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In NCLA Amicus Win, Fifth Circuit Blocks CFTC’s Abusive Policy Reversal Against PredictIt Market

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

Washington, DC (July 24, 2023)—The U.S. Court of Appeals for the Fifth Circuit has [ruled](#) that the Commodity Futures Trading Commission’s threatened crackdown on the PredictIt Market without clear explanation was “likely arbitrary and capricious.” The Court ordered the U.S. District Court for the Western District of Texas to grant a preliminary injunction against CFTC’s action in the case of *Clarke v. CFTC*. NCLA celebrates this ruling, having filed an [amicus curiae brief](#) asking the Fifth Circuit to stop CFTC’s unjust treatment of PredictIt.

PredictIt provides a platform for investors to trade contracts predicting the likely outcomes of major political events like elections. CFTC authorized its establishment in 2014, and it allowed the online marketplace to operate for years without federal registration, assuring its creators that they could operate lawfully under the Commodities Exchange Act. However, eight years later, in August 2022, CFTC abruptly rescinded its no-action letter permitting this arrangement for PredictIt. It then accused PredictIt’s operators of violating the letter’s terms without explaining how, and told them to shut everything down by the arbitrary date of February 15, 2023.

NCLA’s *amicus curiae* brief pointed out that CFTC failed to meet the basic standard of the Administrative Procedure Act, which requires courts to set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” CFTC’s conduct is part of a recurring problem in which federal agencies abruptly reverse earlier policy guidance without explanation, wreaking havoc on the property and reliance interests that such guidance fostered. Such guidance abuse is a core concern for NCLA.

CFTC argued that PredictIt’s case is moot because the agency has since reneged on its rescision of the original no-action letter, replacing it with a March 2023 letter. However, the Fifth Circuit correctly rejected this argument, noting that the replacement letter still says the original letter “is void and should be withdrawn.”

NCLA released the following statement:

“This case is just the latest example of unelected bureaucrats pulling a ‘surprise switcheroo’ on private parties who have long relied on existing regulatory policy. NCLA is deeply gratified by the Fifth Circuit’s confirmation that agencies not only must explicitly consider reliance interests before reversing prior policy positions, but also must articulate a reasoned explanation for overriding those interests or not reasonably accommodating them.”

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

For more information visit the *amicus* 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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