

Fifth Circuit Holds Deceptive Advertising Claims Must Be Adjudicated in Federal Court

April 1, 2026

On March 20, 2026, the U.S. Court of Appeals for the Fifth Circuit vacated an FTC cease and desist order against Intuit, Inc. for deceptive advertising. Applying the Supreme Court’s framework from *SEC v. Jarkesy*, the court held that deceptive advertising claims under Section 5 of the FTC Act are like common law fraud and deceit claims and thus concern private rights that must be adjudicated by an Article III court, not an administrative law judge (ALJ).¹

I. Background

The FTC sued for a preliminary injunction in federal court on March 28, 2022,² claiming that Intuit’s advertisements for TurboTax Free Edition deceived consumers into believing that all TurboTax products are free.³ After the FTC’s preliminary injunction was denied on April 22, 2022, the FTC abandoned the federal suit and pursued internal adjudication before an FTC ALJ.⁴ The ALJ found that Intuit’s advertisements were likely to mislead a significant minority of consumers and issued a cease and desist order, which was affirmed by the FTC’s commissioners.⁵ Intuit petitioned the Fifth Circuit for review on January 24, 2024, arguing that the FTC’s adjudicative process was unlawful because (1) the FTC adjudicated Intuit’s “private rights”; (2) the FTC commissioners’ removal protections violate the Constitution; (3) agency discretion to adjudicate claims internally or in court violates the nondelegation doctrine; (4) the combination of prosecutorial and adjudicative functions in a single government agency

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¹ *Intuit, Inc. v. FTC*, No. 24-60040, 2026 WL 787527 (5th Cir. Mar. 20, 2026).

² *FTC v. Intuit, Inc.*, No. 3:22-cv-1973-CRB, (N.D. Cal. March 28, 2022).

³ *Intuit*, 2026 WL 787527 at *1.

⁴ *Id.*

⁵ *Id.*



violates the nondelegation doctrine; (4) the combination of prosecutorial and adjudicative functions in a single government agency violates due process; and (5) then-Chair Lina Kahn’s failure to recuse violates due process.⁶ The Fifth Circuit found the private rights issue dispositive.⁷

II. Decision

In 2024, the Supreme Court decided *SEC v. Jarkesy*, reaffirming that so-called “private” rights—including, at a minimum, those with common law analogs—must be adjudicated by an Article III court.⁸ By contrast, “public” rights may be adjudicated elsewhere. In doing so, the Supreme Court backed away from a prior case (*Atlas Roofing*),⁹ which had suggested that any issue involving statutory rights qualifies for the public rights doctrine, instead emphasizing the narrowness of the doctrine and the presumption in favor of Article III adjudication.¹⁰

On March 20, 2026, a panel of the Fifth Circuit (Judges Jones, Barksdale, and Ho) held that, under *Jarkesy*, the FTC’s in-house adjudication of deceptive advertising claims violated Article III.¹¹ Having done so, it declined to address Intuit’s other constitutional arguments.

The court explained that several common law causes of action require “a similar showing” to the FTC’s deceptive advertising claim.¹² The court also relied on similarities in remedies and “classic terms of art” shared by the FTC’s complaint and the relevant common law analogs.¹³ The court rejected the FTC’s reliance on “technical differences” between a Section 5 deceptive advertising claim and common law claims for fraud or deceit (particularly in burden of proof), explaining that those differences did not make Intuit’s interests public rights because all three claims share a “common core.”¹⁴ In doing so, the Court highlighted

that the FTC Act did not create a new duty to refrain from deceptive advertising and further explained that modifying the common law cause of action or expanding the remedies available “does not allow Congress to relegate claims of common law pedigree to adjudication by non-Article III bureaucrats.”¹⁵

The court left open the possibility that the FTC could use Section 5 to address other non-deceptive-advertising claims.¹⁶

III. Judge Ho’s Concurrence

Judge Ho concurred and wrote separately to highlight that the FTC’s combination of executive, legislative, and judicial power in a single entity poses numerous constitutional issues.¹⁷ He explained that the FTC’s power to promulgate binding rules challenges the vesting of legislative power in Congress,¹⁸ the FTC’s enforcement of the law while insulated from presidential removal challenges Article I (an issue currently before the Supreme Court in *Trump v. Slaughter*), and its adjudication of private rights in administrative tribunals challenges the vesting of judicial power in federal courts.¹⁹ He likened the FTC to a “monster” that would have “deeply troubled” the Founding Fathers.²⁰

IV. Takeaways

Although the Fifth Circuit was careful to confine its opinion to deceptive advertising claims, its decision shows that *Jarkesy* provides a broad basis to challenge internal adjudication of FTC actions that implicate private property and contract rights. Judge Ho’s concurrence, along with pending Supreme Court decisions in *Trump v. Slaughter* and a pair of consolidated cases regarding the FCC’s internal

⁶ *Id.* at *2 & n.4. Intuit also claimed the FTC’s decision was based on insufficient evidence and was overly broad, and arbitrary and capricious. *Id.*

⁷ *Id.* at *2.

⁸ *SEC v. Jarkesy*, 603 U.S. 109, 127 (2024).

⁹ 430 U.S. 442 (1977).

¹⁰ *Jarkesy*, 603 U.S. at 137–140.

¹¹ *Intuit*, 2026 WL 787527, at *1.

¹² *Id.* at *4–*5.

¹³ *Id.* at *6.

¹⁴ *Id.* at *7.

¹⁵ *Id.* at *5, *8.

¹⁶ *Id.* at *10.

¹⁷ *Id.* at *11 (Ho, J., concurring).

¹⁸ This was an interesting point that seems to call all agency rulemaking into question.

¹⁹ *Intuit*, 2026 WL 787527, at *11 (Ho, J., concurring).

²⁰ *Id.*

adjudications,²¹ potentially provide yet further grounds for challenging the FTC's internal adjudication model.

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²¹ *Trump v. Slaughter*, 25-332; *FCC v. AT&T*, No. 25-406; *Verizon Commc'ns v. FCC*, No. 25-567.