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

KEVIN CLARKE, PREDICT IT, INC., ARISTOTLE INTERNATIONAL, INC., *et al*.	§	Cause No. 1:24-cv-00614-DAE
Plaintiffs,	§	The Honorable David A. Ezra
v.	§	
COMMODITY FUTURES TRADING COMMISSION,	§	
Defendant.	§	

DEFENDANT COMMODITY FUTURES TRADING COMMISSION'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT

INTRODUCTION

The Court should reject Plaintiffs' attempt to inject new parties and claims into this case at this late stage. More than two years after filing their complaint, Plaintiffs propose adding a new plaintiff, two new defendants, and four new constitutional claims. If allowed, the amendment would inevitably complicate and further delay this already lengthy proceeding without altering the outcome or providing any additional relief to Plaintiffs. Adding new parties and claims at this stage would likely require reopening discovery relating to the new parties and claims, and extensive litigation on the merits of Plaintiffs' legally dubious proposed constitutional claims. Meanwhile, the Court can dispose of the case now by entering judgment in favor of Plaintiffs on their Second Amended Complaint as requested by the CFTC's pending Motion for Judgment on the Pleadings (ECF No. 82). The CFTC requests that the Court deny Plaintiffs' motion for leave to file a third amended complaint and enter judgment in favor of Plaintiffs on their Second Amended Complaint as urged by the CFTC's Motion for Judgment on the Pleadings.

Beyond these practical considerations, the Court should deny Plaintiffs' Motion for Leave to File a Third Amended Complaint for three main reasons: (1) undue delay by Plaintiffs in proposing new claims and parties; (2) undue prejudice to the CFTC in adding new claims and parties at this late stage of the case; and (3) the futility of the proposed new parties and claims given the parties already involved in this case, the claims already at issue, and the relief sought by Plaintiffs' existing complaint.

PROCEDURAL BACKGROUND

This case involves a challenge by Plaintiffs to the withdrawal of a 2014 No-Action Letter[1] issued by the CFTC's Division of Market Oversight ("DMO") to Victoria University of Wellington, New Zealand ("Victoria University") relating to the operation of the "PredictIt" election prediction event contract market. Plaintiffs' original Complaint was filed on September 9, 2022, (Complaint, ECF No. 1), and challenged a 2022 DMO letter withdrawing the 2014 No-Action letter. Named Plaintiffs in the Complaint included two U.S. companies that operate the PredictIt market ("PredictIt"), some individuals who trade on the market ("traders"), and some individuals who use data generated by the market for research and teaching ("researchers"). *Id*. at ¶¶ 21-24, 26-27. The only named defendant was the CFTC. The Complaint asserted two legal claims, both relating solely to alleged violations of the Administrative Procedure Act ("APA"). Count I alleged that the withdrawal of the 2014 No-Action Letter was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and therefore violated 5 U.S.C. § 706(2)(A). *Id*. at ¶ 64. Count II alleged that the withdrawal of the 2014 No-Action Letter constituted the revocation of a license without following the procedural requirements for license revocation specified in 7 U.S.C. § 558(c). *Id*. at ¶¶ 72-74.

On October 6, 2022, Plaintiffs filed a First Amended Complaint, adding as plaintiffs additional traders and researchers. First Amended Complaint (ECF No. 15) ("FAC"). One of the individual researchers was described as "co-host[ing] a news podcast that regularly uses data from the PredictIt Market to analyze political developments," FAC ¶ 29. The legal claims in the

[1] A "no action letter," as defined by CFTC Rule 140.99 (17 C.F.R. § 140.99) is "a written statement issued by the staff of a Division of the Commission or of the Office of the General Counsel that it 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 if a proposed transaction is completed or a proposed activity is conducted by the Beneficiary."

FAC were nevertheless the same APA claims asserted in the original Complaint. FAC, Counts I and II.

On July 21, 2023, the United States Court of Appeals for the Fifth Circuit directed the district court to issue a preliminary injunction against the CFTC based on the withdrawal of the 2014 No-Action Letter. *See Clarke v. Commodity Futures Trading Comm'n*, 74 F.4th 627 (5th Cir. 2023). This Court entered an amended preliminary injunction on October 10, 2023, which remains in effect, barring the CFTC from, among other things, "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 a final judgment is entered by this Court in this matter." (Amended Order Granting Plaintiffs' Motion for Preliminary Injunction, ECF No. 48.)

On November 27, 2023, Plaintiffs, with the consent of the CFTC, filed a Second Amended Complaint (ECF No. 55) ("SAC"). The SAC added allegations about a 2023 DMO letter, which withdrew the 2022 DMO letter, stated reasons why it preliminarily appeared that PredictIt violated the terms of the 2014 No-Action Letter, and invited Victoria University to respond. SAC ¶¶ 14-21 and Ex. 3. The legal claims in the SAC were again confined to APA violations, specifically the alleged violation of 7 U.S.C. §§ 706(2)(A) and 558(c), as in the original Complaint. SAC, Counts I and II.

On July 16, 2024, following litigation regarding venue, the CFTC filed a Motion for Judgment on the Pleadings. (ECF No. 82) ("Motion for Judgment"). The CFTC's Motion for Judgment remains pending and asks the Court to enter judgment *in favor of the Plaintiffs*. Motion for Judgment at 1-2, 9-10, 11-12. The purpose of the CFTC's Motion for Judgment is to enable the Court to rule on Plaintiff's APA claims, vacate the 2022 and 2023 DMO letters at

issue in this case, and reinstate the 2014 No-Action Letter without further unnecessary waste of litigant and judicial resources. A ruling on this motion as requested by the CFTC would end this case.

Plaintiffs filed their Motion for Leave to file a Third Amended Complaint (ECF No. 117) ("Motion for Leave") on January 6, 2025, over two years after the original Complaint and after the close of discovery. The proposed Third Amended Complaint adds two individual defendants: CFTC Chairman Rostin Behnam and DMO Director Vincent McGonagle.[2] Both are named in their official capacities. It also adds a new plaintiff, *The Washington Free Beacon*, which the complaint describes as an "online newspaper." The proposed third complaint adds four new counts to the earlier complaints. Proposed Count III claims that withdrawal of the 2014 No-Action Letter violated the First Amendment because (a) trades made on PredictIt supposedly are a form of expression of opinion on political questions; and (b) the press, including *The Free Beacon*, reports on information generated by PredictIt. Proposed Count IV alleges an additional APA violation based on the alleged First Amendment violation, specifically a violation of 5 U.S.C. § 706(2)(B) which authorizes courts to hold unlawful agency action contrary to constitutional rights. Proposed Count V alleges a violation of the Due Process Clause of the Fifth Amendment, claiming that the 2014 No-Action Letter was withdrawn without notice and a hearing. Proposed Count VI alleges a further violation of 5 U.S.C. § 706(2)(B) based on the alleged Due Process violation.

[2] Mr. Behnam resigned as CFTC Chairman effective January 20, 2025, and has announced that he will leave his position as CFTC Commissioner on February 7, 2025. Mr. McGonagle was replaced as DMO Director on January 21, 2025.

LEGAL STANDARD FOR MOTIONS TO AMEND COMPLAINTS

Further amending the complaint at this point requires leave of the Court. Fed. R. Civ. P. 15(a)(2). Leave should be given "freely" but only "when justice so requires," which is not the case here. *Id*. Leave to amend can properly be denied based on one or more of undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies, undue prejudice to the opposing party, or futility. *E.g.*, *Jack v. Evonik Corp.*,79 F.4th 547, 564-65 (5th Cir. 2023). In ruling on motions to amend, courts can also consider "judicial efficiency and effective case management." *Jebaco, Inc. v. Harrah's Operating Co., Inc.*, 587 F.3d 314, 322 (5th Cir. 2009). Most of these factors are present in this case and provide compelling reasons to deny Plaintiffs leave to file a third amended complaint at this stage of the case.

ARGUMENT

I. Plaintiffs unduly delayed by proposing to assert new claims that could have been asserted in the original complaint over two years ago.

Delay in seeking amendment of a complaint is undue if the relevant facts were known to the movant at the time of the original complaint and the delay is unexplained. *Matter of Southmark Corp.*, 88 F.3d 311, 315-16 (5th Cir. 1996); *US Capital Global Inv. Mgt. LLC v. Noble Capital Group*, 2023 WL 11867023 at *1-2 (W.D. Tex. Sept. 1, 2023) (Ezra, J.). Both elements are present here. Plaintiffs' proposed First Amendment claim rests on assertions that PredictIt traders make trades based on opinions about elections and that data generated by the market is used and disseminated by members of the public, both of which were known to Plaintiffs in 2022 (and earlier). Similarly, Plaintiffs necessarily were aware of what notice and opportunity to be heard they did or did not receive at the time of the challenged DMO letters. And nothing in Plaintiffs' Motion for Leave explains the delay in adding the proposed new claims.

The length of the delay in this case—almost 28 months after the original complaint—substantially exceeds delays found to be undue in past cases. *E.g.*, *Robertson v. Intratek Computer Inc.*, 976 F.3d 575, 584 (5th Cir. 2020) (9 months); *Southmark*, 88 F.3d at 316 (13 months after original complaint); *US Capital*, 2023 WL 11867023 at *2 (13 months); *Moore v. Performance Pressure, Pumping Services, LLC*, 2016 WL 11547154 at *1 (W.D. Tex. March 7, 2016) (9 months). And delay is particularly undue where—as here—an amended complaint is timed to forestall potential resolution of a case via a pending dispositive motion. *See*, *e.g.*, *Robertson*, 976 F.3d at 584 (motion to amend was improper "tactical maneuver" where it was filed after magistrate had recommended granting motion to compel arbitration but before court ruled on recommendation); *United States ex rel Gage v. Rolls-Royce North America, Inc.*, 760 Fed. Appx. 314, 318-9 (5th Cir. 2019) (denial of amendment appropriate where plaintiff moved to amend after defendant filed motion to dismiss); *Guzman v. Bank of New York Mellon*, 2018 WL 8061011 at *3 (W.D. Tex. Feb. 23, 2018) (Ezra, J.) (filing of motion to amend two months after motion to dismiss reinforced finding of undue delay). In this case, Plaintiffs filed their Motion for Leave almost six months after the CFTC filed its Motion for Judgment and over three months after briefing on the Motion for Judgment was completed.

That Plaintiffs filed their Motion for Leave by the deadline for motions to amend in the Court's Scheduling Order does not excuse them from their undue delay in seeking to add claims and allegations they could have asserted over two years ago. As explained in *Moore*, 2016 WL 11547154 at *2, a scheduling order deadline for amended pleadings "does not allow the parties to amend their pleadings . . . as a matter of right . . . [r]ather . . . [it] fixes the last day on which the parties may file a motion for leave to amend" and the motion still must meet the usual standards for such a motion. *Id*. *See also*, *e.g.*, *US Capital*, 2023 WL 11867023 at *2 (finding

undue delay even though court had not yet issued scheduling order). Moreover, the deadline in the scheduling order for amendments to pleadings was concurrent with the close of discovery to allow for the possibility that new information could arise that would require amendments to pleadings. But Plaintiffs acknowledge that in their recently filed response to the CFTC's motion for a protective order that they already had the documents the CFTC produced in the Administrative Record (*see* ECF No. 108 at p. 2), so nothing in the proposed TAC is newly learned in this litigation.

Plaintiffs' newly proposed First Amendment claim advances a novel theory that contracts—or wagers—for money constitute speech rather than conduct—an issue of first, or near-first, impression. A ruling would arguably require the Court to assess the broader implications of such a theory, including its potential effects on state gambling laws[3] or securities regulation by the Securities and Exchange Commission, even though the practical consequences for Plaintiffs themselves would be no different if the Court simply granted the CFTC's pending Motion for Judgment. Likewise, Plaintiffs' due process theory raises broad policy questions, such as whether the government must provide notice to customers whenever regulatory action might force a business to close. Yet the facts on which Plaintiffs' new proposed constitutional claims are based—allegations about traders' opinions on political outcomes, the press's use of PredictIt data, and procedural protections made available (or not made available) to Plaintiffs—necessarily were known to Plaintiffs at the time the original Complaint was filed. For example, paragraph 4 of Plaintiff's first Complaint alleges the "heavy reliance of news outlets on political-events markets in reporting on projected political outcomes." Paragraph 9 alleges that "[t]he Revocation provides neither notice of the facts that may warrant revocation, nor an opportunity

[3] *See*, *e.g.*, Texas Penal Code, Title 10 § 47.02(2) (prohibiting gambling on elections).

to demonstrate or achieve compliance with the terms of the Commission's No-Action Relief." Plaintiffs nevertheless asserted no constitutional claims in their initial Complaint.

Plaintiffs' proposed amendment also would add new factual allegations about the alleged motivation for the CFTC DMO's withdrawal of the 2014 No-Action Letter. As with the facts underlying the alleged constitutional claims, these facts must have been known to Plaintiffs long before they filed their Motion for Leave. This is apparent since, for the new allegations, Plaintiffs rely on (1) alleged communications they admit they did not obtain in discovery in this case; (2) an alleged statement by the Chairman of the CFTC, for which they provide no date, but which appears to have been made, if at all, before the start of this litigation; and (3) record documents Plaintiffs admit they possessed before discovery in this case. *See* Motion for Leave at 4-5; Proposed Third Amended Complaint, ¶¶ 21-24; Plaintiffs' Opposition to CFTC's Motion for a Protective Order (ECF No. 108) at 1-2 (admitting Plaintiffs already had record documents).

Thus, Plaintiffs' Motion for Leave clearly meets the requirements for undue delay.

II. The proposed amendment would be unduly prejudicial to the CFTC.

The proposed amendment would be unduly prejudicial to the CFTC for several reasons. First, by ruling on the CFTC's pending Motion for Judgment, the Court can give the Plaintiffs the fundamental relief they seek in this case by vacating the DMO letters challenged in Plaintiffs' complaints and reinstating the 2014 No-Action Letter. Second, Plaintiffs' new proposed constitutional claims involve legal standards and factual considerations distinct from Plaintiffs' existing APA claims under 5 U.S.C. §§ 706(2)(A) and 558(c) and would significantly expand the scope of this case.

A. The Court can end this case now by ruling on the CFTC's Motion for Judgment.

Plaintiffs' Motion for Leave appears calculated to forestall an opportunity for the Court to promptly resolve this case through a ruling on the CFTC's pending Motion for Judgment,

thereby imposing further litigation costs and burden on the CFTC. *See Squyres v. Heico Cos. L.L.C.*, 782 F.3d 224, 239 (5th Cir. 2015) (finding undue prejudice where motion to amend filed after summary judgment motion). As the CFTC makes clear in its briefs on its Motion for Judgment, the judgment requested by the CFTC would end this case because it gives Plaintiffs all the relief they are entitled to on their pending APA claims. Allowing Plaintiffs to file their proposed third amended complaint would obviously impact the CFTC's pending Motion for Judgment, as the parties would need to consider and likely litigate entirely new claims in a case involving additional parties.

Plaintiffs' Motion for Leave repeats Plaintiffs' mistaken claims in their response to the CFTC's Motion for Judgment that the CFTC seeks "not to be bound" in future proceedings by admissions made in connection with the Motion for Judgment and not to be subject to "limitations arising from the judicial disapproval of its actions leading to this litigation." Motion for Leave at 3. These assertions are false. As explained in the CFTC's Reply in Support of Motion for Judgment (ECF No. 97 at 3, 7), any admissions on which the Court relies in ruling on the CFTC's Motion for Judgment will be binding as a matter of judicial estoppel and any rulings made in granting judgment on the pleading will have the same binding force as those in any judgment. A ruling on the CFTC's pending Motion for Judgment would end this case. Considering that this case can be resolved by the entry of the CFTC's requested judgment, it would be unduly prejudicial to the CFTC to face new claims and new parties in a third amended complaint.

B. Plaintiffs' proposed amendments would greatly expand the scope of this case.

Plaintiffs' proposed amendments are unduly prejudicial to the CFTC at this state of the case because they would add new claims with different legal and factual standards and greatly expand the scope of the case. *See*, *e.g.*, *Holman-Farrar Holdings, LLC v. Old Republic Nat'l*

Title Ins. Co., 2024 WL 5357176 at *3 (W.D. Tex. April 26, 2024) (Ezra, J.) (finding amendment would cause undue prejudice by "greatly increasing the scope of the case") *citing Parish v. Frazier*, 195 F. 3d 761, 764 (5th Cir. 1999). At a minimum this would require additional briefing by the CFTC of novel constitutional theories with potentially far-reaching consequences. *See Rainbow Energy Marketing Corp. v. DC Transco*, 2023 WL 11991180 at *2 (W.D. Tex. Jan. 5, 2023) (finding amendment unduly prejudicial where it would "likely require a new round of dispositive motions").

Because of the differences in legal and factual standards from the existing non-constitutional claims, if the new claims survived a motion to dismiss,[4] an adequate defense to the new claims is likely to require the CFTC to move the Court to reopen discovery, imposing burdens on both the CFTC and the Court. *See*, *e.g.*, *Squyres*, 782 F.3d at 238-39 (finding undue prejudice where amendment would require more discovery and motion practice); *Holman-Farrar*, 2024 WL 5357176 at *3 (same). For example, to defend against the due process claim, the CFTC likely would have to question Plaintiff Aristotle International, Inc. about what information it had regarding DMO's plans for PredictIt during the several-month period in 2022 after DMO notified Victoria University of the planned withdrawal of the 2014 No-Action Letter and before the actual withdrawal; as well as what direct communications Aristotle and its counsel had with DMO during this period. The CFTC likely would also have to question Aristotle and/or Victoria University about what input, if any, Aristotle had into the drafting of written submissions that Victoria made to DMO objecting to the withdrawal. Discovery might also be necessary regarding the activities of the proposed new plaintiff as well.

[4] If the new claims cannot survive a motion to dismiss, the amendment should be denied for futility, as discussed in the next section.

Plaintiffs assert that the new counts merely add "detail" or "granularity." Motion at 6. That assertion is false; Plaintiffs' prior complaints gave no indication they intended to raise constitutional claims. Plaintiffs' proposed addition of a new plaintiff, new individuals as defendants, and new constitutional claims, goes further than adding detail or granularity. These proposed amendments would require months if not years of additional discovery and litigation.

III. The new claims Plaintiffs seek to add are largely or entirely futile.

A district court may deny leave to amend when amendment would be futile. *Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 378 (5th Cir. 2014). An amendment is futile if the added claims would not survive a Rule 12(b)(6) motion to dismiss. *Id*. Under this standard, Plaintiffs' First Amendment claim is clearly futile, and Plaintiffs' Due Process claim is either largely or entirely futile.

A. Plaintiffs' First Amendment claim is futile because it ignores the fundamental difference between speech and conduct.

Plaintiffs' First Amendment claim is futile because it ignores the fundamental First Amendment distinction between protected speech (including expressive conduct generally) and other conduct. *See*, *e.g., Rumsfeld v. Forum for Academic and Institutional Rights, Inc,*, 547 U.S. 47, 65-66 (2006) (holding that conduct is not protected by the First Amendment unless it is "inherently expressive"). This is true even if the non-expressive conduct relates closely to protected speech. *Id*. For example, *Rumsfeld* held that a law school policy of denying on-campus recruitment to military recruiters was not protected expressive conduct event though statements explaining the reason for such policies would be. *Id*. Similarly, competitive sports are not protected speech even though newspaper reporting on sports clearly is. *See Jones v. Schneiderman*, 974 F. Supp. 2d 322, 335-36 (S.D.N.Y. 2013) (holding that mixed martial arts is

not speech); *Wisconsin Interscholastic Athletic Ass'n v. Gannett Co.*, 658 F.3d 614, 624-25 (7th Cir. 2011) (holding that sports reporting, like political reporting, is protected speech).

To establish that conduct is expressive, a claimant must prove both that (1) there is an intent to convey a message; and (2) there is a "great" likelihood that the message would be understood by those who viewed it. *Voting for America, Inc. v. Steen*, 732 F.3d 382, 388 (5th Cir. 2013) *quoting Texas v. Johnson*, 491 U.S. 397, 404 (1989). Plaintiffs' First Amendment claim flunks both tests. According to Plaintiffs, PredictIt traders "tend to put aside biases and other views when they put up even a modest financial investment on the outcome." SAC ¶ 4. In other words, they intend to make money, not express themselves. *See also* SAC ¶ 5 (stating trader plaintiffs "expect to realize a profit"). This is particularly true since PredictIt trading is conducted anonymously online and is not a public act. *See Rumsfeld* 547 U.S. at 65-66 (holding that protected speech must be "inherently expressive" and conduct is not speech even if communication about the conduct would be); *Burns v. Town of Palm Beach*, 999 F.3d 1317, 1336, 1338-39 (11th Cir. 2021) (holding that design of house was not protected expression where house was not visible to public). And the corporate plaintiffs here are not expressing political opinions since they are simply running parts of the market on behalf of Victoria for others to trade on. With respect to the second element of the *Johnson* test, there is no reason to think that "viewers" are highly likely to perceive PredictIt traders or the PredictIt Market as trying to express something rather than trying to make money or providing a venue for others to do so.

That traders choose trades based on their opinions about the likely outcome of political questions does not alter the futility of the proposed amendment. Opinions are only covered by the First Amendment if they are reflected in "inherently expressive" speech or conduct, which is not the case here. And Plaintiffs' argument proves too much: Virtually all commercial

transactions involve parties' opinions on the likely outcome of the transaction, often including opinions on political topics. Someone might buy oil company stock based on their opinion about likely future energy policy or a house based on their opinion of likely future property taxes or resale value. Economic regulation nevertheless is not subject to First Amendment scrutiny unless it directly affects expression. *See*, *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (stating "It is possible to find some kernel of expression in almost every activity a person undertakes" but that "is not sufficient to bring the activity within the protection of the First Amendment."); *Mobilize the Message, LLC v. Bonta*, 50 F.4th 928, 935-36 (9th Cir. 2022) (holding that application of labor laws to political canvassers is economic regulation not subject to the First Amendment).

Plaintiffs' argument that operation of the PredictIt Market is speech because data on PredictIt transactions is reported in the press similarly proves too much. Many kinds of market transactions generate useful information, but that does not eliminate the distinction between economic regulation and regulation of speech. *Mobilize*, *supra*. For example, stock prices are politically important and widely reported, but we are aware of no cases holding registration requirements for stock exchanges to be subject to First Amendment scrutiny except where specific regulations directly govern communications by market participants. See generally 15 U.S.C. §§ 78e, 78f (requiring registration of securities exchanges). Similarly, betting on sports and other contests generates data on the "odds' of various outcomes that is widely discussed and reported in the press, but we are aware of no cases holding that the betting itself is protected by the First Amendment. *See generally, e.g.,* Texas Penal Code, Title 10 § 47.02(2) (prohibiting gambling on elections).

Plaintiffs' proposed new First Amendment claim should therefore be denied as futile.

B. Plaintiffs' Due Process claim is futile because they lack the necessary constitutionally protected liberty and property interests.

To state a procedural due process claim under the Fifth Amendment, Plaintiffs must allege facts demonstrating that they: (1) have a constitutionally protected liberty or property interest; and (2) were deprived of those interests without adequate notice or a meaningful opportunity to be heard. *See*, *e.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 332-35 (1976). "Only after finding the deprivation of a protected interest do[es] [the Court] look to see if the [government's] procedures comport with due process." *Am. Mfrs. Mut. Ins. v. Sullivan*, 526 U.S. 40, 59 (1999). "[P]roperty interests . . . are not created by the Constitution." *Roth*, 408 U.S. at 577. Instead, such interests are shaped "by existing rules or understandings that stem from an independent source such as state law . . . ." *Id.* In this case, the only person with a potential property interest is non-party Victoria University, the recipient of the 2014 No-Action Letter, to the extent the Letter is considered a license for constitutional purposes.

The DMO letters challenged in this case affected the Plaintiffs only via their effect on the 2014 No-Action Letter. But the Due Process Clause does not protect persons only "indirectly or incidentally burdened" by government action. *Department of State v. Munoz*, 602 U.S. 899, 917 (2024). *See*, *e.g.*, *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 771-788 (1980) (holding that nursing home residents had no due process rights when government revoked the facility's authority to provide care, even though the action caused serious indirect harm to residents). And, while individuals generally have a liberty interest in having the capacity to make contracts or follow a profession, they do not have a liberty interest in being able to make contracts with or through any particular company, such as PredictIt. *See*, *e.g.*, *McCasland v. City of Castroville*, 514 Fed. Appx. 446, (5th Cir. 2013) (refusal of a particular city airport to do business with a person did not impair person's liberty interest in right to enter into contracts).

Plaintiffs suggest that PredictIt traders have a property interest in contracts made through PredictIt, but, if so, that interest would only be in specific contracts that had not yet settled at the time of the challenged DMO letters, not in the continuing operation of the market. And it would not apply to the researchers who merely use data generated by PredictIt.

Operating a portion of a foreign university's not-for-profit business does not constitute a constitutionally protected liberty or property interest. Likewise, betting on election outcomes or studying that data is not a fundamental right. Moreover, the individual Plaintiffs cannot allege that the withdrawal of the 2014 No-Action Letter prevents them from trading in election contracts or analyzing that data, as they remain free to use an alternative platform offering the same contracts for both purposes.[5] Accordingly, Plaintiffs fail to allege a violation of procedural due process, and amendment of the complaint would be futile.

C. Plaintiffs' proposed claims are futile because they do not alter the scope of relief already sought by (or permitted by) Plaintiffs' current complaint.

In addition to being futile in the legal sense that they would not survive a motion to dismiss, the proposed new claims are futile in a practical sense because, even if Plaintiffs prevailed on them, the practical effect on Plaintiffs' business and future legal rights would be little or no different than if the Court simply granted the CFTC's Motion for Judgment and provided the appropriate relief based on those counts. Plaintiffs do not contend that the 2014 No-Action Letter itself was unconstitutional, only that the withdrawal of it was. *See* Proposed Third Amended Complaint, Counts III-VI (referring to the 2014 No-Action Letter as a "license" and asserting that "revocation" of the license via the 2022 and 2023 DMO letters violated the First and Fifth Amendments). Plaintiffs also do not seek money damages (other than litigation

[5] Election event contracts have been trading on CFTC-regulated markets since approximately October 2, 2024. *See KalshiEX LLC v. CFTC*, 119 F.4th 58 (D.C. Cir. 2024).

costs and fees under the Equal Access to Justice Act). *See* Proposed Third Amended Complaint at Prayer for Relief. As a result, the constitutional claims, even if proven, would justify relief consistent with that available for the already existing APA claims in Plaintiffs' Second Amended Complaint.

Plaintiffs' proposed added factual allegation that the motive for the withdrawal of the 2014 No-Action Letter was that the existence of the letter made it more difficult for the CFTC to deny similar relief to other companies, rather than the evidence of Victoria's violation of the terms of the 2014 No-Action Letter as described in the 2023 DMO Letter (Proposed Third Complaint ¶¶ 20-24), is similarly futile in the practical sense that even if true it would not affect the outcome of the case. It is permissible for agencies to have unstated as well as public reasons for acting unless the stated reasons are entirely pretextual. *Dept. of Commerce v. New York,* 588 U.S. 752, 781-82 (2019). In any event, the appropriate remedy is vacatur of the alleged unjustified agency action, and the CFTC's Motion for Judgment stipulates that relief.

D. Plaintiffs' proposed addition of two CFTC officials as defendants in their "official capacities" is redundant of the relief already sought, and futile.

Plaintiffs' request to add the now former CFTC Chairman and former DMO Director as defendants in their official capacities is futile because it does not alter the relief Plaintiffs are seeking or the relief they are potentially entitled to in this case. A judgment against the agency achieves the same result, whether these or other individuals are named as defendants in their official capacities, or not. For this reason, official capacity defendants are generally dismissed from lawsuits against their agencies. *See e.g.*, *Castro Romero v. Becken*, 256 F.3d 349, 355 (5th Cir. 2001) (affirming dismissal of government officers and employees in their official capacities as duplicative); *Hicks v. Tarrant Cnty. Sheriff's Dep't*, 352 F. App'x 876, 877 (5th Cir. 2009) (Plaintiff's "official capacity claims against Commissioners … were properly treated as claims

against [the county].") Adding the CFTC Chairman and DMO Director as individual defendants in their official capacities is thus redundant. The Court should reject Plaintiffs' proposed amendment to add these individual defendants.

CONCLUSION

The Court should reject Plaintiffs' request to add new parties and claims to this case at this late juncture. This case is more than two years old. Discovery has closed, and the CFTC has filed a dispositive Motion for Judgment that remains pending. Meanwhile, a broad preliminary injunction remains in place. Plaintiffs' Motion for Leave to file a Third Amended Complaint should be denied.

Respectfully submitted,

/s/ *Martin White*

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CERTIFICATE OF SERVICE

I certify that on February 3, 2025, 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/ *Carlin Metzger*

Carlin R. Metzger,
Senior Assistant General Counsel
U.S. COMMODITY FUTURES TRADING COMMISSION