

6 April 2023

To

Vince McGonagle
Director of the Division of Market Oversight
Commodity Futures Trading Commission

By Email

vmcgonagle@CFTC.gov

From

Steve Nightingale
Scott Barker

Dear Mr McGonagle

Victoria University of Wellington response to CFTC Letter No. 23-03 dated 2 March 2023

1. Introduction

1.1 As you know, we act for Victoria University of Wellington in relation to PredictIt (referred to as PredictIt or the platform throughout this letter). We refer to CFTC Letter No. 23-03 dated 2 March 2023 (**Letter 23-03** or **the New Withdrawal Letter**) addressed to the University.¹ Letter 23-03 withdraws CFTC Letter No. 22-08 dated 4 August 2022 (which had withdrawn CFTC Letter No. 14-130 (the no-action letter (**NAL**) in relation to PredictIt)) and announces a preliminary determination that CFTC Letter No. 14-130 should be withdrawn again. The University appreciates the opportunity that the CFTC has provided to submit the following objections to the preliminary determination by 5 April 2023.²

2. Procedural issues

- 2.1 As a preliminary matter, the University wishes to raise the following procedural issues. The University is grateful for the withdrawal of CFTC Letter No. 22-08 which purported to withdraw the NAL. The University also appreciates that the New Withdrawal Letter for the first time has set out in writing the CFTC's bases for wanting to withdraw the NAL.
- 2.2 Page three of Letter 23-03 states that three of the CFTC's bases for withdrawing the NAL were communicated verbally to the University on 8 June 2022, and at page five identifies a new alleged basis relating to PredictIt's fees.
- 2.3 The University considers that the revised approach under the New Withdrawal Letter remains procedurally unsatisfactory and not in compliance with the Administrative Procedure Act (**APA**) because (among other reasons) it lacks a proper process for fact finding, independent or

¹ When we refer to the University in this letter, we are referring to both the University and its wholly owned subsidiary, Victoria Link Ltd (also referred to as Vic UniVentures).

² The facts set out in this letter are based on documents and recollections of events by relevant participants provided to us. Neither we nor the University has written verification for every factual matter in this letter and to that extent rely on the recollections of relevant participants and supporting documents.

disinterested decision-making, or any process within the agency for subsequent review of the decision. The University reserves its rights in this regard.

3. Context – the NAL

3.1 The NAL recites various representations made by the University, described as intentions or proposals, under a "Background" heading, then sets out certain departures from the Iowa Electronic Markets model proposed by the University.

3.2 The NAL concludes with the Division of Market Oversight (**DMO**), based on the representations made by the University, finding that it would be acceptable from a public interest perspective for the PredictIt platform to be unregulated and therefore receive no-action relief. The NAL then states that:³

This letter is based upon the information that has been provided to the Division and is subject to the conditions stated above. Any different, changed or omitted material facts or circumstances may render this no-action relief void.

3.3 Use of the word "may" shows that voiding the NAL requires additional process, findings, and action. It is also a caution to keep DMO apprised of any change to the University's original intentions because DMO *may* (but also may not) conclude that the no-action relief is no longer warranted.

3.4 The University's letter to the CFTC of 26 June 2014 requesting the NAL described what would be a new prediction market as experimental. Accordingly, PredictIt was likely to evolve. By way of example, consistent with the experimental nature of the platform, the University's request for no-action letter dated 26 June 2014 (**Request for NAL**) stated that "[a]t this time, it is *projected* that...the market terms will not require any upfront charge or fee" (emphasis added).⁴

3.5 As discussed below, the University has been transparent and has engaged in good faith with DMO throughout the life of PredictIt, including as to how PredictIt is operating, the role of Aristotle International, Inc. (**Aristotle**), fees and contracts listed.

3.6 We note that while the NAL is prescriptive in a few areas (e.g., the trader and investment limits) it is less prescriptive in other important areas. In particular:

- (a) The NAL does not define a closed scope of services that may be provided by service providers.
- (b) The NAL provides that PredictIt is to be operated by the University as a not-for-profit, fees are to be limited to those necessary to recover costs and there are to be no commissions.⁵ However, the NAL does not otherwise limit the type, structure, or amount of fees, and does not require that service providers themselves be not-for-profit businesses.
- (c) The Request for NAL listed a number of examples of political event contracts and represented that "[t]he market may list additional event-driven contracts based on significant

³ NAL at page 5.

⁴ In practice this has turned out to be the case; PredictIt does not charge any upfront charge or fee.

⁵ NAL at page 3.

Political Events".⁶ The NAL approved the Request for NAL on the express basis of the representations about the manner of operation of the market⁷. The NAL also set out a list of specific political event contracts, but this list was non-exclusive. (See further detail below in this regard.)

4. Bases for withdrawal

4.1 The University considers that all four bases for withdrawal are unsubstantiated as set out below in sections 5 - 8.

5. Operation of the platform—Aristotle's fully disclosed role

5.1 The New Withdrawal Letter states that Aristotle, not the University or its faculty, is operating PredictIt.

5.2 The NAL notes that the University's key employees "overseeing the project" would be three University professors and one administrator and refers to these individuals as "operating the market"⁸. The NAL also notes in a footnote that Aristotle would provide the know-your-customer process⁹ (we also note that the Request for NAL noted that credit card deposits and withdrawals would be processed by Aristotle).¹⁰ However as mentioned above the NAL does not define a closed scope of services that may be provided by service providers. Given the nature of the platform (an online 24/7 financial platform operated with customised software in another country, and different time zone to New Zealand) and how it evolved, it became necessary substantially to outsource platform operations. Interest in the platform grew over time, particularly increasing when Donald Trump entered the US presidential election races. The trader and investment limits in the NAL, however, have kept PredictIt small-scale compared to regulated platforms. Much also has changed technologically since PredictIt was established.

5.3 The University has been transparent in communication with DMO about Aristotle's involvement with the platform.

5.4 Almost six years ago, on 15 May 2017, David Pepper of DMO emailed Richard Shilts of Steptoe & Johnson LLP (**Steptoe**), counsel for Aristotle, with a list of 12 detailed questions regarding the profitability, purpose, and scale of PredictIt, including questions about Aristotle's services in relation to PredictIt and its revenue and profit, and the University's role and costs. On 6 June 2017 Mr Shilts, Micah Green (also of Steptoe), John Phillips (CEO of Aristotle) and Blair Richardson (General Counsel of Aristotle) met with David Pepper, David Van Wagner and Tom Leahy of the DMO to answer DMO's 12 questions.

⁶ Request for NAL at page 3.

⁷ NAL at page 5.

⁸ NAL at page 3.

⁹ Footnote 4 of the NAL at page 3. We note that the Request for NAL had expressly disclosed a wider role for Aristotle than footnote 4, in particular also processing deposits and withdrawals – see page 6 of the Request for NAL.

¹⁰ Request for NAL at page 6 states "the system will allow credit card deposits and withdrawals for those authenticated through the Integrity KYC process. Those transactions will be processed through Aristotle, which has years of experience handling such transactions."

- 5.5 Aristotle's representatives provided responses to DMO's questions, including a summary of the services that Aristotle provided to the University, data on the number of markets and active traders, the extent of involvement of the University, how the platform was used for academic purposes, and the fees collected by Aristotle. (Further details are set forth in paragraph 6.9 below).
- 5.6 Aristotle's counsel continued to communicate with DMO following the 6 June 2017 meeting, raising for discussion, among other things, a need to amend the NAL's 5000 trader limit to prevent potential constraints on market liquidity that might arise for popular contracts, primarily multi-year US presidential election markets, which had substantial numbers of inactive traders (i.e., those that had purchased one or a few contracts in the past but were no longer active yet counted against the 5000 trader limit). In short, the inactive traders reduced the pool of traders who could be counterparties for contracts of new market participants and existing market participants wishing to expand, reduce or exit their positions.
- 5.7 Following the 6 June 2017 meeting, Mr Shilts sent an email to Mr Van Wagner and Mr Pepper providing additional detailed responses to questions raised during the meeting, including (a) contracts that reached the 5000-trader limit, (b) average deposits of traders, (c) Research and Academic Use of PredictIt Data, and (d) the potential solution to ensure market liquidity and improve data quality. With respect to academic use, the email explained, among other things, that:
- there were 100 academic participants signed up for the PredictIt data sharing program for teaching and research, and PredictIt staff had fulfilled 42 requests for data from markets that have closed and been settled in the last twelve months;
 - courses at West Point, University of California at Berkeley, The University of Virginia Darden School of Business and George Mason University used PredictIt as a teaching tool; and
 - scholarly research papers and analyses included *Political Elections as a Test of Macroeconomic Theory: Financial-Market Evidence from U.K. and U.S. Elections*, Jonathan Pedde (University of Oxford), *The Informational Content of the Limit Order Book: An Empirical Study of Prediction Markets*, Joachim Groeger (Carnegie Mellon University), *Recent Evidence on Political Brinkmanship and Treasury Yields*, Srinivas Nippani and Dror Parnes (Texas A&M University) (accepted for publication in the *Journal of Financial Economic Policy*); and *Polls and Prediction Markets: Forecasting presidential primaries*, Giorgio Ravalli (New York University) and David Rothschild (Microsoft Research) (Submitted for publication).
- 5.8 On 1 August 2017, Aristotle's counsel, Micah Green, met with then DMO Chief Counsel, David Van Wagner, to discuss developing amendments to the NAL. When discussing the trader limit issue, Mr Van Wagner raised the issue of ostensibly "redundant" markets (i.e., markets that might appear to be predictive of the same type of event such as whether Hillary Clinton would be elected president and whether a woman would become president). Mr Van Wagner also raised questions about how contracts predicting the number of candidate tweets were political event contracts. The meeting ended without any specific resolution of these issues.

- 5.9 On 31 August 2017, Richard Shilts emailed DMO attaching a draft letter from Aristotle CEO John Phillips to DMO dated 31 August 2017 requesting an amendment to the NAL. The draft letter stated that Aristotle requested the amendment "on behalf of itself and Victoria University" and that "Aristotle and Victoria commit to undertaking specific actions as conditions to the issuance of the amended no-action letter". The fact that the draft letter was from Aristotle and on behalf of itself and the University demonstrates that the University and Aristotle were being open about Aristotle's substantive role.
- 5.10 Following the 1 August 2017 meeting and related to the effort to seek amendments to the NAL, the DMO Staff had additional questions related to PredictIt's operation, governance, and other factors. A follow up meeting was scheduled for 19 September 2017, which occurred via a telephone conference call. DMO participants included David Van Wagner and David Pepper. PredictIt participants were (we understand) Geoff Todd from the University, John Phillips, Blair Richards and Matthew Packard of Aristotle, and Micah Green and Rick Shilts from Steptoe. At the meeting, the DMO Staff made clear that any request for change to the NAL had to come from the University. The parties discussed a broad range of topics and PredictIt's representatives conveyed substantial information. Topics included, among others, the trader limit, the \$850 cap, the number of active contracts, the average size of the investment in a contract by traders, the average number of traders per market/contracts, redundant contracts, the operation of PredictIt, the academic uses of and involvement with the markets, the not-for-profit restriction, and the relationship between the University and Aristotle, including the USD2,000 monthly cost reimbursement that the University received.
- 5.11 Aristotle's role was further described in detail to DMO in a draft letter from the University dated 6 December 2017 (emailed to DMO on 8 December 2017) seeking amended NAL relief. In that letter, the University stated that "the University utilizes the technology and systems of Aristotle International, Inc". The footnote to this sentence details that:

Aristotle, Inc. ... provides compliance and verification technology to political organizations. This technology includes compliance software, voter registration information, PAC and grassroots software, and authentication services. As described in Victoria University's June 26, 2014 letter to DMO, Aristotle is a for-profit company that provides PredictIt with know-your-customer processes and other third-party services. After the October 2014 launch of this event trading platform, public interest and participation in the market grew as the intensity of the 2016 elections increased. As a result of the intensity of this public interest, Victoria asked Aristotle to provide additional day-to-day support to ensure the robustness, security, and integrity of the platform. This assistance involves serving as a clearinghouse for securely processing participants' deposits and payments, software updates, responding to trader inquiries about PredictIt, proposing questions and rules, U.S. legal compliance, and publicizing the site. Importantly, Aristotle also assists Victoria in fulfilling the primary academic purpose of the market, by generating data to fulfill requests by the growing number of academics who have enrolled to receive data for teaching and research, creating an API to enable wider access to the data more simply and efficiently, performing outreach to academics to inform them of the availability of such data, and informing traders of new

markets so that new data can be continuously generated. To date, the cost to Aristotle of providing these services to Victoria University/PredictIt has exceeded revenue.

- 5.12 Aristotle's role was reiterated in a letter from the University to the CFTC dated 29 March 2019 (**March 2019 Letter**)¹¹ that refers at page 2 to Aristotle as "the operational and technology service provider for PredictIt". Further, at page 3 of the March 2019 Letter the University states that:

After the October 2014 launch of PredictIt, public interest and participation in the market grew as the 2016 U.S. presidential election drew near. As a result of the intensity of this public interest, Victoria [the University] asked Aristotle to provide additional day-to-day operational support to ensure the robustness, security, and integrity of the platform. This assistance involves serving as a clearinghouse for securely processing participants' deposits and payments, providing software updates, responding to trader inquiries about PredictIt, proposing questions and rules, assisting with U.S. legal compliance, and publicizing the platform.

Importantly, Aristotle also assists Victoria in fulfilling the primary academic purpose of the market by: generating data to fulfill requests from a growing number of academics who have enrolled to receive data for teaching and research; creating an application programming interface ("API") to enable broader access to the data more simply and efficiently; performing outreach to academics to inform them of the availability of such data; and informing traders of new markets so that new data can be continuously generated. To date, the cost to both Victoria and Aristotle of providing these services has exceeded revenue.

- 5.13 The March 2019 Letter requested certain amendments to the NAL.

- 5.14 In a petition from Aristotle to the CFTC dated 20 May 2019, sent with the University's March 2019 Letter, Aristotle requested that the CFTC regulate event markets by promulgating rules related to the trading in these markets, pursuant to the CFTC's exemptive authority under section 4(c) of the Commodity Exchange Act (**Act** or **CEA**). This petition was supported by the University, see page 2 of the March 2019 Letter.

- 5.15 Aristotle's 20 May 2019 letter also stated:

Aristotle asks that the Division of Market Oversight, in the interim as the Commission and its staff consider this Petition, amend the existing no-action relief granted to Victoria University of Wellington ("Victoria University") [Footnote omitted]. Doing so will provide Aristotle and Victoria University more flexibility to grow and invest in infrastructure to ensure the continued resilience and integrity of their event markets trading platform on the eve of the 2020 national election.

- 5.16 So once again the University and Aristotle were being transparent about Aristotle's role and its broader interest in event markets.

¹¹ Note whilst this letter was dated 29 March 2019, it was not provided to the CFTC until 20 May 2019 so that it could be provided alongside Aristotle's petition under section 4(c) of the Commodity Exchange Act letter, which is discussed below.

- 5.17 Subsequently, in a package of documents provided to DMO by Aristotle's counsel on 18 September 2019 responding to questions posed by Philip Raimondi of DMO in relation to the requested amendments to the NAL, Aristotle provided detail on the level of interest in political event markets, trader limits and data partner agreements with researchers, among other things. DMO was clearly aware of Aristotle's role with the platform, requesting and receiving information about various aspects of the data directly from Aristotle's counsel. Aristotle and its counsel maintained regular communication with the University and particularly related to communication with the CFTC. If the CFTC needs us to provide another copy of the 18 September 2019 email and the attached material, please let us know and we would be happy to provide it to you.
- 5.18 The responses to the questions themselves also conveyed the nature of Aristotle's role. For example, the response noted that PredictIt had nearly tripled in size since the NAL was granted (from over 15,000 funded accounts, i.e., traders, in 2015 to over 43,000 funded accounts in 2019) and it set out the total deposits per year (e.g., \$31 million in 2016). Then later in the response and in the cover email it was noted that, given that growth, Aristotle had to make significant additional investment to ensure that the platform could not only efficiently handle the trading volume, but also do so in a manner that trades were executed and processed accurately and trader funds handled and secured safely.
- 5.19 As the New Withdrawal Letter notes, Aristotle's role in relation to the platform was also set out in a letter from the University to DMO dated 20 April 2021 (**April 2021 Letter**). At page 3 the University states:

Aristotle's role now includes:

- *provision of the PredictIt website and the trading platform software that underlies this (including operation and maintenance of the website and software);*
- *anti-money laundering and customer verification services;*
- *market question formulation (suggested questions are also submitted by third-parties, including academics, the press and others);*
- *clearing and settlement of contracts;*
- *market security, monitoring, and complaint and dispute resolution;*
- *responding to requests from academics for data;*
- *publicity; and*
- *regulatory compliance.*

6. Compensation

Compensation to the University

- 6.1 The New Withdrawal Letter indicates that in violation of the NAL Victoria Link Limited (**VLL**), a wholly owned subsidiary of the University, has been receiving compensation from Aristotle, namely \$2,000 each month from PredictIt user fees.

- 6.2 The \$2,000 per month payment was set early in the life of PredictIt based on an estimate of VLL's expected actual monthly costs in the operation of the platform and has not been adjusted for inflation since. This modest amount was and is considered by the University to be never more (and now less) than a reasonable amount to cover the University's overhead costs in connection with overseeing PredictIt, and entirely consistent with the NAL's requirements that PredictIt be operated as a not-for-profit and without compensation to any of the individuals involved.
- 6.3 Further, the characterisation of this payment as "compensation from Aristotle" is incorrect. Instead, the mechanism for payment is deduction from PredictIt user fees. Aristotle collects these fees, deducts the fixed monthly payment, and remits this to the University. Market operations, accordingly, generate the revenue to cover VLL's costs. This complies with the NAL, which did not contemplate, much less require, that the University run the market for free or at a loss.
- 6.4 The payment was verbally disclosed to DMO at the meeting on 19 September 2017 referred to in paragraph 5.10 above. As the New Withdrawal Letter notes, the payment was also transparently disclosed to DMO in the University's April 2021 Letter.

Compensation to Aristotle

- 6.5 The New Withdrawal Letter states:

Separately, Aristotle's assertions about its operational control, as referenced above, have drawn into question whether Victoria University also acted in a manner inconsistent with the representations that the University would create a small-scale, not-for-profit, online market. In particular, the market was designed to bear many close similarities to the University of Iowa model, including "no additional fees other than those necessary to cover basic expenses of running the market, including the cost of credit card processing of deposits and withdrawals, fulfillment of the know-your-customer ("KYC") process, and all other associated regulatory and compliance costs." However, statements on the Platform's website indicate that Aristotle was charging a 10% fee on all profits and a separate 5% fee on all withdrawals for so called "costs related to running this site." This fee structure appears likely to generate funds far greater than those necessary to operate a small-scale market. As such, it appears facially [sic] inconsistent with the University's representation that it would conduct a small-scale, non-profit operation, covering only basic expenses, in a manner similar to the Iowa Electronic Market." (Footnotes omitted)

- 6.6 The University objects to the above statement for various reasons.
- 6.7 The quote from the NAL in the above paragraph from the New Withdrawal Letter is incorrect. The NAL allows fees for "all other associated regulatory compliance and operating costs" (emphasis added).¹² Clearly, PredictIt user fees are permitted to cover operating costs, which include service provider fees.
- 6.8 The statement that the "fee structure appears likely to generate funds far greater than those necessary to operate a small-scale market" is also problematic. First, it is an impressionistic and

¹² NAL at page 3, penultimate bullet point.

prejudicial assertion that is not accompanied by any supporting data or analysis. Second, it is clearly incorrect because the fee structure is a percentage of successful trades and withdrawals so is inherently tied to the volume and performance of trading on the platform. Third, it is inconsistent with the information previously provided to DMO about PredictIt's actual earnings, as set out below.

6.9 The University and Aristotle have been transparent about fees. The user fees have been in place unchanged since the inception of PredictIt and have always been disclosed publicly on the PredictIt website.¹³ The CFTC has also been aware of the fee structure and fees for at least several years and as far as the University is aware the CFTC has not previously alleged that the fee arrangements violate the NAL. In particular:

- (a) At the meeting with DMO on 6 June 2017 referred to in paragraph 5.45.6 and the meeting with DMO on 19 September 2017 referred to in paragraph 5.10 above Aristotle representatives (and a representative of the University on 19 September) responded to DMO's written questions about PredictIt financial matters. They discussed the successful trade fee, the withdrawal fee, and Aristotle's revenue and profit from PredictIt for the period 2014 – 2016 (which was a net loss of over \$1 million over that period).
- (b) The March 2019 Letter at page 3 states that "to date, the cost to both Victoria and Aristotle of providing these services has exceeded revenue".
- (c) In the information submitted to DMO by Aristotle's counsel on 18 September 2019 responding to questions posed by DMO, as referred to in paragraph 5.17 above, Aristotle gave a detailed breakdown of its revenue, costs, and profits from PredictIt for the period from 2014 to 2019, again showing a net loss in that period.
- (d) Fee revenue from PredictIt has waxed and waned over the years. At the meeting with DMO on 6 June 2017 as described in paragraph 5.45.6 above, the University and Aristotle disclosed that at that point in its existence, PredictIt had operated at a net loss. As of June 2020, PredictIt still had a net loss since inception. It was not until the 2020 Presidential election races that PredictIt's revenues since inception exceeded its expenses. Losses since 2021 have reversed that balance and PredictIt expenses have exceeded revenues over the history of the market to the current date.

6.10 Finally in this regard the University notes:

- (a) The 10% fee is charged only on the gain portion of profitable sales of contracts. No fees are charged on purchases of contracts (50% of all transactions). No fees are charged on sales when the trader sells at a loss (approximately an additional 25% of all transactions). For profitable sales (approximately 25% of all transactions) a 10% fee is charged only on the trader's net gain. For example, if a trader buys shares at 90 cents, holds to expiration, and wins, the trader receives a pay-out of \$1.00 less 1 cent (10% of 10 cents / the share gain). In fact, in the history of the market, these fees have amounted to less than 1.25% of total market volume.

¹³ See "Our Fees" available at <https://www.predictit.org/support/how-to-trade-on-predictit>.

- (b) The 5% withdrawal fee is little more than cost recovery. Credit card fees on deposits average about 4% plus Aristotle has internal costs and overhead for managing deposits, balances, and withdrawals.

7. Scope of contracts

7.1 Letter 23-03 states that PredictIt has listed contracts outside the scope of Letter 14-130.

7.2 The NAL states the substantive scope of contracts PredictIt planned to offer in one paragraph:

*The proposed submarket for political event contracts will **include** winner-take-all contracts to predict the following outcomes:*

- which presidential nominee will win his or her party's primary, the general election popular vote, and the Electoral College;*
- who will be the major party nominees for Vice President; and*
- which party will control the next Congress.*

(Emphasis added.)

7.3 The NAL made clear that the examples listed were not exclusive by using the word "include" as emphasised above. This stands in distinct contrast to the treatment of the companion proposal for "economic indicator contracts", which excluded contracts "that would compete with any contract that is listed by a CFTC-regulated contract market" and barred any more than five economic-indicator contracts at any time.

7.4 The Request for NAL sought permission for PredictIt to list contracts "based on significant Political Events," provided that the "market will not list any contracts that involve, relate to or reference terrorism, assassination or war".¹⁴ The NAL approved the scope of contracts sought in the Request for NAL and provided a non-exclusive list of examples. The NAL summarised what the Request for NAL had proposed to the CFTC about the scope of political event contracts and did not limit or take issue with anything in the description of what political event contracts would entail. Indeed, the NAL was expressly issued on the basis of the representations in the Request for NAL,¹⁵ which included the above representation about the scope of political event contracts. Furthermore, the use of the word "include" in the phrase providing the list of examples was plainly intended to convey that that list was non-exhaustive. This was then confirmed by Mr Van Wagner less than a month after the NAL was issued.

7.5 When the first set of contracts was issued under the NAL, in late 2014, PredictIt (the University and its service provider Aristotle) worked to identify contracts that would be consistent with the parameters in the NAL and generate sufficient liquidity to produce price discovery and trade data that would also produce meaningful predictive data for academic and public purposes.

¹⁴ Request for NAL at page 3.

¹⁵ NAL at page 5.

7.6 Of the first 33 contracts that were listed on PredictIt as of 24 November 2014, fourteen were non-election contracts. Listed markets included:

- (a) Will President Obama have at least one veto overridden before he leaves office?
- (b) Will the Senate confirm a new attorney general before January 3, 2015?
- (c) Who will be the next justice to leave the Supreme Court?
- (d) Will Iran agree to a nuclear deal before the end of 2014?
- (e) Will Vladimir Putin be president of the Russian Federation on April 1, 2015?
- (f) Will the House of Representatives vote to impeach President Barack Obama?
- (g) Will the FCC reclassify internet access under Title II of the Telecom Act?
- (h) Will the US government authorize TransCanada's Keystone XL pipeline?
- (i) Will the Supreme Court disallow subsidies on health insurance purchased via the federal exchange?
- (j) Will President Obama issue an executive order on immigration by the end of 2014?

7.7 In an email to Aristotle counsel dated 24 November 2014, the then-Chief Counsel of the DMO, David Van Wagner, (**the Van Wagner email**) noted:

NAL 14-130 lists three non-exclusive examples of political contracts – each is tied to election outcomes. While the letter allows some flexibility with respect to political contracts, certain contracts such as "how many ebola cases in the US in 2015" would appear to have no relationship to elections or any other meaningful political question. Victoria University personnel should review NAL 14-130 and promptly make any necessary adjustments to comply with its relief conditions.

7.8 As a result of that email, PredictIt immediately terminated trading in the Ebola contract. The Van Wagner email was the only written guidance PredictIt ever received regarding DMO Staff's interpretation of the NAL (albeit there have been periodic discussions about specific markets). PredictIt personnel concluded based on the absence of expression of concern with respect to any other markets that DMO staff agreed that markets on legislation, administrative action, Supreme Court decisions, impeachment, and other topics covered in the early markets represented permissible "meaningful political question[s]".

7.9 As mentioned above, one of the markets listed prior to the Van Wagner email was: "Will the Supreme Court disallow subsidies on health insurance purchased via the federal exchange?". One of the markets cited in Letter 23-03 as being outside the scope of the NAL is "Will the Court legalize same-sex marriage?" (January 2015). If CFTC staff objected to Supreme Court markets in November 2014, the Van Wagner email would have said so.

7.10 In response to the Van Wagner email, PredictIt developed and used the following definition:

To date, "political" event markets have been binary contracts (or, in some cases, series of linked binary contracts) tied to the outcomes of notable domestic and international elections,

information aggregated from or related to such elections (e.g., congressional or parliamentary balance of power, polling data, various individuals' candidacies), and high-profile decisions of domestic and international government policymakers, including legislative outcomes, regulatory decisions, actions of the judiciary and executive branches, and other government acts.

- 7.11 In 2019, a reporter submitted a Freedom of Information Act (**FOIA**) request to the CFTC for Victoria University communications. The University notes the FOIA response includes an internal DMO email dated 1 February 2018 between Jeanette Curtis, David Van Wagner, and Phil Raimondi titled *Overview of PredictIT NAL Conditions*. It is apparent that this email circulates a 51-page document detailing all the then-active markets on PredictIt under the headings "US Elections", "US Politics" and "World". This reflects that DMO was aware of the markets being offered on PredictIt, including not only election markets but also US domestic and international significant political question markets; and CFTC did not raise any fundamental concerns at that stage. The markets included questions on conviction of political figures, polling averages, Trump, and Pence tweet numbers, mentions of particular persons in the State of the Union speech and Democratic response, tenure of various politicians, officials and foreign leaders, passage of particular legislation, government shutdown, and non-US elections.
- 7.12 Then on 28 May 2020, legal counsel for Aristotle had a telephone conference with the then-Director of DMO, Ms Dorothy DeWitt, DMO Chief Counsel, Ms Rachel Reicher, Assistant Chief Counsel, Mr Phil Raimondi, Mr Andrew Ridenour (of Chairman Tarbert's office) and other CFTC staff. The purpose of the call was to discuss the scope of political event markets under the NAL, including a proposed prediction market on when the government would approve a vaccine for COVID-19.
- 7.13 The meeting included significant discussion regarding the difference between "election" markets and "political" markets and the Van Wagner email. Ms DeWitt offered as an example of a permissible non-election political market "who would be nominated to be the Treasury Secretary". Ms DeWitt advised against listing the COVID vaccine market and no such market was listed, evidencing PredictIt's good faith engagement with DMO and compliance with DMO's guidance.
- 7.14 At about this time Ms DeWitt introduced an interpretation of the NAL that markets must be "closely related to the outcome of a particular election". This constricted reading and application of the NAL was introduced without formally revising the letter or accepting that a regulatory change had occurred. Prior to this new interpretation, the standard articulated by Mr Van Wagner nearly 6 years earlier (above at paragraph 7.7) had not been questioned. In the University's view, this new interpretation had no grounding in the text or history of the NAL. Despite this, the University followed a significantly narrowed interpretation of the NAL, resulting in not listing certain markets.
- 7.15 The University notes that the markets identified in Letter 23-03 were all issued prior to this narrowing of the scope of the NAL in mid-2020 and were listed consistent with the broader interpretation taken by Mr Van Wagner at the inception of the market, which permitted meaningful political questions.
- 7.16 About two years after CFTC adopted this narrower interpretation, in discussions in June 2022 with Mr McGonagle and others at CFTC in relation to the intended withdrawal of the NAL, Mr

McGonagle verbally indicated that DMO might adopt an even narrower interpretation of the NAL; namely that only markets about the outcome of a US election are within the scope of the NAL. Once again, this potentially even narrower reading of the NAL was introduced without accepting that in effect this amounted to a regulatory change. DMO's shifting sensibilities or positions over time, which were posed or suggested orally but never in writing, except for the Van Wagner email, resulted in the scope of the NAL being something of a moving target, which University and Aristotle, although not always in agreement with the newly announced or suggested position, nevertheless respected and endeavoured to comply with.

- 7.17 Further, in relying on the recently narrowed interpretation of the NAL as a basis for withdrawing the NAL, the CFTC is seeking to apply the new interpretation retrospectively to contracts that were listed under the earlier interpretation taken by Mr Van Wagner and followed by the University in good faith.
- 7.18 The CFTC's repeated narrowing of its interpretation of the NAL over time, and its move to apply its narrowed interpretation retrospectively to contracts back to the inception of the market about 8 years ago, is very unfair (at best).

8. Alleged out of scope of contracts

- 8.1 Letter 23-03 identifies 17 markets listed on the platform since its establishment that DMO now declares to be out of scope.
- 8.2 This section provides context for and addresses each of the markets that DMO considers to be outside of the bounds of the NAL as set out in Letter 23-03. It describes the thinking that went into the decision to list each market and why PredictIt believed they would be permissible under the NAL.

Context

- 8.3 The 17 markets represent a tiny fraction of the total of 6,829 markets listed on the platform to date. While DMO raised questions about some of them, it objected to only three. If DMO or any CFTC Commissioner had raised questions about or objected to the listing of such markets, the University, PredictIt and Aristotle would have been responsive to and respectful of the views of the Commission and its staff, as they have been with other issues raised by the DMO (for example, terminating the Ebola contract as explained above at 7.8 and discussed further below at 8.7).
- 8.4 As mentioned, the 2014 NAL recognises PredictIt as an experimental market. PredictIt offered every market in the good faith belief that it had the potential to produce data appropriate for academic study and that it was about the outcome of an election or other significant political event unrelated to war, terrorism, or assassination. Uncontroversially, nearly every one of the questions listed by PredictIt since its establishment is about the outcomes of elections or other significant political events unrelated to war, terrorism, or assassination. As for the production of academic data, certain questions were experimental, as befits an experimental market. Not every question was or could be known in advance to produce useful academic data. Some questions were asked specifically to understand whether a prediction market could produce useful data on the subject of

the question. Several of the questions identified in Letter 23-03 were one time or rare instances, not indicative of overall market activity. Others, such as questions involving Supreme Court decisions or foreign heads of state or government are core political events.

- 8.5 The University accepts that reasonable people may disagree as to whether some of the 17 markets identified in Letter 23-03 are, in hindsight, in scope. However, the University considers that all markets identified are within a reasonable and good faith interpretation of the scope of contracts approved by the NAL (i.e., none of the markets are plainly out of scope), such that closure of the platform is not an appropriate or proportionate remedy for addressing any disagreement about whether a particular contract is within the approved scope.
- 8.6 Importantly, as mentioned, the 17 markets identified represent a tiny fraction of the 6,829 markets that have been listed on PredictIt since its establishment. That a tiny number of markets might fall in a grey area might be reasonably expected in a new and experimental marketplace. This is all the more so, when the majority of the markets identified were launched over seven years ago. That does not justify shutting the platform, when, as here, many thousands of other listed markets were unquestionably within scope. In this context, shutting PredictIt would be a disproportionate response to concerns over a small number of markets. This is particularly so because the agency waited, in most cases, years (even until 2 March 2023) to raise any concerns about these contracts. Prompt raising of issues—and the ensuing good faith process of resolving them—is the most appropriate way to address the reliance interests of traders and other stakeholders in the continued operation of the platform. The agency chose not to do so, making the 17 markets listed in the 2 March 2023 letter appear to be a pretextual, post hoc effort to justify a decision already made.

The 17 markets

How many Ebola cases in the U.S. in 2015? (Listed October 2014)

- 8.7 At the time this market was posted Ebola threatened to become a worldwide health crisis. Had that occurred the consequences may have been as serious as the Covid crisis ultimately became years later. If the number of US cases had been significant, political, and governmental actions similar to those taken for Covid might well have become necessary. Thus, this question related closely to potential important governmental and political decisions. On 24 November 2014, DMO Chief Counsel, David Van Wagner, emailed PredictIt's counsel indicating that DMO staff did not believe that the Ebola market fitted within the confines of the NAL. PredictIt immediately terminated trading in the market. Only a very small number of shares traded.
- 8.8 Rather than justifying closing the entire PredictIt market 8 ½ years after this listing, the trading suspension and early termination shows PredictIt's responsiveness to DMO guidance.

Will Iran agree to a nuclear deal before the end of 2014? (Listed November 2014)

- 8.9 This market concerned a high-profile governmental decision that had major US domestic and international political consequences. This market was not about war or terrorism but was about governmental policies for the development of nuclear energy technology. Whether to enter into an agreement, when to do it and on what terms was a pronounced political debate in the US and Europe. Iran's nuclear weapons programme, the international sanctions regime intended to limit

that programme, and the efforts to negotiate an agreement with Iran on the topic were dominant issues in both international and US politics in 2014 and remain significant issues, even to this day.¹⁶ Iran, the five permanent members of the UN Security Council (China, France, Russia, United Kingdom, United States) and Germany had signed an interim agreement (the joint Plan of Action) in November 2013 and, at the time of this question, negotiations for a final agreement were actively underway. In July 2015, the Joint Comprehensive Plan of Action was agreed among Iran, the five permanent members of the UN Security Council, Germany, and the EU. Thus, the question of the timing of this agreement was pertinent when this market was offered. The adoption of binding international treaties or agreements to which the US is a party is an important political question equal in legal weight to US laws (see US Constitution, Article 6, Clause 2). Thus, a question on the timing of the adoption of this agreement constituted a meaningful political question.

- 8.10 This question was one of approximately a dozen non-electoral political questions posted by PredictIt in its first month of operation. On 24 November 2014, after this question was listed, DMO Chief Counsel David Van Wagner, as discussed above, emailed PredictIt Counsel indicating that one of the initially listed contracts regarding Ebola appeared to be out of the scope of those allowed under the NAL. Because Mr Van Wagner cited one of this small number of questions as impermissible but not others, including ones on international treaties and agreements, PredictIt believed that the remaining questions were reasonably within the scope of political event contracts and therefore permissible in view of the DMO staff. PredictIt continued to list questions on international treaties and agreements regularly for at least six additional years without comment from DMO Staff, despite questions from DMO Staff on other topics.

Will Caitlyn Jenner address the 2016 Republican National Convention? (Listed June 2015)

- 8.11 This market concerned a high-profile and controversial political decision of a national political party with potential political consequences within the party and outside it. Caitlyn Jenner is a noted Republican transgender activist, who ultimately became a candidate for Governor of California. In April 2015, ABC aired a two-hour Diane Sawyer interview of Bruce Jenner (as her name was then) announcing her transition to a woman. Jenner also disclosed a Republican political orientation during the interview and announced intentions to lobby then-Speaker Boehner and Majority Leader McConnell regarding LGBT rights. On 2 June 2015, she came out as Caitlyn Jenner in a cover story in *Vanity Fair* and was the subject of a long *Vanity Fair* article by Buzz Bissinger. The story dominated the news at the time.¹⁷ It is not a large leap from Jenner's avowed intentions to lobby Republican Party leaders to speaking at the convention.
- 8.12 National convention speaking slots are used by political parties to highlight their platforms and priorities. Who is chosen to speak sends an important political message. Republicans featuring a

¹⁶ See for example Hal Brands, 07 March 2023, *The Iran Nuclear Crisis May Be Headed for a Showdown*, <https://www.aei.org/oped/the-iran-nuclear-crisis-may-be-headed-for-a-showdown/>.

¹⁷ See for example Daniella Diaz, 25 April 2015, *Bruce Jenner comes out ... as a Republican*, <https://www.cnn.com/2015/04/25/politics/bruce-jenner-diane-sawyer-transgender-lgbt-republican-conservative/index.html>; Hunter Schwarz, 27 April 2015, *Bruce Jenner is a Republican. Here's the reason that shouldn't surprise you* <https://www.washingtonpost.com/news/the-fix/wp/2015/04/27/bruce-jenner-is-a-republican-heres-the-reason-that-shouldnt-surprise-you/>; Hunter Schwarz, 24 April 2015, *Bruce Jenner said he's a Republican. Only 21 percent of LGBT Americans are*, <https://www.washingtonpost.com/news/the-fix/wp/2015/04/24/bruce-jenner-said-hes-republican-only-21-percent-of-lgbt-americans-are/>.

transgender speaker would have represented a major political action with clear implications for the Presidential general election campaign and for state legislation then pending. The decisions of national conventions (Vice Presidential nomination) were among the expressly approved example markets and the decision about a convention speaker certainly relates to that election and in this case also relates to a significant political issue, the rights of transgender persons.

- 8.13 Ms. Jenner was in the heart of the heated political debate on transgender rights. Underscoring this, in April of 2016, then-Presidential candidate Trump offered to allow Caitlyn Jenner to use the bathroom of her choice in Trump Tower, putting him at odds with other Republican politicians who supported or passed laws requiring individuals to use the bathrooms that aligned with the gender on their birth certificate. When candidate Trump made this offer to Caitlyn Jenner, he did so in response to the Republican-backed "bathroom bill" in North Carolina that later sparked widespread protests and boycotts of the state. Thus, Jenner's actions as a proxy for candidates' positions on transgender rights was injected by Trump as a significant issue in the 2016 Republican Presidential nomination contest, a development that this question both forecast and assessed. The controversy also related to state legislation then recently passed in North Carolina and then pending in other states, including Texas.
- 8.14 The citation of this question as out of scope of the NAL does not account for the pronounced, intense, and ongoing political debate over the acceptance of transgender rights.¹⁸

Will Puerto Rico file for bankruptcy in 2015? (Listed July 2015)

- 8.15 This market implicated high-level decisions by the Puerto Rican and federal legislative, executive and judicial branches of government. This market was opened shortly after Puerto Rican Governor Garcia Padilla stated that Puerto Rico's "debt is not payable" and the question pertained to significant political and legal questions about Puerto Rico and its role in the American constitutional structure.
- 8.16 By mid-2015, Governor Padilla and independent observers were warning about the possibility of a Puerto Rican financial "death spiral". Unlike American states and municipalities, Puerto Rico did not have the legal power to re-organise its debt, and previous attempts to restructure debt held by Puerto Rican sovereignly owned corporations (such as electric and sewer corporations) were blocked by court rulings which were affirmed by the Supreme Court of the United States.
- 8.17 This left Puerto Rico in a bind. The Governor of Puerto Rico, backed by a commissioned analysis of its financial situation, saw bankruptcy and restructuring as the only way out, but this was not a legal option.
- 8.18 In February 2015, Puerto Rico's non-voting representative in the US House of Representatives introduced legislation that would have the effect of allowing Puerto Rico to declare bankruptcy. Similar legislation was introduced in the Senate in July 2015, coinciding with the launch of the market question at issue.

¹⁸ Greg Sargent, 3 April 2023, *How Marjorie Taylor Greene's 'pedophile' slur made it to '60 Minutes'*, <https://www.washingtonpost.com/opinions/2023/04/03/lesley-stahl-interview-marjorie-taylor-greene-pedophile-slur/>.

- 8.19 The legislation ultimately failed, but not before being the subject of significant public controversy. Presidential candidates including Marco Rubio, Bernie Sanders, and Hillary Clinton weighed in on the proposed legislation, and President Obama weighed in on other potential options.
- 8.20 The 2014 Van Wagner email stated that markets should have a relationship to elections or other meaningful political questions. The initial set of markets, which Van Wagner did not object to, included Executive actions, Supreme Court decisions, and Congressional votes. At least one of these would have been necessary in order to provide Puerto Rico with a legal basis for either declaring bankruptcy or otherwise escaping its dire fiscal situation. This was a high-profile political question that PredictIt managers believed in good faith was within the scope of the NAL.

Will accused lion poacher Walter Palmer be extradited to Zimbabwe this year? (Listed August 2015)

- 8.21 This market involved high-profile decisions of domestic and international government policymakers, including executive, legislative and potentially judicial branch decisions by Zimbabwe, the White House and Justice Department, and the UN General Assembly. The government of Zimbabwe demanded the extradition of US resident, Walter Palmer, following an international public outcry over Palmer's killing of "Cecil" the lion. A petition to the White House urging Palmer's extradition reached the threshold for review by the administration. The UN General Assembly unanimously adopted its first-ever resolution aimed at combatting the trafficking in wildlife in reaction to the incident. Following the killing of Cecil, the US Fish and Wildlife Service added certain lions to the endangered species list, making it difficult for US citizens to kill lions legally. US Senator Bob Menendez introduced the Conserving Ecosystems by Ceasing the Importation of Large (CECIL) Animal Trophies Act. Rep Betty McCollum, co-chair of the Congressional International Conservation Caucus, called for an investigation of Palmer.¹⁹
- 8.22 The Department of Justice (**DOJ**) has detailed procedures for handling foreign extradition requests.²⁰ A decision to extradite Palmer would have required decisions by both the executive branch and the judiciary.²¹
- 8.23 The controversy ignited numerous political actions (legislation, UN resolutions, administrative action) and would have required both executive and judicial action to approve. As such, the question clearly related to a meaningful political question and involved the actions of the judiciary and executive branches.

Who will win the 2015 Nobel Peace Prize? (Listed October 2015)

- 8.24 This market involved a high-profile decision by the Norwegian Parliament, and the choice has often been viewed as a political statement and contributes to the domestic and international political standing of major leaders (e.g., President Barack Obama and Jimmy Carter). The Nobel Peace Prize is awarded on a yearly basis by the Norwegian Nobel Committee. This is a body that is

¹⁹ Wikipedia https://en.wikipedia.org/wiki/Killing_of_Cecil_the_lion.

²⁰ Department of Justice *International Extradition and Related Matters* <https://www.justice.gov/jm/jm-9-15000-international-extradition-and-related-matters#9-15.700>.

²¹ See for example, Brian Clark Howard, 4 August 2015, *4 Possible Legal Scenarios for American Lion Hunters* <https://www.nationalgeographic.com/animals/article/150803-lion-hunters-legal-extradition-cecil-walter-palmer-jan-seski>.

elected by the Norwegian Parliament (**Storting**). Committee membership is designed to represent the party composition of the Storting on a roughly proportional basis, meaning that Norwegian elections directly affect the composition of the body.²² Nominations for the prize may be made only by a restricted group including members of national assemblies and national governments.²³ Twenty Americans, including four American Presidents, and three American groups have won the Nobel Peace Prize; thus, the award is worthy of particular attention in the United States.²⁴

- 8.25 The Nobel Peace Prize is the result of a political process, indeed, of an election. This market was resolved upon the actions of a committee elected by a sovereign parliament and concerned the impact of actions taken by elected officials. This market directly related to a meaningful political question and was within the scope of the NAL. Members of Congress comment on who should receive the prize.²⁵ Moreover, the award itself is a significant political event focusing international attention on a person or organisation who has resolved a particular conflict or contributed to world peace. A Nobel Peace Prize is an honour that is given to a person or group who has "done the most or the best work for fraternity between nations, for the abolition or reduction of standing armies and for the holding and promotion of peace congresses". The selected individual must have done important work that results in governmental policy changes. When PredictIt opened this market, contracts included, but were not limited to, American Secretary of State Kerry, Colombian President Santos, and German Chancellor Merkel. Each of these individuals was nominated for their direct effect on government policy.
- 8.26 The nomination has sometimes resulted in political controversy; the 2009 committee that awarded the prize to Barack Obama contained a liberal majority, reflecting the results of the previous Norwegian Parliamentary election. PredictIt traders may have speculated that conservative wins in the 2013 Norwegian parliamentary election could have made the 2015 committee members look less kindly upon Chancellor Merkel, who was nominated for her refugee resettlement policy.
- 8.27 The Van Wagner email from 2014 asked that markets have a relationship to elections or other meaningful political questions. The initial set of markets, to which Van Wagner did not object, included multiple questions concerning foreign governments. The award of a Nobel Peace Prize is the result of a process initiated by a foreign government, and the subject matter of these prizes directly relates to meaningful political questions and governmental policies. Moreover, the award of the prize itself constitutes an important political event. Because of the close nexus between these prizes, the election of the award committee by the Norwegian parliament, and governmental policies, it was reasonably believed that this market was within the scope of the NAL. The prize is the result of a political process and itself constitutes an important political event, falling well within the confines of the NAL.

²² The Nobel Peace Prize <https://www.nobelprize.org/prizes/peace/>.

²³ The Nobel Peace Prize <https://www.nobelprize.org/prizes/peace/>.

²⁴ Nobel Peace Laureate Project

http://www.nobelpeace laureates.org/nobel_peace_prize.html#:~:text=American%20Winners%20of%20the%20Nobel,of%20the%20to tal%20number%20awarded.

²⁵ See for example, Adam Schiff, *Press Releases* https://schiff.house.gov/news/press-releases?PageNum_rs=5&year=2015&c=114&type=news_article.

Will North Korea test a hydrogen bomb by the end of 2016? (Listed December 2015)

- 8.28 This market concerned an event that had major international political consequences and is itself a tool to affect US politics. At the time this market was posted North Korea was known to be conducting research in hydrogen bombs and, in fact, North Korea announced in September 2017 that it had conducted a successful test of a hydrogen bomb. Those events triggered an emergency meeting of the UN Security Council.²⁶ Thus, the question about testing before the end of 2016 was pertinent and timely.
- 8.29 The development and testing of nuclear weapons is clearly a political act, as demonstrated in the first instance by the fact that no nation has used nuclear weapons since 1945. Also, since a test, in and of itself, is not directed against any other government or country, it is not related to war. Instead, for more than 70 years, addressing or deterring testing of nuclear weapons has been a diplomatic issue, clearly among the significant political issues faced by the United States and other world powers.
- 8.30 Extended academic studies on the politics of nuclear weapons are numerous. See, for example this small sampling:
- (a) Nuclear Weapons and International Conflict: Theories and Empirical Evidence, Oxford 2017.²⁷**Error! Hyperlink reference not valid.**
 - (b) Nukes with Numbers: Empirical Research on the Consequences of Nuclear Weapons for International Conflict, Annual Review of Political Science 2016.²⁸
 - (c) The International Politics of Nuclear Weapons: A Constructivist Analysis, South African Journal of Military Studies, Vol 35, Nr 1, 2007.²⁹
 - (d) How Acquiring Nuclear Weapons Can Change Foreign Policy, MIT 2015.³⁰
 - (e) Why Do States Acquire Nuclear Weapons? A Theoretical Framework in Assessing Nuclear Proliferation in Israel, Iran and Saudi Arabia Framework, Volume 21 Political Analysis 2020.³¹
 - (f) Behavioral Economics and Nuclear Weapons, Ed. Anne I. Harrington and Jeffrey W. Knopf, University of Georgia Press 2019.³²

²⁶ Elise Hu, 3 September 2017, *North Korea Claims Successful Hydrogen Bomb Test* <https://www.npr.org/sections/thetwo-way/2017/09/03/523913820/north-korea-possibly-conducts-sixth-nuclear-test-south-korea-says>.

²⁷ Daniel S. Geller, 27 July 2017, *Nuclear Weapons and International Conflict: Theories and Empirical Evidence* <https://oxfordre.com/politics/display/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-347>.

²⁸ Erik Gartzke and Matthew Kroenig, May 2016, *Nukes with Numbers: Empirical Research on the Consequences of Nuclear Weapons for International Conflict, Annual Review of Political Science 2016* <https://www.annualreviews.org/doi/10.1146/annurev-polisci-110113-122130>.

²⁹ *The International Politics of Nuclear Weapons: A Constructivist Analysis, South African Journal of Military Studies, Vol 35, Nr 1, 2007* <https://www.ajol.info/index.php/smsajms/article/view/75314/65879>.

³⁰ Mark Stephen Bell, July 2015, *How Acquiring Nuclear Weapons Can Change Foreign Policy, MIT 2015* <https://dspace.mit.edu/handle/1721.1/100497>.

³¹ Marlene Da Cruz, 2020, *Why Do States Acquire Nuclear Weapons? A Theoretical Framework in Assessing Nuclear Proliferation in Israel, Iran and Saudi Arabia Framework, Volume 21 Political Analysis 2020* <https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1055&context=pa>.

³² Anne I. Harrington and Jeffrey W. Knopf, 2019, *University of Georgia Press Behavioral Economics and Nuclear Weapons* <https://ugapress.org/book/9780820355634/behavioral-economics-and-nuclear-weapons/>.

- 8.31 The US Intelligence Community has assessed that North Korea has multiple objectives for its nuclear program, including "deterrence, international prestige, and coercive diplomacy".³³ North Korea has had a nuclear program since the 1960s and the US has engaged in serial nuclear negotiations with North Korea since the 1990s spanning the Clinton, Bush, Obama, and Trump Administrations.
- 8.32 Thus, North Korea's nuclear testing programme is an important political tool intended to advance its domestic and international interests, specifically including its relationship with the United States. As such, a North Korean test of a far more powerful bomb was an important political question sure to have consequences in US and international politics.

Will September CBP Southwest Border Patrol apprehensions be lower than August? (Listed September 2017)

- 8.33 This market directly addressed a central political debate on US immigration policy that impacts national and US southern border state elections. It is a proxy for predicting political sensibilities on the state of immigration policy and legislation. Monthly apprehensions on the southwest border became a closely watched barometer of the success of the new Trump administration's dramatically different immigration policies. This market opened nine days after the Trump Administration announced its largest immigration policy directive, was directly related to the Administration's immigration and border policies and was clearly within the scope of the NAL.
- 8.34 In the years preceding the opening of this market, unauthorized crossings of the southern border had become a major political issue. Donald Trump made reducing illegal immigration through Mexico, by proposing to build a wall and other methods, a major focus of his 2016 campaign. Candidate Trump promised a series of initiatives aimed at reducing these crossings. Candidate Trump opened his campaign with a promise to "build a wall" across the southern border. Over the following year, he made prominent calls for "strong, incredible borders," and he regularly attacked Candidate Clinton for her stance on southern border security.
- 8.35 Upon taking office, President Trump almost immediately signed an executive order to begin construction of a southern border wall and signed another order that would reduce federal funding to "sanctuary cities". Both orders were explicitly aimed at reducing the number of unauthorised crossings of the southern border. These policy changes had apparently immediate effect. Apprehensions were cut by 70% between December 2016 and March 2017 with the sharpest drop in February, immediately after Trump's January inauguration.³⁴
- 8.36 Nine days prior to the launch of this market, President Trump and Attorney General Sessions announced their intention to end the Deferred Action for Childhood Arrivals (**DACA**) program. President Trump's justification for this policy change included a claim that DACA led to a "massive

³³ Bruce Klingner, 13 August 2018, *Why Does North Korea Want Nukes?* <https://www.heritage.org/insider/summer-2018-insider/why-does-north-korea-want-nukes>.

³⁴ US Customs and Border Protection *Southwest Border Migration FY2017* <https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2017>.

surge of unaccompanied minors" crossing the border. The Administration believed that terminating DACA would reduce the number of unauthorised crossings.

- 8.37 The NAL approved the issuance of contracts about the outcome of elections and other significant political events unrelated to war, terrorism, or assassination. The Van Wagner email from 2014 so confirmed, asking that markets have a relationship to elections or other meaningful political questions. This question directly concerned a series of meaningful political questions, particularly related to President Trump's border security and immigration policies. The initial set of markets, to which Van Wagner did not object, included a question relating to an executive order on immigration. Because this market concerned executive actions on an issue that the then-President had made a centerpiece of his presidential campaign, PredictIt reasonably believed that this question was within the scope of the NAL as the result of an important political initiative by the then-new administration and an important political event as a measure of the success of those policies.

Will Pope Francis vacate the papacy by year-end? (Listed August 2018)

- 8.38 The Pope is a Head of State. The Vatican City State (Holy See) is an independent nation and a member of the United Nations. The United States has an ambassador to and an embassy for the Holy See, demonstrating US recognition of the Holy See as a government. Pope Francis addressed the UN in 2015, as had his two immediate predecessors on earlier dates. The Pope is elected by the College of Cardinals. Pope Francis' immediate predecessor had resigned from office, so it was readily conceivable that Pope Francis might do so as well. Thus, this market is no different than other markets on the tenures of foreign heads of state or heads of government. The question certainly has a relationship to an election (which would be called if the Pope were to leave office) and constitutes a meaningful political question, because the Pope is a political leader as well as a religious one.
- 8.39 One of the earliest markets listed on the market was "Will Vladimir Putin be President of Russia on April 1, 2015?" that contract was listed shortly prior to an email from DMO Chief Counsel David Van Wagner questioning whether a different market (regarding Ebola) qualified under the terms of the NAL. Because Mr. Van Wagner mentioned only one market of about 33 then pending as problematic, PredictIt personnel believed that, after reviewing the other markets under the standard prescribed by Mr. Van Wagner, the remaining types of markets were permissible under the interpretation by the DMO Chief Counsel and PredictIt continued to list for eight years markets on the tenure of foreign political leaders without comment from DMO staff, despite comments on other types of markets.

How many tweets will @realDonaldTrump post from noon May 27-June 3? (Listed May 2020)

- 8.40 DMO staff contacted PredictIt about Trump tweet markets in 2017 and PredictIt responded with this justification:
- (a) The President's Twitter habits and the level of his engagement are subjects of endless political coverage, and the manner in which traders approach these markets also provides insight into areas of study such as market theory and trader psychology.

- (b) The President has introduced a new dimension to politics with his instant response to topics and media reported comments. This was used by President Trump in multiple ways, political, provision of information, negotiation, etc. This should provide endless material for political scientists, and the data has been requested by a number of academics.

8.41 Trump's unique use of Twitter dominated political discourse generating extensive media commentary and academic study. A very small sample of the existing studies and commentary include:

- (a) Twitter, Trump, and the Base: A Shift to a New Form of Presidential Talk?, *Signs and Society*, Volume 6, Number 1, Winter 2018.³⁵
- (b) How Trump Reshaped the Presidency in Over 11000 Tweets, *New York Times*, 2 November 2019.³⁶
- (c) New study examines how Donald Trump used Twitter to craft an alternate reality for his followers, *Cleveland.com*, 17 January 2021.³⁷
- (d) How Trump uses Twitter to distract the media, *The Conversation*, 12 November 2020.³⁸
- (e) Using the president's tweets to understand political diversion in the age of social media, *Nature Communications*, 10 November 2020.³⁹
- (f) The Political Frames and Twitter Attacks of Donald Trump, *The Journal of Media in Society*.⁴⁰
- (g) Trump's COVID-19 tweets and Dr. Fauci's emails, *Public Health Emergency COVID-19 Initiative*, 16 January 2022.⁴¹
- (h) Do President Trump's tweets affect financial markets? *Science Direct*, August 2021.⁴²

8.42 President Trump's tweets included international threats, attacks on his political opponents and members of his own administration, were cited in judicial opinions, and had significant effects on the stock market. Twitter ultimately suspended the President's account following the incidents of 6 January 2021 in which a group of President Trump supporters stormed the United States Capitol Building in Washington DC following Trump's defeat in the 2020 presidential election. It is beyond serious dispute that President Trump's use of Twitter was politically important, indeed was a major tool and factor in his election and governing style.

³⁵ See for example Galen Stolee and Steve Caton *Twitter, Trump, and the Base: A Shift to a New Form of Presidential Talk?, Signs and Society, Volume 6, Number 1, Winter 2018* <https://www.journals.uchicago.edu/doi/full/10.1086/694755>.

³⁶ *New York Times*, 2 November 2019, *How Trump Reshaped the Presidency in Over 11000 Tweets*, <https://www.nytimes.com/interactive/2019/11/02/us/politics/trump-twitter-presidency.html>.

³⁷ Seth Richardson, 17 January 2021, *New study examines how Donald Trump used Twitter to craft an alternate reality for his followers, Cleveland.com* <https://www.cleveland.com/open/2021/01/new-study-examines-how-donald-trump-used-twitter-to-craft-an-alternate-reality-for-his-followers.html>.

³⁸ Ullrich Ecker, Michael Jetter and Stephan Lewandowsky, 12 November 2020, *How Trump uses Twitter to distract the media, The Conversation* <https://theconversation.com/how-trump-uses-twitter-to-distract-the-media-new-research-149847>.

³⁹ Ullrich Ecker, Michael Jetter and Stephan Lewandowsky, 10 November 2020, *Using the president's tweets to understand political diversion in the age of social media, Nature Communications*, <https://www.nature.com/articles/s41467-020-19644-6>.

⁴⁰ Eric Dunning, Fall 2018, *The Political Frames and Twitter Attacks of Donald Trump, The Journal of Media in Society*, <https://www.thejsms.org/index.php/JSMS/article/download/413/201/1751>.

⁴¹ David Allen and Michael McAleer, 16 January 2022, *Trump's COVID-19 tweets and Dr. Fauci's emails, Public Health Emergency COVID-19 Initiative*, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8761249/>.

⁴² Peder Gjerstad, Peter Filip Meyn, Peter Molnár, Thomas Dowling Næss, August 2021, *Do President Trump's tweets affect financial markets? Science Direct* <https://www.sciencedirect.com/science/article/pii/S0167923621000877>.

8.43 Based on DMO Staff's reaction to the 2017 discussion, PredictIt personnel understood that DMO did not object to these markets and continued to list them from 2017 until 2020 when then-Director DeWitt enunciated a narrower interpretation of the NAL. At that time Twitter markets were discontinued. Both prior to the 2017 discussion (Ebola) and afterwards (Global Temperature) DMO staff indicated clearly when they believed specific markets were outside the scope of the NAL. When those clear judgements were communicated, PredictIt adhered to them. The failure of DMO staff to express a clear opinion despite engagement specifically regarding Twitter markets in 2017 and again in 2019 (see discussion of AOC Tweet market) makes it unfair, at the least, to cite this question as a justification for shutting down PredictIt. When DMO staff provided clear guidance on this subject in 2020, PredictIt immediately complied with that guidance.

Will federal charges against Andrew McCabe be confirmed by June 30? (Listed March 2018)

8.44 As an initial matter, the agency has raised three markets as alleged scope violations that relate to the DOJ's decision to charge a politically prominent individual with a crime. The agency does not say, but to the extent the agency believes that a DOJ charging decision regarding a politically prominent individual is not a "political" question, that position is clearly wrong. Numerous DOJ policies require such decisions to be vetted by a cabinet secretary, the Attorney General of the United States, and to take into account their effect on upcoming elections. Whether and under what circumstances to charge a politically prominent individual is clearly a meaningful and significant political question. The agency had every opportunity to add "decisions concerning the criminal justice system" to its list of exclusions from those significant political events that could be the subject of markets but did not do so.

8.45 Andrew McCabe is a former Federal Bureau of Investigation (**FBI**) official, whose activities in office were central to the various investigations into both the 2016 presidential election and the Trump campaign's relationship with Russia. Mr McCabe was Deputy Director of the FBI throughout the 2016 Presidential Election and was named Acting Director of the FBI following the termination of James Comey. During Mr McCabe's tenure as Acting Director, he ordered the investigation into President Trump for obstruction of justice that later evolved into the high-profile Special Counsel investigation into the Trump campaign.⁴³

8.46 Mr McCabe was later accused of lying to investigators about comments he made to a Wall Street Journal reporter, which were allegedly made to protect Hillary Clinton's presidential campaign. Various respected national media outlets reported that the investigation approached the point of criminal charges, and critics of the Trump Administration decried the perceived weaponisation of the DOJ.

8.47 Mr McCabe was terminated in 2018, and his termination was celebrated on Twitter by President Trump. Many commentators speculated that his termination was politically motivated. The DOJ later settled a lawsuit filed by Mr McCabe alleging that he was dismissed for political reasons.

⁴³ *Code Name Crossfire Hurricane: The Secret Origins of the Trump Investigation*, 16 May 2018, <https://www.nytimes.com/2018/05/16/us/politics/crossfire-hurricane-trump-russia-fbi-mueller-investigation.html>.

8.48 Bringing federal criminal charges is an action of the executive branch. Charges involving former high level government officials are ordinarily brought only if approved by the Attorney General because such charges are understood to have political implications as well as purely legal ones. (See discussion of Hunter Biden market for additional discussion of DOJ policy on politically sensitive indictments.) The potential charges in this instance were closely related to an election because they involved the 2016 Presidential election. As such, the question of whether charges would be brought against McCabe, a former high-ranking government official, was an important political question with consequences far beyond those of an ordinary action against a non-public figure.⁴⁴

Whether the WHO will declare COVID-19 to be a "pandemic" before March 6? (Listed February 2020)

8.49 This market concerned a high-profile, consequential legal characterisation made by an intergovernmental body, from which significant political consequences could flow on a global scale.

8.50 By 27 February 2020, the COVID-19 virus had already spread across the globe, overwhelming government resources and forcing the adoption of extreme measures, including travel restrictions and lockdowns. These measures famously began in Wuhan, China, but quickly spread to the United States (travel restrictions by 2 February), South Korea (travel bans by 4 February), Italy (lockdowns by 21 February) and elsewhere well before 27 February. The novel virus was clearly a significant focus of governments on a global scale by the time the market was launched.

8.51 The World Health Organization (**WHO**) is a subdivision of the United Nations. It is a public body that is funded by governments including the United States and China. Like all intergovernmental agencies, it is sensitive to the needs of its member states. The apparent delay between the restrictive measures taken by the member states and the pandemic declaration by the WHO drew considerable criticism from outside observers who argued that the WHO delayed the action so as not to disrupt its relationship with Beijing.⁴⁵

8.52 When the WHO declares a pandemic, it does so with the hope of effecting change in the responses of its various member states. Once a pandemic has been declared, the WHO helps to coordinate resources on a global scale to do things like contain viruses, develop treatments and vaccines, and mobilise states to use their resources to fight the pandemic. Thus, there are significant consequences, in the form of government action, that flow directly from the declaration at issue in this market. The declaration of a pandemic by the WHO in March of a US Presidential election year would be a material and significant event affecting the US Presidential election process.

8.53 The Van Wagner email from 2014 asked that markets have a relationship to elections or any other meaningful political question. This question directly concerned the highly politicised response of an intergovernmental body, from which further political decisions would directly flow. This was not a

⁴⁴ Matt Zapposky, Devlin Barrett, Karoun Demirjian and Josh Dawsey, 14 February 2020, *Justice Dept. won't charge Andrew McCabe, the former FBI official who authorized the investigation of President Trump* https://www.washingtonpost.com/national-security/justice-dept-wont-charge-andrew-mccabe-the-former-fbi-official-who-authorized-the-investigation-of-president-trump/2020/02/14/8ab3aac0-4f48-11ea-bf44-f5043eb3918a_story.html.

⁴⁵ James Griffiths, 16 February 2020, *The coronavirus crisis is raising questions over China's relationship with the World Health Organization* <https://edition.cnn.com/2020/02/14/asia/coronavirus-who-china-intl-hnk/index.html>.

market asking if the COVID-19 outbreak would spread or otherwise cause severe disruptions. The virus was already spreading around the world and was already recognised as a threat to daily life. This was solely a question about the actions that government officials would take in response, and thus is directly related to a meaningful political question.

How many tweets will @AOC post from noon March 9 through March 16? (Listed March 2020)

- 8.54 As with presidential Tweets, Tweets by prominent members of Congress had, by this period, become a major means of carrying on policy debates and a major focus of academic study.
- 8.55 Twitter offered special tools for academic researchers⁴⁶ and the Modern Language Association offered guidelines for Twitter citations in academic writings,⁴⁷ reflecting what amounts to a new academic field of study, with one study identifying 382 academic publications between 2006 to 2012 using Twitter for data collection or analysis.⁴⁸
- 8.56 Congressional use of Twitter was a major focus of various studies. See, for example:
 - (a) Congress Soars to New Heights on Social Media, Pew Research Center, July 2020.⁴⁹
 - (b) Congressional Twitter use revisited on the platform's 10-year anniversary, *Journal of the Association for Information Science and technology*, May 2018.⁵⁰
 - (c) Libby Hemphill, Jahna Otterbacher, and Matthew Shapiro What's Congress Doing on Twitter? *Computer Supported Cooperative Work*, 877–886, 2013.⁵¹
 - (d) Alvin B. Tillery Tweeting racial representation: how the congressional Black Caucus used Twitter in the 113th congress, *Politics, Groups, and Identities*, 9:2, 219-238, 2021.⁵²
 - (e) Twitter use by the U.S. Congress, *Journal of the American Society for Information Science and Technology* 61(8):1612-1621, August 2010.⁵³
 - (f) Mary Catherine Sullivan, Representation on Twitter: members of congress' presentations of self, Vanderbilt University.⁵⁴

⁴⁶ Shawn Zamechek, 12 May 2021, *Twitter Offers Free Premium Access to Researchers* <https://research-it.wharton.upenn.edu/news/twitter-offers-free-premium-access-to-researchers/>.

⁴⁷ University of Nebraska-Lincoln *Twitter Citations in Academic Writing* <https://graduate.unl.edu/connections/twitter-citations-academic-writing>.

⁴⁸ Michael Zimmer and Nicholas John Proferes, 19 May 2014, *A topology of Twitter research: disciplines, methods, and ethics*, *Aslib Journal of Information Management*, <https://www.emerald.com/insight/content/doi/10.1108/AJIM-09-2013-0083/full/html>.

⁴⁹ Patrick Van Kessel, Regina Widjaya, Sono Shah, Aaron Smith and Adam Hughes, 16 July 2020, *Congress Soars to New Heights on Social Media*, *Pew Research Center* <https://www.pewresearch.org/internet/2020/07/16/congress-soars-to-new-heights-on-social-media/>.

⁵⁰ Jennifer Golbeck, Brooke Auxier, Abigail Bickford, Lautaro Cabrera, Meaghan Conte McHugh, Stephani Moore, Jacquelyn Hart, Justin Resti, Anthony Rogers, and Jenna Zimmerman, May 2018, *Congressional twitter use revisited on the platform's 10-year anniversary*, *Journal of the Association for Information Science and technology*, <https://asistdl.onlinelibrary.wiley.com/doi/abs/10.1002/asi.24022>.

⁵¹ Libby Hemphill, Jahna Otterbacher, and Matthew A. Shapiro, February 2013, *What's Congress Doing on Twitter?* https://www.libbyh.com/files/Hemphill_Otterbacher_Shapiro_2013_Whats_Congress_Doing_on_Twitter.pdf.

⁵² Alvin B. Tillery, 2021, *Tweeting racial representation: how the congressional Black Caucus used Twitter in the 113th congress*, *Politics, Groups, and Identities*, 9:2, 219-238, https://csdd.northwestern.edu/documents/working-papers/alvin-tillery_tweeting-racial-representation_how-cbc-members-used-twitter-in-the-113th-congress.pdf.

⁵³ Jennifer Golbeck, Justin M. Grimes and Anthony Rogers, May 2010, *Twitter use by the U.S. Congress*, *Journal of the American Society for Information Science and Technology* 61(8):1612-1621 <https://onlinelibrary.wiley.com/doi/abs/10.1002/asi.21344>.

⁵⁴ Mary Catherine Sullivan, 17 December 2022, Representation on Twitter: Members of Congress' Presentations Of Self in the Digital Age, Vanderbilt University <https://ir.vanderbilt.edu/bitstream/handle/1803/17847/SULLIVAN-DISSERTATION-2022.pdf?sequence=1>.

- (g) *Twitter Style: An Analysis of How House Candidates Used Twitter in Their 2012 Campaigns*, PS, Cambridge University Press, 2014.⁵⁵
- (h) *A Network Analysis of Twitter Interactions by Members of the U.S. Congress*, ACM Transactions on Social Computing, Vol. 4, No. 1, February 2021.⁵⁶
- (i) Congressional Twitter use was the subject of Congressional research service reports (*Social Networking and Constituent Communications: Member Use of Twitter During a Two-Month Period in the 111th Congress*) and all Tweets by Members of Congress are stored in a Library of Congress archive.⁵⁷

8.57 Rep Alexandria Ocasio-Cortez had one of, if not, the largest Twitter followings in Congress. The volume of her Tweets both constitute and relate to significant political events. DMO staff contacted PredictIt about non-Presidential tweet markets in 2019, prior to this market being offered. As with the discussion of the Presidential market above PredictIt personnel provided the rationale for these markets and came away from the discussion with the impression that DMO staff did not object to these markets. Following DMO's new and narrower interpretation of the scope in 2020, these markets were no longer offered. Given PredictIt's engagement with CFTC staff about this and related markets and staff's failure to provide clear guidance during those discussions, it is unfair retrospectively to cite these markets as justification for withdrawing PredictIt's NAL.

What will be NASA's estimate for global surface temperature change for February? (Listed July 2018)

- 8.58 The question of global warming is a leading issue in US and international politics. Many believe the climate crisis to be the leading global issue of our time, perhaps even threatening the survival of the human race. The United Nations has held annual climate change summits since 1994. Among President Biden's first official acts was a series of actions intended to address climate change, including cancellation of the Keystone XL pipeline.⁵⁸ NASA's surface temperature estimate is a well-recognised key measure of how quickly climate change is proceeding. As such it is closely and directly related to an important political question and may have important political consequences.
- 8.59 At the same time that DMO Director DeWitt contacted Aristotle counsel about the WHO/Covid Pandemic contract, the outgoing Acting Director of DMO, Vince McGonagle expressed his concern that climate markets were outside the scope of the NAL and PredictIt stopped listing climate

⁵⁵ Heather K. Evans, Victoria Cordova and Savannah Sipole, 14 April 2014, *Twitter Style: An Analysis of How House Candidates Used Twitter in Their 2012 Campaigns*, PS, Cambridge University Press 2014 <https://www.cambridge.org/core/journals/ps-political-science-and-politics/article/abs/twitter-style-an-analysis-of-how-house-candidates-used-twitter-in-their-2012-campaigns/2975E5DB5DC41AE4F4977264DDDFE649>.

⁵⁶ Joshua M. Chamberlain, Francesca Spezzano, Jaclyn J. Kettler and Bogdan Dit, 11 February 2021, *A Network Analysis of Twitter Interactions by Members of the U.S. Congress*, ACM Transactions on Social Computing, Vol. 4, No. 1, <https://dl.acm.org/doi/10.1145/3439827>.

⁵⁷ Matthew Eric Glassman, Jacob R. Straus and Colleen J. Shogan, 3 February 2010, *Congressional Twitter use was the subject of Congressional research Service reports (Social Networking and Constituent Communications: Member Use of Twitter During a Two-Month Period in the 111th Congress)* <https://sgp.fas.org/crs/misc/R41066.pdf>; and Michael Zimmer Library of Congress *all Tweets by Members of Congress are stored in a Library of Congress archive*. <https://firstmonday.org/ojs/index.php/fm/article/view/5619/4653>.

⁵⁸ 20 January 2021, *Fact Sheet: President-elect Biden's Day One Executive Actions Deliver Relief for Families Across America Amid Converging Crises* <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-elect-bidens-day-one-executive-actions-deliver-relief-for-families-across-america-amid-converging-crises/>.

markets in response to that suggestion, notwithstanding our belief that these markets related to important political questions.

- 8.60 The context of this question is important as well. In 2021, three major US universities and the University contacted PredictIt expressing interest in climate change questions. PredictIt viewed these questions as experimental efforts intended to test whether and what sort of climate questions might provide useful data. PredictIt and other interested Universities along with the University engaged in extensive discussions with DMO staff and Commissioners, including Acting Chair Behnam, and generally received high interest and a degree of receptiveness to climate markets, through proposals to expand PredictIt markets or open separate climate event contract prediction markets. These proposals were ultimately not approved by then DMO Director DeWitt.
- 8.61 Given the clear political relevance of global warming, the intense academic interest in climate change markets, our engagement with CFTC on the issue, and our good faith response to the DMO Director's communication, PredictIt believes our treatment of these markets constitutes good faith cooperation with and responsiveness to DMO and CFTC more generally and does not weigh in favour of the draconian solution of closing the entire market, even if DMO Staff continues in the belief that these markets were not sufficiently related to a political question to be listed under terms of the NAL.

Will the Court legalise same-sex marriage? (Listed January 2015)

- 8.62 The Supreme Court granted certiorari in *Obergefell v. Hodges* and related cases involving the legality of same sex marriage in January 2015 and this question was posted contemporaneous to that decision.
- 8.63 Both the legality of same-sex marriage in the United States and the role of courts in determining the issue have been significant political questions for over three decades. This topic was vaulted into the mainstream by the 1993 *Baehr v. Lewin* case, in which the Supreme Court of Hawaii approached the point of legalising same-sex marriage in the state. This case, the first of its kind in the United States, was a key part of the backdrop for the 1996 Defense of Marriage Act, which banned federal recognition of same-sex marriage and allowed states to decline to recognise same-sex marriages performed in other states.
- 8.64 In the years between *Baehr* and *Obergefell*, same-sex marriage was declared illegal or unconstitutional (often through referenda) in many states and then legalised in 36 states, though the processes by which same-sex marriage became legal varied between states. In seven states, beginning with Massachusetts, same-sex marriage was legalised because of state court decisions. In another 18 states, same-sex marriage was legalised by the federal court decisions that set up the *Obergefell* case. In one state, California, same-sex marriage was initially legalised by a state court decision and, after that decision was overturned by a ballot referendum, it was subsequently legalised by a federal court decision.

- 8.65 Three states legalised same-sex marriage via ballot referenda. A number of other states passed legislation, some of which did so after the *United States v. Windsor* Supreme Court decision that overturned parts of the Defense of Marriage Act.⁵⁹
- 8.66 Over a 22-year stretch from *Baehr* to *Obergefell*, courts have played a key role in the political process that legalised same-sex marriage on a nationwide basis. Both state and federal courts repeatedly overturned same-sex marriage bans, and court decisions inspired legislation and referendums on both sides of the issue. The Supreme Court decision in *Obergefell* was a highly anticipated decision that changed or solidified the legal rights of millions of Americans and settled a significant political question, the rights of gay persons. The question involved a judicial action, specifically a Supreme Court decision. A Supreme Court decision had been among the initial questions posted by PredictIt in 2014 prior to the Van Wagner email and it was believed, based on the fact that the Van Wagner email objected to one of the initial questions but not to any others, that DMO staff agreed that Supreme Court decisions were among the significant political questions allowed by the NAL.
- 8.67 PredictIt offered over 75 questions related to the Supreme Court over eight years, including questions on 16 other case rulings. The selection of this single case ruling on gay marriage as impermissible under the NAL is perplexing given that gay marriage was and remains a significant political issue.⁶⁰

Will the U.S. indict FIFA president Sepp Blatter in 2015? (Listed May 2015)

- 8.68 The market "Will the U.S. indict FIFA president Sepp Blatter in 2015?" was launched on 29 May 2015. The political basis for the market was that it involved a significant governmental action involving wide-ranging international crimes.
- 8.69 On Tuesday, 26 May 2015, the US DOJ announced that it had indicted 22 top officials in FIFA, most of whom were not US residents, in an investigation alleging widespread corruption in soccer's governing body over the previous two decades. Most of those individuals ultimately pled guilty or were convicted. The US government investigation involved international cooperation and effort. FIFA's presidential election – which Blatter was expected to win - had been scheduled for 29 May 2015, just three days later. The question of whether Blatter – described by the NYT as "generally recognised as the most powerful person in sports" – would also be charged was an important governmental act with significant business and political implications. On 2 June 2015, Blatter said he would resign from the presidency of FIFA.
- 8.70 The indictments of foreign officials for crimes generally committed outside of the United States was part of a broader development in law taking place at the time of this market.⁶¹ The Times published several more articles about this matter in the days just before the PredictIt market was launched:

⁵⁹ 570 U.S. 744 (2013).

⁶⁰ Madeleine Carlisle and Julia Zorthian, 24 June 2022, *Clarence Thomas Signals Same-Sex Marriage and Contraception Rights at Risk After Overturning Roe v. Wade* <https://time.com/6191044/clarence-thomas-same-sex-marriage-contraception-abortion/>.

⁶¹ NY Times 9 June 2015 *Growing Body of Law Allows Prosecution of Foreign Citizens on U.S. Soil* <https://www.nytimes.com/2015/06/10/nyregion/growing-body-of-law-allows-prosecution-of-foreign-citizens-on-us-soil.html>; NY Times 26 May 2015 *Top Soccer Official Indicted on Corruption Charges*.

- (a) FIFA Officials Arrested on Corruption Charges; Blatter Isn't Among Them (May 26, 2015).⁶²
- (b) What About Sepp Blatter? Questions About the FIFA Case (May 27, 2015).⁶³
- (c) Another Body Blow for FIFA, and for Sepp Blatter (May 27, 2015).⁶⁴
- (d) The Rise and Fall of Sepp Blatter (May 27, 2015, updated December 21, 2015).⁶⁵

8.71 Blatter was not indicted by the United States, but these contemporary news articles show that that possibility was live and widely discussed at the time the market was launched. The FIFA indictments that were issued constituted an important executive branch governmental action with international political consequences. An additional indictment of the body's top official would have been an equally important and politically significant step.

Will a federal charge against Hunter Biden be confirmed by December 31, 2020? (Listed September 2019)

8.72 At the time the market was launched, Hunter Biden's conduct was at the centre of a political firestorm involving the two biggest political events of that time: the 2020 Presidential election and the first impeachment of Donald Trump. As Donald Trump continued to call for investigations into Hunter Biden, the political importance of the possible indictment of Hunter Biden by the US federal government cannot seriously be questioned. To this day, investigation of Hunter Biden's conduct continues to be an important political talking point for the House GOP.

8.73 The political landscape leading up to the launch of the market was as follows:

- (a) On 25 April 2019, former vice president Joe Biden announced his candidacy in the 2020 Democratic Party presidential primaries.
- (b) An investigation centred around Hunter Biden's finances related to overseas business ties and consulting work had begun in 2018.⁶⁶
- (c) In a phone call on 25 July 2019, President Trump pressured Ukrainian President Volodymyr Zelenskyy to investigate Biden, the Democratic presidential front-runner, and his son Hunter, who had worked for a company drilling for gas in Ukraine.
- (d) After President Trump had repeatedly encouraged investigation of Hunter Biden, on 20 September 2019, on Fox News, author Peter Schweizer addressed the questions

⁶² NY Times, 26 May 2015, *FIFA Officials Arrested on Corruption Charges; Blatter Isn't Among Them* <https://www.nytimes.com/2015/05/27/sports/soccer/fifa-officials-face-corruption-charges-in-us.html?searchResultPosition=4>.

⁶³ NY Times, 27 May 2015, *What About Sepp Blatter? Questions About the FIFA Case* <https://www.nytimes.com/2015/05/28/sports/soccer/what-about-sepp-blatter-and-other-questions-about-the-fifa-case.html?searchResultPosition=3>.

⁶⁴ NY Times, 27 May 2015, *Another Body Blow for FIFA, and for Sepp Blatter* <https://www.nytimes.com/2015/05/28/sports/soccer/fifa-sepp-batter-soccer-scandal-corruption-quit-resign.html?searchResultPosition=2>.

⁶⁵ NY Times, 27 May 2015, (updated 21 December 2015) *The Rise and Fall of Sepp Blatter* https://www.nytimes.com/interactive/2015/05/27/sports/soccer/sepp-blatter-fifa-timeline.html?searchResultPosition=1##time376_11015.

⁶⁶ Devlin Barrett and Perry Stein Washington Post, 6 October 2022, *Federal agents see chargeable tax, gun-purchase case against Hunter Biden* <https://www.washingtonpost.com/national-security/2022/10/06/hunter-biden-tax-gun-charges/>.

surrounding Hunter Biden's involvement with a Ukrainian natural gas company while his father, former Vice President Joe Biden, oversaw America's Ukraine policy:

- (i) "The underlying story here involves Hunter Biden going around the world really collecting large payments from foreign governments and foreign oligarchs in the case of Ukraine," Schweizer, the author of "Secret Empires," said on Fox News' "The Ingraham Angle."
- (ii) "Donald Trump is right to ask the question and to ask that there be an investigation to see what Hunter Biden was being paid for. Joe Biden has offered no answers," Schweizer said. "Hunter Biden, when he's been asked about this, has lied repeatedly and they've been proven lies by ABC News and other outlets."⁶⁷

8.74 On 24 September 2019, House Democrats launched a formal impeachment inquiry into President Trump, accusing him of seeking foreign help to smear Democratic rival, Joe Biden, ahead of next year's election. House Speaker, Nancy Pelosi, said that President Trump's actions undermined national security and violated the US Constitution.⁶⁸

- (a) Speaker Pelosi had been reluctant to embrace an impeachment effort, but had a change of heart following reports that President Trump had pressured Ukrainian President Volodymyr Zelenskyy in a 25 July phone call to investigate former Vice President Biden, the Democratic presidential front-runner, and his son Hunter, who had worked for a company drilling for gas in Ukraine. President Trump was accused of withholding nearly \$400 million in US aid to Ukraine as leverage to get President Zelenskyy to launch a probe that would damage Biden, who led opinion polls in the Democratic presidential nominee race.⁶⁹
- (b) President Trump called the inquiry "Witch Hunt Garbage" and relentlessly kept the issue of the propriety of Hunter Biden's financial dealings front and centre in September 2019 as news swirled about an impeachment inquiry.
- (c) "When Biden's son walks out of China with \$1.5 billion in a fund, and the biggest funds in the world can't get money out of China, and he's there for one quick meeting and he flies in on Air Force Two, I think that's a horrible thing. I think it's a horrible thing."— President Trump, remarks with Ukrainian President Volodymyr Zelenskyy, 25 September 2019.
- (d) "Ask how his son made millions of dollars from Ukraine, made millions of dollars from China, even though he had no expertise whatsoever."— Trump, in remarks to reporters with British Prime Minister Boris Johnson, 24 September 2019.

⁶⁷ Victor Garcia, 21 September 2019, *Peter Schweizer says Hunter Biden worked in Ukraine despite lacking credentials: 'What is he being paid for?'* <https://www.foxnews.com/media/peter-schweizer-president-trump-right-to-ask-for-investigation-into-hunter-biden>.

⁶⁸ Patricia Zengerle and David Morgan, 25 September 2019, *U.S. House begins Trump impeachment inquiry over call to Ukraine leader*, <https://www.reuters.com/article/uk-usa-trump-whistleblower-idUKKBN1W91OJ>.

⁶⁹ Patricia Zengerle and David Morgan, 25 September 2019, *U.S. House begins Trump impeachment inquiry over call to Ukraine leader*, <https://www.reuters.com/article/uk-usa-trump-whistleblower-idUKKBN1W91OJ>.

(e) "The son took money from China — a lot of money from China."— Trump, remarks to reporters at the United Nations, 23 September 2019.⁷⁰

8.75 On 24 September 2019, an opinion piece in the Washington Post stated "the price of impeachment for Biden will be weeks, perhaps months, of nonstop discussion of his son Hunter Biden and Hunter's activities in Ukraine and elsewhere.... While Trump's behavior would certainly be on trial, it would be set alongside the awkward question: What did Burisma expect to achieve by allying with the then-vice president's hot mess of a son? And because impeachments are rare and historic events, that awkward question will be a centrepiece of the biggest political news event of the year".⁷¹

8.76 On September 25, 2019, the Washington Post described Hunter Biden as "the former vice president's son suddenly at the center of a national political crisis".⁷²

8.77 On Fox News: The Wall Street Journal reported that Trump had repeatedly asked Zelensky to investigate Hunter Biden, the former vice president's son who had a key role in a natural gas firm that was being investigated by a Ukrainian prosecutor as part of a corruption probe.⁷³

8.78 This sea of controversy around Hunter Biden's conduct was taking place with the 4th Democratic Presidential Primary debate scheduled for 15 October 2019, only a little over 2 weeks after PredictIt's launch of the Hunter Biden charges market.

8.79 The foregoing is only a small sample of the media coverage, just before the market's launch, into the political impact of the investigation of Hunter Biden's conduct. Additional examples, looking only at the New York Times and Fox News:

(a) For Joe Biden, Trump Impeachment Inquiry Brings a Long-Expected Test.⁷⁴

(b) 'The One Who's Got the Problem Is Biden,' Trump Says of Allegations.⁷⁵

(c) Trump, Biden and Ukraine: Sorting Out the Accusations.⁷⁶

(d) Giuliani accuses Ukraine of laundering \$3M to Hunter Biden, asks how Obama could let that happen.⁷⁷

⁷⁰ Glenn Kessler, 26 September 2019, *Trump's false claims about Hunter Biden's China dealings*, <https://www.washingtonpost.com/politics/2019/09/26/trumps-false-claims-about-hunter-bidens-china-dealings/>.

⁷¹ David Von Drehle, 24 September 2019, *Democrats seem set on destroying Biden's chances to beat Trump* https://www.washingtonpost.com/opinions/democrats-seem-set-on-destroying-bidens-chances-to-beat-trump/2019/09/24/caf9da2c-def6-11e9-8dc8-498eabc129a0_story.html.

⁷² Isaac Stanley-Becker, 25 September 2019, *Checking the Web on Hunter Biden? A 36 year-old physicist helps decide what you'll see* https://www.washingtonpost.com/politics/checking-the-web-on-hunter-biden-a-36-year-old-physicist-helps-decide-what-youll-see/2019/09/25/16573a1e-df9c-11e9-be96-6adb81821e90_story.html.

⁷³ Gregg Re, 22 September 2019, *Biden's campaign likely coming to an end -- thanks to Clinton-linked Ukraine bombshell, Nunes says* <https://www.foxnews.com/politics/bidens-campaign-coming-to-an-end-thanks-to-ukraine-story-linked-to-hillary-clinton-nunes-says>.

⁷⁴ NY Times *For Joe Biden, Trump Impeachment Inquiry Brings a Long-Expected Test*, <https://www.nytimes.com/2019/09/24/us/politics/joe-biden-trump-impeachment.html?searchResultPosition=1>.

⁷⁵ NY Times, 23 September 2019, *The One Who's Got the Problem Is Biden,' Trump Says of Allegations*, <https://www.nytimes.com/video/us/politics/100000006732580/trump-biden-ukraine.html?searchResultPosition=2>.

⁷⁶ NY Times *Trump, Biden and Ukraine: Sorting Out the Accusations* <https://www.nytimes.com/2019/09/22/us/politics/biden-ukraine-trump.html?searchResultPosition=3>.

⁷⁷ Fox News, 23 September 2019, *Giuliani accuses Ukraine of laundering \$3M to Hunter Biden, asks how Obama could let that happen* <https://www.foxnews.com/politics/giuliani-accuses-ukraine-of-laundering-3m-to-hunter-biden-asks-how-obama-could-let-that-happen>.

- (e) Rep. Ted Lieu defends Hunter Biden's \$50,000 monthly salary from Ukrainian firm, suggests it's normal.⁷⁸
- (f) Trump's Ukraine controversy cast spotlight on Hunter Biden's business dealings, 24 September 2019.⁷⁹
- (g) Hunter Biden's business ties to oligarch raise questions, 20 September 20 2019.⁸⁰
- (h) Hunter Biden's business dealings in Ukraine and China now in the spotlight, 24 September 24 2019.⁸¹

8.80 Under longstanding DOJ procedures adhered to by Attorneys General of both political parties, indictments that have the potential to affect an election are subject to special procedures.⁸² Indeed, during the pendency of this question then Attorney General Barr issued additional guidelines requiring high level approval for politically sensitive investigations.⁸³

8.81 Thus, the possibility of an indictment of Hunter Biden involved both a hugely significant political issue and also, in order for an indictment to be issued, required a discretionary action, likely by the Attorney General personally. Based on all of the above, there was a clear belief when this market was listed that it most definitely qualified as an important political event.

9. Peremptory shutdown is neither necessary nor appropriate

9.1 The New Withdrawal Letter says that if the NAL is withdrawn, CFTC has preliminarily concluded that no-action relief should not continue to apply to any markets. Withdrawal on this basis presumptively would require the University to shut down PredictIt immediately on withdrawal of the NAL and terminate all remaining markets early, including the liquidation of existing contracts held by thousands of traders, before the timing provided in the terms and conditions.

9.2 The University objects to this position for the reasons set out below. The University requests that if (despite the University's opposition) the NAL is withdrawn, DMO's no-action position continue to apply to all remaining markets until they expire on their own terms, including continuing to permit the University to add contracts to these markets for new candidates for Presidential election if and when additional credible candidates emerge. Adding any new candidates is necessary to avoid markets becoming meaningless due to out-of-date candidate lists and ceasing to trade effectively.

⁷⁸ Fox News Joseph Wulfsohn, 25 September 2019, *Rep. Ted Lieu defends Hunter Biden's \$50,000 monthly salary from Ukrainian firm, suggests it's normal* <https://www.foxnews.com/media/ted-lieu-hunter-biden-ukraine>.

⁷⁹ Fox News Doug McKelway, 24 September 2019, *Trump's Ukraine controversy cast spotlight on Hunter Biden's business dealings*, <https://www.foxnews.com/politics/hunter-biden-business-dealings-ukraine-controversy>.

⁸⁰ Fox News, 20 September 2019, *Hunter Biden's business ties to oligarch raise questions*, <https://www.foxnews.com/transcript/hunter-bidens-business-ties-to-oligarch-raise-questions>.

⁸¹ Fox News, 24 September 2019, *Hunter Biden's business dealings in Ukraine and China now in the spotlight* <https://www.foxnews.com/video/6089079994001>.

⁸² Attorney General's Memorandum of 5 March 2008 Election Year Sensitivities available at <https://www.justice.gov/sites/default/files/ag/legacy/2009/02/10/ag-030508.pdf>; Ryan Goodman 31 August 2020 *Bill Barr's Hidden Truths About Justice Department's Rule of Forbearance in an Election, Just Security* <https://www.justsecurity.org/72243/bill-barrs-hidden-truths-about-justice-departments-rule-of-forbearance-in-an-election/>; and Attorney General's Memorandum of 25 May 2022 Election Year Sensitivities <https://www.justsecurity.org/wp-content/uploads/2022/07/january-6-clearinghouse-attorney-general-garland-memorandum-election-year-sensitivities-may-25-2022.pdf>.

⁸³ See for example Ryan Lucas, 6 February 2020, *Attorney General Barr Issues New Rules For Politically Sensitive Investigations* <https://www.npr.org/2020/02/06/803506238/attorney-general-barr-issues-new-rules-for-politically-sensitive-investigations>.

- 9.3 Closing the platform, much less prematurely liquidating contracts, is not a justified or proportionate remedy for the alleged violations identified by the Commission. The University respectfully disagrees that any of the 17 identified markets were outside the scope of the permission to operate under the NAL. But even indulging for a moment the agency's allegation that the identified markets were outside the scope of its permission to operate the market; the proper remedy would have been timeously advising the University of the agency's view and providing guidance to avoid a recurring violation. We believe this to be particularly so when the University directly and through its service provider, Aristotle, was always engaged and transparent with the Commission with respect to the operation of and listing of markets on the PredictIt platform and acted on the basis of a good faith interpretation of the scope of markets authorised by the NAL. Some of the identified markets were offered more than a half-decade ago, but the agency did not inform anyone of the agency's view that the markets were out of scope.
- 9.4 The New Withdrawal Letter's preliminary determination to close the PredictIt platform entirely would be an excessively severe sanction. The New Withdrawal Letter has not identified any threat to the public from PredictIt's continuation. The interests of traders who have relied on the NAL to participate on the platform and of academics, who have used the platform for political research and analysis as was the intent of the NAL, should be considered and we believe weigh heavily towards permitting the platform to continue.

Remaining markets are clearly in scope

- 9.5 No new markets have been listed on PredictIt since the CFTC's first NAL withdrawal letter on 4 August 2022. As a result of markets expiring, there are eleven remaining markets and 52 remaining contracts on PredictIt.⁸⁴
- 9.6 Nine of the remaining markets are election markets or directly related to elections.
- 9.7 One of these nine markets is "AOC files for President before 2024?". PredictIt has a long history of "will X declare" questions and considers these to be directly related to elections.
- 9.8 Another of these nine markets is "Harris on 2024 Democratic ticket?". This question is really just a combination of one of the questions approved specifically in the NAL (who will the VP nominee be? and who the Democratic Presidential nominee will be (e.g., if Biden does not seek re-election)).
- 9.9 Regarding the other two remaining markets:
- (a) "Will Biden resign during his first term?": Clearly, this is a significant political question, as a presidential resignation would qualify as a significant political event (having occurred only once in US history). The words of the NAL and the Van Wagner email as discussed in paragraph 7.7 above allow for significant political events.
 - (b) "Will Biden be impeached by 6/30/2023?": Impeachment markets have longstanding precedent because a very similar impeachment question (then as to Obama) was listed among PredictIt's first 33 markets in October/November 2014 and prior to the Van Wagner

⁸⁴ PredictIt – Markets, <https://www.predictit.org/markets>.

email referred to in paragraph 7.7 above, which singled out the Ebola market but no other early market. PredictIt has also had impeachment markets running regularly for its entire eight year life. Dorothy DeWitt, when Director of DMO, accepted that some legislative actions (cabinet confirmations) were within the scope of the NAL and impeachment is no less a significant political question than a cabinet selection. Note also that the Biden impeachment market is less than three months from resolution.

Accordingly, all remaining markets are clearly within the scope of the NAL.

Minimal DMO involvement and resources required

- 9.10 The reason DMO gives for its preliminary view that its no-action position should not continue to permit remaining markets to expire is that it says DMO would have to continue significant involvement with PredictIt in the meantime, which would be an unreasonable use of taxpayer resources. However, as the remaining markets are all clearly within the scope of the NAL, we do not see why significant resources would need to be applied and the New Withdrawal Letter provides no evidence or rationale for why it would.
- 9.11 DMO says on page 7 of Letter 23-03 that the University has requested that "the no-action position be extended in the meantime to new markets, and to higher position limits that are covered under the [NAL]". This is not relevant as this related to DMO's previous withdrawal letter, which has now been withdrawn. In any event, however, the University does not understand why, for example, PredictIt having an ability to list new Presidential or Presidential Primary contracts would involve significant additional DMO resources as these contracts are unquestionably in scope. A modified trader limit would also appear not to involve any additional CFTC resources than the existing trader limit does, as CFTC does not actively monitor the trader limit.

Not in the public interest to terminate markets

- 9.12 For the foregoing reasons, the CFTC's preliminary determination to withdraw the NAL is not well founded. The lack of foundation and merit of the New Withdrawal Letter's rationales counsel against withdrawal of the NAL. The New Withdrawal Letter provides no information that calls into question the public interest in the PredictIt platform affirmed in the NAL. The growth of the platform (although still insignificant in size to established regulated markets), the widespread interest in it, and the many academic studies that have relied on its data demonstrate its value to the public. But even if the CFTC nonetheless is determined to shut down PredictIt, requiring the early termination of existing markets would be unfair and contrary to the APA.
- 9.13 Terminating markets early will cause disruption to traders and contracts will have to be closed in a manner they would not otherwise have been if they had been allowed to resolve in accordance with their terms. Given that a central purpose for the PredictIt experiment was to generate significant trade data for academic research on the predictive value of event contract markets, its precipitous termination would markedly and negatively affect ongoing academic use of the trading data for research and teaching purposes. In light of this, and the fact that remaining markets are clearly within scope and little involvement of DMO will be required, the University considers that it would be contrary to the public interest for DMO preemptorily to withdraw no-action relief in respect of

remaining markets, requiring those markets to be terminated early. The University respectfully submits that it would be consistent with the CFTC's investor protection mandate to enable remaining markets to resolve in accordance with their terms.

Yours faithfully
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