

**September 25, 2022**

SUBMITTED VIA CFTC PORTAL

Secretary of the Commission

Office of the Secretariat

U.S. Commodity Futures Trading Commission

Three Lafayette Centre 1155 21st Street, N.W.

Washington, D.C. 20581

**Re: Questions on the KalshiEX, LLC “Will <party> be in control of the <chamber of Congress>?” Contracts for Public Comment**

Honorable Chairman and Commissioners of the Commodity Futures Trading Commission:

From 2017 to 2021, I had the privilege to serve as a Commissioner of the CFTC under the leaderships of former Chairs J. Christopher Giancarlo and Dr. Heath Tarbert, and then-Acting Chair Rostin Behnam. Before my time at the agency, I ran my own investment firm, worked for a bank-focused hedge fund during the financial crisis, and served as a staffer in the House of Representatives. Since leaving public office, I have been an advisor for Andreessen-Horowitz Capital Management, Crypto.com, and sit on Kalshi’s Board of Directors.

I remember fondly a saying at the agency, “Every day is a good day at the CFTC.” Indeed it was. That was the case, however, not because the Commission avoided making hard decisions or taking the easy route on difficult issues. In fact, it was true *because* we dealt with those things and did so in an honest, transparent, and accessible manner with decisions and statements well supported by legal analysis, data, and commenters’ perspectives. In fact, during my time as a Commissioner, the agency deliberated and decided upon many philosophically challenging, controversial, and statutorily confusing matters. In the execution of my role, I found the best way to address such issues was adhering to a strong regulatory philosophy combined with a very deliberate reading of the statute and weighing the appropriateness of any existing or proposed regulations to the issue’s risks and opportunities. I commend the current Chair and Commissioners for taking a similar posture towards their duties.

I also believe, as has been expressed through our Constitution and through the precedent of multiple Supreme Court decisions, that the government has limited authority, and independent agencies cannot assume broader authorities than the statutes - passed by Congress and signed into law by the President - convey to them. Such an outcome would put into question the checks and balances of the separation of powers as well as the ability of the population to have a direct effect on the government’s decisions. Speaking of power, independent agencies have a significant amount of it. Commissioners serve for staggered terms, agencies’ regulations are

heavily insulated from congressional review, and the chairs are difficult to remove, if not debatably irremovable, from office. As such, a deliberate and concerted focus on what discrete authorities the law conveys and whether the agency is acting in accordance with those powers in a manner that is justified, consistent, and repeatable is what the American public and our derivatives markets deserve.

Throughout my time at the Commission, and consistently through its distinguished history, the CFTC has been at the forefront of market-led innovation.<sup>1</sup> It is precisely because of this history the United States enjoys the deepest, most liquid, and broadest derivatives markets in the world. Along those lines, during my time as a commissioner, the agency dealt with event contracts on a number of occasions: through discussions with Aristotle on the scope of PredictIt's activity, through considering and approving Kalshi's license to operate a Designated Contract Market, to Kalshi's repeated efforts to move innovative event contracts through Commission reviews, and ultimately to the Commission's consideration of ErisX's proposed RSBIX NFL Football contracts, on which I authored a statement.<sup>2</sup> Kalshi's proposed contracts on the political control of the House and the Senate is another iteration of the Commission's considerations in this space, namely another frontier in prediction market innovation as well as another opportunity for the Commission to adhere to its statute and recognize its limited authority and ultimate purpose.

I commend you for undertaking this difficult task and for your time, effort, and thoughtfulness in fully analyzing the information provided through this comment process and in reviewing these contracts themselves.

### Background

In 2012, North American Derivatives Exchange, a Designated Contract Market (DCM) self-certified contracts relating to election outcomes. The Commission imposed a 90-day stay and public review of the contracts pursuant to regulation 40.11. After review, it found that the contracts involved gaming, conflicted with certain state laws, brought into question election integrity, and were contrary to the public interest. The Commission voted to prevent the contracts from being listed ("*Nadex*").<sup>3</sup>

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<sup>1</sup> See, for instance, J. Christopher Giancarlo, Letter to the U.S. Senate Committee on Agriculture, Nutrition, and Forestry, September 15, 2022, available at: <https://static1.squarespace.com/static/609d6c0e49158533ad1ae6b9/t/63226625af0a195856b46ec7/1663198758065/Giancarlo+Itr+Senate+Ag+Ctee+re+DCCPA+9.14.22.pdf>

<sup>2</sup> See Statement of Commission Brian D. Quintenz on ErisX RSBIX NFL Contracts and Certain Event Contracts (Mar. 25, 2021), "Any Given Sunday in the Futures Market," available at <https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement032521>

<sup>3</sup> 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 (April 2, 2012), available at: <https://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/if-docs/nadexorder040212.pdf>.

Kalshi received designation as a contract market in November 2020 and exclusively lists event contracts, which depend on the outcomes of events on economic indicators like inflation and GDP growth, natural occurrences such as hurricanes and the spread of Covid-19, and outcomes of legislation like will the Build Back Better bill pass into law.. Kalshi’s current proposal came after significant engagement over the last year with the Commission, the Division of Market Oversight, and legislators.

## Introduction

Kalshi’s proposed contracts comport with the law, would provide meaningful economic and social benefits, and should be approved. Further, because it is critical for the agency to make determinations based on the law and not speculation, fear, or comfort, the Commission can not and should not disapprove these contracts. Such reasoning is important not only for the members of the marketplace and registrants, but for the Commission’s reputation and standing itself. This decision will have significant implications for the future of the marketplace. Kalshi’s proposal presents the Commission with an opportunity to right the wrongs of *Nadex*, and make a decision compliant with the law and consistent with broad segments of futures market activity.

## The contract does not trigger the special rule

Section 5c(c)(5)(C)(i) of the Commodity Exchange Act (CEA) establishes the “Special rule for review and approval of event contracts and swaps contracts.”<sup>4</sup> It reads:

### **(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) [2] of this title), 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

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<sup>4</sup> 7 U.S.C § 7a-2(c)(5)(C)(i)(I)-(VI).

(VI) other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest.<sup>5</sup>

The special rule includes three important steps for a contract to be relevant. First, the contract in question must be “based upon the occurrence, extent of an occurrence, or contingency”; in other words, an event contract. Second, the contract’s event must *involve* at least one of the enumerated activities. Then, if the Commission finds that the contract does involve one of the enumerated activities, it may determine the contract as a whole to be contrary to the public interest.

*Nadex* concluded that *participating* in the political event contracts in question was equivalent to ‘wagering’ or ‘betting’, and thus gaming, to trigger the special rule. Beyond its blatantly incorrect reading of the statute, this is a shockingly poor and vague classification of activity that would scope in common and vital participation in the futures market.

How should the line between morally dubious gaming activity and important and valuable speculative activity be drawn? Gaming describes wagering money on an occurrence that has no inherent economic value itself other than the money wagered on its outcome. For instance, wagering money on roulette or blackjack should be considered gaming because there is no economic significance of the activity apart from the wager itself. Speculation, on the contrary, is risking value where the underlying activity has economic consequences, which then means the speculative activity creates valuable societal and economic benefit from a price-discovery and risk transfer function for those exposed to the risk of that underlying activity.

Unbelievably, the Commission never concretely defined or even philosophically stated the difference between “gaming” as represented in 5c(c)(5)(C)(i) and the speculation that exists every day in derivatives marketplaces and is a critical component of their purpose. But yet, it has chosen to, and may choose to again here, apply a term it hasn’t defined to an activity that is actually more similar to traditional and valuable speculative market participation. Multiple esteemed and long-time futures market participants and former CFTC officials have commented

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<sup>5</sup> *Id.*

similarly in this filing.<sup>6 7 8 9 10 11 12 13</sup> The Commission would owe them a strong explanation if its conclusion on this point has not changed.

There are plenty of events that have a discernable and legitimate economic impact and whose probabilistic outcomes can be estimated through an analysis of relevant factors. They are not gambling activities nor are they games of chance. That is just as true for election outcomes as it is for the prices, production, and demand of things like oil, corn, or gold. Hedge funds put infrared cameras on natural gas processing facilities to know the minutes they are operating or shut down so they have an edge on estimating production figures. Some investment firms have micro climate weather experts so as to more accurately predict localized rainfall and drought conditions to get a better estimate on crop yields. Those same firms' market positions then also provide a strong economic benefit. If the firms are confident enough in their predictions, they will move the equilibrium price and provide a market signal to any business involved (from production to processing to distribution) of the economic value that can be hedged based on an event's perceived outcome. Estimating election outcomes and expressing that view through a market mechanism is just as valuable to society as estimating oil, corn, or gold fundamentals and expressing those views through existing futures contracts. As a case in point, the demand for such predictive election information has exploded in recent years and has been the basis of entire publications like *FiveThirtyEight* or *The New York Times*' "needle".

From a statutory perspective, the relevant portion of the CEA prohibits registered boards of trade from listing event contracts whose *underlying activities* reference one of the enumerated activities. The CEA did not give the Commission authority to conclude that participating in the contract could constitute one of the enumerated activities. The statute is very clear on this matter:

(i) The statute limits the scope of the Commission's authority to "activities" and activities only. The Commission only has discretion to take action on event contracts whose event involves (1) an "activity" that is unlawful under federal or state law; (2) one of four specifically listed "activities" (terrorism, assassination, war, or gaming); or (3) other similar "activity" determined by the Commission to be contrary to the public interest. The Commission itself has previously

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<sup>6</sup> Public comment on Kalshi's proposal by **Dr. Richard Sandor**.

<sup>7</sup> Public comment on Kalshi's proposal by **Christopher Hehmeyer**. Available here: <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69717>

<sup>8</sup> Public comment on Kalshi's proposal by **Mark Wetjen**. Available here: <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=70771>

<sup>9</sup> Public comment on Kalshi's proposal by **Josh Sterling**. Available here: <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69737>

<sup>10</sup> Public comment on Kalshi's proposal by **Daniel Gorfine**. Available here: <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=70755&SearchText>

<sup>11</sup> Public comment on Kalshi's proposal by **Paul Fribourg**. Available here: <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69727&SearchText>

<sup>12</sup> Public comment on Kalshi's proposal by **David Pollard**. Available here: <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=70743>

<sup>13</sup> Memoranda by **Jonathan Marcus** and **Daniel Davis** are also included in Kalshi's submission.

acknowledged that the special rule's textual focus is on "activities," i.e., the underlying conduct. In describing it, the Commission stated that the rule applied to contracts that "involve one or more activities enumerated in the Dodd-Frank Act."<sup>14</sup> These "activities" are not the contracts themselves. They are the events that create the basis for the relevant contract.

(ii) If Congress assumed, as the Commission implies through *Nadex*, that the act of participating in a event contract could itself constitute gaming, there would have been no need for Congress to individually enumerate "gaming" as a distinct category of event contracts upon which the Commission could make a public interest determination, since they would already fall under the "unlawful activity" prong.

(iii) If state gambling definitions of 'wager' and 'bet' are analogous to the act of taking a position in the Political Event Contracts, as *Nadex* argues,<sup>15</sup> then those same state definitions would be analogous to taking a position on any event contract, including ones whose underlying activity is an economic indicator or the weather. The Commission cannot hold that participating in these proposed contracts involve gaming without also implicating participation in all other event contracts. Such an outcome would also clearly be in tension with the purpose of the statute, which is to carve out a select few event contracts with an underlying activity that is specifically referenced or subsequently identified by the Commission through a rulemaking.

(iv) This interpretation would require the Commission to interpret "involve" differently across the enumerated activities, since participating in any event contract itself clearly cannot ever constitute an act of assassination, war, or terrorism.

(v) The statute actually prevents events with no financial impacts to be considered as excluded commodities. In order for the Special Rule in 5c(c)(5)(C)(i) to apply to Kalshi's contracts, those contracts already have to be on events that are considered excluded commodities. The statutory definition of an excluded commodity includes "...an occurrence, extent of an occurrence, or contingency...that is 1) beyond the control of the relevant parties to the contract...and 2) associated with a financial, commercial, or economic consequence."<sup>16</sup> Because Kalshi's contract is on excluded commodity, subject to the Commission's jurisdiction and being vetted through the Special Rule, then, by the very definition of an excluded commodity in the statute, the event contains an economic risk that can be hedged. If the event did not then that event would constitute gaming, not an excluded commodity, and not subject to the Commission's purview.

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<sup>14</sup> *Provisions Common to Registered Entities: Proposed Rule*, 75 Fed. Reg. 67,282, 67,283 (Nov. 2, 2010) ("Section 745 of the Dodd-Frank Act also authorizes the Commission to prohibit the listing of event contracts based on certain excluded commodities if such contracts involve one or more activities enumerated in the Dodd-Frank Act.") ("40.11 Proposed Rule"); see 17 C.F.R. § 40.11(a) at 67,289 ("If [] the Commission determines that such product may involve an activity that is enumerated in 40.11 . . . .")

<sup>15</sup> *Nadex* at 2-3.

<sup>16</sup> 7 U.S.C. § 1a(19)(iv)

### Questions: Other venues' offerings

In the second question posed to the public for comment, the Commission asked whether it should consider “similar offerings are available in traditional gaming venues such as casinos or sports books and/or whether taking a position on elections or congressional control is defined as gaming under state or federal law” when making its gaming determination. It is difficult to understand the rationale for including this question (but that sentiment is not unique to this question either, as this is one of several examples of arbitrary standards proposed through the Commission’s questions to the public). Strikingly, this specific question was not asked of the public when it was considering the legality of ErisX’s proposed NFL Futures contracts, which are a staple of such venues.<sup>17</sup> Additionally, this standard is not found in law or in Commission history and precedent. Moreover, partisan control of Congress is not a bet available on any legal American sportsbook. That it is sometimes available on illegal ones cannot be held against Kalshi’s proposal. Taking a possible motive of this question to its potentially backward conclusion, it would be challenged regulatory logic to allow bucket shops, illegal venues, casinos, or offshore markets to preclude a CFTC registered exchange from offering a contract by virtue of listing that contract themselves. Similarly, we are fortunate the agency has never proposed this standard in the past, as it would have likely precluded the exchange listing of many new derivatives products. The most recent example of such is the agency’s greenlight for CBOE’s and CME’s Bitcoin futures contracts, which traded in some form or fashion in many unregulated venues before listing on CFTC registered DCMs.

### Question: State laws

The Commission has asked whether Kalshi’s proposal involves state law provisions that prohibit ‘wagering’ on the outcomes of elections, in addition to the federal prohibition on interstate gambling (questions three and four). As discussed at length above, the statute refers to the underlying activity of the contract, not the contract itself. The contract only involves obviously legal activity: the partisan affiliation of the Speaker of the House and President *pro tempore*.

However, even if the Commission did consider the contract as a whole instead of just the contract’s underlying event against state laws, the contract nonetheless does not involve illegal activity. Because of preemption, a contract offered by a registered board of trade otherwise compliant with the law and regulations could never constitute unlawful state activity. There is no scenario where a Kalshi member would be illegally trading the proposed contract on the exchange from a state law perspective.

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<sup>17</sup> Questions on the Eris Exchange, LLC (“ErisX”) RSBIX NFL Futures Contracts for Public Comment. Available at: <https://www.cftc.gov/sites/default/files/filings/documents/2020/orgdmerisquestionsre201223.pdf>

In addition, the definition of gaming cited by *Nadex* in federal law had a carveout specifically for regulated derivative products like Kalshi's proposal, as do many state laws regarding gaming. Similarly, the Commodity Futures Modernization Act of 2000 explicitly overrules state gaming and bucket shop provisions. State laws should not be relevant whatsoever in this instance and should not be considered in this process.<sup>18</sup>

### Questions: Hedging and price basing standards

In its questions for the public, the Commission asks what standard should be used to determine whether Kalshi's contracts serve a hedging function (question six) and whether or not a registrant must provide demonstrated need of hedging and whether the Commission should consider the proportion of hedgers in the market (question eight).

Prior to its deletion in 2000 by the CFMA, CEA Section 5(g) provided that the Commission could not designate a board of trade as a contract market unless the board of trade affirmatively and pro-actively demonstrated that transactions in their contracts "will not be contrary to the public interest."<sup>19</sup> The Commission interpreted the words "public interest" to include an economic purpose test, which required that exchanges affirmatively demonstrate to the Commission that a proposed contract could be used for hedging or price basing.<sup>20 21</sup> In 2000, the CFMA repealed Section 5(g) of the CEA in its entirety.

In 2010, Congress passed the Dodd Frank Act, which added the new special rule in CEA section 5c(c)(5)(C) for the Commission to disapprove the enumerated event contracts. This section left untouched the CFMA's revised structure for contract certification. It did not add back any requirement for an exchange to affirmatively demonstrate that a contract has price hedging utility or any other burden to show that a contract was not contrary to the public interest.

In *Nadex*, the Commission re-imposed the economic purpose test on *Nadex*'s political contracts, based on what is presumed to be a short dialogue between Senators Feinstein and Lincoln in the Congressional record. Turning to the legislative history, or specifically a dialogue between only two of the 535 members of the House and Senate, on this matter is a reach. The law which both chambers passed and the President signed is clear, and Congress specifically removed the economic purpose test from the law. Rather than re-enact the economic purpose test, Congress specifically chose instead to create the special rule to target contracts whose events dealt with events that could be contrary to the public interest. The Commission should not—and

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<sup>18</sup> 7 U.S.C § 16a-2.

<sup>19</sup> H.R. Rep. No. 975, 93 Cong., 2d Sess. 29 (1974).

<sup>20</sup> Concept Release on the Appropriate Regulatory Treatment of Event Contracts, 73 FR 25669, 25672 (May 7, 2008).

<sup>21</sup> A Joint Report of the SEC and the CFTC on Harmonization of Regulation. October 16, 2009, page 23 available at <https://www.sec.gov/news/p/ress/2009/cftcjointreport101609.pdf>.



*cannot*—interpret the absence of this provision to mean Congress would still prefer the Commission had that narrow tool. While the economic purpose test might be a good test, it is not appropriate for the Commission to require here and at this time without a change to the law or, at the very least, a notice-and-comment rule on the books.

In question 9, the Commission asks if the economic consequences of Congressional control are predictable enough for a contract based on that control to serve a hedging function. It further asks for examples of commercial activity that can be *directly* hedged via the proposed contracts. Again, the Commission is implementing too narrow of a standard for hedging utility of event contracts or of futures contracts writ large. Changes in *general risk* can provide a strong hedging need as opposed to the changes in risk of a specific outcome. If one party were to take over complete control of Congress, there is likely to be a change in *general risk* on carbon-based energy products and industries and an opposite change in *general risk* on renewable energy products and industries. While the specific policies implemented may be hard to know in advance, that change in *general risk* has been discussed at length in comment letters and is hedged extensively by larger institutions through complex products.<sup>22</sup> For example, following the election of Republicans into Congress in 2016, many publications speculated that trade policy would become more restrictive; but, it was not known if this would come in the form of new but restrictive trade deals, re-negotiating existing trade agreements, new tariffs (and if so, on what goods and at what level), international lawsuits, and more. The general risk, however, of future restrictive trade policy to those industries, firms, and individuals heavily exposed to foreign trade existed concretely and directly because of who would win the election. This risk is exactly what Kalshi's contracts allow traders to hedge.

In question eleven, the Commission makes the same mistake when it asks if the contract could “form the basis of pricing a commercial transaction in a physical commodity, financial asset, or service”. Not only is this language from the discarded economic purpose test, this question also excludes a price-forming impact on other futures contracts, such as other event contracts themselves. If it is in the public interest to list an event contract on potential tax rates two years from now, that contract's price would have an embedded probability of which parties control Congress at that time. Eliciting that probability through a market-based event contract directly on the political control of each chamber would serve a valuable price discovery function for a tax-rate contract as well as other policy-related contracts. It is unfortunate the Commission discarded this valuable price-basing use case from the question's list.

The economic purpose test represented through this question is too narrow for other reasons. In the *Nadex* decision, the Commission acknowledged this by suggesting it could consider other factors in its decision regarding public interest. These other factors, which should be considered

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<sup>22</sup>Public comment on Kalshi's proposal by **Angelo Lisboa**. Available here: <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69662&SearchText=angelo>

here as well, are actually reasons to support the contract, not oppose it. A market-based probability of election outcomes would provide an extremely valuable public service, and act as a competitor to polls and paid pundits. This is sorely needed in American politics and it is exactly why one of the comment letters supporting Nadex's proposal was authored by a host of economists led by the late Nobel Laureate Kenneth Arrow.<sup>23</sup> Many of Kalshi's comment letters testify to the contract's public and academic value.<sup>24 25</sup> Former Chair of the Council of Economic Advisors, Jason Furman, even testified that such markets were used in the White House when analyzing policy and its outcomes.<sup>26</sup>

Kalshi's contracts depend on an economically important commodity and have obvious and widespread hedging and price-basing utilities, as well as other benefits

The economic impact of politics is plain and undeniable. Though it is not required to, Kalshi provided dozens of pages to the Commission and its staff detailing the contract's hedging and price basing utilities that cited much of the deep research on the link between elections, commercial risk, and the prices of financial assets. Investment banks frequently provide such hedging recommendations to their clients, and academic research repeatedly confirms that markets price election risk, with repricing occurring as polls change. Although the outcomes of Congressional control are never truly known, the market is already engaging in significant hedging and pricing behavior and testifies as much.

Other public comments, such as those by members of industry (like that of Angelo Lisboa, a Managing Director at JPMorgan Chase; or Jorge Paulo Lemann, a board member of AB InBev, Kraft Heinz, and Gillette)<sup>2728</sup>, politically sensitive businesses (Greenwork)<sup>29</sup>, and academics and former government officials (former CEA Chair and current Harvard Professor Jason Furman, Aaron Director Lecturer in Law & Economics at The University of Chicago Law School Dr. Richard Sandor, former CFTC Commissioner and Acting Chairman Mark Wetjen, and former

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<sup>23</sup> Public comment on Nadex's political event contracts. Available here: <https://www.cftc.gov/sites/default/files/stellent/groups/public/@rulesandproducts/documents/ifdocs/ericitzewitzltr020312.pdf>

<sup>24</sup> Public comment on Kalshi's proposal by **Alex Tabarrok**. Available here: <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69697&SearchText=alex>

<sup>25</sup> Public comment on Kalshi's proposal by **Michael Gibbs**. <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69704&SearchText=>

<sup>26</sup> Public comment on Kalshi's proposal by **Jason Furman**. Available here: <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69708&SearchText=>

<sup>27</sup> Public comment on Kalshi's proposal by **Angelo Lisboa**. Available here: <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69662&SearchText=angelo>

<sup>28</sup> Public comment on Kalshi's proposal by **Jorge Paulo Lemann**. Available here: <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69684&SearchText=jorge>

<sup>29</sup> Public comment on Kalshi's proposal by **Sam Steyer**. Available here: <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69677&SearchText=greenwork>

SEC Commissioner and Stanford Professor Emeritus Joseph Grundfest, as well as others)<sup>30 31 32 33</sup> repeatedly discuss extant market risk stemming from changes in partisan control of Congressional chambers and the ways that Kalshi’s contract would create risk mitigation opportunities and foster important price discovery.

### In Conclusion

The Commission is heavily, and appropriately, constrained by the narrow language of the statute as well as an implemented regulation with debatable validity.<sup>34</sup> None of the statutory language nor the Commission’s regulations address many of the questions the Commission poses here in evaluating these contracts. A government agency can also not deny a proposal by relying on authorities or frameworks it wishes it had or any internal or external promises to redo any existing regulations to create a different and clearer framework in the future. The Commission has the statute at hand and the regulations it has passed to deal with the proposals currently before it.

A credible regulator also cannot continue to rely on varying and disprovable conjectures to impose value judgments on an ad hoc basis. From potential cherry picked state laws (which are inconsistent, broad, and would be preempted by any Commission action), to an improvised, imprecise, and non-Administrative Procedure Act-based definition of “gaming” (which, if applied widely, would cut out large swaths of valuable futures market activity), to imposing a narrow and changing economic purpose standard found nowhere in the statute nor ever clearly defined by Commission regulations (which would give the Commission unlimited authority over major questions and put the onus on Exchanges instead of the agency), no such excuses have any legal merit.

While it may seem difficult to overturn prior precedent, I believe the analysis is actually very straight forward. Given the enormous extant evidence provided—well in excess of legal requirement—the Commission needs to fully engage with Kalshi’s proposed contracts and approve them. If it does not believe that the market would find these to be useful hedging and price basing tools, despite market participants’, esteemed academics’, and former government officials’ repeated testimony, it should provide its reasoning in detail pursuant to its existing authorities and regulations rather than dismiss the contract out of hand. Businesses, especially

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<sup>30</sup> Public comment on Kalshi’s proposal by **Jason Furman**. Available here:

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

<sup>31</sup> Public comment on Kalshi’s proposal by **Dr. Richard Sandor**

<sup>32</sup> Public comment on Kalshi’s proposal by **Mark Wetjen**. Available here:

<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=70771>

<sup>33</sup> Public comment on Kalshi’s proposal by **Joseph Grundfest**. Available here:

<https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69695&SearchText=grundfest>

<sup>34</sup> See Statement of Commission Brian D. Quintenz on ErisX RSBIX NFL Contracts and Certain Event Contracts (Mar. 25, 2021), “Any Given Sunday in the Futures Market,” available at <https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement032521>

ones that have long-term engagement with regulators, deserve to have a consistent and repeatable framework by which they can operate their firms in accordance with the law and regulations.

I thank you for your consideration of these comments and for doing the hard work of the Commission.

Sincerely,

A handwritten signature in black ink, appearing to read "B. Quintenz", with a horizontal line underneath.

Brian D. Quintenz