POLITICAL PREDICTION MARKETS: BAD LAW, BUT GOOD POLICY?

Abstract: Political prediction markets have been around in limited formats since 1988, but they recently returned to the public consciousness during the 2024 elections as platforms like Kalshi offered trades on the United States presidential and congressional races. The question is: are these trades legal? The Commodity Futures Trading Commission (CFTC) said no, a federal district court said yes, and the answer has implications for the use of prediction markets beyond just elections. To get closer to an answer, this Note examines the statutory source of the CFTC's authority to review trades that are based on the outcome of events (sometimes called "event contracts"). It concludes that the law is contradictory and unclear, but that political prediction markets benefit the public. For that reason, this Note recommends new language for the relevant part of the Commodity Exchange Act that would narrow the CFTC's authority to review event contracts and clarify the standards by which the agency decides whether the contracts it reviews are contrary to the public interest.

> *"All voting is a sort of gaming, like checkers or backgammon, with a slight moral tinge to it, a playing with right and wrong, with moral questions; and betting naturally accompanies it."*
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> —Henry David Thoreau[1]

INTRODUCTION

Just two months before the 2024 elections, a new case landed on the desks of Judges Millett, Pillard, and Pan at the D.C. Circuit Court of Appeals: the Commodity Futures Trading Commission (CFTC) wanted an emergency injunction.[2] Kalshi, an online prediction market registered with the CFTC, had been allowing users to place bets on the outcome of the upcoming congressional elections, and the agency wanted to stop it.[3]

Kalshi had been seeking to offer these bets, sometimes called "event contracts," since the previous summer.[4] The CFTC had intervened, preventing the

[1] HENRY DAVID THOREAU, CIVIL DISOBEDIENCE (1849), *reprinted in* UPRISING 13/13 (2017), https://blogs.law.columbia.edu/uprising1313/files/2017/10/Civil-Disobedience-by-Henry-David-Thoreau.pdf [perma.cc/9WVQ-ZH35].

[2] KalshiEX LLC v. Commodity Futures Trading Comm'n (*Kalshi II*), 119 F.4th 58, 60 (D.C. Cir. 2024).

[3] *Id.*

[4] KalshiEX LLC v. Commodity Futures Trading Comm'n (*Kalshi I*), No. 23-3257, 2024 WL 4164694, at *4 (D.D.C. Sep. 12, 2024), *dismissed*, No. 24-5205, 2025 WL 1349979 (D.C. Cir. May 7, 2025).

congressional election contracts from going public, but when Kalshi sued, the agency lost at the district court.[5] The court announced its decision on September 12, 2024.[6] Later that day, Kalshi's first-ever election market went live.[7] For seventy-six cents, a user could buy a contract predicting Republican control of the Senate.[8] If the prediction was correct, the user would receive a dollar.[9]

The CFTC immediately appealed, seeking an emergency stay of the district court's decision before the November 2024 elections.[10] It lost again.[11] Although the CFTC could continue to pursue the appeal on the merits in the coming months, Kalshi's election markets would remain open during the congressional and presidential elections of 2024.[12]

In the leadup to the elections, voters could turn to prediction markets like Kalshi for information, in addition to traditional polls and forecasting models.[13] The prediction markets, unlike traditional sources, showed not who voters hoped would win, but who they expected to win.[14] Some commentators expressed worries about traders manipulating the markets to sway the election.[15] Others saw evidence of manipulation on unregulated prediction markets operating abroad, such as Polymarket.[16] But throughout, the prediction markets

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[5] *Id.* at *1. To prevent the contracts from going public, the CFTC had issued an order stating that it had determined the contracts involved gaming and unlawful activity, and were against the public interest, pursuant to the "special rule" for event contracts in the Commodity Exchange Act. *Id.*

[6] *Id.*

[7] Oliver Dale, *Kalshi Introduces U.S. Election Prediction Markets Following Court Victory*, BLOCKONOMI (Sep. 13, 2024), https://blockonomi.com/kalshi-introduces-u-s-election-prediction-markets-following-court-victory [perma.cc/D6UA-EZ2T].

[8] *Id.*

[9] *Kalshi I*, 2024 WL 4164694, at *4. In other words, the market gave Republicans a roughly 75% chance of victory. *See* Justin Wolfers & Eric Zitzewitz, *Interpreting Prediction Market Prices as Probabilities* 1 (Fed. Rsrv. Bank of S.F., Working Paper 2006-11, 2006), http://www.frbsf.org/publications/economics/papers/2006/wp06-11bk.pdf [perma.cc/SC3X-K67J] (providing a formal model showing that prediction market prices can plausibly be interpreted as the mean beliefs of a given market).

[10] *Kalshi II*, 119 F.4th at 60.

[11] *Id.* In its opinion, the circuit court rejected the agency's argument that the public would be irreparably harmed if a stay were not granted. *Id.*

[12] *See id.* (describing the procedural posture of the case); Dylan Matthews, *The $2 Billion Election Betting Craze, Explained*, VOX, https://www.vox.com/future-perfect/379379/election-bets-predictions-explained-trump-harris-polymarket-kalshi [perma.cc/3EGH-2RJK] (Oct. 25, 2024) (reporting on the emergence of prediction markets, including Kalshi, during the 2024 presidential election in the United States).

[13] *See* Matthews, *supra* note 12 (describing the variety of polls, forecasting models, and prediction markets available to voters in autumn 2024).

[14] *Id.*

[15] *See* Sarah Kessler, *Should Betting on Elections Be Legal?*, N.Y. TIMES: DEALBOOK NEWSL. (Sep. 14, 2024), https://www.nytimes.com/2024/09/14/business/dealbook/betting-elections-odds.html [perma.cc/JEB3-X3YT] (explaining why some people, including lawmakers, are concerned about potential market manipulation).

[16] *See* Sam Learner & Oliver Roeder, *Burst of Trades Inflates Trump's Margin in Election Prediction Markets*, FIN. TIMES (Oct. 18, 2024), https://www.ft.com/content/11ac92f4-02e4-4313-99b8-264182b74b4b [perma.cc/DCW9-ZLRH] (describing unusual trading activity on Polymarket that

showed a close race leaning toward Trump—and when the former president won with a wider margin of victory than expected, fans of prediction markets touted their superiority over traditional polls.[17]

When the dust finally settles on the 2024 elections, the comparison between polls and prediction markets will be a helpful data point in the pragmatic discussion about whether political prediction markets are truly useful.[18] But this Note addresses a slightly different question: useful or not, are political prediction markets legal?[19]

To answer that question, this Note examines the statutes and regulations governing political prediction markets, finding that they are probably legal, but that the applicable laws are contradictory and unclear.[20] Part I explains the history of political prediction markets, the relevant legal framework, and an illuminating case study: Kalshi's lawsuit against the CFTC.[21] Part II uses that lawsuit as a starting point to discuss the best arguments for and against viewing election markets as legal under current law.[22] Finally, Part III concludes that

boosted Donald Trump's predicted chance of victory on the platform to 62%). The trading activity was later traced to an independent trader living in France, whom the media dubbed "the 'French whale.'" Matthews, *supra* note 12. He placed bets on Trump's victory after informally polling voters in swing states and asking them who they expected their neighbors to vote for—not who they themselves planned to vote for—to eliminate the problem of "shy" Trump voters. Joe Nocera, *How a French Whale Made $85 Million off Trump's Win*, FREE PRESS (Nov. 26, 2024), https://www.thefp.com/p/french-whale-makes-85-million-on-polymarket-trump-win [perma.cc/F9EY-7LJT].

[17] *See* Matthews, *supra* note 12 (stating the election odds from a variety of sources as of late October); Alex Tabarrok, *Prediction Markets for the Win*, MARGINAL REVOLUTION (Nov. 7, 2024), https://marginalrevolution.com/marginalrevolution/2024/11/prediction-markets-for-the-win.html [perma.cc/9GNH-DQMZ] (claiming the relative success of prediction markets compared with traditional polls and forecasting models as evidence of their superior predictive power). In late October 2024, forecasting models from the *Economist*, *FiveThirtyEight*, and Nate Silver's *Silver Bulletin* placed the chances of a Trump victory from 51% to 53.7%. Matthews, *supra* note 12. Likewise, in mid-October, a *New York Times* poll showed 49% of voters planning to vote for Harris and 47% planning to vote for Trump (although readers should note that those units are not interchangeable with the probabilities generated by prediction markets because traditional polls measure who voters *hope* will win, counting up the planned votes on each side, whereas prediction markets measure who voters *expect* to win, aggregating their best guesses and factoring in how confident they are of their predictions). *Id.* In contrast, by late October, Kalshi's presidential election market showed Trump with a 61% chance of victory, and Polymarket showed Trump with a 64.3% chance. *Id.* For a nuanced look at whether Polymarket's election market results constitute a victory for prediction markets, see Scott Alexander, *Congrats to Polymarket, but I Still Think They Were Mispriced*, ASTRAL CODEX TEN (Nov. 7, 2024), https://www.astralcodexten.com/p/congrats-to-polymarket-but-i-still [perma.cc/2SPB-8Y44].

[18] *See, e.g.*, Vitalik Buterin, *From Prediction Markets to Info Finance*, VITALIK BUTERIN'S WEBSITE (Nov. 9, 2024), https://vitalik.eth.limo/general/2024/11/09/infofinance.html [perma.cc/8RNH-ZCDX] (discussing the effectiveness of Polymarket as a source of information while election results gradually emerged).

[19] *See infra* notes 135–270 and accompanying text.

[20] *See infra* notes 225–242 and accompanying text.

[21] *See infra* notes 24–134 and accompanying text.

[22] *See infra* notes 135–218 and accompanying text.

because political prediction markets benefit society, Congress should clarify that they are allowed.[23]

I. WHAT ARE POLITICAL PREDICTION MARKETS?

Political betting in the United States has been present since the election of George Washington, and early political onlookers also frequently relied on the betting odds to predict election outcomes.[24] More recently, however, that practical approach has been supplemented by theoretical explanations for why markets are so good at predicting outcomes: they provide a mechanism for synthesizing information scattered across society.[25] Those theories, in turn, fostered the creation of markets specifically designed to collect knowledge, where distilling information from society was the goal, not just a useful side-effect.[26] As a result, prediction markets began to proliferate in the 1990s and early 2000s, seeking to improve decision-making and provide more accurate information about everything from monthly printer sales to presidential elections.[27]

But the regulation of prediction markets has not always dovetailed cleanly with advances in economic theory.[28] In the United States, gambling is generally prohibited.[29] Even insurance and stock trading were once prohibited as ille-

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[23] *See infra* notes 219–270 and accompanying text.

[24] Paul W. Rhode & Koleman S. Strumpf, *Historical Presidential Betting Markets*, 18 J. ECON. PERSPS. 127, 128–29 (2004).

[25] *See generally* F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945) (explaining how decentralized markets, in contrast to centrally planned systems, successfully aggregate widely dispersed knowledge via prices).

[26] *See* Robin Hanson, *Idea Futures: Encouraging an Honest Consensus*, EXTROPY: J. TRANSHUMANIST THOUGHT, Winter 1991–92, at 7, 8 [hereinafter Hanson, *Idea Futures*] (providing a detailed blueprint for a potential market in scientific policy ideas and predictions); Joyce E. Berg, Forrest D. Nelson & Thomas A. Rietz, *Prediction Market Accuracy in the Long Run*, 24 INT'L J. FORECASTING 285, 286 (2008) (explaining the Iowa Electronic Markets, prediction markets set up at the University of Iowa in 1988 for the purpose of predicting election outcomes).

[27] *See* CASS R. SUNSTEIN, INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE 108–18 (2006) (describing contemporary examples of prediction markets in practice, including presidential election markets at the University of Iowa and internal printer sales markets at Hewlett Packard).

[28] *See* Kenneth J. Arrow et al., *The Promise of Prediction Markets*, 320 SCIENCE 877, 878 (2008) (highlighting the "legal impasse" preventing wider use of prediction markets and advocating for "safe harbors" to allow for their further use and development).

[29] Robin D. Hanson, *Decision Markets*, IEEE INTELLIGENT SYS., May-June 1999, at 16, 18 [hereinafter Hanson, *Decision Markets*]. Although exceptions to the general prohibition now exist, each one must be justified by a specific benefit to the public before it is allowed. *Id.* And "information aggregation" has yet to be recognized as a purpose sufficiently beneficial to merit an exception to the general rule. *Id.* Note, however, that gambling today is largely regulated at the state level (with the exception of some federal laws to address internet gambling, which crosses state borders), so gambling laws vary state by state. John T. Holden & Ryan M. Rodenberg, *Modern Day Bucket Shops?: Fantasy Sports and Illegal Exchanges*, 6 TEX. A&M L. REV. 619, 622 (2019). Financial markets, in contrast, are generally regulated at the federal level. *See* Christine Hurt, *Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox*, 86 B.U. L. REV. 371, 401 (2006) (comparing the regulation of securities with the regulation of gambling).

gal speculation.[30] Over time, however, exceptions to that general prohibition have emerged: insurance, stock trading, horse racing, lotteries, casinos, and eventually sports betting and financial derivatives.[31] Each was seen to have an acceptable purpose beyond mere wagering (lotteries, for example, raised public revenue).[32] Today, commodity futures are another exception, deemed to be in the public interest primarily because they can help farmers hedge against the risk of fluctuating harvests (and secondarily because they promote price discovery).[33] That exception extends to contracts that turn on the outcome of events.[34] The limits of these "event contracts"—and the scope of the CFTC's authority to review them—have important implications for the future of prediction markets, and especially for prediction markets that focus on elections.[35]

To show how we got here, Section A of this Part outlines the history of political prediction markets.[36] Section B then sketches the legal framework that governs them.[37] And Section C describes the litigation between Kalshi and the CFTC, which illuminates the contours of the broader debate.[38]

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[30] Hanson, *Decision Markets*, *supra* note 29, at 18. *See generally* Roy Kreitner, *Speculations of Contract, or How Contract Law Stopped Worrying and Learned to Love Risk*, 100 COLUM. L. REV. 1096, 1096 (2000) (describing the legal difficulties in distinguishing illicit "gambling" from legitimate risk hedging at the turn of the twentieth century, particularly for the life insurance and commodity futures industries).

[31] *See* Hanson, *Decision Markets*, *supra* note 29, at 18 (describing the evolution of laws regulating financial markets in the U.S.); Joshua Robinson, Jared Diamond & Robert O'Connell, *America Made a Huge Bet on Sports Gambling. The Backlash Is Here.*, WALL ST. J. (Mar. 28, 2024), https://www.wsj.com/sports/ohtani-sports-gambling-scandal-927fdd22 [perma.cc/3P8L-GD6H] (explaining the legalization of sports betting and some of its effects).

[32] Hanson, *Decision Markets*, *supra* note 29, at 18.

[33] *See id.* (describing the exceptions); 7 U.S.C. § 5(a) (stating that the transactions governed by the statute implicate the "national public interest" because they offer "a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities"). In commodity futures transactions, the parties agree "to buy or sell a particular commodity at a future date." *Basics of Futures Trading*, COMMODITY FUTURES TRADING COMM'N, https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/FuturesMarketBasics/index.htm [perma.cc/SW9U-KKFC].

[34] *See* 7 U.S.C. § 7a-2(c)(5)(C)(i) (providing a "special rule for review and approval of event contracts").

[35] *See* Brief of Prof. Joseph A. Grundfest as Amicus Curiae in Support of Plaintiff-Appellee and Affirmance at 4, *Kalshi II*, 119 F.4th 58 (D.C. Cir. 2024) (No. 24-5205) (emphasizing the significance of the court's interpretation of the CFTC's authority to review and regulate event contracts for the future of prediction markets).

[36] *See infra* notes 39–87 and accompanying text.

[37] *See infra* notes 88–112 and accompanying text.

[38] *See infra* notes 113–134 and accompanying text.

A. History of Prediction Markets

Before prediction markets, there was gambling.[39] And just as there are now prediction markets for elections, there was gambling on elections in the United States dating back to the country's founding era.[40] By the late 1800s, election betting was an organized and public (although often illegal) activity.[41] In the early 1900s, New York became the hub of national election betting.[42] Specialized firms on Wall Street coordinated the wagering, and at times, the volume of bets on elections was greater than the volume of trades on stocks and bonds.[43] Moreover, election betting was not an underground activity.[44] Brokers called out the odds to crowds congregated at the informal Curb Exchange or the New York Stock Exchange, and newspapers—including the New York Times—reported the odds almost every day in the months leading up to an election.[45]

American betting markets before World War II were known for their ability to predict the winners of elections.[46] From 1884 to 1940, the betting odds one month before the presidential election favored the eventual winner in all

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[39] *See* Hanson, *Decision Markets*, *supra* note 29, at 18 (tracing the history of gambling regulations and identifying those regulations as a roadblock to the adoption of "decision markets"). Whether prediction markets are themselves a form of gambling remains a disputed question. *See* Brief of Appellee KalshiEx LLC at 47–50, *Kalshi II*, 119 F.4th 58 (D.C. Cir. 2024) (No. 24-5205) (contending that the CFTC's interpretation of the Commodity Exchange Act would classify all event contracts as potentially illicit gambling).

[40] *See* Rhode & Strumpf, *supra* note 24, at 128 (explaining the history of betting on presidential elections and comparing this to modern election prediction markets such as the Iowa Electronic Market).

[41] *Id.* A magazine article from 1901 reports that the election between William McKinley and William Jennings Bryan generated half a million bets, including a wide variety of "freak bet[s]" where public humiliation rather than money was on the line:

> Losers have carted winners for miles in wheelbarrows, whiskers have been cut in all conceivable styles, heads shaved; stylish young men, dressed in their finest apparel, have worked as waiters and domestic servants, and have even dug ditches; while several losers have had to submit to mock funerals and actual burial alive.

E. Leslie Gilliams, *Election Bets in America*, STRAND MAG., Feb. 1901, at 185, 185.

[42] Rhode & Strumpf, *supra* note 24, at 128.

[43] *Id.*

[44] *See id.* (describing the public nature of election betting in New York at the turn of the twentieth century).

[45] *Id.* The Curb Exchange was an informal, outdoor stock exchange that operated as an unregulated alternative to the New York Stock Exchange. Ann Daly, *"The New York Curb Market . . . Which Has No Organization Whatever": The Enclosure of New York's Last Outdoor Stock Market, 1900–1921*, GOTHAM CTR. FOR N.Y.C. HIST. (Oct. 9, 2018), https://www.gothamcenter.org/blog/the-new-york-curb-market-which-has-no-organization-whatever-the-enclosure-of-new-yorks-last-outdoor-stock-market-1900-1921 [perma.cc/2KJW-P6D7]. At the Curb Exchange, clerks inside brokerage houses communicated orders and prices to traders in the street below, and "any white man could simply walk up to the market and begin trading . . . ." *Id.* In 1921, the exchange moved indoors and became the American Stock Exchange, or AMEX. *Id.*

[46] Rhode & Strumpf, *supra* note 24, at 129.

but one election.[47] In addition, the markets correctly identified which presidential elections would be extremely close.[48] By 1940, however, more vigorous enforcement of New York state laws banning election gambling, along with the emergence of scientific polling, effectively eliminated these public and organized political betting markets.[49]

Around the same time that Wall Street's political betting markets were winding down, economists began to formulate theories that helped explain why those markets had produced such accurate information.[50] In 1945, Friedrich Hayek published an article called "The Use of Knowledge in Society," for which he would later receive a Nobel Prize.[51] In the article, Hayek showed that prices serve a dual purpose: in addition to facilitating the basic division of labor, they also communicate valuable information.[52] When the price of an item rises, for example, a buyer can infer that it has become more scarce, even if they do not know why.[53] The buyer can then accordingly adjust their spending on that item relative to other items.[54] Hayek's primary aim in writing the article was to illustrate why socialist central planning was doomed to fail—prices form a vast web of ever-changing, localized knowledge that cannot be encompassed by a single person or planning board.[55] But in doing so, he also laid the theoretical groundwork for prediction markets.[56] If prices in a market

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[47] *Id.* In 1916, Charles Evans Hughes lost to Woodrow Wilson despite being favored by the betting markets during the month before the election—although the odds had narrowed to even by the time voting concluded on election day. *Id.*

[48] *Id.* at 130. Along with the election of 1916, the elections of 1884, 1888, and 1892 were all close races, and the betting markets showed essentially even odds throughout. *Id.* at 129.

[49] *Id.* at 139–40. The legalization of pari-mutuel bets on horse races in New York in 1939 may also have contributed to the declining popularity of election betting by providing an alternative type of wager with a quicker payout. *Id.* at 139.

[50] *See* SUNSTEIN, *supra* note 27, at 118–21 (explaining Hayek's theoretical contributions to understanding how prediction markets function).

[51] Hayek, *supra* note 25; *see also* Press Release, The Nobel Prize, The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1974 (Oct. 9, 1974), https://www.nobelprize.org/prizes/economic-sciences/1974/press-release/ [perma.cc/BMW3-2CMG] (announcing the 1974 Nobel Prize in economics, shared between Hayek and Gunnar Myrdal, "for their pioneering work in the theory of money and economic fluctuations and for their penetrating analysis of the interdependence of economic, social and institutional phenomena").

[52] *See* Hayek, *supra* note 25, at 528 (explaining that the price system allows for "not only a division of labor but also a coördinated utilization of resources based on an equally divided knowledge"). Prices facilitate the division of labor because they make it easier for one person to produce good *A* himself and buy good *B* from someone else, rather than having to either produce both goods himself or clumsily barter between items of unequal value. *See id.* (same).

[53] *Id.* at 526.

[54] *Id.*

[55] *See id.* at 524 (remarking that because "the economic problem of society is mainly one of rapid adaptation to" localized circumstances, including tastes and preferences, a centralized authority is unlikely to be able to solve it).

[56] SUNSTEIN, *supra* note 27, at 118–19. Hayek's hypothesis was later formalized in another seminal article, by the economist John Muth. *See* John F. Muth, *Rational Expectations and the Theory of*

inherently convey information, as Hayek demonstrated, why not design a market specifically to elicit that information?[57]

One of the first markets designed for the express purpose of aggregating information was the Iowa Electronic Markets (IEM).[58] Founded in 1988 by faculty at the University of Iowa's Tippie College of Business, the IEM is widely known as the longest-running active prediction market.[59] In the IEM, the payoff for a given election contract equals $1 times the vote share of the selected candidate.[60] For example, if a candidate ultimately attains a vote share of 51%, the contract will pay out $51.[61] As a result, a trader who expects the candidate's vote share to be 51% would be willing to pay up to $50.99 for the contract, and the contract's price at any given time prior to the election therefore reflects the market's predicted vote share for that candidate.[62]

Unlike traditional polls or panels of experts, continuous trading allows for the incorporation of new information, and the ability to invest different amounts allows the market to reflect each trader's confidence in their prediction.[63] And, tellingly, the Iowa markets' results have broadly vindicated Hayek's theory of markets and information: from 1988 to 2004, the IEM presidential election market has predicted the eventual vote share of each party more accurately than polls seventy-four percent of the time, and it outperforms polls even more strikingly over the long term (more than one hundred days before an election).[64]

Price Movements, 29 ECONOMETRICA 315, 315–17 (1961) (providing a formal economic model to explain why industry expectations are so accurate). Echoing Hayek, Muth found that "[industry] expectations, since they are informed predictions of future events, are essentially the same as the predictions of the relevant economic theory." *Id.* at 316. Unlike Hayek's paper, however, which included no equations, Muth's paper was chock full of them. *See generally id.*

[57] *See* SUNSTEIN, *supra* note 27, at 104 (characterizing prediction markets as a deliberate distillation of "the information-aggregating properties of markets").

[58] Berg, Nelson & Rietz, *supra* note 26, at 286. In an article reviewing the performance of the Iowa Electric Markets (IEM) following the 1988 presidential election, the authors allude to "related markets run at the University of Rochester, California Institute of Technology, Princeton University, the Wharton School of the University of Pennsylvania, and the Brookings Institution during the 1988 campaign," but those markets appear to have been less publicized, more short-lived, or both. Robert Forsythe, Forrest Nelson, George R. Neumann & Jack Wright, *Anatomy of an Experimental Political Stock Market*, 82 AM. ECON. REV. 1142, 1142 n.1 (1992).

[59] Berg, Nelson & Rietz, *supra* note 26, at 286 n.1. The IEM remains active today, most recently displaying markets for the 2024 congressional elections, 2024 presidential nominations, and 2024 presidential election (as of March 21, 2025). *Recent Markets*, IOWA ELEC. MKTS., https://iemweb.biz.uiowa.edu/markets/recent-markets/ [perma.cc/KSU4-L4LP].

[60] Berg, Nelson & Rietz, *supra* note 26, at 288.

[61] *See id.* (explaining the mechanics of the IEM's contracts).

[62] *See id.* (same).

[63] *Id.* at 289–90.

[64] *See id.* at 287 (tracking the IEM's performance in presidential elections in comparison to an aggregate of more than nine hundred traditional polls, and finding that it outperforms polls over the long term as well as the short term); Forsythe et al., *supra* note 58, at 1142–43 (framing a review of the IEM's performance in the 1988 election as a direct test of Hayek's hypothesis and finding that the

Around the same time, the economist Robin Hanson was also building on Hayek's theory.[65] Throughout the 1990s, Hanson advocated for the creation of new forms of prediction markets, applying Hayek's idea of markets aggregating information to the realm of policy decision-making.[66] In Hanson's view, public debate among experts was a flawed method of forecasting the future, rife with bias and misaligned incentives.[67] Rather than rewarding experts for popular opinions today, Hanson suggested rewarding experts for accurate forecasts tomorrow.[68] For example, experts could make predictions by buying contracts of the form "$1 if person on Mars by 2020" or "$1 if average mortality rates decline with national health insurance."[69] The resulting market prices would provide a more accurate expert consensus on contemporary policy questions, because each expert's money would be on the line.[70]

During the early 2000s, a wide variety of prediction markets emerged, although many lasted only for a short time.[71] Some were public and open to

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prediction market "dominat[ed]" traditional polls). In 2014, Joyce Berg and Thomas Rietz updated the findings from their 2008 paper, *supra* note 26, to include the results of the 2008 and 2012 presidential elections. Joyce E. Berg & Thomas A. Rietz, *Market Design, Manipulation, and Accuracy in Political Prediction Markets: Lessons from the Iowa Electronic Markets*, 47 PS: POL. SCI. & POL. 293, 293–94 (2014). The authors noted that the IEM's "average absolute forecast error" in U.S. presidential races was 1.13 percentage points, including the two more recent elections, but they did not compare the performance of the IEM with that of traditional polls as they did in the earlier paper. *Id.* at 293.

[65] *See* Hanson, *Idea Futures*, *supra* note 26, at 8–9 (advocating for an early form of prediction markets to help answer questions about the future of science and technology).

[66] *See id.* at 7–8 (proposing prediction markets as a new form of "social institution" that would improve on existing institutions such as peer review or public debate by incentivizing honest contributions).

[67] *Id.*

[68] *Id.*

[69] *See id.* at 9. (proposing the Mars example); Hanson, *Decision Markets*, *supra* note 29, at 17 (proposing the national health insurance example, among others).

[70] Hanson, *Idea Futures*, *supra* note 26, at 9. Hanson later expanded this idea to suggest a form of government by prediction market, that he called "futarchy" (presumably from the word "future"). *See* Robin Hanson, *Shall We Vote on Values, but Bet on Beliefs?*, 21 J. POL. PHIL. 151, 152–53 (2013) [hereinafter Hanson, *Shall We Vote*] (proposing the concept); Robin D. Hanson, *About Me*, GEO. MASON UNIV., https://mason.gmu.edu/~rhanson/home.html [perma.cc/FK4K-MHXW] (assigning the name "futarchy" to the new form of government). Under this form of government, voters would democratically decide the top-level aims of government, but the government would rely on speculative markets to determine which policies were most likely to effectively implement those aims. Hanson, *Shall We Vote*, *supra*, at 152–53.

[71] *See* SUNSTEIN, *supra* note 27, at 227–29 (listing active prediction markets as of 2006). Several of the listed exchanges, including the Austrian Electronic Markets and Intrade, no longer appear to exist. *See, e.g.*, AUSTRIAN ELEC. MKTS., http://zwickl.ibab.tuwien.ac.at/apsm [perma.cc/H5XB-6TD9] (producing an error message on its website); *About Intrade*, INTRADE.COM, https://intrade.com/history [perma.cc/5C7P-HANG] (reporting that "Intrade closed its proprietary trading platform in early 2013").

anyone, following the model of the IEM.[72] The Hollywood Stock Exchange, for example, allowed users to predict box office sales and Oscar winners (albeit using fake money), while the Tech Buzz Market allowed users to predict the fortunes of new technologies (also using fake money).[73] Other markets were internal, as companies began to appreciate Hanson's concept of "decision markets."[74] For example, Hewlett Packard collaborated with the California Institute of Technology to create internal markets predicting the number of monthly printer sales, and both Google and Microsoft created internal markets to more accurately forecast the launch dates and revenues of new products.[75] In 2003, the Department of Defense even proposed a Policy Analysis Market, open to the public, to forecast geopolitical events such as the growth of foreign economies, the deaths of national leaders, or even the possibility of terrorist attacks.[76] It was quickly canceled, however, following a backlash among senators and others who questioned the morality of wagering on events involving violence.[77]

In 2008, a number of influential academics, including several Nobel laureates, published an article advocating for "safe harbor[s]" for prediction markets, possibly marking the high-water point for academic interest in the subject.[78] Today, however, a number of prediction markets nonetheless remain relevant.[79] Recent innovations include a market to predict which scientific pa-

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[72] *See* SUNSTEIN, *supra* note 27, at 111, 228 (describing the markets); *Frequently Asked Questions*, IOWA ELEC. MKTS., https://iemweb.biz.uiowa.edu/about-iem/faq/ [perma.cc/SE47-J3DE] (clarifying that anyone can participate in the IEM's political prediction markets).

[73] *See* SUNSTEIN, *supra* note 27, at 111, 228 (describing first the Hollywood Stock Exchange and then the Tech Buzz Market).

[74] *See id.* at 112–17 (providing examples of intracompany prediction markets); Hanson, *Decision Markets*, *supra* note 29, at 17 (proposing the novel concept of "speculative markets focusing on particular decisions").

[75] *See* SUNSTEIN, *supra* note 27, at 112–17 (describing the rise of corporate internal prediction markets during the 2000s).

[76] *Id.* at 107.

[77] *Id.* The critics, unsurprisingly, focused more on the conflict-related predictions than the economics-related ones. *Id.*

[78] *See* Arrow et al., *supra* note 28, at 877 (explaining the benefits of prediction markets). The article was co-authored by nineteen prominent academics, including five economists who have won the Nobel Prize: Kenneth Arrow, Paul Milgrom, Thomas Schelling, Robert Shiller, and Vernon Smith. *See Kenneth J. Arrow*, THE NOBEL PRIZE, https://www.nobelprize.org/prizes/economic-sciences/1972/arrow/facts/ [perma.cc/XMG7-YT8P] (summarizing the laureate's contributions to economics, resulting in the 1972 prize); *Paul R. Milgrom*, THE NOBEL PRIZE, https://www.nobelprize.org/prizes/economic-sciences/2020/milgrom/facts/ [perma.cc/SGA8-NHSL] (same, for the 2020 prize); *Thomas C. Schelling*, THE NOBEL PRIZE, https://www.nobelprize.org/prizes/economic-sciences/2005/schelling/facts/ [https://perma.cc/3SNY-V7AV] (same, for the 2005 prize); *Robert J. Shiller*, THE NOBEL PRIZE, https://www.nobelprize.org/prizes/economic-sciences/2013/shiller/facts/ [perma.cc/D2Q8-DCQF] (same, for the 2013 prize); *Vernon L. Smith*, THE NOBEL PRIZE, https://www.nobelprize.org/prizes/economic-sciences/2002/smith/facts/ [perma.cc/4UB2-YYJK] (same, for the 2002 prize).

[79] *See* Matthews, *supra* note 12 (explaining the relevance of prediction markets for the 2024 presidential election in the United States).

pers will be reproducible, as well as a news platform that uses artificial intelligence to aggregate forecasts from other prediction markets, provide possible explanations for the numbers, and present them in the format of a traditional news program.[80]

For political forecasting, several key markets have emerged (or persisted).[81] In the United States, the IEM remains active today.[82] The IEM is a nonprofit with limited trading sizes, and it has received a "no-action" letter from the CFTC.[83] Likewise, PredictIt is a nonprofit with limited trading sizes operated by Victoria University of Wellington in New Zealand, and it has also received a no-action letter.[84] Manifold Markets, meanwhile, offers prediction markets on a variety of topics, political and otherwise—albeit using fake money.[85] Polymarket is another large player, although it is based outside of the United States and (at least officially) does not allow Americans to participate.[86]

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[80] *See* Anna Dreber et al., *Using Prediction Markets to Estimate the Reproducibility of Scientific Research*, 112 PNAS 15343, 15343 (2015), https://doi.org/10.1073/pnas.1516179112 [perma.cc/JU7M-LJVM] (reporting the results of a prediction market designed to forecast which papers in The Reproducibility Project: Psychology would successfully replicate their results); Packy McCormick, *Introducing Boring News*, NOT BORING BY PACKY MCCORMICK (Dec. 3, 2024), https://www.notboring.co/p/introducing-boring-news [perma.cc/6GK3-EAK6] (announcing the launch of a news program based on prediction markets).

[81] *See* Matthews, *supra* note 12 (describing the variety of political prediction markets involved in forecasting the 2024 elections).

[82] *See* IOWA ELEC. MKTS., *supra* note 59 (showing active markets for the 2024 elections). In Britain, by contrast, gambling on elections is broadly legal and not limited to prediction markets. *See* Rob Davies, *UK Election Betting Scandal: All You Need to Know About the World of Political Wagers*, THE GUARDIAN (June 22, 2024), https://www.theguardian.com/society/article/2024/jun/22/uk-election-betting-scandal-political-wagers [perma.cc/HX5V-8MPE] (explaining that political betting in the United Kingdom is regulated by the Gambling Commission, based on the Gambling Act 2005). As Jules Verne observed in *Around the World in Eighty Days*: "Everybody knows that England is the world of betting men, who are of a higher class than mere gamblers; to bet is in the English temperament." JULES VERNE, AROUND THE WORLD IN EIGHTY DAYS 31 (1873).

[83] Appellant's Brief at 6 n.7, *Kalshi II*, 119 F.4th 58 (D.C. Cir. 2024) (No. 24-5205). A no-action letter means the CFTC will allow the market to operate, even though it has not registered as a "designated contract market" with the agency. *Id.* at 5–6.

[84] *Id.* at 6 n.7. PredictIt, however, is currently in the middle of litigation against the CFTC following the CFTC's attempted revocation of its no-action letter in 2022. *See* Oliver Roeder, *Prediction Markets Can Tell the Future. Why Is the US So Afraid of Them?*, FIN. TIMES (Nov. 10, 2023), https://www.ft.com/content/9108f393-6a45-41a3-bd76-20581b19288e [perma.cc/N2VG-B2DX] (describing the litigation).

[85] *See generally Browse*, MANIFOLD, https://manifold.markets/ [perma.cc/M9FW-FZF5]. As of March 21st, 2025, the market displays an 11% chance for the question "Russia-Ukraine Ceasefire in Trump's First 90 Days?," a 52% chance for "Did COVID-19 come from a laboratory?," and a 37% chance for "In early 2028, will an AI be able to generate a full high-quality movie to a prompt?" *Id.*

[86] *See* Alexander Osipovich, *FBI Seizes Polymarket Founder's Phone in Raid of Home*, WALL ST. J., https://www.wsj.com/us-news/law/fbi-polymarket-ceo-investigation-75472d18 [perma.cc/WEF9-2M2A] (Nov. 13, 2024) (describing the crypto-based platform). Polymarket settled with the CFTC in 2022 after the CFTC accused it of running an unregistered exchange; since then, Polymarket has not allowed Americans to use the platform, although some traders report getting around the ban by using virtual private networks. *Id.* In November 2024, the FBI seized the phone of Polymarket's founder for

Finally, Kalshi is one of the newest prediction markets, allowing users to trade real money in amounts up to $100 million.[87]

B. The Legal Framework

Although gambling is generally illegal in the United States today, there are exceptions.[88] One exception is for financial derivatives, including commodity futures.[89] And the law treats event contracts as a subspecies of commodity futures.[90]

From 1974 to 2000, under the Commodity Exchange Act, an exchange had to demonstrate to the CFTC that its offerings were not against the public interest before it could become an officially sanctioned "designated contract market."[91] The statute did not specifically mention event contracts, and the earliest prediction markets, like the IEM, did not seek to register with the CFTC.[92] Rather, the agency granted the University of Iowa a "no-action" letter in 1993, allowing the IEM to continue operating on a limited basis without becoming a registered exchange.[93]

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undisclosed reasons (the founder, Shayne Coplan, claimed political retaliation for Polymarket's correct prediction of Donald Trump's victory). *Id.* In July 2025, however, Polymarket officially opened to U.S. traders for the first time, receiving the CFTC's approval as a Designated Contract Market. *See* COMMODITY FUTURES TRADING COMM'N, AMENDED ORDER OF DESIGNATION, IN THE MATTER OF THE PETITION OF QCX LLC D/B/A POLYMARKET US TO AMEND ITS ORDER OF DESIGNATION (Nov. 24, 2025), https://www.cftc.gov/media/12806/Polymarket%20US%20Amended%20Order%20of%20Designation/download [perma.cc/6JK2-7JGE] (reaffirming and slightly modifying the order of designation for Polymarket's U.S. operations).

[87] *See* Roeder, *supra* note 84 (describing Kalshi's platform, including the fact that individual users can wager up to $250,000, while "certain firms" can wager up to $100 million).

[88] Hanson, *Decision Markets*, *supra* note 29, at 18.

[89] 7 U.S.C. § 5(a). Derivatives are financial instruments whose prices reflect the value of underlying securities or commodities. *Futures Glossary*, COMMODITY FUTURES TRADING COMM'N, https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/CFTCGlossary/index.htm#D [perma.cc/TA97-2HDD].

[90] *See* 7 U.S.C. § 7a-2(c)(5)(C)(i) (providing a special rule for event contracts within the Commodity Exchange Act).

[91] *See* Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, § 207, 88 Stat. 1389, 1400 (requiring exchanges to prove "that transactions for future delivery in the commodity for which designation as a contract market is sought will not be contrary to the public interest" as a prerequisite for agency approval).

[92] *See id.* (mentioning only "the commodity" rather than specific types of commodities, such as orange juice futures or event contracts); Appellant's Brief, *supra* note 83, at 6 n.7 (noting the Iowa markets' unregistered status).

[93] Andrea M. Corcoran, CFTC No-Action Letter, CFTCLTR No. 93-66, 1993 WL 595741 (June 18, 1993). The limits included not profiting from the enterprise, capping the number of traders in a given election market at two thousand traders, and capping the investment by a single participant at $500. *Id.*

In 2000, however, Congress passed the Commodity Futures Modernization Act.[94] The new statute modified the Commodity Exchange Act, allowing registered exchanges to "self-certify" their offerings and list new contracts without prior CFTC approval.[95]

Finally, in 2010, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress further amended the provision, creating a new "[s]pecial rule" for event contracts.[96] Under the special rule, exchanges seeking to offer event contracts may still self-certify, but the CFTC can also conduct a public-interest review in some limited instances.[97] In those instances—when the agency determines that a contract involves terrorism, assassination, war, gaming, activity that violates state or federal law, or "other similar activity"—the CFTC may deem the event contract contrary to the public interest and disallow it.[98]

In addition to the Commodity Exchange Act, other state and federal laws may be relevant to the question of whether political prediction markets are legal—both because these laws provide useful definitions of words such as "gaming" and because the special rule for event contracts allows the CFTC to review contracts that involve activity that is "unlawful" under state or federal law.[99]

The Indian Gaming Regulatory Act, for example, is the only federal statute with "gaming" in the title.[100] It does not define gaming, but it does describe various categories of gaming activities, including "social games," bingo, and casino games, among others.[101] Nevada, meanwhile, treats gaming and gambling as roughly synonymous—although it also tends to assume that some sort of "game" is at the heart of the wager.[102] Idaho similarly defines gaming as "any and all gambling or games of chance."[103] Massachusetts, in contrast, de-

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[94] Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, 114 Stat. 2763, 2763 (codified at 7 U.S.C. § 7a-2(c)(1)).

[95] *See* 7 U.S.C. § 7a-2(c)(1) (providing that, in general, a registered exchange "may elect to list for trading . . . any new contract" as long as the exchange provides the CFTC with "written certification that the new contract . . . complies with" the rest of the Commodity Exchange Act).

[96] 7 U.S.C. § 7a-2(c)(5)(C); Appellant's Brief, *supra* note 83, at 9. The new special rule also encompasses "[s]waps contracts," but those are not relevant to this Note. *See* § 7a-2(c)(5)(C)(iii) (stating the rule for swaps).

[97] 7 U.S.C. § 7a-2(c)(5)(C)(i).

[98] *See id.* (listing the exceptions that trigger public interest review); *id.* § 7a-2(c)(5)(C)(ii) (stating that no contract deemed contrary to the public interest may be listed on an exchange).

[99] *See id.* § 7a-2(c)(5)(C)(i) (providing exceptions allowing agency public-interest review for transactions that involve "gaming" or "activity that is unlawful under any Federal or State law").

[100] *Kalshi I*, No. 23-3257, 2024 WL 4164694, at *9 (D.D.C. Sep. 12, 2024), *dismissed*, No. 24-5205, 2025 WL 1349979 (D.C. Cir. May 7, 2025); 25 U.S.C. § 2701.

[101] *Kalshi I*, 2024 WL 4164694, at *9 n.12.

[102] *See* NEV. REV. STAT. § 463.0153 (2021) (defining "'[g]aming' or 'gambling'" as operating or playing any game encompassed by § 463.0152); *id.* § 463.0152 (defining "'[g]ame' or 'gambling game'" as "any game played with cards, dice, equipment or any mechanical or electronic device or machine for money, property, checks, credit or any representative of value").

[103] IDAHO CODE § 23-902(5) (2024).

fines gaming as facilitating "any game for pay," and it defines gambling as the act of participating in such a game.[104]

The Unlawful Internet Gambling Enforcement Act, meanwhile, generally bars gambling over the internet.[105] It does not use the term gaming, referring instead to "bets" or "wagers."[106] The Act also excludes transactions on exchanges registered under the Commodity Exchange Act.[107]

Finally, a number of state laws prohibit most forms of gambling, although many states have recently legalized sports gambling.[108] Some states also expressly prohibit gambling on elections.[109] For example, in North Carolina, it is unlawful "to bet or wager any money or other thing of value on any election."[110] Illinois, Mississippi, Oregon, and Utah have similar laws.[111] And Delaware law appears to make any entity that facilitates the payment of an election bet liable for twice the value of the bet.[112]

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[104] MASS. GEN. LAWS ch. 23K, § 2 (2024).

[105] 31 U.S.C. §§ 5361–5367.

[106] *Kalshi I*, 2024 WL 4164694, at *9; 31 U.S.C. § 5362.

[107] 31 U.S.C. § 5362(1)(E)(ii). For example, because Kalshi is a registered exchange, its contracts are not covered by the Unlawful Internet Gambling Enforcement Act. *See id.* (excluding transactions on registered exchanges from the Act's definition of "bet or wager").

[108] *See State of Play: Sports Betting*, AM. GAMING ASS'N, https://www.americangaming.org/research/state-of-play-map/ [perma.cc/4BUB-LCMW] (showing that sports betting is legal in thirty-nine states, plus the District of Columbia, as of March 21, 2025); Kaitlyn Dunphy, *Following Suit with the Second Circuit: Defining Gambling in the Illegal Gambling Business Act*, 79 BROOK. L. REV. 1295, 1295 (2014) (explaining that gambling laws vary between states, and sometimes also vary depending on the type of game).

[109] *See, e.g.*, N.C. GEN. STAT. § 163-274(a)(6) (2025) (emphasis omitted) (making it a misdemeanor to place a bet on an election).

[110] *Id.*

[111] *See* 720 ILL. COMP. STAT. 5/28-1(A)(2) (2021) (stating that a person in Illinois "commits gambling" when they wager on "any political nomination, appointment or election"); MISS. CODE ANN. § 97-33-1 (2013) (prohibiting wagers or bets "upon the result of any election, event or contingency whatever," subject to a few exceptions including dog fights and betting while on a "cruise vessel"—it is unclear from the statute whether election bets on cruise vessels are allowed); OR. REV. STAT. § 260.635 (2025) (prohibiting any candidate or other person from betting on a pending election, "or on any event relating to it"); UTAH CODE ANN. § 20A-1-606(2)(a) (2018) (barring candidates and others from placing bets or wagers "of pecuniary value" on "any primary or election").

[112] *See* DEL. CODE ANN. tit. 15, § 5164 (2025) (providing for the "[l]iability of [a] stakeholder for paying [an] election bet"). The statute states:

> If any stakeholder, or person with whom any money or thing, laid as a wager or bet on the result of any election, or on the election or defeat of any candidate or person voted for thereat, shall be deposited, shall at any time either before or after such bet shall have been decided, pay over or deliver to either or both of the persons betting the same, or to any other person by the order or for the use of them, or either of them, the money or thing so illegally betted, every such stakeholder or depository shall forfeit and pay to any person who will sue for the same, double the amount of such wager or bet or double the value of the thing betted.

Id. The statute's other (much shorter) sentence states that either bettor can serve as a witness against the "stakeholder," suggesting that the stakeholder is some kind of intermediary. *See id.* Wisconsin

C. The Kalshi *Litigation*

Until recently, the CFTC had conducted only one public-interest review under the special rule for event contracts, finding that political event contracts offered by the North American Derivatives Exchange in 2011 were contrary to the public interest.[113] Today, however, questions about the scope of agency authority over political event contracts have reemerged in the form of litigation by several prominent prediction markets.[114] The most prominent of those lawsuits—and the one whose arguments most closely track the contours of the debate about political prediction markets' legality and the scope of the CFTC's oversight—is the lawsuit involving Kalshi.[115]

After Kalshi tried to offer event contracts based on congressional elections in 2023, the CFTC ordered the exchange not to issue the contracts, stating that they were against the public interest.[116] In the agency's view, it was authorized to review the new contracts because they involved both "gaming" and "activity unlawful under state or federal law," each of which is an enumerated exception to the general rule allowing exchanges to self-certify their offerings.[117] Kalshi disagreed, suing the CFTC and alleging its decision was arbitrary and capricious under the Administrative Procedure Act (APA).[118]

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similarly provides an avenue for "wagerer[s]" to sue for the recovery of gambled money from either the winner of the bet or a "stakeholder or 3rd person" where the money was deposited. WIS. STAT. § 895.056 (2025). Relevantly, Wisconsin's definition of "wagerer" includes a person who has placed a bet on "any game, *election*, . . . or on any future contingent or unknown occurrence . . . ." *Id.* § 895.056(1)(b) (emphasis added).

[113] Appellant's Brief, *supra* note 83, at 11. The contracts were based on races for both Congress and the presidency, and the CFTC found them reviewable because they purportedly involved "gaming." *Id.* It then found the contracts contrary to the public interest because they could not reasonably be used for either hedging risks or setting prices. *Id.* at 12. The North American Derivatives Exchanges appears not to have challenged the agency's decision. *See* Holden & Rodenberg, *supra* note 29, at 637–39 (describing the CFTC's order prohibiting the exchange's proposed political event contracts).

[114] *See* Roeder, *supra* note 84 (describing the legal proceedings involving Kalshi and PredictIt). PredictIt, like the Iowa Electronic Markets, operates under a no-action letter from the CFTC, that the agency issued in 2014. Appellant's Brief, *supra* note 83, at 6 n.7. In 2022, however, the agency rescinded its no-action letter and ordered the exchange to shut down, citing unspecified violations of the letter's terms. Clarke v. Commodity Futures Trading Comm'n, 74 F.4th 627, 633 (5th Cir. 2023). PredictIt successfully sued for a preliminary injunction of the agency's order, arguing it was arbitrary and capricious under the APA, although litigation continues on the merits. *Id.* at 635, 644 (providing the Fifth Circuit's ruling, after a district court let the motion languish and thus "denied" it). *See generally* CFTC Reply in Support of Motion for Judgment on the Pleadings, Clarke v. Commodity Futures Trading Comm'n, No. 1:24-CV-614 (W.D. Tex. Sep. 23, 2024) (showing recent proceedings in the district court).

[115] *See* Brief of Appellee KalshiEx LLC, *supra* note 39, at 16–17 (characterizing the CFTC's asserted authority over political event contracts as potentially limitless).

[116] *Kalshi I*, No. 23-3257, 2024 WL 4164694, at *1 (D.D.C. Sep. 12, 2024), *dismissed*, No. 24-5205, 2025 WL 1349979 (D.C. Cir. May 7, 2025).

[117] *Id.*

[118] *Id.*

In 2024, in *KalshiEX LLC v. Commodity Futures Trading Commission*, The U.S. District Court for the District of Columbia agreed with Kalshi.[119] According to the court, the contracts merely involved elections, and elections are neither gaming nor unlawful activity.[120] It defined "gaming" narrowly, rejecting the broader definition of gambling or betting on a contingent event and instead requiring the presence of a "game."[121] Even more crucially, it also defined "involve" narrowly, stating that a contract only "involves" an activity if that activity is the contract's underlying event.[122] The act of buying or selling the contract itself cannot constitute the activity.[123] Otherwise, the court reasoned, no event contracts would be exempt from the agency's public-interest review under the special rule because the contracts are themselves wagers on uncertain events.[124] Accordingly, buying or selling those contracts could be construed as gambling—and gambling is an "unlawful activity" in some states, one of the enumerated exceptions to the rule.[125] The court viewed that result as absurd, an exception engulfing the general rule.[126] As a result, the court found that the agency lacked the authority to review the contracts under the Commodity Exchange Act, and it struck down the agency's order, granting Kalshi's motion for summary judgment.[127] It did not reach the question of whether the agency correctly decided that the contracts were against the public interest.[128]

The CFTC promptly appealed.[129] It also sought an emergency stay of the district court's judgment in the interim, claiming that the public would be irreparably harmed by Kalshi's congressional contracts if the contracts were available during the final months before the 2024 elections.[130] The District of Columbia Circuit Court of Appeals disagreed.[131] Finding the agency's contentions about misinformation and market manipulation speculative and unsubstantiated, the court declined to issue a stay pending appeal.[132] It rested its decision on the

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[119] *See id.* (holding that the CFTC's order went beyond the agency's authority).

[120] *Id.*

[121] *See id.* at *7–9 (finding that "[g]aming [r]equires a [g]ame").

[122] *Id.* at *10–12. Thus, a contract based on the outcome on an election only "involves" elections. *See id.*

[123] *Id.*

[124] *Id.* at *12.

[125] *Id.*

[126] *See id.* (finding that the agency's reading of the statute would "effectively undo the Congressional amendment to the C[ommodity] E[xchange] A[ct] that eliminated the CFTC's across-the-board review").

[127] *Id.* at *13.

[128] *Id.*

[129] *Kalshi II*, 119 F.4th 58, 60 (D.C. Cir. 2024).

[130] *Id.* at 60, 64.

[131] *See id.* at 64 (holding that the CFTC failed to show that the irreparable harms it posited were likely to come about).

[132] *See id.* at 60 (observing that the agency "has failed at this time to demonstrate that it or the public will be irreparably injured absent a stay").

CFTC's failure to prove irreparable harm, however, and did not discuss the merits.[133] As a result, Kalshi's congressional contracts were open to the public during the final months before the election, but the CFTC's appeal continued.[134]

II. Are Political Prediction Markets Legal?

Whether political prediction markets are legal depends on a number of factors.[135] Section A of this Part looks at the threshold question of whether the CFTC has the authority to conduct public-interest reviews of political event contracts.[136] Section B then asks whether such contracts are in fact against the public interest.[137]

A. Agency Authority to Review Election Contracts

The first question is whether the CFTC can review political event contracts at all.[138] If not, exchanges like Kalshi can simply self-certify their contracts.[139] If so, however, the agency can move on to evaluate the contracts' impact on the public and potentially ban them on that basis.[140]

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[133] *See id.* at 63–64 (characterizing the merits question as "close and difficult").

[134] *See id.* at 60 (denying the motion for a stay pending appeal). Oral arguments on the merits took place at the D.C. Circuit on January 17, 2025. *Recordings*, U.S. Ct. of Appeals for the D.C. Cir., https://media.cadc.uscourts.gov/recordings/bydate/2025/1 [perma.cc/F4T2-ZKKV]. After oral arguments, the CFTC submitted to the court a cease-and-desist letter from the Nevada Gaming Control Board to Kalshi, contending that the letter supported the agency's interpretation of both "gaming" and "'activity that is unlawful activity under any' state law" with respect to Kalshi's election contracts. Letter Pursuant to Fed. R. App. Proc. 28(j) Advising of Additional Authorities Filed by CFTC at 1, *Kalshi II*, 119 F.4th 58 (No. 24-5205). In response, Kalshi noted that because the Nevada Gaming Control Board asserted that *all* "event-based contracts" were unlawful in Nevada unless approved by the Board, its definition of gaming as wagering—like the agency's—was absurdly overbroad. Response to Letter Rule 28j Authorities, Letter Filed by KalshiEX LLC at 1, *Kalshi II*, 119 F.4th 58 (No. 24-5205).

[135] *See infra* notes 135–218 and accompanying text (discussing the arguments for and against agency review of election-based event contracts, as well as the arguments for and against viewing such contracts as contrary to the public interest).

[136] *See infra* notes 138–177 and accompanying text.

[137] *See infra* notes 178–218 and accompanying text.

[138] *See* 7 U.S.C. § 7a-2(c)(5)(C) (providing a "[s]pecial rule for review and approval of event contracts and swaps contracts"). For this discussion, I use the term "political event contract" to mean a contract predicated on the outcome of an ordinary, peaceful election, not a violent political event that could fall under the ambit of terrorism, assassination, or war. *See id.* § 7a-2(c)(5)(C)(i)(II)–(IV) (enumerating the involvement of terrorism, assassination, or war as a possible ground for CFTC review of an event contract).

[139] *See id.* § 7a-2(c)(1) (stating that registered exchanges can generally list new contracts by simply sending the CFTC "a written certification" that the contracts comply with the Commodity Exchange Act).

[140] *See id.* § 7a-2(c)(5)(C)(i) ("[T]he Commission may determine that such agreements, contracts, or transactions are contrary to the public interest if . . . ."); *id.* § 7a-2(c)(5)(C)(ii) ("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 . . . .").

The Commodity Exchange Act's special rule for event contracts sets the framework for this debate.[141] As outlined above, it allows the CFTC to deem contracts against the public interest if they "involve" any of several specific activities: terrorism, assassination, war, gaming, activity unlawful under state or federal law, or "other similar activity" the agency finds to be contrary to the public interest.[142]

Contracts based on the outcome of elections clearly do not involve terrorism, assassination, or war, so advocates of agency review have focused primarily on "gaming" and "activity unlawful under any . . . State law."[143] In particular, the CFTC has argued in its litigation against Kalshi that the platform's election contracts involve both gaming and unlawful activity because the contracts themselves constitute gambling on elections, and gambling is both synonymous with gaming and against the law in several states.[144] But that argument rests on several contentious premises.[145]

First, it assumes that a contract "involves" an activity if the act of trading the contract constitutes that activity, not just if the activity is the contract's underlying event.[146] More concretely, the argument assumes that buying or selling one of Kalshi's congressional election contracts constitutes gambling, even if the election itself—the event that determines the contract's payoff—has nothing to do with gambling.[147] If this is true, then the election contracts inher-

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141 *See generally id.* § 7a-2(c)(5)(C) (creating a special rule for the review and approval of event contracts).

142 *Id.* § 7a-2(c)(5)(C)(i). Note that four of the activities triggering agency review—terrorism, assassination, gaming, and war—are specific and concrete, whereas "activity that is unlawful" is broader but still clearly defined, and "other similar activity" lacks any clear boundaries at all. *See id.* (listing the triggering activities). The heightened scrutiny of event contracts based on terrorism, assassination, and war may stem from the Department of Defense's aborted Policy Analysis Market from the early 2000s. *See supra* note 76 and accompanying text (describing the Policy Analysis Market).

143 *See* Appellant's Brief, *supra* note 83, at 1–2 (quoting 7 U.S.C. § 7a-2(c)(5)(C)) (defending the CFTC's review of Kalshi election contracts based on their purported involvement with gaming and unlawful activity). Proponents of agency review have not (so far) focused on "other similar activity," at least in the Kalshi litigation, but that prong also presents a plausible argument for broad agency authority for review, as this Note discusses below. *See infra* notes 169–177 and accompanying text (explaining this possibility).

144 *See* Appellant's Brief, *supra* note 83, at 1 (characterizing Kalshi's congressional control contracts as "election-gambling contracts"). The amicus brief from the nonprofit Better Markets, Inc.—the only amicus to write in support of the CFTC's position—echoes this reasoning. *See* Brief Amicus Curiae, by Consent, of Better Markets, Inc. in Support of Appellant and Reversal at 3, *Kalshi II*, 119 F.4th 58 (D.C. Cir. 2024) (No. 24-5205) (referring to the contracts as "Kalshi's election gambling contracts").

145 *See infra* notes 146–168 and accompanying text (surfacing and describing these premises).

146 *See* Appellant's Brief, *supra* note 83, at 28–31 (asserting that the meaning of "involve" in the statute relates to more than just an event contract's underlying event).

147 *See id.* at 31 (connecting the broad definition of "involve" to the purported "[e]lection [g]ambling" of Kalshi's congressional event contracts).

ently "involve" gambling, and the CFTC can review them.[148] If not, then they do not involve gambling, and the CFTC cannot review them on that basis.[149]

In support of its argument, the CFTC primarily contends that the plain meaning of "involve" is broad enough to encompass the contract as a whole, not just its underlying activity.[150] The agency notes that the statute does not define the term, and that dictionary definitions generally support its expansive interpretation.[151] It also points to other parts of the statute that use the phrase "based upon" to refer to a contract's underlying activity, suggesting that the use of "involve" in the public-interest-review provision therefore indicates a different, broader meaning.[152]

Kalshi, in contrast, responds that the statute's "structure and context" indicate a narrower definition, where "involve" relates only to the contract's underlying activity.[153] The company contends that the CFTC's broader definition is unworkable because it cannot be applied coherently to every activity enumerated in the statute: the act of buying or selling an event contract cannot constitute terrorism or assassination, for example.[154] In addition, it argues that the agency's interpretation renders the public-interest-review provision either pointless or all-encompassing.[155] If trading an event contract inherently violates federal law, then it is prohibited regardless of the CFTC's ability to con-

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[148] *See id.* (same). The CFTC can review event contracts that involve gambling because gambling is unlawful in some states and, at least according to the agency, gambling constitutes "gaming"—and the involvement of either gaming or unlawful activity is grounds for agency review. *See id.* (providing the CFTC's argument); 7 U.S.C. § 7a-2(c)(5)(C)(i) (providing the statutory grounds for agency review).

[149] *See* 7 U.S.C. § 7a-2(c)(5)(C)(i) (enumerating the involvement of gambling or unlawful activities as grounds for agency review of event contracts).

[150] Appellant's Brief, *supra* note 83, at 28.

[151] *Id.* at 28–29. Citing *Merriam-Webster*, the *Random House College Dictionary*, the *Riverside University Dictionary*, and *Roget's International Thesaurus*, the CFTC provides definitions including "'to relate to or affect,'" "to 'entail,'" "'to relate closely,'" and "to 'have as an essential feature or consequence.'" *Id.* at 29 (quoting *Involve*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/involve [perma.cc/PL2N-6UEV]; *Involve*, RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 703 (Revised ed. 1979); *Involve*, RIVERSIDE UNIVERSITY DICTIONARY 645 (1983); *Involve*, ROGET'S INTERNATIONAL THESAURUS 1040 (7th ed. 2010)).

[152] *Id.* at 29–30. For example, the agency highlights an earlier section of the Commodity Exchange Act's special rule for event contracts, which defines event contracts as "agreements, contracts, transactions, or swaps in excluded commodities that are *based upon* the occurrence, extent of an occurrence, or contingency . . . ." 7 U.S.C. § 7a-2(c)(5)(C)(i) (emphasis added). In contrast, the statute specifies later in the same sentence that the CFTC may conduct a public-interest review "if the agreements, contracts, or transactions *involve*" activities like war, gaming, and so on. *Id.* (emphasis added). In support of its argument, the agency invokes the "meaningful-variation canon," which posits that the use of two different words within the same statute indicates two different meanings. Appellant's Brief, *supra* note 83, at 29.

[153] Brief of Appellee KalshiEx LLC, *supra* note 39, at 21.

[154] *Id.*

[155] *Id.* at 30.

duct a public-interest review.[156] And if, as the agency argues, trading an event contract inherently violates numerous state anti-gambling laws, then *all* event contracts can automatically be reviewed, so the enumerated exceptions allowing agency review are superfluous.[157]

Second, the CFTC's argument also assumes (in part) that gaming means gambling.[158] If this is true—and if the CFTC's interpretation of "involve" is correct—then the agency can review Kalshi's election contracts because they inherently involve gaming.[159] If not, then the agency must rely solely on its argument (outlined above) that it can review the contracts on the basis of unlawful activity.[160] The agency argues that gaming means gambling, and that gambling means "staking something of value" on a contest between others.[161] Thus, because elections are contests, and because election contracts stake something of value on them, Kalshi's congressional election contracts constitute "gaming" and the CFTC can review them.[162] In support of this position, the CFTC points to a variety of dictionary definitions, as well as to several laws and court opinions, contending that these sources illustrate the word's ordinary meaning.[163]

Kalshi, by contrast, disputes the dictionary definitions and arrives at the opposite conclusion from its survey of state and federal laws.[164] In Kalshi's view, "gaming" requires a game, not just a wager on any contest between others.[165] The company also argues that the agency's interpretation of gaming,

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[156] *Id.* at 31. Because the CFTC has exclusive jurisdiction over derivatives markets, any state laws purportedly banning the trading of event contracts would be preempted, so the special rule allowing agency public-interest review for "activity that is unlawful under . . . State law" would be similarly pointless if "involve" refers only to the contract as a whole. *Id.*

[157] *Id.* at 32–33. The CFTC seeks to rebut this argument in its reply brief by stating that its decision was based on state laws that specifically prohibit election betting, not on state laws that ban trading events contracts generally. Appellant's Reply Brief at 25, *Kalshi II*, 119 F.4th 58 (D.C. Cir. 2024) (No. 24-5205). But, as Kalshi notes, because some state laws ban "wagering on *any* contingent event," the agency's interpretation of contracts that "involve[]" activity unlawful under state law would necessarily prohibit those event contracts, too. Brief of Appellee KalshiEx LLC, *supra* note 39, at 34.

[158] *See* Appellant's Brief, *supra* note 83, at 39 (stating that gaming "is synonymous with 'gambling'").

[159] *See* 7 U.S.C. § 7a-2(c)(5)(C)(i)(V) (allowing agency review for event contracts that involve gaming). This assumes, also, that wagering on the outcome of events via event contracts is a form of gambling. *See id.* (same).

[160] *See id.* § 7a-2(c)(5)(C)(i)(I) (allowing agency review for event contracts that involve "activity that is unlawful under any Federal or State law").

[161] Appellant's Brief, *supra* note 83, at 39.

[162] *See* 7 U.S.C. § 7a-2(c)(5)(C)(i)(V) (providing for agency review when event contracts involve gaming).

[163] *See* Appellant's Brief, *supra* note 83, at 39–41 (noting that although many dictionaries define gaming as "playing games for stakes," they often also mention gambling).

[164] *See* Brief of Appellee KalshiEx LLC, *supra* note 39, at 42–43 (emphasizing that the "common denominator, as the word's root suggests, is the predicate of a game").

[165] *See id.* (same).

like its reading of "involve," would make its authority to review event contracts so broad as to swallow the default rule, under which exchanges are allowed to self-certify.[166] For Kalshi, the CFTC's definition of gaming as betting on a contest of others is an arbitrary gerrymander, found nowhere in statutes or dictionaries and tailor-made to guarantee agency review of election markets without nullifying the statutory scheme.[167] And if the agency retreats to its more commonsense definition of gaming as gambling, then all event contracts constitute "gaming," and the CFTC can always review them—so why did Congress create the default rule at all?[168]

Finally, in the Kalshi litigation, the CFTC has not focused on the "other similar activity" ground for public-interest review, but that provision presents another possible avenue for broad agency authority.[169] The statute specifies that the CFTC may deem an event contract against the public interest if it involves "other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest."[170] The statute does not define "similar"—and it is unclear whether an activity must be similar to just one of the other enumerated activities or all of them—but the provision appears to grant the CFTC relatively broad latitude in defining the activities that trigger its review.[171] For example, the agency could enact a "rule or regulation" that classifies elections themselves as contrary to the public interest, thus rendering election-based event contracts reviewable on that ground.[172]

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[166] *See id.* at 46 (arguing that the agency's definition of gaming "proves far too much" because it characterizes all event contracts, in addition to many other benign financial instruments, as illegal gambling). In addition, the amicus brief from Aristotle International, Inc., the parent company of PredictIt—one of five amicus briefs filed in support of Kalshi's position—argues that elections are unlike games because they have far larger economic consequences. Brief of Amicus Curiae Aristotle Int'l, Inc., in Support of Appellee at 9–14, *Kalshi II*, 119 F.4th 58 (D.C. Cir. 2024) (No. 24-5205).

[167] Brief of Appellee KalshiEx LLC, *supra* note 39, at 52–55.

[168] *See id.* at 49–50 (noting that "[t]here is no plausible reason to think that Congress hid sweeping authority to scrutinize all event contracts in the fifth entry on an enumerated list"). Interestingly, the CFTC does not seek to directly rebut Kalshi's argument that its definition of "gaming" is either gerrymandered or overbroad—instead, the agency argues in its reply brief that because its order banning Kalshi's contracts was an act of "adjudication" rather than "rulemaking," its definition is not precedential or forward-looking and thus does not implicate all event contracts going forward, as Kalshi fears. Appellant's Reply Brief, *supra* note 157, at 18–20. At oral argument, however, Kalshi objected strongly to the notion that agency adjudications are not precedential. *Recordings*, *supra* note 134.

[169] *See* 7 U.S.C. § 7a-2(c)(5)(C)(i)(VI) (allowing agency review of event contracts that involve "other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest").

[170] *Id.*

[171] *See id.* (providing "other similar activity" as an enumerated ground for agency review, but failing to define it or clarify how it relates to any of the other enumerated grounds, if at all). If an activity must be similar to all of the other enumerated activities, additional questions arise about to what extent something can be similar to both "gaming" and "assassination," for example. *See id.* (same).

[172] *See id.* (providing an additional basis for agency review).

Exchanges like Kalshi would no doubt object to that interpretation, contending that it would swallow the default rule of self-certification, just as the CFTC's interpretation of "gaming" does.[173] The exchanges might also dispute whether elections are truly "similar" to war, terrorism, or gaming.[174] The CFTC, in turn, might defend the catch-all provision by arguing that any regulation classifying something truly harmless (say, elections) as against the public interest would face immediate lawsuits, so the agency's authority is not unlimited.[175] In the end, the question might once again hinge on the scope of the word "involve"; it would be harder for the agency to justify a rule stating that elections themselves are contrary to the public interest than a rule stating that contracts based on elections are.[176] Regardless, the provision illustrates one of the underlying tensions of the whole debate: the text of the statute in many ways grants the CFTC broad authority to review event contracts, but that authority conflicts with the narrowness and specificity of the statute's other enumerated exceptions to the default ability to self-certify.[177]

B. The Public Interest

Even if the CFTC has broad authority to review political event contracts, another question remains: are they in fact against the public interest?[178]

In its initial order seeking to ban Kalshi's congressional election contracts, the CFTC put forward several reasons why the contracts were against the public interest.[179] First, it asserted that the contracts served no "economic purpose," defined as an ability to facilitate either the hedging of economic interests or the setting of prices.[180] Second, it found that election contracts could

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[173] *Cf.* Brief of Appellee KalshiEx LLC, *supra* note 39, at 49 (explaining how the CFTC's definition of gaming renders other parts of the statute superfluous).

[174] *See* 7 U.S.C. § 7a-2(c)(5)(C)(i)(VI) (specifying that "other *similar* activity" can be reviewable if so labeled by the CFTC (emphasis added)).

[175] *See id.* (requiring the CFTC to determine, "by rule or regulation," that an activity is against the public interest before this exception applies).

[176] *See id.* (same). Kalshi may have anticipated this line of reasoning, writing in its brief to the D.C. Circuit, in a slightly different context, that "[e]lections are the opposite of unlawful activity: They are a basic feature of constitutional government." Brief of Appellee KalshiEx LLC, *supra* note 39, at 40.

[177] *Compare* 7 U.S.C. § 7a-2(c)(5)(C)(i)(VI) (granting seemingly broad authority for the CFTC to define which activities it can review), *with id.* § 7a-2(c)(5)(C)(i)(I)–(V) (providing specific enumerated activities that trigger CFTC review, and implicitly omitting others).

[178] *See id.* § 7a-2(c)(5)(C)(ii) (stating that no contract the CFTC finds to be against the public interest can be listed on an exchange).

[179] *See* Defendant Commodity Futures Trading Commission's Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment at 12, *Kalshi I*, No. 23-3257, 2024 WL 4164694 (D.D.C. Sep. 12, 2024) (summarizing the agency's reasoning in its order).

[180] *Id.* at 12–13. Although the agency acknowledged that a given party's control of Congress could have economic impacts, it stated that those impacts were too "diffuse and unpredictable" to be used for hedging or price basing. *Id.* at 13. Notably, the agency did not consider the information-

harm "election integrity" or the perception of election integrity by encouraging misinformation or market manipulation.[181] In support of that fear, the CFTC cited concerns expressed by a handful of senators and noted that, unlike other derivatives markets it regulates, political prediction markets lack a basis in "reliable informational sources, such as . . . government crop forecasts."[182] Finally, the agency stated that allowing political event contracts would force it into the business of investigating potential market manipulation related to elections, which goes beyond its mandate of merely regulating derivatives markets.[183]

The CFTC reiterated its public-interest concerns, with renewed urgency, in its motion for an emergency stay of the district court's decision prior to the 2024 elections.[184] Citing a "grave risk to the public interest," the agency particularly emphasized the potential for market manipulation, suggesting that individuals could distort the public's perception of which party was ahead by placing large bets in the prediction market.[185] It also sought to refute the informational benefits of political prediction markets, asserting that while manipulation was rife, the informational value was low.[186] The D.C. Circuit disagreed, however, rejecting the motion for emergency stay.[187]

Hayek would likely have disagreed as well, on theoretical grounds.[188] His work clarified the role of prices in aggregating information from disparate sources; political prediction markets, as a system of prices based on the bets of widely dispersed individuals, offer a similar mechanism for generating accurate information.[189]

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aggregation uses of prediction markets or event contracts in its analysis, choosing to consider only the two purposes explicitly mentioned in the Commodity Exchange Act. *See id.* at 12 (emphasizing the Act's finding of a "national public interest in well-regulated markets for hedging and price basing").

[181] *Id.* at 13–14.

[182] *Id.* The CFTC viewed the lack of "reliable information[]" underlying the market as a sign that political prediction markets are more susceptible to manipulation—but Hayek would point out that accurate information is actually an output, not merely an input, of well-functioning markets. *Compare id.* (worrying that the information underlying political prediction markets is "opaque and unregulated"), *with* Hayek, *supra* note 25, at 522 (highlighting as a "mistake" the belief that "all [practical] knowledge is supposed to be 'given'" rather than aggregated from a wide variety of sources via the price system).

[183] Defendant Commodity Futures Trading Commission's Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment, *supra* note 179, at 12.

[184] *See* Emergency Motion for Stay Pending Appeal and Immediate Interim Relief at 3, *Kalshi II*, 119 F.4th 58 (D.C. Cir. 2024) (No. 24-5205) (requesting a stay of the district court's vacatur of the CFTC's order that had prohibited Kalshi from listing its congressional election contracts).

[185] *Id.* at 3–4, 20.

[186] *Id.* at 21.

[187] *See Kalshi II*, 119 F.4th at 60 (holding that the CFTC had failed to show that the public would be irreparably harmed without an emergency stay).

[188] *See* Hayek, *supra* note 25, at 526 (positing that prices, in contrast to the CFTC's view, provide information that could not be discovered or centrally collected otherwise).

[189] *See id.* (same). It should be noted, however, that whereas Hayek primarily characterized prices as providing just enough information to each individual actor that the system functioned smoothly

The literature in economics and political science, meanwhile, provides empirical evidence that supports Hayek's position and mitigates some of the biggest worries of prediction-market skeptics like the CFTC.[190] For example, when a trio of economists from the University of Iowa evaluated the performance of the Iowa Electronic Markets relative to traditional polls for the presidential elections from 1988 to 2004, they found that the market was more accurate than the polls nearly three quarters of the time.[191] That finding suggests that political prediction markets may provide more informational value than the CFTC assumes.[192]

In addition, several amici in the Kalshi litigation and other interested commentators posit that political prediction markets even promote the traditional economic purposes of derivatives markets—hedging and price discovery.[193] For example, Paradigm Operations LP, a cryptocurrency investment firm, describes in its amicus brief how the business prospects of the cryptocurrency startups it invests in depend on which party controls Congress.[194] As a result, those startups rely on prediction markets to predict consequential changes to the regulatory landscape and to hedge against the risk of an adverse outcome.[195] Similarly, the amicus brief of a law professor and former commissioner of the Securities and Exchange Commission highlights a large body of economic research showing that elections impact the prices of financial mar-

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overall, prediction markets seek to make a given piece of information legible for everyone, not just for one particular actor for his limited, specialized purpose. *See id.* ("The whole acts as one market, not because any of its members survey the whole field, but because their limited individual fields of vision sufficiently overlap so that through many intermediaries the relevant information is communicated to all."). In Hayek's formulation, the "relevant information" differs from person to person, but in a prediction market, the "relevant information" is whatever is being predicted—for example, which party will take the House of Representatives in 2024. *Compare id.* (same), *with Trade Election Event Contracts*, KALSHI, kalshi.com/live/elections [perma.cc/G3W4-S9JC] (showing a wide variety of markets based on targeted questions about the outcomes of elections).

[190] *See, e.g.*, Berg, Nelson & Rietz, *supra* note 26, at 287 (finding that the Iowa Electronic Markets outperformed traditional polls in predicting presidential elections from 1988 to 2004).

[191] *See id.* (same). In addition, the researchers found that the prediction markets outperformed polls even more robustly over longer time horizons: more than one hundred days ahead of an election, the market beat the polls every time. *Id.*

[192] *Cf.* Emergency Motion for Stay Pending Appeal and Immediate Interim Relief, *supra* note 184, at 21 (stating that "it defies logic" that political prediction markets could have "up-to-the-minute informational value").

[193] *See, e.g.*, Brief of Amicus Curiae Aristotle Int'l, Inc., in Support of Appellee, *supra* note 166, at 9–14 (noting that the prices of a wide variety of regulation-sensitive indices moved significantly when it became clear that the Republican party was likely to win the presidency and both houses of Congress in 2024). The amicus brief from Aristotle International, Inc., PredictIt's parent company, also pointed out that election probabilities from Kalshi and PredictIt appear on the Bloomberg terminal, which investors rely on for accurate market information. *Id.* at 9.

[194] Brief for Amicus Curiae Paradigm Operations LP in Support of KalshiEx LLC and Affirmance at 1–2, *Kalshi II*, 119 F.4th 58 (D.C. Cir. 2024) (No. 24-5205).

[195] *Id.*

kets.[196] Because companies already use traditional financial markets to crudely hedge against political risks, the law professor reasons, political prediction markets allow companies to hedge against those risks more directly.[197] And an economics professor's comment letter to the CFTC, written in support of Kalshi's initial congressional-contract proposal, emphasizes that political prediction markets can help businesses more accurately discover prices that are central to their business operations but subject to political risk.[198]

Some academic evidence also casts doubt on the CFTC's worries about market manipulation.[199] In 2007, for example, two economists reviewed alleged instances of market manipulation across the history of election betting—from the early Wall Street markets, to the IEM, to the online TradeSports exchange in 2004.[200] In each case, the economists found that the attempted manipulation moved prices in the short term, but the market soon returned to its initial posture.[201] They concluded that political betting markets are difficult to systematically manipulate for more than a short time.[202] Likewise, another pair of academics created an economic model simulating the dynamics of a trader

[196] Brief of Professor Joseph A. Grundfest as Amicus Curiae in Support of Plaintiff-Appellee and Affirmance, *supra* note 35, at 15–18 (citing, among others, Michael Hanke et al., *Recovering Election Winner Probabilities from Stock Prices*, 45 FIN. RSCH. LETTERS 102 (2022), which shows that the ex-ante probability of a candidate winning an election can be reverse engineered from subsequent changes in stock prices). Professor Joseph A. Grundfest is a professor at Stanford Law School who specializes in derivatives markets and corporate governance. *Id.* at 1.

[197] *Id.* at 17–18.

[198] Comment Letter from Jason Furman, Professor of the Prac. of Econ. Pol'y, Harv., to Chairman & Comm'rs of the Commodity Futures Trading Comm'n 2–3 (Sep. 18, 2022), https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69708&SearchText=furman [perma.cc/6HNH-ZFPC]. Jason Furman is a professor of economics at Harvard University and former chairman of the Council of Economic Advisers under President Obama. *Id.* at 1. In the comment letter, Furman also emphasizes the usefulness of political prediction markets to his own work—both as a policymaking economist in the White House and as an academic economist. *Id.* at 1–2. And indeed, since the D.C. Circuit denied the CFTC's emergency stay of Kalshi's congressional event contracts in October 2024, new papers have already begun to emerge, using novel methodological techniques that incorporate data from political prediction markets. *See, e.g.*, Mikhail Chernov, Vadim Elenev & Dongho Song, *The Comovement of Voter Preferences: Insights from U.S. Presidential Election Prediction Markets Beyond Polls* 1, 3–4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 33339, 2025) (creating a novel election-forecasting model by incorporating data from political prediction markets).

[199] *See, e.g.*, Paul W. Rhode & Koleman S. Strumpf, Manipulating Political Stock Markets: A Field Experiment and a Century of Observational Data 3 (Jan. 2007) (unpublished manuscript), https://ideas.repec.org/p/feb/natura/00325.html [perma.cc/WNS7-2XE9] (surveying the history of attempted manipulation in election markets and finding that it rarely succeeds over more than a short time period).

[200] *Id.* The Wall Street and TradeSports manipulations arose organically, whereas the Iowa Electronic Markets manipulation was a planned experiment by academic researchers. *Id.*

[201] *Id.*

[202] *Id.* at 27. The length of time for which would-be manipulators can sway the market has also shortened over the years: from days in early-twentieth-century Wall Street, to hours at the IEM in 2000, to minutes on TradeSports in 2004. *Id.*

seeking to influence the price of a low-volume prediction market.[203] They found that the attempted manipulation not only failed to derail the market in the manipulator's chosen direction; it actually increased the accuracy of prices by incentivizing other traders to acquire information and profit from the manipulator's mistake.[204]

Nonetheless, some other academic sources highlight the possible shortcomings of prediction markets.[205] One law-review note argues that prediction markets—at least in relation to law—tend to be most accurate in the areas where they are least useful.[206] Another paper, although not directly about prediction markets, indicates that surfacing information publicly—as prediction markets do—can sometimes do more harm than good because it leads individuals to rely too much on the public "consensus" relative to their own private information.[207] Meanwhile, a book points out instances where prediction markets have been wrong in the past, including in forecasting the retirement and nomination of Supreme Court justices.[208]

The evidence from Britain, where election betting is allowed, offers another angle from which to examine the CFTC's concerns.[209] Although British political gambling generally takes the form of betting on odds set by bookmakers, rather than trading on a prediction market, the British system still implicates some of the agency's worries about election integrity and the perceptions of voters, if not its more detailed concerns about market manipulation and informational value.[210] And in Britain, political gambling scandals do occur from time to time.[211]

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[203] Robin Hanson & Ryan Oprea, *A Manipulator Can Aid Prediction Market Accuracy*, 76 ECONOMICA 304, 305 (2009).

[204] *Id.*

[205] *See, e.g.*, Note, *Prediction Markets and Law: A Skeptical Account*, 122 HARV. L. REV. 1217, 1217 (2009) (characterizing prediction markets as a form of "groupthink").

[206] *Id.* at 1218. The Note defines the areas in which prediction markets would be useful for addressing legal problems—but in which they are least successful—as those involving future events that are secret, that are contingent on "the idiosyncratic action of an individual," or that are "catastrophic but unlikely." *Id.*

[207] Stephen Morris & Hyun Song Shin, *Social Value of Public Information*, 92 AM. ECON. REV. 1521, 1521–22 (2002). *See generally* Alex Tabarrok, Scott Duke Kominers & Sonal Chokshi, *Prediction Markets and Beyond*, A16Z CRYPTO (Nov. 21, 2024), https://a16zcrypto.com/posts/podcast/prediction-markets-information-aggregation-mechanisms/ [perma.cc/4GK9-LGWV] (drawing the connection between prediction markets and the social value of public information).

[208] *See* SUNSTEIN, *supra* note 27, at 134–43 (describing how, among other events, prediction markets falsely forecasted the retirement of Chief Justice William Rehnquist in 2005, and falsely favored Judge Edith Clement rather than then-Judge John Roberts as his eventual replacement).

[209] *See* Davies, *supra* note 82 (explaining the nature of election betting in Britain). *See generally* Gambling Act 2005, c. 19 (UK) (regulating gambling in the United Kingdom). Relevantly to other sections of this Note, the Gambling Act defines "gaming" as "playing a game of chance for a prize." *Id.* § 6(1); *see supra* notes 138–177 and accompanying text (explaining the competing definitions of both "gaming" and "involve" in the Kalshi litigation).

[210] *See* Davies, *supra* note 82 (describing the structure of political betting in the United Kingdom, including the role of bookmakers, often called "bookies").

On the whole, however, the ability of individuals to bet on British elections appears not to have undermined the parliamentary system.[212]

Finally, evidence from the 2024 congressional and presidential elections in the United States further indicates that fears of market manipulation may be overstated.[213] The amicus brief of ForecastEx, another political prediction market, underscores that point.[214] ForecastEx reports that it hosted more than $560 million in election-contract trades during the month leading up to the U.S. presidential election.[215] Yet, despite the CFTC's concerns, no durable or successful attempts at market manipulation occurred.[216] In ForecastEx's view, the rules that apply to all CFTC-registered exchanges—including both ForecastEx and Kalshi—are more than sufficient to protect market participants from harm.[217] The 2024 elections are still recent, and rigorous academic evaluations will take time to appear—but in the meantime, the catastrophic consequences feared by the CFTC following its failed emergency stay never seemed to materialize.[218]

III. Congress Should Clarify That Political Prediction Markets Are Legal Because They Benefit the Public

Under the current statutory scheme, the legality of political prediction markets is not abundantly clear.[219] The statute's plain language suggests that they may not be legal (as the CFTC believes), yet that same language also ap-

[211] *See id.* (explaining the controversy over bets placed by an aide to the Prime Minister about the date of an upcoming general election).

[212] *See id.* (noting first that the UK's Gambling Commission, established in 2005, has only ever prosecuted one case of alleged cheating—and it involved greyhound racing, not elections—and, second, that election betting markets have trading volumes in the tens of millions of pounds, whereas sports betting markets trade in the tens of *billions*).

[213] *See, e.g.*, Nocera, *supra* note 16 (explaining that the large bets placed by the so-called "French whale" in favor of Donald Trump on the prediction market Polymarket stemmed from the trader's desire to profit from a unique "shy voter" investment thesis rather than his desire to shift public perceptions of the election).

[214] Brief of ForecastEx, LLC as Amicus Curiae in Support of Plaintiff-Appellee and Affirmance at 4–5, *Kalshi II*, 119 F.4th 58 (D.C. Cir. 2024) (No. 24-5205).

[215] *Id.* at 2.

[216] *Id.* at 4.

[217] *Id.* at 12–16.

[218] *See* Nocera, *supra* note 16 (providing an alternative explanation for the most prominent instance of alleged manipulation on a prediction market during the 2024 elections); Tabarrok, *supra* note 17 (touting the success of prediction markets relative to traditional polls as evidence of their informational value). Even theories of election interference further from the Democratic mainstream following the election focused on foreign actors like Russia rather than purported manipulation in prediction markets. *See* Stuart A. Thompson, *Drop-Off in Democratic Votes Ignites Conspiracy Theories on Left and Right*, N.Y. TIMES (Nov. 9, 2024), https://www.nytimes.com/2024/11/09/technology/democrat-voter-turnout-election-conspiracy.html [perma.cc/73YW-LT4G] (describing the theories that conspicuously omit any mention of prediction markets).

[219] *See, e.g.*, Appellant's Brief, *supra* note 83, at 1 (contending that the district court erred, in ongoing litigation on this question).

pears to render large portions of the statute superfluous.[220] Nonetheless, because political prediction markets generally benefit the public, Congress should clarify the statute to limit the CFTC's ability to ban them.[221]

Section A of this Part explains why the statute is currently contradictory.[222] Section B describes how political prediction markets generally benefit the public.[223] Finally, Section C proposes draft language for a new version of the statute that both recognizes the benefits of political prediction markets and avoids the present statute's contradictions.[224]

A. Current Contradictions

In the Kalshi litigation, both sides have a point.[225] The CFTC is correct that the statute's plain language appears to grant it broad authority to review political event contracts and, if it wishes, to ban them.[226] First, the ordinary meaning of "involve" is "to relate" to, or to "entail."[227] Under that broad definition, if trading a contract constitutes a given activity (say, gambling), then the contract "involves" that activity.[228] Second, the ordinary meaning of "gaming" at least evokes gambling, even if the two terms are not strictly synonymous (and state statutes sometimes, but not always, equate the two).[229] In addi-

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[220] *See* Brief of Appellee KalshiEx LLC, *supra* note 39, at 49 (describing how an interpretation of the statute that allows agency review of all event contracts would make its list of enumerated activities unnecessary).

[221] *See infra* notes 243–251 and accompanying text.

[222] *See infra* notes 225–242 and accompanying text.

[223] *See infra* notes 243–251 and accompanying text.

[224] *See infra* notes 252–270 and accompanying text.

[225] *See infra* notes 226–242 and accompanying text (explaining the positions of both parties).

[226] *See* Appellant's Brief, *supra* note 83, at 1–2 (arguing that the district court misconstrued the statute's plain meaning).

[227] *See, e.g.*, *Involve*, MERRIAM-WEBSTER DICTIONARY (2022) (defining the word). The dictionary provides seven different meanings, but not all of them make sense when applied to the statute. *See id.* It is also a canon of statutory interpretation that "[g]eneral terms are to be given their general meaning"—or, in Latin, "*generalia verba sunt generaliter intelligenda*." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 101–06 (2012).

[228] *See* Appellant's Brief, *supra* note 83, at 31 (noting that both sides agree on the word's ordinary meaning and its implications).

[229] *See id.* at 39 n.16 (listing dictionaries that either define gaming as gambling or cross-reference the two terms); *supra* notes 100–104 and accompanying text (describing state-law definitions of gaming, some of which directly invoke gambling and some of which further require a game at the heart of the wager). And the two words might also be synonymous. *Compare Gamble*, MERRIAM-WEBSTER DICTIONARY (2022) ("to play a game for money or property"), *with Game*, MERRIAM-WEBSTER DICTIONARY (2022) ("to play for a stake"). In his recent book on gambling and the culture that embraces it, the election forecaster Nate Silver also suggests that gaming means gambling, writing that "gaming" is simply "the euphemism for gambling that the industry prefers for itself . . . ." NATE SILVER, ON THE EDGE: THE ART OF RISKING EVERYTHING 138 (2024). Interestingly, when I queried ChatGPT on the topic—as Judge Kevin Newsom recently proposed doing in a speculative concurrence—it characterized "gaming" as playing video games, not as something that involves wagering at all. *See* Snell v. United Specialty Ins. Co., 102 F.4th 1208, 1221 (11th Cir. 2024) (Newsom, J., concurring)

tion, wagering on elections is illegal in several states.[230] Taking all these definitions together, then, the CFTC is correct that the special rule for event contracts authorizes it to review political prediction markets because they involve both gaming and activity that is unlawful in some states.[231]

At the same time, however, Kalshi is correct that the statute's plain language leads to a problem: it authorizes agency review of *all* event contracts, making the enumerated exceptions superfluous.[232] If political event contracts involve gaming, then other types of event contracts also involve gaming.[233] And if all event contracts involve gaming, then all event contracts are subject to the CFTC's review.[234] But that outcome is incongruous with the special rule for event contracts.[235] The special rule purports to enumerate specific exceptions to the general ability of exchanges to self-certify their event contracts: the agency may review contracts that involve terrorism, gaming, and so on.[236] If the rule instead allows agencies to review all event contracts, then the enumerated list serves no purpose.[237] Congress could have replaced it with one line:

(proposing large language models as another method of ascertaining the ordinary meaning of a word because they draw from an immense pool of ordinary-language training data); Alexander Kurtz, ChatGPT, "Does 'gaming' mean 'gambling'?" (Feb. 4, 2025) (on file with the author). I used the free version on February 4, 2025, without logging in, and asked: "Does 'gaming' mean 'gambling'?" Kurtz, *supra*. The chat bot replied that gaming "generally refers to playing video games for entertainment or competitive purposes" and "it's usually not about wagering money," whereas gambling "involves betting or staking money (or something of value) on an event with an uncertain outcome, usually with the goal of winning more money or prizes." *Id.*

[230] Appellant's Brief, *supra* note 83, at 53–54; *see also supra* notes 110–112 and accompanying text (describing state laws against election betting in North Carolina, Illinois, Mississippi, Oregon, Utah, Delaware, and Wisconsin).

[231] *See* Appellant's Brief, *supra* note 83, at 20 (making the same chain of inferences).

[232] *See* Brief of Appellee KalshiEx LLC, *supra* note 39, at 48–49 (describing how the CFTC's preferred reading of "gaming" and "involve" leads to redundancy). In addition, Kalshi is correct to view the agency's tortuous definition of gaming as, essentially, "gambling but only gambling on a contest between others" as absurd. *See id.* at 52–55 (making the "arbitrary gerrymander" argument). If Congress had meant to incorporate such an unusual definition into the statute, it would have done so explicitly. *See id.* at 55 (same). And without that Goldilocks-style definition, the CFTC must either concede that it lacks the authority to review political event contracts under the "gaming" prong of the statute, or push forward with a definition of gaming that is so broad it swallows the statute's default rule. *See id.* at 47–51 (same).

[233] *See id.* at 50 (refuting the agency's contention that it could interpret the statute one way for Kalshi's contracts without applying the same interpretation to other event contracts). This is true because it is not the underlying political event that, in the CFTC's view, renders political event contracts "gaming"; it is simply the act of wagering money on any outcome outside of the bettor's control. *See* Appellant's Brief, *supra* note 83, at 39 (seeking to define gambling as "staking something of value upon the outcome of, among other things, a contest of others").

[234] *See* 7 U.S.C. § 7a-2(c)(5)(C)(i)(V) (authorizing agency public-interest review for contracts that involve gaming).

[235] *See id.* § 7a-2(c)(5)(C)(i) (enumerating specific exceptions to the ability of exchanges to self-certify their contracts).

[236] *See id.* (same).

[237] *See id.* (same).

"the Commission may determine that any event contract is contrary to the public interest."[238] That Congress did not do that is significant.[239]

Normally, when a statute's plain language would render large portions of the statute pointless, courts choose the next-best acceptable interpretation.[240] For that reason, even under the current statute, Kalshi may prevail—political prediction markets may be legal.[241] Regardless, however, a clearer statute would better serve all interested parties: the exchanges, the agencies bound to enforce it, and the public at large.[242]

B. Political Prediction Markets Are Generally Beneficial

Political prediction markets tend to benefit the public, so Congress should clarify the statute by limiting the CFTC's ability to ban them.[243] Kalshi is a relatively new exchange—and its election contracts offer some novel features—but political prediction markets more broadly have been around for years.[244] As a result, there is empirical evidence about the impact of those markets, and much of the evidence shows that the impact has been positive.[245] Political prediction markets often perform better than traditional polls, suggesting that they can be a valuable source of information (as Hayek anticipated).[246]

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[238] *See id.* (same).

[239] *See* SCALIA & GARNER, *supra* note 227, at 175–79 (describing the "surplusage canon" of statutory interpretation, which says that courts should avoid an interpretation that renders part of the statute pointless if another interpretation is possible); *see also* Kungys v. United States, 485 U.S. 759, 778 (1988) (plurality opinion) (noting the "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant"); Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."). Nevertheless, courts sometimes choose to follow a statute's ordinary meaning rather than "an unusual meaning that will avoid surplusage." SCALIA & GARNER, *supra* note 227, at 176.

[240] *See* SCALIA & GARNER, *supra* note 227, at 175–79 (explaining the surplusage canon). This is not an iron law, however, and it may also depend on a particular judge's interpretive philosophy; even textualists like Justice Scalia and Bryan Garner caution that weighing ordinary meaning against a different meaning that avoids surplusage involves "judgment and discretion" as well as "careful regard to context." *Id.* at 176.

[241] *See* Brief of Appellee KalshiEx LLC, *supra* note 39, at 59 (making the case that Kalshi's election contracts are legal and unreviewable).

[242] *See infra* notes 252–270 and accompanying text (providing draft language for an improved statute).

[243] *See, e.g.*, Berg, Nelson & Rietz, *supra* note 26, at 287 (providing evidence of one political prediction market's historical outperformance of traditional polls).

[244] *See* Matthews, *supra* note 12 (comparing Kalshi with older political prediction markets like PredictIt and the IEM).

[245] *See* Berg, Nelson & Rietz, *supra* note 26, at 287 (describing the success of the IEM in predicting presidential elections relative to traditional polls, both shortly before each election and over longer time horizons).

[246] *See id.* (same); Hayek, *supra* note 25, at 526 (highlighting the ability of the price system to efficiently aggregate widely dispersed knowledge). In addition, prediction markets in other contexts often outperform experts, another traditional source of political forecasting alongside polls. *See* Martin Spann & Bernd Skiera, *Sports Forecasting: A Comparison of the Forecast Accuracy of Prediction*

Further, political prediction markets allow businesses to mitigate political risks and ascertain prevailing market prices, thereby fulfilling the traditional economic purposes that the Commodity Exchange Act envisions for derivates exchanges.[247] And despite the specter of market manipulation, the evidence shows that manipulation in political betting markets is difficult to sustain over the medium to long term, and it may even make markets more accurate, not less.[248]

It is true that political prediction markets are not always accurate, and that they are better equipped to answer some questions than others.[249] But skeptics such as the CFTC have failed to show that their fears of market manipulation and collapsing election integrity have a basis in fact—and the experiences of election betting in Britain, across decades, and in the United States, in 2024, further undermine those fears.[250] Thus, political prediction markets generally benefit the public, and Congress should alter the special rule for event contracts to reflect that reality.[251]

Markets, Betting Odds and Tipsters, 28 J. FORECASTING 55, 68 (2009) (describing the superior performance of prediction markets relative to expert "tipsters" in predicting the outcome of German soccer games).

[247] *See* 7 U.S.C. § 5(a) (identifying hedging and price discovery as public interests the Commodity Exchange Act seeks to promote); Brief for Amicus Curiae Paradigm Operations LP in Support of KalshiEx LLC and Affirmance, *supra* note 194, at 1–2 (describing how political prediction markets can help businesses hedge against the risk of political and regulatory change); Furman, *supra* note 198, at 2–3 (explaining how political prediction markets can help businesses discover prevailing prices, which reflect expected prices in the future and allow for more planning certainty in the face of political risk).

[248] *See* Rhode & Strumpf, *supra* note 199, at 3 (finding that historical attempts at manipulating election betting markets lasted only a short time and failed over the medium-to-long term); Hanson & Oprea, *supra* note 203, at 305 (creating an economic model that shows manipulation generally has no impact on prices in prediction markets, and sometimes even makes them more accurate). In addition, the "short term" over which attempted market manipulation can succeed has shortened over the years: in a study examining historical manipulation attempts in political betting markets, the most recent attempt, on TradeSports during the 2004 presidential campaign, lasted less than one hour. *See* Rhode & Strumpf, *supra* note 199, at 4.

[249] *See* SUNSTEIN, *supra* note 27, at 134–43 (noting instances where prediction markets have erred in the past, including in predicting Supreme Court nominations and retirements); Note, *supra* note 205, at 1218 (contending that prediction markets are not useful for answering questions of importance to the legal profession).

[250] *See* Emergency Motion for Stay Pending Appeal and Immediate Interim Relief, *supra* note 184, at 3–4, 20 (asserting, without evidence, that Kalshi's congressional election contracts posed a "grave risk" of market manipulation that would harm election integrity); Davies, *supra* note 82 (describing the rarity of prosecutions for election gambling fraud in the United Kingdom, as well as the relatively low trading volume in election betting compared with sports betting); Nocera, *supra* note 16 (explaining why the 2024 election's "French whale"—the only major story of potential election market manipulation—was probably motivated by profits rather than politics).

[251] *Cf.* 7 U.S.C. § 7a-2(c)(5)(C)(ii) (providing the inverse rule that event contracts found to be contrary to the public interest following a CFTC review under the special rule may not be listed on a registered exchange).

C. A Better "Special Rule"

Because the benefits from political prediction markets far outweigh their costs, Congress should make clear that the CFTC has only limited authority to review and prohibit them.[252] To clarify this, Congress should make several changes.[253] First, in clause (i), it should replace the word "involve" with the words "are based upon."[254] That replacement would clarify that the enumerated exceptions to self-certification relate only to a contract's underlying activity, not to the act of trading the contract itself.[255] The replacement would be sufficient to resolve the Kalshi litigation—and it would eliminate many of the statute's internal contradictions—but Congress should go further and make the statute even clearer.[256]

Second, it should replace the word "gaming" with "sports or casino games."[257] That would clarify that gaming means something more specific than gambling, and it would remove another source of confusion around whether event contracts themselves constitute gambling and are therefore subject to review.[258]

Third, Congress should eliminate the sixth enumerated activity entirely—"other similar activity" that the CFTC deems to be against the public interest—because its circular logic offers a loophole for nearly unlimited agency authority to review event contracts.[259] The current provision says that the CFTC may make a rule that designates an activity contrary to the public interest and, on that basis, review event contracts that involve that activity.[260] The Commission may then ban those contracts if it finds that they, too, are against the public interest.[261] The provision thus effectively allows the agency to review any event contract it chooses; all it has to do first is make a rule designating the

[252] *See supra* notes 243–251 and accompanying text (describing the benefits); Furman, note 198, at 4 (concluding that "[t]he benefits of approving electoral prediction markets overwhelmingly outweigh the costs").

[253] *See infra* note 270 and accompanying text (providing a draft of the proposed statutory language).

[254] *See id.* (same).

[255] *See Kalshi I*, No. 23-3257, 2024 WL 4164694, at *12–13 (D.D.C. Sep. 12, 2024), *dismissed*, No. 24-5205, 2025 WL 1349979 (D.C. Cir. May 7, 2025) (explaining the contradictions resulting from the current statute's use of "involve").

[256] *See id.* (same).

[257] *See infra* note 270 and accompanying text (providing the proposed draft statutory language).

[258] *See Kalshi I*, 2024 WL 4164694, at *8 (explaining the contradictions resulting from the CFTC's interpretation of "gaming"). This revision also accords with the theoretical distinction in financial regulation between instruments that deal with "pre-existing risk" (treated as investing) and instruments that artificially create risk "for the purpose of putting money down" (treated as gambling). Karl M.F. Lockhart, *Betting on Everything*, 66 B.C. L. REV. 2175, 2232 (2025).

[259] *See infra* note 270 and accompanying text (providing the proposed draft statutory language).

[260] 7 U.S.C. § 7a-2(c)(5)(C)(i)(VI).

[261] *Id.* § 7a-2(c)(5)(C)(i)–(ii).

contract's underlying activity as contrary to the public interest.[262] Although the rulemaking process (and the qualifier "similar") may provide some friction in the agency's exercise of its authority, that authority is still broad enough to inappropriately engulf the default ability to self-certify.[263] Because political prediction markets generally benefit the public—and because the views of agencies change with each presidential administration—Congress should eliminate the "other similar activity" provision to further limit the agency's ability to prohibit those markets.[264]

Finally, Congress should add a provision to the special rule requiring the CFTC to consider information aggregation as a factor when determining whether event contracts are contrary to the public interest.[265] One of the primary benefits of political prediction markets is that they collect and surface widely dispersed information.[266] The CFTC historically has not recognized information aggregation as a legitimate goal of the contracts that it regulates, but this makes little sense in the context of event contracts: in addition to hedging and price discovery, event contracts provide information.[267] For that reason, the agency should consider information aggregation when conducting a public-interest review of event contracts, just as it currently considers hedging and price discovery.[268]

Accordingly, this Note recommends that Congress adopt the following draft language for a new version of the special rule (altered text underlined; deleted text crossed out):[269]

> (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 sec-

[262] *See id.* (first allowing the CFTC to designate an activity as contrary to the public interest, then allowing the CFTC to review contracts involving those activities to see if the *contracts* are contrary to the public interest, and then prohibiting contracts the CFTC finds to be contrary to the public interest from being listed on a registered exchange).

[263] *See id.* (same).

[264] *See supra* notes 243–251 and accompanying text (explaining the benefits); Ben Miller, *CFTC Acting Chair Pham Gives Kalshi Hope for Election Contracts*, BLOOMBERG L. (Jan. 30, 2025), https://news.bloomberglaw.com/securities-law/cftc-acting-chair-pham-gives-kalshi-hope-for-election-contracts [perma.cc/ZGQ7-UH7L] (explaining that some commentators expect the new administration's incoming CFTC chair to drop the case against Kalshi).

[265] *See infra* note 270 and accompanying text (providing the proposed draft statutory language).

[266] *See generally* Hayek, *supra* note 25 (providing the theory behind this insight).

[267] *See* Hanson, *Decision Markets*, *supra* note 29, at 18 (describing the information-aggregating properties of prediction markets).

[268] *Cf.* 7 U.S.C. § 5(a) (listing hedging and price discovery as reasons why transactions regulated by the CFTC implicate the "national public interest").

[269] *Cf. id.* § 7a-2(c)(5)(C) (providing the special rule in its current form).

> tion 1a(2)(i) 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 are based upon~~—~~
> (I) activity that is unlawful under any Federal or State law;
> (II) terrorism;
> (III) assassination;
> (IV) war; or
> (V) sports or casino games.~~; 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.
>
> (iii) Public interest
> The Commission shall consider information aggregation, in addition to hedging, price discovery, and other relevant factors, in determining whether an agreement, contract, or transaction is contrary to the public interest.[270]

CONCLUSION

Political prediction markets have existed in the United States since the 1980s, and informal election betting markets have been present since the start of the republic. Nonetheless, Kalshi gained national attention when it sought to become the first registered exchange to offer event contracts based on elections in 2024. That raised the question: are political prediction markets legal?

The Commodity Futures Trading Commission (CFTC) said no, arguing that the text of the Commodity Exchange Act allows it to review election-based event contracts and that the prospect of market manipulation threatens the public interest. A federal district court disagreed, reading the text of the statute to disallow agency review of election-based contracts.

Both sides have a point: the plain text of the statute indicates that the CFTC can review election-based event contracts, but the implications of that reading are absurd. It would allow the agency to review *any* event contract,

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[270] *Cf. id.* (same). The new provision discussing information aggregation and the public interest is in addition to the current clause (iii) of the statute, which discusses swaps contracts, not a replacement for it. *See id.* (same).

even though the statute meticulously lists a limited number of instances where agency review is allowed. Thus, political prediction markets are probably legal (and non-reviewable) under the statute—but the statute contains inherent contradictions.

Because political prediction markets generally benefit the public, Congress should revise the statute to resolve those contradictions and clarify that political prediction markets are both legal and safe from agency review. Political prediction markets have a track record of outperforming experts and traditional polls, and there is little evidence of the manipulation that the CFTC fears. For that reason, this Note proposes draft language for a better statute, one that would insulate political prediction markets from shifting agency preferences and clarify the standards by which the CFTC evaluates event contracts of all kinds.

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