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 REPLY IN SUPPORT OF MOTION TO DISMISS

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Plaintiffs' Response to the CFTC's Motion to Dismiss is long on rhetoric. But it does not engage with the actual arguments that the CFTC has made, as to either the lack of appellate jurisdiction or the multiple threshold failures that reveal Plaintiffs' preliminary-injunction motion—and this entire case—to be meritless.

As to the lack of appellate jurisdiction, Plaintiffs reiterate their reliance on *McCoy v. Louisiana State Board of Education*, 332 F.2d 915 (5th Cir. 1964), which recognizes a narrow exception for "constructively denied" injunction motions under 28 U.S.C. § 1292. But they brush off the application of that doctrine to the on-point *Fideicomiso De La Tierra Del Cano Martin Pena v. Fortuno*, 582 F.3d 131 (1st Cir. 2009) (per curiam), which is labelled "inapposite" for also involving the "denial of a temporary restraining order." *See* Resp. 4 n.1.

In *Fideicomiso*, like here, the First Circuit faced protests of "interim" irreparable harm as to the district court's chosen "method of proceeding" by addressing certain "threshold" jurisdictional issues before a pending preliminary-injunction motion—"no radical departure from the usual course"—because there was no "indicat[ion] that an injunction was foreclosed." 582 F.3d at 133–134. The First Circuit distinguished such circumstances from those in which "the district court had made clear that it was foreclosing the requested relief," explaining this distinction's importance because a contrary rule "effectively would deprive district courts of the ability to manage effectively the initial phases of such

litigation." *Id.* at 133. The District Court's docket-sequencing choices below have been similarly unremarkable. If anything, because the *Fideicomiso* district court had already denied a TRO before turning to other "threshold" jurisdictional issues, the lack of appellate jurisdiction here is even starker. *Cf. id.* at 134 (noting that TRO denial order "did not claim to deny an injunction" altogether).

Nor have Plaintiffs justified their litigation strategy that has led to this non-emergency "emergency" situation. Plaintiffs concede, consistent with their original September 30, 2022 motion, that their allegedly ongoing "irreparable harm," all of which takes the form of purely economic downstream losses to third parties, has been incurred "since shortly after" the August 4, 2022 withdrawal letter issued. *See* Resp. 3. Yet Plaintiffs nowhere explain, among other things, why they waited almost 2 months since that letter and 3 weeks after filing suit to move for a preliminary injunction; another month and a half to seek any sort of expedited hearing, and only then giving an arbitrary "by Christmas" deadline for additional harms supposedly incurred in "early December" or "by December 15"; yet another month to notice their appeal; 15 days to object to the Magistrate Judge's R&R, which was presented for the District Court's resolution only 4 days after this appeal was taken; and 11 days to file their motion to this Court on a non-emergency basis, with a new but equally arbitrary January 19, 2023 interim deadline requested less than a month before the original February 15, 2023 relief

date. Without any support and despite the conceded foreseeability of their now-"accelerating" harms, Plaintiffs instead respond that they have "tried to move along their preliminary injunction request," "sought to stimulate district court action" with their November 18 motion to expedite, and are seeking "the most sensible briefing schedule possible" now available. Resp. at 5–6. None of that reflects the behavior of parties facing an actual "emergency." And it certainly does not render "impracticable" Plaintiffs' failure to comply with Federal Rule of Appellate Procedure 8.

Further, Plaintiffs again decline to attempt an argument that this "appeal" is eligible for mandamus under this Court's established three-part test, which ensures that that "extraordinary" writ is reserved for "really extraordinary circumstances." *Compare* Resp. 10–11; *with* Mot. to Dismiss at 15 (citing *In re Babin*, No. 22-40306, 2022 WL 1658701, at *3 (5th Cir. May 25, 2022)). That failure is especially egregious as Plaintiffs, in an unexplained footnote, acknowledge that they have attempted to comply with Federal Rule of Appellate Procedure 21(a)(1) only as of January 12, 2023, *see* Resp. 11 n.2—just 1 week from Plaintiffs' latest January 19 requested relief date, despite being 20 days after this "appeal" was noticed and almost 2 months since Plaintiffs' last update to the District Court. That additional self-inflicted procedural failure, whether intentional or not, only further burdens the District Court's docket-management and effectively eliminates

any potential response, per Rule 21(b)(4), to this surprise collateral attack.

As to the merits, Plaintiffs' Response simply reprises the preliminary-injunction and motion-to-dismiss briefing before the District Court, *see* Resp. 6–10—and is wrong for the same reasons.[1] *See* Mot. to Dismiss 16–24; D.Ct. Dkt. 17; D.Ct. Dkts. 19, 25; *see also* D.Ct. Dkt. 31 at 7 & n.4 (noting that "at best, Plaintiffs can only strain to analogize to other cases" and that their failure to cite on-point authority "leaves the court highly skeptical of their arguments"). And this Court owes no credence to Plaintiffs' characterization of this litigation as some righteous battle against "[u]nelected bureaucrats … vested with great power over American citizens" to preserve "fairness and democracy" from the "administrative state[]." Resp. 1–2. Nor is the CFTC's supposed failure to show that DMO's August 4, 2022 withdrawal letter is somehow "saving the Nation" of any moment. *Cf.* Resp. 6. Again, that withdrawal is no different from any other routine, informal, and inherently discretionary staff no-action correspondence, and on its face and by the express terms of 17 C.F.R. § 140.99(a)(2) lacks any legal

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[1] Plaintiffs' Response declines to address the Notice to Traders on the PredictIt.org website and PredictIt.org's January 1, 2023 Twitter thread, both of which contradict Plaintiffs' characterization of the 2014 no-action letter as some sort of "license," "permit," or other "approval" from the Commission. *See* Mot. to Dismiss 18–19 & Exs. 4–5. That still-unexplained disconnect underscores the absence of Victoria University, PredictIt's ostensible operator, as a party from this case—and the accompanying lack of Article III standing.

effect beyond those otherwise provided by the Commodity Exchange Act and CFTC regulations. And again, it is the CEA and CFTC regulations that at all times govern any legal liability that PredictIt's operators may (or may not) face from the Commission, regardless of any non-binding recommendation that its staff may (or may not) make. Indeed, that is precisely why courts nationwide have unanimously concluded that staff no-action letters are unreviewable under the Administrative Procedure Act. Plaintiffs' overblown table-pounding to the contrary only betrays the absence of law or facts favorable to them here.

For these reasons and those already given, this Court should dismiss or, at a minimum, deny the motion for injunction pending appeal.

Respectfully submitted,

/s/ *Kyle M. Druding*

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January 17, 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)(C) because, excluding the parts of the document exempted by Fed. R. App. P. 27(a)(2)(B) and 32(f), this brief contains 1,106 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 17, 2023, I caused the foregoing Reply 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