No. 22-51124

United States Court Of Appeals
For The Fifth Circuit

KEVIN CLARKE; TREVOR BOECKMANN; HARRY CRANE; CORWIN SMIDT; ARISTOTLE INTERNATIONAL, INCORPORATED; PREDICT IT, INCORPORATED; MICHAEL BEELER; MARK BORGHI; RICHARD HANANIA; JAMES D. MILLER; JOSIAH NEELEY; GRANT SCHNEIDER; AND WES SHEPHERD,
Plaintiffs-Appellants,

v.

COMMODITY FUTURES TRADING COMMISSION,
Defendant-Appellee.

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

PLAINTIFFS-APPELLANTS' OPPOSITION TO DEFENDANT-APPELLEE'S SUGGESTION OF MOOTNESS AND OPPOSED CROSS-MOTION FOR FINDING OF CONTEMPT AND IMPOSITION OF SANCTIONS

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INTRODUCTION

Twenty-two days after this Court heard oral argument in this case, the Commodity Futures Trading Commission ("CFTC") voluntarily rescinded its decision ordering the PredictIt Market to close and replaced it with a new one seeking to achieve the same result. Up until that point, the Commission had vigorously defended its August 2022 action, insisting at every turn that multiple administrative law doctrines insulated from judicial review any decision to open or close the PredictIt Market. It now asks the Court to dismiss this appeal as moot. Def.-Appellee Suggestion of Mootness, ECF No. 74 ("Mot.").

Well-established legal principles do not give the agency the option of pulling its decision at the last minute, after briefing and argument in the district court and this Court, all to avoid an order declaring its action illegal. This is especially so because the agency simultaneously announced that it will substitute the challenged action with one imposing an identical outcome. Because the agency "voluntarily ceased" the challenged decision or law and replaced it with a new action that "disadvantages the plaintiffs in the same fundamental way," its last-minute rescission and replacement of the mandate to close the Market does not moot this case. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993).

What the agency seeks to evade is a binding Court ruling regarding how the

agency must treat the Appellants and what the agency must address if it wishes to close the Market. The agency's effort to short-circuit judicial review at the eleventh hour wastes the Court's resources because it does not eliminate the need for judicial intervention. If the agency were somehow right that this case should start over, the ruling in progress now would just occur after more proceedings that address the same defects that the agency is telling the Court it has no intention of fixing. Those defects include a continued insistence that anything the CFTC does to the PredictIt Market is insulated from judicial review. They also include a failure to explain how the forced liquidation of all existing contracts is a proportionate or appropriate remedy or treatment of the reliance interests the Appellants had built around the agency's authorization of the Market. Stunningly, the replacement decision provides no process for the Appellant traders, market servicers, and academics to present any concerns to the Commission, and, indeed, very deliberately excludes them.

Importantly, the CFTC's new attempt to close the Market and to end the trading of existing political event contracts violates this Court's injunction pending appeal. The injunction expressly allows those contracts to keep trading while this appeal is pending. The agency should have asked this Court's permission to alter the agency action under consideration, rather than acting and then telling the Court that further review of the agency's efforts to close the Market is none of the Court's business. This Court should assess sanctions against the CFTC, including awarding

Appellants their attorneys' fees.

BACKGROUND

In 2014, the CFTC granted permission to establish the PredictIt Market. ROA.145; *see also* 17 C.F.R. § 140.99. On August 4, 2022, the CFTC ordered the PredictIt Market to close. The agency was extremely specific about when the Market should close—"no later than 11:59 p.m. eastern on February 15, 2023." ROA.152-53. It was much less clear about why the Market needed to close or why all existing contracts needed to be liquidated prematurely.

The Appellants sued to challenge the agency's authority to end the PredictIt Market, and prematurely to terminate existing trading positions, without accounting for the fundamental reliance interests of traders and others. And they sought a preliminary injunction against the agency requiring the Market to close and contracts existing as of August 2022 to be liquidated. When the district court did not timely act on this request, Appellants sought relief in this Court. On January 26, 2023, this Court "granted" Appellants' motion for an injunction that would "allow the PredictIt Market event contracts that were offered as of the date of the agency's decision, particularly those concerning the 2024 presidential elections, to continue trading pending the resolution of this appeal." Appellants' Mot. for Injunction Pending Appeal at 4, ECF No. 6; Order, ECF No. 44-1. The Court ordered an expedited briefing schedule and heard oral argument on February 8, 2023.

Twenty-two days after oral argument—on March 2, 2023—the Commission issued new correspondence plainly directed at avoiding this Court passing on the legality of the Commission's efforts to close the PredictIt Market. It issued CFTC Letter 23-03, which purported to "withdraw and supersede" the Commission's directive to close the Market. ECF No. 80 at 1. Unfortunately, this is not a letter in which the Commission changed its mind or abandoned its stated intention to close the Market. Instead, the new letter reaches the same conclusion as the August letter. *Id.* at 3. It sets up a rapid-fire process to reach its policy objective. *Id.* at 7. It provides an explanation of how the Commission believes the Market violated its no-action letter. *Id.* at 3–6. It says the Market should close because it is not worth the Commission's time to keep an eye on it, while never quite explaining why closure is a proportionate remedy for the alleged violations. *Id.* at 6–7.

For the reliance interests of traders, academics, and service companies who organized their affairs around the agency's decision to authorize the Market, the agency had nothing to say. Almost to reinforce that the agency has no regard for those reliance interests, the agency made clear it does not want to hear from any of the Appellants or other traders, academics, or service companies that would be aggrieved by an agency decision to close the Market. *Id.* at 7 n.15. It gives only Victoria University an opportunity to comment, a mere eighteen days after the agency dropped this surprise letter. *Id.* at 7.

ARGUMENT

The CFTC is plainly concerned that this Court is going to hold the agency's efforts to close the PredictIt Market arbitrary and capricious. So, after briefing on a dispositive motion and a preliminary injunction in the district court, after this Court enjoined closure of the Market pending appeal, after full merits briefing in this Court, and after counsel and three judges of this Court prepared for and participated in oral argument, the agency pulls an eleventh-hour stunt to avoid what it apparently believes to be an impending and adverse decision from this Court.

This Government agency tactic is not new. Agencies before have run the litigation process almost all the way through, become concerned about a likely outcome, and then tried to pull their action. After district and appellate courts have invested precious judicial resources and the parties have incurred substantial fees, what the courts do next depends on whether the agency is abandoning the objective of the challenged action or is plainly set on following through on it. In the latter case, the case is not mooted and courts generally proceed to decision. And that is precisely what this Court should do here.

I. The CFTC's Voluntary Rescission and Replacement of the August 4 Closure Mandate Does Not Moot this Appeal.

The CFTC does not meaningfully address precedents of the Supreme Court and this Court rejecting claims of mootness when a government defendant voluntarily rescinds and replaces a challenged action. "It is well settled that a

defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *see also Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 285 (5th Cir. 2012). Importantly here, courts do not allow the Government's voluntary cessation of a prior policy and replacement of it to moot a case if the replacement decision threatens to "disadvantage[]" a plaintiff "in the same fundamental way." *City of Jacksonville*, 508 U.S. at 662 (rejecting mootness challenge when replacement minority set-aside ordinance, while an improvement, pursued same objective); *Opulent Life Church*, 697 F.3d at 286; *Big Tyme Invs., L.L.C. v. Edwards*, 985 F.3d 456, 465 (5th Cir. 2021) (holding challenge to COVID-19 bar closure order was not mooted by a subsequent, less restrictive order); *Cooper v. McBeath*, 11 F.3d 547, 551 (5th Cir. 1994) (holding challenge not moot when Texas repealed a disputed three-year residency requirement for liquor licenses, and replaced it with a one-year version). To moot the case, the defendant bears "the heavy burden" of showing "it is *absolutely clear* the allegedly wrongful behavior could not reasonably be expected to recur." *Already, LLC v. Nike*, Inc., 568 U.S. 85, 91 (2013) (emphasis added); *see also Nat. Res. Def. Council v. U.S. Dep't of Energy*, 362 F. Supp. 3d 126, 138 (S.D.N.Y. 2019) ("*NRDC*") (observing that "[t]his is 'both a stringent and a formidable burden'" in an Administrative Procedure Act case).

This rule applies to Administrative Procedure Act cases, including challenges to the explanatory adequacy of an agency decision. *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 388 (D.C. Cir. 2012); *NRDC*, 362 F. Supp. 3d at 142; *Conservation L. Found. v. Evans*, 360 F.3d 21, 26–27 (1st Cir. 2004); *see also UnitedHealthcare Ins. Co. v. Azar*, No. 16-157 (RMC), 2020 WL 417867, at *6–7 (D.D.C. Jan. 27, 2020) (refusing argument that replacement agency action mooted case); *Kyle-Labell v. Selective Serv. Sys.*, 364 F. Supp. 3d 394, 404–05 (D.N.J. 2019) (same). As the D.C. Circuit explained, an agency cannot "stave off judicial review of a challenged rule simply by initiating a new proposed rulemaking that would amend the rule in a significant way. If that were true, a savvy agency could perpetually dodge review." *Am. Petroleum Inst.*, 683 F.3d at 388. If agencies could reboot the process by replacing their decision at the eleventh hour, the Executive Branch could waste judicial resources at will. *See Cigar Ass'n of Am. v. FDA.*, 480 F. Supp. 3d 256, 280 (D.D.C. 2020) ("Forbearing judicial review of this purely legal issue at this late stage in the game" due to an agency's voluntary cessation of enforcement "would waste judicial resources."). Agencies could roll the judicial dice again and again, looking for a favorable decision but never risk facing the consequences of an adverse decision that constrains their discretion. Courts do not provide advisory decisions. *See Flast v. Cohen*, 392 U.S. 83, 96 n.14 (1968). But the judicial process is also not a video game, for the Government to reset whenever it falls behind on points.

The CFTC's March 2 rescission and replacement of its action seeking to close the PredictIt Market does not satisfy these demanding standards for establishing mootness. In a move that cost the CFTC absolutely nothing, it withdrew its mandate to close the Market on February 15, seventeen days after that enjoined deadline had passed. The agency then replaced that decision with—surprise, surprise—a "preliminary" determination to close the Market. ECF No. 80 at 3. This new mandate would similarly require the liquidation of all contracts, although this time apparently with no multi-month compliance period once the decision goes final. *Id.* at 6–7. The new agency action gives Victoria University a couple of weeks to talk the agency out of its position. *Id.* at 7. But it makes absolutely clear that nobody like the Appellants—no PredictIt Market trader, no service company that invested millions in standing up the Market, no academic studying its data—is invited to that "process." *Id.* at 7 n.15. As with the original decision, not a word is uttered about the "reliance interests" of traders and others in the agency's decision to open the Market nearly nine years ago. *Wages & White Lion Invs., LLC v. FDA*, 16 F.4th 1130, 1138 (5th Cir. 2021) ("When an agency changes course, . . . it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.") (quoting *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020)).

If the agency had announced its intention to keep the Market open, the case

would be moot. Instead, the agency is maneuvering to avoid binding judicial holdings that will constrain its discretion to close it. The replacement action "disadvantages [Appellants] in the same fundamental way" as the original decision. *City of Jacksonville*, 508 U.S. at 662. It is directed at mandating closure. It does not deal with the reliance interests of the Appellants in the agency's authorization for the Market to open. It does not justify the crash landing of existing contracts. And it establishes a process for commenting on the agency's clearly predetermined course of action *that does nothing for the Appellants, expressly excluding them from it.* This "change of heart" is "mere litigation posturing" and no reason to restart the case. *Spell v. Edwards*, 962 F.3d 175, 179 (5th Cir. 2020).

In its motion to dismiss, the CFTC does almost nothing to support its mootness argument. It cites a single case for the proposition that "[o]nce the law is off the books, there is nothing injuring the plaintiff and, consequently, nothing for the court to do." Mot. at 3–4 (quoting *Spell*, 962 F.3d at 179). This aphorism does nothing to address the Government's heavy burden to show its voluntary rescission and replacement does not disadvantage the Appellants in the same fundamental way, as court after court has required. *See, e.g.*, *City of Jacksonville*, 508 U.S. at 662; *Opulent Life Church*, 697 F.3d at 285–86; *NRDC*, 362 F. Supp. 3d at 142.

And the one case cited by the CFTC—*Spell*, 962 F.3d at 179—actually supports Appellants. There, the Court affirmed the voluntary cessation rule, but

chose not to apply it because the challenged stay-at-home orders had "expired by their own terms," before the Court reached a decision. *Id.* The order's expiration "was predetermined and thus not a response to litigation." *Id.* Here, we have the opposite situation—the March 2 letter was dropped in after oral argument, but before decision, precisely to affect the litigation. As *Spell* drives home, "a defendant cannot automatically moot a case simply by ending its [allegedly] unlawful conduct once sued." *Id.* (citation omitted).

It is almost as if the CFTC is throwing this new letter out there and waiting to make its real mootness argument in a sandbagging reply brief, once it sees what the Appellants have to say. That is no way to carry the government's "stringent" and "formidable" burden to establish mootness from a voluntary rescission and replacement of agency action. *NRDC*, 362 F. Supp. 3d at 138. And the Court should reject the CFTC's seven-page conclusory effort to do so, without further thought.

But even hypothesized CFTC future arguments do not support mootness. First, it is no answer that the replacement decision is somewhat more explanatory and, in that sense, somewhat less arbitrary than the conclusory closure mandate from last summer. The rule against government entities mooting a case by voluntarily ceasing a prior policy and replacing it with another applies even when a replacement policy "differs in certain respects" from the prior policy, and disadvantages plaintiffs "to a lesser degree." *City of Jacksonville*, 508 U.S. at 662; *Cooper*, 11 F.3d at 550;

NRDC, 362 F. Supp. 3d at 142 (observing that agency action is not moot even when replacement action "takes 'a more conservative approach'"). Here, instead of just asserting that the Market had violated the no-action letter, the CFTC alleged some specific infractions, citing long-past events that the agency has known about for many years, but presenting them to this Court as if newly discovered. But that incremental step, at most, just places the CFTC in violation of the Administrative Procedure Act "to a lesser degree," as the CFTC continues to phone in why closure of the Market and dumping trader contracts onto the street is the appropriate remedy for these alleged violations. Nor does it explain how its inevitable mandate to close addresses the reliance interests that have built around the agency's decision authorizing the Market's opening.

Second, the agency has not magically created a two-week air pocket when no Administrative Procedure Act claim can exist. *See* Mot. at 5–6. The CFTC technically withdrew its enjoined instruction to close the market. And the CFTC may argue that it has replaced it with only a "preliminary determination" to close the market. *Id.* at 3. Its new determination for the Market to close will become final in about two weeks, after it hears from Victoria University on March 20 and sweeps away anything it has to say. Once an Administrative Procedure Act case has begun, the mootness inquiry is not such an exercise in formalism. Quite the opposite. When an agency policy is challenged and a judicial decision declaring certain agency

behavior illegal is imminent, the government must meet a "heavy burden" to establish that its challenged conduct will not recur. *NRDC*, 362 F. Supp. 3d at 140; *Conservation L. Found.*, 360 F.3d at 26–27. Far from making any effort to carry that burden, the CFTC's submission confirms the opposite: Recurrence is imminent, and it is full steam ahead on closing the Market, without addressing reliance interests. *See* ECF No. 80 at 6–7.

Third, there is nothing unique about the posture of this case that counsels applying a test other than the one in *City of Jacksonville* and its progeny and uncritically crediting a government agency's voluntary cessation of conduct. This case is before the Court due to the district court's failure to enter a preliminary injunction, but proceedings before this Court have centered entirely on the Appellants' likelihood of success on the merits and are poised to deliver a ruling from this Court on the legality *vel non* of the CFTC efforts to close the Market. It is precisely that substantive ruling, which will constrain the agency's decision-making going forward, that the CFTC is straining to avoid by its March 2 gambit. Nor does this case's posture before the court of appeals, instead of a district court, merit any different treatment. That the agency is literally waiting until the 11th hour of the 11th day of the 11th month—to borrow a historical reference to the end of World War I—to rescind and replace a challenged decision only heightens the judicial resource conservation concerns behind the *City of Jacksonville* doctrine. It is hard to imagine

any later in the game than weeks after a case has been argued before three judges of a federal court of appeals.

II. The CFTC's Effort to Replace its Closure Mandate Violates this Court's Injunction Pending Appeal, and this Court Retains the Ability to Provide Effective Relief to the Appellants.

Far from mooting the case, the CFTC's March 2 replacement effort to prohibit trading on the CFTC market violates this Court's injunction against precisely such behavior.

This case is squarely directed at the CFTC's sudden efforts, starting in August 2022, to close the PredictIt Market and kick tens of thousands of traders out of their existing contracts. Appellants sought an injunction, pending a final judgment in this matter, against CFTC efforts to liquidate those pending contracts, whether it be through the August 4 letter *or some other means*. Appellants asked the district court to "enjoin the Commission, pending a final judgment in this action, from prohibiting . . . any . . . investor . . . from buying, selling, or trading through the PredictIt Market . . . any political event contract" offered on the Market as of August 4. ROA.99. And they asked this Court to "enjoin the enforcement of the Commission's February 15, 2023, liquidation mandate *and allow the PredictIt Market event contracts that were offered as of the date of the agency's decision, particularly those concerning the 2024 presidential elections, to continue trading pending the resolution of this appeal.*" ECF No. 6 at 4 (emphasis added). The Court granted

that motion on January 26, 2023. ECF No. 44-1.

The CFTC did not ask this Court's permission before barreling out with its March 2 attempted replacement action. Instead, it took action and announced it was going to issue a new mandate to close the Market as early as March 20 (to occur with apparently immediate effect). That letter did not say that the Commission's plans were contingent on this Court dissolving its existing injunction. It was issued without regard to what this Court does. *And it is plainly an effort, either practically by warning off investors or by force of law, to prohibit or otherwise impede the trading of contracts on the PredictIt Market*. As such, the agency is violating this Court's order.

If there were any CFTC filings in this Court, they should have been those of an enjoined party asking this Court's permission to act. The "suggestion of mootness," waving around a violation of this Court's injunction and claiming (for yet another time) that the agency's efforts to close the PredictIt Market are none of this Court's business, is not meritorious. It is contumacious.

Other administrative agencies understand how preliminary injunctions in Administrative Procedure Act cases work. When more scrupulous agencies seek to alter the pre-violation status quo protected by a preliminary injunction, they ask the permission of the Court first. *See, e.g.*, *Am. Coll. of Obstetricians & Gynecologists v. FDA*, 506 F. Supp. 3d 328, 338 (D. Md. 2020) (FDA seeking to stay or dissolve

preliminary injunction before undertaking modification to challenged decision); *Loudner v. United States*, 200 F. Supp. 2d 1146, 1147 (D.S.D. 2002) (Department of Interior seeking modification to preliminary injunction before modifying challenged decision). They do not shoot first and ask questions later. The CFTC's window to seek to replace its closure mandate and to "prohibit investors from trading" existing contracts through other means, closed on January 26, 2023, when this Court entered its injunction pending appeal.

The CFTC's nascent excuse for its course of action is that this Court only enjoined enforcement of the August 4 closure mandate. Mot. at 1, 4–6. The CFTC could only reach such a conclusion if it stopped reading after the conjunction "and" in the Appellants' request to this Court, which plainly sought an injunction that would allow these contracts to keep trading, pending this appeal.

The CFTC tries to take this crabbed and mistaken reading of the injunction a step further: That because in the district court and this Court Appellants asked only for a preliminary injunction of the August 4 closure mandate, the case is mooted because the agency has withdrawn and replaced that decision. *See* Mot. at 1, 4–6. Of course, (as explained above), the CFTC is incorrect about what Appellants asked of the district court and this Court.

Even if the CFTC were somehow correct about the scope of the requests below, no principle of law freezes in ice the request for injunctive relief. Instead,

this Court's equitable power to craft an injunction is practical and can address intervening events. After all, "[a]n appeal must be dismissed when an event occurs while a case is pending on appeal that makes it *impossible* for the court to grant *any effectual relief whatever* to the prevailing party." *United States v. Jackson*, 771 F.3d 900, 902 (5th Cir. 2014) (emphasis added). Thus, "[t]he question is not whether the *precise* relief sought at the time an application for injunction was filed is still available," but rather "whether there can be *any* effective relief." *Vieux Carre Prop. Owners v. Brown*, 948 F.2d 1436, 1446 (5th Cir. 1991) (first emphasis added). And this is particularly so when the enjoined party is taking intervening actions to wiggle out of the injunction's constraints.

The Court absolutely can still provide effective relief. The Court can put a stop to the agency's shifting efforts to close the Market, and make clear that Market contracts are going to continue to trade until a final judgment in this case, through directing the entry of an appropriately broad preliminary injunction. Not even the CFTC thinks this case is over. At its outer limits, the CFTC is urging the Court only to end this appeal and to remand to the district court for further proceedings on its latest stunts. *See* Mot. at 5. If only to avoid further emergency practice before this Court (given the district court's prior reluctance to act with urgency), this Court should put a preliminary injunction in place preserving the status quo for any such proceedings.

The Court also can put an end to agency arguments that—because this Market was born from so-called "no-action relief"—any subsequent agency instructions to close the Market or to withdraw authorization for the Market are insulated from judicial review. That issue is not going away; the CFTC's intention to press that argument with regard to its replacement order to close is all over its March 2 letter. ECF No. 80 at 6–7. Starting over and re-briefing and rearguing that issue is precisely the giant waste of judicial resources the Supreme Court sought to avoid by placing a heavy burden on the government to show mootness through voluntary rescission and replacement of government action.

The Court also should hold the CFTC's efforts to close this Market arbitrary and capricious. The CFTC pats itself on the back for finally writing down its allegations of the violations of the no-action letter. Mot. at 4–5.[1] But the agency does nothing to answer why alleged violations merit closing the Market and liquidating existing contracts, without regard for the reliance interests of traders and companies investing in the systems necessary for standing up the Market. In the

[1] The agency now alleges that some Market participants were orally briefed on these violations before and that Appellants' counsel somehow "failed to disclose" these alleged discussions "in their pleadings to date." Mot. at 5 n.3. The CFTC filed *at least seven* briefs in the district court and this Court and said not one word about what it now claims were important meetings. Raising them in a court of appeals motion, three weeks after argument, and chiding Appellants' counsel is not particularly self-aware.

wake of the Supreme Court's decision in *Regents*, 140 S. Ct. at 1891, this Court has made clear that those reliance interests must be honored by administrative agencies, even when the agency says it is revoking a policy or authorization born of prosecutorial discretion. *Wages & White Lion*, 16 F.4th at 1138, 1141–42. The CFTC is not getting that memo, and this Court's opinion resolving this appeal should deliver it.

Alternatively, in the face of any CFTC claim that its March 2 replacement action is a game changer, this panel should hold the case in abeyance and retain jurisdiction to determine this replacement decision's legality, after supplemental briefing and argument. Other courts of appeals have followed this course to address last-minute agency efforts to replace a decision in Administrative Procedure Act cases. *See*, *e.g.*, *Am. Petroleum Inst.*, 683 F.3d at 390. And here there is no underlying district court decision on substance. Any order holding the case in abeyance should make clear that the CFTC is enjoined from taking any action to close the Market or to deter or to prohibit the trading of contracts on it, until a final judgment in this matter.

III. The Court Should Hold the CFTC in Contempt of the Injunction Pending Appeal and Impose Sanctions on the CFTC, to Include the Payment of Attorneys' Fees.

No one can contest that the CFTC's March 2 intervening action is an effort to make the last seven months of litigation, and full briefing and argument in this Court,

a massive waste of time. The CFTC is proposing that the parties start all over again, because it saw the writing on the wall and wanted to duck a feared ruling from this Court and to carry on its war against the PredictIt Market through other means. The problem is that this Court had enjoined such behavior.

The CFTC violated that injunction. This Court, in resolving this appeal, should remand to the district court with instructions to impose sanctions on the CFTC, to include the attorneys' fees associated with opposing its motion to dismiss the appeal and any costs associated with nervous investor behavior arising from the CFTC's renewed threat to close the Market by circumventing this Court's injunction. Violating injunctions has consequences, and they typically exceed a government agency simply having to apologize. *Travelhost*, *Inc. v. Blandford*, 68 F.3d 958, 961 (5th Cir. 1995); *In re Skyport Glob. Commc'ns, Inc.*, 661 F. App'x 835, 838, 841 (5th Cir. 2016) (awarding fees for violating preliminary injunction). The CFTC's behavior is wasting the time of counsel and this Court, all because it chose not to honor this Court's order.

The agency's attempted replacement action also is clearly a late-breaking concession that its original closure mandate is indefensible. That apparent conclusion did not stop the CFTC from forcing the Appellants to file a complaint, a motion for a preliminary injunction, briefs opposing a motion to dismiss, a motion for injunction in this Court, merits briefs in this Court, and to prepare for and deliver

oral argument in this Court to challenge it. The voluntary cessation and scrambling replacement show that the Government's position below was not substantially justified and was for purposes of delay, implicating the courts' authority to assess fees under Federal Rule of Civil Procedure 11, their own inherent authority, and the Equal Access to Justice Act. The Court should determine here that the CFTC's position thus far in this matter, as made plain by its last-minute attempt to withdraw its challenged action, is not substantially justified. And it should remand to the district court with instructions to award Appellants their attorneys' fees (that the CFTC seeks to render worthless) in prosecuting this matter through an oral argument in this Court, and their future fees in the district court necessary to secure a fee award.

The CFTC has a $365 million annual war chest. It is no skin off its nose to start this case all over again. And when they conceived of this last-minute "withdraw and replace" strategy, the CFTC must have had a good laugh speculating about how much the traders and servicing companies would be willing to spend to start from scratch and defend the Market against the CFTC's illegal efforts to shut it down. The Administrative Procedure Act, and this Court's authorities to assess fees, is about the only thing that prevents the Government from using its call on taxpayer dollars illegally to big-foot the governed. The Court should invoke that authority here and assess fees.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court deny the CFTC's motion to dismiss this appeal, reverse the district court's refusal of a preliminary injunction, and enjoin the CFTC from closing the PredictIt Market or otherwise prohibiting or deterring the trading of Market contracts, until 60 days after a final judgment in this matter. In addition, the Court should hold the CFTC in contempt for violating the Court's injunction pending appeal and remand to the district court with instructions to award Appellants fees as outlined above.

Respectfully submitted,

/s/ Michael J. Edney

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CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2023 I electronically filed this response in opposition with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and that it complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2) because it contains 5,199 words, excluding the parts exempted by Rule 32(f), according to the count of Microsoft Word.

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