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-LY

APPELLEE'S BRIEF

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February 1, 2023

CERTIFICATE OF INTERESTED PERSONS

No. 22-51124

KEVIN CLARKE, ET AL.,
Plaintiffs-Appellants,

v.

COMMODITY FUTURES TRADING COMMISSION
Defendant-Appellee.

The undersigned counsel of record 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. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs-Appellants:
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Trevor Boeckmann
Harry Crane
Corwin Smidt
Aristotle International, Inc.
Predict It, Inc.
Michael Beeler
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Defendant-Appellee:
United States Commodity Futures Trading Commission

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STATEMENT REGARDING ORAL ARGUMENT

This case has been expedited and is scheduled for oral argument on February 8, 2023.

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INTRODUCTION

Plaintiffs' case is meritless for several reasons. But the crux of their argument is this: that certain staff of the United States Commodity Futures Trading Commission ("CFTC" or "the Commission") issued a no-action letter in 2014 "authorizing" the "birth" of the PredictIt event-contracts market by granting a "license" not found in any statute or regulation to non-party Victoria University of Wellington, New Zealand, only later to "kill" the PredictIt market by ordering it to "close" when the same staff withdrew that letter on August 4, 2022. Those premises—that PredictIt was "licensed" by the Commission to "open," and that the Commission has "mandated" that PredictIt "close"—are wrong. At bottom, Plaintiffs mischaracterize the contents, nature, and legal significance of staff no-action letters generally, and what happened here specifically.

No-action letters are not the equivalent of formal agency "licenses," "approvals," or "permits." They are instead discretionary, non-binding, and inherently staff-level statements about whether the issuing staff might (or might not) recommend to the Commission that the Commission, at the Commission's sole discretion, vote to authorize civil proceedings in accordance with enforcement authority delegated by Congress under the Commodity Exchange Act ("CEA").

Individual CFTC staff members have no authority to either unilaterally "birth" or "kill" an event-contracts market like PredictIt, because nothing in the

CEA or any CFTC regulation grants them that authority. Per Congress's explicit instruction, only the five-member Commission itself could have formally registered or exempted PredictIt from otherwise-applicable CEA requirements, or revoked any such registration or exemption, according to carefully prescribed statutory processes that are expressly subject to judicial review. *See, e.g.*, 7 U.S.C. §§ 6(c)(1)–(2), 7(a), 7a-2(c)(5)(C)(i), 7b, 7b-3(a)(1), 8(b).

The plain language of CFTC Rule 140.99(a)(2) confirms as much. Rather than delegating any of the Commission's authority, Rule 140.99(a)(2) provides simply that no-action letters are "a written statement" that the issuing staff "will not recommend enforcement action to the Commission," and that such statement "binds only the issuing Division … and not the Commission." 17 C.F.R. § 140.99(a)(2). The 2014 no-action letter issued by staff of the CFTC's Division of Market Oversight ("DMO") is fully consistent with Rule 140.99(a)(2), stating only that staff would not recommend that the Commission vote to bring an enforcement action if certain conditions were met. So limited, the 2014 no-action letter is legally indistinguishable from any other no-action letter. *See* ROA.149–150 ("Scope of no-action relief provided by DMO"); ROA.152–153 & n.4. And unsurprisingly, no-action letters have consistently been held to be non-binding and lack the force of law, *see, e.g.*, *New York City Empls.' Ret. Sys. v. SEC*, 45 F.3d 7, 12 (2d Cir. 1995); *Apache Corp. v. Chevedden*, 696 F. Supp. 2d 723, 735 (S.D.

Tex. 2010) (Rosenthal, J.), and no court has ever held such a letter to be judicially reviewable, *see, e.g.*, *Bd. of Trade of City of Chicago v. SEC*, 883 F.2d 525, 529 (7th Cir. 1989); *Kixmiller v. SEC*, 492 F.2d 641, 646 (D.C. Cir. 1974) (per curiam). Plaintiffs cite nothing to the contrary.

By the same token, CFTC staff lack the delegated authority to impose independent legal consequences for noncompliance with the terms of staff no-action letters. Instead, the only recourse under Rule 140.99(a)(2) is for the issuing staff to withdraw the no-action letter and, potentially, make an enforcement recommendation to the Commission. All the August 4, 2022 letter did was withdraw the 2014 no-action letter; that is, it ended DMO staff's conditional commitment not to make a recommendation to the Commission. DMO's withdrawal letter says nothing about any consequences should PredictIt choose to ignore the February 15, 2023 staff-specific grace period announced therein, and does not even threaten to *recommend* that the Commission bring an enforcement action for noncompliance. *See* ROA.257 (stating only that PredictIt's operators "should" comply). That is no "mandate."

Even imagining that Plaintiffs were correct that the 2014 no-action letter had purported to "license" PredictIt and that the 2022 withdrawal had purported to "mandate" PredictIt's closure, their injunction motion would still fail. If some rogue staff had attempted to circumvent the statutorily prescribed, Commission-

level registration and exemption framework chosen by Congress to "authorize" PredictIt at Victoria University's behest—as Plaintiffs implausibly assert—that would have been highly improper. Such an extra-statutory "license" would have been *ultra vires* and void on its face regardless.

But that never happened either. Victoria University, at all times represented by highly sophisticated counsel, was fully aware of the legal and practical consequences of choosing to pursue only staff no-action relief rather than formal Commission authorization. Plaintiffs, who seek to bring suit in the University's absence, remain bound by that choice.

This Court's analysis need proceed no further. Were this Court to reach them, however, there are two other threshold failures that independently doom Plaintiffs' claims on the merits: First, CFTC no-action letters are exercises of prosecutorial discretion unreviewable as a matter of law, 5 U.S.C. § 701(a)(2); and second, Plaintiffs, who allege only indirect harms in the University's stead, lack Article III standing. The lack of any likelihood of success should dispose of Plaintiffs' injunction motion before this Court—and warrants dismissal outright.

Plaintiffs have similarly failed to show that any of the remaining injunction factors warrant the extraordinary relief requested. The downstream, purely economic harms asserted by the exclusively third-party Plaintiffs are not "irreparable." And the equities and public interest would be harmed by the

chilling of a valuable and longstanding channel of informal communication between derivatives market participants and CFTC staff, should this Court to be the first to entertain full-dress Administrative Procedure Act ("APA") litigation over no-action correspondence.

Finally, the scope of Plaintiffs' requested relief is improper. This Court should not preemptively enjoin an as-yet-hypothetical enforcement action before the Commission has said word one on the subject. Rather, the proper course is to have the responsible parties—should the Commission ultimately authorize such an enforcement action—raise any potential affirmative defenses at that time.

For the following reasons, Plaintiffs' motion should be denied and this appeal dismissed.

JURISDICTIONAL STATEMENT

"This court has a continuing obligation to assure itself of its own jurisdiction, sua sponte if necessary." *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 468 (5th Cir. 2020) (en banc).

Here, there is no subject-matter jurisdiction over Plaintiffs' claims for at least three reasons. First, judicial review under the APA is limited to "final agency action," 5 U.S.C. § 704, which the challenged August 4, 2022 withdrawal letter issued by CFTC staff is not. *See, e.g.*, *Sierra Club v. Peterson*, 228 F.3d 559, 565 (5th Cir. 2000). Second, the APA bars judicial review of agency action that "is committed to agency discretion by law," 5 U.S.C. § 701(a)(2), such as the prosecutorial discretion exercised by CFTC staff in issuing and withdrawing Rule 140.99(a)(2) no-action letters. *See, e.g.*, *Munn v. U.S. Dep't of Lab.*, 714 F. App'x 387, 391 (5th Cir. 2018) (per curiam). And third, the exclusively third-party Plaintiffs lack Article III standing to sue in non-party Victoria University's stead. *See, e.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

As to appellate jurisdiction under 28 U.S.C. § 1292(a)(1), the motions panel issued a summary order holding that the District Court had "constructively denied" Plaintiffs' preliminary-injunction motion. ECF No. 34. Should this Court wish to revisit that determination, the CFTC incorporates by reference its January 10 and January 17, 2023 motion-to-dismiss briefing. ECF Nos. 20, 32.

ISSUES PRESENTED

The sole issue before this Court is whether to grant Plaintiffs' request for preliminary injunctive relief:

- when there is no likelihood of success on the merits, as
  - there is no "final agency action,"
  - staff decisions to issue or withdraw no-action letters reflect unreviewable prosecutorial discretion, and
  - Plaintiffs lack Article III standing;
- when third-party Plaintiffs' asserted downstream economic harms are not "irreparable";
- when the equities and public interest would suffer were this Court to subject staff no-action correspondence to full-dress APA litigation, for the first time, and thereby chill the informal (and comparatively less expensive and burdensome) guidance provided through discretionary, non-binding no-action letters under 17 C.F.R. § 140.99(a)(2), and similar staff consultations at other agencies; and
- when the injunctive relief sought would effectively preempt the Commission from reaching a final, as-yet-hypothetical charging decision.

STATEMENT OF THE CASE

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

The CFTC is the federal agency tasked with administering and enforcing the Commodity Exchange Act ("CEA" or "the Act"), 7 U.S.C. §§ 1–26, and does so in part through promulgating regulations, 17 C.F.R. pts. 1–190. The CEA governs markets for commodity derivatives, including futures contracts and swaps, and to a lesser extent, the commodities that underlie them. *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 directly dependent upon—that is, "derived from"—the value of something else, such as an agricultural or financial commodity, debt instrument, or pricing index.[1]

Relevant here are a class of derivate products 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

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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 Feb. 1, 2023).

[2] CFTC, *Contracts & Products: Event Contracts*, https://www.cftc.gov/IndustryOversight/ContractsProducts/index.htm (last visited Feb. 1, 2023).

CFTC regulations, those seeking to offer certain event contracts generally must do so as a "registered entity," 17 C.F.R. § 40.11(a)–(c), including 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 can make sure that they 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).

Registration plays a key role in furthering the CFTC's mission. Should a covered entity fail to register, or otherwise violate the CEA or CFTC regulations, the CFTC can bring suit in federal court to redress the violation and enforce compliance. *Id.* § 13a-1(a). The CEA grants district courts hearing CFTC enforcement actions broad remedial authority, including the power to enjoin wrongdoing, order restitution and disgorgement, and assess civil monetary penalties. *Id.* § 13a-1(a)–(d).

B. The Division of Authority between the Commission and its Staff.

The CFTC exercises only that authority delegated by Congress and employs various staff to assist the Commission's mission promoting the integrity, resilience, and vibrancy of U.S. derivatives markets. 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 to do so, and all votes are recorded by the Secretary of the Commission. *See, e.g.*, 17 C.F.R. § 140.12. Plaintiffs cannot and do not allege that this happened here.

The CFTC employs staff across thirteen operating divisions and multiple offices nationwide. *Id.* §§ 140.1, 140.2. The Division of Market Oversight, among other things, reviews new applications for exchanges such as DCMs and SEFs and examines existing exchanges to ensure their regulatory compliance.[3] Another division, the Division of Enforcement, investigates and, if and only if authorized by vote of the Commission, civilly prosecutes violations. While staff may make recommendations, only the Commission itself—acting by recorded vote—can determine whether to grant DCM and SEF applications, *see* 7 U.S.C.

[3] *See generally* CFTC, *About the CFTC: CFTC Organization*, https://www.cftc.gov/About/CFTCOrganization/index.htm (last visited Feb. 1, 2023).

§ 8(a), or whether to bring enforcement actions. *See* 7 U.S.C. §§ 9(4)(A), 13a-1(a)–(d).

C. 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. They are briefly summarized below.

DCM and SEF Registration. An entity that wishes to operate a derivatives exchange in the United States must apply to be registered with the Commission as either a DCM or as a SEF. As mentioned above, a key prerequisite to offering event contracts in compliance with the CEA is that the offeror be a registered DCM or SEF. 7 U.S.C. § 7a-2(c)(5)(C)(i) (specifying that event contracts be listed "by a designated contract market or swap execution facility"); *see also id.* § 6(b)(1)(A). A DCM is a board of trade or an exchange that has been designated by the CFTC as allowing institutional and retail participants to list and trade various derivatives products including futures, swaps, and options. A SEF is a trading system or platform that allows multiple participants to execute or trade swaps by accepting other participants' bids and offers through that trading system or platform. To operate lawfully in the United States, DCMs and SEFs must first register with the Commission. *See, e.g.*, *id.* §§ 7(a), 7b-3(a)(1); 17 C.F.R. §§ 37.3, 38.3. If the Commission grants registration, the Commission can later revoke

registration only by following statutory procedures that are expressly made subject to "judicial review." *See* 7 U.S.C. §§ 7b, 8(b).

Section 4(c) Exemptions. The Commission has statutory authority to exempt certain transactions or instruments from the CEA. CEA Section 4(c) establishes an exemption process that provides 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 APA, the Commission makes certain required findings. *See* 7 U.S.C. § 6(c)(1)–(2). The Commission can grant Section 4(c) exemptions "either unconditionally or on stated terms or conditions." *Id.* § 6(c)(1). After a Section 4(c) exemption issues, the Commission retains the authority "to conduct investigations" and, if there has been a failure to comply with those conditions, "to take enforcement action for any violation" of the CEA or CFTC regulations. *Id.* § 6(d).

No-action letters. CFTC regulations provide for staff-level no-action letters, which the University chose here to pursue. These letters do not issue from and expressly do not bind the Commission. Nor do they reflect delegated authority. Rather, Rule 140.99(a)(2) codifies a preexisting staff practice of answering inquiries about what staff would "recommend … to the Commission" concerning proposed activities. CFTC, *Requests for Exemptive, No-Action and Interpretive*

Letters, 63 Fed. Reg. 3285, 3285 (Jan. 22, 1998). Under 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" to be "conducted by the Beneficiary." 17 C.F.R. § 140.99(a)(2). No-action letters can be "issued by the staff of a Division of the Commission or of the Office of the General Counsel." *Id.* No-action letters 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.* If issued, "[o]nly the Beneficiary may rely" on the letter. *Id.*

The decision 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). 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.* § 140.99(a)(2).

D. The PredictIt Market and the Withdrawal of No-Action Letter 14-130.

PredictIt is "an online market for political-event contracts," allegedly operated by Victoria University of Wellington. ROA.218 ¶ 1; *but see* Br. 36 (appearing to argue that Aristotle International, Inc. and its subsidiaries are "the companies who operate the Market"). According to the Amended Complaint, PredictIt is "[e]ssentially a stock exchange for political events" that offers tradable

binary options, in the form of "'yes' or 'no' contracts in an event market" with "prices ranging from 1 to 99 cents" per contract. *See* ROA.218 ¶ 2. The "primary purpose" of PredictIt allegedly is to "be a small-scale market" for "academic" research, enabling the production of "market-generated trading/pricing information regarding what informed investors believe the outcome is going to be, reinforced by a relatively small financial investment." ROA.218–219 ¶ 3.

Despite offering event contracts in the United States, neither Victoria University nor PredictIt has ever been registered with the CFTC in any capacity, including as either "a designated contract market or swap-execution facility." *See, e.g.*, ROA.221, 235 ¶¶ 7, 59. Nor do Plaintiffs allege that Victoria University ever attempted to secure relief under CEA Section 4(c) to exempt PredictIt from the CEA's requirement that event-contract trading to be conducted on a CFTC-registered exchange. Instead, Victoria University sought and received only the 2014 staff no-action letter. *See, e.g.*, ROA.221, 225–226, 234–236 ¶¶ 7, 25, 58–63 & ROA.249–254, 259–265. The University's decision to go the less formal staff no-action route rather than apply for registration or seek a Section 4(c) exemption from the Commission itself necessarily limited the applicable procedures and what they ultimately received.

That 2014 no-action letter (No. 14-130), after summarizing Victoria University's request, concluded that "DMO will not recommend that the

Commission take any enforcement action in connection with the operation of your proposed market for event contracts" were PredictIt to operate as proposed. *See* ROA.253. That conclusion was "based upon" the University's "representations" in both its original letter and telephone calls with DMO staff. ROA.250, 253. In its request for no-action relief, Victoria University represented, among other things, that PredictIt "has been designed to serve academic purposes and the operators will receive no compensation," and that only certain categories of event contracts concerning specified "political elections and economic indicators" would be offered subject to certain caps both on the number of allowable traders per contract and total amount that may be spent per contract. ROA.249–253. The University further represented that its written materials concerning PredictIt would "prominently disclose" that neither the market nor its operators are "registered with, the Commodity Futures Trading Commission." ROA.260.

The 2014 no-action letter is clear as to the limits of both its scope and effect. That letter, which uses the term "no-action" thirteen times, including both in the address block and in the subject line, is on DMO letterhead and signed by the Division's Director. In the section titled "Scope of no-action relief provided by DMO," the no-action letter provides:

> 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.

ROA.253–254. At no point does that letter ever 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 its 2014 no-action letter. ROA.221 ¶ 8 & ROA.256–257. That withdrawal summarized the Division's 2014 position "to not recommend enforcement action (*i.e.*, 'no-action' relief)" and reiterated the nine limitations that the University had originally proposed operating under. ROA.256–257. Concluding that "[t]he University has not operated its market in compliance with the terms of Letter 14-130," DMO stated that "Letter 14-130 is hereby withdrawn." ROA.257. As to any then-existing contracts that had been 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.*

Plaintiffs do not allege that PredictIt currently offers any contract in a manner consistent with the terms and conditions in the 2014 no-action letter.

Indeed, Plaintiffs do not directly challenge DMO's conclusion that "[t]he University has not operated its market in compliance with the terms of Letter 14-130," and even the small sample of documents they have submitted to the Court shows that they are in no position to do so. *Compare, e.g.*, ROA.256–257 (summarizing nine enumerated conditions that the University agreed to observe), *with* ROA.155 (November 24, 2014 email from DMO's Chief Counsel questioning as inconsistent with the 2014 no-action letter the University's "indiscriminate advertising" and listing of contracts with "no relationship to elections or any other meaningful political question.").

E. Procedural History.

Plaintiffs can be divided into three groups. First, Plaintiffs Aristotle International, Inc., and Predict It, Inc., allegedly are private corporations that collectively "service[]" various aspects of PredictIt pursuant to an undisclosed "market servicing agreement." ROA.218, 226 ¶¶ 1, 26–27. Second, Plaintiffs Harry Crane, Corwin Smidt, Richard Hanania, and James Miller are academics who allege that they use PredictIt data for "teaching and research" purposes. *See* ROA.225, 227 ¶¶ 23, 24, 30, 31. Third, Plaintiffs Trevor Boeckmann, Kevin Clarke, Michael Beeler, Mark Borghi, Josiah Neeley, Grant Schneider, and Wes Shepherd are individual PredictIt customers who allegedly made various "purchases and trades" on PredictIt. *See* ROA.225–228 ¶¶ 22, 21, 28, 29, 32, 33,

34. Notably absent from Plainitffs' ranks: Victoria University, the sole beneficiary of the 2014 no-action letter. ROA.225–226 ¶ 25.

In the operative Amended Complaint filed on October 6, 2022, Plaintiffs raise two APA counts challenging the 2022 withdrawal of the 2014 no-action letter. ROA.239–246 ¶¶ 75–81, 82–89 & ROA.256–257. Plaintiffs' first count claims that the withdrawal is arbitrary and capricious because that letter lacked sufficient "reasoned decisionmaking," both as to the ultimate decision to withdraw the 2014 no-action letter and the timing for doing so. ROA.239–244 ¶¶ 75–81 (citing 5 U.S.C. § 706(2)(A)). Plaintiffs' second count claims that the withdrawal failed to give sufficient process to revoke a "license" under 5 U.S.C. § 558(c). *See* ROA.244–246 ¶¶ 82–89; 5 U.S.C. § 551(8).

The Parties have collectively filed three threshold motions in the District Court. First, on September 20, 2022, 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. ROA.80. Second, Plaintiffs moved for a preliminary injunction on September 30, 2020. ROA.98. Third, the CFTC moved to dismiss on October 28, 2022. ROA.330.

The District Court referred to the Magistrate Judge both the CFTC's motion to transfer and motion to dismiss. Following oral argument, the Magistrate Judge issued his Report and Recommendation ("R&R") on December 12, 2022.

ROA.505. The R&R concluded that the CFTC's motion to transfer should be granted and expressed concern as to 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 [to] sue." ROA.511–512 & n.4. Plaintiffs objected to the R&R on December 27, 2022, after noticing this appeal. ROA.517.

On November 18, 2023, Plaintiffs filed a motion to expedite their motion for preliminary injunction. ROA.387. After the District Court did not act on that motion, Plaintiffs noticed this appeal on December 23, 2022. ROA.513. Plaintiffs then moved this Court for an injunction pending appeal and a decision by no later than January 19, 2023. ECF No. 6. The CFTC moved to dismiss for lack of appellate jurisdiction on January 10, 2023. ECF No. 20. A motions panel denied the CFTC's motion to dismiss on January 17, 2023, and directed that Plaintiffs' injunction motion be referred to a merits panel. ECF No. 34. The next day the Clerk's Office entered an expedited briefing schedule to be concluded in advance of oral argument, scheduled for February 8, 2023. ECF Nos. 35, 38. On January 26, 2023, the Court directed that a non-dispositive order granting Plaintiffs' motion for stay pending appeal be entered. ECF No. 44.

F. PredictIt.org Publicly Contradicts Plaintiffs' Litigation Position.

The operators of PredictIt.org, supposedly non-party Victoria University,

have issued several public statements that contradict Plaintiffs' litigation position.

From August 4, 2022 until mere days ago, the PredictIt.org homepage prominently displayed a banner titled "Notice to traders: CFTC staff action on No-Action Letter."[4] The first sentence that appeared after clicking through the hyperlink stated: "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 did PredictIt.org refer to a "revocation" of any "license," "permit," or other formal Commission "approval," nor could it have without committing fraud. PredictIt.org never claimed that the relevant "staff" withdrawal was directed toward anyone besides "Victoria University," the sole beneficiary of the 2014 no-action letter.

Similarly, on January 1, 2023, the PredictIt.org Twitter 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

[4] *Available at* https://analysis.predictit.org/post/691692185480036352/important-notice-for-predictit-traders (last visited Feb. 1, 2023).

a regulated entity has been a long-time goal of the PredictIt team."[5] In addition to conceding that PredictIt has never been "a regulated entity," that tweet confirms that PredictIt's operators have long known as much. That Aristotle International, Inc., a private company—not Victoria University, a public research university—now seeks to take over future PredictIt operations is itself directly at odds with the University's representations that PredictIt would be a "small-scale, not-for-profit, online market" for "educational" and "academic purposes" for which "the operators will receive no compensation." *Cf.* ROA.250, 253. It is also directly at odds with Plaintiffs' unsupported and inherently speculative assertions about what, if any, future role Victoria University might play in PredictIt operations, regardless of the outcome of this litigation.

SUMMARY OF THE ARGUMENT

Plaintiffs' theory of the case rests on a pair of interlocking premises that the 2014 no-action letter issued by DMO staff at Victoria University's request was a "license" giving "birth" to the PredictIt market, and that the August 4, 2022 withdrawal was a "mandate" that "kills" it. But the non-party University never requested that DMO staff grant it a "license," staff never granted a "license" or

[5] *Available at* https://twitter.com/PredictIt/status/1609703537642196992 (last visited Feb. 1, 2023).

issued a "mandate" revoking that license, and doing so would have circumvented Congress's formal registration and Section 4(c) exemption framework that vests such decisions, in judicially reviewable fashion, in the Commission alone. For the following reasons, Plaintiffs have failed to carry their burden to show that they are clearly entitled to extraordinary relief under the familiar, four-part injunction standard. *See Winter v. NRDC*, 555 U.S. 7, 22 (2008).

Plaintiffs have no likelihood of success on the merits for at least three separate reasons. First and foremost, the August 4, 2022 withdrawal, just as underlying the 2014 no-action letter, is not "final agency action." Indeed, it is not "agency action" as the APA defines that term. 5 U.S.C. § 551(13). A "license" or "other form of permission" that merely expresses a staff-level prosecutorial recommendation position—the full extent of no-action relief permitted by Rule 140.99(a)(2)—does not "license" or "permit" anything. *See* ROA.256–257 & n.4; ROA.237, 239–245; 17 C.F.R. § 140.99(a)(2). Nor is the August 4, 2022 withdrawal "final" agency action. *See Bennett v. Spear*, 520 U.S. 154, 177–178 (1997). Because the challenged no-action correspondence relates solely to DMO staff's discretion to recommend (or not) that the Commission consider authorizing an enforcement action, the withdrawal letter is not the consummation of the Commission's decisionmaking process. And because the challenged staff no-action correspondence is expressly non-binding on the Commission and does

not—indeed cannot—order anyone to do anything, no rights or obligations have been determined and no legal consequence flow from DMO's 2022 withdrawal letter. As with every other no-action correspondence to come before an Article III court, the challenged staff letters are not judicially reviewable. *See, e.g.*, *Bd. of Trade of City of Chicago v. SEC*, 883 F.2d 525, 529 (7th Cir. 1989); *Kixmiller v. SEC*, 492 F.2d 641, 646 (D.C. Cir. 1974) (per curiam).

Second, DMO staff's decision to issue the August 4, 2022 withdrawal is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Because that withdrawal involves a discretionary staff-level prosecutorial recommendation, just as did the 2014 no-action letter, it "is a classic illustration of a decision committed to agency discretion." *Chicago Bd. of Trade*, 883 F.2d at 530.

And third, the exclusively third-party Plaintiffs lack Article III standing to sue on the absent University's behalf. Under the plain language of Rule 140.99(a)(2), Victoria University was "*the* Beneficiary" of the 2014 no-action letter, and the sole party entitled to rely on that letter in any capacity, as the PredictIt market was to be "conducted by" the University—per DMO's express understanding, based on the University's representations—as a "small-scale, not-for profit, online market for event contracts." ROA.249; 17 C.F.R. § 140.99(a)(2) (emphasis added). Moreover, Plaintiffs' alleged indirect harms are all downstream of and entirely dependent on Victoria University's unknown intentions as to

whether and how the University may continue PredictIt operations in some form. Plaintiffs have introduced no evidence elucidating the University's potential future plans for PredictIt, if any, and the Amended Complaint's allegations that the University will return to business as usual are facially implausible. Especially so given the public statements made by PredictIt.org contradicting Plaintiffs' litigation position. Plaintiffs have thus failed to make the requisite causation and redressability showing in the University's stead. *See Nat'l Wrestling Coaches Assoc. v. Dep't of Educ.*, 366 F.3d 930, 944 (D.C. Cir. 2004).

Plaintiffs also fail to carry their "heavy burden" to produce evidence clearly showing that they will face "irreparable harm." All of Plaintiffs' alleged downstream harms turn on the absent University's independent decisional calculus as to whether to continue operating PredictIt in some form (or not). They are thus inherently speculative. Moreover, those purely economic harms are not "irreparable" because, notwithstanding the United States' sovereign immunity, money damages could be recovered after this litigation concludes through private breach-of-contract suits against the relevant counterparty, to the extent that Plaintiffs' compliance-costs and loss-of-expectation arguments may be meritorious. *See, e.g.*, *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012).

The balance of the equities and public interest likewise cut against preliminary injunctive relief. Were this Court to be the first to hold staff no-action correspondence to be "final agency action" subjecting the Commission itself to full-dress APA litigation, that would substantially "discourage the practice of giving such opinions" in the first place. *Taylor-Callahan-Coleman Cntys. Dist. Adult Prob. Dep't v. Dole*, 948 F.2d 953, 959 (5th Cir. 1991). That would harm U.S. derivates markets participants by forcing them to pursue more prescriptive, costly, and burdensome formal processes that today are unnecessary.

Finally, Plaintiffs' request for injunctive relief is improper because it effectively seeks to enjoin the Commission from authorizing a civil enforcement action. That would further violate the settled administrative-law principle that defendants must challenge final charging decisions by raising affirmative defenses in the ensuing court proceedings that provide both notice and the opportunity to be heard. *See, e.g.*, *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 599 (1950).

This Court should deny Plaintiffs' motion and instruct the District Court to dismiss outright.

STANDARD OF REVIEW

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. *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." *Lake Charles Diesel, Inc. v. Gen. Motors Corp.*, 328 F.3d 192, 196 (5th Cir. 2003) (quotation omitted). Because "the four prongs of the test for granting a preliminary injunction are conjunctive," the movant's failure to demonstrate any particular prong "is fatal to its claim for such relief." *See id.* at 203 (vacating preliminary injunction for "failure of the likelihood-of-success prong").

Plaintiffs argue for a "sliding scale" injunction standard historically applied by some courts of this Circuit that would allow preliminary injunctive relief to issue upon a stronger showing as to the non-merits factors so long as there are sufficiently "serious legal questions." *See* Br. 20–21; ROA.120. While this Court has not yet decided whether some form of "sliding scale" approach may still be viable, *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692, 696 n.1 (5th Cir. 2018), Plaintiffs' preferred articulation is untenable in the face of the

Supreme Court's decision in *Winter v. NRDC*. *See* 555 U.S. at 22 (holding that movants must show that each preliminary-injunction factor is "*likely*," rather than a mere "possibility."); *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).

Because Plaintiffs fail to carry their burden as to any of the traditional injunction factors regardless, this Court need not resolve that issue here.

ARGUMENT

I. Plaintiffs' APA Claims Are Meritless.

A. There is no "final agency action."

The APA waives the United States' sovereign immunity for qualifying claims seeking non-monetary and injunctive relief against federal agencies, but subject to the limitation (among others) that the conduct challenged be "final agency action." 5 U.S.C. § 704. Naturally, to be "final agency action" the challenged conduct must be both "agency action" and "final." DMO's August 4, 2022 withdrawal of its 2014 no-action letter was neither.

i. The August 4, 2022 withdrawal is not "agency action."

Plaintiffs' claims fail out of the gate because they are not challenging "agency action." "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) (quoting 5 U.S.C. § 551(13)) (emphasis added). While that definition is framed broadly "to cover comprehensively every manner in which an agency may exercise its power," the term "agency action" is "not so all-encompassing" to provide for "judicial review over everything done by an administrative agency," *Fund for Animals v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 19 (D.C. Cir. 2006) (quotation omitted), let alone by its staff. In assessing whether the challenged conduct qualifies as "agency action" at all, courts look to "common sense, basic precepts of administrative law, and the Administrative Procedure Act itself." *See, e.g.*, *Indep. Equip. Dealers Ass'n*, 372 F.3d at 427 (concluding that "workaday advice letter" sent by EPA staff that "imposed no obligations and denied no relief" without any "binding effect whatsoever" was not agency action).

Plaintiffs' theory of "agency action" is that the 2014 no-action letter was a "license" under the APA's definitional catchall for "other form[s] of permission." *See* ROA.237, 239–245 ¶¶ 66, 77, 84–85; 5 U.S.C. § 551(8) (defining "license" to include "the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission"). That theory is wrong. Nothing in the CEA or any regulation permits staff to license trading facilities, and DMO's 2014 no-action letter—indeed, any staff no-action letter issued pursuant to 17 C.F.R. § 140.99(a)(2)—on its face grants no

affirmative entitlement to anyone to do anything. CFTC "no-action letters" are nothing more than statements that, while such a letter is in effect, "staff" will "not recommend enforcement action to the Commission for failure to comply with a specific provision of the Act or of a Commission rule" if the "proposed activity is conducted by the Beneficiary." 17 C.F.R. § 140.99(a)(2). As alleged in the Amended Complaint, the limited effect of staff no-action letters and the fact that they are not issued by the Commission itself was clearly and repeatedly explained to Victoria University. *See* ROA.253–254 (stating that "DMO will not recommend that the Commission take any enforcement action in connection with the operation of your proposed market" but cautioning that "[t]his letter, and the no-action position taken herein, represents the views of DMO only"); ROA.256–257 & n.4. And that limited scope stands in sharp contrast to DCM or SEF registration and Section 4(c) exemptions issued by the Commission itself that Victoria University could have pursued—but chose not to. *Cf., e.g.*, 7 U.S.C. §§ 6(c)(1)–(2) (specifying action by "the Commission"), 7(a) (same), 8(a) (same); 17 C.F.R. § 37.3 (same).

If accepted, Plaintiffs' theory that the 2014 no-action letter is a "license"—contrary to the plain language of Rule 140.99(a)(2) and Congress's chosen framework for DCM registration and Section 4(c) exemption—would eviscerate any reasonable limits on the scope of "agency action" potentially subject to

judicial review. This Court should reject that untenable reading, just as other Courts faced with similarly sweeping interpretations have done.[6] *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").

ii. The August 4, 2022 withdrawal is not "final."

Plaintiffs' APA claims independently fail because they challenge conduct that is not "final." Under the two-step analysis for establishing "final" agency action, the challenged conduct 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). Agency staff can, of course, take "final" agency action imposing "direct consequences" on regulated parties when they have been delegated the authority to do so. Staff recommendations to the relevant decisionmaker, however, do not meet that bar as a matter of law. *See, e.g.*,

[6] Because DMO's August 4, 2022 letter does not withdraw or revoke a "license," Plaintiffs' second count for supposed "license"-specific procedural violations under 5 U.S.C. § 558(c) fails to state a claim. *See* ROA.244–246 ¶¶ 82–89; Fed. R. Civ. P. 12(b)(6).

Franklin v. Massachusetts, 505 U.S. 788, 798–799 (1992) (holding unreviewable census report that "carries no direct consequences for the reapportionment" until the President completes "personal transmittal of the report to Congress," "the final action that affects the States."); *Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 669–670 (D.C. Cir. 2016) ("Recommendations of subordinate officials are not final for purposes of judicial review, regardless whether those recommendations might turn out to be influential.").

The withdrawal of discretionary no-action relief issued by CFTC staff meets neither *Bennett* prong. *See, e.g.*, *Luminant Generation Co. v. EPA*, 757 F.3d 439, 441, 444 (5th Cir. 2014) (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"). First, the act of issuing or withdrawing a no-action letter is inherently interlocutory. Under the CFTC's regulations, the issue is simply whether a subset of staff will "recommend enforcement action" to the body with the authority to decide, the five-member Commission. *See* 17 C.F.R. § 140.99(a)(2). DMO could not and did not bind the Commission in its no-action letter. With or without a no-action letter, the Commission, and only the Commission, has at all relevant times had the authority to initiate enforcement proceedings—following a formal vote—against the

University or anyone else, should the Commission determine that there are actionable CEA or rules violations and that pursuing them would be in the public interest. Thus, DMO's 2022 withdrawal letter "does not constitute the consummation of the Commission's decisionmaking process by its own terms and under the [CFTC']s regulations." *See, e.g.*, *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1263 (D.C. Cir. 2018).

Second, DMO's 2022 withdrawal does not determine any rights or obligations from which legal consequences would flow—which Plaintiffs *admitted* to the district court. *See* ROA.126 (conceding that DMO's withdrawal letter "does not itself impose sanctions on anyone"). To the extent that PredictIt's operations comply with the CEA and CFTC regulations, it is free to continue unabated with or without any staff no-action relief. To the extent that Victoria University (or anyone else) decides to continue operating PredictIt, the Commission is fully empowered to bring an enforcement action at its discretion—again, with or without a staff no-action letter. *See* 7 U.S.C. §§ 9(4)(A), 13a-1(a) (vesting enforcement authority in "the Commission"). While the withdrawal of the 2014 no-action letter means that DMO may choose to recommend enforcement proceedings to the Commission, that withdrawal "compels action by neither the recipient nor the agency" and lacks any direct legal effect on any regulated entity. *See, e.g.*, *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 944–945 &

n.6 (D.C. Cir. 2012) (collecting cases and holding that "like other agency advice letters that we have reviewed over the years, FDA warning letters do not represent final agency action subject to judicial review").

Further, while DMO's withdrawal 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," ROA.257, 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 (quotation omitted). The statement reflects nothing more than a staff-specific grace period—that staff were under no obligation to grant—by which, were those contracts still active, DMO staff might recommend an enforcement action. That is, after all, the limit of no-action relief under Rule 140.99(a)(2), and CFTC staff lack the authority to "mandate" anything to the contrary. Instead, the sole consequences facing the University are those faced by any entity in a regulated space presented with the not uncommon "choice" of coming into "voluntary compliance" with a non-binding staff position 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).

This is not new ground. Longstanding case law involving directly

analogous no-action letters issued by Securities and Exchange Commission staff unanimously and persuasively confirms the lack of "final" agency action here. *See, e.g.*, *Chicago Bd. of Trade* , 883 F.2d at 529 (holding SEC no-action letter is not "final" agency action for APA purposes because the underlying staff position "by its terms is tentative" when either the relevant division director "could change his mind tomorrow, or the Commissioners might elect to proceed no matter what the Director recommends"); *Kixmiller*, 492 F.2d at 643–644 (holding non-justiciable "no-action position" in staff letter explaining that the SEC's Division of Corporate Finance "would not recommend that the Commission take enforcement action"); *see also New York City Empls.' Ret. Sys.*, 45 F.3d at 12 (holding that SEC no-action letters are non-binding "interpretive" policy statements that do not require notice-and-comment rulemaking); *Chevedden*, 696 F. Supp. 2d at 735 (holding that legal positions taken in SEC no-action letters "are nonbinding, persuasive authority" only).

None of Plaintiffs' arguments is availing. Plaintiffs primarily ask this Court analogize their APA claims to those in *Data Marketing Partnership, LP v. United States Department of Labor*, 45 F.4th 846 (5th Cir. 2022). But that case is not on point. Rather than a no-action letter, *Data Marketing Partnership* addressed a Department of Labor "advisory opinion" that rendered the Department's official legal interpretation as to the scope of ERISA preemption. While the Department's

Office of Regulations and Interpretations signed the opinion, the relevant staff did so expressly on the Department's behalf pursuant to an agency-specific process that had delegated authority to the issuing staff to opt to provide either "final agency action (advisory opinion)" or "non-final agency action (information letter)" pursuant to an agency-specific "procedure to formally provide guidance to entities" adopted by the Department via rulemaking. *Id.* at 852, 855 (citing U.S. Dep't of Labor, *Advisory Opinion Procedure*, 41 Fed. Reg. 36,281 (Aug. 27, 1976)); *see also* DOL Advisory Opinion 2020-01a, *Data Mktg. P'ship, LP v. Dep't of Labor*, No. 4:19-CV-00800, ECF No. 9-2, at 1, 6 (N.D. Tex. Feb. 3, 2020) (expressing "the Department's views" in an "advisory opinion" rather than non-binding "information letter" following consultation "with the Departments of Health and Human Services and the Treasury").

The *Data Marketing Partnership* Court held that the "advisory opinion" satisfied both *Bennett* prongs. As to the first prong, the Court concluded that the Department of Labor's decisionmaking process had been consummated when the Department "effectively concedes that the advisory opinion is not subject to additional agency review," and argued only that the Department could later revisit its otherwise-final position if it wished to reverse itself. 45 F.4th at 854. As to the second prong, the Court concluded that the advisory opinion "caused legal consequences" because "the advisory opinion bound the Department to some

degree" as "applicable regulation provides requestors the right to 'rely' in certain circumstances on the opinion"; because the Department's regulations themselves recognized "that the 'failure to obtain an advisory opinion' can cause 'unusual hardship'" such that they are "binding as a practical matter"; and that the Department's regulations had expressly differentiated between binding "advisory opinions" and non-binding "informational letters," confirming that the former entailed legal consequences while the latter did not. *See id.* at 845–855 ("The Department thus had the choice to provide final agency action (advisory opinion) instead of non-final agency action (information letter). It chose final agency action. And that choice has consequences." (citation omitted)).

The *Data Marketing Partnership* fact pattern is nothing like the one presented here. As to the first *Bennett* prong, because DMO staff issued the August 4, 2022 withdrawal letter on their own behalf rather than the Commission's, the Commission's decisionmaking process to authorize enforcement proceedings, whether on staff's recommendation or not, is not part of the record of this appeal. As to the second *Bennett* prong, a CFTC no-action letter is an inherently staff-level statement about whether the issuing staff would make an enforcement recommendation to the Commission concerning a proposed activity. The relevant regulation governing no-action letters, Rule 140.99(a)(2), explicitly disclaims—similar to non-final Department of Labor "information

letters"—any binding effect on "the Commission or other Commission staff." *Compare* 17 C.F.R. § 140.99(a)(2), *with* 45 F.4th at 855 ("Information letters are 'informational only' and are 'not binding on the Department with respect to any particular factual situation.'" (quoting 41 Fed. Reg. at 36,282)). By contrast, another CFTC regulation that governs "exemptive letters," which are not relevant here, provides—similar to potentially final Department of Labor "advisory opinions"—that "when the Commission itself has exemptive authority and that authority has been delegated by the Commission to the Division in question," CFTC staff can "bind[] the Commission and its staff with respect to the relief provided therein." *Compare* 17 C.F.R. § 140.99(a)(1), *with* 45 F.4th at 855 ("Advisory opinions, by contrast, are the 'opinion of the Department as to the application[s] of' ERISA." (quoting 41 Fed. Reg. at 36,282)). While not on point factually, the logic of *Data Marketing Partnership* nevertheless confirms the lack of "final agency action" here.

Plaintiffs briefly attempt to distinguish *Chicago Board of Trade* and *Kixmiller* on similar grounds, arguing that unlike the parties seeking to challenge the scope of no-action relief granted by SEC staff in those cases, they themselves are "'under the gun'" and "'in jeopardy'" because they are not asking that the CFTC "take up its prosecutorial sword and enforce penalties against recipients of no-action letters." Br. 28–29 (citing 883 F.2d at 529–530). But the argument that

Plaintiffs are "under the gun" necessarily assumes its conclusion that there has been final agency action, and ignores the actual text of Rule 140.99(a)(2). CFTC no-action letters, just as the virtually indistinguishable SEC no-action letters at issue in *Chicago Board of Trade* and *Kixmiller*, do not meet the *Bennett* standard for "final agency action," both because they do not reflect the consummation of the Commission's decisionmaking process and because they do not carry any independent legal consequences for regulated parties, for the reasons explained above. Neither *Bennett* prong turns on a potential challenger's identity, and Plaintiffs cite no authority suggesting otherwise.[7]

Plaintiffs' remaining counterarguments likewise fail. Plaintiffs' concern with the lack of an intra-agency appeals process for no-action beneficiaries to challenge discretionary staff no-action determinations under Rule 140.99(a)(2) is misplaced. To start, while intra-agency review is, of course, relevant to the first *Bennett* prong, it is not "the hallmark of final agency action" as Plaintiffs assert. *Cf.* Br. 15–16. For obvious reason. The very concept that the Commission would

[7] The D.C. and Seventh Circuits decided *Kixmiller* and *Chicago Board of Trade* under an SEC-specific judicial review provision, 15 U.S.C. § 78y(a)(1), and those decisions both preceded the Supreme Court's decision in *Bennett v. Spear*, 520 U.S. 154 (1997). However, those Courts applied the same APA "final agency action" analysis at issue here to conclude that SEC no-action letters are judicially unreviewable.

have to allow for "appeals" of non-binding staff determinations of what to recommend *to it* about a possible enforcement action makes no sense.

Nor is Plaintiffs' framing of their APA claims as challenging an "order for the PredictIt Market to close," rather than the "no-action letter authorizing it to open," meaningful. Br. 28. Again, the *only* source of staff authority here is Rule 140.99(a)(2), as Plaintiffs concede. Nothing in Rule 140.99(a)(2) empowered CFTC staff in 2022 to "order" that PredictIt "close," just the same as nothing in Rule 140.99(a)(2) empowered CFTC staff in 2014 to "license" PredictIt to "open." Tellingly, Plaintiffs decline to directly quote, much less try to parse, the text of Rule 140.99(a)(2), which is cited obliquely a grand total of three times in Plaintiffs' Brief (at 7, 36, 37)—and not once when addressing "final agency action." To the extent DMO's 2022 withdrawal was "final agency action," so was the 2014 no-action letter. And had CFTC staff purported to issue the "license" and "mandate" Plaintiffs theorize—equally beyond staff's limited Rule 140.99(a)(2) authority—both actions would have been *ultra vires* regardless.

Finally, Plaintiffs assert that they are challenging an "altering" of an agency "polic[y] of 'non-enforcement'" that had engendered certain "reliance" interests, and that PredictIt's operators may face liability for potentially "willful" violations of the CEA and CFTC. Br. 29–31 (citing *Wages & White Lions Invs., LLC v. FDA*, 16 F.4th 1130, 1139 (5th Cir. 2021) and 7 U.S.C. § 13(5)). That too is

wrong. In promulgating Rule 140.99(a)(2), the Commission specifically rejected a commenter's suggestion "that no-action letters be accorded precedential value." 63 Fed. Reg. at 68176. It chose instead to provide that "only the Beneficiary" may rely on the letter. 17 C.F.R. § 140.99(a)(2). The issuance and withdrawal of an individualized Rule 140.99(a)(2) no-action position taken by staff as to a potential prosecutorial recommendation, is far afield from a generally applicable rule establishing enforcement criteria formally adopted by the agency itself. And the potential liability facing PredictIt's operators, including for any potentially "willful" violations, turns not on the status of the 2014 no-action letter but rather on the substantive CEA provisions and CFTC rules that have at all times governed PredictIt's operations. *See, e.g.*, *Luminant Generation Co.*, 757 F.3d at 442 (explaining that "no legal consequences flow" from EPA "notice of violation" because "[t]he Clean Air Act and the Texas SIP, not the notices, set forth Luminant's rights and obligations" such that "if the EPA issued notice and then took no further action, Luminant would have no new legal obligation imposed on it and would have lost no right it otherwise enjoyed"). And while a no-action letter plausibly could be offered as *evidence* in a given case as part of some supposed affirmative defense that a violation was not willful, nothing in the CEA or any other statute gives it such legal effect.

Taken together, Plaintiffs have failed to clearly demonstrate, as they must,

that they are challenging final agency action.[8] This Court's analysis should proceed no further.

B. Staff decisions to issue or withdraw no-action relief are "committed to agency discretion by law."

Plaintiffs' claims additionally fail because the August 4, 2022 withdrawal is unreviewable as "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). 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

[8] Although Plaintiffs (correctly) decline to develop this argument before this Court, they suggest that the August 4, 2022 withdrawal "was orchestrated by the Commissioners themselves," based on their allegations that individual Commissioners "were given the opportunity to object" to that letter but did not do so. *Compare* Br. 31, *with* ROA.372–373. While the CFTC's Chairman does have the authority to direct staff in their duties, 7 U.S.C. § 2(a)(6)(A), the Commission itself acts only upon a majority vote, not through the actions of individual Commissioners. 17 C.F.R. § 140.12(a)–(b). And individual Commissioners' declining to object does not transform otherwise-discretionary, non-binding staff recommendations into final agency action, as both the Seventh and D.C. Circuits have recognized. *See, e.g.*, *Chicago Bd. of Trade*, 883 F.2d at 529–530 (holding that staff no-action letter was not "final agency action" even though SEC formally "voted not to object" at a "a public meeting" at which individual Commissioners made "comments" that "suggested a conclusion" that civil enforcement proceedings would be warranted); *Kixmiller*, 492 F.2d at 643–644 (concluding that "what petitioner seeks to have reviewed in this court is not an 'order issued by the Commission'" even though the SEC had "declined to review the staff's position").

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).

Here, Plaintiffs are challenging DMO staff's withdrawal of their discretionary 2014 no-action position that they would not make an enforcement recommendation to the Commission concerning PredictIt pursuant to various terms and conditions under various representations made by Victoria University. As the Seventh Circuit has recognized, such statements are independently unreviewable as they reflect the exercise of prosecutorial discretion. *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"). Indeed, the unique circumstances of Plaintiffs' challenge—in which the no-action beneficiary is not even a party—render their challenge even further attenuated. *See Simon v. E. Kentucky Welfare Rts. Org.*, 426 U.S. 26, 37 (1976) (noting "the settled doctrine that the exercise of prosecutorial discretion cannot be challenged by one who is himself neither prosecuted nor threatened with prosecution").

C. The exclusively third-party Plaintiffs lack Article III standing.

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). Because they seek to invoke this Court's 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). And because Plaintiffs' "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else," their indirect-only standing theory is "substantially more difficult" to establish and entails a heightened showing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992).

Plaintiffs have failed to make that heightened showing. The Amended Complaint broadly alleges three types of injury from the end of PredictIt: (1) the corporate "services provider" Plaintiffs allege that they "will be forced to incur massive administrative, labor, time, and other costs"; (2) the academic Plaintiffs allege the loss of a "pedagogical tool" and research "data"; and (3) the individual trader Plaintiffs allege the loss of "economic value" from their supposedly curtailed "ability to trade contracts." *See, e.g.*, ROA.239–240 ¶¶ 76.a–c; ROA.226 ¶¶ 26–27; ROA.225, 227 ¶¶ 23–24, 30–31; ROA.225–228 ¶¶ 21–22, 28–29, 32–34. All Plaintiffs' alleged injuries share a critical characteristic: Each reflects a downstream harm flowing directly from Victoria University's hypothetical

decision to continue or cease operating PredictIt—and if either, in what form—depending on the outcome of these proceedings.

Victoria University's absence is particularly acute here because of the express limits of Rule 140.99(a)(2)'s scope. Among Rule 140.99(a)(2)'s other limits on staff's authority is the instruction that no-action letters must be directed only to "the Beneficiary," as to "a proposed transaction" or "a proposed activity" to be "conducted by the Beneficiary," such that "[o]nly the Beneficiary may rely upon the no-action letter." 17 C.F.R. § 140.99(a)(2).

Here, the 2014 no-action letter was requested by and issued to Victoria University alone, and Victoria University is the only one to whom DMO staff made any representations. *See* ROA.249–254 (letter addressed solely to the University's Deputy Vice-Chancellor, noting that "Victoria University proposes the creation" of PredictIt, that the request is being made "on behalf of Victoria University," that PredictIt would be "Victoria University's market for event contracts," and that the no-action letter was "based upon" Victoria University's "representations"). Moreover, the 2014 no-action letter was expressly premised on the University's representation that PredictIt's "operators, who are faculty at the University," would operate the market "for academic research purposes only" and "receive no separate compensation." ROA.249. By contrast, the only other party referenced in the 2014 no-action letter appears in a footnote aside summarizing the

University's representations that "Aristotle International, Inc."—"an outside independent party"—would "implement an age and identity verification system as part of a K[now-]Y[our-]C[ustomer] process." ROA.251 n.4.

Once again ignoring Rule 140.99(a)(2)'s plain language and the text of the 2014 no-action letter, Plaintiffs assert that the term "the Beneficiary" also "clearly includes the companies who operate the Market, the traders who invest in its contracts, and the academics who study it" and merely "excludes would-be PredictIt *competitors*." Br. 36–37. But the rule does not say that. Rather, Rule 140.99(a)(2) expressly distinguishes between "*the* Beneficiary" and "persons in addition to *the* Beneficiary." *Compare* 140.99(a)(2) ("Only the Beneficiary may rely" on a no-action letter") (emphases added), *with id*. § 140.99(a)(3) ("An interpretive letter may be relied upon by persons in addition to the Beneficiary."). Victoria University was "the Beneficiary" of the 2014 no-action letter because the operation of PredictIt as a "small-scale, not-for profit, online market for event contracts" was to be "conducted by" Victoria University, ROA.249; 17 C.F.R. § 140.99(a)(2) (emphasis added), and not also by the "tens of thousands" of alleged PredictIt users, Br. 39. Moreover, to the extent Aristotle International, Inc., originally identified as "an outside independent party," is actually responsible for "operat[ing]" PredictIt as Plaintiffs now appear to argue (at 36), that would

itself violate Victoria University's representations to DMO, rendering the 2014 no-action letter void on its face.

This case is not the first time that third parties feeling the downstream effects of government conduct have tried to press their claims when the directly regulated entity declines to do so on its own behalf. The leading case on point is *National Wrestling Coaches Association v. Department of Education*. 366 F.3d 930, 944 (D.C. Cir. 2004). *See also, e.g.*, *Nat'l Fair Hous. All. v. Carson*, 330 F. Supp. 3d 14, 52 (D.D.C. 2018) (collecting cases applying "the reasoning at the heart of *National Wrestling*").

In *National Wrestling*, several membership organizations representing "the interests of collegiate men's wrestling coaches, athletes, and alumni"—but not the universities and colleges who operated collegiate men's wrestling programs—sought to challenge a 1979 policy interpretation of Title IX issued by what is now the Department of Education that had been clarified by the Department in 1996. *National Wrestling*, 366 F.3d at 934–936. The plaintiffs there sought to bring various APA challenges to that now-clarified policy statement asserting "injuries arising from decisions by educational institutions to eliminate or reduce the size of men's wrestling programs to comply with the Department's interpretive rules." *Id.* at 935. The district court dismissed the case for lack of standing, and the D.C. Circuit affirmed. *Id.* at 949.

As the D.C. Circuit explained, the plaintiffs had failed to show standing for two reasons. First, plaintiffs had failed to sufficiently allege causation, as there was no "clear showing" that the "third parties whose conduct injured the plaintiffs" had decided to eliminate their men's wrestling programs in response to the challenged Title IX guidance, as Plaintiffs had failed to allege that those decisions "would be illegal in the absence of the challenged enforcement policies." *See id.* at 938–945. Second, the plaintiffs had failed to sufficiently allege redressability, as it was "purely speculative that a requested change in government policy will alter the behavior of regulated third parties that are the direct cause of the plaintiff's injuries" when "appellants offer[ed] nothing to substantiate their assertion that" a vacatur of the challenged agency conduct would "alter[] schools' independent decisions whether to eliminate or retain their men's wrestling programs." *Id.* at 938–939. The *National Wrestling* Court rejected as "unadorned speculation" various allegations that the "schools' independent decisions" would turn on a favorable outcome should plaintiffs' claims succeed. *Id.* at 937–938, 943.

The same is true here. As in *National Wrestling*, Plaintiffs repeatedly—but without support—allege that the 2022 withdrawal of DMO's 2014 no-action letter will "effectively" lead to the end of PredictIt. *See, e.g.*, ROA.222, 236 ¶¶ 12, 62. Although the Amended Complaint fails to spell out the precise chain of causation,

Plaintiffs recognize that non-party Victoria University's decision to continue operating PredictIt (or not) constitutes an indispensable link. *See, e.g.*, ROA.225–226 ¶¶ 25, 76.c. Plaintiffs further imply that Victoria University's decision to cease PredictIt operations was contingent on DMO's 2022 withdrawal. *See id.* ("Victoria University intends to comply with the terms of the CFTC's Revocation and therefore close the 2024 contracts in advance of their maturity unless the Revocation is abrogated, amended, or suspended."). Critically, however, Plaintiffs have failed to allege facts plausibly showing how DMO's no-action letter, which expressly disclaims any legally binding effect, compels that result; or that a vacatur order rescinding that withdrawal "will alter the behavior of regulated third parties" when the Commission remains fully empowered to enforce the CEA against all relevant parties either way, and DMO has already stated its own view that the University has not adhered to the letter's terms. *See National Wrestling*, 366 F.3d at 938–945; 17 C.F.R. § 140.99(a)(2).

Plaintiffs' naked assertion that the University will simply resume previous PredictIt operations were DMO's 2014 no-action letter reinstated, but in the absence of a final charging decision by the Commission, is not "plausible on its face." *Arnold v. Williams*, 979 F.3d 262, 266 (5th Cir. 2020). Plaintiffs nevertheless argue that "the University has made its position clear," citing an unsworn letter from the University's Vice-Provost of Research purporting to

"confirm" a pair of allegations from the Amended Complaint. ROA.327–328; *accord* ROA.225–226, 237 ¶¶ 25, 67. That so-called "confirmation," however, lacks any evidentiary value as a matter of law and fails to shed any additional light as to Victoria University's future PredictIt plans, if any. *See* 28 U.S.C. § 1746(1); *Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300, 1306 (5th Cir. 1988).

Plaintiffs' failure to secure Victoria University's participation, either as a formal party or as a declarant willing to provide sworn evidence, is especially telling given PredictIt.org's public statements contradicting their litigation position. Perhaps to avoid being accused of fraud, PredictIt.org has publicly referred only to "CFTC staff action" rather than the "revocation" of any Commission "license." *See supra* n.4. PredictIt.org has further disclosed that Aristotle International, Inc.—not Victoria University—has "applied to the CFTC" for DCM registration of a rebranded entity called "PredictIt Exchange," which would be, for the first time, "a regulated entity" in compliance with the CEA. *See supra* n.5. This belies Plaintiffs' implausible allegations that the University will simply return to business as usual were DMO's 2014 no-action letter reinstated by court order.

II. Plaintiffs' Asserted Harms Are Not "Irreparable."

The "extraordinary remedy" Plaintiffs seek requires more than "a possibility of irreparable harm," but instead "a clear showing that the plaintiff is entitled to

such relief." *Winter v. NRDC*, 555 U.S. 7, 22 (2008). That is a "heavy burden," and requires "evidentiary support" rather than "speculative" assertions. *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985) (quotation omitted).

For the same reasons Article III standing is lacking, Plaintiffs' claimed harms are inherently speculative because Plaintiffs have failed to provide evidence of Victoria University's future plans for PredictIt, if any. *See supra* Part I.C. As such, "[t]he record does not substantiate the granting of an injunction." *See, e.g.*, *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985) (rejecting reliance on "unfounded" assertions that "speculated that multiple lawsuits could be filed" by non-parties to uncertain future effect).

Nor are the third-party Plaintiffs' purely economic downstream harms "irreparable." Plaintiffs rely exclusively on this Circuit's case law holding that, while "economic" harms are not ordinarily "irreparable," they can be when the United States' sovereign immunity bars monetary recovery. Br. 40 (citing *Wages & White Lions Invs., LLC v. FDA*, 16 F.4th 1130 (5th Cir. 2021), and *Texas v. EPA*, 829 F.3d 405 (5th Cir. 2016)).

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 correct that the

United States has not waived its sovereign immunity from money damages for APA claims. 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 it may do so in a manner resulting in the harms alleged, third-party Plaintiffs could seek full recompense against the directly 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.*, ROA.226 ¶ 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,[9] it is the "*possibility* that adequate compensatory or

[9] Plaintiffs assert in a footnote that the so-called "impossibility defense" of "intervening government action" would create "jurisdictional and merits defenses" to any damages claims against Victoria University, Aristotle, and PredictIt. Br. 40 n.5 (citing Restatement (Second) of Contracts §§ 261, 264 (1981)). While there may well be other meritorious defenses to such claims, about which the undersigned takes no position, the "impossibility defense" Plaintiffs hypothesize

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) (alteration and quotation omitted).

III. Granting Injunctive Relief Would Disserve The Balance Of The Equities And Public Interest.

Plaintiffs fail to clearly show that the balance of the equities and 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*, 555 U.S. at 24 (quotation omitted). Here, that balancing is straightforward.

Plaintiffs merely reiterate their merits and harm arguments as to the so-called "invented February liquidation date" and note the undisputed "'public interest'" in federal agencies complying "'with their obligations under the APA.'" Br. 41 (quoting *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.C. Cir. 2009)), all while asking this Court to fashion a new CEA licensure regime out

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turns on their central—and mistaken—premises that the 2014 no-action letter was a "license" and the August 4, 2022 withdrawal a "mandate." That argument is thus wrong for the same reasons.

of whole cloth. Those rehashed arguments are equally wrong here.

On the other side of the scales is the real and substantial harm to the public were this Court to hold, for the first time, that Rule 140.99(a)(2) staff no-action letters constitute "final agency action" warranting injunctive relief against the Commission itself in full-dress APA litigation. Allowing not only the potentially disappointed letter beneficiary, but also any potentially disappointed third parties experiencing downstream harms, 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)).

Informal staff guidance is valuable and should not be chilled by suddenly expanding APA lawsuits into this area. CFTC no-action letters and other staff relief provide market participants with flexible and comparatively cost-efficient means of operating in a regulated space. If this Court were to suddenly subject no-action letters to judicial review, those letters would predictably become more difficult to attain, forcing market participants to undertake more burdensome and prescriptive statutory procedures that today may be considered unnecessary or

unjustified as a use of public or private resources. The same chilling effect may well spread to other parts of the Government, decreasing choice and subjecting more conduct than is necessary to regulatory scrutiny.

By seeking to use this Court's extraordinary equitable powers to ignore the consequences of Victoria University's *own choice* to seek a staff no-action letter rather than formal Commission registration or exemption, on the theory that CFTC staff had inherent "licensing" authority never contemplated by Congress or delegated by the Commission—effectively sandbagging the agency and its staff—Plaintiffs seek to improperly privilege PredictIt over all potential competitors.

IV. Plaintiffs Seek To Preemptively Enjoin An As-Yet-Hypothetical Commission Enforcement Action Contrary To The CEA, CFTC Regulations, And Settled Administrative Law.

It is worth noting what Plaintiffs actually attempt to accomplish here: an injunction that will purportedly allow the continued operation of PredictIt unimpeded by a CFTC enforcement action. Plaintiffs assert that DMO's 2014 no-action letter was withdrawn "on pain of enforcement action," and "the next stop is an enforcement action and penalties" if their injunction is not granted. Br. 16, 27. Not so. As explained, no-action letters are expressly non-binding on the Commission; neither is the issuance of a no-action letter a "license," nor is its withdrawal a Commission "order." Plaintiffs' theory—that non-party Victoria University received from DMO staff a "license" the University never sought, was

never granted, and could not have been lawfully granted—seeks an end-run around the CEA's registration framework, the Section 4(c) exemption process, the limits of Rule 140.99(a)(2), and Article III standing requirements.

The scope of Plaintiffs' requested injunction further offends the settled principle that federal courts will not preemptively enjoin governmental enforcement actions. The proper course is for the subject of any such action to raise any potential affirmative defenses if and only if the Commission actually authorizes proceedings as an exercise of the Commission's sole—and potentially final—prosecutorial discretion. *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' requested injunctive relief 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)).

To be clear, the CFTC is not making a standalone "other adequate remedy"

argument under 5 U.S.C. § 704. Plaintiffs' invocation of *U.S. Army Corps of Engineers v. Hawkes Co.*, for the proposition that parties affected by final agency action "need not await enforcement proceedings before challenging final agency action," is therefore misplaced. *But see* Br. 27 (citing 578 U.S. 590, 600 (2016)). What the CFTC is arguing, among other things, is that there has been no "final agency action" in the first place. If the Commission had made a final charging decision, or if it does so in the future, the responsible parties would then have both ample notice and the opportunity to respond that Plaintiffs claim was lacking here. *Compare, e.g.*, *Hawkes*, 578 U.S. at 598 (applying *Bennett v. Spear* to first conclude that agency-approved "jurisdictional determination" under the Clean Water Act was "final agency action"), *with Luminant Generation Co.*, 757 F.3d at 444 (holding that EPA "notices of violation" are not "final agency action" such that challenges to "the adequacy of the notices" should be raised to "the district court as a defense to the enforcement action" and affected parties would have "full opportunity to challenge the adequacy or sufficiency of such notices once the EPA takes final action").

* * *

A particular irony runs throughout Plaintiffs' briefing. While railing against a supposedly "breathtaking arrogation of governmental power to the administrative state" and bemoaning the fate of "our constitutional order" (Br. 14), Plaintiffs cite zero legal authority for what would be an unprecedented expansion of CFTC staff power. Instead, Plaintiffs assert, on their own say-so, that Victoria University received a "license" that the University never requested, that neither Congress nor the CFTC authorized, that CFTC staff did not and could not grant, and that would have required the issuing staff to circumvent the formal, Commission-level registration and exemption framework that Congress prescribed and expressly made subject to judicial review. All of which would benefit PredictIt and PredictIt alone, giving PredictIt preferred regulatory treatment over potential competitors who remain bound by the Commodity Exchange Act. And to make up for that dearth of Article I or Article II authority, Plaintiffs turn to Article III and ask this Court, in the absent University's stead, for extraordinary equitable relief to backfill this non-existent "license."

That would be a staggering "arrogation of governmental power." But contrary to Plaintiffs' litigation position, CFTC staff do not inherently possess the "breathtakingly consequential" power "to create and then kill entire markets" through issuing and revoking "licenses." *Cf.* Br. 31. Victoria University, at all times represented by highly sophisticated counsel, choose to seek a non-binding

staff prosecutorial recommendation in the form of a Rule 140.99(a)(2) no-action letter rather than a formal—and potentially final—registration or exemption determination from the Commission itself. While Plaintiffs now wish for a do-over, "that choice has consequences." *Data Mktg. P'ship*, 45 F.4th at 855.

CONCLUSION

For these reasons, this Court should deny Plaintiffs' preliminary-injunction motion and dismiss this appeal. Moreover, because Plaintiffs' claims are unreviewable under the APA and because Plaintiffs lack Article III standing, this Court should further direct that the District Court grant the CFTC's motion to dismiss on remand.

Dated: February 1, 2023

Respectfully submitted,

/s/ *Kyle M. Druding*
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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2023, I caused the foregoing Appellee's Brief to be filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit and served on Plaintiffs-Appellants, and filed and served on February 2, 2023, as updated per the Clerk's instructions, 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

CERTIFICATE OF COMPLIANCE

1. I hereby certify that Appellee's Brief complies with the type-volume limits of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 27(a)(2)(B) and 32(f), this brief contains 12,875 words.

2. I hereby certify that Appellee's 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 2019 in 14-point Times New Roman.

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

Dated: February 2, 2023

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

February 02, 2023

Mr. Kyle Druding
U.S. Commodity Futures Trading Commission
Office of General Counsel
1155 21st Street, N.W.
Washington, DC 20581-0000

No. 22-51124 Clarke v. CFTR
USDC No. 1:22-CV-909

Dear Mr. Druding,

We have determined that your brief is deficient (for the reasons cited below) and must be corrected today due to the expedited nature of the this case.

The only attachments allowed to the briefs without leave of court are statutes, rules, regulations, etc. See FED. R. APP. P. 28(f).

Note: Once you have prepared your sufficient brief, you must electronically file your 'Proposed Sufficient Brief' by selecting from the Briefs category the event, Proposed Sufficient Brief, via the electronic filing system. Please do not send paper copies of the brief until requested to do so by the clerk's office. The brief is not sufficient until final review by the clerk's office. If the brief is in compliance, paper copies will be requested and you will receive a notice of docket activity advising you that the sufficient brief filing has been accepted and no further corrections are necessary. The certificate of service/proof of service on your proposed sufficient brief **MUST** be dated on the actual date that service is being made. Also, if your brief is sealed, this event automatically seals/restricts any attached documents, therefore you may still use this event to submit a sufficient brief.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Melissa V. Mattingly, Deputy Clerk
504-310-7719

cc:
Mr. Michael J. Edney
Ms. Renee Flaherty
Mr. Jeff Rowes
Mr. Russell Ryan
Ms. Anne Whitford Stukes

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1155 21st Street, N.W.
Washington, DC 20581-0000

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Dear Mr. Druding,

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

If your brief was insufficient and required corrections, the paper copies of your brief must **not** contain a header noting "RESTRICTED". Therefore, please be sure that you print your paper copies **from this notice of docket activity** and not the proposed sufficient brief filed event so that it will contain the proper filing header. Alternatively, you may print the sufficient brief directly from your original file without any header.

Sincerely,

LYLE W. CAYCE, Clerk

Melissa Mattingly

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