission in its public interest analysis, you wouldn't even know that comments were submitted because the Order discussed none."[72]

Similarly, Commissioner Quintenz bemoaned the failure of any of the commenters to note the same constitutional infirmities he found, saying "It is telling to me that out of the twenty-five comment letters the agency received on this issue, including some from lawyers, legal scholars and law professors, none mentioned an unconstitutional delegation from Congress. Maybe, in life, as we've gotten older, we've gotten used to things being taken away from us. Inch by inch. We've become complacent as freedoms get flipped into presumed regulatory prohibitions."[73] This statement flaunted Commissioner Quintenz's insider status, which includes six years as a Congressional staffer.[74] I see this from the other side of the telescope. The "things being taken away from us inch by inch" include the ability of any citizen who is not either a lobbyist or paying a lobbyist to have any input into federal policy. My experience has been that my elected federal representatives are no longer responsive to individual constituent input on policy.[75] In contrast, citizens have a visible voice in federal policy through the comment process under the Administrative Procedures Act. If I didn't feel heard by doing so, I wouldn't keep filing comments; I'm not getting paid for them. The Administrative Procedures Act gives citizens a marvelous opportunity to interact with their government and actually have a voice, however attenuated.

In terms of due process and of a particular regulatory proceeding writ large, it is not clear how Commissioner Berkovitz's statement functions legally; it could be seen an *ex parte* communication published to the public at large telling ErisX what it should say if it re-applies.[76]

THE WORDS OF SECTION 745 v. RULE 40.11

Commissioner Quintenz stated, "You might have noticed there is a conflict between the statutory framework and regulatory framework. . . . [T]he statute's default is to allow the enumerated event contracts unless there is a determination by the Commission that an enumerated event contract is contrary to the public interest. [In contrast,] The regulation simply announces a blanket prohibition on all enumerated event contracts in accordance with its interpretation of the statute's

intent. You also might have noticed from the description of the Order that it made two conflicting official rulings. On the one hand, the Order found that the ErisX NFL contracts involve gaming and are therefore enumerated event contracts. Under Regulation 40.11, that means game over—the ErisX NFL contracts are prohibited. However, the Order also made specific findings that the ErisX NFL contracts are contrary to the public interest, while then claiming that future enumerated event contracts that are not found to be contrary to the public interest will be allowed, directly contradicting the blanket prohibition in Regulation 40.11. The confusion within the Order is not surprising when you consider the fundamental problems with the statute and the regulation that the Order attempted to incorporate."[77]

In analyzing the statute, Commissioner Quintenz stated, "The presumption of the statute's special rule for these enumerated event contracts, perhaps surprisingly, is not that they are prohibited. To the contrary, the default under this statutory section is that these contracts, even those involving terrorism and assassination, are permitted. An enumerated event contract is only prohibited if the contract is determined by the Commission to be contrary to the public interest. Whatever enumerated event contracts that have not been found to be contrary to the public interest are unequivocally allowed, even those that, on their face, could be blatantly immoral or inciteful of violence, so long as the Commission has not made a direct determination that particular contract or group of contracts are contrary to the public interest."[78]

In his analysis of the statutory language, Commissioner Berkovitz stated, "As enacted by Congress in the Dodd-Frank Act, CEA Section 5c(c)(5)(C) . . . requires a two-part test for the Commission to prohibit a contract that involves gaming. First, the Commission must find that a contract "involves" gaming. Second, it must determine that the contract involving gaming is "contrary to the public interest."[79]

In analyzing the regulation, Commissioner Quintenz correctly notes that Rule 40.11 is a per se rule, although he does not believe that it is a per se rule that is a permissible implementation of § 745: "The regulation is so unrelated to the statute, it cannot even be called its opposite. The regulation simply ignores the default rule [in the statute] and the requirement for the Commission to make a determination that an enumerated event contract is contrary to the public interest. Instead, the regulation adopts a per se rule that all enumerated event contracts are prohibited regardless of their utility or benefit. The regulation does not even offer any potential for an enumerated event contract to be allowed, regardless of any contrarian or even unanimous outside view as to their public utility or propriety. This is not only out of bounds from what the statute authorized, it is completely contrary to the statute's rule that even enumerated event contracts are by default allowed."[80]

The texts of Section 745 (which is CEA § 5c(c)(5)(C)) and Rule 40.11 actually differ in even more ways from the descriptions by the two commissioners. The statute authorizes the CFTC to make a determination that types of activity could be against the public interest, whereas in the text of Rule 40.11 the CFTC made such a determination. Nowhere in § 5c(c)(5)(C)(i) does Congress say that the CFTC must make its public interest determination on a contract-by-contract

basis. In fact, § 5c(c)(5)(B),[81] referring to approval as the default state unless prohibited, and the prohibition of § 5c(c)(5)(C)(ii) against listing any contract "determined by the Commission to be contrary to the public interest" under § 5c(c)(5)(C)(i), each refer to futures contracts in the singular, while § 5c(c)(5)(C)(i), which authorizes the CFTC to make public interest determinations, refers to contracts in the plural. And the CFTC itself made the blanket determination allowed in § 5c(c)(5)(C)(i) for "such" event contracts when it promulgated Rule 40.11.

The CFTC might fail to act, or it might garble its own enabling statute and implementing regulations, but there is no two-part test as alleged by Commissioner Berkovitz, because his part two occurred a decade ago with the CFTC's promulgation of Rule 40.11, when he was its General Counsel. The CFTC was authorized by Congress to, and did, in 2011, make the determination for the statute's very plain, plural, "such . . . contract*s*."

From the statements of the two commissioners, however, what is clear is that with respect to certain specific event contracts the CFTC may fail to take action against futures exchanges that propose to violate Rule 40.11 and § 5c(c)(5)(C)(ii), as Eris proposed to do with its NFL contracts. Commissioner Quintenz argued, "In fact, imagine that a contract regarding terrorism or assassinations is certified by an exchange and, if a public interest analysis were to be conducted, the contract would most certainly fail it. If the Commission remains silent—if it doesn't undertake and make that negative determination—that contract would be perfectly legal and allowed to trade. Further, if the Commission decides to punt on analyzing a specific contract's public interest, the Commission has not shirked its statutory duty, because there is no obligation to make any determinations at all."[82] Presumably, however, a futures exchange that offered such a contract, whether or not in violation of CFTC rules, would not be immune from other sources of liability.

Commissioner Berkovitz cited to the 2012 Nadex order in his statement on the ErisX contracts,[83] and yet for some reason did not rely on it as a precedent for "involving gaming." Neither commissioner described the proposed order on the ErisX contracts as relying on the precedent of the Nadex Order, and in fact both commissioners seem to depart entirely from it as precedent, including by nullifying the plain language of Rule 40.11, upon which the Nadex Order relied.

HEDGING UTILITY/THE "ECONOMIC PURPOSE" TEST-STANDARDS NOT APPEARING IN THE STATUTE/RULE

Commissioner Quintenz noted, "The Order concluded that the 'record in this matter does not establish that the ErisX NFL event contracts have a hedging utility,' and the contracts 'do not form the basis for the pricing of a commercial transaction involving a physical commodity, financial asset or service.' [This is the 'economic purpose' test.] In addition to the economic purpose test, the Order asserted that the Commission can also consider other factors in determining that the contracts are contrary to the public interest. The Order listed one such factor, that 'the ErisX NFL event contracts could potentially promote sports gambling,' which, the order found, also makes the contracts contrary to the public interest."[84]

Commissioner Berkovitz summarized his po-

sition as: "The Commission should permit a [futures exchange] to list contracts on sporting events that are designed to hedge the risks of commercial activity related to those events, including legalized sports bookmaking. However, the proposal (withdrawn) by [ErisX] to list contracts based on the outcome of football games was deficient because: (1) ErisX did not provide sufficient evidence of hedging utility; and (2) ErisX's proposed exclusion of the general public from trading the contract on the [futures exchange] would violate [futures exchange] Core Principles and CFTC regulations regarding impartial access (Core Principle 2) and antitrust considerations (Core Principle 19). . . . ErisX's proposed sporting event contracts are functionally identical to the sports bets offered by bookmakers to the general public, and are designed so that sports bookmakers may use the exchange to hedge the risks arising from selling those contracts to the public. It would be anticompetitive to allow bookmakers to trade these contracts on the exchange so they can sell them to the public at casinos, racetracks, and other betting establishments, while at the same time prohibiting the public from obtaining those contracts through open, transparent, competitive trading on the exchange. Although contracts involving gaming should be permitted to be traded on a [futures exchange] if they have an economic purpose, which may include hedging by sports bookmakers, gaming contracts without any such economic purpose should not be permitted on a [futures exchange]."[85]

Commissioner Berkovitz went on to say that "If ErisX or any other applicant can demonstrate that sports event contracts such as the NFL Contracts can be used for an economic purpose other than for gaming itself, meaning they reasonably can be expected to be used for hedging and/or price basing on more than an occasional basis, then in my view it would not be contrary to the public interest to permit their listing."[86]

Commissioner Quintenz argued, "The Commission requested public comments and received twenty-five comment letters. At least thirteen of these commented that the NFL contracts have hedging utility, and many described how. ErisX's own submission substantively discussed this very point. If the Order actually declared that the contracts lack hedging utility, at least the Commission would have shown, cursorily, that it gave the comments enough consideration to disagree with them. However, the Order's hedge to blame the 'record' for failing to establish a hedging utility ignored the comments completely. If the Commission truly did consider the comments, the Order gave no indication why they were summarily dismissed as insufficient to meet an unknown and undisclosed threshold of proof."[87]

Commissioner Berkovitz made the following profoundly disturbing statement: "Because in many states sports betting is now legal under both state and federal law, it would not be 'contrary to the public interest' for the Commission to permit the listing of sports event contracts if an exchange can demonstrate that the contracts will be used to hedge commercial risks arising from lawful commercial activity related to sports betting."[88] Some of this sentence is difficult to decipher; maybe by "commercial activity related to sports betting" Commissioner Berkovitz meant economic activity that is not betting but attends sports betting, like the cost of rubber bands for bundles of laundered cash, or perhaps he meant economic activity that relates to sports games scores, such as flour for the chain restaurant Bojangles, which

gives free or discounted biscuits the day after the Tar Heels score more than 100 in a home game.[89] But his key thought, that an events contract concerning activity that is illegal in many states should nonetheless be approved by the CFTC so long as it has hedging utility, is clear.

The prohibitions of § 745 apply only to event contracts, and not to agricultural, "exempt," or other "excluded" commodities. Given the statements of two of the five sitting CFTC commissioners on the meaning of Rule 40.11, what indeed would prevent the CFTC from approving, or even let the CFTC disapprove, futures contracts on marijuana, opium poppies, semtex, or heroin?

Presumably a physical contract for heroin is impractical because making or taking delivery would be illegal in all states, but what about a physical contract on marijuana where delivery is in a state where possession and distribution of the requisite quantity of marijuana is legal? Immediately after I read Commissioner Berkovitz's statement, I wrote to a major futures exchange to ask if it had any plans for marijuana futures contracts.

Based on the legal analysis set forth in the statements of the two commissioners, a futures contract that financially settled on the U.S. price of heroin as reported by a dark web price index or the United Nations Office on Drugs and Crime (UNODPC)[90] would be allowed to be listed as a futures contract if it had hedging utility.[91] It would not be an event contract, but would rather be a futures contract for either an excluded commodity under CEA § 1a(19)(ii)(II), because there is no legal cash market in the United States. Alternatively, the underlying is an exempt commodity, and so the futures contract lies outside of Rule 40.11. Therefore, while a futures contract for a certain quantity of heroin of a specified purity to be delivered at a NYMEX warehouse would be illegal, and illegal not because of the CEA or CFTC regulation, but rather because it would be illegal under federal and New York law to deliver or possess the heroin, a futures contract that settled on the UNODPC reported heroin price for the United States would be legal, because it is not an event contract and therefore not subject to Rule 40.11 or any similar prohibition applicable under current CFTC rules.

"LEGISLATIVE HISTORY"

Commissioner Quintenz noted, "The Order used 'legislative history' to reinstitute 'the economic purpose test that the Commission used to determine whether a contract was contrary to public interest' prior to that test's removal from the CEA by the Commodity Futures Modernization Act of 2000 (CFMA).' The Order stated that this test involves evaluating the contracts' utility for both hedging and pricing basis purposes."[92] Commissioner Quintenz also noted, "The Order . . . stated that the 'the legislative history of CEA Section 5c(c)(5)(C) indicates Congress's intent to restore, for the purposes of that provision, the economic purpose test that the Commission used to determine whether a contract was contrary to the public interest pursuant to CEA Section 5(g) prior to the deletion of CEA Section 5(g) by the Commodity Futures Modernization Act of 2000.' Consistent with its conclusory approach, the Order did not inform the public what this 'legislative history' is."[93]

Looking at the "legislative history" represented by language removed from a statute by

Congress should reveal only what the law is ***not***. But, by Commissioner Quintenz's account, the CFTC did the opposite, applying repealed, gone, absent parts of the CEA as if they had been added to new sections, when they hadn't been. This is not a technique of statutory interpretation that is rationally related to Congressional intent, and by applying it the CFTC precludes understanding the meaning of the CEA by simply reading it.

AGAINST "CORE PRINCIPLES"

Commissioner Berkovitz stated, "Even if a proposed contract passes muster under Regulation 40.11, it also must satisfy all the other requirements . . ., including compliance with the CEA core principles and CFTC regulations. In my view, contracts that exclude retail participation on a [futures exchange], such as the NFL Contracts, do not satisfy these requirements. Excluding retail customers from trading the NFL Contracts would violate [futures exchange] Core Principle 2 (impartial access) and Core Principle 19 (antitrust considerations)."[94]

Commissioner Berkovitz argued, "ErisX's exclusion of individuals who are not [eligible contract participants within the meaning of CEA § 1a(18)] is the very kind of discrimination based on net worth that the Commission has prohibited. It is blatantly discriminatory to bar retail customers with less than $10 million in discretionary investments from access to the [futures exchange]."[95]

Commissioner Berkovitz also argued, "The sports betting market as envisioned by ErisX would be anticompetitive—it would protect the bookmakers from competition by members of the public and non-market making [eligible contract participants]. The market structure that would have resulted from ErisX's proposal would be one where sports bookmakers could trade amongst themselves to swap their risks and together balance their books, while preserving their exclusive ability to provide sports event contracts to the public."[96] He argued, "Prohibiting retail customers from accessing sports bet contracts offered on a [futures exchange] would harm the public."[97] He also argued, "The contracts proposed by ErisX would be a no-lose situation for the bookmakers, and a no-win situation for the public."[98]

In this part of his statement, Commissioner Berkovitz argued that the contracts had hedging utility, which bookies could have used successfully to the exclusion of the public, which seems to contradict his prior argument that these futures contracts had no demonstrated hedging utility.

Commissioner Berkovitz's knock-out punch of the Core Principles were not even referenced by Commissioner Quintenz as substantively in the draft order. One wonders why the staff did not interact sufficiently with the commissioners to understand what they would be looking for. One would also think that when it comes to the Core Principles, Core Principle 3, "The board of trade shall list on the contract market only contracts that are not readily susceptible to manipulation."[99] would be directly related to the CFTC's inquiry, and CFTC staff did solicit comments on manipulation and game fixing.

CONCLUSION

At the same time Mack Sennett was making his Keystone Cops films in Hollywood, across the world in World War I Prague, a well-regarded lawyer specializing in workers' compensation insurance wrote a novel called *The Process*, posthu-

mously published in 1925 as *The Trial*, about the chief financial officer of a large bank, tried and executed for an unknown crime, through a secret and indecipherable judicial process. In his novels and short stories, Franz Kafka wrote so vividly of absurd self-referential legal process, inaccessible authority, and impenetrable bureaucracy that "Kafkaesque" has become a pejorative for bewildering and senseless legal and administrative processes.[100]

One of Franz Kafka's law school professors was Max Weber's[101] younger brother, Alfred Weber.[102] Kafka was influenced[103] by Alfred Weber's vivid 1910 article *The Functionary*,[104] which condemned his country's descent into the all-consuming maw of an ever-inflating bureaucratic mechanism, an idolatry of officialdom, that resulted in a soul-selling "theocratization of the civil servant, our transubstantiation of the official into something absolute,"[105] crushing personal rights, community life, individuality, and entrepreneurship, and in a society governed by bureaucratic values that are no longer society's values.[106] Over time, the goal of bureaucracy simply became more bureaucracy. It is up to us to steer that apparatus back to the goals of society at large.

In addressing these proposed ErisX futures contracts, a federal agency with real power over you and me-the CFTC-not only did not disclose its own process, it could not even figure it out. The result was a draft order, obscured from public sight and now jealously sequestered in a bureaucratic safe, that seems to have been propelled, before being stopped short, by mechanisms other than the plain language of the law and agency's own controlling rule.

Commissioner Quintenz's statement showed a vision that rose above mere bureaucratic instrumentality. He sought to apply fundamental norms of fair play, statutory interpretation, and the role of the constitution, and deployed staff, even if so far unsuccessfully, to help the public see the proposed order. Commissioner Berkovitz mystified the rules and, perhaps even after the fact, discovered more broken rules. Neither commissioner argued for application of the law and regulation to their external purposes of the societal, economic, and moral imperatives against gambling, assassination, and terrorism that Congress clearly set forth in the unambiguous text of the statute. Meanwhile, nobody else gets to see what they are talking about.[107]

If the CFTC does not like its own rules, it should address that transparently using the applicable processes.[108] The CFTC claims for itself regulatory oversight over much of the economy,[109] so it is imperative that the CFTC remember its own rules, communicate them to the public, observe them, and consistently enforce them.

ENDNOTES:

[1]Examples include the hysterical sixth reel of *Tillie's Punctured Romance* (1914), avail. at https://www.youtube.com/watch?v=8BMKEeSxZRg; *Love, Loot and Crash* (1915), avail. at https://www.youtube.com/watch?v=nhvDUgOQ9Yk; *For Better or Worse* (1914), avail. at https://www.youtube.com/watch?v=xOtUEQhCNSU&list=PLRCBdgKbQe0jz6u3FKG2dUmBRyWZu5RGg&index=3; and *A Thief Catcher* (1914), featuring Charlie Chaplin as a Keystone Cop, avail. at https://www.youtube.com/watch?v=fFttQivpHSM, long thought lost and found in an antique shop in 2010 (Scott Eyman, *Exclusive: Lost Charlie Chaplin film discovered in Michigan antique sale*, Palm Beach Post, Palm Beach

Post, Jun. 7, 2010, avail. at https://web.archive.org/web/20120514024634/; http://www.palmbeachpost.com/news/nation/exclusive-lost-charlie-chaplin-film-discovered-in-michigan-732037.html ("Finding a lost Chaplin appearance can be roughly compared to finding a lost Beethoven quartet")). On June 27, 2021, searches for "Keystone cops" and "Keystone Kops" on the legal news website Law360 reported litigant or Judge use of the term in nine matters.

[2]"Bookie" is a common slang term for gambling bookmakers. E.g., "the conspiracy was made up of bookmakers, more commonly known as bookies, operators of a bookmaking website, and money launderers," Dept. of Justice, U.S. Attorney's Office, N.D. Ohio, *Eleven people indicted for their roles in a bookmaking and money laundering conspiracy* (Dec. 19, 2019), avail. at https://www.justice.gov/usao-ndoh/pr/eleven-people-indicted-their-roles-bookmaking-and-money-laundering-conspiracy; Dept. of Justice, U.S. Attorney's Office, W.D.N.Y., *Bookie Sentenced For Money Laundering And Extortion Conspiracies* (April 15, 2015) avail. at https://www.justice.gov/usao-wdny/pr/bookie-sentenced-money-laundering-and-extortion-conspiracies.

[3]17 C.F.R. § 40.11(a)(1).

[4] CFTC, *In the Matter of the Self-Certification by North American Derivatives Exchange, Inc., of Political Event Derivatives Contracts and Related Rule Amendments under Part 40 of the Regulations of the Commodity Futures Trading Commission* (Apr. 2, 2012) ("Nadex Order") at p. 2, aval. at https://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/nadexorder040212.pdf. According to the CFTC, "CFTC Regulation 40.11 prohibits event contracts that reference terrorism, assassination, war, gaming, or an activity that is unlawful under any State or Federal law, or that involves, relates to, or references an activity that is similar to any of those activities and that the CFTC determines by rule or regulation to be contrary to the public interest. On April 2, 2012, the CFTC issued an Order Prohibiting the Listing or Trading of certain Political Event Contracts at the North American Derivatives Exchange. The contracts, which would have paid out based upon the outcome of certain US federal elections, were determined to involve gaming and to be contrary to the public interest." CFTC, *Contracts and Products*, avail. at https://www.cftc.gov/IndustryOversight/ContractsProducts/index.htm.

[5]Statement of Commissioner Brian D. Quintenz on ErisX RSBIX NFL Contracts and Certain Event Contracts: Any Given Sunday in the Futures Market (Mar. 25, 2021), avail. at https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement032521. ("Commissioner Quintenz Statement").

[6]See discussion below. As of August 19, 2021, I had not received the draft order or a denial; i.e., my request was still being processed 134 days after the CFTC acknowledged it. The CFTC claims as a "success story" that "our average number of days for processing simple requests decreased from 78 days in FY 2019 to just 12 days in FY 2020." CFTC, 2021 Chief FOIA Officer Report (undated), avail. at https://www.cftc.gov/sites/default/files/idc/groups/public/%40freedomofinformationact/documents/file/chieffoaiofficerreport2021.pdf.

[7]Statement of Commissioner Dan M. Berkovitz Related to Review of ErisX Certification of NFL Futures Contracts: Sports Event Contracts: No Dice Unless There is an Economic Purpose and the Exchange is Open to the Public (Apr. 7, 2021), avail. at https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement040721. ("Commissioner Berkovitz Statement").

[8]Commodity Exchange Act § 1a(19)(iv).

[9]CFTC, *CFTC Glossary*, letter "E," avail. at https://www.cftc.gov/LearnAndProtect/EducationCenter/CFTCGlossary/glossary_e.html.

[10]CFTC, *Concept Release on the Appropriate Regulatory Treatment of Event Contracts*, 73 Fed. Reg. 25669 at 25669-70 (May 7, 2008) ("Concept Release"). See Sullivan & Cromwell, *Event Contract* Markets (May 9, 2008), avail. at https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Event_Contract_Markets.pdf. Concept Release comment file is avail. at https://www.cftc.gov/LawRegulation/PublicComments/08-004.html and includes a 35 page plea from one commenter to the CFTC to prohibit "weather

weapons," avail. at https://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/frcomment/08-004c002.pdf.

[11]CFTC, *Final Rule, Provisions Common to Registered Entities*, 76 Fed. Reg. 44776 (Jul. 27, 2011).

[12]"an occurrence, extent of an occurrence, or contingency (other than a change in the price, rate, value, or level of a commodity not described in clause (i)) that is—(I) beyond the control of the parties to the relevant contract, agreement, or transaction; and (II) associated with a financial, commercial, or economic consequence."

[13]17 C.F.R. § 40.11 (emphasis supplied).

[14]17 C.F.R. § 40.11 is currently the only CFTC regulation to use the words "gaming," "terrorism" or "unlawful under." The Dodd-Frank Act itself makes reference to "gaming" in § 767, which amended § 28(a) of the Securities Act of 1933 to include: "(a)(3) State Bucket Shop Laws. No State law which prohibits or regulates the making or promoting of wagering or gaming contracts, or the operation of 'bucket shops' or other similar or related activities, shall invalidate (A) any . . . security subject to this title . . . (B) any security-based swap between eligible contract participants; or (C) any security-based swap effected on a national securities exchange . . . ." With respect to swaps that are not security-based swaps, federal preemption is at CEA §§ 2(a)(1)(A) and 2(d); see excellent discussion in Barry Taylor-Brill, *Cracking The Preemption Code: The New Model for OTC Derivatives*, 13 Virginia L.& Bus. Rev. 1 (2019).

[15]76 Fed. Reg. at 44776, col. 2.

[16]CFTC, Release No. 6163-12, *CFTC Commences 90-day Review of NADEX's Proposed Political Event Derivatives Contracts* (Jan. 5, 2012), avail. at https://www.cftc.gov/PressRoom/PressReleases/6163-12.

[17]avail. at https://www.cftc.gov/stellent/groups/public/@otherif/documents/ifdocs/nadexquestions.pdf.

[18]Nadex Order. See CFTC, Release No. 6224-12, *CFTC Issues Order Prohibiting North American Derivatives Exchange's Political Event Derivatives Contracts* (Apr. 2. 2012), avail. at https://www.cftc.gov/PressRoom/PressReleases/6224-12 ("the CFTC determined that the contracts involve gaming and are contrary to the public interest, and cannot be listed or made available for clearing or trading").

[19]Nadex Order p. 2.

[20]Nadex Order p. 4.

[21]Nadex Order p. 4.

[22]After the Nadex Order, the CFTC Division of Market Oversight provided "no action relief" to the New Zealand Victoria University of Wellington's request to operate a small-scale, not-for-profit market for trading election-based and economic indicator event contracts for educational purposes, with caps on numbers of trades and traders, and participation limited to students, staff, and academics. CFTC Staff Letter 14-130 (Oct. 29, 2014); CFTC, *CFTC Staff Provides No-Action Relief for Victoria University of Wellington, New Zealand, to Operate a Not-For-Profit Market for Event Contracts and to Offer Event Contracts to U.S. Persons*, avail. at https://www.cftc.gov/PressRoom/PressReleases/7047-14. The CFTC distinguished these contracts from those in the Nadex Order, including "specifically" that this "request for no-action relief was not in any way premised upon claims that its proposed contracts have any hedging or price-basing utility." Staff Letter 14-130 at p. 5. The CFTC had previously, "without asserting jurisdiction," given no action relief to the Iowa Electric Market (IEM) for professors and students to operate an academic and research, "solely" experimental, non-profit, commission-free, non-DCM, events contract market for elections and economic indicators, also with caps on numbers of trades and traders. CFTC No-Action Letter No. 93-66 (Jun. 18, 1993), avail. at https://www.cftc.gov/idc/groups/public/%40lrlettergeneral/documents/letter/93-66.pdf and unredacted at http://www.cftc.gov/files/foia/repfoia/foirf0503b004.pdf, and before that highly specific and limited no-action relief to the "Iowa Political Stock Market," Staff Letter 92-04a (Feb. 5, 1992) (also noting that the Iowa attorney general had opined to the applicant that its proposed activi-

ties did not violate Iowa law), avail. at https://www.cftc.gov/idc/groups/public/%40lrlettergeneral/documents/letter/92-04a.pdf (superseded by No Action Letter 93-66); materials also partially avail. in CFTC's electronic FOIA reading room at https://www.cftc.gov/foia/repfoia/foirf05-003_1.htm; see Concept Release at 25760 and n. 5. The CFTC had asked the SEC if the IEM "earning's markets" event futures contracts could be options on securities under SEC jurisdiction. SEC letter to CFTC, p. 2 n. 4, Sept. 3, 2008, avail. at https://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/frcomment/08-004c028.pdf. The IEM still operates, at https://iemweb.biz.uiowa.edu, while the Victoria University of Wellington's iPredict closed in 2016 for problems that included "an inability to bring the Ministry of Justice round to understanding our views on what would constitute a proportionate level of Anti-Money Laundering due diligence . . . ." iPredict, *A Message from iPredict* (Dec. 1, 2016), avail. at https://web.archive.org/web/20170929140157/http://www.ipredict.co.nz/app.php?do=message.

[23]ErisX, CFTC Regulation 40.2(a) Certification (Dec. 14, 2020) ("Eris Certification"), avail. at https://www.cftc.gov/sites/default/files/filings/ptc/20/12/ptc121520erisdcmdcm005.pdf.

[24]Using the statutory definition of "eligible contract participant," CEA § 1a(18). Eris Certification, p. 4.

[25]Letter from Christopher J. Kirkpatrick, Secretary of the Commission, CFTC, to Mr. Thomas Chippas, Chief Executive Officer, ErisX (Dec. 23, 2020), avail. at https://www.cftc.gov/sites/default/files/filings/documents/2020/orgdcmerissignedletter201223.pdf.

[26]CFTC, Release No. 8345-20, *CFTC Announces Review of RSBIX NFL Futures Contracts Proposed by Eris Exchange, LLC* (Dec. 23, 2020), avail. at https://www.cftc.gov/PressRoom/PressReleases/8345-20. See Phillip, Fogel, Ridell, & Maldonado, *Lawflash: Want To Hedge Your Bets? CFTC Requests Public Comment On RSBIX NFL Event Contracts*, Morgan Lewis (Jan. 19, 2021), avail. at https://www.morganlewis.com/pubs/2021/01/want-to-hedge-your-bets-cftc-requests-public-comment-on-rsbix-nfl-event-contracts.

[27]Comments for Industry Filing 20-004, avail. at https://comments.cftc.gov/PublicComments/CommentList.aspx?id=5203. See discussion at Zachary Zagger, *Sportsbooks Could Use Derivatives Market, But Is It Betting?*, Law360, Feb. 17, 2021, avail. at https://www.law360.com/articles/1355199/sportsbooks-could-use-derivatives-market-but-is-it-betting.

[28]avail. at https://comments.cftc.gov/Handlers/PdfHandler.ashx?id=31489.

[29]Alexander Osipovich and Dave Michaels, *NFL Futures Plan Withdrawn as Regulator Prepared to Reject It*, Wall Street Journal, Mar. 23, 2021, avail. at https://www.wsj.com/articles/nfl-futures-plan-withdrawn-by-exchange-as-regulator-prepared-to-spike-it-11616521600?st=4woyq3k67shbwg6&reflink&=article_email_share&mg=prod/com-wsj; Zachary Zagger, *Exchange Tells CFTC It's Pulling NFL Futures Listing Proposal*, Law360, Mar. 24, 2021, avail. at https://www.law360.com/articles/1368372/exchange-tells-cftc-it-s-pulling-nfl-futures-listing-proposal.

[30]Commissioner Quintenz Statement. Eris' President claimed not to be aware that the CFTC was about to reject the NFL contracts when Eris withdrew them. "In an interview, ErisX Chief Executive Thomas Chippas . . . said ErisX was unaware of the CFTC's plans to reject the proposal . . . ." Alexander Osipovich and Dave Michaels, *NFL Futures Plan Withdrawn as Regulator Prepared to Reject It*, Wall Street Journal, Mar. 23,2021, avail. at https://www.wsj.com/articles/nfl-futures-plan-withdrawn-by-exchange-as-regulator-prepared-to-spike-it-11616521600?st=4woyq3k67shbwg6&reflink=article_email_share&mg=prod/com-wsj.

[31]Commissioner Quintenz Statement p. 1 (emphasis supplied). See Securities and Exchange Commission Commissioner Hester Peirce's thoughtful remarks in *SECret Garden: Remarks at SEC Speaks* (Apr. 8, 2019): "The problems are . . . no less troubling, when firms have to have access to novel interpretations or non-published or draft staff guidance to get credit for complying with our rules. Market participants

begin wondering whether they are subject to the same requirements and standards as their competitors. Firms without access to the high-priced lawyers who have gained a sight into the secret garden may indeed be at a fatal competitive disadvantage. Even more problematically, market participants may be unable to effectively push back when, for example, an examiner insists that a regulation means something that may be doubtful under any reasonable reading of the Commission's rules or policy as spelled out in publicly available materials. Finally, when a patchwork of public and non-public guidance has become so comprehensive that market participants can say, only half-jokingly, that entire sections of our rulebook are irrelevant, similar questions about fairness and transparency arise: Are all similarly situated firms aware of the non-public guidance? Does the staff's guidance reflect a thorough consideration of the likely benefits and costs of that guidance? Does access to our markets depend on hiring counsel that has access to the non-public views of the staff? Will market participants change their behavior in ways that may not make sense under our rules as written to comply with the vast body of guidance, much of which may not be publicly available?" avail. at https://www.sec.gov/news/speech/peirce-secret-garden-sec-speaks-040819. A notable example of Congress codifying a practice of those "in the know" that is not visible in the statute is the added exemption at Securities Act § 4(a)(7) codifying the decades-long practice of a "Section 4(a)(1½) exemption." Thomas Taylor, *"Section 4(a)1(½)" Exemption for Resales of Restricted Securities Now Codified*, Dentons (Jan. 21, 2019), avail. at https://www.dentons.com/en/insights/articles/2016/january/21/section-4a-112-exemption-for-resales-of-restricted-securities-now-codified; see also Joseph McLaughlin, *A New Exemption From SEC Registration Would Be Risky*, Law360, Nov. 13, 2015, avail. at https://www.law360.com/articles/726517/a-new-exemption-from-sec-registration-would-be-risky. See the SEC's remarkable explanation of why it refused to provide to Congress a requested statement that "agency guidance is not legally binding," which included an argument that agency guidance could be relied upon, which seemed to confuse the meaning of the word "binding" with that of the word "reliable." SEC General Counsel David M. Becker letter to Chairman McIntosh, Subcomm., National Economic Growth, House of Representatives (Jul. 18, 2000), in House Report 106-1009, Non-Binding Legal Effect of Agency Guidance Documents, Seventh Report by the Comm. on Government Reform, p. 536 (Oct. 26, 2000). See also Hester Peirce, *Regulating Through the Back Door at the Commodity Futures Trading Commission*, 2 Harvard J. of Law and Public Policy-Federalist Ed. 321 (2014), avail. at https://www.harvard-jlpp.com/wp-content/uploads/sites/21/2010/01/Peirce_7.pdf; summary avail. at https://www.mercatus.org/system/files/Peirce-Back-Door-CFTC-summary.pdf ("... problems with the CFTC's approach to regulation [include]: It lacks procedural rigor. . . . failure to follow a standard process can undermine public confidence in administrative efficiency. It is unpredictable and lacks transparency. Businesses must piece together the voluminous amount of guidance, staff letters, and enforcement actions to discern how a regulation might affect them. Changing compliance dates right before the deadline also creates uncertainty in the market. It is not deliberative. Backdoor rulemaking leaves out commissioners and the public, and precludes careful crafting of clear, unambiguous rules. Moreover, rules that have the potential to radically change existing financial markets avoid judicial and congressional scrutiny."). And now-SEC Commissioner Peirce's article didn't even cover the CFTC's approach to regulating trade options, which approach, and impact on the energy industry, very much accords with her characterization, as has been described in this publication. Jeremy Weinstein, *CFTC Regulation of Trade Options*, 39 Futures & Derivatives L. Rep. issue 10 (Nov. 2019). The SEC and CFTC can exercise powers of punishment in procedures often surprising to those expecting full due process of law from the federal government, so it is especially important that their rules are openly and clearly arrived at and predictably enforced. Cf., Frank E. Cooper, *Should Administrative Hearing Procedures Be Less Fair Than Criminal Trials?*, 53 A.B.A. J. 237 (Mar. 1967) (tongue-in-cheek proposal of a "Federal Corrections Com-

mission" to resolve criminal prosecutions in the manner of federal agencies), avail. at https://in.booksc.eu/dl/28547312/43de6d, also placed in full and verbatim in the Senate hearing transcript by Senator Long of Missouri at p. 249 of *Administrative Procedure Act*, Hearings Before the Subcomm. on Administrative Practice and Procedure of the Comm. of the Judiciary of the Senate on S. 518 (1967).

[32]Commissioner Berkovitz Statement.

[33]CFTC, *Commissioner Dan M. Berkovitz*, avail. at https://www.cftc.gov/About/Commissioners/CommissionerDanMBerkovitz/index.htm.

[34]Commissioner Berkovitz Statement I.

[35]FOIA request 21-00088-FOIA. The CFTC's FOIA regulation is at 17 C.F.R. § 145.7.

[36]"Finally, the Order concluded with a statement that future submissions similar to ErisX's NFL contracts, would benefit from 'any input from relevant Federal, State, and Tribal authorities.' During the comment period which the Commission requested on this matter, not a single Federal, State, or Tribal authority responded. That, in and of itself should provide a view that these authorities did not feel the issue important enough to express their opinions. If the Commission truly felt it needed input from these other authorities to fully weigh these contracts, what did it do to ensure those views were received? The comment period closed on January 28th—plenty of time for the Commission to know whether or not any of these relevant authorities would be providing feedback. Once it was apparent that none had, the Commission could have held a public roundtable on the topic and invited the relevant parties (whose views it now, after an absence of comment and no further opportunity for input, decides are critical to its decision making)." Quintenz Statement E.2. para. 3.

[37]I did receive an unhelpful email from his Senior Counsel.

[38]"This request is in the public interest for the reasons stated above, and "because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C.A. § 552(a)(4)(A)(iii). *See also* 17 C.F.R. Part 145 Appendix B(b)(2). Specifically, I intend to share the Order with attorneys and other professionals who advise clients on compliance with CFTC regulations, on social media and with journalists, including the reporters at The Wall Street Journal and Law360 who have been covering this matter. I expect that disclosure of the Order will likely contribute to a better understanding of the CFTC's procedures, its interpretations of statutes, its application and development of rules, and its expectations of those regulated by it. For these reasons, I request that any fees for this narrow request be waived. Should the CFTC determine that fees are chargeable, I agree in advance to pay up to $300, but if the fees are higher than such amount, I ask that you inform me of the total charges prior to fulfilling my request. If possible, please provide the Order to me in electronic format via email." Jeremy Weinstein letter to CFTC FOIA office, Apr. 6, 2021.

[39]Although I suppose this means that I have a shot at intervening in any CFTC administrative process against Eris concerning these contracts. See Dan M. Berkovitz, *The Resurrection of CFTC Administrative Enforcement Proceedings: Efficient Justice or a Biased Forum?*, 35 Futures & Derivatives L. Rep. issue 2, p. 11 n. 26 (Mar. 2015). I appealed the adverse fee waiver determination on July 12, 2021, and on August 5, 2021, the CFTC Legal Division reversed the denial because "the fees associated with processing your [FOIA request] will amount to less than $10.00." Letter from Nora Flood, CFTC Senior Assistant General Counsel, to Jeremy Weinstein, Aug. 5, 2021.

[40]avail at https://www.cftc.gov/sites/default/files/filings/documents/2020/orgdcmerisquestionsre201223.pdf.

[41]Hesiod, Theogony, 225-32.

[42]"The Judgment of Paris," famously painted many times.

[43]Eris Certification, pp. 4-6.

[44]According to Sports Interaction Insights, *Moneyline Betting Explained*, "A moneyline bet is one of the easiest kinds of bets you can make

at a sportsbook." Avail. at https://news.sportsinteraction.com/guide/moneyline-betting-explained; see also Jack Moore, *The Complete Book of Sports Betting: A New No-Nonsense Approach to Sports Gambling* p. 36 (1996).

[45]E.g., Bookies.com, *Point Spread Betting Explained*, May 27, 2020, avail. at https://bookies.com/guides/what-is-point-spread-betting; see also Jack Moore, *The Complete Book of Sports Betting: A New No-Nonsense Approach to Sports Gambling* p. 38 (1996) ("in the standard point-spread bet, assuming balance, the bookmaker will always retain the vig. There is no element of chance. In the case of money odds, however, the same number of units bet on each side will only lead to a vig for the bookmaker when the underdog wins. . . . Before you start feeling sorry for the bookmaker, you should understand that there is a baseball line given out every day of the baseball season and it is the very rare day when all the winning teams were also the money-odds favorites.").

[46]E.g., Bookies.com, *Understanding Over/Under Betting For Sports Bettors*, May 28, 2020 ("In NFL betting, the Over/Under is the most popular way to wager on totals, with lines set for every game on Sunday and in prime time for Monday Night Football and Thursday Night Football.") avail. at https://bookies.com/guides/how-to-do-over-under-betting; NFLbetting.net, *How the Over/Under Works in the NFL*, avail. at https://www.nflbetting.net/guide/over-under/.

[47]See Appendix A, "Sports Wagering Primer" in Prof. Koleman S. Strumpf, Dept. of Economics, Univ. of N.C., Chapel Hill, *Illegal Sports Bookmakers* (Feb. 2003) avail. at http://users.wfu.edu/strumpks/papers/Bookie4b.pdf ; Bookies.com, *Moneyline Betting* (May 26, 2020), avail. at https://bookies.com/guides/how-to-bet-the-moneyline.

[48]See Zachary Zagger, *Sports & Betting Legislation to Watch in 2021*, Law360, Jan. 3, 2021, avail. at https://www.law360.com/articles/1336733/sports-betting-legislation-to-watch-in-2021; American Gaming Association, *Illegal Sports Betting*, avail. at https://www.americangaming.org/illegal-sports-betting/; CBS Sports, *Wanna bet? Here's where all 50 states stand on the legalization of sports gambling. More than half the country has begun the process of legalizing sports betting* (Nov. 4, 2020), avail. at https://www.cbssports.com/general/news/wanna-bet-heres-where-all-50-states-stand-on-the-legalization-of-sports-gambling/; Roger Foley, *Illegal Bookmaking*, avail. at https://www.rpfoley.com/illegal-bookmaking-and-illegal-bookmaking-on-a-pari-mutuel-facil.html. Eris claimed its gambling futures contracts would help legal bookmakers compete better with illegal bookies, Eris Certification, pp. 2-3, but upon the establishment of an efficient market, the converse would have been true as well.

[49]See, e.g., Cabot & Faiss, *Sports Gambling in the Cyberspace Era*, 5 Chapman L. Rev. 1, 8-9 (2002) avail. at https://chapman.edu/law/_files/publications/CLR-5-anthony-cabot-robert-faiss.pdf.

[50]See, e.g., Brian Costa & Zolan Kanno-Youngs, *Your Neighborhood Sports Bookie Isn't Going Anywhere*, Wall Street Journal, Jun 26. 2018, avail. at https://www.wsj.com/articles/your-neighborhood-sports-bookie-isnt-going-anywhere-1530029329; John Keilman, *Will local bookies survive when legal sports betting comes to Illinois? The odds look good*, Chicago Tribune, Jun. 18, 2019, avail. at https://www.chicagotribune.com/news/ct-met-illinois-sports-betting-bookies-20190611-story.html; SportsHandle, *Q&A: Here's How a Local Bookie Really Operates: Myths and Reality* (Feb. 28, 2018), avail. at https://sportshandle.com/how-local-bookie-works-operates-myths-reality-interview/.

[51]See allegations at Hindenburg Research, *DraftKings: A $21 Billion SPAC Betting It Can Hide Its Black Market Operations* (Jun. 15, 2021) avail. at https://hindenburgresearch.com/draftkings/ ("Unbeknownst to investors, DraftKings' merger with [Bulgaria-based gaming technology company] SBTech also brings exposure to extensive dealings in black-market gaming, money laundering and organized crime. . . . roughly 50% of SBTech's revenue continues to come from markets where gambling is banned, . . . an Asia-focused site tied to a triad kingpin at the center of a Swiss money laundering investigation

advertises its use of BTi/CoreTech technology. . . . extensive operations in Iran . . . . "); Hailey Konnath, *DraftKings Investor Says SPAC Partner Has Black Market Ties*, Law360, Jul. 2, 2021, avail. at https://www.law360.com/capitalmarkets/articles/1400157/draftkings-investor-says-spac-partner-has-black-market-ties (class action securities lawsuit against DraftKings with similar allegations). See also Sara Germano and Ortenca Alia, *DraftKings dips as Hindenburg report alleges illicit gambling*, Financial Times, Jun. 16, 2021; Lawrence Uebel, *How I would Launder Money with DraftKings*, TechCrunch (Oct. 25, 2015), avail. at https://techcrunch.com/2015/10/25/how-i-would-launder-money-with-draftkings/. See Jon Prior, *Banks steer clear of sports gambling even as more states legalize it*, American Banker (Nov. 11, 2020) ("Their main concern? Inadvertently facilitating financial crimes and being punished by federal authorities." (and apparently less primacy of concern for the victims of such inadvertently facilitated financial crime)) avail. at https://www.americanbanker.com/news/banks-steer-clear-of-sports-gambling-even-as-more-states-legalize-it.

[52]Robert Shawhan, *Legalizing Federal Sports Gambling*, 40 Hastings Comm. & Ent. L. J. 41 at 43 (2018).

[53] Thomas A. Hieronymus, The Economics of Futures Trading (Commodity Research Bureau, 1971); Teweles & Jones, The Futures Game (McGraw-Hill, 2nd ed. 1987); Jack D. Schwager, Schwager on Futures: Fundamental Analysis (1995); CFTC, *Final Rule, Position Limits for Derivatives*, 86 Fed. Reg. 3236 at *passim* (Jan. 14, 2021).

[54]"Hedging occurs when positions acquired are economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise. See, e.g., 17 CFR 1.3(z) (definition of bona fide hedging)." Concept Release at 25672 n. 16.

[55] Morris Ploscowe, *New Approaches to Gambling, Prostitution and Organized Crime*, 38 Notre Dame L. Rev. 654, 655-56 (1963) ("Layoff Betting. Every bookmaker from time to time gets more action on a particular horse or a particular sporting event that he can handle. The losses, in case the bettor wins, may be too great for the individual bookmaker. Like any businessman, therefore, the bookmaker tries to reinsure himself against large losses through the mechanics of layoff betting. The risks of too great losses are spread through several layers of the bookmaking hierarchy. The top echelons of the hierarchy may take an additional step to insure themselves against too large losses. They may at the last minute bet substantial sums on the horse on which they have large bets (this is so-called comeback money). In this way, if a horse wins, they will have considerable moneys from the track with which to pay off bettors.").

[56]"For the last century and a half, gambling has been the cornerstone of organized crime, providing both power and capital . . . ." Prof. Gary Potter, Criminal Organizations: Vice, Racketeering and Politics in an American City, p. 72 (1994). See also Peter Ferentzy & Nigel Turner, *Gambling and organized crime—a review of the literature*, 23 J. of Gambling Issues 111 (2009), avail. at http://jgi.camh.net/index.php/jgi/article/view/3812/3828; Kevin B. Kinnee, Practical Gambling Investigation Techniques, ch. 1 (Elsevier 1992).

[57]E.g., Stewart Bishop, *Ex-JPMorgan Manager Cops to Laundering $50M for Crime Op*, Law360, Nov. 26, 2013, avail. at https://www.law360.com/articles/491612/ex-jpmorgan-manager-cops-to-laundering-50m-for-crime-op. For bookies, "access to large amounts of cash on short notice is essential." Ronald Goldstock, *The Prosecutor as Problem Solver* in Kelly et al., Handbook of Organized Crime in the United States p. 444 (1994).

[58]FBI, *Illegal Sports Betting*, avail. at https://www.fbi.gov/scams-and-safety/common-scams-and-crimes/illegal-sports-betting: "Illegal sports betting has real consequences for people who place and receive wagers—and for the safety of the American public. Organized crime groups often run illegal gambling operations. These groups often use the money made from illegal gambling to fund other criminal activities, like the trafficking of humans, drugs, and weapons. These operations may also be involved in tax

evasion and money laundering. One of the FBI's priorities is to investigate organized crime groups that operate illegal sports betting operations and disrupt and dismantle their activities. Besides possibly funding organized crime activities, people who place wagers with illegal sports betting operations may be at risk of extortion and violence, which bookmakers may use to collect debts."

[59]"In the back of every bookmaker's mind is the question of how to make money and not go to jail or, worse, lose it to the IRS. Bookmakers have developed many creative ways to limit these chances of being investigated by trying to hook certain groups of people. By compromising a person who is in an important profession, the bookmaker can, in the end, own this person." Kevin B. Kinnee, Practical Gambling Investigation Techniques, p. 36 (Elsevier 1992). While with the Indianapolis Police Department, Detective Kinnee "conduct[ed] over 700 investigations from vice/narcotics, property recovery, major case gambling operations, murder for hire and in-dept organized crime investigations." Police Books, *Police Writers: Kevin B. Kinnee*, avail. at http://www.police-writers.com/kevin_kinnee.html.

[60]Kevin B. Kinnee, Practical Gambling Investigation Techniques, p. 6 (Elsevier 1992). Mr. Kinnee's diagram illustration is dramatized in the "Bust Out" episode 23 of HBO's *The Sopranos* (2000).

[61]E.g., National Academy of Sciences, Comm. on the Social and Economic Impact of Pathological Gambling, Comm. on Law and Justice, Commission on Behavioral and Social Sciences and Education, National Research Council, Pathological Gambling (National Academy Press 1999), avail. at https://www.ncbi.nlm.nih.gov/books/n/nap6329/pdf/; Latvala, Lintonen & Konu, *Public health effects of gambling-debate on a conceptual model*, BMC Public Health (Aug. 9, 2019), avail. at https://bmcpublichealth.biomedcentral.com/track/pdf/10.1186/s12889-019-7391-z.pdf; Mary Heineman, *A comparison: The treatment of wives of alcoholics with the treatment of wives of pathological gamblers*, 3 J. of Gambling Behavior 27 (1987), avail. at https://link.springer.com/article/10.1007/BF01087475; see also the hesitant National Gambling Impact Study Commission, Final Report, Jun. 1999, avail. at https://govinfo.library.unt.edu/ngisc/index.html.

[62]CFTC, *Final Rule, Provisions Common to Registered Entities*, 76 Fed. Reg. 44776 at 44786 n. 35 (Jul. 27, 2011).

[63]"It is clever to argue 'no no no, this is not a gaming contract, this is a contract to hedge gaming risk . . . .' " Matt Levine, *You Can't Trade Football Futures*, Bloomberg (Mar. 24, 2021) avail. at https://www.bloomberg.com/opinion/articles/2021-03-24/nfl-futures-betting-you-can-t-trade-on-pro-football-odds .

[64]E.g., House Report 109-128, Internet Gambling Prohibition Act of 2006: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary (Apr. 6, 2006) avail. at https://www.govinfo.gov/content/pkg/CHRG-109hhrg26913/html/CHRG-109hhrg26913.htm; House Report 103-104, The National Impact of Casino Gambling Proliferation, Comm. on Small Business, House of Representatives, Hearing (Sept. 21, 1994); National Gambling Impact Study Commission, Final Report, Jun. 1999, avail. at https://govinfo.library.unt.edu/ngisc/index.html; John Kindt and John Palchak, *Legalized Gambling's Destabilization of U.S. Financial Institutions and the Banking Industry: Issues in Bankruptcy, Credit, and Social Norm Production*, 19 Bankr. Dev. J. 21 (2002), avail. at https://www.ideals.illinois.edu/bitstream/handle/2142/30796/Kindt-Legalised-Gamblings-Destabilization0001.PDF?sequence=2&isAllowed=y.

[65]Ante Z. Udovicic, *Special Report: Sprots and Gambling a Good Mix? I Wouldn't Bet On It*, 8 Marquette Sports L. J. 401, 424 (1998), avail. at https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1256&context=sportslaw&httpsredir=1&referer=. See, e.g., Tumaini Carayol, *Yana Sizikova arrested at French Open in match-fixing investigation*, The Guardian, Jun. 4, 2021, avail. at https://www.theguardian.com/sport/2021/jun/04/yana-sizikova-arrested-at-french-open-tennis-in-match-fixing-investigation ("The ar-

rest relates to last year's tournament when bookmakers issued alerts for abnormal betting patterns during Sizikova's first-round women's doubles match . . . . During that encounter, hundreds of thousands of euros were reportedly wagered on a break of serve at 2-2 in set two. Sizikova was culpable for three of the points conceded during her service game, including two double faults as she lost her serve to love."); see also Associated Press, *Russian Tennis Player Arrested on Suspicion of Match-Fixing*, Jun. 4, 2021, avail. at https://www.si.com/tennis/2021/06/04/russian-tennis-player-arrested-during-french-open; Chris Young, *Disturbing footage emerges amid French Open match-fixing furore*, Yahoo Sport Australia, Oct. 6, 2020, avail. at https://au.sports.yahoo.com/french-open-2020-match-fixing-investigation-footage-sizikova-054348470.html. Baseball great Pete Rose fell from grace when he bet on games of a major league baseball team he managed, John M. Dowd, Report to the Commissioner, *In the Matter of Pete Edward Rose*, Manager, Cincinnati Reds Baseball Club, Office of the Commissioner, Major League Baseball (May 9, 1989), avail. at https://www.baseball-almanac.com/players/p_rose0.shtml and https://web.archive.org/web/20160625220526/; http://www.thedowdreport.com/report.pdf, and probably even bet against it. William Weinbaum and T.J. Quinn, *Entries in long-hidden notebook show Pete Rose bet on baseball as player*, ESPN, Jun. 22, 2015, avail. at https://www.espn.com/espn/otl/story/_/id/13114874/notebook-obtained-lines-shows-pete-rose-bet-baseball-player-1986.

[66]E.g., Bill Dedman, *College Football: 4 Are Indicted in Northwestern Football Scandal*, New York Times Dec. 4, 1998, avail. at https://www.nytimes.com/1998/12/04/sports/college-football-4-are-indicted-in-northwestern-football-scandal.html; *Back Gets Jail Time in Point-Shaving Probe*, San Francisco Examiner May 6, 1999, avail. at https://www.sfgate.com/sports/article/Back-gets-jail-time-in-point-shaving-probe-3084992.php (four Northwestern University football players indicted for lying when they testified they had not bet on their own games; one player, Dennis Lundy, intentionally fumbled the ball on the one yard line to win a $400 bet); Mike Fish, Six ex-players charged with conspiracy ESPN, May 6, 2009, avail. at https://www.espn.com/college-sports/news/story?id=4146980; Associated Press, *Quinton Broussard Pleads Guilty*, Aug. 26, 2011, avail. at https://www.espn.com/college-football/story/_/id/6895890/former-toledo-rockets-player-quinton-broussard-pleads-guilty-sports-bribery-investigation ("University of Toledo football player pleaded guilty . . . , admitting he accepted more than $2,000 from a Detroit-area gambler, including $500 to fumble the ball in a 2005 bowl game. Quinton Broussard became the fourth former Rocket to plead guilty in the point-shaving probe . . . ."); Mike Singer, *Ranking the 10 Most Shocking Scandals in College Basketball History*, Bleach Report (May 1, 2013); avail. at https://bleacherreport.com/articles/1625497-ranking-the-10-most-shocking-scandals-in-college-basketball-history; Robert Duff, The Biggest Point Shaving Scandals in Modern History (Mar. 5, 2021), avail. at https://www.sportsbettingdime.com/guides/articles/point-shaving-scandals/; Coris Chase, *11 biggest scandals in sports gambling history*, USA Today Sports, May 16, 2018, avail. at https://ftw.usatoday.com/2018/05/11-biggest-scandals-in-sports-gambling-history; Paul "Wrecking" Crewe in the film *The Longest Yard* (1974). Eight Chicago White Sox solicited bribes from gamblers to throw the 1919 World Series in the "the Black Sox Scandal." See Phil Rosenthal, *1919 Black Sox: 5 misconceptions about the scandal* Chicago Tribune, Oct. 2, 2019, avail. at https://www.chicagotribune.com/sports/white-sox/ct-cb-chicago-white-sox-black-sox-1919-world-series-20191002-bsusjrxo5ba7fifgarmg3mzgwm-story.html; Encyclopedia Britannica, *Black Sox Scandal*.

[67] See, e.g., Prof. Jerry Markham, *Regulation of Derivative Financial Instruments*, 25 Seton Hall L. Rev. 1 (1994); Garrett Baldwin, *Where Trading Meets Gambling*, Futures Magazine (Aug. 15, 2015), avail. at http://www.futuresmag.com/2015/08/15/where-gambling-meets-trading. Cf. Note, *Back to the Future[s]: A Critical Look at the Film Futures Ban*, 29 Cardoza Arts & Ent. L. J. 179, 201-02 (2001). See also Les Blumenthal, *Wall Street's a Casino, So Maybe*

State Gambling Laws Apply, McClatchy Newspapers, Nov. 29, 2009 (Sen. Maria Cantwell "going for their [top CFTC officials] jugular" to repeal federal pre-emption of state gambling laws in the Commodity Futures Modernization Act), avail. at http://www.mcclatchydc.com/2009/11/29/79543/wall-streets-a-casino-so-maybe.html [unenacted H.R. 2454, Waxman-Markey § 355(b) would have rescinded federal preemption of state anti-bucket shop and anti-gaming laws for credit-default swaps]; Hearings, House of Representatives, Comm. on Oversight and Government Reform, *The Financial Crisis and the Role of Federal Regulators* (Oct. 23, 2008) prelim. tr. at 41:954-56 (Sen. Davis: allowing credit default swaps market "basically legalized gambling"); CFTC Chairman J. Christopher Giancarlo Response to [Pope Francis'] Bollettino [on credit default swaps as gambling on the failures of others] (Jul. 21, 2018), avail. at https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarloresponsetobollettino072118. Cf. *Cargill, Inc. v. Hardin*, 452 F.2d 1154, 1172-73 (8th Cir. 1971) (questioning market legitimacy of commodity demand created by futures market short positions).

[68]avail. at https://comments.cftc.gov/Handlers/PdfHandler.ashx?id=31488.

[69]avail. at https://comments.cftc.gov/Handlers/PdfHandler.ashx?id=31493.

[70]Commissioner Quintenz Statement B.3. Commissioner Quintenz/s "scathing assessment reads like a dissenting opinion from a Supreme Court justice." Todd Shriber, *CFTC Member Quintenz Skewers Commission Decision to Reject NFL Futures Contracts* (Mar. 26, 2021), avail. at https://www.casino.org/news/cftc-commissioner-quintenz-not-happy-with-nfl-futures-order.

[71]Commissioner Berkovitz Statement, Executive Summary.

[72]Commissioner Quintenz Statement C.3. The CFTC's reported complete disregard of all comments is disappointing to the members of the public who took the time to answer its request for public comments. In his statement, Commissioner Berkovitz does cite public comments, and even quotes from mine without attribution. Separately from being quoted without attribution, while I used the Mafia slang "vig" to connect the proposed futures contracts with use by organized crime (e.g., *USA v. Lee Besen and Kimberly Schmidt*, Criminal Complaint, D.N.J., Mag. No. 20-13358, p. 7 n. 4, avail. at https://www.justice.gov/usao-nj/press-release/file/1293281/download; "Chasing It" episode 81 of *The Sopranos* (2007), " 'vig' is a slang term that typically refers to a fee collected by a bookie. Here, it referred to the fixed monthly kickbacks and bribes . . . ."), Commissioner Berkovitz uses the word as an anodyne synonym for a bookie's commission. Commissioner Berkovitz Statement III.C.2.

[73]Commissioner Quintenz Statement.

[74]Reenat Sinay, *CFTC Commissioner Quintenz To Leave Agency In October*, Law360, Apr. 28, 2020, avail. at https://www.law360.com/articles/1268253/cftc-commissioner-quintenz-to-leave-agency-in-october.

[75]When I wrote to Senator Diane Feinstein objecting to the Federal Reserve Board's proposed rule on mandatory contractual stays on qualified financial contracts, I received back a letter purporting to empathize with my concerns with "the Fed's" low interest rate policy. I have company. See, e.g., Ralph Nader, *Touching Letters from Barack Obama*, The Register Citizen, Jul. 12, 2012, avail. at https://www.registercitizen.com/news/article/RALPH-NADER-Touching-letters-from-Barack-Obama-12070908.php. In Dan M. Berkovitz, *Government Will Respond to Those Who Seek Influence*, 33 J. Nuclear Medicine 25N (Oct. 1992), avail. at https://jnm.snmjournals.org/content/jnumed/33/10/25N.full.pdf, Commissioner Berkovitz, then Counsel to the U.S. Senate Comm. on Environment and Public Works, wrote a solid case study of how members of the public had to organize and hire a lobbyist in order to successfully provide input into pending legislation. "Members of Congress and their staff . . . get most of our information from newspapers and lobbyists. . . . Letters on technical subjects . . . are not easily understood by the non-specialist." *Id.* at 30N.

[76]"ErisX officials have been quoted as stating that they may re-file another certification.[13] In

light of the public comments received on the initial filing, and the potential for a subsequent filing, I believe that it may be helpful to provide my views on the now-withdrawn ErisX certification and some of the issues it presented." Commissioner Berkovitz Statement I.

[77]Commissioner Quintenz Statement B.3.

[78]Commissioner Quintenz Statement B.1.

[79] Commissioner Berkovitz Statement II.

[80]Commissioner Quintenz Statement D.1.

[81]"The Commission shall approve a new contract or other instrument unless the Commission finds that the new contract or other instrument would violate this chapter (including regulations)."

[82]Commissioner Quintenz Statement C.1.

[83]Commissioner Berkovitz Statement n. 17.

[84]Commissioner Quintenz Statement B.3.

[85]Commissioner Berkovitz Statement.

[86]Commissioner Berkovitz Statement III.B. The CFTC Division of Market Oversight seemed to reach the polar opposite conclusion in Staff Letter No. 14-130, which granted no action relief on the basis of proposed contracts *not* having hedging utility. See n. 22 *supra*.

[87]Commissioner Quintenz Statement E.2.

[88]Commissioner Berkovitz Statement III.B.

[89]Staff, *UNC and Bojangles: An Unlikely Success*, chapelboro.com (Dec. 21, 2015), avail. at https://chapelboro.com/sports/unc-and-bojangles-an-unlikely-success (in the last two minutes of play, Dewey Burke scored baskets that "pushed the Tar Heels over 100 points, and in so doing, he earned the nickname 'Biscuits.' "); Dakota Moyer, *UNC Fans Missed Out on Bojangles Biscuits, but Roy Williams has a Solution*, chapelboro.com (Dec. 6, 2018), avail. at https://chapelboro.com/town-square/unc-fans-missed-out-on-bojangles-biscuits-but-roy-williams-has-a-solution; North Carolina Tar Heels with Bojangles paid partnership Facebook post at https://www.facebook.com/TarHeels/posts/the-bojangles-100-point-special-is-back-dont-forget-if-the-tar-heels-hit-100-poi/10164866562435193/ ("The Bojangles 100-Point Special is back! Don't forget, if the Tar Heels hit 100+ points against NC Central, fans across North Carolina will be able to order two sausage biscuits for $1! This special is valid the day following Saturday's game. Go Heels!"). In its filings, Eris implied vendors could hedge the risk of overstocking licensed goods bearing the name of a football team, and stadium owners could hedge the risk of selling fewer tickets for home games, for a team that becomes unpopular due to a losing streak, by taking futures contracts positions against the team winning. Eris Certification, p. 3; Eris Dec. 29, 2020, letter to CFTC, p. 3, avail. at https://comments.cftc.gov/Handlers/PdfHandler.ashx?id=30472.

[90]See, e.g., UNODC, *Heroin and cocaine prices in Europe and USA*, avail. at https://dataunodc.un.org/drugs/heroin_and_cocaine_prices_in_eu_and_usa-2017; UNODC, *Retail and wholesale drug prices*, avail. at https://dataunodc.un.org/drugs/prices. Another pricing source could be the European Monitoring Centre for Drugs and Drug Addiction Statistical Bulletin, price, purity and potency, e.g., https://www.emcdda.europa.eu/data/stats2019/ppp_en.

[91]Perhaps a futures exchange could promote the "hedging utility" of such futures contracts by arguing police departments could use options on heroin and cocaine price index futures contracts to hedge risk because when illegal drug prices are high there is greater incentive for illegal activity and therefore police departments incur the greater expense of more overtime pay and search warrant battering rams. Alternatively, some opium derivatives are used medicinally, for which perhaps a heroin price index futures contract, or a physical opium poppy futures contract, could be used to hedge commercial risk by pharmaceutical companies.

[92]Commissioner Quintenz Statement B.3.

[93]Commissioner Quintenz Statement C.2 (sic re duplicated "the").

[94]Commissioner Berkovitz Statement III.C.

[95]Commissioner Berkovitz Statement III.C.1.

[96]Commissioner Berkovitz Statement III.C.2.

[97]Commissioner Berkovitz Statement III.C.2.

[98]Commissioner Berkovitz Statement III.C.2.

[99]17 C.F.R. § 38.200.

[100]E.g., *Rice v. Wood*, 77 F.3d 1138, 1150 (9th Cir. 1996) ("The majority's ruling in this case is the ultimate triumph of procedure over substance: the person is now irrelevant to the process. This is the nightmare world of *The Trial*; it is not American justice. Like [the protagonist of *The Trial*,] Josef K, [the defendant in this case] was sentenced to death in absentia, and, like Josef K, . . . will go to his grave asking, 'Where is the judge whom I have never seen?' Franz Kafka, *Der Prozess* 194 (1935, 1979)." Nelson, J., dissenting); *In re William L.*, 477 Pa. 322, 366 n. 6, 383 A.2d 1228, 1250 n. 6 (1978) ("We who sit as appellate judges must always guard against becoming emotionally isolated from human nature and the human consequences of our decisions lest in our endeavors to render dispassionate justice we lose our compassion. Kafka, in describing judges in a fictional judiciary, wrote: '. . . yet confronted with quite simple cases, or particularly difficult cases, they were often utterly at a loss, they did not have any right understanding of human relations, since they were confined day and night to the workings of their judicial system, whereas in such cases a knowledge of human nature itself was indispensable.' F. Kafka, The Trial 148-49 (M. Brod ed. 1969)."); *Seevers v. Arkenberg*, 726 F. Supp. 1159, 1161 (S.D. Ind. 1989) ("In The Trial, Franz Kafka depicts the plight of Josef K., a young man entangled in the arcane and inscrutable webs of the law. Unable to navigate 'the system' 's labrinthine [sic] ways on his own, Joseph K. implores the aid of a distinguished yet equally cryptic attorney. Instead of illuminating his client's situation, however, the attorney only compounds the darkness. Thus the legal system, which should mediate between an individual and society, itself became a vehicle of alienation used by the attorney against his own client."); *In re J.M.*, 454 Pa. Super. 276, 290-91, 685 A.2d 185 (1996), order rev'd, 556 Pa. 63, 726 A.2d 1041 (1999) ("To [the subject of an involuntary treatment warrant] the experience of Joseph K. became very real."); *Beit v. Probate and Family Court Dept.*, 385 Mass. 854, 854 n. 1, 434 N.E.2d 642, 643 n. 1, 29 A.L.R.4th 151 (1982) ("the issues raised in this appeal were foreshadowed in Kafka's The Trial."); *Bruno v. Department of Police*, 451 So. 2d 1082, 1089-90 (La. Ct. App. 4th Cir. 1983), writ granted, 457 So. 2d 1184 (La. 1984) and judgment aff'd, 462 So. 2d 139 (La. 1985) ("The writer, Kafka, makes the point that sometimes those in power are not overly concerned about the existence of actual guilt so long as the proper law enforcement procedures are followed. . . . When the government acts ignobly it injures not only the individual who has become its prey. It hurts our system of laws as well. Many people observe what is actually happening and, not fooled by the attendant protocol and rote of a particular travesty which may be unfolding before them, lose confidence in the entire machinery of justice." Garrison J., dissenting); *Bulen v. Navajo Refining Co., Inc.*, 2000 MT 222, 301 Mont. 195, 210, 9 P.3d 607, 616 (2000) (" 'Kafkaesque' nightmare"); *Silkwood v. Kerr-McGee Corp.*, 485 F. Supp. 566, 5 Fed. R. Evid. Serv. 765, 10 Envtl. L. Rep. 20708 (W.D. Okla. 1979), decision aff'd in part, rev'd in part, 667 F.2d 908, 12 Envtl. L. Rep. 20367 (10th Cir. 1981), judgment rev'd, 464 U.S. 238, 104 S. Ct. 615, 78 L. Ed. 2d 443, 20 Env't. Rep. Cas. (BNA) 1229, 14 Envtl. L. Rep. 20077 (1984) ("the record presents a Kafka-like picture of a young woman [Karen Silkwood, see the film *Silkwood* (1983)] who was contaminated by an originally unknown amount of plutonium that was inexplicably found in her apartment"); *Sullivan v. Houston Independent School Dist.*, 333 F. Supp. 1149, 1163 n. 15 (S.D. Tex. 1971), order vacated, 475 F.2d 1071 (5th Cir. 1973) ("The substitution of 'k' for 'c' and 'ch' (e.g. 'Amerika') is widely current among publications of the New Left, and is believed to derive from the writings of Franz Kafka."); Dornfeld & Marsolek, *A Kafkaesque Process? FERC Jurisdiction during Chapter 11 Bankruptcy*, 1 Mitchell Hamline L.Rev. 1 (2019); Mark Gilbert, *The Flash-Crash Trader's Kafkaesque Nightmare*, Bloomberg, Jun. 18, 2015, avail. at https://www.bloomberg.com/opinion/articles/2015-06-18/the-flash-crash-trader-s-kafkaesque-nightmare?sref=9qd489pp; House Comm. on Financial Services. *Ending "Too Big to Fail:" What is the Proper*

Role of Capital and Liquidity, Hearing Jul. 23, 2015, Serial No. 114-45, Statement of Charles Calomiris, p. 10 of pdf file ("stress tests could be a promising means of encouraging bankers to think ahead, but, as they are structured, stress tests are a Kafkaesque Kabuki drama in which [big banks] are punished for failing to meet unstated standards."). "Kafka's name has appeared in more than 400 opinions written by American state and federal judges. Judges have used Kafka to criticize bureaucratic absurdity, unfair tribunals of all sorts, and even their own colleagues on the other side of an appellate decision, and to empathize with litigants." Parker B. Potter, Jr., *Ordeal by Trial: Judicial References to the Nightmare World of Franz Kafka*, 3 Pierce L. Rev. 195, 195 (2005) ("Kafka is so well-ingrained in the contemporary consciousness that fewer than ten percent of the judicial opinions that refer to Kafka actually provide a citation to one of his novels or short stories." *Id.* at 199 n. 32); avail. at https://scholars.unh.edu/unh_lr/vol3/iss2/6/. See also Robert M. Kaplan, *Joseph K. Claims Compensation: Franz Kafka's Legal Writings*, 3 Advances in Historical Studies 115 (2014), avail. at https://www.scirp.org/pdf/AHS_2014033117165027.pdf; Brian K. Pinaire, *The Essential Kafka: Definition, Distention and Dilution in Legal Rhetoric*, 46 Univ. of Louisville L. Rev. 115 (2007), avail. at http://www.brianpinaire.com/articles; Anthony W. Kraus, *Assessing Mr. Samsa's Employee Rights: Kafka and the Art of the Human Resource Nightmare*, 15 The Labor Lawyer 309 (Fall 1999); Jonathan Blackmore, *The Influence of Franz Kafka on American Jurisprudence* (Feb. 26, 2009), avail. at https://works.bepress.com/jonathan_blackmore/1/; David J. Shakow, *Kafka's Law or Dante's Inferno*, Los Angeles Rev. of Books (Jan. 15, 2015), avail. at https://lareviewofbooks.org/article/kafkas-law-dantes-inferno/. See the excellent, thought-provoking Douglas E. Litowitz, Kafka's Indictment of Modern Law, Univ. Press of Kansas (2017). On June 27, 2021, a search for the word "Kafkaesque" returned 135 articles on Law360.

[101]Max Weber, the author of *The Protestant Ethic and the Spirit of Capitalism* (1905), is considered one of the founding minds of sociology. Peter E. Gordon, *Max the Fatalist*, New York Review of Books (Jun. 11, 2020).

[102]Douglas Litowitz, *Max Weber and Franz Kafka: A Shared Vision of Modern Law*, 7 Law, Culture and the Humanities 48 (2011) and Douglas E. Litowitz, Kafka's Indictment of Modern Law chs. 4 and 5 (Univ. Press of Kansas, 2017).

[103]Conclusion based on evidence set forth in works cited *supra* n. 102 and *infra* n. 104, especially noting the overlap of vivid imagery and turns of phrase in Alfred Weber's article and Franz Kafka's 1914 short story, *In the Penal Colony*.

[104]Alfred Weber, *Der Beamte*, 21 Die neue Rundschau 1321-1339 (1910), translated and reprinted in Austin Harrington, *Alfred Weber's essay 'The Civil Servant' and Kafka's 'In the Penal Colony': the evidence of an influence*, 20 History of the Human Sciences, no. 3 pp. 47-59 (2007).

[105]Alfred Weber, *op. cit.*, p. 55.

[106]"According to the Weber brothers . . . most institutions are now based on formal rules divorced from any underlying normative commitments . . . [resulting in] a closed circle where rules refer to other rules ad infinitum without reference to a higher purpose." Douglas Litowitz, *Max Weber and Franz Kafka: A Shared Vision of Modern Law*, 7 Law, Culture and the Humanities 48 at 55 (2011).

[107]Franz Kafka, *The Problem of Our Laws*: "Our Laws are not generally known; they are kept secret by the small group of nobles who rule us. We are convinced that these ancient laws are scrupulously administered; nevertheless it is an extremely painful thing to be ruled by laws that one does not know. . . . The very existence of these laws, however, is at most a matter of presumption. There is a tradition that they exist and that they are a mystery confided to the nobility, but it is not and cannot be more than a mere tradition sanctioned by age, for the essence of a secret code is that it should remain a mystery." Translated by Willa and Edwin Muir (1935).

[108]And leave it to the appropriate branches of government to perform their respective functions.

Commissioner Berkovitz wrote at length in this periodical about how *litigants* challenge CFTC and SEC regulations. Dan M. Berkovitz, *The CFTC's Implementation of Financial Reform: Progress and Challenge,* 34 Futures & Derivatives L. Rep. issue 4 (Apr. 2014). On its website page, "Commission Rulemaking Explained," the CFTC advises "The Administrative Procedure Act (APA) sets forth the process for an agency to promulgate, amend, or repeal a rule. The Commission follows the APA rulemaking process . . .," but includes the disclaimer, "This information is provided as a service to the public. It is neither a legal interpretation nor a statement of Commission policy." Avail. at https://www.cftc.gov/LawRegulation/CommissionRulemakingExplained/index.htm.

[109]The CFTC has anti-fraud jurisdiction under CEA § 6(c)(1) over all transactions in commodities that use instrumentalities of interstate commerce. *U.S. Commodity Futures Trading Commission v. Monex Credit Company*, 931 F.3d 966, Comm. Fut. L. Rep. (CCH) P 34538 (9th Cir. 2019), cert. denied, 141 S. Ct. 158, 207 L. Ed. 2d 1096 (2020); see Kluchenek, Bisanz & Forrester, *Ninth Circuit Interpretations of "Actual Delivery" and Antifraud Authority Prevails—for the Time Being*, Mayer Brown (Jul. 21, 2020), avail. at https://www.mayerbrown.com/en/perspectives-events/publications/2020/07/ninth-circuit-interpretations-of-actual-delivery-and-antifraud-authority-prevails-for-the-time-being. See also the broad list of every day transactions the CFTC exempted at sufferance from swaps regulation at CFTC & SEC, *Final Rule, Further Definition of 'Swap,'* 77 Fed. Reg. 48208 at 48246-47 (Aug. 13, 2021), but designated as potentially subject to other CEA provisions or CFTC Regulations, *Id*. at 48246 n. 433, and specifically not codified because there is no bright line test, *Id*. at 48248, col. 2, including household propane purchases, default interest rates on consumer loans, guarantying a relative's car loan, appliance warranties, consumer layaway purchases home mortgage rate locks (excepting mortgages products from many banks (but further recursively excluding Fannie Mae and Freddie Mac), over which the CFTC admits to not having jurisdiction, *Id*. at 48249 cols. 1-2). The CFTC noted "new types of agreements" may be "evaluated" for exemption and encouraged parties to "seek an interpretation from the Commissions . . . ." *Id*. at 48248. Parties that want such a request treated confidentially should not copy the SEC. *Id*. at 48297 col. 2. The only request for interpretation of which I am aware took the CFTC four months to decline to answer, CFTC, *Commission Statement Concerning a Request for an Interpretation as to Whether a Particular Agreement Is a Swap . . .*, 82 Fed. Reg. 27044 (Jun. 13, 2017), which is especially noteworthy given that the CFTC specifically provides there is no good faith safe harbor for the parties not getting it right, CFTC, *Final Rule, Swap Data Recordkeeping and Reporting Requirements*, 77 Fed. Reg. 2136 at 2170 (Jan. 13, 2012), even while awaiting a Commissions' (non-) determination under the request for interpretation procedure. 77 Fed. Reg. at 48297 col. 1.