No. 24-50079

IN THE

United States Court Of Appeals
For The Fifth Circuit

IN RE: 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,
Petitioners,

COMMODITY FUTURES TRADING COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF MANDAMUS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, NO. 1:22-CV-00909-DAE

COMMODITY FUTURES TRADING COMMISSION'S RESPONSE IN OPPOSITION TO THE PETITION FOR WRIT OF MANDAMUS

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February 9, 2024

CERTIFICATE OF INTERESTED PERSONS

No. 24-50079

IN RE KEVIN CLARKE, ET AL.,
Plaintiffs-Petitioners,

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary since the issue before the Court is whether the district court, in its transfer order, committed a clear abuse of discretion in applying established legal standards for transfer to undisputed facts. In addition, it is in the interest of both parties and the courts for this petition to be resolved as promptly as practicable.

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PRELIMINARY STATEMENT

This petition challenges the Western District of Texas's decision to transfer a case brought by two District of Columbia based corporations and eleven individuals from across the United States, who contest the withdrawal of a 2014 no-action letter provided to a foreign university concerning the unregistered operation of an options trading exchange. Plaintiffs frame this venue dispute as precedent-setting, with nationwide implications under the Administrative Procedure Act, suggesting that its outcome would dictate the venue for all future APA challenges to government action. This portrayal misrepresents the scope of the issue before the court on mandamus, which is simply whether the district court clearly abused its discretion in applying established standards for venue transfer to the facts here. Plaintiffs' portrayal ignores the fact that a ruling on abuse of discretion inherently has limited precedential effect in different factual scenarios. More importantly, Plaintiffs ignore the decisive factor underlying the district court's ruling, which is that, in this case, the regulated business was operated by Plaintiffs physically located in the District of Columbia. This fact distinguishes this case from almost all other APA cases challenging government regulation, including all cases cited in the petition for mandamus. It belies the claim that allowing a transfer in this particular case will somehow undermine the power of this Court, or other courts outside the District of Columbia, to review government

action, nationwide or otherwise.

Contrary to the Plaintiffs' assertions, the CFTC does not contend that all APA challenges must henceforth be adjudicated in the District of Columbia. It contends only that the facts here, on balance, justify transfer to that district under the standards established by this Court for venue transfer under 28 U.S.C. § 1404(a). These standards are designed to make venue determinations independent of issues of substantive law and of the subjective preferences of both plaintiffs and defendants. As a result, claims of forum shopping by either party were properly treated as irrelevant by the district court in its analysis of venue factors. For the same reason, the fact that this Court ruled in Plaintiffs' favor on certain issues in an interlocutory appeal does not preclude transfer if venue is proper in another district. The Plaintiffs' petition, stripped of its embellishments and accusations of improper motives, seeks an unwarranted rewrite of the law rather than addressing the legal issue. The CFTC respectfully requests the Fifth Circuit deny the Plaintiffs' petition for writ of mandamus, reinforcing the correct application of venue to the specific circumstances of this case.

BACKGROUND AND PROCEDURAL HISTORY

This case concerns the claimed effect of the withdrawal of a 2014 no-action letter on the operations of the PredictIt Market ("PredictIt"), an unregistered options trading exchange. PredictIt is operated by two companies, Aristotle

International, Inc. ("Aristotle") and Predict It, Inc., located in Washington, D.C. Pet. At 3; A197.[1] PredictIt provides services over the internet to thousands of traders throughout the United States and elsewhere. A190. In addition, according to Plaintiffs, academics and others in a variety of locations use PredictIt data for teaching and research. The 2014 no-action letter in question was issued to Victoria University of Wellington, New Zealand, by the staff of the Division of Market Oversight of the Commodity Futures Trading Commission, a federal agency headquartered in Washington, D.C. Victoria University has not joined the suit challenging the withdrawal of the letter.

The original complaint in this case was filed in the United States District Court for the Western District of Texas on September 9, 2022. The Plaintiffs were the two Washington, D.C. firms that operated PredictIt along with two individuals who traded on PredictIt and two individuals who used PredictIt data. Of the individuals, one apiece was located in New Jersey, Michigan, and New York. Only one plaintiff, Kevin Clarke, was located in the Western District of Texas. A117.

On September 20, 2022, eleven days after the case was filed and before any court made any substantive rulings, the CFTC filed a motion to transfer venue to

[1] References to "A" are to pages of the Plaintiffs' Appendix to Petition for Mandamus.

the District of Columbia. A10; Dkt. 8 (W.D. Tex.). In response, on October 6, 2022, Plaintiffs filed an amended complaint adding five additional individual plaintiffs from the Western District of Texas, along with two others, located in Massachusetts and Ohio. Dkt. 15 (W.D. Tex.) On December 12, 2022, a magistrate judge issued a report recommending transfer. Plaintiffs filed an objection on December 27, 2022. The district court never acted on the magistrate's recommendation. Eventually, on May 12, 2023, after the case was reassigned to a new district court judge, the district court denied the motion to transfer pending Plaintiffs' interlocutory appeal, but expressly without prejudice and subject to re-urging.

Meanwhile, on September 30, 2022, Plaintiffs moved for a preliminary injunction. As with the motion to transfer, the district court never ruled on Plaintiffs' motion. On December 23, 2022, Plaintiffs appealed what they described as the effective denial of their motion as a result of the delay in ruling. On July 21, 2023, this Court issued an opinion ordering the district court to issue a preliminary injunction, with the mandate issuing on September 12, 2023. *Clarke v. Commodity Futures Trading Comm'n*, 74 F.4th 627 (5th Cir. 2023). The parties did not present, and the Court did not discuss, issues pertaining to venue. *Id*.

Following the entry of this Court's preliminary injunction mandate on September 12, 2023, the CFTC filed a re-urged motion to transfer on October 13,

2023. Plaintiffs filed an opposition, but neglected to request that the district court stay its order in the event that the court should grant the motion. A24-44. On November 27, 2023, Plaintiffs filed a second amended complaint, substantially expanding the issues before the district court. A185-287. Subsequently, the district court did grant the motion to transfer, in an order signed on January 16 and docketed on January 17, 2024. Plaintiffs again failed to request a stay. The case was then transferred to the District Court for the District of Columbia and docketed there on January 19, 2024. Finally, on January 20, 2024, Plaintiffs moved for a stay of the transfer order, but by then it was too late.

STANDARD OF REVIEW

In this Circuit, review of district court rulings on transfer of venue under 28 U.S.C. § 1404(a) requires a petition for writ of mandamus. Such writs are "reserved for extraordinary circumstances." *In re TikTok, Inc.*, 85 F.4th 352, 356 (5th Cir. 2023). Among other requirements, the petitioner must demonstrate a "clear and indisputable" right to the writ. *Id*. In the context of a venue transfer, this requires a demonstration that the district court did not merely err but engaged in a "clear abuse of discretion" that produces a "patently erroneous" result. *In re Volkswagen of America, Inc.*, 545 F.3d 304, 309-10 (5th Cir. 2008).

The Circuit has also established substantive standards for venue transfer under 28 U.S.C. § 1404(a). It has identified four private interest and four public

interest factors that district courts must consider in evaluating transfer motions. *Volkswagen*, 545 F.3d at 315. The private interest factors include (1) relative ease of access to sources of proof; (2) availability of compulsory process to secure attendance of witnesses; (3) cost of attendance for willing witnesses; and (4) other practical problems relating to conduct of trial. *Id*. The public interest factors include (1) 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 application of foreign law. *Id*. When other factors are neutral, transfer of venue may be justified based on a limited number of the *Volkswagen* factors. *See TikTok*, 85 F.4th at 358. In evaluating the relevant factors, district courts have "broad discretion in deciding whether to order a transfer." *Volkswagen*, 545 F.3d at 311. While this discretion is not unlimited, this Court has stressed that "in no case will we replace a district court's exercise of discretion with our own…." *Id*. at 312.

ARGUMENT

I. The district court did not abuse its discretion, much less clearly abuse its discretion, since it applied this Court's standards for venue transfer to the facts in a reasonable way.

A. The district court correctly found that the factor of local interests favored transfer to the District of Columbia.

1. The district court applied the local interest factor to the facts of this case in a reasonable fashion.

One of the most important of the *Volkswagen* factors for evaluating motions to transfer is local interest in the injury alleged by plaintiffs. *E.g., Def. Distrib. v. Bruck,* 30 F.4th 414, 435 (5th Cir. 2022). In a case, like this one, with multiple plaintiffs in different judicial districts, identifying the district with the greatest local interest necessarily involves a balancing. The district court performed this balancing in a highly reasonable fashion and therefore did not abuse its discretion with respect to this factor.

In particular, the district court recognized that this case is about the regulation of an options exchange; and that the two entity plaintiffs that operate the exchange—and thus are most directly affected by the alleged wrongful regulatory action—are located in the District of Columbia: Indeed, Aristotle and PredictIt share a building on Pennsylvania Avenue, a mile from the local federal courthouse. The merits of any actions taken or not taken by the CFTC or its staff necessarily relate to the operations—and therefore the operators—of the exchange. And any impact on PredictIt traders or data users is downstream from the impact on the exchange and its operators. It was thus highly reasonable for the district court to give greater weight to the location of the entity plaintiffs than the location of the individual plaintiffs in applying the local interest factor.

Contrary to Plaintiffs' implication, the district court did not simply ignore

the allegations of injury to traders and data users located in the Western District of Texas. *See* A62, A69-70. Rather, the court reasoned that any such injury did not single out the impact of the alleged wrongful regulatory action on the Western District of Texas from its impact on traders and data users in all of the other districts where PredictIt provides services and data through the internet. *Id*. By contrast, the location of the operators of the exchange did single out a particular district as having a particularly strong connection to the alleged wrong. *Id*. It was therefore reasonable to base the local interest determination on the location of the latter plaintiffs. In giving greater weight to the location of the exchange operators, the district court properly applied a general principle articulated in the *Volkswagen* decisions—that, for venue purposes, lesser weight should be given to interests common to many or all judicial districts—even if the particular facts supporting transfer in *Volkswagen* were different from those supporting transfer in this case. *See* A69 ("local interest that 'could apply virtually to any judicial district or division in the United States' are disregarded in favor of particularized local interests", quoting *Volkswagen I*, 371 F.3d at 206; *Volkswagen II*, 545 F.3d at 318).

The district court's weighing of local interests is particularly reasonable because it follows the approach of this Court in *Def. Distrib.*, 30 F.4th at 435-36. *Def. Distrib.* concerned an Austin, Texas company, Defense Distributed, that produced computer files for the manufacture of guns using 3D printers, and

distributed them over the internet. 30 F.4th at 422. The attorney general of New Jersey took regulatory actions to block distribution of the files. *Id.* at 422-23. Defense Distributed sued the attorney general in the Western District of Texas but the district court transferred the case, in relevant part, to the District of New Jersey. *Id.* at 422-23. This Court held that the transfer was an abuse of discretion. *Id*. at 436-37.

A key consideration in *Def. Distrib.* was the location of the injury caused by the regulatory actions. 30 F.4th at 435. Although potential *users* of the files, who would be injured if regulation prevented them from making guns, were located in New Jersey and elsewhere, the Court held that the location of the injury was the location *of the company* that produced and distributed the computer files—the entity directly regulated by the government. *Id*. at 435-36. The Court did so even though potential users of the files, who would be injured if regulation prevented them from making guns, were located in New Jersey and elsewhere. *Id*. *Def. Distrib.* thus suggests that it would be an abuse of discretion *not* to transfer this case to the location of the businesses that operate the PredictIt exchange. At a minimum it shows that the district court's application of the local interest factor was not a clear abuse of discretion. *Def. Distrib.* also refutes Plaintiffs' claim that the local interest *Volkswagen* factor only applies to car accidents and the like, *see* Pet. at 29, since *Def. Distrib.* applied this factor in a case involving government

regulation of a company doing business nationally over the internet. 30 F.4th at 435-36.

The reasonableness of the balance reached by the district court is further supported by the fact that Plaintiffs include traders and data users from Massachusetts, Michigan, New York, New Jersey, and Ohio, as well as Texas; and Plaintiffs have made no allegations that Plaintiffs located in the Western District of Texas have suffered injury that differs in nature from Plaintiffs in these other locations. A195-198 at ¶¶ 31-45. Plaintiffs suggest that special consideration should be given to the location of so-called "lead Plaintiff" Kevin Clarke because he prepared declarations for the case. Pet. at 6. However, even assuming Clarke did much besides signing a paper in Texas, the key consideration for purposes of local interest is the location of the alleged injury, *Def. Distrib.*, 30 F.4th at 435, and Plaintiffs have not alleged any essential differences in the injury claimed for Clarke and that claimed for Plaintiffs and (non-Plaintiff PredictIt users) located outside the Western District of Texas.

2. The district court's ruling on local interest does not impair the ability of courts outside the District of Columbia to review actions by federal agencies located in Washington, D.C.

Plaintiffs argue that the district court's analysis of local interest, if affirmed, would make it difficult or impossible for federal courts outside the District of Columbia to review federal agency action, including, in particular, agency action

with national effects. Pet. at 26-28. This argument is patently false for an obvious reason. The decisive consideration in the district court's local interest analysis is that the only directly regulated entities in the case were located in Washington, D.C. A69-70. This fact distinguishes this case from virtually all regulatory cases heard by this Court or other courts outside the District of Columbia.[2] For example, in each of the Fifth Circuit cases reversing nationwide federal actions cited by Plaintiffs at pages 27-28 of their petition, the plaintiffs included regulated businesses located outside the District of Columbia, trade associations representing regulated businesses located outside the District of Columbia, and/or states other than the District of Columbia. *See Community Financial Services Association of America v. CFPB*, 51 F.4th 616, 623 (5th Cir. 2022), *cert. granted*, 143 S.Ct. 978, 215 L. Ed. 2d. 104 (2023); *Missouri v. Biden*, 83 F.4th 350, 359 n.1 (5th Cir. 2023); *Braidwood Mgmt., Inc. v. EEOC*, 70 F.4th 914, 919 (5th Cir. 2023); *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 872 (5th Cir. 2022); *BST Holdings, L.L.C. v. Occupational Safety & Health Admin., U.S. Dep't of Labor*, 17 F.4th 604, 610, n.5 (5th Cir. 2021); *Chamber of Com. v. U.S. Dep't of Lab.*, 885 F.3d 360, 363 (5th Cir. 2018). Giving weight for venue purposes to the

[2] Aristotle's location in Washington, D.C. appears to be an intentional choice to advance its unusual business. The firm's website describes it as providing political consulting services to presidents and congress members, among others, *see* aristotle.com, and boasts that Aristotle is "Headquartered on Capitol Hill." *See* aristotle.com/about/ (accessed Feb. 7, 2023).

location of regulated businesses in the District of Columbia is unlikely to restrict review of federal action by non-D.C. federal courts in the future, as well. The District of Columbia accounts for well under 1% of U.S. GDP, *see* A21, and the overwhelming majority of U.S. businesses and other organizations are located in other judicial districts.

Moreover, denial of mandamus in this case would not even rule out possible venue outside the District of Columbia in future cases involving D.C. businesses if the particular facts justified such venue. The district court here did not purport to establish a novel legal rule but merely applied the *Volkswagen* factors to the facts before it. Denial of mandamus would only require a determination that the district court did not clearly abuse its discretion and would not control the outcome of future cases with different facts.

Plaintiffs' argument that a ruling against them would restrict the remedial authority of federal courts outside the District of Columbia is thus plainly wrong.

B. The district court correctly found that the factor of relative court congestion favors transfer to the District of Columbia and that the private *Volkswagen* factors are neutral.

The district court correctly found that the factor of relative court congestion favors transfer to the District of Columbia and that the private *Volkswagen* factors are neutral for the reasons stated in the court's transfer order and the CFTC's briefing on the issue. A6, 47, 60. Plaintiffs' arguments to the contrary lack merit.

First, Plaintiffs argue that the relevant metric for measuring court congestion is time to trial. Pet. at 30. But, as the district court correctly found, this case is highly unlikely to go to trial since it involves Administrative Procedure Act review of agency action based on the record before the agency. A67; *see Delta Talent, LLC v. Wolf*, 448 F. Supp. 3d 644, 650 (W.D. Tex. 2020) ("[i]n the context of a challenge to an agency action under the APA, [s]ummary judgment is the proper mechanism for deciding, as a matter of law, whether an agency's action is supported by the administrative record and consistent with the APA standard of review.") (internal citation and quotation omitted). So other metrics favoring transfer are preferable in this case. Plaintiffs also suggest that the *Volkswagen* congestion factor is "speculative." Pet. at 31. That is not true here. The docket of this case reflects delays in ruling on time-sensitive motions, which the district court judge—someone in a position to know—has found are the result of court congestion. *See* A68-69.

Finally, Plaintiffs argue that the district court should have considered the private *Volkswagen* factors because an evidentiary hearing might be needed to resolve issues of standing. Pet. at 32-33. But there is no serious likelihood of this since courts in Administrative Procedure Act cases routinely resolve standing issues based on declarations, like those Plaintiffs have already submitted in this case. *See*, *e.g.*, *Securities Industry and Financial Markets Ass'n v. United States*

Commodity Futures Trading Comm'n, 67 F. Supp. 3d 373, 401-12 (D.D.C. 2014).

II. This Court's decision on Plaintiffs' motion for a preliminary injunction does not alter the conclusion that the district court acted within its discretion when it ordered a transfer of venue to the District of Columbia.

This court's decision on Plaintiffs' motion for a preliminary injunction, *Clarke v. Commodity Futures Trading Comm'n*, 74 F.4th 627 (5th Cir. 2023), does not alter the conclusion that the district court acted within its discretion in ordering transfer.

First, contrary to Plaintiffs assertion, there is nothing "unprecedented" about a federal circuit court of appeals addressing significant issues on appeal and later approving a transfer to a district court in a different circuit if transfer is warranted under the usual criteria. For example, in *DeKeyser v. Thyssenkrupp Waupaca, Inc.*, 735 F.3d 568, 570-72 (7th Cir. 2013), the Seventh Circuit reversed a grant of summary judgment, holding that the district court misapplied two complex federal statutes. The Court subsequently approved the transfer of certain plaintiffs to a district court outside the Seventh Circuit, partly on procedural grounds, but also because "there was nothing wrong" with the district court's exercise of discretion under section 1404(a). *DeKeyser v. Thyssenkrupp Waupaca, Inc.*, 860 F.3d 918, 922-23 (7th Cir. 2017). *See also*, *e.g.*, *In re Union Electric Co.*, 787 F.3d 903, 905, 908-910 (8th Cir. 2015) (finding no error of law in transfer from E.D. Mo. to S.D.N.Y. following earlier appeal); *Employers Insurance of Wausau v. Fox*

Entertainment Group, Inc., 346 Fed. Appx. 652, 653 (2d Cir. 2009) (finding arguments for mandamus "without merit" in context of transfer from S.D.N.Y. to C.D. Cal. following appeal addressing complex justiciability issues); *cf. Employers Insurance of Wausau v. Fox Entertainment Group, Inc.*, 522 F.3d 271 (2d Cir. 2008). Courts of appeals have also not hesitated to address substantive issues when necessary to decide appeals of preliminary injunctions in cases where an out-of-circuit transfer has already occurred but the transferor circuit retained jurisdiction over a pre-transfer interlocutory appeal. *E.g.*, *F.T.C. v. IAB Marketing Associates*, *LP,* 746 F.3d 1228, 1232-36 (11th Cir. 2014); *W S International, LLC v. M. Simon Zook, Co.* 566 Fed. Appx. 192, 195-96 (3d Cir. 2014) (ruling on pre-transfer preliminary injunction but finding that out-of-circuit transfer did not warrant discretionary exercise of mandamus jurisdiction). Thus, the fact that this Court has ruled on an interlocutory appeal of the denial of a preliminary injunction does not preclude transfer, even if the decision discussed substantive issues.

Cases cited by Plaintiffs on this point, Pet. at 18-19, do not alter this conclusion. None of the cases states that there is a rule precluding transfer after a court has made substantive rulings in a case. In each of the cited cases the court relied primarily on the usual transfer considerations, such as location of plaintiffs and convenience of witnesses, in denying transfer, unlike in this case where the relevant *Volkswagen* factors support transfer. Moreover, in *Capitol Records, LLC*

v. BlueBeat, Inc., 2010 WL 11549413 at *1 (C.D. Cal. Mar. 16, 2010); *F.T.C. v. Multinet Marketing, LLC*, 959 F. Supp. 394, 395-96 (N.D. Tex. 1997); and *GTE Sylvania Inc. v. Consumer Prod. Safety Comm'n*, 438 F. Supp. 208, 210 (D. Del. 1977), unlike here, the defendants did not move for transfer in a timely fashion; while in *Samsung Elecs. Co., Ltd. v. Rambus, Inc.*, 386 F. Supp. 2d 708, 725 (E.D. Va. 2005), the prior proceedings included a *trial*, not just a ruling on a preliminary injunction. The cases are thus clearly distinguishable.

Second, contrary to Plaintiffs' assertions, Pet. at 18, any considerations of judicial economy associated with this Court's opinion do not outweigh the factors supporting transfer. The effort put into the opinion will not be wasted since law of the case principles apply to decisions by courts in transferor circuits even after transfer. *See*, *e.g.*, *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988); *Crews & Assocs., Inc. v. United States*, 458 F.3d 674, 677 n.2 (7th Cir. 2006). This is not a case in which there has been significant fact finding, so this Court's familiarity with the case primarily involves issues of law, which are spelled out in the Court's opinion. *See generally TikTok*, 85 F.4th at 365-66 (stating, in context of state law issues, that differences in familiarity with law are irrelevant to transfer of venue unless law in one region has "exceptionally arcane features" that "defy comprehension" in other regions); *New Hope Power Co. v. United States Army Corps of Engineers*, 724 F. Supp. 2d 90, 97 (D.D.C. 2010)

(stating that all federal courts are able to interpret the Administrative Procedure Act). In any event, the only appellate *judgment* in *Clarke* was a directive to issue a preliminary injunction. Resolution of the case will require further district court proceedings so it was reasonable for the district court's transfer ruling to focus on issues of district court congestion and identifying the judicial district with the greatest local interest in the case. The transfer order's focus on ongoing district court proceedings was particularly appropriate because Plaintiffs, on November 27, 2023—after appellate proceedings were concluded and after the CFTC re-filed its motion for transfer—filed a second amended complaint substantially expending the scope of the factual, legal, and remedial issues the district court will need to consider. A185-287.

This conclusion is further supported by *TikTok*, 85 F.4th 352. In *TikTok*, a district court denied a motion for transfer over a year after it was filed. *Id*. at 357. *TikTok* held that, because of the delay in ruling, it was improper for the district court to rely on knowledge about the case the court had acquired during the interim period as grounds for denying transfer. *Id*. at 362-63. In this case, the CFTC, as described above, moved for transfer on September 20, 2022, and did not receive even an interim ruling (denial without prejudice) until May 12, 2023, when Plaintiffs' interlocutory appeal was already pending. The CFTC re-filed on October 13, 2023, after issuance of the appellate mandate, but did not obtain a

transfer ruling until January 19, 2024. While *TikTok* involved knowledge acquired by a district court, not an appellate court, its logic suggests that any evaluation of judicial economy in connection with transfer needs to consider the timing of the CFTC's motion and the delay in ruling on it.

Third, Plaintiffs' argument that the *Clarke* appellate mandate barred transfer should be rejected because it rests on an implausible interpretation of this Court's use of the word "it." Pet. at 19-20. Venue was not briefed or argued in *Clarke* and the opinion contains no analysis of the subject. In this context, the decision language remanding "for the district court to enter a preliminary injunction while it considers Appellants' challenge to the CFTC's actions" is obviously standard remand language and not a preemptive ruling on transfer. *See* 74 F.4th at 633. The same is true of the use of the word "its" in the order language quoted in the petition. Pet. at 19. Similarly, and contrary to Plaintiffs' assertion, Judge Ho's concurring statement that "we need not reach a definitive conclusion on [final agency action] at this time," 74 F.4th at 644, is merely a restatement of the legal standard for review of a preliminary injunction and says nothing about venue.

Finally, Plaintiffs' argument about "residual jurisdiction" rests on cases that have nothing to do with venue or transfer thereof. *Int'l Union v. OSHA*, 976 F.2d 749 (D.C. Cir. 1992) and *Am. Trucking Ass'ns, Inc. v. ICC,* 669 F.2d 957 (5th Cir. 1982) each deal with an issue of appellate jurisdiction, specifically whether a court

that has entered a final judgment and order directing a federal agency to take a certain action or actions retains jurisdiction to enforce the judgment following remand. *Int'l Union*, 976 F.2d at 750; *Am. Trucking*, 669 F.2d at 960. The cases are entirely silent on issues of venue and transfer. They also are distinguishable because:

(1) In this case, there has been no final judgment. The only appellate judgment has been an interlocutory order to the district court to enter a preliminary injunction, which has been fully complied with.

(2) *Int'l Union* and *Am. Trucking* involved specialized review statutes authorizing direct review of agency action by appellate courts. *See* 29 U.S.C. § 660(a) (OSHA statute); *Am. Trucking Ass'ns, Inc. v. ICC*, 659 F.2d 452, 456 n.1 (5th Cir. 1981). In this case, the *Clarke* order was a conventional appellate mandate to a district court, which is responsible for the conduct of the litigation in the first instance, so long as it complies with this Court's preliminary injunction order, and otherwise acts within the scope of its discretion, as the district court did here.

III. Plaintiffs' claim of forum shopping by the CFTC is irrelevant to the issue of whether the district court abused its discretion since the court's transfer decision was fully justified by the neutral factors set forth by this Court in *Volkswagen.*

Plaintiffs' accusations of forum shopping, hearsay attributed to the agency's General Counsel, and speculative assertions about the CFTC's motives and

strategy, Pet. at 20-22, are irrelevant to the issue before this Court, which is not the presumed mindset of CFTC counsel but whether the *district court* clearly abused its discretion in ordering transfer. *Volkswagen*, 545 F.3d at 309-10. The district court ignored Plaintiffs' accusations about CFTC counsel's motives, and it also did not consider Plaintiffs' subjective motivation for filing its complaint in a district with only a tenuous connection to the dispute. If it had, *that* would have been an abuse of discretion. Instead, the district court applied the factors identified as relevant by this Court in *Volkswagen*, and it did so in a reasonable way. *See* Argument I, *supra*.

In ruling on a motion to transfer, it is the task of the Court to filter out any substantive law preferences of the parties and decide the issue based on neutral principles like those set forth in *Volkswagen*, 545 F.3d at 315, which pointedly does not mention favorability of local precedent as either a positive or negative factor. "A difference in law between the circuits is not a valid reason to transfer or not transfer a case." *Johnson v. Russell Invs. Tr. Co.*, 2022 WL 782425 at *4 (W.D. Wash. March 15, 2022). As a result, "A plaintiff may not resist the transfer of his action to another district court on the ground that the transferee court will or may interpret federal law in a manner less favorable to him." *H.L. Green Co. v. MacMahon,* 312 F.2d 650, 652 (2d Cir. 1962). The district court transfer order adhered to these principles.

This Court's decision ordering a preliminary injunction does not alter this conclusion. It is undisputed that this decision must be treated as law of the case in the District of Columbia. But Plaintiffs go beyond this, and argue, in essence, that, having obtained a favorable ruling on certain issues from a particular court, they are now entitled to have all future rulings in the case made by that same court regardless of whether venue is otherwise proper. There is no authority for this proposition and it is inconsistent with the principle, implicit in *Volkswagen*, that venue should be decided independently of issues of substantive law.

Plaintiffs cite summary orders in *Cohen v. Waxman*, 421 Fed. Appx. 801 (10th Cir. 2010), and *Utterback v. Trustmark Nat'l Bank*, 716 Fed. Appx. 241 (5th Cir. 2017), for the proposition that transfer should not be granted at the behest of a party against whom an adverse ruling has been handed down, but neither case supports this proposition. *Cohen* held that "[o]nly a neutral reason—one not designed to favor one party over another—can justify a transfer." *Id*. at 803-04. But reliance on neutral reasons is precisely the course followed by the district court in this case. By contrast, in *Cohen* there were no neutral reasons supporting transfer. *Id*. In *Utterback*, a ruling against the party seeking transfer was a factor, but the primary ground for denial was that the movant, in sharp contrast to the CFTC, sought transfer two years too late. 716 Fed. Appx. at 244-45. And, as in *Cohen* and unlike this case, there were no neutral factors supporting transfer. *Id*.

Plaintiffs' forum shopping argument thus does not demonstrate an abuse of discretion by the district court.

IV. This Court should not seek return of this case from the District Court for the District of Columbia without first addressing the merits of the transfer.

Plaintiffs base their argument for the extraordinary relief of ordering mandamus before even reaching the merits on the precedent set by *In re Nine Mile Ltd.*, 673 F.2d 242 (8th Cir. 1982), a single Eighth Circuit opinion decided over thirty years ago. This reliance not only overlooks the evolution of jurisprudence over the last thirty years, including the adoption of electronic filing in every federal district court, but also disregards the subsequent decision of this Court that provided a guideline for litigants faced with a pending motion to transfer venue pursuant to 28 U.S.C. § 1404(a). *See Defense Distributed v. Platkin*, 55 F.4th 486, 492 (5th Cir. 2022) (stating "there was a solution to the jurisdictional morass in which plaintiffs found themselves: They could have moved for a stay of the district court's transfer order before the case was transferred.")

Plaintiffs' argument also ignores the not one, but two chances they had to seek a stay following the CFTC's motions to transfer venue filed in 2022 and 2023. A6, A10. This procedural pathway was not an obscure trail, but a well-established road, signposted by this Court's own opinion. *Id*. The Plaintiffs' decision to bypass these two opportunities in favor of a "wait-and-see" approach followed by

an emergency petition for mandamus relief without a ruling on the merits not only flouts the possibility of an adverse ruling but also is inconsistent with the proper relationship between this Court and the district court on a matter that is within the discretion of district court absent extraordinary circumstances. *See Volkswagen,* 545 F.3d at 309-10.

Asking this Court to "[q]uickly issu[e] the requested partial mandamus", Pet. at 17, without first determining whether the district court's transfer decision was incorrect undermines the deference that appellate courts traditionally accord district courts in managing their dockets. It also would put the District Court for the District of Columbia in an untenable position since the only existing court ruling on the merits of transfer strongly supports venue in the District of Columbia. Plaintiffs' motion for a premature "partial" writ of mandamus therefore should be denied.

CONCLUSION

For the foregoing reasons, Plaintiffs' Petition for Mandamus should be denied.

Dated: February 9, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2024, I caused the foregoing Response in Opposition to the Petition for Writ of Mandamus to be filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit and served on Plaintiffs-Petitioners, using the Court's CM/ECF system, as all participants in this case are registered CM/ECF users.

/s/ Anne W. Stukes
Anne W. Stukes

CERTIFICATE OF COMPLIANCE

1. I hereby certify that the foregoing Response in Opposition to the Petition for Writ of Mandamus complies with the type-volume limitation of Fed. R. App. P. 21(d)(1) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 5,638 words.

2. I hereby certify that foregoing Response in Opposition to the Petition for Writ of Mandamus 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Times New Roman.

/s/ Anne W. Stukes
Anne W. Stukes

Dated: February 9, 2024