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

PETITION FOR REHEARING

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Rules

INTRODUCTION

On October 1-2, 2019, after submission of all briefs in this case and prior to the entry of the order denying certiorari in this case, the Seventh Circuit unsealed court records in *CFTC v. John Robert Blakey*, 19-2769 (2019)[1] which reveal the brazenness in which the CFTC acts in pursuing at all costs its "wins". While the reader may cynically consider the above statement to be the hyperbolic protestations of a *pro se* petitioner, even a measured administrative-law lawyer, Gary DeWaal, who previously served on the "inside", as a CFTC trial-attorney, characterized the case as *"The Twilight Zone"*, to wit:

> "A litigation with three parties – a plaintiff, two defendants and the presiding judge. Wow! As I wrote before, this post-settlement proceeding is an episode out of *The Twilight Zone*. It only gets stranger."[2]

This observation by DeWaal *uncannily* matches Féjọkwụ's comments in his certiorari petition *and* in his supplementary brief, quoted in order below. To wit:

> "Féjọkwụ, for six years has suffered mightily at great personal and professional loss in this regulatory twilight zone. The American

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[1] In this case Judge John Blakey was the Respondent and Kraft was a party-in-interest. The CFTC had sued in the Seventh Circuit for a writ of mandamus in connection with the lower court case *CFTC v. Kraft* 1:15-CV-02881 (2015)

[2] *See,* statement by Gary DeWaal of Katten Muchin at https://www.lexology.com/library/detail.aspx?g=a0892ca1-3f5f-47e5-9c0a-638c1f0db68e

> regulatory regime cannot be a Kafkaesque, Alice in Wonderland twilight zone – for even a day longer. Féjọkwụ fervently prays it ends today."
>
> "***Only*** this Court can bring this grave injustice – this regulatory twilight zone to an end. The Court should do so *posthaste*."

The ongoing CFTC v. Kraft case further exemplifies the fact that the American regulatory regime not only remains a Twilight Zone – but that the near-extinguished light is only becoming dimmer with each passing day as courts in the land look unquestioningly, credulously, uncritically at the CFTC/NFA. This Court should immediately intervene given the serendipitous[3] timing of these events and restore the light of justice. Doing so, Féjọkwụ, respectfully states is this Court's fundamental duty.

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[3] Another *current* example of the CFTC's intensely unyielding, all-powerful, unjust regulatory style is manifest in the ongoing case *CFTC v. Thakkar*. The DOJ brought a criminal case against Thakkar, on referral from the CFTC. A judge acquitted Thakkar of one count and a jury was hung on two counts (10-2 in favor of acquittal) leading to a mistrial. The DOJ dismissed the indictment with prejudice and declined to re-prosecute. The CFTC then continues a previously stayed civil case. See, *CFTC v. Thakkar,* 1:18CV00619 (2018); *USA v. Thakkar*, 1:18CR00036 (2018); petition by the trading/brokerage community: "Justice for Jitesh Thakkar; CFTC Should Drop Civil Charges and Apologize" at https://www.change.org/p/dick-durbin-justice-for-jitesh-thakkar-cftc-should-drop-civil-charges-and-apologize, and "The U.S. v. Jitesh Thakkar: Closing Arguments" at https://medium.com/@cmackie312/the-u-s-v-jitesh-thakkar-closing-arguments-a494b4f6c9a0.

GROUNDS FOR REHEARING

I. In the interests of justice, the Court should grant the petition for rehearing and summarily reverse the Third Circuit.

A foundational tenet of justice is that agreements be upheld and cannot be unilaterally violated. One party cannot choose to unilaterally violate an agreement, simply because it has a *supreme* sense of its powers and confidence in the judiciary reflexively deferring to it. This foundational tenet applies even when the agreement is between an agency's delegated SRO and a solo-operator operating from a home-office.

Kraft claims in recently unsealed court records, that "the CFTC and its Commissioners engaged in a deliberate, orchestrated effort to violate the Court's consent order".[4] Among many shocking revelations in the unsealed records was the fact that the CFTC *twice* through its Director of Enforcement, Jamie McDonald called Kraft to request the removal of the clause in the consent order prohibiting release of touting statements. McDonald did this while not revealing to Kraft that the CFTC *and* her commissioners would violate the clause in the consent order even if Kraft refused to agree to the clause's removal.[5] Worse, in one call, McDonald lied that no

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[4] See, *CFTC v. Kraft*; Case Number: 1:15-CV-02881; U.S. District Court, Northern District of Illinois (Chicago). *See also,* "Let the sunshine in—Appellate court unseals documents in high-stakes CFTC-Kraft Foods dispute" by Brad Rosen, J.D. at https://jimhamiltonblog.blogspot.com/2019/10/let-sunshine-inappellate-court-unseals.html

[5] *Id,* and *see,* "Kraft-Mondelez tells appellate panel why Commissioners are not entitled to mandamus relief" at

commissioner planned to issue a statement. The immediate violation of the consent order proves that McDonald's statement was false. On that call, Kraft explicitly rejected the request to remove the clause from the consent order considering it a "critical part of the agreement".[6] Brazenly, within minutes of the judge entering the consent order, the CFTC released statements by the commission and two of her commissioners.

On October 22, 2019, the Seventh Circuit remanded the case to the district court. The district court reopened the case, and vacated the consent order, with Judge Blakey stating:

> "Quite simply, the factual record undermines the notion that the parties ever agreed to the CFTC's recent legal theory that the Consent Order would somehow bind the CFTC as an entity, but not bind the very agents through which it acts, i.e., its Chairman, Commissioners or staff members."

Time will tell how the case is resolved.

There is a clear analog between the Kraft case and the Féjọkwụ case. In both cases, the regulator choses to violate an agreement in order to create severe adverse outcomes for the regulatee. The NFA, after ignoring multiple requests by Féjọkwụ for meetings to resolve the matter, suddenly issues a notice requesting a response from Féjọkwụ. Yet, they proceeded posthaste to prematurely file a formal complaint ***26-days*** **prior** to the deadline.

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https://jimhamiltonblog.blogspot.com/2019/10/kraft-mondelez-tells-appellate-panel.html

[6] *Id.*

While it is pleasing and highly commendable to see the multinational with its high-powered retinue of lawyers defending her on valid principles, no matter the outcome, no individual member of Kraft will have his/her career permanently destroyed.

In the example of Féjọkwụ, that is simply not the case. Féjọkwụ has received a permanent ban. This is a professional death sentence. This is not hyperbole. See pages 2-3 of the certiorari petition.

Regulated entities should have confidence that the CFTC-NFA duo will keep to their agreements as both regulator and regulatee are equal under the law. If the CFTC agrees to a consent order it should not *post facto* invent a new legal theory to justify its immediate violation of a consent order. If the NFA sets a deadline for a response to its notice, it should abide by that deadline. It should not, **26-days** *prior* to the deadline file a complaint against Féjọkwụ. The NFA acted in this way because it knew Féjọkwụ, lacking legal counsel, regulatory experience, and resources was an easy target it could race through its in-house hearing process, while violating basic due process protocols, to ensure a pre-ordained end – permanently banning Féjọkwụ.

The CFTC/NFA actions are simply, *most* unjust. Their actions are unquestionably against the interests of justice. This Court is respectfully requested to urgently intervene and summarily reverse the Third Circuit in the plain interests of justice – to ensure that all parties remain equal under the law and that the CFTC-NFA are not further emboldened to act with fearless impunity in the American regulatory Twilight Zone they have systematically and purposefully created through their unjust actions and inactions.

II. At least one plain error in this case mandates that the Court should grant the petition for rehearing and summarily reverse the Third Circuit.

There is at least one glaring element of this case that arises under the "Plain Error Exception" and, thus, cries for this Court to exert its power as "required in the interests of justice".[7] The NFA denied Féjọkwụ proper notice. The NFA on May 6, 2014 sent Féjọkwụ a letter indicating its examination findings and providing him a deadline to respond yet filed the complaint 26-days before the deadline. This fact has never been in dispute.

The NFA knows that they did deny Féjọkwụ his due-process rights – and worse they did so in disparate fashion compared to other NFA cases.[8]

The NFA, CFTC and the Third Circuit all side-stepped this issue of due-process violation. This is clearly a plain error and "constitute[s] a fundamental unfairness in the proceedings".[9] Additionally, the violation of a deadline set by the regulator itself and the avoidance of this issue by the CFTC and the Third Circuit is a prime example of an error that "seriously affect[s] the fairness, integrity, or public reputation of public proceedings."[10] Ordinary Americans expect that regulators abide by deadlines they set and regulatees do not become liable with grave

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[7] *See, Wood v. Georgia,* 450 U.S. 261 (1981).

[8] See, *NFA v. Quants Capital Mgmt. See also, NFA v. IKOS;* NFA Case 05-BCC-026.

[9] See, *Supreme Court Practice, Tenth Edition* by Shapiro et al, p. 469

[10] *See, United States v. Atkinson,* 297 U.S. 157, 160 (1936), quoted in *Silber v. United States,* 370 U.S. 717, 718 (1962), and *Connor v. Finch,* 431 U.S. 407, 421 n.19 (1977)

repercussions due to the regulator filing a complaint 26-days prior to their own deadline. The Court should summarily reverse this case to restore "the fairness, integrity, or public reputation of public proceedings".

III. The penalty in this case – the maximum possible penalty is so extreme, indeed draconian, that the Court should grant the petition for rehearing and summarily reverse the Third Circuit.

What began as a minor discovery dispute has resulted in devastating consequences for Féjokwu – a professional death penalty with the added "bonus" of irreparable damage to his personal reputation if this Court does not reverse. Though Féjokwu acknowledges that he might have been "naïve[]" and "foolish[]" to adhere so adamantly to "what [he] felt was a valid principle,", namely that the NFA does not have an unfettered right to demand sensitive financial information from nonmembers, Féjokwu reiterates that he acted at all times in good faith and was never reckless.

Féjokwu's actions were simply the result of trusting the "system" to treat him fairly and provide him due-process not merely in appearance but in form and substance. He attended the Hearing *pro se*, under the naïveté of innocence – he did not see the need to hire lawyers he could not afford for a case in which he was innocent. In popular parlance, there was no need to "lawyer-up", when one's conscience was and remains clear. He viewed the Hearing as effectively a subpoena hearing, where the result would be either a finding that his position that the document was not required was valid or that the NFA had a right to the document. In the latter case, his worst case

assumption, was that the Hearing Panel would issue a direct order (as they could and probably should under NFA Rule 2-5)[11] to provide the document within a defined time window or be subject to indefinite suspension until he complies.

Even if one believes the NFA had a legitimate regulatory reason to seek the document, then the perplexing question is why did the NFA not pursue that judicious outcome of issuing an order to provide the document by a certain time or face indefinite suspension until the document is provided. Such an outcome would have become a de facto permanent bar, if Féjokwu refused to comply. But, if he did comply, this would have been a fair avenue to allow him to clear his name after standing upon principle and move forward with his career and life.

Mystifyingly, lacking any pretense of fairness or justice, the NFA/CFTC purposefully, chose to push Féjokwu punitively, vindictively into the professional abyss. It is for this reason that all attempts by Féjokwu to provide the bank statement to the NFA after the Hearing were rebuffed/rejected. Worse, the CFTC blatantly, repeatedly lied to the Third Circuit to deny all these attempts.

If regulation was their aim, they would have responded to Féjokwu's requests for meetings to clarify and understand the justification for the document request – after all an integral part of *regulation* is *education*. After such meetings, if the dispute remained, they could have referred the case to

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[11] The second sentence of Rule 2-5 states "Each Member and Associate shall comply with any order issued by the .... NFA hearing or arbitration panel."

the CFTC, the agency that does have de jure subpoena powers. By so doing, this would have ensured that the CFTC had justified the rationale for issuing a subpoena. Additionally, this would have allowed for a district judge to determine the legitimacy of the subpoena request. In such scenario, no sanction would be issued until *after* a determination was made that the request was valid, *and* compliance was failed.

If regulation was their aim, they would have accepted the emailed bank statement when they received it on March 26, 2014, the first full day of the hearing, and immediately ended the investigation or if they had questions or needed verification, obtained that trivial verification from Barclays at that time.

If regulation was their aim, they would not have mysteriously held back the email bank statement from evidence at the Hearing despite it being evidence they knew they possessed.

If regulation was their aim, since Féjokwu was *withdrawing* from NFA membership and not continuing as a member, the NFA could have simply allowed him to withdraw from membership and conditioned any future approval of an application for membership on providing the document. In fact, in other NFA cases, they have adopted a similar approach. Why in other cases, but not in Féjokwu's case?!

All these options above, are trivial actions that a party acting fairly and justly could have easily pursued saving the time and expense of all parties involved and would have saved the time of this Court.

Popular culture and social media have created and aggressively promoted "cancel culture" where individuals can have their careers "cancelled" by the

popular culture/social media vanguard for real or perceived offenses. A permanent ban, that is, a *cancellation* of one's career should not become the default outcome for every offense alleged by a regulator, especially when other resolutions exist. The negative imprimatur of such a career cancellation creates a professional death penalty that reverberates *globally*. The cancel culture of popular culture should not be allowed to extend to the regulatory domain. This Court has a duty to ensure cancel culture is *cancelled* from the regulatory domain.

Coach Nick Saban may not be a legal authority, but true justice is always in Solomonic fashion grounded in commonsense. Coach Saban speaks powerfully on cancel culture and his statements speak forcefully about Féjọkwụ's case. Should Féjọkwụ, a young man in his prime be subject to a professional death penalty because of a simple document dispute, a document the NFA has always had? Indeed, it is not even a *document* dispute but a dispute over a document *format* – as the NFA insists the document they have is an "unauthenticated email", and they seek a document in PDF format – **yet the NFA refused to accept the PDF when offered**.

I close this section with Coach Saban's full statement:

> "There's always a lot of criticism out there when somebody does something wrong, everybody wants to know how are you going to punish the guy? But there's not enough for 19-and-20 year-old kids people out there saying 'why don't you give him another chance?'

So I'm going to give a speech right now about this.

Like, where do you want him to be? Guy makes a mistake. Where do you want him to be? You want him to be in the street? Or do you want him to be here graduating?

You know when I was over there at the Nagurski (Award banquet in Charlotte, N.C.), Muhsin Muhammad, who played 15 years for the Carolina Panthers, played for me at Michigan State.

Everybody in the school, every newspaper guy, everybody was killing the guy because he got in trouble and said there's no way he should be on our team.

I didn't kick him off the team. I suspended him, I made him do stuff.

He graduated from Michigan State. He played 15 years in the league, he's the president of a company now, and he has seven children, and his oldest daughter goes to Princeton.

SO WHO WAS RIGHT?

I feel strong about this now, really strong.

About all the criticism out there of every guy that's 19 years old that makes a

> mistake and you all kill him. And then some people won't stand up for him.
>
> So my question to you is 'where do you want him to be?' You want to condemn him to a life sentence or do you want the guy to have his children going to Princeton?
>
> You want to close on that?"[12]

CONCLUSION AND PRAYER

In my native Nigeria, there is a popular aphorism in Nigerian pidgin English: "*Thank God say God no be man*". Translated into the Queen's English this means: "Thank God that God is not like man." The underlying meaning of the aphorism and its usage is to convey the truth that if God were like man – unforgiving, merciless, cruel, inexorable, severe, vindictive, ironfisted, – pick your adjective – then we humans would all be dead, as He would use His power to strike us all down instantly for our numerous sins/failings.

In the USA, the Justices of this Court while not God, are ultra-rarefied and in our constitutional democracy rule *supreme* with deity like powers. The Justices should **not** act like *man* as the NFA and CTC have. Instead, the Justices should use their powers like God – acting swiftly and forcefully to bestow mercy and justice on Féjọkwụ by:

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[12] See video with nearly seven million views at https://twitter.com/ClayTravis/status/1166036844791980032?ref_src=twsrc%5Etfw and see, https://brobible.com/sports/article/nick-saban-rant-2014-cancel-culture/.

1. Granting the petition for rehearing;

2. Vacating the denial of the petition for a writ of certiorari;

3. Granting the petition for a writ of certiorari;

4. Summarily reversing the judgment of the Third Circuit; and

5. Remanding the case with instructions to

   (a) vacate the decision of the NFA hearing panel; and

   (b) dismiss with prejudice the NFA complaint against Féjọkwụ.

Respectfully submitted, with gratefulness,

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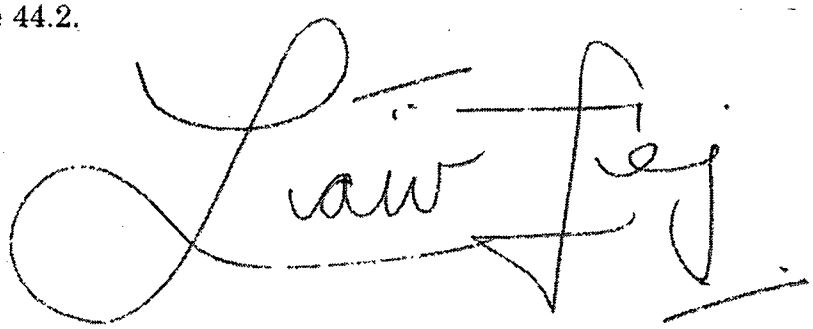
RULE 44.2 CERTIFICATE

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay. This Petition for Rehearing is restricted to the grounds set out in Rule 44.2.



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