No. 19-2769

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN RE: COMMODITY FUTURES TRADING COMMISSION,	Petition for Writ of Mandamus to the United States District Court for the Northern District of Illinois
U.S. COMMODITY FUTURES TRADING COMMISSION, Plaintiff-Petitioner, v. KRAFT FOODS GROUP, INC. and MONDELĒZ GLOBAL LLC, Defendants-Respondents.	United States District Court for the Northern District of Illinois, No. 15-cv-02881 Judge John Robert Blakey

MOTION TO INTERVENE OR ALTERNATIVELY FOR LEAVE TO FILE AMICUS BRIEF

Commissioners Dan Berkovitz and Rostin Behnam, as well as Chairman Heath Tarbert, of the U.S. Commodity Futures Trading Commission, respectfully request that this Court grant them leave to intervene in this mandamus proceeding and to file the brief attached to this motion as Exhibit 1 in support of the Commission's petition for

mandamus relief. Alternatively, pursuant to Federal Rule of Appellate Procedure 29, the Commissioners and Chairman request that this Court grant them leave to file the attached brief as amicus curiae.

This motion is unopposed. Neither the Commission nor Kraft opposes the relief sought by this motion, but Kraft has indicated that it may request the further opportunity to respond to the Commissioners and Chairman's arguments. The Commissioners and Chairman will not object to any such request.

ARGUMENT

On September 13, 2019, the Commission filed a petition for writ of mandamus, asking the Court to (1) vacate the district court's orders setting an unlawful judicial inquest hearing, (2) conduct no such proceedings, and (3) if the hearing must go forward, reassign the case to a different district judge. *See* CFTC Pet. at 1. The Commission also sought a stay of proceedings in the district court.

This Court granted the motion for a stay on September 26, 2019, and ordered Kraft Foods Group, Inc. and Mondelēz Global LLC ("Kraft") to file a response to the mandamus petition by October 7, 2019, with an invitation to the district court judge to respond by the same date. *See*

Order at 2.

A. The Court Should Grant Leave to Intervene Because the Mandamus Petition Implicates Significant Legal Interests of the Commissioners and Chairman.

While neither the Federal Rules of Appellate Procedure nor this Court's Circuit Rules address intervention on appeal, this Court determines whether intervention is appropriate by reference to Federal Rule of Civil Procedure 24. *See, e.g.*, *In re TransUnion Corp. Privacy Litig.*, 664 F.3d 1081, 1084 (7th Cir. 2011) ("Intervention isn't the only route for becoming a party. Nonparties in a trial court can participate as parties to the appeal without formal intervention if the outcome of the appeal would be likely to determine (not just affect) their rights."); *Hurd v. Illinois Bell Tel. Co.*, 234 F.2d 942, 944 (7th Cir. 1956).

In this case, intervention by the Commissioners and Chairman is appropriate because they have interests that are directly affected by the subject of Kraft's motion for contempt, the disposition of which could impair and impede their ability to protect their interests in the district court, as well as claims and defenses that share common questions of law and fact with the CFTC's petition. *See* Fed. R. Civ. P. 24(a), (b). Kraft has made clear that it is seeking contempt sanctions not only

against the CFTC itself but also against individual Commissioners. *See* Doc. No. 316, Def. Mtn. for Contempt; Doc. No. 339, Ex. 1; Doc. No. 351, Def. Resp. to Commissioners' Mtn. for a Status Conf. Furthermore, the district court has required the presence of the Commissioners and Chairman at the stayed evidentiary hearing, plans to question them, read them their *Miranda* rights, and subject them to cross-examination, with a possible criminal contempt referral to the U.S. Attorney's Office, *see* ECF No. 326, Mtn. Hr'g Tr., at 17, 26-27. The potential sanctions the district court is contemplating — "civil contempt, referral for a potential investigation into criminal contempt or [findings of] ethical violations," *see* ECF No. 336, Minute Entry — threatens to directly and individually impact the individual Commissioners and the Chairman. This Court's decision on the Commission's mandamus petition will therefore determine substantial rights of the Commissioners and Chairman.

Because the district court has directed the Commissioners and the Chairman to appear individually and threatened them with individual sanctions, their interests are not adequately represented by any existing party. Indeed, in recognition of their individual interests, the

Commissioners and the Chairman retained separate counsel on September 18, 2019, to represent their separate interests in this proceeding and before the district court.

Furthermore, the Commissioners and Chairman are federal government officials who seek to advance a defense based on an order of the Commission approving the settlement in the underlying matter, as well as an appropriate interpretation of 7 U.S.C. § 2(a)(10)(C), as described in further detail in Exhibit 1 hereto. *See* Fed. R. Civ. P. 24(b)(2).

B. Alternatively, the Commissioners and Chairman Should Be Granted Leave to Address the Petition as Amicus Curiae.

Pursuant to Federal Rule of Appellate Procedure 29, this Court may grant leave for nonparties to file a brief as amicus curiae. The interests of the nonparty Commissioners and Chairman in the petition for a writ of mandamus are clear: their individual rights are at stake in a contempt proceeding that the district court has stated could result in criminal sanctions, civil penalties, or ethical violations. While the Commission's petition for a writ of mandamus addresses the Commission's rights and arguments on its behalf, the individual Commissioners and Chairman's proposed amicus brief addresses their

specific legal rights and matters that directly affect them individually. The arguments raised by the Commissioners and Chairman directly impact whether this Court should bar the contempt proceedings and are necessary to protect the individual Commissioners and Chairman's rights.

CONCLUSION

For the reasons stated above, this Court should grant the Commissioners and Chairman's motion to intervene in the present mandamus proceeding and file a brief in support of mandamus relief, or alternatively, allow them to file the attached brief as amicus curiae.

Respectfully submitted,

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Dated: October 7, 2019

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25, I certify than on October 7, 2019, I served a copy of the foregoing document electronically on all registered counsel through the Court's CM/ECF system.

I further certify that some of the participants in the case may not be CM/ECF users. I have mailed by First-Class Mail, postage prepaid, or have dispatched the foregoing via a third-party commercial carrier for delivery within three calendar days to the following participant:

Honorable John Robert Blakey
United States District Court for the Northern District of Illinois
Everett McKinley Dirksen United States Courthouse
219 South Dearborn Street, Room 1204
Chicago, Illinois 60604

/s/ *Zachary T. Fardon*
Zachary T. Fardon
One of the Attorneys for Commissioners Berkovitz and Behnam, and Chairman Tarbert

EXHIBIT 1

No. 19-2769

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN RE U.S. COMMODITY FUTURES TRADING COMMISSION

U.S. COMMODITY FUTURES TRADING COMMISSION,
Plaintiff-Petitioner,

v.

KRAFT FOODS GROUP, INC., ET AL.
Defendants-Respondents.

On Petition for Writ of Mandamus to the United States District Court
for the Northern District of Illinois
No. 15-cv-02881, Hon. John Robert Blakey, District Judge

BRIEF OF MOVANT-INTERVENORS COMMISSIONERS BERKOVITZ AND BEHNAM, AND CHAIRMAN TARBERT

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October 7, 2019

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

King & Spalding LLP represents Commissioners Dan Berkovitz and Rostin Behnam, and Chairman Heath Tarbert of the U.S. Commodity Futures Trading Commission in their individual capacities, and has appeared on the individuals' behalf in the underlying district court proceedings. No other firm is expected to appear in this Court on behalf of the Commissioners and Chairman.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over the petition for a writ of mandamus pursuant to the All Writs Act. *See* 28 U.S.C. § 1651(a).

ISSUE PRESENTED

Should this Court grant mandamus relief to prevent the district court from transforming a civil contempt motion into a far-ranging investigation that threatens to impose criminal contempt sanctions on government officials who are immune from suit and not parties to the litigation?

INTRODUCTION

Defendants Kraft Foods Group, Inc. and Mondelēz Global LLC (collectively "Kraft") claim that the U.S. Commodity Futures Trading Commission violated a provision of a consent order that restricts either party from making public statements about the underlying case. Resolving that claim requires, first, determining the provision's lawful scope and, second, assessing whether Kraft has clearly shown that the Commission violated an unambiguous obligation imposed by the consent order by publishing three documents on its website: (1) a press release, (2) a statement of the Commission, and (3) a separate

concurring statement explaining the reasons two individual Commissioners voted in favor of settlement.

Unfortunately, instead of addressing these dispositive legal questions, the district court embarked on an improper, far-reaching inquisition. Raising the possibility of criminal contempt and ethical violations, the district court ordered two Commissioners and the Chairman to appear for testimony, and expressed its intent to interrogate and advise them of their *Miranda* rights. This sweeping inquiry risks intrusion on the prerogatives and privileged internal deliberations of executive branch officials. The district court has insisted on this approach even though no extrinsic evidence is necessary to resolve Kraft's contempt motion, and even though the Commissioners and Chairman, who are entitled to immunity, are not parties to the litigation.

In these circumstances, mandamus relief is warranted. Kraft cannot carry its burden to demonstrate a clear and convincing violation of the consent order's unequivocal terms. The Commission's interpretation — that the consent order does not prohibit the Commission from publishing the statements in connection with approving the settlement

— is correct and certainly not "objectively frivolous," and there is accordingly no basis for civil sanctions, let alone criminal proceedings. *In re United States*, 398 F.3d 615, 618 (7th Cir. 2005). The Court should end these proceedings by directing the district court to deny the contempt motion and close its investigation.

In the alternative, if the Court remands to the district court to consider the merits of Kraft's motion, the Court should cabin the scope of proceedings. The district court has no authority to investigate criminal contempt or to impose sanctions against high-ranking government officials acting within the scope of their lawful authority. When considering contempt sanctions, the district court must exercise the least power necessary and maintain the proper separation between executive and judicial roles.

Should the motion be remanded, the Court may wish to reassign resolution of Kraft's motion to a different judge. That would avoid any appearance that the district court's impartiality could be questioned. It would also ensure fair consideration of the serious separation-of-powers concerns raised by Kraft's motion.

STATEMENT OF FACTS

A. The Parties and Their Settlement

The Commission. The U.S. Commodity Futures Trading Commission is an independent federal agency charged with civil enforcement of the Commodity Exchange Act. *See* 7 U.S.C. §§ 1, *et seq.* The Commission is composed of a Chairman and four Commissioners. 7 U.S.C. § 2(a)(2)(A); 17 C.F.R. § 140.10. It is a bipartisan agency, with no more than three Commissioners from the same political party. *Id.*

Only a majority vote of Commissioners constitutes an act by the Commission. Voting follows one of two procedures — either a Commission meeting or the "seriatim" process. 17 C.F.R. § 140.12. When the Chairman is of the opinion that joint deliberation is appropriate, the Commission meets in person and votes on matters within its jurisdiction; the Chairman is authorized to use the seriatim process whenever joint deliberation is "unnecessary" or "impracticable" or would "impede the orderly disposition of agency business." 17 C.F.R. § 140.12(a). During the seriatim process, each Commissioner receives a packet with a statement of and basis for a proposed action, with a sheet for the Commissioner to record his or her vote. *See id.*

Defendants Kraft and Mondelēz. The defendants are Kraft Foods Group, Inc. and Mondelēz Global LLC. Kraft Foods Group, Inc., one of North America's largest consumer packaged food and beverage companies, operated a snack food business that became the subject of a complaint filed by the Commission. *See* ECF No. 1 at ¶¶ 8, 10. During the period covered by the complaint, Kraft Foods Inc. owned Kraft Foods Group, Inc. *Id.* at ¶ 10. Through a spin-off agreement, Mondelēz took over the snack food business, *id.*, and Kraft Foods Inc. became Mondelēz International Inc., which now owns Mondelēz Global.

The Underlying Action. In 2015, the Commission filed a civil enforcement action against Kraft. The Commission's complaint alleged that Kraft violated the Commodity Exchange Act by using a manipulative device in connection with the December 2011 wheat futures contract, reaping approximately $5.4 million in illicit profits. *Id.* at ¶¶ 1, 40.

The Settlement. On March 22, 2019, the parties' counsel participated in a settlement conference with the district court judge. ECF No. 302. At the conference's conclusion, the district court described the material terms of a proposed settlement. *See* ECF No. 303, Settlement Conf. Hr'g

Tr., at 4-10. For one material term — which became paragraph 8 of the consent order — the district court recited the language to be used:

> Neither party shall make any public statement about this case other than to refer to the terms of this settlement agreement or public documents filed in this case, except any party may take any lawful position in legal proceedings, testimony or by court order.

Id. at 5.

The district court acknowledged that the settlement required a Commission vote. As the court explained, the Commission "itself has to — pursuant to its rules and regulations has to agree to the settlement. That would essentially be an up or down vote. They would not have the power to change the material terms." *Id.* at 6. The Commission's counsel later reminded the district court that the settlement "ha[s] to have the Commission approval [sic]," and "the Commission has to approve it before it goes to the Court[.]" *Id.* at 11.

B. The Three Documents Published by the Commission

After the Commission voted to approve settlement, the district court signed the consent order on August 14, 2019. ECF No. 310. The next day, the district court entered judgment, dismissing the case with prejudice. *See* ECF No. 311. Later that same day, the Commission

issued a press release, informing the public of the settlement. ECF No. 316-1. The Commission also published a "Statement of the Commission," ECF No. 316-2, as well as a "Statement of Commissioners Dan M. Berkovitz and Rostin Behnam Regarding the Commission's Settlement with Kraft Foods Group, Inc. and Mondelēz Global LLC," ECF No. 316-3.

The Press Release. The Commission's press release announced the injunction and $16 million civil monetary penalty against Kraft. ECF No. 316-1. The press release observed that the penalty was "approximately three times defendants' alleged gain." *Id.* It also included a quote from Chairman Tarbert about the impact manipulation has on the wheat markets:

> 'America is the breadbasket of the world; wheat markets are its heart. Market manipulation inflicts real pain on farmers by denying them the fair value of their hard work and crops,' said Chairman Heath P. Tarbert. 'It also hurts American families by raising the costs of putting food on the table. Instances of market manipulation are precisely the kinds of cases the CFTC was founded to pursue.'

Id. Chairman Tarbert's quote did not reference Kraft and did not mention the facts of the underlying case.

The Statement of the Commission. The Commission's statement referenced the permanent injunction and the $16 million penalty, noting that it was three times Kraft's alleged gain. It then addressed the consent order's paragraph 8, explaining that the Commission interpreted the provision to only "limit[] what the Commission (*i.e.*, the "party" referenced in paragraph 8) can say about the *Kraft* litigation, it does not restrict individual Commissioners when speaking in their individual capacities." ECF No. 316-2.

The Concurring Statement. The concurring statement by Commissioners Berkovitz and Behnam explained why they voted for the settlement. ECF No. 316-3. It also discussed "two unusual features that merit further explanation and comment," specifically, (1) the lack of factual findings and conclusions of law, and (2) the consent order's paragraph 8. *Id.* Focusing on the latter, the statement observed that, as interpreted by the Commission, "the consent order only limits the statements of the Commission as a collective body." *Id.* Commissioners Berkovitz and Behnam then expressed their view that, in accordance with the Commission's interpretation, "[i]ndividual Commissioners, speaking in their own capacity, retain the right and ability to speak

fully and truthfully about the matter." *Id.* The statement explained that "Commissioners, as public officials, must be able to explain to Congress and the public the sanctions obtained, as well as the rationale for entering into a settlement agreement[.]" *Id.* The statement continued, "[t]he Commission cannot bargain this right away in settlement negotiations. The courts are obligated to recognize it when crafting consent orders." *Id.*

C. Kraft's Motion for Civil Contempt

On August 16, 2019, Kraft filed a motion for contempt, sanctions, and other relief against "the CFTC and its Commissioners." ECF No. 316. Kraft alleged that "the CFTC and its Commissioners have violated the Court's Order," and argued that "the Court may impose civil sanctions to compel their compliance and to compensate Defendants for the harm suffered[.]" *Id.* at 9. Kraft's prayer for relief requested findings that the Commission "and Commissioners Berkovitz and Behnam violated the Consent Order and are therefore in contempt of court[.]" *Id.* at 11. Kraft also requested that the district court order the Commission "and its Commissioners to remove all three statements from the [Commission's] website and other areas of publication." *Id.*

And it sought an injunction against the Commission "and its Commissioners, including Commissioners Berkovitz and Behnam, . . . from making any further public statements about the case or the settlement in any forum, except to refer parties or the public to the Consent Order[.]" *Id.*

On August 19, 2019, the district court held a hearing on Kraft's motion. ECF No. 326. The district court began by expressing its belief that to rule on the motion, it would need to make findings of fact, and it asked whether the parties wanted "an evidentiary hearing with live witnesses and exhibits." ECF No. 326, Mot. Hr'g Tr., at 3. After asking about the Commission's voting process, the district court stated that it would "have to make state-of-mind findings" even though it would not "have to find willfulness." *Id.* at 6. The court also questioned whether the statements reflected the individual Commissioners' acts in their official capacity and whether comparing the Commissioners to a company's Board of Directors or a panel of the Seventh Circuit was appropriate. *Id.* at 10-15.

The district court raised *sua sponte* the potential invocation of Fifth Amendment privileges by witnesses, which the court characterized as

"an unpleasant thing" that was "on the table . . . because this is not just a question of civil contempt; there's a possibility of referral for a criminal contempt." *Id.* at 16-17. The district court asked whether the parties objected to conducting the hearing with attorneys as witnesses "because I will Mirandize everyone in the room." *Id.* at 17.

When counsel for Kraft informed the district court that Kraft did not want the consent order vacated, the district court again raised the specter of potential criminal sanctions. *Id.* at 19. Addressing Kraft's prayer for relief, which included a request for "monetary sanctions," the district court observed that "if it was punitive, then I'd have to make a referral to the U.S. Attorney's Office for a criminal contempt." *Id.* at 19-20. Acknowledging the possibility of a "sovereign immunity problem," the court expressed its "intention right now to . . . go ahead" with the evidentiary hearing. *Id.* at 22. The district court then asked whether the Commission would be asserting the Fifth Amendment, to which counsel for the Commission indicated that it was doing so provisionally. *Id.* at 23-24.

In discussing its plan for the evidentiary hearing, the district court stated, "I'm going to ask questions at the evidentiary hearing and I'm

going to put people on the witness stand and it's going to include the attorneys of record." *Id.* at 26; *see id.* at 27 ("I'm going to ask questions. [The Commissioners] are also going to be subject [to] cross examination by the defendant so be prepared for that, too."). The district court then announced that it would "require the presence of the two commissioners who issued those particular statements. . . . [T]hey can go ahead and assert privilege[,] but I'm going to ask questions." *Id.* at 26-27. The district court observed that it had "to identify the issues, whether some of the issues are criminal contempt, . . . punitive damages, whether I'm able to do that with sovereign immunity or not. There's the question of civil contempt, a referral for criminal contempt, compensatory damages, punitive damages and coercive damages." *Id.* at 27.

The district court scheduled the evidentiary hearing, and required the appearances of Chairman Tarbert,[1] Commissioner Berkovitz, Commissioner Behnam, and the Commission's Division of Enforcement Director James McDonald, in addition to the parties' attorneys of record. *See id.* at 33-39; *see also* ECF No. 319.

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[1]/ During the hearing, counsel for Kraft incorrectly claimed that Chairman Tarbert "issued the statement," which led the district court to require the Chairman's appearance at the hearing, saying, "The chairman too, then. The chairman is coming too." ECF No. 326, Mtn. H'rg Tr., at 35-36.

On September 19, 2019, the district court issued a minute entry stating that the "hearing is simply an evidentiary hearing" on a "civil proceeding, where, as this Court has previously explained, a variety of potential measures or remedies may be considered if supported by the record, including civil contempt, referral for a potential investigation into criminal contempt or ethical violations[.]" ECF No. 336.

D. Subsequent Proceedings

At the Commission's request, the district court reset the evidentiary hearing for October 2. ECF No. 330. On September 13, the Commission filed a petition for a writ of mandamus with this Court as well as a motion to stay proceedings in the district court. Doc. 1, 4.

In advance of the hearing, the Commission and Kraft submitted briefing, ECF Nos. 337, 339, and counsel for Chairman Tarbert, and Commissioners Berkovitz and Behnam entered their appearances and filed a motion for a status conference, ECF No. 344. Kraft repeated its request for findings that the Commission, "through Chairman Tarbert and others, and Commissioners Berkovitz and Behnam," violated the consent order, and that the Commission and "Commissioners, including Commissioners Berkovitz and Behnam," be prohibited from "making

any further public statements about the case or settlement in any forum[.]" ECF No. 339.

On September 26, this Court granted a stay pending resolution of the Commission's mandamus petition, ordered a response by Kraft to the mandamus petition, and invited the district court to respond. Doc. 7.

SUMMARY OF ARGUMENT

Kraft cannot carry its burden to prove a clear and convincing violation of the consent order. Because the Commission's interpretation of the order is correct and, in any event, not objectively unreasonable, the Court should issue the writ to direct the district court to deny Kraft's motion and to cease further inquiry. If the Court decides to remand for further proceedings, it should ensure that any inquiry is kept within appropriate bounds.

First, the Court should terminate the district court's investigation into potential criminal contempt. The district court has no authority to investigate potential criminal sanctions or to undertake a wide-ranging inquisition into the factual circumstances that may precipitate a criminal referral. The dispositive question before the district court is a legal one: whether Kraft carried its burden to clearly and convincingly show the Commission's actions violate an unequivocal obligation imposed by the consent order. *See* Argument, Section I, *infra*.

Second, the Court should bar contempt proceedings against the individual Commissioners and the Chairman. They are not parties to the consent order, which binds only the Commission itself. The separate

concurring statement that Kraft complains about was made by two Commissioners acting in their official capacity on a matter before the Commission for a vote, and the Commission published the statement as directed by statute. *See* 7 U.S.C. § 2(a)(10)(C). In these circumstances, the Commissioners are immune from suit. Moreover, Kraft has made no showing that sanctions against the Commission itself would be ineffective or that sanctioning non-party Commissioners is essential to enforcing the consent order. *See* Argument, Section II, *infra*.

Third, the Court should bar the district court from undertaking an investigation into extrinsic evidence of the Commission's vote to approve the settlement, which the district court indicated required testimony from the Commissioners and Chairman. Such testimony is irrelevant to determining whether Kraft can clearly and convincingly demonstrate that the Commission violated an unequivocal obligation under the consent order. Executive branch officials are not answerable to the district court for their internal deliberations. Requiring their testimony intrudes impermissibly on executive prerogatives and privileges. *See* Argument, Section III, *infra*.

STANDARD OF REVIEW

Mandamus is an appropriate remedy when necessary "to confine a lower court to the lawful exercise of its jurisdiction or to compel it to exercise its authority when it has a duty to do so." *United States v. Lapi*, 458 F.3d 555, 560-61 (7th Cir. 2006) (citing *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34-35 (1980)). Mandamus is also appropriate, "even in the context of discretionary decisions . . . if the trial judge commits a clear abuse of discretion, or patent error." *In re Ford Motor Co., Bridgestone/Firestone N. Am. Tire, LLC*, 344 F.3d 648, 651 (7th Cir. 2003).[2]

[2] Unless indicated otherwise, case citations exclude internal citations, quotation marks, brackets, and ellipses.

ARGUMENT

The Commission's petition should be granted. The district court has exceeded its lawful authority by pursuing an unrestrained factual investigation that it has suggested could lead to potential criminal contempt findings against government officials.

I. The Court Should Grant Mandamus Relief to Terminate the District Court's Planned Investigation into Potential Criminal Contempt.

Because "the contempt power" is "uniquely . . . liable to abuse," *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831 (1994), courts have carefully distinguished between two types of contempt. If "petty, direct" contempt is committed within the court's presence, the conduct may be immediately addressed to restore order. *Id.* at 832; *see also FTC v. Trudeau*, 606 F.3d 382, 386 (7th Cir. 2010). In contrast, if the alleged contempt occurred outside the court's presence, the court may either consider imposing appropriate civil remedies or refer the matter to the U.S. Attorney's Office. *Bagwell*, 512 U.S. at 833. As this Court explained:

> In the rare situations when a prima facie case of criminal contempt has been made out, and the contempt is not committed in the judge's presence (and thus amenable to summary disposition), the judge must turn the matter over to a prosecutor

> rather than assume an inquisitorial role inappropriate to the Judicial Branch.

In re United States, 398 F.3d 615, 618 (7th Cir. 2005); *see also* Fed. R. Crim. P. 42(a). These procedures are essential, for the "fundamental principle in contempt cases is that the court must exercise the least possible power to the end proposed." *Trudeau*, 606 F.3d at 386 (citing *United States v. Moschiano*, 695 F.2d 236, 251 (7th Cir. 1982)).

In this case, Kraft has the burden to prove clearly and convincingly that the Commission violated an "unequivocal command" of the consent order. *Stotle and Co. v. Able*, 870 F.2d 1158, 1163 (7th Cir. 1989). To make that showing, Kraft must demonstrate that the Commission's conduct is prohibited within the consent order's "four corners." *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 460 (7th Cir. 1993). Accordingly, the only question before the district court is whether Kraft has clearly and convincingly demonstrated that the Commission violated an unambiguous provision of the consent order when it published the press release, the Commission's statement, and the separate concurring statement. Answering that question requires a proper understanding of not only the consent order's literal terms, but

also the significant separation-of-powers concerns that must inform any court-imposed restriction on executive branch officials.

Kraft cannot show that the consent order *unequivocally* prohibits Commissioners from making, or the Commission from publishing, statements reflecting their separate views in connection with the agency's vote on a proposed settlement. Commissioners have a right to dissent or concur in connection with determinations made by the Commission, and the Commission is obligated to publish any concurring or dissenting statement in full alongside the Commission's determination. *See* 7 U.S.C. § 2(a)(10(C). Neither the Commission nor its attorneys can negotiate away Commissioners' rights or the Commission's statutory obligations.

While the parties undoubtedly intended the consent order to restrict their ability to make certain public statements once the settlement was voted on, executed, and approved, the consent order did not (and could not) go so far as to prevent individual Commissioners from expressing their views on the matter in which they were asked to vote or eliminate the Commission's statutory obligation to publish separate concurring and dissenting statements. *Cf. White v. Roughton*, 689 F.2d 118, 121

(7th Cir. 1982) (rejecting literal interpretation of consent order that would require concluding that government township "was so inept a bargainer that it gave the plaintiffs not only all the procedures they wanted but also substantive entitlements to which they had no possible claim"). The consent order does not purport to address that issue. Nor should it be interpreted to eliminate the statutory requirement that separate statements by Commissioners be published "in full along with" any "Commission opinion, release, rule, or, interpretation or determination." 7 U.S.C. § 2(a)(10)(C). Those requirements serve an important public interest in transparency and accountable government. *See infra* at 28-30.

Reading the consent order's paragraph 8 to eliminate those requirements would impermissibly squeeze a very large elephant into an ordinary mousehole. *Cf. Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001) (applying this interpretative principle to statutes). It would be wrong to conclude "that by signing a consent decree the government [has] knowingly bartered away important public interests merely to avoid the expense of trial." *Alliance to End Repression v. City of Chicago*, 742 F.2d 1007, 1013 (7th Cir. 1984). And Kraft offers no

reason to conclude that, by agreeing in general not to discuss the case, the Commission intended to subvert the statute and agreed to "tie[]" the Commissioners' "hands to such an extent." *Id.*

Instead of addressing these important legal principles, the district court embarked on a far-reaching factual investigation into the Commission's intent while threatening that the proceedings could have potential criminal ramifications. That inquiry both exceeds the proper judicial role and threatens to intrude on prerogatives and privileges of the executive branch. *Cf. In re United States*, 398 F.3d at 618 (executive branch officials are not "answerable to a judge for the deliberations" among their staff).

For example, the district court suggested that, even before determining whether a clear violation occurred, it intends to question witnesses and advise them of their *Miranda* rights. *See* ECF No. 326, Mtn. Hr'g Tr., at 26 ("I'm going to ask questions . . . ."); *id.* at 27 ("I'm going to ask questions. [The Commissioners] are also going to be subject [to] cross examination by the defendant so be prepared for that, too."); *see also id.* at 17 ("So do you still have any objection to me conducting a hearing with attorneys as witnesses? . . . [W]e'll go off the record for a

little bit because I will Mirandize everyone in the room."). The district court's intent to advise witnesses of their *Miranda* rights is particularly telling. *Miranda* applies to "inherently coercive" custodial interrogations where added protections are necessary to ensure that "[n]o person . . . shall be compelled *in any criminal case* to be a witness against himself." *New York v. Quarles*, 467 U.S. 649, 654 (1984) (citation omitted; emphasis added). *Miranda* has no role to play in a civil contempt proceeding; its invocation demonstrates that the district court contemplated criminal contempt.

The district court also summoned witnesses to testify, from the attorneys of record to two Commissioners and Chairman Tarbert. *See* ECF No. 326, Mtn. Hr'g Tr., at 26 ("I'm going to put people on the witness stand and it's going to include the attorneys of record."); *see also* ECF No. 319 ("[A]ll counsel of record, as well as Jamie McDonald, Chairman Heath Tarbert, Commissioners Rostin Behnam and Dan Berkovitz, are ordered to appear in person at the evidentiary hearing and provide live testimony as needed."). The district court even suggested that it is prepared to issue writs of body attachment against the Commissioners, *see* ECF No. 326, Mtn. Hr'g Tr., at 30-31, 35, and is

actively considering referral for potential ethical violations, ECF No. 336.

The district court's far-reaching investigation is both unnecessary and contrary to law. A court has no authority to use an evidentiary hearing to gather facts for a possible criminal referral to the U.S. Attorney's Office. Yet that is what the district court appears to be contemplating. *See* ECF No. 326, Mtn. Hr'g Tr., at 17 ("There are questions of privilege . . . Fifth Amendment because this is not just a question of civil contempt; there's a possibility of referral for criminal contempt."); *id.* at 23-24 (asking counsel whether he intended to assert the Fifth Amendment on behalf of the Commission and individual Commissioners); *id.* at 27 ("You have to identify the issues, whether some of the issues are criminal contempt, right, punitive damages, whether I'm able to do that with sovereign immunity or not. There's the question of . . . criminal contempt . . . .").

None of this is necessary to resolve Kraft's motion. The district court's only task is to determine whether Kraft has carried its burden to show clearly and convincingly that the Commission violated an unequivocal provision of the consent order and, if so, what would be the

narrowest appropriate remedy. That inquiry is limited to considering the consent order's four corners and does not require an evidentiary hearing, testimony from individual Commissioners, or consideration of extrinsic evidence. *See Stotle*, 870 F.2d at 1163; *Trudeau*, 606 F.3d at 386. And it certainly does not involve an investigation into potential criminal contempt.

This is not the "rare situation" — contemplated in *In re United States* — where a prima facie case for criminal contempt against the executive branch exists. 398 F.3d at 618. Even if this were that "rare situation," the district court would be required to cease further proceedings and refer the matter to the U.S. Attorney. It has no authority to launch its own investigation into potential criminal contempt because "[o]ur legal system does not contemplate an inquisitorial role for federal judges" in these circumstances. *Id.* at 619.

II. The Court Should Grant Mandamus Relief to Bar Contempt Proceedings Against Individual Commissioners.

Kraft has sought contempt findings and relief not only against the Commission itself, but also against Commissioners individually, asserting that they participated in a "conspiracy" to violate the consent order. ECF No. 315. Based on that request, the district court appears to

be contemplating sanctions against the Commissioners. But sanctions against Commissioners acting in their official capacity are neither justified nor permissible. The only parties to this case, and the only parties bound by the consent order, are Kraft and the Commission itself. The Commissioners are entitled to immunity, and there is no lawful basis for imposing sanctions against them.

A. Individual Commissioners Are Entitled to Immunity.

Executive branch officials acting within the scope of their lawful authority are protected from civil liability under doctrines of absolute and qualified immunity. As courts have long recognized, officials engaged in a discretionary adjudicative, prosecutorial, or quasi-legislative function within a federal administrative agency are entitled to absolute immunity. *See Butz v. Economou*, 438 U.S. 478, 511-17 (1978); *Spalding v. Vilas*, 161 U.S. 483, 498-99 (1896). Where, as here, individual agency officials exercise regulatory authority they are immune from suit and cannot be sued in an individual capacity. *See Barr v. Matteo*, 360 U.S. 564, 569-70 (1959); *see also Mendenhall v. Goldsmith*, 59 F.3d 685, 691-92 (7th Cir. 1995); *Jayvee Brand, Inc. v. United States*, 721 F.2d 385, 394-95 (D.C. Cir. 1983). That immunity is

not defeated by an allegation of improper motive. *See Barr*, 360 U.S. at 575 (allegations of "malice" and "unworthy purpose" do not destroy immunity); *see also Novoselsky v. Brown*, 822 F.3d 342, 349 (7th Cir. 2016) (discussing Illinois law principle that executive branch officials "cannot be civilly liable for statements within the scope of their official duties," even if the officials act with "improper motivation" or "knowledge"). Moreover, even when agency officials do not have absolute immunity, they are immune from suit when their actions do not violate clearly established constitutional or statutory rights. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The immunities that protect executive branch officials do not disappear merely because their conduct when carrying out official duties is alleged to violate a judicial consent order. The Commission cannot waive the immunity of any Commissioner. And no court has authority to review concurring (or dissenting) statements made by Commissioners. Although the Commission was required by statute to publish Commissioners' separate statements, *see* 7 U.S.C. § 2(a)(10)(C), those statements remain the statements of *individual* Commissioners

and are not final agency actions. They do not have binding legal consequences and are not attributable to the Commission as a whole.

Here, there is no dispute that the Commissioners were acting within the scope of their official authority when they made a separate statement explaining their vote to approve the settlement. It is also indisputable that the Commissioners' actions conformed to the statement by the Commission that paragraph 8 limited "what the Commission (*i.e.*, the "party" referenced in paragraph 8) can say about the *Kraft* litigation, it does not restrict individual Commissioners when speaking in their personal capacities." ECF No. 316-3; *see also Butz*, 438 U.S. at 507 (agency officials "will not be liable for mere mistakes in judgment").

The Commodity Exchange Act directs that whenever the Commission issues any "opinion, . . . order, . . . or determination" on a matter, "the Commission shall provide that any dissenting, concurring, or separate opinion by any Commissioner on the matter be published in full along with the Commission opinion . . ., order, . . . or determination." 7 U.S.C. § 2(a)(10)(C). That statutory obligation reflects the Commission's status as an independent agency, with bipartisan members whose

"demonstrated knowledge" with respect to the Commission's areas of authority must be "balanced." *Id.* § 2(a)(2)(A).

The events that prompted Congress to amend the Commodity Exchange Act to include § 2(a)(10)(C) underscore Congress's desire to ensure that Commissioners' individual views could not be silenced:

> Last year, the CFTC issued an important and controversial interpretation . . . . One CFTC Commissioner . . . dissented, and prepared a detailed statement of his reasons. But when the CFTC submitted its . . . interpretation to the Federal Register for official publication, [the] Commissioner['s] dissent was omitted.
>
> This was wrong. Silencing opposing voices on a Federal commission is bad law and bad policy. Congress created the CFTC as a 5-member Commission — not as a single-headed agency — so that the public could benefit from a diversity of viewpoints.
>
> . . .
>
> [The] dissent is an important part of the legal history . . . . It has legal weight similar to that of a dissenting or separate case opinion of a Supreme Court Justice — or of the separate views of a Senator in a committee report on a bill or nomination. . . . The public had a right to read his views. My amendment will assure that, in the future, dissenting voices on the CFTC will not be swept under the rug.

137 Cong. Rec. S4599-01, 1991 WL 60789, at *7 (Statement of Sen. Leahy); *see also id.* (noting that the amendment's purpose "is to ensure

that the dissenting viewpoints of any Commissioner, be published"; it "compels the disclosure of the viewpoints of all of the Commissioners on a given matter, whether they are in the majority or in the minority." (Statement of Sen. Lugar)).

The statutory right granted by § 2(a)(10)(C) and its legislative history confirm that individual Commissioners cannot be subject to contempt sanctions for conducting official acts within the scope of their lawful authority.

B. The Consent Order Should Not Be Interpreted to Apply to the Statements Made by Individual Commissioners.

Even if Commissioners do not enjoy immunity from civil contempt, contempt sanctions against individual Commissioners would still be inappropriate for at least two reasons.

First, the consent order does not unambiguously prohibit the Commissioners from making statements about the case. *Ford v. Kammerer*, 450 F.2d 279, 280 (3d Cir. 1971) ("ambiguities . . . in orders redound to the benefit of the person charged with contempt"). To the contrary, the consent order only prohibits the Commission, as a party, from taking certain acts. *See* CFTC Pet. 24-31. Even if there were some

violation of the consent order, the violation has been committed by the Commission and the Commission alone.

While the Commission statement represents the joint statement of all five Commissioners, the separate concurring statement is not and cannot be considered a statement by the Commission itself. *See SEC v. Nat't Student Marketing Corp.*, 68 F.R.D. 157, 160 (D.D.C. 1975) ("[T]he views of an individual Commissioner will not invariably reflect the position of the agency as a whole."). The Commission acts only through the Commissioners' collective votes on opinions, orders, rules, and determinations. *See FTC v. Flotill Products, Inc.*, 389 U.S. 179, 183 (1967) ("The almost universally accepted common-law rule is . . . in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body."); *Pub. Serv. Comm'n of State of N.Y. v. Fed. Power Comm'n*, 543 F.2d 757, 776 (D.C. Cir. 1974) ("the Commission is an entity apart from its members, and it is its institutional decisions — none other — that bear legal significance").

As discussed above, the law is clear that contempt requires a consent order to clearly and unambiguously identify who is bound and what

conduct is bound. *See FTC v. Trudeau*, 579 F.3d 754, 763 (7th Cir. 2009); *Ferrell v. Pierce*, 785 F.2d 1372, 1378 (7th Cir. 1986) (contempt may only be imposed if requirements are unambiguous and unequivocal); *see also Project B.A.S.I.C. v. Kemp*, 947 F.2d 11, 16 (1st Cir. 1991). Moreover, any ambiguities must be read in favor of the party (or, in this case, non-parties) charged with contempt. *See D. Patrick*, 8 F.3d at 460; *Ford*, 450 F.2d at 280 ("ambiguities . . . in orders redound to the benefit of the person charged with contempt").

Applying these principles, the consent order is properly interpreted as applying only to statements by the Commission itself. It should not be broadly interpreted to silence the views of Commissioners regarding their vote on the consent order. Any contrary interpretation would run counter to the Commission's statutory obligation to publish "in full" "any dissenting, concurring, or separate opinion" regarding Commissioners' vote on the Kraft consent order. 7 U.S.C. § 2(a)(10)(C). The Commission simply does not have authority to approve an order resolving this case in a manner that either deprives Commissioners of their rights to state their views on a matter before the Commission for a vote, or that bars the Commission from publishing in full those separate

opinions alongside the consent order memorializing the settlement. *See id.* The Commission's interpretation of the consent order's paragraph 8 — as restricting the Commission's ability to comment on the case but not preventing individual Commissioners from issuing separate concurrences reflecting their votes to approve the settlement — is not only a reasonable interpretation of the consent order, it is the only interpretation that makes sense of the statutory requirements.

Second, the district court has no authority to pursue contempt sanctions against individual Commissioners because there has been no showing that pursuing sanctions against the Commission itself would be insufficient to ensure compliance and deter future violations. The Supreme Court's decision in *Spallone v. United States* is instructive. 493 U.S. 265 (1990). There, the district court entered a consent order requiring the City of Yonkers to enact legislation remedying racial segregation. *See id.* at 268-69. When Yonkers failed to enact an appropriate legislative package, the district court held the city in contempt and imposed sanctions on individual city council members. *See id.* at 271-72. After direct appeal and a grant of certiorari, the Supreme Court reversed.

The Supreme Court began by recognizing the fundamental principle that a district court contemplating contempt sanctions must use "the least possible power adequate to the end proposed." *Id.* at 276 (citations omitted); *see also Trudeau*, 606 F.3d at 386 (describing this principle as "fundamental"). The Supreme Court then held that the district court abused its discretion when sanctioning individual council members. The Court reasoned that the city "was a party to the action from the beginning," while the councilmembers "were not parties to the action." *Spallone*, 493 U.S. at 276. The Court then explained that the district court was required to proceed with "contempt sanctions first against the city alone in order to secure compliance with [its] remedial order" and "[o]nly if that approach failed to produce compliance within a reasonable time should the question of imposing contempt sanctions" against the non-party city council members "even have been considered." *Id.* at 280.

C. The Court Should Grant Mandamus Relief to Bar the Testimony of Individual Commissioners and the Chairman.

The district court has abused its discretion by requiring the appearance and testimony of two Commissioners and the Chairman at an evidentiary hearing on Kraft's motion for contempt. The district

court has before it the consent order, the press release, the Commission statement, and the concurring statement. That is all the district court needs to determine whether Kraft can carry its burden to prove that a violation of an unambiguous provision has occurred.

The private deliberations of Commissioners and the Chairman, and their discussions among themselves and with staff and counsel, leading up to approval of the settlement are not properly within the scope of the court's inquiry. *See In re United States*, 398 F.3d at 618 (explaining that executive branch officials should not be compelled to "reveal deliberative or pre-decisional materials"); *see also id.* ("A federal court must evaluate lawyers' final submissions — that is, must review outputs rather than inputs. How the United States reaches its litigating positions, who said what to whom within the prosecutor's office, and so on, are for the Attorney General and the President to evaluate.").

Kraft has no right and should not be permitted to rely on extrinsic evidence. As this Court has explained, "although it might otherwise be appropriate for a court to consider extrinsic evidence of the parties' intent when the plain language of a judicially approved settlement agreement is unclear, the very ambiguity necessitating such evidence

rules out the possibility that the respondent has violated the *unequivocal* command of a court order." *D. Patrick,* 8 F.3d at 460 (emphasis in original).

These principles are important to protecting the deliberative-process privilege, the attorney-client privilege, and attorney-work product protections that apply. Barring the district court from requiring the testimony of the Commissioners and Chairman is an appropriate reflection of the "integrity of the administrative process [that] must be equally respected" to ensure that the different branches of government enjoy the "appropriate independence of each . . . other." *United States v. Morgan*, 313 U.S. 409, 422 (1941).

CONCLUSION

The Commission's petition for writ of mandamus should be granted.

Respectfully submitted,

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CERTIFICATE OF TYPE-VOLUME COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), I certify that this brief complies with the type and volume limitations set forth in that rule because it contains 6,692 words, as counted by Microsoft Word, excluding the items that may be excluded, and because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

/s/ Zachary T. Fardon
Zachary T. Fardon

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25, I certify that on October 7, 2019, I served a copy of the foregoing document electronically on all registered counsel through the Court's CM/ECF system.

I further certify that some of the participants in the case may not be CM/ECF users. I have mailed by First-Class Mail, postage prepaid, or have dispatched the foregoing via a third-party commercial carrier for delivery within three calendar days to the following participant:

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