No. 22-51124

IN THE

United States Court Of Appeals For The Fifth Circuit

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

Plaintiffs-Appellants,

v.

COMMODITY FUTURES TRADING COMMISSION,

Defendant-Appellee.

On Appeal from the United States District Court for the Western District of Texas, No. 1:22-cv-00909-LY

REPLY IN SUPPORT OF SUGGESTION OF MOOTNESS AND OPPOSITION TO PLAINTIFFS-APPELLANTS' CROSS-MOTION FOR FINDING OF CONTEMPT AND IMPOSITION OF SANCTIONS

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INTRODUCTION

Plaintiffs are before this Court to challenge what they characterized as a "liquidation mandate" CFTC staff supposedly issued in an August 4, 2022 letter without, according to Plaintiffs, "any detailed reasoning, explanation, or legally sufficient process" under the Administrative Procedure Act ("APA"). *See* ROA.237 ¶ 66; ROA.239–246 ¶¶ 75–81 (Count I), ¶¶ 82–89 (Count II). That was factually untrue, as certain Plaintiffs knew when they filed suit, *see* ECF No. 74, Ex. 1 at 3 & n.8, but litigation so far has been based solely on the pleadings. To put the matter to rest, especially in light of additional revelations during these proceedings in briefing and at oral argument, CFTC staff have withdrawn the challenged letter, proposed a new determination supported by detailed reasoning, and afforded the no-action letter's sole beneficiary—non-party Victoria University—fair opportunity to respond. There is no further relief to grant, so this appeal (and perhaps the entire case) is moot.

The underlying issues are not plausibly capable of resurrection, so no mootness exception applies. The March 2, 2023 letter sets the record straight: As explained therein and omitted from third-party Plaintiffs' allegations,[1] the

[1] The March 2, 2023 letter notes that Plaintiff Aristotle International, Inc. had participated in certain post-June 8, 2022 discussions "at the University's

applicable "reasoning, explanation, and legal process" had *already* been afforded, albeit verbally since the no-action process is and always has been informal, which the University (represented by sophisticated U.S. counsel) must have known (notably, they have not sued), and no statute, regulation, or court decision has ever suggested a written-decision requirement. *See* ECF No. 74, Ex. 1 at 3. The March 2, 2023 letter commits that reasoning to writing, along with pertinent, newly revealed facts. Process has now been afforded—beyond what any law requires—and it is implausible to speculate that DMO staff will change course and reissue a shorter letter akin to the now-withdrawn August 4, 2022 letter.

Plaintiffs' contempt motion is frivolous. They do not cite a single provision of any order, let alone of this Court, that the CFTC supposedly violated. Instead, they cite their own briefing. Even so, nothing in the record suggests any restriction on CFTC staff from withdrawing the contested no-action letter and superseding it with a new proposed determination, to which DMO has given the Beneficiary fair opportunity to further respond, which the University has

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invitation." ECF No. 74, Ex. 1 at 3. The Amended Complaint confirms that Plaintiffs were aware at the time of filing that DMO had provided such explanations to non-party Victoria University, though did not disclose the specific reasons given or Aristotle's participation. *See, e.g.*, ROA.238 ¶ 71 (referencing "oral discussion with the Commission staff" involving "alleged violations" of the "limits" on "permitted contracts"); ROA.241–242 ¶ 78.c (challenging the same for being "unexplained and undocumented").

recognized and indicates it will accept. CFTC staff acted well within their prerogative, are in contempt of nothing, and Plaintiffs' arguments comprise little more than *ad hominem* attacks. The contempt motion should not have been filed, and should be denied.

I. At A Minimum, This Appeal Is Moot.

Plaintiffs argue that this appeal falls under the "voluntary cessation" mootness exception, as the March 2, 2023 letter "disadvantages the plaintiffs in the same fundamental way." ECF No. 86 at 1 (quoting *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993)). That exception does not apply here. *See* ECF No. 74 at 3–6 & Ex. 1.

First, DMO's March 2, 2023 letter is a preliminary determination, exactly what Victoria University *would* have received if it had obtained a "license" under the APA. *See infra* at 9; 5 U.S.C. § 558(c). That letter does not precommit DMO to imposing another version of the so-called "liquidation mandate," as Plaintiffs assert. *See, e.g.*, ECF No. 86 at 9, 11 (asserting that DMO will merely make a "new determination for the Market to close"). Plaintiffs' challenge to the August 4, 2022 letter was premised on their mischaracterization that it contained "specific instructions of how the Market must close, down to the minute." *Cf.* ECF No. 6 at

16.[2] But even crediting Plaintiffs' framing of that now-withdrawn letter as an "order" or "mandate," its withdrawal renders this appeal "'plainly' and 'classically moot.'" ECF No. 74 at 6 (quoting *Constellation Mystic Power, LLC v. FERC*, 45 F.4th 1028, 1047 (D.C. Cir. 2022)).[3]

Second, as the March 2, 2023 letter makes absolutely clear, DMO's determination will include both reasoned decisionmaking and opportunity to respond. As that letter indicates, DMO has identified three independent grounds that might render the 2014 no-action letter void: (1) that Plaintiff Aristotle International, Inc., not Victoria University or its professors, was operating the PredictIt market; (2) that the University, via a wholly owned subsidiary, received compensation from Aristotle for Aristotle's operating the PredictIt market, apparently drawn from user fees without obvious connection to the market's operating costs; and (3) that the PredictIt market listed numerous contracts outside the scope of the 2014 no-action letter. *See* ECF No. 74 at 2 (citing Ex. 1 at 3–6). Even if Plaintiffs had ultimately prevailed on the merits of their APA claims, the

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[2] As the CFTC has explained, divisional staff lack the authority to unilaterally order market closure. *See, e.g.*, ROA.349 (citing *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940 (D.C. Cir. 2012)); ECF No. 59-1 at 32–33 (same); *see also* 17 C.F.R. § 140.99(a)(2).

[3] Though faulting the brevity of the CFTC's mootness briefing, Plaintiffs ignore this on-point citation to *Constellation Mystic Power*. *Cf.* ECF No. 86 at 9–10.

only relief they might have achieved is further administrative process. *See, e.g.*, *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (per curiam) (explaining the APA's remedy is "remand" for "additional explanation of the reasons for the agency decision as may prove necessary").

DMO staff will conduct that process in good faith, and the outcome is not predetermined. Depending on the University's response, staff may determine not to withdraw the no-action letter, or continue their no-action position as to unexpired contracts, as Plaintiffs wish. If not, staff will explain why. True, the preliminary determination may not be to Plaintiffs' liking, but that is hardly surprising in a contested "license" proceeding (assuming this were one, which nobody claimed before Plaintiffs filed suit). Even when the APA applies, challengers' preferred substantive outcomes are not guaranteed. *See, e.g.*, *Lone Mountain Processing, Inc. v. Sec'y of Lab.*, 709 F.3d 1161, 1164 (D.C. Cir. 2013) ("The Commission may well arrive at the same result it reached originally, but it must do so with more clarity than it showed in the first instance." (citation omitted)). And while Plaintiffs complain that DMO gave the University insufficient time to respond, the University has asked for and been granted an extension until April 5, 2023.

Third, as the March 2, 2023 letter also clarifies, these three grounds do not reflect some litigation tactic designed to evade judicial review. Rather, the

reasoning was already communicated to the non-party University, and the University's counsel, first at a meeting with DMO staff on June 8, 2022 and then in "a series of subsequent phone calls and emails," months in advance of litigation—which the University, notably, has declined to join or otherwise endorse. *See* ECF No. 74 at 5 n.3 & Ex.1 at 3. That reasoning would have come out had this case progressed to summary judgment—again, the threshold filings to date have taken Plaintiffs' allegations as true. *See* Fed. R. Civ. P. 12(b)(6). But the public interest demanded correction of the record now, particularly in light of new revelations. *See* ECF No. 74, Ex. 1 at 4 (noting that at oral argument "Aristotle's counsel made several representations indicating that the Market was a joint venture from the beginning" contrary to the 2014 no-action letter's basis that the PredictIt market would "be operated by Victoria University")[4]; *see also id.* at 6

[4] As referenced in the March 2, 2023 letter, opposing counsel made numerous statements at oral argument appearing to confirm that Plaintiffs—who include the corporate Aristotle entities but *not* the University—were the driving force behind establishing and operating the PredictIt market from the outset, as well as statements conflating DMO's interactions with the University as if they were interactions with Aristotle. *See, e.g.*, Oral Argument, No. 22-51124 at 42:35 (5th Cir. Feb. 8, 2023) ("*My* clients would have been perfectly happy to keep *their* money in *their* pocket … instead *they* plowed millions of dollars in setting [the PredictIt market] up."); *id.* at 1:55 ("There was regular contact between the Division of Market Oversight and *my* clients."); *id.* at 2:13 ("Were *we* provided with inquiries from the agency and did *we* respond to them on a regular basis? The answer to that question is yes."); *see also, e.g.*, *id.* at 5:52 (referencing the

(expressing concern that violations of the 2014 no-action letter created the "false impression" that DMO approved of those violations). Because the March 2, 2023 letter confirms that this reasoning had been communicated on June 8, 2022 and was "not a response to litigation" filed on September 9, 2022, the "concerns" motivating the voluntary-cessation exception are "not implicate[d]." *See Spell v. Edwards*, 962 F.3d 175, 179 (5th Cir. 2020).

Taken together, the elimination of any so-called "liquidation mandate" and the grant of additional reasoned decisionmaking and opportunity to respond make absolutely clear that Plaintiffs are not "disadvantaged" at all, much less disadvantaged "in the same fundamental way." *Cf. City of Jacksonville*, 508 U.S. at 663.

While conceding that the March 2, 2023 letter "is somewhat more explanatory and, in that sense, somewhat less arbitrary," Plaintiffs nevertheless assert that that letter does not adequately explain why "closure of the Market" is warranted and fails to address the "reliance interests" supposedly created by the 2014 no-action

"two years prior to *our* request to open this market""); *id.* at 12:26 ("*we* should have just kept pressing ahead"); *id.* at 40:52 ("this debate whether *we're* regulated or not"); *id.* at 41:05 ("revoking *our* no-action relief and ordering *us* to close"). Plaintiffs' latest filing declines to explain or justify these conflicting positions and reverts to previous characterizations of the corporate Aristotle entities as mere third-party "market servicers" and "service companies." ECF No. 86 at 2, 4, 8; *but cf., e.g.*, ECF No. 40-1 at 7–9.

letter. *See* ECF No. 86 at 11. That is incorrect; DMO's preliminary determination specifically and rationally does address these supposed "reliance interests." If reliance interests are violated, DMO has preliminarily determined that affected parties should be compensated by PredictIt's operators rather than have staff continue to expend taxpayer resources in connection with an unregulated platform that was supposed to be small-scale, not-for-profit and operated by a public university for academic purposes. The evidence now suggests PredictIt may never have been that. At a minimum, however, PredictIt appears to have morphed into something quite different than what the University had originally represented. *See* ECF No. 74, Ex. 1 at 7 ("To the extent the University believes that withdrawal of the Letter would cause downstream injury to third parties, we believe the better course would be for the University, Aristotle, or others to remedy them, if at all, by compensating any injured parties directly."). Regardless, the determination is preliminary and the University can respond with objections—which is why courts do not review preliminary agency determinations. *See, e.g.*, *Pub. Citizen Health Rsch. Grp. v. Comm'r, Food & Drug Admin.*, 740 F.2d 21, 30 (D.C. Cir. 1984) (citing *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 242 (1980)).

Plaintiffs complain that only the University has been invited to respond. But even assuming that the 2014 no-action letter were a "license," it is *the University's* license, not Plaintiffs'. The APA (where it applies) provides that an agency

granting a license must consider "the rights and privileges of all the interested parties or adversely affected persons," but when a license is *revoked* only "the licensee" is entitled to notice and an opportunity to be heard. *See Kleiman & Hochberg, Inc. v. U.S. Dep't of Agric.*, 497 F.3d 681, 691 n.7 (D.C. Cir. 2007) (rejecting argument that supposedly interested party "was individually entitled to notice" in license-revocation proceeding because Section 558(c) "applies only to 'licensees'"). Thus, the APA's plain language defeats Plaintiffs' demand to participate in the University's proceeding. *See* 5 U.S.C. § 558(c).

Nor is Plaintiffs' supporting authority to the contrary. *See* ECF No. 86 at 7 (citing *Am. Petroleum Inst. v. EPA*, 683 F.3d 382 (D.C. Cir. 2012)); *NRDC v. U.S. Dep't of Energy*, 362 F. Supp. 3d 126 (S.D.N.Y. 2019); and *Conservation L. Found. v. Evans*, 360 F.3d 21 (1st Cir. 2004)). Those cases addressed the effects of subsequently announced rulemakings altering rules of general applicability on pending APA challenges. By contrast, a subsequent decision vacating an individualized "order" or "mandate" in a fact-specific adjudication, as Plaintiffs' characterized their claims, renders the same a dead letter. *See, e.g.*, *Constellation Mystic Power*, 45 F.4th at 1047 ("Because the portion of the orders subject to Mystic's challenge to the Commission's capital structure decision has been vacated, we conclude that the challenge is moot."). And if Plaintiffs are demanding some bespoke "process" outside the APA to allow their participation to

protect supposed "reliance interests," that argument is a nonstarter. *See Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978) (noting the "circumstances" when a court can impose "procedures beyond those required" by the APA, "if they exist, are extremely rare").

Especially so because all previous no-action correspondence has been between DMO staff and the University alone. And two of the three violations DMO identified are that the for-profit Aristotle companies have been operating the PredictIt market, perhaps since its inception, and that the University received compensation for Aristotle's operating the market—which directly contradict the University's representations that formed the basis of the 2014 no-action letter issued to the University.

Moreover, the University alone is "the Beneficiary" of the 2014 no-action letter and "[o]nly the Beneficiary" is entitled to rely on it. 17 C.F.R. § 140.99(a)(2). Under Rule 140.99(a)(2), the Beneficiary is the person who will "conduct[]" the "proposed activity." *Id.* The University represented that "three University professors and one administrator" would operate the market. *See* ECF No. 74, Ex. 1 at 2. If another beneficiary were intended, the University was required to say so: When a no-action request is made on another's behalf, "the requester" must provide "[t]he name … of each other person for whose benefit the requested is seeking the Letter." 17 C.F.R. § 140.99(c)(1)(C). Here, the

University named no other beneficiaries. The sole reference to anyone else was to a "third party" "provider" of the "service" of assisting the University to comply with the "K[now-]Y[our-]C[ustomer] requirements" of "an age and identity verification process," ROA.251 n.4—none other than the corporate Aristotle entities, whom Plaintiffs have wavered between describing as the University's "partners" and "the companies operating the Market" or, after DMO's March 2, 2023 preliminary determination, as the mere third-party "market servicers" and "service companies" that the University originally represented them to be. *Compare* ECF No. 86 at 2, 4, 8; *with* ECF No. 40-1 at 7–9. But taking over the platform (or secretly running it from the start) does not make Aristotle or any other Plaintiff "the Beneficiary" of DMO's 2014 letter to Victoria University.

Should this Court believe that questions concerning mootness persist after DMO has considered the University's objections and reached a determination as to the status of the 2014 no-action letter, the CFTC does not oppose Plaintiffs' alternative request for supplemental briefing at that time. *See* ECF No. 86 at 18; *Am. Petroleum Inst.*, 683 F.3d at 390.

II. CFTC Staff Have Not Violated This Court's Injunction Pending Appeal.

Incredibly, Plaintiffs' cross-motion for contempt fails to cite any provision of any order the CFTC supposedly violated.

Plaintiffs asked this Court for an order stating that the CFTC "is enjoined from enforcing CFTC Letter 22-08, issued August 4, 2022, by" either (1) "prohibiting investors from participating in the PredictIt Market regarding" certain previously offered "political contracts" or (2) "prohibiting the operation of the PredictIt market regarding" certain previous "trading." *See* ECF No. 27-3.[5] On January 26, 2023, this Court entered an order stating only: "IT IS ORDERED that Appellants' opposed motion for an injunction pending appeal is GRANTED." ECF No. 44-1.

That, if anything, is the only operative language. Every order granting an injunction must, among other things, "describe in reasonable detail" without reference "to the complaint or other document" the "act or acts restrained or required." Fed. R. Civ. P. 65(d)(1); *see also* 11 Charles Wright & Arthur Miller,

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[5] Plaintiffs' proposed order in this Court differs in various respects from that proposed to the District Court below. *Cf.* ROA.99, ROA.194–195. While Plaintiffs acknowledge this, they do not explain why they altered their requested injunction language on appeal, or if they believe those differences are significant. *See* ECF No. 86 at 13.

Federal Practice and Procedure §§ 2904, 2955 (3d ed. 2022) ("If an injunction pending appeal is granted it must comply with the requirement of Rule 65(d) that every order granting an injunction set forth the reasons for its issuance and be specific in its terms."); *accord* Fed. R. App. P. 8. This ensures "the elementary due process requirement of notice" be given to the enjoined party. *U.S. Steel Corp. v. United Mine Workers of Am.*, 519 F.2d 1236, 1246 (5th Cir. 1975); *see also State of Louisiana v. Biden*, 45 F.4th 841, 845–846 (5th Cir. 2022) (vacating injunction when it was unclear "what conduct," whether "an unwritten agency policy, a written policy outside of the Executive Order, or the Executive Order itself," "is enjoined" (citing Fed. R. Civ. P. 65(d))). Setting aside that a no-action letter cannot be "enforced" as a matter of law, *see* 17 C.F.R. § 140.99(a)(2), neither the CFTC nor its staff have prohibited anyone from doing anything in connection with PredictIt.

Plaintiffs do not claim otherwise—or that the CFTC violated any other provision of any actual order. Instead, Plaintiffs quote from the introduction of their own motion for injunction pending appeal, which requested that this Court "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." *See* ECF No.

6 at 4; ECF No. 86 at 13.

But a motion is not an order. And this Court's January 26, 2023 order did not incorporate or reference any text in Plaintiffs' briefs, or give any other indication whatsoever that Plaintiffs' intro language was now the law. Plaintiffs' asserted violation thus fails at the outset.

Nor has the CFTC violated that text even if Plaintiffs' preferred language controlled. Nothing in the March 2, 2023 letter purports to disallow anything, including the "continue[d] trading" of any contracts. *Cf.* ECF No. 6 at 4. Instead that letter provides the reasoning behind DMO's preliminary determination, while affording fair opportunity to respond—exactly what Plaintiffs claim was required.

Indeed, the violation Plaintiffs believe occurred appears not to be the March 2, 2023 letter itself, but rather their mischaracterization that the letter "announced" a "new mandate to close the Market as early as March 20"[6] with "apparently immediate effect." *See* ECF No. 86 at 14 (characterizing the March 2, 2023 as "plainly an effort" designed "to prohibit or otherwise impede the trading of contracts"). The letter does not say that, and that is not true.

There is no prohibition on agency staff voluntarily reconsidering for fuller

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[6] As noted, DMO staff has, at the University's request, extended the time for objections until April 5, 2023.

explanation conduct challenged under the APA unless particular injunctive language—not present here—provides otherwise. *See, e.g.*, *Hornbeck Offshore Servs., L.L.C. v. Salazar*, 713 F.3d 787, 793 (5th Cir. 2013) ("For Interior to have been in contempt, the injunction would have had to include an express or clearly inferrable obligation to petition for a remand."); *cf.* ECF No. 86 at 14–15.

But even assuming Plaintiffs' preferred language from their brief applies and holding the CFTC to that language would satisfy applicable notice requirements, *see* Fed. R. Civ. P. 65(d), the March 2, 2023 letter does not say what Plaintiffs claim. The *only* effect that letter has is to withdraw the August 4, 2022 letter—and thereby eliminate what Plaintiffs had characterized as a "liquidation mandate," the supposed justification for this expedited appeal. That letter does not precommit DMO staff to any particular outcome, much less "announce" a "new mandate" with "apparently immediate effect." *Cf.* ECF No. 78 at 13. To the extent that the March 2, 2023 letter publicizes the specific reasoning previously communicated to non-party Victoria University, that reasoning would have been produced in the administrative record had Plaintiffs' challenge to the August 4, 2022 letter progressed to summary judgment and is a natural consequence of third-party Plaintiffs' decision to file suit in the University's absence. Nor, as a practical matter, does the March 2, 2023 letter somehow "warn[] off investors." *Id.* If market participants have reason to be skeptical, it is because of the market

operators' own conduct.

With nothing to say about any order the CFTC supposedly violated, Plaintiffs primarily dedicate their pertinent briefing to expounding their anti-mootness arguments. *See* ECF No. 86 at 15–18. In doing so, they ask this Court to retain jurisdiction and "direct[] the entry of an appropriately broad" injunction, in light of "the district court's prior reluctance to act with urgency." *Id.* at 16. They also ask that this Court consider either issuing advisory opinions about various aspects of the now-withdrawn August 4, 2022 letter or "determin[ing] this replacement decision's legality" in the first instance. *Id.* at 17–18. As part of those alternative requests, Plaintiffs have further asked that the Court adopt broader, though largely unspecified, injunction language that would—for the first time—enjoin the CFTC not only from "prohibit[ing] the trading of contracts" but also "otherwise … deterring" the same. *See id.* at 18, 21.

Plaintiffs' ask for an expanded injunction, written in such vague terms, is an explicit acknowledgement that this Court's January 26, 2023 injunction—whatever its precise contents—is not currently "appropriately broad" to achieve their goals. This only confirms that there has been no violation here. Regardless, the CFTC opposes Plaintiffs' request to have this Court retain jurisdiction after their preliminary-injunction motion has been resolved as highly irregular and procedurally improper.

III. Plaintiffs' Motion For Sanctions Is Meritless.

Plaintiffs have further moved for a contempt finding and award of attorneys' fees based solely on this supposed violation of the Court's January 26, 2023 injunction pending appeal. *See* ECF No. 86 at 18–20. That motion should be denied for at least two reasons.

First and foremost, there was no violation of this Court's injunction, as explained immediately above.

Second, while referencing in passing Federal Rule of Civil Procedure 11, courts' inherent supervisory powers, and the Equal Access to Justice Act ("EAJA"), Plaintiffs fail to develop their motion and do not, because they cannot, explain how these standards apply here. The only authority cited is a pair of cases, standing for the general proposition that "[v]iolating injunctions has consequences," which are facially and factually inapposite. *Cf. In re Skyport Glob. Commc'ns, Inc.*, 661 F. App'x 835, 840–841(5th Cir. 2016) (affirming sanctions award for violating bankruptcy injunction "by pursuing barred claims and impermissibly contacting a former employee of" the debtor); *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 961–962 (5th Cir. 1995) (reversing as "clearly erroneous" sanctions award for supposed "'sham' sale" when the injunction "did not prohibit" the enjoined magazine competitor "from selling assets he owned"). Because the "bare-bones briefing of this issue fails to explain how the substantive

and procedural requirements for an award" would be satisfied, Plaintiffs' motion independently warrants denial. *See, e.g.*, *Hornbeck*, 713 F.3d at 795.

By contrast, this Court's *Hornbeck* opinion reflects a highly analogous fact pattern and is directly on point. The plaintiffs there sued the Interior Department over a six-month moratorium on oil-and-gas exploration in the Gulf of Mexico, raising similar inadequate-explanation claims under the APA. *See id.* at 791. After the district court issued a preliminary injunction, and while that injunction was on appeal before this Court, the Department voluntarily rescinded its original moratorium and issued a new moratorium that, although "the same 'in scope and substance,'" "contained a more thorough explanation of reasons and referred to more voluminous evidentiary support," leading this Court to conclude that the challenged injunction was moot because the original moratorium "'is legally and practically dead.'" *Id.* at 791, 795. Arguing that the Department's issuance of a new, more fully reasoned moratorium was "frustrating to" their "goal of actually allowing drilling to proceed," Plaintiffs moved for a contempt finding and award of attorneys' fees. *See id.* at 792–796.

This Court rejected both requests. Because the injunction "did not state that Interior had to seek permission for a remand" and "did not explicitly prohibit a new, or even an identical, moratorium," there had been no violation at all, regardless of plaintiffs' views as to the broader, but unstated, "purpose[s]" of the

injunction. *Id.* at 793, 795. And because plaintiffs had "inadequately briefed" their request for attorneys' fees, no such award was warranted. *Id.* at 795–796. The result should be no different here.[7]

Moreover, the CFTC's conduct throughout this litigation has been consistent, taken in good faith, and at a minimum, substantially justified. "[T]he last seven months of litigation" were only necessary, because Plaintiffs filed suit without ever citing any case in which any court has held a no-action letter or its revocation judicially reviewable. *Cf.* ECF No. 86 at 18–19. As the CFTC has consistently maintained throughout these still-preliminary proceedings, and based on every federal-court decision considering the issue, there is no subject-matter jurisdiction over Plaintiffs' Amended Complaint for three separate, dispositive reasons: Rule

[7] Plaintiffs' motion should further be denied to the extent they are seeking compensatory sanctions without statutory authorization waiving the United States' sovereign immunity. *See generally United States v. Nordic Village, Inc.*, 503 U.S. 30, 33, 37 (1992). The majority approach holds that "sovereign immunity bars court-imposed fines for contempt against the government" absent a specifically identified statutory waiver. *United States v. Horn*, 29 F.3d 754, 763 (1st Cir. 1994); *see also, e.g.*, *United States v. Droganes*, 728 F.3d 580, 589 (6th Cir. 2013); *Yancheng Baolong Biochemical Prod. Co. v. United States*, 406 F.3d 1377, 1382 (Fed. Cir. 2005); *Coleman v. Espy*, 986 F.2d 1184, 1191–92 (8th Cir. 1993). To the extent that there is some precedent in this Circuit and the Ninth Circuit suggesting otherwise without analysis of the United States' sovereign immunity, this Court should reconsider such precedent in an appropriate case. *See FDIC v. Maxxam, Inc.*, 523 F.3d 566, 596 (5th Cir. 2008); *United States v. Woodley*, 9 F.3d 774, 781 (9th Cir. 1993). Because there is no underlying violation and Plaintiffs have not specified the governing law, this is not such a case.

140.99(a)(2) staff no-action letters generally, and DMO's now-withdrawn August 4, 2022 in particular, are not "final agency action"; Rule 140.99(a)(2) staff no-action letters are inherently discretionary prosecutorial recommendations; and the exclusively third-party Plaintiffs lack Article III standing to bring suit on the University's behalf. *See, e.g.*, ROA.345–355; ECF No. 59 at 27–49. All of those positions are correct. Indeed, they are the only ones with affirmative support under current doctrine. *See* ROA.345–355 (citing, among others, *Bd. of Trade of City of Chicago v. SEC*, 883 F.2d 525 (7th Cir. 1989); *Kixmiller v. SEC*, 492 F.2d 641 (D.C. Cir. 1974); *New York City Emps.' Ret. Sys. v. SEC*, 45 F.3d 7 (2d Cir. 1995); *Apache Corp. v. Chevedden*, 696 F. Supp. 2d 723 (S.D. Tex. 2010); and *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930 (D.C. Cir. 2004)); ECF No. 59 at 27–49 (same).

To the extent any aspect of this case may not be moot, the district court can and should grant the CFTC's still-pending motion to dismiss on remand. It is simply inaccurate to say that the CFTC "is proposing that the parties start all over again." *Cf.* ECF No. 86 at 19. And in no way did the CFTC ever conceivably "forc[e]" Plaintiffs to either "file a complaint" or take any particular litigation strategy in their motions practice and briefing to date. *Cf. id.* at 19–20.

Nor is it a surprise that the CFTC opposed the need for this specially expedited appeal. This appeal, which takes up Plaintiffs' preliminary-injunction

motion in the first instance, was premised on Plaintiffs' position that the August 4, 2022 letter, unlike every other staff no-action letter challenged in court to date, contained a unique and legally significant "liquidation mandate." *See, e.g.*, ECF No. 27-1 at 1 ("In CFTC Letter 22-08 dated August 4, 2022, the agency ordered the PredictIt Market to close and throw investors out of their contracts by 11:59 PM on February 15, 2023."). But, as the CFTC has at all times maintained, that February 15, 2023 date was not legally meaningful and this so-called "liquidation mandate" was nothing more than a "staff-specific grace period" indistinguishable from other informal staff advice about what the advice seeker "should" do, and CFTC staff do not possess the delegated authority to unilaterally impose an "order" or "mandate" regardless. *See* ROA.349 (citing *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940 (D.C. Cir. 2012)); ECF No. 59 at 27–49. Notwithstanding Plaintiffs' unwillingness to accept Rule 140.99(a)(2)'s plain text and that of the two letters at issue, the March 2, 2023 letter has eliminated any reference to a date certain.

To be clear, there has never been any "concession" that the August 4, 2022 letter contained a "closure mandate" or that the CFTC's previous arguments were either wrong or taken in bad faith. *Cf.* ECF No. 86 at 19. Just the opposite. And while it is imaginable that a future court may disagree with the CFTC in some respect, Plaintiffs do not identify any particular argument made by the CFTC that

supposedly lacked a good-faith basis or substantial justification. Nor is there any. *See also, e.g.*, ROA.511 & n.4 (noting "the strength of CFTC's motion to dismiss" and Plaintiffs' "inability to cite cases directly holding that a no action letter is the equivalent of a license or other final action or that third parties are beneficiaries to a no action letter with standing to sue").

CONCLUSION

For these reasons and those already given, this Court should dismiss this appeal as moot and remand to the District Court for further proceedings, if any. This Court should further deny Plaintiffs' motion for a finding of contempt and attorneys' fees.

Dated: March 23, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2023, I caused the foregoing Reply and Opposition to be served on the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit and on Plaintiffs-Appellants, using the Court's CM/ECF system, as all participants in this case are registered CM/ECF users.

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

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Reply and Opposition complies with the type-volume limits of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 27(a)(2)(B) and 32(f), this document contains 5,164 words.

2. I hereby certify that this Reply and Opposition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Times New Roman.

/s/ *Kyle M. Druding*
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Dated: March 23, 2023