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; AND WES SHEPHERD,
Plaintiffs-Appellants,

v.

COMMODITY FUTURES TRADING COMMISSION,
Defendant-Appellee.

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

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

The PredictIt Market—and the traders who have invested in it—are not hurting anyone. We know this because the CFTC has not identified a single public good served by shutting it down.

But shut it down the CFTC seeks to here. Not in any orderly way. Rather, the agency has mandated the random and premature end to tens of thousands of investments, without ever saying why.

If not this, what did Congress mean to prohibit when it enacted the Administrative Procedure Act and barred unelected bureaucrats from acting arbitrarily or capriciously? There is little separating the CFTC's behavior here, from Caesar, sitting in the Colosseum, casually moving his thumb downward to signal disapproval. In Latin, this was called the "*pollice verso*." In English, it is called "caprice."

Over 58 pages, the CFTC claims to have built the perfect mousetrap. According to the agency, it has found a way to greenlight the opening of an entire market, to permit the invitation of tens of thousands of investors to trade on that market, and then to order its closure, without having to provide an explanation or to endure any judicial review.

The administrative state has been delegated sweeping authority over the lives of ordinary Americans, including those who stood up and invested in the PredictIt

Market. But there is at least one check on that authority. It is the strong presumption that its exercise will be subject to judicial review, at least to ensure reasoned decision making and to prevent arbitrary behavior. The CFTC's fusillade against having to answer to the courts notwithstanding, it has done nothing to rebut that presumption here.

In this case, a senior CFTC executive instructed the PredictIt Market to close and prematurely to liquidate all investments. There is no opportunity to appeal that mandate to a higher authority in the agency. And the next stop is an enforcement action seeking significant penalties. This is judicially reviewable, final agency action. All CFTC arguments to the contrary fail.

Because the PredictIt Market sprang from the seed of "no-action relief," the CFTC says the agency may capriciously cut it down with impunity. That is not the law. Judge Easterbrook explained it: Third party competitors cannot challenge no-action letters to force agencies to take enforcement action, but those "under the gun" due to edicts stemming from no-action letters can. *Bd. of Trade of Chicago v. SEC*, 883 F.2d 525, 530 (7th Cir. 1989). And not even the agency's own regulations set up no-action relief as some kind of administrative no man's land where agency bureaucrats have a free hand to open and close entire businesses. Instead, those regulations expressly contemplate that parties will "rely" on no-action relief. 17 C.F.R. § 140.99(a)(2).

The agency's whole exercise in its brief is smushing together the Market's birth, eight years of life, and effort to extinguish it. Appellants are challenging "CFTC Letter 22-08," dated August 4, 2022, that ordered the Market to close. It contained none of the caveats of prior correspondence and no suggestion that the letter was not speaking for the Commission or that changes may later come. It is a mandate to close, at a precise time . . . or else enforcement action will follow. The Supreme Court has rejected repeatedly the CFTC's argument here that the governed must continue on its course and "wait[] for [the agency] to 'drop the hammer'" in an enforcement proceeding, before challenging an instruction to alter its behavior. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 600 (2016).

The agency remarkably turns to the word "should" in its most recent instruction, to suggest this was all just a little piece of avuncular advice, to be taken or left. CFTC Br. at 3, 33. But the CFTC is not your uncle. It is the United States Government, with the power to levy millions in penalties when its instructions are not followed. This is no time to parse the mood of one verb.

What remains is a byzantine walk through other forms of decisions the agency believes might have required it to explain itself before changing course. For no-action relief, the CFTC claims it is a wholly discretionary act of grace—so-called forbearance from enforcement—and can be switched on and off at will. That argument is at least two years past its expiration date. The Supreme Court in 2020

and this Court in 2022 rejected it. Even policies born from an agency staying its prosecutorial hand cannot be revoked without an explanation. And that explanation must account for the citizens who have come to rely on the policy and whether those reliance interests can be accommodated more gently. Here, the CFTC gave absolutely no regard to the investments made in reliance on the Market's authorization to open.

Most desperately, the CFTC says, for the first time, that perhaps this whole exercise—authorizing political event markets to open without formal registration—was outside Congress's scheme and *illegal*. That would be news to PredictIt, the still-operating Iowa Electronic Markets, and anyone reading the agency's determinations that opening PredictIt and the Iowa Markets was "in the public interest." ROA.37-39, 41-42. Regardless, under binding precedent, this late-breaking act of contrition simply does not absolve the agency from explaining what it is doing and why.

Victoria University asked the CFTC for permission to start PredictIt. The agency said "yes" and even set down detailed rules for the Market. It was only then that the Appellants invested vast sums in setting up the Market and in the contracts offered there. It is unfair for that same agency—in fact, the same official of that same agency—to change its mind eight years on and revoke that permission, with a vague accusation that the rules the agency set were violated. Congress thinks so too,

and so it required an additional set of procedures before an agency revokes a license. The governed deserve notice of the facts underlying the accusation and an opportunity to rebut them. 5 U.S.C. § 558(c). This Court should hold the CFTC to these fundamental principles of fair play here, vacate the CFTC's effort to close the Market without them, and make clear that any future effort must be preceded by the procedures the Administrative Procedure Act requires for revoking licenses.

What the CFTC's brief shows is that there is no defense of the CFTC's decision to close the Market, if the Court rejects its efforts to find an exception from judicial review. The CFTC asked for this Court to instruct a dismissal on remand. CFTC Br. at 58. Precisely the opposite should happen. Because the CFTC's defenses are purely legal ones about the availability of judicial review, the Court should remand this case with instructions to vacate CFTC Letter 22-08 instructing the PredictIt Market to close.

ARGUMENT

I. The CFTC's Order to Close the PredictIt Market Is Arbitrary and Capricious

The CFTC's brief makes one thing clear: The agency has no substantive defense of its decision to close the PredictIt Market, as measured against the Administrative Procedure Act's standards for reasoned decisionmaking. Without much self-awareness, the CFTC claims the Appellants "do not directly" challenge the agency's conclusion of non-compliance. CFTC Br. at 16–17. What is there to challenge? The decision contains no detail of when and how PredictIt violated the rules the CFTC set in its 2014 decision opening the Market. The Administrative Procedure Act certainly does not force the regulated to guess what the problem is and then shadow box that speculation.

Not even a summary sentence is spent explaining why closing the Market, and prematurely terminating investments, is the right solution for whatever unspoken problem the agency has identified. Of course, explaining how the policy choice fits the regulatory problem, and explaining why less drastic alternatives do not suffice, are at the core of an agency's responsibilities under the Administrative Procedure Act. *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020). That is especially so when casting aside a long-standing policy on which so many have come to rely. *Id.* at 1913–14.

II. The CFTC Has Not Found a Way to Authorize and Then to Close Whole Markets Without Explanation or Judicial Review

In the absence of a substantive defense of its decision to close the Market, the CFTC's brief is dedicated to keeping the courts away from it. To do so, it interchangeably invokes the "final agency action" doctrine and claims its decision is committed to the agency's unreviewable prosecutorial discretion. The agency's arguments are very technical, parsing the difference between "must" and "should" and picking out words in letters or agency internal operating procedures. CFTC Br. at 3, 23, 33, 44–45. But this thin slicing of the onion has little home in the courts' "pragmatic" and "flexible" final agency action inquiry, which looks to the practical effect of agency behavior on the governed. *Hawkes*, 578 U.S. at 599. Nor in the "narrow" category of agency behavior so committed to agency discretion that courts cannot review it. *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv*., 139 S. Ct. 361, 370 (2018).

Let us state our position plainly: When the staff of an administrative agency demands compliance by taking or withholding action, and the next stop for the regulated party is an enforcement action, that staff demand is final agency action. And it is subject to judicial review. Time and again, the Supreme Court has affirmed this principle by holding that private citizens need not "wait[] for [an agency] to 'drop the hammer' in order to have their day in court." *Hawkes*, 578 U.S. at 600; *Sackett v. EPA*, 566 U.S. 120, 127 (2012); *Free Enter. Fund v. Pub. Co. Accounting*

Oversight Bd., 561 U.S. 477, 490 (2010); *Abbott Labs. v. Gardner*, 387 U.S. 136, 152–53 (1967).

The above uncontroversial truism makes clear that this Court may review the CFTC's instruction to close the PredictIt Market. A division of the CFTC instructed PredictIt not only to close the Market, but to "liquidate" all existing contracts by 11:59 PM on February 15, 2023. ROA.153. There was no invitation, nor any pathway, to appeal that instruction to the Commission. ROA.153 And the next stop, if the instruction is not followed, is an enforcement action portending millions in penalties. If there were any doubt about this, the CFTC's repeated statements that Appellants' remedy is to challenge the instruction as an affirmative defense in the forthcoming enforcement action removes all doubt. CFTC Br. at 5, 25, 40–41. As do the repeated threats in briefing that PredictIt Market participants face civil and criminal sanctions, for willful violations of the Act, now that the CFTC has canned its authorization to operate. CFTC Br. at 32–33, 39–40; ROA.419-20.

The CFTC throws the whole administrative playbook at an effort to make its actions unreviewable. None of its arguments holds water.

1.

First, the CFTC claims that it did not decide anything when it "allow[ed] Victoria University . . . to operate a not-for-profit market" for political event contracts. ROA.145. Instead, an agency division was just exercising its discretion

not to press an enforcement action against the Market, and it can exercise its discretion to reverse course at any time. CFTC Br. at 1, 3, 31–33, 37, 41–43.

This argument was a staple of agency efforts to avoid judicial review, but the Supreme Court and this Court have firmly rejected it. *Regents*, 140 S. Ct. at 1913; *Wages & White Lion Invs., LLC v. FDA*, 16 F.4th 1130, 1141–42 (5th Cir. 2021). When reliance builds around a decision framed as discretionary or abstaining from enforcement, the Administrative Procedure Act requires the agency to explain itself when it "changes course." *Regents*, 140 S. Ct. at 1913. And that explanation must address how best to treat the "serious reliance interests" that have accumulated around the decision. *Id*.

In *Regents*, for example, the Department of Homeland Security reversed its Deferred Action for Childhood Admissions decision and asserted the reversal was unreviewable because the policy involved discretionary forbearance from enforcement. The Court rejected that argument and held that the reversal must both be explained and address the interests of those who had organized their affairs around the policy. *Id*. at 1913–14. It did not matter that the original policy warned all that it was discretionary, created "no substantive rights," and could be reversed at any time. *Id*.

Since *Regents*, this Court has made clear that agencies must explain when changing policies born from a discretionary forbearance from enforcement. *See*

Wages & White Lion, 16 F.4th at 1141–42; *Texas v. Biden*, 10 F.4th 538, 553 (5th Cir. 2021). Even when an agency contends a business "has been breaking the law" and the agency's prior policy of "non-enforcement was entirely discretionary," the agency, when unwinding that non-enforcement decision, must engage in "reasonable consideration of the relevant issues and the 'important aspects of the problem.'" *Wages & White Lion*, 16 F.4th at 1141–42. The failure to consider reliance interests is particularly problematic where, as here, the agency "does not contest[] that [affected parties] face fiscal harm." *Texas v. Biden*, 10 F.4th at 553.

Of course, the CFTC blew through those standards here. Whether or not the agency's 2014 decision birthing the PredictIt Market was an authorization or a withholding of enforcement, Appellants certainly organized their affairs around it. Millions were invested in standing up the Market, and millions more were invested by traders in contracts offered by the Market.

2.

Second, PredictIt did not somehow choose its way into a form of discretionary, no-rights relief such that it now must live with the consequences of not selecting one of the agency's more protective forms of decision. *See* CFTC Br. at 14, 29, 54, 58. The CFTC wants to make it look like PredictIt voluntarily bypassed

formally registering the market or seeking a decision exempting it from registration. But neither of those was an option.

Two years before PredictIt sought authorization to open, the Commission held that registered markets could not offer political event contracts. *See In re Self-Certification by N. Am. Derivatives Exch., Inc.*, CFTC (Apr. 2, 2012), ROA.322-25 (political contracts "shall not be listed or made available for clearing or trading" on a registered exchange). The PredictIt Market also was not a candidate for the Commission's statutory exemption authority. This relief is limited to markets restricted to "appropriate persons," who Congress defined as brokers and other high net worth individuals. 7 U.S.C. §§ 6(c)(2)(B), 6(c)(3). These are not the ordinary Americans making small-scale investments on the PredictIt Market, a cohort indispensable to its academic purpose. This is why the agency had used its "no-action relief" authority to stand up and approve the Iowa Electronic Markets for political events. ROA.47-48.

Asking for no-action relief was no choice; but it is also not clear how that matters. Again, even if no-action relief begins as discretionary forbearance from enforcement, an agency must explain itself when reversing it. *Wages & White Lion*, 16 F.4th at 1141–42; *Texas v. Biden*, 10 F.4th at 553.

3.

The CFTC takes this all a step further, suggesting that perhaps its whole scheme to authorize unregistered political event contracts to open was illegal. *See* CFTC Br. at 3–4, 11–12, 22, 39. It explains that the congressional scheme permits only two pathways for such a market to operate: registration and formal exemption. It is now time for PredictIt to suffer the consequences, the agency says, for some "rogue" officials authorizing this Market contrary to law. CFTC Br. at 3–4. That is news to PredictIt, which invested millions of dollars to set up and operate the Market for the last eight years. It is also news for the Iowa Electronic Markets for political events, operating under virtually identical no-action relief. ROA.37-38, 47-48. Hardly some "rogue" actions, the Commissioners have been fully informed on the decisions about PredictIt. ROA.241, 312. Most importantly, though, the legality of *by what procedure* the CFTC authorized the Market is no answer to the duty under the Administrative Procedure Act to explain why the agency is mandating its closure. When this Court found the Deferred Action for Childhood Admissions policy illegal, *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015), and when the FDA claimed all e-cigarettes had been illegal for years and just permitted them as a matter of grace, that did not license the agencies to change direction without an explanation. *Regents*, 140 S. Ct. at 1910, 1913–14; *Wages & White Lion*, 16 F.4th at 1141–42. Even if somehow a regulated party has been operating contrary to the

law, an agency needs to explain its decision reversing a prior policy of discretionary forbearance.

4.

The CFTC makes a series of arguments denigrating its Division of Market Oversight. As the agency would have it, a letter from the Division is equivalent to a low-level employee answering the phone at the agency's Omaha branch and offering his opinion. *See, e.g.*, CFTC Br. at 1–2, 10, 12–13, 30–33, 39. The CFTC's regulations and internal operating procedures tell a different story. The Division's function is to pass on "applications for designated contract markets," to set rules for their function, and to "examine . . . their compliance with the applicable core principles and other regulatory requirements." *CFTC Organization*, CFTC, https://tinyurl.com/53hbj8n8 (last visited Feb. 6, 2023); *see also, e.g.*, 17 C.F.R. §§ 38.5, 48.11, 140.77.

Agency regulations delegate to the divisions authority to issue no-action relief. These same regulations make clear that such relief is more than a casual opinion. They expressly contemplate that parties "may *rely* upon the no-action letter." 17 C.F.R. § 140.99(a)(2) (emphasis added). And they provide that the division's response to a no-action relief request is the "final" say at the agency. *Id.* at § 140.99(e).

Moreover, the "final agency action" inquiry is "pragmatic." *Hawkes*, 578

U.S. at 599; *Data Mktg. P'ship v. U.S. Dep't of Labor*, 45 F.4th 846, 853 (5th Cir. 2022). And, pragmatically, there are not enforcement actions for having stood up a Market without a division recommendation. *See CFTC Enforcement Manual*, 5–6 (May 20, 2020) (explaining the process of enforcement actions originating at the Division level, after thorough investigation).

To the extent the regulations suggest no-action letters do not bind the Commission itself (CFTC Br. at 12–13), that is little different than agency letters or procedures reserving the right for the agency later to change course. These types of disclaimers are routine, and none has been held sufficient to negate the general obligation for the agency to explain itself when changing direction. *Sackett*, 566 U.S. at 127; *Hawkes*, 578 U.S. at 598; *Biden v. Texas*, 142 S. Ct. 2528, 2545 (2022); *Regents*, 140 S. Ct. at 1913 (rejecting disclaimer that the original DACA decision "conferred no substantive rights" and "could not be relied on" as excuses for not explaining a later revocation). In any event, the key legal question is whether a subordinate division or official's decision can be appealed higher in the agency. *See Bennett v. Spear*, 520 U.S. 154, 178 (1997); *Data Mktg. P'ship*, 45 F.4th at 853–54. No one contends that the decision closing the Market could.

5.

The CFTC claims that the decision to close the Market is not "agency action" at all. CFTC Br. at 27–30. That claim runs headlong into the text of the Administrative Procedure Act, which defines agency action as "an agency rule, license, sanction, *relief*, or the equivalent or denial thereof." 5 U.S.C. §§ 551(13) (emphasis added), 701(b)(2); *see also FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 238 n.7 (1980) ("agency action" broadly defined "to assure the complete coverage of every form of agency power, proceeding, action, or inaction"). The CFTC presents no argument that "no-action relief" is not "*relief*," a term peppering the agency's regulation on the topic. 17 C.F.R. §§ 140.99(b), (c)(3)(iv).

The D.C. Circuit's decision in *Independent Equipment Dealers Association v. Environmental Protection Agency*, 372 F.3d 420 (D.C. Cir. 2004), is of no help to the CFTC. CFTC Br. at 28. The parties there were only arguing that the agency staff letter constituted a "new rule," that should have gone through notice and comment rulemaking. *Indep. Equip.*, 372 F.3d at 425. And the reason the letter was unreviewable is because it made no change of any kind in the agency's longstanding position. *Id.* at 428 (the letter "tread[s] no new ground. It left the world just as it found it, and thus cannot be fairly described as implementing, interpreting, or prescribing law or policy"). Of course, the CFTC's August 2022 mandate to close the Market changed everything for PredictIt.

6.

At the end of the day, the Supreme Court and this Court have rejected all of the CFTC's arguments. That the decision was made by a division or staff of the agency (CFTC Br. at 28–29) does not render it immune from judicial review. *See Data Mktg. P'ship*, 45 F.4th at 852; *see also Hawkes*, 578 U.S. at 596. Nor does the fact that the agency reserved the right to change its position. *Compare* CFTC Br. at 31–32 *with Data Mktg. P'ship*, 45 F.4th at 854; *see also Sackett*, 566 U.S. at 127; *Hawkes*, 578 U.S. at 598; *Biden v. Texas*, 142 S. Ct. at 2545. Otherwise, "no agency action would be final because an agency could always revisit it. And that can't be right." *Data Mktg. P'ship*, 45 F.4th at 854. No one claims the agency decision to end the Market can be appealed to anyone inside the agency, the touchstone of final agency action. And the regulated, once instructed to change their behavior, certainly need not carry on and wait for the agency to initiate an enforcement action to challenge that instruction. *Compare* CFTC Br. at 33, 55 *with Hawkes*, 578 U.S. at 600.

The CFTC tries to cast aside this Court's most recent final agency action decision, which cashiers all of its arguments. CFTC Br. at 34–37. But those efforts to distinguish *Data Marketing Partnership* fail. First, no-action relief is not the equivalent of a Department of Labor "information letter" that the Court contrasted to that department's "advisory opinion." CFTC Br. at 37. Regulations governing

"information letters" make clear that they are "informational only" and "do not bind" any part of the Department of Labor. *Data Mktg. P'ship*, 45 F.4th at 855. By contrast, the regulations governing both the Department of Labor "advisory opinion" this Court found constituted final agency action and CFTC no-action relief, expressly provide that those decisions may be relied on. *Compare id.* at 852 and *Advisory Opinion Procedure*, 41 Fed. Reg. 36,281, 36,283 (Aug. 27, 1976) ("the parties described in the request for opinion may rely on the opinion") *with* 17 C.F.R. § 140.99(a)(2) (beneficiaries "may rely on" no-action relief). To suggest that the decision to authorize the Market's opening was the type of "thoughts in passing for your information" that Department of Labor "information letters" provide does not withstand scrutiny.

Second, just like the Department of Labor advisory opinions discussed in *Data Marketing Partnership*, the agency's authorization to open the Market clearly provided a safe harbor from monetary penalties. With that letter in force, there is no way the Commission could establish the *mens rea* necessary to obtain millions of dollars in monetary penalties in an enforcement action. *See* 7 U.S.C. § 13(a)(5) (requiring "willfulness" for fines); *CFTC Civil Monetary Penalty Guidance* (May 20, 2020) ("The respondent's state of mind, including whether the conduct was intentional or willful" is key factor for civil monetary penalties); *CFTC v. Incomco, Inc.*, 580 F. Supp. 1486, 1490 (S.D.N.Y. 1984) (civil money penalties unobtainable

amidst good-faith efforts to comply). The Commission recognized this safe harbor effect when issuing the no-action relief rule, observing that the "[l]etter will not ordinarily relieve the person for whose benefit it is issued from the consequences of non-compliance that pre-dates the [l]etter," but that it will do so going forward and "will be prospective in terms of coverage." *Requests for Exemptive, No-Action, and Interpretative Letters*, 63 Fed. Reg. 63,175, 63,176 (Nov. 12, 1998).

Third, the CFTC's arguments here are myopically focused on the 2014 decision to open the Market. But again, Appellants are here challenging the mandate to close it. The 2022 CFTC Letter 22-08 was a straightforward instruction to close and to dump investors out of their contracts, or face enforcement and penalties. There was no caveat in that instruction that the division was speaking only for itself or that the Commissioners might later take a different view. Such agency letters are the bread and butter of final agency action, subject to judicial review.

The CFTC tries seeking refuge in other authorities that clearly do not apply. It turns to this Court's decision in *Luminant Generation Co. v. EPA*, 757 F.3d 439 (5th Cir. 2014). CFTC Br. at 31, 40. But that case concerned a preliminary agency determination that wholly concluded conduct occurring years earlier violated agency regulations. It involved no suggestion that the regulated entity would have to adjust its ongoing or future activities or face penalties. Nor does *Holistic Candlers & Consumers Association v. FDA*, 664 F.3d 940 (D.C. Cir. 2012), apply here. CFTC

Br. at 32. The FDA warning letters at issue in that case allowed for further appeal within the agency—an option entirely absent here. *Holistic Candlers,* 664 F.3d at 944.

Indeed, all of the agency's arguments collapse back on the assertion that—notwithstanding a compliance demand from an agency division that could not be further appealed—the regulated parties' only option was to sit back and wait for an enforcement action. How many times does the Supreme Court need to reject this argument before agencies stop making it? Private citizens need not "wait[] for [the agency] to 'drop the hammer' in order to have their day in court." *Hawkes*, 578 U.S. at 600; *see also Sackett*, 566 U.S. at 127.

III. The CFTC's Authorization to Open the PredictIt Market Is a License Within the Meaning of the Administrative Procedure Act, and the CFTC Provided None of the Required Process Before Revoking It

The agency separately violated the Administrative Procedure Act by revoking the Market's authorization to operate without notice of any fact underlying the decision, much less an opportunity to rebut it. 5 U.S.C. § 558(c). The CFTC never, for a moment, contends the process the Administrative Procedure Act requires for revoking licenses was provided. Instead, it claims that the decision to open the Market was not a "license."

As an initial matter, the agency mashes together all its violations under the Administrative Procedure Act claims. The CFTC suggests that, if the decision

opening the Market was not a license, the Administrative Procedure Act does not apply at all. CFTC Br. at 1–4, 21–22, 27–30, 39, 49, 52 n.10, 55, 57. Not so. The treatment of "licenses" is only a subset of the agency action that, if arbitrary or capricious, the Act prohibits. 5 U.S.C. § 551(13). Separately, Congress recognized that a "license" to open a business has sufficiently significant consequences for the governed that additional procedural protections apply. *Id.* § 558(c). Congress did not limit those protections to "formal agency 'licenses' [or] 'approvals,'" as the CFTC suggests. CFTC Br. at 1 (citing no authority); *see Pillsbury Co. v. United States*, 18 F. Supp. 2d 1034, 1036, 1038 (Ct. Int'l Trade 1998) (holding staff letter was a "license"). Its definition was broader: "'[L]icense' includes . . . an agency permit, certificate, approval, registration, charter, membership, statutory exemption *or other form of permission*." 5 U.S.C. § 551(8) (emphasis added).

The decision opening the Market is clearly a "form of permission." To quote it: The relief "*would allow* [Victoria] to operate a not-for-profit market for the trading of event contracts and the offering of such event contracts to U.S. persons." ROA.145-46, 149. The CFTC claims there are only two ways for the CFTC to green light a market offering swaps or futures, through registration of the Market with the Commission or by granting a "statutory exemption" under Section 4(c) of the Commodity Exchange Act. 7 U.S.C. § 6(c)(1)–(2). But Congress, in defining "license," expressly recognized that the term extends beyond "an

agency, . . . registration, [or] statutory exemption." 5 U.S.C. § 551(8). Instead, it reaches any "other form of permission." Congress wished to foreclose precisely the semantic arguments the CFTC advances here.

And what are the consequences? Appellants invested millions in reliance on the 2014 decision "allowing" the Market and setting the rules under which it must operate. Is it too much to ask that the agency, in revoking that permission, provide notice of the facts that support its allegation that the agency's rules for this Market were violated and an opportunity to rebut them? Fairness says PredictIt should have that opportunity, and so does Congress. 5 U.S.C. § 558(c).

IV. Victoria University's Absence as a Formal Plaintiff Threatens Neither Standing nor Appellants' Showing of Irreparable Harm

At the heart of the CFTC's standing and irreparable harm arguments lies a single, irrelevant fact: Victoria University is not a plaintiff in this lawsuit. But the University's absence is neither determinative nor relevant.

The CFTC first argues that this case somehow turns on Victoria University's "hypothetical decision to continue or cease operating PredictIt." CFTC Br. at 44, 50. But there is zero uncertainty about Victoria University's intentions: It would *not* have closed the Market—and crash-landed thousands of investors—had the CFTC not mandated that exact action. ROA.327.

Quoting Rule 140.99(a)(2)'s reference to "the Beneficiary," the CFTC next contends that only Victoria University could do anything about the mandate to

shutter the Market because the 2014 letter "was requested by and issued to Victoria University alone." CFTC Br. at 44–45. The 2014 letter, however, set out in great detail how the Market would function, who would operate it, why they would do so, and how investments would be made. Thus, the market operators, the investors, and the academics are all contemplated by, and beneficiaries of, the 2014 letter.

All the agency can muster in response is that the article "the" in front of "Beneficiary" indicates that only one party may rely on the no-action relief. CFTC Br. at 45. But neither the regulations nor standing turn on such semantic games. 17 C.F.R. § 1.3 (for purposes of CFTC regulations, "singular" words "import the plural and vice versa"). The structure of the regulation clearly distinguishes a beneficiary from just the "person on whose behalf the letter is sought" and the "recipient" of the letter, terms it uses elsewhere in the same provision. 17 C.F.R. §§ 140.99(c), (e). And the Rule's release makes clear that the beneficiary restriction was to bar "uninvolved third parties to rely" on no-action relief decisions. 63 Fed. Reg. at 63,176. The companies operating the Market and the traders invested in it are hardly "uninvolved third parties." *Id.*

In any event, the definiteness of an article in an agency regulation cannot change the Administrative Procedure Act's conferral of jurisdiction, which reaches any person "suffering legal wrong because of . . . or adversely affected by" an agency action. 5 U.S.C. § 702. Here, traders have invested significant sums in contracts

purchased on the Market and companies have invested tens of millions standing up the Market, all of which the CFTC is arbitrarily pouring onto the street. The CFTC absurdly equates these directly affected parties to the concerned citizens trying to stop the effects of an Egyptian dam project on their favorite animals. CFTC Br. at 43 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)). That just shows how little regard the agency had for the reliance interests of tens of thousands of innocent traders and the operating companies when it made its abrupt, inelegant decision to close it.

Contrary to the CFTC's suggestion (CFTC Br. at 24, 46–48), this case bears no resemblance to *National Wrestling Coaches Association v. Department of Education*, 366 F.3d 930, 944 (D.C. Cir. 2004). There, students challenged an agency interpretative rule that gave universities a range of options to comply with Title IX, and the universities, years later, chose one of them. There is absolutely no such wiggle room or menu of choices in the CFTC's mandate or years of intervening events to sort through.

The CFTC's most audacious claim is that the trader Appellants' harm is not irreparable because they could just turn around and sue Victoria University, Aristotle, and PredictIt for following the CFTC's instruction to liquidate their investments. CFTC Br. at 51. This argument has no purchase independent of the CFTC's repeated claims that regulated entities (if they have a problem with an

agency instruction to close a business) have no choice but to keep going, await an enforcement action seeking millions in penalties, and raise their arguments there. CFTC Br. at 55–56. The Supreme Court disagrees. *See, e.g.*, *Hawkes*, 578 U.S. at 600.

This Court's decision in *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262 (5th Cir. 2012), is not to the contrary. CFTC Br. at 51. That case has absolutely nothing to do with the CFTC's argument that, if regulated entities are not intrepid enough to ignore an agency's instruction and soldier on, their customers adversely affected should sue over the entity's timidity. Instead, the Court said that financial harms caused by a City of New Orleans decision were not irreparable because the City lacked sovereign immunity, very much unlike the CFTC. *Dennis Melancon*, 703 F.3d at 279.

V. The CFTC Offers No Public Interest that Justifies the Immense Harm that Will Befall Appellants Absent Injunctive Relief

The CFTC has identified no substantive defense of its mandate to close the PredictIt Market and no harm that is likely to befall the public if the Market continues. Instead, the CFTC uses this factor to make a legal policy argument, suggesting that the ruling urged here is an extensive threat to the agency's informal interactions with regulated parties and that the whole administrative state might

grind to a halt.[1] This case, however, is not some attack on all "no-action letters." It is an attack on the CFTC ordering a long-standing market to close its doors and crash land tens of thousands of investors, with no explanation. Nor is it an invitation to the chattering classes to come after agency decisions not to enforce against certain conduct or parties. Judge Easterbrook understood that, recognizing that parties actually pressed to take or to refrain from action by a no-action letter may challenge it. *Bd. of Trade*, 883 F.2d at 530.

Most important, indulging for a moment the CFTC's incorrect collapsing of this case into the 2014 no-action letter, it is no routine no-action letter. A standard no-action letter provides an agency's interpretation of whether an incremental aspect of conduct by an existing and ongoing business will run afoul of an unclear agency regulation. Most common, among the agencies governing securities and commodities, is what additional language a periodic investor disclosure must or must not include. CFTC Br. at 34 (citing *N.Y. City Empls.' Ret. Sys. v. SEC*, 45 F.3d 7, 12 (2d Cir. 1995)). The 2014 no-action letter in this case is of a whole different cloth. Victoria University asked the CFTC to "allow" an entire business to open,

[1] Here, the CFTC relies on *Taylor-Callahan-Coleman Counties District Adult Probation Department v. Dole*, 948 F.2d 953 (5th Cir. 1991). CFTC Br. at 25, 53. But that opinion "was contradicted by the Supreme Court's subsequent decisions in *Sackett* and *Hawkes*" and thus is no longer good law. *Data Mktg.*, 45 F.4th at 854 n.1.

and the agency said "yes." Had the CFTC said "no," Appellants would have been disappointed but would not have invested in standing up the Market or in its contracts. What this case asks for is that, in the narrow circumstances that an agency permits a business to be started from the ground up, an agency be required to provide a reasoned explanation before closing down that business.

VI. Appellants Properly Are Seeking an Injunction Against Enforcement of the August 4, 2022 Mandate to Close the Market

The CFTC tries to suggest that this case presents some remedial conundrum such that no injunction can possibly be fashioned that honors the precepts of administrative law. CFTC Br. at 5, 25, 54–56. It is unclear to us what the CFTC is arguing. Perhaps its clearest statement occurs in its summary of argument. CFTC at 25. There, the CFTC says the requested injunction "would violate the settled administrative-law principle that defendants must challenge final charging decisions by raising affirmative defenses in the ensuing court proceedings" and cites *Ewing v. Mytinger & Casselberry*, 339 U.S. 594 (1950).

There is a reason the CFTC is reaching back for support to decisions before the lifetimes of anyone signing this brief. It is because the Supreme Court subsequently has directly held that, when the governed are issued an instruction to close a business or to cease conduct, it need not roll the dice, continue the conduct, and wait for an enforcement action to complain about it. *Hawkes*, 578 U.S. at 600; *Sackett*, 566 U.S. at 127.

And that is the point. Appellants are asking the courts to *vacate* the CFTC Letter 22-08—the agency mandate for the PredictIt Market to close and to liquidate all contracts. This is "the default rule" when courts have found an agency to have acted arbitrarily. *Data Mktg.*, 45 F.4th at 859; 5 U.S.C. § 706 ("The reviewing court shall . . . hold unlawful and set aside agency action . . . found to be arbitrary [or] capricious.").

While this case is pending, Appellants are asking this Court to instruct the entry of a preliminary injunction against the enforcement of that closure mandate, the agency decision Appellants are asking the Court to evaporate, and to maintain the status quo prior to the CFTC's arbitrary August 2022 action.

There is another solution, however. If the CFTC is so concerned about the intricacies of an injunction, and because the CFTC has offered no substantive defense of its closure decision, the Court should reverse the district court and remand this case with instruction to vacate the CFTC's 2022 mandate to close the Market, thus returning the PredictIt Market and Appellants to the status quo prior to the CFTC having violated the Administrative Procedure Act.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court reverse the district court's refusal of a preliminary injunction and remand with instructions to enjoin the CFTC from enforcing its mandate to close the PredictIt Market, until 60 days after a final judgment in this matter. Appellants further request that, given that the CFTC's defense of this case is focused solely on legally erroneous arguments about the unavailability of judicial review, the Court instruct the district court to vacate the CFTC's arbitrary and capricious August 4, 2022 mandate to close the Market.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2023 I electronically filed this brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and that it complies with the type-volume limitations of Rules 29(a)(5) and 32(a)(7)(B), because it contains 6,500 words, excluding the parts exempted by Rule 32(f), according to the count of Microsoft Word.

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USDC No. 1:22-CV-909

Dear Mr. Edney,

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

Sincerely,

LYLE W. CAYCE, Clerk

Melissa Mattingly

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