

**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

**UNOPPOSED REQUEST FOR ENTRY OF ATTACHED PROPOSED ORDER
GRANTING DEFENDANT’S MOTION FOR JUDGMENT ON THE PLEADINGS
IN FAVOR OF PLAINTIFFS**

For the last several months, the parties have been engaged in serious discussions aimed at resolving this case and have now reached an agreement that would bring this litigation to an end. Reflecting that agreement, and as further discussed below, the Plaintiffs respectfully request that the Court enter the attached proposed order (1) granting the CFTC’s motion for judgment on the pleadings in favor of Plaintiffs; (2) vacating and setting aside the two CFTC letters seeking to close the PredictIt Market challenged by Plaintiffs; (3) declaring the justifications stated in the those letters for seeking to close the Market arbitrary and capricious and otherwise legally deficient; (4) enjoining the CFTC from seeking to close the PredictIt Market or imposing any other sanction on PredictIt Market sponsors, operators, or participants based on events or facts or features of the PredictIt Market known to the Commission prior to or on the date of the Court’s forthcoming

order; (5) denying Plaintiffs' requests for additional relief, including for litigation costs and attorneys' fees; and (6) denying as moot Plaintiffs' Motion for Leave to File a Third Amended Complaint.

This request is the product of settlement discussions between the parties and would specify findings, declarations, and remedies that would revolve the case in a mutually acceptable manner. Accordingly, the CFTC does not oppose this request.

On July 16, 2024, the CFTC filed a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) ("Motion"). Dkt. 82. The Motion seeks judgment *in favor of Plaintiffs* based on the allegations in Plaintiffs' Second Amended Complaint and the rulings of the United States Court of Appeals for the Fifth Circuit in *Clarke v. Commodity Futures Trading Comm'n*, 74 F.4th 627 (5th Cir. 2023). *Id.* The CFTC's motion conceded, for purposes of entering judgment, problems with the DMO letters and efforts to close the Market identified in the Second Amended Complaint and the Fifth Circuit's opinion granting a preliminary injunction against that and other efforts to close the PredictIt Market and the agency's failure to comply with the Administrative Procedure Act. The CFTC argued, however, that only the remedy of vacating the agency letters is appropriate. *Id.* at 11-12. The CFTC urged the Court to deny other forms of relief sought in the Second Amended Complaint. *Id.* at 14-20.

The Plaintiffs opposed the motion, in part. Relevant here, the Plaintiffs highlighted disagreements about the appropriate remedies for the issues raised in the case, including the need for Plaintiffs' requested injunctive and declaratory relief. Dkt. 96 at 9-20.

Simultaneously, discovery was proceeding under this Court's scheduling order, resulting in production of portions of the administrative record and motion practice over the appropriate scope of that record. On January 6, 2025, in line with the scheduling order, Plaintiffs filed a motion

for leave to file a Third Amended Complaint, seeking to address issues and information arising from the discovery process and to add claims based on violations of the First and Fifth Amendments to the United States Constitution. Dkt. 117. The CFTC opposed that motion. Dkt. 122.

On April 4, 2025, this Court set a hearing on the pending motions. Dkt. 132. Promptly thereafter, the parties notified the Court that they were in serious settlement discussions, and the Court granted their request to continue the hearing and to stay the pending motions to accommodate those discussions. Dkt. 133. Those discussions continued over the intervening three months. *See* Dkts. 133, 134, 135, 136, 137. And they have now borne fruit, as the parties have found a mutually acceptable path to entirely resolve the underlying case. This resolution involves an amendment of the no action letter authorizing the PredictIt Market, which has been completed outside the judicial process. And it proposes to use the CFTC's pending motion for judgment on the pleadings to enter final relief in the case, in a form that is mutually acceptable to both parties. This would resolve the pending disagreement regarding the scope of remedies for the legal problems identified in the pleadings and elucidated in the Fifth Circuit's opinion. A proposed order with the agreed remedies is attached to this request. Each aspect of the proposed order is discussed below.

1. Grant the CFTC's Motion for Judgment on the Pleadings. The proposed order would grant the Government's motion for judgment on pleadings and thereby grant judgment in favor of the Plaintiff on all counts of the Second Amended Complaint based on the facts alleged therein.
2. Vacate and set aside the CFTC's Efforts to Close the Market. The parties agree that the Court should vacate and set aside the two CFTC letters seeking to close the PredictIt

Market and challenged in the Second Amended Complaint. These are CFTC Letter 22-08 and CFTC Letter 23-03. This is a remedy supported by the Fifth Circuit's ruling in *Clarke* and an outgrowth of the letters violating the Administrative Procedure Act. 5 U.S.C. §§ 558, 706.

3. Declare the justifications stated in the DMO letters arbitrary and capricious. The Plaintiffs also sought a declaratory judgment to address recurrence or repetition of the conduct challenged in the complaint. And the Government now does not oppose the entry of the declaratory judgment outlined in the proposed order. The requested declaratory judgment would determine that the justifications stated in the letters seeking to close the Market are arbitrary and capricious and otherwise legally insufficient as grounds for the Commission taking any action to close the PredictIt Market, to cancel the PredictIt Market's No-Action Relief, or to impose any other form of sanction on Plaintiffs.
4. Enter a permanent injunction preventing the CFTC from seeking to close or sanction the PredictIt Market based on currently-known facts and events. The Plaintiffs also sought injunctive relief against renewed CFTC efforts to close the PredictIt Market. The parties have agreed on the appropriate scope of that relief, and thus the CFTC now does not oppose the entry of a permanent injunction against the agency seeking to close the PredictIt Market or imposing any other sanction on PredictIt Market sponsors, operators, or participants based on events or facts or features of the PredictIt Market known to the Commission prior to or on the date of entry of the proposed order.
5. Deny Plaintiffs' additional requests for relief. The Plaintiffs sought other forms of relief in the Second Amended Complaint, including certain forms of monetary relief,

fees, and costs. The Plaintiffs have agreed to entry of judgment denying those forms of relief.

6. Deny Plaintiffs' Motion for Leave to File a Third Amended Complaint as moot. The foregoing remedies provide all the relief necessary to address the matters at issue in this case. Accordingly, further amendment of the complaint is no longer necessary, and the Court should deny as moot Plaintiffs' Motion for Leave to File a Third Amended Complaint.

The Court has the power to grant each form of relief that the parties have agreed to. Vacatur, declaratory relief, and injunctive relief are all appropriate remedies under the Administrative Procedure Act. Vacatur is the baseline remedy for agency action found to be unlawful. *Data Marketing Partnership, LP v. United States Department of Labor*, 45 F.4th 846, 859 (5th Cir. 2022). And the Administrative Procedure Act 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 and vacatur are also rooted in Section 706 of the Administrative Procedure Act, 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).

Moreover, vacatur, declaratory relief, and injunctive relief work together. Courts have found declaratory and injunctive relief, in addition to vacatur, particularly appropriate when, as here, aspects of the unlawful agency action could be repeated. *Texas v. Cardona*, No. 4:23-CV-604, 2024 WL 3658767, at *50 (N.D. Tex. Aug. 5, 2024). *See also 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. . . .”). As discussed in the

Plaintiffs' uncontested allegations in Second Amended Complaint and in the Fifth Circuit's decision in *Clarke*, each type of relief is thus warranted by the circumstances of this case.

Each of the requirements for permanent injunctive relief is satisfied here. *VRC LLC v. City of Dallas*, 460 F.3d 607, 611 (5th Cir. 2006) (explaining that parties seeking a permanent injunction must establish (1) success on the merits; (2) that a failure to grant the injunction will result in irreparable injury; (3) that said injury outweighs any damage that the injunction will cause the opposing party; and (4) that the injunction will not disserve the public interest). Plaintiffs have succeeded on the merits both in the Fifth Circuit's decision in *Clarke* and by virtue of judgment on the pleadings in their favor. Failure to grant the injunction will result in irreparable injury to the Plaintiffs, as the market disruption that would be caused by the Government's reformed future efforts to close the PredictIt Market, as well as the attendant cost of compliance with such efforts, would cause financial injury that would be difficult to recover from the Government due to sovereign immunity. *See Clarke*, 74 F.4th at 643. By contrast, the CFTC is conceding that efforts to close the Market are not in its interest based on the current facts, such that the CFTC will suffer no harm from the injunction. Thus, the injury to Plaintiffs necessarily outweighs any damage that the injunction will cause the CFTC. For the same reason, the injunction will not disserve the public interest. *Id.* at 643-44 ("[T]he public interest is served when administrative agencies comply with their obligations under the APA.").

As to declaratory relief, this case involves an "actual controversy" that is real, substantial, and of sufficient immediacy and reality to warrant judicial intervention, given the effort to close the Market and the risk of similar issues arising in the future. *See Ondrusek v. United States Army Corps of Engineers*, 123 F.4th 720, 729 (5th Cir. 2024). Declaratory relief is thus warranted by both 28 U.S.C. § 2201 and 5 U.S.C. § 703.

* * *

The remedies reflected in the proposed order will resolve all issues in the case and allow the above-captioned matter to come to an end. Plaintiffs respectfully request that the Court enter the attached proposed order resolving the Government's motion for judgment on the pleadings and Plaintiffs' motion for leave to file a third amended complaint, which will serve as a final judgment concluding the above-captioned matter. The Government Defendant does not oppose the entry of the proposed order attached hereto.

Dated: July 21, 2025

Respectfully submitted,

/s/ Michael J. Edney

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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2025, 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