No. 22-51124

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.

COMMODITY FUTURES TRADING COMMISSION,
Defendant-Appellee.

On appeal from the United States District Court for the Western District of Texas (1:22-cv-00909-LY)

PLAINTIFFS-APPELLANTS' REPLY IN SUPPORT OF THEIR OPPOSED MOTION FOR INJUNCTION PENDING APPEAL OR, IN THE ALTERANTIVE, PETITION FOR A WRIT OF MANDAMUS

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January 12, 2023

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In CFTC Letter 22-08 dated August 4, 2022, the agency ordered the PredictIt Market to close and throw investors out of their contracts by 11:59 PM on February 15, 2023. Absent an injunction, enough investors will leave the Market in advance of that deadline, and Market liquidity will drop so low, that there likely will be no meaningful market left to save in late January.

The district court did not act on Appellants' motion for preliminary injunction as considerable harm occurred in December. The agency applauded that inaction and now urges this Court to let the clock effectively run out. This would be "mission accomplished," as the CFTC would then surely be telling the courts "what's done is done," and there's no case left to decide.

Unelected bureaucrats have been vested with great power over American citizens and businesses and are protected from damages by sovereign immunity, even when they behave arbitrarily. What makes this arrangement remotely consistent with fairness and democracy is that Congress empowered courts to review agencies' momentous decisions and to pause them before they cause too much irreparable damage to the governed.

This Court should reject the CFTC's attempt to break that balance and evade this crucial check on its power. The Court should grant an injunction, so the substantial legal questions presented on the merits will not be academic when reached, the agency already having done its worst to the citizens it governs.

As for the balance of the equities, the public interest, and irreparable harm factors, the agency offers *zero* reason not to issue the injunction. In administrative review cases, the agency usually offers some substantive defense of its decision or identifies some harm that will occur if its chosen deadlines are delayed. But there is not a word of that in the CFTC's papers: The agency has shown no public good, no policy objective, nothing that will be served by enforcing its arbitrary closure deadline.

Instead, the agency pre-argues the merits. At stake here is a truly raw appropriation of governmental power by unelected bureaucrats. Rather than seek to justify its mandate as reasoned decisionmaking, the agency says it is "none of the Court's business."

The agency pours that argument into the "final agency action" doctrine, the administrative state's trusty tool to insulate consequential government decisions from any scrutiny. But this Court has recognized that when an administrative action's "practical effect" is to end a business, and to spoil the investments of tens of thousands, it is reviewable. It does not matter that the decision was made by a staff member, or that he reserved the agency's right to change its mind. The key is whether the decision is appealable within the agency, and this one clearly is not.

I. The District Court Constructively Refused a Preliminary Injunction, Giving this Court Direct Appellate Jurisdiction

Everyone agrees that this Court has direct appellate jurisdiction when a district court constructively refuses a preliminary injunction motion by not ruling on it in time to stop substantial irreparable injury. *See* Mot. 4–6; Opp. 10–11.

The agency's closure mandate has been causing irreparable harm since shortly after it was issued. That harm, and its likely course over time, was documented in the preliminary injunction motion. Two months after filing (in mid-November), when the district court had not scheduled a hearing, Appellants updated the projected timeline of harm. Significant costs to comply with the mandate and degradation of market liquidity would occur in December; Appellants asked for a hearing and ruling by Christmas. App. 55. The district court did not act.

Contrary to the CFTC's suggestion (Opp. 13–14), that the district court allowed irreparable harm to occur in December does not mean none is yet to come. Undisputed is that the Market is likely to effectively seize up in late January, absent judicial intervention. This Court should reject the Opposition's rendition of Goldilocks and Three Little Bears, for whom the porridge was too hot and too cold or, in the CFTC's case, coming to this Court was both too early and too late.

Motions for preliminary injunctions against school policies are effectively denied if not scheduled for ruling on before school starts, *McCoy v. Louisiana State Board of Education*, 332 F.2d 915, 916–17 (5th Cir. 1964), as are ones against roads

if not scheduled before the road is built, *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1449–50 (9th Cir. 1992). When the district court is poised to let "a major portion of the alleged harm" occur, a preliminary injunction motion is "effectively denied" and appealable. *Id.* at 1450.[1] The district court, here, let a good chunk of otherwise unrecoverable compliance costs happen and the Market decay to dangerously low trading volume. The CFTC, neither in the district court nor here, disputed evidence of the irreparable harm's magnitude and timing. No principle of law—neither precedents regarding appellate jurisdiction nor FRAP 8—requires Appellants to watch the Market's weak pulse turn to a flatline, before seeking this Court's intervention. Opp. 11.

Nor does this motion for injunction pending appeal violate FRAP 8. Opp. 12. The district court's inaction on the pending motion for preliminary injunction, and the motion to expedite, made moving first in the district court "impracticable." Fed. R. App. P. 8(a)(2)(A)(i). Time was truly up for preserving a market for the Court to save when it reaches the substantial merits questions presented in this case.

The CFTC blames the Appellants for this situation. Opp. 12–15. But the CFTC is the party that set this arbitrary February 15 deadline of which, even now, it

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[1] The CFTC's cited authority is inapposite (Opp. 10–12), as it concerns when either denial of a temporary restraining order, *Fideicomiso De La Tierra Del Cano Martin Pena v. Fortuno*, 582 F.3d 131 (1st Cir. 2009), or inaction on a stay in favor of arbitration, *IDS Life Insurance Co. v. SunAmerica, Inc.*, 103 F.3d 524, 526 (7th Cir. 1996), can be appealed.

refuses to explain the importance. It is undisputed that the trading volume trends will effectively lock up the Market in the two to four weeks before February 15.

The CFTC says Appellants should have filed their challenge in our Nation's capital to dispense with litigating the CFTC's preference to defend itself there. Opp. 11, 14–15. But Appellants clearly had venue and a right to file their challenge in Texas under Section 1391(e) of Title 28. That the CFTC, or even a magistrate judge, thinks discretion should be exercised to move it elsewhere does not absolve the district court from promptly deciding a time-sensitive preliminary injunction request. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Courts regularly issue preliminary injunctions to preserve the status quo while a transfer request is decided, Mot. 19–20, and the "awkwardness of balancing a hearing" with competing demands is "insufficient" reason for delaying preliminary relief. *Mt. Graham*, 954 F.2d at 1450.

Appellants have tried to move along their preliminary injunction request, and the CFTC has opposed expedition every step of the way. *See*, *e.g.*, Ex. 1 (Opp. to Mot. to Expedite). The motion for a preliminary injunction was filed three months before the most significant projected harm occurred in December. Appellants sought to stimulate district court action and advised that they would have to seek redress in this Court if none occurred. App. 60. Appellants were advised by the clerk's office that filing a motion in this Court was not possible until the case was docketed and,

when it was docketed, filed the instant motion the next business day. Mot. iv. And Appellants sought the most sensible briefing schedule possible consistent with averting a likely Market lock up in late January.

II. This Court Should Enjoin the CFTC's Mandate to Liquidate All Pending Investments by Midnight February 15

This Court should enjoin the CFTC's mandate to throw all investors out of the Market by Midnight February 15.

The CFTC's opposition is remarkable. Not one drop of ink is spent defending its decision to throw tens of thousands of investors out of their Market contracts on February 15. One would have expected a catalog of harms from which the CFTC was saving the Nation. But there is simply nothing on the other side of the scale here. The February 15 liquidation date—the only thing the requested injunction targets—is doing no public good.

The CFTC talks only of likelihood of success on the merits. And it turns almost exclusively to the final agency action doctrine. In doing so, the CFTC wants to talk only about its 2014 "no-action letter" authorizing the Market. Opp. 17. But this case is challenging what the agency did, not eight years ago, but in August 2022. In CFTC Letter 22-08, the agency ordered the Market to eject traders from their contracts by 11:59 PM on February 15. App. 26. That mandate was unconditional, carried a threat of sanctions, and is unappealable to the Commission. It bears all of the hallmarks of final agency action.

The CFTC says the 2022 decision was issued by a division of the agency that, on its own, does not have authority to assess penalties. Opp. 17. And that division, back in 2014, reserved the right for the agency to reverse course. Opp. 5. But this Court has rejected these arguments before. *Data Marketing Partnership v. U.S. Department of Labor*, 45 F.4th 846, 854–55 (5th Cir. 2022). What matters is that a staff decision could not be appealed inside the agency and deprived the plaintiffs of a safe-harbor from penalties. *Id.* The CFTC claims in a footnote that the Commission, at any point over the last eight years, could have penalized the Market. Opp. 23 n.5. But, until this liquidation mandate, the agency never could have established the willfulness required for some of its more severe sanctions. *See* 7 U.S.C. § 13(a)(5).

Perhaps most stunningly, the CFTC asks traders, academics, and Market operators to wait and see what happens: If the Commission initiated an enforcement proceeding, they can raise the arbitrariness of the agency's behavior as an affirmative defense. Opp. 23. How many times does the Supreme Court need to reject this argument before agencies stop making it? Private citizens need not "wait[ ] for [the agency] to 'drop the hammer' in order to have their day in court." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 600 (2016); *see also Sackett v. EPA*, 566 U.S. 120, 127 (2012).

In any event, when it comes to final agency action, courts apply the doctrine "flexibly" and look to the practical effect of an agency staff decision. *Hawkes*, 578 U.S. at 599. CFTC Letter 22-08 has the "practical effect" of throwing tens of thousands of investors from their contracts and closing a business without further agency process.

Throughout, the CFTC suggests granting an injunction here would be overturning the administrative china cabinet; it would be parting with an unbroken stream of authority that agency no-action letters and agency misbehavior stemming from them are completely protected from judicial review. Opp. 1, 17–20, 22–23. But the CFTC's lead case—*Board of Trade of Chicago v. SEC*, 883 F.2d 525 (7th Cir. 1989)—gives the lie to this argument. Opp. 17, 20–21. There, Judge Easterbrook held that third parties could not seek to overturn a no-action letter and force an agency to bring an enforcement action against the letter's recipients. *Bd. of Trade*, 883 F.2d at 530–31. If a PredictIt competitor grew tired of the CFTC permitting the Market, the competitor could not ask the courts to order enforcement against PredictIt. Of course, that is right. It is black letter law that courts cannot force an agency to invest its time prosecuting one alleged violation of law over another. *Id.* (relying on the Supreme Court unambiguous holding in *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

Appellants here are an entirely different kettle of fish. They are beneficiaries of and relied on a no-action decision permitting the Market to operate. The agency is pulling the rug out from under them and mandating future action coupled with a threat of enforcement. As Judge Easterbook held, parties that are being put "in jeopardy" or "under the gun" can challenge an agency decision, no matter whether it is denominated as or stems from a "no-action letter." *Bd. of Trade*, 883 F.2d at 529–30.

The rest of the opposition tries to raise spare arguments in a sentence or two. The CFTC wrongly contends that Appellants were not beneficiaries of the no-action letter, and the only entity with standing to sue is Victoria University, to which the letter was addressed. Opp. 21. CFTC regulations, though, make clear that "beneficiaries" of a letter are far broader than its addressee, and the APA makes clear that any adversely affected person has standing to sue. Mot. 17–18. Elsewhere, under various headings, the CFTC tells investors to take their grievances up with Market operators, who it now taunts to keep the Market open past February 15 and see what happens. That option is nowhere in the August 4, 2022 letter mandating the Market's closure. And the CFTC's argument is no different than claiming the regulated must risk dramatic penalties before challenging an agency decision, an argument rejected time and again by the Supreme Court.

The Appellants are not asking for much. They are not asking for permission to offer or trade contracts on new political events or elections. They are asking for an injunction permitting contract markets—existing on the date of the agency's surprise closure mandate—to continue trading while this appeal is pending. And, in seeking to enforce the APA, they are asking for some kind of explanation for why the Market must close, and in this incredibly disruptive way, before an unelected agency inflicts so much arbitrary carnage on the governed. Given the CFTC's inability to articulate public interest in the February 15 date, the requested injunction is asking this agency to give up . . . apparently nothing.

At a minimum, Appellants have brought "a substantial case on the merits" presenting a "serious legal question," which this Court articulated in 2014 and 2022 as the merits-related threshold for an injunction pending appeal even after the Supreme Court's 2008 decision in *NRDC v. Winter*, 555 U.S. 7 (2008). *Compare Campaign for S. Equal. v. Bryant*, 773 F.3d 55, 57 (5th Cir. 2014), and *Texas v. United States*, 50 F.4th 498, 531 (5th Cir. 2022), with Opp. at 16. The Court should issue the injunction.

III. This Court Should Issue Mandamus in the Event of Any Doubts over Appellate Jurisdiction

The CFTC has given this Court no meaningful reason to doubt its appellate jurisdiction. If there were doubt, this Court should use its mandamus authority to

overcome it. Contrary to the agency's arguments (Opp. 15), all requirements for mandamus are met.

If somehow appellate jurisdiction were lacking, Appellants would have "no other adequate means" to preserve a market for this Court to save when it hears the merits. Mot. 20. When a court has not acted in time to prevent the mooting of a case, this and other appellate courts have exercised their mandamus power. Mot. 20–21. This well-trod path of cases demonstrates a "clear and indisputable" right to the writ that is "appropriate under the circumstances." *See In re United States ex rel. Drummond*, 886 F.3d 448, 449–50 (5th Cir. 2018).[2]

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[2] Appellants today have served the district court with its opening and reply motions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and that it complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2) because it contains 2,588 words, excluding the parts exempted by Rule 32(f), according to the count of Microsoft Word.

/s/ Michael J. Edney
Michael J. Edney
Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2023, I electronically filed this brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Michael J. Edney
Michael J. Edney
Counsel for Plaintiffs-Appellants

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., 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

OPPOSITION TO PLAINTIFFS' MOTION TO EXPEDITE

This Court has set both the CFTC's Motion to Transfer Venue, Dkt. 8, and the CFTC's Motion to Dismiss, Dkt. 19, for a hearing at 10:00 a.m. on December, 1, 2022. *See* Dkts. 20, 24. Plaintiffs on November 18, 2022 filed their Motion to Expedite, requesting that this Court further schedule a hearing on their Motion for Preliminary Injunction, Dkt. 12, at an unspecified date in December so as to "render a decision before Christmas." Dkt. 23 at 1.

The CFTC opposes Plaintiffs' Motion to Expedite. For the reasons explained both in the CFTC's Opposition to Plaintiffs' Motion for Preliminary Injunction, Dkt. 17, and the CFTC's Motion to Dismiss briefing, Dkts. 19, 25, there is no jurisdiction under the Administrative Procedure Act for Plaintiffs' putative claims against staff no-action letters, as decades of settled case law confirm. Moreover, "the February 15 liquidation mandate" underlying Plaintiffs' supposed need for expedited treatment, Dkt. 23 at 3, is no such thing. *See, e.g.*, Dkt. 25 at 4–6.

Unless and until the Commission itself acts as an exercise of prosecutorial discretion, to the extent the Commission might chose to do so, that staff-specific grace period carries no independent legal effects as to PredictIt's operations. Nor have Plaintiffs shown the sort of "irreparable harm" that would warrant expedited resolution of their non-meritorious request for extraordinary relief months in advance of the supposed compliance deadline.

For these reasons, Plaintiffs' motion to expedite should be denied.

Respectfully submitted,

/s/ *Kyle M. Druding*

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CERTIFICATE OF SERVICE

I certify that on November 25, 2022, I caused the foregoing Opposition to Plaintiffs' Motion to Expedite 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