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Christopher Kirkpatrick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581
Docket ID: RIN 3038-AF14

**Comments submitted by Maxim Lott, Astral Codex Ten, Ted Frank, and the
Hamilton Lincoln Law Institute in Response to “Proposed Rule: 17 CFR
Part 40 Event Contracts” RIN 3038-AF14, 89 Fed. Reg. 48968 (June 10, 2024)**

Dear Mr. Kirkpatrick:

Thank you for the opportunity to comment on the CFTC’s proposed rule on Event Contracts, which proposes to revise 17 CFR Part 40, Event Contracts.

The Proposed Rule bases its authority on Section 5c(c)(5)(C)(i) of the Commodities Exchange Act, which bars event contracts based on “gaming.” 17 CFR Part 40 Event Contracts” RIN 3038-AF14, 89 Fed. Reg. 48968 (June 10, 2024) (“Proposal”). But the overbroad Proposal runs against the plain text and legislative intent of Congress’s delegation of authority to the Commission. *See infra* Sections I and II. The Commission’s concerns that such contracts would require it to regulate

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elections are baseless. *See* Section III. The proposed rule goes against the public’s interest in having full and accurate information on upcoming elections. *See* Section IV. Similarly overstated is the Commission’s concern about the integrity of elections, which has no empirical basis. *See* Section V. Finally, the Commission does not have authority to enact the proposed rule as “other similar activity,” because elections do not resemble the enumerated categories—illegal activity, terrorism, assassination, war, or gaming. *See* Section VI.

The CFTC should withdraw the proposed rule, or alternatively enact a revised rule to accommodate prediction markets and further the Commission’s aims by requiring that such contracts have unambiguous resolution conditions.

Commenters

Maxim Lott is a journalist who has reported on prediction markets since 2007 and who has run the website ElectionBettingOdds.com since 2015, a journalistic resource aggregating betting odds from US and overseas prediction markets that has been accessed by more than 20 million unique users. Lott’s reporting has been published by ABC News, Fox News, *Newsweek*, the *New York Post*, *Reason* magazine, numerous other outlets, and his own Substack newsletter Maximum Truth.³ In his writing he takes a data-driven approach, drawing conclusions from transparent data rather than political talking points. US prediction markets have proven to be a valuable source of data and superior to conventional political wisdom or foreign bookmakers’ odds, both of which rely on non-public assumptions and opaque biases, often including motivated partisan thinking and undisclosed financial interests. Without US prediction markets, he would be unable to present the information as well as he does to his audience.

ASTRAL CODEX TEN is an influential Substack newsletter, run by the pseudonymous Scott Alexander, a practicing psychiatrist.⁴ It is the successor to the Slate Star Codex weblog. *See* Wikipedia, *Slate Star Codex*.⁵ Both sites have published extensively on the theory and application of prediction markets. While nearly all posts on ASTRAL CODEX TEN are publicly available without a subscription, Alexander is supported by thousands of paid subscribers, and his newsletter has the second most subscription revenue among newsletters in the “science” category on

³ Available at <https://www.maximumtruth.org/>.

⁴ Available at <https://www.astralcodexten.com/>.

⁵ Available at https://en.wikipedia.org/wiki/Slate_Star_Codex.

Substack. His active readers engage in vigorous debate on the site and write guest posts with detailed book reviews and Bayesian (probabilistic) analysis of scientific and political controversies. In addition to his writing, Alexander has contributed to various academic and popular discussions on prediction markets, emphasizing their potential to improve decision-making processes. His advocacy for prediction markets is grounded in their demonstrated ability to provide accurate forecasts.

Ted Frank is an attorney licensed in the District of Columbia, California, and Illinois, who is a citizen of Texas. He supplements his income through successful participation in prediction markets and through political commentary in publications and Twitter. His commentary is informed by prediction markets.

The Hamilton Lincoln Law Institute, co-founded by Frank, is a nonprofit public-interest law firm dedicated to, among other things, limited constitutional government, combating regulatory overreach, and promoting free markets.

I. The proposed rule contradicts the plain text of § 5c(c)(5)(C)(i), because elections and contests are not “gaming.”

Section 5c(c)(5)(C)(i) of the Commodities Exchange Act prohibits event contracts involving activity that is unlawful under Federal or State law; terrorism; assassination; war; or gaming—provided that the Commission determines particular contracts run contrary to the “public interest.”

In other words, the statute plainly sets out five subject matters of “event contracts” that are subject to regulation: (I) activity that is unlawful under Federal or State law; (II) terrorism; (III) assassination; (IV) war; (V) gaming or (VI) similar activity determined by the Commission to be contrary to the public interest. But the proposed rule would prohibit prediction markets beyond those subject matters by adding a spurious prohibition against current political events, under the pretense that these prediction markets constitute “gaming” too. Proposed Rule: 17 CFR Part 40 Event Contracts” RIN 3038-AF14, 89 Fed. Reg. 48968, 48974-75 (June 10, 2024) (“Proposal”).⁶

The proposed definition of “gaming” sweeps much more broadly than any reasonable dictionary definition or interpretation of the term. The proposed rule defines “gaming” 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

⁶ https://www.cftc.gov/media/10706/votingcopy051024_EventContracts/download.

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.” Proposal 48992. Prong (ii) of the definition reasonably captures “gaming”—events that are tied to a *game* whether the game is a soccer match or Fortnite tournament. But the other prongs, including the CFTC’s expansive interpretation of “contests,” go far beyond the statute. We concur with Commissioner Summer K. Mersinger’s dissenting statement, which warns against the overbroad, strained definition of “gaming” the commission proposes. Fed. Reg. 48993-98 (“Mersinger Dissent”).⁷

Wagers based on the “outcome of a contest” or “performance of ... competitors in one or more contests” might be gaming—but only when that contest is the result of a *gaming* competition. But the Commission clearly means much more when it uses the term “contest” in prongs (i) and (iii) of its proposed definition, offering an illustrative example of “gaming” to include stakes placed on the “outcome of a *political* contest.” Proposal 48975 (emphasis added).

Prong (iv) of the proposed definition goes further still, leading to absurd results. This prong purports to bar wagers on “[a]ny other occurrence or non-occurrence in connection with one or more contests or games.” Proposal 48992. As Commissioner Mersinger observed, the broad language “in connection with” suggests that a contract on whether Taylor Swift attends a Kansas City Chiefs’ football game (or a Kamela Harris rally) would be *verboden*, but wagers on Swift’s attendance at a Beyonce concert would be allowed. Mersinger Dissent 48994.

CFTC apparently arrived at its definition by unnaturally finding that “gaming” cannot have its straightforward meaning—actions performed in connection with, or stakes placed on, games.⁸ “None of the Super Bowl, the Kentucky Derby, or the Masters Golf Tournament are, of themselves, ‘gaming.’” Proposal 48974. Having split hairs that these are the results of “games” rather than

⁷ The Mersinger Dissent is available as a convenient stand-alone page at: <https://www.cftc.gov/PressRoom/SpeechesTestimony/mersingerstatement051024>.

⁸ See MERRIAM-WEBSTER DICTIONARY, *Gaming* (“1. the practice or activity of playing games for stakes... 2. the practice or activity of playing games (such as board games, card games, or video games)”), available at <https://www.merriam-webster.com/dictionary/gaming>. Dictionary.com, *Gaming* (“1. gambling. 2. the playing of games developed to teach something or to help solve a problem, as in a military or business situation. 3. Digital Technology. the playing of computer or video games.”), available at <https://www.dictionary.com/browse/gaming>. The proposed rule only quotes the first part of this latter definition. Proposal 48975 n.69.

“gaming,” the Commission decided that the rule must sweep well beyond games because otherwise “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.” *Id.* n.61. As Jeremy D. Weinstein observed, the CFTC’s bizarre assertion that “gaming” has nothing to do with “games” apparently led it to abstract away from the statutory language to “any conceivable synonym” for “gaming,” and from there into mere metaphors of these synonyms. Comment no. 73897.⁹ Political elections are simply not “contests,” much less “gaming,” except by metaphor. *Id.* Instead, elections are the means by which representative governments obtain the consent of the governed. *Id.* The results of a metaphorical “political contest” are not trophies or pennants. The “winners” instead shape government policy that touches all citizens whether or not they pay attention to the so-called “contest.” The Commission could have just as easily and preposterously justified its prohibition of political prediction markets from the statute’s prohibition on contracts involving “war.” After all, elections involve “campaigns,” “wars of ideas,” and even “culture wars.” But the use of martial metaphors does not make elections “war” any more than candidates seeking office engage in “gaming.”

Commissioner Mersinger observed that the Proposal makes a category error by misconstruing the prohibition on “gaming” events as one against “gambling.” The Proposal apparently reasons backward from the premise that “[g]aming means gambling.” Mersinger Dissent 48994. Having committed this category error, the Commission ties “itself into knots” by envisioning that *all* contests or awards—or even events *in connection with* contests and awards—should be proscribed because some states regulate *gambling* on these things. *Id.*¹⁰ But the statute does not delegate the CFTC with power to ban trading for activities that arguably resemble activities that some jurisdictions regulate as “gambling.” The statute instead permits the Commission to prohibit contracts involving “gaming” events—that is, those related to *games*. Consider the prohibitions on terrorism, assassination, and war—these subject matters pertain to events, and so the statute allows the Commission to prohibit staking money on such *events*. But the proposed definition of “gaming” misreads that term differently from the other event categories and as synonymous with *gambling*. See Proposal 48974-76 & n.62 (“a contract ‘involves’ an Enumerated Activity or prescribed similar activity if trading in the contract amounts to such activity.”). This violates “the canon of statutory construction that

⁹ Mr. Weinstein is an attorney with experience in energy contracts; his comment is available at: <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=73897>.

¹⁰ See Proposal 48975-76.

provisions enacted as part of the same statute (here, the Dodd-Frank Act) should be construed in a similar manner.” Mersinger Dissent 48995.

The statute does not actually prohibit gambling—it simply permits the Commission to prohibit trading *based on* “gaming.” The Commission’s category error—equating “gaming” with contracts that allegedly themselves constitute gaming (gambling)—renders the other prohibitions (CEA §§ 5c(c)(5)(C)(i)(I)-(IV)) surplus. *See* Mersinger Dissent 48995. Event contracts for terrorism or war could equally be classified as “gaming” under the proposed definition. And if this were correct, the Commission could also disallow statute-authorized contracts based on bond prices, commodity prices, stock indices, weather, or default rates. After all, trading on political events only constitutes gambling “in the same way that short-term trading on Telsa or Bitcoin or NVIDIA is gambling.” Maxim Lott, *Prediction Markets’ Legal Case*.¹¹ Prediction market prices fluctuate based on market assessments of value; they are not set by a casino bank or bookmaker. *Id.* As with any market, individual traders might seek to hedge commercial risk, to outperform the market through superior knowledge and skill, or to blindly gamble. The possibility of gambling on a futures contract does not alter the subject matter of the contract or bring it under § 5c(c)(5)(C)(i)(V).

Nobel prize winning economist Vernon L. Smith explained the distinction: “Gambling involves the deliberate creation of artificial zero-sum opportunities to engage in risk taking decisions that redistribute existing resources.”¹² In contrast, “[e]vent contract markets are in the class of variable-sum stock and derivatives’ markets in which information on the future outcome of productive and technological activities is dispersed, uncertain, and rendered valuable to society when aggregated into prices.” *Id.* These prices enable improved predictions, allowing the public to better prepare for future political and economic conditions, which enhances wealth creation. *Id.*

The CFTC may not redefine the term “gaming” to suit its whims or expand the scope of its authority. By a plain-text reading of § 5c(c)(5)(C)(i), election prediction market contracts do not involve unlawful activity, terrorism,

¹¹ Maxim Lott, *Prediction Markets’ Legal Case*, MAXIMUM TRUTH (June 10, 2024), available at <https://www.maximumtruth.org/p/prediction-markets-legal-case>.

¹² Public Comment of Vernon L. Smith in Response to Concept Release on the Appropriate Regulatory Treatment of Event Contracts (May 7, 2008), available at <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrfederalregister/documents/frcomment/08-004c001.pdf>.

assassination, war, or gaming. Even if the statute were ambiguous about whether “gaming” encompasses political elections—and it is not—CFTC lacks authority to extend the definition of “gaming” to cover elections. Courts provide interpretations of ambiguous statutory text. *Loper Bright Enterprises v. Raimondo*, 603 U.S. ____ (2024). Non-gaming contests and awards are not enumerated by the statute. “Gaming” is, and this word does not result in a “null set” as the Commission fears because it means activity pertaining to *games*. Because political contests do not pertain to the subject matter of gaming, they cannot be shoehorned into that statutory grant of authority.

Rather than pursuing an extended legal battle over a redefinition of a term contradicted by the plain-text reading, the CFTC could petition Congress for an expansion of its authority to regulate event contracts if it aims to make election prediction markets illegal. The Commission presently lacks statutory authority to do so, however. *See* Mersinger Dissent 48994-95.

II. The proposed rule contradicts the legislative record.

That political event contracts are outside of the plain language of “gaming” is supported by the legislative record. When Senator Dianne Feinstein and Senator Blanche Lincoln discussed event markets that should be regulable during their colloquy, they made their purpose clear: to “prevent trading that is contrary to the public interest,” existing “predominantly to enable gambling” by “participants not having a commercial or hedging interest.” 156 Cong. Rec. S5906-07 (daily ed. July 15, 2010) (statements of Senator Dianne Feinstein and Senator Blanche Lincoln), (“Feinstein-Lincoln colloquy”).¹³ Senator Lincoln mentioned gaming only in the context of sporting events such as “the Super Bowl, the Kentucky Derby, and Masters Golf Tournament,” contracts on which “would be used solely for gambling” and “would not serve any real commercial purpose.” *Id.*

Sporting events are purely recreational, and whether one team wins or loses has little relevance except to the teams themselves and their supporters. As such, it makes sense that contracts on them would be used solely for gambling and would lack real commercial purposes.¹⁴ Unlike game results or dice rolls, elections are

¹³ Available at <https://www.congress.gov/111/crec/2010/07/15/CREC-2010-07-15-senate.pdf>. *See also* Mersinger Dissent 48994 (“Senator Lincoln clearly associated ‘gaming’ with sporting events, i.e., games.”).

¹⁴ *But see* Comment by Susquehanna International Group, LLP, which observes the potential commercial value of hedging the long-term performance of sports teams and attendance to sporting

central to the operation of our democracy, involving countless stakeholders with commercial, hedging, and other meritorious interests. If election markets operated at a scale similar to that of futures markets, there is every reason to expect groups with strong financial stakes in the outcomes of elections (defense contractors, fossil fuel companies, etc.) to use the markets to hedge their risks around elections. Scott Alexander, *Mantic Monday 5/13/24* (“ACX 5/13/24”).¹⁵ Susquehanna International Group, LLP, whose affiliated companies include registered market makers and dealer/brokers in futures markets, agrees with Alexander. “For example, one candidate may be more likely than another to impose strict environmental regulations that would raise operational costs and associated prices in certain energy industries. By trading election outcome contracts, businesses could alleviate the risk of increased energy costs by trading a contract with a party more willing to bear that risk.” Comment no. 73923.¹⁶ Traditional commodity or market futures are “insufficient to fully hedge the risks that arise from these fluctuations in government policy” because individual firms “face idiosyncratic policy risk.” *Id.*

Even setting aside commercial hedging, election markets cannot be said to exist predominantly to enable gambling: academics have lauded their informational value for years, and public commentators and members of the public rely on them to provide accurate, timely information about matters of strong public interest. While, as with any market, some speculators exist, their participation works toward the public good in a way entirely unlike the sorts of gaming legislators intended to discourage, increasing the usefulness of the predictions and providing the public with critical information. *See* Section IV, *infra*.

III. Prediction markets do not put the CFTC in the business of investigating elections.

The proposed rule highlights a concern that “if trading was permitted on CFTC-registered exchanges in event contracts that involve the staking or risking of

events, which often have significant impact on local economies. Comment no. 73923, available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=73923>. We direct our comment to the value of political prediction markets, but the Commission may also reconsider its definition in light of industrial interests in gaming so as to not deny gaming industries the price stability, hedging opportunities, and insurance afforded to participants in non-gaming industries.

¹⁵ Scott Alexander, *Mantic Monday 5/13/24*, ASTRAL CODEX TEN (May 13, 2024), available at <https://www.astralcodexten.com/p/mantic-monday-51324>.

¹⁶ *Supra* n.14.

something of value on a political contest, then the Commission could find itself investigating the outcome of an election itself.” Proposal 48983.

The CFTC is not in the business of investigating tampering with weather stations because of weather contracts, nor of investigating the oil business because of Brent Crude contracts. If someone tries to manipulate nickel futures by blowing up a nickel mine, the correct resolution channel is through an agency such as the FBI, not the CFTC. *See ACX 5/13/24*. Contracts permitted by the CFTC for decades have not forced the Commission to regulate underlying market conditions. “The Commission is not the crop yield police and hasn’t displaced the role of the USDA. The Commission is not the police for changes to corporate officers or asset purchases and has not displaced the role of the SEC. The Commission is not the police for regional insured property losses, which is the domain of state insurance regulators. The Commission is not the bankruptcy police, which is the domain of the courts. The Commission is not the temperature police, and so on and so forth.” Statement of Commissioner Caroline D. Pham, Fed. Reg. 49000.

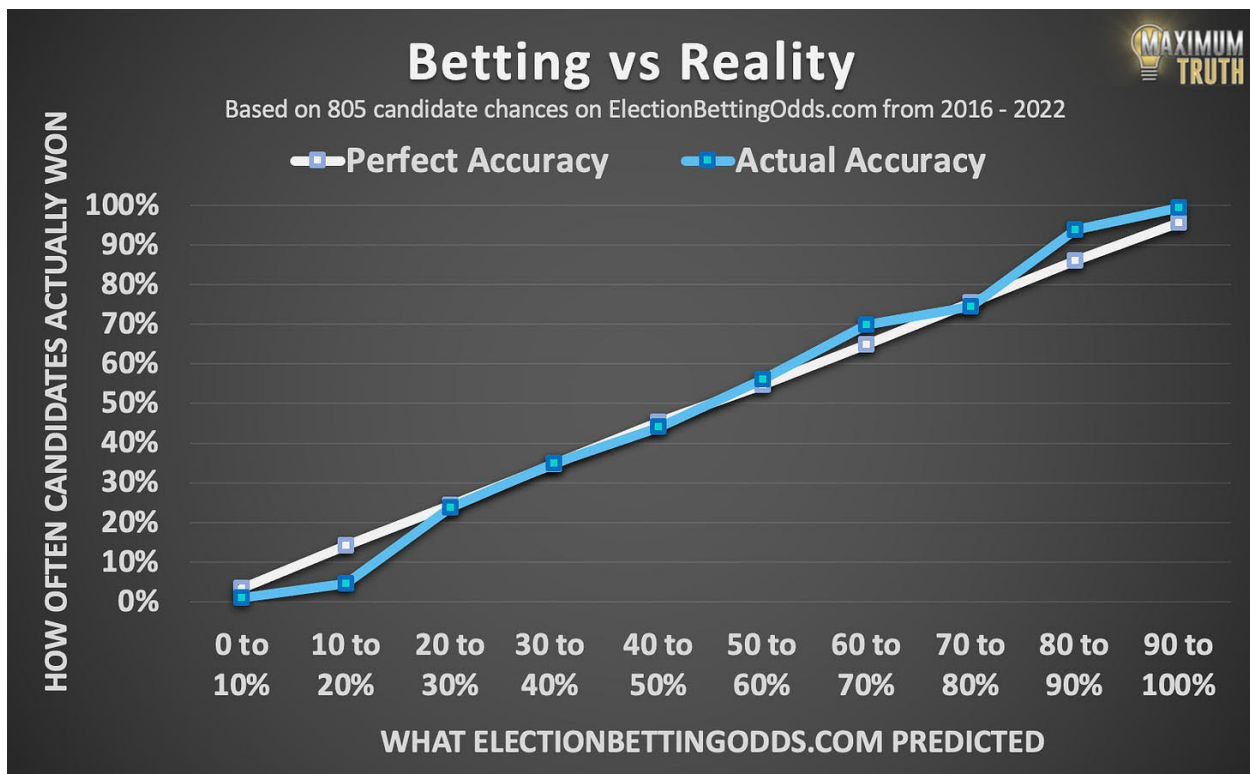
Contract issuers must simply pick unambiguous resolution conditions. To regulate a trading market is not the same as to regulate all facets of the underlying commodity. Were this otherwise, no regulation of markets would be feasible at all.

IV. The proposed rule harms the public’s interest in having full and accurate information on upcoming elections.

The proposed rule elides if not vitiates the first clause of CEA § 5c(c)(5)(C)(i), which provides that “The Commission *may determine* that such agreements, contracts, or transactions are contrary to the public interest...” (emphasis added). Under the statute, the enumerated events *may be* proscribed by the Commission should it determine they violate the public interest, but the Proposal imposes a blanket ban against an overly expansive interpretation of “gaming” contracts. The proposed rule should be rejected for this reason alone. *See* Comment no. 73943 at 3 (Paradigm Operations LP).¹⁷ Even if the Commission’s definition for “gaming” was supported by the statutory language, political prediction markets should not be prohibited because the public derives enormous informational benefits from them.

¹⁷ Available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=73943>. “The CFTC does not have the authority to decide that it would prefer not to regulate certain types of commodities enumerated in the CEA without reasoned analysis.”

Election betting markets, far from being simple profit-focused tools, are reliable sources of information for academics and the public, particularly as alternatives like polling become more difficult as fewer people respond. Historically, predictions on ElectionBettingOdds.com have mapped closely to actual candidate success, with—for example—75% of candidates actually winning when betting odds gave them between a 70% and 80% chance of winning. Maxim Lott, *DEEP DIVE: Election Betting vs 538*, MAXIMUM TRUTH (Nov. 28, 2022).¹⁸ Currently, even with a limited market facing heavy restrictions, prediction markets beat most statistical modelers and remain competitive with the best. *Id.*



Researchers studying prediction markets have found consistent outperformance compared to more common measures. Economists Justin Wolfers and Eric Zitzewitz found that they outperform methods such as election polling. Justin Wolfers & Eric Zitzewitz, *Prediction Markets*, 18 J. ECON. PERSP. 107 (2004).¹⁹ In commercial contexts, they improve on expert forecasts by as much as a 25% reduction in mean squared error. Bo Cowgill & Eric Zitzewitz, *Corporate Prediction Markets: Evidence from Google, Ford, and Firm X*, 82 REV. ECON. STUD.

¹⁸ Available at <https://www.maximumtruth.org/p/deep-dive-on-predicting-elections>.

¹⁹ Available at <https://www.aeaweb.org/articles?id=10.1257/0895330041371321>.

1309 (2015).²⁰ Economist Robin Hanson sums the findings up: “in every known head-to-head field comparison between speculative markets and other forward-looking institutions, the speculative markets have been at least as accurate.” Robin Hanson, *Insider Trading and Prediction Markets*.²¹

The proposed rule greatly underestimates the value of political prediction markets, admitting only that “certain event contracts could have limited informational value in other contexts outside the scope of CFTC-regulated markets that may be lost if the proposed amendments are adopted.” Proposal 48991. In fact, political prediction markets have become the most reliable signals for election outcomes. Prediction markets fill the gap left by the loss of near-universal landline telephone service, which makes the art of polling increasingly difficult. In the 1990s, the public could be confident that the local newspaper’s telephone opinion poll would provide a reasonable snapshot of political races. Fewer polls are conducted by credible neutral news organizations, and now all pollsters have to perform proprietary sampling and demographic weighting to account for low response rates and skewed responses.²² Ordinary citizens cannot easily sort through often politically biased or unreliable polls themselves, but prediction market traders find it profitable to trade the public’s best-informed evaluations, providing a signal in the noise of political commentary. Political predictions markets also provide accurate assessments of political developments that occur between opinion polls. As NASDAQ observed they “provide a more accurate assessment of voter sentiment of real-time developments during the election cycle and are better at forecasting the winner as the election draws closer.” Comment no. 73944.²³

Far from encouraging misinformation (Proposal 48997), prediction markets enable busy citizens to quickly cut through politically-motivated spin, wishful thinking, and yes, misinformation. As a joint letter by Rep. Ritchie Torres and four

²⁰ Available at <http://www.columbia.edu/~bc2656/papers/CorporatePredictionMarkets.pdf>.

²¹ Available at <https://mason.gmu.edu/~rhanson/insiderbet.pdf>.

²² See Courtney Kennedy, Dana Popky, Scott Keeter, *How Public Polling Has Changed in the 21st Century—61% of national pollsters in the U.S. used methods in 2022 that differed from those of 2016*, PEW RESEARCH CENTER (Apr. 19, 2023), available at <https://www.pewresearch.org/methods/2023/04/19/how-public-polling-has-changed-in-the-21st-century/>.

²³ Available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=73955>, citing Hailey Lynn Leister, *Prediction Markets vs. Political Polls: Forecasting Election Outcomes* (May 2021), available at https://repository.arizona.edu/bitstream/handle/10150/666656/azu_etd_hr_2021_0133_sip1_m.pdf.

progressive academics and journalists to the Commission in 2022 put it, “prohibiting these markets doesn’t protect election integrity; it actively undermines it by furthering polarization, worsening the public’s understanding of our democratic process and promoting unsafe, black market exchanges.” Letter from Rep. Ritchie Torres, Sean McElwee (Founder, Data for Progress), Drey Samuelson (Co-founder TakeItBack.org), Dylan Matthews (Vox), Joel Wertheimer (Civil rights lawyer), and Ethan Winter (progressive pollster) to CFTC.²⁴ Banning legal American exchanges threatens election integrity, because protecting “markets and election integrity means looking at evidence and the data, not idle speculation.” *Id.* “The CFTC should not privilege speculative insider trading concerns over real-world data showing these markets can be offered safely. ... CFTC and exchange rules and protections exist for a reason: they work.” *Id.*

Preeminent researchers in a diverse range of disciplines including economics, political science, and law have spoken in favor of prediction markets in emphatic terms when the issue has come before the CFTC. In 2022, a Murderer’s Row of law and economics experts opined on Kalshi’s proposed congressional control contracts “not just for Kalshi but for all other Designated Contract Markets.” Comment no. 70761 for Industry Filing 22-002 (Sep. 21, 2022).²⁵ These academics and researchers included Robert J. Shiller, Yale economics professor emeritus, and 2013 Nobel Prize laureate; Philip Tetlock, University of Pennsylvania professor and author of two books and scores of publications on forecasting and political judgment; Justin Wolfers, University of Michigan public policy professor and co-author of two economics textbooks; Scott Sumner, chair emeritus of monetary policy at the Mercatus Center, George Mason University; Michael Abramowicz, George Washington University law and economics professor; Joseph Grundfest, Stanford law and business professor emeritus and former SEC commissioner; Alex Tabarrok, George Mason University chair in economics and co-author of the influential *Marginal Revolution* blog and widely-used economics textbook; and Michael Gibbs, University of Chicago clinical economics professor and co-author of leading textbook on the economics of human resources. They opined that “these are economically valuable markets (not gaming markets) that promote the public interest through superior forecasting.” Political prediction markets benefit researchers such as themselves, help the public assess the likelihood of future events, and “have bona fide hedging utility”—not just for large firms, but “individuals, families, and small

²⁴ Available at <https://www.politico.com/f/?id=00000184-3518-d0bb-a1ff-377b6ae70000>.

²⁵ Available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=70761>.

businesses.” *Id.* As for gambling, “[w]hile it is true that a portion of market participants may speculate, this is fully consistent with normal market functioning. Many participants in energy or agricultural markets are speculators, yet their presence does not refute the economic utility of those contracts. If anything, these speculators serve an important role by providing liquidity and rapid price-discovery.” *Id.* Even small-scale prediction markets proved “resilient against market manipulation,” and would be more robust in a regulated market. *Id.*²⁶ “If these markets have any impact on the electoral process at all, it would be a positive impact. Polling error has increased in recent years, polarization is at an all time high, fake news is rampant: a market-based mechanism for forecasting the outcome of the midterms would be a vastly superior alternative to polling and punditry, and would thus foster a healthier and more reasonable debate around the electoral process. Combating fake news and providing a better mechanism for truth makes the proposed contracts very much so in the public interest.” *Id.*

During the current round of comments, several researchers and academics have taken the time to submit comments in support of prediction markets. Prof. Harry Crane, a Rutgers statistics professor who researches prediction markets and price discovery, penned a 27-page comment, which was signed by Prof. Luke Froeb, Rutgers professor of business economics, Prof. Koleman Strumpf, Wake Forest professor of political economy who has studied historical prediction markets,²⁷ Prof. Robin Hanson, George Mason economics professor who has published numerous papers on prediction markets,²⁸ and Prof. Michael Abramowicz, whose qualifications are discussed above. Comment nos. 74225 & 74234-37 (“Crane Comment”).²⁹ The comment observes that the categorical disqualification of events contradicts the CEA and that the rule should be rejected if “just a single contract involving those activities [exists] that does serve the public interest.” *Id.* at 2. The comment discusses several: hedging for legislative risk, Covid risk, geopolitical risk, and real-time aggregation of election outlooks. *Id.* at 4-10. Concerning the definition of “gaming,” Prof. Crane observes “[c]limate-related event contracts involve gaming,

²⁶ Citing Paul Rhode & Koleman Strumpf, 2006. *Manipulating political stock markets: A field experiment and a century of observational data*, Natural Field Experiments 00325, available at <https://ideas.repec.org/p/feb/natura/00325.html>.

²⁷ See *supra* n.26.

²⁸ Including *Insider Trading and Prediction Markets*, *supra* n.21, *The Promise of Prediction Markets*, SCIENCE, 320, pp 877-78 (May 2008), Robin Hanson, Ryan Oprea, A Manipulator Can Aid Prediction Market Accuracy, ECONOMICA, 76, pp 304-14 (Mar. 20, 2009).

²⁹ Available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=74225>.

or don't involve gaming, just as much as contracts on elections or sporting contests.” *Id.* at 12. Alleged connection to “gaming” does not make a contract useless for hedging or contrary to the public interest. *Id.* at 12-15. Far from eroding trust in elections, prediction contract markets “provide an independent, objective source of information on sensitive matters of national and public interest, is all the more pronounced given the diminished trust in legacy institutions that have historically served as gatekeepers for such information.” *Id.* at 20. As for gambling, Prof. Crane observes that “potential negative consequences of such markets are isolated to individual participants, whereas the potential positive benefits are widespread.” *Id.* at 22. Markets concerning Covid, for example, could have informed policy and commercial mitigation in support of the public interest, even though such market arguably falls under “other similar activities” to war. *Id.* Commentator Maxim Lott agrees. He set up his site ElectionBettingOdds to report a play money Covid case count prediction market in March 2020, which (accurately) estimated much more dire spread of the virus than official estimates at the time projected.³⁰ The comment concludes “The Commission portrays speculation and profiteering as inherently negative activities that are to be prevented at the expense of any benefit, no matter how great, that such markets provide. But by that rationale, all markets would have to be shut down.” Crane Comment at 27.

Other thoughtful comments from academics include Gerald N. Rosenberg, political science and law professor at the University of Chicago (Comment no. 73748, “the academic community will lose an important generator of information about election outcomes”);³¹ David L. Hames, professor emeritus of economics at the University of Hawaii (Comment no. 73944, “In an era where both liberal and conservative commentators are alarmed at the public’s acceptance of fake news and misinformation, these markets are one of the few mechanisms left for incentivizing the accumulation of true and accurate information (an antidote to fake news).”);³² James Bailey, Providence College economics professor (Comment no. 74217, prediction markets “provides onlookers (not just participants) with more accurate information about the world”);³³ Joseph Fishkin, UCLA law professor (Comment no.

³⁰ ElectionBettingOdds, *Coronavirus Cases in US on April 15* (archived March 29, 2020), Internet Archive, available at <https://web.archive.org/web/20200329162243/https://electionbettingodds.com/CoronavirusApril15US.html>.

³¹ Available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=73748>.

³² Available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=73944>.

³³ Available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=74217>.

73708, “political prediction/futures markets will continue to exist in the world whether or not the CFTC authorizes them, ... it is highly imperfect and messy to study such markets when U.S.-based participants, who would know them best, are excluded.”).³⁴

Professor Fishkin’s observation—that overseas prediction markets would be worse for the public and election integrity—has been echoed by letters filed by nineteen members of congress, representing both major parties. Two of the letters say: “Limiting event contracts could stifle responsible and regulated innovation and encourage industry participants to move their trading overseas to work under the watch of foreign regulators who would not provide the level of safety standards, customer protections, and market oversight as the CFTC. Instead, the CFTC should embrace the authority Congress has already given it to encourage regulated and safe market activity on event contracts so the United States can continue to be a leader in financial market innovation.” Rep. Duarte *et al.*³⁵ Rep. D. Johnson *et al.*³⁶ The second, bipartisan, letter also questioned why political events would be considered “gaming”: “we would encourage the Commission to consider if its reasoning here would also mean that other contracts currently being offered, such as contracts on market volatility, digital assets, oil, and even the weather, are equally ‘gaming’ and not legitimate economic activity.” *Id.* Finally it questioned Commission action based on the “economic purpose test,” which the proposed rule uses to interpret the term “public interest.” Proposal 48978-79. The seven signing Representative write: “[g]iven Congress has determined this test no longer serves as a viable evaluation, we urge the Commission to clarify how it best determines these contracts run contrary to the public interest.” Rep. D. Johnson *et al.* A third letter from sixteen Representatives, overlapping with the previous two letters, also wrote to express concern that “proposal seeks to define a broad class of event contracts as

³⁴ Available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=73708>.

³⁵ Letter from John Duarte, Zach Nunn, Bryan Donalds, Marcus Molinaro, Ronny Jackso, and Max Miller, Comment nos. 74099-104, available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=74104>.

³⁶ Bipartisan letter from Dusty Johnson, French Hill, Ritchie Torres, Lori Chavez-DeRemer, Derrick Van Orden, Jared Moskowitz, and Austin Scott, Comment nos. 74082-88, available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=74082>.

being contrary to the public interest, and therefore prohibited under Section 5c(c)(5)(C).” Letter from Sixteen Representatives.³⁷

Three Senators aired similar concerns, that “CFTC prohibiting the use of these markets in the U.S. will only serve to drive American investors to participate in offshore markets where they are left with inadequate safeguards.” Sen. Marshall *et al.* ³⁸

These academics and elected officials are not gamblers looking for a quick buck, but serious thinkers who understand the potential of prediction markets as a knowledge-generating tool without an adequate alternative.

We share their concerns. Prediction markets are not mere gambling venues, but valuable information-gathering tools currently undergoing a process of refinement and research that the proposed rule threatens to cut short.

V. Prediction markets do not undermine election integrity.

Neither theory nor practice support the idea that prediction markets harm the integrity of elections. The United Kingdom has maintained public, regulated betting on elections since 1963 without compromising election integrity. Matthew Engel, *The Art of the Political Wager: How to Make Money Betting on the General Election*, THE NEW STATESMAN (Jan. 29, 2015).³⁹ Wall Street traded similar contracts from 1880 to 1944 with open interests sometimes exceeding hundreds of millions of dollars, present value. Paul Rhode & Koleman Strumpf, 2006. *Manipulating political stock markets: A field experiment and a century of observational data*, Natural Field Experiments 00325.⁴⁰ Subsequent analysis has proved contemporaneous *Wall Street Journal* commentary correct that the prices

³⁷ Letter from Dusty Johnson, Lori Chavez-DeRemer, French Hill, Zach Nunn, Marcus Molinaro, Nick Langworthy, David Joyce, Austin Scott, John Duarte, Derrick Van Orden, David Rouzer, Barry Moore, Monica De La Cruz, Max Miller, Bryon Donalds, and Randy Feenstra, Comment nos. 74127-34, available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=74127>.

³⁸ Letter from Roger Marshall, M.D., Cindy Hyde-Smith, and Chuck Grassley, Comment nos. 74117-19, available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=74117>.

³⁹ Available at <https://www.newstatesman.com/long-reads/2015/01/art-political-wager-how-make-money-betting-general-election>.

⁴⁰ *Supra* n.26.

were accurate and resilient against manipulation even in mayoral elections involving the notoriously corrupt Tammany Hall machine. *Id.*

Hundreds of groups already care deeply about election outcomes, some for the above-mentioned financial reasons—as with defense contractors, fossil fuel companies, or investment banks—and others for social or ideological reasons—as with transgender people, gun owners, Christians, or Democrats. *Mantic Monday 5/13/24*. Because so many people are involved in elections and so many have stakes in them, they are much harder to materially impact than events like sports matches, and even the most powerful people are rarely in a position to tip elections. Maxim Lott, *Government to Ban All US Election Betting*, MAXIMUM TRUTH (May 10, 2024).⁴¹ Commentator Weinstein put this colorfully with a quote by Kalshi’s counsel: “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.”⁴² There is no reason to expect adding traders will meaningfully impact election integrity. Indeed, those who seek to spend tremendous amounts of money to manipulate markets towards their preferred candidates simply subsidize more politically savvy traders, who are free to find the resulting imbalances and profit accordingly. *Id.*

VI. The Commission’s authority to regulate “other similar activity” “contrary to the public interest” cannot be stretched to cover political prediction markets.

The CFTC’s residual authority to regulate event contracts regarding “other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest” does not confer unbridled discretion on the agency to prohibit any kind of event contract it wishes. This would make the five regulable subject matters into surplus. Worse, it would indulge the “conceit of unlimited agency power” that statutory interpreters ought to avoid. *Acosta v. Cathedral Buffet, Inc.*, 887 F.3d 761, 770 (6th Cir. 2018) (Kethledge, J., concurring). For this reason, the Commission cannot base its “public interest” finding on the “economic purpose test,” which the statute does not contain, was abrogated by Congress, and would seem to undermine contracts concerning events like weather that the CEA expressly allows. See Rep. D. Johnson *et al* Comment,⁴³ Mersinger Dissent 48995-96. When statutes

⁴¹ Available at <https://www.maximumtruth.org/p/government-to-ban-all-us-election>.

⁴² *Supra* n.9.

⁴³ *Supra* n.36.

reference the “public interest,” agencies do not receive unlimited discretion to promote what they see as the general welfare—among other things, this raises serious nondelegation concerns. See *Consumers’ Research v. FCC*, __ F.4th __, 2024 U.S. App. LEXIS 18241, at *33-*35 (5th Cir. Jul. 24, 2024). Much less can the Commission extrapolate from colloquy between two Senators that the body never voted upon. “Rather, the words take meaning from the purposes of the regulatory legislation.” *NAACP v. Federal Power Commission*, 425 U.S. 662, 669 (1976).

Instead, “other similar activity” should be narrowly limited to topics that share a common denominator with (i) activity that is unlawful under Federal or State law; (ii) terrorism; (iii) assassination; (iv) war; or (v) gaming. Thus, the Commission’s residual authority may be exercised to regulate event contracts regarding criminal activities that have the potential to cause harm to individuals or groups. Considering the purpose of the CEA amendments’ language more broadly, it aims to “promote the financial stability of the United States by improving accountability and transparency in the financial system.” *Dig. Realty Tr., Inc. v. Somers*, 583 U.S. 149, 155 (2018) (quoting 124 Stat. 1376). Under this statutory purpose, the Proposal fails. Contracts concerning economically significant events (including elections) allow firms to shore up risk, *improving* financial stability. Permitting such markets domestically, under Commission supervision, also promotes transparency relative to foreign exchanges that may lack KYC rules or adequate risk management requirements.

The Commission clearly worries that contracts for socially useless gambling could proliferate without a clear definition. For example, one can imagine a contract based on the number of particles a Geiger counter detects over a specified time period. Such wager would not be on a “game” as commonly understood, but the random and useless nature of the result resembles the output of a casino game—it would be a sort of quantum roulette. Or to use a more pointed example, imagine that a well-known prediction platform hosted markets concerning the number of tweets Donald J. Trump would send over a given week.⁴⁴ We agree that markets like these would serve no significant commercial, journalistic, or social purpose. Such markets fundamentally resemble gaming wagers on game outcomes like whether a craps shooter rolls a seven. As Vernon L. Smith defined gambling, these

⁴⁴ PredictIt, *How many tweets will @realDonaldTrump post from noon Nov. 20 to 27?* (2019), available at: <https://www.predictit.org/markets/detail/6150/How-many-tweets-will-@realDonaldTrump-post-from-noon-Nov-20-to-27>.

arise from “the deliberate creation of artificial zero-sum opportunities to engage in risk taking decisions that redistribute existing resources.”⁴⁵

But the proposed rule does not even prohibit contracts like this! Or even bets on a celebrity’s attendance at a particular place (as long as that place does not involve a “contest” or “award”). See Mersinger Dissent 48994. To the extent that the Commission believes that “gambling” on prediction markets would be contrary to the public interest, the Proposal is both under- and over-inclusive: it permits gambling on trivial outcomes while prohibiting contracts that provide immense social value.

The Commission must exercise its residual power in a principled way that permits contracts on predictions at least as valuable as soybean futures, and only prohibits contracts on occurrences that resemble gaming—event outcomes that have no real-world repercussions beyond the participants of the game-like event and those who place stakes on the event.

As an illustration, the following definition for “gaming” would better address the Commission’s concerns about socially useless “gambling” *and* excess entanglement in resolving disputes over prediction market contracts by requiring such contracts to have unambiguous resolution conditions:

(b) *Gaming*. (1) For purposes of paragraph (a)(1)(v) of this section, “gaming” means the staking or risking by any person of something of value upon:

(i) The outcome of a game involving skill or chance;

(ii) The performance of one or more competitors in one or more games; or

(iii) Events that, while not understood to be games themselves, provide no commercial, scientific, or informational benefit when traded as agreements, contracts, transactions, or swaps insofar that the events do not embody or result in significant industrial, economic, or political effects for those not directly involved with the events or agreements, contracts, transactions, or swaps deriving from such events.

⁴⁵ *Supra* n.12.

(2)(a) For purposes of paragraph (a)(1)(v) of this section, “gaming” includes, but is not limited to games in which one or more participants compete, or on occurrence or non-occurrence within the course of such games, regardless of whether it directly affects the outcome.

(b) For purposes of paragraph (a)(1)(v) of this section, “gaming” does *not* include the outcome of a political elections, provided that contract resolution depends on conditions not susceptible to ambiguity, such as certification by relevant secretaries of state, official legislative acts, or becoming actually seated within the relevant body or office by a particular date.

(c) For purposes of paragraph (a)(1)(v) of this section, “gaming” does *not* include the outcome of potential or proposed legislation that have significant industrial, economic, or political effects, nor the resolution of Supreme Court cases that have significant industrial, economic, or political effects—provided in each case that contract resolution depends on conditions not susceptible to ambiguity.

(d) For purposes of paragraph (a)(1)(v) of this section, “gaming” does not include the outcome of awards that have significant industrial, economic, or political effects, such as the Academy Awards and Nominations for Best Picture, Director, Leading and Supporting Actor/Actress, or the selection of host venues for major events such as the Olympics and World Cup—provided in each case that contract resolution depends on conditions not susceptible to ambiguity.

We do not contend that this definition must be adopted by the Commission. We provide it to demonstrate how the Commission can comport with an ordinary and internally-consistent definition for “gaming” while proscribing socially useless gambling and curtailing any imagined risk of CFTC involvement in elections.

At minimum, the Commission should not enact the rule as proposed. Doing so gambles away the concrete benefits of prediction markets in favor of imagined risks lacking any empirical support.

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For these reasons, the CFTC should withdraw the proposed rule.

Respectfully submitted,

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