IN 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 **HEARING REQUESTED**

PLAINTIFFS' REPLY IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

On August 4, 2022, the CFTC ordered the PredictIt Market to close and specified exactly how and by when it must do so. Most dramatically, the CFTC mandated that PredictIt prematurely liquidate millions of shares in political event contracts, held by private traders, by 11:59 PM on February 15, 2023. These contracts largely turn on the outcomes of elections that occur in 2024, most prominently the U.S. presidential elections. The lead Plaintiffs in this matter invested in these contracts in reliance on the CFTC having permitted the PredictIt Market to be established and the fact that the CFTC, in turn, could not terminate contracts trading in the Market without an explanation. The requested preliminary injunction is *narrowly targeted* against the enforcement of the CFTC's command that all contracts of any kind must end on February 15, no matter what.

No explanation—much less one amounting to the reasoned decisionmaking required by the Administrative Procedure Act ("APA")—has been provided for why the CFTC will not permit these contracts to run their course until the election outcomes they predict occur. Instead, the agency's message to the Court is: "None of your business." The medium for this message is the whole administrative-law toolbox of technical arguments of why the CFTC's decision should receive *no judicial scrutiny*. Most audacious is the agency's argument that the CFTC is not the one causing the February 15, 2023 crash landing of the political event contracts. As the agency now articulates, the Market operators should just ignore the Revocation and keep those contracts going and, if they choose not to, the traders should sue them. Opp. at 17. One missed the agency's articulation of an option to disregard its instructions in its formal "CFTC Letter 22-08," App'x 23-24, which ordered the contracts to be terminated on February 15, 2023, or else.

From there, the CFTC argues that there has been no "final agency action," so there can be no judicial review under the APA. Opp. at 8-12. The agency says that the No-Action Relief green lighting the PredictIt Market, and its abrupt revocation eight years later, is just a bunch of staff

running around with no authority. This claim does not survive a moment's contact with the agency's own regulations. Those regulations set up no-action relief as a tangible form of grace that can be secured from the agency. 17 C.F.R. § 140.99. Unlike in almost every single other precedent on which the agency now relies, the regulations provide no appeal to the Commission when the division to which it has delegated the power to provide this relief revokes it. Court after court has held that, when the decision of an agency official or division is the end of the road, it constitutes final agency action. Here, the Revocation of "no action relief" was the death of the PredictIt Market; it is final agency action under the Supreme Court's flexible and "pragmatic" approach. *See U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 599 (2016).

ARGUMENT

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

The CFTC does not argue that its Revocation was the product of reasoned decisionmaking. How could it? It summarily concluded, with no detail, that the Market operators had not complied with the dictates of its no-action letter. And then it specified the precise manner in which the Market must close, dumping innocent traders out of their investments on February 15, 2023, with no explanation of why less tumultuous remedies would not achieve the agency's objectives.

Without a substantive defense to its conduct, the CFTC turns to a series of equally flawed technical defenses about why its decisions should escape judicial scrutiny. But contrary to the CFTC's suggestion, Plaintiffs need not prove that they are "entitled to summary judgment or . . . certain to win." *French v. Fisher*, No. 1:17-CV-248-LY, 2017 WL 8727483, at *2 (W.D. Tex. Nov. 7, 2017). Plaintiffs need only—and here have— "raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for a more deliberate investigation." *Id.* (quoting *Allied Home Mortg. Corp. v. Donovan*, 830 F. Supp. 2d 223, 227 (S.D. Tex. 2011)).

A. The Revocation Is Judicially Reviewable Final Agency Action

The CFTC ignores a fundamental principle of APA jurisprudence: The Supreme Court has instructed courts to take a "pragmatic" and "flexible" approach when assessing finality and the reviewability of agency action. *Hawkes Co.*, 578 U.S. at 599; *see also Ciba-Geigy v. EPA*, 801 F.2d 430, 435 (D.C. Cir. 1986) (same). The inquiry is about the *real-world effects* of an agency's behavior. The Revocation's instruction to shut down the PredictIt Market by a date certain with dramatic and unfair effects on traders is clearly not insulated from judicial review under this test.

As the CFTC acknowledges, an agency action is final when it (a) "mark[s] the 'consummation' of the agency's decisionmaking process" and (b) determines "'rights and obligations'" or is an action from which "'legal consequences will flow.'" Opp. at 9 (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). The Revocation concluded the CFTC decisionmaking process about the PredictIt Market and its operation. The Commission delegated the entire authority around no-action relief to its divisions. And the CFTC regulations provide no higher authority (such as the Commission) to oversee the provision—and revocation—of no-action relief. 17 C.F.R. §§ 140.99(a)(2), (b)(1) ("Issuance of a Letter is entirely within the discretion of Commission staff."). In other words, when a CFTC division issues no-action relief or revokes it, it does so at the Commission's direction and as its delegate.

Moreover, nothing in the CFTC regulations labels the delegated decisions as non-final or just a first round in the agency's process. *See* 17 C.F.R. § 140.99; *see also id.* at § 140.99(e) (noting that the staff position is communicated in "final form"). Indeed, the regulations provide no procedure or ability to appeal the division's decision to grant, deny, or revoke no-action relief, which is the hallmark of final agency action. *Sackett v. EPA*, 566 U.S. 120, 127 (2012) (finding agency action was final when there was no "entitlement to further agency review"); *see also* Mot.

at 19 (marshalling additional authorities). This means that once the CFTC issued the Revocation, that was the end of the administrative process, demonstrating the finality of the agency's action.

The CFTC's rejoinder is to take broad view of all the agency's authorities and to claim that revoking formal no-action relief is only one small step on a long march to the five Commissioners voting to impose a penalty. Opp. at 9-10. This contention ignores that the agency's formal no-action relief gave birth to the PredictIt Market, the Market and traders organized their affairs around that authorization for eight years, and the Revocation took that authorization away without explanation. Pulling this long-term authorization to operate was in full view of the Commissioners, who were given an opportunity to object. Am Compl. at ¶ 77(d). The CFTC tries to couch the Revocation as mere advice, making much of the fact that it said that Victoria University "should"—rather than must—close the Market and suggesting that this language left the University a choice. Opp. at 10. But the Revocation presented no meaningful choice from the standpoint of Supreme Court precedent. The Supreme Court repeatedly has held that parties need not "wait[ ] for [the agency] to 'drop the hammer' in order to have their day in court." *Hawkes Co.*, 578 U.S. at 600; *see also Sackett*, 566 U.S. at 127 (same); *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 490 (2010) ("We normally do not require plaintiffs to bet the farm by taking the violative action before testing the validity of the law." (cleaned up)). And courts have treated regulatory dictates coupled with enforcement threats from subordinate agency officials—like the one issued by the CFTC in the Revocation—as final agency action subject to immediate review under the APA. *See, e.g.*, *W. Ill. Home Health Care, Inc. v. Herman*, 150 F.3d 659, 662-63 (7th Cir. 1998) (finding letter from assistant director of DOL division that characterized conduct as violation and threatened enforcement was final agency action). This is because those dictates are the consummation of an agency decisionmaking process, determine

rights and obligations, and have legal consequences. *See Texas v. EEOC*, 933 F.3d 433, 442 (5th Cir. 2019) (determining agency guidance reviewable final agency action when "affected private parties are reasonably led to believe that failure to conform will bring adverse consequences").

The cases cited by the CFTC are not to the contrary. Opp. at 9-11. Those cases did not involve an unappealable mandate of an agency, coupled with a threat of enforcement. They all involved either (a) a circumstance in which agency regulations or procedure provided additional internal process following an adverse agency action[1] or (b) a circumstance in which the agency did not issue a mandate for future required action and threat of future enforcement in the absence of taking that action.[2] The Fifth Circuit's *Luminant* case is particularly distinguishable in this regard, as the EPA there was only making a preliminary finding about the regulated entity's historical compliance, perhaps suggesting enforcement action about behavior wholly in the past. *Luminant Generation*, 757 F.3d at 440-41; Opp. at 11. Here, the CFTC is giving forward-looking instructions and threatening sanctions if the University and the market operators do not conform.

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[1] *See, e.g.*, *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1263 (D.C. Cir. 2018) (finding that letter from FTC staff rescinding staff opinion was not final agency action because impacted entity could seek review by Commission); *Holistic Candelers & Consumers Ass'n v. FDA*, 664 F.3d 940, 944 (D.C. Cir. 2012) (finding FDA warning letter was not final agency action because receiving entity could submit additional information to obtain approval or clearance for its device); *Luminant Generation Co. v. EPA*, 757 F.3d 439, 442 (5th Cir. 2014) (finding that EPA notice of violation was not final agency action because regulations provided additional process following notice).

[2] *See, e.g.*, *Board of Trade of City of Chicago v. SEC*, 883 F.2d 525, 529-30 (7th Cir. 1989) (stating that SEC no-action letter was not final agency action because it only contained division's thoughts about whether proposed activity needed to comport with SEC registration requirements and did not put the futures market "in jeopardy" or "under the gun"); *Kixmiller v. SEC*, 492 F.2d 641, 643 (D.C. Cir. 1974) (involving no agency mandate or threat of enforcement); *N.Y. City Emps.' Ret. Sys. v. SEC*, 45 F.3d 7, 9-11 (2d Cir. 1995) (same); *Apache Corp. v. Chevedden*, 696 F. Supp. 2d 723, 725-34 (S.D. Tex. 2010) (same). The CFTC cannot seriously debate that withdrawing an approval to operate, instructing a business to close, threatening enforcement if the business did not close, and not providing a means for a review of that decision is vastly different than what was at issue in these cases. In addition, neither *Apache* nor *Kixmiller* nor *N.Y. City Employees' Retirement System* assessed whether the agency action at issue was final agency action under the APA.

Under the APA, an agency cannot tell a business it must end or face enforcement, while fending off judicial review based on an assertion that its administrative process has not ended.

B. The Revocation Was Not an Unreviewable Exercise of Prosecutorial Discretion

The CFTC makes a half-hearted argument that its actions are unreviewable because they were an exercise of prosecutorial discretion. Opp. at 12. All of the cases cited by the CFTC deal with an agency's decision not to prosecute or enforce. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (discussing decisions not to prosecute); *Bd. of Trade*, 883 F.2d at 531 (considering argument that SEC must take enforcement action); *Citizens for Resp. & Ethics in Washington v. Fed. Election Comm'n*, 993 F.3d 880, 882 (D.C. Cir. 2021) (deciding challenge to decision not to pursue enforcement action). The Plaintiffs in this case do not challenge a CFTC decision not to prosecute. They, instead, challenge the CFTC's decision to revoke its authorization for the PredictIt Market and its mandate for the Market to close by a date certain. Those actions do not fall into the "narrow[]" and "rare circumstances" where a decision is committed to agency discretion and APA review is unavailable. *See Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018).

C. The CFTC's Revocation of the No-Action Relief Is Reviewable as a Revocation of a License Under Section 558(c) of the APA

The CFTC does not dispute that the APA broadly defines what constitutes a license or that the APA expressly permits court review when an agency withdraws a license without notice and an opportunity to be heard. Opp. at 8-9. The CFTC, instead, argues that the No-Action Relief was not a license because it did not "'permit' anyone to do anything." *Id.* at 9.

But the content of the No-Action Relief letter belies the CFTC's contention. The entire purpose of seeking No-Action Relief was to request that the CFTC "allow" Victoria University "to operate" the PredictIt Market without being required "to register" under the Commodity

Exchange Act. App'x at 16-17. That the No-Action Relief also included a division promise not to recommend an enforcement action does not change the fact that the decision was a Commission green light to establish the PredictIt Market and for traders confidently to buy and sell its offerings.

The No-Action Relief issued by the CFTC in this case is no different than other permissions that courts have found constitute a license under the APA. Courts have found that an agency's permission to allow an entity to avoid or to comply with modified administrative requirements constitutes a license under the broad definition of that term in the APA. *See* Opening Br. at 18 (collecting cases). And that is what happened here. In formal relief, authorized by the agency regulations (17 C.F.R. § 140.99), the Commission allowed the PredictIt Market to offer political event contracts without registering. Contrary to the CFTC's claims now (Opp. at 9, 12), the requested No-Action Relief was the only way to obtain the CFTC's permission to open the PredictIt Market, as the agency already had rejected permitting registered exchanges from offering political futures contracts. *See* Order Prohibiting the Listing or Trading of Political Event Contracts, CFTC (Apr. 2, 2012), https://tinyurl.com/3kwpb6td (attached as Exhibit A).

Contrary to the Commission's suggestion (Opp. at 8), the APA's mandatory procedures for revoking a license are not some limited artifact of the "customs and maritime contexts." *See, e.g.*, *Air N. Am. v. Dep't of Transp.*, 937 F.2d 1427, 1437 (9th Cir. 1991) (Department of Transportation certificate of authority to air carrier constituted a license); *Ursack Inc. v. Sierra Interagency Black Bear Grp.*, 639 F.3d 949, 961 (9th Cir. 2011) (withholding of approval for bear-resistant container by National Park Service was withholding of license under APA). Rather, whatever the industry, when an agency permits an entity to engage in a business and then revokes that permission, it must follow the procedures in Section 558(c), including providing interested parties like Plaintiffs an opportunity to be heard. The CFTC makes no effort to argue those procedures were honored here.

II. The Trader, Academic, and Operator Plaintiffs Have Standing, and a Preliminary Injunction Is Necessary to Prevent Irreparable Harm

The CFTC interposes a standing objection, and claims that its Revocation decision is not causing irreparable harm, primarily by observing that Victoria University—the University that applied for the No-Action Relief—is not a party to this case. Only the University, the CFTC claims, has standing to complain about the Revocation. Opp. at 12-14. And, as the CFTC tells it, the University's independent decisionmaking about whether to close the Market in the face of the Revocation and the ability of the Plaintiffs to seek a monetary remedy against the Market operators kills standing and shows that there is no irreparable harm.

The CFTC's argument rests on a contention that, without the University, we just do not know whether it would have chosen on its own to throw thousands of traders out of their contracts on February 15, 2023. Opp. at 13-14. Of course, the University had no plans to offer contracts to traders based on 2024 elections, bring in their investments, and then terminate those contracts more than a year early. The CFTC's Revocation decision is causing that outcome. In Exhibit B to this reply, Victoria University removes all doubt: The University "had no intention of ending the PredictIt market prior to the CFTC's withdrawal of the NAL, and, but for the CFTC's action, they would have continued the markets for 2024 contracts through their natural conclusion." Moreover, the CFTC's suggestion that Victoria University and the operator Plaintiffs can just ignore the Revocation and its mandate to liquidate contracts by "11:59 p.m. eastern on February 15, 2023" as just some friendly (even if incredibly specific) advice is completely absent from the text of the Revocation decision. On top of that, a party impacted by agency action need not wait for sanctions to challenge an agency prescription of what must be done. *Hawkes Co.*, 578 U.S. at 600.

This case is leagues away from the *National Wrestling* case, where students were challenging an agency interpretative rule that gave universities a range of options to comply with

Title IX, and the university, years later, chose one of them. Opp. at 13-14 (citing *Nat'l Wrestling Coaches Ass'n v. Dept. of Educ.*, 366 F.3d 930, 944 (D.C. Cir. 2004)). There is absolutely no wiggle room or menu of choices in the CFTC's Revocation: It demands the liquidation of contracts by 11:59 pm on February 15, 2023, full stop.

After chiding the Market operators for not asking long ago for some alternative, better form of agency decision that would entitle them to an explanation before the agency throws them out (Opp. at 4-5), the agency finally turns to the lead Plaintiff traders. Opp. at 17. The premature end of their election contracts and their resulting economic losses are not irreparable because, as the agency says, they can always sue the University and other operating entities for not blowing off the CFTC's market-termination mandate and hanging in there, even if sovereign immunity blocks any action against the CFTC. *Id.* That is nothing more than the agency's false refrain that entities must wait for the Government to level a devastating penalty before seeking review of its detailed regulatory mandates. The trader Plaintiffs are simply not required to lean on the Market Operators to risk dramatic penalties, in lieu of challenging an arbitrary decision that is placing their investments at risk. For these citizens, and for Congress in passing the APA, requiring an agency to explain itself before creating a mess is not too much to ask.

III. The Equities and Public Interest Strongly Weigh in Favor of a Narrow Preliminary Injunction Against the CFTC's Mandate to Prematurely Liquidate Contracts

The balance of equities and public interest clearly point in favor of the narrow preliminary injunction requested here. All CFTC arguments to the contrary attack a broader injunction not sought in this motion. Opp. at 19-20. To be clear, the requested preliminary injunction does not seek to block enforcement action against any aspect of the PredictIt Market in perpetuity. It does, however, seek to bar enforcement of the CFTC's mandate—in its August 4 Revocation decision—that even those contracts turning on the outcome of the 2024 elections must be liquidated by

midnight on February 15, 2023. This arbitrary date—which will destroy the investments of the lead investor Plaintiffs and is already distorting trading in those contracts—serves *no meaningful purpose*, much less the "public interest." And even now, in its briefing, the CFTC does not try to explain this date picked from thin air. Nor does it try to explain why, even if there is somehow a reason, the Market should close, these contracts should not trade to their natural conclusion, and all this unnecessary loss to investors and disruption to the Market should not be avoided. Such a position, after all, would be hard to square with the No-Action Relief decision, in which the agency found that the data and academic value produced by the PredictIt Market was in "the public interest." App'x at 20.

In any event, courts have been clear that holding an agency to the straightforward requirement of reasoned decisionmaking before issuing edicts is in the public interest. *See, e.g.*, *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.C. Cir. 2009) ("The public interest is served when administrative agencies comply with their obligations under the APA."). Absent from the opposition is any suggestion of an emergency that would justify leaving the agency's inadequately reasoned Revocation mandate in place.

Nor would this case open the floodgates to litigation, dragging every informal staff opinion into court. Opp. at 18-19. This is a course of agency decisionmaking that opened a political futures market and abruptly closed it eight years later. It is not a musing on what an agency's authorities might or might not require. Permitting challenge here would only ensure that when the agency takes an action against a party's conduct that causes real and immediate harm, the agency does so in a reasoned way. There can be no debate that this is in the public interest.

CONCLUSION

For the above reasons, the Court should grant Plaintiffs' Motion for Preliminary Injunction.

Dated: October 20, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 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.

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