

# Fifth Circuit Vacates FTC's Cease-and-Desist Order Against Intuit, Holding Internal Adjudication of Deceptive Advertising Claims Unconstitutional

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In a significant decision with wide-ranging implications for FTC enforcement on Friday, the U.S. Court of Appeals for the Fifth Circuit vacated the FTC's cease-and-desist order against Intuit, Inc. and held that the agency's administrative adjudication of deceptive advertising claims violates the constitutional separation of powers. *Intuit, Inc. v. FTC*, No. 24-60040 (5th Cir. Mar. 20, 2026). Writing for the panel, Judge Edith H. Jones concluded that deceptive advertising claims under Section 5 of the FTC Act are rooted in the common law of fraud and deceit, implicate private rights, and must therefore be heard before an Article III federal court, not an in-house administrative law judge. Judge James C. Ho concurred in full, writing separately to sound a broader alarm about the FTC's structural constitutionality.

## Background

The FTC brought an administrative complaint against Intuit in 2022, alleging that its TurboTax "Free Edition" advertisements were deceptive because the product — widely advertised as "free" — is available only to taxpayers with "simple tax returns," a category that excludes most Americans. The Commission initially filed suit in federal district court and moved for a preliminary injunction, but after that motion was denied, it abandoned the federal court action and instead pursued a cease-and-desist order through internal agency adjudication. An ALJ found in the FTC's favor, and the Commission affirmed. The resulting order prohibited Intuit for twenty years from advertising any of its goods or services as "free" unless specific and, according to the court, "arguably unworkable" conditions were met.

## The Constitutional Question: Private Rights vs. Public Rights

While Intuit made three categories of arguments, some of which were more fact and decision-specific, the Fifth Circuit held that the threshold question — whether the FTC could adjudicate Intuit's deceptive advertising claim before an ALJ — was dispositive. Applying the framework established by the Supreme Court in *SEC v. Jarkesy*, the court reaffirmed that the Constitution exclusively vests the judicial power of the United States in Article III courts, and Congress may not confer that power on entities outside Article III. The key question under *Jarkesy* was whether the SEC's enforcement involved "private rights," which must be adjudicated by Article III courts, or "public rights," which

Congress may permissibly assign to administrative agencies.

Applying that same framework to FTC administrative enforcement, the Fifth Circuit on Friday concluded that deceptive advertising claims under Section 5 of the FTC Act are, “in their nature,” traditional actions at law and equity and thus involve private rights requiring adjudication in an Article III court. Section 5 requires proof that a material representation “was likely to mislead customers acting reasonably under the circumstances” — a standard that the court found closely mirrors the common law torts of fraud and deceit, which were recognized and actionable in English courts as far back as 1789. American equity law likewise recognized deceptive advertising claims under the heading of “unfair competition” well before Congress enacted the FTC Act.

### **Applying *Jarkesy*: Common Core with Common Law Fraud**

The Fifth Circuit applied the four *Jarkesy* factors to FTC deceptive advertising claims and found each one satisfied. First, such claims target the same basic conduct as the common law actions of fraud and deceit — namely, a material, false representation likely to mislead. Second, the FTC’s own complaint employed “classic terms of art associated with fraud and deceit,” including references to Intuit’s “deceptive business practices,” “false claims,” and “broad, enduring, and willful deceptive ad campaign.” Third, Section 5 actions operate pursuant to similar legal principles as common law fraud. Fourth, the FTC’s cease-and-desist order is analogous to an injunction in the same way that the SEC civil penalties in *Jarkesy* resembled common law money damages.

The court rejected the FTC’s argument that technical differences between Section 5 and common law fraud — such as the absence of a requirement to prove damage, fraudulent intent, or privity of contract — were sufficient to sever the connection to the common law. Quoting *Jarkesy*, the court emphasized: “[M]ere obstacles to relief do not compel the conclusion that there was no actionable wrong.” Similarly, the court rejected the FTC’s comparison of Section 5 to the workplace-safety standards upheld in the longstanding 1977 *Atlas Roofing* decision, noting that a blanket prohibition on “unfair or deceptive acts or practices” does not remotely resemble the “detailed building code” approach of the OSH Act, and that the novel claims in *Atlas Roofing* had — unlike deceptive advertising claims — “never been brought in an Article III court.”

### **Other Counterarguments Rejected**

The FTC argued that its proceedings involve public rights because the agency pursues equitable remedies on the public’s behalf, but the Fifth Circuit characterized this as precisely the circular definition of “public rights” that the Supreme Court repudiated in *Jarkesy*. The court also dismissed the FTC’s reliance on a string of early circuit court decisions upholding FTC adjudication, noting that those cases did not analyze the issue through the private/public-rights framework and that *Jarkesy* calls them into question. Finally, the court distinguished cases such as *Thomas* and *Schor*, where administrative adjudication was upheld, because those decisions were premised on the parties’ consent, which Intuit had consistently withheld by asserting its right to an Article III adjudication throughout the proceedings.

### **What the Decision Does Not Decide**

The court was careful to confine the scope of its ruling. The decision addresses solely the FTC’s authority to internally adjudicate *deceptive advertising claims* under Section 5. As the court expressly stated, “[w]e do not decide the same question for any other ‘unfair methods of competition’ or other ‘unfair or deceptive acts or practices.’” As such, the FTC’s authority to adjudicate claims under its competition authority or related to broader unfair or deceptive acts or

practices that are not deceptive advertising claims remains an open constitutional question — one that will almost certainly be the subject of future litigation in light of this decision.

## **Disposition**

The court granted Intuit's petition for review, vacated the FTC's cease-and-desist order, and remanded the case, holding that any enforcement action must proceed in federal district court. The court declined to order outright dismissal as premature. While it remains to be seen how the FTC will respond to the decision - with options including dropping the case entirely, requesting *en banc* review, appealing the decision to the Supreme Court, or continuing to pursue the case on remand. On remand, the FTC may face a higher standard of proof (preponderance of the evidence rather than substantial evidence), will need to justify the necessity of any order given that Intuit stopped running the challenged advertisements years ago, and will need to reconsider the scope and twenty-year duration of the original order.

## **Judge Ho's Concurrence: A Broader Constitutional Indictment**

Judge Ho concurred fully with the majority but wrote separately to situate the decision within what he characterized as a much larger structural constitutional crisis posed by the FTC's very existence. His concurrence is short but pointed, and practitioners should read it carefully for its substantive content and as a signal of how at least one influential Fifth Circuit judge views the broader trajectory of administrative law.

At its core, Judge Ho's concurrence concludes that the FTC impermissibly combines all three forms of governmental power — executive enforcement, legislative rulemaking, and judicial adjudication — in a single, largely unaccountable agency. Invoking James Madison's *Federalist No. 47* observation that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny," Judge Ho suggested that the Founders would have been "deeply troubled" by a creature like the FTC. He went on to describe the FTC as one of many agencies that has made Americans "increasingly governed by a 'headless fourth branch of government' — 'a potent brew of executive, legislative, and judicial power.'"

Crucially, Judge Ho did not stop at the adjudication issue resolved by the majority. He identified *three* distinct constitutional vulnerabilities facing the Commission: (1) its power to promulgate binding rules governing private conduct challenges the vesting of legislative power in Congress; (2) the insulation of its members from presidential removal challenges Article II executive power; and (3) its adjudication of private rights in non-Article III tribunals. On the removal issue, he flagged that the Supreme Court has already granted certiorari and heard oral argument in *Trump v. Slaughter*, to decide whether *Humphrey's Executor* — the foundational precedent insulating FTC Commissioners from at-will presidential removal — should be overruled.

## **Key Takeaways for Advertisers and FTC Practitioners**

This decision has significant practical implications for companies in the FTC's crosshairs and for the future of the agency's enforcement program. At minimum, companies facing FTC deceptive advertising investigations now have a strong constitutional argument that any enforcement action must be brought in federal court, where they will enjoy the full range of procedural protections that are absent from in-house ALJ proceedings. The FTC's forum choice of internal administrative adjudication, which it has long used strategically and which contributed to the extraordinarily broad order entered against Intuit, is now constitutionally suspect at least in the Fifth Circuit.

Looking further ahead, if the Supreme Court takes up a similar challenge, the constitutional foundations of FTC adjudication could be further eroded. And if *Trump v. Slaughter* results in the overruling of *Humphrey's Executor*, the structural challenges to the FTC identified by Judge Ho will become considerably more acute. Together, the majority opinion and Judge Ho's concurrence suggest that the FTC's administrative enforcement model, as it has existed for over a century, may be on borrowed time.