No. 22-51124

IN THE

United States Court Of Appeals
For The Fifth Circuit

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-Appellants,

v.

U.S. COMMODITY FUTURES TRADING COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court for the
Western District of Texas, No. 1:22-cv-00909-LY

DEFENDANT-APPELLEE'S MOTION TO DISMISS AND OPPOSITION TO PLAINTIFFS-APPELLANTS' MOTION FOR INJUNCTION PENDING APPEAL

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January 10, 2023

CERTIFICATE OF INTERESTED PERSONS

Under Fifth Circuit Rule 28.2.1, the United States Commodity Futures Trading Commission, as a governmental party, need not submit a certificate of interested persons.

/s/ *Kyle M. Druding*
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INTRODUCTION

This "appeal" has no business before this Court. Facing imminent transfer or outright dismissal, and dissatisfied with the self-inflicted pace of litigation, Plaintiffs attempt to boot-strap appellate jurisdiction to ask this Court to grant their preliminary-injunction motion before the District Court weighs in. To that end Plaintiffs have manufactured a series of inconsistent, legally meaningless deadlines—including "early December," "December 15," "Christmas," and currently "January 19"—to demand extraordinary intervention by this Court.

But federal appellate jurisdiction does not cover such maneuvering. The District Court has not yet entered a reviewable order, "constructive" or otherwise. Indeed, the District Court can and should transfer or dismiss this case as explained in the Magistrate Judge's December 12, 2022 Report & Recommendations ("R&R"), to which Plaintiffs objected only several days after noticing this appeal. *See* D.Ct. Dkt. 31 at 7–8 (attached as "Exhibit 1") (recommending transfer and noting "the strength of CFTC's motion to dismiss"). The District Court is fully empowered to, and may at any time, reach Plaintiffs' preliminary-injunction motion. And the District Court's unremarkable docket-sequencing choices to date come nowhere close to the extraordinary circumstances warranting mandamus.

On substance, this case is meritless. Plaintiffs ask this Court to break with decades of settled case law and be the first to hold that a "no-action" letter is final

agency action, despite the fact that the letter here states only that CFTC *staff*, as a matter of prosecutorial discretion, will not "*recommend* that the Commission take any enforcement action" and that it does "not" bind "the Commission" itself. And they do so as third parties without Article III standing, purportedly on non-party Victoria University's behalf, seeking judicial preemption of a hypothetical enforcement action that the Commission might or might not authorize.

This Court should dismiss or, at a minimum, deny Plaintiffs' motion.

BACKGROUND

The following is an abbreviated version of the background from the CFTC's opposition to Plaintiffs' preliminary-injunction motion, D.Ct. Dkt. 17, and motion to dismiss, D.Ct. Dkt. 19. That briefing is incorporated by reference in its entirety.

A. The Commission, the Commodity Exchange Act, and Event Contracts.

The Commodity Futures Trading Commission ("CFTC") is the federal agency tasked with administering and enforcing the Commodity Exchange Act ("CEA" or "the Act"), 7 U.S.C. §§ 1–26. The CEA governs, among other things, markets for commodity derivatives. *See* 7 U.S.C. § 2(a)(1)(A). A derivative is a

financial instrument, such as a future, option, or swap, whose price is dependent upon—*i.e.*, "derived from"—the value of something else.[1]

Relevant here are "event contracts," a derivative whose payoff is based on a specified event, occurrence, or value such as a macroeconomic indicator, corporate earnings, level of snowfall, or value of hurricane damages.[2]

B. DCM and SEF Registration, Section 4(c) Exemptions, and Staff No-Action Letters.

Broadly speaking, there are three categories of Commission- and staff-level conduct relevant here:

DCM and SEF Registration. Under the CEA and CFTC regulations, those seeking to offer certain event contracts generally must do so as a "registered entity," 17 C.F.R. § 40.11, including as a designated contract market ("DCM") or swap execution facility ("SEF"), 7 U.S.C. § 7a-2(c)(5)(C)(i); *id.* § 6(b)(1)(A). If the Commission grants DCM or SEF registration, that registration can be revoked only by following procedures subject to judicial review. *See* 7 U.S.C. §§ 7b, 8(b).

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[1] CFTC, *Glossary: A Guide to the Language of the Futures Industry*, https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/CFTCGlossary/index.htm (last visited Jan. 10, 2023).

[2] CFTC, *Contracts & Products: Event Contracts*, https://www.cftc.gov/IndustryOversight/ContractsProducts/index.htm (last visited Jan. 10, 2023).

Section 4(c) Exemptions. Alternatively, 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 "by rule, regulation, or order" if, "after notice and opportunity for hearing" in accordance with the Administrative Procedure Act ("APA"), the Commission makes certain required findings following prescribed procedures. *See* 7 U.S.C. § 6(c)(1)–(2). As with DCM and SEF registration, a Commission decision to revoke a Section 4(c) exemption is subject to judicial review.

No-action letters. At issue in this lawsuit are staff no-action letters. These letters do not issue from and, by regulation, do not bind the Commission itself. Rule 140.99(a)(2) requires that no-action letters state only the issuing staff "will not recommend enforcement action to the Commission for failure to comply with a specific provision of the [CEA] or of a Commission rule, regulation or order." 17 C.F.R. § 140.99(a)(2). If issued, "[o]nly *the* Beneficiary," in this case non-party Victoria University, "may rely" on the letter. *Id.* (emphasis added). The decision whether to grant a no-action letter "is entirely within the discretion of Commission staff." *Id.* § 140.99(b)(1), (e). No-action letters can be "issued by the staff of a Division of the Commission or of the Office of the General Counsel" and "represent[] the position only of the Division that issued it" and "bind[] only the

issuing Division"—"not the Commission or other Commission staff." *Id.* § 140.99(a)(2).

C. The PredictIt Market, No-Action Letter 14-130, and its Withdrawal.

In this case, non-party Victoria University eschewed formal registration or exemptive relief from the Commission and chose instead to pursue a staff no-action letter, and that is all the University received. *See, e.g.*, Am. Compl. ¶¶ 1, 7, 25, 58–63 & Exs. 1, 3.

That 2014 no-action letter (No. 14-130) concluded that Division of Market Oversight ("DMO") staff "will not recommend that the Commission take any enforcement action in connection with the operation of your proposed market for event contracts" were the online PredictIt market to operate as proposed, and "overseen by faculty at the University." *See* Am. Compl. Ex. 1 at 5. On its face, the 2014 no-action letter, repeatedly labelled as such, is clear as to its limited scope and effect:

> [B]ased 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.

Am. Compl. Ex. 1, at 5–6. Nowhere does that letter refer to a "license," "permission," or "approval" of any sort.

On August 4, 2022, DMO staff issued a second letter to Victoria University (No. 22-08) withdrawing the 2014 no-action letter. Am. Compl. ¶ 8 & Ex. 2. That withdrawal summarized the Division's 2014 position to "not recommend enforcement action (*i.e.*, 'no-action' relief)" and concluded that "[t]he University has not operated its market in compliance with the terms of Letter 14-130." Am. Compl. Ex. 2 at 1–2. As to any then-existing contracts operated "in a manner consistent with each of the terms and conditions provided in Letter 14-130," DMO advised that they "*should* be closed out and/or liquidated no later than 11:59 p.m. eastern on February 15, 2023." *Id.* (emphasis added). The Commission did not issue the letter or order anything, and DMO did not threaten any action should PredictIt decline to observe this staff-specific grace period. Indeed, DMO staff are not authorized under the CEA or CFTC regulations to impose such consequences beyond recommending that the Commission itself bring an enforcement action.

D. Procedural History.

Plaintiffs filed suit on September 9, and their Amended Complaint on October 6, 2022. D.Ct. Dkts. 1, 15. Relevant here, the Parties have collectively filed three motions pending before the District Court.

First, on September 20, the CFTC moved to transfer venue to the District of Columbia, where all the operative facts giving rise to Plaintiffs' claims occurred with the sole exception of Wellington, New Zealand, and where all counsel are located. D.Ct. Dkt. 8; *see also* D.Ct. Dkts. 13, 16.

Second, Plaintiffs waited three weeks after filing suit to seek a preliminary injunction on September 30. D.Ct. Dkt. 12; *see also* D.Ct. Dkts. 17, 18. Despite raising harm arguments virtually identical to those presented here, Plaintiffs did not move to expedite or offer a briefing schedule, and the only potential relief date referenced in their 98-page filing was February 15, 2023. *See, e.g.*, D.Ct. Dkt. 12-1 at 1, 6, 7, 8, 9, 10, 11, 14, 16, 17.

Third, the CFTC moved to dismiss on October 28, 2022. D.Ct. Dkt. 19; *see also* D.Ct. Dkts. 21, 25.

The District Court referred to the Magistrate Judge both the CFTC's motion to transfer and motion to dismiss, on October 6 and November 18. *See* D.Ct. Dkts. 14, 22. The Magistrate Judge heard oral argument on December 1, and issued his R&R less than two weeks later on December 12. D.Ct. Dkts. 29, 31.

The R&R concludes that the CFTC's motion to transfer should be granted because multiple factors favored venue in the District of Columbia, including that the D.C. District Court's docket is substantially less congested than the Western District of Texas's. *See* D.Ct. Dkt. 31 at 4–7 (citing a difference in 845 versus 286 weighted filings per judge and noting that Plaintiffs' "reasons for filing the suit here still confound the court, even after the hearing"). Further, while the R&R does not ultimately reach the CFTC's motion to dismiss, the Magistrate Judge noted that he was "highly skeptical" of Plaintiffs' merits arguments and expressed concern over their "inability to cite cases directly holding that a no action letter is the equivalent of a license or other final action or that third parties are beneficiaries to a no action letter with standing [to] sue." D.Ct. Dkt. 31 at 7–8 & n.4. Plaintiffs objected to the R&R on December 27, four days *after* noticing this appeal. D.Ct. Dkt. 33.

Months after filing suit, more than six weeks after moving for preliminary injunctive relief, and only after the District Court had referred the CFTC's motions to transfer and dismiss, Plaintiffs moved to expedite on November 18. *See* D.Ct. Dkts. 23, 26, 27. That motion asked for a preliminary-injunction decision "before Christmas," and for the first time, Plaintiffs claimed their harms would be "accelerat[ing]" in "early December" or, alternatively, "[b]y December 15"—months in advance of the alleged February 15, 2023 deadline originally briefed. *See, e.g.*, D.Ct. Dkt. 23 at 1–3 & Ex. 2 ¶ 6. Plaintiffs further threatened that "[i]n

the absence of more expedited treatment" they would have "no choice but to seek a temporary restraining order," *id.* at 6, which they never did.

Plaintiffs noticed this appeal on December 23, 2022. D.Ct. Dkt. 32. They did so rather than seek any further relief from the District Court and more than a week after any "early December" and "[b]y December 15" harms had, presumably, occurred. Eleven days later, following the New Year's holiday, Plaintiffs filed with this Court their motion for injunction pending appeal, accompanied by a declaration never presented to the District Court. *See* Mot. at 4 & Ex. 1 (Dec. 31, 2022 Declaration of John Phillips). Plaintiffs—correctly—declined to label their latest filing an "emergency motion" for purposes of Circuit Rule 27.3. But they nevertheless moved to shorten the CFTC's response time and requested that this Court grant an injunction "as soon as possible before January 19"—a total turnaround time of 16 days. *See* Mot. at iii–iv.[3]

Plaintiffs never moved the District Court for injunctive relief pending appeal per Federal Rule of Appellate Procedure 8. Nor have Plaintiffs provided the

[3] As with their previous December deadlines briefed to the District Court, *see* D.Ct. Dkt. 23 at 1, Plaintiffs do not explain why their current January 19 relief date was selected, besides that the period of "mid- to late-January 2023" is "approximately 15 to 30 days before the CFTC deadline." *See* Mot. at iii. Notably, had Plaintiffs chosen an earlier date they would have faced Circuit Rule 27.3's heightened procedural requirements, which apply to "motions seeking relief before the expiration of 14 days after filing."

District Court an update as to their circumstances since November 18, 2022. And Plaintiffs have further failed to explain to the District Court why they believe, per their representations to this Court, that January 19 now reflects an appropriate, legally meaningful relief date.

ARGUMENT

I. This Court Lacks Jurisdiction.

A. The District Court has not "constructively denied" Plaintiffs' preliminary-injunction motion.

Ordinarily this Court has "jurisdiction of appeals" from only those district-court decisions that are "final." 28 U.S.C. § 1291. An exception applies for "[i]nterlocutory orders of the district courts … refusing or dissolving injunctions." *Id.* § 1292(a)(1). And in rare cases, jurisdiction may also exist when a district court takes certain other action that would have "the practical effect" of "deny[ing] the preliminary injunction" requested. *See, e.g.*, *McCoy v. Louisiana State Bd. of Educ.*, 332 F.2d 915, 916–918 (5th Cir. 1964) (asserting appellate jurisdiction to impose school-desegregation order ten years after *Brown v. Board of Education* when district court set joinder deadline that would not otherwise conclude before the semester started). Because the difference between "the denial of a motion and deferral of action" is "a hazy one," federal appellate courts entertain such "constructive denial" claims only when there has been a "showing of unjustifiable

delay coupled with irreparable injury if an immediate appeal is not allowed." *See, e.g.*, *IDS Life Ins. Co. v. SunAmerica, Inc.*, 103 F.3d 524, 526 (7th Cir. 1996).

Plaintiffs relying on *McCoy* argue that they, too, face an "effective denial" because the District Court has improperly "prioritiz[ed] certain procedural issues over the time-sensitive motion for a preliminary injunction." Mot. at 5–6 (citing 332 F.2d at 916–17). Plaintiffs' case is nothing like *McCoy*. Unlike the June 10 start of summer school that would necessarily be missed after an additional 60-day joinder period was scheduled in late May, the District Court here has not taken any action indicating a refusal to resolve Plaintiffs' preliminary-injunction motion in due course and nothing the District Court has done indicates that it already *has* denied injunctive relief. While the CFTC's motions to transfer and dismiss and the Plaintiffs' preliminary-injunction motion remain pending, that is hardly surprising as Plaintiffs waited until December 27, 2022—15 days after the R&R issued and 4 days after they noticed this appeal—to file objections. If anything, Plaintiffs' decision to slow-walk their objections and file this interlocutory "appeal" will only further complicate the District Court's unremarkable and inherently discretionary approach to sequencing its docket.

There is thus no appellate jurisdiction. The District Court's choice to address certain "threshold" matters first does not establish that it "was foreclosing the requested [injunctive] relief." *See, e.g.*, *Fideicomiso De La Tierra Del Cano*

Martin Pena v. Fortuno, 582 F.3d 131, 134 (1st Cir. 2009) (per curiam) (dismissing putative "appeal"). This Court should dismiss.[4]

B. Plaintiffs fail to comply with Fed. R. App. P. 8 and have acted inconsistently with their supposed need for expedited relief.

This "appeal" independently warrants dismissal because Plaintiffs ignored Federal Rule of Appellate Procedure 8 and have acted inconsistently with the supposed need for expedited—but not emergency—appellate relief for their "now-emergency situation." Mot. at 11.

Rule 8 requires that parties first seek injunctive relief from the District Court unless "impracticable." *See* Fed. R. App. P. 8(a)(1), (2)(A)(i). There was nothing impracticable about complying here. Plaintiffs first argue that their motion to this Court "seeks almost identical relief" to their "pending preliminary injunction motion," such that their original filings should count as good enough. *See* Mot. at 11. That ignores the fact that Plaintiffs never presented to the District Court, among other things, the December 31, 2022 Declaration of John Phillips—and thus the supposed newly irreparable harms coming in "mid- to late-January 2023"—relied on in this Court. To the extent Plaintiffs believe that their changed

[4] Part II of Plaintiffs' Motion asks that an identical injunction issue under 5 U.S.C. § 705, an APA-specific stay provision. *See* Mot. at 19–20. But this Court may issue a Section 705 stay only "on appeal." Because there is no appellate jurisdiction, Section 705 is likewise unavailable.

circumstances warrant a different result, they should have raised such arguments with the District Court and secured a reviewable order. *Cf. IDS Life Ins. Co.*, 103 F.3d at 527 (explaining that "it is better to disambiguate" a district-court order actually issued "than to fret over the meaning of constructive denial").

Plaintiffs alternatively argue that complying with Rule 8 was impracticable because "time does not remain for moving first in the district court" as they face a "now-emergency situation." Mot. at 11–12. Wrong again. To start, Plaintiffs' self-characterization of their "now-emergency" situation contradicts their strategic decision not to treat this "appeal" as an "emergency" under Circuit Rule 27.3. Mot. at iii–iv; *compare* 5th Cir. R. 27.4, *with* 5th Cir. R. 27.3.

More fundamentally, however, Plaintiffs' behavior cannot be squared with the existence of an "emergency." To recap, Plaintiffs have known since August 4, 2022, of the non-binding, staff-specific February 2023 grace period announced in DMO's withdrawal letter. Yet Plaintiffs waited over a month to file suit on September 9, and then another three weeks to request a preliminary injunction on September 30. Plaintiffs failed to move for a briefing schedule and identified only February 15, 2023, as the requested relief date. Only months later, on November 18, did Plaintiffs move for expedited relief "before Christmas" tied to allegedly "accelerating" harms in "early December" or "[b]y December 15." Over a month after that, and only after the R&R issued but before filing objections 15

days later, Plaintiffs noticed this appeal on December 23. Without seeking further District Court relief at any point, Plaintiffs then waited an additional 11 days until January 3 to move this Court for expedited (but not "emergency") relief. Plaintiffs now ask for a decision no later than January 19, a legally meaningless date chosen for being sometime in "mid- to late January," giving this Court a mere 5 days to review hundreds of pages of duplicative briefing that has been teed up for the District Court only as of December 27.

Throughout this entire saga, Plaintiffs' core harm theories—all of which involve supposed downstream economic losses in their capacities as third parties—have remained substantively identical, changing, if at all, only in degree. That does not reflect an "emergency" in any sense of the word. And certainly not one precluding recourse to the District Court.

Moreover, if Plaintiffs had brought suit in the logical venue, or agreed to a voluntary transfer, their motion would have been resolved long ago. The D.C. District Court entitles parties to a preliminary-injunction hearing within 21 days upon showing "facts which make expedition essential." *See* D.D.C. LCvR 65.1(d); *see also* 12.1.2022 Tr. 30:9–11 (relevant excerpts attached as "Exhibit 2") ("The Court: All you've got to do is look at the data. You weren't going to get a preliminary injunction hearing here anywhere near as quickly as you might have gotten it in D.C."). That Plaintiffs never pursued this obvious alternative for faster

resolution at any point over the last five months—and instead spent almost two months setting up this Hail Mary—belies their late-coming protests.

C. Mandamus is not available either.

"A writ of mandamus is an extraordinary remedy reserved for really extraordinary cases." *In re Babin*, No. 22-40306, 2022 WL 1658701, at *3 (5th Cir. May 25, 2022) (quotation omitted). This is not an extraordinary case, much less a "really" extraordinary one. Indeed, Plaintiffs' argument fails at the outset because they do not even try to make this Court's three-part mandamus showing, nor could they. Instead, they cite facially inapposite case law, make high-level policy arguments about "Congress's decision to provide prompt appellate review," and express generalized concern for American "representative democracy." *See* Mot. at 20–22.

The extraordinary remedy of mandamus is unavailable here. *See, e.g.*, *Fideicomiso*, 582 F.3d at 135 (declining to issue "decidedly premature" writ as alternative to failed "constructive denial" theory); *see also* Fed. R. App. P. 21(a)(1) (requiring petitioners "to provide a copy" of mandamus petition "to the trial-court judge," which Plaintiffs never served here).

II. Were This Court To Reach It, Plaintiffs' Motion for Injunction Pending Appeal Lacks Merit.

Plaintiffs' motion here is nearly identical to their September 30, 2022 preliminary-injunction motion. As explained in both the CFTC's opposition, D.Ct. Dkt. 17 (attached as "Exhibit 3"), and the CFTC's motion-to-dismiss briefing, D.Ct. Dkts. 19, 25, Plaintiffs are not entitled to injunctive relief. The following summarizes those arguments, which are incorporated by reference in their entirety.

A. Plaintiffs' "sliding scale" approach is wrong.

Plaintiffs propose that "they 'need only present a substantial case on the merits' involving 'a serious legal question'" so long as they make a correspondingly stronger showing on the other three injunction factors. *See* Mot. at 13–14 (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)). That sort of "sliding scale" approach cannot be squared with the Supreme Court's decision in *Winter v. NRDC*, which requires showing that each injunction factor is "*likely*," rather than a mere "possibility." 555 U.S. 7, 22 (2008). While this Court has not yet decided whether some form of "sliding scale" survives *Winter*, Plaintiffs' approach 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).

B. There is no likelihood of success on the merits.

Regardless of the injunction standard this Court may ultimately adopt, Plaintiffs' motion fails because their case is meritless. *See also* D.Ct. Dkt. 31 at 7–8 & n.4 (noting "the strength of CFTC's motion to dismiss").

i. There is no final agency action.

No court has ever held a no-action letter or its withdrawal to be judicially reviewable. *See, e.g.*, *Board of Trade of City of Chicago v. SEC*, 883 F.2d 525, 530 (7th Cir. 1989) (holding SEC no-action letters do not constitute reviewable "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 APA provides for judicial review only as to "final agency action." 5 U.S.C. § 704. By their nature, no-action letters are informal, discretionary, and inherently staff-level statements about whether issuing staff might recommend that the five-member Commission vote to take action against particular regulated entities.

Under Rule 140.99(a)(2)'s express terms, CFTC staff no-action letters

concern only whether issuing staff may "recommend enforcement action to the Commission," are "entirely within the discretion of Commission staff," and "bind only the issuing Division" and "not the Commission or other Commission staff." CFTC divisional staff have not been delegated any authority under the CEA to grant any "license," "permit," or "approval" when issuing no-action letters. Both the 2014 no-action letter and the August 4, 2022 withdrawal issued by DMO staff are entirely consistent with that limited scope of no-action relief. *See, e.g.*, Am. Compl. Ex. 1 at 5–6; Am. Compl. Ex. 2 at 1–2 & n.4.

DMO's August 4, 2022 letter challenged by Plaintiffs thus does not reflect "final agency action": The Commission has not made any decisions about a hypothetical enforcement action against PredictIt's operators, and no-action letters carry no independent legal consequences. *See Bennett v. Spear*, 520 U.S. 154, 177–178 (1997); *accord, e.g.*, *Luminant Generation Co. v. EPA*, 757 F.3d 439 (5th Cir. 2014); *Soundboard Ass'n v. FTC*, 888 F.3d 1261 (D.C. Cir. 2018); *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940 (D.C. Cir. 2012).

Whoever is overseeing PredictIt.org (supposedly non-party Victoria University) understands this. The site's homepage prominently displays a banner that reads "Notice to traders: CFTC staff action on No-Action Letter." Click on it, and the first sentence that appears states: "The staff of the Commodity Futures Trading Commission (CFTC) has withdrawn the No-Action letter (NAL) issued to

[non-party] Victoria University of Wellington." Nowhere does PredictIt.org refer to a "revocation" of any "license," "permit," or other formal Commission "approval."

Whoever is operating Predictit.org's Twitter account understands this difference too. Mere days ago, on January 1, 2023, that account "tweeted" that Plaintiff Aristotle International, Inc. has "applied to the CFTC for permission to operate a Designated Contract Market" that would be rebranded as "'PredictIt Exchange,'" expressing "hope [for] approval in the coming months" as "becoming a regulated entity has been a long-time goal of the PredictIt team." True and correct copies of that Notice and Twitter thread are attached as "Exhibit 4" and "Exhibit 5."

Again, Victoria University is not here to explain.

Plaintiffs' motion does not address the absence of "final agency action" in much detail. To the extent that threshold failing is discussed, Plaintiffs rely primarily on *Data Marketing Partnership v. U.S. Department of Labor*, Mot. at 2–3, 16–17 (citing 45 F.4th 846 (5th Cir. 2022)), which is not on point. That case involved a binding legal interpretation about the scope of ERISA preemption issued by Department of Labor staff acting pursuant to inapposite delegated authority; it in no way undermines the decades of unbroken case law holding that staff no-action letters are non-reviewable. Among other notable differences,

unlike in *Data Marketing Partnership*, here there is no delegation of CEA authority to CFTC staff and nothing in DMO's original letter or the withdrawal bears the "force of law." *Cf. Requests for Exemptive, No-Action and Interpretive Letters*, 63 Fed. Reg. 3285, 3285 (Jan. 22, 1998) (codifying longstanding practice of informal communications from CFTC staff through no-action letters).

Moreover, Plaintiffs' *Data Marketing Partnership* argument appears nowhere in their preliminary-injunction briefing below, and reflects an about-face from what they told the Magistrate Judge. *See* Ex. 2 at 55:18–56:17 (identifying *Chicago Board of Trade* as Plaintiffs' "best case" on final agency action). The supposedly "recent" nature of that decision is no excuse. *Cf.* Mot. at 2. *Data Marketing Partnership* was published on August 17, 2022—two weeks before Plaintiffs filed suit, one month before their preliminary-injunction motion, and more than four months before this "appeal." The choice to change tack on this critical—indeed, dispositive—threshold issue only now, while unavailing, underscores Plaintiffs' failure to seek Rule 8 or similar relief in the District Court.

ii. CFTC staff no-action letters are "committed to agency discretion by law."

Because CFTC staff no-action letters reflect sensitive and inherently discretionary judgments about whether to recommend civil prosecutions, they are independently unreviewable under 5 U.S.C. § 701(a)(2). *See Chicago Bd. of*

Trade, 883 F.2d at 530 (holding that challenged no-action letter "is a classic illustration of a decision committed to agency discretion").

Plaintiffs' motion does not address 5 U.S.C. § 701(a)(2), which is independently dispositive.

iii. The third-party Plaintiffs lack Article III standing to assert claims on non-party Victoria University's behalf.

Victoria University, the sole recipient and "the Beneficiary," 17 C.F.R. § 140.99(a)(2), of the 2014 no-action letter, has never been a party to this litigation. The exclusively third-party Plaintiffs, who include PredictIt's corporate "services providers," individual PredictIt traders, and academics, lack Article III standing. Even taking as true their alleged downstream economic harms, Plaintiffs have failed to show either "causation," as those harms all flow from Victoria University's speculative, independent decisional calculus whether to continue operating the PredictIt market in some form; or "redressability," as it is similarly speculative whether Victoria University will continue or resume PredictIt's operations regardless of any injunctive relief against the CFTC. *See generally Nat'l Wrestling Coaches Assoc. v. Dep't of Educ.*, 366 F.3d 930 (D.C. Cir. 2004).

Plaintiffs' Motion does not address the independently dispositive lack of Article III standing either.

C. The alleged harms are not irreparable.

Plaintiffs' Motion instead focuses on the supposed harms underlying their "now-emergency" situation. *See* Mot. 11–13 & Ex. 1. Citing supposed market distortions and compliance costs, Plaintiffs assert that they face "irreparable" economic losses because they cannot recover money damages against the United States. *Id.* at 13 (citing *Wages and White Lions Invs., LLC v. FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021)). Not so. Plaintiffs still "have recourse" for damages "in the form of subsequent civil suits," if warranted, through breach-of-contract actions against the relevant counterparty. *See, e.g.*, *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012); Am. Compl. ¶ 27 (alleging that "Victoria University has entered into a market servicing agreement with Aristotle" and "[p]ursuant to that agreement" traders "enter into a contract with Aristotle").

D. The balance of equities and public interest disfavor injunctive relief.

Plaintiffs' discussion of the equities and public interest duplicate their merits and irreparable-harm arguments. *See* Mot. at 18–19. They are wrong for the same reasons.

By contrast, were this Court to hold—for the first time ever—that a staff no-action letter or withdrawal thereof is judicially reviewable, that would deal a major blow to a valuable and long-standing agency practice. CFTC staff have for decades offered similarly non-binding informal advice, orally and in writing, to

market participants on sundry topics affecting U.S. derivatives markets. 63 Fed. Reg. at 3285. Suddenly subjecting no-action letters to full-dress APA review "might well discourage the practice of giving such opinions" at all, 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) (quotation omitted).

E. Injunctive relief is unavailable to preempt a hypothetical Commission enforcement action.

Finally, by seeking to enjoin the Commission from interfering with PredictIt's operations on the basis of the 2014 no-action letter, Plaintiffs would effectively preempt an as-yet-hypothetical Commission decision to authorize enforcement proceedings.[5] The proper course is, instead, to raise any affirmative defenses the responsible parties may have if the Commission does bring a case. *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

[5] To be clear, the Commission is not now and has never been bound by any staff position taken in the 2014 staff no-action letter, *see* 17 C.F.R. § 140.99(a)(2), and therefore retains the independent authority to authorize (or not) an enforcement action at any time should such an action be deemed warranted, whether before, on, or after February 15, 2023.

in the courts."); *Sec'y of Lab. v. Twentymile Coal Co.*, 456 F.3d 151, 157 (D.C. Cir. 2006).

CONCLUSION

For these reasons, this Court should grant the motion to dismiss and/or deny the motion for injunction pending appeal.

Respectfully submitted,

/s/ *Kyle M. Druding*

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January 10, 2023

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Motion and Opposition complies with the type-volume limits of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 27(a)(2)(B) and 32(f), this brief contains 5,188 words.

2. I hereby certify that this Motion and Opposition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Times New Roman.

/s/ *Kyle M. Druding*
Kyle M. Druding

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2023, I caused the foregoing Motion and Opposition to be served on the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit and on Plaintiffs-Appellants, using the Court's CM/ECF system, as all participants in this case are registered CM/ECF users.

/s/ *Kyle M. Druding*
Kyle M. Druding

Exhibit 1

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., and ARISTOTLE INTERNATIONAL, INC.,	§	**A-22-CV-909-LY**
Plaintiffs,	§	
V.	§	
COMMODITY FUTURES TRADING COMMISSION,	§	
Defendant.	§	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE:

Before the court are Defendant CFTC's Opposed Motion to Transfer Venue (Dkt. #8), Motion to Dismiss (Dkt. #19), Plaintiffs' Motion for Leave (Dkt. #30), and all related briefing.[1] After reviewing the pleadings and the relevant case law, and having held a hearing, the undersigned submits the following Report and Recommendation to the District Court.

I. BACKGROUND

Since 2014, Victoria University of Wellington, New Zealand ("Victoria University") has operated an online market for political-event contracts (the "Market"). Dkt. #15 (FAC) at ¶ 1. On October 29, 2014, the CFTC's Division of Market Oversight ("DMO") issued Victoria University a "No-Action Letter" regarding Victoria University's creation of a "small-scale, not-for-profit, online market for event contracts in the U.S. for educational purposes." Dkt. #15-1 at 2-3. Victoria

[1] The motions were referred by United States District Judge Lee Yeakel to the undersigned for a Report and Recommendation as to the merits pursuant to 28 U.S.C. § 636(b), Rule 72 of the Federal Rules of Civil Procedure, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas.

University intended to operate two submarkets—one for political event contracts and the other for economic indicator contracts—and proposed to utilize the results of the market information derived from trading in these contracts for educational and research purposes. *Id*. at 3. Based on Victoria University's representations, the DMO stated it would not recommend the CFTC take any enforcement action in connection with the operation of the proposed market. *Id*. at 6. The No-Action Letter stated it was based on the information provided to the DMO and was subject to the conditions stated in the letter. *Id*. It also stated the no-action position represented only the views of the DMO and did not necessarily represent the CFTC's views. *Id*. The DMO also retained "authority to condition further, modify, suspend, terminate or otherwise restrict the terms of the no-action relief provided herein, in its discretion." *Id*. at 7.

On August 4, 2022, the DMO withdrew the No-Action Letter, stating that Victoria University had not operated its market in compliance with the nine conditions of the No-Action Letter. Dkt. #15-2 ("Withdrawal Letter"). The Withdrawal Letter stated that if Victoria University was operating any contract markets subject to the No-Action Letter, "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 3.

Plaintiffs are American individual investors in Victoria University's Market, American university professors who used the Market as a data source, and two U.S. corporate entities that service the Market. FAC at ¶¶ 5, 6, 26, 27. Notably, Victoria University is not a party to the suit. *Id*. at ¶ 25. Plaintiffs allege they have been harmed by the withdrawal of the No-Action Letter and assert claims under the Administrative Procedures Act. *Id*. at ¶¶ 75-89. They contend the withdrawal was arbitrary and capricious in violation of 5 U.S.C. § 706(2)(A) and constitutes the

withdrawal of a license without written notice or opportunity to demonstrate or achieve compliance in violation of 5 U.S.C. §§ 506 and 706. *Id*.

The CFTC moves to transfer the case under 28 U.S.C. § 1404(a) to the United States District Court for the District of Columbia. Dkt. #8. The CFTC also moves to dismiss the case entirely, arguing that the withdrawal of the No-Action Letter was not a final agency action, is a decision committed to agency discretion, and Plaintiffs lack standing. Dkt. #19. Plaintiffs oppose both motions and, in an effort to strengthen their arguments against transfer, amended their complaint to add additional Austin-based individual plaintiffs. Dkt. #13, #15, #21.

Because it was filed first, the court will first address the motion to transfer. As the undersigned recommends transfer, the court does not reach the CFTC's motion to dismiss.

II. MOTION TO TRANSFER

A. Appliable Law

Under Section 1404(a), a suit may be transferred for convenience to another venue where it might have been brought. 28 U.S.C. § 1404(a). Determining whether transfer under Section 1404 is proper requires the court to determine two factors: (1) that the transferee district is one where suit "might have been brought" and (2) that the transferee district is clearly more convenient. *In re Volkswagen of America, Inc.*, 545 F.3d 304, 312, 315 (5th Cir. 2008).

To evaluate convenience, the court considers four public and private interest factors. *Id*. at 315. "The private interest factors are: '(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive.'" *Id*. at 315 (quoting *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004) ("*Volkswagen I*")). "The public interest factors are: '(1) the administrative difficulties flowing

from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law.'" *Id.* (quoting *Volkswagen I*, 371 F.3d at 203).

B. Analysis

The parties agree that suit was properly brought in this District and that suit could have been brought in the District of Columbia. *See* 28 U.S.C. § 1391. The parties also agree that given the nature of this case—review of agency action—not all of the traditional transfer factors apply.

Because this case involves review of an agency action, both parties expect the case to be resolved at summary judgment on the administrative record of the CFTC's decision,[2] which will be produced electronically. Neither side indicates it expects to call witnesses. To the extent that is not the case, Plaintiffs contend Mr. Clarke's "experience making tradition decisions in Texas and the economic harm he has been caused in Texas" will be key. Dkt. #13 at 12. At the hearing, Plaintiffs argued Mr. Clarke's experience and insights are important because he was one of the Market's most involved participants, even though plaintiffs PredictIt, Inc. and Aristotle—both based in D.C.—provided necessary services to the Market. FAC at ¶¶ 26-27.

However, it is the public interest factors that are most compelling to the court. As CFTC points out, there are 845 weighted filings per judge in the Western District versus 286 in the D.C. District Court. Dkt. #8 at 13 (citing Administrative Office of the U.S. Courts, U.S. DISTRICT COURTS: COMBINED CIVIL AND CRIMINAL FEDERAL COURT MANAGEMENT STATISTICS (June 30, 2022). Moreover, this case's own history demonstrates that congestion. This motion to transfer was filed in September, and the court is only addressing it now, even though there are far older

[2] This assumes, for the purpose of this analysis only, that there was a final agency action and that the case survives the motion to dismiss.

motions referred to the undersigned. Plaintiffs' motion for preliminary injunction, also filed in September, has not even been set for hearing.

Additionally, Austin has relatively little local interest in this matter. Although several individual plaintiffs reside here, individual investor and academic plaintiffs are located throughout the country. In contrast, PredictIt Inc. and Aristotle, which face the greatest economic harm, are headquartered in D.C.[3]

Plaintiffs argue the court should give deference to their forum choice and that under the CFTC's arguments any administrative case could be transferred to D.C. The court notes this is not just any administrative case. The CFTC's No Action Letter and its withdrawal were not directed to Plaintiffs, but to a third-party New Zealand university.

When asked why they filed the case here, Plaintiffs repeatedly answered they filed here because Mr. Clarke resides here. Plaintiffs repeatedly emphasized Mr. Clarke's residency, although they conceded that from an economic perspective Mr. Clarke was not the largest investor or faces the greatest potential financial loss of the Plaintiffs. Indeed, even though there are numerous other Plaintiffs, Plaintiffs consistently argue this case is about how the withdrawal of the No-Action Letter has harmed Mr. Clarke.

Plaintiffs' insistence on the importance of Mr. Clarke and reasons for filing the suit here still confound the court, even after the hearing. The two entity plaintiffs—PredictIt, Inc. and Aristotle International, Inc.—are both based in the District of Columbia. FAC at ¶¶ 26-27. The No-Action Letter was issued to a New Zealand university, and its withdrawal was directed to that New Zealand university. Victoria University utilized PredictIt and Aristotle to manage the Market.

[3] There is no indication that either the familiarity of the forum with the law that will govern the case or the avoidance of unnecessary problems of conflict of laws or in the application of foreign law are relevant considerations here.

Thus, those entities assert greater economic damages than Mr. Clarke or any other investor. Further, those entities would seem to have the greater insight into whether the Market failed to comply with the terms of the No-Action Letter, as alleged in the Withdrawal Letter. It is unclear why—except to establish and defend venue here—Mr. Clarke's knowledge about how the Market has been affected by the Withdrawal Letter is so crucial given PredictIt's and Aristotle's role in the Market and in the case. Plaintiffs emphasize the downstream effects of the Market's closure, but those effects are allegedly felt where any Market participant or Market-data user resides.

Although not from a district court within the Fifth Circuit, the court finds *Hight v. United States Department of Homeland Security*, 391 F. Supp. 3d 1178 (S.D. Fla. 2019), the most persuasive of all the cases the parties cited. Plaintiff Matthew Hight was a sailor who sought to become a Registered Pilot to navigate the waters of Lake Ontario and the St. Lawrence River. *Id*. at 1181-82. Hight was denied a pilotage license, and the Coast Guard denied his appeal. *Id*. at 1182. Hight filed suit to challenge the denial under the APA in the Southern District of Florida, where he resided. *Id*. Defendants sought to transfer the case to either the D.C. District Court or to the N.D. of New York, where Hight intended to work if his claims were successful. *Id*. The *Hight* court applied the same transfer factors that this court applies, including that transfer can only be granted if the balance of factors "strongly favors" the defendant. *Id*. at 1185. Like in this case, the parties disputed how much weight the plaintiff's choice of forum should be given. *See id*. After noting that federal courts "traditionally have accorded a plaintiff's choice of forum considerable deference," the *Hight* court declined to give it greater weight because the only nexus to the chosen forum was plaintiff's residence; all the relevant decisions were made in the District of Columbia and the licensing decision related to work on Lake Ontario and the St. Lawrence Seaway. *Id*. at 1185. Similarly, here, the decisions related to the withdrawal of the No Action Letter were made

in the District of Columbia and were directed to a New Zealand university that used two D.C.-based companies to service the Market at issue. The only tie to Plaintiffs' forum choice is Mr. Clarke's and some other individual plaintiffs' residence here. Considering the factors, the *Hight* court found the public interest facts were neutral but nonetheless the interests of justice and convenience favored transfer and thus transferred the case. *Id*. at 1186-87. Here, only the Plaintiffs' choice of forum favors retaining the case, while the public interest factors strongly favor transfer.

Plaintiffs insinuate that the CFTC wants the case transferred to the District of Columbia because the CFTC expects a home court advantage there. Given the strength of CFTC's motion to dismiss,[4] this seems unlikely. Moreover, given the strength of Plaintiffs' protests against transfer, the court is forced to wonder if Plaintiffs fear D.C. Circuit precedent. Setting these concerns aside, the undersigned recommends transfer because the relevant factors favor transfer and outweigh Plaintiffs' forum choice.

III. MOTION FOR LEAVE

A week after the hearing, and on the eve of this Report and Recommendation being filed, Plaintiffs sought leave to supplement their briefing with further argument and evidence. Dkt. #30. Having read the brief, a good portion of it addresses arguments relevant to the motion to dismiss, which the court is not reaching. All of it, however, presents arguments that either were or could have been made at the hearing. Had the court desired additional briefing or thought it would be helpful, the court would have asked for it.

[4] The CFTC argues that issuance of a no-action letter and its withdrawal are not final agency actions and that Plaintiffs lack standing to sue. Plaintiffs argue the No Action Letter constituted a license and they are beneficiaries of the No Action Letter. However, at best, Plaintiffs can only strain to analogize to other cases. Plaintiffs' inability to cite cases directly holding that a no action letter is the equivalent of a license or other final action or that third parties are beneficiaries to a no action letter with standing sue leaves the court highly skeptical of their arguments. Nonetheless, as this court is not reaching the motion to dismiss, Plaintiffs will have a second chance to convince a court that their claims should move forward.

Plaintiffs' motion is denied.

IV. RECOMMENDATIONS

For the reasons stated above, the undersigned **RECOMMENDS** that the District Court **GRANT** Defendant CFTC's Opposed Motion to Transfer Venue (Dkt. #8).

The court **DENIES** Plaintiffs' Motion for Leave (Dkt. #30).

V. OBJECTIONS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battles v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996)(en banc).

SIGNED December 12, 2022.

MARK LANE
UNITED STATES MAGISTRATE JUDGE

Exhibit 2

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

KEVIN CLARKE, TREVOR BOECKMANN, HARRY CRANE, CORWIN SMIDT, ARISTOTLE INTERNATIONAL, INC., PREDICT IT, INC., MICHAEL BEELER, MARK BORGHI, RICHARD HANANIA, JAMES D. MILLER, JOSIAH NEELEY, GRANT SCHNEIDER, WES SHEPHERD,	) AU:22-CV-00909-LY
Plaintiffs,	)
v.	) AUSTIN, TEXAS
COMMODITY FUTURES TRADING COMMISSION,	)
Defendant.	) DECEMBER 1, 2022

****

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE MARK LANE

****

FOR THE PLAINTIFFS:	MICHAEL JAMES EDNEY HUNTON ANDREWS KURTH LLP 2200 PENNSYLVANIA AVENUE, NW WASHINGTON, D.C. 20037
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FOR THE DEFENDANT:	KYLE MITCHELL DRUDING U.S. COMMODITY FUTURES TRADING COMMISSION 1155 21ST STREET, NW WASHINGTON, D.C. 20581-0001
TRANSCRIBER:	ARLINDA RODRIGUEZ, CSR 501 WEST 5TH STREET, SUITE 4152 AUSTIN, TEXAS 78701 (512) 391-8791

Proceedings recorded by electronic sound recording, transcript produced by computer.

(Proceedings began at 10:08 a.m.)

THE CLERK: The Court calls the following for a motion hearing: 1:22-CV-909, *Kevin Clarke and others v. Commodity Futures Trading Commission*.

THE COURT: Let's start with announcements. Tell me who you are and who you represent. We'll start over here on my left who I trust are the plaintiffs.

MR. EDNEY: Yes, Your Honor. My name is Michael Edney from the Hunton Andrews Kurth Andrews Firm. I'm here with my colleague, John Byron. We represent the plaintiffs in this action, Kevin Clarke, Trevor Boeckmann, Harry Crane, Corwin Smidt, Predict It, Incorporated, Aristotle International, Incorporated, Michael Beeler, Mark Borghi, Richard Hanania, James Miller, Josiah Neeley, Grant Schneider, and Wes Shepherd.

I have with me at counsel table today some of the plaintiffs in this action. Mark Borghi here is right across from me. I have Dave Mason, who is the general counsel of Aristotle International, Incorporated, one of the corporate plaintiffs in this case. I have Kevin Clarke, our lead plaintiff. He's right there at the corner in the coat and tie. I have Wes Shepherd, another one of our Austin-based trader plaintiffs in the case. I have Josiah Neeley, one of the plaintiffs in the case here based in Austin, and I have John Phillips, the CEO of Aristotle International, Incorporated

and Predict it, Incorporated.

THE COURT: All right. Thank you, Mr. Edney. And over here on my right.

MR. DRUDING: Good morning, Your Honor. It's Kyle Druding for the U.S. Commodity Futures Trading Commission.

THE COURT: All right. Welcome to everyone.

I'm going to tell a little story, and then we'll get started. I was a prosecutor, state and federal prosecutor, for probably too long, when I was fortunate to get this job a little over ten years ago, so I had a great deal to learn about civil law, how to be a judge, how to write. And with the assistance of good people that I work with, I think I've done a reasonably credible job. I maybe don't get it right all the time, but I sure try.

As it relates to these hearings, when I started, because of my ignorance, I would just turn to lawyers and have them, Mr. Edney, you go ahead for 5, 10 minutes, and then Mr. Druding, you go and respond. And that masked my ignorance with regard to what I was doing a little bit.

But that's -- how I've handled these hearings has changed. And another part of that change is I cannot come out here and fake it. I mean, the only way for me to do that is just sit here and not ask you men any questions. I can't. I just can't fake it, particularly in something like this that is introducing a bunch of things I've never even heard of and an

education I need to receive. In other words, I actually have to study, and I've been studding on those two issues that we have today, the motion to transfer and the motion to dismiss.

And here's the upside, downside of that. As part of that process, you cannot -- I don't care who you are. You can't read through all of the briefing, finish that exercise, and not only read it once, read it twice, go back and read selected affidavits that have been filed. You cannot finish that process without developing some questions and reaching some initial conclusions. And that's the key to my little speech.

I have been studying on this, and I have reached some initial conclusions. As you're going to be able to tell from my questions, I'm not really going to be able to fake where those conclusions have brought me. It's incumbent upon you, if you don't like where you think I'm going, you need to change my mind. And today's the day to change my mind.

So, Mr. Druding, I thought I'd start with you just kind of in general, in the sense that, you know, you-all filed the motion to transfer first. And my -- and that's what I was gearing up for until we recently received the referral on the motion to dismiss. And that -- that broadened my preparations.

But my instincts this morning are to deal with the motion to transfer first and then the motion to dismiss. Is there anything that you see wrong with that strategy?

has been through a lot. They're 4,000 miles away. The CFTC is threatening them with various sanctions. And -- and their position has been made very clear, and it's -- it's at -- it's at Exhibit B to the reply in support of the motion for preliminary injunction. They -- they make very clear that they would not be crashing these investors out of their -- out of these contracts were it not for the -- for the FTC -- or the CFTC's mandate to get them out by February 15th.

THE COURT: I understand. But the lack of an institution's interest in this to me belies the original purpose of this, that it was academic and research oriented. It appears to me to be a gambling network. And I -- and I can think of right off the top of my head a number of reasons why I don't understand how that data can be very reliable for Predict It purposes, but I'll put that aside for a second.

What I do want to know is: Why not file this in D.C., where you would have already had your preliminary injunction hearing? Instead we're on this sideshow here. This stuff has been referred to me because District Judge Yeakel -- I mean, the most important statistic that Defense cited to me was in their -- I think it was in the original brief, the weighted case average. I don't know what they're doing in D.C., but the weighted case average is significantly higher here. And that's accurate. That's a reflection of what's going on. And, unfortunately, that's why you're having --

you're forced to see me. Judge Yeakel has got too much on his plate.

So why not have taken this to the District of Columbia where you wouldn't have had a motion to transfer, you wouldn't have had -- you still would have gotten a motion to dismiss, but it wouldn't have gotten done before the preliminary injunction. Instead, we're here. I don't know when you're going to get your preliminary injunction hearing.

MR. EDNEY: Well, Your Honor, I do think that's unfortunate, and I think the Court should be hearing our preliminary injunction motion in the first instance even if there's a pending motion to transfer. Courts do it all the time.

THE COURT: You could be right.

MR. EDNEY: They put a PI in place and they say, well, okay, let's preserve the status quo at least, and then let's decide where it's supposed to be heard and let's decide whether it should be dismissed, right? And I think that's -- I think that's the appropriate course of action here, especially since the CFTC has absolutely no defense for its February 15th date.

Remember, our preliminary injunction motion isn't trying to turn the lights back on on the entire market. It's just trying to say, look, let's deal with this February 15th date for the -- for the contracts that preexisted August 4th,

and -- and allow those to -- to continue to trade during the pendency of this action or to their natural conclusion.

That's all that is asking for, and I think that's an appropriate preservation of the status quo to put in place while we sort through all these issues.

THE COURT: You could be right. I'm just being honest with you.

MR. EDNEY: No. I understand that.

THE COURT: All you've got to do is look at the data. You weren't going to get a preliminary injunction hearing here anywhere near as quickly as you might have gotten it in D.C.

MR. EDNEY: Well, I --

THE COURT: So it gets me --

MR. EDNEY: -- I practice law in Washington, D.C., too, Your Honor. It's not the rocket docket by any stretch of the imagination. And, you know, the District of Columbia is a very different place than this court. It has fewer trials. It is often focused on governmental issues. And, look, I understand that the CFTC and many other agencies want to litigate all their cases there, but they're making decisions with nationwide effects.

THE COURT: Well, if you practice there, I mean, the CFTC notes this, is there something wrong with the district judges up in the District of Columbia?

MR. EDNEY: There's absolutely nothing wrong with the

district judges up there.

THE COURT: Okay. Then let's get back to my original questions.

MR. EDNEY: I love them, I love you, I love Judge Yeakel.

THE COURT: Why are we -- why are we in Austin? It's not because it's efficient. It's not because it's convenient. Why?

MR. EDNEY: Your Honor, we're here because of Kevin Clarke. That's why we're here.

THE COURT: Well, the law tells me it doesn't just stop with that. Okay? You've got one guy that lives in the district, in the division, analysis is done, we're over. There's no case law that says that. Instead, it says I'm supposed to look to what is clearly convenient.

And that's what I'm asking you. What's the factor that -- that Clarke has that any other person doesn't have, particularly when this affects, according to the pleadings, thousands of people, I take it across the country, and maybe not every of the 94 districts, but probably the majority of them?

MR. EDNEY: Your Honor, Mr. Clarke is intellectually engaged in this case, and that is a rare, rare commodity. It is not a universal trait of every trader that wants to raise his hand up and say, You know what? I think this is wrong. I

want to do something about it, much less help us build the factual and intellectual edifice about why it's wrong.

And, frankly, you know, in building the case for -- for a preliminary injunction, you know, trying to -- he was indispensable in trying to figure out what is going on with this market today that entitles us to relief now on this important issue. It's not just any plaintiff. We need a plaintiff who is engaged, and Mr. Clarke is that person.

But, Your Honor, going -- going back to the issue, I mean, the argument that they've made to you about the locus of decision-making is an argument that can be made about any federal government decision that has nationwide effects.

And -- and -- and the *Hight* case, which -- which has been pressed upon Your Honor, is nowhere close to what we're dealing with here. That plaintiff was complaining about the denial of his permission to drive a boat around Lake Erie. And he was trying to -- he was trying to challenge that issue from Florida because he happened to spend his winters down there. That's not -- that's leagues away from what we're dealing with here.

THE COURT: See, I'll tell you I saw it a little differently. I mean, I found *Hight* fairly persuasive. And the -- it dealt with one man's effort to obtain a license. I thought there was a much stronger argument for that to have stayed in Florida. This one's just one guy who's got $11,000

MR. EDNEY: Well, Your Honor, I -- look, I think -- I think the best case for that is -- is 558(c) of the Administrative Procedure Act. I mean, the Administrative Procedure Act says, you know, when you're issuing permits, you're playing with fire here, right? Essentially, it's -- it's any other form of permission.

THE COURT: If it's a permit. And I'm going back to the CFR in the regs that deal with the CFTC and how they describe a no-action letter. They sure don't use the word "permit" or "license."

MR. EDNEY: Well, I mean, there are no-action letters, and then there are no-action letters, Your Honor.

THE COURT: Okay. That's where you've got to help me.

MR. EDNEY: Yeah. And I'm glad you asked that question, because -- because, listen, I will -- I will say that, in my experience, most no-action letters are different from this one. Here's what they usually do: You know, our -- our administrative regulatory state, they have all sorts of very complicated restrictions and what we can and can't do, especially these businesses.

And -- and a business goes in and says, you know what? I'm having a hard time figuring out what I'm supposed to do with this particularly complicated regulatory provision. Here's what I'm thinking about doing: Are you going to come

and tell me that that's illegal? Okay. Are you going to interpret this ambiguous thing to say that I'm doing a bad thing? And the agency says, you know, we've got better things to do. We're not going to do that, right? You know, we might change our mind later, but we're not going to do it. And -- and they say thank you very much.

But this is -- is -- this is not that type of letter, right? This is not a situation where there's some complicated, ambiguous term that nobody really knows how it applies. Read footnote 6 of the -- of the no-action letter. The CFTC says there's absolutely no ambiguity in their view that these political event contracts are what they call swap contracts. And under the Commodities Exchange Act -- and I didn't know that before this case. But under the Commodities Exchange Act, if you're offering swap contracts in exchange, you've got to register as an exchange, period, right?

And -- and the CFTC here is using no-action relief for the Iowa Electronic Market and for the Predict It market to say, well, there's this -- there's this requirement that clearly applies to you. No question about it. But we're just going to use this no-action relief to tell you that you don't have to do it. And you can go ahead and pile all the money in and set up this market that you haven't even started yet without registering. And, yeah, at the end of it, like in every letter in almost every administrative decision that you

see, they say, you know what? We might change our mind, okay?

But -- but, you know, Chief Justice Roberts dealt with that in *Hawkes*. You know, he goes through kind of the history of administrative decisions. And he says, in every single administrative decision, we see something at the end of it that says, you know, this is our view right now but it may change. Well, that -- no kidding, right?

Administrative agencies are made up of human beings. Human beings change their mind all the time. The government changes its mind all the time. But when -- but when it's not the President of the United States changing his mind or Congress who votes, but the Administrative Procedure Act tells us -- the only thing it really tells us is, okay, the administrate agency can change its mind and dramatically affect the lives of business and regulated entities, but they have to offer a detailed, reasoned explanation first, one that's not arbitrary and capricious. And it's a pretty --

THE COURT: So where's your --

MR. EDNEY: -- pretty light requirement, right?

THE COURT: No. And I'm with you. But what's your best argument applying that to a no-action letter which doesn't -- we're all calling it a no-action letter. We're not calling it a license; we're not calling it a permit. You're saying it --

MR. EDNEY: I am calling it a permit.

THE COURT: Well, you are now. You're saying that it was tantamount to a license or permit. But what's your best case for a no-action letter is turned into a license or a permit?

MR. EDNEY: It's their best case.

THE COURT: Okay. Give it to me.

MR. EDNEY: Which is *Chicago Board of Trade*, right?

I mean Judge Easterbrook tells -- gives you the flip side of the coin, right? He says third parties can't come in and charge no-action letters. But if you've got a no-action letter that is, you know, placing mandates of future action on a regulated entity and it's putting that entity under the regulatory gun, either do this or get charged and face penalties, that's a situation where there is finality and you can bring an APA challenge against it. Because what does he say? Finality is a practical concept. And he didn't make that up. That's what the Supreme Court says.

I mean, this is not -- the final agency action doctrine is not a game where the -- the agency gets to kind of organize its life and hide behind, you know, various procedures and walls so they don't have to come in and answer to the court on things.

It's a practical concept that evaluates the real world effects of an agency decision on a business. And it doesn't get any more real than this, right? These guys, these

traders, have to give up their contracts. These corporations have to liquidate the contracts of a bunch of traders by midnight on February 15th, or it's bad news, right? You know, the next step is -- is enforcement proceedings and penalties. And what the Supreme Court says time and time again is that we don't have to wait for that.

So -- so, you know, I think the -- the key of the final agency action decision is that it is a practical analysis, and I think the dividing line is -- is relatively straightforward. Does the agency letter, staff letter, command future action and threaten penalties for noncompliance? The answer to that question is clearly yes in this case.

And then the next question is: Does the regulated party challenge its lack a mechanism to appeal that determination to a higher entity inside the agency? The answer to that question here is yes.

And if we're on that side of the line, whether it's a no-action letter or a staff letter of another kind, it's -- it's final agency action. And that principle helps you navigate through all these cases, right? Because, I mean, the cases are a bit of a mess, but there's cases on one side of the line or the other.

On our side of the line there's *Western Illinois Health Care v. Herman*, right, in the Seventh Circuit from Judge Wood. This comes after the *Board of Trade* case. You

know, she says there's a staff letter that says you've got to do something or else you're going to be penalized. It's just from staff, right? There's no enforcement action yet. She says you don't have to wait for the enforcement action. The question is: Is there anybody else to appeal it to? The answer is no. Everybody concedes that here. It's final agency action.

United States Army Corps of Engineers v. Hawkes, the Supreme Court case, you know, again a staff letter determination -- staff-level determination. Nowhere to appeal it. The next step is penalties and enforcement action. It's final agency action.

Sackett v. EPA in the Supreme Court in 2012, same situation.

And then there's cases on the other side, right? And -- and the *Luminant* decision from the Fifth Circuit. If you go through the *Luminant* decision, the key aspect of the *Luminant* decision is looking backwards at something the regulated entity did seven years ago and says I'm sending you a notice of violation, and this is the beginning of the -- of a -- of an enforcement action in which there's going to be additional steps.

It's not telling them to do anything in the future. It says you're in trouble for what you did in the past. And what the court says, quite rightly, is, well, you know, there's

REPORTER'S CERTIFICATE

I, Arlinda Rodriguez, do hereby certify that the foregoing was transcribed from an electronic recording made at the time of the aforesaid proceedings and is a correct transcript, to the best of my ability, made from the proceedings in the above-entitled matter, and that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

/S/ Arlinda Rodriguez — December 8, 2022

ARLINDA RODRIGUEZ — DATE

Exhibit 3

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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* *Admitted* pro hac vice

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*
Kyle M. Druding

Exhibit 4

PredictIt Announcements

Visit the PredictIt Status Page (https://status.predictit.org/) for real-time updates

Notice to Traders

The staff of the Commodity Futures Trading Commission (CFTC) has withdrawn (https://www.cftc.gov/PressRoom/PressReleases/8567-22) the No-Action letter (NAL) issued to Victoria University of Wellington and under which PredictIt has operated since 2014.

Here's what you need to know:

- **The security of trader funds will not be affected by this action**
- We intend to continue operating existing markets for trading through Feb. 15, 2023 unless they resolve sooner under their respective market rules
- In light of this decision, we are halting the addition of new markets
- No determination has been made on how markets with end dates after Feb. 15 will be settled
- PredictIt will continue to accept deposits and new signups
- PredictIt will continue to honor all withdrawal requests

PredictIt maintains that all open markets are within the terms of the No-Action letter (https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/14-130.pdf). We know our PredictIt community is incredibly strong and committed to this project. If you want to respectfully comment on this action, you can submit your comments to the CFTC here (https://predictit.ac360.aristotleactioncenter.com/#/alertId/c5637c3e-559f-41c8-8722-4a0c4c70f258/).

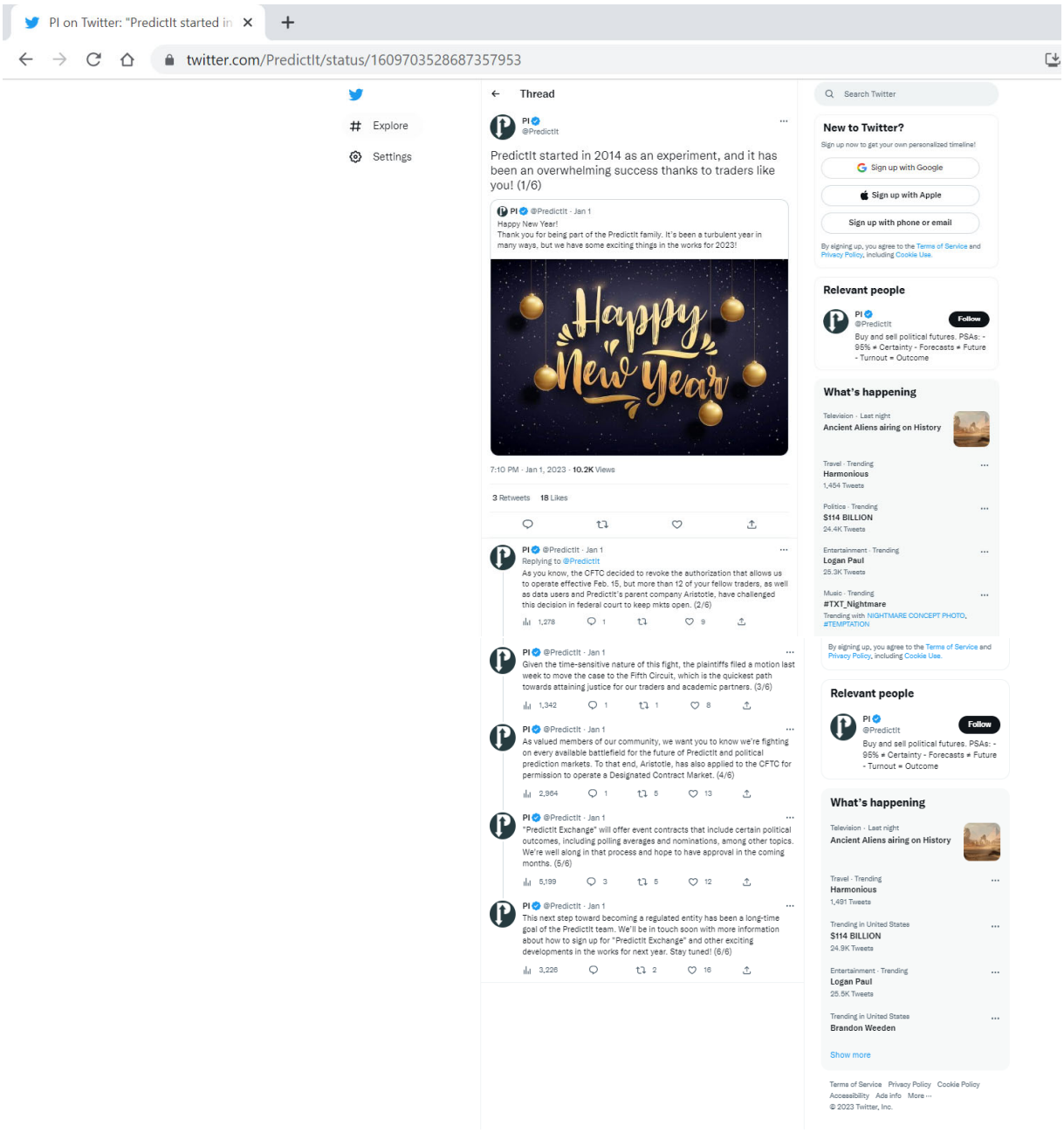
We will continue to update this page with additional information as it becomes available. Thank you for being a PredictIt trader!

Notice to traders: CFTC staff action on No-Action Letter

Predictit.org is an experimental project operated for academic purposes under permission from the CFTC.

Learn More

Exhibit 5


PI on Twitter: "PredictIt started in
twitter.com/PredictIt/status/1609703528687357953
Explore
Settings
Thread
PI
@PredictIt
PredictIt started in 2014 as an experiment, and it has been an overwhelming success thanks to traders like you! (1/6)
PI @PredictIt · Jan 1
Happy New Year!
Thank you for being part of the PredictIt family. It's been a turbulent year in many ways, but we have some exciting things in the works for 2023!
Happy New Year
7:10 PM · Jan 1, 2023 · 10.2K Views
3 Retweets 18 Likes
PI @PredictIt · Jan 1
Replying to @PredictIt
As you know, the CFTC decided to revoke the authorization that allows us to operate effective Feb. 15, but more than 12 of your fellow traders, as well as data users and PredictIt's parent company Aristotle, have challenged this decision in federal court to keep mkts open. (2/6)
1,278 1 9
PI @PredictIt · Jan 1
Given the time-sensitive nature of this fight, the plaintiffs filed a motion last week to move the case to the Fifth Circuit, which is the quickest path towards attaining justice for our traders and academic partners. (3/6)
1,342 1 1 8
PI @PredictIt · Jan 1
As valued members of our community, we want you to know we're fighting on every available battlefield for the future of PredictIt and political prediction markets. To that end, Aristotle, has also applied to the CFTC for permission to operate a Designated Contract Market. (4/6)
2,964 1 5 13
PI @PredictIt · Jan 1
"PredictIt Exchange" will offer event contracts that include certain political outcomes, including polling averages and nominations, among other topics. We're well along in that process and hope to have approval in the coming months. (5/6)
5,199 3 5 12
PI @PredictIt · Jan 1
This next step toward becoming a regulated entity has been a long-time goal of the PredictIt team. We'll be in touch soon with more information about how to sign up for "PredictIt Exchange" and other exciting developments in the works for next year. Stay tuned! (6/6)
3,226 2 16
Search Twitter
New to Twitter?
Sign up now to get your own personalized timeline!
Sign up with Google
Sign up with Apple
Sign up with phone or email
By signing up, you agree to the Terms of Service and Privacy Policy, including Cookie Use.
Relevant people
PI @PredictIt
Follow
Buy and sell political futures. PSAs: - 95% ≠ Certainty - Forecasts ≠ Future - Turnout ≠ Outcome
What's happening
Television · Last night
Ancient Aliens airing on History
Travel · Trending
Harmonious
1,454 Tweets
Politics · Trending
$114 BILLION
24.4K Tweets
Entertainment · Trending
Logan Paul
25.3K Tweets
Music · Trending
#TXT_Nightmare
Trending with NIGHTMARE CONCEPT PHOTO, #TEMPTATION
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Relevant people
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Buy and sell political futures. PSAs: - 95% ≠ Certainty - Forecasts ≠ Future - Turnout ≠ Outcome
What's happening
Television · Last night
Ancient Aliens airing on History
Travel · Trending
Harmonious
1,491 Tweets
Trending in United States
$114 BILLION
24.9K Tweets
Entertainment · Trending
Logan Paul
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Trending in United States
Brandon Weeden
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