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. 24-5205 (Appeal from Case No. 1:23-cv-03257)

CFTC'S REPLY IN SUPPORT OF
MOTION FOR STAY PENDING APPEAL

At issue is whether large-dollar election gambling should commence—during this election season—before this Court can decide whether the Commodity Exchange Act ("CEA") authorized the Commodity Futures Trading Commission ("Commission" or "CFTC") to disallow that activity on futures exchanges. KalshiEX LLC ("Kalshi") argues it will suffer irreparable harm if it is not allowed to launch election gambling *right now*. But Kalshi's claims of financial loss are deeply misleading and, in any event, pale compared to the harm that would flow from allowing election gambling on U.S. futures markets. The CFTC respectfully asks this Court to stay the district court's September 6 and September 12, 2024 orders [Dkt. 47, 51] and enjoin Kalshi from offering election contracts during the

pendency of this appeal. This Court should have the opportunity to review the district court's missteps in allowing this election gambling to take place. Without a stay, Kalshi will relaunch its betting markets, and the CFTC will have little or no recourse to stop Kalshi, or other entrants, from offering a panoply of wagers on the outcome of U.S. elections.

ARGUMENT

A. The CFTC Has Established Likelihood of Success on the Merits.

The district court concluded that the CFTC had not established likelihood of success because its arguments had not persuaded that court. Sept. 12 Tr. at 26:15-20 ("I think I'm right and I don't think that that factor has been satisfied."). But that is not the standard. The CFTC need only show "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," *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977), which it has.

1. The District Court Misconstrued "Involve."

Under the pertinent statute, the CFTC can prohibit an event contract from listing "if the agreements, contracts, or transactions involve" one or more enumerated categories. 7 U.S.C. 7a-2(c)(5)(C) (emphasis added). Nevertheless, the district court held that the word "involve" "can only be referring to the underlying commodity or subject of the transaction," not the contracts or

transactions as a whole. [Dkt. 51 ("Op.") at 23]. There is "fair ground for litigation and thus for more deliberative investigation" on this point. *Holiday Tours*, 559 F.2d at 844. As the CFTC argued, Kalshi's contracts, and transactions in those contracts, involve gaming because the contracts "relate closely" to gaming and it is their "essential feature," and that is what "transactions" in those contracts "entail" [Dkt. 30 at 20-26; Dkt. 37 at 2-7], each of which descriptor is in the agreed definition of "involve" [Op. 20]. This is similarly true of illegal activity.

Kalshi, not the CFTC, ignores the text of the statute. The district court held "a contract or transaction 'involves' an enumerated activity … if the *event* [*i.e.*, the underlying] … relates to that activity." [Op. 26]. But in the statute, the word "involve" modifies "the agreements, contracts, or transactions," not the underlying event. 7 U.S.C. § 7a-2(c)(5)(C)(i). There is only one statutory requirement for the underlying—the instrument or transaction must be "based upon" an event, *id.*, which the CEA uses in reference to the underlying, 7 U.S.C. § 2(a)(1)(C)(ii).[1] "Based upon" and "involve" must have different meanings, with the former explicitly referring to the underlying and the latter, explicitly, to the agreement, contract, or transaction more broadly.

[1] *See also* 7 U.S.C. §§ 2(a)(1)(C)(i)(I), 2(a)(1)(C)(iv), 6b(e) (using "based on").

Kalshi has no answer to this point, and the district court simply missed it. Because the district court confused the "based upon" clause with the "involve" clause, the CFTC is likely to succeed on the merits.

Kalshi insists that the CFTC has no likelihood of success because it is impossible to think of an example where transacting in a contract "amounts to" the statutory categories of war, terrorism or assassination, thus a contract or transaction can only involve such a category if the underlying event "involves" that category.[2] But that makes no difference. It does not change the plain language of the statute, in which "involve" modifies "the agreements, contracts, or transactions" without limitation, and without linking the word "involve" to the "based upon" clause, which alone establishes the requirement for the underlying. Congress deliberately chose a word ("involve") with "expansive connotations," *United States v. Alexander*, 331 F.3d 116, 131 (D.C. Cir. 2003), and tied it to the "agreements, contracts, or transactions" as a whole.

Such a sweeping term could apply to different concepts in different ways. An "agreement, contract, or transaction" *could* involve gaming if a game were its

[2] "Amounts to" is not even the definition the Commission relied on, other than passing mention in a footnote as an "example." AR 7 n.19. The Commission prominently relied on definitions including "to relate to or affect," "to relate closely," to "entail," or to "have as an essential feature or consequence." AR 7.

underlying. But to say that is the *only* way an instrument or transaction can "involve" gaming violates the plain meaning of the term.

Kalshi cites *Clark v. Martinez*, 543 U.S. 371, 378 (2005), for the proposition that a term must apply "without differentiation" to a set of "categories." But in *Clark*, the Court rejected giving "the same word[] a different"—and contradictory—"meaning for each category." *Id.* Here, "involve" by its plain meaning can, without contradiction, embrace situations where an agreement, contract, or transaction involves an enumerated activity in differing ways.[3]

2. The District Court Misconstrued "Gaming."

The Commission construed "gaming" according to its ordinary, dictionary definition as synonymous with "gambling,"[4] and, on the facts before it, as including gambling on the outcome of a contest of others. AR 10. Because

[3] The district court also rejected the statutory term "transaction," holding that it means "instrument" simply because an agreement or contract is an instrument, and only an instrument can be "listed." But the district court overlooked the very next phrase, which says the transaction also may not be "made available for clearing." A transaction *can* be cleared. *Clearing Organization*, CFTC Glossary, https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/CFTCGlossary/index.htm#C ("An entity through which futures and other derivative transactions are cleared and settled."), so this language is no basis to conflate "transaction" with "instrument."

[4] *See, e.g.*, https://thelawdictionary.org/gaming/ (last visited Sept. 13, 2024) ("In general, the words 'gaming' and 'gambling,' in statutes, are similar in meaning.").

Kalshi's contracts involve staking something of value on the outcome of elections, they fall within the ordinary definition of "gaming."

The district court erroneously rejected the CFTC's definition, concluding "gaming" requires a "game." Op. 15-16. Yet the court ignored that the very dictionary it cited lists "gambling" as a synonym for "gaming."[5] And the statute's legislative history indicates that Congress sought "to prevent . . . gambling through futures markets" and "derivatives contracts" that "exist predominately to enable gambling." 156 Cong. Rec. S5906-07 (daily ed. July 15, 2010), 2010 WL 2788026.

The district court also erroneously concluded that the definition of "gaming" as "gambling" was "unworkable" because it would subject all event contracts to the Special Rule. Op. at 15-16. To the contrary, the Commission acknowledged that some state law definitions of "gaming" could arguably capture all contingent events, AR 8, and it *eschewed* those definitions, AR 10. The CFTC did not implicitly adopt every alternative definition in every source it cited, any more than a court adopts every alternative definition in its preferred dictionary. The district court erroneously based its ruling on a definition the CFTC did not apply.

[5] http://www.merriam-webster.com/dictionary/gaming (defining the noun "gaming" as "the practice or activity of playing games for stakes: gambling") (last visited Sept. 13, 2024).

Finally, the district court stated it did not find the sources cited by the CFTC "relevant," and that the Commission should have relied upon other sources. Op. 17-18. Kalshi, more bluntly, accuses the CFTC of "gerrymandering." Oppos. 17. But the question before the Commission was whether Kalshi's contracts, designed to wager on the outcome of elections, were within the ordinary meaning of "gaming." After concluding that they were, the Commission was not required to consider other sources or formulate a prospective rule of general applicability. A contract that did not involve wagering on a contest of others would present different considerations.[6] An agency "retain[s] power to deal with … problems on a case-to-case basis." *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947). Courts often do the same. *See e.g.*, *Strothers v. City of Laurel*, 895 F.3d 317, 331 (4th Cir. 2018) ("[W]e need not test the definition's outer limits."); *Fink v. Time Warner Cable*, 810 F. Supp. 2d 633, 643 (S.D.N.Y. 2011) (finding no "need[] to define the outer limits of the concept, [because] the term 'access' should be interpreted broadly enough to include Defendant's alleged conduct"); *see also United States v.*

[6] The district court also mistakenly believed that "contest" is a synonym for "game." Even in the Kalshi-endorsed Oxford English Dictionary, "contest" includes other "conflict," "contention," and "struggle for victory." *Contest*, Oxford English Dictionary (not mentioning entertainment until the third alternate definition).

Simpkins, 826 F.2d 94, 96 (D.C. Cir. 1987) (noting "no issue arises concerning the outer limits of the meaning of 'danger to the community'").

3. The District Court Misconstrued Unlawful Activity.

As to the Commission's unlawful activity finding, again the district court premised its decision on "involve," which it held means "relates in some way," while acknowledging it only needed to do so "broadly." [Op. 21]. In the court's mistaken view, because the Special Rule does not apply when trading a contract amounts to the enumerated activity (misstating the definitions the Commission applied, *see supra* n.2), this category was not met either. [Op. 22]. But even on the district court's terms, the contracts relate broadly to unlawful activity.

"Unlawful under state law" focuses on state interests. It is not about whether the contracts would violate state law if they traded on a DCM—clearly the CEA would preempt that law. Rather, the election contracts involve unlawful activity because they undermine state interests other than gambling regulation. AR 13 n.28. To illustrate, many state laws ban the sale of marijuana, but those laws don't forbid trading futures contracts on its price; hence, the drug laws are not preempted. However, the Commission could invoke the Special Rule to ask whether trading an event contract on the price of marijuana would undermine state interests in drug laws.

The analysis here is the same. The Commission cited 22 state statutes and 18 cases that forbid betting on elections. AR 11-12, n.26, 27. These laws express interests in election integrity. The Commission properly determined that the election contracts involved—or "relate[d] in some way (admittedly broadly)" [Op. 21]—to unlawful activity because the contracts undermined those state interests in protecting elections. Op. 21. Stated differently, even under the district court's flawed but "broad" construction of "involve," these contracts sufficiently relate to unlawful activity.

B. Public Interest and Irreparable Injury Favor a Stay.

The district court's order has been construed by Kalshi and others as open season for election gambling. Immediately after the decision, Kalshi's website boasted that more election contracts would be coming soon. Another CFTC-registered platform announced a new betting market for the Harris-Trump contest.[7] Without a stay, other DCMs will follow suit. An explosion in election gambling on U.S. futures exchanges will harm the public interest.[8]

[7] https://www.wsj.com/finance/election-betting-is-going-mainstream-after-major-brokerage-gets-on-board-595bc9a6.

[8] Kalshi states inaccurately that only institutions can wager up to $100 million. That limit also applies to wealthy individuals. 7 U.S.C. § 1a(18)(A)(xi) ("eligible contract participant").

Irreparable injury is established when "harm has occurred in the past and is likely to occur again." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Here, documented cases of market manipulation have already been realized in the very markets Kalshi points to. On PredictIt,[9] a fake poll showing Kid Rock leading Senator Stabenow 30% to 26% moved the price of the re-election contract for Senator Stabenow.[10] Polymarket experienced a "spectacular manipulation" attempt by a group of traders betting heavily on Vice President Harris.[11] In 2012, one trader bet millions on Mitt Romney, likely to make the U.S. presidential election seem closer than it was.[12] These examples are not mere speculation; manipulation has happened and is likely to recur.

Unwitting participants may believe Kalshi's contracts are less susceptible to manipulation or misinformation because they are on a regulated exchange, but this

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[9] PredictIt is not a DCM; it operates pursuant to a CFTC Staff Letter, https://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/14-130.pdf.

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

[11] It only "failed" in the sense that the perpetrators lost money—the episode caused "sharp price movements." https://rajivsethi.substack.com/p/a-failed-attempt-at-prediction-market.

[12] https://slate.com/news-and-politics/2013/09/2012-intrade-paper-suggests-a-single-intrade-trader-spent-millions-to-make-it-look-like-mitt-romney-could-win.html.

should heighten concern for the public interest, not allay it.[13] Kalshi argues that the CFTC can simply use its enforcement authority, but such enforcement actions are typically filed after financial damage is done. The CFTC cannot remediate damage to election integrity after the fact.

The Commission is not alone in its concerns. Elected officials expressed alarm during the review process. *See* AR 2816-17; AR 2818, Sen. Klobuchar, *et al.*; AR 2273-76, Representatives Sarbanes and Raskin. More recently, Senator Merkley called this a "nightmare" scenario and "deeply corrupting."[14]

Kalshi suggests that a stay will deprive the public of the predictive value of its contracts. However, the contracts' predictive value is questionable considering Kalshi's admission that the contracts are susceptible to manipulation. Dkt. 36 at 30. There is no guarantee Kalshi's market would be accurate. Betting markets inaccurately predicted the outcome of Brexit until the vote count began.[15]

Kalshi misleadingly states its "time-limited contracts" will be "worthless" if the Court issues a stay. It fails to note that the contracts extend to *every future*

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[13] Neither the CEA nor Kalshi's rules prohibit non-U.S. persons trading on a DCM. https://kalshi-public-docs.s3.amazonaws.com/regulatory/rulebook/rulebook_contracts_elections.pdf.

[14] https://www.politico.com/news/2024/09/12/election-gambling-us-00178904.

[15] https://www.vox.com/2016/6/23/12022436/brexit-odds-of-a-british-exit-are-surging-on-betting-markets.

election cycle. See AR 26 ("[Kalshi] intends to list the contract on a biannual basis (every two years)."). In any case, "economic loss does not, in and of itself, constitute irreparable harm." *Wisconsin Gas*, 758 F.2d at 674. "Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business," which Kalshi has not established. *Id.* Kalshi's website has hundreds of other offerings. And, as noted, Kalshi intends to offer contracts on other elections as well. If it prevails on appeal, it can list election contracts into the foreseeable future and make up its losses. *See id.* at 675 ("it is as likely as not that the pipelines will recover the payments during the make-up period").

Kalshi argues that a stay would preclude it from recouping the millions of dollars it invested in developing and marketing these contracts—a deceptive claim given the contracts are to be offered perpetually. That aside, Kalshi's sunk costs are not attributable to a stay, they are attributable to Kalshi's decision to spend big on election gambling, knowing that the Commission disapproved such contracts in the past.[16]

Kalshi complains that unregulated Polymarket has accrued unlawful market share by engaging in prohibited trading while Kalshi waits for resolution of this

[16] *CFTC Order re NADEX,* https://www.cftc.gov/sites/default/files/stellent/groups/public/@rulesandproducts/documents/ifdocs/nadexorder040212.pdf.

litigation. But the argument that trading should launch because others are already doing it is sophomoric. A pharmacy does not get to dispense cocaine just because it is sold on the black market. The Commission determined that election gambling on U.S. futures markets is a grave threat to election integrity. AR 19-23. That another platform is offering it without oversight from the CFTC is no justification to allow election gambling to proliferate.

CONCLUSION

The Commission respectfully requests that its motion for a stay be granted.

Dated: September 14, 2024

Respectfully submitted,

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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, which was issued September 12, 2024. The Order and memorandum opinion were submitted with the CFTC's motion.

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. During that hearing the District Court heard the CFTC's oral motion for stay pending appeal. The district court denied the CFTC's motions for reasons stated on the record. The transcript for that proceeding was attached to the CFTC's motion in this Court.

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 2,595 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 14, 2024 */s/ Anne W. Stukes*

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2024, I served the foregoing Reply on counsel of record using this Court's CM/ECF system.

/s/ Anne W. Stukes