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July 19, 2023

Via E-file

Lyle W. Cayce, Clerk of Court
United States Court of Appeals
Fifth Circuit
F. Edward Hebert Building
600 S. Maestri Place, Suite 115
New Orleans, LA 70130

Re: No. 22-51124, *Clarke v. CFTC*

Dear Mr. Cayce,

Appellants respond to the Rule 28(j) letter filed by the CFTC on June 28, 2023, in the above-captioned matter.

The CFTC uses a recent Supreme Court decision, *United States v. Texas*, No. 22-58 (June 23, 2023), to reprise the standing argument made in its response brief that Appellants are not “beneficiar[ies]” of the no-action letter. The opinion, however, has no bearing on that argument. As Appellants explained in both their opening and reply briefs, the term excludes would-be competitors from using the no-action letter as authority to establish a market like PredictIt, but not those like Appellants who operate, invest in, and study the Market.

The Supreme Court’s *Texas* opinion actually supports Appellants’ standing to bring this lawsuit, and in particular, Appellants’ arguments concerning prosecutorial discretion. Reflecting upon precedent, history, and tradition, the Supreme Court confirmed that a party generally asserts no redressable injury, and thus lacks standing, when he sues to challenge a prosecuting authority’s enforcement discretion. But important for purposes of this case, that is so when the party “is neither prosecuted nor threatened with prosecution.” Slip Op. at 1,



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5. Indeed, as the Seventh Circuit clarified in *Board of Trade of City of Chicago v. SEC*, and as Appellants stressed in their opening brief at 28–29, plaintiffs *do* have standing when agency action applies directly to them, and thus puts them “under the gun.” 883 F.2d 525, 529–30 (7th Cir. 1989). That is exactly what the CFTC’s order to close the Market did here. Because it is the type of injury the Supreme Court has (once again) acknowledged is redressable—one that “infringe[s] upon interests that courts often are called upon to protect,” Slip Op. at 6—Appellants have standing to pursue this lawsuit against the CFTC.

Sincerely,

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CERTIFICATE OF SERVICE

I certify that on July 19, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will automatically send e-mail notification to all counsel of record.

/s/ Michael J. Edney
Michael J. Edney