No. __-_____

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)

APPENDIX TO PETITION FOR WRIT OF MANDAMUS

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February 1, 2024

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Respectfully submitted,

/s/ *Michael J. Edney*

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2024, I electronically filed this Appendix to Petition for Writ of Mandamus 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. I further certify that Counsel for Respondent, Martin B. White, has been served by email at the address listed below:

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/s/ Michael J. Edney
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TAB 1

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 MILLER, JOSIAH NEELEY, GRANT SCHNEIDER, and WES SHEPHERD,

Plaintiffs,

v.

COMMODITY FUTURES TRADING COMMISSION,

Defendant.

Civil Docket No. 1:22-cv-00909-DAE

The Honorable David Alan Ezra

PARTIES' AGREED JOINT SCHEDULING RECOMMENDATIONS

The below recommended schedule reflects discussions between the parties and is agreed to by all parties. The parties have reached agreement on all case management milestones except the appropriate time for the Defendant to produce the administrative record in this case. The parties will promptly return to this Court with an agreement on where the production of the administrative record fits into the below schedule or motions to resolve any disagreement that cannot be resolved.[1]

1. Plaintiffs' response to Defendant's motion to amend preliminary injunction order. October 12, 2023.

2. Defendant's reply in support of motion to amend preliminary injunction order. October 19, 2023.

3. Plaintiffs' motion to file Second Amended Complaint if amendment is unconsented to by Defendant. November 1, 2023.

4. Defendant's response, if any, to motion to file Second Amended Complaint. November 29, 2023.

5. Plaintiff's reply, if any, in support of motion to file Second Amended Complaint. December 13, 2023.

6. Defendant's Answer and/or dispositive or partially dispositive motions (other than motions for summary judgment). No later than 60 days after the filing of Second Amended Complaint, either by consent or the Court's granting of motion to file.

[1] Defendant Commodity Futures Trading Commission believes that it may be possible to resolve some or all of the issues in this case by stipulation or agreement. If that proves to be the case, some litigation steps in this recommended scheduled may become unnecessary.

7. Plaintiffs' motion for summary judgment. No later than 60 days after filing of Answer or Court ruling on dispositive or partially dispositive motions (other than motions for summary judgment) if any, whichever comes later.

8. Defendant's response and cross-motion for summary judgment. No later than 45 days after Plaintiffs' motion for summary judgment.

9. Plaintiffs' response in opposition to and reply in support of summary judgment. No later than 28 days after Defendant's response and cross-motion.

10. Defendant's reply in support of summary judgment. No later than 21 days after Plaintiff's response and reply.

Respectfully submitted,

/s/ *Martin B. White*

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CERTIFICATE OF SERVICE

I certify that on October 4, 2023, 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*

TAB 2

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

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

Plaintiffs,

v.

COMMODITY FUTURES TRADING COMMISSION,

Defendant.

Civil Docket No. 1:22-cv-00909 DAE

The Honorable David Ezra

DEFENDANT CFTC'S OPPOSED MOTION TO TRANSFER VENUE

INTRODUCTION

Defendant United States Commodity Futures Trading Commission ("CFTC" or "the Commission") respectfully requests that this Court, pursuant to 28 U.S.C. § 1404(a), transfer the above-captioned litigation to the United States District Court for the District of Columbia, the venue where this case could—and should—have been filed. A similar motion was previously filed by the CFTC, and a Magistrate Judge recommended that it be granted; but it was dismissed without prejudice while the case was on appeal, subject to reurging. As the Magistrate correctly held, the motion should be granted.[1]

Simply put, none of Plaintiffs' claims have anything to do with the Western District of Texas. Plaintiffs' First Amended Complaint ("FAC") asserts two counts under the Administrative Procedure Act ("APA") challenging the withdrawal of a "no-action letter" issued to Victoria University of Wellington, an educational institution located in Wellington, New Zealand ("Victoria University" or "the University"). Both the original no-action letter and the subsequent letter withdrawing the earlier letter were issued to the University by D.C.-based staff in the Commission's Division of Market Oversight, from the CFTC's headquarters in the District of Columbia. *See* FAC ¶¶ 61–67, ¶¶ 68–75; 17 C.F.R. § 140.99(a)(2). Those letters related to the University's operation of a non-profit prediction market for certain political-forecasting research purposes. In practice, it appears that the market has largely been operated by two United States companies, Aristotle International Inc. ("Aristotle") and its subsidiary, Predict It Inc.; but these companies, like the CFTC, are located in Washington, D.C. FAC ¶¶ 26-27. All operative facts giving rise to Plaintiff's APA claims reflect the decision making process of D.C.-based staff of a D.C.-headquartered federal agency that occurred solely in either the District of

[1] Counsel for the CFTC contacted counsel for Plaintiffs about this motion on October 12, 2023 and has not yet heard back. Plaintiffs opposed the CFTC's similar previous motion.

Columbia or, to a much lesser extent, Wellington, New Zealand where relevant University staff are located. That decision process concerned the conduct of entities in Wellington and the District of Columbia. All but one counsel of record are located in Washington, D.C.—where the district court is far less congested than this one—and the other operates from D.C. and Chicago.

The first amended complaint lists as plaintiffs the two District of Columbia entities that apparently operate the market, and traders and market data users located in New York, New Jersey, Massachusetts, Michigan, Ohio, and Austin, Texas. FAC ¶¶ 21-34. However, the market operates by remote electronic means and nothing relevant to this case distinguishes the Austin-based plaintiffs from trader and data-user plaintiffs in other judicial districts or from the other over 120,000 traders and over 140 data users alleged to have used the market since its founding. FAC ¶¶ 22, 23, 24, 31, 33, 39, 64; *see generally* www.predictit.org. There is no allegation that the market has, for example, specialized in Texas elections or that the government conduct at issue has an impact on persons in the Western District of Texas that differs in any material way from its impact elsewhere in the United States.

It is unclear why Plaintiffs chose to file their suit in the Austin Division of the Western District of Texas. Whatever the reason, the choice to proceed in this Court was certainly not based on convenience or efficiency. With the sole exception of Plaintiffs' choice of forum, every other relevant private- and public-interest factor under section 1404(a) is either neutral or favors transfer to the D.C. District Court. And, while the case was filed in 2022, transfer at this point will not result in any duplicative or inefficient use of judicial resources. The only substantive district court rulings in this case are the now-superseded magistrate report recommending transfer of venue; an order denying without prejudice, subject to reurging, the CFTC's previous motions to transfer venue and to dismiss; and rulings on the wording of the

preliminary injunction ordered by the Court of Appeals. Dkts. 31, 38, 43, 48. Plaintiffs' interlocutory appeal of the constructive denial of a preliminary injunction was concluded with the issuance of the appellate mandate on September 12, 2023, Dkt. 42; and any orders or holdings of the United States Court of Appeals for the Fifth Circuit in that appeal are now part of the case regardless of the venue of further proceedings. The defendant, the primary plaintiffs, the alleged conduct, and the entities most affected are all located outside this district and a transfer pursuant to Section 1404(a) is in order. *See, e.g.*, *National Ass'n of Life Underwriters v. Clarke*, 761 F. Supp. 1285, 1293 (W.D. Tex. 1991).

BACKGROUND AND PROCEDURAL HISTORY

The original Complaint (Dkt. 1) was filed with this Court on September 9, 2022, by six named Plaintiffs that can be divided into three groups: First, Plaintiffs Aristotle International, Inc. and Predict It, Inc. are Delaware corporations with principal places of business in the District of Columbia that collectively "service[]" various aspects of PredictIt, "an online market for political event contracts," pursuant to an undisclosed "market servicing agreement" with New Zealand-based Victoria University of Wellington. Compl. ¶¶ 1, 26–27. Aristotle and its subsidiary appear to be primarily responsible for operating the market since the Complaint alleged that Aristotle "serves as the clearing house for trades" and that "investors that open accounts" on the market "enter into a contract with Aristotle." Compl. ¶ 27. Second, Plaintiffs Harry Crane and Corwin Smidt are professors at Rutgers University in New Jersey and Michigan State University who use Predict It data for "teaching and research" purposes. Compl. ¶¶ 23, 24. Third, Plaintiffs Trevor Boeckmann and Kevin Clarke are individual Predict It customers living in New York City and Austin who made various "purchases and trades" on the online Predict It market. Compl. ¶¶ 22, 21. Notably, Victoria University of Wellington—the only party to whom

the challenged CFTC staff conduct was directed—has no discernible connection to Texas and is not a party to this lawsuit. Compl. ¶ 25.

The original complaint asserted two APA counts against the United States Commodity Futures Trading Commission, an executive agency of the United States headquartered in the District of Columbia. *See* Compl. ¶¶ 20, 61–67, 68–75. Those counts in turn challenge as "arbitrary" and "capricious" a letter issued by D.C.-based CFTC staff in the Division of Market Oversight ("DMO") to the University on August 4, 2022. 5 U.S.C. § 706(2)(A); Compl. ¶ 8 & Ex. 2. The August 4, 2022 letter withdrew an earlier no-action letter from October 29, 2014 stating, based on the University's representations at that time, that "DMO will not recommend that the Commission take any enforcement action in connection with the operation of your proposed market for event contracts" if certain enumerated conditions were observed. Compl. ¶ 7 & Ex. 1, at 5–6. Plaintiffs have not alleged that any part of the decision making process or other CFTC staff conduct relevant to their APA claims occurred in Texas. *See, e.g.*, Compl. ¶¶ 7–11, 15–16.

The sole basis for venue identified in the original complaint is that "Kevin Clarke resides in … Austin, Texas" and "has made numerous investments in event contracts on the PredictIt Market from Austin, Texas, where he has lived since 2010." Compl. ¶ 18 (citing 28 U.S.C. § 1391(e)(1)(B)–(C)).

On September 20, 2022, the CFTC filed a motion to transfer venue to the District of Columbia. Dkt. 8. Ten days later, on September 30, 2022, Plaintiffs filed a motion for a preliminary injunction. Dkt. 12. On October 6, 2022, Plaintiffs filed an amended complaint adding seven additional individual plaintiffs. Dkt. 15, FAC ¶¶ 28-34. The amended complaint alleged that each of these individuals traded on the PredictIt market and that three of them used

data from the market for various purposes. FAC ¶¶ 28-34, 43. Five of the added plaintiffs are located in Austin, Texas. FAC ¶¶ 28, 29, 30, 32, 34. The other two are located in Massachusetts and Ohio. FAC ¶¶ 31, 33. The amended complaint is otherwise substantially identical to the original complaint.

On October 28, 2022, the CFTC filed a motion to dismiss. Dkt. 19. On December 12, 2022, a magistrate judge, to whom the CFTC's motions had been referred, issued a report recommending transfer of venue. Dkt. 31. This recommendation was never acted on by the district court.

On December 23, 2022, Plaintiffs filed an interlocutory appeal to the United States Court of Appeals for the Fifth Circuit seeking review of what they characterized as a constructive denial of their motion for a preliminary injunction, based on the district court's failure to act on that motion by the time of the appeal. Dkt. 32.

On March 2, 2023, while the preliminary injunction appeal was pending, the CFTC Division of Market Oversight sent a letter to Victoria University revoking the August 4, 2022 letter withdrawing the 2014 no-action letter. *Clarke v. Commodity Futures Trading Comm'n*, No. 22-51124 (5th Cir.) Doc. 78-2. The March 2 letter further set forth in reasons why it appeared that Victoria University may not be in compliance with the conditions of the 2014 letter and stated that, as a result, the Division had determined "as a preliminary matter" that the 2014 letter is void and should be withdrawn. The March 2 letter invited the University to submit any objections it may have by March 20, 2023, which the University did. The Division of Market Oversight, to date, has not made any further determinations following up on the March 2 letter.

On May 1, 2023, the Court of Appeals issued an order (1) denying a CFTC motion to dismiss Plaintiffs' appeal as moot based on the March 2 Division of Market Oversight letter; (2)

denying Plaintiffs motion to hold the CFTC in contempt based on the letter; and (3) clarifying a stay pending appeal previously issued by the Court of Appeals. *Clarke*, No. 22-51124 Doc. 107-2. The clarification stated, "Appellee is ENJOINED from closing the PredictIt Market or other wise prohibiting or deterring the trading of Market contracts until 60 days after a final judgment in this matter." *Id*.

On May 12, 2023, while the preliminary injunction appeal was still pending, this Court issued an order addressing certain pending matters. Dkt. 38. Among other rulings, it denied without prejudice, subject to reurging, the CFTC's motions to transfer venue and to dismiss.

On July 21, 2023, the Court of Appeals issued a decision reversing this Court's "effective denial" of a preliminary injunction and remanding "with instructions that the district court enter a preliminary injunction pending its consideration of Appellant's claims." Opinion at 21, *Clarke*, No. 22-51124 (5th Cir. July 21, 2023) Doc. 123. The appellate mandate issued on September 12. Dkt. 42. On September 13, 2023 this Court entered a preliminary injunction, Dkt. 45, which was amended on October 10, 2023.

ARGUMENT

Under the federal transfer statute's multifactor balancing analysis the only relevant consideration that potentially weighs in favor of retaining this D.C.-centric dispute in the Western District of Texas is Plaintiffs' choice of forum. This Court was an available forum only because this lawsuit arises under the Administrative Procedure Act and several named plaintiffs reside here—and most of those were added in response to the previous motion to transfer.[2]

[2] While Plaintiffs are correct that the Western District of Texas is an available forum under 28 U.S.C. § 1391(e)(1)(c) because of several plaintiffs' residence, the conclusory statement that venue would also be available because "a substantial part of the events or omissions giving rise to the claims also occurred in this jurisdiction," FAC ¶ 18 is wrong for the reasons explained below. *See infra* Part III.A.

While several judicial districts would also have been available given the other Plaintiffs' residencies—including the District of Columbia, Delaware, Massachusetts, Michigan, New Jersey, New York, and Ohio, *see* FAC. ¶¶ 22, 23, 24, 26, 27, 31, 33—there is only one district with more than an incidental connection to the substance of Plaintiffs' claims. That is the District of Columbia. Indeed, the District of Columbia is the only place outside of Wellington, New Zealand, in which *any* of the operative facts giving rise to Plaintiffs' claims occurred.

Because every other consideration either favors transfer to the District of Columbia or is neutral, the transfer analysis is straightforward and decisive.

I. Legal Standard

When, as here, venue is available in more than one federal district court, 28 U.S.C. § 1404(a) provides for transfer in the interest of justice. *See generally In re Volkswagen of Am., Inc.*, 545 F.3d 304, 313 (5th Cir. 2008) ("[W]hile a plaintiff has the privilege of filing his claims in any judicial division appropriate under the general venue statute, § 1404(a) tempers the effects of the exercise of this privilege."). In addressing Section 1404(a) transfer motions, this Court assesses "two factors: (1) that the transferee district is one where suit 'might have been brought' and (2) that the transferee district is clearly more convenient." *Media Chain, LLC v. Roku, Inc.*, No. 1:21-CV-27-LY, 2021 WL 5994809, at *1 (W.D. Tex. Dec. 7, 2021) (citing *In re Volkswagen*, 545 F.3d at 312, 315). The relative convenience of the potential transferee court is determined by considering the following public- and private-interest factors:

> (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; … (4) all other practical problems that make trial of a case easy, expeditious and inexpensive[;] … (5) the administrative difficulties flowing from court congestion; (6) the local interest in having localized interests decided at home; (7) the familiarity of the forum with the law that will govern the case; and (8) the avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law.

In re Volkswagen, 545 F.3d at 315. In weighing these factors, whose proper balance is case- and fact-specific, this Court has "broad discretion." *Balawajder v. Scott*, 160 F.3d 1066, 1067 (5th Cir. 1998) (per curiam) (quotation omitted).

There is an additional wrinkle to the Section 1404(a) transfer analysis in cases arising under the Administrative Procedure Act. *See* 5 U.S.C. §§ 704, 706(2)(A). Because this Court "sits as an appellate tribunal" in APA suits such that the "entire case on review is a question of law," *Delta Talent, LLC v. Wolf*, 448 F. Supp. 3d 644, 650 (W.D. Tex. 2020) (citing *Redeemed Christian Church of God v. U.S. Citizenship & Immigration Servs.*, 331 F. Supp. 3d 684, 694 (S.D. Tex. 2018)), many of the public- and private-interest factors relating to witnesses, discovery, and trial will be of limited applicability. Instead, the primary—and often decisive—factor is determining the "judicial district with the most significant ties to th[e] litigation." *See, e.g.*, *National Ass'n of Life Underwriters v. Clarke*, 761 F. Supp. 1285, 1293 (W.D. Tex. 1991); *Hight v. U.S. Dep't of Homeland Sec.*, 391 F. Supp. 3d 1178, 1185, 1187 (S.D. Fla. 2019) (holding that choice of forum to bring APA suit and "the locus of operative facts for Plaintiff's" together "weigh heavily in favor of transfer" when "Plaintiff's only nexus to the Southern District of Florida is his residence" and all relevant agency decisionmaking occurred "in the District of Columbia by residents of the District of Columbia").

II. There Is No Doubt That This Case Could Have Been Filed In the D.C. District Court.

The Administrative Procedure Act lacks a specialized venue provision, so the general federal venue statute governs. *See* 28 U.S.C. § 1391. For APA suits against executive agencies of the United States, venue is available in "any judicial district" where "a defendant in the action resides"; where "a substantial part of the events or omissions giving rise to the claim occurred"; or where "the plaintiff resides if no real property is involved in the action." *Id.* § 1391(e)(1)(A)–

(C). Here, venue would have been proper in the D.C. District Court under each subsection: (1) the only Defendant in this case is the CFTC, which is headquartered in the District of Columbia, Compl. ¶ 20; (2) among other things, both the "no-action letters" being challenged and all relevant aspects of CFTC staff's decisionmaking process involve D.C.-based employees in the District of Columbia, Compl. ¶¶ 7 –9, 15, 19, 44–49, 63a–e & Exs. 1–2.; and (3) Plaintiffs Aristotle International, Inc. and Predict It, Inc. are both corporate entities incorporated in Delaware with their "principal place of business in the District of Columbia," FAC ¶¶ 26, 27.

Because there is no doubt that this case could have been filed in the United States District Court for the District of Columbia, "only the second factor is in question." *See, e.g.*, *Media Chain, LLC*, 2021 WL 5994809, at *1.

III. Proceeding In The D.C. District Court Is More Convenient Across The Board.

A. Plaintiffs' "choice of forum" should be accorded minimal, if any, weight and is substantially outweighed by "the locus of operative facts" because all CFTC conduct giving rise to Plaintiffs' claims occurred in the District of Columbia.

The strongest—indeed only—tie between Plaintiffs' Complaint and this Court is the residence of several plaintiffs who allege that they will suffer downstream losses as traders or data users were non-party Victoria University of Wellington to cease operating the PredictIt market. *See, e.g.*, FAC ¶¶ 5, 6, 21, 41. The amended complaint lacks any factual allegations that plaintiffs located in the Western District of Texas—or any of the "thousands" of other individual PredictIt traders—played any role in the relevant CFTC staff's decisionmaking process. *See* FAC ¶¶ 64-74. Given the lack of any allegations tying the *CFTC's* conduct to Texas, Plaintiffs cannot rely on the unilateral conduct of several traders and data users to establish a legally relevant nexus to this Court. *See, e.g.*, *Gault v. Yamunaji, L.L.C.*, No. A-09-CA-078-SS, 2009 WL 10699952, at *5 (W.D. Tex. Apr. 17, 2009) (explaining that proper venue analysis "requires

courts to focus on the *defendant's* conduct alone" because "the fact that a plaintiff residing in a given judicial district feels the effects of a defendant's conduct in that district does not mean that the events or omissions occurred in that district").

Because Plaintiffs' claims "only nexus to" the Western District is certain plaintiffs' "residence" (most of whom were added in response to the previous motion to transfer), and "all the relevant … decisions were made in the District of Columbia by residents of the District of Columbia," this case is on all fours with a decision of the Southern District of Florida, *Hight v. U.S. Department of Homeland Security*, 391 F. Supp. 3d 1178, 1181–82, 1185 (S.D. Fla. 2019). In *Hight*, a commercial sailor sought to become a registered ship pilot in the Great Lakes region and, when D.C.-based Coast Guard staff denied his application, he brought an APA lawsuit in the Southern District of Florida, his place of residence. Finding that the "central tension" in resolving the United States' transfer motion was "whether the Court should place more emphasis on Plaintiff's choice of forum or the locus of operative facts in performing the 1404(a) analysis," the Court determined (1) that the nonexistent connection between the claims at issue and Florida rendered "unavailing" plaintiff's argument that his "choice of forum" should control and (2) that "the locus of operative facts" "further tilted" the scales "in favor of transfer" when "all relevant acts or omissions relating to the denial of Plaintiff's pilotage license took place in the District of Columbia." *Id.* at 1185. The Court concluded that "these factors, when taken together, weigh strongly in favor of transfer to the District of Columbia." *Id.* Further concluding that all remaining private- and public-interest factors were on balance, neutral, and of limited value, the Court ordered the case transferred to the D.C. District Court because taken together "the interests

of justice and convenience of the parties weigh heavily in favor of transfer." *Id.* at 1187. The same is true here.

Nor is *Hight* an outlier. This Court and district courts nationwide faced with similarly skimpy nexuses to APA claims routinely grant transfers to the appropriate transferee court. *See, e.g.*, *National Ass'n of Life Underwriters v. Clarke*, 761 F. Supp. 1285, 1293 (W.D. Tex. 1991) (transferring APA claims against the Office of the Comptroller of the Currency to the United States District Court for the District of Columbia when a plaintiff resided in Texas); *Munro v. U.S. Copyright Off.*, No. 6:21-CV-00666-ADA-JCM, 2022 WL 3566456, at *3 (W.D. Tex. May 24, 2022) (Manske, M.J.) (recommending transfer of APA claims against United States Copyright Office for application denial when only Western District nexus was Austin-based plaintiffs' counsel); *Pulijala v. Cuccinelli*, No. 1:20-CV-00822-JPB, 2021 WL 9385877, at *3 (N.D. Ga. Jan. 22, 2021) (granting transfer of APA suit brought by Georgia resident against United States Citizenship and Immigration Services official when "it is undisputed that all relevant acts or omissions relating to the immigrant visa petitions take place in the District of Columbia"); *Holovchak v. Cuccinelli*, No. 20-210-KSM, 2020 WL 4530665, at *5 (E.D. Pa. Aug. 6, 2020) (similar); *Center for Food Safety v. Vilsack*, No. C 11-00831 JSW, 2011 WL 996343, at *6 (N.D. Cal. Mar. 17, 2011) (transferring APA claims to D.C. District Court when "the operative facts giving rise to [agency's] partial deregulation decision did not occur in this district").

B. All Remaining Private Interest Factors Favor Transfer Or Are Neutral.

i. The cost of attendance favors transfer.

Because this is an APA case that will turn on appellate-style review of a fixed administrative record, the CFTC does not anticipate that the traditional private-interest litigation

burdens will be significant in this case as there will be no witnesses or merits discovery. However, at least one consideration—the cost and time required for party counsel to attend hearings in the Western District—affirmatively favors transfer to the United States District Court for the District of Columbia.

No counsel that has appeared to date is located in Texas. Plaintiffs' counsel, only one of whom was admitted to practice before the Western District when the Complaint was filed, are all barred in the District of Columbia and are based out of Chicago and/or the District of Columbia. *See* Docket; Hunton Andrews Kurth LLP, *Michael J. Edney: Bar & Court Admissions*, https://www.huntonak.com/en/people/michael-edney.html (last visited Sept. 12, 2022); Steptoe & Johnson LLP, *John J. Byron: Bar & Court Admissions*, https://www.steptoe.com/en/lawyers/john-byron.html (last visited Sept. 14, 2022). Counsel for the CFTC, as noted below, are all similarly barred in the District of Columbia and based out of the Commission's D.C. headquarters. Thus, every attorney who would be appearing before this Court would have to travel roughly 1,000 miles to do so. By contrast, were this case transferred to the D.C. District Court, no travel would be required because all counsel are at least partially based out of the District of Columbia. *Cf. Hight*, 391 F. Supp. 3d at 1185–86 (holding this factor "neutral" because all parties "would be required to engage in similar cross-country travel").

ii. The remaining private-interest factors are neutral.

Because this is an Administrative Procedure Act case in which the district court sits as a reviewing tribunal, the remaining private-interest factors such as ease of access to sources of proof, availability of compulsory process, and costs of attendance for witnesses are not relevant and thus neutral. *Accord Hight*, 391 F. Supp. 3d at 1186. There will neither be a trial nor any witnesses because in APA review litigation the "entire case on review is a question of law." *See, e.g.*, *Delta Talent, LLC v. Wolf*, 448 F. Supp. 3d 644, 650 (W.D. Tex. 2020) (citation omitted).

C. All Remaining Public Interest Factors Favor Transfer Or Are Neutral.

i. The D.C. District Court's localized interest and relatively lesser level of docket congestion favors transfer.

In addition to the cost and convenience benefits to the parties identified above, the public interest affirmatively favors transfer as well for at least two reasons. First, to the extent that there is any judicial district in the United States with a localized interest in the resolution of this case, it is the District of Columbia. As discussed above, with the possible exception of Wellington, New Zealand all the operative facts giving rise to Plaintiffs' claims occurred in the District of Columbia where all relevant CFTC staff are based. Moreover, the legally cognizable harms of the "no-action letters" being challenged—if any—appear most relevant to Plaintiffs Aristotle International, Inc. and Predict It, Inc., the "service providers" who collectively operate various aspects of nonparty Victoria University of Wellington's online predictions market out of their principal places of business in the District of Columbia. *See* FAC ¶¶ 26, 27.

Second, current statistics show that the Western District of Texas is substantially more congested than the D.C. District Court. "When evaluating the administrative difficulties of court congestion, the most relevant statistics are the median time from filing to disposition, median time from filing to trial, pending cases per judge, and average weighted filings per judge." *Employers Mut. Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153, 1169 (10th Cir. 2010). As relevant here, those statistics favor transfer to the D.C. District Court[3]: The median time from filing to disposition for civil cases in the Western District is 7.4 months, while in the D.C. District Court it's 4.7 months; there are 826 pending cases per judge in the Western District,

[3] Because this is an APA case that will not entail a trial, length of trials is not relevant to the transfer analysis and has been omitted here. Were it relevant, however, that statistic would be the outlier favoring the Western District of Texas as civil trials conclude in an average of 28.3 months versus 55.9 months in the D.C. District Court.

compared to 410 cases in the D.C. District Court; and 801 weighted filings per judge in the Western District versus 276 in the D.C. District Court. 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.

ii. The remaining public-interest factors are neutral.

The remaining public-interest factors, such as the familiarity of the forum with the law that will govern the case and foreign choice-of-law concerns, are neutral here. *Accord Hight*, 391 F. Supp. 3d at 1186–87.

D. Applying the Usual Section 1402(a) Factors to Administrative Procedure Act Cases Does Not Unduely Favor the Government.

In proceedings on the CFTC's earlier motion to transfer venue, Plaintffs argued that grant of a transfer of venue in this case would logically imply that all challenges to federal government administrative action should be heard in the District of Columbia. That argument is incorrect because it ignores facts that distinguish this case from most other cases challenging federal action. Specifically, in this case the persons most affected by the alleged government conduct are located either in the District of Columbia—Aristotle and Predict It Inc.—or are entirely outside the United States. Similarly, the business activity most directly affected by the challenged conduct—operation of a prediction market—occurred either in New Zealand or the District of Columbia even if customers were located throughout the world. By contrast, most entities affected by federal regulation are located, and conduct their primary business, in U.S. judicial districts outside the District of Columbia and that location often serves as a source of venue in APA cases. *See*, *e.g.*, *Mandan, Hidatsa and Aridara Nation v. Dept. of the Interior*, 358 F. Supp. 3d 1, 4, 11 (D.D.C. 2019) (granting motion to transfer venue to District of North Dakota

based, in part, on intervenor's interest in drilling for oil in that state); *see generally* Bureau of Economic Analysis, U.S. Dep't of Commerce, *GDP by State* (Sept. 29, 2023), https://www.bea.gov/data/gdp/gdp-state (statistics showing that District of Columbia accounts for under 1% of U.S. GDP). Similarly, venue outside the District of Columbia is often justified based on the special local impact of federal action. *See*, *e.g.*, *Alaska Wilderness League v. Jewell*, 99 F. Supp. 3d 112, 116-23 (D.D.C. 2015) (ordering transfer to District of Alaska of case involving regulation protecting walruses); *Laboratory Corp. of America Holdings v. N.L.R.B.*, 942 F. Supp. 2d 1, (D.D.C. 2013) (ordering transfer to District of New Jersey of case concerning NLRB action relating to facility in New Jersey). Plaintiffs here have alleged no such special local impact. For example, they have not alleged that the PredictIt market disproportionately lists contracts on Texas elections or that speculating on national election outcomes plays an unusually important role in the economy of the Western District of Texas. And, while several of the Plaintiffs reside in this district, Plaintiffs have not distinguished their interests from those of thousands of other market users throughout the United States and elsewhere. In short, the CFTC's motion to transfer venue is a discretionary matter to be determined based on the facts of this case, leaving venue in other APA cases to be determined based on their own facts.

* * *

The Section 1404(a) factors, taken together, thus overwhelming favor transfer to the District of Columbia, the only judicial district with any substantial ties to Plaintiffs' claims.

To be clear, the CFTC is in no way questioning this Court's authority or ability to handle this case on the merits. Here, however, venue is not appropriate because the above Section 1404(a) analysis overwhelming favors transfer.

CONCLUSION

For these reasons, the Court should grant the CFTC's motion and transfer the above-caption litigation to the United States District Court for the District of Columbia.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 13, 2023, I caused the foregoing Defendant CFTC's Opposed Motion to Transfer Venue 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

TAB 3

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

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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,

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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

TAB 4

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

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

Plaintiffs,

v.

COMMODITY FUTURES TRADING COMMISSION,

Defendant.

Civil Docket No. 1:22-cv-00909 DAE

The Honorable David Ezra

DEFENDANT CFTC'S REPLY IN SUPPORT OF MOTION TO TRANSFER VENUE

INTRODUCTION

In its motion to transfer venue, the CFTC demonstrated that all of the factors that this Court must consider under 28 U.S.C. § 1404(a) are either neutral or support transfer to the District of Columbia. In response, Plaintiffs accuse the CFTC of merely trying to escape the effects of the interlocutory decision of the Fifth Circuit ordering entry of a preliminary injunction. *See Clarke v. Commodity Futures Trading Comm'n*, 74 F.4th 627 (5th Cir. 2023). However, Plaintiffs' reliance on this decision does not alter the overall balance of factors favoring transfer, for at least three reasons:

1. The CFTC originally moved for transfer based on the connections of this case to the District of Columbia eleven days after suit was filed, before there was any appeal, much less a ruling in Plaintiffs' favor. Dkt. 8. The local connections to the District of Columbia—including the location of the two most significant plaintiffs—remain equally strong today. And, despite the passage of time since suit was filed, this Court has made only limited rulings.

2. As Plaintiffs acknowledge, law of the case principles apply when a case is transferred from one district to another. *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). Plaintiffs will thus get the benefit of the Fifth Circuit's preliminary injunction opinion and rulings by this Court implementing the decision regardless of whether venue is transferred. Federal courts in the District of Columbia are competent to interpret and apply Fifth Circuit precedent just as courts in this district are competent to interpret and apply precedent from other circuits. *See*, *e.g.*, *Grace v. Barr*, 965 F.3d 883, 896 (D.C. Cir. 2020) (relying, in part, on Fifth Cir. precedent); *Bradley v. IRS.*, 2019 WL 4980459 (W.D. Tex. Aug. 5, 2019 (relying on Fifth and D.C. Cir. precedent). For the same reason, judicial time and effort put into the Fifth Circuit

decision and other rulings in this case will not be wasted as a result of transfer.

3. Going beyond law of the case principles, Plaintiffs argue, in essence, that they are now entitled to have *future* interpretations of the preliminary injunction decision and other future issues decided in a judicial circuit that they believe has shown itself to be sympathetic to their position. *See* Op. at 18 (asserting that "the courts of this region have a significant local interest in ensuring that the law of the Fifth Circuit" is applied in the remainder of the case).[1] No such legal principle exists. To the contrary, "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). These principles are implicitly reflected in the Fifth Circuit's standards for transfer under 28 U.S.C. § 1404(a), which list numerous factors to be considered—including the localized interests of citizens and businesses—but pointedly do not refer to favorability of local judicial precedent as either a positive or negative factor. *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 (5th Cir. 2008).

To be sure, as a practical matter, when precedent differs in different circuits, litigation counsel for both plaintiffs and defendants are likely to take into consideration circuit precedent, along with other factors, in making decisions about where to file suit and whether to move for a transfer. In ruling on section 1404(a) motions, it is precisely the task of the Court to filter out such considerations and decide the motion based on the factors that have been identified as

[1] References to "Op." are to Plaintiffs' Memorandum in Opposition to Motion to Transfer Venue, Dkt. 52.

relevant by the Court of Appeals. In this case, those factors clearly favor transfer.

ARGUMENT

I. All of the relevant *In re Volkswagen* factors favor transfer of venue in this case.

A. Introduction

Where venue is available in more than one district, the Fifth Circuit has identified eight factors to be considered when a defendant moves for a discretionary transfer of venue under 28 U.S.C. § 1404(a). *In re Volkswagen of Am., Inc.*, 545 F.3d at 315. Transfer is appropriate if it is clearly supported by the balance of the relevant factors. *Id*. Because this case involves an Administrative Procedure Act challenge to agency action, two factors, the local interest in having localized interests decided at home, and court congestion, are particularly pertinent. Mot. at 8. [2] District courts review agency action based on the record before the agency, using summary judgment rather than trial procedures. *See*, *e.g.*, *Delta Talent, LLC v. Wolf*, 448 F. Supp. 3d 644, 650 (W.D. Tex. 2020). As a result, the "private" interest *Volkswagen* factors, which relate to the conduct of trials, are of limited or no relevance.[3] And, because all federal courts are competent to address issues of federal statutory law, familiarity with the law that will govern the case is a neutral factor. *See*, *e.g.*, *City of West Palm Beach v. U.S. Army Corps of Eng'rs*, 317 F. Supp. 3d 150, 157 (D.D.C. 2018). Issues of conflict of laws or foreign law are also absent.

Thus, localized interest and court congestion are the factors relevant to the Court's

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[2] References to Mot. are to Defendant CFTC's Opposed Motion to Transfer Venue, Dkt. 50.

[3] Because there is no significant likelihood of a trial in this case, Plaintiffs' discussion of the location of possible in-person witnesses at pages a 12-13 of its Opposition is of little or no relevance to the decision before the Court. In its Motion at 12, the CFTC pointed out that counsel for all parties are located in Washington, D.C., thereby affecting the expense of litigation if travel to Austin is required for hearings. However, Fifth Circuit precedent has held that location of counsel is not a relevant factor under 28 U.S.C. § 1404(a). *E.g.*, *In re Volkswagen AG*, 371 F.3d 201, 206 (5th Cir. 2004).

transfer decision. Both strongly favor the CFTC.

B. Plaintiffs improperly disregard the local interest of the District of Columbia.

As explained in the CFTC's transfer motion, the District of Columbia has a greater local interest in this case than the Western District of Texas because the defendant, the alleged unlawful conduct, and the two most directly and significantly affected plaintiffs, Aristotle International, Inc. ("Aristotle") and Predict It, Inc. ("Predict It") are all located in the District of Columbia. Mot. at 1-2. Plaintiffs respond that six users of the PredictIt market are located in Austin and allegedly were harmed by CFTC staff conduct. Op. at 18. But Plaintiffs' argument is tellingly silent as to the role of Aristotle and Predict It. Op. at 8-20. Aristotle and Predict It operated the PredictIt market that is the subject of this case. Mot. at 1, 3; *see* First Amended Complaint ("FAC") at ¶¶ 26-27. Through their business in the District of Columbia, they provide services to thousands of market users beyond the half-dozen Austin-based users noted by Plaintiffs. *See* FAC at ¶ 64. Thus, while the Austin plaintiffs establish possible venue in the Western District of Texas, they do not defeat the conclusion that the District of Columbia has a substantially *greater* interest in this case. *See*, *e.g.*, *Chase v. Andeavor Logistics, L.P.*, 2019 WL 5847879 (W.D. Tex. July 7, 2019) (stating focus of local interest inquiry is "the relative connection of the localities to the events giving rise to [the] suit").

The greater local interest of the District of Columbia is further supported by *Defense Distributed v. Bruck*, 30 F.4th 414 (5th Cir. 2022), a case repeatedly cited by Plaintiffs. As relevant here, *Defense Distributed* 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 Court transferred the case, in relevant part, to the District of New Jersey. *Id.* at 422-23. The Court of Appeals held that the transfer was an abuse of discretion. *Id*. at 436-37.

A key consideration in the Court of Appeals's analysis was the location of the injury caused by the regulatory actions. 30 F.4th at 435. The Court found 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 New Jersey actions. *Id*. at 435-36. The Court did so even though potential users of the files, who would be injured if the New Jersey regulations prevented them from making guns, were located in New Jersey and elsewhere since the files were posted on the internet. *Id*. *Defense Distributed* thus supports venue in the District of Columbia, since the Plaintiffs who operate the PredictIt market—Aristotle International, Inc. and Predict It Inc.—are located in the District of Columbia even if some users of market services are located in Austin.

Other grounds for denying transfer in *Defense Distributed* are not present in this case, contrary to Plaintiffs' suggestion. *See* Op. at 18. *Defense Distributed* expressed concern about the New Jersey attorney general improperly asserting "a pseudo-national executive authority" across state lines into Texas. 30 F.4th at 435. That consideration is not present here since Congress granted the CFTC authority to regulate options exchanges nationally, including in both Texas and the District of Columbia. 7 U.S.C. §§ 2(a)(1), 6c(b). *Defense Distributed* also found that New Jersey had a limited interest in that case because a decision would not necessarily prevent the New Jersey attorney general from enforcing the law in New Jersey. 30 F.4th at 435. Plaintiffs here seek relief directly affecting businesses located in the District of Columbia. Finally, Plaintiffs cite *Defense Distributed* for the proposition that the CFTC had to identify "specific evidence" that is more convenient to put on in Washington. Op. at 2. But *Defense*

Distributed discussed "specific evidence" only in the context of the first "private" *Volkswagen* factor, ease of access to sources of proof, which is not relevant because this is an Administrative Procedure Act case and therefore unlikely to go to trial. *See* 30 F.4th at 434.

Thus, the localized interest factor strongly supports venue in the District of Columbia.

C. Relative court congestion supports transfer to the District of Columbia.

In its motion, the CFTC showed that the Western District of Texas is considerably more congested than the D.C. District Court based on median time from case filing to disposition, number of pending cases per judge, and number of weighted filings per judge. Mot. at 13-14. Plaintiffs suggest that congestion is merely a matter of judicial "envy," Op. at 3, but the Fifth Circuit disagrees since it continues to list congestion as a relevant factor under § 1404(a). *E.g., Def. Distributed*, 30 F.4th at 435. Plaintiffs also cite authority suggesting that court congestion may sometimes be less important than other *Volkswagen* factors, such as localized interest. Op. at 16. But none of this precedent holds that congestion can be ignored where facts show meaningful differences between districts. *See*, *e.g.*, *Healthpoint, Ltd. v. Derma Scis.*, 939 F. Supp. 2d 680, 693 (W.D. Tex. 2013) (carefully evaluating congestion evidence before concluding the factor was neutral in that case). Nor could it under Fifth Circuit precedent.

Plaintiffs argue that the relevant statistic for evaluating court congestion is time to bring cases to trial rather than time to final disposition or workload per judge. Op. at 16-17. While that may be true in some cases, it is not true in this case because, as noted above, this is an Administrative Procedure Act case that is unlikely to go to trial. *See* FAC at Counts I and II. Plaintiffs acknowledge that such cases are generally decided based on the record before the agency. Op. at 12. They suggest that one plaintiff, Kevin Clarke, might need to testify in-person on standing and injury, Op. at 13, but this is implausible. Courts in Administrative Procedure

Act cases routinely decide standing and similar issues on summary judgment, relying on declarations. *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). Mr. Clarke has already filed multiple declarations regarding standing and injury with the Court in this case. *See* Op. at 13. Thus, the congestion factor should be decided based on statistics other than time to trial, and those statistics support transfer to the District of Columbia.

II. Transfer will not result in an inefficient use of judicial resources.

Contrary to Plaintiffs' assertions, transfer of this case will not result in a wasteful use of judicial resources. Although this case was filed in 2022, the only major substantive rulings have been the Court of Appeals's preliminary injunction decision and this Court's rulings implementing that decision. As noted above, these rulings have the same effectiveness whether or not there is a transfer. Whatever court handles the case will have the benefit of the Fifth Circuit's rulings and analysis and Plaintiffs will be protected by the preliminary injunction. Plaintiffs may have preferences as to what court decides future issues in the case, but such preferences are not a relevant factor under *In re Volkswagen*. Beyond the rulings on the preliminary injunction, this Court has not substantively addressed any dispositive motions or engaged with a factual record.

Plaintiffs' primary argument regarding efficient use of judicial resources is based on a claim that, if there is no transfer and there is a future appeal, the case will be assigned to the same panel that decided the preliminary injunction appeal and therefore go to judges already familiar with the case. Op. at 15. According to Plaintiffs, such repeat panel assignments are a "common practice" in the Fifth Circuit. *Id.* This argument is entitled to no weight in the transfer determination.

First, the argument is speculative since there is no certainty that there will be another appeal.[4] More fundamentally, Plaintiffs cite no court rule, operating procedure, data, or even anecdotes documenting the alleged "common practice" of repeating panels. To the contrary, the Fifth Circuit's Internal Operating Procedures appear designed to minimize repeat panels. *See* Rules and Internal Operating Procedures of the United States Court of Appeals for the Fifth Circuit (April 2023) at 31 (I.O.P. regarding "Judge Assignments" in I.O.P.s following Fifth Cir. R. 34.13 stating "The judges are scheduled to avoid repetitive scheduling of panels composed of the same members." and "To insure complete objectivity in the assignment of judges and the calendaring of cases, the two functions of (1) judge assignments to panels and (2) calendaring of cases are carefully separated.").

Plaintiffs cite to two isolated Fifth Circuit cases where there were repeat panels in successive appeals. Op. at 8-9, 15. Neither case supports the claim that repeat panels are common, except in special circumstance not present here. In *Defense Distributed*, a panel reversed a district court decision on jurisdiction—*see Defense Distributed v. Grewal*, 971 F.3d 485 (5th Cir. 2020)—and later heard a mandamus petition regarding venue. *Def. Distributed*, 30 F.4th 414. But the next appeal in the case, involving closely related issues, was heard by a different panel. *Def. Distributed v. Platkin*, 55 F.4th 486 (5th Cir. 2022). So this case demonstrates no "common practice."

The other cited case, *M. D. by next friend Stukenberg v. Abbott*, 929 F.3d 272, 275 (5th Cir. 2019) exemplifies the procedure followed by the Fifth Circuit when repeat panels are

[4] For example, if the CFTC were to lose before the district court, in whatever venue, it might determine that it is a better use of resources not to appeal.

intended—a procedure that was *not* followed in the preliminary injunction appeal here. In a previous appeal in *M. D.*, the Fifth Circuit ordered a "limited remand" to modify an injunction and specified explicitly that a future appeal "will be assigned to this panel." *M. D. by next friend Stukenberg v. Abbott*, 907 F.3d 237, 288 (5th Cir. 2018). *See also*, *e.g.*, *Chamber of Commerce of the United States v. United States Securities and Exchange Comm'n*, No. 23-60255, 2023 WL 7147273 at *13 (5th Cir. Oct. 31, 2023) (stating "This is a limited remand. This panel retains jurisdiction to consider the decision that is made on remand."); *M. D. by next friend Stukenberg v. Abbott*, 977 F.3d 479, 481 (5th Cir. 2020) (later appeal in *M. D.* not heard by same panel in absence of specific instruction); *Petition of Geisser*, 627 F.2d 745, 749 (5th Cir. 1980) (stating that "retention of jurisdiction by a particular panel must be specific"). In the appellate decision in this case, there is no language directing a return to the same panel, which strongly suggests that no such return is contemplated.[5]

III. Plaintiffs' remaining arguments lack merit.

Plaintiffs cite *Healthpoint, Ltd. v. Derma Sciences, Inc.*, 939 F. Supp. 2d 680, 694-95 (W.D. Tex. 2013) to illustrate the point that a district's greater familiarity with applicable law can be a factor supporting denial of a transfer. Op. at 15. But the familiarity that was relevant in *Healthpoint* went far beyond the general familiarity with Fifth Circuit law on which Plaintiffs rely. *Healthpoint* concerned pharmaceutical advertising claims under the Lanham Act and the Court noted that the Western District of Texas had recently heard five pharmaceutical

[5] Plaintiffs interpret the sentence, "That said, we need not reach a definitive conclusion on this issue [of the reviewability of no-action letters] at this time." in Judge Ho's concurring opinion as expressing an intent that any future appeal be heard in the Fifth Circuit or by the same panel. Op. at 7-8. That is a distortion of the language. In context, the sentence merely expresses the difference between the standard for issuing a preliminary injunction and the standard for a ruling on the merits. *See Clarke*, 74 F.4th at 644.

advertising cases involving the *Healthpoint* plaintiff, including cases considered leading authority on Lanham Act issues. 939 F. Supp. 2d at 694-95. The case also involved Texas law issues. *Id*. at 695. *Healthpoint* therefore is clearly distinguishable.

Plaintiffs cite *Betts v. Atwood Equity Co-operative Exchange, Inc.*, 1990 WL 92495 at *1 (D. Kan. June 13, 1990) for the proposition that the purpose § 1404(a) is not to allow judge-shopping by litigants. Op. at 9. However, *Betts* is distinguishable because, in *Betts*, the sole stated reason for transfer was the plaintiff's belief that he had been treated unfairly by the Court. 1990 WL 92495 at *1. By contrast, in this case there are reasons to transfer, including local connections to the District of Columbia and relative court congestion, that are independent of either party's subjective preferences.

Finally, Plaintiffs argue that the fact that the relevant CFTC staff decisions were made in Washington does not, by itself, automatically justify transferring venue to the District of Columbia. Op. at 18-20. This argument disregards the fact that two of the primary plaintiffs in the case—the entities responsible for the operation of the PredictIt market and therefore for any of the trading or market analysis engaged in by other plaintiffs—are located in the District of Columbia. This fact, in combination with the location of the defendant and the alleged wrongful conduct, establishes that the District of Columbia has the primary local interest in this case. *See also* Mot. at 14-15, Argument IV.D.

CONCLUSION

For these reasons, the Court should grant the CFTC's motion and transfer this case to the United States District Court for the District of Columbia.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 3, 2023, I caused the foregoing 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

TAB 5

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

KEVIN CLARKE, ET AL.,	§	NO. 1:22-CV-909-DAE
	§	
Plaintiffs,	§	
	§	
vs.	§	
	§	
COMMODITY FUTURES TRADING COMMISSION,	§	
	§	
Defendant.	§	
	§	

ORDER GRANTING MOTION TO TRANSFER VENUE AND DENYING AS MOOT MOTION FOR EXPEDITED CONSIDERATION

The matters before the Court are Defendant Commodity Futures Trading Commission's ("CFTC") (1) Opposed Motion to Transfer Venue (Dkt. # 50), and (2) Opposed Motion for Expedited Consideration of Fully Briefed Motion to Transfer Venue (Dkt. # 60). The Court finds that a hearing on these matters is not necessary. Based on the following, the Court **GRANTS** the motion to transfer venue, and **DENIES AS MOOT** the motion for expedited consideration.

FACTUAL BACKGROUND

In 2014, Victoria University of Wellington, New Zealand ("Victoria University") began operating an online market for political-event contracts (the "Market"). (Dkt. # 55 ¶ 1.)[1] On October 29, 2014, CFTC's Division of Market Oversight ("DMO") issued Victoria University a "No-Action Letter" regarding Victoria University's creation of a "small-scale, not-for-profit, online market for event contracts in the U.S. for educational purposes." (Dkt. #55-1 at 2–3.) Victoria University intended to operate two submarkets—one for political event contracts and the other for economic indicator contracts—and proposed to utilize the results of the market information derived from trading in these contracts for educational and research purposes. (Id. at 3.) Based on Victoria University's representations, the DMO stated it would not recommend the CFTC take any enforcement action in connection with the operation of the proposed market. (Id. at 6.) The No-Action Letter stated it was based on the information provided to the DMO and was subject to the conditions stated in the letter. (Id.) It also stated the no-action position represented only the views of the DMO and did not necessarily represent the CFTC's views. (Id.) The DMO also retained "authority to condition

[1] CFTC filed a second amended complaint in this case after its motion to transfer venue was fully ripe. (Dkt. # 55.) However, the second amended complaint does not affect the matters pending in the motion to transfer venue.

further, modify, suspend, terminate or otherwise restrict the terms of the no-action relief provided herein, in its discretion." (Id. at 7.)

On August 4, 2022, the DMO withdrew the No-Action Letter, stating that Victoria University had not operated its market in compliance with the nine conditions of the No-Action Letter. (Dkt. #55-2 ("Withdrawal Letter").) The Withdrawal Letter stated that if Victoria University was operating any contract markets subject to the No-Action Letter, "all of those related and remaining listed contracts and positions comprising all associated open interest in such market should be closed out and/or liquidated no later than 11:59 p.m. eastern on February 15, 2023." (Id. at 3.)

Plaintiffs are: (1) American individual investors in Victoria University's Market, (2) American university professors who used the Market as a data source, and (3) two U.S. corporate entities that service the Market. (Dkt. # 55 at ¶¶ 5, 32–34.) Notably, Victoria University is not a party to the suit. (Id. at ¶ 36.) Plaintiffs allege they have been harmed by the withdrawal of the No-Action Letter and assert claims under the Administrative Procedures Act ("APA"). (Id. at 32.) They contend the withdrawal was arbitrary and capricious in violation of 5 U.S.C. § 706(2)(A) and constitutes the withdrawal of a license without written notice or opportunity to demonstrate or achieve compliance in violation of 5 U.S.C. §§ 506 and 706. (Id.)

PROCEDURAL BACKGROUND

On September 9, 2022, Plaintiffs filed suit in this Court. (Dkt. # 1.) On September 20, 2022, CFTC filed its original opposed motion to transfer venue in this case. (Dkt. # 8.) On September 30, 2022, Plaintiffs filed a motion for preliminary injunction. (Dkt. # 12). On October 28, 2022, CFTC filed a motion to dismiss Plaintiffs' claims. (Dkt. # 19.) On November 18, 2022, the District Judge originally assigned to this action[2] referred the pending motion to transfer venue and motion to dismiss to Magistrate Judge Mark Lane. (Dkt. # 22.) All pending motions thereafter became ripe. Meanwhile, because no action or briefing schedule had been set on the pending motion for preliminary injunction, on November 18, 2022, Plaintiffs filed a motion to expedite hearing and resolution of their motion for preliminary injunction. (Dkt. # 23.)

On December 12, 2022, Magistrate Judge Lane issued his Report and Recommendation (the "Report") on CFTC's motion to transfer venue. (Dkt. # 31.) Magistrate Judge Lane carefully considered the parties arguments and recommended that the District Court transfer venue of this case to the District of Columbia. (Id.) Given his recommendation to transfer venue, Judge Lane did not make any decision on the merits of CFTC's motion to dismiss. (See id.)

[2] The case was not transferred to the undersigned until April 27, 2023. (Dkt. # 37.)

While the Report was still pending, on December 23, 2022, Plaintiffs filed a Notice of Appeal in this case, notifying the Court that they appealed the "constructive denial of Plaintiffs' Motion for Preliminary Injunction" to the Fifth Circuit Court of Appeals. (Dkt. # 32.) On January 26, 2023, the Fifth Circuit granted Plaintiffs' opposed motion for injunction pending the appeal. (Dkt. # 36.) On February 8, 2023, a three-judge panel of the Fifth Circuit heard oral argument on the merits of the appeal of the injunction in this case. (See Fifth Circuit COA Case No. 22-51124.) Because the matter was still pending at the Fifth Circuit and because the case was only recently transferred to the undersigned, on May 12, 2023, the Court denied without prejudice subject to refiling CFTC's motions to transfer venue and to dismiss. (Dkt. # 38.)

On July 21, 2023, the Fifth Circuit issued its opinion in this matter, reversing the opinion of the District Judge originally assigned to this action, and remanding this case with instructions to enter a preliminary injunction pending consideration of Plaintiffs' claims in this case. Clarke v. Commodity Futures Trading Co., 74 F.4th 627 (5th Cir. 2023). On September 12, 2023, the Fifth Circuit issued its mandate. (Dkt. # 42.) On October 10, 2023, the Court entered an amended order which granted Plaintiffs' motion for preliminary injunction. (Dkt. # 48.) In accordance with that injunction, CFTC is enjoined from taking any action, including without limitation issuance of any preliminary decisions, that

would have the effect of prohibiting or deterring the issuance or trading of PredictIt Market contracts or to close or otherwise to impede the normal operations of the Market, until a final judgment is entered by the Court in this matter. (Id.)

On October 13, 2023, CFTC renewed its motion to transfer venue. (Dkt. # 50.) On October 27, 2023, Plaintiffs filed a response in opposition. (Dkt. # 52.) On November 11, 2023, CFTC filed its reply. (Dkt. # 54.) On January 10, 2024, CFTC filed an opposed motion to expedite consideration of its motion to transfer venue. (Dkt. # 60.)

LEGAL STANDARD

A federal district court may transfer a case "for the convenience of parties and witnesses" to "any other district or division where it might have been brought." 28 U.S.C. § 1404(a). Section 1404(a)'s threshold inquiry is whether the case could initially have been brought in the proposed transferee forum. In re Volkswagen AG, 371 F.3d 201, 202–03 (5th Cir. 2004) ("Volkswagen I"). The question of whether a suit "might have been brought" in the transferee forum encompasses subject matter jurisdiction, personal jurisdiction, and propriety of venue. Id. at 203. Only if this statutory requirement is met should the Court determine whether convenience warrants a transfer of the case. See id.; In re Volkswagen of Am., Inc., 545 F.3d 304, 312 (5th Cir. 2008) ("Volkswagen II").

Once the moving party has established that the instant case could have been brought in the transferee forum, the Court moves on to consider the private and public factors provided in Volkswagen I. The private interest factors include: (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." Id. The public interest factors include: (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." Id. The Fifth Circuit has held that the factors recited in Volkswagen I and Volkswagen II are "not necessarily exhaustive or exclusive" and "none . . . can be said to be of dispositive weight." Volkswagen II, 545 F.3d at 315.

To support a claim for transfer under § 1404(a), a movant must demonstrate that the transferee venue is "clearly more convenient" than the current District. Id. This elevated burden reflects the weight owed to the plaintiff's choice of forum. In re Vistaprint Ltd., 628 F.3d 1342, 1344 (Fed. Cir. 2010).

DISCUSSION

The Court will now consider whether venue should be transferred in this case to the United States District Court for the District of Columbia.

A. Venue in the D.C. District Court

CFTC alleges that, although this case was properly brought in this District, venue is also proper in the D.C. District Court. (Dkt. # 50 at 9.) Plaintiffs do not seriously contest CFTC's showing on this point. (Dkt. # 52.) Accordingly, the Court finds this action could have been brought in the D.C. District Court. And, because this case concerns review of agency action, the parties agree that not all of the traditional transfer factors apply given that the case will likely be resolved at the summary judgment stage on the administrative record. (Dkt. # 50 at 9; Dkt. # 52 at 13.)

A. Private Interest Factors

Again, there is no serious dispute by the parties that this case will be decided on the administrative record, and likely by cross-motions for summary judgment. Therefore, the Court finds that the private interest factors in this case are neutral—relative ease of access to sources of proof, availability of compulsory process to secure the attendance of witnesses, cost of attendance for willing witnesses, and all other practical problems that make trial of a case easy and expeditious and inexpensive.

B. Public Interest Factors

The parties dispute the relevance of the public interest factors. The Court will consider each separately.

1. Court Congestion

CFTC argues that the Western District of Texas is substantially more congested than the D.C. District Court. (Dkt. # 50 at 14.) CFTC cites statistics that there are 801 weighted cases pending in the Western District versus 276 in the D.C. District Court. (Id. at 14–15 (citing Administrative Office of the U.S. Courts, U.S. District Courts: Combined Civil and Criminal Federal Court Management Statistics (June 30, 2023).) Plaintiffs dispute this information on the basis that "the key statistic" in evaluating court congestion is the "speed with which a case can come to trial and be resolved." (Dkt. # 52 at 17.)

The Court finds this factor weighs in favor of transfer. This case's own procedural history documents that the Western District of Texas, and particularly the Austin Division, is heavily congested. This case was appealed to the Fifth Circuit on interlocutory appeal on the basis that the District Judge originally assigned to this case did not timely rule on the pending motion for preliminary injunction, clearly demonstrating the backlog of case dispositions in the Western District. Additionally, before the Court is a motion to expedite consideration of this very motion since it has been pending for four months. And,

this Court's own heavy docket in the Western District would prevent this case from proceeding to resolution in a more expeditious manner than would be in the D.C. District. Given all of this, the Court finds this factor weighs in favor of transfer of this case to the D.C. District.

2. Local Interest in Having Localized Interests Decided at Home

CFTC argues that the D.C. District has more of a localized interest in the resolution of this case than the Western District because all of the operative facts giving rise to Plaintiffs' claims occurred in D.C. where CFTC is located. (Dkt. # 50 at 14.) CFTC also asserts that the harms alleged by the No Action Letters are most relevant to Aristotle International, Inc. ("Aristotle") and PredictIt, Inc. ("PredictIt"), who operate various aspects of the relevant online prediction markets out of their principal places of business in D.C. (Id.) In response, Plaintiffs argue that CFTC has harmed the individual plaintiffs who reside in the Western District, and therefore Texas courts have a significant interest in assessing and redressing the impacts of the action. (Dkt. # 52 at 19.)

This factor focuses on the "factual connection" a case has with both the transferee and transferor venues; however, local interests that "could apply virtually to any judicial district or division in the United States" are disregarded in favor of particularized local interests. See Volkswagen I, 371 F.3d at 206; Volkswagen II, 545 F.3d at 318. While it is true that certain individual plaintiffs

reside in the Western District, the Court finds that the two entity plaintiffs—Aristotle and PredictIt—are both based in D.C. and these entities are also alleged to have been injured and possibly would suffer the greatest economic harm in this case more so than the individual plaintiffs who reside in Austin. The Court finds that this factor also weighs in favor of transfer to the D.C. District.

3. Remaining Public Factors

The parties do not seriously argue that the remaining public factors weigh in their favor. Indeed, the Court finds that familiarity of the forum with the law that will govern the case and avoidance of unnecessary problems of conflict of laws or application of foreign law are both neutral in the Court's analysis.

4. Weighing the Factors

Here, while Plaintiffs' choice of forum favors retaining the case in the Western District, the Court finds that the two most important public interest factors in this case—court congestion and local interest in having the claims decided at home—weigh strongly in favor of transfer to the D.C. District. Accordingly, the Court will order that this case be transferred to that district.

CONCLUSION

Based on the foregoing, the Court **GRANTS** CFTC's Opposed Motion to Transfer Venue (Dkt. # 50) and **DENIES AS MOOT** CFTC's Opposed Motion for Expedited Consideration of Fully Briefed Motion to Transfer Venue

(Dkt. # 60). The Court **ORDERS** that this case be **TRANSFERRED** to the U.S. District Court for the District of Columbia.

IT IS SO ORDERED.

DATED: Austin, Texas, January 16, 2024.

David Alan Ezra
Senior United States District Judge

TAB 6

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 MILLER, JOSIAH NEELEY, GRANT SCHNEIDER, and WES SHEPHERD, *Plaintiffs*, v. COMMODITY FUTURES TRADING COMMISSION, *Defendant*.	Civil Docket No. 1:22-cv-00909-DAE The Honorable David Alan Ezra

PLAINTIFFS' MOTION TO STAY TRANSFER ORDER

The Plaintiffs respectfully request that the Court stay its Order Granting Motion to Transfer Venue, entered on the docket on January 17, 2024 (Dkt. 61), to accommodate the Fifth Circuit's review of that order pursuant to a forthcoming petition for a writ of mandamus. Specifically, the Plaintiffs ask that the Court stay transfer for the greater of fourteen (14) days or the period of time that the Plaintiffs' forthcoming mandamus petition is pending. Plaintiffs further request expedited briefing on and treatment of the instant stay motion, with the Court ordering a response from the CFTC no later than Wednesday, January 24, 2024. Counsel for the Plaintiffs has sought the position of the Defendant Commodity Futures Trading Commission ("CFTC") on their stay request and will provide the Court with the CFTC's position as soon as it is received.

This Court has legal authority to stay the transfer order and effectively to stay proceedings pending the Fifth Circuit's review of that order on mandamus. As part of its power to control its

docket, a district court has the inherent power to stay proceedings. *See Clinton v. Jones*, 520 U.S. 681, 706 (1997); *Landis v. N Am. Co.*, 299 U.S. 248, 254–55 (1936); *Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 545 (5th Cir. 1983); *Soverain Software LLC v. Amazon.com, Inc.*, 356 F. Supp. 2d 660, 662 (E.D. Tex. 2005) ("The district court has the inherent power to control its own docket, including the power to stay proceedings."). Courts have frequently and correctly exercised this authority to stay an order transferring a case pursuant to 28 U.S.C. § 1404(a) during the pendency of appellate proceedings. *See Terra Int'l, Inc. v. Mississippi Chem. Corp.*, 922 F. Supp. 1334, 1385 (N.D. Iowa 1996), *aff'd*, 119 F.3d 688 (8th Cir. 1997); *see also Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1517 (10th Cir. 1991) ("[T]he preferred approach is to delay physical transfer of the papers in the transferred case for a long enough time to allow the aggrieved party to file a mandamus petition."); *In re Warrick*, 70 F.3d 736, 739–40 (2d Cir. 1995) (acknowledging that district courts can and, in many cases, should stay a transfer order when review by mandamus is forthcoming or pending).

As the Eighth Circuit explained in detail: "In order to permit adequate and orderly review of one federal district court's decision to transfer a case to another federal district court, physical transfer of the file should be delayed for a period of time after entry of the transfer order so that review may be sought in the transferor circuit." *In re Nine Mile Ltd.*, 673 F.2d 242, 243 (8th Cir. 1982). In the days following the transfer order, the sequence of events in *Nine Mile* was identical to that here: The district court granted a motion to transfer, actions were immediately taken by clerk officials to transfer the files to the new court, and the party opposing transfer sought a stay of the order three days after the transfer order. *Id.* The Eighth Circuit held that stay motion should have been granted as matter of course. And the instant stay motion should similarly be granted without further inquiry.

If there is to be further inquiry, there are ample reasons in this particular case to stay the transfer order while the Fifth Circuit reviews. The Fifth Circuit regularly reviews transfer orders through petitions for mandamus and has not hesitated to reverse them. *Def. Distributed v. Bruck*, 30 F.4th 414, 421 (5th Cir. 2022); *In re TikTok, Inc.*, 85 F.4th 352, 356 (5th Cir. 2023); *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 307 (5th Cir. 2008) (en banc). The transfer order in this case is far from routine given the Fifth Circuit's significant investment in injunction proceedings. Seamlessly accommodating the Fifth Circuit's appellate review of the transfer order is particularly appropriate for three reasons.

First, the transfer order is unprecedented. The Court ordered transfer after the appellate court substantially resolved nearly every threshold and merits issue in the case. *Clarke v. Commodity Futures Trading Comm'n*, 74 F.4th 627, 635–40 (5th Cir. 2023). That included substantive rulings bearing on: (a) whether the case is challenging final agency action by the CFTC, (b) whether the Plaintiffs have standing, (c) whether the CFTC decisions to open and close the market are so committed to agency discretion that they are judicially unreviewable, (d) whether the challenge to the CFTC's actions was mooted by intervening CFTC efforts to issue a new decision turning off the PredictIt Market's authority to proceed, (e) whether the CFTC had acted arbitrarily and capriciously in attempting to close the PredictIt Market, (f) whether the PredictIt Market had been issued a "license" to operate as that term is contemplated in the Administrative Procedure Act, (g) whether the CFTC followed the required procedures for terminating that license, and (h) whether the CFTC had violated the Fifth Circuit's injunction pending appeal. *Id.* The opinion was a thorough, comprehensive review of the important issues in this case. A very busy appellate court did not hesitate to grapple with them and to provide prompt relief. The Plaintiffs are unaware of any other instance of a district court transferring a case after such

extensive proceedings before a panel of the Circuit Court. In short, this is not a run-of-the-mill transfer decision that deserves no moment of pause.

Second, the Fifth Circuit is the court with the largest substantive stake so far in this case. At stake in the decision to transfer the case out of the Fifth Circuit is the continued efficacy of the Fifth Circuit's substantive legal effort to resolve this matter and the Fifth Circuit's interest in enforcing its rulings on the legal principles at issue. As such, the Fifth Circuit should have an opportunity to evaluate the appropriateness of a transfer. And the Fifth Circuit should be able to undertake this review without clerk- or administrative-driven actions effectuating the transfer that would consume the time of the parties or the court systems in question.

Third, the transfer order raises serious issues regarding this Court's compliance with the Fifth Circuit's mandate. The Fifth Circuit was very specific about what should happen next in this case. It remanded the 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 potentially reach a "definitive conclusion" on some of the questions at issue in the Court's opinion. *Id.* (Ho, J., concurring). The transfer order countermands the Fifth Circuit's clear instruction that further proceedings should occur in the district court to which it remanded the case, subject to continued supervision by the Fifth Circuit.

That the transfer order implicates important issues regarding the meaning of the Fifth Circuit's mandate demands that the Fifth Circuit should have an unimpeded opportunity to review

the order. The enforcement and interpretation of an appellate mandate are commended to the Fifth Circuit panel that issued it, and the requested stay would facilitate that review. *Am. Trucking Ass'ns, Inc. v. I.C.C.,* 669 F.2d 957, 960 (5th Cir. 1982) ("[M]andamus is the appropriate remedy to enforce the judgment of an appellate court[.]"); *Int'l Union v. OSHA*, 976 F.2d 749, 750 (D.C. Cir. 1992) ("[T]he court retains a residual jurisdiction to enforce its mandate[.]"); *Off. of Consumers' Counsel v. FERC*, 826 F.2d 1136, 1140 (D.C. Cir. 1987) ("A federal appellate court has the authority, through the process of mandamus, to correct any misconception of its mandate by a lower court or administrative agency subject to its authority.").

Even without reaching the four-part test for a stay pending appeal, the procedural history of this case is reason alone for this Court to exercise its inherent authority to stay transfer pending proceedings on the writ of mandamus. *See*, *e.g.*, *Fishman Jackson PLLC v. Israely*, 180 F. Supp. 3d 476, 482–83 & n.4 (N.D. Tex. 2016) (explaining the broad discretion under the Supreme Court's decision in *Landis* to stay proceedings and noting that the considerations depend on "context," "without applying any particular test"). But the traditional four-part stay test also favors a pause.

There can be no doubt the Plaintiffs' request for appellate reversal at the very least presents a substantial case on the merits and raises serious issues for appellate consideration. *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981) (to satisfy the likelihood of success factor, the movant "need only present a substantial case on the merits" involving "a serious legal question"). In addition to the serious issues raised above, the transfer order does not address the judicial policies strongly against using the transfer motion process for purposes of forum shopping. *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."). In this case, there was

not just some background strategy of the CFTC trying to project what forum might lead to a more favorable substantive decision. Rather, the CFTC was seeking transfer to avoid the implementation of an existing, documented, and firm Fifth Circuit articulation of key legal principles and express application of them to this case. The CFTC also was faced with a Circuit Court that concluded that it had "violate[d]" the court's "injunction pending appeal." *Clarke*, 74 F.4th at 641. The CFTC cannot be blamed for wanting to run for the hills, but the blatant forum-shopping of the agency weighs strongly against transfer, or at least raises a serious issue for resolution for the Fifth Circuit.

The transfer order also does not appropriately address the strong deference and presumption in favor of the plaintiff's choice of forum, barely mentioning the issue. Dkt. 61 at 11. That is contrary to binding Fifth Circuit cases, which time and again emphasize the significant weight that a district court must assign 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"). To outweigh the Plaintiff's choice of forum, the CFTC was required to demonstrate that the D.C. District Court is the "*clearly* more convenient" forum, which the agency did not come close to doing. *Def. Distributed*, 30 F.4th at 433.

What is more, the transfer order is contrary to the Fifth Circuit's strong commitment to hearing challenges to government actions, with nationwide effect, brought by the citizens under its jurisdiction. The CFTC is effectively arguing that what it does from its Washington headquarters must be litigated there. That is simply not the case. *See* 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). Accordingly, the Fifth Circuit has declined to transfer to Washington challenges to federal government action. *See, e.g.*, *Calumet Shreveport Ref., L.L.C. v. United States Env't Prot. Agency*, 86 F.4th 1121, 1133 (5th Cir. 2023). This Court's focus on the "locus of decisionmaking" by the CFTC as a driving factor in the transfer analysis runs contrary to the Fifth Circuit's repeated articulation of and adherence to a "duty to sit" and to hear challenges to federal government action, instead of deferring solely to courts in our Nation's capital.

Focus on the transferor court's relative busyness similarly has been repeatedly criticized by courts within the Fifth Circuit. *See Healthpoint, Ltd. v. Derma Scis. Inc.*, 939 F. Supp. 2d 680, 693 (W.D. Tex. 2013) (quoting *In re Genentech, Inc.*, 566 F.3d 1338, 1347 (Fed. Cir. 2009)); *Koss Corp. v. Apple Inc.*, No. 6-20-00665-ADA, 2021 WL 5316453, at *12 (W.D. Tex. Apr. 22, 2021). In this matter, though, the Court's view of the burdens of its docket was a substantial factor in transferring. Dkt. 61 at 9–10. How the Court weighed the congestion of its docket compared to the federal courts in our Nation's capital, at a minimum, raises serious issues for appellate review. This is especially so because the Fifth Circuit already has made a significant investment in this case.

A stay also would avoid irreparable harm to the court system and the parties. In the absence of a stay, the Fifth Circuit absolutely will retain the power to grant mandamus and to recall this case from Washington, D.C. *Def. Distributed*, 30 F.4th at 423–26. In that event, the D.C. federal court will have wasted scarce judicial resources on a case not properly transferred in the first place, and the parties will have wasted resources in addressing those proceedings elsewhere. This would be particularly inappropriate in light of the Fifth Circuit's ruling *in this case* that the CFTC has acted arbitrarily and capriciously and caused substantial harm to the Plaintiffs. Forcing the

Plaintiffs to spend additional funds chasing proceedings in D.C. that should not be occurring there would expose the Plaintiffs to additional financial harm. And, given the Government's sovereign immunity, those incremental expenses (entirely avoidable with a stay) would be considered irreparable. *Wages and White Lions Invs., LLC v. FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021).

The balance of equities and the public interest also favor a stay. A relatively short stay of these proceedings while the Fifth Circuit acts will not prejudice the parties. Bringing this case to Washington, now, is hardly urgent, as is evident by the pace of the renewed motion to transfer. The CFTC did not even renew its motion for transfer until well after the Fifth Circuit's decision, and after submitting a scheduling recommendation in response to this Court's request that did not even mention the prospect of transfer. Dkt. 43; Dkt. 47. The CFTC did not make any effort to accelerate the pace of its motion for nearly three months after it filed it, and has shown no urgency in moving this case forward while the motion was pending, seeking multiple extensions of its own filing deadlines. Dkts. 56, 59. Moreover, under Federal Rule of Appellate Procedure 21, if the mandamus petition were without merit (which it is not), it could be disposed of quickly and little time would be lost. If it has merit, these are precisely the circumstances where further administrative burdens implementing an erroneous transfer decision should not be undertaken. *See Def. Distributed*, 30 F.4th at 423–26.

Importantly, the forthcoming mandamus petition will implicate multiple policies that are in the public interest, including ensuring compliance with the law and avoiding the waste of the Fifth Circuit's investment in this case. *See N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.C. Cir. 2009) (the "public interest is served when administrative agencies comply with their obligations under the APA"); *F.T.C. v. Multinet Mktg., LLC*, 959 F. Supp. 394, 395–96 (N.D.

Tex. 1997) ("A change of venue now is likely to upset the discovery and trial schedule and waste judicial resources.").

For the foregoing reasons, the Plaintiffs respectfully request that the Court stay its transfer order for the longer of 14 days or the pendency of the forthcoming mandamus petition seeking reversal of the transfer decision in the Fifth Circuit.

Respectfully submitted,

/s/ Michael J. Edney

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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2024, 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

TAB 7

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 MILLER, JOSIAH NEELEY, GRANT SCHNEIDER, and WES SHEPHERD, *Plaintiffs*, v. COMMODITY FUTURES TRADING COMMISSION, *Defendant*.	Civil Docket No. 1:22-cv-00909 DAE The Honorable David Ezra

DEFENDANT CFTC'S OPPOSITION TO MOTION TO STAY TRANSFER ORDER

Plaintiffs' motion to stay this Court's order transferring venue to the District of Columbia in order to "accommodate" a forthcoming petition for writ of mandamus should be denied because it is moot and because Plaintiffs have little chance of prevailing on the merits if they file the planned petition challenging this Court's well-reasoned decision. The transfer order was dated January 16, 2024. Dkt. 61.[1] The original case file and transfer order were received and docketed in the transferee court by January 19, 2024. *See Clarke, et al. v. CFTC*, No. 1:24-cv-

[1] References in the form "Dkt." are to the docket numbers of this case in the District Court for the Western District of Texas unless the context specifically indicates that they are to the docket numbers of this case as docketed in the District Court for the District of Columbia.

00167-JMC at Dkt. 62 (D.D.C.). Plaintiffs filed their motion to stay the transfer order in this Court on Saturday, January 20, 2024, after the case was already docketed in the District of Columbia. Dkt. 63.

Plaintiffs' motion to stay should be denied for several reasons, discussed in more detail in the argument below. Most fundamentally, since the case has now been transferred to the District of Columbia, the action ordered by this Court has been completed and there is nothing to stay, rendering Plaintiffs' motion to moot. Under Fifth Circuit precedent, venue now lies with the District Court for the District of Columbia and this Court lacks authority to undo the transfer, reinforcing the point that a stay of the transfer order would be a meaningless act.

Moreover, even if this Court had jurisdiction to grant a stay, a stay should be denied because Plaintiffs have little chance of succeeding on the merits of the underlying transfer issue. Plaintiffs can only prevail on their forthcoming petition for a writ of mandamus challenging the transfer order if they can demonstrate a clear abuse of discretion by this Court. They will not be able meet this high standard because the transfer order was justified by this Court's well-reasoned accompanying opinion which applied well-established Fifth Circuit standards for transfer. Dkt. 61. Plaintiffs try to argue that the transfer in this case is some sort of extraordinary circumstance, *see* Dkt. 63 at 3-5, but their arguments on this point are little more than a rehash of arguments already made in Plaintiffs' briefs opposing transfer, Dkt. 13, 52, and refuted in the CFTC's replies. Dkt. 16, 54.

PROCEDURAL HISTORY[2]

Plaintiffs filed this case on September 9, 2022. Dkt. 1. The CFTC filed a motion to

[2] This history is limited to case developments most relevant to the present motion for a stay.

transfer venue to the District of Columbia pursuant to 28 U.S.C. § 1404(a) on September 20, 2022. Dkt. 8. On December 12, 2022, Magistrate Judge Mark Lane filed a Report and Recommendation recommending that the motion be granted. Dkt. 31. Plaintiffs filed an objection on December 27, 2022. Dkt. 33.

Meanwhile, on December 23, 2022, Plaintiffs appealed what they characterized as the district court's constructive denial of Plaintiffs' previously filed motion for a preliminary injunction. Dkt. 32. On May 12, 2023, while the appeal was pending, this Court denied the CFTC's motion to transfer without prejudice, subject to re-urging. Dkt. 38. On July 21, 2023, the Court of Appeals issued an opinion ordering a preliminary injunction, with the mandate issuing on September 12, 2023. Dkt. 42. Contrary to Plaintiffs' assertion, the Court of Appeals decision did not address venue. *See* discussion below.

The CFTC filed a re-urged motion to transfer on October 13, 2023. Dkt. 50. Plaintiffs responded on October 27, 2023. Dkt. 52. The CFTC filed its reply on November 3, 2023. Dkt. 54. On November 27, 2023, with the consent of the CFTC, Plaintiffs filed a Second Amended Complaint. Dkt. 55. The CFTC's answer or dispositive motion in response is currently due on February 26, 2024. Text Order, Jan. 5, 2024.

As noted above, this Court ordered transfer to the District of Columbia on January 16, 2024. Dkt. 61. The case file was received, and docketed in the transferee court, by January 19, 2024. *See Clarke, et al. v. CFTC*, No. 1:24-cv-00167-JMC at Dkt. 62 (D.D.C.). Plaintiffs filed a notice of intent to file a motion to stay in this Court on January 19, 2024. Dkt. 62 (W.D. Tex.). They filed their motion to stay the transfer order in this Court on Saturday, January 20, 2024. Dkt. 63.

ARGUMENT

I. A stay of the January 16, 2024 transfer order would have no effect because the case has already been transferred to the District Court for the District of Columbia and this Court lacks jurisdiction to reverse the transfer.

Plaintiffs' motion for a stay should be denied as moot because the action ordered by the Court in its January 16, 2024 transfer order—transfer to the United States District Court for the District of Columbia—has already been completed and there is nothing left to stay. Once the case files were received by the District Court for the District of Columbia and the case was docketed in that Court—which occurred by January 19, 2024—the transfer was compete and this Court lost jurisdiction over the case. *See*, *e.g.*, *Mlodzianowski v. Markus*, 2021 WL 6750852 at *2 (W.D. Tex. October 7, 2021) (collecting cases). This is particularly true because, under Fifth Circuit precedent, this Court, because of its loss of jurisdiction over the transferred case, lacks the authority to reverse the transfer. *Def. Distrib. v. Bruck*, 30 F.4th 414, 423-424 (5th Cir. 2022). As a result, a stay of the January 16 order would have no effect on the case.

In *Def. Distributed*, as in this case, the District Court for the Western District of Texas transferred a case to a United States District Court outside the Fifth Circuit and the plaintiffs sought relief from the transfer via a petition to the Fifth Circuit for a writ of mandamus. 30 F.4th at 423. A divided panel of the Court of Appeals agreed that the original transfer order was erroneous but held that the effect of the transfer was to severely limit what actions either the District Court for the Western District of Texas or the Fifth Circuit could take in response. *Id*. at 423-24. Specifically, the Court of Appeals stated, "[b]ecause of the transfer, the Texas transferor court can no longer enter an appealable order in the case." *Id*. at 424. And even the Court of Appeals itself "lacks power to order a return of the case to our circuit." *Id*. at 423. The Court of Appeals vacated the transfer order, *id.* at 436-37, but this did not have the effect of returning the

case to the Western District of Texas. *See id*. at 423. The most the Court of Appeals could do was direct the district court to ask—but not order—the transferee court to retransfer the case back to the Western District of Texas. *Id*. at 424, 436. After receiving the request for retransfer, the transferee court made an independent analysis under 28 U.S.C. § 1404(a), including consideration of the Fifth Circuit opinion, and declined to send the case back to the Western District of Texas. *Def. Distributed v. Platkin*, 617 F. Supp. 3d 213, 225, 232-41 (D.N.J. 2022). *Def. Distributed* thus makes clear that this Court no longer has authority to rule on the transfer, making a stay of the transfer order meaningless.

Other authority similarly holds that once a case has been transferred, the courts in the transferor circuit lose jurisdiction over the transfer and therefore cannot undo or, by implication, stay it. *See, e.g., In re Red Barn Motors, Inc.*, 794 F.3d 481, 484 (5th Cir. 2015) (stating that district court in Louisiana "lost its jurisdiction" when case was transferred to district court in Indiana and that "it seems uncontroversial" that "transfer to another circuit removes the case from our jurisdiction"); 15 Fed. Prac. & Proc. Juris. § 3846 (4th ed.), text at n.1 ("When a motion for transfer under 28 U.S.C. § 1404(a) is granted and the papers are lodged with the clerk of the transferee court, the transferor court and the appellate court for the circuit in which that court sits lose jurisdiction over the case . . .").

Even the cases cited by Plaintiffs hold that, once a transfer has occurred, the courts in the transferor circuit lose jurisdiction over the transfer order and cannot reverse it. This is so even if, under local rules or precedent not applicable to this case, the district court *should* have stayed its

transfer order before it took effect but did not.[3] For example, in *In re Nine Mile Limited*, 673 F.2d 242 (8th Cir. 1982), the District Court for the Northern District of Iowa ordered a transfer to the District of South Carolina and the clerk of transferor court immediately effectuated the order by transferring the record to South Carolina. *Id*. at 243. The Eighth Circuit Court of Appeals held that, while it may have been better practice for the Iowa district court to have delayed the execution of the transfer order for a period of time to allow an opportunity for appellate review, the Eight Circuit had nevertheless lost jurisdiction over the transfer order. *Id*. at 244. As in *Def. Distributed*, the Eighth Circuit directed the Iowa district court to request, but not order, the retransfer of the case, reflecting the fact that the Iowa court no longer had jurisdiction to issue orders in the case. *See also*, *e.g.*, *Chrysler Credit Corporation v. Country Chrysler, Inc.*, 928 F.2d 1509, 1516-17 (10th Cir. 1991) (stating that, even where it is good practice to delay execution of transfer order to permit appellate review, once the transfer has been effectuated "[t]he transferor court loses all jurisdiction over the case including the power to review the transfer" and "appellate jurisdiction [over the transfer order] in the transferor circuit is terminated"); *In re Warrick*, 70 F.3d 736, 741 (2d Cir. 1995) (stating that Court of Appeals may issue mandamus order "of limited reach" directing district court to "ask" for return of case following transfer). In other mandamus cases cited by Plaintiffs, the district court denied a motion to transfer, so the issue of loss of jurisdiction did not arise. *E.g.*, *In re TikTok*, *Inc.*, 85 F.4th 352 (5th Cir. 2023); *In re Volkswagen of America, Inc.*, 545 F.3d 304 (5th Cir. 2008).

[3] Plaintiffs have cited no Western District of Texas rule or Fifth Circuit precedent requiring this Court to stay transfer orders when they are issued. But even if such rule or precedent existed, it would lose effect once a transfer is completed, under the precedent cited by Plaintiffs and described in the text of this paragraph.

Thus, because the case file has been transferred to, and docketed in, the District Court for the District of Columbia, this court lacks jurisdiction to issue further orders regarding the transfer and a stay of the original transfer order would be without force. Plaintiffs' motion for a stay should therefore be denied because it is moot and, relatedly, because this Court now lacks jurisdiction to issue any order, including a stay order, in this case.

II. Even if this Court had authority to stay its transfer order pending a future petition for mandamus, it should not issue a stay because Plaintiffs have little likelihood of prevailing on any such petition.

Even if this Court had authority to stay its January 16, 2024 transfer order pending Plaintiffs forthcoming petition for mandamus, it should not issue a stay because Plaintiffs have little likelihood of prevailing on their planned petition. There is no right to a stay pending a Court of Appeals's disposition of a petition for writ of mandamus. *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). To justify a stay, an applicant must, among other requirements make "a strong showing that he is likely to succeed on the merits." *Nken*, 556 U.S. at 426. These factors do not support the requested stay.

First, and most important, Plaintiffs have little likelihood of succeeding on the merits of their planned petition for mandamus. A district court's determination whether to transfer a case is subject to mandamus only if the district court's ruling is "a clear abuse of discretion" leading to a "patently erroneous result." *In re TikTok Inc.*, 84 F.4th at 358. This Court's transfer order clearly does not fall into this category since the Court reached its result based on a meticulous application of the Fifth Circuit's standards for transfer under section 1404(a) to the facts of this case. *See* Order Granting Motion to Transfer Venue and Denying as Moot Motion for Expedited Consideration, Dkt. 61 at 6-11 (applying standards from *In re Volkswagen AG*, 371 F.3d 201 (5th Cir. 2004)).

Plaintiffs argue that the transfer order is "unprecedented" because the Fifth Circuit Court of Appeals addressed numerous issues in the case in its decision ordering this Court to issue a preliminary injunction. Motion, Dkt. 63 at 3. However, as the CFTC explained in its reply brief in support of transfer, rulings by the Fifth Circuit in that decision are not wasted effort because they will be treated as law of the case in the transferee court. Dkt. 54 at 1-2; *see*, *e.g.*, *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988). In any event, district courts frequently transfer cases in circumstances where there have been rulings on preliminary injunctions by the transferor court, including rulings pending on appeal in the transferor circuit at the time of the transfer.[4] *See*, *e.g.*, *FTC v. IAB Marketing Associates*, 746 F.3d 1228, 1231-32 (11th Cir. 2014); *Jones v. InfoCure Corp.*, 310 F.3d 529, 532-33 (7th Cir. 2002) (collecting cases). Transfers have been ordered in cases where transferor courts have had to grapple extensively with merits issues in the course of ruling on preliminary injunction motions prior to transfer. *See*, *e.g.*, *Valley Community Preservation Commission v. Mineta*, 231 F. Supp. 2d 23, 29-43, 48 (D.D.C. 2002) (addressing likelihood of success on merits of complex administrative law issues at length in connection with denial of preliminary injunction before ordering transfer of venue). Thus, while there exists a Court of Appeals decision on a preliminary injunction in this case, that does not make the transfer order "unprecedented" in any sense legally relevant to Plaintiffs' motion for a stay.

Plaintiffs' further state that "the Fifth Circuit is the court with the largest substantive stake so far in this case" and should have an opportunity to review the transfer order "without the

[4] In such cases, the court of appeals for the transferor circuit may retain jurisdiction over the interlocutory appeal of the preliminary injunction order because the order was issued before the case was transferred. *See Jones*, 746 F.3d at 532-34.

clerk-or administrative-driven actions effectuating the transfer . . ..." Motion, Dkt. 63 at 4. The phrasing of this argument is odd since federal courts are normally considered to be "neutral arbiters," not entities with a "substantive stake" in cases. *E.g.*, *Elmen Holdings, L.L.C. v. Martin Marietta Materials, Inc.*, 86 F.4th 667, 673-74 (5th Cir. 2023). In any event, as described above in Argument I, the procedural and jurisdictional parameters for Fifth Circuit review of transfer orders are those set forth in *Def. Distributed* and would not be affected by a stay issued by this Court.

In addition, even though venue issues were not argued before the Fifth Circuit, and the Fifth Circuit's decision on a preliminary injunction contains no analysis of venue, Plaintiffs interpret the words "it" and "its" in the decision as prohibiting future transfer of the case. Motion, Dkt. 63 at 4 (interpreting 74 F.4th at 633, 44). However, the relevant 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 issues. The same is true of the use of the word "its" in the order language quoted in the motion. *Id*. Similarly, and contrary to Plaintiffs' assertion, Judge Ho's concurring statement that "we need not reach a definitive conclusion on [the issue of 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 motion and says nothing about future procedures on remand.

Plaintiffs also reassert their incorrect theory that a transfer of this case to the District of Columbia implies that review of all CFTC actions can only take place in the District of Columbia and is therefore inconsistent with Fifth Circuit doctrine. Motion, Dkt. 63 at 6-7. This theory ignores the decisive point that in this case—unlike in almost all other regulatory review cases—the primary *plaintiffs* are located in Washington, D.C. *See* Transfer Order, Dkt. 61 at 10-11.

Plaintiffs' remaining arguments have been addressed in the CFTC's re-urged Motion to Transfer, Dkt. 52 and Reply in support of that motion, Dkt. 54.

Thus, even if the motion for a stay were not moot and this Court had jurisdiction to issue a stay, Plaintiffs' motion should be denied.

CONCLUSION

Plaintiffs' motion for a stay should be denied.

Respectfully submitted,

/s/ *Martin B. White*
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CERTIFICATE OF SERVICE

I certify that on January 24, 2024, I caused the foregoing Opposition to Motion to Stay Transfer Order 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

TAB 8

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

KEVIN CLARKE, ET AL.,	§	NO. 1:22-CV-909-DAE
	§	
Plaintiffs,	§	
	§	
vs.	§	
	§	
COMMODITY FUTURES TRADING COMMISSION,	§	
	§	
Defendant.	§	
	§	

ORDER DENYING MOTION TO STAY TRANSFER ORDER

The matter before the Court is Plaintiffs' Motion to Stay Transfer Order filed on January 20, 2024. (Dkt. # 63.) Defendant Commodity Futures Trading Commission ("CFTC") filed a response in opposition on January 24, 2024. (Dkt. # 65.) After careful consideration of the matters raised in the motion, the Court will **DENY** a stay of this Court's transfer order because the Court no longer has jurisdiction in this case to grant such a request.

BACKGROUND

The background facts of this case are fully discussed in the Court's Order Granting Motion to Transfer Venue of this case to the U.S. District Court for the District of Columbia. (Dkt. # 61.) In that Order, filed on January 16, 2024, the Court transferred venue of this case to the D.C. District because the Court

determined that the public interest factors weighed heavily in favor of a transfer to that district. (Id.) Thereafter, the Clerk of Court transferred this case to the D.C. District Court and the case was terminated in this district.

On January 20, 2024, Plaintiffs filed the instant motion to stay that transfer on the basis that they intended to file a petition for writ of mandamus to the Fifth Circuit Court of Appeals, seeking to reverse this Court's decision to transfer the case. (Dkt. # 63.) Plaintiffs ask the Court for a stay of fourteen days to file that writ. (Id.) The CFTC opposes any stay, and the Court ordered the CFTC to submit supplemental expedited briefing on this issue. (Dkt. # 64.) On January 24, 2024, the CFTC filed its response in opposition. (Dkt. # 65.)

ANALYSIS

It is well-settled in the Fifth Circuit "that a transfer to another circuit removes the case from our jurisdiction." In re Red Barn Motors, Inc., 794 F.3d 481, 484 (5th Cir. 2015). When case files are "transferred physically to the court in the transferee district, the transferor court loses all jurisdiction over the case, including the power to review the transfer." Bustos v. Dennis, No. SA-17-CV-39, 2017 WL 1944165, at *2 (W.D. Tex. May 8, 2017) (quoting Auto. Body Parts Ass'n v. Ford Glob. Techs., LLC, No. 4:13-CV-705, 2015 WL 1517524, at *1 (E.D. Tex. Apr. 2, 2015)).

Here, the Court finds that it lacks jurisdiction to stay the Order transferring this case to the D.C. District. As stated, the Court granted the motion to transfer on January 16, 2024, and transferred the case that same day. (See Dkt. # 61.) The case was docketed in the transferee court on January 19, 2024. (See Case No. 1:24-cv-167-JMC (D.D.C.). As such, on that date, the Court lost jurisdiction over the case. In re Red Barn Motors, 794 F.3d at 484. The Court shall therefore deny Plaintiff's motion to stay because it lacks jurisdiction over the case.

Although the Court is sympathetic to this procedural hurdle that Plaintiffs may now face in seeking review of the Court's transfer order, see Def. Distributed v. Bruck, 30 F.4th 414 (5th Cir. 2022), Plaintiffs could have requested in their response briefing that should the Court determine that a transfer was warranted pursuant to 28 U.S.C. § 1404(a), the Court stay the transfer until such time as the Fifth Circuit could review the order. But without any such request before it, there is no authority holding that a district court must stay its own decision to transfer a case to a different district. Furthermore, the Court notes that the Order transferring the case was docketed on January 17, 2024, at 8:24AM CST. (Dkt. # 61.) Plaintiffs did not file their Notice of Intent to File a Motion to Stay Transfer until over two days later on Friday, January 19, 2024, at 9:25AM CST (Dkt. # 62), and their full Motion to Stay Transfer Order until the next day,

Saturday, January 20, 2024, at 1:42PM CST (Dkt. # 63.) These documents were filed after transfer to the D.C. District had already occurred. And, given the Court's reporting system, the Court was not made aware that any such Notice or Motion was filed until the morning of January 22, 2024. It is simply too late now for the Court to grant a stay in this case.

CONCLUSION

Based on the foregoing, the Court **DENIES** Plaintiffs' Motion to Stay Transfer Order. (Dkt. # 63.)

IT IS SO ORDERED.

DATED: Austin, Texas, January 25, 2024.

David Alan Ezra
Senior United States District Judge

TAB 9

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 MILLER, JOSIAH NEELEY, GRANT SCHNEIDER, and WES SHEPHERD,

Plaintiffs,

v.

COMMODITY FUTURES TRADING COMMISSION,

Defendant.

Civil Docket No. 1:22-cv-00909-DAE

The Honorable David Alan Ezra

PLAINTIFFS' MOTION FOR THIS COURT TO REQUEST RETURN OF THE CASE FROM THE DISTRICT OF COLUMBIA AND INTEGRATED REQUEST FOR EXPEDITED TREATMENT; RENEWED MOTION FOR STAY OF TRANSFER ORDER; AND REPLY IN SUPPORT OF SUCH STAY

The Plaintiffs respectfully request that the Court take steps to pause the transfer of this case to the federal courts of our Nation's capital, including by requesting the return of the case to this Court, pending appellate review. The Government's arguments against allowing time for appellate review of the transfer order are flawed. And they should not stand in the way of actions to ensure that the case is in the jurisdiction of this Court, while the Fifth Circuit weighs in on the transfer question.

This Court explained in an order hours ago that all clerk actions of this Court to transfer the case to Washington were completed on January 16, 2024, before the transfer order was publicly revealed on this Court's docket. ECF 66 at 3. Plaintiffs thus respectfully move this Court to request return of the case to this Court. The Court should then stay the transfer order pending

appellate review. Multiple appellate courts, across the country, have held that the correct course of action is to pause a transfer out of the jurisdiction of a circuit court to permit the non-moving party to seek appellate review and, to the extent any transfer happened so quickly and automatically after the transfer order to precede a request for stay, to request return of the case.

To allay any concerns about requesting return of the case and then staying transfer, the second section of this motion responds to the Government's arguments that the merits of the transfer decision counsel against pausing completion of the transfer. As demonstrated below, the transfer order in this case raises substantial questions on which the Fifth Circuit should have an opportunity to rule.

The Plaintiffs further respectfully request expedited treatment of this renewed motion and that the Court require a response from the Government by Monday, January 29, 2024.

I. As a Matter of Procedure, the Court Should Promptly Seek Return of the Case from Washington and Stay the Transfer Order.

The Court's order entered today suggests that the administrative steps of transferring the case to Washington have been completed. ECF 66.[1] If that is so, the Court should request return of the case and then stay its transfer order pending mandamus review. Doing so would implement "the better practice, codified in some local district court rules, . . . to stay the effect of transfer orders for a sufficient period to enable appellate review to be sought." Wright & Miller, 15 Fed. Prac. & Proc. Juris. § 3846 (4th ed.).

The Eighth Circuit has explained at length that "physical transfer of the file should be delayed for a period of time after entry of the transfer order so that review may be sought in the

[1] The parties are not privy to any communications between the clerk's office of this Court and that of the federal court in Washington, D.C. Plaintiffs thus are relying solely on this Court's order of today for the indication that transfer had been completed.

transferor circuit." *In re Nine Mile Ltd.*, 673 F.2d 242, 243 (8th Cir. 1982). The Court further explained that, if the physical transfer occurred quickly, the correct course is for the district court promptly to request return of the file once notified of the prospect of appellate review. *Id.* at 244. Indeed, the Court granted mandamus for a district court not promptly seeking return once notified that appellate review would be sought. *Id.* Requesting return is a matter of judicial administration, not some weighing of the chances of appellate review, because "the better procedure is to hold up the transfer for a reasonable time pending possible petition for reconsideration or review." *Id.* at 243 (quoting with approval *Technitrol, Inc. v. McManus*, 405 F.2d 84, 86 (8th Cir. 1968)).

The Eighth Circuit's explanation is right in line with Fifth Circuit precedents, which observe that it is proper to request return of a case to facilitate appellate review and to use mandamus to force such requests when a district court is unwilling. *In re Red Barn Motors, Inc.*, 794 F.3d 481, 484 & n.6 (5th Cir. 2015) (collecting cases approving of mandamus requiring "the transferor district court to request that the transferee district court return the case"); *Def. Distributed v. Bruck*, 30 F.4th 414, 424 (5th Cir. 2022) (granting petition for writ of mandamus and ordering district court to vacate transfer order and request transferee court to return the transferred case to the Western District of Texas).

This practice makes sense. Had the Government's motion to transfer been denied, the Government would have had the ability to weigh seeking mandamus review of that order. The same should be true for orders granting transfer. As the Fifth Circuit explained in *Defense Distributed*, "the fact that the district court here granted the transfer, rather than denying it, makes no difference." 30 F.4th at 426.

Contrary to the impression left by the Government's discussion of the Fifth Circuit's decisions in the *Defense Distributed* cases (ECF 65, Opp. at 5), district court requests to return

transferred cases are routinely granted as a matter of comity, even without Circuit Court involvement. *See*, *e.g.*, *In re Nine Mile Ltd.*, 692 F.2d 56, 58 (8th Cir. 1982) (noting that the transferee court promptly honored the request to return the case); *CCA Glob. Partners, Inc. v. Yates Carpet, Inc.*, No. 5:05-CV-221, 2005 WL 8159381, at *1 (N.D. Tex. Dec. 22, 2005) (transferring case back to the Eastern District of Missouri, stating that "[t]his Court will not stand in the way of another district court attempting to correct what it believes to have been an error made while the case was under its jurisdiction"); *Fine v. McGuire*, 433 F.2d 499, 500 & n.1 (D.C. Cir. 1970) (request granted returning case from District of Maryland to District of Columbia); *Billings v. Ryze Claim Solutions, LLC*, No. 1:19-cv-01038, ECF No. 120 (E.D. Ca. Jan. 27, 2021) (order granting request for retransfer to the Southern District of Indiana in accordance with Seventh Circuit mandate in *In re Ryze Claims Solutions, LLC*, 968 F.3d 701 (7th Cir. 2020)); *Warrick v. General Electric Co.*, No. 3:95-cv-01661, ECF No. 4 (M.D. Pa. Dec. 11, 1995) (order granting request for retransfer to the District of Connecticut in accordance with Second Circuit mandate in *In re Warrick*, 70 F.3d 736, 737 (2d Cir. 1995)); *see also Herman v. Cataphora Inc.*, No. 3:12-CV-04965, 2013 WL 275960, at *2 (N.D. Cal. Jan. 24, 2013) (granting transfer back to Eastern District of Louisiana because "[a] grave miscarriage of justice would result if an administrative glitch were to deprive the Plaintiffs of an opportunity to seek appellate review in the transferor circuit").

In fact, *Defense Distributed* appears to be the only case where a transferee court refused a request to retransfer a case to the original district. *See Def. Distributed v. Platkin*, 48 F.4th 607, 608 (5th Cir. 2022) (Ho, J., concurring) ("[W]e're unsurprised that such courtesy [to honor retransfer requests] appears to be routine practice in district courts nationwide. In fact, we're unaware of any district court anywhere in the nation to have ever denied such a request. The

parties admit they have not found any."). Importantly, the course of events in *Defense Distributed* is all the more reason for this Court to act quickly and request return to facilitate appellate review. It would be an understatement to say that the Fifth Circuit was not pleased with the interplay between the district courts that prevented its views on transfer from having effect. *Id.*[2] If this Court can avoid a repeat of those circumstances, it should—indeed must—do so.

II. The Transfer in this Case Raises Substantial Questions, Such That a Request to Return the Case to this Court and Stay of Transfer Is Warranted.

Regarding the substantive propriety of actions to pause the transfer and allow appellate review, the Government argues only that the Plaintiffs are unlikely to succeed on their forthcoming mandamus petition. Opp. at 7-10.

As an initial matter, the Government's arguments regarding likelihood of success are not directed at the correct inquiry. District and Circuit Courts pausing transfer orders to permit appellate or mandamus review—or directing the request of the case's return to facilitate that review—have acted because it is the correct procedure as a matter of judicial administration, without regard to the likelihood a reviewing court ultimately will reverse the transfer order. *See*, *e.g.*, *In re Nine Mile Ltd.*, 673 F.2d at 243 (as a matter of procedure, requiring the district court to request return of a case transferred to a district court in another circuit so as not to pretermit appellate review in the transferor circuit without review of likelihood of appellate success); *In re*

[2] In addition to being a significant departure from the comity that generally honors a request to return as a matter of course, the New Jersey court in *Defense Distributed* noted unique circumstances, including that the Plaintiffs had filed a related action in the District of New Jersey and consented to consolidation of that action with the action that had been transferred from the Western District of Texas (both of which involved the constitutionality of actions taken under New Jersey law) without opposition. *See Def. Distributed v. Platkin*, 617 F. Supp. 3d 213, 223–25 (D.N.J. 2022). Here, the Plaintiffs have not filed an action in the D.C. District Court and this case does not involve review of D.C. law.

Nine Mile, Ltd., 692 F.2d at 59–61 (as a matter of substance, after proper procedures were honored and district court requested return of case, upholding the transfer order, clearing the way for an ultimate transfer). In any event, the transfer order is not a judgment or other order coercing action; it is akin to a stay of further proceedings pending review. And the Government does not contest that courts regularly stay proceedings—in these very circumstances—pursuant to their inherent docket-control powers, without any reference to likelihood of success. ECF 63, Mot. at 1-2 (collecting cases). Even if that were not the case, the Fifth Circuit has repeatedly affirmed (including after decisions like *Nken v. Holder*, 556 U.S. 418 (2009) and *NRDC v. Winter*, 555 U.S. 7 (2008)) that a stay may issue not only when there is a likelihood of success, but also when a party presents "a substantial case on the merits" concerning a "serious legal question." *See Campaign for S. Equal. v. Bryant*, 773 F.3d 55, 57 (5th Cir. 2014); *Texas v. United States*, 50 F.4th 498, 531 (5th Cir. 2022).

The Plaintiffs have undeniably cleared that hurdle here. Mot. at 3-5. This case raises serious legal questions that the Fifth Circuit should have a chance to review. They include questions regarding where cases challenging government actions having nationwide effect should be heard and questions regarding the Government's efforts to avoid further Fifth Circuit enforcement of the legal principles set forth in its substantive opinion touching all corners of the merits of this case.

"Plaintiffs get to choose where to file their lawsuits from multiple permissible forums. In suits against the federal government, Congress authorizes plaintiffs to bring suit in their district of residence." *Texas v. Garland*, No. 5:23-CV-034, 2023 WL 4851893, at *12 (N.D. Tex. July 28, 2023). Parties cannot—as the Government has done here—use the transfer statute to shop for a forum they perceive likely to yield a better outcome based on more favorable law. The Supreme

Court has expressly instructed that 28 U.S.C. "§ 1404(a) should not create or multiply opportunities for forum shopping." *Ferens v. John Deere Co.*, 494 U.S. 516, 523 (1990); *see also Rusesabagina v. GainJet Aviation S.A.*, No. 5:20-CV-01422, 2023 WL 4853402, at *6 (W.D. Tex. July 28, 2023) (citing *Ferens* in holding that "[t]ransferring this case to the D.D.C. based on its more expansive view of personal jurisdiction would permit the very kind of post-filing forum shopping § 1404 was intended to prevent"). "Section 1404(a) is meant to be a 'judicial housekeeping measure' rather than a 'forum-shopping instrument.'" *Michigan Welfare Rights Org. v. Trump*, 600 F. Supp. 3d 85, 98 (D.D.C. 2022) (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 636 (1964)).

This is even more true when there has been an adverse ruling that the party seeking transfer hopes to evade. Clearly, "[f]orum shopping efforts pursued by awaiting a decision relevant to the merits and then bypassing or filing a motion to transfer should not be rewarded with success." *In re New York Trap Rock Corp.*, 158 B.R. 574, 577 (S.D.N.Y. 1993). Because "[o]nly a neutral reason—one not designed to favor one party over another—can justify a transfer," transfer should not be granted at the behest of a party against whom an adverse ruling has been handed down. *Cohen v. Waxman*, 421 Fed. Appx. 801, 803–04 (10th Cir. 2010) ("Only now that [plaintiff] knows that he will lose in [the original] forum does he seek another. But the law rarely favors two bites at the apple."); *Utterback v. Trustmark Nat'l Bank*, 716 Fed. Appx. 241, 245 (5th Cir. 2017) ("[I]t would emphatically not serve the interest of justice to allow [plaintiff] to take a second 'bite[ ] at the apple' in Florida, just after learning that he would lose in Mississippi.") (citing *Cohen*, 421 Fed. Appx. at 803). Thus, when a transfer motion is made under the pretense of convenience to the parties but "the true motivation behind it is 'judge-shopping,'" the "obviously improper motivations provide an adequate basis for denying the motion [to transfer] in its entirety."

Williams Advanced Materials, Inc. v. Target Tech. Co., No. 1:03-CV-276, 2007 WL 2245886, at *6 (W.D.N.Y. Aug.1, 2007).

The Government attempts to refute that the transfer order is unprecedented because it followed such extensive effort, analysis, and rulings by the Fifth Circuit. Opp. at 8 (citing *FTC v. IAB Marketing Associates*, 746 F.3d 1228, 1231–32 (11th Cir. 2014); *Jones v. InfoCure Corp.*, 310 F.3d 529, 532–33 (7th Cir. 2002); and *Valley Community Preservation Commission v. Mineta*, 231 F. Supp. 2d 23, 29–43, 48 (D.D.C. 2002)). But the cases the Government cites only reinforce how unprecedented transfer after a circuit court so thoroughly grapples with the merits would be. Each of the cited cases considered a scenario where a district court voluntarily relinquished control over a case after ***itself*** ruling on a request for a preliminary injunction (and two of the three denied injunctive relief). That is entirely different than the situation here, where the ***Circuit Court*** ordered entry of a preliminary injunction—in a published opinion evaluating and resolving nearly every threshold and merits issue in the case—only for the district court to then transfer the case across the country. And, without a stay and an opportunity for the Fifth Circuit to review the transfer order, the transfer order would deprive the Court that has most familiarity with the merits of this case to decide whether it should retain jurisdiction.

The Government also argues that language in the Fifth Circuit's mandate and opinions directing *this Court* to engage in further proceedings in this case on remand and contemplating a return to the Fifth Circuit panel deciding the case thereafter was inadvertent loose terminology and no reason to hesitate transferring the case. Opp. at 8-9. That position is difficult to square with the plain text of those documents. But even indulging the Government's argument for a moment, the Fifth Circuit should be allowed to weigh in on any serious question regarding the interpretation of its opinion and mandate. After all, as the Plaintiffs explained in their motion, there can be no

question that a Circuit Court "retains a residual jurisdiction to enforce its mandate," *Int'l Union v. OSHA*, 976 F.2d 749, 750 (D.C. Cir. 1992), and "has the authority, through the process of mandamus, to correct any misconception" with it. *Off. of Consumers' Counsel v. FERC*, 826 F.2d 1136, 1140 (D.C. Cir. 1987).

Finally, the Government repeats its theory that because two of thirteen plaintiffs are located in Washington, D.C., the Court can "disregard" the serious injuries befalling the many trader and academic plaintiffs located in this district. As the Fifth Circuit has already made clear, the injuries to traders are serious and the Government's failure to grapple with them was a particular source of illegality in the CFTC's efforts to close the market. *Clarke v. Commodity Futures Trading Comm'n*, 74 F.4th 627, 640–44 (5th Cir. 2023).

The local interest factor weighs heavily in favor of transfer only when there is *no* relevant factual connection to the transferor district. *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 317–18 (5th Cir. 2008) (en banc). While this Court stated that the D.C.-based plaintiffs may suffer greater economic harm than those in Texas, the amount of money that one stands to gain or lose in the litigation is not a proxy for the "connections between a particular venue and the events that gave rise to a suit," *Def. Distributed*, 30 F.4th at 435, or whether the citizens of one district have a greater "stake" in the litigation than the citizens of the other district. *See Volkswagen*, 545 F.3d at 318.

For all of these reasons, the Government's substantive arguments against a stay should not dissuade this Court from taking actions to pause the transfer, including requesting return of the case from the District of Columbia and then staying the transfer order to permit appellate review.

Respectfully submitted,

/s/ Michael J. Edney

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2024, 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

TAB 10

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 MILLER, JOSIAH NEELEY, GRANT SCHNEIDER, and WES SHEPHERD, *Plaintiffs*, v. COMMODITY FUTURES TRADING COMMISSION, *Defendant*.	Civil Docket No. 1:22-cv-00909 DAE The Honorable David Ezra

DEFENDANT CFTC'S OPPOSITION TO PLAINTIFFS' MOTION FOR THIS COURT TO REQUEST RETURN OF THE CASE FROM THE DISTRICT OF COLUMBIA AND INTEGRATED REQUEST FOR EXPEDITED TREATMENT; RENEWED MOTION FOR STAY OF TRANSFER ORDER; AND REPLY IN SUPPORT OF SUCH STAY

Plaintiffs' motion for this court to request return of this case from the District Court for the District of Columbia should be denied.[1] Plaintiffs, in essence, ask this Court to request the District of Columbia Court to return the case merely as a matter of administrative convenience for further proceedings, even though this Court has determined on the merits that a transfer is appropriate. By contrast, in previous cases, requests for retransfer have typically been made

[1] If the motion to request return of the case is denied, the remainder of the relief requested in the motion would be moot.

after a determination that the transfer was wrong on the merits. *See*, *e.g.*, *Def. Distrib. v. Bruck*, 30 F.4th 414, 433-36 (5th Cir. 2022); *In re: Ryze Claim Solutions, LLC,* 968 F.3d 701, 708-12 (7th Cir. 2020); *In re Warrick*, 70 F.3d 736, 740-41 (2d Cir. 1995); *Fine v. McGuire*, 433 F.2d 499, 500-02 (D.C. Cir. 1970); *see generally CCA Glob. Partners, Inc. v. Yates Carpet, Inc.*, 2005 WL 8159381 at *2 (N.D. Tex. Dec. 22, 2005) (retransferring case following transferor court's determination that it erred); *but see In re Nine Mile Ltd.*, 673 F.2d 242 (8th Cir. 1982) (directing district court to request retransfer where district court did not follow transfer procedure specifically recommended in Eight Circuit precedent); *Herman v. Cataphora Inc.*, 2013 WL 275960 (N.D. Cal. Jan. 24, 2013). Just as there is no authority in this district holding that a court must stay or delay its own decision to transfer a case, *see* Dkt. 66 at p. 3, there is also no authority holding that the transferor court should request return of a case when, as here, a party failed to seek a timely stay before transfer was complete.

In this case, it makes sense to follow the procedure outlined by the Fifth Circuit in *Defense Distributed* and request retransfer only if the Court of Appeals so orders, for several reasons. For this Court to request retransfer without a Court of Appeals determination on the merits would be an imposition on the transferee court. It risks treating this case like a yo-yo since, if the case is returned, it would have to be transferred back to the District of Columbia if the original transfer is left in place by the Fifth Circuit in the forthcoming mandamus proceedings. Such an outcome is likely given the high bar for mandamus and this Court's well-reasoned decision. Plaintiffs' motion also wastes judicial resources by requiring additional district court proceedings in two districts before Plaintiffs proceed with their planned mandamus petition.

The proper course for the Plaintiffs, if they disagree with the transfer, is to use the

procedure set forth in *Defense Distributed* and petition for mandamus in the Court of Appeals. If the Court of Appeals so orders, this Court can request retransfer at the proper time, without prematurely creating additional work for two judicial districts.

CONCLUSION

Plaintiffs' motion should be denied.

Respectfully submitted,

/s/ *Martin B. White*
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CERTIFICATE OF SERVICE

I certify that on January 26, 2024, I caused the foregoing document 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

TAB 11

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 MILLER, JOSIAH NEELEY, GRANT SCHNEIDER, and WES SHEPHERD,

Plaintiffs,

v.

COMMODITY FUTURES TRADING COMMISSION,

Defendant.

Civil Docket No. 1:22-cv-00909-DAE

The Honorable David Alan Ezra

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR THIS COURT TO REQUEST RETURN OF THE CASE FROM THE DISTRICT OF COLUMBIA AND INTEGRATED REQUEST FOR EXPEDITED TREATMENT; RENEWED MOTION FOR STAY OF TRANSFER ORDER; AND REPLY IN SUPPORT OF SUCH STAY

The Government makes no persuasive argument against requesting return of this matter from Washington and staying the transfer order pending Fifth Circuit review on mandamus.

The Government principally contends that requests to return a case are "typically" made only after the Circuit Court commands it through mandamus. To make this argument, the Government cites one Fifth Circuit example addressing a transfer to a court outside the Circuit: the series of events occurring in *Defense Distributed v. Bruck*, 30 F.4th 414 (5th Cir. 2022). *See* ECF 68, Opp. at 1-2. That case hardly stands for the proposition that "the procedure outlined by the Fifth Circuit . . . is to request transfer only if the Court of Appeals so orders." Opp. at 2. It is instead a cautionary tale of the impediments to appellate review, the dissatisfaction of this Court's reviewing circuit, and the administrative chaos when return is not promptly requested. *Def.*

Distributed v. Platkin, 617 F. Supp. 3d 213, 241 (D.N.J. 2022), *reconsideration denied*, *Def. Distributed v. Platkin*, No. 3:19-CV-04753, 2022 WL 14558237 (D.N.J. Oct. 25, 2022); *Def. Distributed v. Platkin*, 48 F.4th 607 (5th Cir. 2022) (Ho, J., concurring) (expressing frustration with the transferee court's declination to return a quickly transferred case, where the Fifth Circuit ordered its requested return a year after transfer, as a transgression of the "judiciary's longstanding tradition of comity, both within and across the circuits" as "an easy tradition of respect").

It is an illustration of why, when the "better procedure" of "hold[ing] up the transfer for a reasonable time pending possible petition for reconsideration or review" is not followed, the proper procedure is for the district court to request return of the file to facilitate orderly review in the original circuit. *In re Nine Mile Ltd.*, 673 F.2d 242, 243-44 (8th Cir. 1982). This expectation is not a peculiarity of the Eighth Circuit, as suggested by the Government. Opp. at 2. The Fifth Circuit itself has recognized that "directing the transferor district to request that the transferee district return the case" can be appropriate even before reaching the merits of the transfer order. *In re Red Barn Motors, Inc.*, 794 F.3d 481, 484 & 485 n.9 (5th Cir. 2015); *see also In re Sosa*, 712 F.2d 1479, 1480 n.1 (D.C. Cir. 1983) (recognizing the option of "an informal request that the [transferee] court retransfer the record [to the transferor court] to permit consideration of" a mandamus petition challenging the merits of the transfer order). These decisions are of one piece with the widely recognized principle that the better course is to pause transfer of a case to a court in another circuit, to permit appellate review. *See* Wright & Miller, 15 Fed. Prac. & Proc. Juris. § 3846 (4th ed.) ("[T]he better practice, codified in some local district court rules, is to stay the effect of transfer orders for a sufficient period to enable appellate review to be sought."). *See also Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1517 (10th Cir. 1991) ("[T]he

preferred approach is to delay physical transfer of the papers in the transferred case for a long enough time to allow the aggrieved party to file a mandamus petition.").

Given the Fifth Circuit's substantive opinion in this case and the open questions regarding the Circuit's expectations and mandate regarding future proceedings, there is no risk the Fifth Circuit would criticize this Court's decision to request return and to facilitate a more orderly appellate review. By contrast, the risk that the Circuit Court would chastise a declination to request return now, especially if it foments into administrative difficulties in implementing the Fifth Circuit's ultimate view on the propriety of transfer, is substantial.

The Government's reference to "treating this case like a yo-yo" and suggestion that promptly requesting return of the case would burden the judicial system are misplaced. Opp. at 2. Plaintiffs are requesting this Court to issue a one-page request to the court in Washington. And then an administrative act there—digitally transferring the file back—that was accomplished in hours, if not minutes, by this Court, prior to the transfer decision even having been served on the parties. An actual burden on the judicial system would be progressing this case in the incorrect forum, at least as far as the Fifth Circuit may be concerned, and any frustration of the Fifth Circuit's ability to implement its position on the inter-circuit transfer of this case.

This Court should avoid the chaos and Circuit Court frustration that occurred in *Defense Distributed* and follow the better practice of keeping the case in this Court until the Fifth Circuit can review the transfer order, a practice that now must be accomplished by requesting the case's return. *In re Nine Mile Ltd.*, 673 F.2d at 243-44.

Dated: January 29, 2024

Respectfully submitted,

/s/ Michael J. Edney

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2024, 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

TAB 12

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

KEVIN CLARKE, in his individual capacity, TREVOR BOECKMANN, in his individual capacity, HARRY CRANE, in his individual capacity, CORWIN SMIDT, in his individual capacity, PREDICT IT, INC., a Delaware corporation, and ARISTOTLE INTERNATIONAL, INC., a Delaware corporation, Plaintiffs, v. COMMODITY FUTURES TRADING COMMISSION, Defendant.	Case No. 1:22-cv-00909

DECLARATION OF KEVIN A. CLARKE

Pursuant to 28 U.S.C. § 1746, I, Kevin A. Clarke, do hereby declare:

1. My name is Kevin A. Clarke. I am a resident of Austin, Texas, where I am the owner of Clarke Mineral Estate and Geosciences, LLC, an Assistant Coach for the University of Texas at Austin's Policy Debate Team. I submit this declaration in support of Plaintiffs' Motion for a Preliminary Injunction.

2. I have personal knowledge of the facts stated herein.

3. I have traded on the PredictIt Market for two years. At the time I began trading on the PredictIt Market, I investigated the Market's operations and discovered that the Market is operated pursuant to CFTC Letter No. 14-130 (the "No-Action Relief"), which I understand permitted the PredictIt Market to operate without formally registering as an exchange with the

CFTC. Knowing that the CFTC had signed off on the PredictIt Market's operations assured me of the security of my investments on the Market.

4. I currently have approximately $11,000 invested in all 85 contract markets currently hosted on the PredictIt Market. Of those markets, approximately 14% of them will not settle on or before February 15, 2023.

5. Based on my research and experience investing in political event contracts, I believe that my contracts predict the correct outcome of the political events to which they relate.

6. I am aware that the CFTC revoked the No-Action Relief in CFTC Letter 22-08, entitled "Withdrawal of CFTC Letter No. 14-130" (the "Revocation"). The Revocation has had a direct and immediate impact on the value of PredictIt Market event contracts.

7. Experienced PredictIt traders tend to purchase event contracts far in advance of the deciding event when the contracts' values are relatively low due to outcome uncertainty based on the event's remoteness. Only when the deciding event grows closer in time do those event contracts appreciate. Accordingly, the further in advance a trader purchases an event contract, the greater his financial gain is likely to be when he sells the contract at an appreciated value or the event closes in his favor. Using this strategy, I have made investments in event contracts predicting the outcome of the 2024 presidential election that I expect to appreciate significantly if allowed to run their course. These contracts will not settle before the February 15, 2023, when the CFTC has ordered that all outstanding PredictIt Market contracts be liquidated. Because of the CFTC's decision, forcing the early liquidation of my contracts, I will lose the opportunity to see these contracts to the end and the gains I anticipate in doing so, or in trading those contracts away at advantageous prices before their maturation.

8. I know of no rationale for why the CFTC has chosen February 15, 2023, as the cutoff date for the PredictIt Market's operations. But the imposition of this seemingly arbitrary date has significantly distorted the current and prospective value of 2024 election contracts because trades are now attempting to salvage their investments based on factors other than the correct outcome of the 2024 presidential election. As a result, I am feeling the effects of the revocation right now, as the market is not working efficiently, is distorted, and I cannot trade the contracts with others attempt the predict *what the outcome of the contract will be* as opposed as to some effort to just get what they can from a difficult situation created by the CFTC.

9. Based on what I know about the markets, if the CFTC is enjoined from requiring contracts to end prematurely in February 2023 and the contracts are allowed to run their natural course, the most significant distortions in the Market should end, as participants resume attempting to predict the post-February 2023 outcome of the event on which the contract turns. Active traders can then resume selling their contracts at times where they believe the price overstates the probability of the outcome and buying when they believe the price understates the probability of the outcome.

10. Not only am I a Market participant, I am also informed consumer of the data the Market provides in terms of projecting the outcome of elections and other significant political events. I have great faith in the superior accuracy of PredictIt Market pricing in making political projections over polls and punditry. This confidence comes from what I observe of other traders in the community, who participate in online communities to discuss the reasoning behind their positions. Because of the modest financial investments in stake, I analyze, and I see other traders analyzing, up-to-the-date developments that will affect the outcome, doing incisive research on legal outcomes or effects of similar events in previous elections. What I rarely see is passionate

argument driven by bias or preference for an outcome, which can affect other forms of political projection. With the CFTC's crash-out date of February 2023, the data produced by the PredictIt Market is being stripped of its value for these longer-term contracts, with no immediately available replacement. The data created by the Market was of great interest and value to me as an observer of politics and, frankly, as a citizen acutely interested in the outcome of elections and other significant political events.

11. The Revocation has also disrupted contract markets based on events that will occur before February 15, 2023, because it provides no certainty regarding which contract markets may continue to operate until February 15, 2023, and which must liquidate immediately due to noncompliance with the terms and conditions of the No-Action Relief decision. This uncertainty has led many traders to attempt to pull their money out of the Market immediately even if they could otherwise have profited from their contract investments. This withdrawal from the Market effects remaining traders' ability to sell appreciated contracts that they no longer believe predict the correct event outcome.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 9/27/2022

Kevin A. Clarke

TAB 13

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 MILLER, JOSIAH NEELEY, GRANT SCHNEIDER, and WES SHEPHERD,

Plaintiffs,

v.

COMMODITY FUTURES TRADING COMMISSION,

Defendant.

Civil Docket No. 1:22-cv-00909-LY

The Honorable Lee Yeakel

DEFENDANT CFTC'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

At the heart of their preliminary-injunction motion—indeed, this entire litigation—is Plaintiffs' misguided premise that a 2014 "no-action" letter sent by the staff of the Commodity Futures Trading Commission ("CFTC" or "the Commission") to non-party Victoria University of Wellington, New Zealand ("Victoria University" or "the University") was a "license" that gave the University "permission" to operate PredictIt, an online event-contract market, in the United States. According to Plaintiffs, the August 4, 2022 withdrawal of the 2014 staff letter is "final agency action" that "forces" PredictIt to shut down. Plaintiffs ask this Court to undo the withdrawal, and enjoin the CFTC from "taking any action to enforce" any Commodity Exchange Act ("CEA") provision or CFTC regulation against PredictIt. Dkt. 12-1 at 20.

All of this is a mischaracterization and contrary to decades of case law. The 2014 letter was not a license, never determined that PredictIt complied with U.S. law, and did not grant a legal right to do business. That letter merely said that staff in one CFTC division, as a matter of discretion, would not "recommend that the Commission take any enforcement action," Dkt. 12-2 Ex. 2 at 5–6, on terms that the University proposed based on the University's own representations. The University *chose* this route *in lieu of* seeking actual Commission approval such as by formally registering its exchange with the CFTC in a manner that, if granted, would have required *further* formal agency action to revoke. As such, the 2022 withdrawal of the 2014 no-action letter merely withdrew the commitment of one division of agency staff not to give certain advice to the Commission. That is inherently a staff function—making discretionary recommendations to agency leadership. And that staff-level conduct is not judicially reviewable, nor does it subject the Commission to injunctive relief. *See, e.g.*, *Bd. of Trade of City of Chicago v. SEC*, 883 F.2d 525, 529 (7th Cir. 1989) (holding SEC staff no-action letters are not "final

agency action"); *Kixmiller v. SEC*, 492 F.2d 641, 646 (D.C. Cir. 1974) (same).

Each of the following independently defeat the extraordinary relief Plaintiffs seek:

First, the CFTC staff no-action letter challenged here is not reviewable "final agency action" under the Administrative Procedure Act, 5 U.S.C. §§ 551(8), 704.

Second, CFTC staff no-action letters are an exercise of prosecutorial discretion that is unreviewable as a matter of law, 5 U.S.C. § 701(a)(2).

Third, the Plaintiffs are not the beneficiary of the challenged no-action letters and lack Article III standing to assert APA claims on non-party Victoria University's behalf.

Fourth, the sweeping injunction Plaintiffs request—preemptively barring future enforcement action by the Commission—is unavailable as a matter of law.

In addition to these threshold failings that reveal no likelihood of success on the merits, Plaintiffs have failed to carry their heavy burden as to any of the other preliminary-injunction factors. Plaintiffs' motion should be denied for the reasons that follow.

BACKGROUND

A. Introduction to the CFTC and the Federal Regulation of Event Contracts.

The CFTC is the federal agency tasked with enforcing the CEA, 7 U.S.C. §§ 1–26, and promulgating regulations thereunder, 17 C.F.R. pts. 1–190. The CEA vests the CFTC with jurisdiction over commodity derivatives, including futures and swap contracts, and to a lesser extent, the commodities that underlie them. *See* 7 U.S.C. § 2(a)(1)(A). Derivatives are financial instruments, such as futures, options, or swaps, whose price is dependent upon—that is, "derived from"—the value of something else, such as a commodity, debt instrument, or pricing index.[1]

[1] CFTC, *Glossary: A Guide to the Language of the Futures Industry*, https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/CFTCGlossary/index.htm (last visited Oct. 13, 2022).

Relevant here is a class of derivatives known as "event contracts." Event contracts, also known as prediction or information contracts, are derivative contracts whose payoff is based on a specified event, occurrence, or value such as, for example, the value of a macroeconomic indicator, corporate earnings, level of snowfall, or dollar value of damages caused by a hurricane.[2] Under the CEA and CFTC regulations, those seeking to offer event contracts generally must do so as a "registered entity," 17 C.F.R. § 40.11(a)–(c), such as a qualifying designated contract market ("DCM") or swap execution facility ("SEF"), 7 U.S.C. § 7a-2(c)(5)(C)(i). Registration enables the CFTC to supervise DCMs and SEFs so that the Commission, among other things, can make sure that registrants conform their operations to core principles designed to prevent market abuse, ensure financial stability, protect information security, and safeguard systems in the event of a disaster, *id.* §§ 7(d)(12)(A), 7(d)(21), 7b-3(f)(2)(B), 7b-3(f)(13); 17 C.F.R. §§ 37.1401(a), 38.1051(a); ensure that contracts offered for trade are "not readily susceptible to manipulation," 7 U.S.C. §§ 7(d)(3), 7(d)(4), 7b-3(f)(3), 7b-3(f)(4)(B); and ensure position limits are imposed, conflict-of-interest rules are established and enforced, and records are kept and maintained, *id.* §§ 7(d)(5), 7(d)(16), 7(d)(18), 7b-3(f)(6), 7b-3(f)(10)–(12).

B. The Division of Authority between the Commission and its Staff.

The CFTC exercises only that authority delegated to the Commission by Congress and employs various staff to assist the Commission's mission. The CFTC is composed of five Commissioners, each appointed by the President with the advice and consent of the Senate. 7 U.S.C. § 2(a)(2)(A); 17 C.F.R. § 140.10. The CFTC acts only when its five Commissioners vote

[2] *See generally* CFTC, *Contracts & Products: Event Contracts*, https://www.cftc.gov/IndustryOversight/ContractsProducts/index.htm (last visited Oct. 13, 2022).

to do so, and all votes are recorded by the Secretary of the Commission. *See, e.g.*, 17 C.F.R. § 140.12. The CFTC employs staff across thirteen operating divisions and multiple offices nationwide. *See id.* §§ 140.1, 140.2.

CFTC staff in the Division of Market Oversight ("DMO"), among other things, review new applications for exchanges such as DCMs and SEFs and examine existing exchanges to ensure their regulatory compliance with CEA provisions and CFTC regulations. Another division, the Division of Enforcement, investigates and civilly prosecutes violations, if and only if authorized by vote of the Commission. While staff may make recommendations to the Commission, only the Commission itself—acting by vote—is empowered to determine whether applications for DCMs and SEFs should be granted, *see* 7 U.S.C. § 8(a), or to bring an enforcement action. *See* 7 U.S.C. §§ 9(4)(A), 13a-1(a)–(d).

C. Commission-level Registration and Exemptions vs. Staff-level No-action Relief.

For an entity seeking to lawfully offer event contracts for trading in the United States there are different ways they could do so, including either of the following:

First, it could formally apply to the Commission to become a registered DCM or SEF. *See* 7 U.S.C. §§ 7(a), 7b-3, 8(a); 17 CFR §§ 38.3, 37.3. If the Commission grants registration, it can only revoke that registration if it follows certain statutory procedures and makes certain findings. *See* 7 U.S.C. §§ 7b, 8(b), 12a(4). By statute, that decision is then subject to judicial review. *Id.* § 7b. Second, an entity seeking to lawfully offer event contracts could request that the Commission grant what is known as a Section 4(c) "public interest" exemption. CEA Section 4(c) provides that the Commission "may," at its discretion, "exempt any agreement, contract, or transaction (or class thereof)" from certain otherwise-applicable CEA requirements, including registration requirements, "by rule, regulation, or order, after notice and opportunity

for hearing." 7 U.S.C. § 6(c)(1)–(2). Before issuing a Section 4(c) exemption the Commission must make statutory findings that doing so "would be consistent with the public interest and the purposes of [the CEA]," that the transactions will be "solely between appropriate persons," and the exemption will not impede the Commission from discharging its duties. *See id.*

Here, Victoria University chose not to seek either registration or an exemption, and accordingly forewent all of the procedural rules and statutory protections that apply in those contexts. Instead, the University, at all times represented by counsel, chose to request a nonbinding "no-action letter" from DMO staff.[3] Dkt. 12-2 Ex. 1 at 2. Under CFTC Rule 140.99(a)(2), a no-action letter is "a written statement issued by the staff" that addresses "a proposed transaction" or "a proposed activity." 17 C.F.R. § 140.99(a)(2). No-action letters can be "issued by the staff of a Division of the Commission" and state only that the issuing Division "will not recommend enforcement action to the Commission for failure to comply with a specific provision of the Act or of a Commission rule, regulation or order." *Id.*

Under Rule 140.99(a)(2), a no-action letter "represents the position only of the Division that issued it" and "binds only the issuing Division and"—explicitly—"not the Commission or other Commission staff." *Id.* Whether to grant a no-action letter and in what form "is entirely within the discretion of Commission staff." *See id.* § 140.99(b)(1), (e). The Rule states that "[o]nly the Beneficiary may rely" on the letter—which in this case is not the Plaintiffs, but non-party Victoria University. *Id.* And unlike the statutory requirements for revoking a DCM or

[3] Although not mentioned in the Amended Complaint or present motion, Plaintiff Aristotle International, Inc. has previously submitted both an application for registration as a DCM and a petition for a Rule 4(c) Order, which was a request for general rulemaking, not a request to operate PredictIt. *See generally* Letter from John A. Phillips, Chairman and CEO, Aristotle International, Inc. to Sec'y of the Commission regarding CFTC Release No. 8578-22 at 2 (Sept. 23, 2022), https://comments.cftc.gov/PublicComments/CommentList.aspx?id=7311.

SEF registration, nothing in the CEA, APA, or any CFTC regulation imposes any specialized procedural requirements on staff before they may change their views on what to recommend.

Nor does anything in Rule 140.99(a)(2) empower staff to grant or deny a legal right to do business. Contrary to Plaintiffs' characterization, the Rule is not a "delegation" of the Commission's authority. Dkt. 12-1 at 19. Rather, it codifies a preexisting staff practice of answering inquiries about what staff would "recommend … to the Commission" concerning proposed activities. *Requests for Exemptive, No-Action and Interpretive Letters*, 63 Fed. Reg. 3285, 3285 (Jan. 22, 1998). Consistent with the foregoing, DMO's 2014 no-action letter stated:

> Consequently, based upon your representations, DMO will not recommend that the Commission take any enforcement action in connection with the operation of your proposed market for event contracts based upon the operators' not seeking designation as a contract market, registering under the Act or otherwise complying with the Act or Commission regulations.
>
> …
>
> This letter, and the no-action position taken herein, represents the views of DMO only, and does not necessarily represent the positions or views of the Commission or of any other division or office of the Commission. As with all no-action letters, DMO retains the authority to condition further, modify, suspend, terminate or otherwise restrict the terms of the no-action relief provided herein, in its discretion.

Dkt. 12-2 Ex. 2 at 5–6; *see also id*. Ex. 3 at 1–2 & n.4.

ARGUMENT

I. Plaintiffs Must "Clearly" Show Each Preliminary-Injunction Factor To Warrant Extraordinary Relief, Not Merely Raise "Substantial Questions" As To Some.

A preliminary injunction is an "extraordinary and drastic remedy," that is "never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689–690 (2008) (quotation omitted). The required showing is four-fold: (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest. *See Janvey v. Alguire*, 647 F.3d 585, 595 (5th

Cir. 2011). When, as here, the Government is the opposing party, the third and fourth equitable factors "merge." *Nken v. Holder*, 556 U.S. 418, 435 (2009). A preliminary injunction "should not be granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements." *DFO, LLC v. Hammoud*, No. A-13-CA-675-LY, 2014 WL 12479996, at *2 (W.D. Tex. Jan. 29, 2014) (quotation omitted).

As the Supreme Court clarified in 2008, Plaintiffs must show that each preliminary-injunction factor is "*likely*," rather than a mere "possibility." *See, e.g.*, *Winter v. NRDC*, 555 U.S. 7, 22 (2008). Plaintiffs, however, rely on a pre-*Winter* "sliding scale" that would allow for preliminary injunctive relief so long as there are sufficiently "substantial" merits questions that "make them fair ground for litigation and thus more deliberate investigation." *See* Dkt 12-1 at 14 (citing *Finlan v. City of Dallas*, 888 F. Supp. 779 (N.D. Tex. 1995)). The approach urged by Plaintiffs would merely require a "showing of *some* likelihood of success" when "the other factors are strong." *See Cho v. Itco, Inc.*, 782 F. Supp. 1183, 1185 (E.D. Tex. 1991) (emphasis added); *Finlan*, 888 F. Supp. at 791 (citing *Cho*, 782 F. Supp. at 1185). That articulation of the preliminary-injunction standard is no longer tenable. *See, e.g.*, *Dine Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016); *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1295–96 (D.C. Cir. 2009) (Kavanaugh, J., concurring).

While the Fifth Circuit has not yet decided whether some form of the "sliding scale" doctrine may survive after *Winter*, *see Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692, 696 n.1 (5th Cir. 2018), this Court is not "required to perform a sliding scale analysis" and should reject Plaintiffs' invitation to lower the bar they seek to clear. *See, e.g.*, *Hale v. Collier*, No. 1:20-CV-841-RP, 2020 WL 6441099, at *2 (W.D. Tex. Nov. 3, 2020).

II. There Is No Likelihood That Plaintiffs Will Succeed On The Merits.

Plaintiffs' claims fail out of the gate. Because likelihood of success is, at a minimum,

"arguably the most important factor," this Court's analysis of Plaintiffs' motion need proceed no further on concluding this factor is lacking. *Robinson v. Ardoin*, 37 F.4th 208, 227 (5th Cir. 2022) (per curiam) (quoting *Tesfamichael v. Gonzales*, 411 F.3d 169 (5th Cir. 2005)).

a. There is no "final agency action."

A critical prerequisite for judicial review under the APA is that there be "final agency action." 5 U.S.C. § 704. Because there is no "final agency action" here, Plaintiffs' claims are non-justiciable and, for that reason alone, they have no likelihood of success on the merits. *See, e.g.*, *Luminant Generation Co. v. EPA*, 757 F.3d 439, 441 (5th Cir. 2014).[4]

Neither DMO's original no-action letter nor its withdrawal are "agency action" at all. "Under the APA, 'agency action' is a defined term, limited to an 'agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.'" *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (citing 5 U.S.C. § 551(13)). Plaintiffs' theory is that DMO's "No-Action Relief was a license" under the catchall "other form of permission" prong of the APA's definition of "license." *See* Dkt. 12-1 at 17–18 (citing 5 U.S.C. § 551(8)); 5 U.S.C. § 551(8) (defining "license" as "an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission"). In support, Plaintiffs cite case law addressing inapposite compliance waivers granted by other agencies in unrelated customs and maritime contexts for the general proposition that "license" has a "broad" definition. Dkt. 12-1 at 17–18 (citing *Pillsbury Co. v. United States*, 18 F. Supp. 2d 1034, 1036

[4] Fifth Circuit precedent treats the absence of "final agency action" as a lack of subject-matter jurisdiction. *See, e.g.*, *Sierra Club v. Peterson*, 228 F.3d 559, 565 (5th Cir. 2000) ("Absent a specific and final agency action, we lack jurisdiction to consider a challenge to agency conduct."); Fed. R. Civ. P. 12(b)(1). By contrast, the D.C. Circuit views the absence of "final agency action" as a pleading failure under the APA. *See, e.g.*, *Trudeau v. FTC*, 456 F.3d 178, 188–189 (D.C. Cir. 2006) (discussing pleading requirements under 5 U.S.C. § 704); Fed. R. Civ. P. 12(b)(6). That distinction is largely academic here, as Plaintiffs' claims fail either way.

(Ct. Int'l Trade 1998); *Atlantic Richfield Co. v. United States*, 774 F.2d 1193 (D.C. Cir. 1985); *Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067 (7th Cir. 1982)).

But unlike those examples, CFTC no-action letters do not affirmatively "license" or "permit" anyone to do anything. As CFTC regulations make clear, "no-action relief" is merely a statement by the issuing Division that, in staff's discretion, "it will not recommend enforcement action to the Commission" under the terms specified during the pendency of a no-action letter. 17 C.F.R. § 140.99(a)(2). That limited scope stands in sharp contrast to formal registration applications and Section 4(c) exemptive orders issued by the Commission directly. *Cf., e.g.*, 7 U.S.C. §§ 7(a), 7b-3, 8(a); *id.* 6(c)(1)–(2). So no matter how "broadly" the APA's definition of "license" may be framed generally, an "other form of permission" that does not affirmatively "permit" anyone to do anything is not a "license." *See, e.g.*, *Sheridan Kalorama Hist. Ass'n v. Christopher*, 49 F.3d 750, 756 (D.C. Cir. 1995) (explaining that courts have "never" found the term "license" to be "so broad as to encompass failure to disapprove a proposal").

Nor is the challenged no-action correspondence "final." To be "final," the challenged agency action must both: (1) "mark the 'consummation' of the agency's decisionmaking process" rather than being "merely tentative or interlocutory"; and (2) "be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177–178 (1997). The withdrawal of a no-action letter is neither. "[B]y its own terms and under the [CFTC']s regulations," a staff-level no-action letter "does not constitute the consummation of the Commission's decisionmaking process." *See, e.g.*, *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1263 (D.C. Cir. 2018). A staff commitment to "not recommend enforcement action to the Commission," 17 C.F.R. § 140.99(a)(2); Dkt 12-2 Ex. 2 at 5–6 & Ex. 3 at 1, necessarily contemplates further action—namely, the Commission deciding whether or not

to authorize an enforcement action, whether or not on the recommendation of staff. *See* 7 U.S.C. § 9(4)(A) (vesting that authority in "the Commission"). Because a no-action letter standing alone "compels action by neither the recipient nor the agency," no legal consequences flow when such letters are issued or withdrawn. *See, e.g.*, *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 944–945 & n.6 (D.C. Cir. 2012) (holding that FDA warning letters are not final agency action and collecting similar authority).

Although the August 4, 2022 revocation letter states that any contracts within the scope of the no-action letter "should be closed out and/or liquidated no later than 11:59 p.m. eastern on February 15, 2023," Dkt. 12-2 Ex. 3 at 2, the use of "should" rather than mandatory language further confirms that "there has been no order compelling [the non-party University] to do anything." *See, e.g.*, *Holistic Candlers.*, 664 F.3d at 944. The statement reflects nothing more than a staff-specific grace period by which, were those contracts still active, DMO staff might recommend an enforcement proceeding. That is, after all, the limit of the no-action letter's terms—which the University chose to pursue instead of a license—and DMO staff lack the authority to institute enforcement proceedings against PredictIt or otherwise "force the premature liquidation of up to 75 contracts." Dkt. 12-1 at 6. Plaintiffs concede as much, admitting that "the Revocation" they challenge "does not itself impose sanctions on anyone." Dkt. 12-1 at 20.

None of this is new ground. Plaintiffs decline to cite, much less distinguish, any of the cases addressing directly analogous SEC no-action letters. All of that authority confirms that informal staff-level no-action letters are not "final agency action." *See, e.g.*, *Board of Trade of City of Chicago v. SEC*, 883 F.2d 525, 529 (7th Cir. 1989) (holding SEC no-action letters do not constitute "final agency action"); *Kixmiller v. SEC*, 492 F.2d 641, 645–646 (D.C. Cir. 1974) (per curiam) (same); *see also New York City Emps.' Ret. Sys. v. SEC*, 45 F.3d 7, 12 (2d Cir. 1995)

(holding that SEC no-action letters are "interpretive" policy statements that do not require notice-and-comment rulemaking); *Apache Corp. v. Chevedden*, 696 F. Supp. 2d 723, 735 (S.D. Tex. 2010) (Rosenthal, J.) (holding that SEC no-action letters "are nonbinding, persuasive authority" only and do not warrant *Chevron* deference). The same is true here.

In support of their "final agency action" theory, Plaintiffs cite *Sackett v. EPA*, 566 U.S. 120 (2012).[5] The *Sackett* Court addressed a "compliance order" issued by agency staff that constituted "final agency action" because, in Plaintiffs' own words, that order "exposed the plaintiffs to penalties if they continued operating as planned." Dkt. 12-1 at 20. But an EPA "compliance order" is, needless to say, not a CFTC staff "no-action letter." The two are highly distinguishable as a CFTC staff no-action "does not itself impose sanctions on anyone." *Id.*; *see also Luminant Generation*, 757 F.3d at 443–444 (distinguishing *Sackett* and concluding that an EPA "notice of violation" is not "final agency action" because "[i]ssuing a notice of violation does not create any legal obligation, alter any rights, or result in any legal consequences and does not mark the end of the EPA's decisionmaking process."); *Soundboard Ass'n*, 888 F.3d at 1268 (distinguishing the "binding enforcement order" in *Sackett* from a non-final FTC staff letter issued "by staff under a regulation that distinguishes between Commission and staff advice, is

[5] This Court should reject Plaintiffs' further novel proposition that "[i]n the Fifth Circuit, the absence of a requirement—much less a mere ability—to appeal an agency official or division's decision is the hallmark of final agency action." Dkt. 12-1 at 19 (citing *Amin v. Mayorkas*, 24 F.4th 383 (5th Cir. 2022)). While unavailability of further intra-agency review may be one of several considerations used to assess the first *Bennett v. Spear* prong, the notion that internal appealability is somehow "the hallmark of final agency action"—notwithstanding that *Bennett* independently requires that "rights or obligations" be "determined"—badly misstates administrative law, whether in the Fifth Circuit or in any other federal court. And *Amin v. Mayorkas* says nothing of the sort. Nor could it, as the *Amin* court was not addressing final agency action as such, but rather exhaustion of administrative remedies. *See* 24 F.4th at 390. Moreover, the very concept of an "appeal" to the Commission of a statement that staff may or may not recommend something to the Commission is nonsensical, further reinforcing the lack of final agency action here.

subject to rescission at any time without notice, and is not binding on the Commission").

This Court need proceed no further.

b. Staff no-action letters reflect an exercise of prosecutorial discretion that is "committed to agency discretion by law."

Plaintiffs' claims additionally fail because the subject of the staff no-action letter they seek to challenge is unreviewable as "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Plaintiffs challenge the withdrawal of a statement that DMO staff will not recommend to the Commission that the Commission bring a civil-enforcement action. As the Seventh Circuit has recognized, such statements are independently unreviewable. *See Chicago Bd. of Trade*, 883 F.2d at 530 (holding that SEC no-action letter "is a classic illustration of a decision committed to agency discretion"). Acts of prosecutorial discretion reflecting "an agency's decision not to prosecute or enforce," which necessarily "involves a complicated balancing of a number of factors" as to how to best prioritize resources, entail a "general unsuitability for judicial review." *Heckler v. Chaney*, 470 U.S. 821, 831–832 (1985). Such decisions are thus "generally committed to an agency's absolute discretion." *Id.* at 831. And that principle applies with equal force in the context of civil-enforcement proceedings. *See, e.g.*, *Citizens for Resp. & Ethics in Washington v. FEC*, 993 F.3d 880, 888 (D.C. Cir. 2021).

c. Plaintiffs, none of whom are the beneficiary of DMO's no-action correspondence, lack Article III standing.

Finally, Plaintiffs lack standing to bring APA claims asserted on Victoria University's behalf. Article III standing entails a three-part showing: (1) an injury-in-fact that is "concrete, particularized, and actual or imminent"; (2) that the injury be "fairly traceable to the challenged action"; and (3) that the injury be "redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). As the parties invoking the Court's subject-matter jurisdiction, Plaintiffs bear the burden of establishing each element. *See, e.g., Shrimpers & Fishermen of*

RGV v. Texas Comm'n on Env't Quality, 968 F.3d 419, 423 (5th Cir. 2020) (per curiam). That burden is heightened here as "it is ordinarily 'substantially more difficult' to establish" standing when the regulated entities directly affected by agency conduct are not parties. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992) (citing *Allen v. Wright*, 468 U.S. 737, 758 (1984)).

The only agency conduct being challenged is a no-action letter sent to Victoria University that, on its face and by the terms of 17 C.F.R. § 140.99(a)(2), is limited solely to the University. Because none of the Plaintiffs are the beneficiary of that letter, and all their downstream harms alleged turn on the non-party University' independent decisionmaking that will proceed independently of the outcome of this litigation, they lack Article III standing to stand in the University's conspicuously empty shoes here. *See, e.g.*, *Nat'l Wrestling Coaches Ass'n v. Department of Educ.*, 366 F.3d 930, 944 (D.C. Cir. 2004) (dismissing challenge to Title IX guidance applicable to colleges and universities brought by third-party wrestling affinity groups for lack of causation and redressability); *see also, e.g., Nat'l Fair Hous. All. v. Carson*, 330 F. Supp. 3d 14, 52 (D.D.C. 2018) (collecting cases applying *National Wrestling*).

Plaintiffs repeatedly—but without support—allege that DMO's August 4, 2022 letter withdrawing the Division's prior no-action letter will "effectively" lead to the end of PredictIt. *See, e.g.,* Am. Compl. ¶ 12 ("The Revocation of the Commission's No-Action Relief effectively means that the PredictIt Market must close."), ¶ 66 (similar). And while their precise chain of causation is unclear, Plaintiffs recognize that non-party Victoria University's intervening decision to continue operating PredictIt (or not) constitutes an indispensable link. *See, e.g.*, Am. Compl. ¶¶ 25, 76.c. Plaintiffs imply—but do not substantiate—that the University's decision to close PredictIt was contingent on DMO's withdrawal letter. *See id.* at ¶ 76.c. But the University is not here to speak for itself. What is more, Plaintiffs further fail to adequately explain how

PredictIt "would be illegal" under the CEA and CFTC regulations only "in the absence" of the 2014 no-action letter that lacks binding legal effect on the Commission or anyone else. Nor do they explain how a court order resurrecting that letter "will alter the behavior of regulated third parties." *See National Wrestling*, 366 F.3d at 938–945; 17 C.F.R. § 140.99(a)(2). Again, the University has not said word one. As such, Plaintiffs have failed to establish Article III standing.

III. None Of Plaintiffs' Unsubstantiated Alleged Harms Are "Irreparable."

a. Because Plaintiffs have not submitted a declaration or any other evidence from Victoria University, the sole no-action beneficiary and operator of PredictIt, their asserted downstream harms are inherently speculative.

"Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with" the fact that "injunctive relief [i]s an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. NRDC*, 555 U.S. 7, 22 (2008). Plaintiffs must submit sufficient evidence to "[c]learly" show a likelihood harms will actually occur; "[a]ssertions of injuries not supported by evidence fail to clearly establish irreparable harm." *ADT LLC v. Cap. Connect, Inc.*, No. 3:15-CV-2252-G, 2016 WL 2897404, at *4 (N.D. Tex. May 18, 2016). That is a "heavy burden." *Id.* (citing *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985)).

Plaintiffs' claimed harms are inherently uncertain and speculative. Specifically, by failing to introduce any evidence substantiating Victoria University's future plans for PredictIt, if any, Plaintiffs have failed to shoulder their heavy burden. Because the "Revocation" of the University's no-action relief "does not itself impose sanctions on anyone," as Plaintiffs concede, their entire theory of harm turns on unspecified practical consequences that allegedly "expose[]" the University (but not Plaintiffs) "to penalties" in the future. *See* Dkt. 12-1 at 20. But the consequences facing the University are merely those faced by any entity in a regulated space presented with the not uncommon "choice" of coming into "voluntary compliance" with a non-

binding legal position expressed by agency staff or risking the "prospect of having to defend itself … should the agency actually decide to pursue enforcement." *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 732 (D.C. Cir. 2003).

Among other things, Plaintiffs have failed to show:

- Whether Victoria University believes that after DMO's withdrawal of the 2014 no-action letter it can nevertheless operate PredictIt lawfully under the CEA and CFTC regulations;
- Whether and how Victoria University will actually continue to operate PredictIt depending on the outcome of this motion for preliminary injunctive relief sought on the University's behalf; and
- If PredictIt will shut down or continue in some modified form in either of those scenarios, and what, if any changes Victoria University will direct as to existing and future contracts.

Because any downstream harms that Plaintiffs fear they will suffer turn entirely on the decisional calculus of a non-party—that is, Victoria University's independent choices whether to continue operating PredictIt and, if so, in what form—the failure to introduce any direct evidence as to those missing links in the causal chain defeats any claim of irreparable harm. Indeed, the fact that Victoria University not only declined to bring its own APA suit or join Plaintiffs', but also submitted no declaration, raises serious doubts about the University's interest in and willingness to pursue future PredictIt operations, regardless of the outcome of this litigation.

To be sure, Plaintiffs do attempt to fill this evidentiary gap with five declarations of their own.[6] But quantity does not equal quality. Plaintiffs cannot show a likelihood that their alleged

[6] *See* Dkt. 12-2 at 1–6 (Declaration of Dean Phillips), 29–32 (Declaration of Kevin A. Clarke), 33–35 (Declaration of Trevor Boeckmann), 36–38 (Declaration of Harry Crane), 62–64 (Declaration of Corwin Smidt).

harms will actually occur with any degree of certainty. Stripping out the (mistaken) legal conclusions that Plaintiffs believe "all contracts must be closed" as a result of DMO's withdrawal letter, *see, e.g.*, Dkt. 12-2 at 37, ¶ 8; *id.* at 63 ¶ 5, their harm allegations are rife with uncertainty and speculation, *see, e.g.*, *id.* at 5, ¶ 17 (noting the "uncertainty regarding which contract markets must be liquidated and when" by PredictIt); *id.* at 32, ¶ 11 (noting the "uncertainty" as to whether and how the PredictIt market will continue offering contracts beyond February 15, 2023); *id.* at 35, ¶ 10 (noting that "it is in unclear which of the contract markets … must terminate immediately" and that is further "unclear how exiting contracts … will or should be valued"). Without more, "[t]he record does not substantiate the granting of an injunction." *See Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985) (rejecting reliance on "unfounded" affidavit assertions that "speculated that multiple lawsuits could be filed" by non-parties to uncertain future effect).

b. Regardless, the economic harms asserted are not "irreparable."

Broadly speaking, Plaintiffs have asserted three categories of harm: (1) the "compliance" costs that will be passed on to the corporate entities that "service" the PredictIt market; (2) monetary losses by individual PredictIt traders who will "not realize the gain of having predicted correctly" when contracts pay out; and (3) the loss of academic research and teaching opportunities. *See* Dkt. 12-1 at 10–13; *see also, e.g.*, Dkt. 12-2 at 5, ¶ 17; *id.* at 30, ¶ 4; *id.* at 33 ¶ 4; *id.* at 38 ¶ 10; *id.* at 63 ¶ 9. For purposes of their preliminary-injunction motion, Plaintiffs rely solely on the first two categories. *See* Dkt. 12-1 at 12–13.[7] Conceding that "economic"

[7] Because Plaintiffs do not include any case-law support or other argument suggesting that their asserted loss of research and teaching opportunities is "irreparable," they have waived that argument. *See, e.g.*, *Paez v. Wal-Mart Stores Texas, LLC*, No. EP-20-CV-00321-DCG, 2022 WL 3216343, at *2 (W.D. Tex. Aug. 9, 2022) ("[W]hen a litigant fails to develop an argument before this Court, that litigant waives that argument."). Regardless, the notion that Plaintiffs

harms are not usually "irreparable," Plaintiffs assert their harms fall under a Fifth Circuit exception when sovereign immunity would preclude recovery. *See id*. (citing, among other cases, *Wages & White Lions Invs., LLC v. FDA*, 16 F.4th 1130 (5th Cir. 2021)).

The injuries Plaintiffs allege, however, are not the sort that "cannot be undone through monetary remedies." *See, e.g.*, *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012). Plaintiffs are, of course, correct that the United States has not waived its sovereign immunity from money damages for APA claims against the CFTC. But were Plaintiffs to "ultimately prevail on the merits of their suit," they would nevertheless still "have recourse" for monetary relief "in the form of subsequent civil suits," *id.* at 279–289—specifically, against Aristotle, PredictIt, and/or Victoria University. To the extent that non-party Victoria University were to decide to cease or alter its PredictIt operations, and to the extent that the manner it chooses to do so actually results in the harms alleged, Plaintiffs here could seek full recompense for their claimed economic harms against the responsible parties. The individual traders could raise identical loss-of-expectation arguments and the corporate entities could raise identical compliance-cost arguments through breach-of-contract suits against the relevant counterparty. *See, e.g.*, Am. Compl. ¶ 27 (alleging that "Victoria University has entered into a market servicing agreement with Aristotle" and that "[p]ursuant to that agreement, … investors that open accounts on the PredictIt Market enter into a contract with Aristotle"). While it is far from clear that any such breach-of-contract suits would prevail, it is the "*possibility* that adequate compensatory or other corrective relief will be available at a later date" that "weighs heavily against a claim of irreparable harm." *See Dennis Melancon*, 703 F.3d at 279 (emphasis added).

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would be entitled to an injunction against a federal agency merely because third-party academics might seek to study conduct that is the subject of a regulatory dispute is, at best, highly dubious.

IV. Plaintiffs Fail To Show That The Balance Of The Equities And The Public Interest Favor A Preliminary Injunction.

Plaintiffs similarly fail to show that the balance of the equities and the public interest favor a preliminary injunction. When addressing these factors, "courts must balance the competing claims of injury" and "consider the effect on each party of the granting or withholding of the requested relief" while "pay[ing] particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter v. NRDC*, 555 U.S. 7, 24 (2008) (quotations omitted). Here, that balancing is straightforward.

Plaintiffs broadly argue that "[c]rashing investors out of contracts predicting the result of the 2024 elections would not foster 'fair and orderly markets'" and further assert the generalized "public interest to require compliance with the APA[]." Dkt. 12-1 at 13–14 (citing 7 U.S.C. § 2). That, of course, is duplicative of their merits and irreparable-harm arguments—and wrong for the same reasons. DMO's withdrawal of its earlier no-action letter does not "crash investors" out of anything, nor has the CFTC or its staff committed any APA violations.

On the other side of the scales is the real and substantial harm to market participants regulated by the CFTC were this Court to hold, for the first time, that 17 C.F.R. § 140.99(a)(2) no-action letters issued by divisional staff constitute "final agency action" warranting injunctive relief against the Commission itself in full-dress APA litigation. Allowing not only any potentially disappointed letter beneficiary, but also any potentially disappointed third party, to seek judicial relief over the "mere informal, advisory, administrative opinions" expressed in staff no-action letters "might well discourage the practice of giving such opinions" in the first place, resulting in "a net loss of far greater proportions to the average citizen than any possible gain which would accrue." *Taylor-Callahan-Coleman Cntys. Dist. Adult Prob. Dep't v. Dole*, 948 F.2d 953, 959 (5th Cir. 1991) (quoting *Nat'l Automatic Laundry & Cleaning Council v. Shultz*,

443 F.2d 689, 699 (D.C. Cir. 1971)). Granting Plaintiffs proposed injunction here—effectively sandbagging the agency and its staff—could, at a minimum, substantially diminish CFTC staff's willingness to engage in such informal dialogue going forward. And by upending Victoria University's *own choice* to seek a staff no-action letter to which the APA does not apply, rather than registration and the regulatory requirements that go along with it, would predictably have a chilling effect on parties' willingness to seek similarly informal action from staff, including guidance across the sundry questions arising under the Commission's jurisdiction over the United States' derivatives markets.

V. Plaintiffs Seek To Circumvent The CEA, CFTC Regulations, And Settled Administrative Law To Preemptively Enjoin The Commission From Taking Any Future Enforcement Action Against PredictIt.

Finally, it is worth noting what Plaintiffs actually attempt to accomplish here. Plaintiffs ostensibly seek to have this Court "vacat[e]" the "Revocation of the No-Action Relief," which would presumably resurrect the 2014 no-action letter and thus reinstate DMO's previous position that it "will not recommend that the Commission take any enforcement action in connection with the operation" of PredictIt. *See* Am. Compl. at 30 ("Prayer for Relief") & Ex. 1 at 5. But in their current motion Plaintiffs ask for much more. Among other things, Plaintiffs request "order[s] enjoining the CFTC"—not merely the DMO staff who issued the no-action letter—"from requiring the liquidation of outstanding contracts on the PredictIt Market before they are settled in the normal course," which DMO cannot and has not ordered in no-action correspondence, regardless of whether the Commission independently determines that continuing such contracts, or any other aspect of PredictIt's operations, violate the CEA or CFTC regulations. *See id.*; Dkt. 12-3 at 1–2 (requesting an order enjoining the Commission from "prohibit[ing] or deter[ing] in any way the PredictIt Market"). And Plaintiffs ask to "enjoin[] the CFTC from taking any action to enforce the provisions of the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*, or CFTC

regulations, 17 C.F.R. § 1.1 *et seq.*, against Plaintiffs based on their continued offering of political-event contracts on the PredictIt Market." Dkt. 12-1 at 20.

Plaintiffs thus ask this Court to preempt any future enforcement action that the Commission may authorize against PredictIt on a theory that non-party Victoria University has a "license" it never sought and was never granted. Not only would that relief work an end-run around the CEA's registration framework, the Section 4(c) exemption process, and Article III standing principles, it also offends the settled principle that federal courts will not preemptively enjoin enforcement actions brought by executive agencies. Instead, the proper course is for the subject of any such action to raise any "legitimate reliance interest[]" that that party might have as an affirmative defense if and only if the Commission actually authorizes proceedings. Dkt. 12-1 at 15; *see, e.g.*, *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 599 (1950) ("[I]t has never been held that the hand of government must be stayed until the courts have an opportunity to determine whether the government is justified in instituting suit in the courts."); *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 157 (D.C. Cir. 2006) ("[W]e have previously found the traditional nonreviewability of prosecutorial charging decisions applicable to administrative cases."). That principle is all the more salient here, as Plaintiffs' broadly framed injunctive relief sought far outstrips the limited remand-for-reconsideration remedy available even were they to prevail on the merits. *See, e.g.*, *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 459–460 (5th Cir. 2015) (citing *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

CONCLUSION

For these reasons, Plaintiffs have failed to show that they are entitled to the extraordinary remedy of a preliminary injunction. Their motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I caused the foregoing Defendant CFTC's Opposition to Plaintiffs' Motion for Preliminary Injunction 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/ *Kyle M. Druding*
Kyle M. Druding

TAB 14

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 MILLER, JOSIAH NEELEY, GRANT SCHNEIDER, and WES SHEPHERD,

Plaintiffs,

v.

COMMODITY FUTURES TRADING COMMISSION,

Defendant.

Civil Docket No. 1:22-cv-00909-LY

The Honorable Lee Yeakel

DEFENDANT CFTC'S MOTION TO DISMISS

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INTRODUCTION

Plaintiffs bring a pair of Administrative Procedure Act ("APA") claims challenging an August 4, 2022 letter written by divisional staff of Defendant the United States Commodity Futures Trading Commission ("CFTC" or "Commission") to non-party Victoria University of Wellington, New Zealand ("Victoria University" or "the University"). That 2022 letter withdrew a "no-action letter" sent in 2014 by the same staff to the University, at the University's request, relating to the operation of an online event-contracts market known as "PredictIt." Plaintiffs ostensibly seek to have that 2014 staff no-action letter resurrected.

But no-action letters, and withdrawals thereof, are not "final agency action" under the APA. No-action letters are informal, staff-level statements that the issuing staff, as an exercise of their discretion, will refrain from recommending that the Commission take an enforcement action so long as certain conditions are met. Under CFTC regulations, a no-action letter does not bind the Commission or any staff division but the one that issues it, and the Commission itself does not vote on or issue them. By their very terms, no-action letters (and letters withdrawing them) carry no legal consequences for their beneficiaries or anyone else, and that is what the University chose. As every court to address directly analogous agency staff no-action letters has held, those letters are not subject to judicial review under 5 U.S.C. § 704. *See, e.g.*, *Bd. of Trade of City of Chicago v. SEC*, 883 F.2d 525, 529 (7th Cir. 1989); *Kixmiller v. SEC*, 492 F.2d 641, 646 (D.C. Cir. 1974) (per curiam). That alone dooms Plaintiffs' claims.

Plaintiffs' claims suffer from two other threshold failures: CFTC no-action letters are exercises of prosecutorial discretion unreviewable as a matter of law, 5 U.S.C. § 701(a)(2); and Plaintiffs, who allege only indirect harms in the University's stead, lack Article III standing. Indeed, CFTC regulations provide that "only the Beneficiary may rely upon" a no-action letter,

17 C.F.R. § 140.99(a)(2), and the beneficiary here—the University—is not a party to this case. Should this Court reach those alternative grounds they, too, warrant dismissal.

BACKGROUND[1]

A. The Commission, the Commodity Exchange Act, and Event Contracts.

The CFTC is the federal agency tasked with administering and enforcing the Commodity Exchange Act ("CEA" or "the Act"), 7 U.S.C. §§ 1–26, and does so in part through promulgating regulations, 17 C.F.R. pts. 1–190. The CEA governs markets for commodity derivatives, including futures contracts and swaps, and to a lesser extent, the commodities that underlie them. *See* 7 U.S.C. § 2(a)(1)(A). A derivative is a financial instrument, such as a future, option, or swap, whose price is directly dependent upon—that is, "derived from"—the value of something else, such as a commodity, debt instrument, or pricing index.[2]

Relevant here are a class of derivate products known as "event contracts." Event contracts**,** also known as prediction or information contracts, are derivative contracts whose payoff is based on a specified event, occurrence, or value such as, for example, the value of a macroeconomic indicator, corporate earnings, level of snowfall, or dollar value of damages caused by a hurricane.[3] Under the CEA and CFTC regulations, those seeking to offer certain event contracts generally must do so as a "registered entity," 17 C.F.R. § 40.11(a)–(c), including

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[1] Some of this background was already included in the CFTC's Opposition to Motion for Preliminary Injunction. We include it again here to provide context about the CFTC and its functions.

[2] CFTC, *Glossary: A Guide to the Language of the Futures Industry*, https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/CFTCGlossary/index.htm (last visited Oct. 28, 2022).

[3] CFTC, *Contracts & Products: Event Contracts*, https://www.cftc.gov/IndustryOversight/ContractsProducts/index.htm (last visited Oct. 28, 2022).

as a qualifying designated contract market ("DCM") or swap execution facility ("SEF"), 7 U.S.C. § 7a-2(c)(5)(C)(i). Registration enables the CFTC to supervise DCMs and SEFs so that the Commission can make sure that they conform their operations to core principles designed to prevent market abuse, ensure financial stability, protect information security, and safeguard systems in the event of a disaster, *id.* §§ 7(d)(12)(A), 7(d)(21), 7b-3(f)(2)(B), 7b-3(f)(13); 17 C.F.R. §§ 37.1401(a), 38.1051(a); ensure that contracts offered for trade are "not readily susceptible to manipulation," 7 U.S.C. §§ 7(d)(3), 7(d)(4), 7b-3(f)(3), 7b-3(f)(4)(B); and ensure position limits are imposed, conflict-of-interest rules are established and enforced, and records are kept and maintained, *id.* §§ 7(d)(5), 7(d)(16), 7(d)(18), 7b-3(f)(6), 7b-3(f)(10)–(12).

Registration thus plays a key role in furthering the CFTC's mission. Should a covered entity fail to register, or otherwise violate the CEA or CFTC regulations, the CFTC can bring suit in federal court to redress the violation and enforce compliance. *Id.* § 13a-1(a). The CEA grants district courts broad remedial authority, including the power to enjoin wrongdoing, order restitution and disgorgement, and assess civil monetary penalties. *Id.* § 13a-1(a)–(d).

B. The Division of Authority between the Commission and its Staff.

The CFTC exercises only that authority delegated by Congress and employs various staff to assist the Commission's mission promoting the integrity, resilience, and vibrancy of U.S. derivatives markets. The CFTC is composed of five Commissioners, each appointed by the President with the advice and consent of the Senate. 7 U.S.C. § 2(a)(2)(A); 17 C.F.R. § 140.10. The CFTC acts only when its five Commissioners vote to do so, and all votes are recorded by the Secretary of the Commission. *See, e.g.*, 17 C.F.R. § 140.12. Plaintiffs cannot and do not allege that this happened here. The CFTC employs staff across thirteen operating divisions and multiple offices nationwide. *See id.* §§ 140.1, 140.2.

CFTC staff in the Division of Market Oversight ("DMO" or the "Division"), among other things, review new applications for exchanges such as DCMs and SEFs and examine existing exchanges to ensure their regulatory compliance.[4] Another division, the Division of Enforcement, investigates and, if and only if authorized by vote of the Commission, civilly prosecutes violations. While staff may make recommendations, only the Commission itself—acting by recorded vote—can determine whether to grant DCM and SEF applications, *see* 7 U.S.C. § 8(a), or whether to bring an enforcement action. *See* 7 U.S.C. §§ 9(4)(A), 13a-1(a)–(d).

C. DCM and SEF Registration, Section 4(c) Exemptions, and Staff No-Action Letters.

Broadly speaking, there are three distinct categories of Commission- and staff-level conduct relevant here. They are briefly summarized below.

DCM and SEF Registration. An entity that wishes to operate a derivatives exchange in the United States must apply to be registered with the Commission as either a DCM or as a SEF. As mentioned above, a key prerequisite to offering event contracts in compliance with the CEA is that the offeror be a registered DCM or SEF. 7 U.S.C. § 7a-2(c)(5)(C)(i) (specifying that event contracts are listed "by a designated contract market or swap execution facility"); *see also id.* § 6(b)(1)(A). A DCM is a board of trade or an exchange that has been designated by the CFTC as allowing institutional and retail participants to list and trade various derivatives products including futures, swaps, and options. A SEF is a trading system or platform that allows multiple participants to execute or trade swaps by accepting other participants' bids and offers through that trading system or platform. To operate lawfully in the United States, DCMs and SEFs must first register with the Commission. *See, e.g.*, *id.* §§ 7(a), 7b-3(a)(1); 17 C.F.R.

[4] *See generally* CFTC, *About the CFTC: CFTC Organization*, https://www.cftc.gov/About/CFTCOrganization/index.htm (last visited Oct. 28, 2022).

§§ 37.3, 38.3. If the Commission grants registration, the Commission can later revoke registration only by following statutory procedures that are expressly made subject to "judicial review." *See* 7 U.S.C. §§ 7b, 8(b).

Section 4(c) Exemptions. The Commission has statutory authority to exempt certain transactions or instruments from the CEA. CEA Section 4(c) establishes an exemption process that provides the Commission "may," at its discretion, "exempt any agreement, contract, or transaction (or class thereof)" from certain otherwise-applicable CEA requirements "by rule, regulation, or order" if, "after notice and opportunity for hearing" in accordance with the APA, the Commission makes certain required findings. *See* 7 U.S.C. § 6(c)(1)–(2). The Commission can grant Section 4(c) exemptions "either unconditionally or on stated terms or conditions." *Id.* § 6(c)(1). After a Section 4(c) exemption issues, the Commission retains the authority "to conduct investigations" and, if there has been a failure to comply with those conditions, "to take enforcement action for any violation" of the CEA or CFTC regulations. *Id.* § 6(d).

No-action letters. CFTC regulations provide for staff-level no-action letters, which the University chose here to pursue. These letters do not issue from and expressly do not bind the Commission. Nor are do they reflect delegated authority. Rather, CFTC Rule 140.99(a)(2) codifies a preexisting staff practice of answering inquiries about what staff would "recommend … to the Commission" concerning proposed activities. *Requests for Exemptive, No-Action and Interpretive Letters*, 63 Fed. Reg. 3285, 3285 (Jan. 22, 1998). Under Rule 140.99(a)(2), a no-action letter is "a written statement issued by the staff" that addresses "a proposed transaction" or "a proposed activity." 17 C.F.R. § 140.99(a)(2). No-action letters can be "issued by the staff of a Division of the Commission or of the Office of the General Counsel." No-action letters state only that the issuing Division "will not recommend enforcement action to the Commission for

failure to comply with a specific provision of the Act or of a Commission rule, regulation or order." *Id.* If issued, "[o]nly the Beneficiary may rely" on the letter. *Id.* The decision whether to grant a no-action letter and in what form "is entirely within the discretion of Commission staff." *See id.* § 140.99(b)(1), (e). A no-action letter "represents the position only of the Division that issued it" and "binds only the issuing Division" and—explicitly—"not the Commission or other Commission staff." *Id.* § 140.99(a)(2).

D. The PredictIt Market and the Withdrawal of No-Action Letter 14-130.

PredictIt is "an online market for political-event contracts," allegedly operated by Victoria University of Wellington. Am. Compl. ¶ 1. According to the Amended Complaint, PredictIt is "[e]ssentially a stock exchange for political events" that offers tradable binary options, in the form of "'yes' or 'no' contracts in an event market" with "prices ranging from 1 to 99 cents" per contract. *See* Am. Compl. ¶ 2. The "primary purpose" of PredictIt allegedly is to "be a small-scale market" for "academic" research, enabling the production of "market-generated trading/pricing information regarding what informed investors believe the outcome is going to be, reinforced by a relatively small financial investment." Am. Compl. ¶ 3.

Despite offering event contracts in the United States, neither Victoria University nor PredictIt has ever been registered with the CFTC in any capacity, including as either "a designated contract market or swap-execution facility." *See, e.g.*, Am. Compl. ¶¶ 7, 59. Nor do Plaintiffs allege that Victoria University ever attempted to secure relief under CEA Section 4(c) to exempt transactions from provisions in the CEA that require certain event-contract trading to be conducted on a CFTC-registered exchange. Instead, Victoria University sought and received only the 2014 staff no-action letter. *See, e.g.*, Am. Compl. ¶¶ 7, 25, 58–63 & Exs. 1, 3. The University's decision to go the less formal staff no-action route rather than apply for registration

or seek a Section 4(c) exemption from the Commission itself necessarily limited the applicable procedures and what they ultimately received.[5]

That 2014 no-action letter (No. 14-130), after summarizing Victoria University's request, concluded that "DMO will not recommend that the Commission take any enforcement action in connection with the operation of your proposed market for event contracts" were PredictIt to operate as proposed. *See* Am. Compl. Ex. 1 at 5. That conclusion was "based upon" the University's "representations" in both its original letter and telephone calls with DMO staff. *Id.* at 2, 5. In its request for no-action relief, Victoria University represented, among other things, that PredictIt "has been designed to serve academic purposes and the operators will receive no compensation," and that only certain categories of event contracts concerning specified "political elections and economic indicators" would be offered subject to certain caps both on the number of allowable traders per contract and total amount that may be spent per contract. *See id.* at 2–5.

On its face, the 2014 no-action letter is clear as to the limits of both its scope and effect. That letter, which uses the term "no-action" thirteen times, including both in the address block and in the subject line, is on DMO letterhead and signed by the Division's Director. The no-action letter explicitly states, per 17 C.F.R. § 140.99(a)(2):

> Consequently, based upon your representations, DMO will not recommend that the Commission take any enforcement action in connection with the operation of your proposed market for event contracts based upon the operators' not seeking designation as a contract market, registering under the Act or otherwise complying with the Act or Commission regulations.
>
> ….

[5] Plaintiff Aristotle International, Inc. has stated in an unrelated administrative proceeding that it previously submitted both an application for registration as a DCM and a petition for a Rule 4(c) order, requesting the Commission undertake notice-and-comment rulemaking addressing various aspects of the Commission's regulation of event contracts. *See generally* Letter from John A. Phillips, Chairman and CEO, Aristotle International, Inc. to the Secretary of the Commission regarding CFTC Release No. 8578-22, at 2 (Sept. 23, 2022), https://comments.cftc.gov/PublicComments/CommentList.aspx?id=7311.

> This letter, and the no-action position taken herein, represents the views of DMO only, and does not necessarily represent the positions or views of the Commission or of any other division or office of the Commission. As with all no-action letters, DMO retains the authority to condition further, modify, suspend, terminate or otherwise restrict the terms of the no-action relief provided herein, in its discretion.

Am. Compl. Ex. 1, at 5–6. At no point does that letter ever refer to a "license," "permission," or "approval" of any sort.

On August 4, 2022, DMO staff issued a second letter to Victoria University (No. 22-08) withdrawing its 2014 no-action letter. Am. Compl. ¶ 8 & Ex. 2. That withdrawal summarized the Division's 2014 position "to not recommend enforcement action (*i.e.*, 'no-action' relief)" and reiterated the nine limitations that the University had originally proposed operating under. Am. Compl. Ex. 2 at 1–2. Concluding that "[t]he University has not operated its market in compliance with the terms of Letter 14-130," DMO stated that "Letter 14-130 is hereby withdrawn." Am. Compl. Ex. 2 at 2. As to any then-existing contracts that had been operated "in a manner consistent with each of the terms and conditions provided in Letter 14-130," DMO advised that they "should be closed out and/or liquidated no later than 11:59 p.m. eastern on February 15, 2023." *Id.* However, Plaintiffs do not allege that PredictIt currently offers any contract in a manner consistent with each of those terms and conditions.

Indeed, Plaintiffs do not directly challenge DMO's conclusion that "[t]he University has not operated its market in compliance with the terms of Letter 14-130," and even the small sample of documents they have submitted to the Court shows that they are in no position to do so. *Compare, e.g.*, Am. Compl. Ex. 2 at 1–2 (summarizing nine enumerated conditions that the University agreed to observe), *with* Dkt. 12-2 Ex. 4 (November 24, 2014 email from DMO's Chief Counsel questioning as inconsistent with the 2014 no-action letter the University's "indiscriminate advertising" and listing of contracts with "no relationship to elections or any other meaningful political question.").

E. Procedural History.

Plaintiffs filed suit on September 9, 2022, then filed the operative Amended Complaint on October 6, 2022. Plaintiffs can be divided into three groups. First, Plaintiffs Aristotle International, Inc., and Predict It, Inc., allegedly are private corporations that collectively "service[]" various aspects of PredictIt pursuant to an undisclosed "marketing servicing agreement." Am. Compl. ¶¶ 1, 26–27. Second, Plaintiffs Harry Crane, Corwin Smidt, Richard Hanania, and James Miller are academics who allege they use PredictIt data for "teaching and research" purposes. *See* Am. Compl. ¶¶ 23, 24, 30, 31. Third, Plaintiffs Trevor Boeckmann, Kevin Clarke, Michael Beeler, Mark Borghi, Josiah Neeley, Grant Schneider, and Wes Shepherd are individual PredictIt customers who allegedly made various "purchases and trades" on PredictIt. *See* Am. Compl. ¶¶ 22, 21, 28, 29, 32, 33, 34. Notably absent from Plainitffs' ranks: Victoria University, the sole beneficiary of the 2014 no-action letter. Am. Compl. ¶ 25.

Plaintiffs raise two APA counts challenging the 2022 withdrawal of the 2014 no-action letter. Am. Compl. ¶¶ 75–81, 82–89 & Ex. 2. Plaintiffs' first count claims that the withdrawal is arbitrary and capricious because that letter lacked sufficient "reasoned decisionmaking," both as to the ultimate decision to withdraw the 2014 no-action letter and the timing for doing so. Am. Compl. ¶¶ 75–81 (citing 5 U.S.C. § 706(2)(A)). Plaintiffs' second count claims that the withdrawal failed to give sufficient due process to revoke a "license" under 5 U.S.C. § 558(c). *See* Am. Compl. ¶¶ 82–89; 5 U.S.C. § 551(8). Neither count states a cognizable claim.

ARGUMENT

An APA complaint must be dismissed if it fails to allege "final agency action." While some courts treat this as failure to state a claim under Rule 12(b)(6), *see, e.g.*, *Trudeau v. FTC*, 456 F.3d 178, 188–189 (D.C. Cir. 2006); Fed. R. Civ. P. 12(b)(6), the Fifth Circuit holds that this

defect is jurisdictional, *see, e.g.*, *Sierra Club v. Peterson*, 228 F.3d 559, 565 (5th Cir. 2000); *see also Walmart Inc. v. U.S. Dep't of Justice*, 21 F.4th 300, 307–308 (5th Cir. 2021) (discussing circuit split over sovereign-immunity waiver in 5 U.S.C. § 702). Because Plaintiffs do not challenge "final agency action" here, this Court lacks jurisdiction to hear their claims.

"Federal courts have an independent obligation to ensure that subject-matter jurisdiction exists before reaching the merits of a dispute." *Miller v. Hughs*, 471 F. Supp. 3d 768, 775 (W.D. Tex. 2020). When subject-matter jurisdiction is lacking, such as when Plaintiffs lack Article III standing, Rule 12(b)(1) is the proper vehicle for defendants to move to dismiss. And because the CFTC is challenging the Plaintiffs' Amended Complaint on its face, the dismissal analysis under both Rule 12(b)(1) and Rule 12(b)(6) is identical here. *See Miller*, 471 F. Supp. 3d at 774 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)).

I. Plaintiffs Do Not Challenge "Final Agency Action."

The APA waives the United States' sovereign immunity for qualifying claims seeking non-monetary and injunctive relief against federal agencies, but subject to the limitation (among others) that the conduct challenged must be "final agency action." 5 U.S.C. § 704. Naturally, to be "final agency action" the challenged conduct must be both "agency action" and "final." The 2022 withdrawal of the 2014 no-action letter was neither.

a. The August 4, 2022 withdrawal is not "agency action."

Plaintiffs' claims fail out of the gate because they are not challenging "agency action." "Under the APA, 'agency action' is a defined term, limited to an '*agency* rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.'" *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (quoting 5 U.S.C. § 551(13)) (emphasis added). While that definition is framed broadly "to cover comprehensively every manner in

which an agency may exercise its power," the term "agency action" is "not so all-encompassing" to provide for "judicial review over everything done by an administrative agency," *Fund for Animals v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 19 (D.C. Cir. 2006) (quotation marks omitted), let alone by its staff. In assessing whether the challenged conduct qualifies as "agency action" at all, courts look to "common sense, basic precepts of administrative law, and the Administrative Procedure Act itself." *See, e.g.*, *Indep. Equip. Dealers Ass'n*, 372 F.3d at 427 (concluding that "workaday advice letter" sent by EPA staff that "imposed no obligations and denied no relief" without any "binding effect whatsoever" was not agency action).

Plaintiffs' theory of "agency action" is that the 2014 no-action letter was a "license" under the APA's definitional catchall for "other form[s] of permission." *See* Am. Compl. ¶¶ 66, 77, 84–85; 5 U.S.C. § 551(8) (defining "license" to include "the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission"). That theory is wrong. The fatal flaw in Plaintiffs' reasoning is that DMO's 2014 no-action letter—indeed, any staff no-action letter issued pursuant to 17 C.F.R. § 140.99(a)(2)—grants no affirmative entitlement to anyone to do anything. CFTC "no-action letters" are nothing more than statements that, while such a letter is in effect, "staff" will "not recommend enforcement action to the Commission for failure to comply with a specific provision of the Act or of a Commission rule" if the "proposed activity is conducted by the Beneficiary." 17 C.F.R. § 140.99(a)(2). As alleged in the Amended Complaint, the limited effect of staff no-action letters and the fact that they are not issued by the Commission itself was clearly and repeatedly explained in DMO's correspondence with Victoria University. *See* Am. Compl. Ex. 1 at 5–6 (stating that "DMO will not recommend that the Commission take any enforcement action in connection with the operation of your proposed market" but cautioning

that "[t]his letter, and the no-action position taken herein, represents the views of DMO only"); Am. Compl. Ex. 2 at 1–2 & n.4. And that limited scope stands in sharp contrast to DCM or SEF registration and Section 4(c) exemptions issued by the Commission itself that Victoria University could have pursued—but chose not to. *Cf., e.g.*, 7 U.S.C. §§ 6(c)(1)–(2) (specifying action by "the Commission"), 7(a) (same), 8(a) (same); 17 C.F.R. § 37.3 (same).

If accepted, Plaintiffs' theory that the 2014 staff no-action letter is nevertheless a "license" would eviscerate any reasonable limits on the scope of staff actions potentially subject to judicial review, and would undermine the public interest in allowing those less-formal interactions. *See Taylor-Callahan-Coleman Cntys. Dist. Adult Prob. Dep't v. Dole*, 948 F.2d 953, 959 (5th Cir. 1991) (citing *Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 699 (D.C. Cir. 1971)). This Court should reject that untenable reading, just as have other Courts faced with similarly sweeping interpretations.[6] *See, e.g.*, *Sheridan Kalorama Hist. Ass'n v. Christopher*, 49 F.3d 750, 756 (D.C. Cir. 1995) (explaining that courts have "never found" the term "license" to be "so broad as to encompass failure to disapprove a proposal").

b. Nor is the August 4, 2022 withdrawal "final."

Plaintiffs' APA claims independently fail because they challenge conduct that is not "final." *See, e.g.*, *DTCC Data Repository (U.S.) LLC v. CFTC*, 25 F. Supp. 3d 9, 14 (D.D.C. 2014) (questioning whether "withdrawal" of interpretive guidance in staff-level "FAQs" that "plainly state that they reflect the views of Commission staff, not of the Commission itself" could "constitute[] 'agency action' at all" but declining to decide that threshold issue because there was no "'final' action" (citing *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992)).

[6] Because DMO's August 4, 2022 letter does not withdraw or revoke a "license," Plaintiffs' Second Count for supposed "license"-specific procedural violations under 5 U.S.C. § 558(c) fails to state a claim. *See* Am Compl. ¶¶ 82–89; Fed. R. Civ. P. 12(b)(6).

Under the two-step analysis for establishing "final" agency action, the challenged conduct must both (1) "mark the 'consummation' of the agency's decisionmaking process" rather than being "merely tentative or interlocutory"; and (2) "be one by which 'rights or obligations have been determined," or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177–178 (1997); *see also, e.g.*, *Gerber Prod. Co. v. Perdue*, 254 F. Supp. 3d 74, 84 (D.D.C. 2017) ("Guidance supplied by a lower-level official generally does not qualify as a 'final' agency action, even if it proves influential.").

The withdrawal of discretionary no-action relief issued by CFTC staff meets neither *Bennett* prong. *See, e.g.*, *Luminant Generation Co. v. EPA*, 757 F.3d 439, 441, 444 (5th Cir. 2014) (concluding that an EPA "notice of violation" is not "final" agency action because "[i]ssuing a notice of violation does not create any legal obligation, alter any rights, or result in any legal consequences and does not mark the end of the EPA's decisionmaking process"). First, the act of issuing or withdrawing a no-action letter is inherently interlocutory: Under the CFTC's regulations, the issue is simply whether a subset of staff will "recommend enforcement action" to the body with the authority to decide, the five-member Commission. *See* 17 C.F.R. § 140.99(a)(2); Am. Compl. Ex. 2 at 1–2 (explaining that "Letter 14-130 is hereby withdrawn" and noting that the "'no-action' relief" previously provided by "the Division of Market Oversight" had been "that the Division not recommend enforcement action"); Am. Compl. Ex. 1 at 5–6 (providing that "DMO will not recommend that the Commission take any enforcement action" while cautioning that "[t]his letter, and the no-action position taken herein, represents the views of DMO only"). Taken together, DMO could not and did not bind the Commission in its no-action letter. Regardless of the no-action letter, the Commission has at all relevant times had the authority to initiate enforcement proceedings—following a vote—against the University or

anyone else, should the Commission determine that there are actionable CEA or rules violations. Thus, DMO's 2022 withdrawal "does not constitute the consummation of the Commission's decisionmaking process by its own terms and under the [CFTC']s regulations." *See, e.g.*, *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1263 (D.C. Cir. 2018).

Second, it is equally clear that DMO's 2022 withdrawal does not determine any rights or obligations from which legal consequences would flow. To the extent that PredictIt's operations comply with the CEA and CFTC regulations, it is free to continue unabated with or without any staff no-action relief. To the extent that Victoria University decides to continue operating PredictIt, the Commission is fully empowered to bring an enforcement action at its discretion—again, with or without any staff no-action relief. *See* 7 U.S.C. § 9(4)(A) (vesting enforcement authority in "the Commission"). Thus, while the withdrawal of the 2014 no-action letter means that DMO may choose to recommend enforcement proceedings to the Commission, that withdrawal "compels action by neither the recipient nor the agency" and lacks any direct legal effect on any regulated entity. *See, e.g.*, *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 944–945 & n.6 (D.C. Cir. 2012) (collecting cases and holding that "like other agency advice letters that we have reviewed over the years, FDA warning letters do not represent final agency action subject to judicial review").

Although DMO's withdrawal letter states that any contracts within the scope of the no-action letter "should be closed out and/or liquidated no later than 11:59 p.m. eastern on February 15, 2023," Am. Compl. Ex. 2 at 2, the use of "should" rather than mandatory language further confirms that "there has been no order compelling [the non-party University] to do anything." *See, e.g.*, *Holistic Candlers*., 664 F.3d at 944. The statement reflects nothing more than a staff-specific grace period—that staff were under no obligation to grant—by which, were

those contracts still active, DMO staff might recommend an enforcement action. That is, after all, the limit of the no-action letter's terms, and staff lack the authority to bring an enforcement action or otherwise "force the premature liquidation of up to 75 contracts." *See, e.g.*, Dkt. 12-1 at 6. Plaintiffs have already conceded as much in their preliminary-injunction motion, as they admit that the withdrawal "does not itself impose sanctions on anyone." *Id.* at 20.

The legal basis for dismissal of the Amended Complaint is neither novel nor complex. Longstanding case law involving directly analogous no-action letters issued by Securities and Exchange Commission staff unanimously and persuasively confirms the lack of "final" agency action here. *See, e.g.*, *Bd. of Trade of City of Chicago v. SEC*, 883 F.2d 525, 529 (7th Cir. 1989) (holding SEC no-action letter is not "final" agency action for APA purposes because the underlying staff position "by its terms is tentative" when either the relevant division director "could change his mind tomorrow, or the Commissioners might elect to proceed no matter what the Director recommends"); *Kixmiller v. SEC*, 492 F.2d 641, 646 (D.C. Cir. 1974) (per curiam) (holding non-justiciable "no-action position" in letter issued by Securities and Exchange Commission staff explaining that the SEC's Division of Corporate Finance "would not recommend that the Commission take enforcement action"); *see also New York City Empls.' Ret. Sys. v. SEC*, 45 F.3d 7, 12 (2d Cir. 1995) (holding that SEC no-action letters are non-binding "interpretive" policy statements that do not require notice-and-comment rulemaking); *Apache Corp. v. Chevedden*, 696 F. Supp. 2d 723, 735 (S.D. Tex. 2010) (Rosenthal, J.) (holding that legal positions taken in SEC no-action letters "are nonbinding, persuasive authority" only).

II. Plaintiffs' Claims Challenge A Classic Exercise Of Prosecutorial Discretion That Is Unreviewable As "Committed To Agency Discretion By Law."

Plaintiffs' claims additionally fail because the challenged conduct is unreviewable as "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Under settled administrative-

law principles "an agency's decision not to prosecute or enforce," which necessarily "involves a complicated balancing of a number of factors" such as "the agency's overall policies" and "whether agency resources are best spent on this violation or another," reflects a "general unsuitability for judicial review." *Heckler v. Chaney*, 470 U.S. 821, 831–832 (1985). Such decisions are thus "generally committed to an agency's absolute discretion." *Id.* at 831. And that principle applies with equal force in the context of civil-enforcement proceedings. *See, e.g.*, *Citizens for Resp. & Ethics in Washington v. FEC*, 993 F.3d 880, 888 (D.C. Cir. 2021).

Here, Plaintiffs challenge the withdrawal of a statement that DMO staff will not recommend to the Commission that the Commission bring a civil-enforcement action. As the Seventh Circuit has recognized, such statements are independently unreviewable under 5 U.S.C. § 701(a)(2). *See Chicago Bd. of Trade*, 883 F.2d at 530 (holding that SEC no-action letter "is a classic illustration of a decision committed to agency discretion"). Indeed, the unique circumstances of Plaintiffs' challenge—in which the no-action beneficiary is not even a party—render their challenge even further attenuated from those that would otherwise be held unreviewable. *See also Simon v. E. Kentucky Welfare Rts. Org.*, 426 U.S. 26, 37 (1976) (noting "the settled doctrine that the exercise of prosecutorial discretion cannot be challenged by one who is himself neither prosecuted nor threatened with prosecution").

III. The Various Named Plaintiffs, None Of Whom Is The Beneficiary Of The Challenged No-Action Correspondence, Lack Article III Standing.

Article III standing entails a three-part showing: (1) an injury-in-fact that is "concrete, particularized, and actual or imminent"; (2) that the injury be "fairly traceable to the challenged action"; and (3) that the injury be "redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Because they seek to invoke this Court's jurisdiction, Plaintiffs

bear the burden of establishing each element. *See, e.g.*, *Shrimpers & Fishermen of RGV v. Texas Comm'n on Env't Quality*, 968 F.3d 419, 423 (5th Cir. 2020) (per curiam).

a. Plaintiffs must make a heightened showing because their asserted injuries hinge on the independent decisionmaking of non-party Victoria University.

Plaintiffs broadly allege three types of injury from the end of PredictIt: (1) the corporate "services provider" Plaintiffs allege that they "will be forced to incur massive administrative, labor, time, and other costs"; (2) the academic Plaintiffs allege the loss of a "pedagogical tool" and research "data"; and (2) the individual trader Plaintiffs allege the loss of "economic value" from their supposedly curtailed "ability to trade contracts." *See* Am. Compl. ¶¶ 76.a–c; *id.* ¶¶ 26–27; *id.* ¶¶ 23–24, 30–31; *id.* ¶¶ 21–22, 28–29, 32–34; *accord* Dkt. 12-2 at 1–6 (Declaration of Dean Phillips), *id.* at 29–32 (Declaration of Kevin A. Clarke), *id.* at 33–35 (Declaration of Trevor Boeckmann), *id.* at 36–38 (Declaration of Harry Crane), *id.* at 62–64 (Declaration of Corwin Smidt). All Plaintiffs' alleged injuries share a critical characteristic: Each reflects a downstream harm flowing directly from Victoria University's hypothetical decision to cease operating PredictIt, or to continue to do so, depending on the outcome of these proceedings.

Plaintiffs' harm theories run headlong into "two overarching principles" of Article III standing. First, indirect-only harm theories like Plaintiffs' are unlikely to succeed because "courts only occasionally find the elements of standing to be satisfied in cases challenging government action on the basis of third-party conduct." *Bloomberg L.P. v. CFTC*, 949 F. Supp. 2d 91, 115 (D.D.C. 2013) (alteration omitted) (dismissing APA claims by swap execution facility alleging potential harm from new CFTC regulation of clearinghouses that plaintiff alleged would affect individual traders' market behavior). Second and relatedly, Plaintiffs must make a heightened showing as to their claimed harms because when "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone

else, much more is needed." *Id.* (emphasis omitted) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992)). As such, Plaintiffs' theory here is "'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562 (quotation omitted).

b. Plaintiffs' speculative and unsupported theories of causation and redressability fail.

Plaintiffs fail to make that heightened showing. This case is not the first time that third parties feeling the downstream effects of government conduct have tried to press their claims when the directly regulated entity declines to do so on its own behalf. The leading case on point is *National Wrestling Coaches Association v. Department of Education*. 366 F.3d 930, 944 (D.C. Cir. 2004). *See also, e.g.*, *Nat'l Fair Hous. All. v. Carson*, 330 F. Supp. 3d 14, 52 (D.D.C. 2018) (collecting cases applying "the reasoning at the heart of *National Wrestling*").

In *National Wrestling*, several membership organizations representing "the interests of collegiate men's wrestling coaches, athletes, and alumni"—but not the universities and colleges who operated collegiate men's wrestling programs—sought to challenge a 1979 policy interpretation of Title IX issued by what is now the Department of Education that had been clarified by the Department in 1996. *National Wrestling*, 366 F.3d at 934–936. The plaintiffs in that case sought to bring various APA challenges to that now-clarified policy statement asserting "injuries arising from decisions by educational institutions to eliminate or reduce the size of men's wrestling programs to comply with the Department's interpretive rules." *Id.* at 935. The district court dismissed the case for lack of standing, and the D.C. Circuit affirmed. *Id.* at 949.

As the D.C. Circuit explained, the plaintiffs had failed to show standing for two reasons. First, plaintiffs had failed to sufficiently allege causation, as there was no "clear showing" that the "third parties whose conduct injured the plaintiffs" had decided to eliminate their men's wrestling programs in response to the challenged Title IX guidance, as Plaintiffs had failed to

allege that those decisions "would be illegal in the absence of the challenged enforcement policies." *See id.* at 938–945. Second, the plaintiffs had failed to sufficiently allege redressability, as it was "purely speculative that a requested change in government policy will alter the behavior of regulated third parties that are the direct cause of the plaintiff's injuries" when "appellants offer[ed] nothing to substantiate their assertion that" a vacatur of the challenged agency conduct would "alter[] schools' independent decisions whether to eliminate or retain their men's wrestling programs." *Id.* at 938–939. The *National Wrestling* Court rejected as "unadorned speculation" various allegations that the "schools' independent decisions" would turn on a favorable outcome should plaintiffs' claims succeed. *Id.* at 937–938, 943.

The same is true here. As in *National Wrestling*, Plaintiffs repeatedly—but without support—allege that the 2022 withdrawal of DMO's 2014 no-action letter will "effectively" lead to the end of PredictIt. *See, e.g.*, Am. Compl. ¶¶ 12, 62. Although the Amended Complaint fails to spell out the precise chain of causation, Plaintiffs recognize that non-party Victoria University's decision to continue operating PredictIt (or not) constitutes an indispensable link. *See, e.g.*, Am. Compl. ¶¶ 25, 76.c. Plaintiffs further imply that Victoria University's decision to cease PredictIt operations was contingent on DMO's 2022 withdrawal. *See id.* ("Victoria University intends to comply with the terms of the CFTC's Revocation and therefore close the 2024 contracts in advance of their maturity unless the Revocation is abrogated, amended, or suspended."). Critically, however, Plaintiffs have failed to adequately allege facts plausibly showing that how DMO's no-action letter, which expressly disclaims any legally binding effect, compels that result; or that a vacatur order rescinding that withdrawal "will alter the behavior of regulated third parties" when the Commission is free to enforce the CEA against all relevant parties either way, and DMO has already stated its own view that the University has not adhered

to the letter's terms. *See National Wrestling*, 366 F.3d at 938–945; 17 C.F.R. § 140.99(a)(2). While Plaintiffs imply that the University would simply resume PredictIt's previous operations in full were the 2014 no-action letter to be reinstated, notwithstanding the fact that nothing in that letter prevents the Commission from authorizing an enforcement action,[7] that allegation is not "plausible on its face." *Arnold v. Williams*, 979 F.3d 262, 266 (5th Cir. 2020). Indeed, willful violation of the CEA or CFTC regulations is a felony. 7 U.S.C. § 13(5). And that allegation is all the more implausible since Plaintiffs have not alleged facts showing that the University has operated PredictIt under the terms enumerated in the 2014 no-action letter at any time, meaning that, as DMO has already concluded, that letter would be irrelevant regardless. *Compare, e.g.*, Am. Compl. Ex. 2 at 1–2, *with* Dkt. 12-2 Ex. 4.

CONCLUSION

For these reasons, Plaintiffs have failed to establish that any of their claims are reviewable. This Court should grant the CFTC's motion and dismiss this case with prejudice.

[7] In their preliminary-injunction reply, Plaintiffs included an unsworn letter from the University's Vice-Provost of Research, purporting to "confirm" that the University "had no intention of ending the PredictIt market prior to the CFTC's withdrawal of the NAL" and "intend[s] to comply with the terms of the CFTC's withdrawal letter …unless the withdrawal letter is amended, abrogated, or suspended." Dkt. 18-2 Ex. B; *accord* Am. Compl. ¶¶ 25, 67. Critically, however, the letter does not state that the University will continue to operate PredictIt if Plaintiffs are successful here and the 2014 no-action letter is restored—which is implausible for the reasons stated above. In any event, an unsworn letter from a "witness" who has not been questioned to test her implausible statement does not comply with 28 U.S.C. § 1746(1) and, accordingly, may not be relied upon by Plaintiffs or credited by the Court. *See, e.g.*, *Miller v. Fed. Home Loan Mortg. Corp.*, No. 4:12CV746, 2013 WL 6172542, at *1 (E.D. Tex. Nov. 22, 2013); *see also Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300, 1306 (5th Cir. 1988).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I caused the foregoing Defendant CFTC's Motion to Dismiss 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/ *Kyle M. Druding*
Kyle M. Druding

TAB 15

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

KEVIN CLARKE, in his individual capacity, TREVOR BOECKMANN, in his individual capacity, HARRY CRANE, in his individual capacity, CORWIN SMIDT, in his individual capacity, PREDICT IT, INC., a Delaware corporation, and ARISTOTLE INTERNATIONAL, INC., a Delaware corporation, MICHAEL BEELER, in his individual capacity, MARK BORGHI, in his individual capacity, RICHARD HANANIA, in his individual capacity, JAMES D. MILLER, in his individual capacity, JOSIAH NEELEY, in his individual capacity, GRANT SCHNEIDER, in his individual capacity, and WES SHEPHERD, in his individual capacity, Plaintiffs, v. COMMODITY FUTURES TRADING COMMISSION, Defendant.	Case No. 2022-cv-00909

DECLARATION OF KEVIN CLARKE

I, Kevin Clarke, do hereby declare under penalty of perjury, in accordance with 28 U.S.C. § 1746, that the following is true and correct, and that I am competent to testify to the matters stated herein:

1. My name is Kevin A. Clarke. I am a resident of Austin, Texas, where I am the owner of Clarke Mineral Estate and Geosciences, LLC, and an Assistant Coach for the University of Texas at Austin's Policy Debate Team.

2. I have personal knowledge of the facts stated herein.

3. I have traded on the Predictlt Market for two years. At the time I began trading on the Predictlt Market, I investigated the Market's operations and discovered that the Market

is operated pursuant to CFTC Letter No. 14-130 (the "No-Action Relief"), which I understand permitted the Predictlt Market to operate without formally registering as an exchange with the CFTC. Knowing that the CFTC had signed off on the Predictlt Market's operations assured me that, when I bought contracts on the PredictIt exchange, they would be permitted to trade until they were settled by the outcome of the election or political event they predicted.

4. I am aware that the CFTC revoked the No-Action Relief in CFTC Letter 22-08, entitled "Withdrawal of CFTC Letter No. 14-130" (the "Revocation"). The Revocation has had a direct and immediate impact on the value of Predictlt Market event contracts.

5. Specifically, I have witnessed the following distortions since the Revocation decision:

- A general loss of trading volume on the Market due to traders exiting the Market. I often cannot find anyone to sell a position to at any reasonable price or in any reasonable amount of time.
- A destabilization of prices causing the potential for high volatility. Given this state of affairs, a relatively small development causes a negative feedback loop without many traders to come in and smooth the pricing. Such a feedback loop could quickly crash the prices with no chance of recovery.

6. These distortions have altered the reliability of the Market's predictions and significantly affected my ability to sell my investments into the Market, at the opportunities and intervals I would have expected. The Market's current numbers on specific contracts vary from what an experienced trader would expect in light of recent events like the midterm elections, if traders were viewing the contract as one that could be held until the projected election outcome or event occurred.

- As one example, I purchased several contracts in the Republican Party Presidential Nomination Market, prior to the Commission's decision to require all PredictIt

contracts to liquidate on February 15, 2023, predicting that third or fourth tier candidates would win the nomination. I purchased these contracts at relatively low prices this summer. In a Market not disrupted by the Commission's decision, I would expect these contracts to significantly rise in value once Former President Trump was wounded by poor election results and given the possibility of the top two candidates wounding each other and opening up a spot for a third or fourth level candidate. One would expect to see third and fourth level candidates surging on the Market. But that is not happening, as I presume that traders do not believe that the Market will exist long enough for these candidates to even announce their candidacies for President. As such, I am left with investments that are under water and on which I am going to lose substantial sums, if I had to sell at today's prices. If I exited at today's prices, I would lose 20 percent on my investment that Mike Pence is going to be the nominee, 33 percent on Tim Scott, 40 percent of Mike Pompeo, 80 percent on Ted Cruz, at 65 percent on Josh Hawley.

7. These market distortions have left me stranded with several valuable positions, unable to find buyers who are trading on projections of the outcome of the election or political event. The Commission's arbitrary cut off date is causing me today to loss money and not have a meaningful option to sell my positions to other parties who are looking to the outcome of a later election, as I was when I bought the contracts.

8. I expect these market distortions to become substantially worse in December, as traders become no longer focused on the midterm elections and turn their attention to the February 15 liquidation date interfering with seeing a contract on the 2024 election through to its conclusion.

9. Finally, the CFTC's February 15, 2023 cut-off date also guarantees loss of investment, and the most sophisticated traders will be more adversely effected. If the market operators liquidate at the price entered, then unrealized gains will be erased. If the Market

operators return the money based on market price at a time certain, then this opens up the markets to manipulation, where traders could buy up the price seconds before the deadline.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on November 18, 2022

/s/ Kevin Clarke
Kevin Clarke

TAB 16

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

KEVIN CLARKE, ET AL.,	§	NO. 1:22-CV-909-DAE
	§	
Plaintiffs,	§	
	§	
vs.	§	
	§	
COMMODITY FUTURES TRADING COMMISSION,	§	
	§	
Defendant.	§	
	§	

ORDER ENTERING A PRELIMINARY INJUNCTION IN LIGHT OF FIFTH CIRCUIT'S REVERSAL AND REMAND

The matter before the Court is the Fifth Circuit Court of Appeal's July 21, 2023 judgment in this case which reversed the opinion of the District Judge originally assigned to this action,[1] and remanded this case with instructions to enter a preliminary injunction pending consideration of Plaintiffs' claims in this case. Clarke v. Commodity Futures Trading Co., 74 F.4th 627 (5th Cir. 2023). On September 12, 2023, the Fifth Circuit issued its mandate. (Dkt. # 42.) In accordance with the Fifth Circuit's opinion, the Court hereby **GRANTS** Plaintiffs' request for a preliminary injunction pending consideration of the merits of the

[1] The case was not transferred to the undersigned until after the parties had appealed. (Dkt. # 37.)

claims in this case. Plaintiffs are **ORDERED** to file an updated proposed preliminary injunction Order which addresses the relief requested in light of the DMO's March 2023 letter voiding and withdrawing the August 2022 no-action recission letter.

It is further **ORDERED** that the parties must submit a proposed scheduling order to control the remaining deadlines in this case **within 21 days of the date of this Order**.

IT IS SO ORDERED.

DATED: Austin, Texas, September 13, 2023.

David Alan Ezra
Senior United States District Judge

TAB 17

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

KEVIN CLARKE, in his individual capacity, TREVOR BOECKMANN, in his individual capacity, HARRY CRANE, in his individual capacity, CORWIN SMIDT, in his individual capacity, PREDICT IT, INC., a Delaware corporation, ARISTOTLE INTERNATIONAL, INC., a Delaware corporation, MICHAEL BEELER, in his individual capacity, MARK BORGHI, in his individual capacity, RICHARD HANANIA, in his individual capacity, JAMES D. MILLER, in his individual capacity, JOSIAH NEELEY, in his individual capacity, GRANT SCHNEIDER, in his individual capacity, and WES SHEPHERD, in his individual capacity, Plaintiffs, v. COMMODITY FUTURES TRADING COMMISSION, Defendant.	Case No. 1:22-cv-00909

SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Kevin Clarke, Trevor Boeckmann, Harry Crane, Corwin Smidt, Michael Beeler, Mark Borghi, Richard Hanania, James D. Miller, Josiah Neeley, Grant Schneider, Wes Shepherd, Predict It, Inc. ("PredictIt"), and Aristotle International, Inc. ("Aristotle"), by and through their undersigned counsel, allege for their Second Amended Complaint for Declaratory and Injunctive Relief against Defendant Commodity Futures Trading Commission ("CFTC" or the "Commission") as follows[1]:

[1] Pursuant to Federal Rule of Civil Procedure 15(a)(2), Plaintiffs file this Second Amended Complaint with the CFTC's written consent.

INTRODUCTION

1. Since 2014, the Victoria University of Wellington ("Victoria University") has operated an online market for political-event contracts (the "PredictIt Market" or the "Market"). This case challenges the Commodity Futures Trading Commission's decision and actions to arbitrarily, capriciously, and without legally required process revoke its permission and license for the Market to operate. These decisions and actions attempt to deprive operators, academics, and traders of the benefits of the Market protected by the Commission's license for the Market to function and to force the premature and otherwise improper liquidation of dozens of contracts, damaging those who invest in the Market, scholars who study and teach from the data produced by the Market, and the entities servicing the Market.

2. The PredictIt Market provides members of the public an opportunity to make investments based on their views about the likely outcome of future elections or other significant political events, like the passage of federal legislation or the nomination of Supreme Court Justices and cabinet officials. Essentially a stock exchange for political events, the PredictIt Market hosts dozens of event markets about the outcomes of future political events. Each event market includes one or more questions about a particular political event, such as the 2024 presidential election. Each question is binary—it must have a yes or no answer—and investors' positions on the outcome are known as "contracts." PredictIt Market users purchase "yes" or "no" contracts in an event market—*e.g.*, yes, Joe Biden will win reelection, or no, Joe Biden will not win reelection—for prices ranging from 1 to 99 cents. Contract prices fluctuate based on the investors' willingness to pay as measured by their view of the probability of the event taking place. If the prediction of the outcome of a contract is correct, it is redeemed for one dollar, while incorrect outcome predictions receive no payout.

3. Unlike a fully regulated stock, futures, or swaps market, however, investors are not permitted to purchase as many as they wish of any one contract. Instead, an investor may not invest funds in excess of $850 in any one contract. In addition, the total number of active traders in any one contract is limited to 5,000. This is in line with the primary purpose of the Market—to be a small-scale market with an academic purpose to produce market-generated trading/pricing information regarding what informed investors believe the outcome is going to be, reinforced by a relatively small financial investment, without giving any one person enough of a financial stake through the Market to try to change the outcome of a political event.

4. Victoria University launched the PredictIt Market for the academic value of the pricing/trading data generated by investor trading on political event contracts and to study, among other things, whether markets are more accurate than polling. Indeed, the results data generated by the PredictIt Market have been used by more than 140 academics around the world, both in their teaching and research. Through this study, the percentage-trading price of election- and political-event contracts offered on the Market has been found to be a remarkably accurate predictor of the outcomes, as informed onlookers tend to put aside biases and other views when they put up even a modest financial investment on the outcome. This accuracy is reflected by the heavy reliance of news outlets on political-event markets in reporting on projected political outcomes. *See, e.g.*, Bernard Stanford, *There's a Glorious Website Where You Can Bet on Politics, and the U.S. is About to Kill it*, Slate (Aug. 14, 2022), https://slate.com/business/2022/08/predictit-cftc-shut-down-politics-forecasting-gambling.html; Victor Reklaitis, *Betting Markets Now See Democrats Keeping Their Grip on Senate in Midterm Elections*, MarketWatch (Aug. 4, 2022), https://www.marketwatch.com/story/betting-markets-now-see-democrats-keeping-their-grip-on-senate-in-midterm-elections-11659542352; A.G. Gancarki, *Donald Trump Retakes 2024*

Prediction Market Lead from Ron DeSantis, Florida Politics (July 7, 2022), https://floridapolitics.com/archives/537385-donald-trump-retakes-2024-prediction-market-lead-from-ron-desantis/; UBS Editorial Team, *ElectionWatch: Potential Outcomes of the Midterms*, UBS Wealth Management USA (Apr. 22, 2022), https://www.ubs.com/us/en/wealth-management/insights/market-news/article.1563885.html.

5. Plaintiffs Kevin Clarke, Michael Beeler, Trevor Boeckmann, Mark Borghi, Josiah Neeley, Grant Schneider, and Wes Shepherd (together, the "Investor Plaintiffs") each have invested in hundreds of PredictIt Market event contracts over several years. Several of the Investor Plaintiffs hold event contracts that turn on the outcome of the 2024 presidential election, for which they believe—based on informed views on political events and study of the fluctuations in the Market as an indicator of change—that they have chosen the correct outcome and wish to purchase further and future similar contracts. For each contract, the Investor Plaintiffs expect to realize a profit on their investments either by selling at a favorable point during the life of the market or by holding the contract to the conclusion of the market when they expect to redeem it at one dollar. The Investor Plaintiffs made their investments in PredictIt Market contracts based on their understanding that the Market's offerings were permitted by the federal government and that their contracts could be traded until the political event on which the contracts are based occurs. All Investor Plaintiffs would continue actively trading on the Market if it were permitted to continue to operate.

6. Plaintiffs Harry Crane, Richard Hanania, James D. Miller, and Corwin Smidt (together, the "Academic Plaintiffs") are among the university professors and academics who rely on the PredictIt Market as a source of data for research and academic scholarship and as a pedagogical tool for teaching college and graduate students regarding political events and the

efficiency of markets. Professors Crane, Miller, and Smidt, and Mr. Hanania, have relied and intend to draw on data generated by the PredictIt Market in their research in the fields of statistics, political science, and economics. They have also incorporated the PredictIt Market into their classes. By studying the PredictIt Market (a real-world, topical example of prediction markets), student engagement increases and students gain a practical understanding of the Market and its operation.

7. The PredictIt Market has operated for nine years pursuant to "no-action relief" ("No-Action Relief") granted under Commodity Futures Trading Commission regulations. 17 C.F.R. § 140.99. The terms of the Commission's grant of No-Action Relief are memorialized in a written decision. The No-Action Relief has permitted Victoria University to operate the PredictIt Market without formally registering it as a designated contract market or swap-execution facility. The No-Action Relief sets forth the terms under which the PredictIt Market is permitted to operate. A true and correct copy of the No-Action Relief, "CFTC Ltr. No. 14-130," is attached hereto as **Exhibit 1**.

8. The No-Act Relief functions as a "license" for the PredictIt Market to operate, as that term is defined by the Administrative Procedure Act.

9. On August 4, 2022, the CFTC purported to revoke the No-Action Relief and, thus, the PredictIt Market's license to operate. The Commission communicated its decision through "CFTC Letter 22-08" (the "Revocation"), a true and correct copy of which is attached hereto as **Exhibit 2**.

10. The only explanation in the Revocation was that Victoria "University has not operated its market in compliance with the terms of [CFTC] Letter 14-130," the 2014 No-Action Relief. *See* Ex. 2 at 2. The Revocation contained no explanation of *how* the PredictIt Market's

operations violated the terms of the Commission's No-Action Relief or *why* revocation of the Commission's license for the Market to operate is the appropriate remedy for those violations. The Revocation provided neither notice of the facts that may warrant revocation, nor an opportunity to demonstrate or achieve compliance with the terms of the Commission's No-Action Relief. *Id.*

11. The Revocation, instead, made the following commands:

> To the extent that the University is operating any contract market, as of the date of this letter, in a manner consistent with each of the terms and conditions provided in Letter 14-130, all of those related and remaining listed contracts and positions comprising all associated open interest in such market should be closed out and/or liquidated no later than 11:59 p.m. eastern on February 15, 2023.

Id.

12. The Revocation's command to prematurely liquidate contracts would cause a chaotic wind-down of the Market. Many existing PredictIt Market contracts turn on events that will occur well into the future, particularly the 2024 primary and general elections in the United States. Without any detailed explanation as to why or how, the Commission dictated that those contracts needed to be liquidated prematurely, by February 2023. In addition, the Revocation gave no indication of what contracts the Commission believed are "consistent with each of the terms and conditions" of the No-Action Relief and could continue to February 2023 and which are not.

13. The Revocation of the Commission's No-Action Relief effectively commanded the PredictIt Market to close. In doing so, the Commission attempted to deprive entities operating the Market, traders investing in Market contracts, and academics studying Market data of the benefits of the Market's continued operation. The Commission took this step with no reasoned explanation for its decision, no explication of facts that would support its decision, no transition plan for addressing scores of existing contracts held by more than ten thousand traders, no consideration

of any alternatives to the chaotic, disruptive, and economically damaging wind-down of the Market its decision forces, and no considered analysis of why operators, academics, and traders should be deprived of the benefits of the Market's continuation that was protected by the Commission's license. The direct consequence of the Revocation—the premature liquidation of contracts that would otherwise turn on events occurring after February 2023—is unnecessarily disruptive.

14. The Revocation decision represented only the first chapter of the Commission's ongoing mission and actions to close the PredictIt Market as soon as possible. On March 2, 2023, after oral argument before the United States Court of Appeals for the Fifth Circuit in his matter and after that Court had preliminarily enjoined the CFTC from taking actions to close the Market or to deter trading in its contracts, the Commission issued "CFTC Letter 23-03" (the "March Action"), a true and correct copy of which is attached hereto as **Exhibit 3**.

15. The March Action purports to "withdraw[] and supersede[]" the Revocation decision. Ex. 3 at 1. But it reaches the same conclusion—that the Market's license to operate is void and should be cancelled. Ex. 3 at 3.

16. The Commission issued the March Action in a transparent attempt to shut down judicial review of its efforts to close the PredictIt Market in this Court and in the Fifth Circuit. The Fifth Circuit firmly rejected that attempt.

17. The March Action now claims for the first time that the PredictIt Market violated the terms of the No-Action Relief in three ways: (1) that Aristotle, rather than Victoria University, is operating the Market, (2) that Victoria University has received—and permitted Aristotle to receive—separate compensation for the operation of the Market, and (3) that Victoria University has offered contracts falling outside of the scope of the categories of submarkets approved in the

No-Action Relief. Ex. 3 at 3–6. According to the CFTC, these alleged violations are somehow grounds for closing the PredictIt Market.

18. Each of these alleged violations of the No-Action Relief is contrary to the substantial evidence in the record before the agency as a matter of fact and also arbitrarily and capriciously misinterprets the text, context, and history of the No-Action Relief decision and extensive subsequent communications with CFTC staff. The alleged violations cannot support the Commission's efforts to close the Market and render those efforts arbitrary, capricious, and an abuse of discretion. Indeed, the Fifth Circuit held the CFTC's allegations were an impermissible attempt at "*post hoc* rationalization."

19. In any event, none of these alleged violations justifies closure of the Market, and the March Action lacks a non-arbitrary explanation for attempting to close it.

20. The March Action also suggests that the PredictIt Market must shut down because it demands too much of the Commission's attention. Ex. 3 at 6. But the March Action does not cite any specific numbers to support this claim. It says nothing about the magnitude of resources required and does not explain why they would not be reasonably expended in light of the considerable and longstanding reliance interests of traders, academics, and service companies.

21. More concerningly, the March Action carries forward many of the legal deficiencies of the earlier Revocation decision. Like the Revocation decision, the March Action provides no serious consideration of any alternatives to the chaotic, disruptive, and economically damaging wind-down of the Market it would force. Like the Revocation decision, the March Action does not give the Plaintiffs an opportunity to rebut the Commission's allegations (it allows Victoria University to respond but fails to give the University a chance to demonstrate or achieve compliance with the asserted requirements of the Commission's license, as required when

withdrawing a license). And like the Revocation decision, the March Action does not account for the longstanding reliance interests of the traders, academics, and service companies that organized their affairs around the Commission's license for the Market to operate.

22. In particular, the consequences of the Commission's sustained efforts to close the PredictIt Market will cause harm to the Investor Plaintiffs. Solely due to the Commission's campaign to close the Market, Mr. Clarke, Mr. Beeler, Mr. Boeckmann, Mr. Neeley, and Mr. Schneider will be deprived of the opportunity to see their positions through to the occurrence or non-occurrence of the political events on which their contracts are based. They do not understand why the Commission, even if it for some reason wants the Market to shut down, cannot let their existing contracts continue to trade until the election or event window would naturally close.

23. They will also be deprived of the benefits of the Market's continued operations and issuance of new contracts in which there would be an opportunity for the Plaintiffs to trade. Private parties investing in Market contracts are among the beneficiaries of the Commission's license for the Market to operate. Neither the Revocation nor the March Action provide any acceptable explanation for the Commission's effort to close the Market with all due haste.

24. The Commission's efforts will cause harm to the Academic Plaintiffs. Gone will be the days that they use the data generated by the Market for research and teaching purposes. This will impact the quality of their legal scholarship and the student experience.

25. The Commission's Revocation of the No-Action Relief for the PredictIt Market, without explanation or other indication of reasoned decisionmaking, without "written notice of the facts or conduct which may warrant" the Revocation, and without providing anyone an

"opportunity to demonstrate or achieve compliance" with the terms of No-Action Relief or other requirements, violates the Administrative Procedure Act. 5 U.S.C. §§ 558, 706.

26. The Commission's attempted do-over suffers from these same deficiencies. *Id.* Among other things, both the Revocation and the March Action are "arbitrary, capricious, an abuse of discretion, [and/or] otherwise not in accordance with law" and occurred "without observance of procedure required by law." 5 U.S.C. § 706. Through both actions, the Commission failed to seriously consider less disruptive alternatives and ignored the serious reliance interests of the Plaintiffs. Moreover, the Commission's actions violated the Administrative Procedure Act by failing to provide the procedural protections that accompany a license from a federal agency, as they offered the Plaintiffs no hearing much less an opportunity "to demonstrate or achieve compliance." 5 U.S.C. § 558(c)); *see also id.* § 706(2)(D).

27. The Court should "hold unlawful and set aside" the Revocation and March Action, including any command that contracts be prematurely liquidated. 5 U.S.C. § 706. The Court also should carry forward the preliminary injunction and then enter a permanent injunction against the proscriptions in the Revocation and March Action that would require premature liquidation of contracts, including contracts that concern the 2024 elections, well before they would ordinarily mature and that would prohibit the Market from offering additional contracts.

JURISDICTION AND VENUE

28. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331 as Plaintiffs' causes of action arise under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, a law of the United States.

29. Venue is proper in this district under 28 U.S.C. § 1391(e)(1)(B)–(C). Plaintiffs Kevin Clarke, Michael Beeler, Mark Borghi, Josiah Neeley, and Wes Shepherd reside in Austin,

Texas and no real property is involved in this action. In addition, a substantial part of the events or omissions giving rise to the claims also occurred in this jurisdiction. Mr. Clarke has made numerous investments in event contracts on the PredictIt Market from Austin, Texas, where he has lived since 2010. Mr. Beeler, Mr. Borghi, Mr. Neeley, and Mr. Shepherd have likewise invested and wish to continue to invest in event contracts on the PredictIt Market from Austin. Many of these contracts will not close before the dates specified by the CFTC in the Revocation or the implementation of the March Action. The Revocation decision and the March Action will cause Mr. Clarke, Mr. Beeler, Mr. Borghi, Mr. Neeley, and Mr. Shepherd harm and damage in the Western District of Texas.

30. An actual controversy exists between the parties under 28 U.S.C. § 2201, and this Court has authority to grant declaratory and injunctive relief to set aside the CFTC's withdrawal of the No-Action Relief and to issue all necessary and appropriate process to preserve each Plaintiff's status or rights pending the conclusion of the proceedings, as requested herein. 28 U.S.C. §§ 2201, 2202; 5 U.S.C. §§ 705–06.

PARTIES AND RELEVANT ENTITIES

31. Defendant Commodity Futures Trading Commission (previously defined as "CFTC" or the "Commission") is an independent federal agency established under Section 2 of the Commodity Exchange Act, 7 U.S.C. § 2, that regulates the derivatives markets, including futures contracts, options, and swaps, in the United States. The CFTC is headquartered in the District of Columbia.

32. Plaintiff Kevin Clarke is an individual who lives and works in Austin, Texas, which is in the Western District of Texas. Mr. Clarke has purchased positions in almost every contract market offered by the PredictIt Market, including positions of which the Commission appears poised to terminate trading prior to the occurrence of the subject event. Mr. Clarke also wishes to

invest in additional contracts that ordinarily would be issued to address new political events and elections, but for the Commission's efforts to close the Market. Mr. Clarke's use of the PredictIt Market, including purchases and trades on the Market, has almost universally occurred from his home or business in Austin, Texas, in the Western District of Texas.

33. Plaintiff Trevor Boeckmann is an individual domiciled in New York City, New York. Mr. Boeckmann purchased event contracts on the PredictIt Market that are based on political events that will not occur until after the CFTC has ordered the PredictIt Market to cease operations.

34. Plaintiff Harry Crane is a Professor of Statistics at Rutgers University in New Jersey and a fellow at the London Mathematical Institute. Professor Crane utilizes the PredictIt Market and the data it generates in his teaching and research.

35. Plaintiff Corwin Smidt is an Associate Professor in the Department of Political Science at Michigan State University. Professor Smidt utilizes PredictIt Market data in his teaching and research. Professor Smidt resides and works in Michigan.

36. Victoria University of Wellington (previously defined as "Victoria University") is not a party to this litigation. Victoria University is a publicly owned university based in and operating under the laws of New Zealand. Victoria University has operated an online market for political-event contracts (previously defined as the "PredictIt Market" or the "Market") since 2014. Victoria University had no intention of ending the PredictIt Market prior the CFTC's withdrawal of the No-Action Relief, and, but for the CFTC's action, Victoria University would have continued the markets for 2024 contracts through their natural conclusions. Victoria University intends to comply with the terms of the CFTC's Revocation and therefore close the 2024 contracts in advance of their maturity unless the Revocation and March Action are abrogated, amended, or suspended.

37. Plaintiff Predict It, Inc. (previously defined as "PredictIt") is a Delaware corporation with its principal place of business in the District of Columbia and a subsidiary of Aristotle International, Inc. PredictIt is an internet distributor of user-generated predictive content. PredictIt, together with Plaintiff Aristotle, services the PredictIt Market.

38. Plaintiff Aristotle International, Inc. (previously defined as "Aristotle"), is a Delaware corporation with its principal place of business in the District of Columbia. Aristotle provides know-your-client and identity-verification services to a wide variety of customers and provides information-technology services to political campaigns and organizations, including software, political data, consulting, and outsourcing services. Victoria University has entered into a market servicing agreement with Aristotle, under which Aristotle serves as the clearing house for trades on the PredictIt Market and provides other services for the PredictIt Market through its Predict It, Inc. subsidiary. Pursuant to that agreement and the terms and conditions of the PredictIt Market, investors that open accounts on the PredictIt Market enter into a contract with Aristotle.

39. Plaintiff Michael Beeler is an individual who lives and works in Austin, Texas. Mr. Beeler holds several positions on the PredictIt Market, including one contract scheduled to expire in 2024. He would make additional 2024 and other investments if the Market were allowed to continue operating. Mr. Beeler's use of the PredictIt Market, including purchases and trades on the Market, has almost universally occurred from his home or business in Austin, Texas.

40. Plaintiff Mark Borghi is an individual who lives and works in Austin, Texas. Mr. Borghi co-hosts a news podcast that regularly uses data from the PredictIt Market to analyze political developments. The podcast advertises the PredictIt Market under one of PredictIt's affiliate programs. Mr. Borghi is also a long-time trader on the PredictIt Market and wishes to continue trading in the future.

41. Plaintiff Richard Hanania is the President of the Center for the Study of Partisanship and Ideology. Mr. Hanania is a long-time PredictIt trader and proponent of prediction markets.

42. Plaintiff James D. Miller is a Professor of Economics at Smith College in Northampton, Massachusetts. Professor Miller has been a PredictIt trader since November 2015 and currently has open investments in the Market from which he hopes to gain a profit, including investments in contracts that do not expire until 2024. Professor Miller also utilizes the PredictIt Market and the data it generates in his teaching.

43. Plaintiff Josiah Neeley is an individual who lives and works in Austin, Texas. Mr. Neeley has actively traded on the PredictIt Market since 2015. He currently holds several open contracts, including some that the Commission appears poised to terminate trading of prior to the subject event. Mr. Neeley's use of the PredictIt Market, including purchases and trades on the Market, has almost universally occurred from his home or business in Austin, Texas.

44. Plaintiff Grant Schneider is Vice President of Machine Learning and Head of the Columbus, Ohio office of a leading artificial intelligence lending marketplace. Dr. Schneider has been a PredictIt trader since 2016 and currently holds open positions, including some that do not close until 2024.

45. Plaintiff Wes Shepherd is an individual who lives and works in Austin, Texas. Mr. Shepherd co-hosts a news podcast that regularly uses data from the PredictIt Market to analyze political developments. The podcast advertises the PredictIt Market under one of PredictIt's affiliate programs. Mr. Shepherd is also a long-time trader on the PredictIt Market and wishes to continue trading in the future.

BACKGROUND

I. The PredictIt Market's Operations and Offerings

46. The PredictIt Market poses numerous yes-or-no questions regarding the outcome of political events at any given time. Discrete questions are grouped into "event markets" involving the same election or other political event. Investors can buy "contracts" based on what they believe to be the likely outcome of the political event. For example, the event market involving the 2024 Republican presidential nomination includes yes-or-no contracts on 17 different potential candidates. Other event markets include only one contract.

47. The PredictIt Market limits each contract to 5,000 active participants with each participant's investment capped at $850 based on the price of the contracts when the investor purchases them.

48. Until settlement, each contract is valued at less than one dollar. And just like a stock exchange or futures market, the aggregated price of a contract continuously changes as users respond to shifting events that make the outcome more or less likely. One day a contract predicting that Republicans will win the House could be valued at $0.75. The next day, the same contract's value could drop to $0.70.

49. If the event ultimately occurs—*e.g.*, Republicans win control of the House—yes-contracts will close at $1. If it does not occur—*e.g.*, Republicans do not win the House—yes-contracts will close at $0. At any time before the event closes, investors are free to liquidate or add to positions by buying and selling contracts.

II. Value of the PredictIt Market to the Academic Community

50. Victoria University launched the PredictIt Market because of the academic value of the results data generated by investments such as those of Mr. Clarke, Mr. Beeler,

Mr. Boeckmann, Mr. Borghi, Mr. Neeley, Mr. Schneider, Mr. Shepherd, and thousands of other traders. This academic purpose is specifically articulated in Victoria University's request for no-action relief and the CFTC's No-Action Relief decision. Consistent with that requirement, the data generated by the PredictIt Market is made available to the academic community at no cost. These data have been the subject of study by over 140 academics at universities around the world. Professors Crane, Miller, and Smidt, and Mr. Hanania, are among the academics that have used and intend to use PredictIt Market data in their teaching and research in the fields of statistics and political science.

51. Professor Smidt—an associate professor of political science at Michigan State University—has used PredictIt Market data to study the reliability of public opinion as an indicator of future political outcomes. PredictIt Market data offers Professor Smidt and other researchers a unique long-term look at the public's view of political outcomes because the PredictIt Market offers event contracts much further in advance of the deciding event to which they relate than comparable markets like the Iowa Electronic Markets.

52. Professor Crane—a statistics professor at Rutgers University—has used and intended to continue using the PredictIt Market in his research and teaching. In his class, Statistics, Science, and Society, he teaches his students to think quantitatively about real-world matters and reporting. As part of the class, students study the PredictIt Market and other methods of forecasting political outcomes, like polling and pundits, and analyze their reliability and the ways bias can enter decision and reporting processes. Similarly, Professor Crane's research using PredictIt Market data has concerned the reliability of various methods of forecasting future political outcomes. His analysis of PredictIt Market data generated between 2018 and 2020 suggests that

the Market's percentage-trading price is a more accurate predicter overall than predictions made on the opinion-poll analysis website FiveThirtyEight.

53. Professor Miller—an economics professor at Smith College—has used and hopes to continue using the PredictIt Market in his teaching. In his discussions with students, Professor Miller stresses the value of the predictions derived from the PredictIt Market because participants must put their own money at risk. Professor Miller believes that PredictIt represents an excellent teaching tool for how stock markets function because many undergraduates have a better understanding of U.S. elections than of traditional financial markets.

54. Richard Hanania—the President of the Center for the Study of Partisanship and Ideology—has drawn on the PredictIt Market in several of his academic writings. He has taken positions on the PredictIt Market and publicly tracks his portfolio, while encouraging other public intellectuals to do the same. Mr. Hanania believes that the accountability mechanism provided by attaching money to political beliefs and predictions improves public discourse. He stresses the potential for PredictIt to overcome many of the shortcomings in American intellectual life, including decreasing civility and inability to conduct conversations across different political tribes.

55. If the PredictIt Market were shut down, its contracts prematurely liquidated, and its ability to offer new contracts to traders terminated, the Commission's efforts to close the Market would deprive professors like Professors Crane, Miller, and Smidt of both a valuable pedagogical tool and a rich source of data for their studies in the fields of statistics, economics, and political science. For example, if contracts predicting the outcome of the 2024 presidential election were liquidated prior to their close-out event (*i.e.*, the winner of the 2024 presidential election is determined), the trading data from those contracts would be worthless from an academic perspective, foreclosing future use of the Market as a research resource.

III. Investor Plaintiffs' Trades on the PredictIt Market

56. The Investor Plaintiffs have each made significant investments in hundreds of event contracts offered on the PredictIt Market over the past several years.

57. They each believe, based on their research and study of the Market, that they have purchased PredictIt Market contracts in a manner that will produce a profit, given their views that their side of the contracts are likely to occur.

58. Mr. Clarke is an assistant policy debate coach at the University of Texas at Austin and owns a business specializing in the acquisition and management of mineral assets such as gemstones and crystals. He has been trading on the PredictIt Market for roughly two years from his home and business in Austin, Texas, and currently has investments in every contract market offered on the PredictIt Market and open positions in excess of $11,000. Among his investments are event contracts related to the outcome of the 2024 election cycle that the Commission appears poised to terminate trading of prior to those elections. He desires to invest in new contracts offered on the Market, provided it is not unlawfully interfered with.

59. Mr. Boeckmann is a public defender at the Neighborhood Defender Service of Harlem in New York City. He has traded on the PredictIt Market since 2016 from his home in Harlem, and he currently has thousands of dollars invested in a wide-range of contract markets. The event contracts he has invested in include several related to the outcome of the 2024 presidential election that the Commission appears poised to terminate trading of prior to those elections. These contracts include certain predictions on which Republican presidential contenders will not win the Republican nomination and which party's candidate will ultimately win the 2024 presidential election.

60. Mr. Beeler is a statistician and holds a Ph.D. in Operations Research. He resides in Austin, Texas. Mr. Beeler has been trading on the PredictIt Market for over four years. He held numerous positions in 2024 election contracts but has sold most of those due to the CFTC's Revocation. He held several positions that expired in 2022 and still holds one contract scheduled to expire in 2024. Mr. Beeler would make additional 2024 and other investments if the Market were allowed to continue operating.

61. Mr. Borghi is a longtime PredictIt trader. He co-hosts a daily news podcast focused on politics—Hard Factor—that is produced in Austin. Mr. Borghi uses data derived from the PredictIt Market on Hard Factor on a weekly basis. If the CFTC's Revocation and March Action are allowed to stand, Mr. Borghi will be deprived of an important data source for his podcast. He will also lose the chance to profit on PredictIt Market contracts.

62. Mr. Neeley is the Texas Director of a national public policy organization and a non-practicing attorney. He has been a PredictIt trader since 2015 and currently holds several open contracts, including contracts that involve the 2024 presidential races. Mr. Neeley stopped purchasing new positions on the PredictIt Market after the CFTC's Revocation.

63. Mr. Schneider is the Vice President of Machine Learning and Head of the Columbus, Ohio office of a leading artificial intelligence lending marketplace. He holds a Ph.D. in statistics and is the co-author of an introductory statistics textbook. Mr. Schneider has been a PredictIt trader since 2016 and currently holds open positions, including some that do not close until the 2024 elections. As a hiring manager he also views consistent success on the PredictIt Market (or other forecasting platforms) as a valuable signal of aptitude for machine learning. Mr. Schneider also finds the Market useful for understanding future political outcomes that might affect his company's business. The CFTC's Revocation has decreased his overall trading activity.

64. Mr. Shepherd is a longtime PredictIt trader. He co-hosts a daily news podcast focused on politics—Hard Factor—that is produced in Austin, Texas. Mr. Shepherd uses data derived from the PredictIt Market on Hard Factor on a weekly basis. He considers PredictIt data more reliable than polls and pundits. If the CFTC's Revocation and March Action are allowed to stand, Mr. Shepherd will be deprived of an important data source for his podcast. He will also lose the chance to profit on his current PredictIt Market contracts.

65. The Investor Plaintiffs were each aware that the PredictIt Market was operated with the permission of the CFTC and believed that, at a minimum, the event contracts they purchased could be traded until their deciding event occurred.

66. The CFTC's Revocation—ordering that event contracts be closed or liquidated prematurely—and the March Action have distorted the value of Investor Plaintiffs' event contracts. In the wake of these actions, the Investor Plaintiffs have observed and continue to observe changes in the pricing of their positions as traders attempt to salvage their investments in contracts that would be prematurely liquidated, either by withdrawing their assets from the Market entirely or attempting to predict what the public's belief about the outcome will be on the liquidation date or the form of the liquidation, rather than what the outcome will actually be. Amid this disruption, the Investor Plaintiffs do not understand why the CFTC will not allow the contracts they have invested in to run their course.

67. Among the many factors contributing to this disruption, the Revocation and March Action provide no clarity on which contract markets will be permitted to operate going forward, and which must liquidate immediately due to alleged noncompliance with the terms and conditions of the No-Action Relief decision. This uncertainty has led many investors to pull their money out of the Market immediately even if they otherwise could have profited from their investments

before Commission shuts down the Market, effecting remaining traders' ability to sell appreciated contracts that they no longer believe predict a correct outcome.

68. For contracts that will not close before the Commission's desired shut down dates—like those related to the outcome of the 2024 election cycle—investors will be denied the opportunity to realize the return they expect if their contracts were allowed to run their course. Indeed, many investors, like the Investor Plaintiffs, strategically invest in PredictIt contract markets early when outcomes are less certain due to their remoteness in time. For example, some traders invest in low-value event contracts—*i.e.*, outcomes believed to be unlikely at the time of investment—based on their belief that their predicted outcome will become more likely as the deciding event grows closer, presenting an opportunity to reap a significant return on their investments. Other investors invest in high-value event contracts early on based on their belief that the odds of the outcome occurring will continue to increase as the deciding event grows closer, presenting an opportunity to reap a smaller but more reliable return. If enforced, the CFTC's efforts to close the Market also will deprive them of the opportunity to invest in new contracts.

IV. The CFTC Grants No-Action Relief to Victoria University, Licensing the Establishment of the PredictIt Market

69. In 2014, Victoria University sought no-action relief pursuant to CFTC regulations. *See* 17 C.F.R. § 140.99. The relief sought would allow Victoria University to operate a not-for-profit market for the trading of event contracts, to offer such event contracts to U.S. persons, and to collect the results data for academic and educational use. A true and correct copy of the June 26, 2014 Application for no-action relief is attached hereto as **Exhibit 4**.

70. Following the procedures specified in its regulations, the Commission granted the requested No-Action Relief, by issuing CFTC Letter No. 14-130. The written grant of relief found that "the operation of [Victoria University's] proposed market without registration as a DCM,

FBOT, or swap execution facility, or without registration of its operators, would [not] be contrary to the public interest." Ex. 1 at 5.

71. The No-Action Relief serves as a Commission-granted license to operate the Market.

72. In its No-Action Relief decision, the Commission specified certain rules that would govern the PredictIt Market. Importantly, the No-Action Relief decision structured the PredictIt Market to be "small scale," and thus placed limits on the amount of money ($850) that any one person could invest in a particular contract and on the number of active traders (5,000) who could participate in a particular contract. These limits ensure that market participants would not build up so great an interest in the outcome of an election or political event to try to change the outcome or to use the market to hedge a financial investment. And they would ensure the market remained focused on providing information, by aggregating the investment-backed predictions of many. Ex. 1 at 3–5.

73. In its application for no-action relief, Victoria University listed eight examples of political event contracts it might offer, including who a Presidential candidate may select as his running mate and made clear that: "The Market may list additional event-driven contracts based on significant Political Events." Ex. 4 at 3. The Commission's No-Action Relief written decision accepted the scope of political event contracts that Victoria University proposed to offer in its application for no-action relief and repeated the non-exclusive list of three of the example contracts Victoria University had identified:

> The proposed submarket for political event contracts will include winner-takes-all contracts to predict the following outcomes:
>
> - Which presidential nominee will win his or her party's primary, the general election popular vote, and the Electoral College;

- Who will be the majority party nominee for Vice President; and
- Which party will control the next Congress.

Ex. 1 at 2. Some of these examples pertained to the outcome of a U.S. election, but another did not, as it pertained to the selection of a vice-presidential nominee, a decision made by a candidate and ratified by his party.

74. The use of the word "include" in the description of "political event" contracts made clear that the examples listed were not exclusive. *Id.* This was further reinforced by the explicit reference back to the "proposed submarket for political event contracts" described in Victoria University's application (*id.*), and its reference to offering "additional event-driven contracts based on significant Political Events." Ex. 4 at 3. The No-Action Relief decision placed only the following restriction on the scope of these contracts: "The market will not list any contracts that involve, relate to or reference terrorism, assassination or war." Ex. 1 at 2.

75. Lest there be any doubt that approved political event contracts were not limited to election outcomes, a senior Commission official clarified in later correspondence: "NAL 14-130 lists three *non-exclusive* examples of political contracts – each is tied to election outcomes and allows some flexibility with respect to political contracts," but cautioned that PredictIt should avoid contracts that "appear to have *no relationship to elections or any other meaningful political question.*"

76. In its March Action, the Commission alleges that the Market has offered contracts "outside the scope of the" Commission's 2014 license for operation of the Market and implies that the Market should close for that reason. The Commission's assertion is based on an arbitrary interpretation of the license, restricting contracts to the outcomes of elections. As demonstrated by the above text and context of the No-Action Relief decision, as well as subsequent

communications with CFTC staff, the approved political event contracts went beyond just election-outcome contracts. Offering contracts beyond election-outcome contracts therefore cannot serve as a basis for revoking the Market's license to operate.

V. The Commission Precipitously and Without Explanation Revokes Permission and Its License to Operate the PredictIt Market

77. Between 2014 and 2022, the PredictIt Market has offered over 8,000 contract markets, in which over 120,000 participants have invested.

78. On August 4, 2022, the CFTC revoked the No-Action Relief by publishing Revocation of CFTC Letter No. 14-130 (previously defined as the "Revocation"). *See* Ex. 2.

79. The Revocation—issued without any detailed reasoning, explanation, or legally sufficient process—would have effected a shutdown of the PredictIt Market as of February 15, 2023, as the entities servicing the Market cannot continue to permit trading and Investors cannot continue to participate in the Market after the Commission has effectively revoked the Market's permission to operate.

80. Victoria University had no intention of ending the PredictIt Market prior the CFTC's withdrawal of the No-Action Relief, and, but for the CFTC's action, Victoria University would have continued the markets for 2024 contracts through their natural conclusion. Victoria University intends to comply with the terms of the CFTC's Revocation (and March Action) and therefore close the 2024 contracts in advance of their maturity unless the CFTC's actions are abrogated, amended, or suspended.

81. The Revocation itself left the corporate entities servicing the market and investors to speculate about the basis of the Commission's decision. The Revocation summarily stated:

> The University has not operated its market in compliance with the terms of Letter 14-130. As a result, Letter 14-130 is hereby

> withdrawn and, as such, is not available for the listing or operation of any new or related contracts.

Ex. 2 at 2.

82. The Revocation further specified prescriptions for the wind-down of the PredictIt Market:

> To the extent that the University is operating any contract market, as of the date of this letter, in a manner consistent with each of the terms and conditions provided in Letter 14-130, all of those related and remaining listed contracts and positions comprising all associated open interest in such market should be closed out and/or liquidated no later than 11:59 p.m. eastern on February 15, 2023.

Ex. 2 at 2.

83. The Revocation did not specify how the PredictIt Market's operations at any time during the previous seven years had failed to comply with the terms of the No-Action Relief decision. It lacked any indication of reasoned decisionmaking.

84. To the extent that the Commission's Revocation was based on an interpretation of its No-Action Relief decision that limits permitted contracts to those directly related to the outcome of a U.S. election and alleged violations of that claimed limit (as suggested in one oral discussion with the Commission staff), the Revocation incorporates reasoning that is contrary to the text, context, and history of the Commission's own No-Action Relief decision and extensive subsequent communications with CFTC staff. That error, in addition to the lack of explanation in the Revocation itself, further makes the Revocation arbitrary, capricious, and an abuse of discretion.

85. The Commission's Revocation also arbitrarily demanded the shutdown of the PredictIt Market in a manner that ignores less disruptive alternatives without explanation.

86. The arbitrarily chosen end date of February 15, 2023, alone forced the premature liquidation of dozens of contracts, the settling of which depends on the outcome of elections that will occur in 2024. The PredictIt Market's participants will be harmed by a premature liquidation,

as it will deprive them of the value they anticipate by the event resolving in their predicted direction in 2024. Even if the Commission had grounds for revoking the Market's permission to operate (which it does not), the Commission arbitrarily passed over, without explanation, the alternative of allowing contracts already issued by the Market to run their course and avoiding the entirely unnecessary displacement caused by the premature liquidation of those contracts. The Commission also passed over the alternative of seeking adjustments to whatever problems it perceived in the Market rather than simply trying to close it.

87. Mr. Clarke, Mr. Beeler, Mr. Boeckmann, Mr. Neeley, Mr. Schneider, and Mr. Shepherd are among those Market participants that will be harmed if the Commission can move forward with premature liquidation or stop the issuance of new contracts in which they can invest. They have invested in open event contracts on the PredictIt Market, including those related to the outcome of the 2024 presidential election that will not close until that year or early 2025. If the PredictIt Market is shut down before those contracts close, Mr. Clarke, Mr. Beeler, Mr. Boeckmann, Mr. Neeley, Mr. Schneider, and Mr. Shepherd, and other PredictIt Market participants will be deprived of the benefit of their investments and of the benefits of a continuing Market.

VI. Following Oral Argument in the Fifth Circuit, the Commission Withdraws the Revocation Letter and Issues a New Determination that the No-Action Relief is Void and Should be Withdrawn

88. In September 2022, the Plaintiffs moved for a preliminary injunction in this Court aimed at preserving the Market during the pendency of litigation and preventing the liquidation of contracts existing as of August 2022. As the February 2023 Revocation deadline drew closer and closer, and this Court had not acted on the preliminary injunction, Plaintiffs deemed the motion effectively denied and appealed the decision to the U.S. Court of Appeals for the Fifth Circuit. On

January 26, 2023, the Fifth Circuit granted an injunction allowing Market contracts to continue trading pending resolution of the appeal. The Fifth Circuit expedited the appeal and heard oral argument on February 8, 2023.

89. On March 2, 2023—twenty-two days after oral argument in the Fifth Circuit but before a decision on appeal—the Commission issued "CFTC Letter 23-03" (previously defined as the "March Action").

90. The March Action violated the Fifth Circuit's injunction pending appeal, which granted Plaintiffs' request to "enjoin the enforcement of the Commission's February 15, 2023, liquidation mandate and allow the PredictIt Market event contracts that were offered as of the date of the agency's decision . . . to continue trading pending resolution of [the] appeal."

91. The March Action purports to "withdraw[] and supersede[]" the August Revocation letter. Ex. 3 at 1. It nevertheless reaches the same conclusion as the prior Revocation—that the No-Action Relief is void and should be cancelled. Ex. 3 at 3.

92. In contrast to the Revocation letter, the March Action attempts to provide an explanation of how the Commission believes the Market violated the conditions of the No-Action Relief. It alleges the following violations:

a. That Aristotle, rather than Victoria University, is operating the Market, in violation of the No-Action Relief's condition that faculty at the University must operate and oversee the Market. Ex. 3 at 3–4.

b. That Victoria University has received, and permitted Aristotle to receive, separate compensation for the operation of the Market, in violation of the No-Action Relief's condition that faculty at the University must oversee the Market, without receipt of separate compensation. Ex. 3 at 4–5.

c. That Victoria University has offered contracts falling outside of the scope of the categories of submarkets approved in the No-Action Relief. Ex. 3 at 5–6.

93. Each of these alleged violations is invalid and contrary to the text, context, and history of the No-Action Relief decision and extensive subsequent communications with CFTC staff. Taken together, the alleged violations cannot justify the preliminary conclusion that the No-Action Relief is void and should be withdrawn. The Commission's assertion of these flawed allegations to justify its action renders the March Action arbitrary, capricious, and an abuse of discretion.

94. The March Action further justifies its preliminary conclusion that the No Action Relief is void and should be withdrawn by suggesting that the Market demands too much of the Commission's attention and "is not an appropriate use of taxpayer resources." Ex. 3 at 6. The Commission does not cite any specific numbers to support this claim. It says nothing about the magnitude of resources required and does not explain why they would not be reasonably expended in light of the considerable and longstanding reliance interests of the traders, academics, and service companies that have organized their affairs around the No-Action Relief. This is no meaningful justification—much less a non-arbitrary one—for declining the alternative of seeking adjustments to whatever practices the Commission contends are inconsistent with its license of the Market and allowing the Market to continue operating. The assertion of this rationale in support of the closure of the Market renders the March Action arbitrary, capricious, and an abuse of discretion.

95. The March Action also arbitrarily fails to grapple with less disruptive alternatives than full closure of the Market. It states only that it would "be inappropriate" to allow currently existing markets to expire on their own terms in light of the "likelihood of recurrence" of alleged

past violations of the No-Action Relief. Ex. 3 at 7. The alleged violations of the No-Action Relief are no such thing and certainly do not warrant closure of the Market. Moreover, the March Action offers no explanation for why alleged past violations suggest a likelihood of recurrence in the future.

96. The March Action invites Victoria University to submit objections to the Letter. Ex. 3 at 7. It does not, however, offer Victoria University—let alone the service companies that organized their affairs around the No-Action Relief—an opportunity to demonstrate or achieve compliance with the requirements of the No-Action Relief. As a result, the March Action violates the APA's procedural requirements for withdrawing agency licenses. *See* 5 U.S.C. § 558(c)(2).

97. Finally, the March Action does not account for the longstanding reliance interests of the traders, academics, and service companies that organized their affairs around the No-Action Relief, as required by prevailing law in the Fifth Circuit when administrative agencies choose to adjust course. Instead, it specifically directs that none of these interested parties will have any opportunity to respond to the March Action, even though all of these parties are beneficiaries of the Commission's license for the Market to operate. Ex. 3 at 7.

98. The PredictIt Market's participants will be harmed by the determination in the March Action, as it will deprive them of the value they anticipate by the event resolving in their predicted direction in 2024. It will also deprive them of the benefits of a continuing Market. The Commission arbitrarily passed over, without sufficient explanation, the alternatives of allowing contracts already issued by the Market to run their course and avoiding the entirely unnecessary displacement caused by the premature liquidation of those contracts or of making structural corrections going forward to permit contracts to trade within limits and under conditions that the Commission believes comply with the license.

99. Mr. Clarke, Mr. Beeler, Mr. Boeckmann, Mr. Neeley, Mr. Schneider, and Mr. Shepherd are among those Market participants that will be harmed. They have invested in open event contracts on the PredictIt Market, including those related to the outcome of the 2024 presidential election that will not close until that year or early 2025. If the PredictIt Market is shut down before those contracts close, Mr. Clarke, Mr. Beeler, Mr. Boeckmann, Mr. Neeley, Mr. Schneider, Mr. Shepherd, and other PredictIt Market participants will be deprived of the benefit of their investments. Moreover, as beneficiaries of the Market's license to operate, Mr. Clarke, Mr. Beeler, Mr. Boeckmann, Mr. Neeley, Mr. Schneider, and Mr. Shepherd wish to continue trading political futures contracts beyond the 2024 presidential election. The full closure of the Market, as opposed to less damaging alternatives like the CFTC targeting allegedly problematic contracts for removal from the Market, would deprive the Investor Plaintiffs of these future trading activities.

100. Professors Crane, Miller, and Smidt are among the academics that will be harmed. They rely on the PredictIt Market as a source of data for research and academic scholarship and as a pedagogical tool for teaching students regarding political events and the efficiency of markets. The quality of the data for academic study is directly tied to the quantity and currency of the data. If the Commission shuts down the PredictIt Market, Professors Crane, Miller, and Smidt will lose this important source of scholarship. This outcome would be significantly more damaging to Professors Crane, Miller, and Smidt than the alternative of the Commission targeting correction of allegedly problematic contracts but leaving the remaining contracts—and the Market as a whole—intact.

101. On the same day it issued the March Action, the Commission moved, on the basis of the Action, to dismiss the Fifth Circuit appeal as moot. Despite the fact that the March Action

violated the injunction pending appeal, the Commission argued that the March Action served as a basis for dismissing the appeal. The positions taken by the Commission in its briefing on the motion to dismiss the appeal were not substantially justified and caused the Plaintiffs to incur unnecessary fees to repel an effort to avoid decision of a fully briefed appeal.

102. On May 1, 2023, the Fifth Circuit denied the Commission's motion to dismiss the appeal as moot and clarified that the injunction pending appeal enjoined the Commission from closing the Market or otherwise prohibiting or deterring the trading of Market contracts until 60 days after final judgment in the appeal.

VII. The Fifth Circuit's Opinion

103. On July 21, 2023, the Fifth Circuit Court of Appeals issued an opinion in this matter. A true and correct copy of the Fifth Circuit's opinion is attached hereto as **Exhibit 5**. The Circuit Court held that the Commission, through the No-Action Relief, had issued a "license" to open and to operate the PredictIt Market. Ex. 5 at 9. The Court considered and rejected as "meritless" each of the CFTC's threshold objections to this suit: (1) that the March Action mooted the case, (2) that the CFTC's actions were not final agency action, (3) that the withdrawal of the No-Action Relief was committed to the CFTC's discretion, and (4) that the Plaintiffs lacked standing. *Id.* at 6–15. The Court then held that the Plaintiffs were likely to succeed on their claims that the Commission's permission and license to operate the Market had been improperly and illegally terminated. *Id.* at 15–19. It also held that the March Action violated the injunction pending appeal. *Id.* at 16.

104. The Court explained that the Commission's efforts to close the Market—including through the Revocation in August 2022 and the March 2023 Action—likely had violated the Administrative Procedure Act. *Id.* at 15–21. These efforts endangered "significant reliance

interests" that Market operators, traders, and academics had in the Market's continued operation, given their significant investments in standing up, purchasing contracts on, and studying the Market. *Id.* at 15–18. The efforts likely also could not be squared with the procedural protections that accompany a license from a federal agency, the Court held, as the agency provided no hearing much less an opportunity "to demonstrate or achieve compliance." *Id.* at 17 (quoting 5 U.S.C. § 558(c)). The Fifth Circuit found it unlikely that the agency could reconcile closing the Market with the "significant reliance interests at play." *Id.* at 15–17. The Court found arbitrary the agency's efforts to close the Market in light of the alternative of the agency identifying the alleged violations of the No-Action Relief's terms, seeking correction of them, and then monitoring the Market for future compliance. *Id.* at 18. The Court also held that due to the threat of irreparable injury to Market operators and traders, as well as academics studying the Market, the balance of the equities and the public interest weighed in favor of a preliminary injunction. *Id.* at 19–21.

105. The Fifth Circuit remanded the case to this Court with instructions to "enter a preliminary injunction pending its consideration of [Plaintiffs'] claims." *Id.* at 21.

COUNT I
(Violation of the Administrative Procedure Act – Agency Action, Findings, and/or Conclusions that are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law)

106. Plaintiffs incorporate the preceding paragraphs as if fully set forth herein.

107. The Investor Plaintiffs, Academic Plaintiffs, Aristotle, and PredictIt may assert claims under the Administrative Procedure Act because they have been adversely affected or aggrieved by the CFTC's withdrawal of the No-Action Relief. 5 U.S.C. § 702.

a. Investor Plaintiffs are active participants in the PredictIt Market and derive economic value from the ability to trade contracts based on their research and knowledge about the likely outcome of elections and other significant political

questions. In addition, Mr. Clarke, Mr. Beeler, Mr. Boeckmann, Mr. Neeley, Mr. Schneider, and Mr. Shepherd have contracts that are not scheduled to settle prior to the Commission's desired termination date, and contracts settling prior to then about which there is uncertainty regarding the timing of their liquidation due to the Commission's vague Revocation and March Action.

b. The PredictIt Market is a central component of the Academic Plaintiffs' classes, and data generated by PredictIt Market event contracts is valuable to their areas of research. If PredictIt Market event contracts are liquidated prematurely—prior to the close-out event for many contracts—or if the Market is prevented from offering new contracts, they will be stripped of a pedagogical tool that facilitates student engagement and understanding of prediction markets, and data from 2024-presidential-election contracts will be rendered valueless for academic purposes, foreclosing the use of that data in future research.

c. For more than half a decade, PredictIt and Aristotle have expended significant resources to assist Victoria University in developing and operating the PredictIt Market in reliance on the No-Action Relief. Victoria University is not a party to this litigation; but Victoria University had no intention of ending the PredictIt Market prior to the CFTC's withdrawal of the No-Action Relief, and, but for the CFTC's action, Victoria University would have continued the markets for 2024 contracts through their natural conclusions. Victoria University intends to comply with the terms of the CFTC's Revocation and therefore close the 2024 contracts in advance of their maturity unless the Revocation and March Action are abrogated, amended, or suspended. Aristotle and PredictIt will be forced to incur massive

administrative, labor, time, and other costs if forced to liquidate pending contracts prematurely due to the Commission's wind-down orders. The arbitrary order to terminate contracts early in violation of contract terms leaves Market Operators to guess about how to unwind contracts.

108. The CFTC's revocation of the No-Action Relief, through both the August 2022 Revocation and the March 2023 Action, is a "final agency action for which there is no other adequate remedy." 5 U.S.C. § 704.

a. Under CFTC regulations, no-action relief is to be sought from the appropriate Division of the CFTC, here the Division of Market Oversight. 17 C.F.R. § 140.99. Victoria University did so in 2014. There is no option under the CFTC's regulations to appeal the issuance, non-issuance, or revocation of no-action relief to the multi-member Commission or any higher power in the Commission. *Id.*

b. The CFTC's regulations make clear that no-action letters issued by the Division of Market Oversight bind the division itself in the discharge of its authority delegated from the CFTC, 17 C.F.R. § 140.99(a)(2), and contemplate that the entity seeking no-action relief may rely on a no-action letter issued by the division. *Id.*

c. The entire process—from beginning to end—rests with the Division of Market Oversight. Accordingly, Plaintiff has no adequate or available administrative remedy to address the Revocation.

d. The No-Action Relief is the final agency action of a license, as that term is defined under the Administrative Procedure Act.

e. The Commission itself approved the revocation of the No-Action Relief. On information and belief, the Division of Market Oversight's proposed revocation of

No-Action Relief was circulated to each Commissioner for his or her objection, and no Commissioner objected.

f. In the alternative, any effort to obtain administrative remedy would be futile.

109. The Fifth Circuit's July 21, 2023, opinion in this matter holds that the CFTC's efforts to withdraw the No-Action Relief constitute final agency action. Ex. 5 at 10–12.

a. The Fifth Circuit found that the withdrawal of No-Action Relief consummated the CFTC's decisionmaking process: "[I]t does not matter that the letter pertains only to the staff's recommendation to the agency. Once the staff decide to issue or withdraw the letter, there is no further appeal within the agency. Illustrating that reality, CFTC regulations state that a beneficiary 'may rely' on [the CFTC's] issuing a no-action letter." *Id.* at 10 (citing 17 C.F.R. § 140.99(a)(2)).

b. The Fifth Circuit also found that legal consequences flowed from the decision because the No-Action Relief withdrew some of the CFTC's discretion by allowing the Market to rely on it. *Id.*

c. The Court further observed that "none of this is changed" by the March Action, as the letter "does not promise to reconsider its decision that the no-action letter 'is void and should be withdrawn.'" *Id.* at 11.

d. The Fifth Circuit's decision viewed the August 2022 Revocation and the March 2023 Action as a continuous, uninterrupted effort to close the Market that constitutes final agency action.

110. The Commission's revocation of the No-Action Relief in the August 2022 Revocation letter—including its direct order to liquidate contracts by February 15, 2023, that turn

on later events—is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and thus violates the APA. 5 U.S.C. § 706(2)(A).

a. The Revocation offered no basis to conclude that it was the product of reasoned decisionmaking, much less was it reasonably explained to the regulated party.

b. In the Revocation, the Commission claimed that "the University has not operated its market in compliance with the terms of Letter 14-130" and that "as a result," the No-Action Relief is revoked. But the Commission provided absolutely no detail or explanation regarding how, when, or in what instances the terms of No-Action Relief have been violated. The Revocation does not reflect the "reasoned decisionmaking" required by the APA.

c. To the extent the Commission was claiming that certain contracts offered by the Market have been outside the category of "political event" contracts approved by the No-Action Relief, that contention is arbitrary, capricious, and an abuse of discretion. That assertion is based on a view that the No-Action Relief's license to operate a market is limited to political-event contracts that are directly related to the outcome of a U.S. election. To the extent that interpretation of the No-Action Relief is driving the Commission's revocation of No-Action Relief, it is arbitrary, capricious, and/or an abuse of discretion. That is because the Commission, in 2014, permitted the trading of political markets relating to the outcome of elections or other significant political questions that do not relate to war, terrorism, or assassination. The Commission took no issue in its No-Action Relief decision with the permitted scope of political event contracts sought by Victoria University. Instead, its No-Action Relief decision provided a non-exclusive list of examples of

the types of contracts to be offered, some of which directly related to election outcomes, and some of which did not, including the selection of a Vice Presidential nominee. From the beginning, the PredictIt Market has offered contracts that predict the outcome of significant political issues, including non-U.S. elections, who would be nominated or confirmed as cabinet officials or Supreme Court justices, and whether key federal legislation would be enacted. The Market offered these contracts without incident for more than seven years. The CFTC has been aware of the PredictIt Market's operations and offerings since its inception, and, through its communications and actions, it has confirmed the PredictIt Market was operating within the scope of the No-Action Relief. To the extent the Commission believes certain contracts have been offered that were outside the scope of No-Action Relief, it should raise those particular contracts with the PredictIt Market and ask that they be addressed. It is arbitrary, capricious, and/or an abuse of discretion to revoke the Market's permission to operate on the basis of the Commission's unexplained and undocumented factual and legal contention that certain contracts were offered that are not permitted by the No-Action Relief decision.

111. The arbitrary reasoning behind the Revocation has led to and been compounded by arbitrary and capricious commands to liquidate certain contracts prematurely. Specifically, the Revocation permitted the corporate entities servicing the market to continue operating any contract market operated "in a manner consistent with each of the terms and conditions in" the No-Action Relief until February 15, 2023, at which time "all associated open interest in such market should be closed out and/or liquidated." Ex. 2 at 2. This disorderly wind-down could have been avoided

if the agency had not arbitrarily and capriciously issued the Revocation and its commands for liquidation therein.

112. The Commission's Revocation and associated commands are arbitrary and capricious in at least the following ways:

a. The new proscriptions do not provide any detail as to what current contracts are not being operated "in a manner consistent with" the No-Action Relief's terms.

b. The Revocation does not allow investors, like the Investor Plaintiffs, to realize any benefit from open event contracts that would settle based on events occurring after February 15, 2023—*e.g.*, event contracts related to the 2024 primary and general elections—which are the majority of the investments currently made in the PredictIt Market.

c. By forcing the liquidation of PredictIt Market event contracts based on the outcome of the 2024 election cycle before their natural maturation, the Revocation renders data generated, to date, by trading of those contracts valueless for academic analysis.

d. The Revocation attempts to prevent the issuance of new contracts, depriving operators, traders, and academics of the benefits of a continuing Market without explaining corrections to the Market short of closing it.

113. The Commission's selection of a remedy—the Revocation and its associated commands—for alleged violations of the No-Action Relief decision's terms is arbitrary and capricious. It ignored or otherwise failed to explain why obvious alternatives—such as allowing all currently pending contracts to run their course and mature on their own terms, while barring

the creation of new event markets or seeking adjustments to a continuing Market—should not be selected.

114. The Commission's determination in the March Action that the No-Action Relief is void and should be withdrawn is likewise "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and thus violates the APA. 5 U.S.C. § 706(2)(A).

115. The March Action provides three ways in which the Commission believes the Market violated the conditions of the No-Action Relief. In fact, none of these alleged actions violates the No-Action Relief.

a. The Commission first claims that Aristotle, rather than Victoria University, is operating the Market, in violation of the No-Action Relief's condition that faculty at the University must operate and oversee the Market. Ex. 3 at 3–4. This claim is false. The No-Action Relief states that three Victoria University professors and one administrator will oversee the Market. The No-Action Relief notes that Aristotle will assist in providing know-your-customer services, but does not otherwise define the closed scope of services that service providers may provide. Given the nature of the Market—an online 24/7 financial platform operated with customized software in a different country than the University—and increased interest in the Market over time, it became necessary during the early years of the Market for the University to substantially outsource platform operations. Since the Market's inception, the University has been transparent in communications with the Commission about Aristotle's involvement in the Market. On numerous occasions since 2017, the University reiterated to the Commission that Aristotle's role includes serving as a clearinghouse for deposits and payments, updating

software, responding to trader inquiries, assisting with U.S. legal compliance, publicizing the site, generating data for academic study, performing outreach to academics, and informing traders of new Markets. Until the March Action, the Commission never objected to Aristotle's role.

b. The Commission next claims that Victoria University has received, and permitted Aristotle to receive, separate compensation for the operation of the Market, in violation of the No-Action Relief's condition that faculty at the University must oversee the Market, without receipt of separate compensation. This claim is false. Victoria University does not receive compensation for operating the Market. Victoria Link Limited, a wholly owned subsidiary of the University, receives $2,000 per month to cover the monthly costs of operating the platform. This modest amount is allocated to cover Victoria University's overhead costs in connection with overseeing the Market, and it often is not even enough to cover those costs. As a result, the $2,000 payment to Victoria Link Limited is fully consistent with the No-Action Relief's requirements that the Market be operated as a not-for-profit and without compensation for any individuals involved. Victoria University has disclosed this payment to the Commission on multiple occasions, and until the March Action, the Commission never objected to it. Moreover, the March Action's statement that the Market's "fee structure appears likely to generate funds far greater than those necessary to operate a small-scale market" is false. The statement is unaccompanied by any supporting data and runs contrary to information previously shared with the Commission explaining the Market's earnings. Specifically, in June 2017, Victoria University and Aristotle disclosed to

the Commission that the Market had operated at a net loss up until that point. As of today, expenses have exceeded revenues for the life of the Market.

c. Finally, the Commission claims that Victoria University has offered contracts falling outside of the scope of the categories of submarkets approved in the No-Action Relief. This claim is false and inconsistent with the text, context, and history of the Commission's own No-Action Relief decision and extensive subsequent communications with CFTC staff. As discussed above, the No-Action Relief's use of the word "include" in the description of "political event" contracts makes clear that the examples listed were not exclusive. Ex. 1 at 2. This is further reinforced by the explicit reference back to the "proposed submarket for political event contracts" described in Victoria University's application (*id.*), and its reference to offering "additional event-driven contracts based on significant Political Events." Ex. 4 at 3. As a senior Commission official clarified in later correspondence: "NAL 14-130 lists three *non-exclusive* examples of political contracts – each is tied to election outcomes and allows some flexibility with respect to political contracts," but cautioned that PredictIt should avoid contracts that "appear to have *no relationship to elections or any other meaningful political question.*" Based on this understanding, the Market had a good faith and reasonable belief that each of the 17 markets the Commission cites in the March Action fell within the No-Action Relief's parameters, as each related to a meaningful political question. When the Commission questioned one of these 17 contracts in November 2014, the Market immediately terminated the contract. For the majority of the 17 markets, however, the Commission never raised any objection until the March Action. In addition,

these 17 markets represent only a tiny fraction of the 6,829 markets that have been listed since the Market's inception.

116. The allegations in the March Action are invalid and cannot justify the Action's preliminary determination that the No-Action Relief is void and should be withdrawn. They are arbitrary and capricious in at least the following ways:

a. The Commission's flawed assertions do not satisfy the requirement that agency action be reasonable and reasonably explained.

b. The closure of the Market is not an appropriate or proportionate remedy for addressing the asserted violations, which are fully consistent with the text, context, and history of the No-Action Relief decision and extensive course of dealing between the agency and the Market and represent only a fraction of the Market's activities over the past eight years.

c. Until the March Action, the Commission did not disclose the large majority of these alleged violations to Victoria University or the Plaintiffs. Asserting them for the first time in the March Action thus constitutes an inappropriate *post hoc* rationalization for the Commission's earlier decision to close the Market.

117. The March Action's rationale that the Market demands too much of the Commission's attention and is not an appropriate use of taxpayer resources is likewise arbitrary and capricious. The Commission does not cite any information to support this claim. It does not quantify the Commission resources consumed by the Market and does not explain why the expenditure of such resources is not warranted in light of the considerable and longstanding reliance interests that traders, academics, and service companies have in the Market.

118. Nor does the March Action account for the longstanding reliance interests of the traders like Mr. Clarke, Mr. Beeler, Mr. Boeckmann, Mr. Neeley, and Mr. Schneider, academics like Professors Crane, Miller, and Smidt, and service companies like Aristotle and PredictIt, Inc. that organized their affairs around the No-Action Relief. Instead, it specifically directs that none of these interested parties will have a meaningful opportunity to respond to the Action. This is arbitrary and capricious in violation of the principle that administrative agencies must consider such reliance interests before changing course on a given policy and the Fifth Circuit's correct ruling that traders, academics, and operators are beneficiaries of the Commission's license for the Market to operate.

119. Finally, the March Action's selection of a remedy—full withdrawal of the No-Action Relief—for alleged violations of the No-Action Relief's terms is arbitrary and capricious because it fails to seriously consider less disruptive alternatives. The March Action states only that it would "be inappropriate" to allow currently existing markets to expire on their own terms in light of the "likelihood of recurrence" of alleged past violations of the No-Action Relief. Ex. 3 at 7. The March Action offers no explanation for why alleged past violations suggest a likelihood of recurrence in the future. Moreover, as discussed above, the Commission's alleged violations are invalid. In addition, the Commission offers no meaningful explanation of why the alternative of seeking forward-looking adjustments to continuing Market operations, to address whatever perceived problems or deviations from license terms the Commissions believes there to be, is not a superior method for dealing with the significant reliance and other interests the Plaintiffs have in the continued operation of the Market.

COUNT II
(Violation of the Administrative Procedure Act, 5 U.S.C. §§ 558 and 706: Withdrawal of License Without Written Notice or Opportunity to Demonstrate or Achieve Compliance)

120. Plaintiffs incorporate the proceeding paragraphs as if fully set forth herein.

121. Section 558(c) of the Administrative Procedure Act prohibits the "withdrawal, suspension, revocation, or annulment of a license" without first giving the licensee: (1) notice by the agency in writing of the facts or conduct which may warrant the action; and (2) opportunity to demonstrate or achieve compliance with all lawful requirements." 5 U.S.C. § 558(c).

122. A "license" includes "the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." 5 U.S.C. § 551(8).

123. The No-Action Relief constitutes a form of permission because it authorizes the PredictIt Market's operation without "registering under the [Commodity Exchange] Act or otherwise complying with the Act or [CFTC] regulations." Ex. 1 at 5.

124. The Fifth Circuit's July 21, 2023, opinion in this matter holds that the No-Action Relief constitutes a "form of permission," and thus "a 'license' within the meaning of the APA." Ex. 5 at 9.

125. The CFTC's August 2022 Revocation letter revoked the No-Action Relief without providing those entities assisting in operating the Market with written notice of the facts or conduct which may warrant the Revocation.

126. The written Revocation of No-Action Relief stated only as follows: "The University has not operated its market in compliance with the terms of Letter 14-130," the No-Action Relief decision. There is not even a specific allegation of how the terms of the No-Action Relief have

been violated, much less "notice of the facts or conduct that may warrant the revocation." 5 U.S.C. § 558.

127. In addition, the Revocation provided those entities assisting in operating the Market with no opportunity—formal or informal—"to demonstrate or achieve compliance with all lawful requirements." 5 U.S.C. § 558. The Administrative Procedure Act requires that the permitted or licensed entity be made aware of the facts forming the basis of the Revocation and to have an opportunity to rebut them. But the Revocation took *immediate effect* and provided no opportunity to be heard, much less one informed about the facts that the Commission believes may warrant revocation.

128. Additionally, the CFTC's revocation of the No-Action Relief violates the Administrative Procedure Act as it is "without observance of procedure required by law," *id.* § 706(2)(D), insofar as the revocation of the permission to operate the PredictIt Market was not accompanied by the notice and opportunity to demonstrate compliance required by Section 558(c) of the APA.

129. The CFTC's March Action similarly violates the Administrative Procedure Act because it is "without observance of procedure required by law." *Id.* § 706(2)(D). Like the August Revocation, the March Action does not provide an opportunity to demonstrate or achieve compliance with the requirements of the No-Action Relief, as required by Section 558(c) of the APA. Nor does it provide several beneficiaries of the Commission's license the opportunity to be heard in response to the allegations or what the remedy for them should be.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs requests that the Court enter judgment in their favor and:

a) Enter an order vacating, "hold[ing] unlawful and set[ting] aside" the Commission's Revocation of the No-Action Relief as arbitrary, capricious, an abuse of discretion,

otherwise not in accordance with law and/or without observance of procedure required by law, 5 U.S.C. § 706;

b) Enter an order vacating the CFTC's Revocation of the No-Action Relief for failure to provide written notice or an opportunity to demonstrate or achieve compliance with the No-Action Relief's requirements, 5 U.S.C. §§ 558, 706;

c) Enter an order vacating, "hold[ing] unlawful and set[ting] aside" the Commission's March Action seeking to cancel the No-Action Relief as arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law and/or without observance of procedure required by law, 5 U.S.C. § 706;

d) Enter an order declaring that each of the alleged violations cited in support of the March Action's seeking to cancel the No-Action Relief—(1) that Aristotle, rather than Victoria University, is operating the Market, (2) that Victoria University has received, and permitted Aristotle to receive, separate compensation for the operation of the Market, and (3) that Victoria University has offered contracts falling outside of the scope of the categories of submarkets approved in the No-Action Relief—is an invalid justification for cancelling the Commission's license for the Market to operate;

e) Enter an order vacating the CFTC's March Action seeking to cancel the No-Action Relief for failure to provide an opportunity to demonstrate or achieve compliance with the No-Action Relief's requirements and an opportunity for beneficiaries of the Commission's license for the Market to respond to the alleged violations, 5 U.S.C. §§ 558, 706;

f) Enter an order enjoining the CFTC from requiring the liquidation of outstanding contracts on the PredictIt Market before they are settled in the normal course based on the occurrence or non-occurrence of the event specified in the contract and from prohibiting the addition of new contracts or deterring trading in any existing or new contracts;

g) Enter an order enjoining the CFTC from requiring the liquidation of outstanding contracts on the PredictIt Market before they are settled in the normal course based on the occurrence or non-occurrence of the event specified in the contract or prohibiting the issuance of new contracts or deterring trading in any existing or new contracts until Plaintiffs have had the opportunity to be heard and to present evidence before the Court in support of its claims that the revocation of the No-Action Relief violates the APA;

h) Enter an order providing for the Court's continued jurisdiction over this case and permanently enjoining the CFTC from taking any action that would have the effect of prohibiting or deterring the issuance or trading of PredictIt Market contracts or to close or otherwise to impede the normal operations of the Market, until 60 days

after a final order disposing of any challenge to such CFTC action, provided a Plaintiff files a challenge to that action within 60 days of it becoming final;

i) Award Plaintiffs their litigation costs and reasonable attorneys' fees, including the fees that Plaintiffs incurred defending against the CFTC's failed effort to dismiss Plaintiffs' Fifth Circuit appeal as moot and in challenging CFTC efforts to close the Market, including an award of fees and expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412, and other authorities available to the Court to award fees and expenses, as the positions taken by the CFTC in defending its efforts to close the Market are not substantially justified; and

j) Order such other relief as the Court may deem just and proper.

[*Signatures on Following Page*]

Dated: November 27, 2023

Respectfully submitted,

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Exhibit 1

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Division of
Market Oversight

CFTC Letter No. 14-130
No-Action
October 29, 2014
Division of Market Oversight

Neil Quigley
Deputy Vice-Chancellor, Research
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Wellington, 6012, New Zealand

Re: Victoria University of Wellington's Request for No-Action Letter regarding the Operation of a Small-Scale, Not-For-Profit Market for the Trading of Event Contracts for Educational Purposes

Dear Mr. Quigley:

This letter is in response to your letter to the Division of Market Oversight ("DMO" or "Division") of the Commodity Futures Trading Commission ("CFTC" or "Commission) dated August 26, 2014, requesting no-action relief that would allow Victoria University of Wellington, New Zealand ("Victoria University")[1] to operate a not-for-profit market for the trading of event contracts and the offering of such event contracts to U.S. persons.

As you note in your letter, the Division of Trading and Markets ("T&M"), which preceded DMO as the CFTC division with oversight responsibilities for regulated markets, granted no-action relief by letter dated June 18, 1993, to the University of Iowa to permit the operation of a non-profit electronic market ("Iowa Electronic Markets" or "IEM").[2] The IEM consists of submarkets for binary contracts concerning political elections and economic indicators — it is operated for academic research purposes only, and its operators, who are faculty at the University, receive no separate compensation.

[1] Victoria University was founded as Victoria College in 1897. The University comprises four campuses, more than 2,000 staff and 16,000 students. Additional information about the University's history, faculty, academic offerings, reputation, rankings, and related matters is available at http://www.victoria.ac.nz/about/.

[2] CFTC No-Action Letter No. 93-66 (June 18, 1993), *available at* http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/93-66.pdf.

Victoria University proposes the creation of a small-scale, not-for-profit, online market for event contracts in the U.S. for educational purposes that will use the IEM as a model, with certain features that would vary from that model. As such, you request on behalf of Victoria University similar no-action relief with respect to the operation of your proposed market for event contracts as was granted to the University of Iowa with respect to operation of the IEM. In particular, you request that DMO recognize that Victoria University's market for event contracts, as proposed, should not be required to register as a designated contract market ("DCM") under section 5 of the Commodity Exchange Act ("CEA") and part 38 of the Commission's regulations, nor as a foreign board of trade ("FBOT") under section 4 of the CEA and part 48 of the Commission's regulations, and that its operators need not register under the CEA or the Commission's regulations.

I. Background

Based upon the representations contained in your letter, as supplemented by telephone conversations with DMO staff, we understand the facts to be as follows. Victoria University (henceforth "University") intends to operate two submarkets: one for political event contracts, and the other for economic indicator contracts. The University proposes to utilize the results of the market information derived from trading in these contracts for educational and research purposes. For example, the University plans to utilize the results from its market as teaching tools in its courses on statistical analysis, market theory, and trader psychology. The University has also expressed plans to utilize the results to publish related research papers and analyses.

All of the proposed event contracts would be structured as follows:

- all contracts would be initially priced at $1;
- each contract for the correct outcome would pay off at $1, while all other contracts (i.e., contracts with incorrect outcomes) would not pay-off; and
- the price of each contract at any given time would reflect the probability that the traders believe that the event will happen.

The proposed submarket for political event contracts will include winner-take-all contracts to predict the following outcomes:

- which presidential nominee will win his or her party's primary, the general election popular vote, and the Electoral College;
- who will be the major party nominees for Vice President; and
- which party will control the next Congress.

The proposed submarket for economic indicator contracts will include winner-take-all contracts to predict monetary policy decisions of the Federal Open Market Committee regarding the federal funds target rate. The University represents that it will not list any economic indicator contract that would compete with any contract that is listed by a CFTC-regulated contract market, and the University would not list more than five economic indicator contracts at any one

time. Participation in the submarket for economic indicator contracts would be limited to students, faculty and staff at any participating universities.[3]

By design, the University's model for its proposed market for event contracts bears many close similarities to the IEM model, including the following items:

- The University's key employees overseeing the project will be three University professors and one administrator.
- Neither the professors nor the administrator will receive any compensation or other payment, directly or indirectly, for operating the market.
- Neither the University nor any of the key personnel operating the proposed market is required to register with the Commission, nor is any of these persons or entities a business affiliate of any person required to register with the Commission.
- There will be no additional fees other than those necessary to cover the basic expenses of running the market, including the cost of credit card processing of deposits and withdrawals, fulfillment of the know-your-customer ("KYC") process,[4] and all other associated regulatory compliance and operating costs.
- Participants will execute their own trades, no brokerage service will be available or allowed, and no commissions will be charged.

However, the University's proposed market for event contracts would feature certain aspects that would distinguish it from the IEM model. The following four departures from the IEM model, you argue, would cause the University's market for event contracts to produce more accurate results, thereby furthering the educational public interest purpose of the project, by permitting:

(1) a larger allowable number of traders in each contract;
(2) a larger number of traders that are not affiliated with the University to trade political event contracts;
(3) a larger allowable investment by any single market participant; and
(4) a limited level of advertising.

1. Number of traders in each contract

Participation in IEM is limited to 2000 total traders in any particular election for which a political market is operated, and to 1000 total trades in any particular economic indicator submarket. The University proposes to have a limit of 5000 total traders in any particular contract, explaining that broader participation would make these contracts more efficient and effective prediction tools. The University anticipates that the higher proposed cap on participation, coupled with a higher maximum deposit limit (discussed below), would together

[3] The University represents that several U.S. universities have indicated a willingness to participate in the University's market for event contracts. Thus far, the University has neither sought nor obtained firm commitments from any of the universities contacted and does not intend to do so until it obtains the necessary relief from Commission staff. Such participation by other universities, as planned, would be similar to the participation by several universities in the IEM that the University of Iowa has been able to obtain.

[4] The University represents that it will implement an age and identity verification system as part of a KYC process, performed by an outside independent party: Aristotle International, Inc.

increase the value of the academic research generated by the project by reducing the likelihood of thinly-traded contracts. Thinly-traded contracts, the University explains, would likely allow individual users to have an outsized impact on contracts, thereby creating the potential for artificially skewed results and undermining the academic utility of the project.

2. Access to submarket for political event contracts

IEM limits participation in its political submarket to primarily students, faculty and staff at participating universities, and restricts participation in its economic indicator submarket to only such "academic traders." While the University proposes that participation in its economic indicator submarket be restricted to only academic traders at participating universities, the University has also proposed that trading in its political submarket not be limited to primarily academic traders. In support of its proposal, the University posits that many of the same reasons stated above for expanding the maximum number of allowable traders would also logically apply to this issue — a reduced number of traders would bias the market and reduce access to a broader range of informational sources, thereby reducing accuracy and academic utility.

3. Larger allowable investment by any single market participant

IEM limits the maximum investment by any single participant in any particular contract to $500. The University proposes raising the limit on investment by any single participant in any particular contract to $850. The University represents that, using the Consumer Price Index, $500 in 1992 (the year in which the Division first granted no-action relief to the University of Iowa) had the same buying power as $844.99 in 2014. The University explains that increasing the maximum allowable investment would allow participants the ability to participate in several more contracts than they might otherwise if limited to 1992 dollar levels. This, the University explains, would make its market more efficient by minimizing the likelihood of thinly-traded contracts, while still adhering to the small-dollar, educational purpose of the IEM model.

4. Advertising would be permitted

In its 1993 relief request, IEM represented that none of its operators, nor any other person involved with the IEM, engages in any advertising concerning the IEM. The University proposes to engage in limited advertisement of its market in media outlets where there is a high likelihood of reaching those interested in the subject matter of its contracts. Any such advertisements would prominently disclose that the proposed market is unregulated, experimental, and being operated for academic purposes. It is the University's view that limited advertisement is necessary to attract sufficient and diverse users to its proposed market.

The University represents that it will use little, if any, paid advertisements to market its contracts. Instead, the University would attract participants through channels of communication within the academic community, including word-of-mouth marketing, articles and interviews with media.

DMO notes that the University's proposed political event contracts can be distinguished from the North American Derivatives Exchange's ("Nadex") political event contracts that were

disapproved by Commission Order on April 2, 2012.[5] Specifically, the University's request for no-action relief was not in any way premised upon claims that its proposed event contracts have any hedging or price-basing utility. Much to the contrary, the University's proposed market for event contracts represents an academic exercise demonstrating the information gathering and predictive capabilities of markets. Another important distinction is that the University's proposed market would operate on a non-profit basis. Furthermore, because participation levels and maximum allowable investments in the University's proposed contracts would each be capped at very low levels, the University's proposed political event contracts would not have the same potential for compromising the integrity of elections as would Nadex's disapproved political event contracts, which were much larger.

II. Scope of no-action relief provided by DMO

Based upon your representations concerning the purposes and manner of operation of your proposed market for event contracts, the Division does not believe that operation of this proposed market without registration as a DCM, FBOT, or swap execution facility ("SEF"),[6] or without registration of its operators, would be contrary to the public interest. The Division's conclusion is based upon the facts that, among others, your proposed market for event contracts has been designed to serve academic purposes and the operators will receive no compensation. Furthermore, the Division would allow the University's four proposed variations from the IEM model, as discussed above, because each is intended to produce more accurate results, which would promote the educational public interest purpose of the project while maintaining the small-scale, not-for profit nature of the proposed market.

Consequently, based upon your representations, DMO will not recommend that the Commission take any enforcement action in connection with the operation of your proposed market for event contracts based upon the operators' not seeking designation as a contract market, registering under the Act or otherwise complying with the Act or Commission regulations.

DMO does not render any opinion as to whether the operation of your proposed market for event contracts violates any state law provisions, nor does the Division's position excuse non-compliance with any such law.

This letter is based upon the information that has been provided to the Division and is subject to the conditions stated above. Any different, changed or omitted material facts or circumstances may render this no-action relief void.

This letter, and the no-action position taken herein, represents the views of DMO only, and does not necessarily represent the positions or views of the Commission or of any other division or

[5] *Order Prohibiting the Listing or Trading of Political Event Contracts* (April 2, 2012), *available at* http://www.cftc.gov/ucm/groups/public/@rulesandproducts/documents/ifdocs/nadexorder040212.pdf. The disapproved Nadex contracts were binary option contracts that would have paid out based upon the results of various U.S. federal elections in 2012.

[6] DMO staff believes that the proposed event contracts could be characterized as swaps pursuant to CEA section 1a(47)(A)(ii). In general, no person may operate a facility for the trading or processing of swaps unless the facility is registered as a SEF or as a DCM. *See* CEA section 5h(a)(1).

office of the Commission. As with all no-action letters, DMO retains the authority to condition further, modify, suspend, terminate or otherwise restrict the terms of the no-action relief provided herein, in its discretion.

If you have any questions concerning this correspondence, please contact David Van Wagner, Chief Counsel, Division of Market Oversight, at (202) 418-5481 or dvanwagner@cftc.gov, or David Pepper, Attorney Advisor, Division of Market Oversight, at (202) 418-5565 or dpepper@cftc.gov.

Sincerely,

_____

Vincent McGonagle
Director, Division of Market Oversight

Exhibit 2

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Division of
Market Oversight

Vincent McGonagle
Director

Professor Margaret Hyland, Ph.D.
Vice-Provost (Research)
Vice Chancellor's Office
Victoria University of Wellington
HU 207, Hunter Building, Gate 1
Kelburn Parade, Kelburn
Wellington 6012, New Zealand

Re: Withdrawal of CFTC Letter No. 14-130

Dear Dr. Hyland:

As you are aware, on October 29, 2014, the Division of Market Oversight ("DMO" or "Division") of the Commodity Futures Trading Commission ("CFTC" or "Commission") issued CFTC Letter No. 14-130 ("Letter 14-130" or "Letter") granting the request of Victoria University of Wellington, New Zealand ("the University") that the Division not recommend enforcement action (*i.e.*, "no-action" relief) against the University in connection with its operation of an online, not-for-profit, event contract market in the U.S. for educational and research purposes, without registration as a designated contract market, swap execution facility, or foreign board of trade, and without registration of its operators, subject to certain terms outlined in the Letter.[1]

According to the terms of the Letter, DMO granted the relief based upon the representations of the University that the proposed event contract market would:

(1) be small-scale and not-for-profit;
(2) be operated for academic and research purposes only;
(3) be overseen by faculty at the University, without receipt of separate compensation;
(4) offer event contracts consisting of two submarkets for binary option contracts concerning political election outcomes and economic indicators;

[1] Letter 14-130, https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/14-130.pdf.

(5) be limited to 5,000 traders per contract, with an $850 investment limit per participant in any contract;
(6) not offer brokerage services or charge commissions to participants;
(7) utilize a third-party service provider to perform know-your-customer ("KYC") due diligence on its participants[2];
(8) only charge those fees necessary to cover the fulfilment of the KYC process, regulatory compliance, and basic expenses to operate the proposed event contract market; and
(9) limit advertising to media outlets where there is a high likelihood of reaching those interested in the subject matter of its event contracts, provided that such advertising prominently discloses that the platform is unregulated, experimental, and being operated for academic purposes.[3]

The University has not operated its market in compliance with the terms of Letter 14-130.[4] As a result, Letter 14-130 is hereby withdrawn and, as such, is not available for the listing or operation of any new or related contracts. To the extent that the University is operating any contract market, as of the date of this letter, in a manner consistent with each of the terms and conditions provided in Letter 14-130, all of those related and remaining listed contracts and positions comprising all associated open interest in such market should be closed out and/or liquidated no later than 11:59 p.m. eastern on February 15, 2023.

Should you have any questions, please do not hesitate to contact Brigitte Weyls, Assistant Chief Counsel, Division of Market Oversight, bweyls@cftc.gov or 312-596-0547, or Rachel Kaplan Reicher, Senior Special Counsel to the Director, Division of Market Oversight, rreicher@cftc.gov or 202-418-6233.

Sincerely,

_____
Vincent McGonagle
Director
Division of Market Oversight

[2] *Id*. at 3.
[3] *Id*.
[4] In Letter 14-130, DMO stated that it "retains the authority to condition further, modify, suspend, terminate, or otherwise restrict the terms of the no-action relief provided herein, in its discretion." *See id*. at 6.

Exhibit 3

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Division of
Market Oversight

CFTC Letter No. 23-03
Other Written Communication
March 2, 2023
Division of Market Oversight

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Kelburn Parade, Kelburn
Wellington 6012, New Zealand

Re: Withdrawal of CFTC Letter No. 22-08 And Initial Determination Concerning CFTC Letter No. 14-130

Dear Dr. Hyland:

This letter hereby withdraws and supersedes the undersigned's correspondence of August 4, 2022.[1]

As Victoria University of Wellington, New Zealand ("Victoria University" or "the University") is aware, on October 29, 2014, the Division of Market Oversight ("DMO" or "Division") of the Commodity Futures Trading Commission ("CFTC" or "Commission") issued CFTC Letter No. 14-130 ("Letter 14-130" or "the Letter") granting the University's request that the Division not recommend enforcement action (*i.e.*, the Division's "no-action" position) against the University in connection with its operation of an online, not-for-profit, event contract market in the U.S. for educational and research purposes, without registration as a designated contract market, swap execution facility, or foreign board of trade, and without registration of its operators, subject to

[1] CFTC Letter No. 22-08.

certain terms outlined in the Letter.[2] We refer herein to the market platform established after Letter 14-130 was issued as "the Market" or "the Platform."

According to the terms of the Letter, which DMO issued based upon the representations of the University, the proposed event contract market would:

(1) be small-scale and not-for-profit;

(2) be operated for academic and research purposes only;

(3) be overseen by faculty at the University, without receipt of separate compensation, directly or indirectly, for operating the market;

(4) offer event contracts consisting of two submarkets for binary option contracts concerning political election outcomes and economic indicators;

(5) be limited to 5,000 traders per contract, with an $850 investment limit per participant in any contract;

(6) not offer brokerage services or charge commissions to participants;

(7) utilize a third-party service provider to perform know-your-customer ("KYC") due diligence on its participants;[3]

(8) only charge those fees necessary to cover the fulfilment of the KYC process, regulatory compliance, and basic expenses to operate the proposed event contract market; and

(9) limit advertising to media outlets where there is a high likelihood of reaching those interested in the subject matter of its event contracts, provided that such advertising prominently discloses that the platform is unregulated, experimental, and being operated for academic purposes.[4]

Victoria University proposed the creation of a small-scale, not-for-profit, online market for event contracts in the U.S. for educational purposes modelled after the non-profit election market operated by the University of Iowa. The Iowa Electronic Market is operated for academic purposes only, and its operators, who are faculty at the University of Iowa, receive no separate compensation. As such, Letter 14-130 states that DMO's no-action position was "[b]ased upon" Victoria University's "representations concerning the purposes and manner of operation of [the University's] proposed market for event contracts," "and is subject to the conditions stated above."[5] The Letter was addressed solely to Victoria University and addressed solely "Victoria

[2] CFTC Letter 14-130.
[3] *Id*. at 3.
[4] *Id.*
[5] *Id*. at 5.

University's market for event contracts, as proposed," whose proposed operators were to be three professors at the University and one administrator who would not receive "payment, directly or indirectly, for operating the market."[6] The Letter noted that the University would utilize a third party, Aristotle International, Inc. ("Aristotle"), a for-profit corporation, to "implement an age and identity verification system as part of a KYC process."[7] The Letter expressly cautioned that any "different, changed or omitted material facts or circumstances" might result in DMO's discretionary no-action position being "void" or withdrawn.

On June 8, 2022, DMO staff met solely with representatives of the University, including the University's counsel, to communicate that the Platform was not being operated pursuant to the conditions set forth in Letter 14-130 and that the Division intended to promptly issue a public notice of withdrawal. At that time, DMO staff raised the following three bases for withdrawal:

- The Platform was no longer operated by the University or its professors, but rather by Aristotle;

- Victoria Link Limited ("VLL"), a wholly owned subsidiary of the University, has been receiving compensation from Aristotle; and

- The Platform had listed contracts outside the scope of Letter 14-130.

Following a series of subsequent phone calls and emails between DMO staff and the University (as well as, at the University's invitation, Aristotle),[8] in a letter dated August 4, 2022 (Letter 22-08), DMO notified the University that Letter 14-130 was being withdrawn because "[t]he University has not operated its market in compliance with the terms of Letter 14-130."

By this letter, Letter 22-08 is withdrawn. DMO nevertheless preliminarily believes Letter 14-130 is void and should be withdrawn. The bases for this Initial Determination are set forth below, including those previously explained to the University, along with further information disclosed since August 4, 2022, which also informs staff's analysis of this Initial Determination.

Aristotle, a for-profit corporation—not the University or its faculty—is operating the Market.

As noted above, Letter 14-130 was conditioned on the University's representation that the proposed market would be operated and overseen by faculty at the University, without receipt of separate compensation, for academic and research purposes only. Inconsistent with the University's representations made when requesting DMO's no-action position in 2014, in a letter

[6] *Id.* at 1–2.

[7] *Id.* at 3 n.4.

[8] The University obtained U.S. counsel and invited Aristotle representatives, including in-house and outside counsel.

from VLL Chief Executive Officer Anne Barnett dated April 20, 2021, the University notified DMO that the University was not operating the Market as of that time. According to the University's letter, "Aristotle's role now includes" the following: market question formulation; publicity; regulatory compliance; clearing and settling of contracts; market security, monitoring, and complaint and dispute resolution; provision of the Market website and the trading platform software that underlies this (including operation and maintenance of the website and software); and responding to requests from academics for data.[9] This activity goes beyond the KYC due diligence and age verification on market participants that the University represented the so-called third party would conduct and is inconsistent with the terms of the Letter. As explained to the University before DMO issued the August 4, 2022 letter, this is one basis upon which DMO believes it should exercise its discretion to withdraw the Letter.

While the University may have been operating the Market at its inception, it appears that at some point the University ceded operational control of the Market to Aristotle, a for-profit corporation. Indeed, recent public statements reflect that the University may not have been operating the Market since its inception and rather that Aristotle played a leading—and undisclosed—role in the development and launch of the Market. Specifically, in declarations submitted under penalty of perjury, Aristotle and its executives have characterized Aristotle and its subsidiaries as "partners" with Victoria University, whose role is to "operate the Market" and who had "invested millions to set up" the Market's "computer systems and compliance infrastructure" and "to hire and train the staff to run them."[10] And in a February 8, 2023 oral argument before the United States Court of Appeals for the Fifth Circuit, Aristotle's counsel made several representations indicating that the Market was a joint venture from the beginning. The Letter required the Market to be operated by Victoria University; the operation of the Market by Aristotle, a for-profit corporation, is inconsistent with the conditions in the Letter.

The University has received, and permitted Aristotle to receive, separate compensation for Aristotle's operation of the Market.

As noted above, Letter 14-130 was conditioned on the representation of the University that the market would be operated and overseen by faculty at the University, without receipt of separate compensation. The University letter to DMO dated April 20, 2021 states that the VLL, a wholly owned subsidiary of the University, receives $2,000 each month from user fees "to fund its monitoring activity." As explained to the University before DMO issued the August 4, 2022

[9] 4.20.2021 Letter at 3.

[10] *See, e.g.*, Corrected Plaintiffs-Appellants' Br., *Clarke v. CFTC*, No. 22-51124, at 7, 10, 36 (5th Cir. Jan. 31, 2023); Dec. 31, 2022 Decl. of John Phillips, *Clarke v. CFTC*, No. 22-51124, at Ex. 1 (5th Cir. Jan. 12, 2023) (sworn statement from Chief Executive Officer of Aristotle International, Inc. disclosing detailed trading-volume and related operational data); Sept. 28, 2022 Decl. of Dean Phillips, *Clarke v. CFTC*, No. 22-51124, at App.3–8 ¶¶ 4, 5 (5th Cir. Jan. 12, 2023) (sworn statement from President and Co-Founder disclosing that Aristotle International, Inc. "assisted" the University's 2014 request for no-action letter and "shepherd[ed] it through the CFTC's regulatory process"; that "Aristotle invested over seven million dollars to stand up the [Platform]"; and that Aristotle was responsible for "develop[ing] a software backbone and internet interface for the Market," and having "hired, trained, and maintain[ed] an employee base of seven fully dedicated (full time) employees and 18 employees who split time between [the Platform] and other Aristotle businesses").

letter, this appears to constitute separate compensation received by the University and thus is in violation of the terms of Letter 14-130.

Separately, Aristotle's assertions about its operational control, as referenced above, have drawn into question whether Victoria University also acted in a manner inconsistent with the representations that the University would create a small-scale, not-for-profit, online market. In particular, the market was designed to bear many close similarities to the University of Iowa model, including "no additional fees other than those necessary to cover basic expenses of running the market, including the cost of credit card processing of deposits and withdrawals, fulfillment of the know-your-customer ("KYC") process, and all other associated regulatory and compliance costs."[11] However, statements on the Platform's website indicate that Aristotle was charging a 10% fee on all profits and a separate 5% fee on all withdrawals for so called "costs related to running this site."[12] This fee structure appears likely to generate funds far greater than those necessary to operate a small-scale market. As such, it appears facially inconsistent with the University's representation that it would conduct a small-scale, non-profit operation, covering only basic expenses, in a manner similar to the Iowa Electronic Market.

The University has offered numerous contracts that are outside the scope of the submarkets addressed in the Letter.

As stated in the Letter, the University represented to DMO that it would operate two submarkets: one for political event contracts and the other for economic indicator contracts. The submarket for political event contracts would include contracts predicting the following outcomes:

- Which presidential nominee will win his or her party's primary, the general election popular vote, and the Electoral College;
- Who will be the major party nominees for Vice President; and
- Which party will control the next Congress.

The submarket for economic indicator contracts would include contracts predicting monetary policy decisions of the Federal Open Market Committee regarding the federal funds target rate.[13]

But, as previously explained to the University before DMO issued the August 4, 2022 letter, the Market has repeatedly listed a significant number of contracts that fall outside of the bounds of these two submarkets as represented to DMO and described in the Letter. More specifically, starting in 2014, not long after the issuance of the Letter, the Market began listing contracts that cannot reasonably be construed as falling within the categories of political event contracts set

[11] CFTC Letter 14-130.

[12] *See* "Our Fees" available at https://www.predictit.org/support/how-to-trade-on-predictit.

[13] CFTC Letter 14-130.The University further represented that it would not list any economic indicator contract that would compete with any contract that is listed by a CFTC-regulated contract market, and the University would not list more than five economic indicator contracts at any one time. Participation in the submarket for economic indicator contracts would be limited to students, faculty and staff at any participating universities.

forth in the Letter or as akin to those contracts.[14] Contracts that the Market has listed that are outside of the bounds of the Letter include the following:

- How many Ebola cases in the U.S. in 2015?
- Will Iran agree to a nuclear deal before the end of 2014?
- Will Caitlyn Jenner address the 2016 Republican National Convention?
- Will Puerto Rico file for bankruptcy in 2015?
- Will accused lion poacher Walter Palmer be extradited to Zimbabwe this year?
- Who will win the 2015 Nobel Peace Prize?
- Will North Korea test a hydrogen bomb by the end of 2016?
- Will September CBP Southwest Border Patrol apprehensions be lower than August?
- Will Pope Francis vacate the papacy by year-end?
- How many tweets will @realDonaldTrump post from noon May 27-June 3?
- Will federal charge against Andrew McCabe be confirmed by June 30?
- Whether the WHO will declare COVID-19 to be a "pandemic" before March 6?
- How many tweets will @AOC post from noon March 9 through March 16?
- What will be NASA's estimate for global surface temperature change for February?
- Will the Court legalize same-sex marriage?
- Will the U.S. indict FIFA president Sepp Blatter in 2015?
- Will a federal charge against Hunter Biden be confirmed by December 31, 2020?

Despite multiple interactions with DMO to address these violations of the Letter's conditions, the Market has persisted for years to list contracts outside of the two submarkets.

* * *

The purpose of Victoria University's request and DMO's no-action letter was that the Market—which the University represented would be a small-scale, not-for-profit platform for educational and research purposes—would be unregulated. Yet, because of these violations, DMO and other CFTC staff have been required to devote considerable time over the last nearly nine years to the Market. This has far exceeded the level of CFTC staff involvement contemplated by Letter 14-130, and we believe it is not an appropriate use of taxpayer resources. Further, the Market's listing of contracts well outside of the scope of Letter 14-130 creates the false impression that DMO staff has determined that these contracts are acceptable. These are additional factors that incline us to exercise our retained discretion to withdraw the Letter. As a result of the University's non-compliance with the terms of Letter 14-130, DMO has determined as a preliminary matter that Letter 14-130 is void and should be withdrawn.

[14] For avoidance of doubt, these contracts also were not based on economic indicators as discussed in the Letter.

On a number of occasions, Victoria University and Aristotle have requested that the Division's no-action position continue to apply to certain markets until they expire on their own terms, after the 2024 elections. Victoria University and Aristotle have further requested that the no-action position be extended in the meantime to new markets, and to higher position limits than are covered under the Letter. Preliminarily, DMO does not believe this would be appropriate given the University's persistent violations of the conditions of the Letter, which at a minimum, suggest the likelihood of recurrence. This would therefore cause additional unreasonable use of taxpayer resources for the Division to verify that the University has begun to comply with the Letter's conditions, and continue to do so over the next nearly two years. To the extent the University believes that withdrawal of the Letter would cause downstream injury to third parties, we believe the better course would be for the University, Aristotle, or others to remedy them, if at all, by compensating any injured parties directly.

To the extent that the University disagrees with these conclusions, DMO exercises its discretion to invite the University to submit any objections it may have. Please send the University's response, if any, by March 20, 2023.[15]

This letter, and the positions taken herein, represent the views of DMO only, and do not necessarily represent the position or view of the Commission or any other office or division of the Commission.

Sincerely,

Vincent McGonagle

Vincent McGonagle

Director

Division of Market Oversight

[15] We reiterate, consistent with our previous statements, that a response, if any, should come from the University and its counsel alone.

Exhibit 4

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI
VICTORIA
UNIVERSITY OF WELLINGTON

Confidential Treatment Requested by Victoria University of Wellington

June 26, 2014

Request Under 7 U.S.C. Sec. 6(a)

Vince A. McGonagle

Director

The Division of Market Oversight

Commodity Futures Trading Commission

Three Lafayette Centre

1155 21st Street, NW

Washington, DC 20581

RE: VICTORIA UNIVERSITY OF WELLINGTON'S REQUEST FOR NO-ACTION LETTER FOR A SMALL-SCALE, NOT-FOR PROFIT, EVENT FUTURES MARKET FOR EDUCATIONAL PURPOSES

Requester:

Victoria University of Wellington

Macdiarmid Building, Am404

Kelburn Parade

Wellington, 6012, New Zealand

Phone:

Dear Mr. McGonagle:

On behalf of Victoria University of Wellington, New Zealand ("Victoria University" or "the University") I am writing to request a no-action letter from the Division of Market Oversight to permit the establishment and operation of a not-for profit, event futures market and offer event futures contracts to U.S. persons without registering as a designated contract market under Section 5 of the Commodity Exchange Act.

Proposal

Victoria University proposes the creation of a small-scale, not-for-profit, electronic real-money event futures market in the U.S. for educational and research purposes. The venture will be modelled

after the Iowa Electronic Market (IEM), which has operated for more than 20 years under two no-action letters from the CFTC.[1] The University intends to establish a subsidiary (to operate on a not-for-profit basis) in the U.S. for the project.

Certain changes are proposed to the IEM model. These changes are intended to insure that the system produces more accurate results and fulfills the educational public interest purpose of the project. As more specifically described below, we intend to accomplish this by offering upgraded technology that we consider more user- friendly, eliminating any upfront user fee, increasing the number of participants, raising the 1992 dollar limits to 2014 levels, employing Know-Your-Customer authentications to strengthen the integrity of the system, requiring that users be at least 18 years old, and facilitating ease of registration, deposits and withdrawals.

Given the important academic and educational benefit we hope to be derived from this research and the purposes and manner of operation of the proposed market, the University believes that the market will be a valuable academic tool and entirely consistent with the public interest. However, because the proposed contracts would be available to U.S. persons, we are concerned that, absent the relief requested in this letter, the operation of the proposed market without obtaining designation as a contract market would be prohibited by the Commodity Exchange Act (the "Act") and the regulations promulgated thereunder.[2] Accordingly, the University seeks confirmation from the Division that it will not recommend enforcement action against the University or its agents for operating the proposed market and offering event contracts without contract market designation.

Description of the Market:

Customized software will be used to operate a market-based political and economic forecasting system. The University's key employees overseeing the project will be three University professors and one administrator. Neither the professors nor the administrator will receive any compensation or other payment, directly or indirectly, for operating the markets. Neither Victoria University nor any of the key personnel operating the proposed markets is required to register with the Commission, nor is any of these persons or entities a business affiliate of any person required to register with the Commission.

The written and other descriptive materials concerning the Proposed Market will prominently disclose that this is an experimental, research-based market that is being operated for academic purposes, and is not regulated by, nor are its operators registered with, the Commodity Futures Trading Commission or any other regulatory authority.

Educational Purposes and Uses of Market Information:

The University proposes to utilize the results of the market information for educational and research uses and purposes, including: courses in statistical analysis, market theory, and trader psychology; and to publish related research papers and analyses. Like IEM, the results may be made available to other participating academic institutions for the same purposes.

Examples of Contracts to be Offered

Political Event Contracts. As with IEM, we hope the market will be open to users worldwide.[3]

Political Event Contracts will include the following:

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[1] *See* http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/92-04a.pdf and http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/93-66.pdf

[2] 7 U.S.C Sec. 1 *et seq.*, and Commission rules and regulations found at 17 C.F.R Part 34.

[3] *See* http://tippie.uiowa.edu/iem/faq.html#who ("The IEM is operated for research and teaching purposes. All interested participants world-wide can trade in our political markets.")

- Presidential Elections Submarket:
  - Winner-Take-All contracts to predict which presidential candidate will win their parties' primaries, the general election popular vote, and the Electoral College;
  - Winner-Take-All contracts to predict who will be the major party nominees for Vice President
  - A Vote Share contract to predict what percentage of the vote the two major party candidates will receive
- Congressional Control Submarket to predict which party will control the next Congress.
  - Congress 2014 contract-- based on the composition of both houses of Congress
  - House2014 contract -- based on the composition of the U.S. House of Representatives
  - Senate2014 contract -- based the composition of the U.S. Senate
- Other Significant U.S. Elections Submarket
  - Contracts to predict the outcome of other significant U.S. Elections not falling within the other markets
- International Elections Submarket
  - Contracts to predict the outcome of certain foreign elections, such as the Canadian elections described in the 1993 IEM no-action letter.

Economic Indicator Contracts

- Federal Reserve Monetary Policy Winner-Takes-All.
  - The Federal Reserve Monetary Policy Submarket B (FedPolicyB) is a real-money event contract. Contract payoffs are determined by monetary policy decisions of the Federal Open Market Committee regarding the federal funds target rate.

The market may list additional event-driven contracts based on significant Political Events. It may also list additional Economic Indicator Contracts. However no Economic Indicator Contracts shall compete with any contracts that are listed by a regulated contract market at the time of listing by the market and the market shall not list more than 5 Economic Indicator Contracts at any one time. Participation in Economic Indicator Contracts shall be limited to students, faculty and staff at any participating universities. The market will not list any contracts that involve, relate to or reference terrorism, assassination or war.

Structure of Contracts

Shares are initially priced at $1. Contracts for the correct outcome pay off at $1. All other contracts pay off at zero. As a result, the price of the contract at any given time is the probability that the traders believe that event will happen. There will be no additional fees other than those necessary to cover the basic expenses of running the market, including the University's expected costs and those of any service providers as described herein. Participants will execute their own trades, and no brokerage service will be available or allowed. Participants will invest their own funds, buy and sell listed contracts, and bear the risk of loss.

Know Your Customer Requirements

The University intends that an age and identity verification process be employed that will follow Know Your Customer Requirements ("KYC"). The KYC process, performed by an established and credible third party, is a critical and essential component of our proposed system, and a major difference from IEM's structure. KYC will be implemented to strengthen the overall integrity and stability of the system and to improve the accuracy of the results, by reducing the likelihood of fraud, market manipulation, use of the system by minors, and excessive amounts being deposited by individuals using multiple accounts. This process will be operated by a third party, Aristotle International, Inc., whose Integrity authentication service is a leading global provider of age and identity verifications for government and business, having successfully performed over 50 million authentications. Aristotle is also one of only 6

Federal Trade Commission-approved Safe Harbors for compliance with the Child Online Privacy Protection Act COPPA. A description of Aristotle and its Integrity Service can be found at http://integrity.aristotle.com/.

Number of Traders in Each Market

IEM is limited to 2000 total traders in any particular election. We propose raising the limit to 5000 total traders in any particular election.

As the purpose of the market is an academic and educational tool, restricting the number of participants too greatly is likely to result in a market that is not as close to an efficient and effective a prediction tool as it could be and therefore impacts the value of the academic research generated by the project.

Specifically, there is nothing in the way of academic or comparative study to justify or even suggest that IEM's limitation is needed to optimize the accuracy of the market. What is known is that there are compelling reasons to raise the limit on the number of traders participating in a market:

1. Prediction markets work because they aggregate information from "a group of traders, and groups are almost always smarter than the smartest people in them."[4]
2. Thinly-traded contracts give single users an outsized voice in the market, creating the potential for results that skew in one direction or the other.[5]
3. A limited trader base will restrict the number and nature of prediction questions, as there will be too small a trading base for specialized questions or regional questions. Prediction questions with few participants are illiquid and have limited appeal to participants. Greater market liquidity is linked to market accuracy. Without liquidity there is less incentive to trade and therefore less information sources available to the market. In our experience this concentrates trading into a small number of prediction stocks and limits the market scope.
4. Limiting participant numbers limits informational sources for the market. The purpose of the market is to bring into the public domain private information. Prediction markets are successful because they are informationally efficient. Restrictions on participation may lead to the market not factoring in some available information, directly reducing accuracy.

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[4] *See* http://www.utsandiego.com/news/2010/feb/01/1c01prediction/ quoting James Surowiecki in his 2004 book, "The Wisdom of Crowds".

[5] *See, e.g.,* **Betting on a future market,** http://www.nbcnews.com/science/betting-future-market-6C10405016?franchiseSlug=sciencemain; *See also*, Betting on Politics--and Getting it Right, CNN November 16, 2011 http://tippie.uiowa.edu/iem/media/story.cfm?ID=2718 :

> "Many of the markets are thin, and that's a problem," Fair said....Thinly traded contracts give single users an outsized voice in the market, creating the potential for results that skew in one direction or the other. And around the margins—when a candidate stands very little chance of winning, or has already locked up the race—the market becomes far less perfect," Fair said.

See also, **Prediction Markets Are Hot, But Here's Why They Can Be So Wrong** (May 19, 2008) Wired Magazine, http://archive.is/eZ0E5#selection-1877.9-1877.691 :

> Like financial markets, prediction markets are big information processors, distilling the collective wisdom of their traders. But the success of any market depends upon the stakes and the pool of traders. Most prediction markets aren't anywhere near as robust as those they emulate on Wall Street. "They are thin, trading volumes are anemic, and the dollar amounts at risk are pitifully small," market analyst Barry Ritholtz wrote in January. That opens them up to all kinds of problems as information processors. Political markets, for example, have a lot of political junkies but few real insiders or outsiders, so they're not very good at catching something the polls might miss.

5. When there is too small a cap as with IEM, people who sign up, but who do not participate or who participate very infrequently, are effectively blocking legitimate participants who could better help the market to realize its beneficial educational purpose.
6. Although IEM has frequently been praised for beating the polls a large percentage of the time, this does not mean that the IEM market is as accurate as it could be, or that IEM is beating the polls as often and by as large a margin as it could.
7. In a letter written by 22 professors who are experts in prediction markets (including those professors who operate IEM), although a "modest" annual cap on deposits by an individual was proposed, they specifically did not propose a limit on the number of participants.[6]
8. Limiting the maximum number of traders too severely can greatly limit the ability to add additional sponsoring universities, a consequence that severely undercuts the educational reach and purpose of the market.
9. We do not anticipate that more than a few thousand traders will participate in any particular election, other than for U.S. President. We expect that the level of public interest in a particular contract will in fact be the strongest and most natural limiting factor. However, where there is a particularly significant event contract in which many thousands more would want to participate, then rejecting those participants would utterly defeat the educational purpose of the project.

We therefore propose that the number of traders in any particular election be increased to 5000. We are of the strong opinion that greater limits on participants will significantly undermine the academic utility of the project. We anticipate that the higher cap proposed, coupled with a slightly higher maximum deposit limit (discussed below), will make the proposed markets more efficient by minimizing the likelihood of thinly-traded contracts, while preserving the small-dollar, educational purpose of the project, similar to IEM.

Markets Open to Non-Academic Traders

We also propose that Political Event Contracts not be limited to a fixed minimum percentage of "academic traders", such as the students and staff of educational institutions. There is nothing to suggest that any such limit used by IEM is in any way related to the educational purpose or the accuracy of the market, or has been justified by any comparative studies. Many of the same reasons stated above for expanding the number of traders would also logically apply to this issue as well.

There is simply no reason to believe a fixed minimum of academic participants will help with educational and research purposes of the market. In fact this is likely to bias the markets and reduce access to a broader range of informational sources therefore reducing accuracy. The primary educational and research purposes of the market rely on the market being informationally efficient and accurate. We also foresee a number of questions that will provide useful information for researchers, in which questions one would not want a quota for academic participation especially where the public debate is already led or heavily influenced by academics.

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[6] *See* **The Promise of Prediction Markets**., Science 16 May 2008, http://www.sciencemag.org/content/320/5878/877.full .
See also, **Betting on a future market**, NBC News, Science, http://www.nbcnews.com/science/betting-future-market-6C10405016?franchiseSlug=sciencemain . The Researchers making this request, and their affiliations at the time, were: Kenneth J. Arrow, Paul Milgrom and Erik Snowberg of Stanford University; Robert Forsythe of the University of South Florida; Michael Gorham of the Illinois Institute of Technology; Robert Hahn of the American Enterprise Institute; Robin Hanson of George Mason University; John O. Ledyard of the California Institute of Technology; Saul Levmore and Cass R. Sunstein of the University of Chicago Law School; Robert Litan of the Kauffman Foundation; Forrest D. Nelson and George R. Neumann of the University of Iowa; Marco Ottaviani of Northwestern University; Thomas C. Schelling of the University of Maryland at College Park; Robert J. Shiller and Paul C. Tetlock of Yale University; Vernon L. Smith, Philip E. Tetlock and Hal R. Varian of the University of California at Berkeley; Justin Wolfers of the University of Pennsylvania; and Eric Zitzewitz of Dartmouth College

Amount of Trader Investment

Under the 1992 and 1993 no-action letters addressing the original IEM proposals[7], the "maximum investment by any single participant in any one Submarket is $500." IEM continues to use that limit. However, using the Consumer Price Index, $500 in 1992 had the same buying power as $844.99 in 2014[8]. Therefore, we propose raising the limit to $850, to allow participants the ability to participate in several more contracts than they might otherwise if limited to 1992 levels. This will make the proposed markets more efficient by minimizing the likelihood of thinly-traded contracts, while preserving the small-dollar, research and academic purpose aspects of the IEM. This $850 limit also compares favorably with the $2000 annual investment limit recommended by 22 researchers (including two of the IEM's co-founders) in their 2008 request to Congress and the CFTC to clear up uncertainty in the regulation of prediction markets.[9]

Methods of Registration

The system will be employed to allow electronic registration to facilitate trader participation, while simultaneously safeguarding against duplicate or multiple accounts for the same user, or registration by minors. These registrations will be verified and authenticated through the KYC process to be provided by Aristotle's Integrity, and can take place in real-time.

Methods of Deposit/Withdrawal

Complementing the efficiency of electronic registration, and to otherwise make the proposed market system easier to use, the system will allow credit card deposits and withdrawals for those authenticated through the Integrity KYC process. Those transactions will be processed through Aristotle, which has years of experience handling such transactions. For example, Aristotle's Integrity service has processed over 50 million authentications using a database of government-issued ID and other government records. Aristotle also is an experienced processor, well versed in regulatory reporting and compliance, having handled millions of dollars in campaign contributions over the years for hundreds of candidates and political action committees through its service at www.campaigncontribution.com .

User Fees/Covering Costs

Neither the University nor its key personnel operating the market will receive any compensation or other payment for operating it. The pricing for the project will be set to cover anticipated regulatory compliance and operating costs. At this time, it is projected that, unlike IEM, the market terms will not require any upfront charge or fee. The only user fees will be those designed to cover for costs of credit card processing of deposits and withdrawals, fulfillment of the KYC process, and all other regulatory compliance and operating costs.

Marketing

We understand that one aspect of the IEM, as spelled out in the no-action letters, was that no one involved in the operation could engage in any "advertising" of the IEM. However, the IEM market would be less efficient, and therefore less valuable from a research standpoint, if the markets draw an inadequate pool of participants as a result of the marketing restrictions. It is the University's view that, in order to reach a pool of widely dispersed but interested political users, one must do limited advertisement to attract sufficient and diverse users to the market. The University believes that the reason that significant research based upon the data derived from prediction markets has been limited is due to a failure to reach a wider audience. Moreover, although IEM may not do "advertising", it does

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[7] *See* http://www.cftc.gov/files/foia/repfoia/foirf0503b002.pdf
[8] *See*, e.g., http://www.dollartimes.com/calculators/inflation.htm
[9] *See n. 7, supra.*

appear that it engages in promotional activity such as press releases[10] and links to earned media[11]. In short, we believe that the limitations on the modest amounts to be invested, together with efficient KYC controls to prevent multiple accounts and participation by minors, will be sufficient to preserve the non-commercial nature of the proposed markets without prohibiting limited efforts to publicize our activities. Any such promotional activities would contain a disclosure that the market is unregulated, and would be limited by targeting only media outlets where there is a high likelihood of reaching those interested in the subject matter of the contracts at hand. Promotional activity would not be directed at the general retail investing public.

Experimental Nature of Prediction Markets

Finally, as noted above, although IEM is reported to perform generally better than polls, this does not mean that the structure developed for IEM in the late 1980's, and approved by the CFTC in the 1992 and 1993 no-action letters, is optimal for an educational market. As the 22 leading academics wrote in their 2008 letter to the CFTC:

> The CFTC should allow researchers to experiment with several aspects of prediction markets—fee structures, incentives against manipulation, liquidity requirements and the like—with the goal of improving their design. Prediction markets are in an early stage, and if their promise is to be realized, researchers should be given flexibility to learn what kinds of design are most likely to produce accurate predictions. Of course, exchanges would need to inform their customers so that they are aware of the risks and benefits of participating in these markets.

Given that the market we propose is a small-money market, and has far greater safeguards than IEM to preserve the integrity of the operation, we believe that the design we have proposed will be in the public interest.

If you have any questions or require additional information, please do not hesitate to contact the undersigned.

Respectfully submitted,

Victoria University of Wellington

By: _____

Neil Quigley
Deputy Vice-Chancellor, Research

[10] *See, e.g.*, http://tippie.uiowa.edu/iem/media/releases.cfm
[11] *See, e.g.*, http://tippie.uiowa.edu/iem/media/news_current.cfm

Exhibit 5

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
July 21, 2023
Lyle W. Cayce
Clerk

No. 22-51124

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,

Plaintiffs—Appellants,

versus

COMMODITY FUTURES TRADING COMMISSION,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:22-CV-909

Before GRAVES, HO, and DUNCAN, *Circuit Judges*.

STUART KYLE DUNCAN, *Circuit Judge*:

The PredictIt Market is an online marketplace that lets people trade on the predicted outcomes of political events. Essentially, it is a futures market for politics. In 2014, a division within the Commodity Futures Trading Commission ("CFTC") issued PredictIt a "no-action letter," effectively allowing it to operate without registering under federal law. But, in 2022, the division rescinded the no-action letter, accusing PredictIt of

violating the letter's terms but without explaining how. It also ordered all outstanding PredictIt contracts to be closed in fewer than six months.

Various parties who participate in PredictIt (collectively, "Appellants") challenged the no-action letter's rescission in federal district court and moved for a preliminary injunction. The district court has not ruled on that motion, though, despite PredictIt's looming shutdown. Appellants now seek our review, treating the district court's inaction as effectively denying a preliminary injunction. We granted Appellants an injunction pending our consideration of their appeal.

The CFTC has since raised a host of objections to our even hearing the appeal, arguing that it is moot, that there has been no final agency action, that revoking the no-action letter was within the agency's discretion, and that Appellants lack standing. These threshold objections are all meritless.

We now conclude that a preliminary injunction was warranted because the CFTC's rescission of the no-action letter was likely arbitrary and capricious. So, we remand for the district court to enter a preliminary injunction while it considers Appellants' challenge to the CFTC's actions.

I. Background

Launched in 2014 by the Victoria University of Wellington in New Zealand, PredictIt was conceived as a data-gathering tool for academic researchers. It allows people to make small investments based on predicting political events, like future elections or the passage of federal legislation.

For instance, in recent markets predicting the 2024 presidential nominees, Donald Trump "shares" were trading at $0.56, while Ron DeSantis "shares" were trading at $0.22 (on 47.5 million shares traded). Joe Biden was outpacing Gavin Newsom by $0.66 to $0.21 (16.4 million shares). And in trading on whether Alexandria Ocasio-Cortez would run for president

in 2024, "No" was beating "Yes" $0.97 to $0.03 (361,000 shares). If a trader accurately predicts an event's outcome, each of his shares will cash out at $1.00.[1]

Offering these sorts of "event contracts" typically requires registering as "a designated contract market or swap execution facility" under the Commodity Exchange Act ("CEA") and CFTC regulations. *See* 7 U.S.C. § 7a-2(c)(5)(C)(i); 17 C.F.R. § 40.11.[2] But the CFTC can exempt certain transactions from the CEA. *See* 7 U.S.C. § 6(c)(1)–(2). And a division within the agency, the Division of Market Oversight ("DMO"), can issue various "letters" concerning the CEA. *See* 17 C.F.R. § 140.99 (setting out DMO authority to issue "exemptive, no-action, and interpretative letters"). Relevant here, a "no-action letter" provides that, as to a proposed transaction or activity, the DMO "will not recommend enforcement action to the [CFTC] for failure to comply with a specific provision of the Act or of a Commission rule, regulation or order." *See id.* § 140.99(a)(2). Only the division that issued the no-action letter is bound by it and "[o]nly the Beneficiary may rely upon the no-action letter." *Ibid.*

In 2014, seeking to operate PredictIt without registering under the CEA, Victoria University sought a no-action letter. The university proposed a small-scale, not-for-profit market that would serve as a valuable academic tool for researchers. This market, the university explained, would abide by certain limits, such as capping trader investment at $850 and restricting each event contract to 5,000 total traders.

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[1] *See* https://www.predictit.org/markets (last visited July 21, 2023).

[2] The CEA describes an "event contract" in relevant part as "agreements, contracts, transactions, or swaps in excluded commodities that are based upon the occurrence, extent of an occurrence, or contingency." 7 U.S.C. § 7a-2(c)(5)(C)(i).

In October 2014, DMO issued Victoria University's requested no-action letter. The letter stated that "based upon [Victoria University's] representations" to abide by certain terms—such as maintaining nonprofit status and allowing researchers to access generated data—the DMO would "not recommend that the Commission take any enforcement action." The letter also explained that its position "represent[ed] the views of DMO only, and d[id] not necessarily represent the positions or views of the Commission." And the DMO purported to "retain[] the authority to condition further, modify, suspend, terminate or otherwise restrict the terms of the no-action relief . . . in its discretion."

Nearly eight years later, in August 2022, the DMO rescinded the no-action letter. The revocation stated that "[t]he University has not operated its market in compliance with the terms of [the no-action letter]" and that, therefore, the no-action letter was "hereby withdrawn." The DMO provided no explanation about which terms of the letter had been violated. Instead, the revocation directed that "remaining listed contracts and positions comprising all associated open interest in such market should be closed out and/or liquidated no later than 11:59 p.m. eastern on February 15, 2023."

In September 2022, various parties affiliated with PredictIt ("Appellants") sued the CFTC in federal court.[3] They claimed the no-action letter's rescission was arbitrary and capricious because it failed to explain the agency's decision. *See* 5 U.S.C. § 706. They also claimed the revocation constituted a withdrawal of a license without the necessary procedural steps. *See* 5 U.S.C. § 558. Appellants moved for a preliminary

[3] Victoria University is not among those parties. Rather, Appellants consist of various third parties—including market operators, traders, and academics—who claim to be negatively impacted by the no-action letter's rescission.

injunction. In response, the CFTC moved to dismiss on the grounds that none of Appellants' claims was justiciable. In December 2022, a magistrate judge recommended the case be transferred to Washington, D.C. During this time, spanning three months, the district court did not rule on the preliminary injunction motion, even after Appellants moved to expedite its consideration in light of the looming deadline for closing PredictIt contracts.

Given this inaction, Appellants appealed what they deemed the effective denial of a preliminary injunction. The CFTC moved to dismiss the appeal for lack of jurisdiction. A motions panel of our court denied that motion, citing *Carson v. Am. Brands, Inc.*, 450 U.S. 79 (1981). Under *Carson*, a court of appeals may review a district court's order that, while not explicitly denying a preliminary injunction, "nonetheless ha[s] the practical effect of doing so" and might cause irreparable harm absent immediate appeal. *Id.* at 83; *see also, e.g.*, *Thomas ex rel. D.M.T. v. Sch. Bd. of St. Martin Par.*, 756 F.3d 380, 384 & n.7 (5th Cir. 2014); 28 U.S.C. § 1292(a)(1). The motions panel carried with the case Appellants' motion for an injunction pending appeal. Our panel granted that injunction on January 26, 2023, and heard argument in February 2023.

Less than a month later, in March 2023, the CFTC withdrew its August 2022 rescission of the no-action letter. Notwithstanding the injunction pending appeal, the agency substituted a new letter that "determined as a preliminary matter that [the no-action letter] is void and should be withdrawn." This new letter gave some explanation for rescinding the no-action letter and gave Victoria University a chance to respond. Given these developments, the CFTC moved to dismiss this appeal as moot. Appellants opposed and cross-moved for sanctions, arguing the CFTC had violated our earlier injunction. On May 1, 2023, we denied both motions. At the same time, we clarified that CFTC "is ENJOINED from closing the

PredictIt Market or otherwise prohibiting or deterring the trading of Market contracts until 60 days after a final judgment in this matter."

II. Threshold Issues

Before addressing whether a preliminary injunction is warranted, we consider several threshold issues raised by the CFTC. Those are: (1) whether the appeal is moot; (2) whether withdrawal of the no-action letter is "final agency action"; (3) whether that withdrawal is unreviewable prosecutorial discretion; and (4) whether Appellants have standing.

A. Mootness

The CFTC contends this appeal is moot because the August 2022 rescission of PredictIt's no-action letter is no longer in effect, having been replaced by the March 2023 letter. And that new letter, the CFTC argues, gives Appellants "the full extent of post-remand relief available to [them]," by providing an explanation for the rescission and a chance for Victoria University to be heard. Moreover, because the March 2023 letter expresses only a "preliminary" determination, the CFTC argues there is "nothing before this Court to review." In opposition, Appellants invoke the doctrine of voluntary cessation and also argue that the March 2023 letter remains procedurally deficient.

The appeal is not moot. Post-filing events do not moot a case "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation." *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012) (citation omitted) (alteration in original). That is true here. The parties continue to spar over whether PredictIt can operate outside the CEA's strictures. Although the DMO has now taken down its August 2022 rescission of the no-action letter, its March 2023 replacement continues to say the letter "is void and should be withdrawn." It makes no difference that the DMO calls this new action "preliminary" and allows Victoria University

to lodge objections. The fact that Victoria University can try to change the DMO's mind does not change the fact that the DMO has declared the no-action letter "void." A case is not moot when the government rescinds one law only to enact a different version that "disadvantages [the plaintiffs] in the same fundamental way." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993).[4]

Nor is it the true that the March 2023 letter gives Appellants all they ask for. That letter actually gives nothing to *Appellants*—it lets Victoria University object to the no-action letter's withdrawal but says nothing about Appellants. And, in any event, Appellants continue to assert that the March 2023 letter, despite giving some explanation for the rescission, falls short of what the APA requires when an agency changes course. *See, e.g.*, *Wages & White Lion Invs., LLC v. FDA*, 16 F.4th 1130, 1139 (5th Cir. 2021) ("When an agency changes course, . . . it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." (citation omitted)).

B. Final Agency Action

The CFTC also argues that withdrawal of the no-action letter is unreviewable because it is neither "agency action" nor "final." *See* 5 U.S.C.

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[4] The voluntary cessation doctrine, invoked by Appellants, only underscores why this appeal is not remotely moot. *See, e.g.*, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) ("[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice."). If the agency had *stopped* the complained-of conduct (say, by simply withdrawing the August 22 rescission and reinstating the no-action letter), the doctrine would have us consider whether it is "absolutely clear" that the conduct would not recur. *Already, LLC v. Nike*, 568 U.S. 85, 91 (2013). But exactly the opposite has happened: the agency has *persisted in* its conduct by reiterating that the no-action letter is "void." *See, e.g.*, *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 286 (5th Cir. 2012) ("Here, as in *Associated General Contractors*, [the defendant] has already repeated its allegedly wrongful conduct.").

§ 704 (providing judicial review of "final agency action"). We disagree on both points.

First, agency action. "Under the APA, 'agency action' is a defined term, limited to an 'agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.'" *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (quoting 5 U.S.C. § 551(13)). The parties joust over whether the no-action letter is a "license" under this definition. Appellants say yes, contending the letter is a "form of permission" to operate a proposed market. *See* 5 U.S.C. § 551(8) (defining "license" as "an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other *form of permission*" (emphasis added)). The CFTC says no, because "[n]othing in the CEA or any regulation permits staff to license trading facilities" and that the no-action letter, on its face, granted "no affirmative entitlement to do anything." We agree with Appellants.

The no-action letter qualifies as agency action under the APA. "Agency action" has a broad sweep: the term "is meant to cover comprehensively every manner in which an agency may exercise its power." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001).[5] Here, the whole point of Victoria University's requesting the no-action letter was to obtain permission to operate an unregistered event futures market, and to get that green light before plunging significant resources into it.

The no-action letter itself characterizes the university as seeking "no-action relief that would allow Victoria University . . . to operate" the

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[5] *See also Abbott Lab'ys v. Gardner*, 387 U.S. 136, 140–41 (1967) (explaining that the APA is meant to "cover a broad spectrum of administrative actions" and so its "generous review provisions must be given a hospitable interpretation" (citations and internal quotation marks omitted)); *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 239 n.7 (1980).

proposed market. Furthermore, the letter details the proposed market, states that operating it outside the CEA's strictures would not be "contrary to the public interest," and affirmatively "allow[s]" proposed variations from a different event market. Thus, by the letter's own terms, the no-action relief granted is a "form of permission." *See* 5 U.S.C. § 551(8).

Courts have previously found that such grants of permission to avoid compliance with administrative requirements constitute agency action. *See, e.g.*, *Atl. Richfield Co. v. United States*, 774 F.2d 1193, 1200 (D.C. Cir. 1985) (discussing one such "temporary license"); *Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067, 1072–76 (7th Cir. 1982) (reviewing withdrawal of a special permit exempting customs brokers from ordinary requirements). Therefore, because the no-action letter here is a "license" within the meaning of the APA, its withdrawal constitutes agency action. *Cf.* 5 U.S.C. § 558(c) (providing procedural protections for license revocations).

Next, finality. Agency action is final when it meets two requirements: "(A) the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature;" and "(B) the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Data Mktg. P'ship v. U.S. Dep't of Lab.*, 45 F.4th 846, 853 (5th Cir. 2022) (citations and internal quotation marks omitted); *see generally Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). "This is generally a 'pragmatic' inquiry." *Data Mktg.*, 45 F.4th at 853 (quoting *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 599 (2016)). And it is a pragmatic inquiry colored by the APA's embodiment of the "basic presumption of judicial review." *Abbott Lab'ys*, 387 U.S. at 140.

The CFTC argues that neither finality prong is met. Granting or revoking no-action relief, it claims, does not "consummate" the agency's decisional process because it is interlocutory—meaning, it pertains only to

whether DMO staff will recommend enforcement action to the CFTC. Nor does the letter's withdrawal trigger any legal consequences. The agency assures us that PredictIt "is free to continue unabated with or without any staff no-action relief," and that the CFTC can commence enforcement "with or without a staff no-action letter." Countering this, Appellants argue that the no-action letter's withdrawal is final because it is unappealable and subjects impacted parties to enforcement proceedings. We again agree with Appellants and find that both finality prongs are met.

As to the "consummation" prong, the key question is whether withdrawal of the no-action letter is "subject to further agency review." *Data Mktg.*, 45 F.4th at 854 (quoting *Sackett v. EPA*, 566 U.S. 120, 127 (2012)); *see also Louisiana v. U.S. Army Corps of Eng'rs*, 834 F.3d 574, 581 (5th Cir. 2016) (same). It is not: the DMO's decision to issue or withdraw the letter is unappealable. So, it does not matter that the letter pertains only to the staff's recommendation to the agency. Once the staff decide to issue or withdraw the letter, there is no further appeal within the agency. Illustrating that reality, CFTC regulations state that a beneficiary "may rely" on the DMO's issuing a no-action letter. 17 C.F.R. § 140.99(a)(2).

As to the "legal consequences" prong, once more our recent decision in *Data Marketing* is instructive. As we explained, it is "well-established that 'where agency action withdraws an entity's previously held discretion, that action alters the legal regime, binds the entity, and thus qualifies as final agency action.'" *Data Mktg.*, 45 F.4th at 854 (quoting *Texas v. EEOC*, 933 F.3d 433, 442 (5th Cir. 2019)). That condition was satisfied in *Data Marketing* because the relevant regulation stated that requestors may "rely" on an advisory opinion. *Ibid.* This reliance "bound the Department to some degree and withdrew its previously held discretion." *Ibid.* The same can be said about PredictIt's no-action letter: it withdrew some of the CFTC's discretion because regulations state a beneficiary "may rely" on it. 17 C.F.R

§ 140.99(a)(2). Thus, for the same reasons as in *Data Marketing*, legal consequences flowed from the 2014 no-action letter issued by the DMO.[6]

None of this is changed by the fact that the DMO has now issued its March 2023 letter. Like the August 2022 letter it supersedes, the March 2023 letter cancels PredictIt's no-action relief. It states: "As a result of the University's non-compliance with the terms of [no-action letter], DMO has determined as a preliminary matter that [no-action letter] is void and should be withdrawn." True, the letter purports to make that decision "as a preliminary matter," and it "invite[s] the University to submit any objections it may have" by March 20, 2023. But the letter does not promise to reconsider its decision that the no-action letter "is void and should be withdrawn."

But, again, the possibility that the DMO may reconsider is irrelevant to our inquiry. "[T]he mere fact that the agency could—or actually does—reverse course in the future does not change" an action's finality. *Data Mktg.*, 45 F.4th at 854 (citing *Biden v. Texas*, 142 S. Ct. 2528, 2545 (2022)). The March 2023 letter does not say the DMO is merely *considering* withdrawing no-action relief; it accuses the university of violating the no-action letter's term in numerous ways and declares the letter "void." This forces Appellants "either to alter [their] conduct, or to expose [themselves]

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[6] The CFTC observes, and the dissent stresses, that a no-action letter "represents the position only of the Division that issued it" and "binds only the issuing Division . . . and not the Commission or other Commission staff." 17 C.F.R. § 140.99(a)(2); *see post* at 2. That does not change our analysis. That same regulation explains that a beneficiary "may rely upon the no-action letter." *Ibid.* This, once more, suggests that the CFTC has withdrawn its discretion to bring enforcement proceedings against the holder of a no-action letter, which undermines the contention that the CFTC is in no way bound through no-action letters.

to potential liability." *Texas v. EEOC*, 933 F.3d at 446 (quoting *Texas v. EEOC*, 827 F.3d 372, 383 (5th Cir. 2016)).

For these reasons, the DMO's withdrawal of no-action relief constitutes final agency action.

C. Committed to Agency Discretion

The CFTC briefly argues that withdrawing no-action relief is unreviewable as "committed to agency discretion by law." *See* 5 U.S.C. § 701(a)(2). It contends that no-action letters are like agency decisions not to prosecute or enforce and, as such, are the "classic illustration of a decision committed to agency discretion." *Bd. of Trade of Chi. v. SEC*, 883 F.2d 525, 530 (7th Cir. 1989); *see generally Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985) (discussing why agency decisions to refuse enforcement are generally unsuitable for judicial review). We disagree.

This case does not challenge an agency's discretionary decision to enforce (or not enforce) the law. What is challenged, rather, is the withdrawal of a regulatory instrument (the no-action letter) that ensured the DMO would not recommend that the agency enforce the CEA against PredictIt. And, as we have pointed out, the agency's own regulations allow beneficiaries to rely on such letters. *See* 17 C.F.R. § 140.99(a)(2). The cases the CFTC cites involve the distinct scenario where third parties try to compel an agency to enforce penalties against recipients of no-action letters. *Cf. Chicago Bd. of Trade*, 883 F.2d at 530 (a challenge to the *issuance* of a no-action letter is unreviewable as committed to agency discretion). Those cases might apply if we had some third party challenging PredictIt's no-action letter, arguing the DMO should never have issued it. This case is different: the no-action letter has been rescinded, and the affected parties claim the agency failed to do so properly.

We thus conclude that the decision to rescind a no-action letter is not "committed to agency discretion by law."

D. Standing

The CFTC also argues that Victoria University's absence spoils Appellants' standing. "An individual has standing to sue if his injury is traceable to the defendant and a ruling would likely redress it." *Tex. State LULAC v. Elfant*, 52 F.4th 248, 253 (5th Cir. 2022) (citations omitted). In other words: (1) injury, (2) traceability, and (3) redressability. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); U.S. Const. art. III, § 2. Appellants say they satisfy each prong. We agree.

Appellants—market operators, traders, and academics claiming to be impacted by the no-action letter's rescission—easily satisfy the standing requirements. At this stage, they have shown numerous injuries stemming from the letter's withdrawal and the resulting impact on the PredictIt Market. Academics will lose a research tool that was PredictIt's *raison d'être*. Traders will lose value in compromised contracts. And PredictIt's service providers will incur costs from having to prematurely shut down operations. Indeed, Appellants have shown that financial harm was *already* ongoing before this court issued a stay pending appeal, with "the CFTC's prohibition on new markets and the impending shutdown order" causing market distortions and "a significant withdrawal of funds."

These injuries, moreover, are directly traceable to the no-action letter's withdrawal. Operation of the PredictIt market depended on the 2014 no-action relief; withdrawing it would obviously imperil the market, resulting in harms to Appellants. Finally, a favorable ruling would redress these injuries by allowing trading to continue on the same terms as before while the district court adjudicates Appellants' challenge to the CFTC's action.

The CFTC resists these conclusions. It argues that because "[o]nly the Beneficiary may rely on the no-action letter," 17 C.F.R. § 140.99(a)(2), only a no-action letter's beneficiary (here, Victoria University) would have standing to sue. It also observes that all of Appellants' alleged injuries "reflect[] a downstream harm flowing directly from Victoria University's hypothetical decision to continue or cease operating PredictIt." It cites *National Wrestling Coaches Ass'n v. Department of Education*, 366 F.3d 930 (D.C. Cir. 2004), where several interested parties in the collegiate men's wrestling world (though not the universities and colleges themselves) challenged a policy interpretation of Title IX. *Id.* at 934–36. The D.C. Circuit found that the plaintiffs lacked standing because they failed to establish causation and redressability: it was unclear that the third-party colleges would eliminate their men's wrestling programs in response to the Title IX guidance's being enjoined. *Id.* at 938–45. According to the CFTC, that same deficiency is present here because Victoria University may choose to operate or close PredictIt independent of any no-action letter.

These counterarguments miss the mark. Whatever CFTC regulations might say, the APA permits suit by anyone "adversely affected or aggrieved by agency action." 5 U.S.C. § 702. Appellants fall into that category. And *National Wrestling* is distinguishable. In that case, the court reasoned that even if the challenged policy was enjoined, "Title IX and the 1975 Regulations would still be in place," serving as an independent obligation for federally funded schools to equally accommodate both genders in athletics. *Nat'l Wrestling*, 366 F.3d at 939–40. Thus, the third-party schools would not necessarily behave any differently than they otherwise would. *Id.* at 940. Here, by contrast, enjoining the withdrawal of no-action relief would reinstate the 2014 no-action letter, permitting PredictIt to continue operating as before. And there would be no independent obligations

to register with the CFTC because of the promise that Victoria University "may rely" on its no-action relief. 17 C.F.R. § 140.99(a)(2).

In sum, Appellants have standing.

III. Preliminary Injunction

We now turn to whether the district court abused its discretion by denying a preliminary injunction. *See Moore v. Brown*, 868 F.3d 398, 402 (5th Cir. 2017) (per curiam). To obtain a preliminary injunction, Appellants must show: (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable harm if the injunction does not issue, (3) that the threatened injury outweighs any harm that will result if the injunction is granted, and (4) that granting the injunction is in the public interest. *Id.* at 402–03.

A. Substantial Likelihood of Success

We first ask whether Appellants are substantially likely to show that the no-action letter's revocation was arbitrary and capricious. "The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *Data Mktg.*, 45 F.4th at 855 (quoting *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021)). The court can only consider the reasoning "articulated by the agency itself," and cannot consider "*post hoc* rationalizations for agency action." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 50 (1983). "[W]e must set aside any action premised on reasoning that fails to account for 'relevant factors' or evinces 'a clear error of judgment.'" *Data Mktg.*, 45 F.4th at 855 (quoting *Univ. of Tex. M.D. Anderson Cancer Ctr. v. HHS*, 985 F.3d 472, 475 (5th Cir. 2021)).

The August 2022 revocation fails these standards for the obvious reason that it gives no explanation whatsoever. Instead of "reasonably

explain[ing]" the withdrawal, *ibid.*, the DMO delivered this terse missive: "The University has not operated its market in compliance with the terms of [the no-action letter]." Not a word discloses which terms were violated or what evidence supports the charge. Nor is any reason given why PredictIt must swiftly close all contracts by a certain date or why the agency rejected less draconian measures, given the significant reliance interests in play. *See, e.g.*, *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013) (agency action is not upheld if it fails to consider "significant and viable and obvious alternatives" (cleaned up)). This is the epitome of arbitrary and capricious action. *See Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007) ("We . . . require more than a result; we need the agency's *reasoning* for that result." (emphasis added)).

Less than a month after oral argument, the agency tried to fix these glaring defects by issuing the March 2023 letter. As noted, this letter purports to "supersede" the August 2022 rescission while reaffirming the agency's decision that the no-action letter "is void and should be withdrawn." It also provides some explanation for withdrawing the no-action letter, such as the charge that Victoria University violated the letter's terms by allowing a for-profit company (Aristotle, Inc.) to operate PredictIt. We have already explained why the March 2023 letter does not moot this appeal. *See supra* II(A).

The March 2023 letter should also have no bearing on whether the withdrawal of the no-action letter is arbitrary and capricious. That is because the letter violates the injunction pending appeal our panel previously entered. Appellants had asked us to "enjoin the enforcement of the Commission's February 15, 2023, liquidation mandate and allow the PredictIt Market event contracts that were offered as of the date of the agency's decision . . . to continue trading pending resolution of this appeal." We granted that requested injunction on January 26, 2023.

The March 2023 letter violates that injunction by purporting to withdraw no-action relief, thereby subjecting PredictIt—and all of its existing contracts—to regulation. Although we exercised our discretion to deny Appellants' sanctions motion, we will not allow the enjoined agency to game the system by retrofitting its previous rescission with "reasons" after oral argument. *See Texas v. Biden*, 10 F.4th 538, 558–59 (5th Cir. 2021) ("It is a fundamental precept of administrative law that an administrative agency cannot make its decision first and explain it later.").

But even if we were to consider the March 2023 letter, we would still find serious problems with its reasons for voiding the no-action letter. To begin with, we have concluded that the no-action letter qualifies as a "license" under the APA. *See supra* II(B). The March 2023 letter, however, does not purport to follow the procedural requirements for withdrawing a license. *See* 5 U.S.C. § 558(c). The agency only provided Victoria University with an opportunity to respond to objections. It offered no opportunity for Victoria University "to demonstrate or achieve compliance" with the requirements that were purportedly violated. *Id.* § 558(c)(2). The withdrawal of no-action relief is therefore procedurally deficient on that basis alone.

Aside from that defect, there are other evident flaws in the March 2023 letter's substance. For instance, the letter does not meaningfully explain why the DMO rejected alternatives like allowing currently existing markets to expire on their own terms. It says only that such alternatives would not "be appropriate," given the likelihood of recurrence due to past violations. But the letter does not explain why past violations suggest a likelihood of recurrence in the future. This is hardly the "reasoned decisionmaking" required of administrative agencies. *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1988)).

Nor does the DMO justify its conclusion that monitoring future compliance would require an "unreasonable use of taxpayer resources." It says nothing about the magnitude of the resources required and does not explain why they would not be justified given longstanding reliance interests. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016) ("[A]n agency must also be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009))); *Michigan*, 576 U.S. at 750–51 (requiring consideration of both sides of the cost-benefit ledger).

Finally, the letter engages in obvious *post hoc* rationalization. It tries to partially justify the agency's charge that Victoria University "ceded operational control" of PredictIt to a for-profit company by referring to remarks made by the company's counsel *at oral argument*. That is verboten. What counsel said at argument cannot justify actions the agency took months if not years before. *See DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020) ("It is a 'foundational principle of administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" (quoting *Michigan*, 576 U.S. at 758)); *see also SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) ("[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.").

In sum, we conclude that the revocation of the no-action letter was likely arbitrary and capricious because the agency gave no reasons for it. And the agency's attempts to retroactively justify the revocation after oral argument—and in the face of our injunction—only underscore why Appellants are likely to prevail.

B. Irreparable Injury

We now turn to irreparable injury. Appellants have alleged a number of harms they will suffer absent a preliminary injunction. First, investors and traders will not be able to see their contracts through and realize any gains from having predicted events correctly. Even if they wanted to cash out now, the prices for those contracts would be distorted due to the market disruptions that the no-action letter's rescission engendered. Second, as traders have attempted to salvage their investments due to a looming and impending shutdown order, academics have had their research compromised by the trading irregularities that corrupted the integrity of their data. Finally, PredictIt's operators have been saddled with heavy compliance costs given the market's closure.

As it did in the standing context, the CFTC claims that all of these harms are inherently speculative. It asserts that any possible injuries could be undone through monetary remedies. And, although the United States would enjoy sovereign immunity, Appellants could sue the market operators. *See Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012) ("The possibility that adequate compensatory or other corrective relief will be available at a later date . . . [weighs] heavily against a claim of irreparable harm" (quoting *Morgan v. Fletcher*, 518 F.3d 236, 240 (5th Cir. 1975))).

We disagree and conclude that Appellants are likely to suffer irreparable harm. As noted, Appellants have shown they were *already* undergoing harm before we issued the stay pending appeal. Some of these harms, such as the academic value of accurate data, would be difficult to restore with monetary damages. And to the extent some of these harms are economic, the United States cannot be sued due to its sovereign immunity. *See Wages & White Lion Invs.*, 16 F.4th at 1142 ("[C]omplying with an agency order later held invalid almost *always* produces the irreparable harm of

nonrecoverable compliance costs . . . because federal agencies generally enjoy sovereign immunity for any monetary damages." (cleaned up, quotation omitted)). To the extent the CFTC argues that the market operators could always be sued, that argument neglects the simple fact that at least some of those operators are themselves parties to this lawsuit.

We therefore conclude that Appellants have established a substantial likelihood of suffering irreparable harm absent a preliminary injunction.

C. Balance of the Equities and the Public Interest

Finally, we consider the remaining preliminary injunction factors: the balance of the equities and the public interest. These factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). When addressing these factors, "courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Winter v. NRDC*, 555 U.S. 7, 24 (2008) (quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987)).

These factors weigh in favor of granting an injunction. On Appellants' side, the harms include all those just discussed: investor losses, corrupted academic data due to market distortions, and heavy compliance costs on market operators. Moreover, "[t]he public interest is served when administrative agencies comply with their obligations under the APA." *Northern Mariana Islands v. United States*, 686 F. Supp. 2d. 7, 21 (D.D.C. 2009).

As for the other side of the ledger, the CFTC points to the systemic harms that would arise by permitting litigation on informal no-action letters. It argues that requiring full-dress APA litigation on these sorts of informal letters would discourage the practice of giving them in the first place, and result in "a net loss of far greater proportions to the average citizen than any possible gain which would accrue." *Taylor-Callahan-Coleman Cntys. Dist.*

Adult Prob. Dep't v. Dole, 948 F.2d 953, 959 (5th Cir. 1991) (citation omitted). While mindful of that possibility, that sort of a high-level, systemic consideration cuts both ways: agency decisionmaking is legitimated in part by the agency's providing adequate reasons. Especially where, as here, longstanding policies have engendered serious reliance interests, agencies must take those considerations into account before abruptly changing course. *See Encino Motorcars,* 579 U.S. at 221–22.

Accordingly, we conclude that the balance of the equities and the public interest weigh in favor of granting a preliminary injunction

IV. Conclusion

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.

JAMES C. HO, *Circuit Judge*, concurring:

Plaintiffs' theory of final agency action admittedly conflicts with the precedents of our sister circuits. To my knowledge, no circuit has held that a no-action letter or its withdrawal is sufficient to constitute "final agency action" under the Administrative Procedure Act. And some have held the opposite. *See*, *e.g.*, *New York City Employees' Retirement System v. SEC*, 45 F.3d 7, 12 (2nd Cir. 1995) ("No-action letters . . . do not impose or fix a legal relationship upon any of the parties."); *Trinity Wall Street v. Wal-Mart Stores, Inc.*, 792 F.3d 323, 331 (3rd Cir. 2015) ("[N]o-action letters are not binding—they reflect only informal views of the staff and are not decisions on the merits."); *Bd. of Trade of City of Chicago v. SEC*, 883 F.2d 525, 531 (7th Cir. 1989) ("The petition for review of the no-action letter . . . is dismissed for want of a reviewable order."). *Cf. Paul v. Petroleum Equipment Tools Co.*, 708 F.2d 168, 174 n.5 (5th Cir. 1983) ("[T]his 'no action' position is not equivalent to an exemption.").

That said, we need not reach a definitive conclusion on this issue at this time. As detailed in the majority opinion, the issues presented in this case are sufficiently close that Plaintiffs have demonstrated a substantial likelihood of success, and satisfied the remaining elements required for a preliminary injunction as well.

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). "[F]indings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *Id. See also Feds for Medical Freedom v. Biden*, 63 F.4th 366, 389 (5th Cir. 2023) ("We hasten to emphasize that this case only involves a *preliminary* injunction.").

Accordingly, I concur.

JAMES E. GRAVES, JR., *Circuit Judge*, dissenting:

Although I agree that this case is not moot, I would not issue a preliminary injunction in this case. As reiterated by this court on numerous occasions, the issuance of a preliminary injunction is an exceptional remedy that should be granted only when the moving party has clearly shown that they can meet all four requirements. *See, e.g.*, *Guy Carpenter & Co. v. Provenzale*, 334 F.3d 459, 464 (5th Cir. 2003) ("A preliminary injunction is an extraordinary remedy which courts grant only if the movant has clearly carried the burden as to all four elements."); *Allied Marketing Group., Inc. v. CDL Marketing, Inc.*, 878 F.2d 806, 809 (5th Cir. 1989) (stating that preliminary injunctive relief "is an extraordinary remedy and should be granted only if the movant has clearly carried the burden of persuasion with respect to all four factors"). We do not grant such relief unless we find: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) the threatened injury to the movant outweighs the threatened harm to the party sought to be enjoined; and (4) granting the injunctive relief will not disserve the public interest. *City of Dallas v. Delta Air Lines, Inc.*, 847 F.3d 279, 285 (5th Cir. 2017).

I am not convinced that Appellants have satisfied this high burden. In my view, Appellants have failed to demonstrate a substantial likelihood that they will prevail on the merits, as there is no final agency action in this case. For agency action to be "final," two conditions must be met: (1) "the action must mark the 'consummation' of the agency's decisionmaking process"; and (2) "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted). CFTC's no-action letters fail to satisfy either condition: they neither mark the consummation of the agency's decisionmaking process nor determine Appellants' legal rights or obligations.

CFTC rule 140.99 outlines the procedure for requesting Commission staff letters. *See* 17 C.F.R. § 140.99. The rule, among other things, requires that the request must be made by or on behalf of the person subject to the request, must relate to a proposed transaction or activity, and must set forth as completely as possible all material facts and circumstances. *See id.* § 140.99(b). When the CFTC staff reviews a request, the rule makes clear that the "[i]ssuance of a [l]etter is entirely within the discretion of Commission staff." *Id.* § 140.99(b)(1). Rule 140.99 further explains that no-action letters are "a written statement" that the issuing staff, here DMO, "will not recommend enforcement action to the Commission," and that such a statement "binds only the issuing Division . . . and not the Commission." *Id.* § 140.99(a)(2). Thus, no-action letters are informal and advisory, inherently staff-level statements about whether the issuing staff might (or might not) recommend to the CFTC that the Commission, at the Commission's sole discretion, vote to authorize civil proceedings against a non-compliant entity. Accordingly, these letters plainly do not mark the consummation of the *agency's* decisionmaking. Nor do the letters represent a decision determining rights or obligations, or one from which legal consequences flow as it does not commit the CFTC to taking enforcement action.

Despite this, the majority concludes that the 2014 no-action letter effectively constituted a "license." *See ante* at 9. Under the APA, a "license" is defined as "an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." 5 U.S.C. § 551(8). With such a sweeping definition at hand, the majority concludes that "by the letter's own terms, the no-action relief granted is a form of permission." *See ante* at 9 (internal quotation marks omitted). I remain

unconvinced by this argument, as the word "permission" is commonly understood as a formal authorization.[1]

What happened here is in stark contrast to the concept of explicit consent. On its face, the no-action letter does not grant Appellants the right to do anything. Instead, the letter simply expresses DMO's intention to "not recommend that the Commission take any enforcement action in connection with the operation of [the] proposed market." The DMO's decision was contingent upon information furnished by Appellants and was subject to certain conditions. The letter explicitly states that any alterations, omissions, or discrepancies in the facts or circumstances may render the granted no-action relief null and void. Thus, to maintain that the absence of a recommendation to prosecute equates to formal consent stretches the bounds of credulity. *See Paul v. Petroleum Equip. Tools Co.*, 708 F.2d 168, 174 n.5 (5th Cir. 1983) (observing that a "no-action" letter "is not equivalent to an exemption") (Higginbotham, J.).

I have not come across any instance where a court has ruled that a "no-action letter" constitutes a final action taken by the agency. Tellingly, the majority cites no such case. Contrarily, no-action letters have been regularly found to be non-binding and devoid of legal authority, precluding their review. *See, e.g.*, *Trinity Wall St. v. Wal-Mart Stores, Inc.*, 792 F.3d 323, 331 (3d Cir. 2015) (recognizing that "no-action letters are not binding—they reflect only informal views of the staff and are not decisions on the merits"); *Board of Trade of City of Chicago v. SEC*, 883 F.2d 525, 530 (7th Cir. 1989)

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[1] Permission, Dictionary.com, http://www.dictionary.com/browse/permission (last visited June 9, 2023) (first definition) ("Permission" is defined as "authorization granted to do something; formal consent"); Permission, Merriam-Webster.com, merriamwebster.com/dictionary/permission (last visited June 9, 2023) (second definition) ("Permission" is defined as "formal consent: AUTHORIZATION").

(concluding that SEC no-action letters are not reviewable because they do not constitute a "final" decision concerning the status of the parties); *New York City Emps.' Ret. Sys. v. SEC*, 45 F.3d 7, 12 (2d Cir. 1995) ("No-action letters are deemed interpretive because they do not impose or fix a legal relationship upon any of the parties."). Because I am not persuaded that we should be the first court to draw the conclusion that a "no-action letter" constitutes "final agency action," I respectfully dissent.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

July 21, 2023

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 22-51124 Clarke v. CFTR
USDC No. 1:22-CV-909

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH CIR. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5TH CIR. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that defendant-appellee pay to plaintiffs-appellants the costs on appeal. A bill of cost form is available on the court's website www.ca5.uscourts.gov.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Mr. Shannen Wayne Coffin
Mr. Michael J. Edney
Ms. Renee Flaherty
Mr. Jeff Rowes
Mr. Russell Ryan
Ms. Anne Whitford Stukes
Mr. Martin B. White

TAB 18

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' NOTICE OF INTENT TO FILE MOTION TO STAY VENUE TRANFER PENDING APPEAL

Plaintiffs file this notice respectfully to advise the Court that they intend to file a motion to stay the Court's January 16 Order Granting Motion to Transfer Venue (Dkt. 61) no later than the next business day, Monday, January 22, 2024. Plaintiffs will petition the U.S. Court of Appeals for the Fifth Circuit for mandamus review of the transfer decision because "mandamus is the prescribed vehicle for reviewing rulings on transfers of cases pursuant to 28 U.S.C. § 1404(a)." *Def. Distributed v. Bruck*, 30 F.4th 414, 423 (5th Cir. 2022). The Fifth Circuit has regularly used mandamus to reverse transfer decisions. *Id.* (collecting cases). The Fifth Circuit should be entitled to hear that petition without the administrative difficulties of the case already having been transferred. This is particularly

so in light of the fact that the Circuit Court is the court in this jurisdiction with the most substantive investment in this case. Plaintiffs' forthcoming motion will ask the Court to stay its transfer order during the pendency of the mandamus petition.

Plaintiffs respectfully submit that the Court and the Clerk of the Court should not take further administrative actions to transfer the case until the motion for stay has been filed and ruled upon.

Respectfully submitted,

/s/ Michael J. Edney

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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 January 19, 2024, 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

TAB 19

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
July 21, 2023
Lyle W. Cayce
Clerk

No. 22-51124

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,

Plaintiffs—Appellants,

versus

COMMODITY FUTURES TRADING COMMISSION,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:22-CV-909

Before GRAVES, HO, and DUNCAN, *Circuit Judges*.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is REVERSED and REMANDED to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendant-appellee pay to plaintiffs-appellants the costs on appeal to be taxed by the Clerk of this Court.

JAMES C. HO, *Circuit Judge*, concurring.

JAMES E. GRAVES, JR., *Circuit Judge*, dissenting.

Certified as a true copy and issued as the mandate on Sep 12, 2023

Attest: Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

TAB 20

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.	No. __-_____

DECLARATION OF DAVID MASON

I, David Mason, do hereby declare under penalty of perjury, in accordance with 28 U.S.C. § 1746, that the following is true and correct, and that I am competent to testify to the matters stated herein:

1. My name is David Mason. I am the General Counsel and Chief Compliance Officer at Aristotle International, Inc.

2. I have personal knowledge of the facts stated herein.

3. On September 20, 2023, I attended a Chicago Bar Association event entitled "State of the Administrative State and its effect on the CFTC and SEC." One topic of the panel discussion was "[t]he recent Fifth Circuit PredictIt decision," meaning this Court's opinion in *Clarke v. Commodity Futures Trading Comm'n*, 74 F.4th 627 (5th Cir. 2023). *See* https://katten.com/state-of-the-administrative-state-and-its-effect-on-the-cftc-and-sec.

4. One of the speakers at the event was Rob Schwartz, the General Counsel of the Commodity Futures Trading Commission. During his remarks, Mr. Schwartz discussed litigation trends facing the Commission, and specifically commented on this Court's opinion in *Clarke*.

5. In discussing the *Clarke* opinion, Mr. Schwartz remarked that it would "verge on malpractice" for a plaintiff's lawyer not to bring an administrative law challenge in the Fifth Circuit if venue were permissible in the Fifth Circuit. Mr. Schwartz then added that "I think about the Fifth Circuit all the time now."

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on January 31, 2024

/s/ David Mason
David Mason

Tab 21

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

KEVIN CLARKE, ET AL.,	§	NO. 1:22-CV-909-DAE
	§	
Plaintiffs,	§	
	§	
vs.	§	
	§	
COMMODITY FUTURES TRADING COMMISSION,	§	
	§	
Defendant.	§	
	§	

ORDER DENYING MOTION FOR THIS COURT TO REQUEST RETURN OF THE CASE FROM THE DISTRICT OF COLUMBIA

The matter before the Court is Plaintiffs' Motion for this Court to Request Return of the Case from the District of Columbia. (Dkt. # 67.) Defendant Commodity Futures Trading Commission ("CFTC") filed a response in opposition on January 26, 2024 (Dkt. # 68), and Plaintiffs filed their reply on January 29, 2024 (Dkt. # 69). After careful consideration of the matters raised in the motion, the Court will **DENY** Plaintiff's request.

BACKGROUND

The background facts of this case are fully discussed in the Court's Order Granting Motion to Transfer Venue of this case to the U.S. District Court for the District of Columbia. (Dkt. # 61.) In that Order, filed on January 16, 2024, the Court transferred venue of this case to the D.C. District because the Court

determined that the public interest factors weighed heavily in favor of a transfer to that district. (Id.) Thereafter, the Clerk of Court transferred this case to the D.C. District Court and the case was terminated in this district.

On January 20, 2024, Plaintiffs filed a motion to stay that transfer on the basis that they intended to file a petition for writ of mandamus to the Fifth Circuit Court of Appeals, seeking to reverse this Court's decision to transfer the case. (Dkt. # 63.) On January 25, 2024, the Court denied that request because it no longer has jurisdiction of this case. (Dkt. # 66.)

On January 25, 2024, Plaintiffs filed an unusual request for this Court to request that the D.C. District Court return this case to this Court to allow the Fifth Circuit to weigh-in on the case's transfer. (Dkt. # 67.) The CFTC opposes this request. (Dkt. # 68.)

ANALYSIS

Plaintiffs request that the Court "should promptly seek return of the case from Washington and stay the transfer order." (Dkt. # 67 at 2.) Plaintiffs further maintain that the transfer in this case "raises substantial questions, such that a request to return the case to this Court and stay of transfer is warranted." (Id. at 5.) The Court disagrees.

As an initial matter, the Court feels compelled to correct a misstatement in Plaintiffs' motion. Plaintiffs state that "the parties are not privy to

any communications between the clerk's office of this Court and that of the federal court in Washington, D.C." in regard to whether the "administrative steps of transferring the case to Washington have been completed." (Dkt. # 67 at 2, n.1.) This Court too is not privy to any communications regarding the Clerk's office and the D.C. District Court. The Court noted in its Order denying the motion to stay the transfer that, "[t]he case was docketed in the transferee court on January 19, 2024." (See Case No. 1:24-cv-167-JMC (D.D.C.).) The Court only found this information after conducting its own CM/ECF search of the case in the D.C. District Court. Certainly, the parties would have the ability to find the same information and come to the same conclusion that transfer of the case was completed on January 19, 2024.

Next, Plaintiffs cite a case from the Eighth Circuit, written in 1982, which suggests that a district court should stay its own transfer order so that an appellate court could review that order. (Dkt. # 67 at 2–3 (citing In re Nine Mile, Ltd., 673 F.2d 242, 243 (8th Cir. 1982).) Plaintiffs also cite two Fifth Circuit cases which they argue demonstrate that "it is proper to request return of a case to facilitate appellate review and to use mandamus to force such requests when a district court is unwilling." (Id. at 3 (citing In re Red Barn Motors, Inc., 794 F.3d 481, 484 & n.6 (5th Cir. 2015); Def. Distributed v. Bruck, 30 F.4th 414, 424 (5th Cir. 2022).)

Assuming without deciding that these cases stand for these propositions, the Court here questions Plaintiffs' own procedural choices which put them in the position they now face. Certainly, if Plaintiffs felt that transfer of this case to the D.C. District Court was a "miscarriage of justice," why did they not immediately seek to stay the transfer and ask *this* Court to reconsider its decision. As noted in the order denying the stay of transfer, it appears that Plaintiffs waited over two days to seek any action to stay the transfer. (See Dkts. ## 62, 63, 66.) And, instead of asking for reconsideration of that Order in *this* Court pursuant to Rule 60, Plaintiffs state that they wish to go directly to the appellate court for mandamus review of the Order.

In any case, the Court disagrees with Plaintiffs that a stay is warranted because the parties have presented "a substantial case on the merits" concerning a "serious legal question." (See Dkt. # 67 at 6.) Plaintiffs seem to rest on the Fifth Circuit's opinion in this case which remanded the case to this Court with instructions to enter a preliminary injunction, which the Court immediately did. See Clarke v. CFTC, 74 F.4th 627 (5th Cir. 2023). Plaintiffs argue that this Court should retain jurisdiction of the case because the Fifth Circuit, "in a published opinion evaluat[ed] and resolv[ed] nearly every threshold and merits issue in the case." (Dkt. # 67 at 8.) First, the Court points out that the Fifth Circuit had opportunity to review only the arguments raised in Plaintiffs' motion for

preliminary injunction, not the benefit of a fully developed record. "Because of the limited scope of review and because the fully developed factual record may be materially different from that initially before the district court," an appellate court's disposition on a preliminary injunction may "provide little guidance as to the appropriate disposition on the merits of the case." Melendres v. Arpaio, 695 F.3d 990, 1003 (9th Cir. 2012) (quoting Sports Form, Inc. v. United Press Int'l, Inc., 686 F.2d 750, 753 (9th Cir. 1982)).

Furthermore, the substance of the Fifth Circuit's opinion, with both its concurrence and dissent, suggests that Plaintiffs' ultimate ability to prevail in this lawsuit may not be so firm and determined as Plaintiffs believe. Indeed, Judge Ho concurred in the case only after noting that "Plaintiffs' theory of final agency action admittedly conflicts with the precedents of our sister circuits," and that to his knowledge, no other "circuit has held that a no-action letter or its withdrawal is sufficient to constitute 'final agency action' under the Administrative Procedure Act," and that some circuits have held opposite. Clarke, 74 F.4th at 664 (Ho, J. concurring). Nevertheless, Judge Ho concurred because the matter was only at the court pursuant to a request for preliminary injunction for which he noted that

> "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." Univ. of Tex. v. Camenisch, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). "[F]indings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on

> the merits." Id. See also Feds for Medical Freedom v. Biden, 63 F.4th 366, 389 (5th Cir. 2023) ("We hasten to emphasize that this case only involves a preliminary injunction.").

Id.

Additionally, Judge Graves issued a strong dissent in the case, stating that "I am not convinced that Appellants have satisfied this high burden. In my view, Appellants have failed to demonstrate a substantial likelihood that they will prevail on the merits, as there is no final agency action in this case." Id. at 645 (Graves, J., dissenting). Among others, Judge Graves stated that he is "not persuaded that [the Fifth Circuit] should be the first court to draw the conclusion that a 'no-action letter' constitutes 'final agency action,' and so he "respectfully dissented." Id. at 646. Given the uncertainty expressed by the *majority* of the three-judge panel in the Fifth Circuit's opinion on the preliminary injunction, the Court disagrees with Plaintiffs that the Fifth Circuit "substantially resolved nearly every threshold and merits issue in the case," and that this Court's transfer of the case was therefore "unprecedented." (See Dkt. # 63 at 3.)

The Court also notes that after it issued the preliminary injunction pursuant to the Fifth Circuit's ruling, Plaintiffs filed a second amended complaint which substantially changes and expands the facts upon which the Fifth Circuit was able to consider in this case. (See Dkt. # 55.) The second amended complaint adds allegations, legal contentions, and requests relief with respect to an additional

DMO letter issued to Victoria University in March 2023. (Id.) Thus, the amended complaint raises other factual, legal and practical issues beyond the earlier complaints in this case. (See id.) Therefore, the matters upon which the Fifth Circuit entered its Order have changed such that appellate review now would not be the same.

And in any case, and more importantly to this Court in denying the motion to transfer venue, the undersigned never had an opportunity to consider the merits of the preliminary injunction, so it curious to this Court why Plaintiffs are fighting so hard to keep venue here. Had the district judge originally assigned to this matter had the opportunity to consider this case—with the benefit of a less congested docket—it is likely this case would have already been transferred to the D.C. District Court prior to Plaintiffs' appeal to the Fifth Circuit, given the Magistrate Judge's original recommendation to transfer this case. (See Dkt. # 31.) What is more, the Court finds Plaintiffs' arguments that the CFTC seeks to forum shop a bit of a contradiction given that Plaintiffs, at nearly every opportunity, have attempted to appeal this Court's orders (or inaction given the congested docket) to the Fifth Circuit, suggesting their own preferred forum.

All this to say, the Court still finds venue in the D.C. District the most appropriate for this case to proceed pursuant to 28 U.S.C. § 1404(a)—if the Court was even a bit unsure, it would grant Plaintiffs' request to transfer the case back.

But the Court is firm in its belief that the D.C. District Court is now the appropriate venue for this case.[1] The Court will therefore decline to request a transfer of this case from the D.C. District Court.

CONCLUSION

Based on the foregoing, the Court **DENIES** Plaintiffs' Motion to for this Court to Request Return of the Case from the District of Columbia. (Dkt. # 67.)

IT IS SO ORDERED.

DATED: Austin, Texas, February 1, 2024.

David Alan Ezra
Senior United States District Judge

[1] The Court notes that the D.C. District Court is currently considering at least one other similar case against the CFTC, which is assigned to the same judge as is this case. Certainly, for convenience, consistency and judicial economy, the D.C. District Court is now in a better position to consider the merits of Plaintiffs' arguments. See KalshiEx, LLC v. CFTC, 1:23-cv-03257-JMC (D.D.C. 2023).

Tab 22

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
January 26, 2023
Lyle W. Cayce
Clerk

No. 22-51124

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,

Plaintiffs—Appellants,

versus

COMMODITY FUTURES TRADING COMMISSION,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:22-CV-909

ORDER:

IT IS ORDERED that Appellants' opposed motion for an injunction pending appeal is GRANTED.

IT IS FURTHER ORDERED that Appellants' alternative request for mandamus relief is DENIED AS MOOT.

LYLE W. CAYCE, CLERK
United States Court of Appeals
for the Fifth Circuit
/s/ Lyle W. Cayce

ENTERED AT THE DIRECTION OF THE COURT

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

January 26, 2023

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 22-51124 Clarke v. CFTR
USDC No. 1:22-CV-909

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

Christina Rachal

By: _____
Christina C. Rachal, Deputy Clerk
504-310-7651

Mr. Philip Devlin
Mr. Kyle Druding
Mr. Michael J. Edney
Ms. Anne Whitford Stukes

Tab 23

No. 22-51124

IN THE

United States Court Of Appeals
For The Fifth Circuit

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,
Plaintiffs-Appellants,

v.

COMMODITY FUTURES TRADING COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court for the
Western District of Texas, No. 1:22-cv-00909-LY

SUGGESTION OF MOOTNESS

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Anne W. Stukes
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March 3, 2023

CERTIFICATE OF INTERESTED PERSONS

No. 22-51124

KEVIN CLARKE, ET AL.,
Plaintiffs-Appellants,

v.

COMMODITY FUTURES TRADING COMMISSION
Defendant-Appellee.

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.

Plaintiffs-Appellants:

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
Wes Shepherd

Defendant-Appellee:

United States Commodity Futures Trading Commission

Counsel:

For Plaintiffs-Appellants:
Michael J. Edney
Shannen Coffin
John J. Byron

For Defendant-Appellee:
Robert A. Schwartz
Anne W. Stukes
Kyle M. Druding

/s/ *Kyle M. Druding*
Kyle M. Druding
Counsel of Record for Defendant-Appellee

The sole issue raised by this appeal is Plaintiffs' motion for preliminary injunction, which challenges the August 4, 2022 letter sent to non-party Victoria University of Wellington, New Zealand ("the University") by Division of Market Oversight ("DMO") staff withdrawing a 2014 no-action letter similarly issued by DMO staff to the University under 17 C.F.R. § 140.99(a)(2). On March 2, 2023, DMO withdrew and superseded the challenged August 4, 2022 withdrawal letter.[1] Accordingly that letter, including what Plaintiffs had characterized as a "liquidation mandate"—which is what Plaintiffs had sought to enjoin—no longer exists. The CFTC therefore suggests that Plaintiffs' appeal of the claimed denial of a preliminary injunction is moot. The undersigned shared these developments and a redacted copy of that March 2, 2023 letter with Plaintiffs' counsel, who have indicated that they oppose this Suggestion of Mootness.

Prior to issuing the August 4, 2022 letter, DMO staff had explained to the University the basis for withdrawing the 2014 no-action letter, as the March 2, 2023 letter confirms. Neither Plaintiffs, nor the non-party University (which submitted an unsworn letter to the district court) ever disclosed that information at any point in this litigation to date. Although there is no requirement that DMO do

[1] A true and correct copy of DMO's March 2, 2023 letter is attached here as "Exhibit 1."

so, the March 2, 2023 letter reiterates three categories of previously identified evidence that appear to show actions inconsistent with the conditions specified in the 2014 no-action letter and related inconsistencies in various representations made by the University to DMO staff.

Specifically, DMO reiterated its previous statements to the University that (1) Aristotle International, Inc. ("Aristotle")—not the University or its faculty—had been responsible for operating the PredictIt event-contracts market; (2) that the University, through a wholly owned subsidiary, appears to have received compensation from Aristotle for the latter's operation of the PredictIt market; and (3) that the PredictIt market had listed numerous event contracts falling outside of the limitations enumerated in the 2014 no-action letter. Ex. 1 at 3–6. The March 2, 2023 letter further reiterated that DMO staff had alerted the University to these reasons at a meeting with various University representatives, including the University's counsel, held on June 8, 2022, several months before Plaintiffs filed this lawsuit. *Id.* at 3. DMO staff and the University then engaged in "a series of subsequent phone calls and emails," in which Aristotle participated at the University's invitation, between the June 8, 2022 meeting and the issuance of the August 4, 2022 letter. *Id.* at 3 & n.8. The March 2, 2023 letter also identifies relevant information previously undisclosed to DMO by the University (or

Plaintiffs here) that has come out in the course of this litigation.[2]

Based on those originally identified violations first communicated to the University on June 8, 2022, as well as additional information disclosed after August 4, 2022, the March 2, 2023 letter expresses DMO's tentative and preliminary determination that the 2014 no-action letter appears to be "void and should be withdrawn." *Id.* at 6. However, because that initial determination is preliminary only, the March 2, 2023 letter provided the University an additional period to respond and lodge objections as it deems relevant. *Id.* at 6–7. DMO staff have asked that the University file its response, if any, by March 20, 2023. *Id.* at 7.

Plaintiffs' motion for preliminary-injunction is therefore moot, and this appeal should be dismissed. *See, e.g.*, *Spell v. Edwards*, 962 F.3d 175, 179–180 (5th Cir. 2020) (dismissing as moot appeal seeking to reverse "only the denial of the motion for a preliminary injunction" when challenged stay-at-home order had expired because "[o]nce the law is off the books, there is nothing injuring the

[2] For example, DMO's March 2, 2023 letter references several statements made under penalty of perjury by high-level Aristotle executives that disclosed that Aristotle had, among other things, "invested over seven million dollars to stand up" the Market, including hiring, training, and maintaining over twenty full- and part-time employees responsible for various PredictIt operations; "assisted" the University's request for the original 2014 no-action letter; and "shepherd[ed] it through the CFTC's regulatory process." *See* Ex. 1 at 4 & n.10.

plaintiff and, consequently, nothing for the court to do"). While the CFTC vigorously disputes Plaintiffs' characterization of DMO's August 4, 2022 withdrawal letter as containing a "liquidation mandate" or carrying any other legal consequences, that letter has been definitively superseded by DMO's March 2, 2023 letter. Moreover, that letter confirmed both that the three sets of apparent violations identified by DMO before issuing the August 4, 2022 letter—that Aristotle, not the University, had been operating the PredictIt market; that the University appears to have been receiving compensation from Aristotle for Aristotle's operation of the PredictIt market; and that the PredictIt market had listed numerous out-of-scope contracts—had been identified and communicated to the University on June 8, 2022. The March 2, 2023 letter further confirms that there had been a series of informal communications between DMO staff and the University after the June 8, 2022 meeting and before August 4, 2022, all of which occurred months before the onset of this litigation but were not disclosed by Plaintiffs or the University here or in the district court.

Regardless, DMO's initial determination as to the status of the 2014 no-action letter reflected in the March 2, 2023 letter independently and expressly provides the non-party University with both the written reasoned explanation and the opportunity to respond that the exclusively third-party Plaintiffs claimed were

missing from the now-superseded August 4, 2022 letter.[3] *See* ROA.239–244, ¶¶ 75–81; ROA.244–246 ¶¶ 82–89. That additional explanation and opportunity to be heard would have been the full extent of post-remand relief available to Plaintiffs, even had they ultimately prevailed on the merits of their original Administrative Procedure Act ("APA") claims once the full administrative record had been produced. And to the extent that Plaintiffs may believe that DMO's ultimate position as to the status of the 2014 no-action letter might be separately deficient under the APA, they are free to amend their claims accordingly on remand—once DMO responds to the University's objections, if any are raised.

There is accordingly nothing before this Court to review. Moreover, as the March 2, 2023 letter confirms, the University has already received the notice and opportunity to respond that Plaintiffs incorrectly have asserted that the University was denied. Regardless, the challenged August 4, 2022 withdrawal letter has been

[3] Notably, despite Aristotle's participation in certain informal communications at the University's invitation prior to August 4, 2022, Plaintiffs have failed to disclose the June 8, 2022 meeting or the University's response thereto in their pleadings to date. Those previously nonpublic communications underscore that the exclusively third-party Plaintiffs here lacked Article III standing to raise their now-moot challenge to the August 4, 2022 letter, which the University has at all times declined to join. *Cf.* ROA.327–328 (unsworn letter from the University's Vice-Provost of Research purporting to "confirm" a pair of allegations in Plaintiffs' Amended Complaint but declining to endorse Plaintiffs' APA claims on the merits).

definitively superseded and DMO has now provided the University both additional notice and another opportunity to respond to the three sets of violations previously identified prior to the onset of litigation, as well as having reiterated DMO's previous reasoning accompanied by new facts disclosed after August 4, 2023, only after which DMO will decide the status of the 2014 no-action letter. Thus, neither the "voluntary cessation" nor "capable of repetition yet evading review" exception to the normal mootness rule applies. *Spell*, 962 F.3d at 179–180 (citing *Already, LLC v. Nike, Inc.*, 568 U.S. 85 (2013) and *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162 (2016)); *see also, e.g.*, *Constellation Mystic Power, LLC v. FERC*, 45 F.4th 1028, 1047 (D.C. Cir. 2022) (explaining that challenges to later-vacated agency orders with no continuing legal effect are "'plainly'" and "'classically moot'" (citations omitted)).

For these reasons, the CFTC respectfully requests that Plaintiffs' motion for preliminary injunction be denied as moot, this appeal dismissed, and this case remanded to the District Court for further proceedings, if any.

Dated: March 3, 2023

Respectfully submitted,

/s/ *Kyle M. Druding*
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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2023, I caused the foregoing Suggestion of Mootness to be filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit and served on Plaintiffs-Appellants, using the Court's CM/ECF system, as all participants in this case are registered CM/ECF users.

/s/ *Kyle M. Druding*
Kyle M. Druding

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Suggestion of Mootness complies with the type-volume limits of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 27(a)(2)(B) and 32(f), it contains 1,365 words.

2. I hereby certify that this Suggestion of Mootness 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/ *Kyle M. Druding*
Kyle M. Druding

Dated: March 3, 2023

EXHIBIT 1

Redacted Version for Public Release+

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Division of
Market Oversight

CFTC Letter No. 23-03
Other Written Communication
March 2, 2023
Division of Market Oversight

Professor Margaret Hyland, Ph.D.
Vice-Provost (Research)
Vice Chancellor's Office
Victoria University of Wellington
HU 207, Hunter Building, Gate 1
Kelburn Parade, Kelburn
Wellington 6012, New Zealand

Re: Withdrawal of CFTC Letter No. 22-08 And Initial Determination Concerning CFTC Letter No. 14-130

Dear Dr. Hyland:

This letter hereby withdraws and supersedes the undersigned's correspondence of August 4, 2022.[1]

As Victoria University of Wellington, New Zealand ("Victoria University" or "the University") is aware, on October 29, 2014, the Division of Market Oversight ("DMO" or "Division") of the Commodity Futures Trading Commission ("CFTC" or "Commission") issued CFTC Letter No. 14-130 ("Letter 14-130" or "the Letter") granting the University's request that the Division not recommend enforcement action (*i.e.*, the Division's "no-action" position) against the University in connection with its operation of an online, not-for-profit, event contract market in the U.S. for educational and research purposes, without registration as a designated contract market, swap execution facility, or foreign board of trade, and without registration of its operators, subject to

[1] CFTC Letter No. 22-08.

+ This letter will be made public with temporary redactions, omitting references to a document for which Victoria University had requested confidential treatment under 17 C.F.R. § 145.9. Based on an initial review, the basis for the University's request for confidential treatment is unclear. DMO plans to remove these redactions and make public that document should it be determined, following notice to the University and an opportunity to respond, that that document, in whole or in part, does not warrant confidential treatment.

certain terms outlined in the Letter.[2] We refer herein to the market platform established after Letter 14-130 was issued as "the Market" or "the Platform."

According to the terms of the Letter, which DMO issued based upon the representations of the University, the proposed event contract market would:

(1) be small-scale and not-for-profit;

(2) be operated for academic and research purposes only;

(3) be overseen by faculty at the University, without receipt of separate compensation, directly or indirectly, for operating the market;

(4) offer event contracts consisting of two submarkets for binary option contracts concerning political election outcomes and economic indicators;

(5) be limited to 5,000 traders per contract, with an $850 investment limit per participant in any contract;

(6) not offer brokerage services or charge commissions to participants;

(7) utilize a third-party service provider to perform know-your-customer ("KYC") due diligence on its participants;[3]

(8) only charge those fees necessary to cover the fulfilment of the KYC process, regulatory compliance, and basic expenses to operate the proposed event contract market; and

(9) limit advertising to media outlets where there is a high likelihood of reaching those interested in the subject matter of its event contracts, provided that such advertising prominently discloses that the platform is unregulated, experimental, and being operated for academic purposes.[4]

Victoria University proposed the creation of a small-scale, not-for-profit, online market for event contracts in the U.S. for educational purposes modelled after the non-profit election market operated by the University of Iowa. The Iowa Electronic Market is operated for academic purposes only, and its operators, who are faculty at the University of Iowa, receive no separate compensation. As such, Letter 14-130 states that DMO's no-action position was "[b]ased upon" Victoria University's "representations concerning the purposes and manner of operation of [the University's] proposed market for event contracts," "and is subject to the conditions stated above."[5] The Letter was addressed solely to Victoria University and addressed solely "Victoria

[2] CFTC Letter 14-130.
[3] *Id.* at 3.
[4] *Id.*
[5] *Id.* at 5.

University's market for event contracts, as proposed," whose proposed operators were to be three professors at the University and one administrator who would not receive "payment, directly or indirectly, for operating the market."[6] The Letter noted that the University would utilize a third party, Aristotle International, Inc. ("Aristotle"), a for-profit corporation, to "implement an age and identity verification system as part of a KYC process."[7] The Letter expressly cautioned that any "different, changed or omitted material facts or circumstances" might result in DMO's discretionary no-action position being "void" or withdrawn.

On June 8, 2022, DMO staff met solely with representatives of the University, including the University's counsel, to communicate that the Platform was not being operated pursuant to the conditions set forth in Letter 14-130 and that the Division intended to promptly issue a public notice of withdrawal. At that time, DMO staff raised the following three bases for withdrawal:

- The Platform was no longer operated by the University or its professors, but rather by Aristotle;

- Victoria Link Limited ("VLL"), a wholly owned subsidiary of the University, has been receiving compensation from Aristotle; and

- The Platform had listed contracts outside the scope of Letter 14-130.

Following a series of subsequent phone calls and emails between DMO staff and the University (as well as, at the University's invitation, Aristotle),[8] in a letter dated August 4, 2022 (Letter 22-08), DMO notified the University that Letter 14-130 was being withdrawn because "[t]he University has not operated its market in compliance with the terms of Letter 14-130."

By this letter, Letter 22-08 is withdrawn. DMO nevertheless preliminarily believes Letter 14-130 is void and should be withdrawn. The bases for this Initial Determination are set forth below, including those previously explained to the University, along with further information disclosed since August 4, 2022, which also informs staff's analysis of this Initial Determination.

Aristotle, a for-profit corporation—not the University or its faculty—is operating the Market.

As noted above, Letter 14-130 was conditioned on the University's representation that the proposed market would be operated and overseen by faculty at the University, without receipt of separate compensation, for academic and research purposes only. Inconsistent with the University's representations made when requesting DMO's no-action position in 2014, [redacted]

[6] *Id.* at 1–2.

[7] *Id.* at 3 n.4.

[8] The University obtained U.S. counsel and invited Aristotle representatives, including in-house and outside counsel.

[redacted] This activity goes beyond the KYC due diligence and age verification on market participants that the University represented the so-called third party would conduct and is inconsistent with the terms of the Letter. As explained to the University before DMO issued the August 4, 2022 letter, this is one basis upon which DMO believes it should exercise its discretion to withdraw the Letter.

While the University may have been operating the Market at its inception, it appears that at some point the University ceded operational control of the Market to Aristotle, a for-profit corporation. Indeed, recent public statements reflect that the University may not have been operating the Market since its inception and rather that Aristotle played a leading—and undisclosed—role in the development and launch of the Market. Specifically, in declarations submitted under penalty of perjury, Aristotle and its executives have characterized Aristotle and its subsidiaries as "partners" with Victoria University, whose role is to "operate the Market" and who had "invested millions to set up" the Market's "computer systems and compliance infrastructure" and "to hire and train the staff to run them."[10] And in a February 8, 2023 oral argument before the United States Court of Appeals for the Fifth Circuit, Aristotle's counsel made several representations indicating that the Market was a joint venture from the beginning. The Letter required the Market to be operated by Victoria University; the operation of the Market by Aristotle, a for-profit corporation, is inconsistent with the conditions in the Letter.

The University has received, and permitted Aristotle to receive, separate compensation for Aristotle's operation of the Market.

As noted above, Letter 14-130 was conditioned on the representation of the University that the market would be operated and overseen by faculty at the University, without receipt of separate compensation. [redacted] As explained to the University before DMO issued the August 4, 2022

[redacted]

[10] *See, e.g.*, Corrected Plaintiffs-Appellants' Br., *Clarke v. CFTC*, No. 22-51124, at 7, 10, 36 (5th Cir. Jan. 31, 2023); Dec. 31, 2022 Decl. of John Phillips, *Clarke v. CFTC*, No. 22-51124, at Ex. 1 (5th Cir. Jan. 12, 2023) (sworn statement from Chief Executive Officer of Aristotle International, Inc. disclosing detailed trading-volume and related operational data); Sept. 28, 2022 Decl. of Dean Phillips, *Clarke v. CFTC*, No. 22-51124, at App.3–8 ¶¶ 4, 5 (5th Cir. Jan. 12, 2023) (sworn statement from President and Co-Founder disclosing that Aristotle International, Inc. "assisted" the University's 2014 request for no-action letter and "shepherd[ed] it through the CFTC's regulatory process"; that "Aristotle invested over seven million dollars to stand up the [Platform]"; and that Aristotle was responsible for "develop[ing] a software backbone and internet interface for the Market," and having "hired, trained, and maintain[ed] an employee base of seven fully dedicated (full time) employees and 18 employees who split time between [the Platform] and other Aristotle businesses").

letter, this appears to constitute separate compensation received by the University and thus is in violation of the terms of Letter 14-130.

Separately, Aristotle's assertions about its operational control, as referenced above, have drawn into question whether Victoria University also acted in a manner inconsistent with the representations that the University would create a small-scale, not-for-profit, online market. In particular, the market was designed to bear many close similarities to the University of Iowa model, including "no additional fees other than those necessary to cover basic expenses of running the market, including the cost of credit card processing of deposits and withdrawals, fulfillment of the know-your-customer ("KYC") process, and all other associated regulatory and compliance costs."[11] However, statements on the Platform's website indicate that Aristotle was charging a 10% fee on all profits and a separate 5% fee on all withdrawals for so called "costs related to running this site."[12] This fee structure appears likely to generate funds far greater than those necessary to operate a small-scale market. As such, it appears facially inconsistent with the University's representation that it would conduct a small-scale, non-profit operation, covering only basic expenses, in a manner similar to the Iowa Electronic Market.

The University has offered numerous contracts that are outside the scope of the submarkets addressed in the Letter.

As stated in the Letter, the University represented to DMO that it would operate two submarkets: one for political event contracts and the other for economic indicator contracts. The submarket for political event contracts would include contracts predicting the following outcomes:

- Which presidential nominee will win his or her party's primary, the general election popular vote, and the Electoral College;
- Who will be the major party nominees for Vice President; and
- Which party will control the next Congress.

The submarket for economic indicator contracts would include contracts predicting monetary policy decisions of the Federal Open Market Committee regarding the federal funds target rate.[13]

But, as previously explained to the University before DMO issued the August 4, 2022 letter, the Market has repeatedly listed a significant number of contracts that fall outside of the bounds of these two submarkets as represented to DMO and described in the Letter. More specifically, starting in 2014, not long after the issuance of the Letter, the Market began listing contracts that cannot reasonably be construed as falling within the categories of political event contracts set

[11] CFTC Letter 14-130.

[12] *See* "Our Fees" available at https://www.predictit.org/support/how-to-trade-on-predictit.

[13] CFTC Letter 14-130.The University further represented that it would not list any economic indicator contract that would compete with any contract that is listed by a CFTC-regulated contract market, and the University would not list more than five economic indicator contracts at any one time. Participation in the submarket for economic indicator contracts would be limited to students, faculty and staff at any participating universities.

forth in the Letter or as akin to those contracts.[14] Contracts that the Market has listed that are outside of the bounds of the Letter include the following:

- How many Ebola cases in the U.S. in 2015?
- Will Iran agree to a nuclear deal before the end of 2014?
- Will Caitlyn Jenner address the 2016 Republican National Convention?
- Will Puerto Rico file for bankruptcy in 2015?
- Will accused lion poacher Walter Palmer be extradited to Zimbabwe this year?
- Who will win the 2015 Nobel Peace Prize?
- Will North Korea test a hydrogen bomb by the end of 2016?
- Will September CBP Southwest Border Patrol apprehensions be lower than August?
- Will Pope Francis vacate the papacy by year-end?
- How many tweets will @realDonaldTrump post from noon May 27-June 3?
- Will federal charge against Andrew McCabe be confirmed by June 30?
- Whether the WHO will declare COVID-19 to be a "pandemic" before March 6?
- How many tweets will @AOC post from noon March 9 through March 16?
- What will be NASA's estimate for global surface temperature change for February?
- Will the Court legalize same-sex marriage?
- Will the U.S. indict FIFA president Sepp Blatter in 2015?
- Will a federal charge against Hunter Biden be confirmed by December 31, 2020?

Despite multiple interactions with DMO to address these violations of the Letter's conditions, the Market has persisted for years to list contracts outside of the two submarkets.

* * *

The purpose of Victoria University's request and DMO's no-action letter was that the Market—which the University represented would be a small-scale, not-for-profit platform for educational and research purposes—would be unregulated. Yet, because of these violations, DMO and other CFTC staff have been required to devote considerable time over the last nearly nine years to the Market. This has far exceeded the level of CFTC staff involvement contemplated by Letter 14-130, and we believe it is not an appropriate use of taxpayer resources. Further, the Market's listing of contracts well outside of the scope of Letter 14-130 creates the false impression that DMO staff has determined that these contracts are acceptable. These are additional factors that incline us to exercise our retained discretion to withdraw the Letter. As a result of the University's non-compliance with the terms of Letter 14-130, DMO has determined as a preliminary matter that Letter 14-130 is void and should be withdrawn.

[14] For avoidance of doubt, these contracts also were not based on economic indicators as discussed in the Letter.

On a number of occasions, Victoria University and Aristotle have requested that the Division's no-action position continue to apply to certain markets until they expire on their own terms, after the 2024 elections. Victoria University and Aristotle have further requested that the no-action position be extended in the meantime to new markets, and to higher position limits than are covered under the Letter. Preliminarily, DMO does not believe this would be appropriate given the University's persistent violations of the conditions of the Letter, which at a minimum, suggest the likelihood of recurrence. This would therefore cause additional unreasonable use of taxpayer resources for the Division to verify that the University has begun to comply with the Letter's conditions, and continue to do so over the next nearly two years. To the extent the University believes that withdrawal of the Letter would cause downstream injury to third parties, we believe the better course would be for the University, Aristotle, or others to remedy them, if at all, by compensating any injured parties directly.

To the extent that the University disagrees with these conclusions, DMO exercises its discretion to invite the University to submit any objections it may have. Please send the University's response, if any, by March 20, 2023.[15]

This letter, and the positions taken herein, represent the views of DMO only, and do not necessarily represent the position or view of the Commission or any other office or division of the Commission.

Sincerely,

Vincent McGonagle

Vincent McGonagle

Director

Division of Market Oversight

[15] We reiterate, consistent with our previous statements, that a response, if any, should come from the University and its counsel alone.