IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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. 1:24-cv-00167

The Honorable Jia M. Cobb

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT CFTC'S CONDITIONAL MOTION TO STAY PROCEEDINGS AND ORDER BRIEFING BEFORE ANY RETRANSFER

On Friday afternoon, the Fifth Circuit held that the United States District Court for the Western District of Texas transferred this case to this Court in error. For the Fifth Circuit, it was not a close call: "Beyond dispute is the fact that the CFTC totally, absolutely, and unqualifiedly failed to show 'good cause' for transferring to D.D.C." under 28 U.S.C. § 1404(a). Published Opinion Granting Writ of Mandamus, *Clarke v. Commodity Futures Trading Comm'n*, No. 24-50079 (5th Cir.), filed at Dkt. 65-1 (hereinafter, "Writ"), at 16. To remedy the error, the Fifth Circuit has directed the Texas District Court to request this Court to return the case. Writ at 20.

That remedy was necessary because of an administrative accident. The clerk of the Texas District Court physically transferred the case file before the parties ever received notice of that court's decision to transfer the case or could have asked for a pause of it pending review. To avoid

such problems in the future, the Texas District Court intends to hold any future transfer orders "for a short period in the event a party wishes to challenge the transfer," a practice that the Fifth Circuit and other courts have "commended." Writ at 2 n.1; *see also Starnes v. McGuire*, 512 F.2d 918, 935 (D.C. Cir. 1974); *In re Nine Mile Ltd.*, 673 F.2d 242, 243 (8th Cir. 1982); *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1517 (10th Cir. 1991); *In re Warrick*, 70 F.3d 736, 739–40 (2d Cir. 1995); Wright & Miller, 15 Fed. Prac. & Proc. Juris. § 3846 (4th ed. 2022).

This Court should reject the CFTC's request to take briefing on why the Fifth Circuit erred in granting mandamus. "[T]he judiciary's longstanding tradition of comity, both within and across the circuits, as repeatedly demonstrated by district courts nationwide[,]" is to promptly honor a request for return of a case to the transferor district. *See Def. Distributed v. Platkin*, 48 F.4th 607, 607 (5th Cir. 2022) (Ho, J., concurring). Doing so is an "act of interdistrict comity, mutual respect, and courtesy." *Id.* at 608. Declining a request to return the case has occurred only once in recorded judicial history, in circumstances not remotely comparable to those presented here. *Id.*

PROCEDURAL HISTORY

The PredictIt Market hosts individuals investing in contracts based on their predictions of 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 in 2014. *Id.* at 633–34. In 2022, the CFTC abruptly tried to revoke that license and set a deadline for the Market to close. *Id.* at 634–35. The Plaintiffs—who are traders who participate in the Market, academics who use Market data in their teaching or research, and two entities that assist in the operation the Market—filed this lawsuit in the Western District of Texas. They asserted various claims, including under the Administrative Procedure Act, challenging the decision. Five of these traders and academics reside in Austin, Texas.

The Plaintiffs appealed an effective denial of a preliminary injunction against the CFTC's mandate to close the market to the Fifth Circuit. The Fifth Circuit then issued a published opinion finding a catalog of likely Administrative Procedure Act violations. *Clarke*, 74 F.4th at 627. The Fifth Circuit also thoroughly analyzed and held "meritless" each Government threshold objection to the claims being entertained, including no final agency action, standing, mootness, and commitments to agency discretion barring judicial review. *Id.* at 633, 635–40. The Fifth Circuit remanded the case "for the district court to enter a preliminary injunction while it considers [Plaintiffs]' challenge to the CFTC's actions." *Id.* at 633.

After the mandate issued, the Texas District Court entered a preliminary injunction and called for a joint proposed scheduling order, which was submitted by the parties. Thereafter, the CFTC moved to transfer the case to this Court. Dkt. 50.

Without a hearing, the Texas District Court granted the motion to transfer four months later. It found that its own docket was congested and that the District of Columbia had a greater local interest in deciding this matter, because two companies assisting with operating the Market are located there. Dkt. 61 at 9–10. The Texas District Court clerk transferred the physical file of the case to this Court the same day it signed its order and the day before the order was posted to the docket notifying the parties. Writ at 4.

After motion practice in the Texas District Court, the Plaintiffs sought review of the transfer decision through filing a petition for mandamus in the United States Court of Appeals for the Fifth Circuit.

On March 1, 2024, the Fifth Circuit issued the requested writ of mandamus, holding that transferring this case from the Western District of Texas to this Court was a clear abuse of discretion. Writ at 1–2. The Fifth Circuit noted that "[t]ransfer under 28 U.S.C. § 1404(a) is

properly granted only if the moving party 'clearly establishes good cause' by 'clearly demonstrating that a transfer is for the convenience of parties and witnesses, in the interest of justice.'" Writ at 4 (quoting *Def. Distributed v. Bruck*, 30 F.4th 414, 433 (5th Cir. 2022)). "[T]o establish 'good cause,' a movant must show (1) that the marginal gain in convenience will be *significant*, and (2) that its evidence makes it plainly obvious—i.e., clearly demonstrated—that those marginal gains will *actually* materialize in the transferee venue." Writ at 5. The Fifth Circuit analyzed the public-interest and private-interest factors governing transfer and held that "[a]ssessing the public- and private-interest factors yields but one message: Beyond dispute is the fact that the CFTC totally, absolutely, and unqualifiedly failed to show 'good cause' for transferring to D.D.C." Writ at 16. Because "[n]ot a single relevant factor favors CFTC's chosen venue of D.D.C. . . ., petitioners' right to the writ [wa]s clear and indisputable." Writ at 19. The Fifth Circuit directed the Western District of Texas "to request that the case be returned to the court *à quo*." Writ at 2.

ARGUMENT

This Court should promptly honor the retransfer request it will soon receive from the Western District of Texas without additional briefing and should deny the CFTC's motion for stay and additional procedures.

The sole basis for the CFTC's motion is its contention that "[a] transferee court that receives a request for retransfer is not required to comply with the request but must make an independent determination of the merits of the transfer." Dkt. 63 at 3. The CFTC's argument that this Court is required to make an independent determination of where the case should be heard has no basis in law. Instead, the normal course is to honor the request for return—as a matter of comity and mutual respect between circuit court systems and without further analysis. In fact, according

to a recent nationwide survey of the issue, a request to return a case has been declined only once in recorded judicial history, and then under extraordinary circumstances not present here. *See Def. Distributed v. Platkin*, 55 F.4th 486, 496 (5th Cir. 2022).

Contrary to the Government's argument, no independent determination of the merits is undertaken, much less required, when a court requests retransfer after the transferor circuit determines that the transfer was erroneous. *See, e.g.*, *CCA Glob. Partners, Inc. v. Yates Carpet, Inc.*, No. 5:05-CV-221, 2005 WL 8159381, at *1 (N.D. Tex. Dec. 22, 2005) (retransferring 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"); *Billings v. Ryze Claim Solutions, LLC*, No. 1:19-CV-01038, Dkt. 120 (E.D. Cal. Jan. 27, 2021) (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, Dkt. 4 (M.D. Pa. Dec. 11, 1995) (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)); *In re Nine Mile Ltd.*, 692 F.2d 56, 58 (8th Cir. 1982) (noting that request for retransfer was honored in accordance with Eighth Circuit mandate in *In re Nine Mile Ltd.*, 673 F.2d 242, 243 (8th Cir. 1982)).

Indeed, this Circuit has recognized the option of "an informal request that the [transferee] court retransfer the record [to the transferor court]" even before the Circuit Court determines the merits of a mandamus petition challenging a transfer order. *In re Sosa*, 712 F.2d 1479, 1480 n.1 (D.C. Cir. 1983). The D.C. Circuit itself has directly requested return while considering a mandamus petition, and the transferee court promptly complied. *Fine v. McGuire*, 433 F.2d 499, 500 & n.1 (D.C. Cir. 1970) (noting that the District of Maryland granted request to return case to

District of Columbia while the D.C. Circuit considered mandamus petition).

The CFTC cites only one case where a transferee district court has declined a request to return a case. Dkt. 63 at 3 (citing *Def. Distributed v. Platkin*, 617 F. Supp. 3d 213 (D.N.J. 2022), *reconsideration denied*, No. 3:19-cv-04753, Dkt. 66 at 10–11 (D.N.J. Oct. 25, 2022)). That case is hardly a model for how relations between divisions of this Nation's courts are supposed to work. Rather, it occasioned a "breakdown in comity across courts." *Def. Distributed v. Platkin*, 55 F.4th 486, 491 (5th Cir. 2022); *see also Def. Distributed v. Platkin*, 48 F.4th at 608 (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.").

In any event, the *Defense Distributed* case involved extraordinary circumstances not present here. *Defense Distributed* was not an action where there was one single case—transferred by a district court—and the transfer decision then was found to be an erroneous application of Section 1404 on mandamus review. Instead, there were two parallel cases, initiated by the same plaintiffs on the same topic, separately proceeding in the Texas District Court and the New Jersey District Court. The Texas District Court transferred part of its case—the part against a unit of the State of New Jersey—to the New Jersey District Court so the plaintiffs' cases against New Jersey could be tried together. *Def. Distributed v. Grewal*, No. 1:18-CV-637-RP, 2021 WL 1614328, at *8 (W.D. Tex. Apr. 19, 2021), *mandamus granted*, *order vacated sub nom. Def. Distributed v. Bruck*, 30 F.4th 414 (5th Cir. 2022). Following the transfer, the New Jersey District Court consolidated those cases without opposition from the Plaintiffs. *See Def. Distributed v. Platkin*, 617 F. Supp. 3d at 223–25. Thus, the transferee court would have had to either sever the claims originally filed in Texas and send those claims back to Texas or transfer the entire consolidated

action—including the case originally filed in New Jersey—to Texas. *Id.* at 226. The New Jersey district court found neither option tenable. *Id.*

Of course, this case does not involve disentangling two actions filed by the same plaintiffs about the same topic. There is one case—against the CFTC—seeking judicial review of its decision to close the PredictIt Market. After the transferor circuit determines that a single case was transferred in error, there is no precedent nationwide—including the New Jersey District Court's *Defense Distributed* decision—holding that the transferee court should, much less must, take its own look at the propriety of transfer.[1] Nor does this case involve any of the thorny issues of whether a state sovereign should be sued only in the district court of its home jurisdiction. *See Def. Distributed v. Grewal*, 364 F. Supp. 3d 681, 693 (W.D. Tex. 2019), *rev'd and remanded*, 971 F.3d 485 (5th Cir. 2020).

This is a routine transfer case, where the district court's transfer decision was reviewed on mandamus and the circuit court held it was a clear abuse of discretion. In such cases, principles of "interdistrict comity, mutual respect, and courtesy" require that an ensuing request to return the transferred case be honored without further analysis. *Def. Distributed v. Platkin*, 48 F.4th at 608

[1] The New Jersey District Court, indeed, took pains to explain it was not disagreeing with the Fifth Circuit. It was instead addressing a different record, created by the plaintiffs filing a second case in New Jersey:

> In essence, Plaintiffs' transfer motion seeks to turn back the clock to a time before they filed the NJ action in this District. Indeed, since [the original plaintiffs] appealed to the Fifth Circuit the Texas District Court's decision to sever and transfer the Texas action, a separate NJ action was filed in this Court and a consolidation of that case with the Texas action also occurred, which resulted in additional claims and the inclusion of other plaintiffs. Accordingly, ***the considerations for transfer are procedurally and factually distinct from those considered by the Fifth Circuit***.

Def. Distributed v. Platkin, 617 F. Supp. 3d at 241 (emphasis added).

(Ho, J., concurring). Importantly, the Fifth Circuit having to direct such a request for return is only occasioned by the district court having physically transferred the file within hours of signing the order and before informing the parties.

If the CFTC disagrees with the Fifth Circuit's decision, which it apparently does, the appropriate next step for the CFTC is to file a petition for panel rehearing or rehearing *en banc* in the Fifth Circuit or a petition for certiorari with the Supreme Court of the United States. It is not to ask this Court to disagree with a three-judge panel of the highest-level of courts in this country, short of the Supreme Court.

Finally, this Court may honor the request for transfer in comfort that the Fifth Circuit was applying widely-accepted legal principles to reach its decision. The Fifth Circuit held that "[i]t is well-settled law that § 1404(a) transfer cannot be granted solely because of court congestion." Writ at 17. The same is true in this Circuit. *See Starnes v. McGuire*, 512 F.2d 918, 932 (D.C. Cir. 1974) ("[C]ongestion alone is not sufficient reason for transfer . . . ."); *Douglas v. Chariots for Hire*, 918 F. Supp.2d 24, 33 (D.D.C. 2013). The Fifth Circuit also held that to identify localized interests properly, the parties' connections to the venue are not considered, but rather the interests of non-party citizens in adjudicating the case. Writ at 9–10. Again, the same is true in this Circuit. *See Adams v. Bell*, 711 F.2d 161, 167 n.34 (D.C. Cir. 1983); *Wolfram Alpha LLC v. Cuccinelli*, 490 F. Supp. 3d 324, 338 (D.D.C. 2020).

CONCLUSION

When this court receives a request for retransfer of this case back to the Western District of Texas, it should promptly honor the request without further analysis.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 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
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