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. 1:24-cv-00614-DAE

The Honorable David Alan Ezra

PLAINTIFFS' RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

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Plaintiffs file this opposition to the Motion for Judgment on the Pleadings (Dkt. 82) filed by Defendant Commodity Futures Trading Commission ("CFTC" or the "Commission"). The Court should deny that Motion because it only provides a fraction of the relief requested by Plaintiffs and attempts to avoid any judicial findings about the CFTC's arbitrary and capricious conduct. Through the Motion, the Commission asks the Court to let it just start over as if nothing in this case ever happened. If the Court enters the order proposed by the CFTC, it would be a virtual guarantee that the Commission would move forward with its planned closure of the PredictIt Market in whatever way it sees fit and the parties would end up back here.

INTRODUCTION

Since the beginning of this case, the CFTC has done everything it could think of to avoid any disclosure of the information surrounding and any substantive judicial review of its efforts to close the PredictIt Market.

The Motion is another attempt by the CFTC to avoid judicial scrutiny. The CFTC says it is willing to have its arbitrary and capricious efforts to close the PredictIt Market vacated. But the agency is demanding that no court tell it why or how it acted arbitrarily and capriciously, at least in any way that the CFTC will have to pay attention to in its inevitable next effort to close the PredictIt Market. Make no mistake, the CFTC is asking that this case end now (with a substantively empty vacatur) to avoid having to follow the Fifth Circuit's decision granting a preliminary injunction. As detailed further below, the CFTC has told this Court and the courts in the District of Columbia that the Fifth Circuit's decision was merely a prediction of an outcome that does not bind the CFTC until it ripens into a substantive final judgment.

What the CFTC is asking this Court to do now is not new. After oral argument in the Fifth Circuit showing strong signs of a loss, the CFTC took an extraordinary measure to end the case

without a substantive opinion. Instead of letting the appeal run its course, the agency decided to rescind and replace its original decision revoking the Market's license, telling the court that further judicial scrutiny of its actions was unnecessary and inappropriate. The Fifth Circuit wisely rejected the CFTC's attempt to "game the system" and proceeded to decide the appeal substantively. *Clarke v. Commodity Futures Trading Comm'n*, 74 F.4th 627, 641 (5th Cir. 2023).

Then, on return to this Court, the CFTC again tried to hit reset. The agency pursued a months-long campaign to escape the Fifth Circuit's jurisdiction in search of more favorable law in the District of Columbia. The object then was the same as that today: To prevent the Fifth Circuit's detailed substantive decision from ripening into a hard final judgment that would govern the agency's treatment of the Market in the future.

The Court should reject the CFTC's latest attempt to meddle with the normal course of judicial review for several reasons. First, the CFTC's motion for judgment on the pleadings is premature. Courts are clear that a judgment on the pleadings must be made *on the pleadings*, and the agency has not yet amended its answer to reflect what allegations of the Complaint it now admits such that the Plaintiffs are entitled to relief. Moreover, the parties have agreed on—and this Court has entered—a scheduling order that anticipates further pleadings and sets distant deadlines for settlement, alternative dispute resolution, and discovery. Judgment on the pleadings would be inappropriate before that schedule plays out.

Second, the CFTC is really seeking judgment on *a sliver of* the pleadings. It asks the Court to vacate its flawed attempts to shut down the Market, but wants the Court to rule that the Plaintiffs are categorically not entitled to the other relief sought in the Second Amended Complaint. The CFTC is wrong. The Plaintiffs are entitled to the other forms of relief that they asked for in their Second Amended Complaint, including a substantive decision explaining why vacatur is

appropriate, a declaratory judgment, and a permanent injunction against the misconduct identified in the Complaint.

Those remedies deserve full consideration. And they should not be turned aside in a vacuum. Importantly, the agency has worked hard to avoid producing even the administrative record in this case—the bread and butter of Administrative Procedure Act ("APA") cases. The facts and the documents in that record absolutely will inform what relief this Court should award. The Court should therefore address the form of relief on summary judgment, after discovery at least provides for the production of the administrative record and permits arguments of the parties informed by it.

BACKGROUND

This case has a theme: The CFTC does not want to live with a final judicial ruling—under the supervision of the Fifth Circuit—detailing the ways in which it broke the law in trying to end the PredictIt Market. That is because the CFTC has every intention of trying to do so again and wants an open field for the manner of doing so and the reasons for doing so. The Court need not speculate about this, as in its briefing (including the instant motion) the CFTC projects a renewed effort to close the Market and ensuing litigation. Dkt. 82, CFTC Mot. at 4 & n.5, 12-14, 16, 19.

A. The CFTC Licenses the PredictIt Market in 2014 and Tries to Close it in 2022

For ten 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*, 74 F.4th at 633. 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 collectively invested tens of millions of dollars in contracts offered by the Market. Dkt. 55 at ¶ 77. And professors from across the country and the world developed

elaborate research projects that depend on the data that is produced by the Market. *Id.* at ¶¶ 4, 6, 24, 34-35, 50-55.[1]

In 2022, the CFTC abruptly attempted to revoke the Market's license to operate. *Clarke*, 74 F.4th at 634-35. The Fifth Circuit detailed the unnecessary and unexplained harm visited on Market traders by tossing them out of their positions on an arbitrary date of the Commission's choosing. *Id.* at 639-40, 643. The decision also chronicled the injuries to academics, upending their carefully constructed research programs at an administrative agency's whim. *Id.* at 639-40, 643. All of those injuries represented reliance interests in the Market's continued operation that the agency blew over in its successive efforts to close the Market. *Id.* at 641-42, 644.

B. The CFTC Attempts to Avoid a Substantive Fifth Circuit Ruling, After Pointed Criticism at Oral Argument

As the February 2023 Revocation deadline drew closer, Plaintiffs appealed seeking a preliminary injunction against the CFTC's efforts to close the Market. Dkt. 32. On January 26, 2023, the Fifth Circuit granted an injunction pending appeal against efforts to close the Market. *Clarke v. Commodity Futures Trading Comm'n*, No. 22-51124 (5th Cir.), ECF No. 44-1.

At oral argument, the Fifth Circuit extensively questioned the CFTC regarding 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. Judge Ho summed up where the Court was headed, correctly diagnosing the CFTC's urged vision of its "no-action letters"—where it could turn an

[1] Contrary to the CFTC's assertions in its brief, the Second Amended Complaint alleges that Plaintiffs Predict It, Inc. and Aristotle International, Inc. "service[] the PredictIt Market," Dkt. 55 ¶¶ 37-38; it does not allege they "operate" it. *Contra* CFTC Mot. at 2.

organization's ability to operate on and off without much explanation or consideration of reliance interests—as "a license to bully." *Id.* at 26:33.

After these comments from the bench, the CFTC decided to do anything and everything to avoid the Fifth Circuit's forthcoming decision on the merits. A few weeks after oral argument, on March 2, 2023, the Commission issued CFTC Letter 23-03 (the "March 2023 Letter"). That agency action was a transparent effort to avoid judicial review, "withdraw[ing]" and superseding the August Revocation letter. March 2023 Letter at 3, *Clarke*, No. 22-51124, ECF No. 78-2. In it, the CFTC announced a replacement for its 2022 decision to close the Market, offering a series of reasons why closing the Market in the very near future was appropriate. *Id.* The day after the CFTC issued the March letter, it moved to dismiss the Fifth Circuit appeal on grounds very similar to those at issue here: That there was no agency behavior left to challenge and thus the case was moot because the agency had agreed to pull down its firm closure of the Market and was only contemplating, but had not yet finalized, a repeat of the closure decision based on the new explanations in the future. *Clarke*, No. 22-51124, ECF No. 74. Nothing more for any court to do, the CFTC said.

C. The Fifth Circuit Rules in Favor of the Plaintiffs and Remands to this Court to Enter a Preliminary Injunction

The Fifth Circuit disagreed. On May 1, 2023, the Fifth Circuit denied the CFTC's motion to dismiss and entered an enhanced injunction pending appeal, making clear that further attempts to dissuade traders from participating and operators from servicing the Market were violations of the injunction pending appeal. *Clarke*, No. 22-51124, ECF No. 107-2.

On July 21, 2023, the Fifth Circuit issued a merits opinion determining that the Plaintiffs were likely to establish that the July 2022 effort to close the Market was arbitrary and capricious and ordering a preliminary injunction against efforts to close the Market. The Fifth Circuit held

that the "no-action relief" the Commission issued in 2014 is a "license" under the APA, and that Market participants are therefore entitled to extensive notice and process before the agency pulls the plug on the Market. *Clarke*, 74 F.4th at 637, 642. The Court also held that the Commission's effort in the March Letter to withdraw and replace its decision to close the Market with new reasoning was an unjustifiable violation of the Court's injunction pending appeal and itself likely arbitrary and capricious. *Id.* at 641. The Court meticulously went through the new reasons offered for closure in the replacement letter and explained how they did not justify closure of the Market. *Id.* at 642 ("The March 2023 letter . . . does not purport to follow the procedural requirements for withdrawing a license."); *id.* ("[T]he letter does not meaningfully explain why the DMO rejected alternatives like allowing currently existing markets to expire on their own terms."); *id.* ("[T]he letter does not explain why past violations suggest a likelihood of recurrence in the future."); *id.* ("Nor does the DMO justify its conclusion that monitoring future compliance would require an 'unreasonable use of taxpayer resources.'"); *id.* ("[T]he letter engages in obvious *post hoc* rationalization.").

D. On Remand the CFTC Seeks Transfer to the District of Columbia

On remand, this Court ordered the parties to submit a proposed order "to control the remaining deadlines in this case." Dkt. 43. The parties did so, and the CFTC therein announced its plans promptly to produce the "administrative record." Dkt. 47. The Plaintiffs promptly filed a Second Amended Complaint to address and to challenge the CFTC's actions during the pendency of the appeal, and the CFTC answered it. Dkts. 55, 64.[2] But instead of following through on rest

[2] The Second Amended Complaint makes clear that the CFTC's revocation decision and March 2023 Letter are part of a broader campaign to close the Market, and that declaratory and injunctive relief is therefore necessary to protect the Market beyond the pendency of the litigation. Dkt. 55 ¶¶ 14, 26-27, 98-100, Prayer for Relief ¶¶ d, f-h. The Second Amended Complaint also alleges that the CFTC's positions in defending its efforts to close the Market were not substantially

of the proposed schedule, the CFTC filed a renewed motion to transfer the case to the District of Columbia, more than a year after this case was filed. Dkt. 50.

After the CFTC's motion was initially granted, Dkt. 61, and the case was transferred to Washington, the Fifth Circuit issued a writ of mandamus directing return of the case. *In re Clarke*, 94 F.4th 502, 507 (5th Cir. 2024).

During the transfer proceedings, the CFTC stated how it intends to handle the Fifth Circuit's decision going forward. Despite the Fifth Circuit's extensive treatment of the issues, the agency stated that it viewed that the *Clarke* opinion was limited to "a directive to issue a preliminary injunction," occurred without "significant fact finding," and was nothing more than a prediction of a litigation outcome that had not been reduced to a binding final judgment. *In re Clarke*, No. 24-50079, CFTC's Opposition to Mandamus, ECF No. 24 at 16-17. With that view of the Fifth Circuit decisions' limited utility in mind, the CFTC encouraged the D.C. District Court to exercise "independent" judgment, "applying the law of [the D.C. Circuit] and viewing the Fifth Circuit like other out-of-circuit precedent, entitled to weight to the extent it is convincing and not inconsistent with the D.C. Circuit law." Dkt. 73 at 4.

E. The CFTC Seeks Judgment on the Pleadings

After the case returned to this District, the Court promptly requested scheduling recommendations. Dkt. 81. But four business days before the recommendations were due, the CFTC filed a surprise motion for judgment on the pleadings. Dkt. 82. The CFTC did not confer with the Plaintiffs before filing the motion.

Even though the CFTC's answer to the Second Amended Complaint denies most of Plaintiffs' material allegations, Dkt. 64, the CFTC's motion assumes the accuracy of factual

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justified, entitling Plaintiffs to fees under the Equal Access to Justice Act and other authorities. Dkt. 55 ¶ 101, Prayer for Relief ¶ i.

allegations in the [Second Amended Complaint]" "[f]or the purposes of this motion only," an obvious and misbegotten effort to live with those allegations having been established beyond the pendency of this case. CFTC Mot. at 1 n.1. It asks the Court to vacate its two actions seeking to close the Market, but strenuously resists more than half of the relief requested by the Plaintiffs in the Second Amended Complaint. *Id.* at 14-20. It argues that any relief beyond vacatur would be unnecessary and improper. *Id.* All the while, the CFTC repeatedly forecasts a "future DMO decision[] on the subject," that "could justify withdrawal of the [no-action letter] if DMO use[s] proper procedures and explanations." *Id.* at 12-13. And it predicts that such a decision would lead to renewed litigation before this Court. *Id.* at 4 n.5, 12.

F. The Court Issues a Scheduling Order Governing Settlement, Discovery, and Further Amendment of the Pleadings

On August 19, 2024, the Court issued a scheduling order setting several deadlines to govern the case. Dkt. 94. Notably, the scheduling order gives the parties until January 6, 2025, to file any further motions to amend or supplement the pleadings. *Id.* ¶ 4. The scheduling order also provides a period—until December 1, 2024—where the CFTC would produce documents relevant to addressing the substance of the matter and to inform any amended complaint, especially here, the administrative record. *Id.* ¶ 7. In execution of that schedule, the Plaintiffs have issued a request for production of the administrative record, a response to which is due on September 25, 2024. The order also specifies that settlement offers and responses will be exchanged in October, and that the parties have until December 15 to submit a report on alternative dispute resolution. *Id.* ¶¶ 2-3.

ARGUMENT

I. The CFTC's Motion for Judgment on the Pleadings Is Premature.

The CFTC's motion for judgment on the pleadings is presented too soon in at least two ways. First, the CFTC has not yet amended its answer in a manner that permits this Court to enter judgment on the pleadings. Second, this Court has entered a scheduling order that anticipates further pleadings and sets yet-to-come deadlines for settlement, alternative dispute resolution, and the production of the standard agency documents in an APA case including the administrative record. Dkt. 94. Ruling on the CFTC's motion now would inappropriately truncate the proceedings and schedule ordered by the Court and sink any prospect for a non-judicial resolution to this dispute.

A. The CFTC Must Amend Its Answer Before the Court Enters Judgment on the Pleadings.

As an initial matter, judgment on the pleadings is impossible unless CFTC amends its answer to admit a sufficient bundle of the Plaintiffs' allegations, which it has not. "A motion brought pursuant to Fed. R. Civ. P. 12(c) is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered *by looking to the substance of the pleadings . . . .*" *Hebert Abstract Co. v. Touchstone Props., Ltd.*, 914 F.2d 74, 76 (5th Cir. 1990) (emphasis added). Thus, a motion for judgment on the pleadings "only has utility when *all* material allegations of fact are admitted *in the pleadings* and only questions of law remain." *Id.* (quoting 5A Wright & Miller, *Federal Practice & Procedure,* § 1367 at 511) (emphasis added). Here, the CFTC's answer to the Second Amended Complaint—filed after the Fifth Circuit's decision—denies almost all of the material factual allegations in the Second Amended Complaint, Dkt. 64, and interposes a raft of affirmative defenses. Judgment on the pleadings as they stand today is therefore inappropriate. The CFTC's instant motion puts the cart miles before the horse.

The only nod to the current state of the pleadings in the CFTC's motion is a throw away footnote, where the CFTC says it "assumes the accuracy of factual allegations in the [Second Amended Complaint]" "[f]or the purposes of this motion only." CFTC Mot. at 1 n.1. Only the CFTC knows what that means, but it sounds like the CFTC is hoping that this Court will hit the reset button on its decisions to close the Market as if they and this case never even happened. Its motion having been granted to resolve this case, then, the CFTC phrasing suggests that the purposes of assuming the accuracy of the allegations will have passed and it will not have to live with admitting anything in the Plaintiffs' complaint.

That is exactly why a judgment on the pleadings requires actual pleadings that provide a basis for a judgment. *Hebert*, 914 F.2d at 76. If the agency wants to concede that its actions were arbitrary and capricious, it needs to formally amend its answer in line with that position.

Requiring amendment of the answer prior to judgment on the pleadings is more than just a formality. Amendment is necessary to facilitate the Court's findings of fact and conclusions of law. Both the Court and the Plaintiffs need to know what, exactly, the CFTC is prepared to admit and deny before judgment is rendered.

B. Judgment on the Pleadings Would Short Circuit the Agreed Case Schedule.

Even if the CFTC's motion were considered ripe before amendment of the answer, judgment on the pleadings would be premature in light of this Court's August 19, 2024, scheduling order. Dkt. 94. The schedule outlined in that order—to which both parties signed agreed—permits motions to amend or supplement the pleadings until January 6, 2025. *Id.* ¶ 4. And appropriately so, as that date expressly comes after the discovery period so that the Plaintiffs may address any revelations in the heretofore entirely private to the CFTC administrative record in this matter. The spirit and letter of Federal Rule of Civil Procedure 12(c) bars motions for judgment on the pleadings prior to when the pleadings "close." This Court's scheduling order keeps the pleadings,

appropriately, an open question until the most basic facts about the agency's decisionmaking process is laid bare through production of the administrative record.

And, in fact, the Plaintiffs intend to move to amend the complaint well before the January 6 deadline to address intervening events in the nine months since the filing of the Second Amended Complaint. *See* Dkt. 55. There is thus a good chance the pleadings will materially change in the coming weeks. Entering judgment on the pleadings without giving that process a chance to play out would be premature.

The scheduling order also lays out the framework for settlement proceedings, setting October 2024 deadlines for settlement offers and responses, and a December 15, 2024 deadline for the filing of a report on alternative dispute resolution. *Id.* ¶¶ 2-3. Judgment on the pleadings now would prematurely terminate the settlement period in this case. That is ill-advised, particularly in the context of a motion that purports to be an effort to satisfy the Plaintiffs' claims. There is no reason whatsoever why this Court should not deny the motion without prejudice and allow the mediation process to occur and to see whether there is an agreed judgment—with an agreed bundle of remedies—that can resolve this matter.

More broadly, a settlement would conserve judicial resources and reduce strain on this Court's docket. *See* Dkt. 61 at 9-10. Moreover, as the CFTC's motion lays bare, the agency is poised to revoke the Market's license to operate in the future. CFTC Mot. at 12 (discussing "any future DMO decision on the subject"); *id.* at 12-13 (discussing whether violations of the no-action relief's terms "could justify withdrawal of the NAL if DMO used proper procedures and explanations"). As a result, this case is all but certain to land back on this Court's docket down the road if, as the CFTC requests, this Court grants only a partial judgment on the pleadings with an unexplained vacatur of the agency's decisions and nothing to bind the agency going forward.

A settlement could avoid that outcome and therefore should be afforded every opportunity to succeed.

C. Judgment Should Not Issue Before the CFTC Produces the Administrative Record.

At a minimum, the Court should not enter judgment on the pleadings before the agency produces the administrative record. The administrative record is necessary for a fair appraisal of the alleged facts and the agency's responses, which in turn will determine what remedies are appropriate. This is why most courts, once the agency chooses to answer a complaint, require production of the administrate record before considering other dispositive motions. *See, e.g.*, D.D.C. LCvR 7(n)(1) (contemplating that dispositive motions will rely on portions of the administrative record, the production of which must begin 30 days after an agency answers the complaint). And, as explained below, what the agency has done—what led to the challenged decision and the severity of the error—turns on the administrative record and informs the remedies selected. An agency cannot ask this Court to deny requested and customary APA remedies—such as a declaratory judgment and an injunction—in a vacuum without party arguments informed by the administrative record.

The CFTC has not yet filed the administrative record in this case, even though it answered the complaint six months ago, on February 26, 2024, and the prior proposed scheduling order submitted to this Court contemplated that the record be produced promptly thereafter. Pursuant to the Court's current scheduling order, the Plaintiffs have served a request for production of the administrative record. That production is due by September 25, 2024. Any decision on this motion should not occur before the administrative record is produced.

II. The CFTC's Proposed Judgment Would Inappropriately Deny Plaintiffs Several Forms of Requested Relief.

For all of the reasons above, the CFTC's motion is premature and should be denied on that basis. But if the Court reaches the merits of the CFTC's proposal, it should reject the agency's attempt to deny the Plaintiffs more than half of the relief they have requested. Contrary to the CFTC's suggestions, relief under the causes of action advanced by the Plaintiffs, including the APA, customarily include declaratory and injunctive relief. And courts are especially apt to award declaratory and injunctive relief when the agency is poised to act again in a similar manner, as is plainly the case here.

A. The CFTC Marshalls No Authority for the Proposition That APA Cases End with Vacating the Agency Decision and Cannot Include Declaratory and Permanent Injunctive Relief.

One of the things this Court should do on final judgment is vacate the 2022 and 2023 agency decisions seeking to end the PredictIt Market. But it is not the only thing. The CFTC incorrectly suggests that Supreme Court and Fifth Circuit decisions *require* courts to order vacatur, and only vacatur, in APA cases.

First, the CFTC miscites a line of cases culminating in the Fifth Circuit's recent decision in *Data Marketing Partnership, LP v. United States Department of Labor*, 45 F.4th 846 (5th Cir. 2022), where the Court pronounced vacatur the "default rule" for agency action found to be unlawful. *Id.* at 859; *see also* CFTC Mot. at 11-12. That vacatur is the default rule is unsurprising, because the APA itself provides that courts "shall . . . hold unlawful and set aside" an arbitrary and capricious agency action. 5 U.S.C. § 706(2).

But the Fifth Circuit's discussion in *Data Marketing Partnership* of "vacatur" as the "default rule" in APA cases is not anywhere close to a holding that other remedies cannot be ordered in addition to vacatur. The Court was instead *rejecting Government arguments* that

arbitrary and capricious agency actions can simply be remanded to the agency for further explanation, without also being vacated. 45 F.4th at 859-60 (citing *Texas v. Biden*, 20 F.4th 928, 1000 (5th Cir. 2021), for the rule that "by default, remand *with* vacatur is the appropriate remedy." (emphasis in original)); *see also Nat'l Ass'n of Manufacturers v. SEC*, 105 F.4th 802, 815 (5th Cir. 2024) (rejecting SEC request for remand ***without*** vacatur).[3]

Agencies often urge remand without vacatur as a milder alternative to vacatur, and some courts (particularly the D.C. Circuit) often select it as a remedy—but the Fifth Circuit does not like it. Nothing in the *Data Marketing Partnership* line of cases, even for a moment, suggests that APA remedies are limited to vacatur.

Second, the CFTC miscites a line of cases rejecting lower court decisions to resuscitate arbitrary agency decisions by creating new justifications for them. CFTC Mot. at 13 (citing *Calcutt v. FDIC.*, 598 U.S. 623 (2023), and *Wages & White Lion Invs., L.L.C. v. FDA*, 90 F.4th 357 (5th Cir. 2024) ("*Wages*")). The Supreme Court and the Fifth Circuit correctly rejected Government attempts to salvage illegal agency actions: A reviewing court must vacate an action if it is determined to be substantively or procedurally flawed; it cannot affirm them by creating a justification that the agency did not use when making the decision. *Calcutt*, 598 U.S. at 629 ("[I]f the grounds propounded by the agency for its decision are inadequate or improper, the court is powerless to *affirm* the administrative action by substituting what it considers to be a more

[3] The other cases cited by the CFTC about the "default rule" are similarly inapposite, as none deal with whether declaratory and injunctive relief are appropriate ***in addition to*** vacatur. CFTC Mot. at 11-12. In *Braidwood Management, Inc. v. Becerra*, 104 F.4th 930, 952 (5th Cir. 2024), the issue was whether vacatur was available at all because the plaintiffs had not pursued a claim under the APA. In *Franciscan Alliance, Inc. v. Becerra*, 47 F.4th 368, 374–75 (5th Cir. 2022), the Department of Health and Human Services' adoption of a new rule "gave [plaintiff] the remedy an APA violation called for—vacatur of the [old rule]," which (unlike this case) was the only remedy the plaintiff had sought, and the plaintiff's APA claim was thus moot.

adequate or proper basis.") (emphasis added); *Wages*, 90 F.4th at 389 ("Once we identify an error in the agency's decision, our work is almost always done: If the agency rests its decision on grounds [that] are inadequate or improper, *the court is powerless* to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."). These cases, however, say nothing about vacatur being the only relief *for a plaintiff challenging invalid agency action*. Instead, they are entirely about rejecting government arguments to avoid vacatur when an agency has acted arbitrarily.

B. Declaratory Judgments and Permanent Injunctions Are Standard Fixtures of APA Cases, Contrary to the CFTC's Arguments.

The CFTC's arguments also cannot be squared with the statutory text of the APA itself. The APA expressly contemplates declaratory and injunctive relief in addition to vacatur: "The form of proceeding for judicial review . . . includ[es] actions for declaratory judgments or writs of prohibitory or mandatory injunction[.]" 5 U.S.C. § 703. Declaratory relief is also firmly rooted in Section 706 of the APA, which requires that a court finding an agency action arbitrary and capricious "shall . . . *hold unlawful and* set aside [the] agency action." 5 U.S.C. § 706(2). In other words, the court's duty is not just to "set aside" or "vacate" arbitrary agency action; it is also to "hold [it] unlawful" and explain why.

And providing declaratory relief to remedy an APA violation is reinforced by the Declaratory Judgment Act, which authorizes courts to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). Because of the Declaratory Judgment Act, courts have held declaratory relief is available unless a statute creating a cause of action expressly bars it. *See Neese v. Becerra*, 640 F. Supp. 3d 668, 685–86 (N.D. Tex. 2022). The APA does no such thing, expressly embracing "actions for declaratory judgments[.]" 5 U.S.C. § 703.

Stemming directly from this statutory backdrop, courts in the Fifth Circuit have regularly and repeatedly ordered declaratory relief and a permanent injunction in addition to vacating an agency action that violates the APA. *See*, *e.g.*, *Texas v. Cardona,* No. 4:23-CV-604, 2024 WL 3658767, at *48 (N.D. Tex. Aug. 5, 2024); *Nat'l Ass'n for Gun Rights, Inc. v. Garland*, No. 4:23-CV-830, 2024 WL 3517504, at *14 (N.D. Tex. July 23, 2024). After all, "'[t]he existence of another adequate remedy [such as a vacatur or injunction] does not preclude a declaratory judgment that is otherwise appropriate.'" *Cardona*, 2024 WL 3658767, at *47 (quoting Fed. R. Civ. P. 57) (alterations in original); *Nat'l Ass'n for Gun Rights*, 2024 WL 3517504, at *24. Rather, the three forms of relief expressly allowed by the APA work together.

Courts in the Fifth Circuit have encountered before the same arguments that the CFTC is making here: That the Court should vacate the case and decline further relief like vacatur or an injunction. *See*, *e.g.*, *Cardona*, 2024 WL 3658767 at *45 (recounting the Department of Education's argument that "entry of judgment . . . should do nothing more than vacate the [agency action] and should not issue injunctive relief"). But those same courts have held that the APA entitles plaintiffs establishing violations to more, including "a declaration delineating the rights and legal relations among" themselves and the agency. *Id.* at 48.

Courts have found declaratory and injunctive relief, in addition to vacatur, particularly appropriate when aspects of the unlawful agency action are likely to be repeated. *Id.* at 50 (in granting injunctive relief, stressing past agency evasion of legal requirements and court remedies and observing that the agency "may attempt to do so again as an end-run to the Court's relief"); *Nat'l Ass'n for Gun Rights*, 2024 WL 3517504, at *25 ("[V]acatur and declaratory relief are not enough without the additional protection that flows from the clarity of permanent injunctive relief,

such as avoiding circumvention of any declaration and preventing confusion in the absence of specifically enjoined actions should [the agency] later attempt to" reassert its illegal position).

That is clearly the case here. The CFTC has repeatedly forecast its plans to try on remand, again, to revoke the PredictIt Market's license. *See, e.g.*, 2023 Letter & CFTC Mot. at 12-13. The CFTC is already priming arguments that the Fifth Circuit's very direct criticisms of the procedures and reasons provided for prior attempts at ending the PredictIt Market can be avoided. The CFTC has repeatedly argued that the Fifth Circuit opinion is merely predictive and that none of its precepts will be binding until a substantive final judgment adopting them is entered in this Court—the very thing the motion for judgment on the pleadings is endeavoring to avoid. *In re Clarke*, No. 24-50079, CFTC's Opposition to Mandamus, Dkt. 24 at 16-17. The parsing even made its way into the instant motion, where the CFTC claims "the *Clarke* decision reached no conclusions on the underlying issues of whether Victoria complied with the terms of the NAL or whether any violations of those terms could justify withdrawal of the NAL if DMO used proper procedures and explanations." CFTC Mot. at 12-13. The CFTC went so far to say that it has a "policy preference[]" for which it is "working to 'substantiate the legal basis.'" *Id.* at 14 (quoting *Biden v. Texas*, 597 U.S. 785, 812 (2022)).

As important, the CFTC has a history—in this very case—of working around judicial remedies. The Fifth Circuit held that the CFTC's March 2023 effort to withdraw and replace its 2022 decision to close the Market "violate[d] the injunction pending appeal" and was an effort "to game the system." *Clarke*, 74 F.4th at 641. This is precisely the history of evasive conduct that supports a permanent injunction in addition to vacatur and declaration of rights.

The CFTC is asking for an empty vacatur, with no opinion explaining how it violated the APA and no declaration that certain actions are unlawful. That hollow outcome risks—indeed

invites—recurrence of the APA violations that brought us here, with great and unfair expense to the Plaintiffs. And to the court system, when a suit that efficiently could be brought to substantive and enduring conclusion now has to be repeated. The CFTC's stripped down remedy is antithetical to judicial economy, equity, and law. It should be rejected.

In any event, this Court should not decide these remedy issues in a vacuum. It should do so only with the benefit of the administrative record, so the Court can determine the severity of the CFTC's errors and what remedies are appropriate for them. The Court should deny the motion without prejudice and entertain arguments about the appropriate remedies after the administrative record has been produced and the parties can inform the Court about what went on here. *Calcutt*, 598 U.S. at 628; *Delta Talent, LLC v. Wolf*, 448 F. Supp. 3d 644, 650 (W.D. Tex. 2020).

C. Each Species of Relief Sought by the Plaintiffs Is Appropriate.

The CFTC makes no meaningful argument that the particular forms of declaratory or injunctive relief are inappropriate in the circumstances of this case, but instead incorrectly argues they are legally unavailable as a general matter. Those contentions of legal unavailability are wrong, and the Court should not entertain arguments about the fit of declaratory and injunctive relief within the circumstances of this case without the administrative record. But the Court can be assured that each of the requested forms of relief is justified.

First, declaratory judgment is necessary to avoid recurrence of the CFTC's procedural and substantive violations of the APA that it has leveled against the PredictIt Market over the past several years. A binding judgment setting forth the specific ways in which the CFTC ran afoul of its legal obligations is needed so that it is legally bound not to repeat them—rather than bound to repeat them if gifted the vacatur it seeks. "'If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it

deals with them.' No principle is more important when considering how the unelected administrators of the Fourth Branch of Government treat the American people." *Wages*, 90 F.4th at 362-63 (quoting *Niz-Chavez v. Garland*, 593 U.S. 155, 172 (2021)).

Second, the existing injunction needs to remain in place for the requested sixty day period after final judgment to protect the reliance interests that the Plaintiffs have in the continued existence and operation of the PredictIt Market. *Clarke*, 74 F.4th at 636. A precipitous renewed effort to end the Market when this case comes to a close—and the Market tumult that would effect—simply cannot be squared with "the significant reliance interests in play" in this case. *Id.* at 641.

Finally, a permanent injunction is necessary to curb the CFTC's history of repeated APA violations in this case as detailed above. The Fifth Circuit held that the CFTC's August 2022 revocation of the license to operate the PredictIt Market failed the APA's arbitrary-and-capricious standard. *Clarke*, 74 F.4th 641. But rather than *stopping* its arbitrary and capricious conduct, the CFTC "has *persisted in* its" wrongful conduct. *Id.* at 636 n.4 (emphasis in original).

D. The Proposed Judgment Would Improperly Deny a Substantive Determination of Plaintiffs' Claims to Fees.

In the Second Amended Complaint, given the violations of the injunction pending appeal and clear APA violations determined in the Fifth Circuit's opinion, the Plaintiffs sought attorneys' fees under the Equal Access to Justice Act and other authorities, including Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927. The CFTC's proposed judgment on the pleadings is just kind of wishing those claims would go away. It makes no allowance for them or resolving them. And for that reason too, the motion for judgment on the pleadings should be denied.

What is clear is that the fee claims cannot and should not be decided without the administrative record the CFTC is straining to avoid producing through the proposed premature

judgment. Under the EAJA, after all, "it is the government's burden to show that its position in every stage of the proceedings was substantially justified," *Herron v. Bowen*, 788 F.2d 1127, 1130 (5th Cir. 1986), and that showing must be made "on the basis of the record (*including the record with respect to the action or failure to act by the agency upon which the civil action is based*)." 28 U.S.C. § 2412(d)(1)(B) (emphasis added).

The CFTC makes absolutely no argument how an empty vacatur—now prior to production of the administrative record—could appropriately address the fee claims. Without any support, it speculates that some Plaintiffs may not qualify under the EAJA. CFTC Mot. at 19. But that argument itself is undercooked and does not address the other claimed bases for fees. The fee issue alone is sufficient grounds to deny the motion for judgment on the pleadings.

CONCLUSION

"[A]n administrative agency cannot avoid judicial review by gaming the APA's remand rules." *Wages*, 90 F.4th at 390 n.7. Gaming the APA's remand rules is precisely what the CFTC seeks to do via its clever motion: Avoid a binding ruling finding fault with its decision-making process, freeing it to perpetuate its illegal campaign against the PredictIt Market. The Court should deny the CFTC's motion for judgment on the pleadings.

Dated: August 26, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 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