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

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

Plaintiffs,

v.

COMMODITY FUTURES TRADING COMMISSION,

Defendant.

Case No. 1:22-cv-00909

The Honorable David Alan Ezra

# PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION TO TRANSFER VENUE

Michael J. Edney
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
T: (202) 778-2204
medney@huntonak.com

John J. Byron
STEPTOE & JOHNSON LLP
227 West Monroe Street
Suite 4700
Chicago, Illinois 60606
T: (312) 577-1300 / F: (312) 577-1370
jbyron@steptoe.com

*Attorneys for Plaintiffs*

Plaintiffs oppose Defendant the United States Commodity Futures Trading Commission's ("CFTC's" or "Commission's") Motion to Transfer Venue (Dkt. 50). Plaintiffs further respectfully request, if this Court does not just summarily deny the Motion to Transfer, a hearing and oral argument on this motion.

## INTRODUCTION

This case has proceeded in the tower of trial and appellate courts of this region for more than a year. Several judges already have poured countless hours and resources into familiarizing themselves with the CFTC's patently arbitrary behavior and crafting the remedy to stop it. That process led to a thorough and detailed appellate court opinion, which dispatches the CFTC's many arguments against judicial review and determines that the Plaintiffs are highly likely to establish that the agency's efforts to end the PredictIt Market ("Market") contradict the most basic standards governing the conduct of the administrative state.

Now, nearly fourteen months into the litigation, the agency wants to hit the reset button and transfer the litigation to yet another Court and tower of appellate judges on its home turf in Washington, D.C. The agency's motive is both obvious and verboten: *The CFTC does not like the ruling of the Fifth Circuit in this matter and never wants to see that panel again in this case*. Court after court, when faced with such a patent exercise in judge shopping, has rejected requests to transfer a case to another jurisdiction. At this point, transferring the case would only multiply waste and inconvenience.

This lawsuit was filed by six plaintiffs who live in Austin, work in Austin, and have been harmed by the conduct of the CFTC in Austin. The lead Plaintiff Kevin Clarke—who identified the unfairness and financial harm of the CFTC's actions in the days following its abrupt and unexplained mandate to close the Market—decided to bring this lawsuit in the jurisdiction in which he resides, works, invested in the Market, and experienced harm because of the CFTC's actions.

This Court has recognized, as has the Fifth Circuit, that the plaintiff's choice of forum "should be respected" and should not be disrupted unless the defendant demonstrates that the transferee venue is "*clearly* more convenient." *Mateos v. Select Energy Servs., L.L.C.*, 919 F. Supp. 2d 817, 820-21 (W.D. Tex. 2013) (Ezra, J.) (emphasis added) (quoting *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 (5th Cir. 2008)). In this case, the CFTC comes nowhere close to discharging its "significant burden" of demonstrating that litigating this case in its preferred venue in the District of Columbia would be *clearly* more convenient than in this District. *In re Volkswagen*, 545 F.3d at 314 n.10.

To carry that burden, the CFTC would have had, at least, to identify the specific evidence that is clearly more convenient to put on in Washington. *Def. Distributed v. Bruck*, 30 F.4th 414, 434 (5th Cir. 2022). The CFTC did not, most likely because it could not. That is because the CFTC clearly views this case as a traditional Administrative Procedure Act ("APA") case focused on a written administrative record that will be electronically transmitted to court. To the extent the CFTC has made witness testimony relevant so far, it is that of the Plaintiffs in this District, attacking whether they have sufficient injury to maintain standing or to seek an injunction. What the CFTC is really arguing is that aggrieved citizens must trapse to Washington to judicially challenge any federal Government overreach, because it all emanates from that city. That is not and cannot be the law.

At the end of the day, the CFTC leans on only three of the traditional eight private and public interest factors that govern whether to transfer. To get even there, the CFTC continues to stubbornly ignore binding Fifth Circuit precedent. The only *private* interest factor that the CFTC musters in favor of transfer—convenience to counsel who are headquartered (as almost all lawyers for federal Government agencies) in Washington, D.C.—has been firmly rejected by the Fifth

Circuit and this Court. *In re Horseshoe Ent.*, 337 F.3d 429, 434 (5th Cir. 2003); *Mateos*, 919 F. Supp. 2d at 823 (Ezra, J.).

The CFTC then tries to trigger some kind of envy that the judges in Washington, D.C. work less than the judges of this District. But this Court has repeatedly concluded that relative court congestion should not alone be grounds for transferring a case. *Healthpoint, Ltd. v. Derma Scis., Inc.*, 939 F. Supp. 2d 680, 693 (W.D. Tex. 2013) (Ezra, J.); *Chase v. Andeavor Logistics, L.P.*, No. 5:18-CV-1050-DAE, 2019 WL 5847879, at *7 (W.D. Tex. July 9, 2019) (Ezra, J.) (same).

This transfer motion is just the latest gambit to avoid the finalization of the redress provided by the courts of this region and final scrutiny of the agency's onslaught against the PredictIt Market. After all, the Commission tried to pull the plug on these whole proceedings by attempting to withdraw and replace its decision to scuttle the Market *while the case was pending decision in the Fifth Circuit*. Thus far, the courts have rejected such maneuvers—and arguments over mootness, standing, total agency discretion, lack of final agency action. This latest, "renewed" transfer effort should suffer the same fate.

## BACKGROUND

### A. The CFTC Licenses the PredictIt Market in 2014 and Tries to Close and Throw Traders Out of the Market in 2022

For more than nine years, the PredictIt Market has operated as a forum for individual investors to trade contracts based on their predictions on outcomes of future elections or other significant political events. *Clarke v. Commodity Futures Trading Comm'n*, 74 F.4th 627, 633 (5th Cir. 2023). The CFTC licensed the Market to operate through a decision issued in 2014, granting the Market so-called "no-action relief." *Id.* at 633-34. In reliance on the decision, individual traders (including many in this District) collectively invested tens of millions of dollars in contracts offered by the Market. FAC at ¶ 64.

In 2022, the CFTC abruptly attempted to revoke that license. *Clarke*, 74 F.4th at 634-35. The Fifth Circuit explained, in great detail, the unnecessary and unexplained harm visited on Market traders by tossing them out of their positions on some arbitrary date of the Commission's choosing. *Id.* at 639-40, 643. The evidence underlying the Fifth Circuit's conclusion came from Plaintiff Kevin Clarke of Austin, Texas, who explained the damage of ejecting him from his trading positions. *Id.*; Dkt. 12-2, Dec. of Kevin Clarke, at 29-32. So too have the agency's efforts to close the Market injured academics, who study the data generated by traders expecting their contracts to be valid until the political event predicted occurs. *Clarke*, 74 F.4th at 639-40, 643.

The Plaintiffs—who are nine traders who participate in the Market, four academics who use Market data in their teaching or research, and the two entities that operate the Market on the University's behalf—filed this lawsuit asserting claims under the APA to redress the harm caused by the CFTC. FAC at ¶¶ 75-89. Six of these traders and academics reside in Austin, purchased their contracts from Austin, and have been harmed in Austin. FAC at ¶¶ 20-34. The lead Plaintiff, Kevin Clarke is a key witness: He has investments in every contract that the CFTC has been trying prematurely to terminate and has fully analyzed trends in trading activity, noting the departure of key trading volume creating a distorted, inefficient, and illiquid market for those who remain. *Id.* at ¶¶ 21, 47; Dkt. 12-2, Dec. of Kevin Clarke, at 29-32; Dkt. 23-2, Dec. of Kevin Clarke, at 2-4.

### B. The CFTC Scrambles to Avoid Any Further Proceedings in the Fifth Circuit, After Extensive Criticism of Its Position at Oral Argument

As the February 2023 Revocation deadline drew closer and closer and traders scrambled to grapple with the CFTC's threat of crashing them out of their positions, the Plaintiffs appealed the District Court's failure to timely rule on their long-pending motion for a preliminary injunction. Dkt. 32. On January 26, 2023, the Fifth Circuit granted an injunction against efforts to close the Market pending appeal. *Clarke v. Commodity Futures Trading Comm'n*, No. 22-51124 (5th Cir.),

ECF No. 44-1. Recognizing the importance of the matter, the Fifth Circuit expedited the appeal and heard oral argument one week after the completion of highly expedited merits briefing, on February 8, 2023.

At oral argument, a panel of three Fifth Circuit judges extensively questioned the CFTC regarding its numerous claims that the case should never be heard and whether there was any conceivable justification for the agency's sudden change in position and effort to close the Market. *See generally* Oral Argument, *Clarke*, 74 F.4th at 633, https://tinyurl.com/ytjvmd67. Members of the Court queried the agency about whether its no-action letter—issued before operators and traders invested tens of millions in opening the Market and its contracts—was a government license that requires robust procedures and extensive explanation before revocation. The agency parried that, when it "permits" whole markets to open through no-action letters, it has provided a discretionary act of grace, whose duration depends solely on the whims of current agency leadership. Judge Ho summed up where the Court was headed, correctly diagnosing the CFTC's urged vision of "no-action letters" as "a license to bully." *Id.* at 26:33.

The CFTC's legal weather vane turns adroitly. Sensing defeat in this venue, the agency quickly decided it wanted to do anything and everything to avoid the Fifth Circuit's forthcoming decision on the merits, or frankly any Fifth Circuit supervision of its efforts to clean out PredictIt Market traders. So, on March 2, 2023—twenty-two days after oral argument in the Fifth Circuit—the Commission issued "CFTC Letter 23-03." That letter was a transparent effort to get out of the Fifth Circuit for good, "withdraw[ing]" and superseding the August Revocation letter. March Letter at 3, *Clarke*, No. 22-51124, ECF No. 78-2. That sounds like good news for PredictIt Market traders until the next sentences are read, where the CFTC announces a process for replacing its 2022 decision to close the Market with the same outcome and its preliminary conclusion that the

Market [surprise!] should close. *Id.* The day after the CFTC issued the March letter, it moved to dismiss the Fifth Circuit appeal on grounds that there was no agency behavior left to challenge and the case was moot. *Clarke*, No. 22-51124, ECF No. 74.

### C. The Fifth Circuit Rules in Favor of the Plaintiffs and Remands to this Court to Enter a Preliminary Injunction While this Court Considers the Plaintiffs' Claims

The agency's efforts to pretermit the Fifth Circuit's adjudication of its efforts to close the Market were not well received. On May 1, 2023, the Fifth Circuit denied the CFTC's late-breaking motion to dismiss and entered an enhanced injunction pending appeal, making clear that further shenanigans to dissuade traders from participating and operators from running the Market would not be tolerated. *Clarke*, No. 22-51124, ECF No. 107-2.

On July 21, 2023, the Fifth Circuit issued the merits opinion that the CFTC had tried so hard to avoid. The Court held that the Commission's effort to withdraw and replace its decision to close the Market, and to avoid the Court's decision, was an unjustifiable violation of the Court's injunction pending appeal. *Clarke*, 74 F.4th at 641. The Court saw this gambit for what it was, the latest attempt to harangue traders out of the Market and avoid answering to the judicial system.

As for the Commission's campaign to close the PredictIt Market, the Court found a catalog of likely Administrative Procedure Act violations. As an initial matter, the Court held that the "no-action relief" the Commission issued in 2014 to "permit" the Market to open is a "license" under the APA. *Clarke*, 74 F.4th at 637, 642. That means the traders and operators who relied on that license to invest in the Market are owed more than the Commission's successive "Dear John" letters left on the mantle, saying the Commission has decided that its relationship with the Market is just no longer working out. *Id.* Instead, the Market participants are entitled to extensive notice

of whatever violations the Commission believes justifies revoking the license and a subsequent opportunity to rebut them or to come into compliance. *Id.* at 642.

The Court further detailed the arbitrariness of the Commission's successive decisions to close the Market, in violation of the APA. Most prominently, the Court focused on the "reliance interests" of the Market's traders, who reasonably expected the Commission not to pull the plug on the host of the event contracts in which they were investing. *Id.* at 641-42, 644. The Fifth Circuit also thoroughly analyzed the legal basis for each of the CFTC's threshold objections to this suit. *Id.* at 635-40. The CFTC threw at the Court the whole federal Government administrative law playbook for avoiding judicial scrutiny: No final agency action, standing, mootness, and commitments to agency discretion barring judicial review. *Id.* The Court held that each of these objections to the suit being heard was "meritless." *Id.* at 633. [Remarkably, the Commission is contemplating a reprise of these same arguments before this Court, foreshadowed in its now-scheduled motion to dismiss the Complaint. Dkt. 47.] As for the preliminary injunction factors, the Court found it plain that the Market's traders would be irreparably injured by the Commission closing the Market and dismissed the Commission's lengthy argument that those traders should seek being made whole from the operators of the Market instead. *Clarke*, 74 F.4th at 643.

The Fifth Circuit was very specific about what should happen next in this case. It remanded this case "for the district court to enter a preliminary injunction *while it considers* Appellants' challenge to the CFTC's actions." *Id.* at 633 (emphasis added); *see also id.* at 644 ("We REVERSE the district court's effective denial of a preliminary injunction and REMAND with instructions that the district court enter a preliminary injunction *pending its consideration* of Appellants' claims.") (italic emphasis added). The concurring opinion expressly contemplated that the case

would return to the Fifth Circuit, even to the same particular panel of the Fifth Circuit, to reach a "definitive conclusion" on many of the issues at the later stage of the case. *Id.* (Ho, J., concurring).

This Court took up those instructions immediately the day after the Fifth Circuit's mandate issued. It entered the preliminary instruction and ordered the parties to submit a proposed order "to control the remaining deadlines in this case." Dkt. 43. The parties did so, with CFTC plans to move to dismiss this case again and to produce the "administrative record." Dkt. 47.

There was no mention of any intention to seek, at this late stage, transfer of this matter to another court. *Id.* But the CFTC filed precisely such a motion, more than a year after this case was filed, nearly three months after the Fifth Circuit's opinion, and one month after the mandate was issued.

**ARGUMENT**

Much has changed since the CFTC last sought to transfer this case to the District of Columbia. This is not the 11-day-old case targeted by the CFTC's last transfer motion. In the intervening year, the courts of this region have meticulously evaluated the Commission's effort to close the PredictIt Market, culminating in a comprehensive opinion from the Fifth Circuit. That decision went through every CFTC defense against judicial review and dissected the Commission's sustained offensive on the PredictIt Market. *Clarke*, 74 F.4th at 641-43. The Fifth Circuit then instructed "the district court to enter a preliminary injunction *while it considers* Appellants' challenge to the CFTC's actions." *Id.* at 633 (emphasis added).

Given the CFTC's resounding defeat in the Fifth Circuit, the agency no doubt would prefer some court—any court—outside Texas, Louisiana, or Mississippi. But the cases implementing the transfer statute simply do not provide for going elsewhere, in the middle of the case, because a party does not like the rulings of the incumbent line of courts. To the contrary, when a motion to transfer is so plainly directed an influencing the substantive outcome of a case, rather than

simply where it is litigated, the motion must be rejected. *See, e.g.*, *Betts v. Atwood Equity Co-op. Exch., Inc.*, No. 88-4292-R, 1990 WL 92495, at *1 (D. Kan. June 13, 1990) ("The purpose of § 1404(a) is not to allow judge-shopping by litigants.").

The CFTC's transparent attempt to abandon this District midstream and avoid litigating this case within the Fifth Circuit should be rejected. And the Fifth Circuit panel that already so thoroughly examined this case has an interest in ensuring the principles it set forth to govern this matter are carried out through final judgment. The Fifth Circuit has not hesitated to stop transfers from its jurisdiction through mandamus for less significant reasons than those presented here. *See Def. Distributed*, 30 F.4th at 433-43.

## I. Transferring the Case at this Late Juncture Would Waste Judicial Resources

One of the primary functions of the transfer statute, 28 U.S.C. § 1404(a), is to conserve judicial resources. *See Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964) (stating that § 1404(a)'s purpose is "to prevent the waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense." (cleaned up)); *Houston Trial Reports, Inc. v. LRP Publ'ns, Inc.*, 85 F. Supp.2d 663, 671 (S.D. Tex. 1999) ("Conservation of judicial resources is a primary consideration."). Transferring the case to the District of Columbia now would have the opposite effect.

Nearly fourteen months into the case, the Fifth Circuit closely has analyzed issues that go directly to the heart of Plaintiffs' case. All of this analysis—by *both* the courts and the litigants—represents a considerable investment of time and resources.

If either party chooses to appeal any further ruling in this case, three judges of the Fifth Circuit will have a massive head start in understanding and analyzing the issues presented. *See, e.g.*, *Def. Distributed*, 30 F.4th at 421 (appeal and mandamus action returning to the same Fifth

Circuit panel handling prior appeal in the case); *M. D. by next friend Stukenberg v. Abbott*, 929 F.3d 272, 275 (5th Cir. 2019) (case returning to same panel following remand to district court). As other courts have recognized, this fact alone weighs heavily against transfer. *See, e.g.*, *Capitol Records, LLC v. BlueBeat, Inc.*, No. CV 09-8030-JFW, 2010 WL 11549413, at *3 (C.D. Cal. Mar. 16, 2010) ("[T]his Court has presided over this action for four months, already issued a Temporary Restraining Order and Preliminary Injunction, set a trial date, and entered a detailed Scheduling and Case Management Order, . . . transfer would thus waste judicial resources"); *FTC v. Multinet Mktg., LLC*, 959 F. Supp. 394, 395–96 (N.D. Tex. 1997).

Moreover, these changed circumstances were not before the Magistrate Judge when he recommended transfer last December. Dkt. 31, Report and Recommendation. As an initial matter, the Magistrate was not considering a case that had proceeded in this region for more than a year and that the Fifth Circuit had already pored over. In any event, the Magistrate Judge's view of the local Plaintiffs' stake in the litigation was colored by his belief that the Market had descended into an online gambling operation. Dkt. 33-1, Hr'g Tr. at 28, 48, 69-72. The Fifth Circuit rejected that mistaken impression, recognizing both the "significant reliance interests" of the Austin-based trader Plaintiffs, *Clarke*, 74 F.4th at 641, and the academic value that the Market provides, *id.* at 639-40, 643.[1]

[1] The Magistrate also focused heavily on the CFTC's arguments that Victoria University of Wellington, New Zealand—the addressee of the no-action letter that the Fifth Circuit found to be a license—was the only entity having any business challenging the CFTC's actions. Dkt. 31, Report at 5-6. According to the Magistrate Judge, New Zealand would be a better venue than Austin, given the Magistrate Judge's view that Plaintiffs probably had no standing to challenge the CFTC's behavior with regard to the license. *Id.* at 7 n.4. The CFTC tried that same argument in the Fifth Circuit, which resoundingly rejected it. *Clarke*, 74 F.4th at 639-40.

## II. The Plaintiffs' Choice of Forum Weighs Against Transfer

The Fifth Circuit long has held that deference must be given to a plaintiff's choice of forum. *See In re Volkswagen*, 545 F.3d at 315 ("[T]he plaintiff's choice [of forum] should be respected."); *Peteet v. Dow Chem Co.*, 868 F.2d 1428, 1436 (5th Cir. 1989) ("the plaintiff is generally entitled to choose the forum"); *Tenneco Oil Co. v. EPA*, 592 F.2d 897, 900 (5th Cir. 1979) ("[I]n the absence of unusual circumstances compelling transfer, courts have not exercised their inherent power to transfer to disturb a party's choice of forum."); *Menendez Rodriguez v. Pan Am. Life Ins. Co.*, 311 F.2d 429, 434 (5th Cir. 1962) ("[T]he plaintiffs' privilege to choose, or not be ousted from, his chosen forum is highly esteemed."). In line with that deference, the Fifth Circuit has instructed the district courts to respect the plaintiff's chosen forum unless the movant shows the transferee venue is "*clearly* more convenient." *Def. Distributed*, 30 F.4th at 433 (emphasis added); *see also Mateos*, 919 F. Supp. 2d at 820-21 (Ezra, J.).

In this case, the lead Plaintiff chose to file this lawsuit in Austin, where he and five other Plaintiffs reside, as Congress specifically authorized him to do. 28 U.S.C. § 1391(e)(1)(C); *see also* Charles A. Wright & Arthur R. Miller, 14D Fed. Prac. and Proc. § 3815 (4th ed. 2022) (noting that Congress found the idea of forcing all claims against D.C.-based federal agencies into D.C. District Court to be "quite unsatisfactory" and explicitly authorized plaintiffs to sue federal agencies in the jurisdiction in which they live).

As discussed below, there are no facts demonstrating that the District of Columbia is clearly more convenient, so the Plaintiffs' chosen forum should be respected. *See Def. Distributed*, 30 F.4th at 433-43 (granting writ of mandamus because defendant had not shown that transferee venue was clearly more convenient).

## III. The Private and Public Interest Factors Weigh Against Transfer

Courts in the Fifth Circuit weigh private and public interest factors to make transfer decisions. *In re Volkswagen*, 545 F.3d at 315. The CFTC argues that three of the eight private and public interest factors warrant transfer to the District of Columbia. Dkt. 50, Mot. at 9-15. Its arguments fall well short of its "significant burden" of demonstrating the District of Columbia would be more *clearly* more convenient. *In re Volkswagen*, 545 F.3d at 314 n.10.

### A. The Private Interest Factors Favor Retaining the Case in the Western District of Texas

The private interest factors are: "(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive." *In re Planned Parenthood Fed'n of Am., Inc.*, 52 F.4th 625, 630 (5th Cir. 2022). The CFTC only argues that the fourth factor supports transfer. To the contrary, the private interest factors counsel keeping this case in this District.

Much of this case stems from the Administrative Procedure Act. And cases under the APA rely heavily on the written administrative record. The Commission does not suggest that some phalanx of agency officials will be headed to Texas to testify, seeking to explain themselves after the fact. That rarely works well, as "an agency must defend its actions based on the reasons it gave when it acted." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020). As a result, in APA cases generally speaking, the law of transfer is clear: The fact that the federal Government decision challenged was one made in the Nation's capital is irrelevant to the transfer analysis. *See Permian Basin Petroleum Ass'n v. Dep't of the Interior*, No. MO-14-CV-050, 2015 WL 11622492, at *2 (W.D. Tex. Feb. 26, 2015) (finding that private interest factors . . . [were] neutral" when case would be "decided on the administrative record and cross-summary

judgment motions"); *Ron Peterson Firearms, LLC v. Jones*, No. 11-CV-678, 2012 WL 12863342, at *3 (D.N.M. Feb. 16, 2012) (same).

In fact, if there is any evidence relevant to the transfer analysis to be offered, much of it resides in Austin. Standing and injury evidence will come primarily from lead Plaintiff and Austin-resident Kevin Clarke who has been studying the distortions in the marketplace due to the agency's decision to require premature liquidation of contracts and who chronicles the injuries to traders from the agency's decision. Dkt. 12-2, Dec. of Kevin Clarke, at 31-32; Dkt. 23-2, Dec. of Kevin Clarke, at 2-4; Dkt. 30-3, Dec. of Kevin Clarke, at 2-3.

More importantly, the CFTC has not demonstrated that *any* critical evidence will come from the District of Columbia. The CFTC cannot just wave its hands and say its decision was made in Washington so it should be challenged there. It instead "has the burden to establish good cause, which requires an *actual showing* of the existence of relevant sources of proof, *not merely an expression that some sources likely exist in the prospective forum*," such that transferring the case there would make the litigation clearly more convenient. *See Def. Distributed*, 30 F.4th at 434 (emphasis added); *see also Texas v. United States Dep't of Homeland Sec.*, No. 6:23-CV-00007, 2023 WL 2457480, at *5, --- F. Supp. 3d. ---- (S.D. Tex. Mar. 10, 2023) (holding that the private interest factors cut against transfer when the defendants "pointed to no evidence that [would] be unavailable in an electronic format").

The CFTC certainly tries to skip this required analysis by invoking the words "locus of operative facts." Mot. at 8-11.

But the "locus of operative facts" is not an independent factor to be considered as part of the transfer analysis. It is only relevant insofar as it is a proxy for determining the location of the witnesses and evidence. *See UniFirst Corp. v. Protein Prods., Inc.*, No. 4:13CV114, 2014 WL

1225657, at *2 (N.D. Miss. Mar. 25, 2014) (explaining that assertions about the "locus of operative facts" are irrelevant without a showing of specific evidence more conveniently evaluated in the proposed transferee forum).

Nor does the location of counsel support a motion to transfer. Dkt. 50, Mot. at 11-12. The Fifth Circuit has held, in no uncertain terms, that "the convenience of counsel is not a factor to be assessed in determining whether to transfer a case under § 1404(a)." *In re Volkswagen AG*, 371 F.3d 201, 206 (5th Cir. 2004) (citing or *In re Horseshoe Ent.*, 337 F.3d at 434). So has this Court—on multiple occasions. *See Mateos*, 919 F. Supp. 2d at 823 (Ezra, J.); *Piernik v. Collection Mgmt. Co.*, No. 5:17-CV-320-DAE, 2018 WL 1202972, at *6 (W.D. Tex. Jan. 25, 2018) (Ezra, J.). The CFTC—litigating this issue for the second time now—either has overlooked these precedents or has chosen to ignore them entirely. In any event, relying on the convenience of counsel would constitute reversible error. *In re Volkswagen AG*, 371 F.3d at 206 ("[R]eliance on the location of counsel as a factor to be considered in determining the propriety of a motion to transfer venue was an abuse of discretion.").

**B. The Public Interest Factors Weigh Against Transfer**

The public interest factors are: "(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law." *Planned Parenthood*, 52 F.4th 625 at 630. In the wake of the Fifth Circuit's decision, all of these factors cut against transfer.

**1. Following the Fifth Circuit's Decision, the Third and Fourth Public Interest Factors Favor Retaining the Case in This District**

As the CFTC recognizes, the Fifth Circuit's "orders or holdings . . . are now part of the case." Dkt. 50, Mot. at 3. It nevertheless insists that the third and fourth public interest factors—

the familiarity of the forum with the law that will govern the case and the avoidance of unnecessary problems of the application of foreign law—are neutral. Dkt. 50, Mot. at 14. Not so.

Transferring this case now would require a district court in the District of Columbia, and then potentially the D.C. Circuit, to apply the Fifth Circuit's decision as law of the case. *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1516 (10th Cir. 1991). This Court and the Fifth Circuit are much more familiar with Fifth Circuit law and better situated to determine how the law of this case fits within it. As this Court has recognized, a history of litigation in the courts of this region and those courts' resulting familiarity "with the federal law that would govern [the] case" weighs against transfer. *Healthpoint*, 939 F. Supp. 2d at 694-95 (Ezra, J.).

Indeed, it is the Fifth Circuit's common practice to assign an appeal of final judgment to the same panel of three judges that thoroughly examined a prior mandamus petition or an interlocutory appeal closely wrapped with the merits. *See, e.g.*, *Def. Distributed*, 30 F.4th at 421; *M. D. by next friend Stukenberg*, 929 F.3d at 275. By contrast, an appeal from a decision in the District of Columbia would waste the Fifth Circuit panel's existing facility with *the facts and law* of this case. Those three D.C. Circuit judges would have to get up to speed and reconcile their own precedents with the Fifth Circuit's prior opinion. This is the paradigmatic "unnecessary problem[ ] with the application of foreign law" that cuts against transfer.

This Court should deny transfer to prevent the scrambled mess of several jurisdictions' law the CFTC is hoping for. That mess may be better for the CFTC than the long odds it faces in the courts of the Fifth Circuit. But it is not good for the judicial system.

**2. The CFTC Incorrectly Argues that Court Congestion Favors Transfer**

The CFTC argues that transfer is warranted because courts in the District of Columbia are less congested than the courts in this District. Dkt. 50, Mot. at 13-14. This argument is not correct as a matter of fact and far from sufficient to justify transfer as a matter of law.

The CFTC spilled significant ink on the caseload of this Court, and the Magistrate Judge focused heavily on concerns about a comparatively overburdened Western District in his report and recommendation. Dkt. 31, Report at 4-5. But this Court in particular has rejected such heavy reliance on relative court congestion as a basis for transferring a case. As this Court has explained on several occasions, "[c]ourt congestion is considered the 'most speculative' of the factors, since 'case-disposition statistics may not always tell the whole story.'" *Healthpoint*, 939 F. Supp. 2d at 693 (Ezra, J.) (quoting *In re Genentech, Inc.,* 566 F.3d 1338, 1347 (Fed. Cir. 2009)); *see also Chase*, 2019 WL 5847879, at *7 (Ezra, J.) (same); *Vassallo v. Goodman Networks, Inc.*, No. 5:14-CV-743-DAE, 2015 WL 502313, at *5 (W.D. Tex. Feb. 5, 2015) (Ezra, J.) (same); *see also*, *e.g.*, *Koss Corp. v. Apple Inc.*, No. 6-20-00665-ADA, 2021 WL 5316453, at *12 (W.D. Tex. Apr. 22, 2021) (stating that court congestion "should not alone outweigh all th[e] other factors"); *Gentex Corp. v. Meta Platforms, Inc.*, No. 6:21-cv-00755-ADA, 2022 WL 2654986, at *9 (W.D. Tex. July 8, 2022) (same).

In all events, the CFTC misapplies the congestion factor. The agency argues that the District of Columbia needs to serve as a relief valve for this Court, because the statistics show that there are 801 weighted filings per judge in this District versus 276 in the District of Columbia. Dkt. 50, Mot. at 13-14 (citing Administrative Office of the U.S. Courts, U.S. DISTRICT COURTS: COMBINED CIVIL AND CRIMINAL FEDERAL COURT MANAGEMENT STATISTICS (June 30, 2023), https://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2023/06/30-1); *see also* Dkt. 31, Report at 4-5 (stressing comparison of weighted filings per judge). But weighted filings is not the relevant statistic in determining court congestion. The key statistic is the "speed with which a case can come to trial and be resolved." *EcoFactor, Inc. v. Resideo Techs., Inc.*, No. W-22-CV-00069-ADA, 2022 WL 13973997, at *9 (W.D. Tex. Oct. 21, 2022); *see also Koss*

*Corp.*, 2021 WL 5316453 at *12 (same). As the CFTC concedes, Dkt. 50, Mot. at 13 n.3, this statistic weighs against transfer: The courts in this District bring civil cases to trial in approximately 26 months on average, whereas the courts in the District of Columbia bring civil cases to trial in approximately 53 months on average. Administrative Office of the U.S. Courts, U.S. DISTRICT COURTS: COMBINED CIVIL AND CRIMINAL FEDERAL COURT MANAGEMENT STATISTICS (June 30, 2023). At most, when the incumbent court has more cases per judges but resolves cases more quickly than the proposed transferee court, the court congestion factor is neutral. *See Permian Basin*, 2015 WL 11622492 at *2 (finding the court-congestion neutral when plaintiffs' chosen forum resolved cases faster than proposed transferee venue despite larger caseload).

**3. This Court and the Fifth Circuit Have a Significant Local Interest in this Case**

There is only one way for the CFTC to argue that the courts of this region have no significant local interest in this case: By completely ignoring the traders and academics thoroughly injured by the agency's arbitrary behavior. The Fifth Circuit already has scolded the CFTC for doing so. *Clarke*, 74 F.4th at 641-42, 644. This Court should put a final stop to it.

As the Fifth Circuit held, the CFTC took direct aim at "investors and traders [being] able to see their contracts through and realize any gains from having predicted events correctly." *Clarke*, 74 F.4th at 643. The Fifth Circuit chronicled how, even before it issued its injunction pending appeal, Austin-based Plaintiffs like Kevin Clarke "were *already* undergoing harm," *id.*, "with the CFTC's prohibition on new markets and the impending shutdown order causing market distortions and a significant withdrawal of funds," *id.* at 640.

The CFTC's "renewed motion" to transfer, on this score, is just a retread of its original motion. It contains no analysis of the Fifth Circuit's extensive holdings on the harm to trader

plaintiffs in this District. Dkt. 50, Mot. at 13. The CFTC goes so far as to refer to the traders and academics' injuries as "downstream losses," a back of the hand that was all over the CFTC's appellate briefs and that was rejected by the Fifth Circuit. *Id.* at 9.

Other Fifth Circuit precedent also completely blocks the CFTC's argument. The Fifth Circuit has been clear: When a government actor, projects itself across state lines into Texas and causes harm to individuals in Texas, Texas courts have a significant interest in assessing and redressing the impacts of the action. *See Def. Distributed*, 30 F.4th at 435-36. That impacts of the CFTC's decisionmaking were experienced by traders nationwide does not weigh in favor of transfer because the trader and academic Plaintiffs were harmed in Austin. *See Planned Parenthood*, 52 F.4th at 631 (finding that one Texas district had no more interest than another when impacts of defendants' alleged actions experience statewide); *see also Texas*, 2023 WL 2457480, at *6 (in a case with "national implications," "the proposed transferee venues have no more interest in having [the] case decided there than in [the district the Plaintiffs chose]"). In addition, the courts of this region have a significant local interest in ensuring that the law of the Fifth Circuit—now applied in detail to and governing this case—is faithfully carried out through final judgment. Placing that stewardship in the hands of a new stack of courts, not as invested in carefully implementing the analysis and holdings provided by the Fifth Circuit, would be contrary to that intense local interest.

## IV. Contrary to the CFTC's Arguments, a Southern District of Florida Opinion Should Not Guide the Way for this Court

Against all of the foregoing, the CFTC leans hard on a case decided by a district court more than a thousand miles outside of the Fifth Circuit. Dkt. 50, Mot. at 9-11; *see also* Report at 6-7, Dkt. 31 (discussing *Hight v. United States Department of Homeland Security*, 391 F. Supp. 3d 1178 (S.D. Fla. 2019)). This Court should not do the same.

The Southern District of Florida placed paramount weight on where the Government decision being challenged was made. The law of this jurisdiction, however, requires a movant to show specific pieces of evidence that will be clearly more conveniently presented in another court. *Def. Distributed*, 30 F.4th at 434. The CFTC has done none of that. And *Hight* never grapples with the focus of an APA case on the written administrative record, transmitted to this Court with the click of a button. If the *Hight* analysis were correct, the Government could force just about any challenge to its decisions to Washington. *See Behring Reg'l Ctr. LLC v. Wolf*, No. 20-cv-09263-JSC, 2021 WL 1164839, at *3 (N.D. Cal. Mar. 26, 2021) (under the same argument's "reasoning nearly all APA action should be decided in the District of Columbia, but there is no such rule"). But Congress explicitly authorized aggrieved plaintiffs to sue federal agencies in the location where they reside. 28 U.S.C. § 1391(e)(1)(C).

Moreover, in *Hight*, the plaintiff's *only* connection to the Southern District of Florida was his residence. 391 F. Supp. 3d at 1185. The federal licensing action at issue concerned the plaintiff's "work as a pilot on Lake Ontario and the St. Lawrence Seaway," quite literally on the other latitudinal side of the country from the Southern District of Florida. *Id.* Not so here. Six Plaintiffs live in Austin, invested in Market contracts or studied Market data in Austin, and are having the value of that work destroyed in Austin. FAC ¶¶ 21, 28–29, 32, 34.[2]

[2] The Commission's string cite of transfers in APA cases is also inapposite. Dkt. 50, Mot. at 11. *See, e.g.*, *Nat'l Ass'n of Life Underwriters v. Clarke*, 761 F. Supp. 1285 (W.D. Tex. 1991) (transferring case because no plaintiff lived in the Western District after Texas plaintiffs were dismissed for lack of standing); *Munro v. U.S. Copyright Off.*, No. 6:21cv00666, 2022 WL 3566456 (W.D. Tex. May 24, 2022) (considering the *different* legal issue of whether venue was proper in the Western District *at all* because the plaintiff did not reside in the district); *Pulijala v. Cuccinelli*, No. 1:20cv00822, 2021 WL 9385877 (N.D. Ga. Jan. 22, 2021) (reviewing alien investor suit where "none of the remaining plaintiffs reside[d] in the Northern District of Georgia," and none of them "invested in projects located in the Northern District of Georgia"); *Holovchak v. Cuccinelli*, No. 20-210-KSM, 2020 WL 4530665 (E.D. Pa. Aug. 6, 2020) (considering transfer

Instead of creating new law in this District by importing the *Hight* analysis, this Court should follow a recently-decided case from within the Fifth Circuit, *Texas v. United States Department of Homeland Security*, 2023 WL 2457480, at *1. That case also involved a challenge to a government decision made in the District of Columbia that had nationwide effects. *Id.* at *5. The government moved to transfer the case to Washington using the CFTC's same arguments here. *Id.* The Court declined: Because the case involved government decisionmaking that had nationwide impacts including on plaintiffs in the plaintiffs' chosen forum and involved resolution on the administrative record, there was no reason to disturb the plaintiffs' selected forum. *Id.*; *see also Anunciato v. Trump*, No. 20-CV-07869-RS, 2020 WL 13547186 (N.D. Cal. Dec. 23, 2020) (reaching similar conclusion).

**CONCLUSION**

For the foregoing reasons, the Court should deny CFTC's motion to transfer venue.

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where both parties *agreed* that their claims should be transferred to the District of Columbia).

Even further afield is the Commission's citation of *Gault v. Yamunaji*, L.L.C., No. A-09-CA-078-SS, 2009 WL 10699952, at *5 (W.D. Tex. Apr. 17, 2009). Dkt. 50, Mot. at 9-10. *Gault* did not concern a decision of a federal Government agency; it was a wholly private suit by individual plaintiffs against a corporate defendant. And the Court was not deciding whether to transfer the case, but instead whether there was proper venue. As a suit between private parties, the court analyzed venue under Section 1391(b) of Title 28, *not 1391(e), which applies to suits against a federal Government agency*. While 1391(e) allows suit where any plaintiff resides, 1391(b) generally allows suit only where any defendant resides or a substantial part of the events or omissions giving rise to the claim occurred.

Dated: October 27, 2023

Respectfully submitted,

*/s/ Michael J. Edney*

Michael J. Edney
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
T: (202) 778-2204
medney@huntonak.com

John J. Byron
STEPTOE & JOHNSON LLP
227 West Monroe Street
Suite 4700
Chicago, Illinois 60606
T: (312) 577-1300 / F: (312) 577-1370
jbyron@steptoe.com

*Attorneys for Plaintiffs Kevin Clarke, Trevor Boeckmann, Harry Crane, Corwin Smidt, Aristotle International, Inc., Predict It, Inc., Michael Beeler, Mark Borghi, Richard Hanania, James D. Miller, Josiah Neeley, Grant Schneider, and Wes Shepherd*

**CERTIFICATE OF SERVICE**

I hereby certify that on this twenty-seventh day of October 2023, a copy of the foregoing was filed electronically and was served on counsel of record through the Court's electronic case filing/case management (ECF/CM) system.

*/s/ Michael J. Edney*
Michael J. Edney

*Attorney for Plaintiffs*