

## [Securities Regulation Daily Wrap Up, ENFORCEMENT—U.S.: Jarquesy cross-cert petition suggests it's hard to be a winner in the Fifth Circuit, \(Apr. 14, 2023\)](#)

Securities Regulation Daily Wrap Up

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By [Mark S. Nelson, J.D.](#)

George R. Jarquesy, Jr. defeated the SEC on constitutional grounds in the Fifth Circuit, but has filed a cross petition for certiorari asserting that the Fifth Circuit lacked authority to remand his case to the SEC.

A petition styled as a conditional cross petition for certiorari filed on behalf of George R. Jarquesy, Jr. asks the justices to clarify that the Fifth Circuit, or any federal court for that matter, cannot simply remand his or similar cases back to the Commission for further proceedings consistent with that court's decision. Jarquesy defeated the SEC on constitutional grounds in the Fifth Circuit but now complains, alleging as a matter of first impression, that the way the Fifth Circuit handled its disposition of the case leaves open the possibility of further proceedings before the SEC, which Jarquesy claims are beyond the scope of the applicable Exchange Act jurisdictional provision. The SEC has also [asked](#) the justices to review its loss in the Fifth Circuit ([Jarquesy v. SEC](#), April 10, 2023).

**Vacated and/or remanded?** Jarquesy had challenged the constitutionality of the SEC's in-house proceedings several years ago in the D.C. Circuit, and more recently in the Fifth Circuit. The second time around prove successful for Jarquesy and the Fifth Circuit ruled in his favor on three constitutional issues: (1) the Seventh Amendment right to trial by jury; (2) the nondelegation doctrine; and (3) that the SEC's administrative law judges are improperly afforded multiple layers of tenure protection. The Fifth Circuit vacated the SEC's case against Jarquesy with respect to the first two claims but did not issue any further order with respect to the third claim. The Fifth Circuit then appeared to remand the entire case back to the Commission.

For purposes of completeness, here is the full text of the Fifth Circuit's [disposition](#) of Jarquesy's appeal:

"In sum, we agree with Petitioners that the SEC proceedings below were unconstitutional. The SEC's judgment should be vacated for at least two reasons: (1) Petitioners were deprived of their Seventh Amendment right to a civil jury; and (2) Congress unconstitutionally delegated legislative power to the SEC by failing to give the SEC an intelligible principle by which to exercise the delegated power. We also hold that the statutory removal restrictions for SEC ALJs are unconstitutional, though we do not address whether vacating would be appropriate based on that defect alone" (footnote omitted).

"We GRANT the petition for review, VACATE the decision of the SEC, and REMAND for further proceedings consistent with this opinion."

A lengthy dissent disputed the Fifth Circuit majority's conclusions regarding the several constitutional issues but did not discuss the court's disposition of those issues by way of vacatur and/or remand.

Moreover, by way of background, Jarquesy's prior appeal before the D.C. Circuit had resulted in a three-judge panel affirming the district court's dismissal of Jarquesy's lawsuit challenging the constitutionality of the SEC's administrative proceedings. The D.C. Circuit's unanimous panel opinion finding that the district court lacked subject matter jurisdiction was written by Judge Srinivasan and joined by the other two judges, one of whom was Judge (now Justice) Kavanaugh.

Today, the Supreme Court unanimously held that respondents in SEC and FTC administrative proceedings may bring constitutional challenges to such proceedings in federal district courts. Justice Kavanaugh was one of seven justices finding that a constitutional challenge is a type of case that Congress never intended to be

“channeled” through the administrative process before receiving federal appellate court review. Justice Thomas concurred and questioned whether Congress’s “appellate review model” is constitutional while Justice Gorsuch concurred but would have abandoned the majority’s multifactor test in favor of applying the plain text of 28 U.S.C. §1331 (See [Axon Enterprise, Inc. v. FTC](#)).

**Exchange Act v.s. APA v.s. 28 U.S.C. 2106.** According to Jarquesy, Exchange Act Section 25 specifies the jurisdiction of federal appeals courts hearing petitions for review of SEC enforcement actions. Specifically, Section 25(a)(3) allows a court to: (1) affirm or modify; (2) enforce; or (3) set aside the Commission’s order in whole or in part. A separate provision (Section 25(a)(5)), under which any party can ask for remand to adduce further evidence before the Commission, was not at issue.

“It has long been recognized that the jurisdiction Congress confers on the federal courts may not ‘be expanded by judicial decree.’ But that is exactly what the circuit court did in the proceedings below,” said Jarquesy.

Jarquesy’s petition reviewed the remand options available in other contexts. For one, 28 U.S.C. §2106 provides: “The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.” In other words, appeals from lower courts can be remanded to those lower courts but, according to Jarquesy, such rule does not necessarily apply to agencies.

Moreover, Section 706 of the APA, said Jarquesy, allows for implicit authority for courts to remand a matter to an agency. But Jarquesy argued that this implicit authority is circumscribed. Said Jarquesy: “Even under the longstanding *Chenery I* ‘remand Rule’—allowing disposition of APA reviews by vacating and remanding—courts have frequently refused to remand when an agency decision has been reversed exclusively on a question of law or where remand would be otherwise ‘futile.’”

In Jarquesy’s case, the Fifth Circuit opinion addressed constitutional issues. For this reason, Jarquesy asserted that, even under the more lenient APA remand rule (as opposed to Section 25 of the Exchange Act), remand of the Fifth Circuit’s order should be considered to be a futile act.

As a result, Jarquesy asked the justices to grant his cross petition for certiorari if, as an initial matter, they grant the SEC’s petition for certiorari. Jarquesy further asked that the Fifth Circuit’s remand be reversed.

The case is [No. 22-991](#).

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