

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,

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 OPPOSED MOTION FOR
LEAVE TO FILE SUR-REPLY IN OPPOSITION TO PETITION
FOR WRIT OF MANDAMUS**

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February 20, 2024

Respondent Commodity Futures Trading Commission moves for leave to file a two-page sur-reply to the reply filed by Petitioners. Counsel for Petitioners has advised counsel for the CFTC that Petitioners do not consent to this motion. A copy of the proposed sur-reply is attached to this motion. The purpose of the sur-reply is to clarify that, despite some differences in language from the original petition for mandamus, the reply in support of mandamus adds no material new arguments beyond those already rebutted in the CFTC's response.

CONCLUSION

The CFTC should be granted leave to file a short sur-reply in opposition to mandamus.

Respectfully submitted,

/s/ Martin B. White

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CERTIFICATE OF SERVICE

I certify that on February 20, 2024, I caused the foregoing motion to be served on the Clerk of the Court using the Court's CM/ECF system, which will send notice to all counsel of record in this case.

/s/ Martin B. White
Martin B. White

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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 SUR-REPLY TO
PETITIONERS' REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS**

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Despite some differences in language from the original petition for mandamus, Petitioners' reply in support of mandamus adds no new material arguments or facts and suffers from the same blind spots as the original petition, notably:

The reply continues to exaggerate the precedential significance of the venue issue in this case. Denial of mandamus here merely requires a determination that the district court did not clearly abuse its discretion and would not be an endorsement of some far-reaching change in the law. In mistakenly arguing that denying mandamus in this case would centralize future Administrative Procedure Act litigation in the District of Columbia the reply fails to recognize that this case is readily distinguishable from almost all other APA litigation. Specifically, among the plaintiffs this Court has found to have standing, there are two that significantly stand out in their role in the case and these plaintiffs have chosen to locate their business in Washington, D.C.

The discussion of *Clarke v. Commodity Futures Trading Comm'n*, 74 F.4th 627 (5th Cir. 2023) in the reply relies on speculative imputed motivations of this Court rather than the text of the opinion, which addresses numerous issues but does so, according to the opinion, because they were necessary to decide the issue of whether to order a preliminary injunction. The reply similarly relies on speculative imputed motivations of CFTC counsel when the relevant consideration for transfer of venue is that, under Supreme Court precedent, *courts* in the District of Columbia will be required to apply law of the case principles to holdings in *Clarke*.

Finally, the proposed reply, like the original petition, conflates issues of merits and venue.

CONCLUSION

The petition for mandamus should be denied.

Respectfully submitted,

/s/ Martin B. White

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I certify that on February 20, 2024, I caused the foregoing sur-reply to be served on the Clerk of the Court using the Court's CM/ECF system, which will send notice to all counsel of record in this case.

/s/ Martin B. White
Martin B. White