
To Protect Democracy, Investors, and Commodity Markets, D.C. Circuit Should Uphold CFTC’s Decision to Prohibit Gambling on Elections

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January 9, 2025

Beginning in 2022, [KalshiEX LLC sought to introduce an “event contract”](#) allowing speculators to wager up to \$100 million on the outcomes of congressional elections. This venture set off loud alarms, and in the years since, Better Markets has called upon public interest organizations, policymakers, and concerned citizens to [urge the Commodity Futures Trading Commission \(CFTC\) to prohibit these contracts](#). And that’s exactly what the CFTC did in September 2023 when it prohibited the listing of Kalshi’s election gambling contracts. But last year a district court [vacated the CFTC’s ban](#), allowing bets on the 2024 congressional elections on Kalshi’s platform. The CFTC’s appeal is pending in the U.S. Court of Appeals for the District of Columbia Circuit.

Better Markets filed an [amicus brief](#) urging the D.C. Circuit to reverse the district court and restore the wise decision of the CFTC to prohibit gambling on our elections. Kashi’s contracts allow large-scale wagers on an ever-increasing number of election contests across the country. This poses a long list of threats. These contracts undermine the integrity of our elections; foster rampant market manipulation; create a new class of gambling addicts; and distract the CFTC, an already beleaguered agency, from its real mission of safeguarding the commodity markets. Close oversight of those markets is essential to ensure that Americans can rely on stable prices for the food, fuel, and other products that are critical in their everyday lives.

The D.C. Circuit has ample legal grounds for overturning the lower court’s decision. The district court not only misread the law but also failed to consider the damaging impact of its decision, thus ignoring the very concerns that motivated Congress to authorize the CFTC to ban any “event contract” found to be contrary to the public interest. The court also failed to consider the CFTC’s three decades of experience dealing with this type of event contract and its status under the law.


Here’s a recap of the 12 leading reasons why the appellate Court should reverse the district court’s ruling and reinstate the CFTC’s important ban on election gambling contracts:

1. **VIOLATED THE BASIC RULES OF STATUTORY CONSTRUCTION.** The district court erroneously rejected the plain and ordinary meaning of the key terms and phrases in Section 5c of the Commodity Exchange Act (CEA), which governs the case. Specifically, the court adopted exceedingly narrow definitions of the key terms in the statute; failed to consult relevant sources of meaning for those terms; ignored the statutory context in which the key words appear in the CEA; misapplied or shunned familiar canons of statutory construction; and at times offered no support at all for its conclusions. Thus, the court erred as a matter of basic statutory construction, in addition to its failure to consider the remedial purposes of the law or the CFTC’s expertise on the issues presented, discussed below.
2. **ERRONEOUSLY CONCLUDED THAT WAGERING ON ELECTION OUTCOMES DOESN’T INVOLVE “GAMING.”** Trading in Kalshi’s election gambling contracts clearly involves “gaming” because gaming is widely understood to encompass betting or wagering on a wide variety of contests, including election contests. The district court erroneously rejected the CFTC’s interpretation based on the simplistic notion that gaming must involve “games” and elections are not “games.”
3. **IGNORED MOUNTAINS OF EVIDENCE THAT WAGERING ON ELECTIONS HAS LONG BEEN ILLEGAL UNDER THE LAW OF MANY STATES.** Kalshi’s election gambling contracts also involve activities that are illegal under state law. For 200 years, state courts have been explaining that gambling on elections is illegal because it threatens the integrity of the election process at the heart of our democracy. The district court failed to consider this vast body of evidence or the underlying concerns that guided those courts. Instead, the court seized on the simplistic idea that the underlying subjects of Kalshi’s contracts are elections, and elections are not themselves illegal. The court thus ignored the reality that *trading* in the contracts clearly does involve wagering on elections, which clearly *is* illegal under state law.
4. **FAILED TO CONSIDER THE UNDERLYING PURPOSE OF THE LAW.** The district court compounded its analytical errors by failing to consider the legislative intent behind the statutory provision at issue. The Commodity Exchange Act was written to prevent manipulation in the commodity markets for the benefit of businesses and everyday Americans who rely on them for stable commodity prices. That’s why it’s called a “remedial” statute—a law designed to “remedy” or fix a problem facing society and the markets. And the specific provision giving the CFTC explicit authority to ban certain event contracts is a perfect example of a remedial statutory provision, as it seeks to protect the public from especially toxic contracts involving war, terrorism, assassination, or gaming. For that reason, every court that applies the law is expected to interpret it broadly—not narrowly and technically—so that it serves its underlying purpose. But the district court did just the opposite: It didn’t even mention the judicial duty to interpret remedial statutes broadly, and it adopted a very narrow reading of the terms and phrases in the provision on event contracts, including the concept of gaming.

5. **DECLINED TO CONSIDER THE CFTC'S EXTENSIVE EXPERTISE ON THE ISSUES PRESENTED.** Last term, the Supreme Court abolished the obligation of federal judges to defer to the way agencies interpret ambiguous provisions in the laws they implement. But at the same time, the Court expressly preserved the basic principle that federal courts can and should still consider an agency's vast body of experience and informed judgment on the best way to read a law. In this case, the CFTC has acquired over 30 years of knowledge and experience regarding event contracts, specifically those involving election gambling. It therefore has a deep understanding of how these contracts fit into the legal framework of the Commodity Exchange Act and the threats they pose to election integrity, investors, and the CFTC itself. It applied all of that expertise when it decided that the Kalshi contract was (a) subject to special scrutiny and (b) contrary to the public interest. Yet the district court ignored the CFTC's expertise, offering the odd justification that the CFTC had failed to "argue" that the court should consider it. But the Supreme Court did not say or suggest in *Loper Bright* that courts must receive an invitation or an urging from a party before taking full advantage of an agency's reservoir of knowledge and experience. On the contrary, the Court anticipated that federal judges would do so as a matter of course—but that didn't happen in this case.
6. **CLEARED THE WAY FOR AN ONGOING ASSAULT ON ELECTION INTEGRITY.** As hundreds of commenters—including a group of U.S. Senators—argued during the CFTC's review of Kalshi's election gambling contract, betting on elections poses a serious threat to our democracy. Kalshi's contracts will incentivize the dissemination of misinformation for profit, as some bad actors assume large positions in the contracts and then disseminate false or misleading information to skew election outcomes in favor of their market position. These contracts will also serve as direct tools of election interference, as some bad actors will take large positions in the contracts to convey misleading information about the status of an electoral race, with the goal of either stimulating or suppressing fundraising, voter turnout, and the general level of support for a candidate. In short, election gambling not only incentivizes the use of misinformation to "manipulate" election outcomes in pursuit of financial gain but also serves as an attractive tool for distorting perceptions about candidates' prospects in the quest for political or electoral gains.
7. **PROMISED A NEW WAVE OF INVESTOR LOSSES THROUGH MARKET MANIPULATION.** The manipulation of any financial market causes the price of contracts to swing in volatile and unpredictable ways, which in turn inevitably harms the vast majority of investors who are not privy to the scheme. The Kalshi contracts will be especially vulnerable to market manipulation for a variety of reasons. First, they will not be tethered to any underlying cash market, unlike other mainstream commodity markets. Moreover, political prediction markets operate in an opaque space that will readily lend itself to manipulation. These markets raise the specter of political insiders with access to non-public information—such as internal polling or campaign finance data—wielding their informational advantage to profit at the expense of others. Finally, the information that determines the pricing of these contracts will be a hodge podge of unregulated, opaque, and unscientific sources such as polls, voter surveys, rumors, and media reports, all of widely varying degrees of rigor and reliability. Much

of this data can be selectively compiled, skewed, and deployed by almost anyone in ways designed to manipulate prices in the election gambling market. And this activity will be especially difficult to detect.

8. **PROMISED A NEW WAVE OF GAMBLING ADDICTION.** The decision to permit gambling on elections will prove doubly harmful to investors. In addition to fostering market manipulation, these contracts will inevitably spawn a new generation of investors who are lured into these markets only to join the ranks of those who lose vast sums of money, sink into debt, and grapple with a gambling addiction. Investor losses will inevitably be intensified through the rapidly expanding use of “gamification.” These strategies pair advanced technologies, including AI, with high-profile advertising campaigns and game-like features such as rewards, leaderboards, push notifications, and other methods to encourage users to engage in constant trading activities. And they are deployed through easily accessible online trading platforms, robo advisers, and mobile apps. This pattern was starkly revealed in the “gamification practices” deployed by the broker-dealer Robinhood that fueled the meme stock frenzy. They also appear in the market for cryptocurrencies. And the explosion in sports gambling highlights the financially ruinous consequences that these business models can inflict.
9. **SADDLED THE CFTC WITH A JOB IT IS ILL-EQUIPPED AND INADEQUATELY FUNDED TO PERFORM.** The district court’s decision is bad for the CFTC and the markets it oversees. The CFTC was established in 1975 as the premier regulator of the derivatives markets, where trillions of dollars in futures, options, and swaps contracts based on underlying physical commodities and financial indices are traded. Those markets are vital to innumerable businesses and industries that rely on them to hedge risks in commodity prices and to set benchmark prices for commercial transactions. As a direct result of these markets, all Americans can rely on stable prices for the everyday goods that are essential in their day-to-day lives, from gasoline to groceries. Close oversight of these markets by the CFTC is critical to protect their integrity and utility. Yet by virtually every metric, from budget to staffing, the CFTC is among the very smallest financial regulators. It already lacks the resources to adequately police the vital commodities markets. Asking it to oversee an election gambling marketplace would place an even greater strain on its capacity to fulfill its true mission and protect the legitimate commodity markets. Moreover, as the CFTC explained when it banned the Kalshi contract, the agency lacks the expertise necessary to effectively police election manipulation—activity that will become all too common if election wagering is allowed to flourish.
10. **SET A PRECEDENT THAT WILL LEAD TO A LITANY OF NEW CONTRACTS AND INCREASINGLY BAD OUTCOMES.** A decision affirming the lower court’s holding would permit and encourage the proliferation of innumerable variations on the Kalshi contract, involving all manner of elections and other types of events. All of the harms described above would be multiplied many times over. The threat to democracy and to the public interest will intensify exponentially while the CFTC remains powerless to stem the flow. The incidents of



market manipulation, the magnitude of investor losses, and the trend toward addiction in the event contract markets would correspondingly increase. Attempting to police all of these trends will impose an ever-increasing burden on the CFTC, sapping its resources and saddling it with the exceedingly difficult and resource-intensive task of investigating and prosecuting cases of election fraud and interference.

11. **UNDERMINED IMPORTANT AXIOMS GOVERNING JUDICIAL REVIEW.** Allowing the district court's flawed analysis to remain intact would undermine two important axioms applicable to judicial review of agency action: (a) that courts must interpret remedial statutes broadly so as to effectuate their public interest goals, and (b) that courts can and should consider an agency's expertise and judgment on the issues presented to a court. If these principles are eroded, a federal judiciary increasingly hostile to regulation will exercise even greater power to nullify important rules and agency actions that serve the public interest.

12. **UNLESS REVERSED, WILL FURTHER UNDERMINE CONFIDENCE IN JUDICIAL REVIEW OF AGENCY DECISIONS.** If a district court decision so untethered to basic canons of statutory construction, so oblivious to the public policy goals underlying the law, and so willing to ignore an agency's expert judgment is allowed to stand by a respected appellate court, then the public's confidence in the entire process of judicial review of agency action will suffer.



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Better Markets is a public interest 501(c)(3) non-profit based in Washington, DC that advocates for greater transparency, accountability, and oversight in the domestic and global capital and commodity markets, to protect the American Dream of homes, jobs, savings, education, a secure retirement, and a rising standard of living.

Better Markets fights for the economic security, opportunity, and prosperity of the American people by working to enact financial reform, to prevent another financial crash and the diversion of trillions of taxpayer dollars to bailing out the financial system.

By being a counterweight to Wall Street's biggest financial firms through the policymaking and rulemaking process, Better Markets is supporting pragmatic rules and a strong banking and financial system that enables stability, growth, and broad-based prosperity. Better Markets also fights to refocus finance on the real economy, empower the buy-side and protect investors and consumers.

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