No. 22-51124

In the United States Court of Appeals for the Fifth Circuit

Kevin Clarke; Trevor Boeckmann; Harry Crane; Corwin Smidt; Aristotle International, Incorporated; Predict It, Incorporated; Michael Beeler; Mark Borghi; Richard Hanania; James D. Miller; Josiah Neeley; Grant Schneider; 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,
No. 1:22-cv-00909

BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Certificate of Interested Persons

Amicus certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case.

1. Plaintiffs-Appellants

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Dated: February 1, 2023 /s/ Renée D. Flaherty
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Identity and Interest of Amicus Curiae[1]

The Institute for Justice (IJ) is a nonprofit, public-interest legal center dedicated to defending the foundations of a free society. A central pillar of IJ's mission is to protect the rights of individuals to earn an honest living, operate businesses, own and enjoy property, and participate in the free market. IJ files lawsuits to protect these rights nationwide and has an interest in ensuring that justiciability doctrines such as "final agency action" and "standing" allow citizens access to the courts in cases against government defendants, including administrative agencies. IJ has a particular interest in the development of Fifth Circuit law, as IJ has an office in Austin, Texas, and regularly appears before this Court in strategic constitutional litigation. IJ has recently filed amicus curiae briefs in *Rogers v. Smith*, No. 22-30352, and *Marfil v. City of New Braunfels*, No. 22-50908.

[1] No party or party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than the amicus curiae—contributed money that was intended to fund preparing or submitting this brief. Pursuant to Federal Rule of Appellate Procedure 29(a), counsel for amicus states that counsel for all parties have consented to the filing of this brief.

Introduction and Summary of the Argument

In 2014, the Commodity Futures Trading Commission (CFTC) issued a "no action" letter allowing a small, nonprofit market to form to trade contracts about election results. That letter created a safe harbor for The PredictIt Market ("the Market"), which flourished for eight years, facilitating trades among countless investors, providing a livelihood to many, and generating valuable information for academics and policymakers. Then, in August 2022, the CFTC revoked the no-action letter, destroyed the safe harbor, and ordered the Market to shut down before midnight on February 15, 2023—two weeks from today—or else.

Chaos followed for the Market's operators, investors, and participants (Plaintiffs-Appellants here). The CFTC acted without explaining why and without providing a way to appeal the agency's decision. Then, when Plaintiffs-Appellants sued in federal court, the CFTC argued that the case is nonjusticiable because a staff member of the agency was merely "suggesting" that the Market shut down. Indifferent to the immense damage the letter revocation is causing, the CFTC's position boils down to: "If you were foolish enough to rely on us,

too bad for you." It's Kafkaesque.

Practically speaking, commands from the government are not mere "suggestions." To act otherwise risks ruin—prison, loss of livelihood, destruction of a business. But sometimes the government's edicts are not legitimate. Citizens must then have redress in the courts when government commands threaten their livelihoods, businesses, property, and contracts. Having sought compliance with a direct, personal command, the government cannot—as the CFTC does here—begin to play a game in court; a game in which the government pretends that its order is not a command and coyly refuses to say whether someone is breaking the law.

The goal is compliance without judicial accountability. The CFTC very well knows that the Market's operators must obey the revocation of the no-action letter, even as the CFTC disingenuously argues that it has not done anything to them. This pattern is repeated every day across the Fifth Circuit and the country as governments at all levels issue orders and then play justiciability games to secure compliance without litigants being able to vindicate their statutory or constitutional rights. But this Court and the Supreme Court have repeatedly said no to gamesmanship,

and this Court should use this case as an opportunity to say no again in forceful terms.

Argument

I. The CFTC Demands Obedience Without Judicial Accountability.

The CFTC expects the Market to shut down on February 15, 2023. No explanation, no invitation to cooperate, no hearing, no appeal. Just comply.

And the CFTC is not shutting down some rogue operator causing actual harm. The Market exists within a safe harbor that the CFTC deliberately created in its 2014 "no-action relief" letter. ROA.145. Plaintiffs-Appellants Aristotle, Inc. and Predict It, Inc., invested millions to set up the Market. ROA.131. More investors flocked to the Market and purchased contracts tied to the outcomes of future political events, and academics mined the data for information to advance the fields of microeconomics, political behavior, computer science, and game theory. *See* ROA.133, 165–67, 191–93, 457–60.

But on August 4, 2022—the CFTC revoked the Market's permission to operate and commanded it to liquidate its contracts by an arbitrary date. ROA.152–53. The CFTC said only that the Market "has not [been]

operated . . . in compliance with the terms of" the agency decision authorizing the Market's opening, ROA.153, and

> [t]o the extent the University is operating any contract market, as of the date of this letter, in a manner consistent with each of the terms and conditions provided in [CFTC] Letter 14-130, 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.

ROA.153. That date is nearly here, and the CFTC has fought tooth and nail to kick Plaintiffs-Appellants out of court. In the meantime, the Market continues to lose traders and liquidity. ROA.397–400. The Market's operators have also been forced to invest in costly systems that will implement the CFTC's mandate. ROA.134–35; 389–90, 402–06.

The CFTC does not even try to explain why it suddenly sawed off the tree limb that the CFTC had induced Plaintiffs-Appellants to venture onto eight years ago. The decision is substantively indefensible under the APA, *see* Pls.-Appellants' Opening Br. 21–33, and so the agency moved to dismiss this appeal on procedural grounds: Plaintiffs-Appellants have no standing to sue because they suffer only "alleged downstream economic harms," Def.-Appellee's Mot. Dismiss and Opp. Mot. Prelim. Inj. ("Def.

Opp.") 21, and there has been no final agency action under the APA. Def. Opp. 17–21. To support its argument, the CFTC asserts that its edict came from the agency's staff, not the agency itself, and those staff said "should" instead of "must." Def. Opp. 6.

For Plaintiffs-Appellants, however, revocation of no-action relief is a command from the government to do as you are told. What else would it be? The agency's revocation came with no path forward: no invitation to a discussion, no plan for correcting a mistake, no right of appeal. Just an order to shut down by a date certain, or else. The CFTC's actions are punitive, not informative. Moreover, telling the court that it cannot hear the case only serves to run out the clock. The CFTC's approach allows the government to "have its cake and eat it too": that is, achieve its enforcement goals without the oversight that comes with judicial review. *TVA v. Whitman*, 336 F.3d 1236, 1250 n.26 (11th Cir. 2003) (discussing the EPA's similar strategy when plaintiffs sued about administrative compliance orders). Plaintiffs-Appellants are not the only litigants facing this dilemma.

II. The CFTC's Strategy Is Commonplace.

Government entities use these tactics at all levels to secure

compliance without having to answer for it in court. Entities like the CFTC and its staff know that people in the real world must take directions from enforcement officials seriously. When an official from the CFTC's Department of Market Oversight revokes your no-action letter, the only reasonable conclusion is that you are in the CFTC's crosshairs and better do what the overseer says. And not just because the failure to do so can result in severe civil and criminal sanctions, though that would be enough. For people in the real world, it is more than that. They have to feed their families, employ their employees, honor promises made to investors, and pay back debt to lenders.

Those few who challenge the government then face the formalistic justiciability inquiry that the CFTC wants this Court to impose. In the CFTC's view, it does not matter what happens in the real world—does not matter that the Market's operators have done good things for eight years, that investors and scholars have real stakes in the Market's continued existence, that the Market must close with the revocation of the letter, that no right of appeal exists. What matters to the CFTC is the org chart, that the Division of Market Oversight is below the Commissioners themselves; that, as the CFTC argued below, maybe

someone else somewhere else on the org chart could entertain some other sort of license application, such permission to operate a full-blown Designated Contract Market under 7 U.S.C. § 7. By shutting down the Market now but telling this Court that Plaintiffs-Appellants must wander the CFTC's org-chart labyrinth for several more years, the CFTC is trying to put the Market in a hopeless limbo: the Market operators know that enforcement officials think what they are doing is illegal, but the government itself refuses to take an "official" position.

Plaintiffs represented by Amicus are plunged into this limbo all the time. Take Full Circle of Living and Dying, a California nonprofit devoted to offering counseling, advice, and other services to families and loved ones of those who are dying. *See Full Circle of Living & Dying v. Sanchez*, No. 2:20-CV-01306, 2020 WL 7714200, at *1 (E.D. Cal. Dec. 29, 2020). The California Cemetery and Funeral Bureau demanded that Full Circle qualify as a licensed funeral establishment, that its volunteers become licensed funeral directors, and that Full Circle cease operations and advertising their services in the meantime. The bureau threatened fines and prosecution if they did not. *Id.* When Full Circle and its volunteers sued, the bureau argued that the plaintiffs had failed to exhaust

administrative remedies, lacked standing, and that the case was not ripe for review. *Id.* at *2–4. Like in this case, the bureau refused to tell Full Circle exactly what sort of conduct was prohibited. The agency's position in court was that Full Circle's harm was "speculative" until it "materialize[d] in a full-fledged 'enforcement action.'" *Id.* at *3. Like the CFTC, the bureau dared Full Circle to violate its orders to find out what it had done wrong. The district court ruled that Full Circle's claims were justiciable because it "would be forced to choose between continuing established operations as it has conducted them for several years and risking fines or withholding services." *Id.* at *4.

In contrast, Steve Cooksey, a dietary advice blogger, knew exactly what the government thought he had done wrong. The North Carolina Board of Dietetics/Nutrition sent him a printout of his website marked up with red pen noting all the statements he made that allegedly violated the state's dietetics licensing law. *See Cooksey v. Futrell*, 721 F.3d 226, 232 (4th Cir. 2013). Frightened by the letter, Cooksey modified his website and the board dismissed the complaint, noting that it "reserve[d] the right to continue to monitor" Cooksey. *Id.* (emphasis added). When he sued, the board argued that he lacked standing and the case was not

ripe because the board had not taken an enforcement action against him or come up with an "official" position on whether his blog violated the law. *Id.* at 240. The Fourth Circuit held that Cooksey's claims were justiciable because "[n]o further action from the Board is needed: it has already, through its executive director, manifested its views that [the dietician licensing law] applies to Cooksey's website, and that he was required to change it in accordance with the red-pen review or face penalties." *Id.* at 241. The CFTC's mandate is equally clear here, and so, too, have Plaintiffs-Appellants taken steps to comply. ROA.134–35; 389–90, 402–06.

Even when enforcement might not occur for years (or at all), plaintiffs must prepare for the worst. That preparation is enough to confer standing and ensure ripeness. In 2018, day-care providers in the District of Columbia challenged the city's new regulations requiring that they obtain college degrees to care for children. The regulations did not go into effect until 2023, and so the city argued that the plaintiffs should wait and see how merciful the regulators were in granting hardship waivers. *See Sanchez v. Off. of the State Superintendent of Educ.*, 959 F.3d 1121, 1124 (D.C. Cir. 2020). Rejecting this argument, the court

recognized the "quandary" faced by the plaintiff: "[I]n the absence of a decision in her favor, she will have to begin expending time and money now in order to obtain the credentials the regulations prescribe." *Id.* at 1125–26. The court also took a realistic view of the city's "discretionary, time-limited and revocable waiver[s]," which provided only "cold comfort." *Id.* at 1125. The court recognized that saving money for tuition, putting a business on hold, and enrolling in college are not trivial things. Plaintiffs should not have to put their heads under the chopping block to challenge laws that are costly to obey.

The common thread in these cases is that the government cannot command a citizen to do something and then pretend it was only a suggestion when it stands in front of a judge. If the government's actions have real consequences for the plaintiff, then they can sue.

III. Plaintiffs-Appellants Should Have Their Day in Court.

The CFTC's position is not simply inconsistent with common sense and the ancient duty to act in good faith with those who trusted you. It is also inconsistent with precedent. The Supreme Court has long held that the ability to sue is based on practical, real-world injuries, not just government org charts. Courts have a "virtually unflagging obligation . . .

to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Because there are real-world injuries here that the CFTC inflicted, this Court should exercise its jurisdiction and reach the merits of Plaintiffs-Appellants' claims.

A. Plaintiffs-Appellants have standing.

To establish standing, courts look for a concrete "injury in fact" that is caused by a defendant and redressable by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). This inquiry considers the "practical" impact of government action. *Duarte ex rel. Duarte v. City of Lewisville*, 759 F.3d 514, 518 (5th Cir. 2014). Courts are practical about timing, too: "[O]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)). The Market has already suffered because of the CFTC's actions, and Plaintiffs-Appellants stand to lose much more. That is enough for standing.

The CFTC argues that Plaintiffs-Appellants have not shown

"causation" or "redressability" necessary for standing because the Market's founder, Victoria University (to whom the CFTC's no-action relief letter was addressed), is not a party to this lawsuit. The CFTC asserts that Plaintiffs-Appellants' harms are "speculative" because Victoria University might shut down the market anyway, no matter what the agency does in the future. Def. Opp. 21. Victoria University has said the opposite, that it would not shut down the market but for the CFTC's actions. ROA.327 (Victoria Univ. Ltr.).

The CFTC simply ignores this statement and the concrete injuries suffered by Plaintiffs-Appellants—the Market's operators who have already invested in compliance and who will lose millions more if forced to shut down, investors whose contracts will be liquidated, and academics whose research will be vaporized. These are real harms caused by the CFTC's revocation of the Market's authority to operate.

Plaintiffs-Appellants, who are directly involved in the everyday operation of the Market, have *more* at stake than Victoria University, which is located 7,500 miles away in New Zealand. Indeed, plaintiffs who were not the direct targets of an agency action have had standing to sue for injuries far less substantial than Plaintiffs-Appellants' here. *See, e.g.*,

United States v. SCRAP, 412 U.S. 669, 686–90 (1973) (members of environmental association had standing to challenge administrative order granting a railroad freight rate increase because reduced shipments of waste products would cause environmental harm by reducing recycling); *Suntex Dairy v. Bergland*, 591 F.2d 1063, 1065–66 (5th Cir. 1979) (milk producers had standing to challenge marketing order issued to milk handlers).

The CFTC's own regulations contemplate this situation: Any "[b]eneficiary" of no-action relief—not just the "recipient" or the "person on whose behalf the [relief] is sought" as used in other parts of the regulations—may rely on the relief. *Compare* 17 C.F.R. § 140.99(a)(2), *with id.* § 140.99(c), (e). Plaintiffs-Appellants have certainly done so here, and they have standing to sue under the Fifth Circuit's "practical" approach. *Duarte*, 759 F.3d at 518; *see also Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 265 (5th Cir. 2015) ("Whether someone is in fact an object of a regulation," and therefore has standing to sue, "is a flexible inquiry rooted in common sense.").

B. Revocation of a no-action relief letter on which the Market has relied for nine years is reviewable.

Similarly, courts have taken a "pragmatic" and flexible approach

when assessing whether there has been a reviewable "final agency action" under the APA. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 599 (2016); *see also Ciba-Geigy v. EPA*, 801 F.2d 430, 435 (D.C. Cir. 1986) (same). Here, over the course of nine years, Plaintiffs-Appellants invested millions and built a business in reliance on the CFTC's no-action letter. The CFTC yanked it away without explanation. The agency's actions must be reviewable in court.

An agency action must satisfy two conditions to be final. First, "the action must mark the consummation of the agency's decisionmaking process"; it cannot be "merely tentative or interlocutory." *Hawkes Co.*, 578 U.S. at 597. Second, "the action must be one by which rights or obligations have been determined, *or* from which legal consequences will flow." *Id.* (emphasis added); *see also Sackett v. EPA*, 566 U.S. 120, 127 (2012) (finding agency action was final when there was no "entitlement to further agency review"). Parties need not "wait[ ] for [the agency] to 'drop the hammer' in order to have their day in court." *Hawkes Co.*, 578 U.S. at 600 (quoting *Sackett*, 566 U.S. at 127). Put another way, "We normally do not require plaintiffs to bet the farm by taking the violative action before testing the validity of the law." *Free Enter. Fund v. PCAOB*,

561 U.S. 477, 490 (2010) (cleaned up)).

The CFTC's no-action letter induced reliance by granting the Market authority to operate. Revoking that letter pulled the rug out from under the Market. It does not matter whether the decision to revoke the letter came from the CFTC's staff, or that they used the word "should" instead of "must." As discussed above in Section I, the practical outcome of the CFTC's actions is that the Market must shut down or face penalties, and the agency left no avenue for appeal. There is nothing "tentative or interlocutory" about the situation, and if the Market does not shut down, "legal consequences will flow." *Hawkes Co.*, 578 U.S. at 597. When an agency allows its officials to create safe harbors, and then allows those officials to destroy a safe harbor without any opportunity for higher review within the agency, that is a final agency action. *Id.* at 600 ("As we have long held, parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of 'serious criminal and civil penalties.'").

The CFTC relies on two cases to argue that no-action letters are not reviewable in court. *See* Def. Opp. 17 (citing *Board of Trade v. SEC*, 883 F.2d 525, 530 (7th Cir. 1989); *Kixmiller v. SEC*, 492 F.2d 641, 645–646

(D.C. Cir. 1974) (per curiam)). Neither of these cases involves the *revocation* of a no-action letter and subsequent challenge by the beneficiaries of the letter who are directly affected by that revocation. First, in *Board of Trade*, existing markets wanted to invalidate a no-action letter given to someone else and force the Securities and Exchange Commission to enforce against that someone else. 883 F.2d at 526. This was simply a plea to prosecute the competition.

Kixmiller is even more distinguishable. There, a stockholder asked the Commissioners of the SEC to review a no-action letter that the Division of Corporate Finance issued to a company to create a safe harbor for the company's decision to exclude the stockholder's proposals from an upcoming shareholder meeting. 492 F.2d at 642. The Commissioners declined to comment on the Division's decision or offer informal advice. *Id.* at 643. The stockholder then sued under a statute giving courts the authority to review "[orders] issued by the Commission." *Id.* But the Commission itself had not issued any order. And even the Division of Corporate Finance had not issued any order (or revoked its no-action letter). Rather, neither the Commission nor the Division ordered the company or stockholder to do anything. That case, then, was not about

an agency order, like the revocation letter here, instructing someone to take action by a specific date. Nor was the procedural issue "final agency action" under the APA.

In sum, neither case involves the creation of an eight-year safe harbor for a market and its investors, and neither involved an unmistakable, unignorable, unappealable order to destroy that thriving market or face serious penalties. Nor did either case involve the SEC playing justiciability games in court by trying, for instance, to split hairs over the difference between "should" and "must." Thus, recent, on-point Supreme Court authority, not these 40–50 year-old cases, controls.

Conclusion

The CFTC resorts to the same tired playbook as many other government entities who do not want to be held accountable in court. Just like the funeral board in *Full Circle of Living & Dying*, the dietetics board in *Cooksey*, and the day-care regulators in *Sanchez*, the CFTC cannot play this game with litigants who have been directly harmed by their actions. This Court should exercise its jurisdiction and reach the merits of Plaintiffs-Appellants' claims.

Dated: February 1, 2023 Respectfully submitted,

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Certificate of Service

I hereby certify that on February 1, 2023, I caused the foregoing **Brief of Amicus Curiae Institute for Justice** to be filed electronically via the Court's CM/ECF filing system in compliance with Rule 25(b) and (c) of the Federal Rules of Appellate Procedure, which will send notice of such filing to all registered CM/ECF users.

Dated: February 1, 2023

/s/ Renée D. Flaherty
Counsel for Amicus Curiae
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Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,697 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and the Rules of this Court.

2. This brief 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 365 in 14-point Century Schoolbook font.

Dated: February 1, 2023

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No. 22-51124 Clarke v. CFTR
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Dear Ms. Flaherty,

You must **OVERNIGHT** the 7 paper copies of your brief required by 5th Cir. R. 31.1.

Sincerely,

LYLE W. CAYCE, Clerk

Melissa Mattingly

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