**N THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

KEVIN CLARKE, ET AL.,

Plaintiffs,

v.

COMMODITY FUTURES TRADING COMMISSION,

Defendant.

Case No. 1:22-cv-00909

The Honorable Lee Yeakel

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION TO TRANSFER VENUE

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Plaintiffs oppose Defendant the United States Commodity Futures Trading Commission's ("CFTC's") Motion to Transfer Venue (ECF No. 8).

INTRODUCTION

The CFTC would prefer to litigate this case on its home turf in the United States District Court for the District of Columbia and asks this Court to transfer the case there. But more than sixty years ago Congress acted to prevent just this kind of maneuver, undoing a prior state of affairs in which nearly *every* case filed against *any* federal agency had to be brought in the District of Columbia. The resulting statutory provision—Section 1391(e) of U.S. Code Title 28—authorizes a plaintiff challenging the actions or omissions of a federal agency or officer to bring that case where he resides. 28 U.S.C. § 1391(e)(1)(C). Congress decided that federal agencies that seek to regulate with nationwide effect must be prepared to defend their decisions before federal courts in places where the governed are affected by those decisions.

Carrying out that congressional mandate, the lead Plaintiff in this case—Mr. Kevin Clarke, an Austin businessman—chose to challenge the CFTC's arbitrary decision to terminate his political futures contracts in the Western District of Texas. He is joined by numerous other investor plaintiffs from the Western District of Texas and around the country, as well as academics and companies damaged by the Commission's decision, who also chose this forum. The Fifth Circuit has made clear that the Plaintiffs' choice of venue "should be respected" unless another location is "*clearly* more convenient." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 (5th Cir. 2008) (en banc) (emphasis added).

The CFTC comes nowhere close to meeting this heavy burden of disturbing the Plaintiffs' choice of venue. The Commission speaks of this case as if it concerns some kind of car accident in the District of Columbia, with regard to which eye witnesses located there may be strained by traveling to a lengthy trial in Austin. But this is a case brought under the Administrative Procedure

Act. Such cases do not generally involve any trial; they are resolved by the Court through cross-motions for summary judgment. *Delta Talent, LLC v. Wolf*, 448 F. Supp. 3d 644, 650 (W.D. Tex. 2020) (Yeakel, J.). And Administrative Procedure Act cases are limited *to reviewing the adequacy of the record leading to the agency's decision*. *Id.* The agency's task in this case is to assemble that record, to produce it to the Court and the Plaintiffs, and to defend its decision to prematurely liquidate investor contracts trading on the PredictIt Market on the basis of that record. None of that is hampered or made more difficult by proceeding in Austin. The Federal Reports are full of cases where government agency decisions that are made in Washington, but have effects in Texas, are challenged in Texas federal courts—the decisions of which are subject to review by the Fifth Circuit and the Supreme Court of the United States. There is nothing about the CFTC's decision here that suggests that it should be the exception to the long-standing practice of entertaining challenges to federal government actions in Texas federal courts.

Because Congress specifically intended for plaintiffs to litigate cases like this one outside the District of Columbia, and because the CFTC comes nowhere close to carrying its significant burden of displacing Plaintiffs' choice of venue, this Court should deny the motion to transfer.

BACKGROUND

For seven years, the PredictIt Market has allowed individual investors to trade contracts based on their prediction of the outcome of a future election or other significant political event. This Market was established based on a 2014 CFTC decision permitting its operation. On August 4, 2022, the CFTC decided that the PredictIt Market had to close and mandated that investor contracts all be liquidated on or before February 15, 2023. That decision had a direct and immediate impact on Plaintiffs Kevin Clarke and Trevor Boeckmann, longtime traders in contracts on the PredictIt Market who held positions on contracts regarding, among other things, the outcome of the 2024 U.S. Presidential elections. The CFTC's decision—picking a date out of thin

air for forced liquidation of Messrs. Clarke and Boeckmann's contracts—immediately put their investments at risk.

Plaintiffs Clarke and Boeckmann are being injured right now due to the agency's decision to force them out of their contracts, arbitrarily, on February 15, 2023. They made predictions about the outcome of elections, backed them with investments, and, solely because of the Commission's decision, are being deprived of the opportunity to see those investments through to when the election's outcome is known. Declaration of Kevin Clarke in Support of his Motion for a Preliminary Injunction, ECF No. 12-2 at 30. Even if Messrs. Clarke and Boeckmann wanted to cut their losses and sell today, their efforts to do so would be hampered by the severe distortions in the market caused by the agency's precipitous announcement. Because of the agency's pronouncement, current trading in the market has less to do with whether investors' current predictions will occur, and more to do with investors scrambling to unwind their positions. ECF No. 12-2 at 32. This lawsuit seeks to remediate the mess the Commission's action has made of Messrs. Clarke and Boeckmann's investments.

Messrs. Clarke and Boeckmann, along with two academics and the companies that service the PredictIt Market, brought suit against the CFTC on September 9, 2022. Around the time of this filing, seven new plaintiffs are joining the case, several of whom are traders in the market and residents of the Austin area. *See* First Amended Complaint, ECF No. 14.

The effect on investors is the main event of this case. As a reflection of that reality, the Plaintiffs filed a motion for a preliminary injunction on September 30, 2022, focused exclusively on allowing investors' current contracts to continue trading past February 15, 2023, and until their natural conclusions. That injunction would restore integrity to the markets, refocus trading on participants' current predictions of the outcome of elections, and allow Messrs. Clarke and

Boeckmann to see their investments through to their logical conclusions or to trade them in the interim with other investors who are trying the predict the outcome of the political event rather than manage the premature termination of their contracts.

ARGUMENT

Section 1404(a) authorizes a district court to transfer a civil action to another district in which the action might have been brought "[f]or the convenience of the parties and witnesses, in the interest of justice." 18 U.S.C. § 1404(a). Section 1404(a), however, is not some invitation for defendants, much less for the federal Government, to choose where they would prefer to be sued. Instead, the plaintiff's choice of forum is to receive nearly dispositive deference, and the case may be moved only if another district is clearly more convenient. *In re Volkswagen*, 545 F.3d at 315. That fundamental maxim of transfer jurisprudence is nowhere to be found in the Government's motion.

The arguments in the Government's motion could be made about any case challenging the behavior of a federal Government agency based in Washington, DC. As the Government would have it, the Government made its decision in Washington, its officials and lawyers are in Washington, and it would be move convenient for them to walk down Pennsylvania Avenue to the federal courthouse and try to avoid scrutiny of their actions there. Yes, the CFTC made a decision to throw PredictIt Market investors out of their contracts, prematurely, destroying the value of those investments nationwide. But, according to the Government, those investors, if they have a problem with what was done, should bring their grievances to Washington.

As explained herein, the Government's position is contrary to the federal venue statute and ignores the dramatic effect that the Commission's decision has had on investors. There is no reason sufficient to overcome the heavy deference placed on the Plaintiff's choice of forum to transfer this case to our Nation's capital.

I. The CTFC Ignores the Heavy Deference Given to the Plaintiffs' Choice of Forum Under Controlling Fifth Circuit Precedent

The CFTC's argument that this Court should disregard or give minimal deference to the Plaintiffs' decision to file this lawsuit in the Western District of Texas runs face first into Fifth Circuit precedent. In the Fifth Circuit, a plaintiff is entitled to "choose the forum," *Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1436 (5th Cir. 1989), and that choice should be "highly esteemed." *Menendez Rodriguez v. Pan Am. Life Ins. Co.,* 311 F.2d 429, 434 (5th Cir. 1962), *vacated on other grounds,* 376 U.S. 779 (1964); *see also In re Volkswagen*, 545 F.3d at 315 (courts in the Fifth Circuit must give "appropriate deference" to the Plaintiffs' choice of venue). As your Honor has put the issue, "[c]ourts generally give great deference to the plaintiff's choice of forum." *21st Century Fin. Servs., LLC v. Manchester Fin. Bank*, No. 10-CV-803-LY, 2012 WL 12883044, at *1 (W.D. Tex. June 29, 2012).

The Plaintiffs here decided to bring this lawsuit in the Western District of Texas. The Plaintiffs brought suit in this District because the lead plaintiff—Kevin Clarke—resides here and suffered harm here. ECF No. 12-2 at 29–32. The CFTC does not argue that filing this lawsuit in this District was improper, nor could it. After all, Congress specifically authorized a plaintiff—like Mr. Clarke—to challenge an action or omission of a federal agency where he resides. 28 U.S.C. § 1391(e)(1)(C).

The CFTC's motion wholly ignores the deference that courts in this Circuit must give to the plaintiff's choice of forum. As set forth in more detail below, there is no reason in this Administrative Procedure Act case, which involves review of the administrative record, to disturb the Plaintiffs' choice of forum.

II. An Administrative Procedure Act Case Challenging a Federal Agency Decision, Like This One, Should Not Be Transferred to Washington at the Expense of a Plaintiff's Properly Chosen Forum

A party seeking transfer in this Circuit must "show good cause" that the proposed venue is "clearly more convenient than the venue chosen by the Plaintiff." *Def. Distributed v. Bruck*, 30 F.4th 414, 433 (5th Cir. 2022) (quoting *In re Volkswagen*, 545 F.3d at 315)). "[I]n the absence of unusual circumstances compelling transfer, courts have not exercised their inherent power to transfer to disturb a party's choice of forum." *Tenneco Oil Co. v. EPA*, 592 F.2d 897, 900 (5th Cir. 1979).

"[W]hen the transferee venue is *not clearly more convenient* than the venue chosen by the plaintiff, the plaintiff's choice should be respected." *In re Volkswagen*, 545 F.3d at 315 (emphasis added). The CFTC does not even come close to meeting its burden of disrupting the Plaintiffs' chosen venue.

The arguments the agency makes in support of transfer—focusing on the Commission having made its decision in Washington and thus the evidence and facts relevant to the case residing there—could be made about any judicial challenge to any federal agency decision. Mot. at 6–10. The Commission's argument ignores both the Congressional decision to permit challenges to federal Government actions in courts throughout the country and the nature of the present case under the Administrative Procedure Act.

First, Congress has squarely considered and rejected the prospect of forcing all claims against D.C.-based federal agencies into the District Court for the District of Columbia. Indeed, that prospect represented the status quo until 1962, and it "was quite unsatisfactory." Charles A. Wright & Arthur R. Miller, 14D Federal Practice and Procedure § 3815 (4th ed. 2022). During that period, several doctrines required litigants to bring cases against federal officers and agencies exclusively in the District of Columbia, "which was extremely inconvenient for plaintiffs who

resided elsewhere." *Id.* Against this backdrop, Congress chose to intervene and widen the venue options for plaintiffs seeking review of federal administrative action. Thus, Section 1392(e) provides that a civil action against a federal agency "may . . . be brought in any judicial district in which . . . *the plaintiff resides* . . . ." 28 U.S.C. § 1392(e)(1)(C) (emphasis added).

Several courts, including the U.S. Supreme Court, have confirmed that the purpose of Section 1392(e) was precisely to avoid sending every case challenging a federal Government decision to Washington, and to permit a plaintiff to challenge federal Government action where he resides. *See Schlanger v. Seamans*, 401 U.S. 487, 489 n.4 (1971) (observing that Section 1392(e) "was enacted to broaden the venue of civil actions which could previously have been brought only in the District of Columbia" (citing H.R. Rep. No. 536, 87th Cong., 1st Sess., 1; S. Rep. No. 1992, 87th Cong., 2d Sess., 2)); *Reuben H. Donnelley Corp. v. F.T.C.*, 580 F.2d 264, 267 (7th Cir. 1978) (explaining that "[t]he congressional purpose in enacting § 1391(e) was indeed to broaden the number of places where federal officials and agencies could be sued," and that "[t]he manner which Congress chose to effectuate this objective was by adding additional venue choices to a plaintiff"). A federal Government that regulates nationwide, Congress decided, should be held to account in federal courts across the country, where the effects of its regulatory decisions are felt. *Pruess v. Udall*, 359 F.2d 615, 618 (D.C. Cir. 1965).

This congressional policy—requiring the federal Government to defend cases in federal courts located where the citizen plaintiffs live—is consistent with fundamental fairness. The arms and actors of the U.S. Government maintain offices in districts across the country and are, of course, very capable of litigating cases in any of those districts. For this reason, any complaint against a Washington-based federal agency must be served on the United States Attorney's office for the district in which the action is brought. Fed. R. Civ. P. 4 (i)(1-2). And allowing plaintiffs

to challenge agency actions outside of the District of Columbia prevents the Government from using its influence as a repeat player to develop precedent—favorable to the Government and protecting agency actions against judicial scrutiny—within a single, special forum.

It comes as no surprise, then, that plaintiffs regularly litigate Administrative Procedure Act claims against Washington-based federal agencies in the Fifth Circuit under Section 1392(e) of Title 28. *See, e.g.*, *Vista Health Plan, Inc. v. United States Dep't of Health & Hum. Servs.*, No. 1:18-CV-824-LY, 2020 WL 6380206, at *1 (W.D. Tex. Sept. 21, 2020) (Yeakel, J.) (considering APA challenge to the Affordable Care Act's risk-adjustment program); *Texas v. United States*, 95 F. Supp. 3d 965, 973 (N.D. Tex. 2015) (considering APA challenge to a Department of Labor rulemaking); *Safety Nat. Cas. Corp. v. U.S. Dep't of Treasury*, No. CIV.A. H-07-643, 2007 WL 7238943, at *1–7 (S.D. Tex. Aug. 20, 2007) (considering APA challenge to the Department of the Treasury's decertification of a corporation as authorized to do business in the United States); *Synthetic Organic Chem. Mfrs. Ass'n v. Sec'y, Dep't of Health & Hum. Servs.*, 720 F. Supp. 1244, 1247 (W.D. La. 1989) (considering APA challenge to Department of Health and Human Services' methodology for classifying carcinogens).

Moreover, courts around the country frequently respect plaintiffs' choice of forum and deny efforts by Government defendants to transfer Administrative Procedure Act cases to the District of Columbia. *See, e.g.*, *Safety Nat. Cas. Corp. v. U.S. Dep't of Treasury*, 2007 WL 7238943, at *7 (S.D. Tex. Aug. 20, 2007) (respecting the plaintiff's choice of venue and denying transfer to the District of Columbia in APA case); *Anunciato v. Trump*, No. 20-CV-07869-RS, 2020 WL 13547186, at *3 (N.D. Cal. Dec. 23, 2020) (same); *Oklahoma v. Dep't of the Interior*, No. 14-CV-123-JHP-PJC, 2014 WL 4705431, at *10 (N.D. Okla. Sept. 22, 2014) (denying transfer to the District of Columbia in case considering APA claim); *Ron Peterson Firearms, LLC v. Jones*,

No. 11-CV-678 JC/LFG, 2012 WL 12863342, at *4 (D.N.M. Feb. 16, 2012) (holding, in APA case, that "it would be an improper exercise of . . . discretion to deny Plaintiff its chosen forum and transfer the case" to the District of Columbia); *Carolina Cas. Co. v. Data Broad. Corp.*, 158 F.Supp.2d 1044, 1048 (N.D. Cal. 2001) (denying transfer of an APA case and observing that "[b]y Defendants' reasoning nearly all APA action should be decided in the District of Columbia, but there is no such rule").

Second, Congress's decision to give U.S. citizens the option to bring their grievances against the Government in the place of their residence should be the beginning and the end of the transfer analysis in this case. That is because this case is based on the Administrative Procedure Act, which sets aside analyses into the location of witnesses and evidence common in considering transfer of a case headed to a trial on the merits. The CFTC admits that questions presented by this Administrative Procedure Act suit limit the importance of any one factor in the traditional transfer analysis. *See* Mot. at 5. In cases like this one, "the district judge sits as an appellate tribunal" and "[t]he entire case on review is a question of law." *Delta Talent*, 448 F. Supp. 3d at 650 (citation omitted). Trial is unnecessary because "[s]ummary judgment serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Id.*

This reality neutralizes many of the convenience factors that courts consider to weight transfer. For example, in a case where the parties agreed that the case would be "decided on the administrative record and cross-summary judgment motions," they also agreed that "the private interest factors . . . [were] neutral." *Permian Basin Petroleum Ass'n v. Dep't of the Interior*, No. MO-14-CV-050, 2015 WL 11622492, at *2 (W.D. Tex. Feb. 26, 2015). The same was true in *Stockbridge-Munsee Cmty. v. United States*, where "Plaintiff and Defendants agree[ed] that th[e]

case [was] to be decided based on the administrative record," so "convenience to witnesses [was] a non-factor." 593 F. Supp. 2d 44, 47 (D.D.C. 2009); *see also Missouri ex rel. Schmitt v. United States Dep't of the Interior-bureau of Reclamation*, No. 2:20-CV-4018-NKL, 2020 WL 3051608, at *3 (W.D. Mo. June 8, 2020) ("If the case is decided on the basis of the administrative record alone, witnesses and outside records will be a nonfactor.").

For this reason alone, federal judges have refused to transfer venue to Washington in Administrative Procedure Act cases challenging agency decisions made in Washington. When the Government moved to consolidate pretrial proceedings in nine different actions challenging EPA's "waters of the United States" rule, the U.S. Judicial Panel on Multidistrict Litigation denied the request, citing the ease of record-based review. *In re Clean Water Rule: Definition of "Waters of the United States"*, 140 F. Supp. 3d 1340, 1341 (J.P.M.L. 2015). Because resolution of each case would "involve only very limited pretrial proceedings," and "[d]iscovery, if any, [would] be minimal" the panel refused to centralize the proceedings in the District of Columbia. *Id.*; *see also In re Dry Bean Revenue Prot. Crop Ins. Litig.*, 350 F. Supp. 3d 1381, 1382 (J.P.M.L. 2018) (deploying the same reasoning to deny centralization); *In re: Lesser Prairie-Chicken Endangered Species Act Litig.*, 109 F. Supp. 3d 1380, 1381 (J.P.M.L. 2015) (same).

Punting this case to the District of Columbia would countermand Section 1392(e)'s explicit legislative purpose and effectively shift the balance of conveniences that Congress chose to strike in cases like this one back in favor of the Government. This Court should refuse CFTC's invitation to return to the days when federal agencies always received home-field advantage. Moreover, as in the *Waters of the United States* decision, the mechanics of addressing a record-based Administrative Procedure Act case, with a record produced to the Court by the agency and cross-

motions for summary judgment, answer the Government's assertions that the location of its faulty decision—Washington, DC—is where this case must be heard.

III. The Commission's Motion, Much Like Its Decision to Crash Land the PredictIt Market, Ignores the Effect of the Commission's Decision on Investors Like Lead Plaintiff and Austin Resident, Kevin Clarke.

The Commission's motion completely ignores the effect of its decision to close the PredictIt Market—particularly the effect of its decision to require premature liquidation of all pending contracts by February 15, 2023—on lead Plaintiff Kevin Clarke and other individual investors. As detailed in the Plaintiffs' motion for a preliminary injunction, individual investors are already being harmed by the Commission's crash landing decision, as the hard February 2023 liquidation date is distorting trading in 2024 presidential election contracts and hampering investors' ability even to salvage their investment by selling. ECF No. 12-1; ECF No. 12-2 at 29–32. It is not an understatement to say that the first phase of the case will focus on whether a preliminary injunction should be granted and thus on the irreparable harm to Plaintiff Clarke caused by the agency's decision.

The record of the agency's harmful impact on individual investors comes not from the Commission having sought out their opinions before concluding its decisionmaking process, but from lead Plaintiff Kevin Clarke and others who have come forward with their experiences in and observations of the market in the wake of the August 4 decision. *See* Declaration of Kevin Clarke, ECF No. 12-2 at 29–32. Indeed, the Clarke declaration is the primary record evidence on the market distortions, and harm, the February 2023 liquidation date is causing now in the marketplace. *Id.* To the extent that this case will require any factual development outside of the administrative record, it will be about this issue and in turn focus on Mr. Clarke's experience making trading decisions in Texas and the economic harm he has been caused in Texas.

The CFTC argues that the District of Columbia represents a better venue because "[t]he Complaint lacks any factual allegations that Mr. Clarke—or any of the alleged 'thousands' of other individual Predict It traders[]—played any role in the relevant CFTC staff's decisionmaking process." ECF. No. 8 at 7. But that is exactly Plaintiffs' point—*the CFTC entirely failed to consider the effects of its revocation decision on individual investors*. The agency provided no notice to investors and did not solicit their views before taking action. It therefore failed to consider "an important aspect of the regulatory problem,"—the unfair and avoidable effect of its decision on investors—in violation of the Administrative Procedure Act. *Amin v. Mayorkas*, 24 F.4th 383, 393 (5th Cir. 2022) ("Agency action is arbitrary and capricious if the agency . . . failed to consider an important aspect of the problem." (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))).

The CFTC nevertheless attempts to minimize Mr. Clarke's connection to this District and argues that the "locus of operative facts" favors transfer. Mot. at 6–9. In other words, the CFTC contends that the case belongs in D.C. because the agency "is headquartered in the District of Columbia" and "the decisionmaking process involve[d] D.C.-based employees." *Id.* at 6. But if that were true, almost every Administrative Procedure Act case against any federal agency could be dragged back to the District of Columbia. As discussed above, Congress expressly considered that prospect and chose to grant plaintiffs greater flexibility when suing federal agencies.

Nor does *Hight v. United States Department of Homeland Security*, 391 F. Supp. 3d 1178, 1181 (S.D. Fla. 2019), control this case. *Hight* is distinguishable on its facts and, in any event, is legally inapposite because it does not apply the Fifth Circuit's binding principles for analyzing a transfer motion under 28 U.S.C. § 1404. Start with the facts. In *Hight*, the plaintiff's *only* connection to the Southern District of Florida was his residence. 391 F. Supp. 3d at 1185. The

federal licensing action at issue, meanwhile, concerned "Plaintiff's work as a pilot on Lake Ontario and the St. Lawrence Seaway," quite literally on the other latitudinal side of the country from the Southern District of Florida. *Id*. Not so here. Kevin Clarke lives in Austin, bought his PredictIt contracts in Austin, and is having the economic value of those contracts destroyed by the Commission's decision in Austin.

Moreover, *Hight*'s general proclamation that "courts generally focus on where the Decision making process occurred to determine where the claims arose" is not binding, and appears confined to cases from the United States District Court for the District of Columbia, which perhaps unsurprisingly held that any problem with the U.S. Government can be handled in the courts of our Nation's capital. 391 F. Supp. 3d at 1185 (citing *Gulf Restoration Network v. Jewell*, 87 F. Supp. 3d 303, 313 (D.D.C. 2015), and *Nat'l Ass'n of Home Builders v. EPA*, 675 F. Supp. 2d 173, 179–80 (D.D.C. 2009)). *Hight* cites no appellate authority of any sort for this proposition. *See id.*

Nor should this Court jettison the transfer analysis applied in the Fifth Circuit for the one that the Southern District of Florida applied. *Hight* engaged in a weighing analysis, counterbalancing the plaintiff's choice of forum as an independent factor against other considerations raised by the defendant in that case. *See* 391 F. Supp. 3d at 1185. But as discussed above, the Fifth Circuit has rejected this approach. Instead of treating the plaintiff's choice of forum as a mere factor to be weighed along with all the others, the plaintiff's choice sets the burden of proof that the defendant must then surmount. *In re Volkswagen*, 545 F.3d at 315 n.10.

The Commission also cites to a list of cases for the proposition that courts "routinely" grant transfers in Administrative Procedure Act cases. Mot. at 8. Like *Hight*, several of those cases are readily distinguishable. *See, e.g.*, *National Ass'n of Life Underwriters v. Clarke*, 761 F. Supp. 1285 (W.D. Tex. 1991) (transferring case because no plaintiff lived in the Western District after

Texas plaintiffs were dismissed for lack of standing); *Munro v. U.S. Copyright Off.*, Case No. 6:21cv00666, 2022 WL 3566456 (W.D. Tex. May 24, 2022) (considering the *different* legal issue of whether venue was proper in the Western District *at all* because the plaintiff did not reside in the district); *Pulijala v. Cuccinelli*, Case No. 1:20cv00822, 2021 WL 9385877 (N.D. Ga. Jan. 22, 2021) (reviewing alien investor suit where "none of the remaining plaintiffs reside[d] in the Northern District of Georgia," and none of them "invested in projects located in the Northern District of Georgia"); *Holovchak v. Cuccinelli*, Case No. 20-210-KSM, 2020 WL 4530665 (E.D. Pa. Aug. 6, 2020) (considering transfer where both parties *agreed* that their claims should be transferred to the District of Columbia).

Even further afield is the Commission's citation of *Gault v. Yamunaji*, L.L.C., No. A-09-CA-078-SS, 2009 WL 10699952, at *5 (W.D. Tex. Apr. 17, 2009). The Commission tries to suggest that case stands for the proposition that any lawsuit attacking the decision of an entity should be brought where the decision was made. Mot. at 7. But *Gault* did not concern a decision of a federal Government agency; it was a wholly private suit by individual plaintiffs against a corporate defendant. And the Court was not deciding whether to transfer to case, but instead whether there was proper venue. As a suit between private parties, the court analyzed venue under Section 1391(b) of Title 28, *not 1391(e), which applies to suits against a federal Government agency*. While 1391(e) allows suit where any plaintiff resides, 1391(b) generally allows suit only where any defendant resides or a substantial part of the events or omissions giving rise to the claim occurred. In short, that case has absolutely no application here.

IV. The Traditional Private and Public Interest Factors Weigh Against Transfer

The Commission attempts to argue that the traditional convenience and public interest factors support a transfer to Washington. In Section II above, Plaintiffs explain that most of the

factors aimed at witnesses and evidence in a case headed to trial simply do not apply to an Administrative Procedure Action case.[1] To the extent they do, a key witness is Mr. Clarke, who resides in Austin, and whose experience and observations of disruptions in the PredictIt Market caused by the Commission's decision are crucial to establishing the irreparable harm supporting Plaintiffs' pending motion for a preliminary injunction. *See* Section III *supra*.

So the Commission tries to create a convenience factor based on the location of counsel and the need for some of them to travel. Mot. at 9. But the Fifth Circuit has held, in no uncertain terms, that "the convenience of counsel is not a factor to be assessed in determining whether to transfer a case under § 1404(a)." *In re Volkswagen AG*, 371 F.3d 201, 206 (5th Cir. 2004) (citing or *In re Horseshoe Ent.*, 337 F.3d 429, 434 (5th Cir. 2003)); *see also Mateos v. Select Energy Servs., L.L.C.*, 919 F. Supp. 2d 817, 823 (W.D. Tex. 2013). Indeed, relying on the convenience of counsel constitutes reversible error. *In re Volkswagen AG*, 371 F.3d at 206 ("[T]he Eastern District Court's reliance on the location of counsel as a factor to be considered in determining the propriety of a motion to transfer venue was an abuse of discretion."); *see also Venable's Constr. Inc. v. Oneok Arbuckle II Pipeline, LLC*, No. 2:20-CV-018-Z-BR, 2020 WL 2841398, at *2 (N.D. Tex. June 1, 2020); *Yates v. Pine Bluff Sand & Gravel Co.*, No. 1:06CV376 (TH), 2006 WL 8441307, at *3 n.2 (E.D. Tex. Oct. 27, 2006).

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[1] In the typical transfer case, courts in the Fifth Circuit apply eight factors: "(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; . . . (4) all other practical problems that make trial of a case easy, expeditious and inexpensive[;] . . . [5] the administrative difficulties flowing from court congestion; [6] the local interest in having localized interests decided at home; [7] the familiarity of the forum with the law that will govern the case; and [8] the avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law." *In re Volkswagen*, 545 F.3d at 315 (citation omitted).

CFTC's arguments that two public interest factors—localized interest and docket congestion—favor transfer to the District of Columbia fare no better. Mot. at 10–11.

As for local interest, the CFTC misapprehends what the localized interest factor requires. Specifically, it argues that the District of Columbia has a localized interest because "all relevant CFTC staff are based" there, and two plaintiffs have principal places of business in the District. Mot. at 10. But the whole point of whether the case is "localized controversy" or is infected by a "local public interest" is whether the local community has an acute interest in the resolution of the case, either because the claimed violation of law is intertwined with a local matter of public policy or has profoundly affected the local citizenry. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 260 (1981) (citation and internal quotation marks omitted); *see* Charles A. Wright & Arthur R. Miller, 15 FEDERAL PRACTICE AND PROCEDURE § 3854 (4th ed. 2022) (describing this factor as especially pertinent "in environmental cases or other matters involving land or matters of local policy"). Examples include a New Jersey court issuing a show cause order why constitutional claims against New York state officers should not be adjudicated in New York, *Brooks v. Dardzinski*, Case No. 14-7474 (JMV), 2016 WL 6806339, at *4 (D.N.J. Nov. 17, 2016), a Virginia court granting a motion to transfer a *qui tam* action against a North Carolina university to North Carolina, *United States ex rel. Thomas v. Duke Univ.*, No. 4:13-CV-17, 2017 WL 1169734, at *1 (W.D. Va. Mar. 28, 2017), and a New York court transferring a dispute about a Connecticut insurance policy arising from an automobile accident in Connecticut to Connecticut, *Meyers v. Allstate Ins. Co.*, No. 08CIV4769DF, 2009 WL 804672, at *1 (S.D.N.Y. Mar. 26, 2009). Of course, the people of the *District of Columbia* have no similar interest in this case being resolved there.

Nor does the CFTC's attempt to claim that "the Western District is substantially more congested than the D.C. District Court" merit transfer. Mot. at 10–11. As an initial matter, the

tables the CFTC cites show a backlog of 928 civil cases over three years old in the District of Columbia, compared with only 240 cases in this District. Administrative Office of the U.S. Courts, U.S. DISTRICT COURTS: COMBINED CIVIL AND CRIMINAL FEDERAL COURT MANAGEMENT STATISTICS (June 30, 2022), https://tinyurl.com/5e8zwkxb. And the historic trends for the median time from filing to disposition in civil cases betray a narrow gap between districts. *Id.* (showing a difference of only 1 month as recently as 2020, and 0.4 months in 2017). In any event, this case is not threatening to upend this Court's jury trial docket; it is an Administrative Procedure Act case to be decided on the agency's record, through cross motions for summary judgment and oral argument by counsel. The Commission's parsing of case-load statistics does not come close to justifying transfer.

Nothing the Government has done in picking through the convenience and public factors is enough to disturb the Plaintiff's choice of forum. This is not an issue on which the defendant can just eke out a narrow victory. Courts in the Fifth Circuit refuse transfer even when the traditional convenience factors weigh slightly in favor of an alternate forum, given the "great deference" to Plaintiffs' choice of forum. *Century Fin. Servs., LLC*, 2012 WL 12883044, at *1 (Yeakel, J.); *see also Def. Distributed*, 30 F.4th at 433 ("The standard is not met by showing one forum is more likely than not to be more convenient."); *Permian Basin*, 2015 WL 11622492, at *5 (even though "one factor weigh[ed] in favor of transfer and the remaining factors [were] neutral," defendants had not "shown good cause" sufficient to demonstrate that the transferee venue was "clearly more convenient"). Against these standards, the Commission's attempt to transfer this case to Washington must be rejected.

CONCLUSION

For the foregoing reasons, the Court should deny CFTC's motion to transfer venue.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this fourth day of October 2022, a copy of the foregoing was filed electronically and was served on counsel of record through the Court's electronic case filing/case management (ECF/CM) system.

/s/ Michael J. Edney
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