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)

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

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INTRODUCTION

The CFTC—three weeks after oral argument before three judges of this Court—lobbed in a replacement scheme to end the PredictIt Market, all to avoid an adverse decision from this Court. The Supreme Court and courts across the country are very clear: When the Government claims to have abandoned a challenged action and seeks thereby to moot a case, it bears a "formidable" burden to establish that the challenged conduct will not recur. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013).

Far from establishing that its errors are things of the past, the CFTC confirms that it will endeavor to abruptly end the PredictIt Market in a manner that rides roughshod over the reliance interests of traders and operators and academics. This Court continues to make clear that agency behavior like this is illegal, reaffirming just last week that when "an agency changes course, it must take into account 'serious reliance interests' its 'longstanding policies may have engendered' along with 'alternatives that are within the ambit of existing policy.'" *R.J. Reynolds Vapor Co. v. FDA*, No. 23-60037(L), slip op. at 5 (5th Cir. Mar. 23, 2023).

The CFTC's effort to replace its decision is both way too late and a violation of this Court's injunction. This Court froze the status quo when it issued an injunction pending appeal, precisely to give this Court an opportunity to decide the legality of what the CFTC had done. The CFTC ignored that injunction and tried to

shift the ground underneath this case. In doing so, it publicly took further action to deter trading in the PredictIt Market, an action correctly forbidden by this Court's injunction. The CFTC's only response is its belief that the Court's order was an empty piece of paper that restrained the agency from nothing. If the CFTC were confused about the scope of the injunction, it should have asked, instead of plunging headlong into its March 2 litigation stunt. The only thing that will deter this repeat litigant from similarly treating the Court's orders in the future is an order assessing fees for having to respond.

The Court should proceed to decide the case and direct entry of a preliminary injunction against agency actions to close the Market or to disrupt trading on it while the courts fully evaluate the CFTC's efforts to close the Market. The Court should further hold that the agency's March 2 litigation gambit violated this Court's injunction and warrants a fee award in Appellants' favor.

ARGUMENT

I. The CFTC's Renewed Effort to Shutter the Market Violated this Court's Injunction Pending Appeal and Should Lead to Sanctions.

Without saying anything, the CFTC has apparently believed for the last two months that this Court's January 26, 2023, order granting the Appellants' motion for an injunction pending appeal did *precisely nothing* to constrain its behavior. Remarkably, instead of explaining why its replacement action does not violate the injunction, the CFTC begins its argument by deflecting the blame to *this Court*. Opp.

to Cross-Mot. at 12–14 ("Opp."), ECF No. 97. That is as wrong as it is tone-deaf—the Court's order clearly "granted" Appellants' motion for an injunction pending appeal, which sought 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." Mot. for Inj. at 4, ECF No. 6.

That provided the CFTC with plenty of notice that it was prohibited from interfering with the trading of Market contracts pending this appeal. This Court's order followed its long-time practice of granting injunctions pending appeal by reference to parties' motions. *See, e.g.*, *United States v. Texas*, No. 21-50949, 2021 WL 4786458, at *1 (5th Cir. Oct. 14, 2021); *Sambrano v. United Airlines, Inc.*, 19 F.4th 839 (5th Cir. 2021). The CFTC's citation to cases setting down rules on how district courts should paper their injunctions (if only to facilitate appellate review) have no application here. Opp. at 12–13.

Moreover, if the CFTC had any questions about the scope of the injunction, it should have asked the Court for clarification before dropping its surprise decision. Responsible agencies seek permission from the court *before* attempting to alter the pre-violation status quo protected by an injunction. Opp. to Suggestion of Mootness at 14–15, ECF No. 86 (detailing agencies following proper protocol). The CFTC cannot now benefit from claims of ignorance after the fact, certainly as its current

defense is based on the absurd assertion that the Court's injunction had no content of any kind.

When it finally turns to fighting the violation itself, the CFTC ignores reality. It argues that the replacement letter does not "precommit DMO staff to any particular outcome," and that it does not "'warn off investors.'" Opp. at 15–16. The March 2 letter, however, plainly concludes that the no-action letter authorizing the Market "is void and should be withdrawn." ECF. No. 80 at 3. It characterizes its new explanations for its behavior as "conclusions." *Id.* at 7. Although it gives Victoria University a chance to talk the agency down, the narrow window it provides for that process demonstrates an intent to condemn the Market with all due haste. It sends a clear message to PredictIt investors like Appellants here: "buy and trade contracts at your own risk because a shutdown is imminent." That is exactly what the injunction pending appeal was designed to avoid—agency behavior directed not just at a *de-jure*, but also a *de-facto*, shut down of the market. The agency's course of action constitutes a clear violation of the command to "allow" Market contracts "to continue trading pending the resolution of this appeal." ECF No. 6 at 4; Order Granting Mot. for Inj., ECF No. 44-1.

The violation of the injunction should lead the Court to cast aside the agency's March 2 replacement decision and order the payment of Appellants' fees to respond to that improper intervention. The Fifth Circuit's decision in *Hornbeck Offshore*

Services, L.L.C. v. Salazar, 713 F.3d 787 (5th Cir. 2013), is not to the contrary. Opp. at 18. There, the Court parsed the precise terms of an injunction, finding it did not explicitly foreclose the particular conduct in question. *Hornbeck*, 713 F.3d at 789, 793–95. Here, the injunction was designed to preserve the status quo, and give the Court an opportunity to rule on that state of affairs, while protecting the Market from further government-caused distortion and disruption. That purpose is flatly inconsistent with the agency shifting gears and conceiving new vehicles for its desire to close the Market.

In addition, in lieu of a timely disclosure of the facts that the agency now contends disposes of this case at any point during the last six months of bitterly-contested litigation, the CFTC decided to waste everyone's time and resources by waiting until the last possible minute in the judicial process before the second-highest Court in the land to reverse course and attempt to moot this case. Conduct of this type is sanctionable.

Contrary to the CFTC's suggestion, Opp. at 17–18, there is no shortage of authorities that allow courts to sanction parties like the CFTC who, despite having full knowledge of potentially dispositive facts, decide to pursue an inconsistent litigation strategy that ultimately ends up wasting everyone's time and money. Courts have the inherent authority to sanction parties who abuse the litigation process in bad faith. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46 (1991). Rule

11 authorizes sanctions for "caus[ing] unnecessary delay" or "needlessly increase[ing] the cost of litigation." Fed. R. Civ. P. 11(b)(1). And 28 U.S.C. § 1927 is aimed at "deter[ring] dilatory litigation practices" that "unreasonably and vexatiously" multiply the proceedings in a case. *Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater*, 465 F.3d 642, 646 (6th Cir. 2006). Congress also provided special protections for private parties who must litigate against the Government through the Equal Access to Justice Act. Under the Act, "the government must do more than show it is 'merely undeserving of sanctions for frivolousness,'" to avoid paying attorneys' fees. *W.M.V.C. v. Barr*, 926 F.3d 202, 208 (5th Cir. 2019).

Applying these authorities, the Fourth Circuit upheld sanctioning Blue Cross Blue Shield for failing to inform the bankruptcy court that its opponent's counterclaims had been enjoined. *In re Jemsek Clinic, P.A.*, 850 F.3d 150, 156–58 (4th Cir. 2017). Blue Cross "kept mum about the [other] court's injunction and thus allowed the bankruptcy court to continue adjudicating counterclaims that had already been enjoined," which "prolonged the proceedings" and "thereby wasted 'an inordinate amount of court time.'" *Id.* at 156–57.

Similarly, in *Schanen v. U.S. Department of Justice*, the Government waited until it filed a petition on rehearing to "argue[] in explicit terms" that the district court's judgment granting the plaintiff's FOIA request should be reversed because, if released, "the documents would endanger the lives and well-being of agents and

informants." 798 F.2d 348, 349 (9th Cir. 1985). Because "much controversy and expense could have been avoided" had the Government "defended this action diligently," the Ninth Circuit ordered the Government on remand to pay the other side's fees. *Id.* at 350.

In each of these cases, the sanctioned party knew of what that party claims to be potentially outcome determinative facts, but allowed earlier proceedings to focus on something else, only to try to change the whole case in extra innings. This has been the CFTC's tactic here, surfacing an entirely new theory of the case weeks after oral argument in an appellate court.

The CFTC's defense that this case is still at the pleadings stage also is meritless. Opp. at 1. In the case, the Appellants moved for a preliminary injunction and the CFTC could challenge the Appellants' likelihood of success on factual grounds. Moreover, the CFTC's arguments provide no explanation for why the CFTC is rolling out its new theory now, weeks after an appellate court oral argument.

Sovereign immunity also does not defuse for the federal government any of the traditional grounds for sanctions against a litigant. Opp. at 19 n.7. That position is contrary to this Court's decision in *FDIC v. Maxxam, Inc.*, 523 F.3d 566, 596 (5th Cir. 2008). And the Court should decline the invitation to reconsider that precedent, as the CFTC has not shown the "intervening change in the law, such as by a statutory amendment, or the Supreme Court, or [the] *en banc* court" necessary to overturn a

another panel's decision. *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008). In any event, the Equal Access to Justice Act directly applies to the Government and clearly is not impeded by immunity.

II. The CFTC's Eleventh-Hour Effort to Replace its Closure Mandate Does Not Moot this Case.

The CFTC does not contest that the "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). This means that the CFTC must make the "formidable" showing that "*it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur*." *Nike*, 568 U.S. at 91 (emphasis added). It has not done so: the March 2 replacement letter disadvantages Appellants in the same fundamental way as the rescinded letter. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993).

The CFTC argues that the appeal is moot because the March 2 letter does not "precommit" the agency to closing the Market. Opp. at 3. To the contrary, there is no mystery as to what is going to happen. The March 2 letter makes the CFTC's position crystal clear: Traders should run away now, because the CFTC is about, again, to order the Market to close and liquidate contracts before their natural expiration. ECF No. 80 at 3, 7. The CFTC providing Victoria University a few weeks to talk it out of its clear preference in no way carries the CFTC's "formidable"

burden to show that its wrongful behavior could not be reasonably expected to recur. *Nike*, 568 U.S. at 91.

Nor has the CFTC somehow corrected its many problems. Opp. at 4–5. Although the agency's replacement letter provides some explanation and provides Victoria University (but no party in this case) with an opportunity to respond, it never explains why closure and liquidation is a proportionate remedy or meaningfully engages with the massive reliance interests that Appellants have built around the authorization to open the Market. This Court keeps holding illegal agency efforts to close businesses without reconciling such remedies with reliance interests. *R.J. Reynolds Vapor Co.*, No. 23-60037(L), slip op. at 5; *Wages & White Lion Invs., LLC v. FDA*, 16 F.4th 1130, 1138 (5th Cir. 2021). In any event, as the Supreme Court held in *City of Jacksonville*, a replacement decision that "differs in certain respects" from the original action does not moot a case, even if the replacement disadvantages the plaintiffs "to a lesser degree." 508 U.S. at 662.

The CFTC then says—without irony—that its new letter does not "reflect some litigation tactic designed to evade judicial review." Opp. at 5–7. The timeline of this case tells a different story. The CFTC waited until three weeks after the second-highest Court in the land heard oral argument to reveal alleged information that it now contends is dispositive. There's only one explanation for this timing; the agency concluded it did not like its current chances and wanted to change the game.

But when an agency's effort to replace its decision "appears to track the development of the litigation," courts reject efforts to use that as a reason for mooting the case. *Nat. Res. Def. Council v. U.S. Dep't of Energy*, 362 F. Supp. 3d 126, 138 (S.D.N.Y. 2019).

The CFTC also suggests that, because Appellants claim that the agency revoked a license without required process, the agency is somehow exempted from its burdens under the voluntary cessation doctrine for showing mootness. Opp. at 3, 8–10. But the CFTC is simply ignoring both of Appellants' Administrative Procedure Act claims challenging the CFTC's efforts to close the Market as arbitrary and capricious, which are in the heartland of voluntary cessation doctrine. *Nat. Res. Def.*, 362 F. Supp. 3d at 141–44. This case is about both substance and process, and some last-minute opportunity to let Victoria University contest the agency's late-breaking reasons does not address the former category in any way.

The agency's effort to say this case is akin to *Constellation Mystic Power, LLC v. FERC*, 45 F.4th 1028, 1047 (D.C. Cir. 2022), fails. Opp. at 9. Nothing in that decision says that challenges to orders directed at an individual company can be mooted simply by the agency withdrawing the order. Rather, in *Constellation*, FERC withdrew an order, and there was no evidence that it was coming back, much less that the agency had already replaced it with another decision directed at the same outcome. *Constellation Mystic Power*, 45 F.4th at 1047.

Taken together, the CFTC's mootness arguments amount to little more than misdirection about what Appellants are actually claiming, conclusory statements about what the agency thinks is likely to happen, and hand-waving about a bunch of newly-revealed facts that the agency chose to sit on for six months while the parties and the judicial system poured countless hours into this case. That is not enough to satisfy the agency's heavy burden to demonstrate mootness.

Respectfully submitted,

/s/ Michael J. Edney

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 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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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 2,597 words, excluding the parts exempted by Rule 32(f), according to the count of Microsoft Word.

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