IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

KEVIN CLARKE, in his individual capacity, TREVOR BOECKMANN, in his individual capacity, HARRY CRANE, in his individual capacity, CORWIN SMIDT, in his individual capacity, PREDICT IT, INC., a Delaware corporation, and ARISTOTLE INTERNATIONAL, INC., a Delaware corporation, Plaintiffs, v. COMMODITY FUTURES TRADING COMMISSION, Defendant.	Case No. 22-cv-00909-LY

MEMORANDUM IN SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION

Michael J. Edney
HUNTON ANDREWS KURTH LLP
2200 Connecticut Avenue, NW
Washington, DC 20037
T: (202) 778-2204
medney@huntonak.com

John J. Byron
STEPTOE & JOHNSON LLP
227 West Monroe Street
Suite 4700
Chicago, Illinois 60606
T: (312) 577-1300 / F: (312) 577-1370
jbyron@steptoe.com

Attorneys for Plaintiffs Kevin Clarke, Trevor Boeckmann, Harry Crane, Corwin Smidt, Aristotle International, Inc., and Predict It, Inc.

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The Commodity Futures Trading Commission—for more than seven years—has permitted the PredictIt Market (the "Market") to operate. The PredictIt Market allows individuals to make limited investments based on their predictions on the outcome of an election or other significant political event. The data produced by the Market have become a hallmark of modern political coverage, with the collective, investment-backed predictions of thousands of traders now regarded as far more reliable than any polling or punditry.

On August 4, 2022, the Commission ordered the PredictIt Market to close. The decision was announced in a formal agency letter that included no meaningful explanation. Most strikingly, the revocation decision commanded PredictIt to cease trading in any contract on February 15, 2023. It did so even though 75 contracts then existing on the Market turn on events occurring after February 2023, most notably the 2024 presidential primary and general elections. As a result, the lead Plaintiffs in this case—traders in the PredictIt Market—will crash out of their positions in those contracts well before the outcomes of those elections or political events they predicted do or do not occur.

The Commission's decision to close the Market—particularly its decision to pick out of thin air a date by which all pending contracts must liquidate—is arbitrary and capricious in violation of the Administrative Procedure Act. The trader Plaintiffs, at a minimum, were owed an explanation of why the Market must close and of why the February 2023 date was the only way to accomplish whatever unspoken policy objectives are driving the agency's decision.

The Plaintiffs request a preliminary injunction targeted at a narrow aspect of the Commission's closure order that is creating an urgent problem. The requested injunction would allow 75 event contracts turning on elections or political events that may not resolve before February 2023 to continue to trade until their natural conclusion. This narrow and targeted preliminary injunction will abate disruption in and distortion of those election or political event

markets that are occurring now, as traders address the Commission's decision by making sales to salvage their positions. This targeted motion leaves for another setting, with the benefit of motions and arguments in the longer and normal course, questions of whether this Court should entirely overturn the revocation decision and allow PredictIt to resume the offering of contracts on new elections or political questions.

BACKGROUND

A. The PredictIt Market Offers Reliable Data on the Outcome of Elections and Other Significant Political Questions for Academics, the Media, and Other Observers

The PredictIt Market has provided members of the public an opportunity to make investments based on their views about the likely outcome of future elections and other significant political events since 2014. (App. 1, ¶ 3.) Essentially a stock exchange for political events, the Market hosts dozens of event markets about the outcomes of future political events. (App. 2, ¶ 7.) Each event market includes one or more questions about a particular political event, such as the 2024 presidential election. (*Id.*) Contract prices fluctuate between 1 and 99 cents, and when the deciding event ultimately occurs, contracts predicting the correct outcome are redeemed for one dollar. (App. 3, ¶ 8.) Contracts predicting incorrect outcomes receive no payout. (*Id.*) At the same time, PredictIt was built as a small-scale market, with limits on the amount anyone can invest, to provide data for academic and other research regarding public views on the likely outcome of political events. (App. 1, ¶ 3; App. 9.)

In 2014, the Commodity Futures Trading Commission issued a ruling that permitted the PredictIt Market (the "No-Action Relief"). (App. 16.) That ruling took the form of "no-action relief," a form of decision expressly provided for in the Commission's regulations. 17 C.F.R. § 140.99. It was issued on October 29, 2014. (App. 16.) The No-Action Relief approved a formal application by the Victoria University of Wellington ("Victoria University"). (App. 20.)

The No-Action Relief decision was detailed. It approved the Market's issuance of contracts within the substantive parameters provided by the University's application. (*Id.*) That application sought approval to issue contracts concerning the outcome of elections and other significant political questions, such as the likely nominee for the Supreme Court, that "do not involve war, assassination, or terrorism." (App. 9–10.) The No-Action Relief placed restrictions on the size of the market, limiting a trader's initial investment in any one contract to $850 and the number of traders in any one contract to 5000. (App. 19.) With these prescriptions, the decision determined that the Market would serve the purpose of generating data regarding investment-backed predictions for academics, media, and other observers. (App. 20.) In the end, the decision found that operation of the Market, even without formal registration as an exchange with the Commission, would be in the "public interest." (*Id.*)

Over the history of the PredictIt Market, 177,293 individual investors have traded in 8,059 event markets on the outcome of elections and other significant political questions. In the previous full year of its operations, 35,668 individual investors participated in 728 separate event markets.[1] (App. 4, ¶ 13.) These investors include Plaintiffs Kevin Clarke—a business owner in Austin, Texas, and Assistant Debate Coach at the University of Texas—and Trevor Boeckmann—a public defender in New York City. (App. 29, ¶¶ 1, 3; App. 33, ¶¶ 1, 3.) Both have been active traders in PredictIt contracts since 2020 and 2016 respectively. (*Id.*) Each made their investments with the

[1] The terms "contracts" and "event markets" will be used herein, and we explain what those terms mean in this note. The PredictIt Market hosts "event contracts," yes-or-no questions regarding the outcome of a specific political event. These binary event contracts are grouped into "event markets" involving the same election or other political event. Investors can buy "event contracts" based on what they believe to be the likely outcome of the political event. For example, the event market involving the 2024 Republican presidential nomination includes yes-or-not contracts on 17 different potential candidates. Comparatively, an event market regarding whether a woman will win the presidency in 2024 will include only one event contract.

expectation that their contracts would continue to trade under their deciding events. (App. 29, ¶ 3; App. 34–35, ¶¶ 6–10.)

Throughout the seven years of its operation, the Market has provided important trading and pricing data to the academic community at no cost. (App. 62, ¶ 3.) These data offer researchers a wealth of information that has advanced the fields of microeconomics, political behavior, computer science, and game theory. *See Research Opportunities*, PREDICTIT, https://www.predictit.org/research (last visited Sept. 14, 2022). To date, more than 140 researches from institutions around the world—including Michigan State University, Rutgers University, Harvard, Yale, MIT, Oxford, Cambridge, and the University of Copenhagen—have used PredictIt Market data in their teaching and research. *Id.* Among these academics are two Plaintiffs in this case: Professor Harry Crane of Rutgers University and Professor Corwin Smidt of Michigan State University. (App. 36, ¶¶ 1, 3; App. 62, ¶¶ 1, 4.)

Studies have shown that the aggregated investment-backed predictions of PredictIt traders are more reliable indicators of election outcomes of polling or statistical expert analyses, such as those provided by FiveThirtyEight or the Cook Political Report. (App. 36–37, ¶ 4; App. 40.) This is not surprising, as even modest investments encourage traders to put aside their biases and hopes for a particular election outcome in making a prediction. (App. 63, ¶ 6.) The PredictIt Market also lacks the potential incentives of one or a handful of experts to skew their analyses to suggest that one candidate or another is ahead or behind and thereby to encourage or discourage voter behavior. (App. 36–37, ¶ 4; App. 40–61.) As such, PredictIt trading data have been a staple of modern media reporting on the status of pending election, a subject of intense media interest.[2]

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[2] *See Republican Presidential Nomination, 2024*, BALLOTPEDIA, https://ballotpedia.org/Republican_presidential_nomination,_2024 (last visited Sept. 22, 2022); Holman W. Jenkins, Jr., *A Betting Man with a Plan for America*, WSJ (Sept. 9, 2022),

Victoria University partnered with Aristotle International, Inc. and its subsidiary Predict It, Inc., to stand up and to operate the PredictIt Market. (App. 2, ¶¶ 4–5.) Aristotle and PredictIt are also Plaintiffs in this case. Aristotle invested more than seven million dollars to develop the technology for and operation of the PredictIt Market. (App. 2, ¶ 5.) Together, they have employed seven full-time and 18 part-time professionals to build and operate the Market's electronic infrastructure, security, payment, and compliance programs. (*Id.*) These are significant and important undertakings, including Aristotle's state-of-the-art, custom-designed systems for the trading engine and trade clearing electronic apparatus and team, due diligence on investors, and anti-money laundering controls. (*Id.*)

B. The Commodity Futures Trading Commission Precipitously Orders the PredictIt Market to Close

On August 4, 2022, the Commission ordered the PredictIt Market to close, without any meaningful explanation or process to the traders, academics, and operating companies affected by that decision (hereinafter "the Revocation"). (App. 23–24.) In a decision spanning two pages, an official Commission letter revoked the 2014 No-Action Relief decision that permitted the standing up and operation of the PredictIt Market. (*Id.*) The Revocation gave only the following reason for shutting down the Market: The Market "has not [been] operated in compliance with the terms

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https://www.wsj.com/articles/a-betting-man-with-a-plan-to-save-america-poker-odds-school-choice-war-climate-policy-donor-markets-prediction-invest-11662755750; Bernard Stanford, *There's a Glorious Website Where You Can Bet on Politicas, and the U.S. Is About to Kill It*, SLATE (Aug. 14, 2022), https://slate.com/business/2022/08/predictit-cftc-shut-down-politics-forecasting-gambling.html; Victor Reklaitis, *Betting Markets Now See Democrats keeping Their Grip on Senate in Midterm Elections*, MARKETWATCH (Aug. 4, 2022); A.G. Gancarski, *Donald Trump Retakes 2024 Prediction Market Lead from Ron DeSantis*, FLA. POL. (July 7, 2022), https://floridapolitics.com/archives/537385-donald-trump-retakes-2024-prediction-market-lead-from-ron-desantis/; UBS Editorial Team, *ElectionWatch: Potential Outcomes of the Midterms*, UBS (Apr. 22, 2022), https://www.ubs.com/us/en/wealth-management/insights/market-news/article.1563885.html.

of" the No-Action Relief decision. (App. 24.) It provides no detail or explanation of how or why the Market was operated not in compliance with the Commission's restrictions. (App. 23–24.)

Importantly, the Revocation not only commanded the Market to close, but it provided specific instructions as to how it must close:

> Letter 14-130 is hereby withdrawn and, as such, is not available for listing or operation of any new or related contracts. To the extent the University is operating any contract market, as of the date of this letter, in a manner consistent with each of the terms and conditions provided in [the No-Action Relief decision], all of those related and remaining listed contracts and positions comprising all associated open interest in such market should be closed out and/or liquidated no later than 11:59 p.m. eastern on February 15, 2023.

(App. 24.) In doing so, the Revocation mandated all contracts in the Market to be liquidated on or before February 15, 2023. (*Id.*) The agency provided no explanation for this arbitrary cut-off date, which will force the premature liquidation of up to 75 contracts, the deciding of event of which will or may not occur before February 15, 2023. (*Id.*; App. 5, ¶ 15.) Importantly, many of these contracts address the outcome of the 2024 presidential nomination and election.[3] As of the date of the Revocation, 14,478 individual traders (including lead Plaintiffs Clarke and Boeckmann) have positions in markets that turn on events occurring after the Commission's arbitrarily chosen February 15, 2023 date. (App. 5, ¶ 15; App. 30, ¶ 4; App. 33, ¶ 4.)

The Revocation also mandated the PredictIt Market to cease "listing or operation of any new or related contracts." (App. 24.) That command prohibits serving an existing event market for an election by adding a contract for a new candidate who enters a race or otherwise becomes

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[3] *See, e.g., Who will win the 2024 Republican presidential nomination?*, PREDICTIT, https://www.predictit.org/markets/detail/7053/Who-will-win-the-2024-Republican-presidential-nomination; *Which party will win the 2024 U.S. presidential election?*, PREDICTIT, https://www.predictit.org/markets/detail/6867/Which-party-will-win-the-2024-US-presidential-election; *Will a woman be elected U.S. president in 2024?*, PREDICTIT, https://www.predictit.org/markets/detail/7013/Will-a-woman-be-elected-US-president-in-2024.

viable. (*Id.*) The inability to add supplemental contracts to those election event markets in existence as of the date of the Revocation will distort event markets on particular elections and will harm the investors in them and the observers who study them, as these markets inevitably will miss a significant possible outcome of the election. (App. 36–37, ¶ 9; App. 63, ¶ 7.) In some cases, the distortion could render the data created by an election event market useless and create a situation where no investor receives a return on his investment for a particular election, all because the Commission had prohibited the simple adding of a candidate who emerged as viable. (App. 5, ¶ 16; App. 63, ¶ 6.)

Plaintiffs Kevin Clarke and Trevor Boeckmann are being harmed already by distortions in the contract markets that will terminate early, a harm that will not stop unless the Commission's action is enjoined. (App. 31, ¶¶ 8–9; App. 32, ¶ 11; App. 34, ¶¶ 8–9.) Traders are attempting to salvage their investments, either by withdrawing their assets from the Market entirely or attempting to predict what the prevailing belief about the outcome of events will be on the cut-off date, rather than what the outcome will actually be. (*Id.*)

Mr. Clarke, for example, often invests in lower-value PredictIt Market contracts that are believed to reflect less likely outcomes early in the life cycle of an event market. (App. 30, ¶ 7.) The market distortions occurring now are depriving Mr. Clarke of the ability to exit these contracts at a profit during fluctuations in the price, as the Commission's February 15, 2023 crash landing has unmoored trading from views about the actual outcome of the event. (*Id.*) Messrs. Clarke and Boeckmann also will be stripped of the opportunity to redeem correct-outcome contracts for one dollar because the triggering outcome will not occur before liquidation. (App. 30, ¶ 7; App. 34–35, ¶ 9.)

In addition, the distortions are corrupting the data related to event contracts predicting the outcome of the 2024 presidential elections that researchers, like Professors Crane and Smidt,

intend to study. (App. 37–38, ¶¶ 9–10; App. 63, ¶ 7.) As trader volume on the Market decreases, the Market is becoming less liquid and its data less reliable. (App. 11.) Researchers will also be unable to operate under the basic assumption that investors are trading (at least in part) based on what they believe the outcome of an event will be. (App. 63, ¶ 7.)

The Revocation is also causing significant damage to Aristotle and PredictIt, as they address the quagmire of premature liquidation. They are incurring significant administrative costs to comply with the Commission's arbitrary decision, which provides no guidance as to *how* prematurely liquidated contracts should be ended. (App. 5–6, ¶ 17.) Should those contracts be cashed out at their percentage trading price as of the date of liquidation? Should they be cashed out at the price investors initially paid for the contracts? Or should some other rule apply? (App. 5, ¶ 16.)

The Commission has provided no indication that it considered the consequences of its edicts on existing trading or that it considered less disruptive alternatives to premature liquidation of existing contracts. (App. 23–24.) It has made no attempt to justify the imposition of February 15, 2023, as the date by which all PredictIt Market contracts must terminate. (*Id.*) And it has made no claim that the continuation of existing contracts or the addition of new related contracts would somehow be "contrary to the public interest." (*Id.*; App. 20.)

ARGUMENT

The arbitrary and capricious Revocation has created an administrative nightmare that will continue to harm Plaintiffs during the pendency of this litigation, absent a preliminary injunction. Plaintiffs respectfully request that the Court enjoin, pending a final decision in this matter, the Revocation's mandate to liquidate all pending contracts before February 15, 2023, and its prohibition against adding supplemental contracts for new candidates in elections covered by an existing event market. The requested preliminary injunction does not seek to stay the entire

Revocation or to authorize the addition of contracts to the Market at will. Instead, this motion is targeted at abating the current and avoiding the future disruption of the Market's preexisting contracts that would be prematurely terminated under the Revocation. That disruption is causing irreparable harm.

The Administrative Procedure Act ("APA") recognizes the importance of granting preliminary relief to prevent irreparable injury during a pending judicial review of an administrative decision. 5 U.S.C. § 705. "In order to obtain a preliminary injunction, a movant must demonstrate (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction does not issue; (3) that the threatened injury outweighs any harm that will result if the injunction is granted; and (4) that the grant of an injunction is in the public interest." *Moore v. Brown*, 868 F.3d 398, 402–03 (5th Cir. 2017). Courts take each question in turn, but in the final analysis, "[l]ikelihood of success and irreparable injury to the movant are the most significant factors." *Louisiana v. Becerra*, 20 F.4th 260, 262 (5th Cir. 2021).

Plaintiffs are likely to succeed on the merits. The Revocation is striking for its lack of any explanation, trafficking in the unadorned conclusion that those operating the Market had not complied with the terms of the Commission's decision to allow the Market and lacking any explanation of why dozens of contracts had to liquidate prematurely on February 15, 2023. These shortcomings clearly violate the APA, which requires "reasoned decisionmaking" and an explanation that is not arbitrary and capricious. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020). In addition, agencies must consider alternatives to the policy option chosen and explain why the course the agency selected is superior. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1013 (5th Cir. 2019) (reciting *State Farm* standard). The Revocation contains no indication that the CFTC considered letting existing contracts trade until their natural

conclusion as an alternative to crashing them out of the market in February 2023, much less an explanation of why the February 2023 option is superior.

The requested preliminary injunction—targeted solely at the distortions to the Market that the early 2023 cutoff is creating now—also will prevent irreparable harm. The lead Plaintiff investors Kevin Clarke and Trevor Boeckmann are losing value in their contracts and lack an efficient market in which to trade them solely because of the cutoff. Plaintiff Professors Crane and Smidt are being deprived of reliable Market data for use in their research and teaching. And the entities that assist in operating the market will continue to encounter significant administrative costs in determining how to implement the Commission's arbitrary decision to cut off these contracts early. The Commission—protected by sovereign immunity—is likely insulated from a later monetary judgment that would address this financial harm.

Nor is throwing away all PredictIt Market contracts in the public interest. Nowhere has the Commission articulated why these contracts cannot continue until their natural end. The balance of the equities tips heavily in favor of the requested preliminary injunction, and this motion should be granted.

I. Absent a Preliminary Injunction, the Illegal, Arbitrary, and Capricious Revocation Will Continue Irreparably to Harm Plaintiffs

This motion seeks a preliminary injunction prohibiting the Commission from mandating existing PredictIt contracts liquidate on February 15, 2023, before their natural expiration. That mandate is causing irreparable harm right now, as trading and prices in PredictIt event markets for 2024-election outcomes are already distorted.

Solely because of the Commission's mandate to liquidate early contracts predicting post-February 2023 political outcomes, Plaintiffs Kevin Clarke and Trevor Boeckmann, as well as other Market investors, are being deprived of the value of having carefully invested in what they believe

to be the most likely political outcomes. (App. 30–32, ¶¶ 7–11; App. 34–35, ¶¶ 5–10.) They will not be able to see their contracts through to the end and realize the gain of having predicted correctly. More importantly, they lack a meaningful current option to trade out of their 2024 election contracts, as spot prices are distorted for these contracts due to the Revocation's mandate that they terminate early. (*Id*.) Some investors are trying to speculate about what the general public sentiment towards election outcomes will be on February 15, 2023, rather than the actual outcome of the event; others are just trying to cut their losses, randomly affecting the market price. (App. 30, ¶ 6; App. 32, ¶ 11; App. 34, ¶ 8.) All are losing the monetary value of holding contracts in event markets that, absent the Commission's arbitrary cutoff, would have efficiently traded until the 2024 election results or other triggering events were certified.

The requested injunction focuses on contracts that were existing as of August 4, the date of the Revocation and would otherwise turn on the occurrence of events after February 15, 2023. The requested relief also preliminarily would enjoin the Commission from prohibiting the supplementation of existing event markets regarding the outcome of elections with new candidates or parties as they enter the field. *See, e.g.*, *Who will win the 2024 Republican presidential nomination?*, PREDICTIT, https://www.predictit.org/markets/detail/7053/Who-will-win-the-2024-Republican-presidential-nomination (last visited Sept. 14, 2022). This too is necessary to prevent irreparable harm, as the inability to add a new candidate is distorting trading as new potential outcomes arise. The ban on any supplementation deprives traders of the choice to trade their current contracts if they come to believe a new possible outcome is more likely, and it creates the possibility that an event market could close with no investor earning a profit because an event contract predicting the winning outcome was not offered.

These irregularities in trading behavior also corrupt the integrity of data generated by the Market as traders shift from focusing on the outcome of an event to attempting to salvage their

investments. (App. 37, ¶ 9; App. 63, ¶¶ 6–7.) In the absence of a preliminary injunction, these irregularities will continue and will make data generated by trading in existing PredictIt contract markets worthless to Plaintiff Professors Crane and Smidt, and other academics, who intend to use the data in researching matters relating to the 2024 presidential elections. (*Id.*) Professors Crane and Smidt will be harmed by having to redesign their research plans that involve analyses of PredictIt Market data and their classes that incorporate use of that data. (App. 38, ¶ 10; App. 63, ¶¶ 6–7.)

For their part, PredictIt and Aristotle will be forced to undertake heavy compliance costs, including administrative, labor, time and other costs to force the premature liquidation of dozens of election or other political event contracts collectively with tens of thousands of investors. (App. 5, ¶ 17.)

Many of the harms to the traders and operating companies are economic. When a federal government agency is the entity causing the harm, however, economic damage is irreparable. That is because the federal Government enjoys protections, including sovereign immunity, against a later award of damages to compensate that injury. *Wages and White Lions Invs., LLC v. FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021) (noting, as a general rule, "complying with an agency order later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs . . . because federal agencies generally enjoy sovereign immunity from any monetary damages" (emphasis in original)); *Texas v. EPA*, 829 F.3d 405, 433–34 (5th Cir. 2016) (plaintiffs suffer irreparable harm by economic damage caused by an invalid rule because there is "no mechanism . . . to recover compliance costs they will incur if the Final Rule is invalidated on the merits"); *Teladoc, Inc. v. Tex. Med. Bd.*, 112 F. Supp. 3d 529, 543 (W.D. Tex. 2015) ("imposition of money damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury").

Not only does such irreparable harm support the entry of a preliminary injunction, but it also supports "postpone[ment of] the effective date of action taken by [the CFTC] pending judicial review." 5 U.S.C. § 705; *see Wages and White Lion Invs.*, 16 F.4th at 1143–44 (emphasizing that § 705 confers authority to temporarily "suspend administrative alternation of the *status quo*" to prevent irreparable harm); *Cmty. Fin. Servs. Assoc. of Am., Ltd. v. CFPB*, No. A-18-CV-0295-LY, 2018 WL 6252409, at *1 (W.D. Tex. Nov. 6, 2018) (staying agency rule's compliance date until final judgment under 5 U.S.C. § 705 to avoid irreparable injury).

II. The Public Interest Weighs in Favor of a Preliminary Injunction

The "balance of equities and public interest merge when the Government" is the party opposing a preliminary injunction. *Nken v. Holder*, 556 U.S. 418, 435 (2009). The public interest will not be harmed by the requested injunction. Importantly, the preliminary injunction does not seek to permit entirely new contracts or to overturn the decision eventually to close the Market (although the underlying lawsuit does seek that relief). Instead, it seeks to ensure the continuation of existing contracts until their natural culmination. Nowhere does the Commission explain why the continued existence of markets until their natural culmination or the addition of related event contracts to existing contract markets threaten the public interest.

Crashing investors out of contracts predicting the result of the 2024 elections would not foster "fair and orderly markets," as is the Commission's statutory mandate. 7 U.S.C. § 2. Instead, it would endanger them. Nor is it against the public interest to require compliance with the APA's requirements of reasoned decisionmaking before agency action. Rather, the "public interest is served when administrative agencies comply with their obligations under the APA." *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.C. Cir. 2009); *see also Finlan v. City of Dallas*, 888 F. Supp. 779, 791 (N.D. Tex. 1995) ("the public interest always is served when public officials act within the bounds of the law and respect the rights of the citizens they serve"); *Jackson Port*

Auth. v. Adams, 556 F.2d 52, 59 (D.C. Cir. 1977) ("there is an overriding public interest . . . [in] an agency's faithful adherence to its statutory mandate"); *Kentucky v. Biden*, 23 F.4th 585, 612 (6th Cir. 2022) ("the public's true interest lies in the correct application of the law"); *California v. Health and Hum. Servs.*, 281 F. Supp. 3d 806, 831 (N.D. Cal. 2017).

Plaintiffs strongly disagree that a Commission order to wind down the Market is in the public interest. Even putting that broader question aside for purposes of this motion, there is certainly no public interest in the Commission's selected manner of closing the Market: That is, prematurely terminating the 2024-election contracts and other political event contracts that may not naturally resolve before February 2023. With regard to election contracts, the preliminary injunction seeks only to allow those contracts to trade until their natural conclusion in the certified results of the 2024 primary and general elections and to permit the addition of new candidates as they emerge. There is not even an unexplained hint in the Revocation that such contracts are now against the public interest.

III. Plaintiffs Are Likely to Succeed on the Merits of Their APA Claims

Plaintiffs are likely to demonstrate that the CFTC's Revocation—particularly the Revocation's command to prematurely terminate existing contracts and prohibition on offering related contracts—violate the APA. The Revocation is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and "without observance of procedure required by law." 5 U.S.C. §§ 558, 704, 706(2)(A), (D).

To show that they are likely to succeed on the merits of their claims, the Court need only find that Plaintiffs have "raised questions going to the merits so substantial as to make them fair ground for litigation and thus more deliberate investigation." *Finlan*, 888 F. Supp. at 791; *see also Lakedreams v. Taylor*, 932 F.2d 1103, 1109 n.11 (5th Cir. 1991) ("movant need not prove his case" to establish a likelihood of success on the merits). That is undoubtably the case here.

A. The Revocation is "Arbitrary, Capricious, an Abuse of Discretion, and Otherwise Not in Accordance with Law"

The APA prohibits an agency from taking any final action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and "without observance of procedure required by law." 5 U.S.C. §§ 558, 704, 706(2)(A), (D). The CFTC's Revocation violates this statutory command for at least three reasons.

First, the Commission failed to engage in reasoned decisionmaking when revoking the No-Action Relief or to provide any explanation for its action that was not arbitrary and capricious. The Supreme Court has stated that any agency action "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made." *State Farm*, 463 U.S. at 43; *State v. Biden*, 10 F.4th 538, 552 (5th Cir. 2021) ("agency action [must] be reasonable and reasonably explained").

Far from considering relevant data and reasonably explaining its decision, the CFTC's only explanation for the Revocation was to summarize the general scope of the No-Action Relief and summarily state: "The University has not operated its market in compliance with" the No-Action Relief decision. (App. 24.) The Revocation includes *no* facts to support the conclusion of noncompliance or to even determine the nature of the alleged noncompliance. And there is *no* evidence that the CFTC staff considered the legitimate reliance interests of investors or the Market entities, the beneficiaries of the No-Action Relief that allows the PredictIt Market (academic, economic, or otherwise). The absence of any serious explanation for the decision to change course and to revoke the Commission's permission for the Market to operate renders it arbitrary and capricious. *See State Farm*, 463 U.S. at 50 (finding revocation of automotive safety requirement arbitrary and capricious where "the agency submitted no reasons at all" for the revocation); *Am. Stewards of Liberty v. Dep't of the Interior*, 370 F. Supp. 3d 711, 278–79 (W.D. Tex. 2019)

(vacating agency's determination on plaintiffs' determination and remanding for the agency to consider relevant information).[4]

Second, the Revocation's mandates for the manner of closing the market—in particular its selection of a February 15, 2023 to liquidate all contracts—clearly violate the APA. The February 15, 2023, liquidation date was picked from thin air, without regard for the timing of the event that settles the contract. That is the definition of "arbitrary" action: "Coming about seemingly at random or by chance; determined by individual preference or convenience than by the necessity or intrinsic nature of something." *Arbitrary*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1981). And arbitrary agency behavior is what the APA prohibits. 5 U.S.C. § 706. Not only is there no explanation of why this date was chosen, there is no indication that the Commission considered alternatives to the remedy it ordered. The most obvious would be to prohibit the creation of brand-new election or political question event markets, but allowing existing markets to continue trading until their natural conclusion. This alternative would have spared the present

[4] Some Commission officials have orally communicated their view that PredictIt opened certain event markets that were outside the substantive scope of contracts permitted by the Commission's No-Action Relief decision. (ECF 1, ¶ 64(c).) According to those officials, the No-Action Relief decisions permitted only those contracts directly related to the outcome of U.S. elections. *Id.* This explanation for the Revocation decision is written down nowhere. But, to the extent that this is the basis for the agency's mandate to close the market, it is arbitrary and capricious. The No-Action Relief decision approved Victoria University's application, which clearly sought permission to offer contracts on election outcomes *and other significant political questions* that do not involve war, terrorism, or assassination. (ECF 1, ¶ 48; App. 10.) In this regard, the Market has offered contracts, from its inception, on significant political questions unrelated to elections, such as the next Supreme Court nominee or the passage of federal legislation. (ECF 1, ¶ 64(c).) In any event, if the agency wanted to trim the scope of contacts to be offered, it was arbitrary and capricious to do so by closing the market and certainly by mandating the premature termination of contracts existing on the date of its decision. The APA requires reasoned decisionmaking in reaching a policy decision and determining how to implement it. *Texas v. United States*, 524 F. Supp. 3d 598, 652 (S.D. Tex. 2021) ("'reasoned decisionmaking' . . . necessarily means that not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational").

disruption in and distortion of the current markets, while permitting the Commission to serve whatever objective it has in seeking ultimately to close the PredictIt Market.

Nothing is clearer under the APA than the requirement to consider alternatives to an agency's policy choice that are less disruptive to regulated parties and to explain why its choice is superior. *State Farm*, 463 U.S. at 50; *State v. Biden,* 10 F.4th at 552–53. An agency need not boil the ocean for every alternative, but when another course of action is obvious and presented by the record, it must explain why that option is not appropriate. *District Hosp. Partners, LP v. Burwell*, 786 F.3d 46, 69 (D.C. Cir. 2015) (observing agency action is arbitrary and capricious "if it fails to consider significant and viable and obvious alternatives"). None of that happened here. The Revocation contains a command of a February 15, 2023 termination date, but no explanation why the 75 contracts that would naturally resolve after that date cannot continue trading thereafter. This feature of the Revocation is causing acute, unnecessary, and irreparable harm to investors. And it is this arbitrary outcome that the requested preliminary injunction addresses.

Third, the Commission failed to "follow[] procedures prescribed by statute" when revoking its No-Action Relief. *Am. Stewards of Liberty*, 370 F. Supp. 3d at 724–25. Section 558(c) of the APA prohibits "the withdrawal, suspension, revocation, or annulment of a license" only if the licensee has been given –

> (1) notice by the agency in writing of the facts or conduct which may warrant action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements."

5 U.S.C. § 558(c).

The No-Action Relief was a license. The APA establishes a broad definition of a "license" to include "an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." 5 U.S.C. § 551(8). Courts have found that this broad

definition includes instances, like here, where an agency grants permissions that allow an entity to avoid or modify compliance with administrative procedures or requirements. *Pillsbury Co. v. United States*, 18 F. Supp. 2d 1034, 1036, 1038 (Ct. Int'l Trade 1998) (holding letter issued by U.S. Customs Service granting Pillsbury permission to use certain expedited procedures for filing for refunds and remissions on customs duties and waiving other pre-export notice requirements was a "license" within the meaning of § 558 of the APA); *Atlantic Richfield Co. v. United States*, 774 F.2d 1193, 1199–1202 (D.C. Cir. 1985) (Maritime Administration approvals held by subsidized shippers for conditional entry in Alaskan-Panama Canal domestic oil trade held to be APA-protected licenses); *Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067, 1072–76 (7th Cir. 1982) (permits issued pursuant to Customs regulations allowing for expedited entry of certain imports constituted licenses under the APA).

In this case, the Revocation provides no detail as to how the Market "has not [been] operated in compliance with the terms of" the No-Action Relief. (App. 24.) To the extent it is alleged that an event contract or contracts were outside the parameters of the No-Action Relief, no such notice was provided in writing, and the Revocation does not identify the offending contracts, much less does it give anyone an opportunity to defend them or to propose another remedy for these alleged shortcomings. The APA recognizes that an agency's power to permit private activity is mighty and that suddenly turning off that permission can cause severe disruption and wipe out substantial investment. For that reason, affected parties must be given an opportunity to demonstrate why the agency is wrong before permission is revoked. 5 U.S.C. § 558. That did not happen here.

B. Other Threshold Requirements for APA Relief Are Satisfied in this Case

All of the other requirements for relief under the APA are met here. The Plaintiffs have exhausted their administrative remedies, and the Revocation is a final agency action. It constitutes

the "consummation" of the CFTC's decisionmaking process and determines "rights and obligations" of the parties and carries legal consequences. *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (defining "final agency action" within meaning of Administrative Procedure Act, 5 U.S.C. § 704); *Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019). The "Supreme Court has long taken a pragmatic approach to finality, viewing the APA's finality requirement as flexible." *Id.* at 441. Both the CFTC's regulatory regime and the Revocation's practical effect strongly support the conclusion that the No-Action Relief is final and justiciable.

The decision to issue no-action relief—as well as the decision revoking it and prescribing in detail how the Market must close—was not some informal opinion by a subordinate agency official. It was the consummation of an agency decisionmaking process that is set out in the agency's own regulations. *See* 17 C.F.R. § 140.99. There, the Commission fully delegated the authority to issue no-action relief to its Division of Market Oversight ("DMO") and provides no higher authority (such as the Commission itself) from which to obtain such a decision. *Id.* § 140.99(a)(2), (b)(1). Most importantly, the regulations provide no procedure or ability to appeal the Division's decision to grant, deny, or revoke no-action relief. In the Fifth Circuit, the absence of a requirement—much less a mere ability—to appeal an agency official or division's decision is the hallmark of final agency action. *Amin v. Mayorkas*, 24 F.4th 383, 390 (5th Cir. 2022) (holding agency action USCIS adjudicator was final despite availability of administrative appeal process because appeal process was not mandatory); *see also W. Ill. Home Health Care, Inc. v. Herman*, 150 F.3d 659, 662 (7th Cir. 1998) (noting "the core question is whether the agency has completed its decisionmaking process," and finding agency's subordinate official's action was final where official had been delegated "authority to make a decision binding on the recipient of the letter" and there was no internal mechanism to appeal).

The Revocation also determines the "rights or obligations" of Plaintiffs and "legal consequences . . . flow" from it. *Bennett*, 520 U.S. at 177–78. In *Sackett v. EPA*, 566 U.S. 120 (2012), the Supreme Court held that legal consequences flowed from an EPA compliance order because it exposed the plaintiffs to penalties if they continued operating as planned. *Id.* at 121. So too here. Though the Revocation does not itself impose sanctions on anyone, it exposes regulated parties to penalties if its detailed commands are not followed. *See id.* at 129 ("the APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction"); *see also U.S. Army Corps of Engineers v. Hawkes Co*., 578 U.S. 590, 600 (2016) ("As we have long held, parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of 'serious criminal and civil penalties.'"). In short, the Revocation has detailed, non-appealable prescriptions of how the PredictIt Market must shut down, and "affected parties" would be "reasonably led to believe that failure to conform" with the Revocation's prescriptions "will bring adverse consequences." *Texas v. EEOC*, 933 F.3d at 442.

CONCLUSION

Plaintiffs do not seek to continue offering new event contracts until it prevails in a final order resolving this litigation. But, for the reasons stated above, Plaintiffs seek a preliminary injunction enjoining the CFTC from taking any action to enforce the provisions of the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*, or CFTC regulations, 17 C.F.R. § 1.1 *et seq.*, against Plaintiffs based on their continued offering of political-event contracts on the PredictIt Market that: (1) were initially offered on or prior to August 4, 2022; or (2) are offered after August 4, 2022 to fill gaps—*i.e.*, provide for yet unknown event outcomes—in existing contract markets, *e.g.,* yet-unknown candidates for the 2024 presidential election. For the reasons stated above, the four-part test for preliminary relief is satisfied here, and the Court should issue the requested preliminary injunction.

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Respectfully submitted,

/s/ Michael J. Edney

Michael J. Edney
HUNTON ANDREWS KURTH LLP
2200 Connecticut Avenue, NW
Washington, DC 20037
T: (202) 778-2204
medney@huntonak.com

John J. Byron
STEPTOE & JOHNSON LLP
227 West Monroe Street
Suite 4700
Chicago, Illinois 60606
T: (312) 577-1300 / F: (312) 577-1370
jbyron@steptoe.com

Attorneys for Plaintiffs Kevin Clarke, Trevor Boeckmann, Harry Crane, Corwin Smidt, Aristotle International, Inc., and Predict It, Inc.