No. 19-132

IN THE

Supreme Court of the United States

LAWRENCE I. FÉJỌKWỤ,

Petitioner,

v.

COMMODITY FUTURES TRADING COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTARY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Events of recent weeks, occurring after Féjọkwụ's filing of his petition for a writ of certiorari further confirm Féjọkwụ's argument in his petition – the CFTC and the NFA remained engaged in an ongoing usurpation of powers. They continue to fearlessly act with a sense of *supremacy* emboldened by excessive judicial deference and acquiescence. As a direct result, regulatees entrapped by the vast CFTC/NFA regulatory net continue to suffer severe repercussions. Other regulatees, seeing the *supremacy* of the CFTC and NFA's regulatory powers surrender their legal and constitutional rights, thus, allowing the CFTC and NFA to establish precedents grounded not in law but in the crippling fear of the real threat of the destruction of regulatees' businesses, livelihoods, and personal reputations.

Justice is grounded in law – where *all* are equal under the law. Justice is *not* grounded in fear where an unjust power dynamic stemming from usurpation and arrogation of powers makes one party all powerful and *superior* to others under the law.

This Court should immediately intervene to restore justice to the land and to assert its supremacy over the American regulatory landscape. By so doing, the Court fulfills its essential purpose and, thereby, ensures that the livelihoods, businesses, and reputations of hundreds of thousands of regulatees are not at risk of destruction by an usurpatory agency-SRO tandem.

I. Ongoing usurpation of *undelegated* powers, exploitation of lacunas, and acting with a sense of *supreme* powers by the CFTC and the NFA create a regulatory abyss for millions of regulatees and encourages even more usurpation and *supreme* behavior, if unchecked by this Court.

A. CFTC violates a Court's Consent Order within minutes of the Consent Order's issuance.

According to Kraft, "the CFTC and its Commissioners engaged in a deliberate, orchestrated effort to violate the Court's Consent Order within minutes of its entry."[1] The order stated "neither party shall make any public statement about this case."[2] Yet, immediately after the order was issued on August 15, 2019, the CFTC issued *three* documents on its website. According to Kraft, the documents were "self-aggrandizing" and "often false". [3]

In an extraordinary action, the judge in the case has set a hearing for October 2, 2019 and has asked the CFTC Chairman and two Commissioners to testify.

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[1]See, *US Commodity Futures Trading Commission v. Kraft Foods Group, Inc. et al*; Case Number: 1:15-CV-02881; U.S. District Court, Northern District of Illinois (Chicago)

[2] *Id.*

[3] *Id.*

B. NFA and CFTC in tandem exploit a legal lacuna to the severe detriment of Effex Capital, a party *not* subject to regulation by NFA.

Effex Capital is a firm "not subject to regulation by the NFA."[4] Yet, NFA in a disciplinary case with an NFA member (FXCM) chose to disparage Effex in the documents detailing the settlement of the FXCM case. Effex sought relief including removal of its name from the settlement documents and damages for loss of profits. The district court ruled against Effex and the Seventh Circuit affirmed.

Effex claimed that as it was not a party to the case involving FXCM, it had no standing to contest the NFA's findings before they were published on the NFA's website. The district court held that (i) "Effex could have petitioned the CFTC to exercise its authority under 7 U.S.C. § 21(h)(2) to review ... *sua Sponte*", or (ii) "Effex could have intervened to become a party"; or (iii) since "CFTC had previously suggested that a nonparty could ask the Commission to waive its rules...", Effex should have done so; or (iv), "Effex could have ... petitioned the CFTC to revise its rules generally to permit Commission review in such instances." [5]

Keeping aside, the near-certain irreparable harm done to the businesses of regulatees or in the case of Effex, even *non-regulatees*, while pursuing these "options", these "options" appear to any party experienced in the CFTC-NFA regulatory universe as futile if not impossible.

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[4] See, *Effex Capital, LLC v. National Futures Association,* 933 F.3d 882 (2019)

[5] *Id.*

At the invitation of the Seventh Circuit, CFTC filed an amicus brief in support of the NFA where it contended that "Congress has decided that a "person aggrieved" by the SRO's action may seek redress before the Commission.". Effex is not a party to the case, so it is *not* explicitly a "person aggrieved". The Seventh Circuit held that Effex would have to rely on CFTC – a clearly conflicted party – to determine if Effex fell within the "zone-of-interests of the statute and therefore have the right to seek redress before the CFTC." Given this admission by the Seventh Circuit, it is curious why they agree with the district court's finding that remedies before the CFTC would *not* be "impossible or futile". Furthermore, in its amicus brief, CFTC admitted "that although nonparties do not have a right to CFTC review of an NFA action that implicates them, the Commission does have the discretion to permit nonparties to obtain CFTC review in extraordinary circumstances pursuant to 17 C.F.R. § 171.14. The CFTC has not indicated it will use this discretion in this case.

More bewildering and indeed frightening to regulatees, the Seventh Circuit concludes that:

1. There "may" be "administrative remedies ... open to [Effex]".

2. "We do not believe it appropriate for us to delineate in any definitive way the administrative paths that may be open to Effex."

So, who is to "delineate" those "administrative paths"/"remedies"? The regulators, themselves? These questions remind one of the maxim

"Quis custodiest Ipsos custodes?"[6]

("Who will guard the guards themselves?")

Clearly, there is a lacuna being exploited by the powerful regulators to the great detriment of not just their regulatees but even *non-regulatees*.

II. Excessive judicial deference and acquiescence by courts encourage and facilitate the ongoing *supreme* behavior of the CFTC and the NFA.

Why are the CFTC and NFA engaged in an ongoing usurpation of undelegated powers, exploitation of lacunas, and acting with a sense of *supreme* powers? Perhaps, because there is an exceedingly low rate of certiorari granted to parties opposing the CFTC by this Court – effectively a rate of **zero percent**.[7]

The CFTC was established in 1974. In the ensuing 45 years, there have been 41 cases in which petitions for a writ of certiorari have been filed at this Court. These 41 cases include Féjọkwụ's case, the only case of the 41 that is still pending. Only three of these 41 had the CFTC as the petitioner. In all three, the CFTC was granted a writ of certiorari – a 100% success ratio.[8] There were 38 cases in which the

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[6] Juvenal in Satires (Satire VI, lines 347-348)

[7] All statistics in this section are from research conducted using the ThomsonReuters Westlaw database on September 20, 2019 during approximately 10:30 AM through 2:30 PM.

[8] See *Commodity Futures Trading Comm'n v. Weintraub*, 469 U.S. 929, 105 S. Ct. 321, (1984); *Commodity Futures Trading Comm'n v. Schor*, 473 U.S. 922, 105 S. Ct. 3551 (1985); and

CFTC was *respondent*; one case – Féjọkwụ's case is under consideration[9]; one case[10] was dismissed pursuant to Court Rule 53[11]; and in the remaining 36 cases the CFTC prevailed in 35 for a 97% success rate. In the one case where the CFTC did not prevail[12], the CFTC later prevailed in a related case with the same petitioner.[13]

While the Court in its role of court of "review" and not court of "first view" historically grants a small number of petitions for a writ of certiorari, it does appear that granting only **one** of an already incredibly small number of petitions involving the CFTC as respondent to reach the Court is exceptional.

Admittedly, one cannot speak to the merits of these petitions and their "certworthiness", two facts remain quite striking:

1. An exceedingly small number of petitions are filed at the Court despite significant activity within the confines of the regulators' adjudicatory venues. Of those cases, only 1662 cases seek redress outside

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Commodity Futures Trading Comm'n v. Schor, 474 U.S. 1018, 106 S. Ct. 566 (1985).

[9] *See*, Supreme Court docket 19-132.

[10] *Chicago Commodities Inc. v. Commodities Futures Trading Comm'n*, 483 U.S. 1041 (1987), 108 S. Ct. 362

[11] Rule 53 of "Rules of the Supreme Court of the United States" effective June 30, 1980. Rule 53 (1980) is equivalent to Rule 46 (2019) i.e. Rule 46 of "Rules of the Supreme Court of the United States" effective July 1, 2019.

[12] *Dunn v. Commodity Futures Trading Comm'n*, 517 U.S. 1219, 116 S. Ct. 1846, (1996)

[13] *Dunn v. Commodity Futures Trading Comm'n*, 528 U.S. 825, 120 S. Ct. 73, (1999)

of the regulators' venues at district and appeal courts. Yet only 41 cases over a 45-year timespan have reached this Court.

2. The CFTC has a surprising 100% success rate in cases where it is petitioner, while in cases where it is respondent it is successful 97% of the time.

This power dynamic results in a dual chilling effect on the regulatory regime.

1. A realization by regulatees that the CFTC and NFA are treated as *superior* under the law.

2. A realization by the CFTC and NFA that they can persist, with emboldenment in their assertion of their unjust *supreme* regulatory powers.

No party is *superior* under the law or should even be perceived as *superior* under the law. No party should be allowed to function as if its powers are *supreme* and can never be checked. **This is not the intent of the law. This cannot be the law.**

This Court should immediately end this power dynamic and make regulators and regulatees equal under the law. The Court will achieve this by actively reviewing matters involving this regulatory domain with a non-deferential, non-acquiescing eye. This is particularly so, in cases like this case where:

1. The matter involves an issue this Court has clearly spoken on for over thirty years. Specifically, this Court held in *Taggart,* that "willfulness" requires "no fair ground of doubt" and in both *Safeco* and *McLaughlin*, that "willfulness" requires measures of bad-faith or recklessness.

2. Féjọkwụ as an individual petitioner is highly disadvantaged when compared to a federal agency with the full resources of the United States of America. Féjọkwụ is a clear example of a party in dire need of achieving equality under the law through urgent judicial intervention.

3. Féjọkwụ is also highly disadvantaged by virtue of being a *pro se* petitioner.

III. This case is an ideal vehicle as it is a rare case to reach the Court in an area where percolation simply cannot occur due to excessive judicial deference and acquiescence.

The CFTC and the NFA act almost lawlessly, as *supreme* powers to themselves. This fact is evidenced amongst other examples by the recent Kraft and Effex cases. Stemming directly from the CFTC and NFA's success in assuming *supreme* powers unto themselves, most regulated parties surrender early allowing the CFTC to set unjust, illegal precedents.

Even in cases like that of Kraft where Kraft surrendered by agreeing to pay a hefty fine, the CFTC

still gratuitously violated the consent order by releasing "false" statements.

Similarly, even in Féjọkwụ's case where Féjọkwụ surrendered by filing a withdrawal from membership, the NFA insisted they had to engage in a multi-month investigation just to allow Féjọkwụ, a solo operator to withdraw from membership. Even after the multi-month investigation found no evidence of fraud and as the NFA freely admitted "**This is not a sales practice case, a fraud case**." the NFA persisted.[14] The NFA resolute in demonstrating its *supreme* powers, permanently banned Féjọkwụ for not providing bank statements that were not required by the plain letter meaning of the law to prove Féjọkwụ's qualification for the exemption.

These bank statements had always been in the NFA's possession from the first full-day of the investigation. When this fact was brought to the NFA's attention, they incredulously claimed the bank statement was an "unauthenticated email". Yet, when Féjọkwụ sought on *five* different occasions to provide the bank statements to the NFA in any form of their choosing, the NFA refused to accept them.[15] Additionally, the CFTC blatantly lied to the Third Circuit that Féjọkwụ refused to provide the bank statement "*even now*". [16] In response to this falsehood by the CFTC, Féjọkwụ successfully moved to include the bank statements in the record.[17] The NFA's multi-month investigation has now turned into a six-year battle where the NFA and CFTC are determined to enforce their professional death penalty on Féjọkwụ.

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[14] See, page 10 of Féjọkwụ's petition.

[15] See, page 10-11 of Féjọkwụ's petition.

[16] See, page 46 of Féjọkwụ's petition.

[17] *Id.*

So even, when regulatees frightened at losing their businesses, their livelihoods, and their personal reputations *surrender* to the CFTC and NFA, it is still *never* enough.

The NFA and CFTC are not satisfied with ordinary victory, they must obtain gratuitous and total victory over their opponents and in the case of weak regulatees, like Féjọkwụ – the total destruction of their livelihoods – all for two joint aims.

Firstly, the NFA/CFTC through this ongoing abuse of their powers and usurpation of powers creates a regulatory environment of completely cowed regulatees – regulatees *no* longer equal under the law to the NFA/CFTC, but significantly *inferior* under the law to the NFA/CFTC. *Secondly*, the NFA and CFTC create unjust/illegal precedents grounded not in law but anchored in the fear of cowed regulatees.

Only this Court can bring this grave injustice – this regulatory twilight zone to an end. The Court should do so *posthaste.*

This case is an ideal vehicle for the Court to assert its supremacy, and to uphold equality of *all* under the law as very few cases reach the Court for adjudication. Very few cases in this regulatory arena, reach this Court for three reasons. *Firstly,* regulatees, having been cowed by the reality that the CFTC and NFA are effectively *supreme*, fully surrender and do not pursue their cases, fearing certain defeat. *Secondly*, because of previous illegal and unjust precedents established by prior surrender of other regulatees, legal avenues for redress are effectively foreclosed. *Thirdly,* lacking financial resources and/or emotional fortitude to continue the battle, regulatees surrender to the all-powerful CFTC/NFA.

Féjọkwụ's case is a rare example of a case of a regulatee persisting in the fight for truth and justice – fighting to have the unjust professional death penalty reversed, so that his livelihood, business, career, and personal reputation may be restored. This case is an ideal vehicle not just because it is a rare example of a determined David seeking victory over a Goliath, but it is the rare example of a case that has the *additional* characteristic of a mature circuit split. This case presents a major circuit split on a critical issue that will reoccur in this specific regulatory domain where judicial adjudication is rare due to cowed regulatees.

Justice Ginsburg, stated a fortnight ago that it is not the duty of the Court "to right wrong judgments" but "to keep the law in the United States more or less uniform".[18] This Court should uphold this duty by resolving the circuit split to conform to its precedents over thirty years in *Taggart*, *Safeco,* and *McLaughlin*, and, thus, as in Justice Ginsburg's words, "keep the law in the United States more or less uniform". [19]

While the Court may be tempted to allow percolation to occur, this is neither necessary nor just because percolation is simply not occurring. **The issue of "willfulness" is likely to reoccur, but it is *not* likely to legally *percolate* for the reasons presented earlier.** Any delay/inaction by the Court will result in severe adverse repercussions for thousands of regulatees – and this is particularly so for weak regulatees like Féjọkwụ. Justice Ginsburg

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[18] See, Kalvis Golde, *Ginsburg addresses first-year class at Georgetown Law*, SCOTUSblog (Sep. 13, 2019, 9:31 AM), https://www.scotusblog.com/2019/09/ginsburg-addresses-first-year-class-at-georgetown-law/

[19] *Id.*

as recently as two weeks ago put forth that important questions percolate and return to the Court. Justice Ginsburg further stressed that "when the court denies review, it [says] nothing about the merits" of a case, but rather indicates a desire for "further percolation" of the issue presented.[20]

Féjọkwụ, respectfully posits that on the basis of the statistical analysis of petitions before this Court over the forty-five year history of the CFTC as presented in section II above, that in this specific regulatory domain, percolation is not occurring and indeed is severely straitjacketed from occurring due to the intense and insidious power dynamic that exists between regulators and regulatees. Simply, the CFTC and NFA will continue to assert their unjust/unlawful precedents taking the Court's silence to mean consent. Regulatees seeing the Court's silence and the deference/acquiescence of the lower courts of appeals will simply surrender. **No percolation, therefore, occurs or can occur.**

This case presents a mature circuit split on the issue of willfulness and good-faith. In addition, it presents critical issues of due process and delegation of powers. Furthermore, as the Court has already made clear in *Taggart*, *Safeco,* and *McLaughlin*, the essential issue in this case is crystal clear – "willfulness" cannot logically co-exist with good-faith:

1. "Willfulness" requires "no fair ground of doubt"

2. "Willfulness" requires measures of bad-faith or recklessness.

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[20] *Id.*

Therefore, the Court can immediately end this unjust six-year saga that has had disastrous consequences for Féjọkwụ; simultaneously assert its supremacy over the CFTC and NFA; end this unjust regulator-regulatee power dynamic; and restore equality under the law for *all* – regulator and regulates alike – by summarily reversing the Third Circuit.

CONCLUSION AND PRAYER

This case is fundamentally a case of regulatory power run amok resulting in disastrous consequences for Féjọkwụ. Recent cases discussed in this brief reinforce this point. Is there a limit to the ambit of the *supreme* power of the CFTC and the NFA? Will this Court assume its rightful place as the supreme court in the land? Will this Court guard the CFTC and NFA and not allow these regulatory guards to guard themselves?

Féjọkwụ, prays that this Court will answer **YES** to each of the three questions posed above. Féjọkwụ reiterates his prayers in his petition.

This Court should summarily reverse the judgment of the Third Circuit.

Respectfully submitted, with gratefulness,

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