THE LAW OFFICES OF
JEREMY D. WEINSTEIN
A PROFESSIONAL CORPORATION

April 27, 2026

Christopher Kirkpatrick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Prediction Markets, Advance Notice of Proposed Rulemaking, 91 Fed. Reg. 12516 (Mar. 16, 2026) ("ANOPR") RIN 3038–AF65

Dear Sirs and Madams:

The CFTC's impressively exhaustive list of questions shows remarkable and commendable depth of thought. I offer the following, responding to numbered questions:

> *9. Under a past version of the CEA that was repealed in 2000, the Commission applied an "economic purpose" test as part of determining whether a DCM could list a contract for trading. Are there any elements of the former "economic purpose" test that should or should not be applied in the Commission's public interest determination under CEA section 5c(c)(5)(C)?*

Congress removing words from a statute clearly articulates what the law is ***not***. Congress knew about the economic purpose test, because it was in the statute, and removed it. But it still seems to be applied.[1] The CFTC should not apply repealed law.

> *16. The first listed activity is an "activity that is unlawful under any Federal or State law." ... If an event contract involves an activity that is unlawful under some State laws, but not others, how should this conflict be resolved? What public interest factors should the Commission consider for event contracts involving unlawful activity?*

Distinguish the activity of hedging through futures and swaps from an instrument's underlying activity. The activity of hedging risk using futures and swaps is not illegal under state antigambling and anti-bucketshop laws because it is federally pre-

[1] E.g., the CFTC's secret Mar. 2021 ErisX Order; see Jeremy Weinstein, *Football Gambling Futures Contracts*, 41 Futures and Derivatives Law Report (Aug. 2021), pp. 10-13, attached as Attachment A.

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empted by the CEA. This is different from the underlying risks hedged by the instrument, which could be activity that is legal under state law – e.g., making money from selling grain, or activity that is illegal under state law – e.g., making money because a sports team beat a point spread.

The CFTC asserts a maximalist view of its jurisdiction. For example, the CFTC argued in a 2022 amicus brief that it has jurisdiction over "commodities," that "commodities" means virtually every good or service, tangible or intangible, domestic or foreign, and that its interpretation is entitled to *Chevron* deference.[2] In its 2024 Events Contract NOPR, the CFTC asserted authority to investigate anything domestic or foreign underlying an event contract, and that lack of desire or resources to surveil specific events justified prohibiting such event contracts.[3]

The CFTC carries this even further by arguing it can pre-empt state regulation of anything on which it approves a futures contract. In 2026, the CFTC, conflating jurisdiction over hedging activity with jurisdiction over activity hedged, started suing states and filing amicus briefs seeking to enjoin states from enforcing their own laws against sports gambling, on grounds of federal field and other pre-emption.[4]

The CFTC has this opportunity to change course and embrace cooperative federalism. The CEA is clear - pre-emption is in the application of the state anti-gambling or anti-bucketshop law to the activity of entering into a future or swap[5] - not to the activity of the underlying. Event contract underlyings should not be allowed on activity illegal under the law of any state. The CFTC can work within a cooperative federalism framework, respecting state anti-sports gambling laws.

A first step is to examine why Congress pre-empted these state laws: to protect the activity of hedging using futures and swaps. Starting in the 19th century,

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[2] CFTC, Brief for *Amicus Curiae* in Support of Rehearing, *Laydon v. Cooperatieve Rabobank U.A.*, No. 20-3626, Dkt. 383, 2022 WL 17369433 (2d Cir. Nov. 29, 2022), at 5-9. See Chairman Selig, *WSJ Op-Ed: States Encroach on Prediction Markets*, Feb. 17, 2026 ("The statutory definition of 'commodity' is extraordinarily broad and includes practically all goods, articles, services, rights and interests except for onions (due to a history of market manipulation) and movie box-office receipts (because of Hollywood lobbying)."), https://www.cftc.gov/PressRoom/SpeechesTestimony/seligstatement021726. Regarding the last clause of this quote: (a) almost all legislation, and perhaps some of this ANOPR, is "because of … lobbying"; (b) movie box-office receipts are easily manipulated, see text at fn. 65-67 of Attachment E; and (c) Commissioner Sommer dissented from the CFTC approval of movie box-office receipts futures contracts because they are not "commodities," and their approval "crosses a line that should not be crossed", Release 5834-10, Dissenting Statement of Commissioner Sommers (Jun. 14, 2010) https://www.cftc.gov/idc/groups/public/@otherif/documents/ifdocs/mdexdissentingsommers061410.pdf.

[3] CFTC, NOPR, Event Contracts, 89 Fed. Reg. 48968 at 48983, fn. 126 (Jun. 10, 2024). See my District Court amicus brief in CFTC/futures exchange litigation, attached as Attachment D.

[4] E.g., CFTC, Release 9218-26, *CFTC Sues New York Over Prediction Markets Amid Ongoing Efforts to Preserve Jurisdiction* (Apr. 24, 2026); CFTC, Release 9208-26, *CFTC Seeks to Enjoin Arizona Criminal and Civil Enforcement Against Prediction Markets* (Apr 9, 2026); Law 360, *3rd Circ. Backs Kalshi In Prediction Markets Battle With NJ* (Apr. 6, 2026); Law360, *CFTC Sues Ill., Conn., Ariz. Over Event Contract Enforcement* (Apr. 2, 2026); Law360, *CFTC Backs Prediction Markets In 9th Circ. Fight With Nevada* (Feb. 17, 2026).

[5] CEA §12(e)(2); 7 U.S.C. §16(e)(2).

unscrupulous operators pretended to be commodity or stock brokers entering exchange trades for retail investors on margin. Rather than actually enter the trade on an exchange, the operator was the undisclosed swap counterparty, and "bucketed," or threw away, the trade.[6] About two dozen states outlaw bucket shops;[7] "contracts for differences" are felonies in New York and California.[8] As swaps grew to become essential to the modern economy, swaps enforceability was jeopardized by state anti-bucketshop and anti-gambling laws,[9] and in the 1990s Congress federally pre-empted them, legislating that swaps themselves weren't gambling or bucketing.[10] This does not always apply to everything that could be a swap: Congress and the CFTC can deprive particular swap-like transactions of federal pre-emption by designating them as "*not swaps*."[11]

A second step is to reflect on whether prohibiting states from enforcing anti-sports gambling laws, in order to enable sports gambling *underlyings*, appropriately extends Congress's intent to provide legal certainty to people seeking ***to hedge*** with swaps and futures. Did Congress intend to overturn all state anti-sports gambling laws? There is no evidence it did; in fact the evidence is to the contrary.[12] And, the CFTC cannot do so on its own: the U.S. Supreme Court in *West Virginia v. EPA* (2022) established a "major questions" doctrine limiting agency action absent new legislation, and in *Loper Bright* (2024) overturned the *Chevron* deference on which the CFTC relied in asserting its above-referenced maximalist definition of "commodity."

The third step is to ask, even if Congress intended to, whether Congress constitutionally could, overturn all state anti-sports gambling laws. In 2018, *after* Congress amended the CEA to add federal pre-emption, the U.S. Supreme Court ruled that Congress did not have the power to force states to prohibit sports gambling:

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[6] See Thomas A. Hieronymus, Economics of Futures Trading, pp. 89-93 (Commodity Research Bureau, 1971); Joshua C. Tate, *Gambling, Commodity Speculation, and the "Victorian Compromise"*, 19 Yale J.L. & Human. 97 (2007); John Hill, Jr., Gold Bricks of Speculation (Chicago 1904).

[7] *E.g.*, Ariz. Rev. Stat. Ann. §44-1651; Mass. Gen. Laws Ann. ch. 271, §§35-38; N.C. Gen. Stat. 16-3; Or. Rev. Stat. Ch. 59.710-740; 18 Pa. Cons. Stat. Ann. §§7316, 7319; Tex. Rev. Civ. Stat. Ann. Tit. 132, Art. 8653-54.

[8] Cal. Corp. Code §29100, §29008(c); N.Y. Cons. Laws Art. 23 - 351.

[9] Practicing Law Institute, Advanced Swaps and Derivative Financial Products, pp. 52-73, 162-176 (1991).

[10] Futures Trading Practices Act of 1992 §502(a); *Thrifty Oil Co. v. Bank of Am.*, 310 F.3d 1188, 1207 (9th Cir. 2002); Commodity Futures Modernization Act of 2000, §408(c); and the Dodd-Frank Act (2010). See Barry Taylor-Brill, *Cracking The Preemption Code: The New Model For OTC Derivatives*, 13 Virginia L.& Bus. Rev. 1 (2019).

[11] As to the CFTC, see, e.g., question 37 below and *Joint Final Rule*, 77 Fed. Reg. 48208 at 48260 col. 1 (Aug. 13, 2012) (some types of "contracts for differences" are not within the definition of "swap"). As to Congress, see, e.g., proposed rescission of federal pre-emption of state anti-bucketshop and anti-gaming laws for naked credit-default swaps, *by excluding such instruments from being swaps*. The American Clean Energy and Security Act of 2009, H.R. 2454 [Waxman-Markey] §355(b), Elimination Of Preemption Of State Bucketing Laws Regarding Naked Credit Default Swaps. Cf. Pope Francis, *Bolletino N. 180517a, Oeconomicae et pecuniariae quaestiones*, para. 26 (May 17, 2018) (criticizing naked credit default swaps as gambling); CFTC Chairman Giancarlo response to Pope Francis, Jul. 21, 2018, https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarloresponsetobollettino072118.

[12] E.g., Dodd-Frank Act §745 (CEA §5c(c)(5)(C)); Professional and Amateur Sports Protection Act of 1992 (PASPA); see Jeremy Weinstein, *Football Gambling Futures Contracts*, 41 Futures and Derivatives Law Report (Aug. 2021), fn. 64, fn. 67, attached as Attachment A.

> The legalization of sports gambling is a controversial subject. Supporters argue that legalization will produce revenue for the States and critically weaken illegal sportsbetting operations, which are often run by organized crime. Opponents contend that legalizing sports gambling will hook the young on gambling, encourage people of modest means to squander their savings and earnings, and corrupt professional and college sports.
>
> The legalization of sports gambling requires an important policy choice, but the choice is not ours to make. Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own. Our job is to interpret the law Congress has enacted and decide whether it is consistent with the Constitution. PASPA is not. PASPA "regulate[s] state governments' regulation" of their citizens … . The Constitution gives Congress no such power.[13]

Accordingly, Congress does not have the power to either require or prohibit states from allowing sports gambling, and therefore the Commodity Exchange Act cannot constitutionally field pre-empt state laws prohibiting sports gambling.

The distasteful and easily abused[14] CEA §5c(c)(5)(C) event contracts undermine the entire events contract enterprise. Congress clearly sought to discourage them by putting §5c(c)(5)(C) in the CEA. Congress sought cooperative federalism with CEA §5c(c)(5)(C)(I): the CFTC may determine event contracts "are contrary to the public interest if [they] involve activity that is unlawful under *any* Federal or State law." However, instead of working with the states to advance the common interests of free markets, the CFTC and its regulated exchanges are litigating against Arizona, Connecticut, Illinois, Iowa, Massachusetts, Maryland, Michigan, Montana, New Jersey, New York, Nevada, New York, Ohio, Pennsylvania, Tennessee, Utah, Washington, Wisconsin, and California, Tennessee, and Wisconsin Indian Tribes to force on them sports gambling contracts. It is unseemly for the CFTC to sue states to keep the world safe for CEA §5c(c)(5)(C) contracts.[15] The CFTC and exchanges will lose at least some of these lawsuits.[16] As noted, e.g., in a compelling amicus brief filed last Friday by 38

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[13] *Murphy v. NCAA*, 584 U.S. 453, 486 (2018).

[14] E.g., CFTC, Release 9217-26, *CFTC Charges U.S. Service Member with Insider Trading in Nicolás Maduro-Related Event Contracts* (Apr. 23, 2026) (on invasion and war event contracts trading notwithstanding CEA §5c(c)(5)(C)(IV)); see "war: and "invade" on this Special Forces Master Sergeant's Polymarket screen at https://bit.ly/41SgHmx; Politico, *Newly created Polymarket accounts bet big on US-Iran ceasefire in hours before Trump's announcement* (Apr. 8, 2026).

[15] The Hill, *Utah governor blasts Trump regulator for blessing prediction markets* (Feb. 17, 2026) ("Mike, I appreciate you attempting this with a straight face, but I don't remember the CFTC having authority over the 'derivative market' of LeBron James rebounds. Let me be clear, I will use every resource within my disposal as governor of the sovereign state of Utah, and under the Constitution of the United States to beat you in court.").

[16] See e.g., Law360, *9th Circ. Judge Rips 'Sophistry' By Online Prediction Markets* (Apr. 16, 2026); Law360, *Ohio Judge Won't Shield Kalshi's Sports Contracts* (Mar. 9, 2026); Law360, *Tenn. Regulators To Challenge Kalshi Win At 6th Circ.* (Mar. 23, 2026); Law360, *Contracts On Aliens, Hugs Aren't Gambling, Kalshi Tells Judge* (Feb. 11, 2026); Law360, *Judge Says Betting Case No 'Slam Dunk' For Kalshi Or*

state attorneys general,[17] the CFTC's position is flawed. And, state attorneys general have had a recent influx of talent.[18] The result will be contradictory judicial opinions reducing legal certainty for swaps and futures on things other than sports bets.[19] Disrespecting state criminal law is a slippery slope. Claimed CFTC preemption may start with sports gambling; in today's age of broken norms it can progress to underlyings in winning lottery ticket numbers, heroin and fentanyl prices, high-profile kidnap ransoms and live return, and the number of rapes per month in a particular city.[20]

> *21. Why, or why not, would it be appropriate for the Commission to propose any changes to its regulations related to the activities listed in CEA section 5c(c)(5)(C)? …*

It would be appropriate for the CFTC to propose changes to §40.11. Back in the days when there were multiple Commissioners,[21] two of them publicly debated what it even means.[22] It has not protected futures exchanges from arbitrary and capricious agency action.[23] Clearly articulated, mandatory prohibitions with details - such as whether "gaming" includes "gambling," previously a source of confusion[24] - would be very helpful. Lack of explicit, mandatory prohibitions for §5c(c)(5)(C) contracts is dangerous; a rule that does not prohibit, but rather gives the CFTC discretion to prohibit, assassination event contracts is open for case-by-case prohibitions on such contracts on politicians of one main political party but not of the other.

Mass. (Dec. 9, 2025) ("Justice Barry-Smith questioned whether that was the intent of Congress when it enacted each of the laws governing commodities exchanges. 'I believe in [the 1970s] and in 2010, Congress didn't have the explicit intention of preempting sports gaming laws, but they did provide jurisdiction for contracts and swaps'"); and ultimately, *Murphy v. NCAA*, 584 U.S. 453, 486 (2018).

[17] https://ag.ny.gov/sites/default/files/amicus-curiae/massachusetts-v-kalshiex-llc-amicus-brief-2026.pdf.

[18] ABA, *Justice Department struggles as thousands exit—and few are replaced*, Washington Letter (Nov. 19, 2025) ("Many attorneys seeking government work are opting to work for state governments, leading to a surge of qualified candidates to state attorneys general offices … .")

[19] E.g., enforceability of Marex Group structured notes that pay 7% if Nvidia Corp. is still the largest company in a year. Bloomberg, *First Prediction Market Note Offers Nvidia Bets With Less Risk* (Apr. 2, 2026). See also Smith, Pinkert, *What Kalshi Cases Reveal About State Authority, Regulation* (Law360, Mar. 4, 2026); Law360, *Coinbase Asks Judge To Bar Ill. Action Over Event Contracts* (Feb. 24, 2026) (possibly new critical distinction between the "outcome" v. "occurrence" of an "event"); Murphy, Altman, Benjamin, *Contradictory Rulings Show Complexity Of Swaps Regulation* (Law360, Nov. 20, 2025).

[20] See Tamara de Silva, *What The CFTC's Event Contracts Amicus Brief Is Missing* (Law360, Mar. 12, 2026); Jeremy Weinstein, *Football Gambling Futures Contracts*, 41 Futures and Derivatives Law Report (Aug. 2021) p. 12, attached as Attachment A.

[21] Cf. 91 Fed. Reg. at 12524 col. 2: "On this matter, Chairman Selig voted in the affirmative. No Commissioner voted in the negative." Because the Chairman is the only member of a "Commission [that] consists of five Commissioners … ." https://www.cftc.gov/About/Commissioners/index.htm.

[22] See Jeremy Weinstein, *Football Gambling Futures Contracts*, 41 Futures and Derivatives Law Report (Aug. 2021), p. 3, pp. 8-14, attached as Attachment A.

[23] See CFTC abuses in the wake of its desire to prohibit Kalshi election contracts, described in Jeremy Weinstein July 21, 2023, comment letter on CFTC Review of KalshiEx Proposed Congressional Control Contracts under CFTC Regulation 40.11, pp. 3-6, attached as Attachment E. In another case, an allowed event contract got cancelled when the CFTC wanted to stop a newly proposed similar event contract. *Clarke v. CFTC*, 74 F.4th 627 (5th Cir. 2023).

[24] See my D.C. Circ. amicus brief in a CFTC/futures exchange lawsuit, attached as Attachment C.

33. As noted above, event contracts may be covered by the statutory definition of the term "swap" in CEA section 1a(47)(A). What aspects of prediction markets are relevant to whether event contracts should, or should not, appropriately be classified as swaps? …

Claimed federal swaps pre-emption should not create two classes of people - one subject to state sports gambling laws, and another of wealthy "eligible contract participants" avoiding such laws by structuring sports bets as swaps transactions under an ISDA Master Agreement.

37. In the 2012 joint rulemaking to further define the term "swap," the CFTC and the SEC adopted an interpretation which, in part, listed certain types of agreements, contracts, or transactions that "will not be considered swaps … when entered into by consumers (natural persons) … primarily for personal, family, or household purposes." In doing so, the CFTC and SEC stated that they "do not believe that Congress intended to include these types of customary consumer and commercial agreements, contracts, or transactions in the swap … definition, to limit the types of persons that can enter into or engage in them, or to otherwise to subject these agreements, contracts, or transactions to the regulatory scheme for swaps … ." Are any event contracts similar to, or different from, the types of agreements, contracts and transactions that are excluded from the swap definition under this interpretation? How are such similarities or differences, if any, relevant to the CFTC's regulation of those event contracts?

Consistent with the CFTC's maximalist view of its jurisdiction, in its rule defining "swap" the CFTC crafted a "customary consumer/commercial arrangements" exemption so things like leasing, furnishing, and heating a house or apartment are not "swaps" (but still subject to CFTC "commodities" jurisdiction).[25] The language referenced in question 37 is clear with respect to sports gambling:

With respect to consumers, … the types of … transactions that will ***not be considered swaps*** … when entered into by consumers (natural persons) as principals … primarily for personal, family, or household purposes, include:

• Agreements … to acquire or lease real or personal property, to obtain a mortgage, to provide personal services …;

• … purchase products or services for … household purposes … including … home heating fuel … where the consumer takes delivery of and uses the fuel;

• … an interest rate cap or lock on a consumer loan or mortgage …;

• … consumer product warranties, … purchased with major appliances …;

• … options to … purchase rugs …;

• ***Consumer agreements, contracts, or transactions where, by law or regulation, the consumer may cancel the transaction without legal cause;***[438] {[438] ***Examples … include*** consumer transactions that may be cancelled pursuant to … Regulation Z… and other ***consumer transactions that have cancellations rights***

[25] See Jeremy Weinstein, *CFTC Regulation of Trade Options*, 39 Futures and Derivatives Law Report (Nov. 2019) p. 7 col. 1, attached as Attachment B.

conferred by statute or regulation.} …;

• … Consumer guarantees of credit card debt … of a friend or relative. …

The types of … transactions discussed above are not intended to be exhaustive of the customary consumer … arrangements that should not be considered to be swaps … . There may be other, similar types of … transactions that also should not be considered to be swaps … . In determining whether similar types of … transactions entered into by consumers … are swaps …, the Commissions intend to consider the characteristics and factors that are common to [those] listed above:

• They do not contain payment obligations, whether or not contingent, that are severable from the … transaction;

• They are not traded on an organized market or over-the-counter; and

• In the case of consumer arrangements, they: —Involve an asset of which the consumer is the owner or beneficiary, or that the consumer is purchasing, or they involve a service provided, or to be provided, by or to the consumer …

Two of the key components reflected in these characteristics that distinguish these … transactions from swaps … are that: (i) The payment provisions of the … transaction are not severable; and (ii) the … transaction is not traded on an organized market or over-the-counter, and therefore such … transaction does not involve risk-shifting arrangements with financial entities, as would be the case for swaps … . This interpretation is not intended to be the exclusive means for consumers … to determine whether their … transactions fall within the swap … definition.[26]

Under many state laws, gambling contracts are void by statute[27] and so consumers may by law and statute cancel a sports gambling transaction without legal cause. In such states, sports gambling transactions are therefore within the exception noted in the bold-faced language above, and meet the three part test at the end of the quote. While Congress intended to regulate swaps to ensure that they are not illegal gambling contracts under state laws, there is no evidence that Congress intended to regulate illegal sports gambling contracts as swaps; in fact the evidence is to the contrary.[28]

The CFTC invented "customary consumer and commercial arrangements" out of whole cloth and is free to reinvent it; until then illegal sports gambling contracts are customary consumer arrangements, that conveniently really are not swaps, and therefore

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[26] CFTC & SEC, *Joint Final Rule*, 77 Fed. Reg. 48208 at 48246-48 (Aug. 13, 2012) (emphasis supplied).

[27] For U.S. states adopting English common law (e.g., Cal. by Civ. Code §22.2; N.C. by N.C. Gen Stat § 4-1), Statute of Anne, which declared all gambling debts "utterly void, frustrate, and of none effect, to all intents and purposes whatsoever." 9 Anne, ch. 14, § 1. See, e.g., *TAK Chun Gaming Promotion Co. v. Long*, 96 Cal.App.5th 1027, 314 Cal.Rptr.3d 890 (Cal. App. 2023), attached as Attachment F. See also *Dream, Inc. d/b/a Frontier Bingo v. Samuels*, 392 So.3d 462 (Ala. 2023); *Macon Cty. Greyhound Park v. Hoffman*, 226 So.3d 152, 168 (Ala. 2016); *The Casanova Club v. Bisharat*, 189 Conn. 591 (1983); *Gulf Collateral. v. Morgan*, 415 F. Supp. 319 (S.D. Ga. 1976); *In re Hionas*, 361 B.R. 269 (Bankr. S.D. Fla. 2006); Va. Code, §11-14; Ga. Code §13-8-3; cf. S.C. Code §32-1-40; I. Nelson Rose, *Gambling and the Law - Update 1993*, 15 Hastings Comm. & Ent. L.J. 93, 109-110 (1992).

[28] E.g., Dodd-Frank Act §745 (CEA §5c(c)(5)(C)); Professional and Amateur Sports Protection Act of 1992 (PASPA); see Jeremy Weinstein, *Football Gambling Futures Contracts*, 41 Futures and Derivatives Law Report (Aug. 2021), fn. 64, fn. 67, attached as Attachment A.

state prohibitions of illegal sports gambling contracts are not field pre-empted by the Commodity Exchange Act or CFTC regulation.

Additional

I reiterate my letter submitted for the Prediction Markets Roundtable and my recommendations therein.[29] The CFTC should rationally scope its asserted jurisdiction. Futures markets will be indelibly sullied, with negative long-term consequences for their use for the economically critical task of hedging risk, if the public sees them as smart phone platforms competing with casino sports books.

It has been a long road to this ANOPR. Over the past six years I've written six comment letters to the CFTC,[30] filed two federal court amicus briefs,[31] written a 28 page, 109 footnote law review article,[32] and made a Commissioner-invited, yet denied, CFTC FOIA request and appeal,[33] all focused on CEA §5c(c)(5)(C). I look forward to an excellent, thoughtful, and thorough proposed rulemaking by the CFTC, which I very much hope leaves me with nothing to say about CEA §5c(c)(5)(C).

These comments are solely my own and are not necessarily the opinions of any client I represent or industry group in which I participate.

Yours truly,



Jeremy D. Weinstein

cc: Senator Adam Schiff
Congressman Mark DeSaulnier

[29] Jeremy Weinstein, Prediction Markets Roundtable (Feb. 21, 2025) https://www.cftc.gov/media/11886/JeremyDWeinsteinLawCorporation022125/download.
[30] One of which is Attachment E; three of which are in my filing referenced in footnote 29.
[31] Attachments C and D.
[32] Attachment A.
[33] Attachments to my filing referenced in footnote 29.

ATTACHMENTS

A Weinstein, Football Gambling Futures Contracts
B Weinstein, CFTC Regulation of Trade Options
C Weinstein, D.C. Circ Amicus, *KalshiEx v. CFTC*
D Weinstein Dist. Court Amicus, *KalshiEx v. CFTC*
E Weinstein 7/21/23 CFTC comment letter
F *TAK Chun Gaming Promotion Co. v. Long*

ATTACHMENT A

Weinstein, Football Gambling Futures Contracts

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REPORT

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POINT OF VIEW

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

By Jeremy D. Weinstein

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INTRODUCTION

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

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

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

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

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

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

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

CFTC REGULATION OF "EVENT CONTRACTS"

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

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

> Special Rule For Review And Approval Of Event Contracts And Swaps Contracts.—(i) Event Contracts.—In connection with the listing of agreements, contracts, transactions, or swaps in excluded commodities that are based upon the occurrence, extent of an occurrence, or contingency (other than a change in the price, rate, value, or levels of a commodity described in section 1a(2)(i)), by a designated contract market or swap execution facility, the Commission may

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> determine that such agreements, contracts, or transactions are contrary to the public interest if the agreements, contracts, or transactions involve—(I) activity that is unlawful under any Federal or State law; (II) terrorism; (III) assassination; (IV) war; (V) gaming; or (VI) other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest. (ii) Prohibition.—No agreement, contract, or transaction determined by the Commission to be contrary to the public interest under clause (i) may be listed or made available for clearing or trading on or through a registered entity.

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

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

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

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

NADEX'S 2012 ELECTION CONTRACTS—PRECEDENT OR NOT?

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

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

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

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

ErisX's 2020/21 NFL GAMBLING CONTRACTS

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

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

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

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

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

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

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

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

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

INVITATION ACCEPTED

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

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

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

In my FOIA letter, I argued that the CFTC

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

ErisX NFL CONTRACT-THE PUBLIC COMMENT PROCESS

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

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

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

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

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

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

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

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

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

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

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

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

DUE PROCESS

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

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

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

THE WORDS OF SECTION 745 v. RULE 40.11

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

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

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

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

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

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

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

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

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

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

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

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

Commissioner Berkovitz summarized his po-

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

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

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

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

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

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

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

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

"LEGISLATIVE HISTORY"

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

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

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

AGAINST "CORE PRINCIPLES"

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

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

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

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

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

CONCLUSION

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

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

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

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

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

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

ENDNOTES:

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

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

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

[3]17 C.F.R. § 40.11(a)(1).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[19]Nadex Order p. 2.

[20]Nadex Order p. 4.

[21]Nadex Order p. 4.

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

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

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

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

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

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

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

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

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

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

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

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

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

[32]Commissioner Berkovitz Statement.

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

[34]Commissioner Berkovitz Statement I.

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

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

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

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

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

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

[41]Hesiod, Theogony, 225-32.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[71]Commissioner Berkovitz Statement, Executive Summary.

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

[73]Commissioner Quintenz Statement.

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

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

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

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

[77]Commissioner Quintenz Statement B.3.

[78]Commissioner Quintenz Statement B.1.

[79] Commissioner Berkovitz Statement II.

[80]Commissioner Quintenz Statement D.1.

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

[82]Commissioner Quintenz Statement C.1.

[83]Commissioner Berkovitz Statement n. 17.

[84]Commissioner Quintenz Statement B.3.

[85]Commissioner Berkovitz Statement.

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

[87]Commissioner Quintenz Statement E.2.

[88]Commissioner Berkovitz Statement III.B.

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

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

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

[92]Commissioner Quintenz Statement B.3.

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

[94]Commissioner Berkovitz Statement III.C.

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

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

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

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

[99]17 C.F.R. § 38.200.

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

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

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

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

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

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

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

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

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

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

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

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

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ATTACHMENT B

Weinstein, CFTC Regulation of Trade Options

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REPORT

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CFTC REGULATION OF TRADE OPTIONS: UNFINISHED PROJECT KISS BUSINESS

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PROJECT KISS

In May 2017, acting Chairman Giancarlo of the Commodity Futures Trading Commission (CFTC) launched, with much fanfare, "Project KISS."[1] "KISS" meant "Keep it simple, stupid."[2] Although Chairman Giancarlo later said it may have been unclear whom the CFTC was calling "stupid," most of the market assumed he meant the CFTC and its initial rulemaking to regulate "swaps" under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"). Project KISS started with a CFTC "solicitation of suggestions from the public regarding how the Commission's existing rules, regulations, or practices could be applied in a simpler, less burdensome, and less costly manner. The Commission is not asking the public to identify rules for revocation, suspension, annulment, withdrawal, limitation, amendment, modification, conditioning, or repeal."[3]

Even though the CFTC, oddly, announced the initial outcomes of Project KISS at a private venue,[4] there have been some positive outcomes of Project KISS, including alphabetizing definitions,[5] and a revamp of the formerly pernicious initial margin collateral segregation rules.[6] Overall however, Project KISS has been a disappointment. Perhaps this disappointment was inevitable, given the CFTC's long list of what Project KISS was not. Nevertheless, the comment letters provide a treasure trove of recommendations for potential future CFTC regulatory relief.[7]

One set of suggestions yet to be acted upon is reform of the CFTC's regulations, interpretations, and guidances on non-financial commodity trade options and commodity transactions with "embedded volumetric optionality." Under CFTC Chairman Gary Gensler,[8] the CFTC made a series of mistakes in implementing its authority to regulate the markets for "swaps," and instead of admitting them, dug in deeper. The CFTC, under subsequent Chairmen Massad and Giancarlo, took a few baby steps towards sanity within the framework each was left by his predecessor. However, the CFTC still needs to reform these "rules." This is because the CFTC claims swaps jurisdic-

tion over transactions that are specifically excluded therefrom by Congress, and also because the CFTC promulgated its "rules" in such a disjointed manner, and so far outside of ordinary regulatory process, that there is no single place that any interested person can look to learn these rules so as to comply with them. This is having detrimental consequences to both compliance and market liquidity. Even new CFTC Commissioners and staff members struggle to understand how the rules, interpretations, no-action letters, and various staff guidance documents are, or were, intended to work.

NON-FINANCIAL COMMODITY TRADE OPTIONS AND "EMBEDDED VOLUMETRIC OPTIONALITY"

In its Dodd-Frank Act rulemaking on the definition of a "swap" in 2012 (the "Products Release"),[9] the CFTC under Chairman Gensler determined that all physically settled (or "non-financial," a new regulatory term) commodity transactions, even those between commercial end users,[10] many of which are used to feed the country and keep the lights on, must be analyzed by all those commercial end users for "swaps" regulatory coverage. When confronted with its numerous factual and legal errors, rather than take a deep breath and regroup, the CFTC insisted it was right, quickly compounded a complex and often fact-free analysis in its interpretations providing a "three part test"[11] and a "seven part test"[12] with an Office of General Counsel further five part test,[13] and obdurately concocted a Frankenstein's monster (in the sense of a monster stitched together from the body parts of cadavers brought to life in an electrical storm and then let loose upon the peasantry by an irresponsible mad scientist, as in the film *Frankenstein* (1931)) of final regulations,[14] interim final regulations,[15] proposed regulations,[16] no action letters,[17] proposed interpretations,[18] staff interpretations,[19] "final interpretations,"[20] proposed guidances,[21] guidances,[22] and ***undated*** "FAQs."[23] Anyone seeking to comply cannot learn how to do so by referring to rules that have gone through the rulemaking process required by the Administrative Procedures Act.

The pièce de résistance was the CFTC's six page, 18 question, ***undated*** Commodity Options FAQs,[24] laying out a scheme that, when coupled with the special entity regulations, caused real people to lose real, good-paying jobs, as energy trading desks and end-users' commercial risk hedging activities sharply cut back or even shut down due to intense regulatory uncertainty. The CFTC's Commodity Options FAQ wasn't the CFTC's only undated statement by a CFTC official, issued with the boilerplate statement that it was not binding on the Commission and should not be relied upon. The Office of General Counsel's five part test was also in an ***undated*** FAQ.[25] A regulator shows contempt for the regulated by issuing undated "FAQs" on an incomprehensible governing patchwork of issuances, few of which are actual regulations. It is reminiscent of the humiliative town clerk in the German expressionist masterpiece, *The Cabinet of Dr. Caligari (1919)*.

Undated FAQs cannot help people comply, since one cannot tell if they were issued before, concurrently with, or after any specific final regulation, interim final regulation, no action letter, proposed interpretation, staff interpretation, final interpretations, proposed guidance, guidance, or other undated FAQ.

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"NON-FINANCIAL" COMMODITY TRANSACTIONS WITH "EMBEDDED VOLUMETRIC OPTIONALITY"

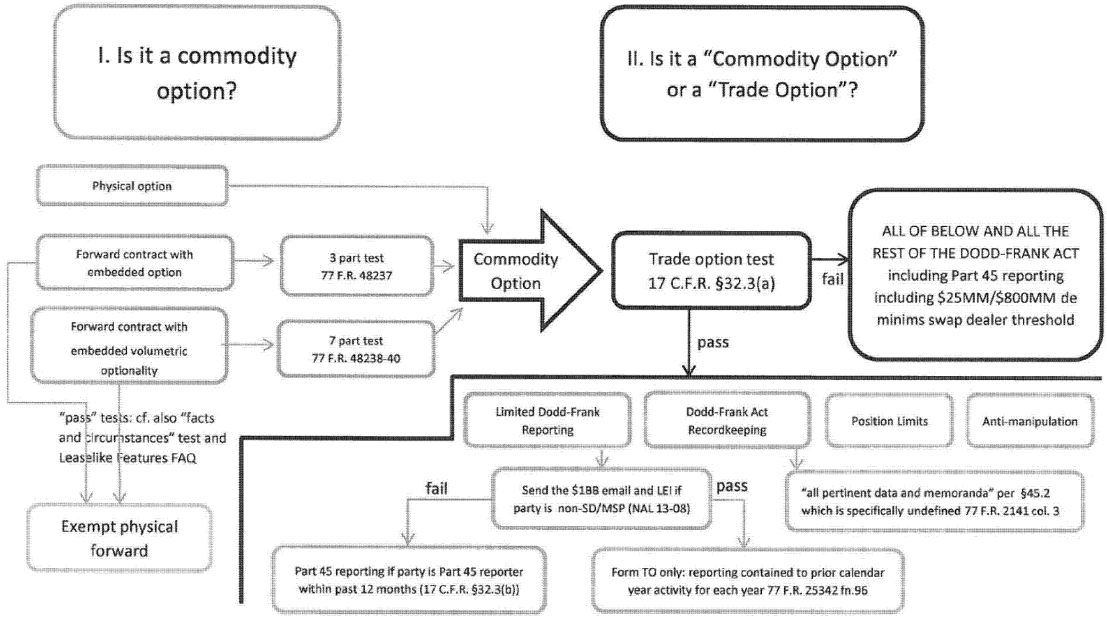
The optionality the CFTC purports to regulate can come about in one of two ways. The first is for the transaction to be a straightforward call or put option that is physically settled. The second is for either such an option, or what the CFTC refers to as "optionality," to be embedded in a physical forward contract. But what the CFTC has labeled as "optionality," commercial parties to contracts understand as innocuous choices one or the other can make (or "exercise") as part of contract performance. The CFTC, in its Products Release, focused specifically on optionality that "targets the delivery term."[26] By "delivery term," the CFTC does not mean what parties to a commodity contract mean, which is the span of time (term) over which deliveries are made; rather for the CFTC, "delivery term" means "quantity." Optionality to vary volumes to take advantage of market price movements, as opposed to physical or regulatory requirements driving the buyer to deliver or receive different volumes, is, according to the CFTC, swap-regulated embedded volumetric optionality.[27]

In the Products Release, the CFTC explained how a contract can have embedded optionality and not be a swap.[28] For example, an embedded volumetric option in a power purchase agreement for all power a facility generates, as a "full output" contract, is interpreted not to have the type of embedded volumetric optionality that would imply the power purchase agreement is a "swap."[29] The same would be the case for a contract that provided optionality only as to delivery time and delivery points.[30] An option that allowed the buyer to change volumes based on price could be an embedded volumetric option (implying a "swap"), but not necessarily; for example a right under a power purchase agreement not to take volumes when the locational marginal pricing is negative might be a volumetric option, although maybe not because physical factors, like sunny weather driving solar facility production, can drive negative pricing.[31]

COMPLIANCE

By 2015, the compliance map ***for commercial end users***, such as utilities and farmers, for every transaction "intended to be physically settled" (and therefore which Congress in the Dodd-Frank Act specifically excluded from CFTC regulation[32]) had grown to:

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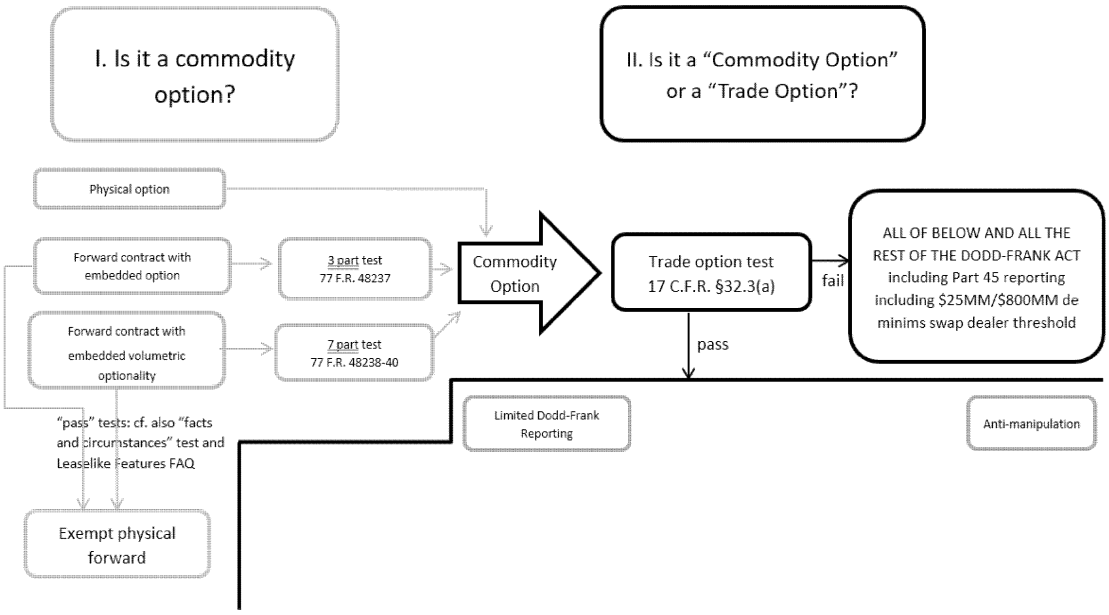


The CFTC specifically provides that there is no good faith safe harbor for determining whether a transaction is a swap or not under its rules[33] even though these very rules reject the clear line provided by Congress in the Dodd-Frank Act[34] of what is and is not a swap. Moreover, the parties' determination of whether or not a transaction is a "swap" (or a commodity trade option, more on which below) must be correct at the time the transaction is entered into—if the transaction is a "swap," and does not meet the commodity trade option exemption conditions, it must be reported almost immediately to a swap data repository.[35] CFTC rules ensure confusion for parties seeking to understand which of the two contracting parties' potentially differing analysis controls.[36] Chairman Gensler's CFTC emulated the Roman Emperor Caligula, of whom Suetonius reported, "great grievances were experienced from the want of sufficient knowledge of the law. At length, on the urgent demands of the Roman people, he published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it."[37] And yet, the CFTC claimed it "***does not believe that an intricate knowledge*** of the CEA or the agency's procedures, personnel, and implementing regulations is necessary in order to accurately prepare and submit a Form TO in approximately two hours . . . ."[38]

The CFTC under Chairman Massad recognized it had created an untenable situation for commercial market participants who simply wanted to hedge or mitigate commercial risks arising from ongoing business operations, and comply with the rules. Chairman Massad's approach to Chairman Gensler's mess was to ameliorate some of it, such as to grant relief from the annual requirement to file a Form TO for commodity trade options,[39] revise the final rule for commodity trade options,[40] and make it less likely that many commercial users would run afoul of the complicated, multi-part tests for embedded volumetric optionality.[41] This left the

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current compliance map ***for commercial end users*** as:



I won't dive further into the very many detailed specifics of these compliance maps. The point of this article is that the CFTC should regulate according to the law, propose and publish rules in accordance with the Administrative Procedure Act, and provide the public with a set of coherent regulatory requirements that would make any such specific explanation obsolete, as soon as possible.

The above charts are incomplete, as there are further compliance obligations for non-financial commodity trade options. For example, a commercial end user must include commodity trade options in its compliance with large trader reporting requirements to the extent applicable[42] and, when transacting with a swap dealer, a commercial end-user must obtain a legal entity identifier and report it to the swap dealer.[43] Moreover, because other laws promulgated by other agencies incorporate by reference the term "swap" as defined in the CFTC's rules and regulations, but without referring to the CFTC's exemption of commodity trade options, it is not clear if, for example, the Volcker rule applies to commodity trade options, which are "swaps," according to the CFTC's interpretation in the Products Release.

COMMODITY OPTION V. TRADE OPTION

Just as the author of an article about nuclear waste should explain why "radioactive" is "bad," I will explain the difference between a "commodity option" and a "non-financial commodity trade option." By filtering the ***transaction*** through the tests for options, including options that might be "embedded volumetrically," a party learns first whether it has a "commodity option" on its hands. If it is a commodity option, according to the CFTC, it is a type of "swap" and regulated under the Dodd-Frank Act. Then the analysis moves on to consider whether the option could

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be a "non-financial commodity trade option." If the ***parties to*** the option, the commodity underlying the option, and the consequences upon exercise of the option all meet the requirements of the trade option exemption rule,[44] it is a "trade option" and is regulated as Dodd-Frank lite.[45] If the parties, the commodity, and the consequences upon exercise of the option do not meet the trade option exemption rule conditions, it's a "commodity option," and subject to the full panoply of Dodd-Frank Act regulation as a "swap."

ELIGIBLE CONTRACT PARTICIPANT

Another challenge of meeting the trade option exemption requirements is that the CFTC's trade option rule refers to an "offeree" and an "offeror" of the option, which does not translate to market terms of "buyer" (or holder) of an option and "seller," and the CFTC adds conditions to the commercial user or merchant elements. Therefore, in a contract where both parties are commercial users or merchants handling the commodity, a way to help the contract be a "trade option/Dodd-Frank Act lite swap" (good), and not a "commodity option/full Dodd-Frank Act swap" (bad), is for the parties to each be, and to represent to each other that they are, "eligible contract participants."[46] The Commodity Exchange Act (CEA) definition of "eligible contract participant,"[47] the related CEA definition of "eligible commercial entity,"[48] and CFTC regulation definition of "eligible contract participant"[49] are long and involved. "Eligible contract participant" generally includes privately owned entities that have a net worth of over $1,000,000 or assets over $10,000,000. An "eligible contract participant" representation is appropriate between commercial parties. It can be made even by a project entity that will become one, even if it does not yet have any assets because it does not yet have financing, because the CFTC allows "anticipatory ECPs."[50]

While some overcompliance, such as reporting, as swaps, transactions that are not swaps, "just to be safe," is prohibited overcompliance,[51] mutual ECP representations, if truthfully made, are not. In every contract for the sale or purchase of a commodity, each party should represent that it is an "eligible contract participant" within the meaning of the CEA if it is true, and an anticipatory ECP if it is not an ECP but is an anticipatory ECP. Each transacting entity should perform due diligence to assure itself that its counterparty is an ECP or anticipatory ECP, along with the other elements of the trade option rule, and document that due diligence. Unlike some Dodd-Frank regulations that provide that a representation is sufficient,[52] for trade options a representation cannot substitute for actual status.[53]

The guarantor of a "swap,"[54] and therefore the guarantor of a commodity option, must also be an ECP, but the guarantor of a trade option need not be.[55] Under the CFTC's rules, a recourse guarantee of a swap ***is*** a swap.[56] This ups the stakes of the commodity option v. non-financial trade option analysis into a game of barefoot mumblety-peg with a switchblade. Although some practitioners have said that guaranties are merely part of swap documentation, that is not the CFTC's position, and regulation that makes no sense should not be rationalized, it should be changed. Chairman Gensler even told one major energy company of his plans to fund the CFTC with fines for noncompliance with regulations with which he knew no one could comply.[57]

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CUSTOMARY COMMERCIAL ARRANGEMENTS

There is another special transaction category that the CFTC interprets as being exempt from swaps regulation. These are "customary commercial arrangements." These include ordinary retail consumer transactions[58] and probably certain regulatory compliance transactions, such as California Resource Adequacy capacity.[59] Since anytime you drive up to a gas station you can choose whether to buy one gallon or fill your tank, doing so would be a commodity option reportable to a swap data repository but for this customary commercial arrangement exception.[60] "Customary commercial arrangements" are separate from the forward contract exclusion, although their full scope is also unclear. They are commercial arrangements or contracts that the CFTC has interpreted Congress did not intend to regulate as "swaps."[61]

The uncodified, enigmatic, and obscure nature of all of the above makes it difficult for new entrants to these markets to know of them and know how to apply them to their transactions. The CFTC uses words, presumably from its futures markets regulations, that have different meanings in commercial markets and courthouses, such as "delivery term" for "quantity," and "offeror or offeree" rather than "buyer, seller, or holder of an option," which ensures confusion from the start. As the years pass, and more CFTC staffers, private practice attorneys and compliance specialists arrive who missed the initial horror show of Dodd-Frank Act rulemakings, confusion on the requirements of the CFTC rules and their application has increased and will continue to do so.

CONGRESS' CLEAR EXCLUSION OF "PHYSICALLY SETTLED" TRANSACTIONS FROM DODD-FRANK

When seeking to reform the trade option and embedded volumetric optionality rules, the CFTC should reread CEA § 1a(47) and especially CEA § 1a(47)(B)(ii), under which: "The term 'swap' does not include any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically ***settled***." The CFTC has asserted swaps jurisdiction over commodity options that are intended to be physically settled,[62] even though the CEA provides that transactions that are intended to be physically settled are not "swaps."[63]

All commercial transactions are either payments of money for the opportunity to get money, i.e., exchanging cash flows (financial settlement), or one party paying money to the other for something (other than money) that exists when it is delivered (physical settlement). Such commercial transactions are settled either by the payment of money by one party to the other or the delivery of something that exists. If the transaction is "intended" to settle by the payment of money, like an exchange traded option is settled financially or financially-settled, that's a swap. But if the transaction is "intended" to settle by one party getting something physical, even if the party is not obligated to buy it, then the statute itself specifically excludes the option from the defined term "swap." The non-exercise of an optional obligation to buy is not the equivalent of financially settling the transaction, the option simply is not exercised and lapses, with the consequence that nothing is delivered. But the transaction was

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still always intended to be physically settled. If the option had been exercised, something that exists would have been handed over and physically settled.

In its commodity trade option exemption, the CFTC defined "physically settled" using different words: "if exercised, the option would result in the sale of an exempt or agricultural commodity (i.e., non-financial) commodity for immediate (spot) or deferred (forward) shipment or delivery," and added an element requiring intent of "both parties": "The third element of the trade option exemption is that both parties must intend that the commodity option be physically settled . . . ."[64] But "settled" does not need to mean "purchased" or "sold" or "delivered"; that element was added by the CFTC in the commodity trade option exemption. It is not in the statute, and it is not a requirement of Congress' exclusion in § 1a(47)(B)(ii). Something that can only be physically settled must be intended to be physically settled, whether or not one or both parties "intend" to "purchase" or "sell" or "deliver." In the commodity trade option exemption, the CFTC added two new elements—"dual intent" to "actually deliver"—that are not in the statute. "Settled" has a dictionary entry that is different from that for "delivered," and they are different words, so the CFTC should not replace Congress' "settled" with "delivered." The CFTC said that in an option only one of the parties is ***required to deliver***, and from there said that this means that only one of the parties ***intends to physically settle***, which is wrong—both parties "intend to physically settle" the deal if the option holder exercises its right to "require delivery."

Attorneys representing commercial end-users, particularly those in the energy industry, have commented for many years on the ambiguities of the CFTC's interpretations regarding the term "swap," and the compliance difficulties this creates for market participants. For a sophisticated and erudite analysis of the line between a "swap" and a "not-a-swap," and the consequences of drawing that line without clear regulatory guidance, see the various comment letters authored by Patricia Dondanville for the Not-For-Profit Electric Associations, addressing all relevant prior rulemakings and the legislative history, which also conclude that under the Dodd-Frank Act the CFTC is exceeding its jurisdiction by claiming to regulate trade options and embedded volumetric optionality as a category of swaps,[65] and to which I heartily refer the CFTC, and any attorney briefing the defense of a CFTC swap or trade option enforcement action concerning a transaction that is "intended to physically settle."

CONCLUSION

If the CFTC is interested in drafting swaps rules that are complied with, that can be complied with, and that it can successfully enforce compliance with, it should dip back into Project KISS and reform its approach to trade options and embedded volumetric optionality—and promulgate tractable rules that conform with the Dodd-Frank Act and the Administrative Procedures Act.

ENDNOTES:

[1]CFTC, *Request for Information, Project KISS*, 82 Fed. Reg. 21494 (May 24, 2017).

[2]82 Fed. Reg. at 21494 col. 3.

[3]82 Fed. Reg. at 21494 col. 3.

[4]Feb. 12, 2018, by the CFTC Chief of Staff, at the National Press Club (avail. at http://www.cftc.gov/PressRoom/SpeechesTestimony/opagill

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2).

[5]CFTC, *Interim Final Rule, Definitions,* 83 Fed. Reg. 7979 (Feb. 23, 2108).

[6]CFTC *Final Rule, Segregation of Assets Held in Uncleared Swap Transactions*, 84 Fed. Reg. 12894 (Apr. 3, 2019). The original of this regulation was one of the CFTC's first under Dodd-Frank, and very much in need of reform. *See* International Energy Credit Association (IECA), Comments on Proposed Rule (Sept. 28, 2018); Jeremy Weinstein, *How the Dodd-Frank Act Will Bring Back Stagflation [If Interest Rates Increase],* Futures & Derivatives Law Report, Jan. 2011 (avail. at http://docsjweinsteinlaw.com/pdfs/FDLR31.01_Weinstein.pdf).

[7]Avail. at https://comments.cftc.gov/KISS/KissInitiative.aspx?Type=ListAll&Year=2017. The CFTC's website page for KISS Initiatives (https://comments.cftc.gov/KISS/KissInitiative.aspx), though linked to from the CFTC's home page, currently does not list any.

[8]Gary Gensler was CFTC Chairman when the Dodd-Frank Act was enacted, and he continued as Chairman until January of 2013.

[9]CFTC & SEC, *Joint Final Rule; Interpretations; Request for Comment on an Interpretation, Further Definition of "Swap,"* . . ., 77 Fed. Reg. 48,208 (Aug. 13, 2012). The CFTC was able to define a dealer in "swaps" (CFTC & SEC, *Joint Final Rule; Joint Interim Final Rule; Interpretations, Further Definition of "Swap Dealer," ... and "Eligible Contract Participant,"* 77 Fed. Reg. 30596 (May 23, 2012), three months ***before*** it published interpretations in the Product Release that defined "swap." *See*, *IECA Petition for Rulemaking to Amend and Extend the Effective Date of CFTC Regulations . . . in the Commission's Final Rule to Further Define Swap Dealer . . ., and to Allow the Submission of Additional Comments/Requests for Additional Guidance/ Requests for Reconsideration of such Regulations* (Jul. 2, 2012), which remains unanswered. I guess this is okay, because we know what a "snipe hunter" is, even if we don't know what a "snipe" is. See, *The Heart Is a Lonely Snipehunter*, episode of TV sitcom *Cheers*, first aired Jan. 10, 1985. Similarly, the CFTC published a rule providing an exemption from most of its regulations regarding "swaps" for commodity trade options several months before its erroneous interpretation that all commodity options, even those intended to settle physically, are "swaps." Thousands of pages after the Dodd-Frank Act, the CFTC's regulations on "swap" transactions, do not provide regulatory clarity on what is and isn't a "swap."

[10]*CFTC Division* of *Market Oversight Responds to Frequently Asked Questions Regarding Commodity Options—Commodity Options FAQs*, fn. 10 (undated).

[11]77 Fed. Reg. at 48,237.

[12]77 Fed. Reg. at 48,238-40.

[13]CFTC, OGC *Response to Frequently Asked Questions Regarding Certain Physical Commercial Agreements for the Supply and Consumption of Energy*, http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/leaselike_faq.pdf.

[14]CFTC & SEC, *Joint Final Rule; Interpretations; Request for Comment on an Interpretation, Further Definition of "Swap,"* . . ., 77 Fed. Reg. 48,208 (Aug. 13, 2012); CFTC, *Final Rule, Adaptation of Regulations to Incorporate Swaps*, 77 Fed. Reg. 66288 (Nov. 2, 2012); 17 C.F.R. §§ 32.2, 32.3; 17 C.F.R. 45.2.

[15]CFTC, *Commodity Options Final and Interim Final Rules*, 77 Fed. Reg. 25320 (Apr. 27, 2012), since superseded by CFTC, *Trade Options Final Rule*, 81 Fed. Reg. 14966 (Mar 21, 2016).

[16]CFTC, *Notice of Proposed Rulemaking*, *Trade Options*, 80 Fed. Reg. 26200 (May 7, 2015).

[17]CFTC Letter No. 13-08 (April 5, 2013) (avail. at http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/13-08.pdf); CFTC, *Staff Interpretations and No-Action Relief Regarding ECP Status: Swap Guarantee Arrangements*, CFTC Letter No. 12-17 No-Action and Interpretation (Oct. 12, 2012), Office of General Counsel (avail. at https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/12-17.pdf).

[18]CFTC, *Proposed Interpretation, Forward*

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Contracts With Embedded Volumetric Optionality, 79 Fed. Reg. 69073 (Nov. 20, 2014) (comments avail. at http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1541); superseded by CFTC, *Final Interpretation, Forward Contracts with Embedded Volumetric Optionality*, 80 Fed. Reg. 28239 (May 18. 2015).

[19]CFTC Staff Letter No. 12-17.

[20]CFTC, *Final Interpretation, Forward Contracts with Embedded Volumetric Optionality*, 80 Fed. Reg. 28239 (May 18. 2015).

[21]CFTC, *Proposed Guidance on Certain Natural Gas and Electric Power Contracts*, 81 Fed. Reg. 20583 (Apr 8, 2016).

[22]CFTC, *Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations,* 78 Fed. Reg. 45292 (July 26, 2013).

[23]*CFTC Division of Market Oversight Responds to Frequently Asked Questions Regarding Commodity Options -Commodity Options FAQs* (this at last appears to have been taken down from the CFTC's website, but you can bear witness to it at https://web.archive.org/web/20170421203524/https://forms.cftc.gov/_layouts/PublicForms/Docs/TradeOptionsFAQ.pdf); CFTC, OGC *Response to Frequently Asked Questions Regarding Certain Physical Commercial Agreements for the Supply and Consumption of Energy*, http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/leaselike_faq.pdf.

[24]CFTC Division of Market Oversight Responds to Frequently Asked Questions Regarding Commodity Options -Commodity Options FAQs (avail. at https://web.archive.org/web/20170421203524/https://forms.cftc.gov/_layouts/PublicForms/Docs/TradeOptionsFAQ.pdf).

[25]CFTC, OGC *Response to Frequently Asked Questions Regarding Certain Physical Commercial Agreements for the Supply and Consumption of Energy* (avail. at http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/leaselike_faq.pdf). The CFTC cited this undated FAQ in a subsequent proposed guidance published in the Federal Register. 81 Fed. Reg. at 20586 fn. 34.

[26]77 Fed. Reg. at 47317-18.

[27]See CFTC, *Final Interpretation, Forward Contracts with Embedded Volumetric Optionality*, 80 Fed. Reg. 28239 (May 18. 2015); see also CFTC, *Proposed Guidance, Certain Natural Gas and Electric Power Contracts*, 81 Fed. Reg. 20583 (Apr. 8, 2016).

[28]77 Fed. Reg. at 48238.

[29]77 Fed. Reg. at 48239.

[30]77 Fed. Reg. at 48240.

[31]See 77 Fed. Reg. at 48338 fn. 341.

[32]CEA § 1a(47)(B)(ii).

[33]CFTC, *Final Rule, Swap Data Recordkeeping and Reporting Requirements*, 77 Fed. Reg. 2136 at 2170 (Jan. 13, 2012).

[34]CEA § 1a(47)(B)(ii).

[35]77 Fed. Reg. at 48297.

[36]17 C.F.R. § 45.14.

[37]Suetonius, De Vita Caesarum: Caius Caligula XLI.

[38]*CFTC Paperwork Reduction Act Supporting Statement for Form TO*, OMB Control No. 3038-0106 (April 8, 2013). Contra CFTC, *Public Roundtable to Discuss Dodd-Frank End User Issues* pp. 160-61 (Apr. 3, 2014) (Jim Allison of ConocoPhillips advised time to fill out the Form TO is one full-time employee equivalent) (avail. at http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/transcript040314.pdf). And the Form TO's own instructions on how to fill it out had errors: e.g., question 5 was the answer form for question 4, the Form implied legal entity identifiers were optional even though no action letter 13-08 required them, and the Form TO and Trade Option FAQ said the start date was Apr. 10, 2013, even though the rule (77 Fed. Reg. at 25329) said it was Jan. 1, 2013. Perhaps if the CFTC had published the Form TO as part of a proposed rule before issuing it in a Final Rule, which it did not, people may have notified the CFTC of such errors.

[39]CFTC, *Trade Options Final Rule*, 81 Fed. Reg. 14966 (Mar 21, 2016).

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[40]17 C.F.R. § 32.3; CFTC *Trade Options Final Rule*, 81 Fed. Reg. 14966 at 14969 (Mar 21, 2016).

[41]E.g., "the embedded volumetric optionality must primarily be intended as a means of assuring a supply source or providing delivery flexibility in the face of uncertainty regarding the quantity of the nonfinancial commodity that may be needed or produced in the future, consistent with the purposes of a forward contract." 80 Fed. Reg. at 28241, col. 3; "CFTC clarifies that the seventh element's reference to 'physical factors' should be construed broadly to include any fact or circumstance that could reasonably influence supply of or demand for the nonfinancial commodity under the contract. Such facts and circumstances could include not only environmental factors, such as weather or location, but [also] broader social forces, such as changes in demographics or geopolitics. . . . The CFTC reiterates, however, that if the embedded volumetric optionality is primarily intended, at contract initiation, to address concerns about price risk (e.g., to protect against increases or decreases in the cash market price), the seventh element would not be satisfied absent an applicable regulatory requirement, including guidance, whether formal or informal, received from a public utility commission . . ., to obtain or provide the lowest price (e.g., the buyer is an energy company regulated on a cost-of-service basis)." 80 Fed. Reg. at 28242 cols. 1-2. *See* also potentially helpful language for supply transactions at 81 Fed. Reg. at 20586, col. 2-3, that is possibly too hedged to be definitive. In stark contrast to Chairman Gensler's CFTC, which specifically excluded good faith determinations for swap characterization, 77 Fed. Reg. at 2170; 77 Fed. Reg. at 48297, Chairman Massad's CFTC specifically allowed good faith determinations, 80 Fed. Reg. at 28242, col. 3, text at fn. 33 and reliance on counterparty representations, 80 Fed. Reg. at 28242, col. 1, text at fn. 25, at least for the seventh element of the seven part test.

[42]81 Fed. Reg. at 14967 fn. 12.

[43]17 C.F.R. § 32.3(b).

[44]17 C.F.R. § 32.2.

[45]17 C.F.R. § 32.3; 81 Fed. Reg. at 14966-67. Subsequent reproposed CFTC rulemaking proposed to reverse the CFTC's previous position and have position limits not apply to trade options. CFTC, *Reproposal, Position Limits for Derivatives*, 81 Fed. Reg. 96704 at 96735 col. 2 (Dec. 30, 2016). Trade options (but not commodity options) were first excluded from the swap dealer de minimis threshold in 77 Fed. Reg. at 25326, fn. 39 (Apr. 27, 2012), and this was affirmed at 81 Fed. Reg. at 14967 fn. 18 (Mar. 21, 2016).

[46]*See* 17 C.F.R. § 32.2(a)(1)(i).

[47]CEA § 1a(18).

[48]CEA § 1a(17).

[49]17 C.F.R. § 1.3.

[50]CFTC, *Staff Interpretations and No-Action Relief Regarding ECP Status: Swap Guarantee Arrangements; Jointly and Severally Liable Counterparties; Amounts Invested on a Discretionary Basis; and "Anticipatory ECPs"* CFTC Letter No. 12-17 No-Action and Interpretation, pp. 11-13 (Oct. 12, 2012), Office of General Counsel.

[51]*E.g.,* Strumpf, *CFTC Fines Futures Firm Over Reports*, Wall Street Journal (Jan. 10, 2012) (CFTC $700,000 fine of Newedge USA LLC for overreporting trading positions).

[52]E.g., a representation of "utility special entity" status is sufficient pursuant to 17 C.F.R. § 1.3, definition of "swap dealer," (i)(B)(4).

[53]Common sense may be applied; for example, in an oil sale, only a modicum of diligence is required to conclude that ExxonMobil is an ECP and is engaged in processing petroleum products. A recalcitrant counterparty that is a giant enterprise and obviously an ECP and commercial user of the commodity (if it's the giant enterprise, and not a special purpose entity subsidiary thereof) that won't field the legal talent to understand the rule's requirements, can be forgiven and the parties can move on.

[54]CFTC Letter No. 12-17. pp. 2-5.

[55]CFTC Letter No. 12-17, p. 3, cl. 3 at fn. 15.

[56]See 77 Fed. Reg. at 48226. In footnote 189,

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the CFTC even promises to issue reporting requirements for guaranties of swaps.

[57]Personal communication from attendee at *ex parte* meeting with Chairman Gensler.

[58]The CFTC listed such transactions at 77 Fed. Reg. at 48246-47, and expanded on the criteria at 81 Fed. Reg. at 20585, col. 3. The CFTC noted at 77 Fed. Reg. at 48246 n. 433 that although these might not be "considered swaps," they could be subject to other CEA provisions or CFTC Regulations. We learn from *U.S. Commodity Futures Trading Commission v. Monex Credit Co.*, 931 F.3d 966, Comm. Fut. L. Rep. (CCH) P 34538 (9th Cir. 2019), that the CFTC claims antifraud jurisdiction under CEA § 6(c)(1) over transactions in commodities that use instrumentalities of interstate commerce. As the SEC is to fraud in securities transactions, the CFTC is to fraud in commodities transactions, even commodities transactions that are "customary commercial arrangements."

[59]CFTC, *Proposed Guidance, Certain Natural Gas and Electric Power Contracts*, 81 Fed. Reg. 20583 at 20584-86, citing IECA comment letter I co-wrote with esteemed IECA colleagues (Jun. 22, 2015); 77 Fed. Reg. at 48238 n. 340, citing comment letter I co-wrote as Pacific Gas & Electric's attorney (Aug. 13, 2012).

[60]The CFTC under Chairman Gensler initially sought to regulate new environmental markets in credits for renewable energy and Carbon. After a bill that would have established a Carbon market under CFTC jurisdiction (H.R. 2454, the American Clean Energy and Security Act of 2009 (Waxman-Markey) Title III, Subtitles D and E) failed to pass, we saw lascivious advances towards environmental markets in CFTC *Notice of Intent*, 74 Fed. Reg. 42052 (Aug. 20, 2009); CFTC, *Order Finding That the Carbon Financial Instrument Contract Offered for Trading . . . Does Not Perform a Significant Price Discovery Function*, 75 Fed. Reg. 23686 (April 28, 2010) (citing comment letter I wrote). The Dodd-Frank Act included many provisions rooted in Waxman-Markey, but did not give the CFTC "swaps" jurisdiction over Carbon or other environmental markets; rather Section 750 of the Dodd-Frank Act merely established a study group, although that did not hinder the CFTC. Had it regulated renewable energy credits as swaps subject to mandatory clearing with resulting massive collateral posting requirements, as it proposed, the CFTC would have killed off renewable energy in the U.S. California Public Utilities Commission and California Energy Commission staff, who should have sought to protect the California Renewables Portfolio Standard, declined to do so, despite being fully and repeatedly briefed. Fortunately, Environmental Protection Agency staff and others pressed this point and the CFTC backed off. 77 Fed. Reg. 48233-35 (citing, among others, comment letters I co-wrote); CFTC, *Final Rule, Adaptation of Regulations to Incorporate Swaps*, 77 Fed. Reg. 66288 at 66293-94 (Nov. 2, 2012) (citing, among others, comment letter I co-wrote). *See also* Jeremy Weinstein & Christopher Berendt, *The Nature of the Thing*, Environmental Finance (Jun. 2011) pp. 20-21 (avail. at http://docsjweinsteinlaw.com/pdfs/EF0611_pp,20-21.pdf).

[61]See 77 Fed. Reg. at 48246-50. For example, the CFTC said it would not regulate the sale of patents or trademarks as swaps at 77 Fed. Reg. 48247 col. 1 para. 7. The CFTC noted "new types of agreements" may be similarly "evaluated" for the customary commercial arrangement exemption and encouraged parties to "seek an interpretation from the Commissions as to whether the agreement, contract or transaction is a swap . . . ." 77 Fed. Reg. 48248. The only request for interpretation of which I am aware took the CFTC four months to decline to answer, CFTC, *Commission Statement Concerning a Request for an Interpretation as to Whether a Particular Agreement Is a Swap . . .*, 82 Fed. Reg. 27044 (Jun. 13, 2017), which is especially noteworthy given that the CFTC specifically provides there is no good faith safe harbor for the parties not getting it right, 77 Fed. Reg. at 2170, even while they are awaiting a Commissions' (non-)determination under the request for interpretation procedure. 77 Fed. Reg. at 48297.

[62]17 C.F.R. § 32.3; CFTC, *Final Rule, Trade Options,* 81 Fed. Reg. 14966 (Mar. 21, 2016); see 77 Fed. Reg. at 25326 creating a "dual intent" to

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physically deliver test, in place of the physically settled requirement for exclusion from being a swap provided in the statute. The CFTC provided a "clarifying" interpretation of the meaning of "actual delivery" under CEA § 2(c)(2)(D) in CFTC, *Interpretation, Retail Commodity Transactions Under Commodity Exchange Act,* 78 Fed. Reg. 52426 (Aug. 23, 2013).

[63]CEA § 1a(47)(B)(ii). This error was identified back in 2012 in comments on the Products Release, which the CFTC solicited ***after*** it published the Products Release with the erroneous interpretation at 77 Fed. Reg. at 48236-37.

[64]77 Fed. Reg. at 25326, col. 3. This is CFTC descriptive matter in the 2012 iteration of § 32.3(a)(3); § 32.3(a)(3) itself simply says "intended," not "both parties intend." The 2016 iteration of § 32.3(a)(3) is unchanged from 2012, and there is no discussion of "both parties" in the 2016 descriptive matter. 81 Fed. Reg. at 14967 col. 1.

[65]Section X (pp. 25-31) of the Oct. 12, 2012, National Rural Electric Cooperative Association (NRECA), American Public Power Association (APPA), et al. comment letter filed in RIN No. 3038-AD46 (avail. at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59235); see also pp. 8-10 of NRECA and APPA comments in the Project KISS docket filed Sept. 28, 2017 (avail. at https://www.fdic.gov/regulations/laws/federal/2018/2019-exposure-amount-derivative-contracts-3064-ae80-staff-004-02.pdf). See also comments of Southern Company on the Proposed Interpretation regarding Forward Contracts with Embedded Volumetric Optionality (RIN Number 3038-AE24) pp. 3-6 (Dec. 22, 2014).

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ATTACHMENT C

Weinstein, D.C. Circ Amicus, *KalshiEx v. CFTC*

ORAL ARGUMENT NOT YET SCHEDULED

No. 24-5205

In the United States Court of Appeals for the District of Columbia Circuit

KALSHIEX LLC,
PLAINTIFF-APPELLEE,

v.

COMMODITY FUTURES TRADING COMMISSION,
DEFENDANTS-APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, NO. 23-cv-03257, HON. JIA M. COBB, PRESIDING

BRIEF FOR *AMICUS CURIAE* JEREMY D. WEINSTEIN IN SUPPORT OF APPELLEE AND AFFIRMANCE

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

(A) Parties

All parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Opening Brief for Appellant.

(B) Rulings Under Review

Reference to the ruling at issue appears in the Opening Brief for Appellant.

(C) Related Cases

Related cases are listed in Appellant's opening brief. This case has not previously been before this Court, except for a motions panel's resolution of the Appellant's motion for a stay pending appeal in this case, No. 24-5205.

/s/ *Christopher Mills*
CHRISTOPHER MILLS

REPRESENTATION OF CONSENT FROM ALL PARTIES AND CERTIFICATE STATING WHY A SEPARATE BRIEF IS NECESSARY

In accordance with FRAP 29(a)(2) and D.C. Circuit Rule 29(b), undersigned counsel certifies that all parties have consented to the filing of this brief.

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel further certifies that this separate brief is necessary. *Amicus* knows of no other *amicus curiae* focusing on the issues discussed here.

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INTEREST OF *AMICUS CURIAE* AND SUMMARY

Amicus Jeremy D. Weinstein is a private energy commodities law transactional and regulatory attorney. *Amicus* has long been interested in seeking transparency for the law regarding commodities, especially when it comes to the opaque rulemaking often engaged in by the Commodity Futures Trading Commission (CFTC), so that energy companies can enjoy the benefits of being able to comply with tractable law and regulation. *Amicus* has contributed scholarship on issues in commodity law regulation, including by writing articles and submitting comments in federal and state rulemakings. *Amicus* also submitted a brief in the district court proceeding.

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money to fund the preparation or submission of this brief. No person—other than the *amicus curiae* and his counsel—contributed money to fund the preparation or submission of this brief.

This brief presents the lack of foundation for the CFTC's position on what it calls the "plain meaning" of the statute.

ARGUMENT

The CFTC's arguments about the "plain meaning" of § 5c(c)(5)(C) of the Commodity Exchange Act are foundationally flawed. In 2010, Congress added § 5c(c)(5)(C) to the Commodity Exchange Act and empowered the CFTC to prohibit futures contracts that "involve … gaming." But, according to the CFTC, contracts that "involve … gaming" do not include contracts that "involve" "games":

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

Based on this false assumption that the word "gaming" couldn't possibly mean "games," because "games" is a "null set," the CFTC argued that Congress must have authorized the CFTC to prohibit any conceivable *synonym* for "gaming":

> The Commission proposes to define "gaming" in new § 40.11(b)(1) as "the staking or risking by any person of something of value upon: (i) the outcome of a contest of others; (ii) the outcome of a game involving skill or chance; (iii) the performance of one or more competitors in one or more contests or games; or (iv) any other occurrence or non-occurrence in connection with one or more contests or games."[2]
> …

[1] CFTC, Event Contracts, Notice of Proposed Rulemaking, 89 Fed. Reg. 48968, 48974 n.61 (Jun. 10, 2024).
[2] *Id.* at 48974.

> [T]he Commission proposes to set forth in new § 40.11(b)(2) a non-exclusive list of examples of activities that constitute "gaming," as proposed to be defined … The Commission emphasizes that the list of examples provided in proposed § 40.11(b)(2) is non-exclusive. To the extent that other activity falls within the definition of "gaming" set forth at proposed § 40.11(b)(1), such activity would also constitute "gaming."[3]

From there, the CFTC argued that anything within an internet dictionary's "ordinary meaning" of any of the *synonyms* of gaming falls within the statutory prohibition:

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

Then, the CFTC goes on to argue that the "examples" of synonyms also includes possible *metaphors* that use any of the synonyms.[5] This allowed the CFTC to label elections as "games," because they are sometimes described as "political contests":

> Proposed § 40.11(b)(2) states that "gaming" includes, but is not limited to, the staking or risking by any person of something of value upon: (i)

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[3] *Id.* at 48975.
[4] *Id.* at 48974–75 n.65. Courts citing dictionaries typically cite actual dictionaries rather than internet sites. *See, e.g.*, Wessel & Weissenberg, *The Role Of Dictionaries In Last Term's High Court Decisions*, Law360 (Jul. 12, 2019).
[5] *See* 89 Fed. Reg. at 48975.

> the outcome of a political contest, including an election or elections ….[6]

Stringing together each of these leaps of logic reveals just how convoluted the CFTC's reasoning is. According to the agency, congressional authorization allowing it to prohibit event contracts involving "gaming" could not possibly be limited to games, since "games" is a "null set." Thus, the argument goes, the CFTC must have authorization to prohibit event contracts for anything that is potentially synonymous with "gaming." And because "contest" is one synonym for gaming, and people sometimes say "political contest" as a metaphor for an election, the CFTC can supposedly prohibit futures contracts on elections under the theory that they "involve … gaming."

Problem is, that's not what Congress said. Congress gave the CFTC power to prohibit contracts that "involve … gaming." The ordinary understanding of "gaming" in this context includes sporting events and other low-stakes competitions. Futures contracts on football games, for instance, are clearly prohibited by § 5c(c)(5)(C), though the CFTC and its Commissioners seemed confused when presented with this question a few years ago.[7] Given that the plain meaning of "gaming"

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[6] *Id.* The use of the word "including" might imply that the CFTC believes that there is a superset of "political contests" of which "elections" are only a subset.

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

is clear, there was no reason for the CFTC to adopt an atextually broad reading of the term. By including metaphors and synonyms within its definition of "gaming," the CFTC seeks to expand its authority beyond what the text of the statute can bear.

In common parlance, elections are not "games." In fact, given their high stakes, they are in large part the opposite of what people ordinarily refer to as a "game." Elections are the mechanism by which democratic republics decide who will wield the power yielded by the citizenry to the government. Free elections are foundational to any free society. *See, e.g.*, The Federalist No. 53 (Madison).

In the district court, the CFTC could not identify outer boundaries for "game." In the May 30, 2024, district court oral argument, the following exchange occurred:

> THE COURT: Besides elections, in your view, is there a contest of others that doesn't involve a game as plaintiff would define what game means?
>
> MS. STUKES [counsel for the CFTC]: I actually thought the horse race wasn't a game. But there are contests, Academy Awards, award types of things that doesn't seem like a game, just seems like a contest.[8]

The CFTC's expansive vision of "gaming" essentially allows it to regulate betting on contests, competitions that have winners and losers, of any kind.[9] When

[8] Hearing Tr. 55, *Kalshi v. CFTC*, No. 1:23-cv-03257-JMC (May 30, 2024).
[9] *See* Foretek, *Kalshi Says Elections Aren't Games In Voting Wager Hearing*, Law360 (May 30, 2024) ("But when Judge Cobb pressed Stukes on what else the agency's definition of 'gaming' might prohibit for futures betting aside from games and sports in the traditional sense, Stukes hesitated before pointing to the outcome of an awards show like the Grammys. On rebuttal, Jones Day's Yaakov Roth pointed

pressed on this at a hearing below, the agency admitted this much.[10] But this ignores fundamental differences between different contests. Though almost all games are contests, not all contests can be considered games.

Games are "contest[s], for amusement or for a prize." Black's Law Dictionary (12th ed. 2024). Ask any random set of Americans to list their favorite games, and you will get similar responses that reflect this common understanding: football, soccer, tennis, basketball, or perhaps chess or Mario Kart. Political elections do not fall within this same category. Elections are contests, but they are not games. They are not undertaken for amusement or entertainment. Rather, democratic countries hold elections for the very significant purpose of establishing their government. Thus, elections are excluded from any ordinary understanding of the term "game."

CONCLUSION

The Court should affirm.

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out that, actually, Kalshi offers contracts on awards show outcomes, and has done so for 'a long time.' 'They've never subjected those to review,' he told Judge Cobb. 'I think that really underscores the…outcome-driven aspect of this. It's not statutory interpretation.'").

[10] *Id.*

Respectfully submitted,

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NOVEMBER 22, 2024

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation provided by D.C. Cir. R. 24(a)(5) because it contains 1,411 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 365 in 14-point Times New Roman.

/s/ *Christopher Mills*
CHRISTOPHER MILLS

NOVEMBER 22, 2024

CERTIFICATE OF SERVICE

I certify that on this day the foregoing was served electronically on all parties via CM/ECF.

/s/ *Christopher Mills*
CHRISTOPHER MILLS

NOVEMBER 22, 2024

ATTACHMENT D

Weinstein Dist. Court Amicus, *KalshiEx v. CFTC*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KalshiEx LLC,

Plaintiff,

v.

Commodity Futures Trading Commission,

Defendant.

No. 1:23-cv-03257-JMC

BRIEF OF JEREMY D. WEINSTEIN AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Concept Release on the Appropriate Regulatory Treatment of Event Contracts, 73 Fed. Reg. 25,669 (May 7, 2008) 2

Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48,208 (Aug. 13, 2012) 2

Kristin N. Johnson, *Keynote Remarks of Commissioner Kristin N. Johnson at Rice University's Baker Institute for Public Policy Annual Energy Summit: Credibility, Integrity, Visibility: The CFTC's Role in the Oversight of Carbon Offset Markets*, https://www.cftc.gov/PressRoom/SpeechesTestimony/opajohnson7 (Oct. 5, 2023) 4

INTEREST OF *AMICUS CURIAE*

Amicus Jeremy D. Weinstein is a private energy commodities law transactional and regulatory attorney. *Amicus* has long been interested in seeking transparency for the law regarding commodities, especially when it comes to the opaque rulemaking often engaged in by the Commodity Futures Trading Commission (CFTC), so that energy companies can enjoy the benefits of being able to comply with tractable law and regulation. *Amicus* has contributed to the literature and scholarship on issues in commodity law regulation, including writing articles and submitting comments in federal and state rulemakings.

This brief highlights the adverse consequences that arise from aspects of the CFTC's position here. It also highlights evidence in the record that underscores the arbitrariness and capriciousness of the CFTC's Order. [1]

ARGUMENT

I. The CFTC Does Not Have Plenary Jurisdiction.

CFTC's Order here argues that one reason why it cannot approve the contracts at issue is that it lacks the resources to investigate elections and enforce federal election laws. AR 22–23 (final WHEREAS clause). In the underlying administrative process, the CFTC also asserted itself as a plenary investigative agency, with an unexpressed relationship with the authority of other government agencies with jurisdiction. AR 1063–64.

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[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money to fund the preparation or submission of this brief. No person—other than the *amicus curiae* and his counsel—contributed money to fund the preparation or submission of this brief.

The Second Circuit recently dismissed a purported class action against some large foreign banks for manipulating the Yen-LIBOR interest rate "because the alleged conduct occurred predominantly outside the United States" and the applicable provision of the Commodity Exchange Act lacked Congressional intent for extraterritorial effect. *Laydon v. Cooperatieve Rabobank U.A.*, 55 F.4th 86, 95 (2d Cir. 2022), *cert. denied*, 144 S. Ct. 192 (2023). The CFTC filed an *amicus* brief in support of rehearing at the Second Circuit. See Brief for *Amicus Curiae* U.S. Commodity Futures Trading Commission in Support of Rehearing, *Laydon*, No. 20-3626, Dkt. 383, 2022 WL 17369433 (2d Cir. Nov. 29, 2022). The CFTC focused on the meaning given by the Second Circuit to the word "commodity," and argued that it has jurisdiction over "commodities," that "commodities" means virtually every good or service, tangible or intangible, domestic or foreign, and that the CFTC's interpretation is entitled to *Chevron* deference. *Id.* at 5–9. The CFTC has also suggested a similarly broad enforcement authority over ordinary consumer transactions elsewhere. *See, e.g.*, *Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 77 Fed. Reg. 48,208, 48,246–47 (Aug. 13, 2012).

In the context of event contracts, the CFTC's jurisdiction claim is momentous. Plaintiff explains the concept of "event contracts." Long ago, the CFTC teased a rulemaking for event contracts. *See Concept Release on the Appropriate Regulatory Treatment of Event Contracts*, 73 Fed. Reg. 25,669 (May 7, 2008). According to the CFTC, "Event contracts have been based on a wide variety of interests including the

results of presidential elections, the accomplishment of certain scientific advances, world population levels, the adoption of particular pieces of legislation, the outcome of corporate product sales, the declaration of war and the length of celebrity marriages." *Id.* at 25,670.

Sixteen years later, the CFTC has not yet undertaken an events contract rulemaking. The CFTC's assertion of plenary jurisdiction is especially dangerous in the context of event contracts for which the CFTC has yet to express clear rules. Take one of the event contracts posited by the CFTC, the length of a celebrity marriage. Perhaps it would be reasonably within the scope of investigating market manipulation if the celebrity's attorney or accountant had a position in the contract, or one of the couple was photographed in public being intimate with a non-spouse. But based on the CFTC's stated position in its Order here, including an ability to question why someone voted as he or she did, AR 20, it seems that the CFTC would claim jurisdiction to step in even when there are other government entities that regulate the activity, such as to determine when and whether there was a divorce, or whether the grounds for divorce were proper.

Or consider the case of an event contract on the population of a city. CFTC's claim would presumably include authority to investigate for market manipulation, for example, a person with a long position in the contract who advocated against abortion.

The CFTC has elsewhere seemed to assert that its jurisdiction to investigate manipulation is not limited to transactions in commodities, but also includes claimed

personal uses of commodities. For example, one CFTC Commissioner claimed that the CFTC has authority to investigate "fraud with respect to the purported environmental benefits of purchased carbon credits." Kristin N. Johnson, *Keynote Remarks of Commissioner Kristin N. Johnson at Rice University's Baker Institute for Public Policy Annual Energy Summit: Credibility, Integrity, Visibility: The CFTC's Role in the Oversight of Carbon Offset Markets*, https://www.cftc.gov/PressRoom/SpeechesTestimony/opajohnson7 (Oct. 5, 2023). By this logic, the CFTC would have the authority to investigate fraud with respect to the purported health benefits of vaccines. And why stop with "purported benefits"? If the CFTC has the power to investigate fraud with respect to any aspect of any commodity, the CFTC's jurisdiction is virtually unlimited, especially when "commodities" means everything.

The breadth of power claimed by the CFTC could mean that if an election changed control of Congress in a way the CFTC dislikes, it could investigate that election as manipulation of the event contract. And before an election, a government's ability to regulate and investigate opinion polling could be abused to stay in power. AR 1062. This Court should thus consider whether the CFTC's actual jurisdiction and investigative authority in administering these contracts matches what the CFTC claims.

II. The CFTC's Order is Arbitrary and Capricious

In its Order here, the CFTC said that "the binary payout of the Congressional Control Contracts further limits their utility as a vehicle for hedging any eventual economic effects resulting from which party controls a chamber of Congress." AR 18. This makes no sense and is contradicted by the record, which provided evidence that

binary payouts enhance hedging utility, for example a company that faces a risk from one political party but not the other. AR 1054–55. If only one party presents a risk, there is no need for a payout if the other party is not in power. Thus, binary payouts are appropriate and effective at mitigating risk.

Respectfully submitted,

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JANUARY 31, 2024

ATTACHMENT E

Weinstein 7/21/23 CFTC comment letter

THE LAW OFFICES OF
JEREMY D. WEINSTEIN
A PROFESSIONAL CORPORATION

July 21, 2023

Christopher Kirkpatrick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581
https://comments.cftc.gov/PublicComments/CommentList.aspx?id=7394

Re: CFTC Review of KalshiEx Proposed Congressional Control Contracts Under CFTC Regulation 40.11

Dear Mr. Kirkpatrick:

I am responding to the CFTC's Questions on the KalshiEX LLC ("Kalshi") "Will <chamber of Congress> be controlled by <party> for <term>?" Contracts for Public Comment ("CFTC 2023 Questions").[1] I respond despite signs that the CFTC has already made up its mind.

The Kalshi contracts are clearly not prohibited under the Commodity Exchange Act ("CEA") and CFTC regulations. These prohibit ***an instrument*** that has any involvement with, relationship to, or ***reference*** a defined set of listed activities. The prohibition is not whether people can make an illegal bet on an outcome- for example who will win an election or whether the price of wheat will increase- but whether ***the instrument "involves, relates to, or references"*** activities listed by the CFTC in Rule 40.11 as against the public interest. These listed activities are "terrorism, assassination, war, gaming, or an activity that is unlawful under any State or Federal law" or "an activity that ***is similar … and*** that the Commission determines, by rule or regulation, to be contrary to the public interest." "Elections" is not in this list, and elections are not "similar" to terrorism, assassination, war, gaming, or an activity that is unlawful under any state and federal law.

Part One

The CEA defines "event contracts" as "an occurrence, extent of an occurrence, or contingency (other than a change in the price, rate, value, or level of a commodity not

[1] CFTC, Release No. 8728-23, *CFTC Announces Review of Kalshi Congressional Control Contracts and Public Comment Period*, Jun. 23, 2023, avail. at https://www.cftc.gov/PressRoom/PressReleases/8728-23.

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described [here]) that is (I) beyond the control of the parties to the relevant contract ...; and (II) associated with a financial, commercial, or economic consequence."[2] In 2008, the CFTC explained, "event contracts may be based on eventualities and measures as varied as the world's population in the year 2050, the results of political elections, or the outcome of particular entertainment events. ... Event contracts have been based on ... the accomplishment of certain scientific advances, ... the adoption of particular pieces of legislation, the outcome of corporate product sales, the declaration of war and the length of celebrity marriages."[3]

In 2010, §745 of the Dodd-Frank Act added §5c(c)(5)(C) to the CEA:

> Special Rule For Review And Approval Of Event Contracts And Swaps Contracts.— (i) Event Contracts.—In connection with the listing of agreements, contracts, transactions, or swaps in excluded commodities that are based upon the occurrence, extent of an occurrence, or contingency (other than a change in the price, rate, value, or levels of a commodity described in section 1a(2)(i)), by a designated contract market or swap execution facility, the Commission may determine that such agreements, contracts, or transactions are contrary to the public interest if the agreements, contracts, or transactions involve— (I) activity that is unlawful under any Federal or State law; (II) terrorism; (III) assassination; (IV) war; (V) gaming; or (VI) ***other similar activity*** determined by the Commission, by rule or regulation, to be contrary to the public interest. (ii) Prohibition.—No agreement, contract, or transaction determined by the Commission to be contrary to the public interest under clause (i) may be listed or made available for clearing or trading on or through a registered entity. …[4]

The law provides that the CFTC "may determine" that "such" event contracts are "contrary to the public interest" for one of six listed reasons, and if the CFTC does so, "such" event contracts are prohibited. A year later the CFTC promulgated Rule 40.11:[5]

> Review of event contracts based upon certain excluded commodities. (a) Prohibition. A registered entity ***shall not list for trading or accept for clearing*** on or through the registered entity any of the following: (1) An agreement, contract, transaction, or swap based upon an excluded commodity, as defined in Section 1a(19)(iv) of the Act,[6] that ***involves, relates to, or references terrorism, assassination, war, gaming, or an activity that is unlawful*** under any State or Federal law; or (2) An agreement, contract, transaction, or swap based upon an excluded commodity, as defined in Section 1a(19)(iv) of the Act, which involves, relates to, or references an activity that is ***similar*** to an activity enumerated in § 40.11(a)(1)

[2] CEA §1a(19)(iv).
[3] CFTC, *Concept Release …*, 73 Fed. Reg. 25669 at 25669-70 (May 7, 2008).
[4] §5c(c)(5)(C)(i)-(ii) (emphasis supplied).
[5] CFTC, *Final Rule, Provisions Common to Registered Entities*, 76 Fed. Reg. 44776 (Jul. 27, 2011).
[6] "an occurrence, extent of an occurrence, or contingency (other than a change in the price, rate, value, or level of a commodity not described in clause (i)) that is— (I) beyond the control of the parties to the relevant contract, agreement, or transaction; and (II) associated with a financial, commercial, or economic consequence."

of this part, ***and that the Commission determines***, by rule or regulation, to be contrary to the public interest.[7]

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

For example, on December 15, 2020, the CFTC received a self-certification by the Eris futures exchange for listing three financially settled contracts called "RSBIX NFL Futures Contracts."[8] The CFTC told Eris that it had determined that these futures contracts "may involve, relate to, or reference . . . gaming" under Rule 40.11, instructed Eris to suspend listing the proposed futures contracts for a 90-day review period,[9] and posted questions for public comment.[10] I and others commented.[11] Eris's futures contracts involved, related to, ***and*** referenced sports gambling, as was clear in their names[12] – the "moneyline,"[13] "point spread,"[14] and "over/under"[15] for individual games - terms of sports gambling and the three main types of illegal sports bets.[16] The standard of Rule 40.11(a)(1) is "gaming," not "illegal gaming." An "activity that is unlawful under any Federal or State law" under §5c(c)(5)(C)(i)(I) is a separate and distinct prohibition than "gaming" under §5c(c)(5)(C)(i)(V).

Therefore, even if gambling on football was legal in every state, the ErisX contracts were prohibited under the statute and Rule 40.11 because they referenced "gaming" and football is a "game." On March 22, 2021, just one day before the end of

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[7] 17 C.F.R. §40.11 (emphasis supplied).
[8] Eris, CFTC Regulation 40.2(a) Certification (Dec. 14, 2020) ("Eris Certification"), avail. at https://www.cftc.gov/sites/default/files/filings/ptc/20/12/ptc121520erisdcmdcm005.pdf.
[9] Letter from Christopher J. Kirkpatrick, Secretary of the Commission, CFTC, to Mr. Thomas Chippas, Chief Executive Officer, Eris (Dec. 23, 2020), avail. at https://www.cftc.gov/sites/default/files/filings/documents/2020/orgdcmerissignedletter201223.pdf.
[10] CFTC, Release No. 8345-20, *CFTC Announces Review of RSBIX NFL Futures Contracts Proposed by Eris Exchange, LLC* (Dec. 23, 2020), avail. at https://www.cftc.gov/PressRoom/PressReleases/8345-20.
[11] Comments for Industry Filing 20-004, avail. at avail. at https://comments.cftc.gov/PublicComments/CommentList.aspx?id=5203; my comment at avail. at https://comments.cftc.gov/Handlers/PdfHandler.ashx?id=31489. See discussion at Zachary Zagger, *Sportsbooks Could Use Derivatives Market, But Is It Betting?*, Law360, Feb. 17, 2021, avail. at https://www.law360.com/articles/1355199/sportsbooks-could-use-derivatives-market-but-is-it-betting-.
[12] Eris Certification, pp. 4-6.
[13] E.g., Sports Interaction Insights, *Moneyline Betting Explained*: "A moneyline bet is one of the easiest kinds of bets you can make at a sportsbook.", avail. at https://news.sportsinteraction.com/guide/moneyline-betting-explained.
[14] E.g., Bookies.com, *Point Spread Betting Explained*, avail. at https://bookies.com/guides/what-is-point-spread-betting.
[15] E.g., Bookies.com, *Understanding Over/Under Betting For Sports Bettors* ("In NFL betting, the Over/Under is the most popular way to wager on totals, with lines set for every game on Sunday and in prime time for Monday Night Football and Thursday Night Football.") avail. at https://bookies.com/guides/how-to-do-over-under-betting.
[16] See Appendix A, "Sports Wagering Primer" in Strumpf, Dept. of Economics, Univ. of N.C., Chapel Hill, *Illegal Sports Bookmakers* (Feb. 2003) avail. at http://users.wfu.edu/strumpks/papers/Bookie4b.pdf.

the 90-day review period, Eris withdrew its self-certification.[17] It soon became apparent that the CFTC would have issued an order denying the NFL Contracts.

Public statements by two CFTC Commissioners over the following weeks, as well as the Freedom of Information Act, highlighted a deficient CFTC rulemaking process,[18] which with additional deficiencies continues to be applied by the CFTC to the Kalshi contracts. Then-Commissioner Quintenz, who went on to work for Kalshi,[19] publicly stated, "the statute is unconstitutional, the regulation is invalid, and even without those issues, there were flaws in the Order that made it arbitrary and capricious."[20] Then-Commissioner Dan Berkovitz's made a public statement that treated the CFTC's public interest determination in Rule 40.11 as if it had never happened,[21] even though he was the CFTC's General Counsel when Rule 40.11 was promulgated.[22]

By §745 of the Dodd-Frank Act, as implemented in part by Rule 40.11(a), Congress made a policy determination to restrict certain event contracts. The standard of Rule 40.11 and §745 is not whether the trader of the instrument is involved in the illegal activity; it is whether ***the instrument*** has any involvement with, relationship to, or reference of listed activities. Therefore, the CFTC should not have approved the Eris contracts. An earlier CFTC Order prohibiting a Nadex election contract for involving gaming within the meaning of §5c(c)(5)(C)(V)[23] was incorrect. The prohibition is not whether people can make an illegal bet on an outcome- for example who will win an election or whether the price of wheat will increase- since people can make illegal bets on anything, including the direction of any price of any futures contract, but whether ***the instrument "involves, relates to, or references"*** activities listed by the CFTC as against the public interest in Rule 40.11. These are "terrorism, assassination, war, gaming, or an activity

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[17] Alexander Osipovich and Dave Michaels, *NFL Futures Plan Withdrawn as Regulator Prepared to Reject It*, Wall Street Journal, Mar. 23, 2021, avail. at avail. at https://www.wsj.com/articles/nfl-futures-plan-withdrawn-by-exchange-as-regulator-prepared-to-spike-it-11616521600?st=4woyq3k67shbwg6&reflink=article_email_share&mg=prod/com-wsj.

[18] Jeremy Weinstein, *Football Gambling Futures Contract: Can the CFTC Measure up to the Keystone Cops?*, 41 Futures and Derivatives Law Report (Aug. 2021), avail. at https://bit.ly/3qJrBZ4.

[19] *Former CFTC Commissioner Brian Quintenz Joins Our Board* (Nov. 16, 2021), avail. at https://kalshi.com/blog/former-cftc-commissioner-brian-quintenz-joins-our-board.

[20] Statement of Commissioner Brian D. Quintenz on ErisX RSBIX NFL Contracts and Certain Event Contracts: Any Given Sunday in the Futures Market (Mar. 25, 2021) B.3, avail. at https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement032521.

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

[22] CFTC, *Commissioner Dan M. Berkovitz*, avail. at https://web.archive.org/web/20190321055134/avail. at https://www.cftc.gov/About/Commissioners/CommissionerDanMBerkovitz/index.htm.

[23] CFTC, *In the Matter of the Self-Certification by North American Derivatives Exchange, Inc., of Political Event Derivatives Contracts and Related Rule Amendments under Part 40 of the Regulations of the Commodity Futures Trading Commission* (Apr. 2, 2012) at p. 2, aval. at avail. at https://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/nadexorder040212.pdf. See CFTC, Release No. 6224-12, *CFTC Issues Order Prohibiting North American Derivatives Exchange's Political Event Derivatives Contracts* (Apr. 2. 2012), avail. at https://www.cftc.gov/PressRoom/PressReleases/6224-12 ("the contracts involve gaming and are contrary to the public interest, and cannot be listed or made available for clearing or trading").

that is unlawful under any State or Federal law" or "an activity that is ***similar … and*** that the Commission determines, by rule or regulation [i.e., not on a one-off basis],[24] to be contrary to the public interest." The Eris contracts referenced gaming. In contrast, the Kalshi instruments ***do not reference*** terrorism, assassination, war, gaming, or an activity that is unlawful under any state or federal law, or any similar activity that the Commission has determined by rule or regulation to be contrary to the public interest. Rather, they reference elections, which are legal under all state and federal laws, and present risks that people could use the contracts to hedge.

Last year in response to a Kalshi self-certification, the CFTC posted and asked its Questions on the Kalshi "Will <party> be in control of the <chamber of Congress>?" Contracts for Public Comment ("CFTC 2022 Questions").[25] Many responded to the CFTC 2022 Questions, including me.[26] Yet, the CFTC provided no indication of what the CFTC did with all that public input. In fact, a self-appointed market "watchdog" complained to the CFTC's inspector general when one Commissioner sought to shed some light on it.[27]

After the CFTC's vaporware Kalshi elections contract review, the CFTC withdrew previously granted no action relief to a venue that trades election event contracts.[28] The reason the CFTC stated was "The [venue] has not operated its market in compliance with the terms of Letter 14-130." The CFTC provided no indication of evidence of the manipulation risks of which it asked in the CFTC 2022 Questions or the CFTC 2023 Questions. That withdrawal is currently in litigation.[29]

If the CFTC does not want election event futures contracts, it can propose rules

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[24] The texts of CEA §5c(c)(5)(C) and Rule 40.11 differ. The statute authorizes the CFTC to make a determination that types of activity could be against the public interest, whereas in the text of Rule 40.11 the CFTC made such a determination. See answer to Question 1 below.

[25] CFTC, Release Number 8578-22, *CFTC Announces Review and Public Comment Period of KalshiEx Proposed Congressional Control Contracts Under CFTC Regulation 40.11*, Aug. 26, 2022, avail. at https://www.cftc.gov/PressRoom/PressReleases/8578-22.

[26] Avail. at https://comments.cftc.gov/Handlers/PdfHandler.ashx?id=33678.

[27] Better Markets, *Better Markets Files Complaint With CFTC IG To Investigate CFTC Commissioner Pham's Apparent Disclosure Of Highly Confidential Agency Information Involving Kalshi's Application*, December 9, 2022, avail. at https://bettermarkets.org/newsroom/better-markets-files-complaint-with-cftc-ig-to-investigate-cftc-commissioner-phams-apparent-disclosure-of-highly-confidential-agency-information-involving-kalshis-application/. Better Markets has also demanded that said Commissioner recuse herself from this process. Better Markets, *The CFTC Should Not Be Used As A Sneaky Backdoor To Unleash Gambling On U.S. Elections, Undermining Public Trust, Democracy, And The Commodity Markets*, June 26, 2023, avail. at https://bettermarkets.org/newsroom/the-cftc-should-not-be-used-as-a-sneaky-backdoor-to-unleash-gambling-on-u-s-elections-undermining-public-trust-democracy-and-the-commodity-markets/.

[28] CFTC Letter No. 22-08, Withdrawal of CFTC Letter No. 14-130 (Aug. 4, 2022), avail. at https://www.cftc.gov/csl/22-08/download. CFTC Staff Letter 14-130 (Oct. 29, 2014); CFTC, *CFTC Staff Provides No-Action Relief for Victoria University of Wellington, New Zealand, to Operate a Not-For-Profit Market for Event Contracts and to Offer Event Contracts to U.S. Persons*, avail. at https://www.cftc.gov/PressRoom/PressReleases/7047-14.

[29] *Clarke et al. v. CFTC*, 5th Cir., case no. 22-51124. See, e.g., Katryna Perera, *5th Circ. Judge Decries CFTC 'Bully' In Election Betting Suit*, Law360, February 8, 2023; *Election Betting Co. Can Continue For Now, 5th Circ. Says*, Law360, Jan. 27, 2023; Katryna Perera, *Election-Betting Firm Sues CFTC Over Order To Shut Down*, Law360, Sept. 12, 2022.

that prohibit them in a public rulemaking process in accordance with the Administrative Procedures Act. It can provide the regulations of event contracts that it teased 15 years ago.[30] Right now, the CFTC does not have a rule that prohibits the Kalshi contracts; certainly they are not prohibited by §5c(c)(5)(C) or Rule 40.11.

Part Two

Several of the CFTC's numbered questions are set forth below with my responses.

1. Do these contracts involve, relate to, or reference gaming as described in Commission regulation 40.11(a)(1) and section 5c(c)(5)(C) of the Commodity Exchange Act, or in the alternative, involve, relate to, or reference an activity that is similar to gaming as described in Commission regulation 40.11(a)(2) and section 5c(c)(5)(C) of the Commodity Exchange Act?

No, they do not. These contracts are not about games or subjects of gambling, such as a football game or whether a roulette wheel will stop on red. People can make legal or illegal bets on any outcome- for example who will win an election or by how much the price of wheat or interest rates will increase, Therefore, to say these contracts involve gaming would be to say that all futures contracts involve gaming. Please see discussion in Part One above.

The CFTC 2023 Questions and CFTC 2022 Questions differ for this question. In 2022, the CFTC asked about "regulation 40.11(a)(2) or section 5c(c)(5)(C)". The texts of §5c(c)(5)(C) and Rule 40.11 differ. The statute authorizes the CFTC to make a determination that types of similar activity could be against the public interest, whereas in Rule 40.11 the CFTC made such a determination. Nowhere does §5c(c)(5)(C)(i) say that the CFTC must make its public interest determination on a contract-by-contract basis. In fact, §5c(c)(5)(B),[31] referring to approval as the default state unless prohibited, and the prohibition of §5c(c)(5)(C)(ii) against listing any contract "determined by the [CFTC] to be contrary to the public interest" under § 5c(c)(5)(C)(i), each refer to futures contracts in the singular, while §5c(c)(5)(C)(i), which authorizes the CFTC to make public interest determinations, refers to contracts in the plural. This change to Question 1 perhaps indicates that the CFTC believes "gaming" has the same meaning in the statute and the rule.

2. What role does the requirement that the contracts trade in multiples of 5000 and/or the position limits applicable to the contracts play in the analysis of whether the contracts involve, relate to, or reference gaming as described in Commission regulation 40.11(a)(1) and section 5c(c)(5)(C) of the Commodity Exchange Act?

None, since the contracts do not involve, relate to, or reference "(I) activity that is

[30] CFTC, *Concept Release on the Appropriate Regulatory Treatment of Event Contracts*, 73 Fed. Reg. 25669 (May 7, 2008); comment file at https://www.cftc.gov/LawRegulation/PublicComments/08-004.html.
[31] "The Commission shall approve a new contract or other instrument unless the Commission finds that the new contract or other instrument would violate this chapter (including regulations)."

unlawful under any Federal or State law; (II) terrorism; (III) assassination; (IV) war; (V) gaming; or (VI) ***other similar activity*** determined by the Commission, by rule or regulation, to be contrary to the public interest." Please see discussion in Part One above.

3. Should the Commission consider whether similar offerings are available in traditional gaming venues such as casinos or sports books and/or whether taking a position on elections or congressional control is defined as gaming under state or federal law?

No. The prohibition is not whether people can make a legal or illegal bet on an outcome - for example who will win an election or on the closing price of a futures contract in wheat or interest rates next Tuesday - but whether ***the instrument "involves, relates to, or references"*** "(I) activity that is unlawful under any Federal or State law; (II) terrorism; (III) assassination; (IV) war; (V) gaming; or (VI) ***other similar activity*** determined by the Commission, by rule or regulation, to be contrary to the public interest." Please see discussion in Part One above.

4. Do these contracts involve, relate to, or reference "an activity that is unlawful under any State or Federal law" as described in Commission regulation 40.11(a)(1) and section 5c(c)(5)(C) of the Commodity Exchange Act?

No. Elections are legal under all state and federal laws, just as buying and selling wheat futures or interest rate futures on a DCM is legal under all state and federal laws.

5. In determining whether these contracts involve an activity that is unlawful under any State or Federal law, should the Commission be influenced by whether state laws permit betting on the outcome of elections or other political outcomes and/or by the prohibition of interstate betting under Federal law?

No. "Wagering" is illegal in most states, and it is not the subject of the wager that is illegal. People can break the law by illegally "wagering" on football games, which raindrop will reach the bottom of a train window first, an election outcome, or next Tuesday's closing price of the March 2024 wheat futures contract. Rule 40.11 prohibits contracts that help people in the business of wagering, not contracts that reference something on which people might wager.

The availability of hedging instruments, including those traded in public futures markets, is an essential tool for businesses to mitigate commercial risks.[32] Reducing commercial risks through hedging[33] enhances the ability of any business to succeed. That is what the ErisX futures contracts would have done for organized crime. The ErisX contracts would have given illegal bookies futures contracts to hedge their commercial

[32] Thomas A. Hieronymus, The Economics of Futures Trading (Commodity Research Bureau, 1971); CFTC, *Final Rule, Position Limits for Derivatives*, 86 Fed. Reg. 3236 at *passim* (Jan. 14, 2021).
[33] "Hedging occurs when positions acquired are economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise. See, e.g., 17 CFR 1.3(z) (definition of bona fide hedging)." CFTC, *Concept Release …*, 73 Fed. Reg. 25669 at 25672 n. 16.

risks by allowing the futures markets to be used for layoff betting.[34] Giving illegal bookies a futures contract to hedge their commercial risks likewise would enhance their ability to succeed. Sports gambling and illegal sports bookmaking are foundational tools for organized crime.[35] The ability to hedge commercial risk helps businesses succeed, and the ability to use these futures contracts to hedge commercial risk would have helped these illegal businesses succeed. That success would have inflicted upon the public more of all of the harms that accompany illegal gambling, including money laundering, loan sharking,[36] extortion, game-fixing, corruption, infiltration of legitimate businesses,[37] and broken families. Likewise, §5c(c)(5)(C)(i)(I) prohibits instruments that would permit any other criminals to hedge their risk through a contract that references crime, or provide an incentive for the commission of crime by, for example, an event contract on burglary statistics in a residential neighborhood. By prohibiting contracts that involve, relate to or reference one particular type of crime, "assassination," §5c(c)(5)(C)(i)(III) seeks to avoid creating any economic incentive for an assassination.

No such use may be made of the Kalshi contracts and they are accordingly not prohibited by §5c(c)(5)(C)(i)(I).

6. Are the contracts substantively different from Nadex's previously proposed political event contracts such that the Commission's analysis should be different? For reference, please see "CFTC Order Prohibiting North American Derivatives Exchange's Political Event Derivatives Contracts" (Apr. 2, 2012)…

Maybe. It does not matter, since the Nadex Order prohibiting an election contract

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

[35] "For the last century and a half, gambling has been the cornerstone of organized crime, providing both power and capital ... ." Prof. Gary Potter, Criminal Organizations: Vice, Racketeering and Politics in an American City, p. 72 (1994). See also Kevin B. Kinnee, Practical Gambling Investigation Techniques, ch. 1 (Elsevier 1992).

[36] FBI, *Illegal Sports Betting*, avail. at https://www.fbi.gov/scams-and-safety/common-scams-and-crimes/illegal-sports-betting: "Illegal sports betting has real consequences for people who place and receive wagers—and for the safety of the American public. Organized crime groups often run illegal gambling operations. These groups often use the money made from illegal gambling to fund other criminal activities, like the trafficking of humans, drugs, and weapons. These operations may also be involved in tax evasion and money laundering. One of the FBI's priorities is to investigate organized crime groups that operate illegal sports betting operations and disrupt and dismantle their activities. Besides possibly funding organized crime activities, people who place wagers with illegal sports betting operations may be at risk of extortion and violence, which bookmakers may use to collect debts."

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

as involving gaming within the meaning of §5c(c)(5)(C)(V)[38] was incorrect. The prohibition is not whether people can make an illegal bet on an outcome. Please see discussion in Part One above.

> ***7. Are the contracts substantively different from Kalshi's previously proposed, and withdrawn, congressional control contracts? For reference, please see "CFTC Announces Review and Comment Period of KalshiEX Proposed Congressional Control Contracts Under CFTC Regulation 40.11" (August 26, 2022) …***

This question is inappropriate. The CFTC can run a redline and know the differences. The only reason to seek public input on those differences is to receive public input on the meaning and implication of those differences, and the CFTC has hidden those from the public. By its CFTC 2022 Questions, the CFTC solicited, and received, public input, and yet provided no public output. In the ErisX contracts, the CFTC solicited public input, yet provided no output. The CFTC engaged in processes by which it led the public to believe, by taking the public's time for input, that it would provide guidance that future sponsors of futures contracts could learn from and rely upon. Instead, the CFTC did not provide anything to the public. The CFTC now asks the public on the meaning of how the 2023 contracts differ from the 2022 contracts, when the public can have no idea what they mean for outcomes, because the public was not told.

That the CFTC is required to solicit public input does not excuse disrespect to the public that comes from disregarding that input.

> ***8. Do the contracts serve a hedging function? What standard should be used in reviewing the contracts' hedging function? Is it sufficient that a contract could theoretically be used for hedging, or should an exchange provide evidence of demonstrated need by likely hedgers in the market? How often must a contract be used for hedging or what percentage of market participants or open interest must represent hedging use in order for a contract to serve a hedging function?***

Yes, the contracts could serve a hedging function. In connection with the approval of a new futures contract, as a matter of law and common sense, it must be sufficient that the contract could be used for hedging, because without the contracts being available for hedging, all hedging is theoretical and there is no way a proposer could present evidence of how often a contract is used for hedging. I provide evidence of that theoretical hedging function in my answer to Question 9.

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[38] CFTC, *In the Matter of the Self-Certification by North American Derivatives Exchange, Inc., of Political Event Derivatives Contracts and Related Rule Amendments under Part 40 of the Regulations of the Commodity Futures Trading Commission* (Apr. 2, 2012) at p. 2, aval. at avail. at https://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/nadexorder040212.pdf. See CFTC, Release No. 6224-12, *CFTC Issues Order Prohibiting North American Derivatives Exchange's Political Event Derivatives Contracts*, Apr. 2. 2012 ("the CFTC determined that the contracts involve gaming and are contrary to the public interest, and cannot be listed or made available for clearing or trading"), avail. at https://www.cftc.gov/PressRoom/PressReleases/6224-12.

9. Are there unique economic risks tied to the outcome of congressional control that cannot be hedged via derivative products on equities, debt, interest rates, tax rates, asset values, and other commodity prices?

Yes. Here are three examples:

One example is business line risk, risk is to a specific existing line of business that may be targeted by one of the political parties. Currently, proxy advisers may become subject to different economic risks based on which party controls Congress. One political party has introduced legislation to amend the Securities Exchange Act to require proxy adviser registration and compliance, opposed by the other political party.[39] Compliance would be expensive, and a real economic risks for proxy advisers and their stockholders for which no other hedging instruments are available.

Another example is targeted corporation risk, which is risk to a particular company that has incurred the ire of a political party. Companies in cross-hairs have the unique risks of the economic and reputational damage from boycotts, new legislation, and hearings that can be held by a party in control with the goal of harming them. This presents these companies and their stockholders with very real economic risks that these futures contracts can hedge, and for which no other hedging instruments are available.

Here are three current, real-world examples of targeted corporation risk:

A political boycott[40] of a beer company[41] is being inflamed by Republican lawmakers. A Republican Senator demanded "investigation" of a beer company's transgender-friendly marketing campaign,[42] and that beer company should worry this could translate into hearings were the Republicans to control the Senate. This targeted corporation has so far suffered billions of dollars in revenue, and its stockholders have suffered billions of dollars in market capitalization loss.

Another is Republican retribution against a large entertainment company for speaking against legislation proposed in a state where it is the largest private employer. A Republican Congressman introduced legislation with the stated goal of bankrupting[43]

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[39] *House GOP Threatens Crackdown On Proxy Advisers*, Law360, Jul. 13, 2023, avail. at https://www.law360.com/projectfinance/articles/1699304/house-gop-threatens-crackdown-on-proxy-advisers

[40] "A political boycott uses economic coercion to force its victims to speak or act politically in a way that furthers the goals, not necessarily of the speaker, but of the boycotter." Note, *The Political Boycott: An Unprivileged Form of Expression*, 1983 Duke L.J. 1076, 1077.

[41] avail. at https://en.wikipedia.org/wiki/2023_Bud_Light_boycott.

[42] *Cruz opens a probe into Anheuser-Busch over Dylan Mulvaney partnership*, The Hill, May 18, 2023, aval. at avail. at https://thehill.com/homenews/senate/4011114-cruz-opens-a-probe-into-anheuser-busch-over-dylan-mulvaney-partnership/.

[43] Troy E. Nehls, *Rep. Troy E. Nehls Reintroduces Airlines Independent of Restrictions (AIR) Act*, May 05, 2023, "No corporation should get preferential treatment from the government—especially when it is grooming children. **Go woke, go broke.**" (emphasis supplied) avail. at

this company as punishment. If Republicans control both houses of Congress, this particular economic risk could become a reality for this targeted corporation were there also a Republican President.

Another is a threat a Republican Senator made to 51 large US law firms to hold hearings to investigate the legal advice the law firms provide clients on employment practices,[44] perhaps to see if that legal advice aligned with the Senator's views. Such hearings would present direct costs to the law firms and indirect costs by interfering with client relations. Such hearings could be held if the Republicans control the Senate, and there are no other instruments available to hedge this risk.

Another example is much broader, long-term risks for which the Kalshi contracts are not optimal hedging instruments right now, but could become such once a political party articulates specific legislation to advance its policies. For example, there are economic risks presented to American Jewry and Jewish-owned businesses by antisemitism. Today, 1 in 4 hiring managers say they are less likely to move forward with Jewish applicants.[45] Antisemitism presents economic risks to Jewish people and their businesses. Those risks become more directly hedgeable by these contracts if one party proposes legislation implementing antisemitic policies that the other party opposes.

Republican lawmakers have long engaged in dog whistle antisemitism, for example attacking Jewish financier George Soros,[46] and increasingly include overt

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https://web.archive.org/web/20230510040957/avail. at https://nehls.house.gov/posts/rep-troy-e-nehls-reintroduces-airlines-independent-of-restrictions-air-act; MSNBC, *GOP lawmakers are now attacking Disney at the federal level*, May 11, 2023, avail. at https://www.msnbc.com/the-reidout/reidout-blog/disney-desantis-boebert-no-fly-zone-rcna84030.

[44] Tom Cotton, *Cotton Warns Top Law Firms About Race-Based Hiring Practices*, Jul. 17, 2023, "To the extent that your firm continues to advise clients regarding DEI programs or operate one of your own, both you and those clients should take care to preserve relevant documents in anticipation of investigations and litigation.", avail. at https://www.cotton.senate.gov/news/press-releases/cotton-warns-top-law-firms-about-race-based-hiring-practices

[45] "Key findings include: 26% of hiring managers say they are less likely to move forward with Jewish applicants; top reason for negative bias is belief Jews have too much power and control; 26% make assumptions about whether a candidate is Jewish based on their appearance; 23% say they want fewer Jews in their industry; 17% say leadership has told them to not hire Jews; 33% say antisemitism is common in their workplace; 29% say antisemitism is acceptable in their company." Reasons hiring managers stated they would be less likely to move forward with Jewish applicants included: Jews have too much power and control (38%); Jews claim to be the 'chosen people' (38%); Jews have too much wealth (35%); Jews are greedy (22%); Jews killed Jesus (18%); Jews are an inferior race (18%); Jews are oppressors (18%) and Jews are less capable (17%). Updated: Jan. 19, 2023, avail. at https://www.resumebuilder.com/1-in-4-hiring-managers-say-they-are-less-likely-to-move-forward-with-jewish-applicants/.

[46] A core tenet of modern antisemitism is that Jews control the world through shadowy conspiracies. See Holocaust Museum, *Protocols of the Elders of Zion*, avail. at https://encyclopedia.ushmm.org/content/en/article/protocols-of-the-elders-of-zion. A core tenet of both traditional and modern antisemitism is that Jews care most about money. American Jewish Committee, *5 of Kanye West's Antisemitic Remarks, Explained*, Dec. 2, 2022, avail. at https://www.ajc.org/news/5-of-kanye-wests-antisemitic-remarks-explained. See Umberto Eco, The Prague Cemetery (2010) for an explanation of antisemitism's transition from traditional to modern.

antisemitism in the Republican brand.[47] The Republican House of Representatives candidate in the 2018 general election in my district was an open Holocaust denier.[48] Republican President Trump's Executive Order 13967 parroted Nazi attacks against Jewish "degenerate art," even attacking US works of a refugee from the Nazis.[49] A Republican Congresswoman accused a wealthy Jewish family of starting California wildfires using light beams from outer space,[50] and the Republican leadership effectively

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[47] E.g., Haaretz, *Antisemitism Is Now a Key Part of the Republican Agenda for America: Once fringe and denounced, extremism and antisemitism are now not only at home in the Republican Party, but built into the GOP's political strategy for the midterms and beyond. As antisemitism in America rises, this is a startling normalization of hate*, Nov. 8, 2022, avail. at https://www.haaretz.com/us-news/2022-11-08/ty-article-opinion/.premium/antisemitism-now-a-key-part-of-the-republican-agenda-for-america/00000184-56ed-dc83-a7fd-feff297c0000; Los Angeles Times, *Denouncing antisemitism shouldn't be hard; for some Republicans, it seems to be*, Dec. 2, 2022, avail. at https://www.latimes.com/politics/newsletter/2022-12-02/antisemitism-trump-and-the-gop-essential-politics; *Arizona Republicans to host white nationalist antisemite Nick Fuentes at conference*, AZCentral, Jul. 11, 2023, avail. at https://www.azcentral.com/story/opinion/op-ed/ej-montini/2023/07/11/arizona-republican-event-features-white-nationalist-nick-fuentes/70400626007/; Media Matters, *100-plus examples of Republican politicians embracing antisemitic media since 2021*, Dec. 12, 2022, avail. at
avail. at https://www.mediamatters.org/diversity-discrimination/100-plus-examples-republican-politicians-embracing-antisemitic-media-2021; *Dr. Oz Stood in Front of One of Hitler's Cars at a Fundraiser*, Oct. 7, 2022, avail. at https://jezebel.com/dr-oz-stood-in-front-of-one-of-hitlers-cars-at-a-fundr-1849630627.

[48] "A Republican candidate for Congress in California is openly running as a Holocaust denier, calling it a 'complete fabrication' in an interview with The New York Times published Friday." The Hill, *California GOP congressional candidate runs as open Holocaust denier*, Jul. 6, 2018, avail. at https://thehill.com/homenews/campaign/395913-california-gop-congressional-candidate-runs-as-open-holocaust-denier/.

[49] *Promoting Beautiful Federal Civic Architecture*, 85 Fed. Reg. 83739 (Dec. 23, 2020). "In the District of Columbia, classical architecture shall be the preferred and default architecture for Federal public buildings," §2(a), and the President shall be notified and given a detailed explanation if the GSA "proposes to approve a design for a new applicable Federal public building that diverges from the preferred architecture set forth in [§]2(a) ..., including Brutalist ... architecture or any design derived from or related to these types of architecture," and told "whether such design is as beautiful and reflective of ... vigor". §6(b). "'Brutalist' means the style of architecture that grew out of the early 20th-century modernist movement ... ." §3(b). EO 13967 attacked by name two buildings designed by a Jewish-born refugee from the Nazis, Bauhaus architect Marcel Breuer (HHS HQ, avail. at https://www.hhs.gov/about/hhs-headquarters/index.html and Robert C. Weaver Federal Building avail. at https://www.gsa.gov/historic-buildings/robert-c-weaver-federal-building-washington-dc), 85 Fed. Reg. at 83740, para. 1. "Among Hitler's grand plans upon coming to power ... was to purify German culture, to promote the Apollonian 'classical' and eradicate the uncontrollably Dionysian 'primitive,' a category that included ... avant-garde modernism, Bolshevism, and Jewish culture. ... Harassment of Bauhaus artists began even earlier." NY Times, *First, They Came for the Art*, Mar. 13, 2014, avail. at https://www.nytimes.com/2014/03/14/arts/design/degenerate-art-at-neue-galerie-recalls-nazi-censorship.html; see also Bloomberg CityLab, *How the Bauhaus Kept the Nazis at Bay, Until It Couldn't*, Mar. 11, 2019, avail. at https://www.bloomberg.com/news/articles/2019-03-11/100-years-later-how-the-bauhaus-resisted-nazi-germany?sref=9qd489pp; BBC News, *Bauhaus in pictures: The architects exiled by Nazis*, 16 Jan. 2019, avail. at https://www.bbc.com/news/in-pictures-46863364. President Biden rescinded EO 13967. *Executive Order on the Revocation of Certain Presidential Actions*, avail. at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/24/executive-order-on-the-revocation-of-certain-presidential-actions/.

[50] Zack Beauchamp, *Marjorie Taylor Greene's space laser and the age-old problem of blaming the Jews: Why conspiracy theorists always end up pointing the finger at Jews — and why that's a problem for the GOP*, Jan 30, 2021, Vox, avail. at https://www.vox.com/22256258/marjorie-taylor-greene-jewish-space-

backed her.[51] Republican Speaker of the House Kevin McCarthy accused three Jewish people, including Soros, of trying to "buy" elections.[52] The current front runner for the 2024 nomination for Republican presidential candidate publicly dined with open and notorious antisemites, and this was accepted by many Republicans in Congress.[53] The Republican conference of the House Judiciary committee supported a virulent antisemite on its Twitter feed, despite real consequences to American Jews.[54] Supporters of the

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laser-anti-semitism-conspiracy-theories. "Blood libel" is the medieval false accusation that Jews kidnap and murder Christian children to use their blood to make Passover Matzah, avail. at https://en.wikipedia.org/wiki/Blood_libel; Sara Lipton, *Seven Centuries of Slander*, New York Review of Books, Sept. 23, 2022, avail. at https://www.nybooks.com/articles/2021/09/23/blood-libel-seven-centuries-slander/. "QAnon, conspiracy theory … adherents believed [in] a cabal of satanic cannibalistic pedophiles within Hollywood, the Democratic Party, and the so-called 'deep state'… ." Encyclopedia Britannica, *QAnon conspiracy theory*, avail. at https://www.britannica.com/topic/QAnon. QAnon is based in and expands upon blood libel and other antisemitic conspiracy theories. Wikipedia, *QAnon*, avail. at https://en.wikipedia.org/wiki/QAnon#Antisemitism. QAnon conspiracy theory is accepted, if not endorsed, by some Republican politicians. Axios, *11 GOP congressional nominees support QAnon conspiracy*, Jul. 12, 2020, avail. at https://www.axios.com/2020/07/12/qanon-nominees-congress-gop; *Wisconsin GOP invites QAnon, Jan. 6 conspiracy theorist to speak at state convention*, Wisconsin Examiner, May 5, 2023, avail. at https://wisconsinexaminer.com/brief/wisconsin-gop-invites-qanon-jan-6-conspiracy-theorist-to-speak-at-state-convention/; Wikipedia, *QAnon*, avail. at https://en.wikipedia.org/wiki/QAnon#Republican_politicians_and_organizations. The QAnon phenomena seems ripe for transition from "it's the Democrats" to "it's the Jews."

[51] New York Times, *Top House Republican Condemns Marjorie Taylor Greene's Comments, but Stands by Her*, Feb. 3, 2021, avail. at https://www.nytimes.com/2021/02/03/us/politics/kevin-mccarthy-marjorie-taylor-greene.html.

[52] Kevin McCarthy said on Twitter: "we cannot allow Soros, Steyer, and Bloomberg to BUY this election! Get out and vote Republican November 6th. #MAGA." avail. at https://twitter.com/JuddLegum/status/1055170806949523458.

[53] Roll Call, *House GOP overlooks internal antisemitism, points at Democrats*, Dec. 1, 2022, avail. at https://rollcall.com/2022/12/01/house-gop-overlooks-internal-antisemitism-points-at-democrats/. Kevin McCarthy "went on to defend Trump, claiming the former president was ignorant of Fuentes' well-known racist and antisemitic views when he had him over for dinner. … Like other Republicans, McCarthy has stopped short of directly saying Trump has supported antisemitism with his actions." Trump was not unaware of Kanye's antisemitism, as Politico reported two months previously. Politico, *Trump and Kanye West speak amid rapper's antisemitic rants, acquisition of Parler: A dinner between the two is in the future*, Oct. 17, 2022, avail. at https://www.politico.com/news/2022/10/17/trump-and-kanye-speak-amid-rappers-anti-semitic-rants-aquisition-of-parlor-00062158. PBS Newshour, *We asked 57 Republican lawmakers if they condemn Trump's dinner with Fuentes and Ye. Here's what they said*, Nov 29, 2022, avail. at https://www.pbs.org/newshour/politics/we-asked-57-republican-lawmakers-if-they-condemn-trumps-dinner-with-fuentes-and-ye-heres-what-they-said; Vanity Fair, *Surprise: A Number of Republicans Don't Want to Condemn Donald Trump's Dinner With a Couple of Antisemites: They too know where their bread is buttered*, Vanity Fair, Nov. 28, 2022, avail. at https://www.vanityfair.com/news/2022/11/surprise-a-number-of-republicans-dont-want-to-condemn-donald-trumps-dinner-with-a-couple-of-antisemites. But see Axios, *McConnell: Anyone meeting with antisemites "highly unlikely" to be president*, Updated Nov 29, 2022, avail. at https://www.axios.com/2022/11/29/mitch-mcconnell-antisemites-2024-election; NBC News, *RNC passes resolution condemning anti-Semitism following Trump dinner with Ye*, Jan. 27, 2023, avail. at https://www.nbcnews.com/meet-the-press/meetthepressblog/rnc-passes-resolution-condemning-anti-semitism-trump-dinner-ye-rcna67922.

[54] On Oct. 6, 2022, the House Judiciary Committee Republican caucus tweeted support of Kanye West, on the day Fox News aired West's antisemitic remarks. The Republican caucus kept the tweet in place despite knowing Kanye was inspiring antisemitic intimidation in Jewish areas of the US, NBC News, *Rise in antisemitism is feared after banner saying 'Kanye is right' is hung over Los Angeles freeway,* Oct 24, 2022,

current second-place runner for the Republican 2024 Presidential candidate picketed Disney World with Nazi flags.[55] One can expect this to get worse, because since 2015 it has only gotten worse. Although Republicans do not have a monopoly on antisemitism,[56] too many embrace it. If Republican party antisemitism advances to legislative proposals that present American Jewry and their businesses economic risks of lost job opportunities and the need to move out of the US and sell assets at distressed prices, these contracts could hedge those risks. There are no other derivative products or commodity prices that can hedge these risks.

10. Are the economic consequences of congressional control predictable enough for a contract based on that control to serve a hedging function? Please provide tangible examples of commercial activity that can be hedged directly by the contracts or economic analysis that demonstrates the hedging utility of the contracts.

Yes, there are economic consequences of congressional control predictable enough for a contract based on such outcomes to serve a hedging function. See examples in my answer to Question 9. As an additional example, Republican-controlled House or Senate could make good on Republican threats to cause the US to default on its debt,[57]

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avail. at https://www.nbcnews.com/news/us-news/banner-kanye-right-los-angeles-freeway-antisemtic-group-rcna53653, and elsewhere in the US. ABC News, *Antisemitic message referencing Kanye West displayed outside Florida v. Georgia football game*, Oct. 31, 2022, avail. at https://abcnews.go.com/US/antisemitic-message-referencing-kanye-west-displayed-florida-georgia/story?id=92387005. After displaying the tweet for two months, the Republican caucus finally took it down when West pronounced his "love" of Nazis and Hitler, Variety, *Kanye West Praises Hitler in Horrific Antisemitic Tirade*, Dec. 1, 2022, avail. at https://variety.com/2022/music/news/kanye-west-praises-hitler-antisemitic-tirade-1235447083/, antagonizing non-Jewish constituents, such as WWII veterans and their survivors. NBC News, *House Judiciary Republicans delete 'Kanye. Elon. Trump.' tweet as rapper praises Hitler: Republicans on the House Judiciary Committee had tweeted in apparent support of Ye on Oct. 6. The tweet was removed Thursday, Dec. 1, 2022*, avail. at https://www.nbcnews.com/politics/congress/house-judiciary-republicans-delete-kanye-elon-trump-tweet-rapper-prais-rcna59654; Le Monde, *Kanye West praises Hitler and embarrasses the Republican Party*, Dec. 3, 2022, avail. at https://www.lemonde.fr/en/international/article/2022/12/03/kanye-west-praises-hitler-and-embarrasses-the-republican-party_6006495_4.html. The Republican message to American Jews is stark and unambiguous.

[55] *Nazis Wave Swastikas & DeSantis 2024 Flags, Yell 'White Power' Outside Walt Disney World Entrance*, June 10, 2023, Walt Disney World News Today, avail. at https://wdwnt.com/2023/06/nazis-rally-at-entrance-to-walt-disney-world/; *Protesters carrying Nazi flags and DeSantis imagery gathered outside Disney World in Orlando, Florida*, Business Insider, Jun. 11, 2023, avail. at https://www.businessinsider.com/protesters-nazi-flags-desantis-posters-outside-disney-world-2023-6

[56] E.g., CNN, *Jewish groups denounce [Democrat] RFK Jr.'s false remarks that Covid-19 was 'ethnically targeted' to spare Jews and Chinese people*, Jul. 15, 2023 ("'Covid-19 is targeted to attack Caucasians and Black people. The people who are most immune are Ashkenazi Jews and Chinese,' Kennedy said, adding that 'we don't know whether it's deliberately targeted that or not.'"), avail. at https://www.cnn.com/2023/07/15/politics/rfk-jr-covid-jewish-groups/index.html; *White House calls anti-Semitic Covid conspiracy theory voiced by RFK Jr. 'vile'*, Politico, Jul. 17, 2023, avail. at https://www.politico.com/news/2023/07/17/white-house-rfk-conspiracy-comment-00106681.

[57] Washington Post, *Republicans warn Biden: The next debt limit increase won't be so easy*, Dec. 13, 2021, avail. at https://www.washingtonpost.com/politics/republicans-debt-ceiling-biden/2021/12/13/b40b6c2a-59d5-11ec-9a18-a506cf3aa31d_story.html.

which would present substantially adverse economic consequences,[58] although for this risk there are hedging instruments currently available.

11. Should the Commission consider contract and position sizes, size of trade requirements, and/or an exchange's intended customer base to help assess whether a contract is likely to be used for hedging in at least some cases? Does the requirement that all contracts listed on Kalshi must be fully-collateralized affect this analysis? Does the requirement that these contracts trade in multiples of 5000 and/or the position limits applicable to the contracts affect the analysis of the hedging utility of the contracts?

The examples of corporate hedging utility in my answer to Question 9 involve risks that are substantially in excess of the 5,000 contract limit.

12. Should the Commission consider the contract design and payout to help assess the hedging utility of the contract? For example, are binary contracts useful for hedging nonbinary economic events?

The question assumes facts not in evidence. As I noted in my answer to Question 9, for Anheuser-Busch and the Walt Disney Company, the economic risks that are hedgeable by the Kalshi contracts are in fact binary.

14. Are the contracts contrary to the public interest? Why or why not?

The inquiry is not if they are contrary to the public interest, but if they involve relate to, or reference "(I) activity that is unlawful under any Federal or State law; (II) terrorism; (III) assassination; (IV) war; (V) gaming; or (VI) ***other similar activity*** determined by the Commission, by rule or regulation, to be contrary to the public interest." If they do not reference (I), (II), (III), (IV) or (V), which they do not, there is no public interest inquiry. Please see discussion in Part One above.

15. Could the trading of these or other political control or election-based contracts affect the integrity of elections or elections within a chamber of Congress? Could they affect the perception of the integrity of elections or elections within a chamber of Congress?

No to both. There is no way to "fix" an election the way one can "fix" a baseball game by bribing a few players. It is hard to imagine a political candidate accepting a payoff to lose an election, and even harder to imagine proving it. It is extraordinarily unlikely that a person would seek election of a national slate of candidates with policies contrary to that person's economic or political interests, simply to win a fully collateralized futures contract binary outcome. It would be far more economically efficient to leverage a position in a contract with relatively low initial margin, such as

[58] CBS News, *U.S. debt default could wipe out 6 million jobs and $15 trillion in wealth, Moody's says*, Sept. 22, 2021, avail. at https://www.cbsnews.com/news/debt-ceiling-default-6-million-jobs-15-trillion-wealth/.

crude oil, that will be impacted by the policies of the winning party.

16. Could the contracts be used to influence perception of a political party or its candidates' likelihood of success? To this end, could the contracts be used to manipulate fundraising or voting?

One can imagine people buying futures contracts to bid up the perceived chances of a political party, but it is far cheaper and effective to do what is done now, which is to pay companies that present themselves to the public as polling companies to write bogus polls, with a view to manipulating perceptions of which candidate is winning. This was done to create the false narrative of the "red wave" of 2022 that did not come to pass.[59] Seeking power through elections and false polls is a far more rational and prevalent reason for false polling than would be moving futures contracts.

Perhaps partisans could bid up a futures contract to create a false poll of strength. The effects would be attenuated at the individual candidate level. In either event, this is solved through market depth and public understanding of the predictive power of the contract as reflecting only the views of those participating in that market. The Kalshi contract might skew to overweight the views of those participating in that market, who can afford to collateralize 5,000 contracts. Eventually academic papers will be available instructing how to model to adjust for that skew.

17. Could the contracts facilitate violations of, or otherwise undermine, federal campaign finance laws or regulations? For example, could the contracts make it easier to sidestep prohibitions governing coordination between candidate campaign committees and political action committees?

These contracts do not provide any opportunities to sidestep campaign finance and anti-bribery laws that are not already available from all other futures contracts.[60]

Donors receive far more value for their money – ***and do so legally*** – by donating to candidates to obtain access and special favors than they could ever achieve through some fantastic illegal election futures market manipulation. Hedge fund managers got far more bang for their ***legal*** million dollars from Senator Sinema, who single-handedly prevented the closing of the carried interest tax loophole,[61] than they ever could have hoped to make on futures contracts by spending hundreds of millions illegally seeking to influence hundreds of elections nationwide, especially if those races were to be won by

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[59] New York Times, *The 'Red Wave' Washout: How Skewed Polls Fed a False Election Narrative*, Dec. 31, 2022, avail. at https://www.nytimes.com/2022/12/31/us/politics/polling-election-2022-red-wave.html.
[60] See, e.g., Wikipedia, *Hillary Clinton cattle futures controversy*, avail. at https://en.wikipedia.org/wiki/Hillary_Clinton_cattle_futures_controversy; Taylor & Ingersoll, *Hillary Clinton's Commodities Broker Was Disciplined for a Variety of Violations*, Wall Street Journal; Gottschalk, *If Hillary Clinton Could Make Money in Commodities, Why Can't You? Well, Let's Count the Reasons*, Wall Street Journal (Mar. 28, 1994).
[61] Fortune, *Kyrsten Sinema's donations from investors surged to nearly $1 million in the year before she killed a huge new tax on private equity and hedge funds*, Aug. 13, 2022, avail. at https://fortune.com/2022/08/13/sinema-wall-street-money-killing-tax-investors/.

candidates against the carried interest loophole. On a national level, political parties raise money and seek to win elections; they would not gamble the money on futures contracts, they would buy services and advertisements.

If in the future DCMs propose contracts on individual races, which are not the Kalshi contracts, the CFTC can evaluate those contracts at that time.

18. Do the contracts present any special considerations with respect to susceptibility to manipulation or surveillance requirements?[62]

No. There are major companies that control large portions of wheat, oil, gas, or other commodity supply or demand. It is appropriate to watch for commodity market manipulation by companies improperly furthering their economic interest. In contrast, no one can "manipulate" which party controls a chamber of Congress. Considering evidence-free conspiracy theories to the contrary is not appropriate. Federal rulemaking must be reasoned.[63] There is no "inside information," and any positing that there is traffics in fantasy conspiracy theory. Polling data would implicate 870 or more candidate for the House, and 66 or 67 for the Senate, and could hardly be "internal." Please see answers to Questions 15-17 above as well.

Since these contracts are financial instruments in the US's financial system, those inclined to traffic in antisemitism could use them as evidence in their false narrative of Jewish financier control of the country and over elections.[64] But the result will not involve the contracts being used to manipulate fundraising or voting, the result will be more antisemitism.

19. What is the price forming information for these contracts while the contracts are trading? If the price forming information includes polling and other election prediction information, is that information regulated? How does the price forming information compare to informational sources (e.g. government issued crop forecasts, weather forecasts, federal government economic data, market derived supply and demand metrics for commodities, market-based interest rate curves, etc.) that are generally used for pricing commodity derivative products within the Commission's jurisdiction?

Reports such as crop reports, Energy Information Administration reports, and Commitment of Traders reports from the federal government represent the publication of information that people are required by regulation to report to the government. This information could be price forming for futures contracts. The government does not sponsor political polls the way it sponsors reporting the information that people are required to

[62] The CFTC 2022 Questions also included at the end of this questions: "For example, could candidate campaign committees or political action committees manipulate the contracts by trading on internal, non-public polling data?"
[63] A Guide to the Rulemaking Process Prepared by the Office of the Federal Register, avail. at https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.
[64] See answer to Question 9 above.

report to it. Rather, the information concerning the leading candidate is reported when the government holds an election, people vote, and the government reports to the public the results of the election.

Unlike in the movie *Trading Places* (1983), where an orange crop report was stolen as part of a scheme to manipulate the NYMEX Frozen Concentrated Orange Juice futures contract, there is no equivalent government report for political polls, nor should there be. That is not the role of the government. Were the government to poll and to seek to regulate political polling, the inevitable result would be the party in power using this to stay in power. Policing polling is certainly not the role of the CFTC. Any such purported policing would feed a false narrative that Congressional elections may be manipulated, not address any concerns, and should have no impacts on the CFTC's determination on whether the contracts have hedging utility or involve, relate to, or reference, one of the six prohibited activities.

It is highly inappropriate for the CFTC to even hint that the government should regulate political polls; taken together with Questions 20 and 22, it seems to indicate that the CFTC is hinting that it is considering regulating polling, or harbors some belief that approving these contracts somehow would justify the CFTC in regulating polling, or that its inability to regulate polling should be a reason to not approve these contracts. The CFTC should clarify what it means by Question 19.

> ***20. Should, and if so how would, the registered entity listing the contracts take steps to address possible manipulative and/or false reporting activity involving the price forming information for the contracts, while the contracts are trading?***

No. It is not possible to manipulate elections the way bad actors can manipulate commodity prices. The CFTC should not regulate political polls, or require private companies to monitor and report on them, on the grounds that such polls, if false, could be used to manipulate futures prices. As was the case for the bogus polls used to generate the false narrative of the 2022 "red wave" that did not come to pass, the goal of a false poll is to win an election, not to manipulate a futures price. Perhaps someone inclined to create a false narrative of a coming win might invest in both bogus polls and trying to bid up a futures contract; this risk does not justify the CFTC seeking to directly or indirectly regulate polling, because for the latter the problem is solved by market depth. The inability of the CFTC to regulate polling should not be a reason to deny the futures contract.

The CFTC approved film box office receipt futures contracts,[65] finding them "not

[65] CFTC, Release Number 5834-10, *CFTC Approves Box Office Receipt Contracts Submitted by Media Derivatives*, https://www.cftc.gov/PressRoom/PressReleases/5834-10, See dissenting statement of Commissioner Sommers, https://www.cftc.gov/idc/groups/public/@otherif/documents/ifdocs/mdexdissentingsommers061410.pdf, noting that the CFTC even at that time (2010) needed to proceed with the events contracts rulemaking that it had floated in 2008. This remains the case. See Anderson, *Back to the Future[s]: A Critical Look at the Film Futures Ban*, 29 Cardozo Arts & Ent. L.J. 179 (2011), avail. at https://www.cardozoaelj.com/wp-content/uploads/Journal%20Issues/Volume%2029/Issue%201/Anderson.pdf.

readily susceptible to manipulation,"[66] even though not only studios, but third parties, can advertise movies (an analogue to buying and promoting false polls) to affect box office receipts or deploy "insider status" to predict them. The CFTC even said that "false … rumors or misreporting does not constitute a legal basis to conclude that a proposed futures or options contract would violate" the CEA.[67] Film box office receipt futures had at best a tiny fraction of the potential hedging utility of the Kalshi contracts.

See also answers to Questions 19-23.

22. Should the Commission be responsible for surveilling, and enforcing against, possible manipulative and/or false reporting activity involving the price forming information for the contracts, while the contracts are trading?

No. The Federal Election Commission enforces against campaign finance violations. There are gasoline futures contracts, and it is the Federal Trade Commission that is responsible for surveilling and enforcing against gas market manipulation.[68] There are electricity and natural gas futures contracts, and it is the Federal Energy Regulatory Commission that is responsible for surveilling and enforcing against energy market manipulation.[69] The CFTC does not have to be responsible for surveilling and enforcing against manipulation or illegal conduct in the underlying for it to take action should the regulator with jurisdiction do so and provide the information to the CFTC.[70] There are futures on assets and prices that are subject to manipulation beyond the CFTC's jurisdiction to regulate and investigate, and on which the CFTC can piggyback for its enforcement should manipulation be discovered by the law enforcement agency with jurisdiction. For example, the CFTC relied on the investigations of the UK Financial Conduct Authority when assessing fines against Lloyds Bank for LIBOR manipulation.[71] See also answers to Questions 19-23.

23. Could trading in the markets for the contracts obligate the

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[66] CFTC, *Statement of the Commission,* Jun. 14, 2010, pp. 6-9, avail. at https://www.cftc.gov/idc/groups/public/@otherif/documents/ifdocs/mdexcommissionstatement061410.pdf.
[67] CFTC, *Statement of the Commission,* Jun. 14, 2010, p. 8. Ironically, the CFTC included this Statement as Exhibit 3 in CFTC, Brief for Amicus Curiae ... in Support of Rehearing, *Laydon v. Cooperative Rabobank, et al.,* 2d Cir. Case 20-3626, doc. 383, Nov. 29, 2022; see Law360, *CFTC Urges 2nd Circ. Redo Of Yen Libor-Rigging Suit*, Nov. 30, 2022, avail. at https://www.law360.com/articles/1553368/cftc-urges-2nd-circ-redo-of-yen-libor-rigging-suit-.
[68] 16 C.F.R. §317 Prohibition of Energy Market Manipulation Rule; FTC, Guide to Complying with Petroleum Market Manipulation Regulations, avail. at https://www.ftc.gov/sites/default/files/documents/rules/prohibition-energy-market-manipulation-rule/091113mmrguide.pdf.
[69] FERC Order 670, 18 C.F.R. §1c.2 Energy market manipulation; FERC Enforcement Resources, avail at https://ferc.gov/enforcement-resources.
[70] E.g., Dodd-Frank Act §720.
[71] Law360, *Lloyds To Pay $370M In US, UK Libor-Rigging Deal*, Jul. 28, 2014, avail. at https://www.law360.com/articles/561429/lloyds-to-pay-370m-in-us-uk-libor-rigging-deal; CFTC, Release Number 6966-14, July 28, 2014, *CFTC Charges Lloyds Banking Group and Lloyds Bank with Manipulation, Attempted Manipulation, and False Reporting of LIBOR*, avail. at https://www.cftc.gov/PressRoom/PressReleases/6966-14.

Commission to investigate or otherwise become involved in the electoral process or political fundraising? If so, is this an appropriate role for the Commission?

No. See answers to Questions 19-22. The CFTC has not been granted authority by Congress to investigate elections or political fundraising. The CFTC does not expand its investigatory jurisdiction into an area by simply approving a contract in an underlying. The ICE futures contracts on Rotterdam coal, Brent crude oil, California Carbon allowances, London Cocoa, UK government bonds, US government bonds, UK equities, Austrian financial energy, and freight between Mediterranean ports, do not obligate the CFTC to investigate those markets that are under the primary jurisdiction of foreign governments, other federal agencies, or U.S. states, and the CFTC probably lacks the jurisdiction to do so.[72] The CFTC cannot expand its investigatory jurisdiction whenever it likes simply by approving futures contracts that involve underlyings that it would like to investigate.

24. What other factors should the Commission consider in determining whether these contracts are "contrary to the public interest?"

The only relevant factors that the CFTC should consider are set forth in the statute. Therefore the only relevant factors for CFTC inquiry are whether elections for control of Congress are one of, or an activity that is similar to, one of "(I) activity that is unlawful under any Federal or State law; (II) terrorism; (III) assassination; (IV) war; [or] (V) gaming … ." They are not. Title 17 gives the CFTC no "contrary to the public interest" denial authority outside of Rule 40.11.

Conclusion

I and many other members of the public have provided very detailed responses to three CFTC requests on event contracts. I hope the CFTC has not prejudged this matter, and I hope that the CFTC will provide useful information to the public in return.

Yours truly,



Jeremy D. Weinstein

[72] E.g., *Laydon v. Coöperatieve Rabobank U.A., et al.*, No. 20-3626 (2d Cir. Oct. 18, 2022); *West Virginia v. Environmental Protection Agency*, 597 U.S. ___ (2022).

ATTACHMENT F

TAK Chun Gaming Promotion Co. v. Long

Filed 10/26/23

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

TAK CHUN GAMING PROMOTION COMPANY LIMITED, Plaintiff and Appellant, v. KEVIN C.S. LONG, Defendant and Respondent.	B317918 (Los Angeles County Super. Ct. No. 21BBCV00094)

APPEAL from a judgment of the Superior Court of Los Angeles County, John J. Kralik, Judge. Affirmed.

Greenan, Peffer, Sallander & Lally, John P. Makin, Nelson S. Hsieh, and Helen H. Chen for Plaintiff and Appellant.

Bird, Marella, Boxer, Wolpert, Nessim, Drooks, Lincenberg & Rhow, Thomas R. Freeman, Ekwan E. Rhow, and Kimmy Yu for Defendant and Respondent.

* * * * * *

During our state's infancy, our Legislature declared "[t]he common law of England" to be "the [default] rule of decision in all the courts of this State." (Civ. Code, § 22.2; see also former Pol. Code, § 4468; *Merritt v. Hill* (1894) 104 Cal.184, 185.) In so doing, our state imported the English common law rule that prohibits resort to the courts to enforce gambling debts. (E.g., *Bryant v. Mead* (1851) 1 Cal. 441, 442-443 (*Bryant*).) In the intervening 173 years, our state has legalized many discrete types of gambling. Does this shift to a selective and partial legalization of gambling warrant the abandonment of the common law rule shuttering the California courts to lawsuits seeking to enforce gambling debts? We hold that it does not. The public policy basis for not legalizing gambling and the public policy basis for not providing a judicial forum to enforce gambling debts are distinct; erosion of the former does not call the latter into question. We consequently agree with the trial court that the lawsuit in this case seeking to enforce a gambling debt was properly dismissed. Thus, we affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Kevin C.S. Long (Long) resides in Arcadia, California, and holds a Chinese resident identification card. In 2019, Long made several trips to Macau, which is an autonomous region on the south coast of China.[1] Gambling is legal in Macau.

While in Macau, Long entered into seven loan agreements with Tak Chun Gaming Promotion Company Limited (Tak Chun)—one in January 2019, five in September 2019, and one in

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1 Macau is officially known as the Macao Special Administrative Region of the People's Republic of China.

November 2019. Tak Chun is a licensed junket operator that owns and operates gaming clubs inside Macanese casinos; among other things, Tak Chun loans funds to gamblers. The agreements obligated Long to repay the loaned amounts within 30 or 45 days, or face an interest rate at "five times the amount stipulated by law" in Macau. The agreements did not contain a forum selection clause.

Tak Chun loaned Long "casino tokens" worth a total of $88 million in Hong Kong currency (that is, over US$11 million); Long repaid only HK$13,668,680 (that is, around US$1.7 million).

II. Procedural Background

On February 1, 2021, Tak Chun sued Long in a California state court seeking HK$74,331,320 (that is, US$9,904,787) under causes of action for (1) breach of contract, (2) quantum meruit, and (3) common counts.

Long moved for judgment on the pleadings, arguing that the lawsuit was barred by California's public policy against allowing the California courts to be used as a forum for enforcing gambling debts, even when the gambling giving rise to those debts was lawful where it occurred.[2] Tak Chun opposed, urging that this public policy was now outdated. After further briefing and a hearing, the trial court granted Long's motion.

The court acknowledged that California's legalization of certain pockets of gambling had "undoubtedly reduced the integrity and moral force" of California's public policy against *gambling*, but ruled that the prohibition on using California's

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2 Prior to Long's filing of this motion, the parties litigated Tak Chun's application for a writ of attachment against Long's assets, which the trial court denied.

courts as a forum *to collect gambling debts* had been a "clear[] and consistent[]" policy for "hundreds of years." As for Long specifically, the court noted that he was "headed down the road to perdition," yet Tak Chun continued "giving him more help along the way again and again and again." The court concluded that "California['s] public policy" "strongly disfavor[ing]" the "enforcement of gambling debts" barred Tak Chun's claims.

Following the entry of judgment for Long, Tak Chun filed this timely appeal.

DISCUSSION

Tak Chun argues that the trial court erred in granting judgment on the pleadings.

A motion for judgment on the pleadings is appropriate when the operative complaint "does not state facts sufficient to constitute a cause of action . . . ." (Code Civ. Proc., § 438, subds. (c)(1)(B)(ii) & (c)(3)(B)(ii).) A motion brought on this basis is equivalent to a demurrer (*People ex rel. Harris v. Pac Anchor Transportation, Inc.* (2014) 59 Cal.4th 772, 777), such that our task is to examine the complaint's allegations and any judicially noticed documents in order to assess whether the pled causes of action are legally viable (*ibid.*; *Barajas v. Sativa L.A. County Water Dist.* (2023) 91 Cal.App.5th 1213, 1224 (*Barajas*)). A cause of action is not viable if, as pertinent here, it offends public policy. (*Griffin v. McCoach* (1941) 313 U.S. 498, 506 ["It is 'rudimentary' that a state 'will not lend the aid of its courts to enforce a contract founded upon a foreign law where to do so would be repugnant to good morals . . . or . . . violate the public policy of the State where the enforcement of the foreign contract is sought'"].) As to contract claims specifically, although public policy encourages the making of contracts, the courts will decline

to enforce a contract if it violates """"sound public policy."""" (*Dunkin v. Boskey* (2000) 82 Cal.App.4th 171, 184.)

We independently evaluate whether the trial court properly granted judgment on the pleadings.[3] (*Barajas*, *supra*, 91 Cal.App.5th at p. 1224.) We also independently review any subsidiary questions of law, including whether enforcement of a contract in the California courts is contrary to public policy. (*Bovard v. American Horse Enterprises, Inc.* (1988) 201 Cal.App.3d 832, 838.)

I. California's Public Policy Against the Enforcement of Gambling Debts

Although Tak Chun's complaint alleges three causes of action, all seek to enforce the gambling debts Long incurred in Macau. Thus, the legal viability of Tak Chun's claims turns on whether California provides a judicial forum for their adjudication.

It does not.

In 1850, our Legislature enacted a statute declaring that "[t]he common law of England . . . is the rule of decision in all the

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3 Our review of a judgment on the pleadings ordinarily includes a second step—that is, whether the trial court abused its discretion in denying leave to amend. (*Starlight Cinemas, Inc. v. Massachusetts Bay Ins. Co.* (2023) 91 Cal.App.5th 24, 31-32.) We need not reach that issue because Tak Chun conceded in the trial court that any amendment "would not be useful" to this "issue of law" and because Tak Chun has not asked this court to grant leave to amend. (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924 [leave to amend properly denied where cause of action is legally invalid and cannot be cured by additional allegations]; *Starlight Cinemas*, at p. 32 [appellant has burden of proving an amendment would cure legal defect].)

courts of this State" unless "repugnant to or inconsistent with" federal or state constitutional law or state statutes. (Civ. Code, § 22.2; former Pol. Code, § 4468; *Tufeld Corp. v. Beverly Hills Gateway, L.P.* (2022) 86 Cal.App.5th 12, 21 ["Since the beginning of California's statehood, the common law of England has been the law of the state except where it conflicts with the United States Constitution or other California law"].) Through this statute, California imported not only the "whole" "'body of judge-made,'" decisional law of the English courts, but also "the written statutes enacted by Parliament." (*Martin v. Superior Court* (1917) 176 Cal. 289, 292-293 (*Martin*); *People v. Williams* (2013) 57 Cal.4th 776, 782; *Moore v. Purse Seine Net* (1941) 18 Cal.2d 835, 838-839; *Tennant v. John Tennant Memorial Home* (1914) 167 Cal. 570, 573-574; but see *In re Estate of Fair* (1901) 132 Cal. 523, 534 ["'English statutes'" from definition of "'common law'"], overruled by *Martin*, at pp. 292-293.) Among the enactments of Parliament adopted as California common law was the Statute of Anne, which declared all gambling debts "utterly void, frustrate, and of none effect, to all intents and purposes whatsoever." (9 Anne, ch. 14, § 1.)

On this basis, our Supreme Court has issued a long line of unbroken decisions "traced back virtually to the inception of statehood," declaring the California courts off limits when it comes to enforcing gambling debts. (*Kelly v. First Astri Corp.* (1999) 72 Cal.App.4th 462, 477 (*Kelly*); *Bryant*, *supra*, 1 Cal. at pp. 442-443; *Carrier v. Brannan* (1853) 3 Cal. 328, 329 (*Carrier*).) With one exception, the intermediate appellate courts have all uniformly toed that line. (*Lane & Pyron, Inc. v. Gibbs* (1968) 266 Cal.App.2d 61, 64-65; *Metropolitan Creditors Service v. Sadri* (1993) 15 Cal.App.4th 1821, 1824 (*Metropolitan*); *Kelly*, at p. 477;

Kyablue v. Watkins (2012) 210 Cal.App.4th 1288, 1294 (*Kyablue*); but see *Crockford's Club Ltd. v. Si-Ahmed* (1988) 203 Cal.App.3d 1402, 1406 (*Crockford's Club*).)

Adhering to this line of precedent, the trial court properly dismissed Tak Chun's complaint because it seeks to use the California courts to enforce Long's gambling debts.

II. Tak Chun's Arguments

Tak Chun offers what boil down to three reasons why we should take the common law of our state in a new direction and depart from this precedent.

A. *The "loosening morality" argument*

First and chiefly, Tak Chun makes a "times have changed" argument. It observes that, over the last several decades, California has legalized gambling in four discrete areas—namely, (1) pari-mutuel horse racing (Bus. & Prof. Code, § 19400 et seq.); (2) the California State Lottery (Cal. Const., art IV, § 19, subd. (d); Gov. Code, § 8880 et seq.); (3) draw poker clubs and similar card games (Bus. & Prof. Code, § 19800 et seq.); and, although it springs from a federal mandate, (4) gambling on tribal land pursuant to the federal Indian Gaming Regulatory Act of 1988 (25 U.S.C. §§ 2701-2721). From this receptivity to legalize gambling in certain circumstances, Tak Chun extrapolates that it "defies facts and logic" to believe that there remains any "moral" justification for shuttering the California courts to claims seeking to collect gambling debts.

To be sure, California's public policy against gambling has "wan[ed]" and "eroded" somewhat as our state's initial and more sweeping prohibition against gambling—as embodied in prior iterations of the California Constitution and Penal Code section 330—has given way to the legalization of discrete types of

gambling. (Cal. Const., art. IV, § 19 [authorizing certain types of gambling but prohibiting Legislature from "authoriz[ing] . . . casinos of the type currently operating in Nevada and New Jersey"]; Pen. Code, § 330 [enumerating gambling in many instances as a misdemeanor]; see *Kyablue*, *supra*, 210 Cal.App.4th at p. 1293 [noting "waning public policy against gambling in general"]; *Metropolitan, supra*, 15 Cal.App.4th at p. 1828 [noting how "California's historical public policy against gambling has been substantially eroded"]; *Crockford's Club*, *supra*, 203 Cal.App.3d at p. 1406 [noting "expanded acceptance of gambling in this state"]; *Nevcal Enterprises, Inc. v. Cal-Neva Lodge, Inc.* (1961) 194 Cal.App.2d 177, 180 (*Nevcal*) [noting how "modern day[] Californians" are no longer "too pious" about "gambling"].) What was once a mostly impermeable wall against gambling is undoubtedly more porous.

But there are three reasons why this shift in public attitude toward some types of gambling does *not* erode the public policy against opening the California courts to the litigation of gambling debts.

First, the public policy that justifies keeping litigation over gambling debts out of the California courts is independent of—and hence not inextricably dependent upon—the public policy prohibiting gambling. (*Metropolitan*, *supra*, 15 Cal.App.4th at p. 1828 [noting the "critical distinction" between those two policies].)

Originally, the public policy against litigating gambling debts in the California courts was grounded in two rationales—namely, (1) that gambling *itself* was immoral and unlawful, such that the courts should not open their doors to vindicate rights grounded in immoral or unlawful contracts (*Bryant*, *supra*, 1 Cal.

at pp. 442-443; *Carrier*, *supra*, 3 Cal. at p. 329; *Union Collection Co. v. Buckman* (1907) 150 Cal. 159, 162, 164; *Wong v. Tenneco, Inc.* (1985) 39 Cal.3d 126, 135 (*Wong*); *Lee On v. Long* (1951) 37 Cal.2d 499, 502; *Braverman v. Horn* (1948) 88 Cal.App.2d 379, 381; *Lavick v. Nitzberg* (1948) 83 Cal.App.2d 381, 383; *Fong v. Miller* (1951) 105 Cal.App.2d 411, 413 (*Fong*); *Tokar v. Redman* (1956) 138 Cal.App.2d 350, 353; *Homami v. Iranzadi* (1989) 211 Cal.App.3d 1104, 1109-1110; *Kyablue*, *supra*, 210 Cal.App.4th at p. 1292; see generally, Civ. Code, §§ 1667 [contract is "not lawful" if it is "contrary to good morals"], 1607 ["consideration of a contract must be lawful"]); and (2) that closing the courts to litigation over gambling debts "discourage[s]" the creation of such debts, which is good for public policy because gambling—whether unlawful *or lawful*—leads to the "ruin of [the gamblers'] families," and courts should not "'become a handmaid of [such] iniquity,'" for doing so would be "humiliating to the Courts" (*Takeuchi v. Schmuck* (1929) 206 Cal. 782, 786-787; *Bryant*, at p. 442; *Wallace v. Opinham* (1946) 73 Cal.App.2d 25, 28; *Carrier*, at p. 329; *Homami*, at pp. 1111-1113; *Metropolitan*, *supra*, 15 Cal.App.4th at p. 1829).

Critically, however, either of these two rationales is sufficient *on its own* to support the public policy of denying a judicial forum in California for adjudicating gambling debts. This is why, from the very beginning, "California's public policy against judicial resolution of civil claims arising out of gambling contracts or transactions" has "applie[d] to all forms of gambling, *whether legal or illegal*." (*Kelly*, *supra*, 72 Cal.App.4th at pp. 490, 480, italics added; *Bryant*, *supra*, 1 Cal. at p. 444 [noting that legality of gambling by holding a license would not "confer[] a *right to sue* for a gaming debt"]; *Hamilton v. Abadjian* (1947) 30

Cal.2d 49, 51-52 (*Hamilton*) [refusing to adjudicate gambling debt incurred in Nevada, where gambling is legal].) And it is why the "substantial[] ero[sion]" of the "public policy against" gambling has not eroded "California's deep-rooted policy against [the] enforcement of gambling debts." (*Metropolitan*, *supra*, 15 Cal.App.4th at p. 1828.) Other jurisdictions have reached similar conclusions. (Accord, *King International Corp. v. Voloshin* (Conn.Super.Ct. 1976) 366 A.2d 1172, 1174-1175; *Carnival Leisure Indus. v. Aubin* (5th Cir. 1991) 938 F.2d 624, 626; *Cie v. Comdata Network* (Ill.App.Ct. 1995) 656 N.E.2d 123, 128.)

The only California case to disagree with this otherwise unbroken line of precedent is *Crockford's Club*, *supra*, 203 Cal.App.3d 1402. *Crockford's Club* held that the "expanded acceptance of gambling" in California justified opening the California courts for adjudicating a claim to enforce an English default judgment based on a casino gambling debt incurred in England, where the gambling was legal. (*Id.* at p. 1406.) *Crockford's Club* is an outlier in that it is the only decision to conflate the public policy against gambling with the public policy against using the California courts as a forum for enforcing gambling debts; tellingly, its three-paragraph analysis of this issue did not cite—let alone distinguish—*Hamilton* or any of its progeny (*Metropolitan*, *supra*, 15 Cal.App.4th at p. 1828 [so observing]), choosing instead to cite a single out-of-state case applying that state's different public policy. Not surprisingly, every court to subsequently consider the issue has rejected *Crockford's Club*. (*Ibid.*; *Kelly*, *supra*, 72 Cal.App.4th at pp. 485-488.) We join that chorus.

Second, the premise of Tak Chun's argument—that California has legalized gambling—is overstated. California did

not flip a switch from "all gambling is illegal" to "all gambling is legal." Instead, California has maintained its longstanding presumptive constitutional and statutory rules against gambling, but has expanded the types of gambling for which that presumption has been rebutted. But California has not fully embraced the legalization of all gambling. Just last year, for instance, the California voters *rejected* two ballot propositions that would have legalized in-person gambling on tribal lands and online sports betting. (Voter Information Guide, Gen. Election (Nov. 8, 2022), text of Prop. 26, archived at <https://perma.cc/RB66-XEQY> [as of Oct. 23, 2023]; Voter Information Guide, Gen. Election (Nov. 8, 2022), text of Prop. 27, archived at <https://perma.cc/69PA-3ZDG> [as of Oct. 23, 2023].) Contrary to what Tak Chun implies, California has not become Sodom and Gomorrah.[4]

Third, our Legislature has at no point expressed an intent to deviate from the common law rule barring resort to the California courts to enforce gambling debts. To be sure, our Legislature has the power to alter the common law. (*People v. Hickman* (1928) 204 Cal. 470, 479; *Lowman v. Stafford* (1964) 226 Cal.App.2d 31, 39.) But it must *exercise* that power—either by an express repeal of the common law or by a "plain[] declaration of legislative intent" that necessarily (but implicitly) repeals the common law. (*Saala v. McFarland* (1965) 63 Cal.2d

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4 Tak Chun's comparison to our Supreme Court's decision in *In re Marriage Cases* (2008) 43 Cal.4th 757 is ill conceived, for this decision was an acknowledgment that persons of different sexual orientations are entitled to the equal protection of the law authorizing marriage rather than, as Tak Chun distastefully implies, an illustration of a "substantial shift of public acceptance or morality" in California.

124, 130 [“‘“Statutes are not presumed to alter the common law otherwise than the act expressly provides”’”]; *Martin*, *supra*, 176 Cal. at pp. 296-297; *Shaw v. Superior Court* (2022) 78 Cal.App.5th 245, 258.) Absent such an exercise,[5] we must presume our Legislature and the voters were aware of the preexisting common law rule against use of the courts to adjudicate gambling debts at the time they added new islands of legalized gambling amid an ocean of its presumptive illegality, and by not countermanding that rule—either expressly or implicitly—they thereby opted to leave the common law rule in place. (*Presbyterian Camp & Conference Centers, Inc. v. Superior Court* (2021) 12 Cal.5th 493, 503; *People v. Giordano* (2007) 42 Cal.4th 644, 659.) Tak Chun’s subsidiary argument that we must infer an intent to alter the common law rule from legislative or voter *silence* accordingly has it backwards. Indeed, Nevada’s common law rule against resort to its courts to enforce gambling debts persisted despite that state’s legalization of gambling until the Nevada Legislature enacted a statute that expressly overturned its common law rule. (Compare *West Indies, Inc. v. First Nat. Bank of Nevada* (Nev. 1950) 214 P.2d 144 [adopting Statute of Anne into Nevada’s common law] with Nev. Rev. Stat.

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5 At oral argument, Tak Chun pointed us to a regulation authorizing “cardroom business[es]” to “extend credit” to their patrons. (Cal. Code Regs., tit. 4, § 12388, subd. (a).) But this regulation does not purport to authorize enforcement in court of any resulting debts. Indeed, the regulation’s very existence—and its self-imposed limitation that it does not apply if extending credit is otherwise “prohibited by any statute, law, regulation, or local ordinance” (*ibid.*)—reaffirms that our Legislature has *not* overturned the longstanding common law rule against the enforcement of gambling debts in California courts.

Ann. § 463.368 (1983) [statute altering common law rule and allowing for the enforcement of gambling debts in Nevada courts].) California has yet to do that. (*Kelly*, *supra*, 72 Cal.App.4th at p. 489 ["The Legislature has not enacted a statute permitting the use of the process of the courts in California to resolve" gambling-related claims].)

B. *The "weighing" argument*

Second, Tak Chun argues that the common law rule declaring the California courts off limits to disputes over gambling debts does not erect an absolute barrier; rather, it obligates courts to make a case-by-case determination of whether to grant access to the courts after weighing a variety of factors, including (1) the "relative moral fault of the plaintiff and the defendant," (2) "whether refusing a remedy can protect the public," (3) "the degree of moral turpitude involved," and (4) "whether application of the [common law] rule will result in the unjust enrichment of the defendant at the expense of the plaintiff." (*Kyablue*, *supra*, 210 Cal.App.4th at p. 1293.) For support, Tak Chun cites *Kyablue* as well as *Tri-Q, Inc. v. Sta-Hi Corp.* (1965) 63 Cal.2d 199, 218-219, *Kelton v. Stravinski* (2006) 138 Cal.App.4th 941, 949, and *Southfield v. Barrett* (1970) 13 Cal.App.3d 290, 294. (See also *Fong*, *supra*, 105 Cal.App.2d at p. 413.)

This argument mixes apples and oranges. The cases Tak Chun cites all address whether a court, after invalidating a contract on public policy grounds, should nonetheless grant some type of *equitable relief* despite the absence of a contract. This is irrelevant to this case, as the invocation of California's public policy against enforcing gambling debts does not invalidate any of the loan agreements between Tak Chun and Long; instead, we

hold that those contracts may not be enforced *in this forum*. Tak Chun remains free to attempt to enforce them in a different forum, and Tak Chun's decision not to have insisted that Long agree in those contracts to litigate disputes arising therefrom in a particular forum lies with Tak Chun and Tak Chun alone. There is no support in the case law to let California courts decide—on a case-by-case basis—whether to lift the denial of access after weighing various factors. Indeed, such a case-by-case weighing process would significantly undercut the efficacy of the across-the-board ban California has adopted by leaving it to individual judges to decide whether to apply the ban; the exception would swallow the rule, and quite likely force our courts into the role of "handmaid[s] to iniquity."

C. *The "change the common law" argument*

Third and lastly, Tak Chun urges us to exercise our authority as a common law court, and reject the common law rule in favor of the outlier decision in *Crockford's Club*, *supra*, 203 Cal.App.3d 1402.

To be sure, the common law of California is meant to be "'flexib[le].'" (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 393-394.) Thus, we as a court have the ability to "modify[] . . . the common law" (*Schmier v. Supreme Court* (2000) 78 Cal.App.4th 703, 709), and even have a duty to modify the common law "'[w]henever an old rule is found unsuited to present conditions or unsound'" (*Rodriguez*, at p. 394). We accordingly reject Long's contention that our Legislature's use of a statute in 1850 to cut and paste English common law into California somehow transmogrified and elevated that decisional law into something statutory in nature, and hence beyond the power of the courts to modify. (Cf. *People v. Tufunga* (1999) 21 Cal.4th

935, 950 [courts lack the authority to modify statutes when they disagree with "the wisdom of the Legislature's chosen" rule].)

However, for the reasons articulated above, we conclude that the common law rule barring resort to the California courts to collect gambling debts rests on a rationale with continued vitality—namely, a policy of discouraging the creation of those debts and the financially ruinous consequences that often flow from them, regardless of whether those debts were lawfully incurred.

Tak Chun resists this conclusion with what boil down to four arguments.

First, Tak Chun asserts that a common law doctrine may be upheld only if the rationale *originally* articulated to support it remains viable, such that the concern articulated by recent decisions that gambling is an addiction (and even a mental illness) cannot support adherence to the common law rule barring use of the California courts to enforce gambling debts. (See *Metropolitan*, *supra*, 15 Cal.App.4th at p. 1830 [citing the Diagnostic and Statistical Manual of Mental Disorders].) This assertion ignores that the common law rule barring use of the California courts to collect gambling debts has—*since its inception*—relied on *two* rationales, one tied to the underlying illegality of most gambling at that time and the other aimed at discouraging judicial enforcement of gambling debts and their ruinous consequences even when those debts were incurred lawfully. Modern innovations in the diagnosis of mental health conditions may better explain the second rationale by expanding on *why* certain gamblers incur debts that lead to ruinous consequences—but they do not somehow erase that these

consequences have been a justification for California's public policy from the very beginning.

Second, Tak Chun contends that the common law rule reaches beyond its current rationale. Specifically, it argues that (1) the sole rationale for barring the enforcement of gambling debts in the California courts is to protect gambling addicts, (2) gambling addicts comprise only a subset of all gamblers, and (3) the bar against enforcing *all* gambling debts is overbroad because it bars litigation to enforce the debts of gamblers who are not addicts. Although the second step of Tak Chun's argument may be correct (*Metropolitan*, *supra*, 15 Cal.App.4th at p. 1830), the first and third steps are most certainly not. The first step is wrong because, as explained above, the common law rule barring litigation of gambling debts in the California courts is *not* based solely on a need to protect *gambling addicts* against ruin; instead, it is meant to protect *all* gamblers against such ruin. And the third step is wrong because—even if the sole justification for the common law rule was to protect addicts—the right to enforce a gambling debt is not a "fundamental right" triggering strict scrutiny (*People v. Chatman* (2018) 4 Cal.5th 277, 288), such that the "fit" between the "ends" (of protecting gambling addicts) and the "means" (by not allowing for enforcement of any gambling debt in California courts) need not be "[]perfect" (*Heller v. Doe* (1993) 509 U.S. 312, 321); it need only be *rational*, and here it is because closing off California courts as a forum is one step toward protecting those addicts (*Kaanaana v. Barrett Business Services, Inc.* (2021) 11 Cal.5th 158, 180 ["[t]he Legislature is permitted to attack problems one step at a time"]), even if it additionally protects non-addicts.

Third, Tak Chun urges that the common law rule is riddled with so many "exceptions" that it should be abandoned, and points to three such "exceptions." Yet the "exceptions" Tak Chun identifies do not undermine the rule so much as they reasonably define its contours. To begin, California courts may enforce out-of-state judgments regarding gambling debts, but this does no more than reflect the deference accorded to a sister state's judgments under principles of full faith and credit. (*Kelly*, *supra*, 72 Cal.App.4th at pp. 476-477; *Metropolitan*, *supra*, 15 Cal.App.4th at p. 1824.) Where, as in this case, a gambling debt has yet to be reduced to a judgment and is merely a cause of action, full faith and credit considerations do *not* trump, and the common law embodying California's public policy against using the California courts to facilitate collection of those debts applies. (*Kelly*, at pp. 476-477; *Metropolitan*, at p. 1824.)[6] Next, California courts may ostensibly entertain a lawsuit by a credit card company to enforce its unpaid debts, even if its customer has used the card to purchase one or more lottery tickets, but in such a situation, the credit card company would have no foreknowledge that the card would be used to purchase lottery

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6 Similar concerns provide one potential way to harmonize *Crockford's Club*, *supra*, 203 Cal.App.3d 1402, with the bulk of other precedent. The plaintiff in that case sought to enforce a foreign country's *judgment*. Because full faith and credit only applies to the judgments of other states and not other countries, full faith and credit considerations did not trump. (*Wong*, *supra*, 39 Cal.3d at p. 135; *Metropolitan*, *supra*, 15 Cal.App.4th at p. 1828.) That being said, the fact that the plaintiff was seeking to enforce a judgment makes that case different from the typical case where, as here, the plaintiff is seeking to litigate their claim in the first instance.

tickets. (See *Rose v. Nelson* (1947) 79 Cal.App.2d 751, 751-752 [recognizing "exception[]" to the "general rule" barring access to the courts "when there is no evidence that the lender knew that the loan was intended to be used for gambling purposes"].) Where, as in this case, the lender knows that the money will be used for gambling (as Tak Chun knew because it tendered Long casino tokens), the common law rule applies. Lastly, California courts will entertain a lawsuit seeking an accounting following a transaction to sell a casino (*Nevcal*, *supra*, 194 Cal.App.2d at pp. 180-182), but such a lawsuit does not directly involve any gamblers and hence does not hasten any gambler's financial ruin; while such a lawsuit involves the gambling industry *in general*, it does not implicate the rationale underlying the common law rule.

Fourth and finally, Tak Chun argues that tradition alone is not sufficient to sustain this public policy-based common law prohibition against the enforcement of gambling debts in the California courts. As we have explained, this prohibition has a still-viable and still-vital rationale that goes far beyond upholding "tradition for tradition's sake."

DISPOSITION

The judgment is affirmed. Long is entitled to his costs on appeal.

CERTIFIED FOR PUBLICATION.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
CHAVEZ

_____, J.*
KWAN

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* Judge of the Superior Court of Los Angeles County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.