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**Media Inquiries:** [Judy Pino](#), 202-869-5218

## **NCLA Amicus Brief Condemns CFTC’s Arbitrary and Capricious “Switcheroo” on PredictIt Market**

*Kevin Clarke, et al. v. Commodity Futures Trading Commission*

**Washington, DC (February 1, 2023)** – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, filed an [amicus curiae brief](#) today in the U.S. Court of Appeals for the Fifth Circuit, urging the court to confront a recurring scourge in administrative regulation: the “switcheroo” whereby an agency abruptly reverses prior policy guidance without explanation, wreaking havoc on property and reliance interests that policy had engendered. NCLA’s brief argues that agencies must provide reasoned explanation and cannot act arbitrarily or capriciously when retracting previous guidance, which was binding on the agency, in the face of reliance interests.

The PredictIt Market provides a platform for investors to trade contracts that predict the likely outcome of elections and other significant political events. In 2014, CFTC authorized the trading market’s establishment and assured its creators that the market could operate lawfully under the Commodities Exchange Act. Now, after millions of dollars and years of sweat equity have been invested to build and operate the market, CFTC pulled the rug out from under its operators and told them to shut everything down by the apparently arbitrary date of February 15, 2023—or else. Many thousands of third-party traders have invested in PredictIt Market contracts offered over the years—some of which remain open.

The Administrative Procedure Act (APA) requires courts to set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Clearing this low bar is the least we expect from unelected administrators entrusted to promulgate and enforce ever-expanding reams of regulation. Yet here, CFTC failed to clear the bar. The agency acted arbitrarily and capriciously by reversing course on PredictIt Market without considering reliance interests and providing a reasoned explanation for disregarding those interests.

This litigation provides the Fifth Circuit a golden opportunity to underscore the need for agencies not only to explicitly consider reliance interests before reversing prior policy, but also to give a reasoned explanation for overriding or not reasonably accommodating such interests. One troubling fact that makes this case egregious is that the same unaccountable official signed off on both the 2014 permission slip and the 2022 shut-down order.

### **NCLA released the following statement:**

“Agencies may abandon or change their prior positions when circumstances warrant—and they often do—but they need to explain why they’re doing so, especially when regulated parties have relied for years on prior policy and invested millions to build and operate a compliant enterprise. The CFTC fell woefully short when it pulled the plug on PredictIt Market.”

— **Russ Ryan, Senior Litigation Counsel, NCLA**

**For more information visit the *amicus* brief page [here](#).**

## **ABOUT NCLA**

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights.

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