No. 24-50079

In the United States Court of Appeals for the Fifth Circuit

IN RE: 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,
Petitioners.

On Petition for Writ of Mandamus from the United States District Court for the Western District of Texas (1:22-cv-00909)

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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INTRODUCTION

Neither the District Court's decision nor the Government's response brief shows that Washington is the "clearly more convenient" forum for a challenge to an agency decision with nationwide effects. That is the significant showing required to displace the significant deference afforded a citizen-plaintiff's choice of forum, particularly the forum in which he resides. *Def. Distributed v. Bruck*, 30 F.4th 414, 425 (5th Cir. 2022); *see Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255–56 (1981).

Instead, the Government makes clear that it has had it with the Fifth Circuit. Its true goal is a complete reboot of these proceedings in the Nation's capital, so that it can reargue everything this Court decided from first principles, using another Circuit's case law. The challenged transfer is unprecedented and would deprive this Court of the opportunity to enforce, interpret, and see through the Court's comprehensive decision guiding the way on multiple threshold and merits issues. And the transfer is anathema to—the literal enemy of—the convenience and judicial efficiency on which the transfer statute focuses. It would waste this Court's investment in addressing and familiarizing itself with the facts and applicable law and would ensure that another circuit court would have to start from scratch.

Contrary to the Government's arguments, the District Court's decision erroneously casts aside the interests of citizens across the country injured by the nationwide effects of an agency decision—*including the interests of the six Texans*

located in the Western District who decided to stand up to the Government in this case. If allowed to stand, the District Court's decision would become a blueprint for vacuuming challenges to sweeping government rules and decisions back to Washington, where the agencies first made the arbitrary decisions.

In apparent recognition that traders and academics who chose to challenge the CFTC's unnecessary shockwave of injury to their investments and research in closing the PredictIt Market are not irrelevant, the Government tries to rewrite the District Court's decision. The Government now claims that the District Court merely afforded those citizens' injuries "less weight" than those of corporations based in Washington. *But that is not what the District Court said*. The District Court said the interests of the traders in Texas who chose to challenge Government misbehavior are to be "disregarded" in the transfer analysis, because similar victims of the Government's arbitrary behavior live in many other judicial districts. A69. "Disregarded:" That means, "pa[id] no attention to, treat[ed] as unworthy of regard or notice." *Webster's Third International Dictionary*. The District Court did not engage in some kind of discretionary weighing process. Instead, the District Court said: "Who cares about those guys?"

If allowed to stand, expect Washington's alphabet-soup agencies, chock full of unelected bureaucrats, citing Judge Ezra's decision as grounds to say that other Texans, Louisianans, and Mississippians choosing to stand up and challenge the

federal Government also should be "disregarded" because they are a dime a dozen in California, or New York, or Washington, D.C. Perversely, the broader the impact, the longer the tentacles, of some arbitrary, capricious, and illegal action by unaccountable federal Government officials, the more appropriate for courts and the Government to "disregard" the interests of those injured across the country and to transfer the case back to where the decision was made.

The Government's plan to redirect Administrative Procedure Act cases from the federal courts of the Fifth Circuit—and to avoid this Court's further enforcement of the APA in this case—leaps off the pages of the Government's brief. Congress, of course, had different plans, giving any citizen "adversely affected or aggrieved" by agency action the right to ask the "judicial district in which [he] resides" to review and to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." 5 U.S.C. § 703; 28 U.S.C. § 1391(e)(1); 5 U.S.C. § 706(2). If the Government wants its behavior judicially evaluated only in Washington, it should cease making sweeping, coercive decisions injuring citizens outside Washington. This Court should grant mandamus to make that clear to the Government and to restore the statutory order.

ARGUMENT

I. The Court Should Award Early Mandamus to Maintain this Court's Authority to Address the Merits in this Case.

As soon as is practicable, this Court should issue a partial writ of mandamus directing the District Court to seek return of the case from the District of Columbia. The Court can then consider the merits of the transfer order, including through any additional merits briefing or oral argument that the Court deems appropriate. This two-step approach would implement the "better procedure" of "hold[ing] up the transfer for a reasonable time pending possible petition for reconsideration or review," a procedure the Eighth Circuit has implemented through mandamus. *In re Nine Mile Ltd.*, 673 F.2d 242, 243–44 (8th Cir. 1982). Importantly, the District Court agrees this is the better practice, explaining that it "intends to follow" it in the future. Dist. Ct. Resp. at 3–4.

The CFTC is holding out against it. The agency says Petitioners should have moved for a stay before the case was transferred. CFTC Resp. at 22 (citing *Def. Distributed v. Platkin*, 55 F.4th 486, 492 (5th Cir. 2022) to suggest that move was somehow required). Here, of course, the transfer occurred before Petitioners received any notice of the District Court's order. Pet. at 12. And nothing in *Defense Distributed* required Petitioners to peremptorily request a stay, in their opposition to transfer, before the District Court even ruled on the motion. *See* 55 F.4th at 492. To the contrary, that such a preemptory stay was the only other thing that the *Defense*

Distributed plaintiff could have done to stop a rapid transfer, and a willful transferee court unwilling to return the case, was "not necessarily fair to plaintiffs." *Id.* This Court bemoaned the situation, noting the extraordinary event of the transferee court not cooperating with a request to return. *See Def. Distributed v. Platkin*, 48 F.4th 607, 608 (5th Cir. 2022) (Ho, J., concurring). For the Government to try to convert this passage into some kind of criticism or theory of default by the plaintiff is a willful misreading of this Court's *Defense Distributed* opinion. The sequence of events in *Defense Distributed*, again, shows that the best course is for the Court to grant early partial mandamus to effect a return request.

II. The Transfer Is an Admitted Effort to Reargue this Case Completely from First Principles in a New Circuit and an Unprecedented Waste of Judicial Resources.

The Government's brief confirms the agency's aspirations behind the transfer: To go to Washington and reargue the case all over from first principles, using the precedents of another Circuit. The Government's move and the objective behind it tear at any concept of convenience or judicial economy. This Court's decision certainly did advance the resolution of many important issues in the case, setting forth the governing law and guiding the way to apply it to the facts. To all but the most obstinate reader, this Court cleared out a phalanx of Government threshold and merits arguments, which it termed "meritless." *Clarke v. Commodity Futures Trading Comm'n*, 74 F.4th 627, 633, 635–40 (5th Cir. 2023). Similarly "meritless"

are Government arguments that this transfer and its accompanying reboot of the case advances judicial economy and convenience.

You can see the Government's phonebook-sized motion to dismiss in Washington now. The Government's started writing it in its opposition to the mandamus petition. The Government says this Court's opinion really resolved nothing, that the opinion's reach was limited to "a directive to issue a preliminary injunction" and occurred without "significant fact finding." CFTC Resp. at 16–17; *see also* A300–01. The CFTC softly asserted that this Court's work was not a complete waste of time, because it will travel to Washington as "the law of the case." CFTC Resp. at 16, 21. But the CFTC is telling us what is coming next, that this Court's decision means nothing with regard to resolving the merits and that a District Judge in Washington should start over and take nothing about the law from this Court's decision other than that a preliminary injunction must be in place until a final decision on the merits.

What prevents a complete reboot, what prevents starting over, what prevents rearguing many largely settled issues from first principles, what prevents wasting the time of courts and the parties, is the knowledge that this case is likely headed back to this Court. The District Court knows this Court likely would reverse substantial deviations from the legal principles in its lengthy prior opinion, that this Court was not casually musing in a law review article but meant what it said about

the relevant law applicable to this case. That reality will speed up this case in the District Court and will conserve the resources this Court invested in advancing its resolution. Transferring the case to Washington and removing that sequence of events will slow this case down, as the Government inevitably argues that every legal issue should be rebuilt from the ground up.

The transfer is an attack on convenience and judicial economy. It is all about the Government increasing the chances of substantive victory by never seeing this Court again.

Nor does Plaintiff's amendment of the Complaint sacrifice the efficiencies of keeping the case in this Circuit. CFTC Resp. at 17; Dist. Ct. Resp. at 3. This Court is well familiar with the issues added in the Second Amended Complaint too: They concern the Government's last attempt to evade review in this Court by withdrawing the termination of the PredictIt Market's license and replacing it with a new and improved explanation and "preliminary decision" to terminate the license. And this Court substantively addressed that stunt; it was not impressed; and it provided significant guidance to the District Court for addressing it on remand. *Clarke*, 74 F.4th at 635–36, 641–42. That the Complaint's allegations, appropriately and promptly, caught up with the CFTC's antics while this case was in the Circuit Court, is no argument in favor of transfer.

The District Court and the Government also do not meaningfully address this Court's interest in maintaining supervision of this case and ensuring faithful implementation of the reasoning in its thorough opinion. CFTC Resp. at 14–19. Contrary to the Government's suggestion, this Court's "residual jurisdiction" to clarify what it meant in *Clarke* is not some specialized artifact of direct appeals from administrative agencies to circuit courts. *Id*. at 18–19. Rather, that residual jurisdiction exists "to correct any misconception of its *mandate* by *a lower court* or administrative agency subject to its authority." *Off. of Consumers' Counsel v. FERC*, 826 F.2d 1136, 1140 (D.C. Cir. 1987) (emphasis added). This Court's mandate reflected an expectation of retaining exactly that residual jurisdiction—not its supervision of this case being permanently severed through an inter-circuit transfer. That is why the Court remanded "for the district court to enter a preliminary injunction while ***it*** considers Appellants' challenge to the CFTC's actions" and mandated "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." *Clarke*, 74 F.4th at 633, 644 (emphasis added). The CFTC says these are just casually selected pronouns, not instructions for the District Court to finish the case. CFTC Resp. at 18. Litigants chalk up circuit court mandates to loose language at their peril. The Court's choice of words indeed reflects the governing presumption that, after a substantive opinion,

the Circuit Court will have another opportunity to correct significant deviations from the principles set forth in its opinion through later appellate review and potential reversal.

For these reasons, the decision below—transferring a case from a Circuit Court's supervision after a substantive opinion from that Court—is truly unprecedented. The Government cites several cases to claim the District Court was not breaking new ground, but none shows what the Government claims. CFTC Resp. at 14–15.

Contrary to the Government's assertion, in *DeKeyser v. Thyssenkrupp Waupaca, Inc.*, 860 F.3d 918 (7th Cir. 2017), the Seventh Circuit did not bless sending a case outside its jurisdiction after prior circuit-level substantive treatment. The district court, there, severed and transferred out of the circuit the claims of only a handful of Tennessee-based plaintiffs, retaining Circuit control over the lion's share of the case. *Id.* at 922–23.

In the other Government-cited cases, the Circuit Courts in question had never previously analyzed substantive issues related to the merits prior to transfer, deciding instead the effect of a contractual forum selection clause, *In re Union Electric Company*, 787 F.3d 903, 907, 909 (8th Cir. 2015), or interpreting the venue-related

"first to file rule," *Employers Insurance of Wausau v. Fox Entertainment Group*, 522 F.3d 271, 272 (2d Cir. 2008).[1]

Nor does *In re TikTok*, 85 F.4th 352 (5th Cir. 2023), stand for any general proposition that a transferor court's investment in a case cannot weigh on the transfer analysis. CFTC Resp. at 17–18. *TikTok* explicitly limited its discussion to "the specific facts of [the] case," and declined to impose "a *per se* limitation on a district court's ability to consider post-motion events when assessing [the 'practical problems'] factor." 85 F.4th at 362 & n.10. And this Court was dealing with a district court judge who was becoming a destination on intellectual property litigation and who sat on a transfer motion, dove into the merits, and then cited his work as weighing against transfer, even though the evidence to resolve the dispute was located elsewhere. *Id.* at 356.

III. The Transfer Decision Is a Blueprint for the Government Avoiding Review in the Fifth Circuit of Rules and Decisions with Nationwide Effect.

The District Court held that—when the federal Government takes actions injuring citizens across the country—the interests of plaintiffs who choose to

[1] The same holds true for the CFTC's remaining cases—none involved a circuit-level opinion, substantive or otherwise, *issued prior to transfer*. CFTC Resp. at 15 (citing *FTC v. IAB Marketing Associates, LP,* 746 F.3d 1228, 1232–36 (11th Cir. 2014) (upholding injunctive relief after district court itself voluntarily relinquished control over case); *W S International, LLC v. M. Simon Zook, Co.*, 566 F. App'x 192, 195–96 (3d Cir. 2014) (same)).

challenge those actions but are injured similarly to those in other districts, must be "disregarded" in the transfer analysis. A69. Once "disregarded," other "interests" can fill that vacuum, including Government arguments (as made in this case) that there is an "interest" in evaluating federal Government decisions in Washington because they were made at agency headquarters there. A7–8, A15–17. The District Court decision belittles the interests of the Texas-based plaintiffs who invested in PredictIt Market contracts and who chose to challenge the CFTC's arbitrary decision in this case. CFTC Resp. at 7–10. But this move is old hat for the CFTC, and this Court already has rejected it. *Clarke*, 74 F.4th at 639–40.

The decision is a repeatable template for moving out of the Fifth Circuit all challenges to administrative actions with nationwide effects. Make no mistake, that is the CFTC's and the federal Government's broader objective in pursuing transfer in this case. As the CFTC's General Counsel made clear, the federal Government resents the Fifth Circuit's consistent and faithful enforcement of the APA against arbitrary Government action: He thinks about the Fifth Circuit's holding his and other agencies to account "all the time now." A294.

The CFTC knows the District Court's reasoning is indefensible, so it attempts to rewrite the District Court's decision. But the District Court did not just "[*give*] *lesser weight* . . . to interests common to all or many judicial districts," as the CFTC

asserts. CFTC Resp. at 8 (emphasis added). It expressly "*disregarded*" the individual Plaintiffs' interests altogether. A69.

The District Court said it was seeking to establish and apply a rule of general application, citing this Court's *Volkswagen* decisions to do so. But the *Volkswagen* cases do not use the word "disregard," nor do they stand for the proposition that resident plaintiffs' interests are to be "disregarded" if they could be similar to those of people residing elsewhere who did not file suit. *See* Pet. at 24–25. Instead, this Court held that the curiosity of non-plaintiff forum residents in that case—the interest of citizens in knowing what caused car accidents occurring outside the forum—was no local interest at all. *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 317–18 (5th Cir. 2008) (en banc) ("*Volkswagen II*"). In each decision, this Court emphasized that when, as here, a case involves in-forum resident parties and in-forum harms, there is a local interest that weighs against transfer. *Id.*; *In re Volkswagen AG*, 371 F.3d 201, 206 (5th Cir. 2004).

The CFTC's attempt to reframe the District Court's local interest analysis as one based on the location of the regulated entity has no basis in the language of the District Court's opinion, the CFTC's prior litigating positions (as explained below), or this Court's *Defense Distributed* opinion. CFTC Resp. at 8–10.

First, in *Defense Distributed*, this Court did not, as the CFTC suggests, equate the "location of the injury" with the "location of the [directly regulated]

company." CFTC Resp. at 9. The Court instead held that New Jersey's interest in deciding the controversy was significantly diminished because it had projected itself across state lines and into Texas, where *Texas citizens* had a "significant interest" in assessing the legality of that extraterritorial New Jersey law. *Def. Distributed*, 30 F.4th at 435–36. Far from focusing exclusively on the company publishing weapons plans being located in Texas, this Court explicitly cited the First Amendment interests Texas citizens had in reading the materials. *Id.* at 435 (noting the important local interest of "Texans access to the materials."). Hardly helping the Government, *Defense Distributed* is a precedential barrier to transferring this case. After all, the CFTC projected itself and its coercive power far outside Washington and into Texas and harmed the Market traders and academics residing there. *See Clarke*, 74 F.4th at 640, 643. *Defense Distributed* confirms that Texas courts have a "significant interest" in redressing that action. 30 F.4th at 436.

Second, the Court's decision and the CFTC's defense of it also turns the local interest factor—and indeed the entire venue analysis—on its head. The factor *anchors* an action to the plaintiff's chosen forum when there are "relevant factual connection[s]" between that forum and the plaintiff's claims. *See Volkswagen II*, 545 F.3d at 317–18. It does not operate like a *magnet* to draw the case away from such a forum in disregard of those relevant connections. In *Volkswagen II*, the case had to be transferred from the Marshall Division to the Dallas Division because

Marshall had *no* relevant connections to the plaintiffs' claims *at all*. *See id.* Unlike the District Court here, this Court did not order the case transferred in the face of relevant connections between the plaintiffs' case and their chosen forum. Such a transfer would have been possible only by wholly disregarding the plaintiffs' interests, but that cannot be the law.

That a Plaintiff's local interest tends to anchor an action in the Plaintiff's chosen forum is hardly surprising. Section 1404(a) is meant to protect against "the most blatant forum-shopping" by plaintiffs—which is not the case when a plaintiff brings an action in its home district. *Tik-Tok*, 85 F.4th at 357. Indeed, this Court held in *Defense Distributed* that a "Plaintiff's residence" is an "[i]mportant consideration[]" in assessing the second public interest factor. 30 F.4th at 435.

Third, the CFTC abandons the District Court's holding that the two corporations that assist in operating the Market trump the transfer analysis because the CFTC's arbitrary action might cost them more as a matter of dollars and cents. A70. Appropriately so. *See* Pet. at 25–26. Instead, the CFTC pivots, claiming the corporations helping to operate the market are qualitatively different than the injured traders and the academics because those corporations are the "directly regulated entities." CFTC Resp. at 11; *see also id.* at 1 (calling Aristotle and its subsidiary "the regulated business"). Perhaps the CFTC is hoping nobody was actually reading their previously filed briefs in this Court. Up until this point, the agency has argued,

over and over, that Victoria University—the recipient of the license—is the only regulated entity here, indeed the only institution worldwide that the challenged regulatory action breathes on. Dkt. 8 at 1–2; Dkt. 17 at 2, 5, 15, 17; Dkt. 19 at 9; *Clarke*, 74 F.4th 627 (No. 22-51124), ECF No. 20-1 at 4; *Id.* ECF No. 59 at 20. Everyone else—the companies helping to operate the Market, the traders investing in the Market, and the academics studying the Market—are just irrelevant bystanders and their injuries so-called "downstream harms." Dkt. 8 at 6; Dkt. 17 at 13; Dkt. 19 at 17; *Clarke*, 74 F.4th 627 (No. 22-51124), ECF No. 20-1 at 21; *Id.* ECF No. 59 at 23–24, 44–46. The CFTC's stark reversal on this point is nothing more than hopes for poor reader memories and a convenient litigating position that the agency no doubt plans to abandon if it receives a blank slate in Washington.

Remarkably, the CFTC goes on to argue that focusing on "regulated businesses" rather than individuals injured by regulatory decisions, is in the best traditions of the Fifth Circuit. It asserts that all the Fifth Circuit's cases entertaining challenges to agency rules or decisions with nationwide effect were brought by "regulated businesses located outside the District of Columbia, trade associations representing [such businesses], and/or states other than the District of Columbia [*sic* as to D.C.'s statehood]." CFTC Resp. at 11. If courts of this Circuit just focus on the business-victims of Government regulation, and "disregard" the individual victims, the Fifth Circuit will still get plenty of APA challenges, the CFTC says. *Id.*

This argument—elevating the artificial person of a corporation over actual persons—borders on incomprehensible. In any event, it does not get any more Washington than the public policy trade associations whose challenges to federal Government misbehavior are routinely heard in this Circuit.

IV. The District Court Abused Its Discretion in Applying the Court Congestion Factor.

Not even the CFTC thinks that the court congestion factor, on its own, can support transfer. CFTC Resp. at 12–13. It argues only that "other metrics," rather than docket efficiency, matter most for this factor because this case will probably be resolved on summary judgment. *Id.* But whether the case is ultimately resolved by a jury or on the papers, speed and docket efficiency are the proper "metrics." *See, e.g.*, *BNSF Ry. Co. v. OOCL (USA), Inc.*, 667 F. Supp. 2d 703, 712 (N.D. Tex. 2009) (congestion factor considers "the speed with which a case may be *resolved*") (emphasis added). The District Court applied a different, irrelevant statistic about the number of cases per judge (completely unmoored from the speed of resolving any case), and thereby abused its discretion.

CONCLUSION

The Court should issue, as soon as is practicable, a partial writ of mandamus directing the District Court to seek return of the case from the District of Columbia while this matter proceeds. The Court should then order whatever additional briefing it requires on the merits of transfer, hold oral argument, and issue a writ of

mandamus directing the District Court to vacate its order transferring this case to Washington.

Dated: February 16, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2024, I electronically filed this brief 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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Counsel of Record for Petitioners

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Reply in Support of Petition for Writ of Mandamus complies with the requirements set out in Federal Rules of Appellate Procedure 21 and 32(a)(7)(B)(ii).

/s/ Michael J. Edney
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