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**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

KEVIN CLARKE, TREVOR BOECKMANN,) AU:22-CV-00909-LY
HARRY CRANE, CORWIN SMIDT, ARISTOTLE)
INTERNATIONAL, INC., PREDICT IT, INC.,)
MICHAEL BEELER, MARK BORGI,)
RICHARD HANANIA, JAMES D. MILLER,)
JOSIAH NEELEY, GRANT SCHNEIDER,)
WES SHEPHERD,)
)
Plaintiffs,)
)
v.) AUSTIN, TEXAS
)
COMMODITY FUTURES TRADING COMMISSION,)
)
Defendant.) DECEMBER 1, 2022

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE MARK LANE

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Proceedings recorded by electronic sound recording, transcript
produced by computer.

1 (Proceedings began at 10:08 a.m.)

2 THE CLERK: The Court calls the following for a
3 motion hearing: 1:22-CV-909, *Kevin Clarke and others v.*
4 *Commodity Futures Trading Commission.*

5 THE COURT: Let's start with announcements. Tell me
6 who you are and who you represent. We'll start over here on my
7 left who I trust are the plaintiffs.

8 MR. EDNEY: Yes, Your Honor. My name is
9 Michael Edney from the Hunton Andrews Kurth Andrews Firm. I'm
10 here with my colleague, John Byron. We represent the
11 plaintiffs in this action, Kevin Clarke, Trevor Boeckmann,
12 Harry Crane, Corwin Smidt, Predict It, Incorporated, Aristotle
13 International, Incorporated, Michael Beeler, Mark Borghi,
14 Richard Hanania, James Miller, Josiah Neeley, Grant Schneider,
15 and Wes Shepherd.

16 I have with me at counsel table today some of the
17 plaintiffs in this action. Mark Borghi here is right across
18 from me. I have Dave Mason, who is the general counsel of
19 Aristotle International, Incorporated, one of the corporate
20 plaintiffs in this case. I have Kevin Clarke, our lead
21 plaintiff. He's right there at the corner in the coat and tie.
22 I have Wes Shepherd, another one of our Austin-based trader
23 plaintiffs in the case. I have Josiah Neeley, one of the
24 plaintiffs in the case here based in Austin, and I have
25 John Phillips, the CEO of Aristotle International, Incorporated

1 and Predict it, Incorporated.

2 THE COURT: All right. Thank you, Mr. Edney. And
3 over here on my right.

4 MR. DRUDING: Good morning, Your Honor. It's
5 Kyle Druding for the U.S. Commodity Futures Trading Commission.

6 THE COURT: All right. Welcome to everyone.

7 I'm going to tell a little story, and then we'll get
8 started. I was a prosecutor, state and federal prosecutor, for
9 probably too long, when I was fortunate to get this job a
10 little over ten years ago, so I had a great deal to learn about
11 civil law, how to be a judge, how to write. And with the
12 assistance of good people that I work with, I think I've done a
13 reasonably credible job. I maybe don't get it right all the
14 time, but I sure try.

15 As it relates to these hearings, when I started,
16 because of my ignorance, I would just turn to lawyers and have
17 them, Mr. Edney, you go ahead for 5, 10 minutes, and then
18 Mr. Druding, you go and respond. And that masked my ignorance
19 with regard to what I was doing a little bit.

20 But that's -- how I've handled these hearings has
21 changed. And another part of that change is I cannot come out
22 here and fake it. I mean, the only way for me to do that is
23 just sit here and not ask you men any questions. I can't. I
24 just can't fake it, particularly in something like this that is
25 introducing a bunch of things I've never even heard of and an

1 education I need to receive. In other words, I actually have
2 to study, and I've been studding on those two issues that we
3 have today, the motion to transfer and the motion to dismiss.

4 And here's the upside, downside of that. As part of
5 that process, you cannot -- I don't care who you are. You
6 can't read through all of the briefing, finish that exercise,
7 and not only read it once, read it twice, go back and read
8 selected affidavits that have been filed. You cannot finish
9 that process without developing some questions and reaching
10 some initial conclusions. And that's the key to my little
11 speech.

12 I have been studying on this, and I have reached some
13 initial conclusions. As you're going to be able to tell from
14 my questions, I'm not really going to be able to fake where
15 those conclusions have brought me. It's incumbent upon you, if
16 you don't like where you think I'm going, you need to change my
17 mind. And today's the day to change my mind.

18 So, Mr. Druding, I thought I'd start with you just
19 kind of in general, in the sense that, you know, you-all filed
20 the motion to transfer first. And my -- and that's what I was
21 gearing up for until we recently received the referral on the
22 motion to dismiss. And that -- that broadened my preparations.

23 But my instincts this morning are to deal with the
24 motion to transfer first and then the motion to dismiss. Is
25 there anything that you see wrong with that strategy?

1 MR. DRUDING: No, Your Honor.

2 THE COURT: Okay. Is there any part of your motion
3 to dismiss that, if it's successful, it takes away my
4 jurisdiction and I really can't weigh in on the motion to
5 transfer?

6 MR. DRUDING: I'm not aware of the Fifth Circuit
7 addressing that issue. I haven't thought about that because
8 all of our grounds for dismissal, or at least two of them have
9 been explicitly held to be subject matter jurisdiction related.
10 I think it's possible you would consider sequencing them first
11 for that reason. However, I believe that Section 1404(a) would
12 allow the transferee court were that motion granted to make
13 those determinations.

14 And I know under the district -- or the D.C.
15 Circuit's precedent, they treat a lot of our grounds for
16 dismissal, including final agency action, as a pleading failure
17 under Rule 12(b)(6). And I know Your Honor just gave that
18 speech about needing an education. This is an incredibly
19 complex, specialized area of law.

20 But I think what that means is I think the analysis
21 would actually be different in the D.C. Circuit as to which
22 order to sequence them were it transferred there. So I think
23 there's an additional wrinkle in addition to this being a novel
24 question to my understanding.

25 So I think -- or that was the long answer. The short

1 answer is, no, Your Honor. Your approach makes sense.

2 THE COURT: Okay. All right. Well, let's start then
3 with the motion to transfer as an issue. Why -- tell me your
4 best reason for me to transfer this case. And, again, I liked
5 what you did in your reply brief on this issue, which I thought
6 fairly captured what there seems to be no disagreement by
7 anybody about, which is from page 1: "This court no, less than
8 any other, has authority and ability to resolve APA claims."
9 Agreed.

10 "The parties agree that 1391 controls and venue is
11 available in the Western District of Texas because certain
12 plaintiffs are Austin residents." Agreed.

13 "Third, the parties agree that the case could have
14 been brought in the District of Columbia," and I'll just leave
15 it at that. So the District of Columbia is an available forum.

16 "Fourth, the parties agree that the APA's unique
17 appellate style standard review requires specialized transfer
18 analysis under 1404," meaning the way I understood it, a lot of
19 those factors, they just don't fit here.

20 And then next, that, "Fifth, and relatedly, because
21 the unique nature of the APA review neutralizes many of the
22 factors," as I just said, "the weightiest part of the analysis
23 is determining what, if any, deference to afford plaintiff's
24 choice of forum under these circumstances."

25 And I think I'd add another one, which is I think

1 we're agreed that, whether or not to grant a motion to transfer
2 rests in the -- in the discretion of the court. And as long as
3 the court's decision is at least principled, that's that.

4 So, with that understanding in mind, what should I
5 look to to make this decision on whether to grant your motion
6 to transfer or not?

7 MR. DRUDING: Thank you, Your Honor. I think we
8 would point to two primary sources, first the amended complaint
9 itself.

10 THE COURT: And point that mic a little closer
11 towards your face.

12 MR. DRUDING: Your Honor, of course, I can go up to
13 the lectern.

14 THE COURT: You know, I'm a believer in you can go
15 anywhere you want.

16 MR. DRUDING: Thank you, Your Honor. So I think
17 first we would look to the amended complaint and the
18 allegations as to defendant's conduct. So that's what the CFTC
19 did that gave rise to the claims. I know there's some dispute
20 that Plaintiffs have raised. Whether that applies in the
21 context of 1391(e)(1)(3), which is the venue provision for
22 resident plaintiffs challenging government actions. So it's a
23 specialized venue provision.

24 We think, based on the weight of authority, that we
25 do look still to the nexus between the district in which the

1 case is filed and the relevant conduct being challenged and not
2 say the downstream harms that Plaintiffs are alleging.

3 And so what Plaintiffs are challenging here based on
4 the amended complaint is two correspondence -- letter
5 correspondences from certain CFTC staff. And those
6 correspondences were written in response to a nonparty, the
7 Victoria University of Wellington, New Zealand's request for a
8 no-action letter which was originally granted and then later
9 withdrawn.

10 And so, between all of those underlying facts, they
11 either occurred in the District of Columbia primarily or, to a
12 lesser extent, Wellington New Zealand, which of course is not
13 an American jurisdiction to which this court could transfer
14 that case.

15 And then the second sort of authority, having
16 understood that these allegations lack any connection to Texas
17 until you consider downstream harms, is the Southern District
18 of Florida's *Hight v. United States Department of Homeland*
19 *Security* case. We think that case is on all fours factually
20 with this case.

21 There, there was a resident-only plaintiff. He was a
22 commercial pilot who wanted to apply for permission to operate
23 watercrafts or the like in the St. Lawrence Seaway which is
24 partly in the Northern District of New York. He applied to the
25 Coast Guard officials in the District of Columbia. The

1 Southern District of Florida, where he lived, is where he filed
2 suit. That court held that there was no substantial nexus to
3 that -- to that district and transferred it to the District of
4 Columbia.

5 I think there was an open question there whether, had
6 plaintiff in that case wanted to be in the Northern District of
7 New York where the regulatory action, particularly the license
8 to operate watercraft, would have occurred. I think there was
9 some question that it could have also been transferred to the
10 Northern District of New York, but the plaintiff didn't want
11 that. Here, similarly, Wellington, New Zealand has not been
12 requested, nor would it be an available transferee location.

13 So we think, based on the connection between the
14 claims and the relevant districts at issue, it really is the
15 District of Columbia, Your Honor, understanding that it is a
16 discretionary matter.

17 THE COURT: And if I understand *Hight*, *Hight* was
18 about one man's application with the Coast Guard.

19 MR. DRUDING: Uh-huh.

20 THE COURT: Not multiple named plaintiffs or people
21 across the country. It wasn't -- it wasn't a nationwide Coast
22 Guard action, as I understand it.

23 MR. DRUDING: That's right, Your Honor. I don't
24 believe, though, that the no-action letter here is nationwide
25 either in that sense. It was a request from a university,

1 again, in Wellington, New Zealand. And so, really, the
2 regulatory action being challenged, that staff-level conduct,
3 did take place as to one entity, which is that university.

4 By Rule 149.982, which is the CFTC regulation that
5 governs no-action letters, I believe subsection (e), although
6 it might be (b)(1) -- I would have to check -- says that only
7 the recipient of that letter can rely on it and no other third
8 parties can.

9 So it really is agency conduct that is directed to a
10 single entity, understanding, Your Honor, that that entity then
11 used its understanding of that no-action letter to proceed with
12 an online marketplace that did have wider effects. But I don't
13 think, in terms of for the APA review, which really is focused
14 on the agency conduct at issue and not necessarily the
15 downstream harms --

16 THE COURT: Well, I know it's -- I get that part.
17 But who says -- who says I'm not supposed to look at downstream
18 harms? What's my authority for that in making -- and we're
19 kind of conflating a little bit of the motion to dismiss here.

20 MR. DRUDING: Yeah. I understand.

21 THE COURT: But what authority do I have for I don't
22 look at the downstream harm, I just look at whether or not
23 Victoria University and the CFTC, what their interchange was?

24 MR. DRUDING: Yes, Your Honor. I think *Hight* itself
25 holds that. So -- and I don't know if it explicitly said that,

1 but the downstream harm would have come to the Southern
2 District of Florida, where this now nonlicensed commercial
3 sailor is sort of left. I believe he was asserting loss of
4 livelihood. And so those economic effects would have been felt
5 in the Southern District of Florida, where he lived. And I
6 think the court correctly did not countenance that when looking
7 at what would be the appropriate court to hear his challenge.

8 I think in terms of this Court's precedent, I -- that
9 *Gault* case, understanding that it didn't arise under
10 1391(e)(1)(C), but it was cited in another 1391 case, which was
11 Judge Manske's *Monroe v. Copyright Office* case that I believe
12 the report and recommendation was just adopted after the
13 briefing. So I -- I think this Court and *Hight* and, frankly,
14 every other one that we're aware of, given that this is a sort
15 of an unusual fact pattern, how limited the connection to Texas
16 really is in this case, is that it's truly only a
17 residence-only theory. It's not there are some events that
18 happened here, and we're deciding which one is the more
19 substantial. It really is they all happened in D.C. and New
20 Zealand and -- and it's sort of recognizing that fact, which I
21 think is *Hight*, the fact pattern.

22 THE COURT: The phrase "locus of operative facts,"
23 where does that come from?

24 MR. DRUDING: I think we use that from the *Hight*
25 court. I think, whether it's "locus of operative facts" or the

1 "nexus of relevant facts giving rise to the complaint," I think
2 those aren't a statutory term. I think it's just a recognition
3 of sort of the inquiries as to what venue has the most
4 connection or relation to -- so it comes from *Hight* case,
5 but --

6 THE COURT: Well, the reason I'm asking, when I'm
7 looking at these factors, none -- you know, they just don't
8 apply to this very well. Is -- is this nexus another factor,
9 or is it the first factor? I mean, what -- you know, think
10 about what I'm going to have to write whether you win or lose
11 this, is I'm basically doing what you-all did in your briefing,
12 which is to suggest that the eight factors really don't fit
13 here. So what factors am I looking for?

14 MR. DRUDING: Your Honor, I think -- I think it goes
15 hand and glove with the plaintiff's choice of forum, for the
16 same reason plaintiff's choice of forum is entitled to a
17 diminished, if not no, weight in this case. The flip side of
18 the coin is because all of the operative effects rose
19 elsewhere. So I think that is a general principle of -- of
20 transfer law.

21 How the *Hight* court framed it was to consider those
22 two factors together under a single bolded heading. I think
23 Your Honor would be well within its discretion to do that. I
24 think whether you wanted to address it as a -- as a -- two
25 separate factors, I think Your Honor would also be in his

1 discretion to do that.

2 The Fifth Circuit's *Volkswagen* case, I believe those
3 factors are nonexhaustive. I don't think those are fixed and
4 always applicable factors. It's, you know, one of those
5 unfortunate, many numbered -- and circuits disagree about how
6 many numbers there are in multifactor analyses. But I think
7 every court, you know, following the Supreme Court's *Gulf Oil*
8 and related precedent, analyzes essentially the same concepts,
9 however many numbered factors courts choose to use.

10 So I think Your Honor would have the discretion to
11 choose is my answer, whether it's one or two separate.

12 THE COURT: Okay. All right. Mr. Edney, I have
13 questions for you, too, but I thought I'd initially, is there
14 anything you'd like to say in response to things Mr. Druding
15 has said?

16 MR. EDNEY: Yes, Your Honor. Thank you. Yes. Just
17 discussing Your Honor's conversation with Mr. Druding, I think
18 one of the most important things he told you is that the
19 plaintiffs choice of forum in this circumstance is entitled to
20 no weight because he believes the locus of operative facts is
21 somewhere else. He's citing to you the *Hight* case.

22 That's not Fifth Circuit law. That's not Fifth
23 Circuit law. And -- and what the Fifth Circuit says that is --
24 is that the plaintiffs' choice of forum is entitled to great
25 deference and that he needs to demonstrate that the place that

1 he wants this case to go to, Washington, D.C., is clearly more
2 convenient than this court.

3 And that comes from cases decided this year,
4 including the *Defense Distributed v. Bruck* decision. This is
5 30 F.4th at 433. And a case just decided a few weeks ago,
6 *In re Planned Parenthood Federation of America*, 52 F.4th 625 at
7 630. I would encourage the Court to look at that case. It was
8 decided after the briefing was conducted here.

9 And -- and what the Fifth Circuit is saying, yes,
10 there is discretion that the district court at the magistrate
11 judge level to decide where this case goes. But -- but one
12 thing the district courts do need to do is -- is -- is provide
13 great deference to the plaintiffs' choice of forum and make the
14 party seeking transfer demonstrate that forum that it wishes is
15 clearly more convenient.

16 When it comes to that issue, Your Honor, I think we
17 have the better side of it. This is an APA case. It's an
18 Administrative Procedure Act case. In terms oh of what
19 happened in Washington, D.C., we're not going to have a bunch
20 of CFTC witnesses coming down here and explaining why they did
21 what they did. They're supposed to defend their decision on
22 the basis of a written administrate record that at some point
23 they're going to need to produce to us.

24 So this is a decision that was made in Washington,
25 but it's not a car accident that happened in Washington where

1 there's a bunch of eyewitnesses that need to travel down here
2 and tell the court what happened. It's a -- it's a record
3 review case. And in that sense, the evidence from Washington
4 is coming down here by e-mail. It's going to be produced in
5 written format, not in live testimony.

6 But the evidence -- there is evidence that does
7 matter that is live, and that concerns the effects of this
8 decision. In our complaint, Your Honor, we sought, and we have
9 a motion on file with the court, now a preliminary injunction
10 against this kind of drop-dead date that the CFTC set for all
11 these traders, February 15th. And -- and a big part of our
12 entitlement to that preliminary relief is to demonstrate to
13 Your Honor that irreparable harm has occurred and is occurring,
14 and this is going to have dramatic effects on us. And we have
15 built that factual case, and we have primarily built that
16 factual case through our lead plaintiff, Kevin Clarke.

17 Kevin Clarke is one of the most engaged traders in
18 the entire Predict It community. He monitors this market very
19 carefully, and he has helped us demonstrate through -- through
20 his declaration, which is attached to the motion for
21 preliminary injunction -- you can find it at page 31 of the
22 appendix of that motion -- how -- how the decision of the CFTC
23 today, today, is causing massive distortions in the prices that
24 are being offered for the contracts on the Predict It market.

25 He is holding contracts that he bought before the

1 CFTC decided that this market needs to close on August 4th.
2 And he can't get rid of those contracts at efficient prices,
3 because now people are trading on the basis of what's going to
4 happen on February 15th, what people will --

5 THE COURT: Was he advised when he placed his trades
6 that he was doing so in a market that was operating on the
7 basis of a no-action letter in 2014 that was issued to Victoria
8 University?

9 MR. EDNEY: Absolutely.

10 THE COURT: And was he further advised that the --
11 that 2014 letter left modifications changes in the sole
12 discretion of the CFTC?

13 MR. EDNEY: Your Honor, we aren't planning to getting
14 into the motion to dismiss right now, but I'm glad that we are.
15 Because -- because on that particular point, Your Honor,
16 that -- that sentence in the no -- in the no-action letter
17 is -- is a sentence that you're going to find in almost every
18 single agency decision to this challenge under the
19 Administrative Procedure Act.

20 THE COURT: But isn't it consistent with the regs
21 themselves?

22 MR. EDNEY: It -- Your Honor, it is -- it is an
23 absolute truism that an agency can decide to change its mind at
24 any time. It can reverse course at any time. But the
25 Administrative Procedure Act tells us, though, that the agency

1 needs to explain why it is doing so as it is doing it or before
2 it does it. And that -- that is what is absent from the
3 August 4th decision in this case.

4 THE COURT: That's assuming it's a final decision and
5 licensing. And, again, we're conflating a little bit, but
6 we'll talk about that more. Let's talk about the transfer.

7 MR. EDNEY: One other point I'd like to just say on
8 that, Your Honor, because it goes directly to it: This very
9 same argument the CFTC is making, that, you know, everybody
10 should have known that -- that the CFTC could change its mind
11 like that, at the snap of fingers, it's the same argument --
12 argument that the administrative agency has been making for a
13 long time. And Chief Justice Roberts dealt with it in *United*
14 *States Corps -- Army Corps of Engineers v. Hawkes*, the recent
15 U.S. Supreme Court case, you know, which too dealt with
16 language at the end of a decision that says, listen, we want
17 you guys to know that we can change our mind about what we have
18 decided here at any time.

19 He says, of course, that's right. But the APA says,
20 if you're going to change your mind, you need to explain it
21 first. And there's nothing in the letter, there's nothing in
22 the regulations, that -- that this claims that legal obligation
23 that is present in all administrative decision-making.

24 We trust our administrative agencies with big
25 governmental decisions, but the -- but the -- the compensation

1 that they need to pay for that discretion, the deal that the
2 American people have made with the administrative state is
3 that, when they make those decisions and when they change their
4 mind, they need to tell us why.

5 So this case is not saying that they can never pull
6 our permission to operate this market, that they can never
7 decide to liquidate contracts. But when they do so, they need
8 to tell us why they're doing it and why they chose this course
9 of action, which is very damaging to our clients, over
10 alternatives that would have been less disruptive.

11 THE COURT: Is -- is -- and I have this impression
12 that we're really talking about those contracts that were let
13 before the letter was issued in August. Do you concede that no
14 more contracts could be issued after -- or after that or
15 certainly that would extend beyond February.

16 It seems like -- like, for instance, I think in the
17 Clarke affidavit there is something. I've got X number of
18 contracts. Fourteen percent of them won't be completed by the
19 time the February 2023 date arrives.

20 I almost read into that that we're really just
21 talking about those contracts that were let before
22 August 4th, 2022 and won't expire until sometime after
23 February 20 -- February of 2023 because Plaintiffs concede they
24 can't let any new contracts out.

25 MR. EDNEY: So I'm glad you asked that question,

1 Your Honor, and I want to explain where we are on the whole
2 reaction to what the CFTC did on August 4th. The Predict It
3 market after August 4th has not offered any new contracts that
4 weren't existing before August 4th. So we -- we are abiding by
5 the CFTC's instruction to us in the termination decision to not
6 offer any new contracts.

7 We are challenging that decision in this case. But,
8 for time being, we have not been offering any brand new
9 contracts after August 4th. So all the contracts that are
10 trading today are contracts that the Predict It marketplace put
11 in play before August 4th and that Kevin Clarke and the other
12 plaintiffs here from Austin bought either before August 4th or
13 have traded in the contracts that were trading and offered by
14 the market before August 4th.

15 THE COURT: Okay. So I had that right.

16 MR. EDNEY: You had that right. So we're not
17 conceding that the CFTC, on the basis of this record and with
18 this absence of explanation, can properly tell us to stop
19 offering new contracts. But we are abiding by -- by that -- we
20 are abiding by that instruction for now, until we get judicial
21 relief.

22 The big issue here, though, is -- is the contracts
23 that everybody bought before August 4th and that are still
24 trading and that would not naturally resolve before
25 February 15th. And I think probably the best example of that

1 are the contracts that concern the outcome of the 2024 U.S.
2 Presidential primary and general elections.

3 There the CFTC has said, look, you can't let those
4 contracts continue to trade until their natural conclusion.
5 You have to liquidate all those contracts by 11:59 p.m. on the
6 15th of February, a date for which there has thus far been no
7 explanation. And on that Predict It is -- under the terms of
8 the termination letter is allowed to keep those contracts
9 trading until then. We are seeking a preliminary injunction to
10 get that date lifted, at least until this case is decided on
11 the merits, so that those contracts can continue to trade
12 either until their natural conclusion or until this court
13 upholds on the merits the CFTC's decision.

14 We don't think the Court should do that. But we --
15 we think probably one of the most arbitrary aspects of the
16 August 4th termination decision was -- was not just telling us,
17 hey, listen, we would prefer it if you guys didn't offer any
18 new contracts, but instead saying to us, well, those contracts
19 you've already offered that all these plaintiffs have already
20 invested in, you need to cash those out by February 15th
21 whether they like it or not.

22 And, you know, our complaint about that is why? Why
23 does it have to go away by February 15th? Why can't those at
24 least go to their natural conclusion and trade in an efficient
25 market? What is the emergency? And -- and did the agency

1 consider alternatives to that course of action that would be
2 less damaging to these trader plaintiffs?

3 And in that regard -- in that regard, you know, I
4 want to talk about this downstream effects concept. I will
5 tell you that our request for a preliminary injunction is
6 exclusively focused on these contracts that were offered before
7 the 4th of August and now have to be cashed out and thrown out
8 in the street by February 15th.

9 And -- and the corporate plaintiffs here, Predict It
10 and Aristotle, think that that's very unfair and they don't
11 want to do it. But the biggest injury that is caused by that
12 is to the actual investor plaintiffs. It's those folks who are
13 going to have their investments unfairly treated and are going
14 to lose money on it, at least compared against what they
15 thought they were going to make based on their predictions.

16 And establishing the nature of that injury and
17 whether it's redressable and whether we're entitled to
18 preliminary relief really does depend on these plaintiffs
19 coming forward and explaining what's happening to their
20 investments, what's happening to the market now such that they
21 can't efficiently get out of them, and why preliminary relief
22 is incredibly important.

23 So those -- those private factors in the transfer
24 analysis about the locus of evidence, the witnesses, the
25 efficiently bringing those to the Court, I think those go in

1 our favor. I would not say that those are irrelevant. I would
2 say they're irrelevant as to, you know, the decision having
3 been made in Washington, D.C., because in terms of that
4 decision, that decision is going to rise or fall on the basis
5 of a lifeless, written administrative record. That's just the
6 way that the Administrative Procedure Act works.

7 But in terms of the relief we're seeking in terms of
8 the preliminary injunction and establishing that, that does
9 require witnesses and live information that, frankly, is based
10 down here in Austin, Texas. And Kevin Clarke, you know, was
11 not picked out of thin air. Kevin Clarke is one of the most
12 active participants in our market and is on top of how this
13 market works probably more than any other trader that we're
14 aware of.

15 THE COURT: Well, Boeckmann apparently has more out
16 there than -- than Clarke.

17 MR. EDNEY: Well, I mean, listen, you know, at
18 various stages of our lives, right, a certain amount of money
19 means more to others than some other folks.

20 THE COURT: Well, I know, but --

21 MR. EDNEY: Mr. Clarke has a lot of cash out there,
22 right?

23 THE COURT: You just told me Clarke is number one.
24 He's not.

25 MR. EDNEY: No, no. I don't mean Clarke's number one

1 in terms of magnitude investment. I would say he's number one
2 in terms of -- he's one of the most active, engaged traders in
3 our community.

4 THE COURT: Why did you-all pick this division and
5 this district for this lawsuit? You could have picked
6 districts all across the country.

7 MR. EDNEY: No. We could not have picked any
8 district across the country. We --

9 THE COURT: It had to have somebody live in it.

10 MR. EDNEY: -- did need to have on engaged plaintiff.
11 But, you know, this --

12 THE COURT: But you've represented to me there are
13 thousands of people. So you probably could have picked any one
14 of the 94 federal districts, right?

15 MR. EDNEY: If I work very hard to find those
16 plaintiffs, I could have. I did not have all 94 federal
17 districts in front of me. We -- we had a number of plaintiffs
18 that were inter -- were interested in this, and among that we
19 did choose this one, Your Honor. That is true.

20 THE COURT: My question is: Whether it's Mr. Clarke,
21 Mr. Boeckmann or any of the other fellows that have been added,
22 the harm -- the harm is the same. They're all the same
23 wherever they are across the country. And, again, this whole
24 thing is about odds. I'm going to go out on a limb and suggest
25 you could have found a plaintiff in any of the other

1 continental federal districts. But that's not my point.

2 My point is, getting back to my original question,
3 why Austin? What is -- what is unique about Austin as opposed
4 to any of the other federal districts in which this case could
5 have been brought?

6 MR. EDNEY: What you think about Austin is that
7 Kevin Clarke is here. And I do understand, Your Honor, that
8 you -- you think if I put enough work into it, I could find
9 somebody anywhere else. But -- but, again, Mr. Clarke is very
10 engaged in the dynamics and academics of the market, and, you
11 know, I need an engaged plaintiff in this case. And, you know,
12 this man has been with us arm in arm through this case from the
13 very beginning, from the briefing, to the declarations, to the
14 theory behind it.

15 THE COURT: Who's making money? Because that's what
16 those cases are always about. Who's make -- who is the
17 interest, the outfit, that's making money? Is it the two
18 corporate entities?

19 MR. EDNEY: Well, sure.

20 THE COURT: And are they making a profit?

21 MR. EDNEY: Well, Your Honor, I mean, this is a
22 struggle for them insofar as -- insofar as they've had to
23 dedicate a lot of resources to try to comply with this
24 arbitrary termination decision.

25 And -- and they do -- they do make a profit on the

1 operation of the market. But for this particular issue about
2 crashing out these contracts on February 15th -- and that's the
3 focus of our preliminary injunction motion -- the most dramatic
4 effects are on the investors.

5 THE COURT: But isn't the individual investors'
6 complaint with Predict It and what's the other name of the
7 other outfit? Aristotle.

8 MR. EDNEY: Aristotle and Victoria?

9 THE COURT: Yeah. Isn't there beef with them if they
10 were not given an accurate impression of the authority by which
11 they were operating?

12 MR. EDNEY: Well, Your Honor, I don't think -- I
13 don't think that is the case. I think they -- I think the fact
14 of the matter is that we had a decision from the CFTC that
15 allows us to establish this -- this market.

16 THE COURT: No, no. None of them did. This letter,
17 this 2014 letter, was to Victoria. It -- I think Aristotle is
18 mentioned once in here as an outfit that they were going to
19 contract for some services, but it's not between any of the
20 investors, it's not between any of the named plaintiffs. I'm
21 wondering by -- by what stretch do they get to contend that
22 this letter was a benefit to them.

23 And the other thing I don't understand is the
24 authorization here and even the briefing, it wraps itself in
25 the importance of academic freedom and research, but really it

1 appears to me to be all about money and bets. I mean, I'm
2 trying to figure out how these things are any different than
3 over-under bet on a football game. And I want to know who is
4 paying the vig or the juice and who's making the money. And
5 it's -- it's got to be Aristotle and Predict It, right?

6 MR. EDNEY: Your Honor, there are some expenses in
7 operating this market, and Aristotle and Predict It do get paid
8 for running the market and dedicating those resources to it.
9 There's no question about that. But -- but this -- this
10 project explicitly on the face of the no-action letter began
11 and has been operated as an academic exercise. You know,
12 you --

13 THE COURT: But it doesn't -- it doesn't look like
14 one.

15 MR. EDNEY: You can go on a sports bet site,
16 Your Honor, and bet thousands of dollars. You can't do that on
17 Predict It. Why? Because -- because -- because the people who
18 started this market and the CFTC wanted to keep this limited to
19 an exercise that generates useful information about what is
20 going to happen in political events. So -- so as you can see
21 in the no-action letter, you know, an individual investment in
22 any contract is limited to \$850. Okay? Not thousands like you
23 can go bet on the -- on the Texans game with a 40-point spread.
24 Or I guess they're not doing so great these days.

25 THE COURT: Yeah. Nobody's betting on them.

1 MR. EDNEY: I guess if the spread gets big enough,
2 somebody might. But -- but, you know, here the idea was
3 that -- that there are all sorts of informed individuals out
4 there that have views about what's going to happen in an
5 election or another political event. And if they just put a
6 little bit of money behind their prediction, they leave their
7 biases at the door.

8 And that is why the data that is generated by the
9 Predict It market has generally been regarded as more accurate
10 than the pollsters, where you call me up and, you know, I might
11 have all sorts of reasons to tell you -- not tell you exactly
12 what I'm going to do as a voter or whether I'm going to vote,
13 or the pundits who frankly have their own incentives to kind of
14 drive an outcome through their predictions.

15 With even these modest financial investments, the
16 biases are left at the door, and that's what the research work
17 of -- of Professors Smidt and others shows, that the market --
18 that the market kind of sheds those biases and leads to more
19 accurate information. And that's why it's been the focus of
20 intense academic study. That's why a university started this
21 company in the first place.

22 THE COURT: Then why isn't the university here?
23 What -- why isn't Victoria here?

24 MR. EDNEY: Well, look. The university has been
25 through a lot. And I don't speak for them, but the university

1 has been through a lot. They're 4,000 miles away. The CFTC is
2 threatening them with various sanctions. And -- and their
3 position has been made very clear, and it's -- it's at -- it's
4 at Exhibit B to the reply in support of the motion for
5 preliminary injunction. They -- they make very clear that they
6 would not be crashing these investors out of their -- out of
7 these contracts were it not for the -- for the FTC -- or the
8 CFTC's mandate to get them out by February 15th.

9 THE COURT: I understand. But the lack of an
10 institution's interest in this to me belies the original
11 purpose of this, that it was academic and research oriented.
12 It appears to me to be a gambling network. And I -- and I can
13 think of right off the top of my head a number of reasons why I
14 don't understand how that data can be very reliable for
15 Predict It purposes, but I'll put that aside for a second.

16 What I do want to know is: Why not file this in
17 D.C., where you would have already had your preliminary
18 injunction hearing? Instead we're on this sideshow here. This
19 stuff has been referred to me because District Judge Yeakel --
20 I mean, the most important statistic that Defense cited to me
21 was in their -- I think it was in the original brief, the
22 weighted case average. I don't know what they're doing in
23 D.C., but the weighted case average is significantly higher
24 here. And that's accurate. That's a reflection of what's
25 going on. And, unfortunately, that's why you're having --

1 you're forced to see me. Judge Yeakel has got too much on his
2 plate.

3 So why not have taken this to the District of
4 Columbia where you wouldn't have had a motion to transfer, you
5 wouldn't have had -- you still would have gotten a motion to
6 dismiss, but it wouldn't have gotten done before the
7 preliminary injunction. Instead, we're here. I don't know
8 when you're going to get your preliminary injunction hearing.

9 MR. EDNEY: Well, Your Honor, I do think that's
10 unfortunate, and I think the Court should be hearing our
11 preliminary injunction motion in the first instance even if
12 there's a pending motion to transfer. Courts do it all the
13 time.

14 THE COURT: You could be right.

15 MR. EDNEY: They put a PI in place and they say,
16 well, okay, let's preserve the status quo at least, and then
17 let's decide where it's supposed to be heard and let's decide
18 whether it should be dismissed, right? And I think that's -- I
19 think that's the appropriate course of action here, especially
20 since the CFTC has absolutely no defense for its February 15th
21 date.

22 Remember, our preliminary injunction motion isn't
23 trying to turn the lights back on on the entire market. It's
24 just trying to say, look, let's deal with this February 15th
25 date for the -- for the contracts that preexisted August 4th,

1 and -- and allow those to -- to continue to trade during the
2 pendency of this action or to their natural conclusion.

3 That's all that is asking for, and I think that's an
4 appropriate preservation of the status quo to put in place
5 while we sort through all these issues.

6 THE COURT: You could be right. I'm just being
7 honest with you.

8 MR. EDNEY: No. I understand that.

9 THE COURT: All you've got to do is look at the data.
10 You weren't going to get a preliminary injunction hearing here
11 anywhere near as quickly as you might have gotten it in D.C.

12 MR. EDNEY: Well, I --

13 THE COURT: So it gets me --

14 MR. EDNEY: -- I practice law in Washington, D.C.,
15 too, Your Honor. It's not the rocket docket by any stretch of
16 the imagination. And, you know, the District of Columbia is a
17 very different place than this court. It has fewer trials. It
18 is often focused on governmental issues. And, look, I
19 understand that the CFTC and many other agencies want to
20 litigate all their cases there, but they're making decisions
21 with nationwide effects.

22 THE COURT: Well, if you practice there, I mean, the
23 CFTC notes this, is there something wrong with the district
24 judges up in the District of Columbia?

25 MR. EDNEY: There's absolutely nothing wrong with the

1 district judges up there.

2 THE COURT: Okay. Then let's get back to my original
3 questions.

4 MR. EDNEY: I love them, I love you, I love
5 Judge Yeakel.

6 THE COURT: Why are we -- why are we in Austin? It's
7 not because it's efficient. It's not because it's convenient.
8 Why?

9 MR. EDNEY: Your Honor, we're here because of Kevin
10 Clarke. That's why we're here.

11 THE COURT: Well, the law tells me it doesn't just
12 stop with that. Okay? You've got one guy that lives in the
13 district, in the division, analysis is done, we're over.
14 There's no case law that says that. Instead, it says I'm
15 supposed to look to what is clearly convenient.

16 And that's what I'm asking you. What's the factor
17 that -- that Clarke has that any other person doesn't have,
18 particularly when this affects, according to the pleadings,
19 thousands of people, I take it across the country, and maybe
20 not every of the 94 districts, but probably the majority of
21 them?

22 MR. EDNEY: Your Honor, Mr. Clarke is intellectually
23 engaged in this case, and that is a rare, rare commodity. It
24 is not a universal trait of every trader that wants to raise
25 his hand up and say, You know what? I think this is wrong. I

1 want to do something about it, much less help us build the
2 factual and intellectual edifice about why it's wrong.

3 And, frankly, you know, in building the case for --
4 for a preliminary injunction, you know, trying to -- he was
5 indispensable in trying to figure out what is going on with
6 this market today that entitles us to relief now on this
7 important issue. It's not just any plaintiff. We need a
8 plaintiff who is engaged, and Mr. Clarke is that person.

9 But, Your Honor, going -- going back to the issue, I
10 mean, the argument that they've made to you about the locus of
11 decision-making is an argument that can be made about any
12 federal government decision that has nationwide effects.

13 And -- and -- and the *Hight* case, which -- which has
14 been pressed upon Your Honor, is nowhere close to what we're
15 dealing with here. That plaintiff was complaining about the
16 denial of his permission to drive a boat around Lake Erie. And
17 he was trying to -- he was trying to challenge that issue from
18 Florida because he happened to spend his winters down there.
19 That's not -- that's leagues away from what we're dealing with
20 here.

21 THE COURT: See, I'll tell you I saw it a little
22 differently. I mean, I found *Hight* fairly persuasive. And
23 the -- it dealt with one man's effort to obtain a license. I
24 thought there was a much stronger argument for that to have
25 stayed in Florida. This one's just one guy who's got \$11,000

1 in -- that represent 14,000 -- or 14 percent of his -- his
2 contracts in Austin. That's it. Against a backdrop where
3 there are thousands of people across the entire country. Why
4 is Austin the best division and district in which to handle
5 this case?

6 MR. EDNEY: Well, I don't know that it's the best,
7 but that's not the inquiry, Your Honor. The inquiry is whether
8 Washington is clearly more convenient than Austin, Texas, and
9 they haven't established that by any stretch of the
10 imagination. The answer is not that they've -- that they've
11 made the decision there, because -- because that's a paper
12 record issue. The answer is not that Mr. Druding has an office
13 there. The Fifth Circuit says that you can't consider the
14 location of counsel on this issue.

15 THE COURT: Right. So I'm not.

16 MR. EDNEY: So that's out, right?

17 THE COURT: But I'm looking for other factors.
18 You've given me one. We have identified a plaintiff,
19 Your Honor, who is intellectually engaged. Okay. That's not
20 in any of the case law. But we're all searching for factors or
21 something, and that's one you've given me and I'm grateful for
22 that. Mr. Druding has articulated locus of operative facts,
23 nexus, another factor. What other factors?

24 MR. EDNEY: Yeah. I mean, I -- I -- the locus of
25 operative facts there, I would challenge Mr. Druding to give us

1 a case where that is -- that is one of the factors.

2 THE COURT: Well, they talk about it in *Hight*.

3 MR. EDNEY: Where are the witnesses coming from, and,
4 you know, how efficiently are we going to be able to present
5 this evidence? And I will say this is an APA case. On their
6 side, you know, their evidence is going to be on paper. You
7 know, in terms of the folks at the CFTC office that made the
8 decision, they either have an administrative record that can
9 defend this decision or not, and we're going to see this at
10 some point.

11 In terms of establishing harm, our evidence is right
12 here in Austin, Texas, okay? I mean, he is the driver of
13 that -- of that thesis. And, you know, again, intellectual
14 engagement, I -- he -- his intellectual engagement has made him
15 an available vessel, a witness with a unique perspective,
16 that's willing to share the distortions of this marketplace
17 with this Court.

18 And -- and, under those circumstances, he's a
19 gentleman that decided to bring this case, right? Under those
20 circumstances -- and the Fifth Circuit tells us this -- you
21 know, there's not enough here to show that it's clearly more
22 convenient to try this case in Washington. And, frankly --
23 frankly, from an equitable standpoint, since we have a
24 time-sensitive issue, moving this case around the country is
25 just going to run out the clock on February 15th, which is not

1 a good situation.

2 THE COURT: Well, that may be true, but that's what I
3 meant earlier by my comments. That's on you-all. You knew --
4 you knew you were going to get a motion to transfer if you
5 didn't -- if you didn't file this in D.C.

6 MR. EDNEY: There is not -- I did not know that,
7 Your Honor, because we do -- we do file challenges to
8 nationwide federal government actions all across this country.
9 But on top of that, Your Honor, whether I get a motion to
10 transfer or not, that does not affect our entitlement to a
11 prompt decision on a motion with time-sensitive effects. And
12 if that means putting the preliminary injunction in place and
13 then dealing with all the procedural issues, then that's what
14 needs to happen.

15 THE COURT: Yeah, but you're looking --

16 MR. EDNEY: And if my preliminary injunction is
17 effectively denied because it's not decided for some time, then
18 that's an issue that, you know, we'll take up with the
19 appropriate appellate bodies. But, you know, that is -- you
20 know, I didn't -- I did not -- I did not tell my clients -- and
21 I probably shouldn't say this -- that, you know, we're going to
22 get a motion to transfer. I mean, we got one, and we're
23 dealing with it. But I think under the law of the Fifth
24 Circuit, the case needs to stay here.

25 THE COURT: Well, listen, you're entitled to -- you

1 certainly have the right to a prompt decision, but that's
2 against the backdrop of knowing that this division and this
3 district hasn't had a new district judge position since the
4 early '90s. So for over 30 years. And all you have to do --
5 if any of those men have lived in Austin as long as I have,
6 they know how much this place has grown. We're behind. I
7 mean, we are. So I -- I feel your pain. I wish you were
8 getting a prompt decision. But it's -- there are reasons why
9 you're not.

10 But, again, back to the motion to transfer, I think I
11 have enough on that. As it relates to the motion to dismiss --

12 MR. EDNEY: Could I just direct Your Honor to one
13 more case?

14 THE COURT: Yes. Of course.

15 MR. EDNEY: Your Honor, one of the cases cited in our
16 opposition to the motion to dismiss is *Anunciato v. Trump*.
17 This is a case that was cited in the Northern District of
18 California. And -- and this is -- this is truly the case that
19 is all -- on all fours with this one.

20 This is not -- this is not a situation where the
21 individual plaintiff, you know, really had interest in -- in
22 the Northern District of New York and was talking about conduct
23 in the Great Lakes. This is a -- this was a nationwide
24 immigration decision that was made -- made by the Trump
25 Administration and his Department of Homeland Security. There

1 were 200 plaintiffs from all across the country. Only four of
2 them lived in the Northern District of California. But -- but,
3 you know, they -- the decision clearly had effects on those
4 plaintiffs there.

5 And what the court says in the APA case, applying the
6 Fifth Circuit standard -- the Ninth Circuit standard is just
7 with the Fifth Circuit standard on establishing the clear --
8 clearly greater convenience of the transferee forum, that that
9 type of case needs to stay where it was brought by the
10 plaintiffs. I think that's the analysis that should control
11 here, not a Southern District of Florida case that is not
12 showing that deference to the choice of forum.

13 THE COURT: Okay. So before you go to motion to
14 dismiss, let me ask Mr. Druding, why is that case that he just
15 cited not controlling here?

16 MR. DRUDING: I confess, Your Honor, I do not recall
17 that case of the many cited off the top --

18 THE COURT: I confess I don't either.

19 MR. DRUDING: I think the lack of providence and
20 briefing suggests that it probably doesn't say that. If it
21 does, I'm not familiar with and it wouldn't be controlling on
22 this court anyway, given Your Honor's discretion.

23 THE COURT: All right. We'll look at it. I don't
24 recall it off the top of my head either.

25 MR. DRUDING: But I'm happy to provide supplemental

1 briefing. I'm not sure if Your Honor would be --

2 THE COURT: No. No. Twenty pages each, I'm briefed
3 out.

4 MR. DRUDING: Understood.

5 THE COURT: I'm briefed out guys.

6 All right. On the motion to dismiss, well, let's let
7 Mr. Druding go first.

8 MR. EDNEY: Okay.

9 THE COURT: Thank you.

10 MR. EDNEY: Thank you, Your Honor.

11 THE COURT: All right. Give me -- give me the
12 laymen's down and dirty why you -- you believe this case should
13 be dismissed here.

14 MR. DRUDING: Yes, Your Honor, I think Your Honor
15 hinted at it earlier when you pointed both to the letter and
16 the regulation. I confess, had Your Honor not been as clearly
17 prepared as you are, I would have offered to read them to you,
18 but that seems unnecessary.

19 I think the fundamental disagreement as to the motion
20 to dismiss is really whether there was a license or approval or
21 other decision of legal significance on which third parties
22 could rely at issue here. That was done by the commission or
23 by its staff pursuant to properly delegated authority.

24 I think the only legal authority that has been cited,
25 which is correct, because it was the only legal authority staff

1 we're acting under, is 17 CFR 140.99(a)(2), which is the
2 process that the commission codified back in the late '90s on
3 how staff-level recommendations about prosecutorial matters are
4 to be handled. And, specifically, that regulation allows
5 divisions of the commission at their discretion to authorize
6 no-action relief, which is defined as stating in a written
7 statement that they will not make a recommendation enforcement
8 action to the commission for failure to comply with a specific
9 provision of the act or of a commission rule, regulation, or
10 order if a proposed action is completed or if a proposed
11 activity is conducted by the beneficiary.

12 Here the beneficiary is nonparty Victoria University,
13 as Your Honor has noted. They're not here contesting it.
14 they're the only party to whom that letter was directed and, by
15 regulation, which could rely on. The extent of the
16 university's reliance is then tempered by the scope of
17 no-action relief which, as Your Honor noted, is discretionary.
18 And it is a limited duration agreement not for that division to
19 recommend that the commission then, in turn, vote to authorize
20 enforcement proceedings. There has been no commission vote to
21 do so.

22 The Predict It market is not facing an enforcement
23 proceeding now. Were they to do so at some point in the
24 future, should the commission in its discretion decide that
25 would be the best use of its limited resources and staff time,

1 they could raise any of those arguments as an affirmative
2 defense.

3 So I think, you know, the silver lining at least for
4 the Predict It market that they're not facing that sort of
5 enforcement action. But, were they to do so, that would be the
6 proper time at which judicial review would commence. And it
7 wouldn't do so under the APA. It would do so under the
8 Commodity Exchange Act.

9 THE COURT: So let me spit back what I think I heard
10 you telling me.

11 MR. DRUDING: Yeah. I'm sorry. I know it was a long
12 argument.

13 THE COURT: No, no. Basically, that they're --
14 Mr. Clarke, in particular, or the other individual named
15 defendants, they were not the beneficiaries of the 2014 letter.

16 MR. DRUDING: That's correct.

17 THE COURT: That's one.

18 MR. DRUDING: Yes.

19 THE COURT: Two is no final action, meaning there was
20 no license given.

21 MR. DRUDING: Yes, Your Honor.

22 THE COURT: And that's it.

23 MR. DRUDING: Also, we have the third argument that,
24 because none of the plaintiffs are the beneficiary, they also
25 lack Article III standing. So -- but that sort of feeds into

1 your earlier --

2 THE COURT: And which is your best case? Is it that
3 list of cases you gave me on the SEC no-action letters?

4 MR. DRUDING: I think those are directly analogous,
5 holding that SEC no-action letters, which are legally
6 indistinguishable from CFTC no-action letters in this context,
7 are not judicially reviewable are the Seventh Circuit's *Chicago*
8 *Board of Trade* case and the D.C. Circuit's *Kixmiller v. SEC*
9 case.

10 I would say the logic of the D.C. Circuit's
11 *Soundboard v. FTC* case that we cite, the D.C. Circuit's
12 *Holistic Candles v. FDA* case, and the Fifth Circuit's *Luminant*
13 *Generation v. EPA* case all deal with similarly staff-level
14 conduct that does not have independent legal effect and which
15 either the relevant agency did not take an action nor was
16 specific authority to do so delegated to the staff action being
17 challenged.

18 THE COURT: Okay.

19 MR. DRUDING: But, yes, Your Honor.

20 THE COURT: Okay. Okay. Thank you. Mr. Edney, why
21 aren't the SEC type cases analogous to this. And that's my
22 first question. And then the second is, if Victoria was here,
23 how -- how can the individuals or Predict It or Aristotle, how
24 can they have any greater rights under the letter than Victoria
25 had? And I'm talking about the 2014 letter.

1 MR. EDNEY: Okay. Well, thank you, Your Honor. Let
2 me take those questions.

3 THE COURT: You take them any way and weave in
4 whatever else you want.

5 MR. EDNEY: Sure. And I'm going to go straight to
6 the heart of your first question about the SEC case.
7 Your Honor, the -- this *Chicago Board of Trade v. SEC* case from
8 the Seventh Circuit in 1989 decided by Judge Easterbrook, it
9 was cited on the first page of their brief, it's the first case
10 that he showed you. I think you should follow it in its
11 absolute entirety. And I would dedicate that case to your --
12 to your close consideration and review.

13 What they cite the case for is the proposition that
14 an agency no-action letter and everything that stems from it
15 cannot be judicially reviewed. That is not what the case says.
16 As a matter of fact, it says the exact opposite. This is a
17 case like several others cited by the commission, including the
18 *Kixmiller* case, where a competitor is challenging a no-action
19 letter issued to a third party.

20 So -- so this is a case where the SEC told an
21 exchange-like entity, hey, listen, you can do all this stuff
22 and we're not going to enforce against you. And one of the
23 competitors to that exchange came out and said, Wait, that's
24 unfair. The law requires that they do this and that and the
25 other thing. And, if they're not doing it, you should go

1 penalize them for it. That's what they were doing in
2 challenging the no-action letter.

3 And the Seventh Circuit decided that third parties
4 cannot force an agency to take up an enforcement action against
5 a third party. I mean, that's a -- that's a -- that's a pretty
6 unremarkable conclusion. As a matter of fact, it was one that
7 was dictated by a Supreme Court case decided four years
8 earlier, *Heckler v. Chaney*. This was a -- this was a case
9 where -- where a bunch of folks wanted the FDA to go tell
10 the -- to make drugs unavailable for executions, right, and
11 said you should go come crashing down on the pharmaceutical
12 companies for that.

13 The Supreme Court said no. You can't sue the FDA to
14 use its kind of precious resources to go after one entity or
15 another to go after a third party you don't like. And that's
16 what that case stands for.

17 Importantly, Judge Easterbrook explained exactly how
18 that worked, and he said that it would -- that it was clear
19 that it would be an entirely different case if the -- if the
20 regulated parties, the parties that were kind of under the gun
21 in the no-action letter, were the ones challenging these terms.
22 And -- and this is particularly -- made particularly clear by
23 page 4 -- 530 of that decision.

24 If I could just pass something up to Your Honor, if
25 you don't mind.

1 THE COURT: Yeah. Of course.

2 MR. EDNEY: Here's a second copy. And I have a copy
3 for opposing counsel.

4 MR. DRUDING: I have one. Thank you.

5 MR. EDNEY: Oh, you do?

6 MR. DRUDING: Yes. Thank you so much.

7 MR. EVANS: And if we could turn to the third page of
8 this short PowerPoint, Your Honor, the back page, but this
9 is -- you know, this is the key language from page 530. And
10 Judge Easterbrook -- Judge Easterbrook tells us, look, this
11 final agency action doctrine, it's a practical concept. It's a
12 flexible concept. It's something where we're supposed to
13 determine the effect of an agency decision on a business.

14 And this would be an entirely different case if the
15 SEC had put the futures market in jeopardy should they neglect
16 to dance to its tune. Even a decision of staff might be final
17 agency action. The question, he said, is whether the plaintiff
18 that is challenging the no-action letter is the one that is put
19 under the regulatory gun.

20 And I would say that that characterization absolutely
21 applies to us. John Phillips and his company, who is here with
22 us today, Kevin Clarke and the traders that have -- have these
23 contracts, are absolutely under the regulatory gun if they do
24 not dance to the CFTC's tune and liquidate all these contracts
25 that they hold by 11:59 p.m. on the nose on February 15th.

1 And, Your Honor, I would submit to you that the --
2 that the agency's lead case, the *Board of Trade* case, stands
3 for the proposition that regulated parties under the gun don't
4 have to wait for penalties before challenging an agency
5 decision even if it came from staff and even if it stemmed from
6 a previous no-action letter.

7 And I think that's -- that's a lesson that we can
8 also draw from the Supreme Court of the United States. This is
9 a -- the arguments that are made here are arguments that have
10 all been made before by administrative agencies that don't want
11 their decisions reviewed.

12 And -- and the key about what we're talking about
13 here, if we can -- if we can turn to the first page of the
14 PowerPoint, is that we're challenging this August 4th decision.
15 And it's a mandate to act coupled with the threat of sanctions
16 if we don't do it. They're telling us exactly what we need to
17 do and by what time we need to do it. And, importantly,
18 there's absolutely no entitlement for us to appeal that
19 decision to the commission itself. We're at the end of the
20 regulatory road.

21 And what -- and what he told you, Your Honor, what
22 brother counsel told you is: No, no, no. We're going to have
23 an opportunity to hear from the commissioners. It's going to
24 be when John Phillips and Kevin Clarke wake up one morning and
25 the commission has authorized an enforcement action against you

1 folks with seeking hundreds of thousands, if not millions, of
2 dollars in penalties. And then you will know what the
3 commissioners actually think.

4 But this -- this argument is made -- been made a
5 million times before and has been rejected every time by the
6 Supreme Court. When -- when -- when the agency says, look,
7 we're not done yet. This is not -- this is not the
8 consummation of the agency's decision-making process. We still
9 have another step yet to go, and that's when you wake up some
10 morning and find an enforcement action for the agency. And
11 that's why we should not have judicial review at this point.
12 The Supreme Court has slammed the door on that argument every
13 single time.

14 And I would direct Your Honor to the Supreme Court's
15 decision in *United States Army Corps of Engineers v. Hawkes*,
16 page 600, Justice Chief Roberts -- Chief Justice Roberts,
17 quote: We have long held parties need not await enforcement
18 proceedings before challenging final agency action where such
19 proceedings carry the risk of serious criminal and civil
20 penalties.

21 THE COURT: And I'm with you on that. Except is
22 Mr. Clarke a party to this letter that you just cited, the
23 first page of the PowerPoint? The letter is directed to
24 Professor Margaret Hyland in Wellington, New Zealand.

25 MR. EDNEY: Your Honor, I -- maybe that is -- that is

1 a separate point, and I'd be happy to address it now if you'd
2 like --

3 THE COURT: Yeah. Because I'll be honest with you --

4 MR. EDNEY: -- if that's what concerns you.

5 THE COURT: It does. A lot.

6 MR. EDNEY: And -- and I hear what you're saying,
7 that it's addressed to Victoria University. And the regulation
8 says -- says that, when you get a no-action letter, only the
9 beneficiary can rely on it. This is, you know, 17 CFR 140.99.
10 The -- I think those are all the numbers in sequence. And that
11 word "beneficiary" is capitalized. You know, when I read that,
12 I said, well, jeez, that must be defined some place, right, the
13 beneficiary of the letter. It's not, right?

14 And I would argue to Your Honor -- and you won't find
15 anything in that letter, Your Honor, that says only Victoria
16 University can rely on it. I would argue -- argue, Your Honor,
17 that the beneficiaries of that letter are sitting here at this
18 counsel table here today.

19 The beneficiaries of the letter are the ones that are
20 participating in the Predict It market that the CFTC allowed to
21 be established. That includes the operator corporate
22 plaintiffs, Aristotle and Predict It, and it includes the
23 traders. Why? Because -- because the CFTC told that
24 community, the beneficiaries of -- of that letter, that -- that
25 this market could be established and that folks can buy

1 contracts in confidence, that they're not going to have the rug
2 pulled out from them by the CFTC.

3 THE COURT: But it sure looked like an academic
4 project in 2014. And now with Victoria not here and corporate
5 entities that stand to -- I saw a reference to \$250,000 in
6 potential losses, it sure is looking like a gambling
7 consortium.

8 MR. EDNEY: Your Honor, I think that that's not
9 accurate.

10 THE COURT: Then tell me what I got --

11 MR. EDNEY: And I don't think there's facts in the
12 record to draw that conclusion, and I also don't think it's the
13 case.

14 THE COURT: Well, tell me why I'm wrong. I mean,
15 because that's what it looks like.

16 MR. EDNEY: I mean, this -- this started -- and I
17 would direct the Court to that -- that no-action letter, which
18 I have in front of me here, too, right? I think it's, you
19 know, Exhibit 1 to our amended complaint. I think -- I think I
20 saw you -- I saw you have it up there. I do have a copy of it
21 if you don't.

22 THE COURT: No. I have it.

23 MR. EDNEY: Do you have it, Your Honor?

24 THE COURT: Yes, sir, I do.

25 MR. EDNEY: Okay. Let's go to -- let's go through

1 that a bit, you know, pages 3 and 4. And I just want to
2 provide a -- a little bit of a -- a background on this before I
3 go in too deep to it -- on it.

4 There was another -- another very similar market that
5 the CFTC allowed to be established and, frankly, is -- is still
6 operating today. That's the Iowa Electronic Market. It's run
7 too by the University of Iowa. And, you know, people can come
8 in there and -- and place investments based on -- based on what
9 they think is going to happen in elections.

10 And the CFTC and Victoria University were looking at
11 that market, and they said, We want to establish a similar one,
12 but we want to have some changes, because -- because there's
13 some features of the Iowa Electronic Markets that are not
14 particularly conducive to the type of academic work that we're
15 doing.

16 And one of those changes wasn't particularly liquid.
17 I mean, there weren't enough traders in the market. So -- so
18 the -- so the prices were -- were, I guess, probably the
19 informal word for -- for it would be hinky. The prices were
20 bouncing around all over the place. You know, there was --
21 there was volatility that didn't make sense. And -- and the
22 view was that that could be smoothed out if you let more
23 traders in the market. So they asked that the limit on the
24 number of traders in the contract be increased, and it was, to
25 5,000.

1 They also -- they also thought an important asset to
2 liquidity is the amount of money that an individual could put
3 into it should be raised to 850. Not to 10,000, right, not to
4 20,000, but to \$850. And the CFTC and Victoria University
5 decided that that would make sense; that that would -- that
6 would produce -- that would not give any one person too much of
7 a stake in the outcome of a particular election either to lose
8 a ton of money or to -- or to be in the situation where they
9 might have an incentive to go out and try to affect the outcome
10 of that election. But -- but it would provide enough liquidity
11 that you would get more accurate results about what people were
12 thinking with their investment-backed expectations about the
13 outcome of these elections.

14 And the view was from Victoria University, and from
15 the academic plaintiffs in this case, that if you had a liquid
16 properly functioning market, that you were going to get more
17 accurate and reliable predictors of what was going to happen in
18 these elections than you would get with polling and punditry.
19 And -- and as it turns out, the academic literature has proven
20 that that has turned out to be the case.

21 So -- so it is -- it is on academic purpose. These
22 limits were adjusted for academic reasons all to improve the
23 quality of the data. And that was an endeavor that the CFTC
24 was behind and Victoria University was behind.

25 Now, you're asking here why do we have these

1 corporations here that, you know, appear to have a lot of money
2 at stake in terms of winding down this -- this market and, you
3 know, are going to have to spend a lot of money complying with
4 this decision. Well, when you increase that volume and you
5 increase that liquidity, there are all sorts of things that
6 need to be done to make that market run appropriately.

7 I mean, look, you can't just have a market out there
8 where anybody can come in and trade. You need to know your
9 customer. You can't have a market where there's no
10 surveillance of whether there's manipulation going on. People
11 need to do that, and it's expensive. And -- and -- and
12 Victoria University, with its partners at Aristotle and
13 Predict It, invested a lot of money in setting up the systems
14 necessary to -- to put that market in place.

15 But this was -- this was not some kind of -- it
16 hadn't evolved into a problem. This -- this was the system
17 that the CFTC and Victoria University decided to stand up --
18 decided to stand up. And they knew that some investment was
19 going to be required to -- to -- to stand up those systems.
20 And, at the same time, you know, given the scale of the market
21 today, investment is required to comply with this decision to
22 crash out these contracts in February 15th.

23 You know, we're just not equipped for that, right?
24 Our systems that were built seven years ago are designed to,
25 you know, pay people a dollar on a contract if the -- if the

1 event they predict turns out to be the case and pay them
2 nothing if it doesn't, right? Now we're -- now we're trying to
3 figure out how to, you know, liquidate all these contracts
4 before the event occurs.

5 And I think what we're telling you in the
6 declarations is that's going to cost a lot of money, right?
7 It's going to cost a lot of money, and that's anticipated. And
8 the idea is that CFTC said, you know, go ahead and make those
9 investments and -- and put that money in, and you're allowed to
10 do it.

11 And I think when the CFTC says today that, well, we
12 weren't permitting you to set up the market, they're not
13 reading the no-action letter, right? The no-action letter, the
14 first paragraph, I mean, let's keep in mind the first paragraph
15 of it, too. And I think you have it in front of you, and it's
16 on the second page of my -- of my PowerPoint.

17 The CFTC says there that you're seeking relief that
18 would allow Victoria University of Wellington to operate a
19 not-for-profit market for the trading of event contracts and
20 offering such event contracts to U.S. persons.

21 In the revocation letter on the first page of my
22 PowerPoint, they understand that the no-action letter is the
23 one that's available for the listing of the contracts. This
24 was a permit. This was a license to establish --

25 THE COURT: And what's your best case for that?

1 MR. EDNEY: Well, Your Honor, I -- look, I think -- I
2 think the best case for that is -- is 558(c) of the
3 Administrative Procedure Act. I mean, the Administrative
4 Procedure Act says, you know, when you're issuing permits,
5 you're playing with fire here, right? Essentially, it's --
6 it's any other form of permission.

7 THE COURT: If it's a permit. And I'm going back to
8 the CFR in the regs that deal with the CFTC and how they
9 describe a no-action letter. They sure don't use the word
10 "permit" or "license."

11 MR. EDNEY: Well, I mean, there are no-action
12 letters, and then there are no-action letters, Your Honor.

13 THE COURT: Okay. That's where you've got to help
14 me.

15 MR. EDNEY: Yeah. And I'm glad you asked that
16 question, because -- because, listen, I will -- I will say
17 that, in my experience, most no-action letters are different
18 from this one. Here's what they usually do: You know, our --
19 our administrative regulatory state, they have all sorts of
20 very complicated restrictions and what we can and can't do,
21 especially these businesses.

22 And -- and a business goes in and says, you know
23 what? I'm having a hard time figuring out what I'm supposed to
24 do with this particularly complicated regulatory provision.
25 Here's what I'm thinking about doing: Are you going to come

1 and tell me that that's illegal? Okay. Are you going to
2 interpret this ambiguous thing to say that I'm doing a bad
3 thing? And the agency says, you know, we've got better things
4 to do. We're not going to do that, right? You know, we might
5 change our mind later, but we're not going to do it. And --
6 and they say thank you very much.

7 But this is -- is -- this is not that type of letter,
8 right? This is not a situation where there's some complicated,
9 ambiguous term that nobody really knows how it applies. Read
10 footnote 6 of the -- of the no-action letter. The CFTC says
11 there's absolutely no ambiguity in their view that these
12 political event contracts are what they call swap contracts.
13 And under the Commodities Exchange Act -- and I didn't know
14 that before this case. But under the Commodities Exchange Act,
15 if you're offering swap contracts in exchange, you've got to
16 register as an exchange, period, right?

17 And -- and the CFTC here is using no-action relief
18 for the Iowa Electronic Market and for the Predict It market to
19 say, well, there's this -- there's this requirement that
20 clearly applies to you. No question about it. But we're just
21 going to use this no-action relief to tell you that you don't
22 have to do it. And you can go ahead and pile all the money in
23 and set up this market that you haven't even started yet
24 without registering. And, yeah, at the end of it, like in
25 every letter in almost every administrative decision that you

1 see, they say, you know what? We might change our mind, okay?

2 But -- but, you know, Chief Justice Roberts dealt
3 with that in *Hawkes*. You know, he goes through kind of the
4 history of administrative decisions. And he says, in every
5 single administrative decision, we see something at the end of
6 it that says, you know, this is our view right now but it may
7 change. Well, that -- no kidding, right?

8 Administrative agencies are made up of human beings.
9 Human beings change their mind all the time. The government
10 changes its mind all the time. But when -- but when it's not
11 the President of the United States changing his mind or
12 Congress who votes, but the Administrative Procedure Act tells
13 us -- the only thing it really tells us is, okay, the
14 administrative agency can change its mind and dramatically affect
15 the lives of business and regulated entities, but they have to
16 offer a detailed, reasoned explanation first, one that's not
17 arbitrary and capricious. And it's a pretty --

18 THE COURT: So where's your --

19 MR. EDNEY: -- pretty light requirement, right?

20 THE COURT: No. And I'm with you. But what's your
21 best argument applying that to a no-action letter which
22 doesn't -- we're all calling it a no-action letter. We're not
23 calling it a license; we're not calling it a permit. You're
24 saying it --

25 MR. EDNEY: I am calling it a permit.

1 THE COURT: Well, you are now. You're saying that it
2 was tantamount to a license or permit. But what's your best
3 case for a no-action letter is turned into a license or a
4 permit?

5 MR. EDNEY: It's their best case.

6 THE COURT: Okay. Give it to me.

7 MR. EDNEY: Which is *Chicago Board of Trade*, right?

8 I mean Judge Easterbrook tells -- gives you the flip
9 side of the coin, right? He says third parties can't come in
10 and charge no-action letters. But if you've got a no-action
11 letter that is, you know, placing mandates of future action on
12 a regulated entity and it's putting that entity under the
13 regulatory gun, either do this or get charged and face
14 penalties, that's a situation where there is finality and you
15 can bring an APA challenge against it. Because what does he
16 say? Finality is a practical concept. And he didn't make that
17 up. That's what the Supreme Court says.

18 I mean, this is not -- the final agency action
19 doctrine is not a game where the -- the agency gets to kind of
20 organize its life and hide behind, you know, various procedures
21 and walls so they don't have to come in and answer to the court
22 on things.

23 It's a practical concept that evaluates the real
24 world effects of an agency decision on a business. And it
25 doesn't get any more real than this, right? These guys, these

1 traders, have to give up their contracts. These corporations
2 have to liquidate the contracts of a bunch of traders by
3 midnight on February 15th, or it's bad news, right? You know,
4 the next step is -- is enforcement proceedings and penalties.
5 And what the Supreme Court says time and time again is that we
6 don't have to wait for that.

7 So -- so, you know, I think the -- the key of the
8 final agency action decision is that it is a practical
9 analysis, and I think the dividing line is -- is relatively
10 straightforward. Does the agency letter, staff letter, command
11 future action and threaten penalties for noncompliance? The
12 answer to that question is clearly yes in this case.

13 And then the next question is: Does the regulated
14 party challenge its lack a mechanism to appeal that
15 determination to a higher entity inside the agency? The answer
16 to that question here is yes.

17 And if we're on that side of the line, whether it's a
18 no-action letter or a staff letter of another kind, it's --
19 it's final agency action. And that principle helps you
20 navigate through all these cases, right? Because, I mean, the
21 cases are a bit of a mess, but there's cases on one side of the
22 line or the other.

23 On our side of the line there's *Western Illinois*
24 *Health Care v. Herman*, right, in the Seventh Circuit from
25 Judge Wood. This comes after the *Board of Trade* case. You

1 know, she says there's a staff letter that says you've got to
2 do something or else you're going to be penalized. It's just
3 from staff, right? There's no enforcement action yet. She
4 says you don't have to wait for the enforcement action. The
5 question is: Is there anybody else to appeal it to? The
6 answer is no. Everybody concedes that here. It's final agency
7 action.

8 *United States Army Corps of Engineers v. Hawkes*, the
9 Supreme Court case, you know, again a staff letter
10 determination -- staff-level determination. Nowhere to appeal
11 it. The next step is penalties and enforcement action. It's
12 final agency action.

13 *Sackett v. EPA* in the Supreme Court in 2012, same
14 situation.

15 And then there's cases on the other side, right?
16 And -- and the *Luminant* decision from the Fifth Circuit. If
17 you go through the *Luminant* decision, the key aspect of the
18 *Luminant* decision is looking backwards at something the
19 regulated entity did seven years ago and says I'm sending you a
20 notice of violation, and this is the beginning of the -- of
21 a -- of an enforcement action in which there's going to be
22 additional steps.

23 It's not telling them to do anything in the future.
24 It says you're in trouble for what you did in the past. And
25 what the court says, quite rightly, is, well, you know, there's

1 other shoes to drop here, right? But -- but, you know, this is
2 all about the past and, you know, there's other proceedings to
3 come.

4 The *Soundboard* decision in the D.C. Circuit, the key
5 to the *Soundboard* decision in the D.C. Circuit -- and you'll
6 see a spirited dissent there from Judge Millett. But when it
7 comes right down to it, from the dissent and the majority
8 opinion, you know, what the majority opinion says, you know,
9 these guys, they can -- they have a procedure under the FTC to
10 go ask the -- the commission, the actual Federal Trade
11 Commission, the same question. And that's still available to
12 them, and they haven't done it. And they could get -- get the
13 same opinion out of them, and they haven't. And the
14 availability of that higher-level review means that it's not
15 final. That's not an option that's available to us.

16 The *Holistic Candles* case in the D.C. Circuit, same
17 deal, it's an FDA warning letter. The FDA warning letter says,
18 look, we might be wrong about this. Come in and tell us why
19 we're wrong. You know, present more evidence to us. You have
20 that additional step to turn them around. There's no step to
21 turn these folks around at this point. There's no invitation
22 in that letter, you know, listen, we might -- we might not have
23 this exactly right. Why don't you come in and tell us why
24 we're incorrect, you know. Just kind of like Your Honor did,
25 right, here's your opportunity to turn me around.

1 There's nothing like that in that August 4th letter.
2 It's the end of the road, right? And there's -- and everybody
3 can see there's no way up to go to the CFTC itself. And, you
4 know, they -- they say there might be. They say there might
5 be. But, Your Honor, you know, that's -- you know, there was
6 some noise in the briefs about, well, maybe we could have gone
7 to the commission and sought an exemption for this market from
8 the commission itself. And there's this statute. It's Section
9 6(c) of Title 7 that says, well, you can go to the CFTC and
10 say, you know, I don't want to abide by this requirement. It's
11 not in the public interest for us to do so.

12 But, you know, that section says this is only for
13 markets that deal with really sophisticated folks, right? You
14 know, like brokerages and high net worth individuals. Well,
15 I'm telling you that's -- that's not who is seated at this
16 counsel table, right? This is not -- the whole point of the
17 Predict It market is that everybody can participate, you know,
18 rich or poor or in the middle. You know, you don't need to
19 have some qualification to get in. That pathway wasn't
20 available to us.

21 So -- so the CFTC has been using this thing,
22 Your Honor, to -- to -- to make exemption decisions from
23 registration. It is in the manner of a permit. Section 77(b)
24 of our amended complaint says that they checked with every
25 single one of these commissioners before they issued the

1 termination letter, and they all said go forward, right? That
2 hasn't been disputed.

3 And -- and one thing we do know from the final agency
4 action jurisprudence is it isn't a game. I mean, this is not a
5 situation where -- where the CFTC can set up a system where the
6 commissioners are really making the big decisions, but they're
7 hiding behind the State as a -- as a -- as staff action. And
8 they say, look, you can't come to court yet. You just have to
9 wait to get penalized.

10 THE COURT: Let me interrupt you, because that's a
11 nice segue. I want to hear what he has to say about what you
12 just laid out for us.

13 MR. EDNEY: Okay.

14 THE COURT: All right.

15 MR. EDNEY: Makes sense, Your Honor.

16 THE COURT: You bet. Mr. Druding, why didn't this
17 become tantamount to a license or a permit after the expiration
18 of seven or eight years, where this market that the CFTC
19 authorized was initiated, it grew, it became bigger, it looks
20 like we've got some people who actually this is what they do
21 for a living, why didn't at some point it become a license or a
22 permit, particularly when the withdrawal of the no-action
23 letter was actually circulated to the commissioners?

24 MR. DRUDING: Absolutely, Your Honor. I would start
25 by saying I'm not sure that that is -- is factually true. I

1 think we are taking it as true for purposes of the motion to
2 dismiss. So I think we're not challenging for the motion to
3 dismiss that the individual commissioners were circulated and
4 received --

5 THE COURT: Did at least the chair of the commission
6 look at the draft?

7 MR. DRUDING: I don't believe that's in the public
8 record. But, again, we'll take that as true because they've
9 alleged that each commissioner did, and the chairman is a
10 commissioner.

11 THE COURT: Okay.

12 MR. DRUDING: The chairman does have -- I think what
13 Your Honor would be referring to is supervision authority over
14 staff that the other commissioners don't have. That's one of
15 his powers under section 2 of the Commodity Exchange Act. So
16 it's possible he could have seen it in a supervisory. I don't
17 know that. Personally, I don't think I could say, even if I
18 did know that. And I don't -- it's not alleged in the amended
19 complaint.

20 But we're taking it as true that it was circulated.
21 I think that is also true of both *Kixmiller* and the *Chicago*
22 *Board of Trade*. The SEC is sitting as the commission, and the
23 Chicago Board of Trade action actually held a vote at a public
24 meeting about whether or not to upset the no-action letter that
25 was being challenged there.

1 And at that meeting the individual commissioners made
2 comments suggesting that an enforcement action should be taken,
3 although the vote was to not disturb it. And the Seventh
4 Circuit still felt it was not final agency action. And I don't
5 have a slide show for Your Honor, but the -- the sentences both
6 before and after the quoted language in *Chicago Board of Trade*
7 I think is also why the *Chicago Board of Trade* case came out in
8 our favor and not their favor.

9 And it said, "Second, the futures markets seek review
10 of a decision that by its terms is tentative. The division
11 won't recommend prosecution just now, and just so long as
12 conditions are satisfied, Director Ketchum could change his
13 mind tomorrow or the commissioners might like to proceed no
14 matter what the director recommends. The SEC has not, in other
15 words, issued a, quote/unquote, final decision concerning the
16 status of the system. Under the Administrative Procedure Act,
17 finality is a precondition to judicial review."

18 And then there's the language they excerpted in their
19 slide show. And then the court continues, "Nothing of that
20 sort has occurred here, however. The division's missive is a
21 no-action letter. The futures markets are not under the gun;
22 the system, which might be, does not want review." That,
23 again, is true here. The University is not here.

24 Nor were there any legally operative effects of the
25 no-action letter. I think what counsel conceded to Your Honor

1 is that you do indeed need to register with the commission
2 before you can operate as an event contract market lawfully
3 under the Commodity Exchange Act. And there are two formal
4 routes that do imply commission authorization around that. One
5 is the section 4(c). It's confusing because the sections go by
6 how the acts work. It's codified at 6(c), but it's a
7 section 4(c) public interest exemption, where if the commission
8 determines that it would be in the public interest to do so, it
9 may formally dispense with particular requirements as to
10 particular markets. I understand that the predictive market
11 would have to change its operations to be eligible for that.
12 They chose not to do that, obviously.

13 The other one is just straight-up registration as
14 either a designated contract market, which is commonly a DCM,
15 or a swap execution facility, a SEF. Under the CEA, which is
16 the source of all of the commission and staff's authority, that
17 is the only two formal approval mechanisms we're aware of.
18 Nowhere in the CEA or the commission's regulations has it
19 delegated that authority to its staff, and certainly it hasn't
20 done so under rule 140.99(a)(2).

21 As to your specific question about the passage of
22 time somehow transforming into a license, I think looking at
23 the letter as originally written, it's clear that -- that that
24 letter was based on the university's representations. There
25 had not been an independent factual investigation, as would not

1 be normal in the course of issuing no-action letters. These
2 are, again, informal. They're meant to be inexpensive,
3 relatively quick, and access to staff for informal channels of
4 communication. They're not meant to be the equivalent of a
5 formal licensing decision, which would be both much longer and
6 based on both factual and legal conclusions entered by the
7 commission or its delegated staff members. And we just don't
8 have that delegation here.

9 So I think the fact that the division of the market
10 oversight hadn't changed its mind as to whether or not it would
11 be in the public interest for the division of market oversight
12 to recommend to the commission that the commission then
13 independently considers whether the commission viewed it would
14 be in the public interest to authorize an enforcement action, I
15 think we don't know as of what has been produced yet.

16 And I understand Plaintiffs are very eager to get to,
17 quote/unquote, the merits of this case. There has not been a
18 record produced. One of the reasons is because APA review, as
19 Your Honor is well aware from the briefing, requires final
20 agency action. And because there's not agency action here,
21 there's no record for which that agency action attaches. So
22 I'm not -- I'm not sure what the concept of a record would even
23 be here.

24 Were it to be produced, though, it's clear from the
25 original 2014 letter itself that it was based on not only the

1 application that is attached, but also telephone conversations
2 and e-mails. At least one of those e-mails from CFTC DMO
3 counsel Victoria University has an attached. That was from
4 November 2014, months after the original no-action letter
5 issued, calling into question what it described as
6 indiscriminate advertising and markets that exceeded the scope.
7 That's something they've attached, so it is publicly available
8 and as in their preliminary injunction brief.

9 THE COURT: Yeah. I saw that.

10 MR. DRUDING: So I think it has been a question, as
11 Your Honor noted, how -- how much in fact this small academic
12 exercise that had been proposed was falter in fact.

13 THE COURT: Well, I mean, clearly the CFTC and
14 Victoria had a deal, and the deal was premised on the
15 representations that Victoria made to the CFTC. The letter of
16 August 2022 says it doesn't provide detail, but it says,
17 Victoria, you haven't honored -- or the representations that
18 you made in an effort to obtain approval in 2014 are no longer
19 accurate. But there's no -- there -- you talk about no agency
20 record. The agency has to have some information or detail or
21 information to support the accusations in the August letter
22 that Victoria hasn't been in compliance with the preconditions
23 of the 2014 letter.

24 MR. DRUDING: Yes, Your Honor. So I have an agency
25 record in the formal sort of procedural sense that we had

1 produced, an exhaustive list of all the e-mails and telephone
2 conversations and other factors that were considered by the
3 agency staff making the decision.

4 I think we haven't done so both because this is not
5 at the summary judgment stage of this case. Given these
6 threshold failures, we don't think it should reach that point.
7 But also because one of our arguments is that there is neither
8 agency action at all because it was staff action, nor was that
9 agency action final, even if it was agency action, because it
10 doesn't mark the consummation of the commission's
11 decision-making process or attach legally independent
12 significant effects that are not already provided for by the
13 CEA and CFTC regulations. That it doesn't -- that requirement
14 doesn't make sense in the context. Were it to do so, there
15 would be e-mails and telephone calls, Your Honor, perhaps among
16 other submissions.

17 THE COURT: All right. I'm going to exercise my
18 right to call it after an hour and a half. Is it -- if there's
19 something else -- you've come a long way -- you want to share
20 with me, share it. But I'm prepared to adjourn shortly. Go
21 ahead.

22 MR. EDNEY: Yeah. Could I have just a few moments,
23 Your Honor?

24 THE COURT: Yeah. Of course.

25 MR. EDNEY: Thank you.

1 Your Honor we appreciate the time that you've given
2 us. You know, I'll try to keep this brief. First of all, on
3 the -- on the academic purpose of all this, in -- in the
4 amended complaint -- and it would be in the factual record once
5 we get to that point -- 110 universities study and use the data
6 coming off the Predict It market today. This is still very
7 much an academic exercise.

8 I can tell you that the operator plaintiffs, the
9 corporations here, it costs a lot of money to run this thing.
10 It has not been a windfall profit by any stretch of the
11 imagination. For the last seven years, this thing has been
12 operating at just about break even. We do know that it will be
13 really and unnecessarily expensive to wind this down in the way
14 they're ordering to do this.

15 I mean, one of the reasons we're really focused on
16 this February 15th date and just letting these things kind of
17 trade to their natural conclusion is creating a giant mess, a
18 giant and expensive mess. But I don't want you to think that
19 there's some corporation sitting here that, you know, has a --
20 has a profit interest in this thing --

21 THE COURT: I don't think that, but I don't think
22 Victoria has a dog in this fight anymore. I don't think they
23 care.

24 MR. EDNEY: Well, Your Honor, I think they do care,
25 and I think they -- I think they told Your Honor that they care

1 in their letter, insofar as they wouldn't be doing this, they
2 wouldn't be crashing all these investors out on February 15th,
3 if it weren't for what the CFTC is telling them to do in this
4 decision. So it is the efficient force of creating all of
5 this.

6 But, you know, obviously, coming into a federal court
7 and getting involved in litigation from 3,000 miles away is a
8 particularly -- is a bigger challenge for -- for a foreign
9 university than it is for a domestic corporation. There's
10 absolutely no question about that. But I can tell you that
11 they do care. They don't want this to -- they don't want this
12 to happen. They think it's wrong.

13 THE COURT: They should have been here.

14 MR. EDNEY: Well --

15 THE COURT: I mean --

16 MR. EDNEY: I'll take that back, Your Honor.

17 THE COURT: -- I respect what you're telling me, and
18 maybe you've talked to them. But they're not. And it's --
19 frankly, it speaks a lot of volume, at least for me, about what
20 this is really about.

21 MR. EDNEY: Well, Your Honor, share with me, what is
22 it really about? I mean, I --

23 THE COURT: It sure looks like an effort to -- it
24 looks like a gambling market to me. And I've got to tell you,
25 I need to go read some of the academic research. But how is it

1 that gamblers are the best predictors of who's going to win?
2 Because that presupposes the only people who are gambling are
3 people who have money, who have money to play on this -- in
4 this particular game.

5 I know a lot of people that won't go to Vegas. They
6 won't lay a bet. They won't play cards. So only the people
7 who are willing to make bets are going to be the best predictor
8 of who wins? I don't see the academic angle. But I don't have
9 to make that decision. What's more important to me is I don't
10 have an academic institution that was given this letter that's
11 expressed that they really care about this.

12 MR. EDNEY: I do think they care about it, and I
13 don't think they want to crash these people who relied on them
14 out of the market. And the only reason that that is happening
15 is in Victoria University's letter, is because of the CFTC's
16 decision.

17 And, Your Honor, I would not characterize these folks
18 as gamblers. I mean, look, the dividing line between investors
19 and gamblers from hedge funds, the people who invest in the
20 New York Stock Exchange, is a -- you know, is a --

21 THE COURT: I understand what --

22 MR. EDNEY: Is a very thin line.

23 THE COURT: I get it. We use different names. But
24 whether it's you're trading pork bellies, it's still kind of
25 gambling.

1 MR. EDNEY: Well, I mean, it is. But you -- you
2 don't have all these folks that are coming in -- they can't
3 come in and abuse it like they -- like they do in Vegas and,
4 you know, plop down their live savings on a contract. There's
5 an \$850 limit here. There was a balance that was tried -- that
6 was -- folks that were trying to draw between getting a liquid
7 market and -- and keeping it to its academic purposes. And
8 that's a decision that the CFTC made. If it's changed its
9 mind, okay, right?

10 But -- but, remember, what are we asking for, right?
11 We're not asking for an order from Your Honor or anyone else
12 that says the CFTC can never end the -- the Predict It market.
13 We're not -- we're not saying that. We're not asking for an
14 order that says they could never order liquidation of existing
15 contracts.

16 All we're saying is, tell us why, right? And I think
17 Your Honor's questions to opposing counsel drew that out. I
18 mean, there must be a reason for this. If there's been
19 violations, let us know what they are, right, so we can
20 evaluate whether that's really happened. If there's -- if
21 there's a reason behind February 15th as opposed to another
22 date and not letting these contracts go to their natural
23 conclusion, please tell us so a court can evaluate whether it's
24 arbitrary or capricious, a wide standard. But they've chosen
25 not to do that.

1 THE COURT: Well, luckily, whether this really does
2 have value for academics or whether or not gambling is the
3 right word, none of that really matters. What really matters
4 is (a) whether or not this case should be transferred and, if
5 it's not transferred, whether or not dismissal should be
6 granted.

7 So here's where I want to leave it: I don't know
8 exactly what I'm going to do, because I think both of those
9 calls are close and they require a little bit more time. But
10 if I were -- if you wanted me to make a ruling from the bench
11 right now, it would be I'd grant the motion to dismiss and I
12 don't think you want me to do that.

13 So what may happen is you win and lose. You lose on
14 the motion to transfer but you win on your ability to have
15 another judge who is smarter than me determine whether or not
16 their motion to dismiss is -- is a good one. And that's, of
17 course, presupposing that Judge Yeakel is going to adopt my
18 report and recommendation. I don't know what he's going to do.
19 But I'm just telling you these are going to build in more
20 delays. I don't know when you're going to get to that
21 preliminary injunction hearing. But that's not my problem,
22 although he does send those to me from time to time.

23 So that's kind of where I'm leaning, gentlemen, and
24 that's what I want to share with you.

25 MR. EDNEY: Can I leave two --

1 THE COURT: Well, hold on a second. I want to tell
2 you men something, and that is this isn't about who is the best
3 lawyer, because I've got to tell you I really like you. My
4 definition of a good lawyer is a good lawyer who can come in
5 and take hard fast balls up near his chin and respond
6 respectfully, authoritatively, and intelligently. And you've
7 done all those things, because I've clearly thrown you more
8 hard fast balls than I have Mr. Druding. So I wanted to share
9 that with you.

10 But can you be quick? I've got an appointment back
11 here that is necessitating a visit.

12 MR. EDNEY: No. I appreciate that, Your Honor, and I
13 thank you -- I thank you for that assessment. It means a lot
14 to me.

15 But, just two additional points. First of all, I --
16 on the permit issue, I don't want to leave the Court with the
17 impression that, you know, it needs to be a permit for us to go
18 forward, right? It can be -- a permit is a form of final
19 agency action, but there are other forms of final agency
20 action. So that's not the only pathway.

21 I will tell Your Honor, look at section 551(8) of the
22 Administrative Procedure Act. It defines "permit" as any other
23 form of permission. And I think that's exactly what happened
24 here in the first paragraph of that no-action letter.

25 THE COURT: And you may be right. But if I -- if I

1 do transfer it, then I'm not going to make that call.

2 MR. EDNEY: And then -- and then, second, Your Honor,
3 the -- this is -- this is -- this is something with pretty
4 extensive legal consequences. And I'll tell you one thing that
5 no-action letter did, is if the commission woke up one day and
6 said, you know, we didn't want Predict It to be around anymore
7 and they sought an injunction against us doing it anymore, one
8 thing they couldn't do with that no-action letter around is
9 assess us civil penalties for -- for having operated the
10 market, right? That requires willfulness, and that no-action
11 letter negates it.

12 But with that August 4th decision, it puts us in an
13 entirely different legal category, and a big part of the final
14 agency action analysis is the legal consequences that that --
15 that decision is exposing us to significant penalties, and it's
16 something we didn't have to deal with on August 3rd, it's
17 something we do have do deal with on August 4th, and it's
18 something that requires an explanation before that change is
19 made.

20 THE COURT: And you may be right. And let me be real
21 clear. I'm not saying these folks haven't been harmed. I get
22 it. I really do understand it. It's whether or not legally
23 this is the best forum for this case to be, whether it's the
24 most clearly convenient place or the one in D.C. that they
25 suggest.

1 And I'm -- I'm telegraphing to you that, as it
2 relates to the motion to dismiss, just on legal basis, I mean,
3 there's agreement on most of the facts here. On a legal basis,
4 I'm just being honest with you, I'd be tilting towards granting
5 it right now. And I just don't think you want me to do that
6 and you want to live to fight another day.

7 So that's kind of -- I'm just sharing with you some
8 initial thoughts, but we'll put --

9 MR. EDNEY: Well, look at that *Planned Parenthood*
10 decision that came out three weeks ago on this transfer issue.

11 THE COURT: You have my -- you have my word we'll do
12 that.

13 MR. EDNEY: Okay. Thank you, Your Honor.

14 THE COURT: All right. Thank you, gentlemen.

15 (Proceedings concluded at 11:43 a.m.)

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REPORTER'S CERTIFICATE

1
2 I, Arlinda Rodriguez, do hereby certify that the foregoing
3 was transcribed from an electronic recording made at the time
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6 above-entitled matter, and that the transcript fees and format
7 comply with those prescribed by the Court and Judicial
8 Conference of the United States.

9
10 /S/ Arlinda Rodriguez

December 8, 2022

11 ARLINDA RODRIGUEZ

DATE

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