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 D. MILLER, JOSIAH NEELEY, GRANT SCHNEIDER, and WES SHEPHERD,

Plaintiffs,

v.

COMMODITY FUTURES TRADING COMMISSION,

Defendant.

Case No. 1:22-cv-00909

The Honorable Lee Yeakel

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

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INTRODUCTION

The Commodities Futures Trading Commission ("CFTC" or "Commission") has now filed four briefs in this matter. Each was an opportunity to explain that the decision to revoke the No-Action Relief provided to the PredictIt Market ("Market") and force the liquidation of tens of thousands of private investor contracts was the product of reasoned decisionmaking. But the agency has offered no substantive defense of these decisions. Nor could it have. This is because the agency summarily concluded that the Market had not complied with the dictates of its No-Action Relief, demanded that the Market close, and dumped innocent traders out of their investments, with no reasoned explanation for its decisions or of why less tumultuous remedies would not achieve the agency's objectives. Causing such consequences, with no meaningful explanation, is the textbook definition of arbitrary and capricious agency behavior.

With no substantive defense to its conduct, the CFTC invokes a series of technical arguments to avoid judicial scrutiny. As the agency would have it, it can order a business to shut down, threaten enforcement proceedings if it does not, and harm thousands of private citizens and companies in the process without having to answer to anyone. This not how the Administrative Procedure Act ("APA") works. Court after court has found that an agency mandate coupled with a threat of enforcement is reviewable under the APA when there is not an administrative process to challenge the mandate. In this case and unlike the cases on which the agency relies, the CFTC's regulations provide no appeal to the Commissioners of the staff's revocation of the No-Action Relief and command to close the Market. These agency actions were the end of the road for the Market, constituting final, reviewable agency action.

The CFTC distorts what is being challenged in this lawsuit to argue that its actions are unreviewable. But this lawsuit is not a challenge to the agency's *issuance* of or *failure to issue* No-Action Relief or a decision not to bring an enforcement action against a private party—like the

vast majority of the cases on which the agency relies. This lawsuit is a challenge to the agency's abrupt *revocation* of its decision that green-lighted tens of millions in investment to establish the PredictIt Market and tens of thousands of private individuals to invest in the contracts offered on the Market and its *unappealable mandate* to liquidate tens of thousands of private investors' contracts by a specific date or else. There can be no doubt that these actions are reviewable.

The CFTC tries to jam this course of events into an unreviewable exercise of prosecutorial discretion. But the agency's revocation decision was not like some prosecutor thinking about whether to bring one case instead of others. Instead, it was an explicit command to dump tens of thousands of private contracts on the street, all purchased in reliance on the CFTC's prior permission for the Market to operate.

Nor does the agency's challenge to standing carry water. The Amended Complaint is clear: If the revocation decision never happened or if this Court vacates or enjoins it, Victoria University and any other entity operating the Market would never act to cut off contracts offered by the Market before they matured. The agency's standing argument treats its revocation decision as if it were simply an invitation to stop offering entirely new contracts, ignoring the decision's command to crash land tens of thousands of existing contracts.

The Court should refuse the CFTC's attempt to evade accountability for its action. Six private citizen investors are challenging the agency's decision to close out the contracts in which they invested on an arbitrary date in February, with no recourse to appeal it. The agency made this decision without any explanation of why other alternatives—such as allowing their existing contracts to trade until the 2024 election happened—were inadequate, much less any detail for why the market should close in the first place. The APA requires that explanation, and its absence shows a cause of action has been stated under the APA.

BACKGROUND

A. The PredictIt Market Offers Reliable Data on the Outcome of Elections and Other Significant Political Questions

Since 2014, the PredictIt Market has provided members of the public an opportunity to make investments based on their views of the outcome of future elections and other significant political events. Doc. 15, Amend. Compl. at ¶ 2. The Market is like a stock exchange for those wishing to invest in their predictions of political events. *Id.* Each event market includes one or more questions about a particular political event, such as the 2024 presidential election. *Id.* Contract prices fluctuate between 1 cent and 99 cents, and when the deciding event ultimately occurs, contracts predicting the correct outcome are redeemed for one dollar. *Id.* Contracts predicting incorrect outcomes receive no payout. *Id.* The Market was built as a small-scale market, with limits on the amount anyone can invest, to provide data for academic and other research regarding public views on the likely outcomes of political events. *Id.* at ¶ 3.

On October 29, 2014, the CFTC issued a ruling that green-lighted the PredictIt Market after a formal application by the Victoria University of Wellington ("the University"). *Id*. at ¶¶ 58-59 & Ex. 1. That ruling took the form of "no-action relief," a form of decision expressly provided for in the Commission's regulations. *Id*; *see also* 17 C.F.R. § 140.99 (no-action relief rules).

The decision granting that relief—which expressly "allow[ed]" the Market "to operate"—was detailed. Doc. 15, Amend. Compl. at Ex. 1. It placed particular restrictions on how the Market would operate. *Id.* The relief decision permitted contracts on the outcome of elections and other significant political questions that "do not involve, relate to or reference terrorism, assassination, or war" but limited a trader's initial investment in any one contract to $850 and the number of traders in any one contract to 5,000. *Id.*; *Id*. at Ex. 3 at 2-5.

Based on the CFTC approval, the University and Plaintiffs Aristotle Inc. and Pedicit It, Inc. ("Market Operators") set up and launched the Market, investing significant amounts of money in reliance of the No-Action Relief. Doc. 15, Amend. Compl. at ¶¶ 7, 64. Over the seven-year history of the Market, more than 120,000 individual investors have traded in more than 8,000 markets on the outcome of elections and other significant political questions. *Id.* at ¶ 64.

Throughout its operation, the Market has provided important data to the academic community at no cost. *Id.* at ¶¶ 4, 39. These data have advanced the fields of microeconomics, political behavior, computer science, and game theory. *Id.* at ¶¶ 39-44. To date, more than 140 researchers from institutions around the world—including Michigan State, Rutgers, Harvard, Yale, MIT, Oxford, Cambridge, and the University of Copenhagen—have used PredictIt Market data in their teaching and research. *Id.* Among these academics are four Plaintiffs in this case: Professor Harry Crane of Rutgers, Professor Corwin Smidt of Michigan State, Professor James D. Miller of Smith College, and Research Fellow Richard Hanania of the Salem Center for Public Policy at the University of Texas at Austin. *Id.* at ¶¶ 40-43.

Studies have shown that the aggregated investment-backed predictions of PredictIt traders provide more accurate data regarding the likely outcome of elections than polling or statistical expert analyses. *Id.* at ¶ 41. Academics studying polling, political analysis, and political futures markets have opined that even modest investments encourage traders to put aside their biases and hopes for a particular election outcome in making a prediction. *Id.* at ¶ 4. The PredictIt Market also lacks the potential incentives of one or a handful of experts to skew their analyses to suggest that one candidate or another is ahead or behind and thereby to encourage or discourage voter behavior. PredictIt trading data have been a staple of modern media reporting on the status of pending elections, and a subject of intense media interest. *Id.*

B. The CFTC Abruptly Orders the PredictIt Market to Close

On August 4, 2022, the CFTC ordered the PredictIt Market to close and to liquidate tens of thousands of private investor contracts before midnight on February 15, 2023. Doc. 15, Am. Compl. at Ex. 2. The Revocation gave only the following reason: The Market "has not [been] operated in compliance with the terms of" the No-Action Relief decision, with no detail as to why or how. *Id*. at 2. What followed was a command for the Market to force tens of thousands of private investors to liquidate their already existing contracts before the election outcome predicted occurs:

> To the extent the University is operating any contract market, as of the date of this letter, in a manner consistent with each of the terms and conditions provided in [the No-Action Relief decision], all of those related and remaining listed contracts and positions comprising all associated open interest in such market should be closed out and/or liquidated no later than 11:59 p.m. eastern on February 15, 2023.

Id. at 2. The agency provided no explanation for this arbitrary cut-off date. As of the date of this filing, seven markets with forty-eight contracts have a deciding event that occurs after February 15, 2023. Most prominent are political event markets concerning the outcome of the 2024 presidential election. Doc. 15, Amend. Compl. at ¶¶ 35, 48.

Investors in the PredictIt Market were stunned by the Commission's command that tens of thousands of their contracts must be cashed out and prematurely terminated. Several of them promptly sued the Commission to reverse this arbitrary decision. They are: Kevin Clarke, an Austin businessman; Michael Beeler, an Austin-based statistician; Mark Borghi, co-host of a daily news podcast produced in Austin; Josiah Neeley, an Austin-based director of a national public policy organization; Wes Shepherd, a co-host of a daily news podcast produced in Austin; and Trevor Boeckmann, a public defender in New York City. *Id.* at ¶¶ 47-53. Each made their investments with the expectation that their contracts would continue to trade until their deciding events. *Id.* at ¶ 5. And each of them is being harmed today by the Commission's decision, as

contracts are now trading for reasons other than investors' predictions. *Id.* at ¶¶ 13, 55-57. Instead, the traders are attempting to salvage their investments, either by withdrawing their assets from the Market entirely or attempting to predict what the *prevailing belief* about the outcome of events will be on the cut-off date, rather than what the outcome will actually be. *Id.* As a result, the Plaintiffs today cannot exit their contracts except at a loss as compared to what they believe they would have recovered by seeing the contract through to the 2024 election outcomes or by trading it later as good faith investor predictions about the likely election outcome moved the market.

These market distortions, and the harm to the Investor Plaintiffs, have been on stark display since the November 8, 2022 midterm elections. Those elections have had implications for the control of houses of Congress and the success of certain Senate and House nominees endorsed by a former Republican president. And the midterm elections, in turn, have affected predictions about several 2024 elections, including who the Republican party will nominate for President, whether the current President will run again, and who will ultimately win the general Presidential election. The Investor Plaintiffs had views about how the midterm elections would affect predictions about the 2024 elections, but they have been deprived of the opportunity to trade their existing contracts into a market that is about the outcome of the 2024 election, as trades are affected by the arbitrary February 15, 2023, crash landing of all contracts, mandated by the CFTC.

The Academic Plaintiffs would have studied the crucial data produced by the Market about the 2024 presidential elections, including the effect of particular events (such as the 2022 midterm elections) on predictions of the 2024 elections outcome. But they have been deprived of that opportunity, due to the Commission's mandate to end 2024 election contracts must end early.

The University and the Market Operators would have continued to operate the Market but for the CFTC's arbitrary revocation. *Id.* at ¶ 25. Since the Commission has ordered the Market to

close and threatened enforcement proceedings if it does not, the University and Market Operators will close the Market. *Id.* This will come at great cost to the Market Operators to sort out the administrative nightmare caused by the agency's unexplained cutoff date.

The Commission has provided no indication that it considered the consequences of its edict on existing trading, the academic community, or the Market Operators, or that it considered less disruptive alternatives to premature liquidation. Doc. 15, Am. Compl. at Ex. 2. It has made no attempt to justify the imposition of February 15, 2023, as the date by which all PredictIt Market contracts must terminate. *Id.* And it has made no claim that the continuation of existing contracts or the addition of new related contracts would somehow be "contrary to the public interest." *Id.*

ARGUMENT

The CFTC does not cite any evidence in support of its motion to dismiss. Because the CFTC's attack on the Amended Complaint is facial rather than factual, the Court must consider only "the sufficiency of the allegations in the complaint because they are presumed to be true." *Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523, 533 (5th Cir. 2016); *see also PlainsCapital Bank v. Rogers*, 715 F. App'x 325, 328 (5th Cir. 2017). The Court must deny a motion to dismiss where, as here, the plaintiffs have stated valid claims for relief for which they have standing. *Libby v. Nat'l Republican Senatorial Comm.*, 551 F. Supp. 3d 724, 728 (W.D. Tex. 2021).

I. The Revocation Is Judicially Reviewable Final Agency Action

The CFTC argues that the Revocation was not final agency action. Mot. at 12-16. But the agency continues to ignore that the Supreme Court has instructed courts to take a "pragmatic" and "flexible" approach when assessing finality and the reviewability of agency action. *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 599 (2016); *see also Ciba-Geigy v. EPA*, 801 F.2d 430, 435 (D.C. Cir. 1986) (same). The inquiry is about the *real-world effect* of agency behavior.

The Revocation's instruction to liquidate Market contracts by a date certain, with dramatic effects on private citizen traders and no further administrative process, is 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 or obligations'" or is an action from which "'legal consequences will flow.'" Mot. at 13 (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). The Revocation satisfies both conditions.

A. The Revocation Marked the Consummation of the Agency's Decisionmaking Process about the Market

According to the CFTC, the Revocation is not the end of agency decisionmaking on the Market. The agency says there is much more to come before a penalty is levied: The staff must recommend an enforcement action, the Commissioners must authorize one, there must be a hearing, and then a sanction assessed. Mot. at 13-14. This argument ignores both the terms and real-world effect of the Revocation, which will result in the closure of the Market and will dump tens of thousands of private investors out of contracts they purchased in good faith.

The Revocation withdrew the Market's authorization to operate, ordered the Market to close, commanded the Market to liquidate all contracts on an arbitrary date in 2023, and threatened enforcement proceedings if the Revocation's instructions were not carefully followed. Doc. 15, Am. Compl. at Ex. 2. The CFTC did not invite the submission of evidence that there had not been violations of terms of the 2014 No-Action Relief. *Id.* Nor did the Revocation decision solicit the views of investors who would rather their contracts not be prematurely terminated. *Id*. Nowhere did the Revocation state that it was non-final or a first step in a longer agency process. *Id.*

The Commission's regulations reinforce the finality of the Revocation. In those regulations, the Commission delegated its entire authority pertaining to no-action relief to its divisions. *See, e.g.*, 7 C.F.R. §§ 140.99(a)(2), (b)(1) ("Issuance of a Letter is *entirely* within the

discretion of Commission staff." (emphasis added)). Consistent with the delegation, the regulations make clear that the decisions of the division on no-action relief—and its revocation—are final. *See* 17 C.F.R. § 140.99; *see also id.* at § 140.99(e) (noting that the staff position is communicated in "final form"). The regulations provide for no higher authority (such as the Commissioners) to oversee the provision—and revocation—of no-action relief and no procedure for or ability to appeal the division's decision to grant, deny, or revoke no-action relief.

The absence of any ability to appeal or seek review of an agency division's decision with a higher agency authority, as is the case here, is the hallmark of final agency action. *See, e.g.*, *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 Rollerson v. Brazos River Harbor Navigation Dist. of Brazoria Cnty. Tex.*, 6 F.4th 633, 642 (5th Cir. 2021) ("APA review is not precluded if the very existence of an alternative remedy is doubtful." (cleaned up)); *W. Ill. Home Health Care, Inc. v. Herman*, 150 F.3d 659, 662-63 (7th Cir. 1998) (noting "the core question is whether the agency has completed its decisionmaking process," and finding agency's subordinate official's action was final where official had been delegated "authority to make a decision binding on the recipient of the letter" and there was no internal mechanism to appeal); *McDonald v. U.S.*, No. H-04-1845, 2005 WL 1571215, at *3 (S.D. Tex. June 30, 2005) (holding "Vice Commandant [of the Coast Guard]'s decision is a final agency action," in part, because the "Vice Commandant's decision marks the consummation of the Coast Guard's decision-making process because there are no other avenues of appeal Plaintiff may pursue within the Coast Guard itself").

What is more, the CFTC has ignored, now over the course of four briefs, the Complaint's allegation that the Revocation of No-Action Relief was approved by the Commissioners. The Complaint alleged that the CFTC's Division of Market Oversight circulated the Revocation letter

to every one of the Commissioners and gave them an opportunity to object it. Doc. 15, Amend. Compl. at ¶ 77b. Only after having sought the Commissioners' assent to the Revocation did the division issue it. The "final agency action" doctrine does not set up a game for agency heads to effectively make all decisions, but erect some formal edifice suggesting otherwise, so the agency heads can avoid judicial review. In this case, the Commissioners delegated by regulation their authority to issue and revoke no-action relief to the Division on Market Oversight, gave regulated parties no right to seek the Commissioners' review of any decision, and established an internal practical process to make sure they would control the Division's decision. The Commission's litigation counsel cannot be heard now to claim that the outcome of that process is protected from judicial review because the Commissioners are not the ones acting.

The CFTC also chides the University for, long ago, seeking a no-action letter from a division of the CFTC rather than petitioning the Commissioners themselves for an exemption from the Commodity Exchange Act under Section 4(c) of that Act. *See* Mot. at 6-7, 12; *see also* 7 U.S.C. § 6(c) (codifying this authority). But the agency oversimplifies what it calls its "exemption process," which does not lend itself to one Market operator asking for an exemption from registration for its particular market. That is, in part, because Section 4(c) of the Act cannot be used unless the traders are "appropriate persons," including brokers and high net worth individuals, a restriction that would be an anathema to the academic purpose of the PredictIt Market. 7 U.S.C. §§ 6(c)(2)(B) and 6(c)(3). Thus, when the entities associated with PredictIt later sought the Commission to act pursuant to this statutory authority in 2019, they asked the Commission to stand up a universal regulatory system for all political event markets. *See* Mot. at 7 n.5. The CFTC is wrong to suggest there was an option other than no-action relief to allow the PredictIt Market alone, with its customers drawn from all walks of life, to be established. *See id.* at 6-7, 12.

The CFTC next attempts to couch the Revocation as mere advice, highlighting the fact that it said that the Market "should"—rather than must—close and suggesting that this language left the Market participants a choice to keep on going and blow through the arbitrary deadline to liquidate all contracts. *Id.* at 14. That choice is nowhere encouraged in the Revocation decision itself. To the contrary, the decision says private investors must be kicked out of their contracts by February 15, 2023, or enforcement action will follow. The Supreme Court already has made short work of the same argument being presented by the CFTC here, holding private citizens 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); *see also Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 490 (2010) (regulated parties need not "bet the farm by taking the violative action before testing the validity" of law or an agency position).

Moreover, 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*, 150 F.3d at 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).[1] 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)

[1] The CFTC cites *Gerber Prod. Co. v. Perdue*, 254 F. Supp. 3d 74, 84 (D.D.C. 2017), for the proposition that guidance from "a lower-level official," even if influential, "generally" does not qualify as final. Mot. at 13. But *Gerber* considered a regional branch chief's e-mail to a state conveying a "personal interpretation" of federal regulations. 254 F. Supp. 3d at 84. That kind of informal guidance is a far cry from the No-Action Relief and Revocation here, which are specifically contemplated by the CTFC's regulations.

(construing agency guidance as 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. Mot. at 13-15. None of these cases involved an unappealable mandate of an agency coupled with a threat of enforcement. Many considered a circumstance, not present here, in which agency regulations or procedure provided additional internal process following an adverse decision by a division of the agency. *See 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).

The CFTC's lead cases, cited on the first page of its motion, are *Board of Trade of the City of Chicago v. SEC*, 883 F.2d 525 (7th Cir. 1989) and *Kixmiller v. SEC*, 492 F.2d 641 (D.C. Cir. 1974). Mot. at 1. But, in these cases, the courts held that third parties could not seek to overturn no-action letters and force an agency to bring an enforcement action against the recipient of the no-action letter. *See Kixmiller*, 492 F.2d at 644-45; *Bd. of Trade*, 883 F.2d at 530-31. These cases applied the classic principle recognized by the Supreme Court in *Heckler v. Cheney*, 470 U.S. 821, 831 (1985), that concerned citizens cannot use the courts to force an agency to invest its time prosecuting one alleged violation of law over another. *See Kixmiller*, 492 F.2d at 644-45; *Bd. of Trade*, 883 F.2d at 530-31. The current case is entirely different. Here, the parties who relied on a no-action decision, including private citizen traders who invested their own money in contacts

the agency said could be issued and trade, are suing over what the *agency is doing to them*. The agency is pulling the rug out from under them and mandating future action together with a threat of future enforcement. In *Board of Trade*, Judge Easterbrook recognized that the plaintiff competitors who wanted the SEC to take enforcement action against a rival were not themselves being put "in jeopardy" or "under the gun." 883 F.2d at 529-30. In stark contrast, the CFTC's revocation decision puts the operators of the PredictIt Market and the investors with trades that must be liquidated in February 2023, "or else," both "in jeopardy" and "under the gun." *Id.*[2] The CFTC cannot seriously debate that withdrawing approval to operate, instructing a business to close, threatening enforcement if the business does not close, and failing to provide for a review of that decision is vastly different than what was at issue in these cases.

The Fifth Circuit's *Luminant Generation* case cited by the CFTC is particularly distinguishable, 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. Here, in contrast, the CFTC gave forward-looking instructions and threatened sanctions if the instructions in its Revocation are not followed. The APA does not permit an agency to 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.

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[2] Nor of any of the other case cited by the CFTC, which even further afield cases, involve an agency mandate for future action backed by a threat of enforcement action. *See N.Y. City Emps.' Ret. Sys. v. SEC*, 45 F.3d 7, 9-11 (2d Cir. 1995); *Apache Corp. v. Chevedden*, 696 F. Supp. 2d 723, 725-34 (S.D. Tex. 2010); *DTCC v. Data Repository (U.S.) LLC v. CFTC*, 25 F. Supp. 3d 9, 14 (D.D.C. 2014). 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.

B. The Revocation Is an Action from Which Legal Consequences Flow

The CFTC claims that no legal consequences flow from the Revocation because the Commissioners must still authorize and initiate an enforcement action. Mot. at 14. But this argument is belied by other portions of the CFTC's motion. In its motion, the CFTC acknowledged that the Revocation raised the legal consequences for market participants if the dictates in the Revocation decision are not followed, because Congress and the agency have established a set of enhanced penalties for "willful" violations of the Commodity Exchange Act. Mot. at 20. These include higher administrative penalties and exposure to criminal penalties. *Id.* (citing 7 U.S.C. § 13(a)(5), which states that a willful violation of the CEA or CFTC regulations is a felony that carries fines up to $1,000,000 or imprisonment up to 10 years); *see also*, *e.g.*, Civil Monetary Penalty Guidance, CFTC: Div. of Enforcement (May 20, 2020), https://www.cftc.gov/media/3896/EnfPenaltyGuidance052020/download ("The respondent's state of mind, including whether the conduct was intentionally or willful" are factors to consider when recommending and approving civil monetary penalties). Courts have defined willful misconduct as a deliberate action, knowing that the action is "unauthorized and contrary to instructions." *Poplar Grove Planting and Refining Co. Inc. v. Bache Halsey Stuart Inc.*, 465 F. Supp. 585, 591 (M.D. La. 1979). There can be no doubt that the CFTC would argue that the Revocation put market participants on notice of illegality and places market participants in a separate legal category of an enhanced penalty the agency's mandate to close the Market and liquidate contracts by February 15, 2023, were ignored.

That the Revocation decision had legal consequences is made clear by the Supreme Court's decision in *Frozen Food Express v. United States*, 351 U.S. 40 (1956). There, the Supreme Court held that an Interstate Commerce Commission interpretative order was final agency action. That order opined on what transported commodities were exempted from regulation. The Court held

the order was reviewable because it "warn[ed] every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties." *Id.* at 44. The Revocation decision here is no different. It told participants in the PredictIt Market exactly how and when the Market must be closed and contracts must be liquidated to avoid an enforcement action and penalties. It told participants in the PredictIt Market exactly how and when the Market must be closed and contracts must be liquidated to avoid an enforcement action and penalties. It took away a "safe harbor" from at least the legal consequences of a willful violation of the Commodity Exchange Act, *Texas v. EEOC*, 933 F.3d at 442, and it "warned" market participants that continued activity would be "at the risk of incurring [ ] penalties, *Frozen Food Express*, 351 U.S. at 44. In other words, because it affected the Market participants' "possible legal liability," exposing them "to civil or criminal liability for non-compliance with the agency's view of the law," it was "final agency action." *See Louisiana State v. United States Army Corps of Engineers*, 834 F.3d 574, 583 (5th Cir. 2016).

II. The Revocation Is Reviewable as a Revocation of a License Under Section 558(c) of the APA

The August 4 mandate to close the PredictIt Market and to liquidate all pending contracts by February 2023 was also the termination of a license without any of the process required by the APA. The agency does not dispute that the APA broadly defines what constitutes a license or that the APA expressly permits judicial review when an agency withdraws a license without notice and an opportunity to be heard. *See* Mot. at 10-11. Instead, it argues that the No-Action Relief was not a license because it "grants no affirmative entitlement to anyone to do anything." *Id.* at 11.

The content of the No-Action Relief letter tells a different story. The entire purpose of seeking No-Action Relief was to request that the CFTC "allow" Victoria University and the Market Operators "to operate" the PredictIt Market without being required "to register" under the

Commodity Exchange Act. Doc 15-1 at 1-2. The No-Action Relief decision's inclusion of a division promise not to recommend an enforcement action does not change the fact that the decision was a CFTC approval to establish the PredictIt Market and to allow traders confidently to buy and sell its offerings, especially because the Commissioners delegated this authority to agency staff and had the opportunity to object to the approval.

The No-Action Relief issued by the CFTC in this case is no different than countless other permissions that courts have found constitute licenses under the APA. Case after case—decided in various contexts—confirms that an agency's allowing an entity to comply with modified administrative requirements or to avoid them altogether constitutes a license under the broad definition of that term in the APA. *See, e.g.*, *Ursack Inc. v. Sierra Interagency Black Bear Grp.*, 639 F.3d 949, 961 (9th Cir. 2011) (finding that withholding approval for bear-resistant container by National Park Service was withholding of license under APA); *Pillsbury Co. v. United States*, 18 F. Supp. 2d 1034, 1036, 1038 (Ct. Int'l Trade 1998) (holding that a letter issued by U.S. Customs Service granting Pillsbury permission to use certain expedited procedures for filing for refunds and remissions on customs duties and waiving other pre-export notice requirements was a "license"); *Air N. Am. v. Dep't of Transp.*, 937 F.2d 1427, 1437 (9th Cir. 1991) (holding that a Department of Transportation certificate of authority to air carrier constituted a license); *Atlantic Richfield Co. v. United States*, 774 F.2d 1193, 1199–1202 (D.C. Cir. 1985) (holding that Maritime Administration approvals held by subsidized shippers for conditional entry in Alaskan-Panama Canal domestic oil trade held to be APA-protected licenses); *Gallagher & Ascher Co. v. Simon*,

687 F.2d 1067, 1072–76 (7th Cir. 1982) (holding that permits issued pursuant to Customs regulations allowing for expedited entry of certain imports constituted licenses under the APA).[3]

That is what happened here. Pursuant to formal relief, authorized by the agency regulations (17 C.F.R. § 140.99), the CFTC allowed the PredictIt Market to skip formally registering as an exchange before offering political event contracts. Significantly, and in direct contrast to what the CFTC repeatedly implies, *see* Mot. at 4, 6, 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 to offer political futures contracts and the exemption process did not otherwise apply to a single market for normal citizens seeking a one-off right to operate. *See* Doc 18-1, Order Prohibiting the Listing or Trading of Political Event Contracts, CFTC (Apr. 2, 2012), https://tinyurl.com/3kwpb6td; *see also* exemption discussion *supra* Section I.A.

Moreover, the CFTC's suggestion that this case would open the floodgates to litigation—dragging every informal staff opinion into court—fails. *See* Mot. at 12 (citing *Taylor-Callahan-Coleman Cntys. Dist. Adult Prob. Dep't v. Dole*, 948 F.2d 953, 959 (5th Cir. 1991)). This case involves an agency delegating its authority to a division of staff, that division granting permission on behalf of the agency to a political futures market to operate without registration, and that same division revoking the agency's permission eight years later. This case is not a challenge to a casual opinion by an agency employee about what the law might or might not be require. Instead, this case is testing the outcome of a formal process—provided by agency regulations—where a division of the CFTC has delegated authority to allow a private party to skip certain regulatory steps before offering contracts the agency believes are covered by the Commodity Exchange Act.

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[3] The CFTC cites *Sheridan Kalorama Association v. Christopher*, 49 F.3d 750 (D.C. Cir. 1995) to argue that the No-Action Relief was not a license. But that case did not assess finality under the APA or address a situation in which an agency expressly allowed a proposed transaction.

At bottom, 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, which did not occur here.

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

The CFTC makes a fleeting argument that its actions are unreviewable because they were an exercise of prosecutorial discretion. Mot. at 15-16. All of the cases cited, however, involve challenges by a private citizen seeking to force a government agency to take enforcement action against a third party. *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).[4] The Plaintiffs in this case do not challenge a CFTC decision not to prosecute. Instead, they 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).

IV. The Investor, Academic, and Market Operator Plaintiffs Have Standing

The CFTC contests Plaintiffs' standing primarily by observing that Victoria University—the University that applied for the no-action relief—is not a party to this case. Mot. at 9, 17-20. As the agency tells it, the University's independent decisionmaking about whether to close the

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[4] As additional support for its argument, the CFTC also cites to a statement characterizing a party's position in *Simon v. E. Kentucky Welfare Rts. Org.*, 426 U.S. 26, 37 (1976). Mot. at 16. But that statement too relied on the decision not to prosecute in *Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973).

Market in the face of the Revocation dooms standing. This argument rests on a contention that, without the University, we cannot know whether it would have chosen on its own to close the Market and throw thousands of traders out of their contracts on February 15, 2023. Mot. at 17.

To be sure, 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. Doc. 15, Am. Compl. ¶ 25. The CFTC's Revocation decision is causing that outcome. And the University itself removes all doubt: It "had no intention of ending the PredictIt market prior to the CFTC's withdrawal of the NAL, and, but for the CFTC's action, . . . would have continued the markets for 2024 contracts through their natural conclusion." Doc. 18-2 at 1. The CFTC objects to Plaintiffs' reliance on a signed but "unsworn" letter from Victoria University. Mot. at 20 n.7. But the agency ignores that the letter substantially overlaps with the allegations in paragraph 25 of the Amended Complaint. *See PlainsCapital Bank*, 715 Fed. App'x at 328 (finding that the motion to dismiss was facial, not factual, and therefore the court would "simply conside[r] the sufficiency of the allegations in the complaint because they are presumed to be true." (internal citations omitted)).[5]

This case bears no resemblance to 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. Mot. at 18-19 (citing *Nat'l Wrestling*

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[5] Perhaps acknowledging this, the agency contends that it is not "plausible" to assume that the University would resume operations if the No-Action Relief were reinstated. That gets it backwards. The University is continuing to operate the Market until February 2023—so the relevant question is not whether it will resume operations but whether it will be able to see "the markets for 2024 contracts through their natural conclusions." Am. Compl. ¶25. The CFTC also argues—without irony—that Plaintiffs "have not alleged facts showing that the University has operated PredictIt under the terms enumerated in the no-action letter." Mot. at 20. But that represents one of the primary reasons for this lawsuit. Plaintiffs believe PredictIt has been operated in a lawful manner and seek a reasoned explanation for CFTC's entirely undetailed conclusion to the contrary.

Coaches Ass'n v. Dept. of Educ., 366 F.3d 930, 944 (D.C. Cir. 2004)). There is absolutely no such wiggle room or menu of choices in the CFTC's Revocation: It demands the closure of the Market and the liquidation of contracts by 11:59 pm on February 15, 2023—full stop.

Indeed, *National Wrestling* supports Plaintiffs' standing here. It recognized that "plaintiffs have standing to challenge government action on the basis of injuries caused by regulated third parties where the record present[s] substantial evidence of a causal relationship between the government policy and the third-party conduct." *Id.* at 941. That is precisely the case here. In the shadow of the Revocation, closing the Market is the only option available to Victoria University, "leaving little doubt as to causation and the likelihood of redress." *Id.*[6]

Moreover, 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. Accepting the CFTC's position would hamstring the Investor Plaintiffs—and countless similarly-situated Market participants—by forcing them to stand by idly as an arbitrary decision places 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.

CONCLUSION

For the above reasons, the Court should deny the CFTC's Motion to Dismiss.

[6] For the same reason, *Bloomberg L.P. v. CFTC*, 949 F. Supp. 2d 91, 115 (D.D.C. 2013), is inapposite. In that case, the plaintiff company did "not allege that it ha[d] yet suffered any injury as a result" of the CFTC regulation and "simply assume[d] the worst-case scenario" based on anticipated third-party action. *Id.* at 117. Here, the plaintiffs are already feeling harmful effects from the Revocation decision in the form of market distortions, Doc. 15, Am. Compl. ¶ 55, and, there is no question that, but for the Revocation, Victoria University would permit existing contracts to trade through to their natural conclusion, Doc. 15, Am. Compl. ¶ 25.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this fourteenth day of November 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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