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FILE NO: 126225.0000001

February 2, 2024

Mr. Lyle W. Cayce  
Clerk of the Court  
U.S. Court of Appeals for the Fifth Circuit  
600 S. Maestri Place  
New Orleans, LA 70130

Re: *In re: Clarke, et al.*: Petition for a Writ of Mandamus, No. 24-50079  
related to *Clarke v. Commodity Futures Trading Commission*, Case No. 22-  
51124, opinion reported at 74 F.4th 627 (5th Cir. 2023)

Dear Mr. Cayce:

Undersigned counsel represents Petitioners seeking a writ of mandamus, to the United States District Court for the Western District of Texas, in *In re Clarke et al.*. This case is related to and an outgrowth of the recent appeal decided by this Court in Case No. 22-51124, *Clarke v. Commodity Futures Trading Comm'n*, 74 F.4th 627 (5th Cir. 2023). The Petitioners were the Appellants in that appeal. At the recommendation of the Clerk's office, Petitioners have placed the following information in a letter to accompany the petition.

The petition challenges the United States District Court for the Western District of Texas's decision to transfer this case to the United States District Court for the District of Columbia, after this Court reversed the Texas District Court and provided instructions for further proceedings in that District Court.

As an initial matter, Petitioners understand from your Office that petition will be submitted to the next available panel of this Court as a matter of course. Petitioners respectfully request that the Court—through instructions of the next available panel—direct the petition to the panel that handed down the lengthy opinion and decision in this matter, under Case No. 22-51124. *See Clarke v. Commodity Futures Trading Comm'n*, 74 F.4th 627 (5th Cir. 2023).

That panel was comprised of Judges Graves, Ho, and Duncan. The mandamus petition raises issues regarding the meaning of that opinion and content of the Court's mandate, matters that the Court often has returned to the previous panel issuing the opinion and mandate at issue. *See*



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Pet. at 2; *see also, e.g., Defense Distributed*, 30 F.4th at 421; *M.-D. by next friend Stukenberg v. Abbott*, 929 F.3d 272, 275 (5th Cir. 2019). By transferring this case from the district courts of this Circuit, the challenged District Court decision would eliminate this Court’s ability to supervise further proceedings in this matter and their consistency with this Court’s opinion.

The Clerk’s office also inquired whether Petitioners are designating this as an emergency petition or motion. Petitioners are not requesting “relief before the expiration of 14 days” and therefore are not denominating the petition as an “emergency” petition under Fifth Circuit Rule 27.3.

As detailed in the Petition, Petitioners have requested the Court to break mandamus relief into two phases. First, Petitioners have asked the Court—“as soon as is practicable for the Court,” but not by any specific date—to grant mandamus to order the District Court to request return of the transferred case from the United States District Court for the District of Columbia. Pet. at 2, 15-17. This is necessary because the District Court physically transferred the case files to Washington on the same day it signed the transfer order, before even posting that order to the docket.

We have asked for this early and partial mandamus relief to preserve the Court’s jurisdiction and ability to implement any decision reversing Judge Ezra’s transfer order. Such a partial grant of mandamus is in line with the Eighth Circuit’s decision in *In re Nine Mile Ltd.*, 673 F.2d 242, 243 (8th Cir. 1982), and is designed to avoid the Fifth Circuit’s ultimate inability to reverse the transfer decision, as experienced in *Defense Distributed v. Bruck*, 30 F.4th 414 (5th Cir. 2022). This request for partial and early mandamus is time sensitive. Petitioners, however, cannot say, at this time, that relief is required by a date certain to avoid irreparable harm. The United States District Court for the District of Columbia, as of now, has taken no action on the case that was erroneously transferred to it. Petitioners will inform the Court if that changes.

Second, Petitioners are asking the Court to consider the merits of the transfer and to reverse it through mandamus in the normal course of this Court’s mandamus proceedings. Pet. at 2, 15-33. Petitioners have requested oral argument on the merits of whether the transfer order should ultimately be reversed.



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Petitioners are grateful for the Court's consideration of this matter. Please contact me with any questions.

Respectfully submitted,

/s Michael J. Edney

Michael J. Edney

cc: Ms. Melissa Mattingly  
Fifth Circuit's Clerk's Office

Martin White, Esq.  
Counsel for the Commodity Futures Trading Commission