

**IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

KALSHIEX LLC,

Appellee/Plaintiff,

v.

COMMODITY FUTURES TRADING
COMMISSION,

Appellant/Defendant.

No.

(Appeal from Case No. 1:23-cv-03257)

**EMERGENCY MOTION FOR STAY PENDING APPEAL AND
IMMEDIATE INTERIM RELIEF**

At issue in this appeal is whether a registered U.S. futures exchange should be able to offer election gambling, allowing U.S. customers, for the first time on such an exchange, to place bets on the outcomes of elections right in the heart of election season, in some cases wagering up to \$100 million. Appellee KalshiEx LLC (“LLC”), knowing that this Court’s review was imminent, has raced to launch its election gambling contracts on the same day the District Court issued a memorandum opinion, before Appellant the Commodity Futures Trading Commission (“Commission” or “CFTC”) has had the opportunity to file this motion for stay pending appeal about the serious legal issues and public interests at stake.

Kalshi is a registered futures exchange subject to comprehensive regulation under the Commodity Exchange Act (“CEA”). It wants to offer bets on elections. To market the endeavor, it touts press coverage of its new “Contracts to Bet on Control of Congress,” “Political Betting,” “election betting,” “Election Gambling,” and “wager[s] on elections.”¹ After the District Court issued its order, Kalshi’s CEO posted a Wall Street Journal article titled *Are You Ready to Bet on U.S. Elections?*² As of today, Kalshi’s website has begun trading election contracts on which political party will control each house of Congress. <https://kalshi.com/elections> (last visited September 12, 2024).

Kalshi is not a casino; it is an actor in markets regulated by the Commission and governed by the CEA. The CEA’s purpose is to protect the “national public interest by providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities.” 7 U.S.C. § 5(a).

On September 22, 2023, the CFTC issued an order holding that Kalshi was not permitted to offer election event contracts under a CEA section that empowers the CFTC to prohibit contracts that “involve” “gaming” or “activity that is unlawful under any ... state law.” 7 U.S.C. § 7a-2(c)(5)(C). On September 6,

¹ *Press*, Kalshi, <https://kalshi.com/blog/press> (last visited Sept. 12, 2024).

2024, the District Court vacated the CFTC's order for the "reasons stated in the Court's forthcoming memorandum opinion," [Dkt. 47], and the memorandum opinion issued today, September 12, 2024 [Dkt. 51].

The CFTC respectfully moves for an emergency stay of the District Court's order during this Court's consideration of the instant motion to stay pending appeal. The Commission seeks an emergency stay/injunction that suspends Kalshi from listing and trading the election contracts during the pendency of this motion, until further order of the Court, so that this Court has time to decide whether a stay pending appeal should issue.

Compliance with Fed. R. App. P. 8(a)(1) and Local Rule 8(a)(1)

Under Fed. R. App. Procedure 8(a)(1) and Local Rule 8(a)(1), the CFTC orally moved the District Court for the relief requested herein. *See* Sept. 12, 2024 Hearing Tr. (transcript attached). The District Court denied the CFTC's motion for stay pending appeal during the hearing, concluding that the standards for a stay had not been satisfied. *See* Sept. 12, 2024 Hearing Tr.

Compliance with Local Rule 27(e)

This Court's immediate intervention is needed because Kalshi has now listed the election contracts for trading, which poses a grave risk to the public interest. On Thursday, September 12, 2024, on the date the District Court issued its memorandum opinion, the Commission orally moved, and the District Court

denied, a motion to stay pending appeal. Thus, the Commission was not in a position to file this emergency motion before today. In accordance with both Circuit Rule 27(e) and Circuit Rule 8, counsel has communicated telephonically with opposing counsel and the Clerk's Office.

INTRODUCTION

On September 6, 2024, the District Court vacated the Commission's order prohibiting the listing and trading of election gambling contracts on Kalshi's U.S. futures market. The District Court issued its memorandum opinion on September 12, 2024. Now Kalshi has launched "Election Gambling" before the CFTC can even ask this Court for a stay pending appeal. As the CFTC found in its order, "allowing the public to trade on the outcome of elections threatens the public interest." [Dkt 51 at 2]. Moreover, as trading commences on Kalshi's election event contracts, even if only briefly, there is an acute risk of short-term manipulation of election markets and threats to election integrity. A court order is needed if such trading to be suspended during this appeal. Thus, the Commission requests a short administrative stay, suspending trading on the election contracts while this Court deliberates on whether a further stay is warranted.

BACKGROUND

A. The CFTC

The CFTC is an independent federal agency that regulates derivatives markets and administers the Commodity Exchange Act (the “CEA” or “Act”). A “derivative” is a financial instrument, or contract, such as a future, option, or swap, whose price is directly dependent upon—that is, “derived from”—the value of something else, such as an agricultural or financial commodity.³ In this case, the derivatives in question are known as “event contracts,” a type of derivative contract whose payoff is based on a specified “underlying” “event, occurrence, or value.”⁴ For example, an event contract might be based on the occurrence, nonoccurrence, or extent of an occurrence of a weather event such as snowfall or rainfall.

The CEA requires that certain derivatives instruments be traded only on regulated exchanges. Retail customers’ only legal avenue to trade event contracts is on a contract market registered with the CFTC. *See* 7 U.S.C. §§ 2(e), 6, 6c(b);

³ CFTC, *Glossary: A Guide to the Language of the Futures Industry*, <https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/CFTCGlossary/index.htm> (last visited Sept. 9, 2024).

⁴ CFTC, *Contracts & Products: Event Contracts*, <https://www.cftc.gov/IndustryOversight/ContractsProducts/index.htm> (last visited September 9, 2024). The asset or other factor that gives rise to the rights and obligations in a derivative contract is called its “underlying.” *Underlying*, BLACK’S LAW DICTIONARY (11th ed. 2019).

17 C.F.R. § 33.3. Kalshi is a type of regulated exchange called a “designated contract market” (“DCM”).

B. Event Contracts and Special Rule

For most derivatives contracts, a DCM can self-certify a new product and trade it one business day after its submission to the CFTC, without waiting for the Commission to take any action. 7 U.S.C. § 7a-2(c)(1); 17 C.F.R. § 40.2.

Alternatively, a DCM may voluntarily submit a new product and seek the CFTC’s pre-approval, in which case the Commission will review the submission and approve the product unless it violates a specific provision of the CEA or the Commission’s regulations. 7 U.S.C. § 7a-2(c)(4)-(5); 17 C.F.R. § 40.3.

In 2010, Congress enacted the statutory provision relevant to this case, CEA Section 5c(c)(5)(C), codified at 7 U.S.C. § 7a-2(c)(5)(C), known as the “Special Rule” for certain event contracts. The Special Rule authorizes the Commission to review and determine whether the contract should be disallowed as contrary to the public interest. The Special Rule provides that the Commission “may determine” that certain “agreements, contracts, transactions, or swaps in excluded commodities that are based upon the occurrence, extent of an occurrence, or contingency,” *i.e.*, event contracts, “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.”

7 U.S.C. § 7a-2(c)(5)(C)(i). If an event contract or transaction therein “involve[s]” an enumerated category, and the Commission has determined the contract or transaction is contrary to the public interest, that contract may not be listed or made available for trading through a registered entity. 7 U.S.C. § 7a-2(c)(5)(C)(ii).

To establish a process for determining whether an event contract is prohibited from listing, the Commission enacted Regulation 40.11(c), which provides for a 90-day review period. 17 C.F.R. § 40.11(c). If the Commission engages in this review, it must request that the registered entity suspend the listing or trading of the contract under review. 17 C.F.R. § 40.11(c)(1).

PROCEDURAL HISTORY

A. Agency Proceedings

Kalshi operates as a CFTC-registered DCM that lists event contracts for trading. On June 12, 2023, Kalshi filed a product certification of certain Congressional Control Contracts (or “Contracts”), pursuant to Section 5c(c)(1) of the CEA and Regulation 40.2. AR 24, 26.

The Congressional Control Contracts are binary (yes/no) event contracts based on the question: “Will <chamber of Congress> be controlled by <party> for

<term>?”. AR 27. The Contracts permit market participants to choose which political party will control either the House of Representatives or Senate. AR 26. Upon settlement, the holder of one side of the contract is paid a dollar per contract, and holders of the opposite position receive nothing. AR 28.

Shortly after Kalshi submitted the Congressional Control Contracts, the CFTC commenced a 90-day review of the contracts based on its determination that the Contracts may involve an activity enumerated in Regulation 40.11(a) and Section 5c(c)(5)(C) of the CEA. AR 148. In accordance with Regulation 40.11(c)(1), the CFTC requested that Kalshi suspend any listing and trading of the Contracts during the pendency of the review period. AR 148.

On September 22, 2023, at the conclusion of the review period, the Commission issued an Order prohibiting Kalshi from listing the Congressional Control Contracts for trading. The Commission’s order determined that the Contracts “involve” two enumerated activities – “gaming” and “activities unlawful under state law.” The Commission then determined that the Contracts were contrary to public interest because, *inter alia*, they (i) cannot reasonably be expected to be used more than occasionally for commercial or hedging interests; (ii) could be used in ways that adversely affect the integrity and perception of integrity of elections; (iii) could be manipulated to influence elections or electoral perceptions; and (iv) could put the CFTC in the position of having to investigate

election-related activities. The Commission accordingly ordered pursuant to CEA Section 5c(c)(5)(C)(ii) and Regulation 40.11(a)(1), that the Congressional Control Contracts are prohibited and shall not be listed for clearing or trading on or through Kalshi. AR 23.

B. District Court Proceedings

On November 1, 2023, Kalshi filed this lawsuit alleging the Order violated the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C). Kalshi alleged that the Commission's application of the term "involve" in determining that the Contracts involve enumerated activities for purposes of the Special Rule misconstrued the CEA; that the Commission's interpretations of statutory terms "gaming" and "activity that is unlawful under any . . . State law" were also incorrect; and finally that the Commission's public interest determination was not reasonable. [Dkt 1].

On September 6, 2024, a target date requested by Kalshi, the District Court entered an order granting summary judgment for Kalshi and vacating the Commission's order. The District Court's order stated that an opinion was "forthcoming" and the opinion issued six days later, on September 12, 2024. Dkt. 47, 51. The CFTC orally moved for a stay pending appeal on September 12, 2024. During the hearing, Kalshi refused to agree to even a 24-hour stay to allow for the docketing of this appeal and the filing of this motion. The CFTC argued that this

case presents serious legal issues, and a stay would pose little risk of injury to Kalshi. Further, the CFTC argued that the public interest lies with granting a stay because of the grave risk of harm to election integrity or the perception of election integrity posed by the listing and trading of the Contracts. The CFTC also argued that the orderly administration of justice should allow short period of time before Kalshi begins trading the contracts for the parties to brief, and this Court to decide, whether trading Kalshi's election contracts should be stayed pending appeal.

Kalshi opposed the motion at the hearing, arguing that there was widespread trading of election betting contracts already, pointing to Polymarket, which is not even permitted to offer event contracts to U.S. customers, and PredictIT, which may only offer event contracts pursuant to the terms of a no action letter and imposes a trading limit of \$850, in contrast to Kalshi's limit of \$100 million.

The District Court denied the CFTC's request for a stay pending appeal, prompting the Commission to seek emergency appellate intervention. This appeal followed.

ARGUMENT

A. Standard for Motions to Stay

The instant motion is in an unusual procedural posture because the District Court initially issued a summary judgment order without an opinion, and only issued the opinion hours before the Commission was compelled to come to this

Court for emergency relief. The motion is appropriately viewed not just as a motion for stay pending appeal, but also as a request for an administrative stay that will prohibit or suspend Kalshi's offering of the election contracts for trading while the parties brief, and the Court decides, whether a longer stay should issue pending the resolution of this appeal. The purpose of an administrative stay is "to minimize harm while an appellate court deliberates." *United States v. Texas*, 144 S. Ct. 797, 798 (2024). As another circuit has reasoned, the administrative stay "is only intended to preserve the status quo until the substantive motion for a stay pending appeal can be considered on the merits." *Doe#1 v. Trump*, 944 F.3d 1222, 1223 (9th Cir. 2019).⁵ The *Nken* factors applicable to stays pending appeal may also be referenced for administrative stays. *Texas*, 144 S. Ct. at 798.

In deciding a motion to stay pending appeal, courts consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *In re NTE Connecticut, LLC*, 26 F.4th 980, 987 (D.C. Cir. 2022). While

⁵ Although Kalshi raced to launch its election gambling markets in advance of this Court's review, it is unlikely that they will achieve significant volume before the Court has a chance to rule on this interim relief.

the first two are the most important and require more than a “possibility” of relief or potential irreparable injury, this Court has analyzed the four factors on a “sliding scale,” whereby “a strong showing on one factor could make up for a weaker showing on another.” *Sherley v. Sebelius*, 644 F.3d 388, 392-93 (D.C. Cir. 2011). The “sliding scale” framework allows a movant who presents a “serious legal question” on the merits to obtain a stay if “little if any harm will befall other interested persons or the public and . . . denial of the order would inflict irreparable injury on the movant.” *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977).⁶

Where, as here, the party is a federal agency charged with serving the public interest, *see* 7 U.S.C. § 5(b), the Court should consider injury and public interest together because the government’s interest “*is* the public interest.” *See Pursuing America’s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016).

⁶ It remains unresolved in this Circuit whether the sliding scale framework survives the Supreme Court’s decision in *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). *See Changji Esquel Textile Co. v. Raimondo*, 40 F.4th 716, 726 (D.C. Cir. 2022); *see also Nat’l R.R. Passenger Corp. (Amtrak) v. Sublease Int. Obtained Pursuant to Assignment & Assumption of Leasehold Int. Made as of Jan. 25, 2007*, No. 22-CV-1043 (APM), 2024 WL 3443596, at *2 (D.D.C. July 15, 2024) (“[T]his court remains bound by *Holiday Tours*’ sliding scale.”).

B. Analysis of *Nken* Factors

1. *The CFTC is Likely to Succeed on the Merits*

The CFTC need not show “absolute certainty of success.” *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986). Rather, it need only “raise[] questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.” *Holiday Tours*, 559 F.2d at 844. Here, the District Court’s interpretation of the statute was deeply flawed, because it rejected the plain meanings of three critical terms.

First, the District Court rejected the plain meaning of “involve” and missed critical context demonstrating that its plain meaning applies. It held that a contract or transaction only “involves” gaming if the contract or transaction’s underlying is gaming. But, correctly read, to qualify for the Special Rule provision, two things must be true: **The Commission must determine if the “agreements” or “contracts” or “transactions” are “based upon” an “occurrence, extent of an occurrence, or contingency.”⁷ “Based upon” is a term the CEA uses to refer to the underlying. Thus, these must be agreements, contracts, or transactions whose underlying is an event. *Separately, the Commission must determine if “such***

⁷ 7 U.S.C. § 7a-2(c)(5)(C)(i) (stating the provision applies to “agreements, contracts, transactions, or swaps in excluded commodities that *are based upon*” an event (emphasis added)).

agreements, contracts, or transactions [*i.e.*, whose underlying is an event] involve” a category of activity enumerated in the statute. That is, once the Commission has determined that the underlying is an event, the next step is to determine if the agreements or contracts or transactions—in any respect and without any stated limitation—“involve” an enumerated activity such as gaming or activity that is unlawful under state or federal law.⁸

The District Court mistakenly rejected the plain meaning of “involve.” It acknowledged that the parties did not much disagree that the word is exceedingly broad:

The Parties offer definitions of involve from various dictionaries that are largely the same, such as “[t]o contain as a part; include,” “to have as a necessary feature or consequence,” ECF 17-1 at 25 (citing American Heritage Dictionary 921 (4th ed. 2009)), and “to relate to or affect,” “to relate closely,” to “entail,” or to “have as an essential feature or consequence,” see ECF 30 at 33 (citing Merriam-Webster, <https://perma.cc/2RS8-ZRBJ>; Random House College Dictionary 703 (rev. ed. 1979); Riverside University Dictionary 645 (1983)); see also ECF 38-1 at 12 (CFTC Order).

As several courts have observed, the word has “expansive connotations.” *See, e.g., United States v. Alexander*, 331 F.3d 116, 131 (D.C. Cir. 2003) (citation omitted). So understood, the issue is simple. As the CFTC concluded, the election contracts “involve” gaming, because gambling is their purpose and essential

⁸ *Id.* (stating that the provision applies where “such agreements, contracts, or transactions ... involve” an enumerated activity).

feature, and a “transaction” in them involves gaming because it entails gaming.

But the District Court expressly rejected the plain meaning. [Dkt 51 at 20]

(“Construing the plain meaning of involve does not resolve the Parties’ dispute”).

Instead, the District Court held that, because “elections are not games,” betting on them is not gaming.

Not only is this a misreading of the word “involve,” it mistakenly conflates two separate clauses in the statute, discussed above—the “based on” clause, which addresses what the underlying must be, and separate clause that states what “such agreements, contracts, or transactions” must involve. The District Court erroneously held that to qualify for the Special Review provision, the contract or transaction’s underlying must *be* the event, rather than any other way in which a contract or transaction may involve the event.

To reach that result, the District Court also rejected the plain meaning of the term “transaction” and held that it means “the contract” itself—but those are *also* separate terms of the statute. In Section 5c(c)(5)(C), as in ordinary legal usage, a “contract” is “[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law,” CONTRACT, Black’s Law Dictionary (11th ed. 2019), and a “transaction” is “the formation, performance, or discharge of a contract,” TRANSACTION, Black’s Law Dictionary (11th ed. 2019). Congress used the word “or” to connect these terms, the use of which “is

almost always disjunctive, that is, the phrases it connects are to ‘be given separate meanings.’” *Pinson v. United States Dep’t of Just.*, 964 F.3d 65, 69 (D.C. Cir. 2020) (quoting *United States v. Woods*, 571 U.S. 31, 45 (2013)) (cleaned up); *see also United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 432 (2023) (articulating the “interpretive principle that every clause and word of a statute should have meaning” (internal quotation marks omitted)). Nothing in the statute suggests that the Court should apply anything but the plain meaning of “contract” or “transaction” or “or.”

Accordingly, the statute authorized the Commission to consider two different things - both Kalshi’s contracts, and “transactions” in those contracts. Keeping its focus myopically on only one feature of the contract, the court held that a “transaction” only “involves” gaming if the event underlying the contract transacted is gaming. But that is not what the statute says.

It also applied an arbitrarily narrow definition of “gaming.” The Commission defined “gaming” by reference to numerous sources: dictionary definitions of “gaming” to mean “gambling,” and referring to both state laws and federal laws that define gambling or betting as the staking something of value upon the outcome of, among other things, a contest of others.

Thus, the Commission found that staking something of value on elections amounts to “gaming” or “gambling” because it is staking something of value on

the outcome of a contest of electoral candidates. The District Court’s opinion wrongly rejected those references to hold that “gaming requires a game.” [Dkt 51 at 14].⁹ But there is no reason to think that Congress was concerned with only certain *types* of gambling, least of all in the common understanding of what “gaming” means. The concern was broad: to “prevent *gambling* through futures markets.” 156 Cong. Rec. S5906-07, 2010 WL 2788026 (daily ed. July 15, 2010) (statements of Sen. Diane Feinstein and Sen. Blanche Lincoln). Indeed, as the Commission explained to the District Court, State and Tribal “Gaming” commissions prohibit betting on elections: The Nevada Gaming Commission prohibits wagers on “any election for public office.” Regulation22.pdf (nv.gov). So does the Little River Band of Ottawa Indians Gaming Commission. Microsoft Word - Chapter 13 - Retail Sports Betting - APPROVED - FINAL (lrboi-nsn.gov).

The court further erroneously rejected the Commission’s interpretation of “unlawful under any ... State law.” The Court held that the interpretation was too broad because several state laws prohibit staking money on a contingent outcome and, thus, every event contract would be unlawful under those laws and subject to Commission review under this category. Dkt. 51 at 23-24. However, the

⁹ The opinion also misquoted the CFTC’s proffered conclusion, instead quoting where the CFTC looked to state law for definitions: “Under most state laws, “gambling” involves a person staking something of value upon the outcome of a game, contest, or contingent event,” AR 8.

Commission's interpretation of the category was not that broad. Rather, the Commission, noting that the CEA preempts any state law that would prohibit all event contracts, determined that the relevant state laws were not those targeting futures trading, but those concerning "important state interests expressed in statutes separate and apart from those applicable from trading on a DCM." AR 13 n.28. The Commission cited several state laws that expressly prohibit gambling on elections and thus express a state interest separate from regulating derivatives trading. *See, e.g.*, Nev. Rev. Stat. § 293.830. Accordingly, the Commission's interpretation would not subject all event contracts to public interest review and would not swallow the rule to render the other categories meaningless.

The District Court misunderstood the Commission to be asserting that state laws that ban all event contracts are preempted, but laws banning specific types of event contracts are not. To be clear, all state laws concerning event contracts are preempted under the CEA. However, if a state law banning a certain activity expresses a state interest separate from trading on a DCM, the Commission, which has the authority to regulate all event contracts, may subject an event contract that involves that activity to public interest review. Because several states express an interest in preventing wagering on elections, the Commission rightly decided that the election event contracts, which wager on the outcomes of elections, involved an activity unlawful under state law.

For these reasons, a decision rejecting these interpretations and determining the applicability of the Special Rule raises, at the very least, serious questions for this Court's consideration.

2. The CFTC Will Be Irreparably Injured Absent a Stay and the Public Interest Weighs in Favor of a Stay

When reviewing irreparable injury, this Court should look to the public interest because the government's interest in avoiding harm merges with the public interest. *See, e.g., Pursuing America's Greatness*, 831 F.3d at 511 (“[T]he government's interest *is* the public interest.”). The public interest concerns relating to election gambling on a federally regulated exchange cannot be overstated. The Commission's order made extensive findings about adverse effects posed by the Contracts on election integrity or the perception of election integrity. This included concerns that the Contracts will create monetary incentives to vote (including as an organized collective) for particular candidates, incentivize the spread of misinformation in order to influence the markets, or incentivize the use of the market to influence perceptions about elections. The Commission observed the difficulty of guarding against misinformation and manipulative activity where the Contracts have no underlying cash market and price forming information and would be driven largely by opaque and unregulated sources such as polling, voter surveys, and even social media. AR 20-21.

While the District Court thought this interest was too speculative, these are not abstract concerns. The Commission’s order cited detailed examples of “fake polls” and how they had consequences in corresponding event contracts. AR 22 n.39 (citing Tyler Yeargain, *Fake Polls, Real Consequences: The Rise of Fake Polls and the Case for Criminal Liability*, 85 MO. L. REV. 129 (2020)). Moreover, these real-world examples of market manipulation occurred on a market with a trading limit of only \$850 per contract.¹⁰ By contrast, Kalshi’s election gambling contracts propose position limits as high as \$100 million for institutional customers and high net-worth individuals. The incentive for wrongdoing in connection with Kalshi’s Contracts is exponential. Moreover, there are reports of recent attempted manipulation just last week in the election event contracts offered on Polymarket.¹¹

¹⁰ Tyler Yeargain, *Fake Polls, Real Consequences: The Rise of Fake Polls and the Case for Criminal Liability*, 85 MO. L. REV. 129, 134 (2020)).

¹¹ Polymarket, which cannot offer event contracts to U.S. persons, experienced a “spectacular” manipulation attempt with “a group of traders” betting “heavily on Harris and against Trump,” wagering millions of dollars to manipulate the contract during a certain period. *See* Rajiv Sethi, *A Failed Attempt at Market Manipulation*, (Sept. 7, 2024) <https://rajivsethi.substack.com/p/a-failed-attempt-at-prediction-market>. The Commission submits that although this particular attempt failed, Kalshi admitted in its own briefing that “short-term risk exists with any derivative. A trader can always try to manipulate short-term pricing by spreading falsehoods and trading large quantities.” [Dkt 36 at 30]. Where, as here, there are no underlying markets to help assess manipulation events—and where, as here—these very markets are being touted as important public information, this risk is much more stark.

Kalshi has not proposed prohibiting foreign entities or members of the media from trading. These risks cannot be overestimated: Just last week, a grand jury indicted Russian nationals for deploying a \$10 million scheme in the United States to distribute political content to Americans with hidden Russian messaging.¹²

While Kalshi argues that its contracts have benefits—notably the alleged informational value of these “Election Gambling” contracts—it defies logic that contracts subject to short term manipulations should be championed as having up-to-the-minute informational value. Moreover, such short-term manipulations may do damage very quickly. A group of traders could target the contracts during an important event, such as a political debate, or during the close of a fundraising window, for maximum impact. These are very real potential harms, and moreover, would require an extensive utilization of Commission resources to investigate.

With Americans’ confidence in elections at an all-time low, now is not the time to plunge into election gambling without reasoned review. The question here is whether the Court should prevent or suspend the trading long enough for this

¹²Press Release, DOJ, *Two RT Employees Indicted for Covertly Funding and Directing U.S. Company that Published Thousands of Videos in Furtherance of Russian Interests*, (Sept. 4, 2024) <https://www.justice.gov/opa/pr/two-rt-employees-indicted-covertly-funding-and-directing-us-company-published-thousands>.

Court to decide this motion, and to suspend trading for the duration of this appeal.

Given the seriousness of the potential harms, the answer to both questions is yes.

3. A Stay Will Not Substantially Injure Kalshi

Kalshi will not be substantially harmed by a stay of the District Court's Order. Kalshi argued to the District Court, without supporting evidence, that it stakes its future on political event contracts. Kalshi has a business interest in listing the contracts before the November elections, so it can collect transaction fees from the trading. And if Kalshi is successful, it will surely offer election gambling beyond November.

Kalshi argued to the District Court that it would be harmed because it was the only DCM to offer event contracts on elections, and operations like Polymarket have been able to dominate the market for political event contracts during this litigation. This harm is misleading because Polymarket, which operates with offshore customers, is not registered with the CFTC and is, therefore, prohibited from offering *any* event contracts to U.S. customers.¹³ No registered DCM lawfully offers political event contracts in the United States.

¹³ The CFTC ordered Polymarket to cease and desist offering off-exchange event contracts in January 2022. Press Release, CFTC, *CFTC Orders Event-Based Binary Options Markets Operator to Pay \$1.4 Million Penalty*, (January 3, 2022), CFTC, <https://www.cftc.gov/PressRoom/PressReleases/8478-22>.

Kalshi's argument is essentially it wants to enter the election betting marketplace under the mantle of respectability via its DCM designation. While Kalshi claims harm because other entities have dominated the election gambling market, its premise is wrong. Kalshi seeks to offer election gambling on a federally regulated exchange, something neither Polymarket nor PredictIt does. Kalshi is not harmed for the exact reason they say they are harmed: they are not similarly situated to other election gambling platforms.

* * *

CONCLUSION

For the reasons stated above, the Commission requests an emergency administrative stay of the District Court's order, a suspension of the trading of Kalshi's Congressional Control Contracts while this motion for stay pending appeal is pending, and respectfully requests that this Court grant a stay that extends this relief during the pendency of the appeal.

Dated: September 12, 2024

Respectfully submitted,

/s/ Anne W. Stukes

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Certificate of Parties and Amici Curiae and Corporate Disclosure Statement

Pursuant to D.C. Circuit Rule 8(a)(4), the U.S. Commodity Futures Trading Commission (“CFTC”), by and through undersigned counsel, submits this Certificate of Parties and Amici Curiae and Corporate Disclosure Statement.

Parties and Amici.

Parties in this case are: KalshiEX, LLC (KalshiEX LLC stated in its Certificate of Disclosure that “no other company holds at least 10% of the stock in KalshiEX LLC”) and the CFTC (an agency of the United States government).

The Amici in this case are: Aristotle International, Inc. (Aristotle stated in its Amicus brief that it has no parent company, and no publicly held company has a 10% or greater ownership interest in it.); Better Markets, Inc., (Better Markets stated in its Amicus brief that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock); Joseph A. Grundfest; Paradigm Operations LP, (Paradigm stated in its Amicus brief that it has no parent company, and no publicly held company has a 10% or greater ownership interest in it); and Jeremy Weinstein.

Rulings Under Review

On September 6, 2024, the District Court entered an order ruling against the CFTC and in favor of KalshiEX and vacating the CFTC’s September 22, 2023 Order prohibiting Plaintiff from listing its congressional control contracts for

trading. The Order stated the reasons would be stated in a forthcoming memorandum opinion. The Order and memorandum opinion are attached.

On September 12, 2024, the District Court held a hearing on the CFTC's emergency motion for a stay pending the issuance of the District Court's reasoned opinion. The Court denied the motion for reasons stated on the record. The transcript for that proceeding is attached.

Related Cases

This case was not previously on review before this Court. There are no other related cases currently pending in this Court or in any other court.

CERTIFICATE OF COMPLIANCE

I hereby certify under Fed. R. App. P. 32(g)(1) the following:

1. This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), it contains 5,102 words, as counted by the word processing software Microsoft Word.
2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, in Times New Roman 14-point type.

Dated: September 12, 2024

/s/ Anne W. Stukes

CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2024, I served the foregoing Brief of Appellee on counsel of record using this Court's CM/ECF system.

/s/ Anne W. Stukes