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

KEVIN CLARKE, TREVOR BOECKMANN, HARRY CRANE, CORWIN SMIDT, PREDICT IT, INC., ARISTOTLE INTERNATIONAL, INC., MICHAEL BEELER, MARK BORGHI, RICHARD HANANIA, JAMES MILLER, JOSIAH NEELEY, GRANT SCHNEIDER, and WES SHEPHERD,

Plaintiffs,

v.

COMMODITY FUTURES TRADING COMMISSION,

Defendant.

Civil Docket No. 1:22-cv-00909-LY

The Honorable Lee Yeakel

DEFENDANT CFTC'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

At the heart of their preliminary-injunction motion—indeed, this entire litigation—is Plaintiffs' misguided premise that a 2014 "no-action" letter sent by the staff of the Commodity Futures Trading Commission ("CFTC" or "the Commission") to non-party Victoria University of Wellington, New Zealand ("Victoria University" or "the University") was a "license" that gave the University "permission" to operate PredictIt, an online event-contract market, in the United States. According to Plaintiffs, the August 4, 2022 withdrawal of the 2014 staff letter is "final agency action" that "forces" PredictIt to shut down. Plaintiffs ask this Court to undo the withdrawal, and enjoin the CFTC from "taking any action to enforce" any Commodity Exchange Act ("CEA") provision or CFTC regulation against PredictIt. Dkt. 12-1 at 20.

All of this is a mischaracterization and contrary to decades of case law. The 2014 letter was not a license, never determined that PredictIt complied with U.S. law, and did not grant a legal right to do business. That letter merely said that staff in one CFTC division, as a matter of discretion, would not "recommend that the Commission take any enforcement action," Dkt. 12-2 Ex. 2 at 5–6, on terms that the University proposed based on the University's own representations. The University *chose* this route *in lieu of* seeking actual Commission approval such as by formally registering its exchange with the CFTC in a manner that, if granted, would have required *further* formal agency action to revoke. As such, the 2022 withdrawal of the 2014 no-action letter merely withdrew the commitment of one division of agency staff not to give certain advice to the Commission. That is inherently a staff function—making discretionary recommendations to agency leadership. And that staff-level conduct is not judicially reviewable, nor does it subject the Commission to injunctive relief. *See, e.g.*, *Bd. of Trade of City of Chicago v. SEC*, 883 F.2d 525, 529 (7th Cir. 1989) (holding SEC staff no-action letters are not "final

agency action"); *Kixmiller v. SEC*, 492 F.2d 641, 646 (D.C. Cir. 1974) (same).

Each of the following independently defeat the extraordinary relief Plaintiffs seek:

First, the CFTC staff no-action letter challenged here is not reviewable "final agency action" under the Administrative Procedure Act, 5 U.S.C. §§ 551(8), 704.

Second, CFTC staff no-action letters are an exercise of prosecutorial discretion that is unreviewable as a matter of law, 5 U.S.C. § 701(a)(2).

Third, the Plaintiffs are not the beneficiary of the challenged no-action letters and lack Article III standing to assert APA claims on non-party Victoria University's behalf.

Fourth, the sweeping injunction Plaintiffs request—preemptively barring future enforcement action by the Commission—is unavailable as a matter of law.

In addition to these threshold failings that reveal no likelihood of success on the merits, Plaintiffs have failed to carry their heavy burden as to any of the other preliminary-injunction factors. Plaintiffs' motion should be denied for the reasons that follow.

BACKGROUND

A. Introduction to the CFTC and the Federal Regulation of Event Contracts.

The CFTC is the federal agency tasked with enforcing the CEA, 7 U.S.C. §§ 1–26, and promulgating regulations thereunder, 17 C.F.R. pts. 1–190. The CEA vests the CFTC with jurisdiction over commodity derivatives, including futures and swap contracts, and to a lesser extent, the commodities that underlie them. *See* 7 U.S.C. § 2(a)(1)(A). Derivatives are financial instruments, such as futures, options, or swaps, whose price is dependent upon—that is, "derived from"—the value of something else, such as a commodity, debt instrument, or pricing index.[1]

[1] CFTC, *Glossary: A Guide to the Language of the Futures Industry*, https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/CFTCGlossary/index.htm (last visited Oct. 13, 2022).

Relevant here is a class of derivatives known as "event contracts." Event contracts, also known as prediction or information contracts, are derivative contracts whose payoff is based on a specified event, occurrence, or value such as, for example, the value of a macroeconomic indicator, corporate earnings, level of snowfall, or dollar value of damages caused by a hurricane.[2] Under the CEA and CFTC regulations, those seeking to offer event contracts generally must do so as a "registered entity," 17 C.F.R. § 40.11(a)–(c), such as a qualifying designated contract market ("DCM") or swap execution facility ("SEF"), 7 U.S.C. § 7a-2(c)(5)(C)(i). Registration enables the CFTC to supervise DCMs and SEFs so that the Commission, among other things, can make sure that registrants conform their operations to core principles designed to prevent market abuse, ensure financial stability, protect information security, and safeguard systems in the event of a disaster, *id.* §§ 7(d)(12)(A), 7(d)(21), 7b-3(f)(2)(B), 7b-3(f)(13); 17 C.F.R. §§ 37.1401(a), 38.1051(a); ensure that contracts offered for trade are "not readily susceptible to manipulation," 7 U.S.C. §§ 7(d)(3), 7(d)(4), 7b-3(f)(3), 7b-3(f)(4)(B); and ensure position limits are imposed, conflict-of-interest rules are established and enforced, and records are kept and maintained, *id.* §§ 7(d)(5), 7(d)(16), 7(d)(18), 7b-3(f)(6), 7b-3(f)(10)–(12).

B. The Division of Authority between the Commission and its Staff.

The CFTC exercises only that authority delegated to the Commission by Congress and employs various staff to assist the Commission's mission. The CFTC is composed of five Commissioners, each appointed by the President with the advice and consent of the Senate. 7 U.S.C. § 2(a)(2)(A); 17 C.F.R. § 140.10. The CFTC acts only when its five Commissioners vote

[2] *See generally* CFTC, *Contracts & Products: Event Contracts*, https://www.cftc.gov/IndustryOversight/ContractsProducts/index.htm (last visited Oct. 13, 2022).

to do so, and all votes are recorded by the Secretary of the Commission. *See, e.g.*, 17 C.F.R. § 140.12. The CFTC employs staff across thirteen operating divisions and multiple offices nationwide. *See id.* §§ 140.1, 140.2.

CFTC staff in the Division of Market Oversight ("DMO"), among other things, review new applications for exchanges such as DCMs and SEFs and examine existing exchanges to ensure their regulatory compliance with CEA provisions and CFTC regulations. Another division, the Division of Enforcement, investigates and civilly prosecutes violations, if and only if authorized by vote of the Commission. While staff may make recommendations to the Commission, only the Commission itself—acting by vote—is empowered to determine whether applications for DCMs and SEFs should be granted, *see* 7 U.S.C. § 8(a), or to bring an enforcement action. *See* 7 U.S.C. §§ 9(4)(A), 13a-1(a)–(d).

C. Commission-level Registration and Exemptions vs. Staff-level No-action Relief.

For an entity seeking to lawfully offer event contracts for trading in the United States there are different ways they could do so, including either of the following:

First, it could formally apply to the Commission to become a registered DCM or SEF. *See* 7 U.S.C. §§ 7(a), 7b-3, 8(a); 17 CFR §§ 38.3, 37.3. If the Commission grants registration, it can only revoke that registration if it follows certain statutory procedures and makes certain findings. *See* 7 U.S.C. §§ 7b, 8(b), 12a(4). By statute, that decision is then subject to judicial review. *Id.* § 7b. Second, an entity seeking to lawfully offer event contracts could request that the Commission grant what is known as a Section 4(c) "public interest" exemption. CEA Section 4(c) provides that the Commission "may," at its discretion, "exempt any agreement, contract, or transaction (or class thereof)" from certain otherwise-applicable CEA requirements, including registration requirements, "by rule, regulation, or order, after notice and opportunity

for hearing." 7 U.S.C. § 6(c)(1)–(2). Before issuing a Section 4(c) exemption the Commission must make statutory findings that doing so "would be consistent with the public interest and the purposes of [the CEA]," that the transactions will be "solely between appropriate persons," and the exemption will not impede the Commission from discharging its duties. *See id.*

Here, Victoria University chose not to seek either registration or an exemption, and accordingly forewent all of the procedural rules and statutory protections that apply in those contexts. Instead, the University, at all times represented by counsel, chose to request a nonbinding "no-action letter" from DMO staff.[3] Dkt. 12-2 Ex. 1 at 2. Under CFTC Rule 140.99(a)(2), a no-action letter is "a written statement issued by the staff" that addresses "a proposed transaction" or "a proposed activity." 17 C.F.R. § 140.99(a)(2). No-action letters can be "issued by the staff of a Division of the Commission" and state only that the issuing Division "will not recommend enforcement action to the Commission for failure to comply with a specific provision of the Act or of a Commission rule, regulation or order." *Id.*

Under Rule 140.99(a)(2), a no-action letter "represents the position only of the Division that issued it" and "binds only the issuing Division and"—explicitly—"not the Commission or other Commission staff." *Id.* Whether to grant a no-action letter and in what form "is entirely within the discretion of Commission staff." *See id.* § 140.99(b)(1), (e). The Rule states that "[o]nly the Beneficiary may rely" on the letter—which in this case is not the Plaintiffs, but non-party Victoria University. *Id.* And unlike the statutory requirements for revoking a DCM or

[3] Although not mentioned in the Amended Complaint or present motion, Plaintiff Aristotle International, Inc. has previously submitted both an application for registration as a DCM and a petition for a Rule 4(c) Order, which was a request for general rulemaking, not a request to operate PredictIt. *See generally* Letter from John A. Phillips, Chairman and CEO, Aristotle International, Inc. to Sec'y of the Commission regarding CFTC Release No. 8578-22 at 2 (Sept. 23, 2022), https://comments.cftc.gov/PublicComments/CommentList.aspx?id=7311.

SEF registration, nothing in the CEA, APA, or any CFTC regulation imposes any specialized procedural requirements on staff before they may change their views on what to recommend.

Nor does anything in Rule 140.99(a)(2) empower staff to grant or deny a legal right to do business. Contrary to Plaintiffs' characterization, the Rule is not a "delegation" of the Commission's authority. Dkt. 12-1 at 19. Rather, it codifies a preexisting staff practice of answering inquiries about what staff would "recommend … to the Commission" concerning proposed activities. *Requests for Exemptive, No-Action and Interpretive Letters*, 63 Fed. Reg. 3285, 3285 (Jan. 22, 1998). Consistent with the foregoing, DMO's 2014 no-action letter stated:

> Consequently, based upon your representations, DMO will not recommend that the Commission take any enforcement action in connection with the operation of your proposed market for event contracts based upon the operators' not seeking designation as a contract market, registering under the Act or otherwise complying with the Act or Commission regulations.
>
> …
>
> This letter, and the no-action position taken herein, represents the views of DMO only, and does not necessarily represent the positions or views of the Commission or of any other division or office of the Commission. As with all no-action letters, DMO retains the authority to condition further, modify, suspend, terminate or otherwise restrict the terms of the no-action relief provided herein, in its discretion.

Dkt. 12-2 Ex. 2 at 5–6; *see also id*. Ex. 3 at 1–2 & n.4.

ARGUMENT

I. Plaintiffs Must "Clearly" Show Each Preliminary-Injunction Factor To Warrant Extraordinary Relief, Not Merely Raise "Substantial Questions" As To Some.

A preliminary injunction is an "extraordinary and drastic remedy," that is "never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689–690 (2008) (quotation omitted). The required showing is four-fold: (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest. *See Janvey v. Alguire*, 647 F.3d 585, 595 (5th

Cir. 2011). When, as here, the Government is the opposing party, the third and fourth equitable factors "merge." *Nken v. Holder*, 556 U.S. 418, 435 (2009). A preliminary injunction "should not be granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements." *DFO, LLC v. Hammoud*, No. A-13-CA-675-LY, 2014 WL 12479996, at *2 (W.D. Tex. Jan. 29, 2014) (quotation omitted).

As the Supreme Court clarified in 2008, Plaintiffs must show that each preliminary-injunction factor is "*likely*," rather than a mere "possibility." *See, e.g.*, *Winter v. NRDC*, 555 U.S. 7, 22 (2008). Plaintiffs, however, rely on a pre-*Winter* "sliding scale" that would allow for preliminary injunctive relief so long as there are sufficiently "substantial" merits questions that "make them fair ground for litigation and thus more deliberate investigation." *See* Dkt 12-1 at 14 (citing *Finlan v. City of Dallas*, 888 F. Supp. 779 (N.D. Tex. 1995)). The approach urged by Plaintiffs would merely require a "showing of *some* likelihood of success" when "the other factors are strong." *See Cho v. Itco, Inc.*, 782 F. Supp. 1183, 1185 (E.D. Tex. 1991) (emphasis added); *Finlan*, 888 F. Supp. at 791 (citing *Cho*, 782 F. Supp. at 1185). That articulation of the preliminary-injunction standard is no longer tenable. *See, e.g.*, *Dine Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016); *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1295–96 (D.C. Cir. 2009) (Kavanaugh, J., concurring).

While the Fifth Circuit has not yet decided whether some form of the "sliding scale" doctrine may survive after *Winter*, *see Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692, 696 n.1 (5th Cir. 2018), this Court is not "required to perform a sliding scale analysis" and should reject Plaintiffs' invitation to lower the bar they seek to clear. *See, e.g.*, *Hale v. Collier*, No. 1:20-CV-841-RP, 2020 WL 6441099, at *2 (W.D. Tex. Nov. 3, 2020).

II. There Is No Likelihood That Plaintiffs Will Succeed On The Merits.

Plaintiffs' claims fail out of the gate. Because likelihood of success is, at a minimum,

"arguably the most important factor," this Court's analysis of Plaintiffs' motion need proceed no further on concluding this factor is lacking. *Robinson v. Ardoin*, 37 F.4th 208, 227 (5th Cir. 2022) (per curiam) (quoting *Tesfamichael v. Gonzales*, 411 F.3d 169 (5th Cir. 2005)).

a. There is no "final agency action."

A critical prerequisite for judicial review under the APA is that there be "final agency action." 5 U.S.C. § 704. Because there is no "final agency action" here, Plaintiffs' claims are non-justiciable and, for that reason alone, they have no likelihood of success on the merits. *See, e.g.*, *Luminant Generation Co. v. EPA*, 757 F.3d 439, 441 (5th Cir. 2014).[4]

Neither DMO's original no-action letter nor its withdrawal are "agency action" at all. "Under the APA, 'agency action' is a defined term, limited to an 'agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.'" *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (citing 5 U.S.C. § 551(13)). Plaintiffs' theory is that DMO's "No-Action Relief was a license" under the catchall "other form of permission" prong of the APA's definition of "license." *See* Dkt. 12-1 at 17–18 (citing 5 U.S.C. § 551(8)); 5 U.S.C. § 551(8) (defining "license" as "an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission"). In support, Plaintiffs cite case law addressing inapposite compliance waivers granted by other agencies in unrelated customs and maritime contexts for the general proposition that "license" has a "broad" definition. Dkt. 12-1 at 17–18 (citing *Pillsbury Co. v. United States*, 18 F. Supp. 2d 1034, 1036

[4] Fifth Circuit precedent treats the absence of "final agency action" as a lack of subject-matter jurisdiction. *See, e.g.*, *Sierra Club v. Peterson*, 228 F.3d 559, 565 (5th Cir. 2000) ("Absent a specific and final agency action, we lack jurisdiction to consider a challenge to agency conduct."); Fed. R. Civ. P. 12(b)(1). By contrast, the D.C. Circuit views the absence of "final agency action" as a pleading failure under the APA. *See, e.g.*, *Trudeau v. FTC*, 456 F.3d 178, 188–189 (D.C. Cir. 2006) (discussing pleading requirements under 5 U.S.C. § 704); Fed. R. Civ. P. 12(b)(6). That distinction is largely academic here, as Plaintiffs' claims fail either way.

(Ct. Int'l Trade 1998); *Atlantic Richfield Co. v. United States*, 774 F.2d 1193 (D.C. Cir. 1985); *Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067 (7th Cir. 1982)).

But unlike those examples, CFTC no-action letters do not affirmatively "license" or "permit" anyone to do anything. As CFTC regulations make clear, "no-action relief" is merely a statement by the issuing Division that, in staff's discretion, "it will not recommend enforcement action to the Commission" under the terms specified during the pendency of a no-action letter. 17 C.F.R. § 140.99(a)(2). That limited scope stands in sharp contrast to formal registration applications and Section 4(c) exemptive orders issued by the Commission directly. *Cf., e.g.*, 7 U.S.C. §§ 7(a), 7b-3, 8(a); *id.* 6(c)(1)–(2). So no matter how "broadly" the APA's definition of "license" may be framed generally, an "other form of permission" that does not affirmatively "permit" anyone to do anything is not a "license." *See, e.g.*, *Sheridan Kalorama Hist. Ass'n v. Christopher*, 49 F.3d 750, 756 (D.C. Cir. 1995) (explaining that courts have "never" found the term "license" to be "so broad as to encompass failure to disapprove a proposal").

Nor is the challenged no-action correspondence "final." To be "final," the challenged agency action must both: (1) "mark the 'consummation' of the agency's decisionmaking process" rather than being "merely tentative or interlocutory"; and (2) "be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177–178 (1997). The withdrawal of a no-action letter is neither. "[B]y its own terms and under the [CFTC']s regulations," a staff-level no-action letter "does not constitute the consummation of the Commission's decisionmaking process." *See, e.g.*, *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1263 (D.C. Cir. 2018). A staff commitment to "not recommend enforcement action to the Commission," 17 C.F.R. § 140.99(a)(2); Dkt 12-2 Ex. 2 at 5–6 & Ex. 3 at 1, necessarily contemplates further action—namely, the Commission deciding whether or not

to authorize an enforcement action, whether or not on the recommendation of staff. *See* 7 U.S.C. § 9(4)(A) (vesting that authority in "the Commission"). Because a no-action letter standing alone "compels action by neither the recipient nor the agency," no legal consequences flow when such letters are issued or withdrawn. *See, e.g.*, *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 944–945 & n.6 (D.C. Cir. 2012) (holding that FDA warning letters are not final agency action and collecting similar authority).

Although the August 4, 2022 revocation letter states that any contracts within the scope of the no-action letter "should be closed out and/or liquidated no later than 11:59 p.m. eastern on February 15, 2023," Dkt. 12-2 Ex. 3 at 2, the use of "should" rather than mandatory language further confirms that "there has been no order compelling [the non-party University] to do anything." *See, e.g.*, *Holistic Candlers.*, 664 F.3d at 944. The statement reflects nothing more than a staff-specific grace period by which, were those contracts still active, DMO staff might recommend an enforcement proceeding. That is, after all, the limit of the no-action letter's terms—which the University chose to pursue instead of a license—and DMO staff lack the authority to institute enforcement proceedings against PredictIt or otherwise "force the premature liquidation of up to 75 contracts." Dkt. 12-1 at 6. Plaintiffs concede as much, admitting that "the Revocation" they challenge "does not itself impose sanctions on anyone." Dkt. 12-1 at 20.

None of this is new ground. Plaintiffs decline to cite, much less distinguish, any of the cases addressing directly analogous SEC no-action letters. All of that authority confirms that informal staff-level no-action letters are not "final agency action." *See, e.g.*, *Board of Trade of City of Chicago v. SEC*, 883 F.2d 525, 529 (7th Cir. 1989) (holding SEC no-action letters do not constitute "final agency action"); *Kixmiller v. SEC*, 492 F.2d 641, 645–646 (D.C. Cir. 1974) (per curiam) (same); *see also New York City Emps.' Ret. Sys. v. SEC*, 45 F.3d 7, 12 (2d Cir. 1995)

(holding that SEC no-action letters are "interpretive" policy statements that do not require notice-and-comment rulemaking); *Apache Corp. v. Chevedden*, 696 F. Supp. 2d 723, 735 (S.D. Tex. 2010) (Rosenthal, J.) (holding that SEC no-action letters "are nonbinding, persuasive authority" only and do not warrant *Chevron* deference). The same is true here.

In support of their "final agency action" theory, Plaintiffs cite *Sackett v. EPA*, 566 U.S. 120 (2012).[5] The *Sackett* Court addressed a "compliance order" issued by agency staff that constituted "final agency action" because, in Plaintiffs' own words, that order "exposed the plaintiffs to penalties if they continued operating as planned." Dkt. 12-1 at 20. But an EPA "compliance order" is, needless to say, not a CFTC staff "no-action letter." The two are highly distinguishable as a CFTC staff no-action "does not itself impose sanctions on anyone." *Id.*; *see also Luminant Generation*, 757 F.3d at 443–444 (distinguishing *Sackett* and concluding that an EPA "notice of violation" is not "final agency action" because "[i]ssuing a notice of violation does not create any legal obligation, alter any rights, or result in any legal consequences and does not mark the end of the EPA's decisionmaking process."); *Soundboard Ass'n*, 888 F.3d at 1268 (distinguishing the "binding enforcement order" in *Sackett* from a non-final FTC staff letter issued "by staff under a regulation that distinguishes between Commission and staff advice, is

[5] This Court should reject Plaintiffs' further novel proposition that "[i]n 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." Dkt. 12-1 at 19 (citing *Amin v. Mayorkas*, 24 F.4th 383 (5th Cir. 2022)). While unavailability of further intra-agency review may be one of several considerations used to assess the first *Bennett v. Spear* prong, the notion that internal appealability is somehow "the hallmark of final agency action"—notwithstanding that *Bennett* independently requires that "rights or obligations" be "determined"—badly misstates administrative law, whether in the Fifth Circuit or in any other federal court. And *Amin v. Mayorkas* says nothing of the sort. Nor could it, as the *Amin* court was not addressing final agency action as such, but rather exhaustion of administrative remedies. *See* 24 F.4th at 390. Moreover, the very concept of an "appeal" to the Commission of a statement that staff may or may not recommend something to the Commission is nonsensical, further reinforcing the lack of final agency action here.

subject to rescission at any time without notice, and is not binding on the Commission").

This Court need proceed no further.

b. Staff no-action letters reflect an exercise of prosecutorial discretion that is "committed to agency discretion by law."

Plaintiffs' claims additionally fail because the subject of the staff no-action letter they seek to challenge is unreviewable as "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Plaintiffs challenge the withdrawal of a statement that DMO staff will not recommend to the Commission that the Commission bring a civil-enforcement action. As the Seventh Circuit has recognized, such statements are independently unreviewable. *See Chicago Bd. of Trade*, 883 F.2d at 530 (holding that SEC no-action letter "is a classic illustration of a decision committed to agency discretion"). Acts of prosecutorial discretion reflecting "an agency's decision not to prosecute or enforce," which necessarily "involves a complicated balancing of a number of factors" as to how to best prioritize resources, entail a "general unsuitability for judicial review." *Heckler v. Chaney*, 470 U.S. 821, 831–832 (1985). Such decisions are thus "generally committed to an agency's absolute discretion." *Id.* at 831. And that principle applies with equal force in the context of civil-enforcement proceedings. *See, e.g.*, *Citizens for Resp. & Ethics in Washington v. FEC*, 993 F.3d 880, 888 (D.C. Cir. 2021).

c. Plaintiffs, none of whom are the beneficiary of DMO's no-action correspondence, lack Article III standing.

Finally, Plaintiffs lack standing to bring APA claims asserted on Victoria University's behalf. Article III standing entails a three-part showing: (1) an injury-in-fact that is "concrete, particularized, and actual or imminent"; (2) that the injury be "fairly traceable to the challenged action"; and (3) that the injury be "redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). As the parties invoking the Court's subject-matter jurisdiction, Plaintiffs bear the burden of establishing each element. *See, e.g., Shrimpers & Fishermen of*

RGV v. Texas Comm'n on Env't Quality, 968 F.3d 419, 423 (5th Cir. 2020) (per curiam). That burden is heightened here as "it is ordinarily 'substantially more difficult' to establish" standing when the regulated entities directly affected by agency conduct are not parties. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992) (citing *Allen v. Wright*, 468 U.S. 737, 758 (1984)).

The only agency conduct being challenged is a no-action letter sent to Victoria University that, on its face and by the terms of 17 C.F.R. § 140.99(a)(2), is limited solely to the University. Because none of the Plaintiffs are the beneficiary of that letter, and all their downstream harms alleged turn on the non-party University' independent decisionmaking that will proceed independently of the outcome of this litigation, they lack Article III standing to stand in the University's conspicuously empty shoes here. *See, e.g., Nat'l Wrestling Coaches Ass'n v. Department of Educ.*, 366 F.3d 930, 944 (D.C. Cir. 2004) (dismissing challenge to Title IX guidance applicable to colleges and universities brought by third-party wrestling affinity groups for lack of causation and redressability); *see also, e.g., Nat'l Fair Hous. All. v. Carson*, 330 F. Supp. 3d 14, 52 (D.D.C. 2018) (collecting cases applying *National Wrestling*).

Plaintiffs repeatedly—but without support—allege that DMO's August 4, 2022 letter withdrawing the Division's prior no-action letter will "effectively" lead to the end of PredictIt. *See, e.g.,* Am. Compl. ¶ 12 ("The Revocation of the Commission's No-Action Relief effectively means that the PredictIt Market must close."), ¶ 66 (similar). And while their precise chain of causation is unclear, Plaintiffs recognize that non-party Victoria University's intervening decision to continue operating PredictIt (or not) constitutes an indispensable link. *See, e.g.*, Am. Compl. ¶¶ 25, 76.c. Plaintiffs imply—but do not substantiate—that the University's decision to close PredictIt was contingent on DMO's withdrawal letter. *See id.* at ¶ 76.c. But the University is not here to speak for itself. What is more, Plaintiffs further fail to adequately explain how

PredictIt "would be illegal" under the CEA and CFTC regulations only "in the absence" of the 2014 no-action letter that lacks binding legal effect on the Commission or anyone else. Nor do they explain how a court order resurrecting that letter "will alter the behavior of regulated third parties." *See National Wrestling*, 366 F.3d at 938–945; 17 C.F.R. § 140.99(a)(2). Again, the University has not said word one. As such, Plaintiffs have failed to establish Article III standing.

III. None Of Plaintiffs' Unsubstantiated Alleged Harms Are "Irreparable."

a. Because Plaintiffs have not submitted a declaration or any other evidence from Victoria University, the sole no-action beneficiary and operator of PredictIt, their asserted downstream harms are inherently speculative.

"Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with" the fact that "injunctive relief [i]s an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. NRDC*, 555 U.S. 7, 22 (2008). Plaintiffs must submit sufficient evidence to "[c]learly" show a likelihood harms will actually occur; "[a]ssertions of injuries not supported by evidence fail to clearly establish irreparable harm." *ADT LLC v. Cap. Connect, Inc.*, No. 3:15-CV-2252-G, 2016 WL 2897404, at *4 (N.D. Tex. May 18, 2016). That is a "heavy burden." *Id.* (citing *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985)).

Plaintiffs' claimed harms are inherently uncertain and speculative. Specifically, by failing to introduce any evidence substantiating Victoria University's future plans for PredictIt, if any, Plaintiffs have failed to shoulder their heavy burden. Because the "Revocation" of the University's no-action relief "does not itself impose sanctions on anyone," as Plaintiffs concede, their entire theory of harm turns on unspecified practical consequences that allegedly "expose[]" the University (but not Plaintiffs) "to penalties" in the future. *See* Dkt. 12-1 at 20. But the consequences facing the University are merely those faced by any entity in a regulated space presented with the not uncommon "choice" of coming into "voluntary compliance" with a non-

binding legal position expressed by agency staff or risking the "prospect of having to defend itself … should the agency actually decide to pursue enforcement." *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 732 (D.C. Cir. 2003).

Among other things, Plaintiffs have failed to show:

- Whether Victoria University believes that after DMO's withdrawal of the 2014 no-action letter it can nevertheless operate PredictIt lawfully under the CEA and CFTC regulations;
- Whether and how Victoria University will actually continue to operate PredictIt depending on the outcome of this motion for preliminary injunctive relief sought on the University's behalf; and
- If PredictIt will shut down or continue in some modified form in either of those scenarios, and what, if any changes Victoria University will direct as to existing and future contracts.

Because any downstream harms that Plaintiffs fear they will suffer turn entirely on the decisional calculus of a non-party—that is, Victoria University's independent choices whether to continue operating PredictIt and, if so, in what form—the failure to introduce any direct evidence as to those missing links in the causal chain defeats any claim of irreparable harm. Indeed, the fact that Victoria University not only declined to bring its own APA suit or join Plaintiffs', but also submitted no declaration, raises serious doubts about the University's interest in and willingness to pursue future PredictIt operations, regardless of the outcome of this litigation.

To be sure, Plaintiffs do attempt to fill this evidentiary gap with five declarations of their own.[6] But quantity does not equal quality. Plaintiffs cannot show a likelihood that their alleged

[6] *See* Dkt. 12-2 at 1–6 (Declaration of Dean Phillips), 29–32 (Declaration of Kevin A. Clarke), 33–35 (Declaration of Trevor Boeckmann), 36–38 (Declaration of Harry Crane), 62–64 (Declaration of Corwin Smidt).

harms will actually occur with any degree of certainty. Stripping out the (mistaken) legal conclusions that Plaintiffs believe "all contracts must be closed" as a result of DMO's withdrawal letter, *see, e.g.*, Dkt. 12-2 at 37, ¶ 8; *id.* at 63 ¶ 5, their harm allegations are rife with uncertainty and speculation, *see, e.g.*, *id.* at 5, ¶ 17 (noting the "uncertainty regarding which contract markets must be liquidated and when" by PredictIt); *id.* at 32, ¶ 11 (noting the "uncertainty" as to whether and how the PredictIt market will continue offering contracts beyond February 15, 2023); *id.* at 35, ¶ 10 (noting that "it is in unclear which of the contract markets … must terminate immediately" and that is further "unclear how exiting contracts … will or should be valued"). Without more, "[t]he record does not substantiate the granting of an injunction." *See Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985) (rejecting reliance on "unfounded" affidavit assertions that "speculated that multiple lawsuits could be filed" by non-parties to uncertain future effect).

b. Regardless, the economic harms asserted are not "irreparable."

Broadly speaking, Plaintiffs have asserted three categories of harm: (1) the "compliance" costs that will be passed on to the corporate entities that "service" the PredictIt market; (2) monetary losses by individual PredictIt traders who will "not realize the gain of having predicted correctly" when contracts pay out; and (3) the loss of academic research and teaching opportunities. *See* Dkt. 12-1 at 10–13; *see also, e.g.*, Dkt. 12-2 at 5, ¶ 17; *id.* at 30, ¶ 4; *id.* at 33 ¶ 4; *id.* at 38 ¶ 10; *id.* at 63 ¶ 9. For purposes of their preliminary-injunction motion, Plaintiffs rely solely on the first two categories. *See* Dkt. 12-1 at 12–13.[7] Conceding that "economic"

[7] Because Plaintiffs do not include any case-law support or other argument suggesting that their asserted loss of research and teaching opportunities is "irreparable," they have waived that argument. *See, e.g.*, *Paez v. Wal-Mart Stores Texas, LLC*, No. EP-20-CV-00321-DCG, 2022 WL 3216343, at *2 (W.D. Tex. Aug. 9, 2022) ("[W]hen a litigant fails to develop an argument before this Court, that litigant waives that argument."). Regardless, the notion that Plaintiffs

harms are not usually "irreparable," Plaintiffs assert their harms fall under a Fifth Circuit exception when sovereign immunity would preclude recovery. *See id*. (citing, among other cases, *Wages & White Lions Invs., LLC v. FDA*, 16 F.4th 1130 (5th Cir. 2021)).

The injuries Plaintiffs allege, however, are not the sort that "cannot be undone through monetary remedies." *See, e.g.*, *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012). Plaintiffs are, of course, correct that the United States has not waived its sovereign immunity from money damages for APA claims against the CFTC. But were Plaintiffs to "ultimately prevail on the merits of their suit," they would nevertheless still "have recourse" for monetary relief "in the form of subsequent civil suits," *id.* at 279–289—specifically, against Aristotle, PredictIt, and/or Victoria University. To the extent that non-party Victoria University were to decide to cease or alter its PredictIt operations, and to the extent that the manner it chooses to do so actually results in the harms alleged, Plaintiffs here could seek full recompense for their claimed economic harms against the responsible parties. The individual traders could raise identical loss-of-expectation arguments and the corporate entities could raise identical compliance-cost arguments through breach-of-contract suits against the relevant counterparty. *See, e.g.*, Am. Compl. ¶ 27 (alleging that "Victoria University has entered into a market servicing agreement with Aristotle" and that "[p]ursuant to that agreement, … investors that open accounts on the PredictIt Market enter into a contract with Aristotle"). While it is far from clear that any such breach-of-contract suits would prevail, it is the "*possibility* that adequate compensatory or other corrective relief will be available at a later date" that "weighs heavily against a claim of irreparable harm." *See Dennis Melancon*, 703 F.3d at 279 (emphasis added).

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would be entitled to an injunction against a federal agency merely because third-party academics might seek to study conduct that is the subject of a regulatory dispute is, at best, highly dubious.

IV. Plaintiffs Fail To Show That The Balance Of The Equities And The Public Interest Favor A Preliminary Injunction.

Plaintiffs similarly fail to show that the balance of the equities and the public interest favor a preliminary injunction. When addressing these factors, "courts must balance the competing claims of injury" and "consider the effect on each party of the granting or withholding of the requested relief" while "pay[ing] particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter v. NRDC*, 555 U.S. 7, 24 (2008) (quotations omitted). Here, that balancing is straightforward.

Plaintiffs broadly argue that "[c]rashing investors out of contracts predicting the result of the 2024 elections would not foster 'fair and orderly markets'" and further assert the generalized "public interest to require compliance with the APA[]." Dkt. 12-1 at 13–14 (citing 7 U.S.C. § 2). That, of course, is duplicative of their merits and irreparable-harm arguments—and wrong for the same reasons. DMO's withdrawal of its earlier no-action letter does not "crash investors" out of anything, nor has the CFTC or its staff committed any APA violations.

On the other side of the scales is the real and substantial harm to market participants regulated by the CFTC were this Court to hold, for the first time, that 17 C.F.R. § 140.99(a)(2) no-action letters issued by divisional staff constitute "final agency action" warranting injunctive relief against the Commission itself in full-dress APA litigation. Allowing not only any potentially disappointed letter beneficiary, but also any potentially disappointed third party, to seek judicial relief over the "mere informal, advisory, administrative opinions" expressed in staff no-action letters "might well discourage the practice of giving such opinions" in the first place, resulting in "a net loss of far greater proportions to the average citizen than any possible gain which would accrue." *Taylor-Callahan-Coleman Cntys. Dist. Adult Prob. Dep't v. Dole*, 948 F.2d 953, 959 (5th Cir. 1991) (quoting *Nat'l Automatic Laundry & Cleaning Council v. Shultz*,

443 F.2d 689, 699 (D.C. Cir. 1971)). Granting Plaintiffs proposed injunction here—effectively sandbagging the agency and its staff—could, at a minimum, substantially diminish CFTC staff's willingness to engage in such informal dialogue going forward. And by upending Victoria University's *own choice* to seek a staff no-action letter to which the APA does not apply, rather than registration and the regulatory requirements that go along with it, would predictably have a chilling effect on parties' willingness to seek similarly informal action from staff, including guidance across the sundry questions arising under the Commission's jurisdiction over the United States' derivatives markets.

V. Plaintiffs Seek To Circumvent The CEA, CFTC Regulations, And Settled Administrative Law To Preemptively Enjoin The Commission From Taking Any Future Enforcement Action Against PredictIt.

Finally, it is worth noting what Plaintiffs actually attempt to accomplish here. Plaintiffs ostensibly seek to have this Court "vacat[e]" the "Revocation of the No-Action Relief," which would presumably resurrect the 2014 no-action letter and thus reinstate DMO's previous position that it "will not recommend that the Commission take any enforcement action in connection with the operation" of PredictIt. *See* Am. Compl. at 30 ("Prayer for Relief") & Ex. 1 at 5. But in their current motion Plaintiffs ask for much more. Among other things, Plaintiffs request "order[s] enjoining the CFTC"—not merely the DMO staff who issued the no-action letter—"from requiring the liquidation of outstanding contracts on the PredictIt Market before they are settled in the normal course," which DMO cannot and has not ordered in no-action correspondence, regardless of whether the Commission independently determines that continuing such contracts, or any other aspect of PredictIt's operations, violate the CEA or CFTC regulations. *See id.*; Dkt. 12-3 at 1–2 (requesting an order enjoining the Commission from "prohibit[ing] or deter[ing] in any way the PredictIt Market"). And Plaintiffs ask to "enjoin[] 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." Dkt. 12-1 at 20.

Plaintiffs thus ask this Court to preempt any future enforcement action that the Commission may authorize against PredictIt on a theory that non-party Victoria University has a "license" it never sought and was never granted. Not only would that relief work an end-run around the CEA's registration framework, the Section 4(c) exemption process, and Article III standing principles, it also offends the settled principle that federal courts will not preemptively enjoin enforcement actions brought by executive agencies. Instead, the proper course is for the subject of any such action to raise any "legitimate reliance interest[]" that that party might have as an affirmative defense if and only if the Commission actually authorizes proceedings. Dkt. 12-1 at 15; *see, e.g.*, *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 599 (1950) ("[I]t has never been held that the hand of government must be stayed until the courts have an opportunity to determine whether the government is justified in instituting suit in the courts."); *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 157 (D.C. Cir. 2006) ("[W]e have previously found the traditional nonreviewability of prosecutorial charging decisions applicable to administrative cases."). That principle is all the more salient here, as Plaintiffs' broadly framed injunctive relief sought far outstrips the limited remand-for-reconsideration remedy available even were they to prevail on the merits. *See, e.g.*, *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 459–460 (5th Cir. 2015) (citing *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

CONCLUSION

For these reasons, Plaintiffs have failed to show that they are entitled to the extraordinary remedy of a preliminary injunction. Their motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I caused the foregoing Defendant CFTC's Opposition to Plaintiffs' Motion for Preliminary Injunction to be served on the Clerk of the Court using the Court's CM/ECF system, which will send notice to all counsel of record in this case.

/s/ *Kyle M. Druding*
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